

THE PARADOX OF ACCESS TO CIVIL JUSTICE: THE “GLUT” OF NEW LAWYERS AND THE PERSISTENCE OF UNMET NEED

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ABSTRACT

This Essay reviews the existing data on unmet needs for legal services for both poor and moderate-income people, the distribution of lawyers in the U.S., and current efforts to fill the needs. It then explores possible roles for law schools and argues that access to civil justice and economic survival for law school graduates are intertwined. We know that the vast majority of lawyers in the U.S. work in small community practices where individual and family legal needs are most often addressed. At the same time, there appears to be a market failure between the growing supply of lawyers and the unmet need for legal services in these communities. Current efforts in law schools to expand experiential education, encourage pro bono activities and develop incubators are important, but law schools also need to focus on the costs of legal education, reforming curriculum, engaging fully in access to justice discussions, addressing gaps in our knowledge regarding legal practice and unmet needs, and assisting in developing scalable models to expand access to justice. We might then be able to develop solutions that simultaneously expand the availability of legal services and help to create meaningful work for our graduates.

INTRODUCTION

DURING my first year as dean of Northeastern University School of Law (NUSL), I responded to a request from the Massachusetts Equal Justice Coalition to organize the law school deans in Massachusetts to join in a request for increased state funding for civil legal services for the poor. Every dean I contacted responded affirmatively.¹ When the letter we signed became public, a reporter from the *Boston Globe* called and asked me, “Why are law school deans interested in legal services funding?” My response was, “Because

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1. The joint letter was sent to the Governor and legislative leadership. The other signatories were the deans of the law schools at Boston College, Boston University, Harvard University, New England College of Law, Southern New England School of Law (now University of Massachusetts School of Law), Suffolk University and Western New England. As deans have turned over, the tradition of joining in this annual effort has continued.

law school deans care about access to justice.” “Oh, right,” she said. “Really?” Although the law school deans in Massachusetts have continued this tradition, I have reluctantly concluded that the reporter was right to be skeptical.

I have just completed ten years as dean at NUSL, a private law school in Boston. This followed 12 years as a professor at West Virginia University College of Law, a public law school in a notoriously poor state. There are, of course, many individual faculty members who are concerned about access to justice. But, after more than 22 years in legal education, it is crystal clear to me that law schools as a group have not been leaders in tackling many of the problems confronting our civil justice system, including the challenges of access to legal representation.

This Essay is intended to raise an alarm about this failure. It is written for deans and other leaders in legal education to draw attention to the current status of access to civil justice and the relationship between unmet legal needs and legal education. It is my thesis that the future success of law schools is inextricably tied to the ability of our profession to provide adequate legal assistance to people without significant means.

Failure to address this issue is a mistake on every level. Access to recourse under the law is central to maintaining the rule of law and to advancing social justice for vulnerable people. It is also critical to the economic survival of law school graduates and therefore to the future of legal education.

We live in a diverse country in which law is our shared center. Our socio-economic system is rooted in the complex web of rules that emanate from the legal system. It goes without saying that laws without enforcement mechanisms and remedies may be worthless. Inequalities of wealth and power undermine a system based on rule of law; legal complexities cannot be navigated without competent representation; and legal representation is often unavailable to people with limited wealth or knowledge of the system. Unmet need for legal services for both poor and moderate-income people is vast. Many have written extensively, and in some cases brilliantly, about these issues. I make no claim that this Essay provides a complete review of the existing data and literature. For those who want to learn more, I urge you to read these sources yourself.²

To the extent we talk about access to justice at all, deans' conversations tend to focus on the need to expand the availability of pro bono legal services by instilling in our students a commitment to some form of public service. Sometimes, as in the Massachusetts deans' letter, we think more broadly to include concerns regarding the inadequacy of funding for legal services programs. But, while pro bono and funded legal services are terribly important, these approaches will simply not meet the need for legal services. Both focus only on providing free legal services to the very poor. Pro bono activities will

2. With specific regard to the issues of access to justice, I would recommend that you start with Deborah Rhode's book on this subject. *See generally* DEBORAH L. RHODE, ACCESS TO JUSTICE (2004). For a remarkably timely and comprehensive review of many of the issues discussed in this Essay, see generally A.B.A., NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS (Aug. 1995), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Non_Lawyer_Activity.authcheckdam.pdf.

always be limited: large firm lawyers rarely are interested in the gritty complicated human problems that confront individuals in the lowest courts; smaller firms and solo practitioners operate closer to the margin and are even less likely to engage in pro bono work; pro bono legal work is simply not designed to meet the needs of unrepresented people systematically. Publicly funded legal services programs are under continuous attack, and their funding is—and always will be—limited.³

Existing evidence suggests that economic barriers are only one explanation for the fact that legal needs of both poor and moderate-income people are not being met. While news stories focus on the “glut” of new lawyers and lack of employment in large law firms, little is said about unmet legal needs. There is strong evidence that the labor market for lawyers is failing. Thus, the motivating questions underlying this Essay are: Why is it that well-documented need is not being met by the increasing number of lawyers who are entering the profession? And second, what can law schools do about it?

As I discuss in Part I, the majority of lawyers in this country work in small law offices or in solo practices. It is, in many places, these lawyers who meet the critical legal needs for representation in local courts and agencies. While lawyers in federally funded legal services programs struggle to serve the very poor, most people of both low and moderate means receive legal services from community law offices. There is a great deal that we do not know about this form of legal practice. There are, however, new studies that are being launched⁴ and growing assistance being offered by bar associations and others to these practitioners.

3. See *infra* note 13 and accompanying text. See also Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 152 (2010). Professor Hadfield hits the nail on the head:

The access problems in the U.S. legal system are largely conceptualized by the profession as problems of the ethical commitments of individual lawyers to assist the poor and the failure of federal and state bodies to provide adequate levels of funding to legal aid agencies and the courts. The first conceptualization fails, I believe, to come to grips with the dimensions of the problem, which cannot be solved with an increase in pro bono efforts, as welcome as such an increase would be. Pro bono currently accounts for at most 1-2% of legal effort in the country; even if every lawyer in the country did 100 more hours a year of pro bono work, this would amount to an extra thirty minutes per U.S. person a year, or about an hour per dispute-related (potentially litigation-related) problem per household. This does not even begin to address the realistic demands that ordinary households have for ex ante assistance with navigating the law-thick world in which they live, some of which could indeed reduce the need for ex post legal representation in litigation and crisis. The problem is not a problem of the ethical commitment of lawyers to help the poor. Nor is an increase in public legal aid likely to make a substantial impact. The cost of even that extra hour per dispute-related problem per household would be on the order of \$20 billion annually at a market rate of \$200 per hour. That would entail a twenty-fold increase in current U.S. levels of public and private (charitable) legal aid funding. Again, more legal aid funding would be welcome and is clearly called for, but it cannot make a serious dent in the nature of the problem.

Id.

4. These include on-going research being conducted under the auspices of the American Bar Foundation. See, e.g., *After the J.D., The Beginning of a Longitudinal Study*, AM. B. FOUND., <http://www.americanbarfoundation.org/publications/afterthejd.html> (last visited Oct. 24, 2012)

Part I provides a summary of information and is intended to educate those unfamiliar with existing data on unmet civil need and efficacy of legal representation (Part I.A.), where lawyers practice and what they earn (Part I.B.) and current efforts to meet needs for civil representation across the country (Part I.C.). These summaries lay the foundation for Part II, in which I turn my attention to law schools. I summarize existing efforts within law schools as well as barriers to change. I then challenge legal educators to think more broadly about our possible roles in simultaneously expanding opportunities for our graduates and improving access to justice for people who are currently underserved.

Many people have been grappling with these critical justice issues for a long time, and much of this work is going on outside of law schools. Although there is a large literature, the role of law schools has been inadequately discussed, and the conversation among deans and law school leaders on these subjects is insufficiently robust. I hope that this piece will contribute to raising the volume and improving the focus of that conversation.

I. UNMET NEED, LAWYERS, AND EFFORTS TO EXPAND ACCESS TO JUSTICE

Concerns about the shortcomings in our civil justice system are certainly not new. These concerns are rooted, at least in part, in an understanding that vulnerable populations are likely to be treated unequally and unfairly by the civil justice system, and that legal representation is critical to creating a more level playing field—both procedurally and substantively. The focus on access to justice has grown recently, fed by the growing number of people in poverty in the wake of a deep recession, the expanding number of pro se litigants,⁵ the struggles over funding for both legal services programs and adjudicative agencies and civil courts—and by the crisis in employment for new lawyers.

As this conversation continues, it is important that we explore three basic but pivotal questions:

- To what extent can we accurately assess the unmet need for civil legal services?
- If there is so much need, where are all the lawyers?

(providing the background of the study of career outcomes of new lawyers); *Access to Justice*, AM. B. FOUND., <http://www.americanbarfoundation.org/research/A2J.html> (last visited Oct. 24, 2012) (detailing the Civil Justice Infrastructure Mapping Project); *Accessing Justice in Contemporary America: The Community Needs and Services Study*, AM. B. FOUND., <http://www.americanbarfoundation.org/research/project/69> (last visited Oct. 24, 2012) (the most recently launched project, designed to answer the question, “What do people do when they face significant problems that could bring them into contact with the civil justice system?”).

5. See generally Memorandum from Madelynn Herman, Nat’l Ctr. for State Courts on Self-Represented Pro Se Statistics (Sept. 25, 2006), available at <http://www.ncsconline.org/wc/publications/memos/prosestatsmemo.htm#other> (providing information on the numbers of self-represented litigants in the courts); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 3, 23-26 (2009) [hereinafter DOCUMENTING THE JUSTICE GAP], available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

- What is being done to address the unmet need?

The responses to these questions do not fit into a simple linear narrative. But each component is critical to our understanding of the central puzzle.

A. *To What Extent Can We Accurately Assess the Unmet Need for Civil Legal Services?*

There are many barriers to obtaining legal counsel. People may be unaware of how to find counsel, or ignorant of the value of seeking assistance, or unable to overcome language, cultural, or racial barriers. Distance and lack of transportation pose challenges in rural and urban areas. Both poor and moderate-income people may face these obstacles.

Not surprisingly, much of the discussion about access to justice focuses on economic barriers, and particularly on people living in deep poverty, for whom a single adverse event can be completely destabilizing. Publicly funded programs attempt to address the needs of the very poor, with federal funding coming from the Legal Services Corporation (LSC), supplemented by state allocations, Interest On Lawyers' Trust Accounts (IOLTA) funding, private grants, and generated fees.⁶ While some of these programs may have historically managed to renew funding sources after downturns,⁷ the total funding is indisputably inadequate to meet the level of need.

People who seek representation from LSC-funded programs must be really poor to meet income guidelines. The income *ceiling* for eligibility for federally funded LSC programs may not exceed 125% of poverty⁸; in 2012, 125% of poverty was \$28,813 for a family of four.⁹ Programs can, and do, set the income eligibility at a lower level. The regulations explicitly make no guarantee that legal representation will be available to income-eligible people.¹⁰

Even for income-eligible poor people, legal services are often not available. The 2009 LSC report, *Documenting the Justice Gap In America: The Current*

6. Federal funding only provides about 44% of funding for "LSC" programs. LEGAL SERVS. CORP., FACT BOOK 2011, at 11 (June 2012), http://grants.lsc.gov/sites/default/files/Grants/RIN/Grantee_Data/fb11010101.pdf [hereinafter LSC FACT BOOK]. IOLTA (Interest On Lawyers' Trust Accounts) depends on the interest generated on money held in these accounts. All 50 states set up IOLTA accounts, and these accounts provided substantial support for legal services when interest rates were higher and more money was held in the accounts. The constitutionality of IOLTA accounts was upheld in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 240 (2003). For a discussion of fee generation, see *infra* notes 92-95 and accompanying text.

7. See Gerry Singen, *Riding the Dragon Coaster*, MGMT. INFO. EXCH. (MIE) J., Spring 2009, at 24-26 (summarizing the twists and turns of funding for legal services programs, arguing that in fact the trend is gradually upwards).

8. 45 C.F.R. § 1611.3(c)(1) (2012) ("As part of its financial eligibility policies, every recipient shall establish annual income ceilings for individuals and households, which may not exceed one hundred and twenty five percent (125%) of the current official Federal Poverty Guidelines amounts.").

9. 45 C.F.R. § 1611 app. A (2012).

10. 45 C.F.R. § 1611.1 (2012) ("This part is not intended to and does not create any entitlement to service for persons deemed financially eligible.").

Unmet Civil Legal Needs of Low Income Americans, notes that roughly half of the people who seek help from LSC-funded legal aid providers are denied service: almost one million cases are rejected annually because of inadequate program resources.¹¹ According to the LSC, the large number of pro se litigants results from two related problems: poor people cannot afford to pay for attorneys and cannot obtain representation through free legal assistance programs.¹²

In recent years, the number of people living in poverty has grown while LSC funding has been threatened. Political attacks on LSC have been relentless.¹³ Annual appropriations to LSC have increased in nominal dollars but declined in real terms; the 2011 appropriation was about 63% of the funding allocated in the mid-1980s.¹⁴ At the same time, the number of people living below the federal poverty line has grown substantially: in 2010, the poverty rate was 15%, with 46.2 million people living *below* the federal poverty line that year, compared with 25 million in the mid-1970s.¹⁵ The other sources of funding for legal services have also diminished, as IOLTA funds have virtually vanished¹⁶ and state budgets are stretched beyond capacity to support critical social programs as a result of the recession. Although civil legal assistance is delivered across the country in a variety of ways, and not solely through LSC-funded organizations, it is nevertheless undeniable that the need is greater than the

11. DOCUMENTING THE JUSTICE GAP, *supra* note 5, at 12. The first edition of this study was published in 2005, a second in 2007, and the most recent in 2009. The Preface at the front of the Report notes:

[O]nly a fraction of the civil legal problems experienced by low-income Americans are addressed with the help of a private attorney or a legal aid lawyer. New data also indicate that state courts, particularly family and housing courts, are facing increased numbers of unrepresented litigants, which raises concerns about equal access to justice. Significantly, the number of people in poverty has increased because of the recession and high unemployment rate.

