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19TH ANNUAL ROTHGERBER CONFERENCE—TOWARD A CONSTITUTIONAL RIGHT OF ACCESS TO JUSTICE: IMPLICATIONS AND IMPLEMENTATION

ARTICLES

MARIJUANA AT THE CROSSROADS

ARTICLES

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DOING JUSTICE TO LAW: AND WHAT JUSTICE ROTHGERBER PARTICIPANTS *DID* TO LAW

KAREN A. LASH[†]

Ms. Lash gave the keynote presentation at the November 4, 2011 Rothgerber Conference. In it she challenged those present to report in 100 days on what they had done to advance a justice goal—"what one thing that has been inspired, catalyzed or planned at this conference." What follows is the speech, with an epilogue summarizing the fruits of the 100-day challenge.

Thank you Deborah [Cantrell] for your generous words, which mean so much coming from you. Thanks too to Colorado Law Professor Melissa Hart, director of the Byron White Center for the Study of American Constitutional Law, for organizing what is already an amazing Rothgerber Conference.

It's a particular privilege to be here in the high altitude at the top of our profession, swapping ideas with folks from the Colorado Access to Justice Commission,[1] the Universities of Colorado and Denver, state and federal government, private attorneys, the legal academy, judiciary, and local and national advocacy organizations. If it takes a village to raise the bar for access to justice, the villagers here are the ones to do it.

I was deeply honored when Melissa called inviting me to join this impressive gathering of leading thinkers. I asked her what kind of a conference it would be—more of a think tank-like gathering, an academic fountain of ideas, or more of a "do tank," to hammer out concrete plans for what to *do* She answered, "both." My remarks, therefore, center on how people in the business of thinking translate their ideas into action. First, I'll describe how our office—the US Department of Justice's Access to Justice Initiative—is translating ideas to actions; then, I'll invite us all to "do" something new to get the ideas generated here out of the room and into the streets.

I say "something new" with humility, recognizing that each of you are *already* doing so much to support local and national efforts that provide critical and often life-changing legal services to those who cannot afford them.

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† Senior Counsel for the U.S. Department of Justice Access to Justice Initiative.

1. For more information on the Colorado Access to Justice Commission, see *Access to Justice Commission*, COLO. BAR ASS'N, http://www.cobar.org/page.cfm/ID/20129/ (last visited Dec. 18, 2012).

Moreover, if what Melissa had in mind was someone to bark out a rallying cry from the ramparts, I fear she'll be disappointed because I don't have that skill. Instead, I speak as a first-rate noodge, a Yiddish term for kind of a pest derived from Polish words for fretting and aching, but not quite as bad as a nudnik. Some of you know this about me first hand. Having never thought much of "don't ask, don't tell" in any form, I'll be making a noodgy ask before lunch is over. I'll challenge each of us to just DO something, just a little something more than what we *do* now.

First, I'll talk about what the ATJ Initiative is doing. Our office, the brainchild of the President and Attorney General Eric Holder, opened in March 2010, led by the legendary Larry Tribe. More recently, Mark Childress stepped in as our new Senior Counselor.

Mark has spent most of his professional life learning how both the executive and legislative branches of government work—working for Senators Daschle and Kennedy and most recently as acting General Counsel for Health & Human Services. This man knows where the federal levers are, how—as he is fond of saying—to use the inertia inherent in bureaucracy to our advantage, and how to find ways to fold access to justice considerations into government processes and procedures wherever possible.

We have focused on studying and improving civil legal assistance to poor people as well as the closely-related crisis in indigent defense—two small, manageable tasks for a staff of six. But even without a grant-making budget or any enforcement authority, we've discovered that other useful tools came with our little office in the main building of the Department of Justice: a bully pulpit; mechanisms to convene and connect players; access to Department of Justice policy makers like the Solicitor General and Office of Legislative Affairs, as well as to other federal agencies that might consider spending *their* grant dollars to increase access to justice; and the ability to inject ATJ perspectives in the more than a dozen inter-agency working groups on which we serve. All these levers combined, it turns out, can nudge—or noodge—us as a country closer to the national ideals of justice for all.

On the defender side we're working to help states develop high-quality indigent defense systems. That includes working to expand research and data on delivery systems, and to increase funding, training, technical assistance, and other support for defender programs.[2]

One recent example involves a new partnership with our office, the Bureau of Indian Affairs, the Federal Public Defenders, and the Execu-

2. For specific examples, see *Attorney General Eric Holder Speaks at the American Bar Association's National Summit on Indigent Defense*, U.S. DEP'T OF JUSTICE (Feb. 4, 2012), http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html.

tive Office for U.S. Attorneys to organize the first tribal court trial advocacy program for tribal defenders, prosecutors, and judges. This historic Rapid City training was so successful that five more are now planned in Arizona, Mississippi, Montana, Oklahoma, and Washington.

On the civil side, we're supporting development of quality civil legal aid systems.

One recent example of using the bully pulpit to this end occurred just a few weeks ago, when we gathered at the White House to honor sixteen remarkable advocates from across the legal profession whom President Obama had designated as "Champions of Change,"[3] including the Brennan Center's Laura Abel,[4] who is here today.

These champions engaged in a dialogue with the Attorney General based on questions posed by law professors and law students across the country about their work helping families facing foreclosure, addressing civil rights violations, and improving court access for people with limited English proficiency. Watching live on-line were students, staff, and faculty at 118 law schools—including both Colorado and Denver—bringing thousands together for a conversation that reflected how much this Administration values public interest legal work and seeks to encourage and support the next generation of public interest lawyers.

We're also working hard to preserve existing funding and unlock *new* funding streams, also known as noodging other agencies to spend their grant dollars with ATJ in mind.

The latest example involves working with the Department of Labor on their job-training grants to help people with criminal records get jobs and generally rejoin their communities. The Department of Labor has agreed to allow, and even encourage, using these job-training grant funds to include legal services. The idea is that even the best job-training program works better if a man who goes through the training can get his record expunged, or get back his revoked drivers license, so he can get to the interview and have a better chance at getting the job. Along the same lines, modifying his child support order to reflect unearned dollars while in prison could leave him enough money to pay his rent.

A "before" and "after" demonstration at our meeting with the Department of Labor vividly showed the difference a little lawyering can make. Here's the rap sheet of a client of New York's Center for Community Alternatives before getting legal help. Under New York law, employers can't ask about arrests that did not lead to criminal convictions.

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3. For a video recording of this event, see *Champions of Change: Closing the Justice Gap in America*, YOUTUBE (Oct. 13, 2011), http://www.youtube.com/watch?v=0vnKy9RH1wg.

