THE LLLT CONUNDRUM

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ABSTRACT

The United States faces a concerning lack of access to justice crisis. Most low and middle-income individuals are unable to afford adequate legal services. In response, several states have implemented Licensed Paralegal (LP) programs to allow non-lawyers to provide limited legal services. This article evaluates the viability and efficacy of LPs in addressing the justice gap by analyzing their regulatory frameworks, assessing the market viability, and reviewing practical limitations. LP programs face challenges such as restrictive practice limits, high licensing barriers, and competition from underemployed lawyers and unregulated paralegals. The analysis concludes that LP programs, as currently structured, are unlikely to significantly alleviate the crisis. Instead, this article advocates for alternative reforms that provide more promising solutions to the access to justice crisis. This may include integrating advanced technology, simplifying court processes, and adopting innovative business structures.

INTRODUCTION

America faces a significant and worsening access to justice crisis. The Legal Services Corporation (LSC) has released four different *Justice Gap* studies (2005, 2009, 2017, and 2022) that clearly establish the deterioration.[1] The 2005 Report notes that "[o]nly a very small percentage of the legal problems experienced by low-income people (one in five or less) are addressed with the assistance of . . . [a] lawyer."[2] By 2022, LSC reported that "[l]ow-income Americans did not receive any legal help or enough

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1. For links to all five reports, see LEGAL SERV. CORP., THE JUSTICE GAP REPORT (2022), https://justicegap.lsc.gov/resource/section-1-introduction/ [https://perma.cc/B3H6-C5TL].

2. LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 4 (Sep. 2005), https://lsc-live.app.box.com/s/zb2hn2xm0ewmsubckbtpo9jjegxruwfp [https://perma.cc/B4UX-UXXF].

legal help for 92% of the problems that substantially impacted their lives in the past year."[3] Legal Aid is meant to provide help to exactly this population, but decades of limited funding coupled with expanding demand means that "LSC-funded organizations are unable to provide any or enough legal help for 71% of the civil legal problems brought to them; this translates to an estimated 1.4 million problems over the course of a year."[4]

Nor is the issue limited to the poor. Middle-income Americans are increasingly priced out of the market for legal services. Rebecca Sandefur estimates that more than one hundred million Americans experience one or more civil justice issues at any given time.[5] Survey results from a mid-sized city suggest that 66% of Americans encounter at least one civil justice issue in an eighteen-month period, and those same Americans use a lawyer's help just 16% of the time.[6] Small businesses fare similarly, with one study finding that 60% of small business owners lack a lawyer's assistance with their significant legal issues.[7]

The problem is shown most clearly in the rise of the *pro se* litigant. At least one party appears unrepresented in a whopping 76% of state-court civil cases.[8] In courts that handle issues like debt collection, family law, or eviction—90% or more of the cases feature at least one *pro se* litigant.[9] The upshot is quite embarrassing for a country founded on "equal justice under law." In 2022, the *World Justice Project's Rule of Law Index* ranked the United States 36th in the world for civil justice, tucked between Barbados and Mauritius, hardly the company we expect to keep.[10]

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3. LEGAL SERV. CORP., *supra* note 1.

4. *See id*.

5. *See* Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, *in* MIDDLE INCOME ACCESS TO JUSTICE 222, 223 (Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds., 2012).

6. *See* REBECCA L. SANDEFUR, AM. BAR. FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 3, 6, 14 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf [https://perma.cc/966A-JYV4].

7. *See* LEGALSHIELD, THE LEGAL NEEDS OF SMALL BUSINESS: A RESEARCH STUDY CONDUCTED BY DECISION ANALYST COMMISSIONED BY LEGALSHEILD 4 (2013), https://avonintegrativehealth.com/storage/app/media/_Client/patient_education/1010711-legal-needs-of-small-businesses.pdf [https://perma.cc/V5CJ-FTBH].

8. Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J. F. 228, 230 (2022).

9. *Id.* at 230 n.9.

10. WORLD JUST. PROJECT, RULE OF LAW INDEX 10, 34 (2022), https://worldjusticeproject.org/sites/default/files/documents/WJPIndex2022.pdf

How bad has it gotten? After years of relatively monolithic lawyer regulation, we have seen a smattering of states willing to experiment to try to address access to justice issues. Utah created a regulatory sandbox.[11] Arizona allowed non-lawyer ownership of law firms, among other reforms.[12] And, most pertinently here, a number of states have adopted—or are considering adopting—a second licensing category for professionals offering legal services. The first version of this new licensing category was created in Washington State in 2012 with the snappy title of Limited License Legal Professionals (LLLP).[13] Among the various reforms, the LLLT concept has proven perhaps the most influential. There are now versions of the LLLT program up and running in Arizona, Minnesota, Oregon, New Hampshire, and Utah.[14] Similar programs are under consideration in Colorado, Connecticut, Illinois, New Mexico, Nevada, North Carolina, and South Carolina.[15] The concept has been popular, but the title LLLT has not. For simplicity's sake this article will refer to this new category as "Licensed Paralegal(s)" (LP).

The appeal of LP programs is obvious: if the issue is that most Americans cannot afford legal services, why not allow alternative providers in the space? This solution of course parallels the medical field. Anyone familiar with medical licensure in the United States knows that there are multiple categories of medical practitioners beyond medical doctors including nurse practitioners, chiropractors, acupuncturists, massage

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[https://perma.cc/A3GU-CEPV].

11. *See* Rebecca L. Sandefur et al., *Seconds to Impact?: Regulatory Reform, New Kinds of Legal Services, and Increased Access to Justice*, 84 L. & CONTEMP. PROBS. 69, 74 (2021).

12. *See* Benjamin P. Cooper, *Preliminary Thoughts on Access to Justice in the Age of COVID-19*, 56 GONZ. L. REV. 227, 242 (2021).

13. *See* Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75, 112, 116 (2013).

14. Tara Hughes, *How States Are Using Limited Licensed Legal Paraprofessionals to Address the Access to Justice Gap*, A.B.A. (Sept. 2, 2022), https://www.americanbar.org/groups/paralegals/blog/how-states-are-using-non-lawyers-to-address-the-access-to-justice-gap/ [https://perma.cc/FL9Q-K2C3]. For New Hampshire specifically, see Tom Jarvis, *Newly Enacted Paraprofessional Pilot Program Helps Promote Access to Justice*, N.H. BAR ASS'N (2022), https://www.nhbar.org/newly-enacted-paraprofessional-pilot-program-helps-promote-access-to-justice/ [https://perma.cc/696L-62DQ].

15. *See* OR. STATE BAR, PARAPROFESSIONAL LICENSING IMPLEMENTATION COMM., FINAL REPORT OF THE PARAPROFESSIONAL LICENSING IMPLEMENTATION COMMITTEE 3 (Mar. 18, 2022), https://paraprofessional.osbar.org/files/Revised-PLIC-Report-031822.pdf [https://perma.cc/6B8F-UUAZ].

therapists, and many, many more.[16] Traditionally, there have been no similar subcategories in law. While there are paralegals, notaries, and other subspecialties within the legal field, none of these professions are allowed to "practice law" under most state's protections against the unauthorized practice of law (UPL).[17] Thus, one simple answer to the access to justice crisis is to create other licensure categories beyond lawyers who can legally offer some limited set of legal services to the public regardless of the UPL.

This article assesses the viability of this new model and argues that individualized legal services by a new group of providers, especially a group of providers that face onerous licensing requirements and stringent limits on the work they can do, is unlikely to make a significant dent in the access to justice crisis. Technology-driven solutions and/or court navigator programs are both far more likely to help. Part I describes UPL in America. Part II covers the original LLLT program and the different versions of LPs that have spread to other states. Part III looks at the existing market for legal services these new practitioners will be joining—solo practitioners or main street/people lawyers—and argues that the struggles of solo practitioners are a clear warning for any new entrants. Part IV then describes why LPs will likely fare even worse in this space. Part V concludes by arguing that other solutions like technology or court navigators are more promising.

I. THE UNAUTHORIZED PRACTICE OF LAW (UPL)

UPL is illegal in all fifty states.[18] The definition of the "practice of law" and levels of enforcement vary,[19] but, at a minimum, the practice of law includes appearing in court on behalf of another party.[20] Likewise, non-lawyers typically cannot offer "legal advice."[21] Generally, "forms books"

16. *See, e.g.*, Michael H. Cohen & Harry Nelson, *Licensure of Complementary and Alternative Practitioners*, 13 A.M.A. J. ETHICS 374, 374–77 (June 2011), https://journalofethics.ama-assn.org/article/licensure-complementary-and-alternative-practitioners/2011-06 [https://perma.cc/U7M9-3NW7] (explaining there are different types of medical licensure).

17. *See* Bruce A. Green, *Should State Trial Courts Become Laboratories of UPL Reform?*, 92 FORDHAM L. REV. 1285, 1288–90 (2024).

18. *See* Tanina Rostain, *The Emergence of "Law Consultants,"* 75 FORDHAM L. REV. 1397, 1407 n.53 (2006).

19. *See* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 4–5 (1981).

20. *See* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2581–94 (1999).

21. *See generally* A.B.A. TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW,

that include various model legal documents have been allowed, but providing advice along with forms has been barred.[22]

A Nevada case from 1990 offers a helpful example. The State Bar of Nevada sued two companies, named Ace Paralegal & Secretarial Services and Divorce Made Easy, for UPL.[23] The district court distinguished between "scrivener services," which were permissible, and any services that caused the customer to rely on their written or oral technical expertise.[24] So providing simple and self-explanatory legal forms was allowed, but offering advice in filling them in was not.[25]

These UPL restrictions are generally justified as protections for an unsuspecting public, although "support for that claim is notable for its absence."[26] Outside of the area of immigration advice and *notarios*, it is rare for customers to assert injury from UPL.[27] Instead, the complaints that lead to these prosecutions (like the one described above in Nevada) tend to come from bar associations. Note that America is unique in allowing only licensed lawyers to offer legal advice.[28]

II. THE LP REVOLUTION

The idea of allowing some kind of non-lawyer legal paraprofessional to offer some range of legal services is not a new one. For example, in 1990, a

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APP. A: STATE DEFINITIONS OF THE PRACTICE OF LAW (2003) (collection of each states laws demonstrating consistency between states in restricting legal advice to lawyers).

22. *See, e.g.*, Florida Bar v. Stupica, 300 So. 2d 683, 686 (Fla. 1974) (providing divorce forms with advice is UPL); State *ex rel.* Ind. State Bar Ass'n v. Diaz, 838 N.E.2d 433 (Ind. 2005) (same for immigration forms and advice).

23. *See* Kathleen Eleanor Justice, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 196–97 (1991).

24. *Id.* at 197.

25. *See id.*

26. Benjamin H. Barton & Deborah Rhode, *The United States of America: Legal Services Regulation in the United States—A Tale of Two Models*, *in* INTERNATIONAL PERSPECTIVES ON THE REGULATION OF LAWYERS AND LEGAL SERVICES 27, 37 (Andrew Boon ed., 2017). *But see* Nicholas J. Wallwork, *UPL Harms Public, Lawyers and Consumer Confidence*, ARIZ. ATT'Y (Feb. 2002), (arguing UPL harms consumers and should be restricted).

27. Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public: Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2595, 2603–2606 (2014). In Latin America a *notario* is a legal professional that is allowed to offer more legal services than an American notary public. Att'y. Regul. Couns., *Notary or "Notario"—What's the Difference?*, COL. SUP. CT., https://www.coloradosupremecourt.com/PDF/UPL/Notary%20or%20notario%20whats%20the%20difference_English.pdf [https://perma.cc/CZ3T-R35N].

28. Barton & Rhode, *supra* note 26, at 37.

California Bar Commission on Legal Technicians drafted a report suggesting changes to UPL to allow a new type of licensed paralegal to practice law.[29] The current version of the LP revolution began in Washington State and has now spread to other states.

A. Washington State LLLT Program

In 2012, after a lengthy and contentious process, the Supreme Court of Washington created the Limited License Legal Technician (LLLT) program in an effort to expand access to justice.[30] The program was at first limited to family law and the LLLTs were required to complete a newly designed licensing program.[31] The initial reactions to the program were quite hopeful, with commentators trumpeting its potential to address access to justice issues and even announcing "cracks" in the "monopoly armor" of American lawyers.[32]

The reality was substantially less rosy. In 2020, just eight years after the program began (and five years after the first licensed LLLT came online), the Supreme Court of Washington voted to "sunset" the program due to "the overall costs of sustaining the program and the small number of interested individuals."[33] What went wrong? Part of the issue was turnover on the bench.[34] Two of the strongest proponents of the program, including then Chief Justice Fairhurst, retired and were replaced by new justices who voted against continuing the program.[35]

Part of the issue was the draconian requirements for becoming an

29. *See* Kathleen Eleanor Justice, Note, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 181 (1991).

30. *See* Holland, *supra* note 13, at 115–16.

31. *See* Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE U. L. REV. 1, 8–9 (2018).

32. *See, e.g.*, Laurel A. Rigertas, *Collaborations Between Lawyers and New Legal Professionals: A Path to Increase Access to Justice and Protect Clients*, 24 KAN. J.L. & PUB. POL'Y 539, 542 (2015).

33. *See* Letter from Debra L. Stephens, C.J. of the Wash. Sup. Ct., to Stephen R. Crossland, Chair Ltd. License Legal Tech. Bd., Terra Nevitt, Interim Exec. Dir. of Wash. State Bar Ass'n, Rejeev Majumdar, President of Wash. State Bar Ass'n (June 5, 2020), https://www.lawsitesblog.com/wp-content/uploads/2020/06/Crossland-Majumdar-Nevitt.6-5-20FINAL.pdf [https://perma.cc/6EVP-BFD5] [hereinafter Wash. Sup. Ct. Letter].

34. *See* JASON SOLOMON & NOELLE SMITH, STAN. CTR. ON THE LEGAL PRO., THE SURPRISING SUCCESS OF WASHINGTON STATE'S LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 6 (2021), https://law.stanford.edu/wp-content/uploads/2021/04/LLLT-White-Paper-Final-5-4-21.pdf [https://perma.cc/8DE2-K56T].

35. *Id.*

LLLT. Applicants were required to earn the equivalent of an associate's degree (90-credit hours), with at least one year of full-time study required at a law school, 300 hours of experiential work (for applicants without prior legal employment), pass *three* different licensing exams, *and* purchase mandatory legal malpractice insurance.[36] These requirements were in some ways *more stringent* than the lawyer equivalents. Lawyers in Washington state need not carry malpractice insurance, face one fewer mandatory exam, and have much lower experiential requirements.[37]

Part of the issue was how capital "L" limited the LLLTs were in practice. Once licensed, the LLLTs were limited to offering advice and were not allowed to sign and file legal papers or appear in court (although this restriction was eventually eased).[38] They were also only allowed to practice in family law. Why such strict limits? One clue is that the Washington Supreme Court asked the State Bar of Washington, which had opposed the program at every turn, to build, run, and fund the program.[39] When all was said and done, the program failed to make a significant dent in Washington's access to justice issues. In 2022, there were just sixteen active LLLTs in Washington.[40]

Nevertheless and despite all of these barriers and the program's untimely death, a Stanford Center on the Legal Profession *postmortem* on the program ironically concluded that the program was a "surprising success" and that clients described "overwhelmingly positive experiences with LLLTs."[41] Upon closer examination though, the Stanford report was right on several fronts. The clients of the LLLTs were quite pleased with the representation and the work itself seemed of relatively good quality.[42] Given that the biggest argument against allowing non-lawyers to provide legal services is consumer protection, these findings should embolden other states.

36. *Id.* at 8.
37. *Id.* at 7–8.
38. *See* Lacy Ashworth, Comment, *Nonlawyers in the Legal Profession: Lessons from the Sunsetting of Washington's LLLT Program*, 74 ARK. L. REV. 689, 703–04 (2022).
39. *Id.* at 700.
40. Hughes, *supra* note 14.
41. Solomon & Smith, *supra* note 34, at 1, 9.
42. *Id.* at 9–14.

B. Regardless of Washington's Retreat, Other States Adopt the Model

The Washington LLLT program was a success in a second way. It spawned other LP programs all over the country, with more possibly on the way. There are now versions of LP programs in Arizona, Minnesota, New Hampshire, Oregon, and Utah.[43] Similar programs are under consideration in Colorado, Connecticut, Illinois, New Mexico, Nevada, North Carolina, and South Carolina.[44]

The existing programs are different from the original Washington LLLT program in several ways. For example, the Utah program allows Licensed Paralegal Practitioners to practice in family law, eviction, and debt collection cases; it also allows a much broader range of activities (including appearing in court) than the original LLLT program.[45] The Arizona program is even broader—covering family, civil, criminal, administrative, and juvenile law and similarly allowing legal advice, drafting documents, and appearing in court.[46]

Some of the programs present difficulties similar to the original LLLT program. For example, the admissions requirements for the licensed paralegal program in Oregon include 1,500 hours of lawyer supervised work as a paralegal, at least an associate's degree (or an educational waiver), twenty hours of designated professional coursework, and a "three-pronged assessment" that includes two licensing exams and a portfolio of legal work completed as a paralegal.[47] Utah likewise requires at least an associate's degree or qualifying paralegal certificate, 1,500 of law-related work experience, and two different licensing exams.[48] The Arizona program is not as stringent, but still requires relatively extensive specialized education,

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43. Hughes, *supra* note 14. For New Hampshire, see Tom Jarvis, *Newly Enacted Paraprofessional Pilot Program Helps Promote Access to Justice*, N.H. BAR ASS'N (2022), https://www.nhbar.org/newly-enacted-paraprofessional-pilot-program-helps-promote-access-to-justice/ [https://perma.cc/6JEZ-XFP2].

44. *See* OR. STATE BAR, *supra* note 15, at 2.

45. *See* UTAH SUP. CT. R. 14-802.

46. *See* ARIZ. CODE OF JUD. ADMIN. § 7-210.

47. Linda Odermott, *The Role of the Committee of Paralegal Assessors for Oregon Licensed Paralegals*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Jan. 4, 2024), https://iaals.du.edu/blog/role-committee-paralegal-assessors-oregon-licensed-paralegals [https://perma.cc/9F6T-7C7E].

48. *See Licensed Paralegal Practitioner*, UTAH STATE CTS., https://www.utcourts.gov/en/about/miscellaneous/legal-community/lpp.html [https://perma.cc/R973-Y7ZV].

a character and fitness program similar to lawyers, and two exams (one general and one subject specific).[49] Some of the programs are even more limited than the original LLLT program. For example, the Minnesota and New Hampshire programs require their LPs to practice under the supervision of a lawyer.[50] New Hampshire likewise limits LPs to representing clients with "household income no greater than 300 percent of the federal poverty guidelines at the commencement of representation."[51]

III. CAN LPS REVOLUTIONIZE THE PEOPLE LAW MARKET?

To understand the potential market for these new LP services, it helps to consider the financial realities of small firms or solo practitioners, because these are the most analogous lawyers offering services to the poor and middle class. It also bears reminding that, in most cases, the LP category is expected to work for profit and earn a living providing services in areas where private lawyers either don't, or rarely, offer services.

There are, of course, LP-like programs in other states that work for legal aid, are non-profit, and are much more expressly aimed at serving the poor. For example, Alaska faces unique access to justice problems. In response, the Alaska Legal Services Corporation (ALSC) proposed a new Alaska Court Rule (43.5) to allow non-lawyer "Community Justice Worker[s]" (CJWs) to practice certain kinds of law throughout the state under the supervision of ALSC.[52] The rule went into effect in 2022 and allows CJWs to offer legal help to needy Alaskans if they complete training, apply to the Alaska Board of Governors, and practice under ALSC supervision.[53] The program is new, but has been quite successful so far.[54] Arizona, Delaware, South Carolina, and Utah have similar programs, and other states are

49. *See* ARIZ. CODE OF JUD. ADMIN. § 7-210.

50. Hughes, *supra* note 14; *see, e.g.*, Tom Jarvis, *Newly Enacted Paraprofessional Pilot Program Helps Promote Access to Justice*, N.H. BAR ASS'N (2022), https://www.nhbar.org/newly-enacted-paraprofessional-pilot-program-helps-promote-access-to-justice/ [https://perma.cc/6JEZ-XFP2].

51. N.H. SUP. CT. R. 35.

52. *See generally Introduction to Proposed Alaska Bar Rule 43.5*, ALASKA BAR ASS'N (2022), https://www.alsc-law.org/wp-content/uploads/2022/12/Alaska-Bar-Rule-43.5.pdf [https://perma.cc/2Z6Y-364B].

53. *Id.*; ALASKA BAR R. 43.5 (2022).

54. *See* ALSC Community Justice Worker Resource Center, *Community Justice Workers: Expanding Legal Help for Alaskans*, 47 SENIOR VOICE 1, 2, 12 (July, 2024), https://www.seniorvoicealaska.com/story/2024/07/01/news/community-justice-workers-expanding-legal-help-for-alaskans/3639.html [https://perma.cc/EKR7-JP53].

considering the model as well.[55] These CJWs do not compete with existing lawyers, because legal aid generally only offers services to clients who could not otherwise afford a lawyer.

The LP programs discussed thus far, by contrast, will try to make a living in the "people law" area, along with the existing lawyers working therein.[56] So how are these lawyers doing? Is there evidence that new entrants will help, hurt, or struggle?

It turns out that the available evidence suggests that the "people law" sector is already extremely competitive and challenging. Clio, a leading legal practice management software program, provides some economic context.[57] Clio's software helps lawyers—mostly small firms and solo practitioners—to track their time, send out bills, and collect fees.[58] Given its focus, Clio is in a good position to report on the state of the market for these practitioners.