Id. at Preface. The last conclusion noted in the text is based upon state surveys in Virginia (2007), Utah (2007), Wisconsin (2007), Nevada (2008), Alabama (2009), Georgia (2009) and New Jersey (2009). *Id.* at 13, 15 & 18.

12. *Id.* at 27.

13. See generally Heather Rogers, *The Relentless Push to Bleed Legal Services Dry*, REMAPPING DEBATE (June 6, 2012), <http://www.remappingdebate.org/article/relentless-push-bleed-legal-services-dry> (describing the shrinking availability of funding for legal services and the continuing attacks on funding; noting that the LSC budget was cut by 25% in President Reagan's 1982 budget and by 30% in the 1996 budget under the "Contract for America"; and further noting that the 1996 bill also contained significant restrictions on LSC representation, including that LSC-funded organizations could no longer represent prisoners, handle many types of cases involving immigrants, or pursue class-action lawsuits or cases that would bring in lawyers' fees).

14. See LSC FACT BOOK, *supra* note 6 (information derived from Chart, 1976–2011 Annual LSC Appropriations).

15. CARMEN DENAVAS ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-239, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 11, 14 (2011), available at <http://www.census.gov/prod/2011pubs/p60-239.pdf> (see Table 3 and Figure 4).

16. LSC FACT BOOK, *supra* note 6. The availability of IOLTA funding is a function of the amounts that are held in these accounts and the interest rates. With interest rates very low, the amount of money generated is very small.

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resources.¹⁷ Notably, funding for legal services programs in other countries exceeds the funding in the U.S., despite our lip service to equality, to justice, and to the rule of law.¹⁸

As a result, most legal services to the poor are delivered by private lawyers in the U.S.,¹⁹ not by federally funded legal services attorneys. Moreover, it is not only the very poor who have unmet legal needs. As we think about the need for legal services, there is simply no bright line between the “middle class” and “the poor.” The median household income in the U.S. was \$50,054 in 2011,²⁰ hardly a lot of money if someone is involved in a complex problem involving benefits, employment, family, or property/housing. While the very poor may rarely be able to pay for legal services on their own, there is a continuum of need and ability to pay that our current thinking about legal services often fails to recognize. Very poor people can “pay” for legal services when legal fees can be generated from opposing parties under fee-shifting statutes or as contingent fees from lump sum settlements or monetary awards; moderate-income people can pay for services directly or indirectly, but may not be able to pay fully for legal services when the needs are costly and complex.

Assessing the overall unmet legal needs of people in the U.S. turns out to be a challenging task. There are, as Professor Gillian Hadfield has observed, few studies of the performance of the legal system for non-corporate clients (that is, real, not virtual, people).²¹ Hadfield further observes:

[T]hose [studies] that exist are almost uniformly focused on the delivery of legal services to the poor as a form of charity or welfare assistance. While obviously of high significance, assessing only this segment of legal markets is a bit like assessing the performance of the U.S. health care system by asking only how well Medicaid and free clinics work. It treats the issues of access and cost for citizens as if they were entirely questions of the appropriate levels of charity (pro bono) and welfare spending. But the vitality of a market democracy premised on the rule of law depends on more than minimal provision for those in desperate need at poverty levels of income. And it depends on more than the quality and cost of services available to corporate and other large entities. It depends on the success with which

17. See generally REBECCA L. SANDEFUR & AARON C. SMYTH, AM. B. FOUND., ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT (2011), available at http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf (a project of the American Bar Foundation, charting state-by-state the provision of free legal services through all providers including LSC, clinics, hotlines, court-based self-help, medical-legal partnerships, etc., to a range of eligible groups including those in poverty, the elderly, disabled, and veterans; looking at the funding and coordination of the services; noting the wide variation in delivery models among the states; and noting the expansion of empirical work looking at the availability of legal assistance).

18. RHODE, *supra* note 2, at 112 (noting that “America’s per capita government allocation for civil legal aid is \$2.25, while the equivalent figure is \$32 in England, and about \$12 in New Zealand and Ontario”).

19. See *infra* note 66 and accompanying text.

20. DENAVAS ET AL., *supra* note 15, at 5.

21. Hadfield, *supra* note 3, at 131.

law manages to serve in fact—not merely on the books—as the fundamental organizing principle of the institutions and relationships of the ordinary citizen.²²

We do know that civil justice problems are common and that most of these problems never make it into the formal justice system.²³ According to Professor Deborah Rhode, about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, are unmet.²⁴

The last ABA-sponsored survey regarding legal needs that included middle-income families was conducted in 1993.²⁵ It generally defined legal needs as disputes or problems that could be addressed by the civil justice system²⁶ and

22. *Id.* (internal footnote omitted). Professor Hadfield continues:

Is law routinely available, for example, to consult before deciding how to choose between market options, or to evaluate how one has been treated in a relationship governed by legal principles? Or is law merely alive in moments of crisis? We know that even in those moments of crisis—the impending loss of a relationship with one’s child, the loss of one’s home to foreclosure, bankruptcy in the face of impossible medical bills, or grievous injury in an accident—our legal system is not committed (as it is somewhat half-heartedly committed in the case of a felony charge) to ensuring that an individual is fully able to participate in the systems that will manage this crisis. But what of the everyday life that falls short of crisis, that sets the path on which a crisis may occur or may be averted? We live in an everyday world that is, in fact, flooded with law—how our children are supposed to be treated in school, what lenders are supposed to tell us when they sell us a mortgage, when our employers can and cannot change our conditions of work or pay, what is fair play in consumer markets, and so on. Every time we sign a document, click a box that says “I Agree,” enter a retail shop, or get on a local bus we navigate a world that is defined by legal obligations and rights and, importantly, one that assumes that the ordinary citizen who moves in this world is doing so as a functioning, choosing, legal agent. Should that citizen end up in a crisis that requires more active use or response to the legal system—filing or responding to a lawsuit or enforcement action—she will inevitably be treated as if she functioned with this kind of legal agency on the path that brought her to this point: bound by the contracts she “agreed” to or the risks she was given “notice” of or the legal consequences of the actions she took in caring for her children.

Id. at 131-32.

23. Rebecca L. Sandefur, *Money Isn’t Everything: Understanding Moderate Income Households’ Use of Lawyers’ Services*, in MIDDLE INCOME ACCESS TO JUSTICE 223, 224 (Michael Trebilcock et al. eds., 2012) [hereinafter Sandefur, *Money Isn’t Everything*].

24. RHODE, *supra* note 2, at 3 (“It is a shameful irony that the country with the world’s most lawyers has one of the least adequate systems for legal assistance. It is more shameful still that the inequities attract so little concern.”).

25. A.B.A., LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994), available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf> [hereinafter ABA LEGAL NEEDS STUDY]. See also Sandefur, *Money Isn’t Everything*, *supra* note 23, at 224 (summarizing the ABA data regarding moderate income households).

26. The problems tracked by the report were significant. The most frequently reported issues included: personal finances and consumer problems; housing and property, including unsafe conditions, disputes about utilities, and disagreements with landlords, as well as real-estate transactions for the moderate-income households; issues relating to the community, such as police and municipal services, and environmental hazards; family and domestic problems; employment-related problems, including discrimination, compensation and working conditions; personal and

studied both people in poverty (using the same 125% of federal poverty that defines eligibility for LSC-funded programs) and those with moderate income (the middle three-fifths of the income distribution).²⁷ The study showed that about half of all households (47% of poor households and 52% of moderate-income households) indicated they had experienced one or more unmet legal need during 1992, but nearly three-fourths of the needs of low-income households and two-thirds of needs of moderate-income households were never taken to the civil justice system.²⁸ Subsequent research suggests that these numbers may be significantly understated.²⁹ In fact, for moderate-income households, law is not considered at all for the majority—60%—of problems.³⁰

Of course, there should be no expectation that people will seek legal assistance for every legal problem, even when there are no clear barriers to doing so. It is, however, important that rights be enforced with sufficient frequency to maintain legal and social norms, and that vulnerable people—and not just the deeply poor—have access to the legal system to challenge rules in order to advance social justice. Despite the continuous media coverage that suggests that we are an excessively litigious society, Americans simply do not take their justice problems to lawyers.³¹ Looking across multiple countries, Professor Hadfield found that legal need was comparable across countries, but that:

[T]he U.S. legal system plays a significantly smaller role in providing a key component of what law provides—ordered means of resolving problems and disputes—than either comparable advanced market democracies or countries still in the early stages of establishing the basic institutions of democratic governance and a market economy.³²

The rate of seeking assistance in the U.S. is far below the use of lawyers in other jurisdictions as varied as England and Slovakia.³³

The reasons that Americans do not seek legal help are murky³⁴ and do not appear to relate only to cost.³⁵ There has been remarkably little study of the

economic injuries; wills and estates; and health-related matters, particularly problems with payment and barriers to care. ABA LEGAL NEEDS STUDY, *supra* note 25, at 11-12.

27. *Id.* at 11.

28. *Id.* at 17.

29. Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 57-59 (2010) [hereinafter Sandefur, *The Impact of Counsel*]. See also DOCUMENTING THE JUSTICE GAP, *supra* note 5, at 23-25 (suggesting that, at least for poor people, the extent to which people do not seek assistance for serious matters is even higher than found in the ABA study).

30. Sandefur, *Money Isn't Everything*, *supra* note 23, at 236.

31. Sandefur, *The Impact of Counsel*, *supra* note 29, at 60 (“Forty years of civil justice surveys reveal that the vast majority of civil justice problems are never taken either to lawyers or to a court or other hearing body.”).

32. Hadfield, *supra* note 3, at 139-40.

33. *Id.* at 135, 141.

34. ABA LEGAL NEEDS STUDY, *supra* note 25, at 18 (posing the question: “Why are people not receiving legal help when they may benefit from it? (Is it because they are unaware of their legal rights or worry about the cost of representation? Are they resigned to some adversity? Do they face

general use of legal services by moderate-income households. Moreover, according to Professor Rebecca Sandefur's research, "Americans typically do not understand their civil justice problems as legal problems,"³⁶ even when they face profound, destabilizing challenges.³⁷ That is, Americans do not conceptualize problems—including problems that have clear legal boundaries and which could be solved through interaction with the law—in terms of the legal system. The issue does not seem to be that there is widespread dissatisfaction with lawyers: according to the ABA Legal Needs study, when people did seek legal assistance, they had a generally "affirmative view" of the performance of their lawyers.³⁸

There is also a question about the extent to which legal representation actually matters, if it is sought and obtained. We may initially resist posing this question—we are, after all, invested in the value of what we do. But the recent publication of James Greiner and Cassandra Wolos Pattanayak's study of the Harvard Legal Aid Bureau's representation of claimants for unemployment insurance has fueled a new debate: it concluded that the results of an offer of legal representation did not necessarily yield better results in these cases in which individuals were seeking benefits, but definitely did increase delays in the resolution of claims.³⁹ This finding challenged the deeply held belief that

administrative obstacles or some kind of barrier? Do they want to avoid strife? Or, are they unaware of the legal help that may be available?").

35. Sandefur, *Money Isn't Everything*, *supra* note 23, at 237 (relying on data from the ABA 1994 study, Professor Sandefur writes: "For only 6 per cent of all civil justice problems did moderate income households report not turning to law because they were concerned about the costs of doing so."). Cost certainly can be prohibitive in contested litigation, however. *See id.* at 230. The LSC study suggests cost is at least factor, however. DOCUMENTING THE JUSTICE GAP, *supra* note 5, at 14. *See also* Herbert M. Kritzer, *To Lawyer or Not to Lawyer: Is That the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875, 899-900 (2008) (noting that the kind of legal problem and the amount at stake for monetary claims have a higher impact than income when deciding whether to use a lawyer).

36. *See* Sandefur, *The Impact of Counsel*, *supra* note 29, at 80.

37. Sandefur's list of "challenges" includes not having enough to eat; denial of government benefits; lack of health insurance; unemployment or discrimination and harassment at work; divorce, child support and child custody; evictions, foreclosures, homelessness, and loss of utilities; and debt, bankruptcy, collections, and identity theft. Sandefur, *Money Isn't Everything*, *supra* note 23, at 233.