4. For a post detailing the work Ms. Abel was being recognized for, see Laura Abel, *Holding Our Nation to Its Promise*, THE WHITE HOUSE (Oct. 21, 2011), http://www.whitehouse.gov/blog/2011/10/21/holding-our-nation-its-promise.

Yet his report had old arrests that went no further, and the all-important box indicating "Yes" or "No" to a police record says "Yes." Here's the same guy's rap sheet after a lawyer removed the information that isn't allowed under New York law—the box accurately changed to "No," a change that should help give this job-trained applicant a better chance at a new life. Legal help, here, could make the difference for one man and over scores of clients and grants, a program's success. Now, when new Department of Labor reentry job-training programs grant solicitations are released, we'll make sure the word gets out so that legal services programs and their local potential partners know they are eligible and encouraged to include legal services in their grant applications.

We will continue to pursue this strategy aggressively since we believe there are other federal government safety-net programs that could also work better with legal aid lawyers on the team.

These are just a few of the strategies we've learned we can do during our brief tenure. They make some small headway in closing the justice gap, but we can't do it alone. As Uncle Sam has said before, "We need you." Indeed, our work depends on what you do—your research, your pilot projects, your lessons learned, your new court rules, such as Colorado's recent rule enabling unbundling services, your new clinics, all of it.

That's the soft transition from the talking to the noodging. If Melissa and the other conference planners took full advantage of the extraordinary talent and expertise in this room, you'd all commit to doing something extra to close the justice gap. Given who is here, and the conversations underway, identifying the "*what* to do" prospects is pretty easy.

- Steve Scudder[5] is prioritizing the big pro bono ideas just amassed at the ABA's Pro Bono Summit in Colorado—well represented by Justice Hobbs and Jonathan Asher—and needs help.

- The *Turner v. Rogers*[6] panel wants help thinking through and implementing their ideas for a post-*Turner* strategy so we can ensure self-represented litigants actually get meaningful access. In fact, I'll digress from the "what-to-do" prospects to make an offer of the sort we hope you'll be making. Thanks in large part to the human catalyst Richard Zorza[7], our office and the Health & Human Services Office of Child Support Enforcement—represented today by Nancy Thoma Groetken—

5. Steven Scudder is counsel for the ABA Standing Committee on Pro Bono and Public Service. For more information, see *Staff*, ABA CTR. FOR PRO BONO EXCHANGE, http://centerforprobono.wordpress.com/about/staff/ (last visited June 3, 2012).

6. 131 S. Ct. 2507 (2011).

7. Richard Zorza is an attorney and independent consultant who has worked for the past fifteen years on issues of access to justice. He is the coordinator of the national Self-Represented Litigation Network and his own blog, Richard Zorza's Access to Justice. *See* ACCESS TO JUSTICE BLOG, http://accesstojustice.net/ (last visited June 3, 2012).

have launched an interagency working group to develop a federal strategy to address the marching orders in *Turner*. *Turner* panelists, I took lots of notes and hope and expect we can do something together.

- Jeff Selbin[8] will talk about his work with Becky Sandefur studying the "clinic effect" and hope academics will take that information back to present to their faculties.

- The Cause Lawyering panel needs help with their campaign for Cause Lawyering course offerings at more law schools.

- The Research panel will make the case for plugging the research gap. A sustainable organized research capacity hasn't existed since 1981 when the LSC Research Institute run by Alan Houseman[9] had to shut its doors.

- David Udell[10] wants partners to figure out what measures should be used to tell us if our legal systems are delivering justice, and what methodology should be used to establish best practices.

- Alan Houseman will ask us to enroll the business community in the access to justice cause.

I hope these ideas and many more will be translated into action and advanced in the Operationalizing panel. There will be no shortage of excellent to-do options from which to choose.

Along the way, as you decide just what task to embrace, keep in mind the words of the Nike commercial, "Just do it." Nike, after all, is the Greek goddess of victory. Or, more directly on point, is JFK's famous charge to late twentieth century idealists asking what you can *do* for your country, not what your country can do for you. If you are more inclined toward the non-governmental sector, remember the words of Dr. Martin Luther King, celebrated not just for his dream but for the things he *did* to move towards making that dream reality. He said, "The time is always right to *do* what is right." In the same spirit, death-penalty activist Sister Helen Prejean said in her contribution to NPR's *This I Believe* series, "The only way I know what I really believe, is by keeping watch over what I *do*."

In the spirit of the words of these giants, let me begin to noodge.

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8. Jeffrey Selbin is Faculty Director of East Bay Community Law Center and Clinical Professor of Law at the University of California, Berkeley, School of Law. *Berkeley Law—Faculty Profiles*, UNIV. OF CAL., BERKELEY, SCH. OF L., http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=780 (last visited June 3, 2012).

9. Alan Houseman is the Executive Director of The Center for Law and Social Policy (CLASP). *Experts: Alan W. Houseman*, CLASP, http://www.clasp.org/experts?id=0006 (last visited June 3, 2012).

10. David Udell is Director of The National Center for Access to Justice and Visiting Professor from Practice at Cardozo Law School. *Staff*, NAT'L CTR. FOR ACCESS TO JUST., http://www.ncforaj.org/home/staff (last visited June 3, 2012).

Last September a *New York Times* article, *Making Change Happen, on a Deadline*,[11] described how the World Bank uses a strategy called Rapid Results to achieve big goals in just 100 days. From Nicaragua to villages in Ghana and Sierra Leone, local NGOs tripled the number of people who got tested for HIV, quintupled the use of family planning services, and improved local infrastructure by digging wells and building schools. Apparently the Rapid Result technique works because deadlines, motivation, and confidence are often more important than technology and money.

Today, all I'll ask you to do for your country is answer an email about your Rapid Result. In 100 days, I'm going to send each of you an email asking about your version of Rapid Results. What did you advance—what one thing that has been inspired, catalyzed, or planned at this conference. We'll collect your response, and depending on what we get, we'll find ways to use it. It could be in speeches, ideas introduced to a relevant interagency working group or shared at conferences, or an entry for the Department of Justice blog about what you've done, what you've learned about what you've done, and what next steps you've planned.

Looking at the people in this room makes me optimistic that we really can close the justice gap, as long as we don't give in to cynicism or to the temptation to not try and give up. Recall the last time you sat through a meeting, and someone said "we can't do that because we've never done it before," and a few minutes later, someone else said, about the same thing, "we tried that and it didn't work." Our job, all of us in the profession of protecting and preserving justice, is to fight off cynicism with the same strength and ingenuity that we fight injustice. I think we'll be amazed by what can happen, in just 100 days.