In 2017, Clio released its second *Legal Trends Report*.[59] The report aggregated anonymous data from approximately 60,000 users to analyze the consumer/small business market for legal services.[60] Before we discuss the data, please note that Clio's information is not from a random sample of American lawyers—it is drawn solely from paying customers of Clio.[61] Nevertheless, 60,000 users is an adequate sized sample of solo and small firm practitioners. In 2017, there were 1,335,963 licensed lawyers in the United States.[62] Given that roughly half of all American lawyers work in small firm or solo practice settings, 60,000 users may be as many as 10% of

55. *See* Carly Balser & Stacy Rupprecht Jane, *The Diverse Landscape of Community-Based Justice Workers*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (Feb. 22, 2024), https://iaals.du.edu/blog/diverse-landscape-community-based-justice-workers [https://perma.cc/D8ZK-VH5C].

56. "People law" means what it sounds like—lawyers who primarily serve individuals rather than large businesses. I sometimes refer to this area as "main street" law to make the same point.

57. *See generally About Us*, CLIO, https://www.clio.com/about/ [https://perma.cc/VB4Z-VZCW].

58. *Id.*; *See Clio Manage*, CLIO 1, https://www.clio.com/manage/ [https://perma.cc/27ZL-A4DK].

59. *See generally* CLIO, LEGAL TRENDS REPORT (2017), https://www.clio.com/wp-content/uploads/2023/02/2017-Legal-Trends-Report.pdf [https://perma.cc/56MD-MP8G] [hereinafter Clio 2017 Legal Trends Report].

60. *Id.* at 8.

61. *Id.*

62. A.B.A., NATIONAL LAWYER POPULATION SURVEY 1 (2022), https://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2022.pdf [https://perma.cc/V3Y4-BYP2].

this population.[63]

The report had some good news and bad news for people law. On the one hand, the information on hourly rates was generally quite positive. The average billable hourly rate for a lawyer using Clio was $260 per hour.[64] Average hourly rates were the highest in Nevada and the lowest in West Virginia, and urban lawyers charged significantly more per hour than rural lawyers.[65] Immigration lawyers charged the most on average ($340 per hour) and juvenile law the lowest rate ($85 per hour).[66]

Based on these numbers it sounds like main street lawyers must be doing pretty well, $260 per hour is nothing to sneeze at. Even at a relatively leisurely thirty billed hours a week for forty-eight weeks a year, these lawyers should be grossing $374,400. Even if overhead takes half that amount, these lawyers should be sitting comfortably in the upper middle class. Note that it is highly unlikely that main street lawyers work at such a leisurely pace—this is a highly competitive marketplace; and anecdotal estimates suggest solo practitioners work long hours just like other lawyers in private practice.[67]

The Clio Report makes clear, however, that while main street lawyers are working harder than ever, they are typically not billing thirty hours a week. Not even close. The Clio Report does a terrific job of describing and quantifying the Key Performance Indicators (KPIs) of a main street law practice.[68] On the revenue side there are three such measures. The first is the "utilization rate," which is the number of theoretically billable hours the lawyers worked for clients and then logged into Clio.[69] The second is the "realization rate," which is the amount of that billed time the lawyers actually sent out to clients.[70] There is naturally some slippage between the raw hours and the billed hours in every legal practice, because a lawyer may

63. *See* Joseph D. Lawson, *What About the Majority? Considering the Legal Research Practices of Solo and Small Firm Attorneys*, 106 LAW LIB. J. 377, 381 (2014).

64. Clio 2017 Legal Trends Report, *supra* note 59, at 29.

65. *Id.* at 30–31.

66. *Id.* at 34.

67. *See* Randall Ryder, *Nine Myths About Solo Attorneys*, LAWYERIST (Dec. 11, 2019), https://lawyerist.com/news/myth-solo-attorney/ [https://perma.cc/PU92-NZPJ].

68. Clio 2017 Legal Trends Report, *supra* note 59, at 9–18.

69. CLIO, LEGAL TRENDS REPORT 25 (2016), https://www.clio.com/wp-content/uploads/2023/02/2016-Legal-Trends-Report.pdf [https://perma.cc/T9V9-2AXT] [hereinafter Clio 2016 Legal Trends Report].

70. *Id.* at 29.

have quoted a lower total cost to the client or a lawyer may want to make their total bill look reasonable by discounting.

The third, and most important, measure is the "collection rate," which is the amount of the bill that is actually paid.[71] The reason why this is the critical KPI should be obvious. The billing and realization rates are essentially theoretical sums. The money coming in the door is the amount that actually matters, because that makes up the gross earnings. Again, some slippage between the billed amount and the collection rate is natural in every private practice. Clients may push back on the total amount billed or on a particular group of hours, or simply refuse to pay or cannot pay due to bankruptcy or other misfortune. The slippage between utilization, realization, and collection is simply a cost of doing business.

What is startling about the Clio findings is just how little time these lawyers spend on billable matters and how slight their collection rate is:

> **Utilization rate:** Lawyers logged 2.3 hours of billable time per day.
>
> **Realization rate:** Lawyers billed 1.9 hours per day.
>
> **Collection rate:** Lawyers collected payment on 1.6 hours per day.[72]

This helps explain why solo practitioner and small firm lawyers have had such a hard time making a decent living. Bill Henderson aptly summarizes how dire these numbers are:

> This translates into $422/day per lawyer ($260 x 2.6 x 82% x 86%), or $105,000 in gross receipts over a 50-week year. This is a sum that needs to cover office overhead, healthcare, retirement, malpractice insurance, marketing, and taxes, etc. And note, these are *averages*, not the bottom decile or quartile. Further, these are lawyers at firms that have invested in practice management software.[73]

In sum, main street lawyers are spending too little of their time working billable and collectible matters for clients. This is not because they are lazy.

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71. *Id.* at 32.
72. Clio 2017 Legal Trends Report, *supra* note 59, at 11.
73. Bill Henderson, *The Decline of the PeopleLaw Sector*, LEGAL EVOLUTION (Nov. 19, 2017), https://www.legalevolution.org/2017/11/decline-peoplelaw-sector-037/ [https://perma.cc/U37Q-QHF7].

To the contrary, these lawyers are working harder than ever in a brutally competitive marketplace.

The 2017 Clio Report included a survey of these lawyers to determine what, exactly, lawyers are doing with the rest of their time.[74] They spend a third of their time on business development or, in other words, finding clients.[75] They spend about half of their time on administrative matters: keeping their licenses current, managing their offices, generating and collecting bills, and related tasks.[76] That leaves roughly twenty percent of their time for substantive legal work. These findings should be an urgent concern for the legal profession and those who regulate it. A very large cohort of lawyers is struggling to find enough billable work to make ends meet.

All the data described above is from 2017, and Clio has kept publishing these reports annually. The 2024 Clio Report does little to suggest that the situation has improved. In the nine years Clio has been publishing these reports, solo practitioner hourly rates have lagged behind inflation, and the other KPI have remained low or even fallen.[77]

There's a related question here: why do these lawyers not lower their hourly rates or move to a fixed price system? Traditional economic theory suggests that when there is pent up demand in the market, such as the access to justice crisis suggests, and there is more capacity to supply the needed good—prices would fall, and production would rise until the supply meets the demand profitably.[78] Why are solo practitioners not charging less per hour and billing more?

Here, the answer is the nature of the work. Main street lawyers, like most lawyers in private practice, provide individualized legal work and bill by the hour rather than charging a flat fee.[79] Why? Because individualized legal work is very complicated and variable. For example, lawyers have

74. *See* Clio 2017 Legal Trends Report, *supra* note 59, at 12–14.

75. *Id.* at 13.

76. *Id.*

77. *See* CLIO, LEGAL TRENDS FOR SOLO AND SMALL LAW FIRMS 11–19 (2024), https://www.clio.com/wp-content/uploads/2024/04/Legal-Trends-for-Solo-and-Small-Law-Firms-2024.pdf [https://perma.cc/VG24-Q6PD].

78. *See generally* LIBBY RITTENBERG & TIM TREGARTHEN, *Chapter 3 Demand and Supply*, *in* PRINCIPLES OF MICROECONOMICS 119–120 (2011) (describing the predicted interaction between supply and demand in market economies).

79. The Clio data itself confirms that the billable hour is by far the dominant billing method in the people law sector. *See* Clio 2017 Legal Trends Report, *supra* note 59, at 27.

long charged agreed divorces by the task rather than by the hour, and there is a race to the bottom in terms of the price for that work.[80] That is because in an agreed divorce, the time involved is relatively fixed (drafting, signing, filing, and a short court appearance), so the downside risk of extra hours is low.[81] A contested divorce, however, is a completely different animal—the amount of legal fees involved depends on what exactly the fight is over, how much the litigants have to spend on their lawyers, etc.[82] Because each case is different and the lawyers work each case individually, there is no way to set a lower, fixed price without a great risk to the lawyer involved.

This explains why per task billing has not taken off. But why not just lower the hourly rate? Here, we have to consider the earnings of the lawyers at the lower end of the market (the lawyers most likely to discount their hourly rates). Two datapoints are worth considering here. First, solo practitioners earn less than other lawyers in private practice, especially lawyers that work in BigLaw.[83] The estimates for solo practitioner earnings vary wildly, with payscale.com coming in at an average of $90,603, salary.com estimating $42,223, and ZipRecruiter estimating $126,034.[84] IRS data from 2016 suggests the average earnings that year were somewhere between $50,000 and $65,000.[85] The lower estimates are well supported by the Clio data and even the higher estimates show a very unprofitable bottom quartile of practitioners. The *After the JD 3* survey

80. *See* BENJAMIN H. BARTON & STEPHANOS BIBAS, *Chapter 4 Access to Justice in Civil Courts*, *in* REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 46–49 (2017); Alvin L. Zimmerman & Gary J. Zimmerman, *Succeeding in Texas Family Law Litigation: What Attorneys Need to Know*, *in* STRATEGIES FOR FAMILY LAW IN TEXAS: LEADING LAWYERS ON HANDLING NEGOTIATIONS, MANAGING CLIENT EXPECTATIONS, AND NAVIGATING RECENT TRENDS 8 (Aspatore eds., 2012), Westlaw 2012 WL 4433302.

81. Zimmerman & Zimmerman, *supra* note 80, at 8.

82. *Id.*

83. *See* BENJAMIN H. BARTON, *Chapter 2 The New Problem the Job Market for Law Grads, 1990s to the Present*, *in* FIXING LAW SCHOOLS: FROM COLLEGE TO THE TRUMP BUMP AND BEYOND 45–50 (2019).

84. *See Average Attorney, Solo Practitioner Salary*, PAYSCALE (2024), https://www.payscale.com/research/US/Job=Attorney%2C_Solo_Practitioner/Salary [https://perma.cc/F39G-YAXZ]; *Solo Practitioner Salary in the United States*, SALARY.COM, https://www.salary.com/research/salary/hiring/solo-practitioner-salary [https://perma.cc/54ND-MJ8N]; *Solo Practitioner Attorney Salary*, ZIPRECRUITER (Sept. 2024), https://www.ziprecruiter.com/Salaries/Solo-Practitioner-Attorney-Salary [https://perma.cc/9G9T-GF2A].