38. ABA LEGAL NEEDS STUDY, *supra* note 25, at 112.

39. D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2118 (2012) [hereinafter Greiner UI Study]. There is, as Greiner notes, a substantial literature on the question of the value of representation in a wide range of types of cases, including "automobile insurance claims, bankruptcy, disability (SSI/SSDI, FECA, and veterans claims), educational programs for disabled children, employment (generally as well as focusing specifically on discharge/discipline and discrimination), family law (child neglect, custody, divorce, and restraining orders), housing/eviction, immigration disputes of all types, juvenile delinquency, small claims, special education, federal tax (both small claims and general), state tax, unemployment, and welfare." *Id.* at 2175-80 & nn.155-77 (providing references to the studies and literature on the value of legal representation). Greinger and Pattanayak conclude that "we know almost nothing as a result of these studies, and all but two provide no information on representation effects that would not already have been available from instinct and conjecture." *Id.* at 2180. Their basic point is that a post-hoc review of case files to see whether there was an effect from legal representation is

lawyers matter, and elicited quick rejoinders from legal services lawyers and others.⁴⁰ In a particularly thoughtful response, four leading clinicians and legal scholars noted that the special nature of unemployment insurance adjudication may mean that the Greiner-Pattanayak results “reflect the success of sustained individual and institutional advocacy by experienced lawyers whose efforts over many decades paved the way for effective self-representation.”⁴¹

In keeping with this analysis, other research has shown that in matters that are likely to involve more complexity and judgment, lawyers do matter. In a study of a Boston-area pilot project involving eviction cases in a Massachusetts district court (a lower-level state court), Greiner and Pattanayak found that an offer of representation to tenants by experienced lawyers had a strong, positive impact on their case outcomes.⁴² In a separate study of a similar pilot in a specialized housing court, they found that it may not matter if the legal services are provided on an “unbundled” basis.⁴³ A report by the Boston Bar Association touted the success of these same pilot programs more vigorously.⁴⁴

insufficient to give defensible results: “case-file-based observational studies ... generally suffer from three sets of methodological problems: the failure to define an intervention being studied, the failure to account for selection effects (which come in multiple layers), and the failure to follow basic statistical principles to account for uncertainty.” *Id.* at 2183-84. There is much to be said about the methodological argument; I will not venture into this terrain here.

40. See Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 48-49 (2012) (summarizing reactions to the Greiner UI Study, *supra* note 39).

41. *Id.* at 51. Notably, Selbin et al. take their analysis further, noting the possible lessons regarding the use of law to create systemic change in ways that improve the system of adjudication and the results for people and which expand the possibilities for access to justice through self-representation. *Id.* at 51, 53. This analysis is worth pursuing, but it may have less salience in situations involving both more factual variables and more complex legal analyses. Selbin et al. do not mention the fact that unemployment insurance cases involve strong presumptions in favor of the applicant for benefits when the claimant has been discharged, including that the employer has the burden of proof, creating a much more easily navigated landscape for self-represented claimants than other public benefit programs where these presumptions may not exist.

42. See generally James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. (forthcoming 2013) (manuscript at 47) [hereinafter Greiner et al., *Unbundled Services Study*], available at <http://ssrn.com/abstract=1948286> (studying eviction cases that were carefully screened by experienced legal aid attorneys, in which tenants were given self-help training and then randomly assigned to groups with no further representation and full representation, and finding that those with full representation had significantly higher success rates in defeating the eviction: approximately two-thirds of occupants in the treated (that is, represented) group, versus about one third of occupants in the control, unrepresented group, retained possession of their units at the end of litigation). Representation was by very experienced legal services attorneys who specialize in housing cases. Note that the landlords seeking eviction were represented by counsel in almost all cases; that 97% of tenants assigned to the representation group accepted representation; and that 89% of those who were not offered full representation were not represented by another lawyer. *Id.*

43. See generally D. JAMES GREINER, CASSANDRA WOLOS PATTANAYAK & JONATHAN PHILIP HENNESSY, HOW EFFECTIVE ARE LIMITED LEGAL ASSISTANCE PROGRAMS? A RANDOMIZED EXPERIMENT IN A MASSACHUSETTS HOUSING COURT 1-2 (Oct. 23, 2011), available at <http://ssrn.com/abstract=1880078> [hereinafter GREINER ET AL., HOUSING COURT STUDY]. In a study in which there was no pre-screening of cases, the authors found no statistically significant evidence that the service provider’s offer of full, as opposed to limited, representation had a large (or any)

In a 2010 meta-analysis of the effect of legal counsel on the outcome of adjudicated claims, Professor Sandefur concluded that “[l]awyer-represented people are more likely to prevail than people who appear unrepresented, on average.”⁴⁵ Not surprisingly, the differences were greatest in types of cases that lawyers rated as presenting greater procedural complexity, and least in cases without complexity, that were heard by administrative bodies.⁴⁶ This finding provides important insight into the findings in the Greiner UI study.⁴⁷

All of this suggests that legal representation in situations in which Americans experience serious problems—certainly the procedurally complex situations—would be a good thing in the pursuit of justice. Many people are appearing before courts and agencies without lawyers. Both poor and moderate-income individuals and families are foregoing legal recourse or legal representation, even when lawyers would improve the result—and even when payment for legal services might be available. Moderate-income households are ignoring opportunities to have their justice needs met, and the reason is not entirely due to cost. This is a puzzle, considering the abundance of lawyers in the U.S.

effect on any of the following: the likelihood that the occupant would retain possession; the financial consequences of the case; judicial involvement in or attention to cases; or any other litigation-related outcome of substantive import. Note that in comparison to the study of unbundled services, the numbers in this study were small, the number of evictors represented by counsel was lower, and this study was done in a specialized housing court, rather than a low level court of general jurisdiction. *Id.* Compare Greiner et al., *Unbundled Services Study*, *supra* note 42. Unbundling, which eliminates the attorney obligation to on-going representation of a client, is discussed further below. See *infra* notes 104-106 and accompanying text.

44. BOSTON B. ASS'N, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS PREVENTION: REPORT ON THE BBA CIVIL RIGHT TO COUNSEL HOUSING PILOTS 3 (2012), available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf> (“The findings of both pilot studies confirm that extensive assistance from lawyers is essential to helping tenants preserve their housing and avoid the potential for homelessness, including all of the far-reaching tangible and intangible costs to tenants and society generally that are associated with homelessness.”). The BBA Report includes summaries of interviews with the lawyers involved—lacking statistical significance, but informative nevertheless. *Id.* at 16-18, 21-22.

45. Sandefur, *The Impact of Counsel*, *supra* note 29, at 69. The meta-analysis involved twelve prior studies, involving more than seventy thousand adjudicated civil cases including administrative hearings about benefits, eviction defense, as well as problems faced across the population such as tax appeals, children’s special education classification, employment law, social security disability reconsideration hearings; two of the studies included asylum cases; two looked at hearings in small claims court. *Id.* at 63-64.

46. *Id.* at 71-72.

47. As noted in the Greiner UI Study, employers bear the burden of proof in about half of the total claims in the study. Moreover, unrepresented claimants for UI benefits find themselves before ALJs who are likely to assist them, given the general underlying presumptions in the UI system. Greiner acknowledges this possibility: “Perhaps the ALJ made a special effort (bent over backwards) for pro se litigants. Thus, our second proposed explanation is that the Massachusetts DUA had used and trained its staff effectively to create a system that was accessible to pro se litigants.” Greiner UI Study, *supra* note 39, at 2174.

B. We Have so Many Lawyers, But Where Are They?

We hear many assertions that there are too many lawyers coming out of law school, flooding a saturated—and some say transformed—legal market. There is spirited discussion at national meetings and in the blogosphere about the fate of large law firms and the changing nature of global legal practices.⁴⁸

In reality, few lawyers will ever work in the large firm world. For most law schools, few young graduates have ever entered that world. This is not to say that law practice for lawyers everywhere is not changing as a result of globalization and technological developments. But the high-paid associate and partner positions in global law firms are few and far between—and these positions are not distributed evenly among the more than 44,000 people⁴⁹ who graduate annually from American law schools.⁵⁰ Therefore, conversations about legal education, the legal market, legal representation, and access to justice simply should not focus on this sector.

Where *do* lawyers work? The ABA provides us with data on this question,⁵¹ bolstered by information from the American Bar Foundation,⁵² the Bureau of Labor Statistics,⁵³ the *After the J.D.* study,⁵⁴ the Census Bureau and, of

48. And this is echoed in academic writings. See, e.g., Mini-Symposium, *Legal Infrastructure and the Global Economy*, 8 J.L. & POL'Y INFO. SOC'Y 1 (2012), available at <http://moritzlaw.osu.edu/students/groups/is/archives/volume-81-2/>. This symposium was organized around Gillian K. Hadfield's article, *Legal Infrastructure and the Global Economy*, 8 J.L. & POL'Y INFO. SOC'Y 1 (2012), available at <http://moritzlaw.osu.edu/students/groups/is/files/2012/02/Hadfield.pdf>.

49. In 2011, 44,494 J.D. degrees were awarded by ABA-accredited law schools. See *Enrollment and Degrees Awarded 1963-2011*, A.B.A., available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf. This does not include the graduates of unaccredited law schools, who may be eligible to sit for the bar in some states, including California and Massachusetts.

50. There are 202 law schools that have been accredited by the ABA. *Approved Law Schools*, A.B.A., available at http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited Jan. 13, 2013). There are also unaccredited law schools functioning in states, like California and Massachusetts, which allow graduates of unaccredited law schools to sit for the bar.

51. See, e.g., *Legal Education Statistics from ABA-Approved Law Schools*, A.B.A. (2012), available at http://www.americanbar.org/groups/legal_education/resources/statistics.html; A.B.A., *LAWYER DEMOGRAPHICS* (2012), available at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf.

52. See generally CLARA N. CARSON, AM. B. FOUND., *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000* (2004), available at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_statistical_report_2000.authcheckdam.pdf.

53. See *Occupational Outlook Handbook: Lawyers*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (2011), <http://bls.gov/ooh/Legal/Lawyers.htm>.

54. RONIT DINOVIETZ ET AL., *AFTER THE J.D.: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* (2004), available at <http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf>.

course, the National Association of Legal Career Professionals (NALP).⁵⁵ According to the ABA, in 2011 there were 1,245,205 licensed lawyers in the U.S.⁵⁶—or about one lawyer for every 249 people.⁵⁷ In 2005,⁵⁸ 75% of lawyers were in private practice (up from 68% in 1980), 8% worked in government, and 8% in private industry. Of the private practitioners, 69% were working in firms with 10 lawyers or fewer, and a full 81% were working in firms with 50 lawyers or fewer. Only 16% of those—or 12% of the total number of lawyers—were in firms of 100 lawyers or more⁵⁹—and far fewer work in the largest global firms with hundreds of lawyers. Thus, the focus of all the chatter about large law firms pertains directly to less than 12% of the working lawyer population. Of new graduates going into private practice, the percent going to firms of over 101 lawyers fell to 27.7% in 2011; this represents 13.7% of total graduates. Even at the very peak of the curve, fewer than one-quarter of all law school graduates landed jobs in larger firms.⁶⁰

Many of the lawyers who work in firms with 20 or fewer lawyers—two-thirds of the total lawyer population—are practicing in local offices, serving local communities, and presumably meeting (or attempting to meet) local needs: Over 88% of private firms are located in one community, in one state.⁶¹ While the lawyers in these firms often deal with issues of international law—from trade affecting small business purchasing and sales, to adoptions and custody issues that cross national boundaries, to immigration and visa problems confronting local families—the practices themselves are rooted in the local environment. In fact, people often turn to people they know to get legal services⁶²—again

55. See *Research and Statistics*, NAT'L ASS'N LEGAL CAREER PROF'LS (NALP), <http://www.nalp.org/research> (last visited Oct. 25, 2012).

56. *Lawyer Demographics*, A.B.A. (Apr. 2012), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf.

57. The U.S. Census Bureau reported that the U.S. resident population in January 2011 was 310,544,109. *Monthly Population Estimates for the United States: April 1, 2010 to December 1, 2012 (NA-EST2012-01)*, U.S. CENSUS BUREAU, downloadable at <http://www.census.gov/popest/data/national/totals/2012/index.html>. When this population number is divided by the number of lawyers reported by the ABA, the calculation yields 249 lawyers per person.

58. The last available data in the ABA statistics was 2005. See *Lawyer Demographics*, *supra* note 56.

59. *Id.* See generally CARSON, *supra* note 52, at 5 (showing slightly different data for the year 2000: 14.3% of 74% of private practitioners were in firms with greater than 100 lawyers, or a total of 10.6 % of total lawyers in that year were in the larger firms). Note that there is some discrepancy in reported numbers regarding the distribution of lawyers. See, e.g., DINOVIETZ ET AL., *supra* note 54, at 27 (showing fewer solo practitioners than is reported by the ABA, among other discrepancies).

60. See *Class of 2011 Has Lowest Employment Rate Since Class of 1994*, NALP BULL. (July 2012), <http://www.nalp.org/0712research>.

61. CARSON, *supra* note 52, at 30.

62. Sandefur, *Money Isn't Everything*, *supra* note 23, at 240-41 (based on the 1996 General Social Survey, and showing that a substantial plurality of people in all income brackets rely on personal acquaintances; surprisingly, the income brackets are substantially similar, although the highest quintile is likely to rely somewhat more on relatives and previous business contacts). Few people find their lawyers through lawyer referral services. *Id.* at 242. This is important as law

pointing to the value of community-based law offices. And as the job market has become more challenging, more new law school graduates are deciding to start out in solo practices.⁶³

Most lawyers definitely are not working in funded legal assistance programs targeting people in poverty. Although more than 15% of the U.S. population now lives in poverty, the number of lawyers in legal services and public defender organizations is tiny—less than 1% of all lawyers—and the total budget, including all sources of funding, for civil legal assistance is miniscule compared to the need.⁶⁴ Given the paucity of resources, it is not surprising that only about half of eligible people nationally even know about the availability of free legal services.⁶⁵

It is therefore logical that almost three-fourths of low-income people's contacts with lawyers involve private practitioners, not federally funded legal services practitioners.⁶⁶ As we think about how to meet the need for legal services, we need to focus more on community law offices and private practitioners. If nothing else, we certainly need to stop thinking that the unmet

schools develop starting-out-solo and incubator ideas. Since these data were collected in 1996, use of web-based searches for lawyers has increased, but even in 2011 only 7% of people in an ABA survey reported searching for an attorney on the internet. *Id.* at 243-44.