To put a new spin on a popular bumper sticker, "shift happens," even when all the instruments we have predict that shift is impossible.

- Six states and the District of Columbia, where I live, shifted toward marriage equality, allowing me to marry the woman I now call my "wife."

- Technology shifted transportation into the very skies, as my wife and I learned last summer on a beach vacation in the Outer Banks. People said the Wright Brothers would never achieve powered air flight. But they did. And only sixty-five years after the Wright Flyer took flight—really, it was the equivalent of a bike with a little motor and wings—the Apollo 11 landed on the moon.

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11. Tina Rosenberg, *Making Change Happen, on a Deadline*, N.Y. TIMES—OPINIONATOR (Sept. 29, 2011, 7:55 PM), http://opinionator.blogs.nytimes.com/2011/09/29/making-change-happen-on-a-deadline/.

• Justice shifts too. Before 1963 few lawyers dared to imagine that federal constitutional law would compel counsel for every indigent criminal defendant facing possible jail time. But *Gideon v. Wainwright*[12] happened.

Every day when my colleagues and I begin our work shifts by walking into the Department of Justice, we see photos of President Obama and Attorney General Holder. Every day, those pictures remind us that while U.S. race relations remain troubled in many ways, seismic shifts have also happened. Despite persistent gaps between law on the books and law in action—not to mention ideals and everyday life—shifts continue to happen. I'll press my "shift" key in 100 days as I type my emails noodging you about what kind of justice you've done on your to-do list lately. I look forward to weaving those deeds together and sharing what we are all doing to achieve the fundamental promises of our country.

Thank you.

EPILOGUE: THE FRUIT RIPENED 100-DAYS LATER

> I was really enjoying Karen's keynote remarks until I realized that there would be a homework assignment. And not just any homework assignment. But one that is going to blow up on me in 100 days. That said, you have to like the urgency that comes with that kind of call to action.[13]

100 Days Later: Advancing Access to Justice Through the Courts

A cornucopia of fruitful judicial efforts emerged from the 100-day challenge issued at the Rothgerber conference:

• Judge Daniel Taubman, as part of his service on the Commission on the Legal Profession's working group dealing with access to justice and pro bono issues, proposed recommendations, including the need for a secure funding source for Colorado Legal Services, increased pro bono efforts through voluntary or mandatory pro bono reporting, increased support for the Judicial Branch's efforts to obtain funding for pro se centers, and improved access to justice for moderate income people by linking them with recent unemployed law school graduates.[14] Thanks in part to judicial noodging over the last 100 days, the Colorado Bar Association's Board of Governors approved a resolution recommending that the

12. 372 U.S. 335 (1963).

13. University of Colorado Law School Professor J. Brad Bernthal, speaking at the Rothgerber Conference

14. Email from Judge Daniel Taubman, Colo. Court of Appeals, to author (Feb. 24, 2012) (on file with author).

Colorado Supreme Court allocate some attorney registration fees to support Colorado Legal Services for the next two years.[15]

• Additional noodging from the bench and bar over the last 100 days enabled Justice Greg Hobbs to report record high pro bono activity.[16] A whopping 160 Colorado firms achieved the Rule of Professional Conduct 6.1 goal of fifty hours of pro bono legal services per attorney in 2011, with 209 firms now appearing on the Colorado Supreme Court's pro bono commitment list.[17] The end of year surge is a significant increase since 2008 when 109 firms appeared on the commitment list, eighty-three of which achieved the goal.

• Justice Hobbs sent the above pro bono report as he left for Fort Collins to participate in the local Larimer Bar Association's pro bono recognition ceremony, the first of a series with judicial support that will be held around the state through June.

David Udell and Laura Abel[18] of the National Center for Access to Justice also focused on court-based advancements:

• In partnership with New York Unified Court System, the Center submitted a funding concept paper titled *Representation Counts to the State Justice Institute*. If funded, the partners would work together to systematically review the status of unrepresented litigants in the courts, research the approaches used by other states, and use that information to improve the delivery of services in New York.[19]

• The Center published a *National Law Journal* op-ed calling for a national Justice Index, advancing the idea promoted by Rothgerber presenters James Greiner, Becky Sandefur, Laura Abel, David Udell, and others that we need more data about who has access to what types of justice (as well as where, when, and under what circumstances).[20] The Justice Index will use data to "illuminate the performance of state[-]based justice systems in delivering justice," while highlighting the need for increased funding and other reforms.[21]

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15. *See* Sara Crocker, *CBA Board of Governors Support Request to Courts to Provide Emergency Funding to Legal Aid*, CBA LEGAL CONNECTION (Feb. 23, 2012), http://cbaclelegalconnection.com/2012/02/cba-board-of-governors-support-request-to-courts-to-provide-emergency-funding-to-legal-aid/.

16. Email from Justice Gregory Hobbs, Colo. Supreme Court, to author (Feb. 27, 2012) (on file with author).

17. *Colorado Supreme Court Pro Bono Legal Service Commitment and Recognition Program RPC 6.1*, COLO. ST. JUD. BRANCH (February 27, 2012), www.courts.state.co.us/Courts/Supreme_Court/Pro_Bono.cfm.

18. Since the Rothgerber Conference, Laura Abel joined the National Center for Access to Justice as Deputy Director. *Staff*, *supra* note 10.

19. Laura Abel, *100 Days Promoting Access to Justice*, NAT'L CTR. FOR ACCESS TO JUST. (Feb. 29, 2012, 9:54 AM), http://www.ncforaj.org/home/news/100dayspromotingaccesstojustice.

20. *See* Cara Anna and David Udell, *We Need a National Justice Index*, NAT'L L.J. (Dec. 5, 2011), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202534218778&slreturn=1.

21. Abel, *supra* note 19.

• The Center is bringing together experts on performance measurement and advocacy for a panel conversation at the May 2012 Equal Justice Conference to further promote the use of data to illuminate access to justice in the courts. The panel will include representatives from the Florida courts, the World Justice Project, Jacksonville Legal Aid, and the Center, itself, to discuss the latest approaches to using the tools of performance measurement to increase access to justice.

Michael Millemann, University of Maryland Jacob A. France Professor of Public Interest Law, addressed both civil and criminal justice problems in the courts in three ways:[22]

• As a member of the Maryland Access to Justice Commission and as chair of its self-represented litigant subcommittee, Professor Millemann applied the Rothgerber discussion about removing access barriers to repairing rules authorizing unbundled representation with the goal of approval by the Maryland Court of Appeals this fall.