85. *See* BARTON, *supra* note 80, at 45–50.

studied American lawyers twelve years after they joined the profession.[86] Solo practitioners in the bottom quartile earned $0 in the study, meaning that they actually lost money practicing law.[87] Basically, the lawyers who are struggling the hardest can hardly afford to risk earning less. They are likelier to leave the market altogether than to lower the hourly rate too precipitously.

This unprofitability is also reflected in the number of Americans who hold a Juris Doctor (JD) degree but no longer practice law.[88] The number of JD-holders who do not practice law is much higher than the number of MD-holders who are not doctors, likely reflecting that a number of JD-holders have left the practice of law, possibly due to lower earnings than expected in the main street law sector.[89]

IV. THE VIABILITY OF LPS AS AN ACCESS TO JUSTICE SOLUTION

This section will talk generally about the likelihood that LPs will make a significant dent in the access to justice crisis. Of course, the devil is in the details. Some programs (notably the Arizona version) are more promising than others (Washington and Minnesota). Why? Because as previously discussed, the Arizona version has slightly lower barriers to entry coupled with a broader set of possible practice areas. Washington was doomed to fail because its LP program was severely limited in terms of services and very hard to join. The Minnesota program (like New Hampshire) is limited because it requires lawyer supervision, which will naturally slow uptake.

But, to cut to the chase, as currently defined and in the current market—LPs are not likely to help much. The first reason is their limitations, the second reason is the relatively tough entry regulations, the third reason is the market itself, and the last reason is the strong likelihood that LPs will operate in a bespoke manner just like main street lawyers.

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86. *See* AM. BAR FOUND. & NALP FOUND. FOR LAW CAREER RSCH. AND EDUC., AFTER THE JD III: THIRD RESULTS FROM A *NATIONAL STUDY* OF LEGAL CAREERS 14 (2015), https://www.americanbarfoundation.org/wp-content/uploads/2022/12/after-the-jd-phase-3.pdf [https://perma.cc/TRA5-EFTQ].

87. *Id.* at 44–46.

88. *See* BARTON, *supra* note 80, at 37–42.

89. Ben Barton, *A Comparison Between the American Markets for Medical and Legal Services*, 67 HASTINGS L.J. 1331, 1340 (2016).

A. The LLLT Practice Limitations – Structured to Fail

One reason to fear for the effectiveness of LPs is the restrictions placed upon them by lawyer regulators. In this section, various restrictions on LPs are surveyed.

i. Limitations on Appearing in Court, Filing Paperwork, & Contacting Opposing Counsel

The original Washington State LLLT program was limited to offering legal advice and helping in drafting legal papers in the family law area. LLLTs were not allowed to sign or file papers on behalf of clients nor were they allowed to appear in court or negotiate with opposing counsel on behalf of their clients.[90] This meant that the LLLTs were basically offering only limited help in the drafting part of a *pro se* proceeding. In terms of appearing in court or filing the papers, the clients were on their own.

This presented some obvious problems, especially when the *pro se* client appeared in court and faced the judge and/or opposing counsel. The client had the paperwork but was often confused as to the choices made in drafting the paperwork or what evidence needed to be entered (and how), among other issues.[91] The practice limitations meant that LLLTs were offering a very limited set of services indeed, basically help filling out forms. Other than that, clients were proceeding *pro se*, with all the pitfalls and challenges that status entails when in court or dealing with opposing counsel.

The situation was bad enough that the LLLT Board came back to the Washington Supreme Court and petitioned for changes to the rules to allow for appearances in court, at depositions and direct negotiations with opposing counsel.[92] The LLLT was still limited in these appearances, however, to conferring with their client at a deposition and in court to answering "direct questions" from a judge about "factual and procedural issues."[93] These changes meant that LLLTs were not allowed to advocate in court. The court approved the change, but in a narrow vote and with a stern

90. *See* Ashworth, *supra* note 38, at 703–04.
91. *See id.* at 703–04.
92. *See id.* at 703–05.
93. *Id.*

dissent.[94] But, as noted above, the change was not enough to save the program.

Despite the experience in Washington, these restrictions and some new ones have followed in most of the new LP programs. In Utah for example, a Licensed Paralegal Practitioner can assist clients with a limited number of approved forms and join a client in court "to provide emotional support, [by] answering factual questions as needed that are addressed to the client by the court or opposing counsel, taking notes, and assisting the client to understand the proceeding and relevant orders."[95] Oregon's Licensed Paralegal program similarly allows LPs to "[a]ttend court appearances and depositions with clients to provide support and assistance in procedural matters."[96] In other words, the Utah and Oregon LPs—like their Washington forbears—are barred from advocating on their clients' behalf.

Minnesota and New Hampshire both require LPs to operate under the supervision of a licensed attorney.[97] They must have written permission from these attorneys to appear in court and are quite limited in the courts and matters they can appear in.[98] The proposed Colorado LP program would allow Licensed Legal Paraprofessionals to appear in court, but not "examine or cross-examine witnesses."[99]

Arizona appears to be the most open-ended in terms of what its LPs are allowed to do. Arizona LPs are limited in terms of the areas of law where they can practice, but within those areas their allowed activities sound quite similar to a licensed lawyer's:

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94. *See generally* Wash. Sup. Ct. Order Adopting Proposed Amendments to APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1258 (May 1, 2019) (dissent objected to "expanding the scope of legal services that LLLTs are allowed to provide" without "any evidence of success" thus far).

95. *Limited License Practitioner*, UTAH STATE CTS., https://www.utcourts.gov/en/about/miscellaneous/legal-community/lpp.html [https://perma.cc/92X5-89L2].

96. *About Oregon's Licensed Paralegals (LPs)*, OR. STATE BAR, https://www.osbar.org/lp/about.html [https://perma.cc/K3W5-AMDQ].

97. For New Hampshire, see Jarvis, *supra* note 50; *see, e.g.*, N.H. SUP. CT. R. 35. For Minnesota, see Order Implementing Legal Paraprofessional Pilot Project, No. ADM19-8002 (filed Sep. 29, 2020).

98. For New Hampshire, see Jarvis, *supra* note 50; *see, e.g.*, N.H. SUP. CT. R. 35. For Minnesota, see Order Implementing Legal Paraprofessional Pilot Project, No. ADM19-8002 (filed Sep. 29, 2020).

99. Colo. Sup. Ct. Off. of Att'y Regul. Couns., *Frequently Asked Questions About Licensed Legal* Paraprofessionals, COLO. LAW. 7–8 (June 2023), https://cl.cobar.org/departments/frequently-asked-questions-about-licensed-legal-paraprofessionals/ [https://perma.cc/J3VE-FSPD].

> Under ACJA § 7-210, Legal Paraprofessionals can 1. Prepare and sign legal documents; 2. Provide specific advice, opinions, or recommendations about possible legal rights, remedies, defenses, options, or strategies; 3. Draft and file documents, related to motions, discovery, interim and final orders, and modification of orders, and arrange for service of legal documents; 4. Appear before a court or tribunal; 5. Negotiate legal rights or responsibilities.[100]

With the exception of Arizona, every other state currently offering a LP program significantly limits what its LPs may do in court either by requiring attorney supervision or severely limiting their activities within court.[101] To state the obvious, this makes these services significantly less useful than those of a lawyer.

Hopefully, the LP services do make a difference and put the client in a better position than they would have been if they had just proceeded *pro se*. Nevertheless, the fear of appearing in court with a person whose job is to offer "emotional support" rather than a person licensed and allowed to advocate on your behalf is significant and makes the value proposition for LPs questionable.

ii. Limitations on Practice Areas

The original Washington LLLT program was limited to family law, with expansion possible (but never realized).[102] Family law was chosen because of the inordinate number of *pro se* family law matters and a hope that the LLLT program would help low-income individuals access legal services.[103]

The later LP programs have likewise been limited. Colorado LPs are restricted to a similar list of family law topics.[104] Oregon allows LPs to

100. *Legal Paraprofessional Program*, ARIZ. SUP. CT., https://www.azcourts.gov/cld/Legal-Paraprofessional [https://perma.cc/A9TX-CGMR].

101. *See supra* notes 29–51 and accompanying text.

102. *See* Donaldson, *supra* note 31, at 8 (Washington LLLT program not expanded in 2018); *see also* JASON SOLOMON & NOELLE SMITH, *supra* note 34, at 1 (explaining program details that remained only in family law and despite success, was subsequently terminated).

103. Wash. Sup. Ct. Order Adopting Proposed Amendments to APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1258 (May 1, 2019).

104. *See* Colo. Sup. Ct. Off. of Att'y Regul. Couns., *supra* note 99, at 7–8.

handle limited areas within family law and landlord/tenant law; presumably selected on the basis of their simplicity and likelihood to assist in expanding access to justice.[105] So, LPs can help with general divorce matters, but not most appeals or divorces "relating to defined benefit plans or deferred compensation plans."[106] LPs can handle Oregon Residential Landlord/Tenant Act cases, but only on the basis of tenants.[107] Minnesota and New Hampshire limit their LPs similarly.[108] Utah allows LPs to practice small claims debt collection defense in addition to family law and detainer warrants.[109] Arizona is again the farthest ranging program, with the following areas currently allowed: "Family law; Limited jurisdiction civil; Criminal law; State administrative law; and Juvenile Court (pending)."[110]

States have allowed LPs to practice in these areas because of unmet need, relative simplicity, and success in other states.[111] Note that these criteria are quite different than choosing areas of law that are most likely to allow LPs to earn a living selling their services. One reason the Washington program "sunsetted" was because it was not able to provide significant services to the poor and had transitioned into a middle-income and above program.[112] This should not be surprising. The access to justice crisis is most acute in these areas because these individuals cannot afford to pay for a lawyer. Given that these LPs are working in private practice (for profit), they are either going to drift to compete with existing lawyers for the middle and upper-middle class clients or go hungry.

105. OR. STATE BAR, *supra* note 96.

106. *Id.*

107. *See id.*; *see also* Jayati Ramakrishnan, *Oregon Bar Proposes to Let Paralegals Represent Clients in Some Housing, Family Law Cases*, OREGON LIVE (Nov. 29, 2021, 7:00 AM), https://www.oregonlive.com/business/2021/11/oregon-bar-proposes-to-let-paralegals-represent-clients-in-some-housing-family-law-cases.html (discussing Oregon paralegals as representing tenants, as opposed to landlords in housing disputes).

108. For New Hampshire, see Jarvis, *supra* note 50; *see, e.g.*, N.H. SUP. CT. R. 35(2). For Minnesota, see Order Implementing Legal Paraprofessional Pilot Project, No. ADM19-8002 (filed Sep. 29, 2020).

109. *See* UTAH STATE CTS., *supra* note 48.

110. *See* ARIZ. SUP. CT., *supra* note 100.