63. HANOVER RESEARCH, SOLO PRACTICE: OBSTACLES AND RESOURCES, PREPARED FOR NORTHEASTERN UNIVERSITY SCHOOL OF LAW 6 (Sept. 2012), available at <http://www.hanoverresearch.com/wp-content/uploads/2012/10/Solo-Practice-Obstacles-and-Resources-Membership.pdf> (“Many new law school graduates are forgoing the law firm or corporate attorney route upon graduation, instead deciding to “go solo” and open their own law firms. Indeed, the number of law graduates following this path into solo practice is on the rise. In a 2011 article for MSNBC, author Anita Anand notes that “the number of recent law graduates going solo increased from 3.5 percent in 2008 to 5.5 percent in 2009”) (footnotes omitted)).

64. SANDEFUR & SMYTH, *supra* note 17, at 17.

Conservative estimates drawing on unpublished data collected by the American Bar Association suggest that total public and private funding amounted to around \$1.3 billion in a recent year. While over a billion dollars is in some ways a substantial expenditure, the amount is small when compared to total public spending on justice-related activities. In 2007, “federal, state and local governments spent an estimated \$228 billion for police protection, corrections and judicial and legal services”. In the context of overall government spending and national economic activity, the estimated amounts spent on civil legal assistance appear even more modest: In 2010, total U.S. federal spending was around \$3.6 trillion and gross domestic product was expected to be \$14.6 trillion.

Id. (citations omitted).

65. ABA LEGAL NEEDS STUDY, *supra* note 25, at 26. In fact, only 36% of eligible people in the study believed that they were eligible for subsidized legal help. *Id.* At least this was true in 1992, when the study was done. Of course, given the number of cases LSC organizations are turning away, greater awareness would hardly lead to better access under current conditions.

66. See SANDEFUR & SMYTH, *supra* note 17, at 28 (“Available evidence suggests that when low-income people face civil justice problems and seek out a lawyer's help, most of their contacts with attorneys are actually not with legal aid or pro bono attorneys, but rather with private practice lawyers and in the context of fee arrangements.”) (citation omitted). Note that this assistance is often not full representation in litigation: 42% of this assistance involved advice or assistance with documents. Email correspondence with Professor Rebecca Sandefur (July 13, 2012) (on file with author) (noting that the number was computed from the ABA Report).

need for civil legal services for poor or vulnerable populations is, or can be, met by LSC-funded organizations.

Increased recognition of the dominance of solo and small firm practice has led to the expansion of resources to support this sector. The ABA recently launched a new Solo and Small Firm Resource Center to offer assistance “for the nation’s largest law practice demographic.”⁶⁷ Private sector vendors⁶⁸ and consortia of solo practitioners⁶⁹ are enhancing the work of the sections of local bar associations that have been bringing these practitioners together for a long time.⁷⁰

Despite all of this, we know remarkably little about the economics of the small and solo practices where most lawyers work, nor do we know how they organize their legal work, the extent to which they specialize, or their ability to weather the inevitable volatility of demand for their services. The information we do have suggests that what people pay for legal services varies widely and that many of these services are affordable on a fee basis, at least for moderate-income people.⁷¹

67. Press Release, Am. Bar Ass’n, ABA Serves Solo and Small-Firm Lawyers with New Online Resource Center (Jan. 19, 2012), *available at* <http://www.abanow.org/2012/01/aba-serves-solo-and-small-firm-lawyers-with-new-online-resource-center/>.

68. *See, e.g.*, SOLO PRACTICE UNIV., <http://solopracticeuniversity.com> (last visited Oct. 24, 2012). Having seen an expanding market in the growing anxiety of law school administrators, Solo Practice University sent an email peddling its program to law schools on Sept. 12, 2012, ending with the following postscript: “P.S. Be sure to ask about the New Solo Success Package!” and exhorting law school administrators to offer scholarships to students to join through the SPU “bridges” program. Email from M.J. Armin to the author (Sept. 12, 2012) (on file with author). The bridges program is described this way: “Solo Practice University® and its law school partner enter into an agreement by which the school purchases a block of scholarships for its upper-year students and alumni at a reduced rate and arranges a similar discount rate for its other students and alumni who do not receive these scholarships. Solo Practice University® creates a special branded “portal” on its website for each participating law school, through which students and alumni can enroll. New arrivals can also connect with current Solo Practice University® users from their school.” *Building Bridges to Professional Independence*, SOLO PRACTICE UNIV., <http://solopracticeuniversity.com/bridges> (last visited Oct. 24, 2012).

69. *See* STARTING OUT SOLO, <http://www.startingoutsolo.com/> (last visited Oct. 4, 2012). In Boston, for example, there is a Starting Out Solo network, which has developed an extensive membership and now assists in teaching 3Ls and young graduates about how to launch a practice—and then move into the network.

70. *See, e.g.*, *Boston Bar and LOMAP Launch Series for Lawyers Starting Their Own Firms*, BOSTON B. ASS’N (Sept. 7 2012), <http://www.bostonbar.org/sections/solo-small-firm/2012/09/07/boston-bar-and-lomap-launch-series-for-lawyers-starting-their-own-firms>. These efforts are also being ramped up, as can be seen by the Boston Bar Association Section’s posting on September 7, 2012: “As more lawyers consider venturing into solo or small firm practice, the Boston Bar Association (BBA) today announced that it has joined forces with the Law Office Management Assistance Program (LOMAP) to offer Foundations for a New Practice” *Id.* In Columbus, Ohio, the Columbus Bar Association announced a new solo practice incubator program designed to offer newly admitted attorneys assistance as they work to build solo practices. *See Columbus Bar Inc: A Professional Development Center*, COLUMBUS B. INC, http://www.cbaw.org/_files/Columbus%20Bar%20inc%20Sponsorship%20Packet.pdf (last visited Oct. 24, 2012).

71. Sandefur, *Money Isn’t Everything*, *supra* note 23, at 227-30. Although, of course, complex trials are quite expensive and difficult for moderate-income people to finance.

Looking at this from another vantage point, the Bureau of Labor Statistics tells us that there is anticipated job growth in legal employment, but that it lags behind other occupations.⁷² Given the number of new lawyers graduating from law schools, and the current slow rate of retirement, the estimated rate of growth is not enough to absorb all new law school graduates.⁷³ Indisputably, recent graduates of law schools face increasing difficulty finding salaried employment.⁷⁴ While the long-term prognosis may not be so grim,⁷⁵ we clearly need expansion of opportunities for young lawyers, or we will face increasing competition over a smaller number of jobs.

It is possible that the current salary structure of the legal market exacerbates the problem of underemployment of new graduates. Newly minted young lawyers may be seeking incomes that are higher than is generally earned by the profession, both because their expectations do not reflect reality and because they need to manage their debt. Overall, the current average income for practicing lawyers is \$112,000, with the bottom 10% earning less than \$54,130, and the top 10% earning more than \$166,400.⁷⁶ Other than this kind of summary data, we know quite a lot about starting salaries for our graduates, but good information about the development of lawyers' income over time does not seem to be readily available.⁷⁷ We can be reasonably certain, however, that most lawyers in

72. *Occupational Outlook Handbook: Lawyers: Summary*, *supra* note 53. BLS estimates legal job growth at 10% over the period 2010 to 2020, below the average growth rate of 14% for all occupations. The BLS further notes that job growth is constrained both by the economy and by the fact that businesses increasingly use large accounting firms and paralegals to do some of the same tasks that lawyers do. *Occupational Outlook Handbook: Lawyers: Job Outlook*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (2011), <http://www.bls.gov/ooh/legal/lawyers.htm#tab-6>. BLS provides explanations of its projections regarding job growth on its website, noting that "projections of industrial and occupational employment are developed in a series of six interrelated steps, each of which is based on a different procedure or model and related assumptions: labor force, aggregate economy, final demand (GDP) by consuming sector and product, industry output, employment by industry, and employment by occupation. The results produced by each step are key inputs to following steps, and the sequence may be repeated multiple times to allow feedback and to insure consistency." *Employment Projections: About the Numbers*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (2011), <http://www.bls.gov/emp/nioem/empioan.htm>.

73. Although the retirement age is rising, it is significant that more than three-fifths of lawyers nationally are 45 years old or over. CARSON, *supra* note 52, at 8. Note that the current rate of law school graduation may not be excessive in the future as the older demographic bulge moves out of full-time work.

74. *Class of 2011 Has Lowest Employment Rate Since Class of 1994*, *supra* note 60.

75. There may also be real differences in different parts of the country: the number of lawyers per population varies from a high of 10:1 in Washington D.C., to 463:1 in South Carolina. CARSON, *supra* note 52, at 271 tbl.IV.2. The largest number of lawyers practice in New York and California, followed by Texas, Florida, Illinois, and the District of Columbia. *Id.* at 270 tbl.IV.1.

76. *Occupational Outlook Handbook: Lawyers: Pay*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (Apr. 26, 2012), <http://bls.gov/ooh/Legal/Lawyers.htm#tab-5>.

77. The National Association of Legal Career Professionals provides extensive data on starting salaries for new law school graduates, and these data are available to show trends. See *Trends in Median Reported Salaries*, NAT'L ASS'N LEGAL CAREER PROF'LS (NALP) (Sept. 2011), http://www.nalp.org/trends_in_median_reported_salaries. Median and mean salaries for new lawyers have fallen dramatically, primarily reflecting the drop in lawyers and in compensation at the large firms. *The NALP Salary Curve for the Class of 2011*, NAT'L ASS'N LEGAL CAREER

community practices are not earning at the top of the range, and that many of our graduates hope to land in the top bracket early in their careers.

These data, when combined with the magnitude of unmet need in communities across the country, suggests several issues. First, we need to come to grips with the fact that most legal services are provided to people, including small businesses, by small local legal practices, and this is where the vast majority of American lawyers practice law. Second, although the current rate of job creation is slow, we should not have to rely on retirements to meet new graduates' need for employment, given the magnitude of unmet need. There ought to be possibilities for new job creation. For law schools to assist in this process, we must understand the local market for legal services, the local magnitude of unmet need, and the actual earning levels of lawyers where our graduates go. Third, if current law students are to graduate to work in community practices, they will need assistance in managing both their salary expectations and their educational indebtedness.

C. *What Are We Doing About Unmet Need and Access to Justice?*

The challenges of access to justice described above have not gone unnoticed. There is plenty of buzz, and some meaningful action.⁷⁸

In recent years, the American Bar Association has embraced the issue of unmet need for civil legal services. In partnership with the National Legal Aid and Defender's Association, the ABA's Board of Governors created the Resource Center for Access to Justice Initiatives and launched the Access to Justice support website (www.ATJsupport.org),⁷⁹ providing assistance to bench, bar, and legal services leaders engaged in efforts to expand civil justice. In 2006, under the leadership of ABA President Michael Greco and his Presidential Task Force on Access to Civil Justice, the ABA House of Delegates unanimously

PROF'LS (NALP) (July 2012), http://www.nalp.org/salarycurve_classof2011 (showing the adjusted median salary for 2011 graduates as \$73,984, and the mean was \$78,653). The median salary for the largest law firms has dropped significantly in the last few years, from \$160,000 to \$145,000. *Median First-Year Big-Law Associate Salary Slumps to \$145,000 in 2012, a Median Last Seen in 2007*, NAT'L ASS'N LEGAL CAREER PROF'LS (NALP) (Sept. 20, 2012), http://www.nalp.org/2012_associate_salaries. More importantly, the distribution of starting salaries is troublingly bimodal. Salaries are redistributing to the left (lower) side of the curve, and the median starting salary is dropping as a result. *See Salary Distribution Curve*, NAT'L ASS'N LEGAL CAREER PROF'LS (NALP), <http://www.nalp.org/salarydistrib> (last visited Oct. 24, 2012) (showing starting salary distribution for graduating classes of 2006 to 2011). Salaries in private sector firms vary by size. *See How Much Do Law Firms Pay New Associates? A 16-Year Retrospective*, NAT'L ASS'N LEGAL CAREER PROF'LS (NALP) (Oct. 2011), http://www.nalp.org/new_associate_sal_oct2011.

78. Not all of the activity is new, of course. HALT (Help Address Legal Tyranny) was founded in 1978 and now claims to have 20,000 members. *See About HALT*, HALT.ORG, <http://www.halt.org/about/about-halt> (last visited Nov. 4, 2012) (stating that HALT is "[d]edicated to providing simple, affordable, accountable justice for all, HALT's Reform Projects challenge the legal establishment to improve access and reduce costs in our civil justice system at both the state and federal levels").

79. *Resource Center for Access to Justice Initiatives*, A.B.A., http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html (last visited Jan. 2, 2013).

endorsed “Civil Gideon” rights as a means for guaranteeing adequate representation in civil matters when basic rights were at stake.⁸⁰

Since 2000, the number of state commissions on access to justice has mushroomed: the ABA website now lists 33 state commissions or related organizations, and more states are represented at the annual meeting of state commissions.⁸¹ By definition, each of these commissions has the core charge “to expand access to civil justice at all levels for low-income and disadvantaged people in the state (or equivalent jurisdiction) by assessing their civil legal needs, developing strategies to meet them, and evaluating progress.”⁸² The ABA further notes that the “charge may also include expanding access for moderate-income people”⁸³ though, in general, the activities on access to justice are largely focused on very low-income people.