• His subcommittee is working to launch an unbundled representation pilot project that will utilize empirical evaluation to build in an assessment tool.

• As chair of the Office of Public Defender's Board of Trustees, Professor Millemann is working with the office to implement a new policy that will require legal representation at 180,000 bail hearings a year.[23]

Richard Zorza, consultant and coordinator of the national Self-Represented Litigation Network, led an effort to establish decision protocols for what's known as the "triage"[24] process:[25]

• Focusing on how court-based self-help centers decide who gets what help, Mr. Zorza assembled a group that included several Rothgerber participants to draft a set of triage "principles" to determine how a court

22. Email from Professor Michael Millemann, Univ. of Md. Jacob A. France Professor of Pub. Interest Law, to author (Feb. 24, 2012) (on file with author).

23. *Cf.* Tricia Bishop, *Appeals Court Ruling Requires Lawyers at Bail Hearings*, BALT. SUN (Jan. 4, 2012), http://articles.baltimoresun.com/2012-01-04/news/bs-md-public-defenders-20120104_1_public-defender-appeals-court-hearings (discussing the response on behalf of the Maryland Office of the Public Defender's to a court opinion requiring legal representation during bail hearings).

24. Triage is a word used to describe processes designed to make sure that those in need of access to justice most efficiently obtain the services they need to achieve such access, and that they are directed to the processes in the court itself that help ensure speedy, appropriate and fair resolution. For more information about triage, see generally Richard Zorza, *The Access to Justice "Sorting Hat": Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 DENV. U. L. REV. 859 (2012); Thomas M. Clarke and Victor E. Flango, *Case Triage for the 21st Century*, NAT'L CTR. FOR ST. COURTS (2011), *available at* http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1847.

25. Email from Richard Zorza, consultant and coordinator of the Nat'l Self-Represented Litigation Network, to author (Feb. 25, 2012) (on file with author).

should treat a case with a self-represented litigant, as well as to decide what services should be provided to litigants to navigate the court track.[26]

100 Days Later: Advancing Access to Justice at Law Schools

University of Colorado Law School continued its leadership role from the Rothgerber conference:

• J. Brad Bernthal, Associate Clinical Professor of Law in the Entrepreneurial Law Clinic (ELC), is developing a model for Colorado "deal attorneys"—especially in-house attorneys—to expand *pro bono* transactional assistance for startups and micro-entrepreneurs in Colorado's Front Range. The ELC is currently in the feasibility analysis stage, tapping the talent of spring 2012 students who are interviewing Colorado deal attorneys to measure interest in participation and to identify barriers that currently frustrate pro bono participation. ELC students are also reaching out to other organizations currently involved or potentially interested in transactional pro bono services.[27]

• Deborah J. Cantrell, Associate Professor and Director of Clinical Education University of Colorado Law School, is spearheading efforts to get a new low bono network set up as a collaboration between the law school, the Boulder County Bar Association, and individual lawyers in Boulder County who are already experimenting with low-bono or unbundled services. Modeled on the version of the Law School Consortium Project developed at the University of Maryland, and with coaching from Rothgerber presenter Professor Millemann, the network's nascent planning team predicts it will be open to any Boulder County attorney, offering research assistance and other support from Colorado law to network attorneys doing low bono or unbundled work.

• Melissa Hart, Associate Professor and Byron White Center for the Study of American Constitutional Law Director, reports that the White Center started an access to justice initiative to accomplish the following: (1) launch a new mentoring program that partners a law student, a recent graduate, and a more senior lawyer in a one-year mentoring group to, among other things, take at least one pro bono case; (2) develop the Colorado Law Faculty Pro Bono Push, asking Colorado Law faculty to take on one pro bono case and to work with students on that case; and (3) start a pro bono pairing project that will partner current students with senior attorneys to work on pro bono cases. The Byron White Center will offer

26. *See* Richard Zorza, *A New Cut at Triage Principles*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (Feb. 28, 2012), http://accesstojustice.net/2012/02/28/a-new-cut-at-triage-principles/.

27. Email from Professor J. Brad Bernthal, Assoc. Clinical Professor of Law in the Entrepreneurial Law Clinic at the Univ. of Colo. Law Sch., to author (Feb. 24, 2012) (on file with author).

support including assistance in finding pro bono cases, free continuing legal education, and help with pro bono case-related questions.[28]

Making an East Coast push to increase access to justice in law schools, David Udell and Laura Abel of the National Center for Access to Justice[29] found new ways to engage law students:

- Joining with the U.S. Department of Justice Access to Justice Initiative, the Center worked with the recently re-opened 9/11 Victim Compensation Fund to help create a law student pro bono program that will rely on students to help 9/11 victims file their applications for awards from the fund.

- The Center's staff are teaching a new course at Cardozo Law School this spring, *The Justice Gap, Strategies for Delivering on the Promise of Equal Justice in American Courts,* that incorporates ideas gleaned from several Rothgerber presenters who spoke about integrating access to justice themes into the law school curriculum.[30]

Out on the West Coast, Luz E. Herrera, Thomas Jefferson School of Law Assistant Professor, reports on new incubator projects:[31]

- A favorable December faculty vote on her proposed Attorney Incubator project signals her school's commitment to support new graduates who provide unbundled legal services at affordable fees. Plans for after the Attorney Incubator launch include a new law school based self-help center that operates in the evenings and on Saturdays when the courts and legal aid offices are closed.

- Talk of the need for innovative pro bono models prompted Professor Herrera to work over the last 100 days to apply the incubator model to Community Lawyers, Inc., a nonprofit she co-founded in Compton, California.[32] She has laid the groundwork to build an attorney support program for recently unemployed graduates and underemployed lawyers who provide client education and pro bono consultations, in exchange for a network that reduces their isolation and helps them build their practice.

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28. Email from Professor Melissa Hart, Assoc. Professor at the Univ. of Colo. Law Sch. and Dir. Of the Byron White Ctr. for the Study of Am. Constitutional Law, to author (Feb. 24, 2012) (on file with author).

29. Email from David Udell, Dir. of The Nat'l Ctr. for Access to Justice, to author (Feb. 22, 2012) (on file with author).

30. *See* David Udell, *Spring 2012, Justice Gap Seminar, Cardozo Law School,* NAT'L CTR. FOR ACCESS TO JUST. (Nov. 11, 2011, 4:15 PM), http://www.ncforaj.org/home/events/spring2012justicegapseminarcardozolawschool (containing a description of the course).