111. *See* Aebra Coe, *More States Turn to Paraprofessionals to Fill Justice Gap*, LAW360 (June 2, 2023, 7:02 PM), https://www.law360.com/articles/1683291/more-states-turn-to-paraprofessionals-to-fill-justice-gap [https://perma.cc/A9TX-CGMR].

112. *See* Wash. Sup. Ct. Letter, *supra* note 33; *see also* Wash. Sup. Ct. Order Adopting Proposed Amendments to APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1258 (May 1, 2019).

iii. Income Limits

New Hampshire explicitly limited its eligibility for LP representation to clients with "household income no greater than 300 percent of the federal poverty guidelines at the commencement of representation."[113] This means that their program (like Alaska's CJW) will certainly be aimed at the poorest citizens and will help with their challenges, either explicitly (as in Alaska) or presumably (in New Hampshire) working under legal aid lawyers. Legal aids struggle mightily to meet the demand for their services, so this may well help. But these programs present the reverse problem of the others—they will only help the very poor, leaving the middle class in the lurch.

iv. Licensing Requirements and Paralegals

As noted above, the original Washington LLLT program had relatively challenging entry requirements, in some regards *more stringent* than the lawyer entry equivalents.[114] The newer states are less involved, but still quite challenging.

The Oregon LP Program website has a helpful "Licensing Flowchart" to describe the steps necessary to become a LP.[115] It has *sixteen* different steps, including six steps with sub-steps or optional pathways.[116] Like the Washington program, the experiential and topic specific training is in some ways harder than the requirements to become a lawyer.

Arizona's requirements include extensive education or demonstrated years of experience, exams, a character and fitness process, and a professionalism course.[117] Utah requires significant educational and work experience, multiple exams, and a number of required classes.[118] Minnesota's and New Hampshire's requirements are significantly less strenuous, but remember that these LPs must practice under the supervision of a lawyer.[119]

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113. *See* N.H. SUP. CT. R. 35(2)(e).
114. *See id.*
115. *Licensing Flowchart*, OR. STATE BAR, https://www.osbar.org/lp/flowchart.html [https://perma.cc/BG4Q-Z4J9].
116. *Id.*
117. *See* ARIZ. CODE JUD. ADMIN. § 7-210(E) (licensure requirements for paralegals in Arizona).
118. *See* UTAH STATE CTS., *supra* note 48.
119. For New Hampshire, see Jarvis, *supra* note 50; *see, e.g.*, N.H. SUP. CT. R. 35. For Minnesota,

These requirements are easier than becoming a lawyer, but much harder than becoming a paralegal, which is typically unregulated.[120] This is why the new licensed professions have typically avoided the word "paralegal," to avoid confusion between the two different professions. According to the Department of Labor's *Occupational Outlook Handbook* in 2023, paralegals earned a median annual salary of $60,970.[121] Consider this salary when contemplating the likely uptake in LP programs. Rational actors will presumably expect to make more, given the hassle and expense required in becoming a LP. This may well prove challenging for the market-related reasons listed above.

Likewise, one obvious employment area for a LP is within a law firm staffed with lawyers. In Minnesota and New Hampshire, this is explicitly required—but in every jurisdiction, there is the assumption that even if some of the LPs work as solo practitioners, others will team up with law firms or legal aid societies.[122]

Here, the comparison is different than individuals choosing a career, rather it's the question of hiring for a law firm. Are there reasons to hire a LP rather than a traditional paralegal? Lawyers are, of course, governed by Rules of Professional Conduct and most jurisdictions hold a licensed lawyer to be responsible for managing nonlawyer assistants under Model Rules of Professional Conduct (MRPC) Rule 5.3.[123] MRPC Rule 5.5 bars lawyers from the UPL in a foreign jurisdiction, but also bars a lawyer from encouraging a member of its own staff to commit UPL.[124] Nevertheless, the comments to Rule 5.5 establish that "[t]his Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."[125]

As such, paralegals already have significant latitude to handle legal

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see Order Implementing Legal Paraprofessional Pilot Project, No. ADM19-8002 (filed Sep. 29, 2020).

120. California is the only state that currently regulates paralegals. *See Educational Information for Paralegals*, A.B.A. (Oct. 23, 2024), https://www.americanbar.org/groups/paralegals/profession-information/educational-information-for-paralegals/ [https://perma.cc/WE99-KLSV].

121. U.S. BUREAU OF LAB. STAT., OCCUPATIONAL OUTLOOK HANDBOOK, PARALEGALS AND LEGAL ASSISTANTS (Aug. 29, 2024), https://www.bls.gov/ooh/legal/paralegals-and-legal-assistants.htm [https://perma.cc/YE65-2P4E].

122. Solomon & Smith, *supra* note 34, at 19–20.

123. MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 2020).

124. MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 2020).

125. *Id.* at cmt. n.2.

work when "supervised" by a lawyer. In practice this authority ranges quite widely, especially at legal aid offices where funds are short and all members of the staff need to maximize their effect. While some regulators have frowned on allowing paralegals to offer legal advice unsupervised, the practice of allowing paralegals to do significant legal work, including the type of work envisioned for LPs (gathering facts and drafting documents, talking clients through the process, etc.), is anecdotally widespread.[126] The fact that unregulated (and presumably cheaper) paralegals can offer many or most of the same advantages as a LP also makes the value proposition unclear.

v. The Paradoxical Result of Focusing on Areas with the Least Representation

These programs have been created with the best intentions and as an explicit effort to battle the access to justice crisis. As a result, the programs have been aimed at the areas of greatest need—such as family law, eviction, and debt collection. Yet, these programs have unwittingly chosen the areas of law that are the hardest to make a living practicing. How do we know? Because if there was low hanging fruit in this area, i.e. clients who have the money and the desire to pay for professional services, lawyers would already be providing these services. Remember that at the low end of the market for main street lawyers, the practitioners are quite desperate for paying clients. If it was simply a matter of slight discounts, those would already be offered.

This effect is easiest to see in small claims debt collection defense or eviction defense. What are the odds that these potential clients have money

126. For regulatory pushback, see Victoria White & Thomas G. Wilkinson Jr., *2020-028 Permissible Activities of a Paralegal*, 43 PA. LAW. 54, 55 (2021) ("Based on these opinions and other authorities, including the *PBA Unauthorized Practice of Law Manual*, inquirer was advised that inquirer would violate Rule 5.5(a) if inquirer would facilitate, by action or inaction, conduct by a paralegal that would entail the provision of legal advice about custody or landlord-tenant cases, the evaluation of the facts of a client's landlord-tenant case and recommendation to the client of defenses to eviction or other measures and the provision of legal advice through the legal aid organization's 'helpline.'"). For an example of a legal aid paralegal doing legal work, see Bob Paolini, *An Interview with Incoming VBA President Anna E. Saxman*, 29 VT. BAR J. 25, 25 (2003) ("After graduating from UVM, I worked as a paralegal representing patients at the state hospital—working for Legal Aid. Legal Aid at that time was really understaffed so the paralegal did everything. I interviewed all the witnesses. I prepared all the cases for trial. I negotiated against my future boss, Bud Allen, who was prosecuting.").

to pay for a legal professional? Very low. Eviction and debt collection cases are primarily about money. More specifically, they are about the defendants' lack of money. There are, of course, eviction cases about the behavior of tenants with money, but the leading cause of eviction is nonpayment of rent.[127] Likewise some debt collection cases are disputes between a middle or upper-middle class person and a creditor; but again, most of the defendants in debt collection court are there because they cannot afford to pay their bills.[128] This is not a very promising client base for professionals who hope to charge $100–250 an hour for their services.

Family law is different. The triggering legal event is not typically associated with a lack of funds. Nevertheless, this practice area also presents significant challenges, notably the challenge of charging by the task rather than by the hour. As noted above, agreed family law matters (like an uncontested change in child custody or an agreed divorce) can be handled briskly and for a flat fee. Of course, if former spouses or unmarried parents of minor children could agree on what to do, they would likely not be in court at all. Here lies the uncertainty. The overall cost of a contested divorce or a contested child custody hearing is hard to determine ahead of time and often requires knowing how much each side must spend on legal fees. Here, the "discount" for a LP may well help but note the problem of arriving with a knife to a gun fight. If your opponent has hired a lawyer, and that lawyer knows the limitations of the LP, there will be a significant strategic advantage to steering the proceedings to where the LP cannot speak (i.e. court) or into complex areas the LP may be less familiar with. Even if all those suppositions are not true, potential clients may *think* that they are true, therefore affecting demand for the services of LPs.

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127. *See* Matthew Desmond & Carl Gershenson, *Who Gets Evicted? Assessing Individual, Neighborhood, and Network Factors*, 62 SOC. SCI. RSCH. 362, 362 (2016), https://scholar.harvard.edu/files/mdesmond/files/desmondgershenson.ssr_.2016.pdf [https://perma.cc/9BNF-WJRF] ("Nonpayment of rent is a leading cause of eviction"); *see also* Juliet M. Brodie & Larisa G. Bowman, *Lawyers Aren't Rent*, 75 STANFORD L. REV. ONLINE 132, 133 (2023), https://www.stanfordlawreview.org/online/lawyers-arent-rent/ [https://perma.cc/6429-XDEK].

128. HUMAN RIGHTS WATCH, RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR 1 (Chris Albin-Lackey eds., 2016), https://www.hrw.org/sites/default/files/report_pdf/us0116_web.pdf [https://perma.cc/2HP9-LNM3]; *see generally* THE PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS (2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf [https://perma.cc/VGK9-XGX] (describing the growth in debt collection cases in the US).

B. Complexity and Lagging Legal Productivity

What does the market for main street lawyers have to do with creating a LP designation to address access to justice issues? Ask the lawyers who have fought the creation of this new category in Washington and elsewhere: these new entrants will either compete with main street lawyers for business or try to make a living in areas of law where there is little money to be made, like eviction or debt collection. Neither one is likely to make a large dent in the access to justice crisis.

The struggles at the bottom end of the market for solo practitioners and main street lawyers suggests that there are no obvious solutions (at least under current versions of legal practice) to lowering the price to meet middle-class consumer demand while still making a decent living. If some significant portion of solo practitioners are earning $50,000 a year or under and the real median household income in 2022 was $74,580, this is a group of professionals who are barely scraping by.[129] And of course, the median household is not the relevant comparison; the average income for households with a professional degree is $172,100.[130]

There are several issues contributing to these struggles. The first is legal complexity. Gillian Hadfield has noted the special effect that legal complexity has on the market for legal services:[131]

> Law is not merely complex. It is so complex that it is also highly ambiguous and unpredictable. The necessity and quality of legal services are not merely difficult for nonexperts to judge; they are also difficult for experts, *even the expert providing the service*, to judge.[132]

Hadfield describes law as a "credence good," a good that is complex enough that the consumer cannot gauge quality before or even after they purchase

129. GLORIA GUZMAN & MELISSA KOLLAR, U.S. CENSUS BUREAU, INCOME IN THE UNITED STATES: 2022 (2023), https://www.census.gov/library/publications/2023/demo/p60-279.html# [https://perma.cc/8RM6-47BX].