On April 17, 2012, the White House and the Legal Services Corporation co-hosted a forum on the state of civil legal assistance. President Obama said at that time that making civil legal assistance available to low-income Americans was “central to our notion of equal justice under the law,” and he pledged to be a fierce defender and advocate for legal services.⁸⁴ Despite this commitment, the funding for LSC dropped in 2011 in the face of current political and budgetary challenges.⁸⁵

Recognition in the blogosphere came with the additional creation of an “access to justice” website, now just one year old.⁸⁶

All of this supplements the constant—even dogged—efforts by the poverty bar to draw attention to the “justice gap”⁸⁷ and, of course, the unending efforts to

80. A.B.A., REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 112A (Aug. 7, 2006), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf (unanimously approved by ABA House of Delegates Aug. 7, 2006).

81. *Resource Center for Access to Justice Initiatives*, *supra* note 79. For a description of the history and workings of state commissions, see generally Karla M. Gray & Robert Echols, *Mobilizing Judges, Lawyers, and Communities: State Access to Justice Commissions*, 47 THE JUDGES’ J. 33 (2008), available at <http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/grayechols.authcheckdam.pdf>.

82. *Definition of Access to Justice Commission*, A.B.A. RESOURCE CENTER FOR ACCESS TO JUSTICE INITIATIVES (July 2011), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_of_a_commission.authcheckdam.pdf.

83. *Id.*

84. *The White House and LSC Co-Host Forum on the State of Civil Legal Assistance*, LEGAL SERVS. CORP., <http://www.lsc.gov/media/in-the-spotlight/white-house-and-lsc-co-host-forum> (last visited Nov. 4, 2012).

85. LSC FACT BOOK, *supra* note 6, at 7.

86. RICHARD ZORZA’S ACCESS TO JUSTICE BLOG, <http://accesstojustice.net/> (last visited Oct. 25, 2012). The blogger is Richard Zorza, who has also written more traditional articles in the area. See Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 156-57 (2011) (viewing the four key access-to-justice elements as “court simplification and services, bar flexibility, legal aid efficiency and availability, and systems of triage and assignment”).

87. See generally DOCUMENTING THE JUSTICE GAP, *supra* note 5.

expand the reach of pro bono work.⁸⁸ Suggestions here always include increased coordination, increased funding, and more exhortation for lawyers to engage in pro bono work.

Efforts to expand access to justice can include everything from increasing the efficiency of the courts, to ensuring that existing rights are not abrogated, to expanding substantive rights in order to change the existing economic or power structure. In current efforts, the focus is almost entirely on procedural, rather than substantive, access to justice, as has been pointed out repeatedly by Professor Deborah Rhode.⁸⁹ This is very clear in the ABA activities.

Of course, we face a brutal problem of limited resources. We know that we can never have sufficient resources to offer every person with a legal problem full, free representation by a dedicated and creative lawyer. Instead, there is a desperate focus on providing reasonably competent representation while we attempt to allocate severely limited resources.⁹⁰

There is increasing recognition that, as the old adage—often attributed to Albert Einstein—goes, it is insanity to do the same thing over and over again and expect different results. The budget for legal services is inadequate. Lawyers' participation in pro bono work does not make a significant dent in the unmet need.⁹¹ Resources are severely limited. It is obvious that we need broader and more creative discussions—and solutions. This is not a new revelation.

Ideas that are in circulation vary from highly targeted (and arguably narrow) attempts to expand available funding for legal services for specific vulnerable populations, to broader ideas about rethinking the right to counsel. Many of these ideas are applicable across the income spectrum, and thus would benefit not only the very poor but moderate-income families as well. Few of these ideas, however, focus on the basic market issue of how to deploy expanding numbers of lawyers in ways that they might support themselves and meet the large need for legal services. In addition, none of them grapple fully with concerns about the adequacy of limited forms of legal representation.

Here is a brief synopsis of current efforts surrounding access to justice:

1. Expand the availability of legal representation:

88. These efforts are very well described in Deborah Rhode's writings. See generally RHODE, *supra* note 2; Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009) [hereinafter Rhode, *Whatever Happened to Access to Justice?*]. For a description of current efforts, see PRO BONO INST., <http://probonoinst.org/> (last visited Oct. 9, 2012), as well as the resources available at *Resources on Pro Bono*, A.B.A., http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/pro_bono_resources.html (last visited Nov. 4, 2012). See also *infra* note 128 for a description of the new New York State requirement for 50 hours of pro bono service as a prerequisite for admission to the bar.

89. See Rhode, *Whatever Happened to Access to Justice?*, *supra* note 88, at 872-74.

90. In the 49 countries that guarantee legal aid in civil matters, representation is not provided in all cases. *Id.* at 875 (citing Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World?*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 771-72, 778-79 (2006)).

91. *Id.* at 887.

- Increase the use of fee-shifting statutes and the pursuit of other fee-generating work. Fee-generating cases can form the economic basis for a community law office, whether it is LSC-funded or not. The ban that prevented LSC-funded organizations from seeking fees was lifted in 2009.⁹² Many LSC-funded organizations have been slow to respond,⁹³ perhaps because the current generation of legal-services lawyers did not practice when legal-services offices saw their role as the eradication of poverty and bred aggressive litigators who used fee-shifting statutes effectively as part of their overall strategy. This is a missed opportunity, given the need for help in both consumer and employment cases, which generally allow fees to prevailing plaintiffs. Some legal-service organizations have made very effective use of fee-generating cases in order to expand both the organizations' ability to serve more clients and take on broader substantive issues.⁹⁴ Although this may not be a politically feasible idea, expansion of fee-shifting statutes, or amendment of the basic American rule on fees, would certainly help the effort to expand services for both the extremely poor and moderate-income people. Fees are also available in cases that generate back benefits or tort damages, and income from these cases can help support both LSC-funded and private law offices.
- Expand the number of nonprofit and public service organizations that provide legal services, particularly in geographic and substantive areas that are not being served adequately by LSC-funded organizations. There are a number of examples of this around the country. Among the organizations that employ full-time attorneys, Mountain State Justice in West Virginia, started primarily with IOLTA funds, is now financially stable due to aggressive litigation on behalf of poor clients in fee-shifting consumer-protection cases, predominantly in the area of predatory lending.⁹⁵ Using a different

92. The December 2009, appropriations bill for fiscal year 2010 eliminated the provision that would have required the Legal Services Corporation to sanction programs that collected attorneys' fees. See generally Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524 (2009). For a discussion of the LSC program issues around fee collection, see generally Rochelle Bobroff, *Legal Services Attorney Fees Are Obtainable in Pending Cases*, 44 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 157 (2010).

93. Interview with Robert Baker, Chair, West Virginia Access to Justice Commission (June 15, 2012). Baker was managing attorney of a legal services organization before retirement.

94. Telephone Interview with Bill Kennedy, Managing Attorney of the Sacramento Office of Legal Services of Northern California (May 21, 2012). The ability to shift fees in lawsuits brought against the state has provided an important income stream for Legal Services of Northern California. *Id.* For a cogent discussion of why and how a nonprofit organization should collect attorneys' fees, see Jennifer S. Wagner, *Funding Legal Services Programs with Attorney Fee Awards*, CLEARINGHOUSE REV. (forthcoming 2013).

95. Interview with Jennifer Wagner, Managing Attorney, Mountain State Justice (Aug. 12, 2012). See also MOUNTAIN STATE JUSTICE, <http://www.msjlw.org/> (last visited Oct. 10, 2012). Mountain State Justice has been so successful that the organization has recently hired additional attorneys to specialize in the non-fee-generating areas of prison conditions and health care.

model, law graduates in St. Louis, who had other employment, set up Arch City Defenders Nonprofit Holistic Legal Defense to provide services to indigent criminal defendants who do not qualify for the services of other legal-aid organizations.⁹⁶ Other examples of such organizations abound, but I have not found any thorough analysis of where they are, what they do, and the extent to which they are sustainable. Whether they can survive may depend on their ability to generate fees, in lieu of dependence on donors. Community law offices that are not part of the LSC-funded network may fit within this paradigm as well. Notably, nonprofit organizations that employ graduates also enable recent graduates to qualify for very beneficial loan repayment provisions. This is an important secondary consequence of expanding access to justice through public service and nonprofit organizations.⁹⁷

- Increase pro bono work and build “scalable” models to expand the reach of pro bono efforts.⁹⁸ The question of how to build from small individualized efforts to broader scale models is a key challenge, and many are thinking about it. Some of these efforts rely on retiring lawyers. The efforts of the Pro Bono Institute are notable in this regard, but as yet there is little data.⁹⁹ These models may rely on the unbundling of legal services, so that pro bono attorneys do not feel obligated to take on the full representation of needy clients.
- Create a “Civil Gideon” right. This is a much more ambitious campaign that would create a right to civil representation and result in substantially expanded public funding for legal representation in areas of basic needs.¹⁰⁰ As endorsed by the ABA, it would include representation in “adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”¹⁰¹ The term, of course, comes from the Supreme

96. See *ArchCity Defenders: About Us*, ARCHCITYDEFENDERS.ORG, <http://archcitydefenders.org/pages/about.html> (last visited Nov. 4, 2012). For further description of their work, see 13 ST. LOUIS UNIV. SCH. OF LAW ALUMNI MAG. 10, 13 (2012).

97. See discussion *infra* Part II.2: *Addressing the Costs of Legal Education* regarding loan repayment assistance and the College Cost Reduction and Access Act.

98. Deborah Rhode has written extensively on this subject, and sections of her articles and books invariably address the failure of the bar to provide extensive pro bono services.

99. The Pro Bono Institute, for example, is funding programs like Second Acts, for retiring lawyers. See *Second Acts*, PROBONOINST.ORG, <http://www.probonoinst.org/projects/second-acts.html> (last visited Oct. 10, 2012).

100. See John Pollack, *Where We’ve Been, Where We’re Going: A Look at the Status of the Civil Right to Counsel, and Current Efforts*, 26 MGMT. INFO. EXCH. (MIE) J. 29, 30-31 (2012) (providing a concise history and status report on the “Civil Gideon Movement”). See also Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 715-17 & n.63 (2006); Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065, 1075, 1082, 1084 (2009).

101. A.B.A., REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 112A (Aug. 7, 2006), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_

Court's decision in *Gideon v. Wainwright*,¹⁰² which guaranteed right to counsel to indigent criminal defendants when there was substantial risk of incarceration. Clearly, this right will not grow easily, particularly given the recent Supreme Court decision in *Turner v. Rogers*, in which the Court unanimously held that there was no entitlement to counsel in a case involving contempt for nonpayment of child-support that resulted in a 12-month incarceration.¹⁰³ Instead, the majority concluded that court-aided self-representation is sufficient to protect due process rights. Clearly, more research will be needed on the efficacy of alternative representation approaches if the right-to-counsel movement is to be persuasive in the political (or the judicial) arena.

2. Increase efficiency in the delivery of legal representation:

- Unbundle legal services in order to target limited resources to the greatest needs. This idea is driven by the scarcity of resources and the belief that we can identify the most critical components of cases—particularly those in which representation in a proceeding is required—and separate these from any on-going obligation to an individual client. The Civil Justice Infrastructure Mapping Project found that, as of 2010, almost 90% of states had adopted a rule that would allow lawyers to limit the scope of representation.¹⁰⁴ This approach would certainly meet judges' desire to have represented litigants in their courtrooms. Moreover, people seem to find the idea attractive,¹⁰⁵ and one randomized study in a specialized housing court

defendants/ls_sclaid_06A112A.authcheckdam.pdf (“RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.”).

102. 372 U.S. 335, 344 (1963).

103. *Turner v. Rogers*, 131 S. Ct. 2507, 2512 (2011). While a five-to-four majority of the Supreme Court agreed that the defendant's due process rights had been violated, not a single Justice felt that this meant that the individual was entitled to representation by a lawyer. Needless to say, commentary has followed. See Richard Zorza, *The Implications of Turner v. Rogers: A New Day for Judges and the Self-Represented*, 50 THE JUDGES' J. 16, 16 (2011). In an on-line symposium on the *Turner* decision, participants managed to find a range of more positive potential impacts of the decision. See Richard Zorza, *A Final Turner Post from Your Co-Hosts, Richard Zorza & David Udell*, CONCURRINGOPINIONS.COM (June 28, 2011, 12:20 PM), <http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers>.

104. SANDEFUR & SMYTH, *supra* note 17, at 28-29.

105. *Id.* (“A 2010 survey of Americans commissioned by the American Bar Association found that, while most people were unfamiliar with limited-scope representation, many found the idea attractive once it was explained to them. A majority of those surveyed who lived in households with annual incomes less than \$100,000 ‘believe[d] it [was] important for lawyers they are considering using for personal legal matters to offer unbundled legal services.’ The percentage regarding this as important increased as household income declined, with almost four fifths of people in households with incomes less than \$15,000 regarding the availability of unbundled services as somewhat or very important in their choice of a lawyer.”) (internal citation omitted).

in Massachusetts found that unbundled representation was as effective as full representation in preventing evictions.¹⁰⁶ Thus, many argue that unbundling is good for clients, good for lawyers and good for courts—and that we should not let the best be the enemy of the good. Of course, this does not address at least two important countervailing concerns: that the efficacy of this kind of representation may not be adequate, particularly in more complex matters; and that lawyers providing limited unbundled representation are very unlikely to address underlying complex substantive issues, which would undoubtedly require more extensive longitudinal time commitments.