31. Email from Professor Luz E. Herrera, Assistant Professor at the Thomas Jefferson Sch. of Law, to author(Feb. 25, 2012) (on file with author).

32. For more information, see COMMUNITY LAWYERS, INC., www.community-lawyers.org (last visited Dec. 18 2012).

100 Days later: Closing the Research Gap

D. James Greiner, Harvard Law School Assistant Professor, used the Rothgerber Conference as a forum for getting feedback on research projects he was considering:[33]

• Thanks to positive feedback from Rothgerber participants, Professor Greiner spent many of his last 100 days pursuing projects to assess the effectiveness of free financial counseling and advice versus an offer of a free attorney-client relationship when a consumer is sued in debt collection litigation. Given the congressional mandate in recent bankruptcy legislation that individuals filing for certain kinds of bankruptcy certify that they have undergone counseling, he hopes to learn whether such counseling actually improves the lot of a consumer with troubled finances, or whether the counseling requirement serves as a barrier to the discharge of burdensome debt.

Jeffrey Selbin, Berkeley Law Clinical Professor, got the evidence-based message:[34]

• Challenged by the repeated admonitions from Rothgerber panelists to learn more about what we do and what works, Professor Selbin completed an essay (with co-authors) arguing for more and better research in clinics and legal services.[35]

These many reports, research projects, policies, and classes show what a difference 100 days can make. The innovations pursued with such determination show how right Margaret Mead was when she observed that a few talented, dedicated people can change the world.[36]

33. Email from Professor D. James Greiner, Assistant Professor at Harvard Law Sch., to author (Feb. 22, 2012) (on file with author).

34. Email from Professor Jeffrey Selbin, Clinical Professor at the Univ. of Cal., Berkeley, Sch. of Law, to author (Feb. 24, 2012) (on file with author).

35. *See* Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45 (2012), http://yalelawjournal.org/images/pdfs/1099.pdf.

36. *See, e.g.*, Jone Johnson Lewis, *Margaret Mead Quotes*, ABOUT.COM, http://womenshistory.about.com/cs/quotes/a/qu_margaretmead.htm.

TURNER V. ROGERS AND THE RIGHT OF MEANINGFUL ACCESS TO THE COURTS

LAURA K. ABEL†

The Supreme Court's opinion last term in *Turner v. Rogers* was a new take on an old question: what is meaningful access to the courts, and how do we know when a litigant has it?[1] In *Turner*, a man sent to prison for a year for civil contempt for willful failure to pay court-ordered child support claimed that his due process rights had been violated because he lacked legal representation at his contempt hearing.

The Court held that a litigant does not have meaningful access to the courts if all he can do is file initial papers or walk into the courthouse door. Rather, the Court held, for a litigant to have meaningful access, he must be able to identify the central issues in the case and present evidence and arguments regarding those issues.[2] In so holding, the Court implicitly rejected the definition of meaningful access used by the Court in its 1996 opinion *Lewis v. Casey*,[3] which encompassed only the ability to present grievances to the Court, and embraced a broader definition from its 1977 opinion in *Bounds v. Smith*[4] that litigants must be able to engage in "an adversary presentation." This portion of the opinion thus holds promise for a reinvigorated federal constitutional role in ensuring that people who lack counsel nonetheless are able to participate meaningfully in their civil cases.

At the same time, the Court's application of its meaningful access standard threatens to rob that standard of any real meaning. The Court adopted a suggestion by a nonparty, presented for the first and only time in a Supreme Court amicus brief, that civil contempt defendants can obtain meaningful access to the courts if they are provided with minimal assistance: a notice identifying the ability to pay as the central issue in the case, a form requesting information about their ability to pay, a hearing at which they are questioned about the information on the form, and a finding on whether the defendant had the ability to pay.[5] The Court's embrace of this extra-record information resembles the Court's analyses of the abilities of pro se litigants in two other cases, *Lassiter v. Department of Social Services*[6] and *Walters v. National Association of Radia-*

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1. Turner v. Rogers, 131 S. Ct. 2507 (2011).
2. *See* discussion *infra* Part II.
3. 518 U.S. 343, 346 (1996).
4. 430 U.S. 817, 826 (1977).
5. *See* discussion *infra* Part III.
6. 452 U.S. 18 (1981).

tion Survivors,[7] which likewise rely on the Justices' intuitions regarding the abilities of pro se litigants, even in the face of evidence to the contrary.

This Article proceeds as follows. Part I describes the Court's opinion in *Turner* and how the legal academy has reacted to it so far. Part II describes the Court's holding regarding the definition of meaningful access, compares that definition to the definitions used in *Lewis* and *Bounds*, and posits that what emboldened the *Turner* Court to broaden the right of meaningful access were innovations in pro se assistance that are cheaper than providing counsel. Part III describes how the *Turner* Court relied on facts not in evidence to conclude that measures short of counsel could provide meaningful access to the courts, notes that appellate courts generally do not rely on extra-record evidence, and points to similarities between the Court's treatment of the facts in this case and in *Lassiter* and *Walters*. Finally, the Article concludes that the only way to make the meaningful access standard meaningful is for the courts to rely on empirical evidence regarding the capabilities of pro se litigants.

I. THE *TURNER* OPINION

In *Turner*, the Court considered the plight of Michael Turner, who spent a year in prison for civil contempt for failure to pay child support.[8] He had no lawyer at his civil contempt hearing.[9] Mr. Turner argued that his due process rights were violated when he was incarcerated for over a year without being represented by counsel.[10] Justice Breyer, writing for a five-justice majority, held that Mr. Turner did not have a categorical right to counsel under the federal Constitution.[11] The Court applied the *Mathews v. Eldridge*[12] test for due process violations, which considers:

> (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]."[13]

The Court acknowledged that the first factor "argues strongly" in favor of the appointment of counsel because Mr. Turner faced the potential loss of his liberty.[14] However, the Court held that the second factor weighed against appointment of counsel because the "critical question," which the Court identified as the defendant's "ability to pay," is often

7. 473 U.S. 305 (1985); *see* discussion *infra* Part III.
8. Turner v. Rogers, 131 S. Ct. 2507, 2513 (2011).
9. *Id.*
10. *Id.* at 2515–16.
11. *Id.* at 2520.
12. 424 U.S. 319 (1976).
13. *Id.* at 2517–18 (quoting *Eldridge*, 424 U.S. at 335).
14. *Id.* at 2518.