130. *See Median Household Income in the United States in 2022, by Educational Attainment of Householder*, STATISTA (Sept. 17, 2024), https://www.statista.com/statistics/233301/median-household-income-in-the-united-states-by-education/ [https://perma.cc/K88F-QM8T].

131. *See* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 959–68 (2000).

132. *Id.* at 969.

it.[133] Here, law's complexity allows lawyers to charge a premium for their services because consumers cannot tell how much they "should" cost. The ironic twist in law, of course, is that the procedures and law (and human drama) are so complex that even the *providers* have a hard time pricing the good.[134]

So, complexity is also a *floor* to the cost of legal services because even lawyers have a hard time evaluating the true cost of legal work ahead of time. A contested divorce could take ten hours of work to gather the relevant information about assets, earnings, and the parental desires for custody—and then split everything down the middle. Or it might take hundreds of hours of work in discovery, motions, and a trial. Heading into a case, it will be very hard to know what to charge. This means that flat fee arrangements are risky and carry a significant downside for the lawyer. But an hourly engagement is a significant risk for the client, because if the lawyer cannot guess the total cost of the work—then the client certainly cannot.

The great Deborah Rhode had a favorite New Yorker cartoon that captured this market reality quite nicely: it shows a well-dressed lawyer asking a client "[s]o, Mr. Ptikin, how much justice *can* you afford?"[135] This joke works, like many of the best jokes, because it is essentially true. If a middle-class person is facing a contested child custody hearing or a DUI charge (or some other high stakes legal problem) they will likely seek out a lawyer's help. Consider a truck driver who will lose his driver's license, and thus his livelihood, if convicted of DUI; or a loving parent who may lose custody of their children. These people will be willing to pay whatever it takes to reach a satisfactory outcome. The problem is that they may not have the funds to buy sufficient legal work to make the best outcome likely. This is why the joke is not funny: when a panicked middle-class person asks, "how much will it cost to keep my children/license" the lawyer's likely answer (whether paraphrased or not) is "how much do you have?"

This sounds mercenary and unfair, but it is not. Instead, it's a market reality and a reflection of how hard it is to do complex legal work quickly and inexpensively. Or, stated differently, the difficulty of guessing whether a case is simple or complicated at the outset. This portion of the legal market

133. *Id.*
134. *See id.*
135. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 2 (2000).

is especially dogged by what Bill Henderson calls "lagging legal productivity,"

> As society become wealthier through better and cheaper good and services, human-intensive fields such as law, medical care, and higher education become relatively more expensive. In contrast to medical care and higher education, however, a growing proportion of U.S. consumers are choosing to forgo legal services rather than pay a higher price.[136]

Basically, modern lawyers, and especially main street and solo practitioners, practice law the same way that lawyers always have—they handle each case separately and in a bespoke manner. Other areas of the economy have seen great jumps in productivity, but law remains stubbornly immune. This is partially due to how lawyers are trained. Other causes are complexity and court processes, which are also basically unchanged over the last century or so.

Regardless of the cause, the fact remains that many solo practitioners have failed to find a way to meet swelling demand with affordable legal services. This failure has disastrous ramifications on the consumer side, with the *pro se* explosion and the access to justice crisis as two obvious results. But the failure also has significant negative effects on the lawyers who are practicing in this market. Large swaths of these lawyers are struggling to make a living practicing law, mostly because they do not know how to practice in a manner where they can meet consumer demand and still make a living.

This is why the LPs are unlikely to make much of a dent in these problems, unless there is some reason to believe that they will have a solution to lagging legal productivity. Instead, it appears that these professionals are being trained to practice identically to the lawyers already in this market. Some jurisdictions require some coursework at law schools, which are, of course, the fountainhead of much of lagging legal productivity

136. WILLIAM D. HENDERSON, STATE BAR OF CAL., LEGAL MARKET LANDSCAPE REPORT i (2018), https://www.legalevolution.org/wp-content/uploads/sites/262/2022/01/State-Bar-Study-of-Online-Delivery-of-Legal-Services-July-2018.pdf [https://perma.cc/8AQ7-UGTV]; *see also* Colin S. Levy, *Bill Henderson*, COLIN S. LEVY (Feb. 3, 2021), https://www.colinslevy.com/post/bill-henderson-thoughts-on-the-evolution-of-the-legal-profession [https://perma.cc/4CPV-5NT2].

for lawyers. Law schools teach students that every case is a unique snowflake to be handled individually and focus teaching in the gray areas, rather than in areas where law can be streamlined.

This, of course, makes sense for law schools, since gray areas are the most lucrative in law. And yet, not all of law is indeterminate and gray. There is also (theoretically) a good living to be made in addressing those areas. Regardless, law schools will teach LPs a watered-down version of their typical curriculum, which will hardly put LPs in a position to innovate in practice. Other jurisdictions accept time working as a paralegal in a lawyer's office to satisfy the LP Program training requirement. Again, this training will likely reproduce lagging lawyer productivity because these LPs will learn the existing individualized and inefficient manner of practice.

One sign that the LPs will not significantly upend the market or advance lagging legal productivity is their billing schemes. Rebecca Donaldson wrote an early and pessimistic assessment of the Washington State LLLT program and interviewed the early entrants on a number of topics including billing:

> Most [LLLTs] planned to charge some if not all clients based on an hourly rate. Estimated hourly rates ranged from $40 to $175 per hour, with a median of about $100 per hour. Some also thought that they might charge flat fees, either as an option for certain cases or exclusively. Estimated flat fees ranged from $300 to $2,500 per case, with a median of about $750 per case.[137]

Later data from Washington showed that the higher estimate of $175 an hour was closer to the reality: "[m]ost LLLTs bill hourly . . . many on a sliding scale based on the client's income. For instance, one LLLT in King County billed an average of $125 per hour, although her full fee was $175 per hour. LLLTs at firms billed around $160 per hour."[138] These fees are still well below a lawyer's rates but are not obviously affordable for working class persons.

Indeed, from the outset there were concerns over the business model. Elizabeth Chambliss put it quite succinctly: "[a]lthough there is no shortage of unmet legal need in Washington, or elsewhere, it is unclear how private

137. Donaldson, *supra* note 31, at 20–21.
138. Solomon & Smith, *supra* note 34, at 20.

paraprofessional practice aimed at the back-end legal needs of low- and middle-income consumers will be any more viable than private law practice in that market."[139]

C. Upshot

If you add all of these various effects together, it seems unlikely that LPs are likely to be *the* solution, or even a major ingredient, to solving the access to justice crisis. As currently structured, LPs are theoretically a new licensed category of legal practitioner. This license allows LPs to do some activities that have previously been limited to licensed lawyers; although the scope of these new areas depends a lot on the jurisdiction. Still, every jurisdiction limits these LPs substantially by subject matter, task, or both. Further, LPs face competition from unlicensed paralegals on one side—who can do almost everything a LP can do while under the supervision of a lawyer—and under-employed solo practitioners some of whom are already struggling to find enough business to make a living. They also seem unlikely to solve the riddle that is the provision of inexpensive or predictable individualized legal services by the hour, and barring such a solution it is unclear how exactly the LPs will mark out their own territory while also earning a living commensurate to the efforts involved in gaining licensure.

In 2017, Rebecca Sandefur and Thomas Clarke released a largely positive *Preliminary Evaluation of the Washington State Limited License Legal Technician Program*. The report promisingly concluded that creating "new legal roles with costs lower than traditional lawyers" like LLLTs "are a potentially significant strategy for meeting the legal needs of many people who now are dealing with their legal problems unassisted. Creating similar programs in other states would clearly improve access to justice for a broad section of the public."[140] Nevertheless, the report also quite honestly noted that "[m]ost LLLTs struggle to attract enough clients to sustain a viable business."[141]

Perhaps not coincidentally, the report also noted that the uptake of the

139. Elizabeth Chambliss, *Law School Training for Licensed "Legal Technicians"? Implications for the Consumer Market*, 65 S.C. L. REV. 579, 588–89 (2014).

140. THOMAS M. CLARKE & REBECCA L. SANDEFUR, PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 3 (2017), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/405/ [https://perma.cc/49CA-3PA4].

141. *Id.* at 13.

program was well below initial expectations.[142] This effect has continued in Washington and other jurisdictions. In 2022, there were just sixteen active LLLTs in Washington, twenty-three in Utah, and twenty-two in Arizona.[143] These numbers well establish that the business and regulatory challenges here are not theoretical. Perhaps these initial numbers will increase as the programs age and become better known, but barring a significant expansion—the LP movement will be less helpful than hoped.

A cynic might note that the LP approach has proven much more popular in other states than the Alternate Business Structure (ABS), or sandbox, approaches of Utah and Arizona. This is strange, because both of those states also have LP programs, and the ABS/sandbox model has proven vastly more effective than the LP model in those states in terms of generating new and promising approaches to the access to justice crisis.[144] When states reject the ABS/sandbox model, they typically cite the "administrative burden" of okaying the new entrants and then monitoring their services.[145] Fair enough, both Utah and Arizona have found funding and staffing those programs a challenge. That said, the LP programs look to be much more of a hassle for a much smaller return. These states are creating educational, testing, and licensing apparatus from scratch. It is almost as if these states want to be seen as doing *something* to address the issue, without actually doing anything that might upset the apple cart too much.

V. BETTER SOLUTIONS

If LPs are not the solution to the access to justice crisis, what are more promising approaches?

First, a note of "yes, and" encouragement for the LP approach. This article does not mean to suggest that the entire project is misguided or harmful, as long as it does not distract from other, more promising solutions.

142. *Id.* at 10.

143. *See* Hughes, *supra* note 14, at 1–5.

144. For example, in December 2023 there were sixty-four laws related ABS's operating in Arizona. *See* Jessica D. Kemper & Andrew F. Halaby, *The Arizona ABS Program—Three Years In*, GREENBERG TRAURIG (Dec. 8, 2023), https://www.gtlaw.com/en/insights/2023/12/published-articles/the-arizona-abs-program-three-years-in [https://perma.cc/TDZ2-L557]. There were only twenty-two individual LPs. *See* CLARKE & SANDEFUR, *supra* note 140 and accompanying text.

145. Matt Reynolds, *When it Comes to Deregulation of the Legal Industry, Divisions Run Deep*, ABA J. (Nov. 16, 2023, 2:37 PM) https://www.abajournal.com/web/article/when-it-comes-to-deregulation-of-the-legal-industry-divisions-run-deep [https://perma.cc/BGN4-JFUQ].

The fact that the LP approach has spread more quickly than other, more promising reforms is a sign that it may in fact be taking up reformist energies better spent elsewhere. But in a world of unlimited attention spans and good will towards reforms, sure—adding a LP category to American legal licensure is unlikely to hurt anyone in particular and may, in fact, prove helpful insofar as sufficient numbers apply and join.