- Simplify procedures, improve the availability of information, and develop new techniques for managing cases. Presumably, if we simplify procedures, courts will function more efficiently and litigants will have reduced need for representation. In fact, if we make accurate information more available, everyone who needs legal advice can benefit.¹⁰⁷ There is already vastly expanded access to information, including legal documents, on the internet, though there is no quality control on the information. Certainly, the bar and judges of the 1950s would have been astonished at the rapid development of pro se uncontested divorce procedures in the 1980s. Many are theorizing that these developments will lead to delivery of legal advice and legal services that are more efficient and potentially less costly. Procedural and substantive streamlining has the possibility of yielding substantial reductions in costs and time for resolution of disputes. Triage of cases to determine when full legal representation is critical would help to target limited resources. In addition, various alternative dispute resolution mechanisms can also be helpful in increasing the efficiency of the resolution of disputes. Each of these approaches does, of course, pose countervailing dangers to vulnerable parties who may be disadvantaged by the lack of formal process and representation. Again, the question is whether they would be sufficiently better off to justify the trade-offs, a question that is difficult to answer given the limitations of the currently available research.

106. See GREINER ET AL., HOUSING COURT STUDY, *supra* note 43, at 1 (abstract), 5-6, & 23-33. The Boston Bar Association, which was a partner with Greiner in this study, has managed a “lawyer for the day” program in housing court for some time. Not surprisingly, and in part based on these findings, the Association is now working vigorously to expand that program. See *Housing Court Lawyer for the Day Program*, BOSTON B. ASS’N, <http://www.bostonbar.org/in-the-community/public-service-opportunities/housing-court-lawyer-for-the-day-program> (last visited Nov. 4, 2012); Press Release, Boston Bar Ass’n, Expanding Lawyer for Day at Housing Court: One Piece of Homelessness Puzzle (Sept. 10, 2012), received via email to author (as a member of the BBA) from J.D. Smeallie, President of the Association (Sept. 10, 2012, 9:55 a.m.).

107. Rhode, *Whatever Happened to Access to Justice?*, *supra* note 88, at 897 (“[M]arket forces are already pushing in this direction.”).

3. Strengthen systems to allow for expanded and effective self-representation or non-lawyer representation. This approach assumes, probably correctly, that lawyers will never meet all of the unmet need, and therefore we should work to limit the necessity for lawyers. While not a solution to the need for expanded opportunities for young lawyers, these efforts will shape the work of lawyers in the future.

- Self-representation. Pro se litigants are not new, but they are a growing phenomenon. This of course raises dual concerns: whether people can represent themselves adequately and the burden pro se litigants place on the process because of their lack of familiarity with the law. There are two possible responses. The first is to work hard to provide all litigants with representation—represented by the efforts to expand the right-to-counsel, to increase funding for legal assistance, to encourage pro bono representation, and to unbundle services. An alternative approach is to enable people to act on their own. The movement to simplify procedures and to provide better, more accessible and reliable information is linked directly to the hope that this will enable individuals to take the law into their own hands more effectively. Moving at least somewhat in this direction, nearly every state judicial system has put some court forms and basic information on the internet, and over two-thirds have set up at least one staffed center located in a courthouse to assist the public, including with pro se litigation.¹⁰⁸

Self-representation poses no challenge to the existing unauthorized practice of law rules. The real question is whether it leads to effective use of the law for these individuals.¹⁰⁹ Certainly, simple forms—increasingly available on the internet—can enable individuals to bypass professionals in favor of alternative approaches. Professors Greiner and Pattanayak's study of claimants for unemployment insurance suggests that, at least in some situations, people can do as well on their own as with counsel.¹¹⁰ In contrast, however, their study of eviction cases in Massachusetts district courts suggests that experienced counsel can indeed make a difference in outcome—even after the litigants have attended “clinics” during which they received both general information about the process and individualized assistance in filling out forms.¹¹¹

Some courts have gone further in the distribution of information, clearly reacting to the flood of pro se litigants. In New York, for example, the U.S. district court has issued a *Trial-Ready Manual for Pro Se Litigants Appearing Before the United States District Court*

108. SANDEFUR & SMYTH, *supra* note 17, at 11.

109. Deborah Rhode raises some of the salient issues. See Rhode, *Whatever Happened to Access to Justice?*, *supra* note 88, at 882-86.

110. See generally Greiner UI Study, *supra* note 39.

111. See generally Greiner et al., *Unbundled Services Study*, *supra* note 42.

for the Southern District of New York.¹¹² It is a successful attempt to explain complex matters in lay language, but it is hard to imagine that a 120-page manual for non-lawyers, on how to manage a trial in federal district court, is likely to provide them with sufficient expertise to self-represent effectively. Perhaps it will improve the process for pro se litigants, but one can only imagine that this was a gesture of some desperation by the court.

- Non-lawyer advocates. Linked to the self-help or self-representation movement is the recognition that a lot of legal advice is already coming from people who are not lawyers and who don't work under lawyers' supervision. Accounting firms, local lay advocates, and social service providers all give advice, assist in drafting documents, and sometimes represent people in administrative processes.¹¹³ Should these roles be expanded? Many are raising this as a possibility.¹¹⁴ In the provision of health care, much of the pressure for the development of independent non-physician provider groups, including nurse practitioners and physician assistants, was rooted in a shortage of physicians, particularly primary care physicians. A full analysis of legal needs and the availability of lawyers may suggest that our profession also lacks the availability of affordable "primary care" practitioners, and there are many tasks that can be done by someone with less, but more focused, training. Further, the cost of legal education, and the expectations regarding income after

112. TRIAL-READY MANUAL FOR PRO SE LITIGANTS APPEARING BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (2011), available at <http://www.nysd.uscourts.gov/file/forms/trial-ready-manual-for-pro-se-litigants>.

113. This includes, by way of example, immigration hearings and government benefits including unemployment and Social Security, and some state forums. See SANDEFUR & SMYTH, *supra* note 17, at 29.

114. The ABA REPORT ON NONLAWYER ACTIVITY, *supra* note 2, discusses this issue in depth. See also Hadfield, *supra* note 3, at 154.

Those concerned with access to justice have long emphasized how the extreme approach to unauthorized practice of law in the United States drastically curtails the potential for ordinary folks to obtain assistance with their law-related needs and problems... American lawyers often take for granted that it is natural that anyone who wishes to practice law must be an authorized member of a bar association and subject to the admissions, ethical, and disciplinary controls of the profession, including the judiciary. The regulatory problem, however, goes beyond a straightforward restriction on supply. The more fundamental problem with the existing regulatory structure is traceable to the fact that the American legal profession is a politically unaccountable regulator, which lacks the funding levers and policymaking apparatus needed for a sector that is a huge share of the American economy and one that plays an increasingly important role in a rapidly changing and decentralized economic system. Many critics of the bar's self-regulation have decried the tendency for the bar to put professional self-interest ahead of public interest.

Id. (footnotes omitted). See generally RHODE, *supra* note 2; Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 199 (1990); HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (2001).

admission to the bar, may preclude the delivery of full services to all in need, particularly those at the lowest end of the income scale.

The legitimate concern is that this will further reify our two-tier legal system, in which the rich receive extensive services and the poor receive “efficient” services. While this may be occurring already, it is nevertheless reasonable to ask whether this is how we want to build the future of the American legal system.

Further, any serious expansion of the role of non-lawyer advocates would require a change in the legal profession’s position on the unauthorized practice of law. In general, it is the rules governing unauthorized practice that limit the ability of non-lawyers to provide legal advice and representation without direct supervision by a licensed attorney. Reexamination of these rules would certainly be appropriate. The question of whether independent allied legal professions should be regulated and licensed, and by whom, is the obvious corollary issue.

Together, these suggestions—and other work that is being done at the state and local level—may indeed lead to a genuine rethinking of the way in which legal services are provided. Some of these ideas may replace or complement traditional ideas about how to solve the challenge of access to justice in the U.S.¹¹⁵ These ideas do not, however, envision harnessing the potential of the large numbers of lawyers who can and do work in local communities, other than through exhortations for pro bono work. Nor do they fully acknowledge that we are underutilizing young lawyers who are now graduating from law school. Further, no one seems to envision a role for law schools in helping to meet the challenges. It is to these issues that I turn in Part II.

II. THE ROLE OF LAW SCHOOLS

It may be critical to the survival of many law schools to put the pieces of this puzzle together. Law schools are churning out new law graduates into a job market that is failing to absorb many of them, while the unmet need for legal services keeps growing. Is there a way for law schools to add value both by increasing our understanding of what is actually going on and by educating our students so they are better able to address these unmet needs?

Interestingly, if you look at the access to justice task forces and commissions around the country, law school representation is thin. Law schools are not automatically seen as key partners.¹¹⁶ This is not surprising, but it is worrisome. After all, it is up to law schools to teach, research, and advocate in

115. See Sandefur, *Impact of Counsel*, *supra* note 29, at 51.

116. ACCESS TO JUSTICE PARTNERSHIPS STATE BY STATE 53 (2005) (*Twelve Lessons from Successful State Access to Justice Efforts*), available at <http://www.nlada.org/DMS/Documents/1113666733.35/NLADA-AccessToJustice%239.pdf>. The first point says: “Successful Access to Justice efforts are founded upon a strong partnership among the bar, the judiciary, and legal aid providers. *Law schools can also be key partners . . .*” *Id.* (emphasis added).

this domain, or lawyers will continue to enter the profession ill-prepared for the real challenges of the practice of law. We definitely have a long way to go.¹¹⁷

Where do law schools fit? Below, I first discuss some of the barriers to change within legal education and then summarize ideas for the future.¹¹⁸

A. *Barriers to Change*

In order for law schools to play a more significant role in thinking about access to justice, we undoubtedly need a major cultural shift¹¹⁹: the culture of law schools is simply not focused on the core issues surrounding access to justice or the delivery of legal services. We tend to think of these as matters for the bar, not legal educators. We doubt the capability of our graduates to enter solo or small practices, despite the fact that the data suggest that most of our graduates end up in these practices over time.¹²⁰ And we forget that many of our students come to law school to pursue a passion for justice.

As deans, we generally do not focus our attention, our resources, our research, or our time on these issues.¹²¹ At national meetings, we talk a great deal about the needs and concerns of the largest firms, despite the fact that most law schools place few graduates in these positions. We give lip service to issues surrounding access to justice, but few schools educate their students to give serious thought to the issue, and only a small number require pro bono or public interest experience.¹²² Despite huge competitiveness to land full-time positions in funded legal assistance or nonprofit advocacy programs, most legal educators do not think of these as high status positions—even though some of our most talented students pursue work in this arena.

Moreover, despite the growth of externships, members of law school faculties tend to be quite separated from the work of the bench and the bar. Most schools do not seek out tenure-track faculty with significant practice experience.¹²³ Tenured faculty members with commitment to theoretical scholarship are accorded the greatest respect, and often the highest salaries,

117. For a withering summary of the failure of legal education to address these issues, see Rhode, *Whatever Happened to Access to Justice?*, *supra* note 88, at 889 (suggesting that the ABA Standards fail to encourage schools to address social justice issues as well as fail to require an effort at instilling pro bono commitments). For an equally withering commentary on legal education in general, see generally BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

118. Note that this may not be fully comprehensive, either as a description of current work or as a prescription for future work. If I have missed important examples of work that is being done, I apologize in advance. It is certainly true that the more that is written on this subject, the better, and I hope those who have been omitted will see it as an opportunity to add to the discussion.

119. See Rhode, *Whatever Happened to Access to Justice?*, *supra* note 88, at 905-07.

120. See *supra* notes 58-61 and accompanying text.

121. This may be because deans need to focus our time on the wealthiest alumni/ae, and (although there are exceptions) they are rarely working in these sectors.

122. Rhode, *Whatever Happened to Access to Justice?*, *supra* note 88, at 906-07; RHODE, *supra* note 2, at 156.

123. On more than one occasion, I was told by potential faculty members that they had been advised to “hide” practice experience on their CVs. At Northeastern, we consider practice experience to be a plus in almost all cases.

within our institutions. Sadly, the respect that we give to theoretical legal scholarship is not generally shared by members of the bar or the judiciary—all one needs to do is ask almost any judge about what he or she thinks of our scholarship, and you will hear a rant regarding its general irrelevancy. We are rarely viewed as potentially useful partners precisely because most research-oriented faculty lack both the interest and the expertise to delve into issues related to access to justice—or the delivery of legal services. Obviously, there are exceptions to this, particularly among clinical faculty.¹²⁴

These patterns reflect past and persistent culture and values. There is a substantial question whether these values and the attendant allocation of resources is justifiable given the needs of our students and our graduates, as well as the crisis in the distribution of legal resources more generally.

B. What Can Law Schools Do?

If we were to focus more on unmet need, and less on the collapse of the big firm job market, we might be able to imagine different solutions that will expand the level and quality of legal services and also provide opportunities to do meaningful work for our graduates. A failure to shift our focus means that existing culture will continue to inhibit our capacity to move legal education forward, that we will continue to bypass opportunities offered by the existing need for legal services, and that we will fail to act to further our students' real interests.