"straightforward" when "the right procedures are in place."[15] To identify those procedures, the Court relied on a suggestion by the Solicitor General, appearing as amicus curiae, that:

> Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.[16]

The Court also held that the second and third *Mathews* factors weighed against appointing counsel because Rebecca Rogers, the mother of Mr. Turner's child and his opposing party, lacked representation, so that "[a] requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would 'alter significantly the nature of the proceeding.'"[17] In fact, the Court concluded, providing Mr. Turner with counsel "could make the proceedings *less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive."[18]

To some observers, the decision holds the promise of expanded access to the courts.[19] For instance, if the Court relies on *Turner* to hold that there is a right to counsel in civil cases in which there is counsel on the other side, or in which the government is on the other side, then the case may ultimately be viewed as expanding the right to counsel in civil cases.[20] Additionally, *Turner* may come to be seen as requiring trial courts to provide unrepresented litigants with assistance short of full representation, such as forms, information about court processes, and questions from the bench about essential issues.[21]

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15. *Id.* at 2518–19.

16. *Id.* at 2519.

17. *Id.* at 2519 (quoting Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973)).

18. *Id.*

19. *See, e.g.*, Richard Zorza & David Udell, *A Final* Turner *Post From Your Co-Hosts*, CONCURRING OPINIONS (June 28, 2011, 12:20 PM), http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers; Jeanne Charn, Turner v. Rogers, CONCURRING OPINIONS (June 27, 2011, 7:07 PM), http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-2.html.

20. *See* Mark Noferi, *'Turner' Could Support Appointed Counsel for Immigrants*, 246 N.Y. L.J. 15, (2011) ("In short, although the Court sidestepped arguments regarding immigrant detainees, its reasoning might one day support a groundbreaking right to counsel for immigrants detained pending deportation proceedings . . . .").

21. *See* Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of* Turner v. Rogers, JUDGES' J., Fall 2011, at 16, 16 ("Before *Turner*, it was not yet fully settled for all whether judges can appropriately intervene in such civil cases. After *Turner*, the issues are when must they do so, and how they can most effectively do so in the situations in which they are either required or choose to intervene."); Michael Millemann, Turner—*Implications for Civil Gideon, the Use of Unbundled Legal Services to Provide Access, and the Lawyers' Practice Monopoly*, CONCURRING OPINIONS (June 26, 2011 8:28 PM),

The *Turner* opinion has also been criticized on many grounds. It represents a dangerous incursion into the principle that people should not be sent to prison until they have had the benefit of a lawyer making the strongest possible case for their freedom.[22] It understates the difficulty of the willfulness determination at the heart of the case, in part by characterizing the central issue as "ability to pay," not willfulness.[23] The Court's claim that providing Mr. Turner with a lawyer would make the proceeding less fair is odd, given that the judge is the ultimate decider of the facts and the law, whether or not there is a lawyer.[24] And, the Court did not adequately acknowledge that while Mr. Turner's freedom was at stake his opponent's was not, a situation that could justify providing representation to him but not her.[25] In Part III below, this Article describes another flaw in the decision: the Court's reliance on facts not in the record to determine the level of assistance that unrepresented litigants need in order to have meaningful access to the courts.

II. *TURNER* HOLDS THAT LITIGANTS MUST BE ABLE TO IDENTIFY CRITICAL ISSUES AND PRESENT RELEVANT EVIDENCE FOR ACCESS TO BE MEANINGFUL

The *Turner* Court held that while Mr. Turner did not necessarily have a right to counsel, he did have a right to meaningful access to the courts, and that the right had been violated in his case. Specifically, the Court held, Mr. Turner should have been provided with notice that the key issue in his case was whether he was able to pay child support, a form eliciting relevant information about his ability to pay, and a hearing at which he could answer any remaining questions about his ability to pay.[26] Thus, the Court held that in order for Mr. Turner to have meaningful access, he should have been able to identify the critical issues in his case and present relevant evidence regarding those issues.

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http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers ("[D]epending on the three *Mathews* factors, some of the forms of limited assistance that many legal services projects provide to indigent litigants in family law cases may be constitutionally required in some of those and other civil cases, thus validating the access to court right.").

22. Joy Moses, *With* Turner, *Access to Justice Efforts Must Expand*, CONCURRING OPINIONS (June 27, 2011 4:39 PM), http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers.

23. Norman Reimer, Turner v. Rogers: *The Right to Counsel Haunted by the Ghost of* Gagnon, CONCURRING OPINIONS (June 27, 2011, 4:51 PM), http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-the-right-to-counsel-haunted-by-the-ghost-of-gagnon.html; John Pollock, Turner v. Rogers: *Why the Supreme Court Is a Day Late and a Dollar Short*, CONCURRING OPINIONS (June 22, 2011, 6:05 PM), http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-why-the-supreme-court-is-a-day-late-and-a-dollar-short.html#more-46984.

24. Bruce Green, *A Professional Responsibility Perspective on* Turner v. Rogers, CONCURRING OPINIONS (June 22, 2011, 8:45 PM), http://www.concurringopinions.com/archives/2011/06/a-professional-responsibility-perspective.html.

25. *Id.*

26. Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011).

The *Turner* Court's definition of meaningful access echoes the definition the Court used in *Bounds* in 1977.[27] In *Bounds*, prisoners claimed that their right of access to the courts was being violated because they lacked adequate access to law libraries and as a result had difficulty filing lawsuits challenging their criminal convictions and the conditions of their confinement. Justice Marshall, writing for the majority, held that the Constitution guaranteed the prisoners "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."[28] While the Court's focus was on prisoners' ability to file petitions and complaints,[29] the Court also held that prisoners needed access to legal materials in order to cite cases in "an adversary presentation" to respond to arguments made by the state.[30]

Twenty years later, in *Lewis*, the Court severely limited *Bounds*'s interpretation of the requirements of meaningful access. *Lewis* concerned a class action brought by people incarcerated in Arizona state prisons, claiming that they were unable to exercise their right of meaningful access to the courts because the law libraries in their prisons contained outdated materials, law library staff were insufficiently trained, and access to photocopying was limited.[31] Justice Scalia, writing for the majority, characterized the right of meaningful access as "a right to bring to court a grievance that the inmate wished to present."[32] He specifically criticized *Bounds* for implying "that the State must enable the prisoner to discover grievances, and to litigate effectively once in court."[33]

The meaningful access envisioned by Justice Breyer in *Turner*—the ability to identify the critical issues in the case and present relevant evidence regarding those issues—is similar to the view of meaningful access specifically rejected in *Lewis*—the ability "to discover grievances, and to litigate effectively once in court." The *Turner* Court does not discuss or even cite *Lewis* and *Bounds*. Thus, the Court gives no explanation for departing from *Lewis*'s narrow definition, and we can only speculate.