Further, insofar as the LP program is aimed at the provision of services to the poor through legal aid or some other nonprofit structure, I am more agnostic. The limitations and market realities suggest that LPs will struggle to make a living in a for profit practice. Insofar as legal aid societies or nonprofits believe that spending their precious and very limited resources on one or two LPs rather than a (presumably) more expensive licensed lawyer, I will trust their judgment and wish them Godspeed. Legal aid does *a lot* with little funding; so their judgment here is *highly* likely to be better than mine. That said, if I had my druthers, every additional cent available to legal aid would be dedicated to technological solutions rather than individual human-based solutions.

Why? Because there are some obviously better answers to the access to justice crisis, including three that more directly address lagging legal productivity. At its heart, the issue with the LP solution is that it adds more individual humans, working individually, and by the hour for clients or nonprofits, and it is hard to believe that type of service model will ever meet the yawning and unmet demand for access to justice. The more promising reforms involve the increased use of technology on the provision of services side, allowing the creation of legal ABS, as well as simplifying the court and legal structures that drive legal complexity. I present these solutions in order of their likelihood to actually happen.

A. Technology

First, note that technology is, and should always be, the first and primary solution to lagging productivity. From the industrial revolution to today, new technologies have improved productivity. Better farming methods led to an agricultural boom that allowed populations to expand. The steam engine made all sorts of manufacturing and shipping less expensive and removed the bulk of the world's population from miserable poverty and away from the regular fear of starvation.

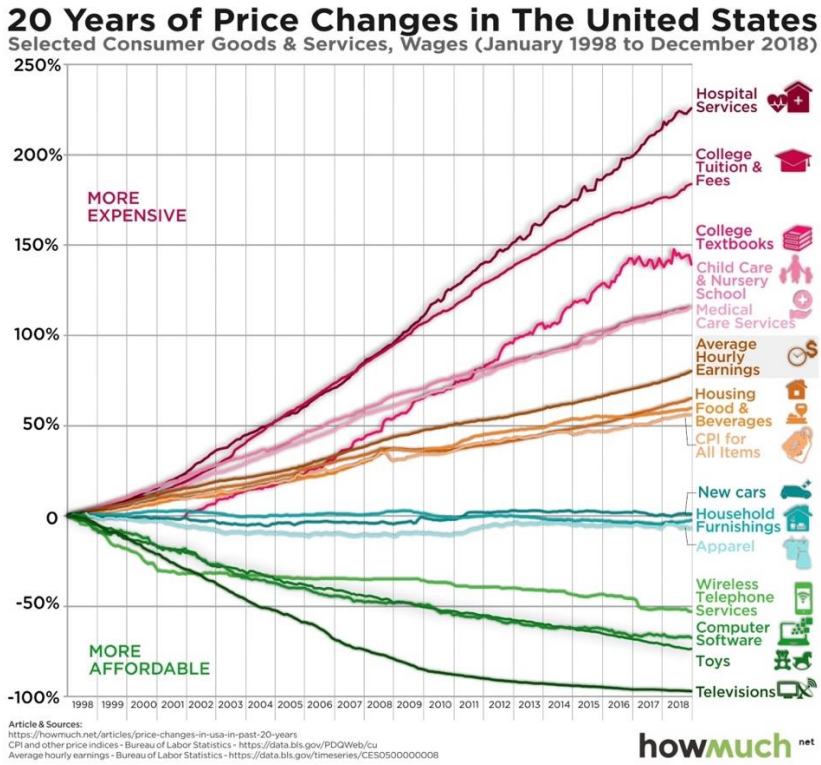
Technology has a long history of making legal work more efficient as well. The printing press, typewriter, telephone, fax machine, and word processor all made legal work more efficient. The mass publication of state and federal case law and statutes by West Publishing memorialized whole swathes of law that were only intermittently available to lawyers before their publication. The rise of specialization and large law firms also created efficiencies of practice.

Yet despite those changes, the American legal profession has remained stubbornly resistant to change. American law schools are still operating on the Langdell-Harvard model from the 19th century.[146] Large law firms are still operating on the Cravath system from a similar time frame.[147]

American courts are the same. If Abraham Lincoln were to time travel to today, his head would spin on the way to a modern courthouse: horseless carriages, mobile phones, and flying machines. But when Lincoln entered a court room and saw the individual lawyers with their individual clients pleading individual cases before human judges in robes, he would feel right at home.

This is part of the reason why law has remained so stubbornly expensive. As technology, globalization, and efficiencies have relentlessly made manufactured and farm goods less expensive, human-driven, localized services like medicine, higher education, and law have become much more expensive.

146. *See* BARTON, *supra* note 83, at 15–31.
147. *See* BENJAMIN H. BARTON, GLASS HALF FULL 24–25, 64–69 (2015).



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Legal fees and law school tuition are not on this chart, but they are certainly on the high end of inflation. Law school tuition ran well ahead of inflation from 2000–2019.[149] Over an even longer period of time (1986–2024), the cost of legal services rose at an annual pace of 4%, while all goods rose at a rate of just 2.8%.[150]

That said, technology has played a *huge* part in addressing at least some of the access to justice crisis. First, there is more legal information freely

148. Raul Amoros, *Price Changes Over the Last 20 Years Prove the Economy is Rigged*, HOW MUCH (Jan. 28, 2019), https://howmuch.net/articles/price-changes-in-usa-in-past-20-years [https://perma.cc/RP9L-QYWK].

149. *See Cost of Attendance*, LAWHUB, https://www.lawhub.org/trends/tuition?y1=2000&y2=2019 [https://perma.cc/PM79-K8RQ].

150. *Prices for Legal Services, 1986–2024 ($10,000)*, IN2013DOLLARS, https://www.in2013dollars.com/Legal-services/price-inflation [https://perma.cc/A9CE-X5QW].

available on the internet now (including a lot of generic legal advice) than ever before. A literate citizen in the United States with a smartphone has more access to statutes and caselaw than a Supreme Court Justice from the 19th century. All this information is a boon to Americans. The existence of this information partially explains the rise of the *pro se* litigant. It makes it possible to file legal paperwork on your own behalf and have at least some semblance of an idea of what to expect in court.

Likewise, LegalZoom and Rocket Lawyer have brought the price for simple legal documents down radically.[151] Many more Americans can afford a will or to incorporate a business than ever before. Again, each of these areas have made some legal work very inexpensive for American consumers.

As we sit on the precipice of the Artificial Intelligence (AI) Revolution, we have potentially found a new technology that can do some of the solely individualized human legal work of learning facts and applying law. Technology has always been the answer to this problem, but in the age of AI, it is especially and obviously so. We should tweak the training and licensing of lawyers to encourage the full-scale adoption of AI into all elements of practice and let the humans handle oversight of the machines' work, the most complicated issues, and appearances in court. Instead of barring AI, the profession should encourage it. Think of how many more clients' lawyers could serve at reduced prices by fully incorporating AI into their practice.

B. Allow More ABS in the Legal Space

As noted above, both Utah and Arizona have made substantial changes to loosen the UPL and MRPC Rule 5.4 to allow for innovative combinations of lawyers (or even non-lawyers) to practice law and sell legal services. Unlike more traditional law firms (or even newer LPs), these ABS have every incentive to try new ways of delivering legal services to different groups of people. The bulk of the ABS applications in both Utah and Arizona have been aimed at the consumer legal market.

151. Benjamin H. Barton & Deborah L. Rhode, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955, 959–64 (2019).

C. Reducing Procedural and Legal Complexity

Procedural and legal complexity often go hand in hand, but note that they can be ameliorated separately. This has been especially true in efforts to address the access to justice and *pro se* litigation crisis. Courts all over the country have made great strides in addressing procedural complexity, making these reforms among the most pervasive and promising. Legal complexity, in comparison, only seems to be growing. Here we discuss these two different types of complexity, why one has made more progress than the other, and why reducing procedural complexity is such a promising avenue for reform.

i. Procedural Complexity

The American Judicature Society (AJS) was formed in 1913 to promote the efficient administration of justice.[152] For the bulk of its history, the AJS advocated for modernizing administrative structures, creating stronger judicial ethics codes, and demanding merit-based systems of selecting judges.[153] The National Center for State Courts (NCSC) was founded in 1971 in response to a request from Chief Justice Warren Burger for a central resource for state court administration.[154] Like the AJS, the NCSC focused on meat and potatoes issues of court system improvement: serving as an invaluable data resource, and a central repository for court concerns like judicial salaries and case backlogs.[155]

Neither of these institutions were obvious first movers in addressing the access to justice crisis, yet they launched a nationwide revolution. In 1998, the AJS published *Meeting the Challenge of Pro Se Litigation*.[156] The report is prescient and far reaching, especially for 1998, when the contours of the problem were just starting to come into view. The report details the

152. *History*, AM. JUDICATURE SOC'Y., https://americanjudicaturesociety.org/about-us/history/ [https://perma.cc/X36Q-BJX9].

153. *See id.*

154. *Vision, Mission & History*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/about-us/vision-mission-and-history [https://perma.cc/N53B-N8YN].

155. *See id.*

156. *See generally* JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 1 (Am. Judicature Soc'y eds., 1998), https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/106/ [perma.cc/U4VS-8MT7].

anecdotal and empirical evidence for growth in *pro se* litigation, judicial and court administrator reactions, and some very simple means to address issues like pushing court staff and judges to offer more assistance to confused litigants, or opening self-service centers in courthouse lobbies.[157]

In 2005, AJS followed up with a guide entitled *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*.[158] It includes a long list of common sense things that judges are allowed (and encouraged) to do to help *pro se* litigants—including making procedural accommodations, being courteous, avoiding legal jargon and procedural snafus, explaining the litigation process, avoiding over-familiarity with lawyers in the courtroom, and training court staff so they provide patient, helpful service to self-represented litigants.[159] It also includes a long section on *Best Practices for Cases Involving Self-Represented Litigants.*[160]

In 2002, the NCSC released Richard Zorza's magnum opus *The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers*.[161] Zorza deserves more coverage than we can offer here, but it is not an exaggeration to say that he was the individual most responsible for calling attention to this crisis and offering workable and realistic solutions. Following the 2002 report, Zorza went on to found the

157. *Id.* at 1–35.

158. CYNTHIA GRAY, REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS 1–2 (Am. Judicature Soc'y eds., 2005), https://www.ncsc.org/__data/assets/pdf_file/0029/18884/judicial-ethics-and-self-represented-litigants.pdf [perma.cc/68Y7-QZND].

159. *See id.* at 1–2. This list of activities is so basic as to induce a chuckle from an experienced poverty lawyer, but sadly, in 2005, these were radical suggestions. The guide reminds me of a *Simpsons* episode where Marge and Homer are required to attend a parenting class and the instructor tells the class to "put your garbage in a garbage can, people. I can't stress that enough. Don't just throw it out the window." Homer writes this wisdom down carefully and says, "garbage in garbage can . . . hmm, makes sense." *The Simpsons: Home Sweet Homediddly-Dum-Doodily* (Fox television broadcast Oct. 1, 1995) (clip available at https://www.youtube.com/watch?v=2ZgtEdFAg3s&feature=youtu.be [perma.cc/EW27-ANF8]).