1. Overcoming Barriers: The Dean's Leadership Role

As deans, we need to work at shifting culture. This is, without a doubt, a leadership challenge of significant magnitude. We need to stop suggesting the "best" jobs are in the global law firms, remembering that the people who work in these positions are frequently unhappy and often leave to pursue less remunerative but more satisfying work elsewhere. We need to recognize that our most important faculty may not be those who write the most (or even the best) law review articles, despite the importance of this work in academic institutions. We need to pay more attention to the overall delivery of legal services, to how the graduates of each law school fit into the profession, and to how unmet need for legal services might be met. We need to advocate for access to justice, in all its guises. We need to know a good deal more about the economics and

124. There are also institutional exceptions to this generalization. Some schools, and their faculties, are deeply rooted in the clinical tradition, such as the City University of New York School of Law and the University of the District of Columbia David A. Clarke School of Law. Some are tied to the bar through their position as public supported state schools, particularly in states with no other law schools. This was true in West Virginia, where I practiced and then taught for almost 25 years. Northeastern has maintained its relationship to practice through both clinicians and the Co-op Program, which requires all students to have a year's worth of real work under their belts when they graduate. This enables (and forces) us—including faculty—to have continuing relationships with over 1000 employers in all sectors.

functioning of the solo and small firm market in order to be able to match the huge unmet needs to the supply of lawyers.

We also need to understand better how our graduates can manage their debt. There is a burgeoning debt crisis surrounding higher education in the U.S., and law schools are not alone. But there is certainly a mismatch between debt obligations and income for new lawyers. Our ability to assist our graduates to find fulfilling and adequately remunerative work may rest on our ability to help them contain and manage their debt.

We need to build bridges to practicing lawyers and to the bench, and not only to the lawyers who work in the highest paid or most influential positions. We should pursue opportunities to be an active partner in collaborative public service efforts. We should be using the bully pulpit to advocate for justice—and access to justice—and to assist lobbying efforts for increased legal services funding. We need to stop thinking that people who have practiced law should not teach law. And we should be working actively with both the ABA Access to Justice efforts and our local task forces and commissions to expand access to justice. We should encourage our faculty and students to expand pro bono and public service efforts. We should investigate carefully, through surveys and other devices, where our graduates are and how they got there,¹²⁵ while remembering both that legal practice is undergoing significant change and that our graduates have chosen many career paths, some of which do not involve the active practice of law.

One last thought on this: as long as we are seen as just another special-interest group, we will not make inroads on these issues. The fact that the *Boston Globe* reporter was surprised by the Massachusetts' deans' shared interest in access to justice bodes ill for our future. Despite deans' roles as active managers of small- to-medium-sized businesses in a competitive marketplace, we also need to be leaders in the quest for justice.

2. *Focusing on Our Students: Re-examining/Renewing/Revising Curriculum for Students*

In educating students, law schools need to think more about the following three issues. First, do our students understand the social justice challenges and the obligations of the profession to advance social justice? In this regard, access to justice should be part of the core curriculum of every law school. The Carnegie Report exhorts us to teach skills and values, as well as doctrine and analysis.¹²⁶ Much of our attention has been focused on the expansion of skills

125. At Northeastern, we have embarked on a major research effort, the Outcomes Assessment Project, which will evaluate our program through empirical research, reaching out to graduates and employers of our students and graduates. See *Outcomes Assessment Project*, NE. UNIV. SCH. OF LAW, <http://www.northeastern.edu/law/about/oap/index.html> (last visited Oct. 11, 2012). Harvard Law School is conducting extensive surveys of its graduates modeled on the After the J.D. Study. West Virginia conducted less extensive surveys of its graduates in conjunction with ABA accreditation visits.

126. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 8-11 (2007).

training, but the “third apprenticeship” that encompasses ethics and morality is also critical.¹²⁷ This means that the functioning of the legal system and individual access to justice should be incorporated as themes into courses on professional responsibility and elsewhere. Expansion of pro bono activities and requirements may not ultimately have a systemic effect on the challenge of unmet needs, but it will ensure that new lawyers understand the justice gaps and the need to address them.¹²⁸ As Deborah Rhode had often noted, if we are seriously committed to instilling values of social justice and public service, our own priorities must reflect this.

Second, we need to teach people how to be lawyers in the markets in which they are likely to find themselves¹²⁹—and where they may be key players in addressing issues of access to justice in the coming years. If most lawyers are in small practices, then law students who will practice need to learn about how these practices function. Community lawyers need the advanced analytic and problem-solving skills that characterize great lawyers, but they also need pragmatic training. Mentorship and careful apprenticeship is reportedly dying out in the large firms, and we do not know the extent to which small law offices nurture their less-experienced associates. It is a good sign that, increasingly, law schools are offering courses and seminars on law office management, the business of law, and how to start a practice. Members of the bar who have successfully built practices can, of course, be of assistance.

127. *Id.* at 9.

128. This is true even for the much-touted, new requirement in New York that every new lawyer have performed 50 hours of pro bono service in order to be admitted to the bar. See Daniel Wiessner & Joseph Ax, *NY Announces First-in-Nation Pro Bono Mandate for Lawyers*, THOMSON REUTERS NEWS & INSIGHT (Sept. 19, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/2012/09_-_September/NY_announces_first-in-nation_pro_bono_mandate_for_lawyers/. Law schools were not generally advocates of this rule, citing the potential costs of implementation. According to the coverage in the *New York Times*:

The rule requires law students to do pro bono work for the poor, nonprofit or civil rights groups or any of the three branches of government, between the first year of law school and the time they apply for a license. The work can be performed anywhere in the world but students must be under the supervision of a practicing lawyer, a judge or a member of a law school faculty.

Mosi Secret, *Judge Details a Rule Requiring Pro Bono Work by Aspiring Lawyers*, N.Y. TIMES, Sept. 20, 2012, at A25. Given the scope of allowable activity, the fact that existing activities will count toward completion of the requirement, and the lack of expertise of most law students in providing direct legal services, the rule is unlikely to have real impact on access to justice. It will, however, teach law students that service outside the paid sector is important to the profession.

129. HANOVER RESEARCH, *supra* note 63, at 3 (noting that there is a disparity between the skills and knowledge taught in law school and those necessary to successfully operate a solo practice, and that young lawyers who started out in solo practices wished that they had learned more during law school about how to start solo practices). In response to this kind of concern, Thomas Jefferson School of Law has launched a “solo practice track” for law students. Steve Semeraro, *Thomas Jefferson School of Law Commits to Solo Practice*, T. JEFFERSON SCH. OF LAW (May 21, 2012), <http://www.tjisl.edu/news-media/2012/6505>.

Although we are responding to the national reports on legal education that have focused on the teaching of skills,¹³⁰ we should not think about skills too narrowly. Are we teaching students enough in the areas of problem solving and how to manage uncertainty? How to build and manage organizations? How to negotiate, communicate, understand political and social environments, and evaluate policy and programs? How to effect change through political processes? How to use media and technology? Some of these skills are critical to the day-to-day practice of law. Many are equally critical to the ability of community leaders to effect positive social change—and for lawyers who are seeking to make inroads on inequality and injustice.

Third, we need to rethink the boundaries between the world of work and our world of education as we develop our models of “experiential” education.¹³¹ In doing so, we can expand both our students’ lawyering skills and their understanding of inequality. They need to see, first hand, how law is practiced, and what the barriers are to achieving social justice through the law. At Northeastern, where every student has to complete four full-time, 11-week placements, 90% of our graduates have personally worked in the public interest or public service sector. Their understanding of the justice challenges in America is vastly enriched by these personal experiences.

We should remember that law school clinical programs, in which students provide direct services to clients, only contribute minimally to the actual problem of unmet need. Many clinics provide careful and thoughtful legal representation to poor clients, teaching students how to do client-centered representation—but they are small and costly, and they provide services to a very limited number of people.

3. *Addressing the Costs of Legal Education*

Educational cost—and debt—are huge deterrents to pursuing a legal practice that serves moderate and low income people. Almost every law school in the country has raised tuition regularly in recent years, resulting in annual tuition that now averages \$39,184 at private law schools.¹³² Without adequate need-based scholarships, students are forced to borrow to finance their legal

130. See generally SULLIVAN ET AL., *supra* note 126; A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (“MacCrate Report”) (1992); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).

131. Experiential education—including clinics, externships, internships—has been developing rapidly. The Alliance for Experiential Education in Law, initiated in September, 2011, by Northeastern law school and dedicated to evaluating and expanding experiential education, now has almost 70 law school members. See *Academics*, NE. UNIV. SCH. OF LAW, <http://www.northeastern.edu/law/academics/institutes/alliance-exp-learning.html> (last visited Oct. 22, 2012).

132. In 2011, public law school non-resident tuition had risen to a median of \$35,765, and median private sector tuition had risen to \$39,496. Even in the current environment, median private sector tuition rose 5% from 2010 to 2011. A.B.A., LAW SCHOOL TUITION 1985-2011, *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_tuition.authcheckdam.pdf.

education; not surprisingly, average indebtedness is high, reaching \$125,000 for private law school graduates in 2011,¹³³ or perhaps even higher.¹³⁴ None of this is news. Clearly, tuition increases cannot continue at the same rate given the salaries of our graduates.

There are considerable barriers to reducing tuition. Many costs are fixed, including the budget rigidities caused by staffing with tenured professors. Current falling rates of applications to law schools, combined with the challenging graduate job market, mean that schools cannot increase class size in order to compensate for lower tuition levels. To the extent that the combined effects of the ABA's Standards and Rules of Procedure for Approval of Law Schools,¹³⁵ and the ranking variables used by *U.S. News and World Report*¹³⁶ push costs up, we need to be much more vocal and inventive in fighting back. This is, of course, easier said than done.¹³⁷

We can also provide loan repayment assistance for graduates. The College Cost Reduction and Access Act (CCRAA)¹³⁸ changed the rules on how and when

133. A.B.A., AVERAGE AMOUNT BORROWED FOR LAW SCHOOL 2001-2010, available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/avg_amnt_brwd.authcheckdam.pdf. It is also troubling that tuition discounting is almost exclusively applied to merit aid to entice the students with the highest grades and scores, rather than to need-based awards.

134. See Staci Zaretsky, *Law Schools Misreport Debt Figures to the ABA; To No One's Shock, the ABA Does Nothing*, ABOVE THE LAW (Aug. 9, 2012, 12:21 PM), <http://abovethelaw.com/2012/08/law-schools-misreport-debt-figures-to-the-aba-to-no-ones-shock-the-aba-does-nothing/>.

135. A.B.A., STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf.

136. Robert Morse & Sam Flanigan, *Methodology: Law School Rankings*, USNEWS.COM (Mar. 12, 2012), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2012/03/12/methodology-law-school-rankings>.

137. Aspects of the ABA Standards create rigidities in legal education that may not make sense if we analyze them from the standpoint of access to justice. The Standards are a matter of self-regulation, and we have only ourselves to blame if we fail to agitate for changes that reflect these concerns. The *U.S. News and World Report* is less within our control: given the extraordinary power of the ranking system for law school applicants (and University officials), and the fact that the variables are chosen by someone with little or no concern for the justice system, only a few schools can ignore the problem.

138. College Cost Reduction and Access Act, Pub. L. No. 110-84, 121 Stat. 784 (2007) (codified in scattered sections of the U.S. Code). There is not space here to provide a full summary of the law. For that, see generally Philip G. Schrag & Charles W. Pruet, *Coordinating Loan Repayment Assistance Programs with New Federal Legislation*, 60 J. LEGAL EDUC. 583 (2011); Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27 (2007).

Websites that give detailed information about the workings of the CCRAA and link to other useful sites include: *Educational Debt Relief*, EQUAL JUSTICE WORKS, <http://www.equaljusticeworks.org/resources/student-debt-relief> (last visited Oct. 8, 2012); *Federal Student Aid*, U.S. DEP'T OF EDUC., <http://studentaid.ed.gov/PORTALSWebApp/students/english/index.jsp> (last visited Oct. 8, 2012) (including sections on income-based repayment and public service loan forgiveness); *Public Service Loan Forgiveness*, FINAID.ORG, <http://www.finaid.org/loans/publicservice.phtml> (last visited Oct. 8, 2012); *Repayment Plans*, NAT'L CONSUMER LAW CTR., <http://www.studentloanborrowerassistance.org/repayment/repayment-plans/#income> (last visited Jan. 3, 2013).

graduates need to repay their loans, and thereby changed the calculus for law schools' loan repayment programs in two critical ways. First, all graduates can repay loans using a calculation based on income rather than debt.¹³⁹ Second, law students working in public service or nonprofit organizations are eligible for full debt forgiveness after 120 months of qualifying work.¹⁴⁰ The current political climate certainly carries the threat that these provisions could be repealed; nevertheless, for the time being, every law school graduate—and every law school dean—should be aware of the possibilities that the program creates for new law graduates.¹⁴¹

Law schools need to leverage the CCRAA to encourage graduates who want to pursue work that will expand access to justice, broadly defined. This means ensuring that graduates' loans are properly consolidated to take full advantage of the federal program; assisting graduates with repayment of loans

139. Income Based Repayment (IBR) and Income Contingent Repayment (ICR): All lawyers (in any practice, including private practice) who earn very low salaries can repay their loans under the IBR provision. See 20 U.S.C. § 1098(b)-(e) (2012); 34 C.F.R. § 682.215 (2013). The repayment amount is determined by income, and not by amount of loan. A graduate who borrowed \$200,000 and someone who borrowed \$50,000 would repay the same monthly amount. IBR payments are capped at 15% of earnings above 150% of federal poverty. Thus, for example, an attorney earning \$40,000 would repay \$3600/year; \$50,000, \$5040/year; \$60,000, \$6600/year. IBR calculators can be found at <http://www.finaid.org/calculators/ibr.phtml> or <http://www.equaljusticeworks.org/resources/student-debt-relief/income-based-repayment>. In addition, the Health Care and Education Reconciliation Act of 2010 established an improved version of the income-based repayment plan for new borrowers of Direct Loans called Income Contingent Repayment (ICR). See Pub. L. No. 111-152, 124 Stat. 1029 (2010). The new repayment plan is available to borrowers who have at least one federal student loan in 2012 or a later year and no loans prior to 2008; thus, it is for very new graduates only. The improved plan cuts the monthly loan payments by one third from 15% of discretionary income to 10% of discretionary income for qualifying graduates. The new ICR provisions, found at 34 C.F.R. § 685.208(k)(1) (2012), and § 685.209(a) (2012), were originally not effective until 2014, but the effective date was moved up to Dec. 21, 2012, at the discretion of borrowers. See 77 Fed. Reg. 72960 (Dec. 7, 2012).