The political climate surrounding the cases may be one reason. At the time *Lewis* was decided, anti-prisoner sentiment was high. Members of Congress had touted horror stories regarding frivolous prisoner litigation, warning that the litigation was overwhelming the courts, unduly interfering with state control of penal institutions, and impoverishing

27. Bounds v. Smith, 430 U.S. 817 (1977).
28. *Id.* at 825.
29. *Id.* at 828 n.17.
30. *Id.* at 826.
31. Lewis v. Casey, 518 U.S. 343, 346 (1996).
32. *Id.* at 354.
33. *Id.* The *Lewis* Court also imposed a stringent "actual injury" requirement on prisoners seeking meaningful access, and held that in prisoner cases courts must weigh meaningful access claims against the prison's legitimate penological interests. *Id.* at 348–49, 361.

state governments.[34] The Gingrich Congress had responded in 1996 both by passing the Prison Litigation Reform Act,[35] which made it more difficult both for prisoners to find attorneys and for them to represent themselves, and by placing Legal Services Corporation (LSC)-funded civil legal aid attorneys off limits to prisoners.[36] *Lewis* was decided the same year.

But *Lewis* was a product of its times in another way, too: it was based on the premise that providing prisoners with lawyers was the only way to empower prisoners to "discover grievances, and to litigate effectively once in court." The Court warned: "To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires."[37] Thus, the *Lewis* Court's rejection of a broader reading of the right of meaningful access was based on a tautology: the only way to satisfy the broader right would be to provide counsel, and the Constitution does not require the appointment of counsel in civil cases.

In the years that have elapsed since *Lewis*, there has been a revolution in assistance for pro se litigants. Forty years after LSC's founding, it is well established that the supply of civil legal aid attorneys is, and always has been, grossly inadequate to meet the demand. LSC-funded programs turn away half the people who seek their help; study after study shows that, at most, 20% of the legal needs of low-income communities are satisfied; and in civil cases concerning the lives of low-income people, the vast majority of litigants are unrepresented.[38]

As a result, courts, civil legal aid programs, and community organizations are experimenting with techniques to help unrepresented litigants in court. These include websites and computer kiosks with online information and forms, self-help centers, attorney-for-a-day programs, and more.[39] Justice Breyer's idea that Michael Turner should have been provided with a "form" is an apparent nod to this spectrum of services.[40]

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34. Amy Petre Hill, *Death Through Administrative Indifference: The Prison Litigation Reform Act Allows Women to Die in California's Substandard Prison Health Care System*, 13 HASTINGS WOMEN'S L.J. 223, 236-37 (2002).

35. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321(1995); *see also* David Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1454–55, 1458–59 (2010).

36. *See* Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53 to -56 (1996).

37. *Lewis*, 518 U.S. at 354.

38. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 1–3, 25–26 (2009).

39. Deborah Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 882–83 (2009).

40. *See* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice* 989 (Univ. Penn L. Sch., Public Law Research Paper No. 11-36, Univ.

The *Turner* Court's statement that Mr. Turner should have been provided with "an opportunity at the hearing . . . to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form)"[41] echoes another innovation in pro se assistance: the notion that judges sometimes need to affirmatively question pro se litigants who have no other way of raising critical issues.[42] Here, the Court is adopting the Solicitor General's suggestion that "[t]o the extent the court had questions about the information on the form or disbelieved it, the court could question the contemnor about his finances at the contempt hearing."[43] Unlike the Solicitor General, the Court does not specify that it is the judge who must ask the parent questions about his financial status raised by his responses on the form. But if the judge does not ask, who will? It is unlikely that opposing counsel would ask because the *Turner* ruling is limited to cases in which there is no attorney on the other side. An opposing parent is not likely to ask because he is not likely to be more knowledgeable about the law than the defendant is. And an opposing attorney or parent is unlikely to have an incentive to ask Mr. Turner to clarify unclear responses in a way that would elicit evidence favorable to Mr. Turner.

Thus, the *Turner* Court's suggestion resembles the notion, embraced by the American Bar Association in a 2008 resolution, that a judge may have an affirmative duty to question a pro se litigant in order to elicit relevant information.[44] As Stephen Gillers and Russell Engler noted in a 2007 report, there has been "a consistent trend to encourage judges to make reasonable accommodations to unrepresented litigants as a matter of fairness."[45] Admittedly, the ABA resolution is a suggestion,

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Tenn. Legal Studies Research Paper No. 157, 2011), *available at* http://ssrn.com/abstract=1919534 ("*Turner* invites forward-looking, flexible *pro se* alternatives."); Charn, *supra* note 19.

41. Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011).

42. *See* Zorza, *supra* note 21, at 16 (characterizing *Turner* as an "effective endorsement of judicial engagement as helping ensure, and indeed sometimes required to ensure, fairness and accuracy, and to meet the requirements of due process").

43. Brief for the United States as Amicus Curiae Supporting Reversal at 25, Turner v. Rogers, 131 S. Ct. 2507 (2011) (No. 10-10).

44. AMERICAN BAR ASSOCIATION, BEST PRACTICES FOR JUDGES IN THE SETTLEMENT AND TRIAL OF CASES INVOLVING UNREPRESENTED LITIGANTS IN HOUSING COURT , sec. II.D.8 (2008) ("[I]t may be necessary for the Judge to ask open-ended questions regarding specific elements of the landlord's claims or the unrepresented tenant's defenses or counterclaims to assist the unrepresented litigant in articulating the elements of her/his claims, defenses or counterclaims."); *see also* Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L., ETH. & PUBLIC POL'Y 367 (2010); N.Y. CNTY. LAWYERS' ASS'N, BEST PRACTICES FOR JUDGES IN THE SETTLEMENT AND TRIAL OF CASES INVOLVING UNREPRESENTED LITIGANTS IN HOUSING COURT 11 (2008), *available at* http://www.nycla.org/siteFiles/Publications/Publications1166_1.pdf; Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2017 (1999).