160. GRAY, *supra* note 158, at 51–58.

161. *See generally* RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (Nat'l Ctr. for State Cts. eds., 2002), http://www.ncsconline.org/WC/Publications/Res_ProSe_SelfHelpCtPub.pdf [perma.cc/256Z-3MEF]. American Judicial System has an entire website dedicated to the topic of self-help legal advice. *See* AM. JUD. SYS., www.ajs.org/ [perma.cc/2UFQ-TATG]; *see also* Richard Zorza, *Self-Represented Litigants and the Access to Justice Revolution in the State Courts: Cross-Pollinating Perspectives Toward a Dialogue for Innovation in the Courts and the Administrative System*, 29 J. NAT'L ASS'C ADMIN. L. JUDICIARY 63, 63 (2009).

influential Self-Represented Litigant Network (SRLN) in 2005.[162]

The report is a masterwork. It carefully establishes the existence and parameters of the problem and some common sense and simple solutions. In that regard, it seems like a relatively conservative document. But the concept of designing a "self-help friendly" court from scratch was radical then and remains radical now—where many judges, lawyers, and court administrators still assume that a "court process" will involve lawyers on both sides; and therefore pro se representation is an exception, not the norm. Zorza flipped the script here, and the solutions were thus much farther reaching and likelier to succeed.

Following these first three reports, state courts were off to the races. The ABA now lists forty-four different state committees or commissions dedicated to increasing access to justice (including organizations in Puerto Rico and the Virgin Islands).[163] The results have been breathtaking. NCSC offers a web page filled with research on self-represented litigants.[164] The SRLN offers a similar resource.[165]

State supreme courts all over the country have started to offer free, online forms that can be used by *pro se* litigants. California is the leader in this regard, with hundreds of forms available in multiple languages.[166] But California is hardly alone. For example, Tennessee has a court supported self-help website that offers pdfs that can be filled in online and used for uncontested divorces,[167] orders of protection,[168] and various defenses in

162. *See generally About SRLN—2020 Report*, SELF-REPRESENTED LITIG. NETWORK (Aug. 25, 2024), https://www.srln.org/node/21/about-srln [https://perma.cc/U7Z5-YJMJ]; *see Richard Zorza*, SELF-REPRESENTED LITIG. NETWORK (Aug. 25, 2024), https://www.srln.org/node/22/richard-zorza [https://perma.cc/Z3DK-HR38].

163. *See Access to Justice Commissions Directory and Structure*, A.B.A., https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/atj-commissions/commission-directory/ [https://perma.cc/M5Q4-XEK4].

164. *See Self-Represented Litigants*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/self-represented-litigants [https://perma.cc/QZP9-DUVU].

165. *See SRLN Publications*, SELF-REPRESENTED LITIG. NETWORK (Aug. 25, 2024), https://www.srln.org/node/1288/srln-publications [https://perma.cc/2QGT-2K8X].

166. *See Find Your Court Forms*, CAL. CTS., https://www.courts.ca.gov/forms.htm [https://perma.cc/DW8V-ETR5].

167. *Court-Approved Divorce Forms*, TENN. CTS., http://www.tncourts.gov/help-center/court-approved-divorce-forms [https://perma.cc/55UM-DWC6].

168. *Order of Protection Forms*, TENN. CTS., http://www.tncourts.gov/programs/self-help-center/forms/order-protection-forms [https://perma.cc/B477-D67F].

collection matters.[169] Tennessee is not unusual in this practice; the NCSC has a page with links to the court websites for every state, and forms can be found throughout.[170]

How does it work? The Tennessee site for divorces is fairly typical.[171] It has two different types of forms, for divorces with and without children. Either form requires the spouses to have agreed on the disposition and neither form is allowed if the divorce involves real property.[172] The simpler "no children" form has seven pages of instructions and twenty-six pages of forms.[173] The more complicated forms for divorces with children has eight pages of instructions and another thirty-two pages of forms.[174] The instructions walk the applicant through the various forms, explain what to expect in court, and answers some common questions. The applicant then fills out the necessary forms.

These forms are obviously not for everyone. The instructions and the form require some fluency in English, access to a printer, no real property, and—of course—the ability to agree on a divorce settlement. Most people get divorced because they have trouble getting along, so this is not a small barrier. That said, the forms are a quantum leap forward for self-represented litigants in several ways. First, the forms are "approved by the Tennessee Supreme Court as 'universally acceptable as legally sufficient.' This means that if the forms are filled out correctly all Tennessee courts that hear divorce cases must accept the forms."[175] Tennessee has ninety-five counties, and thus ninety-face different state courts. Before these forms were created and posted by the state Supreme Court, different courts would have different forms they accepted or no forms they accepted. With the stroke of a pen (and some drafting), the Supreme Court created forms that are meant to be used *pro se* and *must* be accepted in all ninety-five counties.

Second, if you can agree with your spouse, you can get divorced in Tennessee without a lawyer. Last, even if you can't agree on the terms, the

169. *Court-Approved General Sessions Civil Court Forms*, TENN. CTS., http://www.tncourts.gov/node/1436225 [https://perma.cc/SX4D-ASBH].

170. *State Court Websites*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/information-and-resources/state-court-websites [https://perma.cc/DLD9-TQLK].

171. *See* TENN. CTS., *supra* note 167.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

existence of these forms have emboldened online divorce sites like divorce.com and Tennessee Divorce Online to create cheap ways to come to an agreement and then use the existing forms for uncontested divorces.[176]

These forms can also be leveraged by lawyers, self-help centers, and legal aid societies. Lawyers can leverage the forms to provide cheaper services by narrowing the actual "legal work" to signing and filing paperwork and appearing in court. Legal aid societies can do the same. Self-help centers are not typically staffed by lawyers and have popped up to help *pro se* litigants in courthouses all over the country.[177] Help can be found in every state via Lawhelp.org.[178]

Courts have also gotten into the game. The Tennessee Access to Justice Commission penned a *Meeting the Challenges of Self-Represented Litigants: A Bench Book for General Sessions Judges*.[179] It includes many of the innovations championed by Richard Zorza.[180] After the pandemic many courts have started to allow remote appearances—saving litigants time and money.[181] Online dispute resolution has also grown as an alternative to small claims and other types of courts.[182]

ii. Legal Complexity

The current and continuing wave of reforms aimed at simplifying court processes and forms for use by *pro se* litigants is unmitigated good news and very heartening to anyone who has worked in the access to justice space. And yet, these efforts inevitably crash into a painful reality: much of the

176. *Divorce Mediation Tennessee*, TENN. DIVORCE ONLINE, https://www.tennesseedivorceonline.com/tennessee-divorce-services/divorce-mediation.html [https://perma.cc/89ND-GDQ9].

177. *See* NAT'L CTR. FOR STATE CTS., COURT-BASED SELF-HELP CENTERS: NATIONAL SURVEY FINDINGS, RECOMMENDATIONS, AND BEST PRACTICES *passim* (2023), https://www.ncsc.org/__data/assets/pdf_file/0016/92023/Court-Based-Self-Help-Centers-National-Survey-Findings-Reccomendations-and-Best-Practices23.pdf [https://perma.cc/53RE-KRKL].

178. *See About Us*, LAWHELP, https://www.lawhelp.org/about-us [https://perma.cc/3J6W-BPD9]; *see also Find Help By State*, LAWHELP, https://www.lawhelp.org/find-help [https://perma.cc/YP39-BUTB].

179. *See generally* BENCH BOOK FOR GENERAL SESSION JUDGES OF THE STATE OF TENNESSEE, TENNESSEE SUP. CT. ACCESS TO JUST. COMM'N (2013).

180. *See generally id.*

181. Honorable Bridget M. McCormack, *The Disruption We Needed: Accelerated Innovation in Courts and Access to Justice*, 99 N.Y.U. L. REV. 1, 13–15 (2024).

182. *See id.* at 5; *Online Dispute Resolution*, TYLER TECHS., https://www.tylertech.com/products/online-dispute-resolution [https://perma.cc/KNE2-9HFH].

complexity of American law is not procedural, it is *legal*. For example, even the "easy" form for a no kids, no real property, agreed divorce in Tennessee is twenty-seven pages long. Why? Because it is complicated to agree to separate assets between spouses even when they agree. Some of this legal complexity is just a reflection of a complex world. If you read through the divorce form it is very long because there are, in fact, a lot of issues to be decided when unraveling a marriage: debts, assets, salaries, and more.

Not all legal complexity is a reflection of a complex world, however. Some legal complexity is structural. Federalism adds complexity, as any particular legal issue may trigger a mix of federal, state, and even county or city laws. Administrative law adds complexity, as regulations and administrative processes join statutes as potentially relevant. Common-law courts and our reliance on precedent also add complexity. We have state, federal, and local laws and regulations as well as court cases interpreting these sources of law, typically all collected and published in separate areas and often written in confusing legalese or even Latin. Even *one* of these sources might be challenging to find and understand for an ordinary American. Taken together the complexity can seem hopeless.

Lawyers and courts contribute to an especially iterative and toxic version of legal complexity. The problem is that all too often, judges and lawyers focus on doing justice *ex post*; that is, looking back at the equities of particular cases. This encourages the creation and expansion of exceptions to rules or in many cases, the application of loose standards or multipart balancing tests that can be custom fitted to particular fact patterns.

This is, in some ways, the greatest strength of common-law courts: judges retain some flexibility to tailor the written law and precedents to a particular set of facts and to avoid results that seem unfair or at odds with the spirit, if not the letter, of the law. But in a system where judicial decisions are written and carry precedential value, there are significant costs to this flexibility. The most obvious costs are multiple exceptions to even the clearest of rules and the creation of multifactor balancing tests to handle the most mundane of legal tasks. These balancing tests and exceptions give judges immense discretion to adjust the law to reach a desired outcome on almost any set of facts. They also create a tremendous uncertainty in the system.

This uncertainty benefits judges because they have much more room to maneuver and reach decisions that fit their version of justice. It also suits

lawyers because the flexibility and uncertainty make hiring a lawyer, and a very good lawyer, critical to success. That drives business. This uncertainty helps drive the crisis in public faith in the justice system. It is not just that a litigant needs a lawyer to operate the system, the quality of the lawyer matters *significantly*. Given the difference in pay between a legal aid lawyer or a solo practitioner and corporate lawyers, it is little wonder that even litigants lucky enough to have a lawyer still feel outgunned when facing a wealthier opponent.

This sort of complexity is baked into the system and much harder to even describe, let alone remedy. Nevertheless, simplifying procedure and offering access to law will only go so far.

CONCLUSION

The LP revolution is well meaning and hopeful. Insofar as it is presented as just part of an access to justice strategy and does not distract from more promising avenues, then Godspeed. That said, proponents should go forward with the understanding that these programs, and any programs that focus on individual humans doing more individual legal work for the poor and middle-class, are doomed to fail. We need to encourage simplification and routinization of American legal work through technology. If LPs can help accomplish this goal, all the better. In the much likelier event that they will practice law in a manner similar to existing main street lawyers, except with less training and more limitations, we need to keep looking for solutions.