140. The CCRAA guarantees that after ten years in public service (or in the nonprofit sector), the federal government will forgive the remaining debt obligation. The Public Service Loan Forgiveness Program is governed by 20 U.S.C. § 1087e(m) (2012) (Repayment Plan for Public Service Employees), and 34 C.F.R. § 685.219 (2010). The legislation defines public service jobs quite broadly, including lawyers and staff members in both government, public service (including at "a non-profit organization under section 501(c)(3) of the Internal Revenue Code") and "public interest law services (including prosecution or public defense or legal advocacy in low-income communities at a nonprofit organization)." Effective dates for the relevant provisions range from 2007 to 2009. See 20 U.S.C.A. § 1087e(m) (2012); 34 C.F.R. § 685.219 (2010). Note that the IRS has ruled that the debt forgiveness is not a taxable event. See I.R.S. Rev. Rul. 2008-34 (June 20, 2008). In addition, there is a 25-year loan forgiveness provision (which is moving to 20 years under the 2010 legislation) for lawyers in the private sector. Some fear, however, that this aspect of the legislation is particularly prone to political attack and is therefore less likely to survive.

141. Many deans have raised the concern to me that the effects of the IBR/ICR repayments programs are that they will result in negative amortization of debt, and that this may expose graduates to serious financial difficulties down the road. In analyses we undertook at Northeastern, we think the dangers are being somewhat overstated. Further, if we can expand the definition of qualifying public interest employment, then more of our new graduates will be relieved from the pressure of lifelong debt.

through loan repayment programs, to the extent feasible; and joining with others to fight for the preservation of the public service loan forgiveness component of the law.

Will lawyers working in community law offices, who are dedicated to improving access to justice for low and moderate-income people, qualify for ten-year loan forgiveness under the CCRAA? This may be a critical question as we put together pieces of a puzzle that address the imbalance between the cost of legal education and the income of on-the-ground community lawyers. The law provides that those who provide “public interest law services” and those who work in an organization that qualifies for nonprofit tax status under Section 501(c)(3) of the Internal Revenue Code¹⁴² will qualify. To what extent can community legal services be considered under these provisions? What if the offices serve communities using a variety of mechanisms, including direct client fees, to support the work? These questions may become critical. We should consider researching these questions and, in the longer run, take a position on them in litigation through amicus curiae briefs and other mechanisms, thus expanding the ability of our graduates to provide needed legal services.¹⁴³

4. *Developing Opportunities for Our Own Graduates*

The Law School Consortium Project was launched in 1997 by four law schools to extend the educational and professionalism missions of law schools beyond graduation and provide training, mentoring, and other support to solo and small-firm lawyers.¹⁴⁴ The project grew to include 16 law schools and then went into a “state of rest” in 2009, declaring that it had demonstrated that “law schools can enable [solo and small-firm practitioners] to have satisfying and economically viable careers while serving the needs of low and moderate-income individuals and communities,” thereby “providing students with employment

142. 26 U.S.C. § 501(c)(3) (2012).

143. An initial analysis suggests that private public-interest firms have access to a wide range of organizational forms that may qualify under these provisions. *See* 20 U.S.C. § 1078e(m)(3)(B)(i) (2012). The I.R.S. has historically been skeptical that legal service providers who charge attorneys’ fees can qualify for this form of tax-exempt status. *See* Rev. Rul. 75-75, 1975-2 C.B. 662 (1975) (“If a public interest law firm has an established policy of charging or accepting attorneys’ fees from its clients, the representation provided cannot be distinguished from that available through traditional private law firms.”). On the other hand, subsequent rulings suggest there is more wiggle room that would allow private community law offices to shape their fee structures and obtain tax exempt status. *See* Rev. Proc. 92-59, 1992-2 C.B. 411 (1992) (suggesting substantial limitations on the way in which fees can be charged). Moreover, as our understanding of unmet legal needs has grown and bar associations have endorsed Civil Gideon rights and other approaches to meeting these needs, it seems possible that the arguments in these cases before the I.R.S. may be amenable to more sophisticated and persuasive analyses.

144. 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 (2002). The four founding law schools were City University of New York School of Law, University of Maryland Law School, Northeastern University School of Law, and St. Mary’s University School of Law. St. Mary’s University School of Law withdrew as a member of the Law School Consortium Project in July 2000. *Id.* at 1245 n.1.

options that enable them to develop public interest practices that serve underrepresented individuals and communities and allowing students to engage in work about which they care deeply.”¹⁴⁵ This project spurred the development of the Starting Out Solo network in Boston, begun by recent Northeastern law graduates to create a network of support for new solo practitioners.¹⁴⁶

Numerous law schools are launching “incubators” to assist new graduates to become fully functioning lawyers in small and solo practices.¹⁴⁷ Most of these incubators would provide a limited number of graduates of the sponsoring law school with office space and equipment, some form of coaching and mentoring (from either retired or practicing attorneys), and a network. Funding comes from the law schools, from public funds, and from clients. Many of these networks exist in collaboration with efforts of local bar associations.¹⁴⁸ Graduates participate directly for a predetermined period of time ranging from six months to two years. The graduates are sometimes supported by the program¹⁴⁹ but often have to earn their own income through fees.

On a somewhat larger scale, the Sandra Day O’Connor College of Law at Arizona State University (ASU) plans to launch a “residency” program within a new nonprofit teaching law firm, modeled on the medical residency model. Several experienced attorneys would act in the role of senior partners; up to 20 graduates per year would pursue two- or three-year residencies in the firm, during which they would learn both lawyering skills and the business of running a practice.¹⁵⁰ The details of this project are far from clear at this point,¹⁵¹ proposals for law school-based law firms are not, however, new.¹⁵²

All of these models, though laudable, share several limiting characteristics. They are small in scope; even the most ambitious, ASU’s, would serve only 20

145. *The Law School Consortium Project*, U. MD. FRANCIS KING CAREY SCH. LAW (2012), <http://www.law.umaryland.edu/programs/clinic/initiatives/lscp> (last visited Oct. 9, 2012).

146. See *STARTING OUT SOLO*, *supra* note 69.

147. See HANOVER RESEARCH, *supra* note 63, at 19-30, 32-35 (describing incubators at City University of New York School of Law (“Incubator for Justice”); University of Missouri-Kansas City School of Law (Solo and Small Firm Incubator); Florida International University College of Law (“Law Bridge” program); University of Maryland Francis King Carey School of Law (partnership with Civil Justice Inc., a nonprofit organization associated with the law school); Thomas Jefferson School of Law; and Pace University Law School (the Pace Community Law Practice)). Others are in the works at University of Dayton School of Law, Georgia State University College of Law, The Charlotte School of Law, and others. *Id.* at 36.

148. *E.g.*, UMKC’s network was established with assistance from the Missouri Bar Association and the Kansas City Metropolitan Bar Association’s Solo Practitioners/Small Firms Committee. *Id.* at 24.

149. *Pace Law School Joins Others in Starting a Solo Practitioner Incubator Project*, LEGAL SKILLS PROF BLOG (Nov. 16, 2011), http://lawprofessors.typepad.com/legal_skills/2011/11/pace-law-school-joins-others-in-starting-a-solo-practitioner-incubator-project-.html (providing fellowships for their “legal residency” in the incubator).

150. HANOVER RESEARCH, *supra* note 63, at 35-36.

151. Telephone Interview with Douglas J. Sylvester, Dean and Foundation Professor of Law, Sandra Day O’Connor College of Law (July 5, 2012); Telephone Interview with Professor Adam Chodorow, Sandra Day O’Connor College of Law (July 12, 2012).

152. See, *e.g.*, Bradley T. Borden & Robert J. Rhee, *The Law School Firm*, 63 S.C. L. REV. 1, 2-3 (2011).

graduates per year from that school. They are all school-specific; they are designed, in part, to demonstrate each law school's commitment to its own graduates, particularly in a very bad job market. They are expensive to run, and the on-going funding for them is not secure.¹⁵³ They are after-the-fact solutions to the problem that core legal education fails to give students adequate skills and does not create robust graduate mentoring systems during law school.

As we go forward, it will be critical for us to evaluate the effectiveness of these models. Can they be scaled up? Is there any possibility of building more effective mentoring networks that will bring more students along through law school and directly into community practices? In order to contemplate any of this, we would have to focus on the dismantling of the barriers between study and work, law schools and practice. Are we willing and able to think about doing this?

5. *Expanding Support for Relevant Research*

While law faculty members have considerable autonomy in selection of research foci, law schools can provide incentives for faculty to pursue important questions. The ability to do this will depend, of course, on the culture and resources of a particular law school.

More research is needed to answer questions like these: What can we learn about the ways in which law is practiced, on the ground, outside the large law firms? We need to look at the economics of the profession, and lawyers' ability to support legal practices relying on sliding-fee scales or fee-shifting statutes. Why is it that Americans are less likely to seek legal assistance than people in other countries? What are the possible effects of legal and regulatory changes that would expand access, including rules governing the unauthorized practice of law, expansion of fee-shifting statutes, or requirements for civil representation in critical cases? What are the best mechanisms for optimal distribution of limited resources, from effective triage to use of non-lawyer professionals to unbundling of legal services? Can we further document the need for counsel, in order to address the issues within the Civil Gideon movement raised by the *Turner* case?¹⁵⁴ Can we better analyze the effects of financial cutbacks on the judiciary? And, as I noted above, we should be exploring tax issues that affect legal practice, including the application of the definitions of public service in the CCRAA to various modes of law practice that assist in meeting unmet and necessary demand for legal services.

153. The 1997 law school consortium final report noted that "none of the member school projects are currently financially sustainable without additional outside funding." Deborah Howard, *The Law School Consortium Project: Learning Assessment* (Dec. 11, 2000) (on file with author). None was obtained, although Maryland has continued the project to some extent through maintenance of the website. *The Law School Consortium Project*, *supra* note 145.

154. *See supra* notes 101-103 and accompanying text.

6. *Engaging More Broadly*

Thinking more broadly about the role of law schools in expanding access to justice, here are a number of additional questions that we might consider.

What would it take to use law clinics—including both full- and part-time faculty, as well as students—to assist in triaging cases for agencies (or legal services organizations) or to act as a backup center for lawyers in the community? If this were possible, should it be instead of, or in addition to, the current dominant clinical model of focusing on individual clients and their individual cases? Might we build partnerships with local bar associations to assist in creating stronger systems for various forms of mentoring, working with current and retiring practitioners to support networks of younger lawyers? Might we build direct relationships with community legal providers (both private and legal services), creating an active teaching-learning-doing network to advance access to legal services?¹⁵⁵ Or perhaps with social service agencies which often have the initial encounters with people in need of legal services? How might these kinds of efforts be funded? One of the problems with the incubator model is that it is too little, too late: it assists a very small number of graduates of an individual school. Can the model be expanded? How?

Might we create seminars or clinics that are focused specifically on the development of online resources, working as a partner to courts and bar associations, who will then disseminate the information? This is already being undertaken in some places.

Should we be investigating the questions of the development and regulation of “allied” fields? What would the role of law schools be in this development? Would educational programs be offered through law schools? What role should we be playing in reviewing the boundaries of what counts as legal practice?

In the public arena, how can we join forces with efforts that are focused on the expansion of access to justice? I believe that we should be present when Civil Gideon rights are being discussed. We should be present when the funding for legal services for the poor is being discussed. We should lend support to pro bono efforts. We should be fighting to maintain loan forgiveness for public service, and for a broad and deep definition of service that promotes access to justice.

Finally, we need to rethink community legal services. I keep coming back to this question: Why is the market failing? Is it possible to meet the need for legal services and the need for legal employment by addressing this market failure? How can we help build understanding of these issues, thereby furthering both the needs of our students and graduates, and the cause of justice?

155. One model for this is a physician-medical school model that was built in West Virginia. Rural primary care practitioners are given status as adjunct faculty at the medical school. They rotate into the medical school to teach students and also hone their own skills; they accept students into their practices to teach them about the basics of primary care rural practice. *Service to the State*, W. VA. UNIV. SCH. OF MED., <http://www.hsc.wvu.edu/som/Service-to-the-State.aspx> (last visited Oct. 9, 2012).

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Much has been written about the transformation of legal practice that suggests that globalization and technology will change legal practice for all lawyers. Certainly this is true, but not entirely. Much of what lawyers do involves difficult face-to-face work with individuals and families, complex problem solving, local processes, and local political challenges. People's problems with finances and banks, employment, consumer protection violations, injuries to personal health and welfare, housing, wage replacement programs and family disputes are not amenable to analysis or solution through use of technology. If lawyers cannot afford to represent people in these matters, then we need to examine the economics of our profession more closely and think creatively about the ways in which legal services can be made affordable. There is much opportunity here, and little to be lost if we pursue these questions with a genuine concern for the future of legal education, and with a passion for justice.