45. Russell Engler & Stephen Gillers, *Background Memo on Judicial Ethics: The Role of Judges in Settlement and Trial in Cases Involving Unrepresented Litigants*, *in* New York County Lawyers' Association, REPORT ON PROTOCOLS FOR JUDGES IN THE SETTLEMENT AND TRIAL OF CASES INVOLVING UNREPRESENTED LITIGANTS app. A at 2 n.6 (2006), *available at* http://www.nycla.org/siteFiles/News/News59_2.pdf; *see also* Russell Engler, *The Toughest Nut:*

not a requirement, and it is hardly embraced in all courts by all judges.[46] But the salient point is that the idea of an affirmative judicial obligation to question pro se litigants was gaining ground just as the *Turner* decision came down.

The spectrum of self-help services is a necessary innovation in light of the extreme shortage of counsel for low-income communities. At the same time, we lack an evidence base to determine the scope and efficacy of self-help services.[47] Some worry that self-help services will provide the appearance of a solution to the pro se crisis when in fact pro se litigants still cannot effectively assert their claims.[48] To some extent, the *Turner* opinion provides evidence for these fears. The Solicitor General's contention that there were adequate alternatives to counsel was clearly a basis for the *Turner* Court's rejection of the right to counsel in Turner's case. Jo-Ann Wallace, President and CEO of the National Legal Aid and Defender Association, warns that *Turner* "could potentially be interpreted to lessen the need for attorneys in cases in which they are essential."[49]

At the same time, the case demonstrates that while government, including the judiciary, is often paralyzed by policies that appear too expensive or unwieldy, it can be persuaded to act when the solution appears more manageable. The *Lewis* Court developed a narrow view of "meaningful access" in the belief that truly meaningful access—enabling pro se litigants to litigate effectively— would require the appointment of counsel and be prohibitively expensive.[50] Believing that cheaper pro se help options would suffice to enable pro se litigants to litigate effectively, the *Turner* Court was able to embrace a definition of meaningful access that encompassed the ability to litigate.

Handling Cases Pitting Unrepresented Litigants Against Represented Ones, 62 JUVENILE & FAMILY CT. J. 10 (2011) (tracing the chronology of guidelines regarding judicial engagement in cases involving pro se litigants).

46. *See* Engler & Gillers, *supra* note 45, at 21 (acknowledging the need for judicial education and training to "embolden judges who might otherwise feel isolated and fearful to use these techniques").

47. DEBORAH RHODE, ACCESS TO JUSTICE 120–21 (2004); Laura Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L & SOC. CHANGE 295, 297 (2010); Sande Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 993 (2009).

48. *See, e.g.*, Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 871–73 (2004).

49. Jo-Ann Wallace, Turner v. Rogers *Is a Watershed Moment for Civil Justice Guidance*, CONCURRING OPINIONS (June 27, 2011, 3:03 PM), http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-is-watershed-moment-for-civil-justice-guidance.html#more-47345.

50. *See* RHODE, *supra* note 47, at 9–10 ("As law professor Geoffrey Hazard has noted, no 'politically sober judge, however anguished by injustice unfolding before her eyes,' could welcome the battles involved in trying to establish some broadly enforceable right to counsel.").

III. THE *TURNER* COURT OVERSTEPPED THE APPELLATE ROLE WHEN IT FOUND THAT NOTICE, A FORM, A HEARING, AND A FINDING WOULD PROVIDE MEANINGFUL ACCESS

What *Turner* gives with one hand, it takes away with the other. As the previous section discussed, the Court signals a possible willingness to demand that courts do more to provide meaningful access. However, the *Turner* Court relies on supposition regarding the types of assistance that will enable a pro se litigant to obtain meaningful access, rather than engaging in an evidence-based examination of what it would take for a litigant to have such access.[51] As a rule, federal appellate courts decide cases based on the facts in the record. Ideally, the trial court will have made findings of fact. The appellate court then reviews most factual findings deferentially, asking only whether they are clearly erroneous.[52] When, as in *Turner*, the factual findings are made by a state court and concern a claimed violation of a federal constitutional right, however, the appellate court may scrutinize the factual findings more closely, and will apply particular scrutiny to whether the trial court attached the proper significance to the facts.[53] Even then, however, appellate courts tend to accept the trial court's findings. And, appellate courts tend to refrain from making new findings based on facts that were not before the trial court.[54]

The *Turner* Court departed from this method of review quite dramatically. It accepted as true a claim presented by the Solicitor General for the first time in an amicus brief: that notice, a form, a hearing at

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51. *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 93 (2011) (characterizing *Turner* as "predicated on Justices' own impressionistic senses of both the costs and the benefits of using particular procedures"); *id.* at 158 (criticizing the *Mathews v. Eldridge* test used in *Turner* because "[n]either judges nor litigants can identify with any rigor the actual costs of various procedures, let alone model (or know) the impact in terms of false positives and negatives produced by the same, more, or different processes. . . . While one can state the equation, one cannot do the math because the data are missing. Interpretative choices abound."); Norman Reimer, Turner v. Rogers *and the Ghost of* Gagnon v. Scarpelli, THE CHAMPION, July-Aug. 2011, at 7, http://www.nacdl.org/champion.aspx?id=20800 ("From the criminal defense practitioner's standpoint, the Court's decision betrays naïve simplicity and a breathtaking disconnect from the real world.").

52. FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2571 (3d ed. 2012); *see, e.g.*, Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 111–12 (1980) ("[W]e customarily accept the factual findings of state courts in the absence of 'extraordinary circumstances.'") (quoting Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952)).

53. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 567–68 (1995) (stating that Supreme Court would "make a fresh examination of crucial facts" presented to the trial court in First Amendment case).

54. WRIGHT & MILLER, *supra* note 52 § 2577 (3d ed. 2012); *see, e.g.*, Boy Scouts of America v. Dale, 530 U.S. 640, 648–49 (2000) (conducting "independent review" of the "factual record" in First Amendment case, without adding facts not already in the record). *But see* Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 26–35 (2011) (describing cases in which Supreme Court relied on facts not in the record).

which the judge could question the defendant, and a finding "can assure the 'fundamental fairness' of the proceeding even where the State does not pay for counsel for an indigent defendant."[55] There was no evidence on this question before the trial court, and the parties themselves did not brief it at the Supreme Court.[56] If the Court were following usual appellate procedure, it would have sent the case back to the trial court for an assessment of the facts.[57] Or, because Mr. Turner himself could not benefit from such a factual assessment because he had already served his prison term, the appellate court would have described the legal standard and left it to trial courts in future cases to determine what measures would enable litigants to adequately present a defense, given the litigants' educational background, cognitive abilities, and the complexity of the case.[58]

To be sure, courts are not required to hear evidence regarding facts that are self-evident or are a matter of common sense.[59] The Supreme Court has a long tradition of relying on common sense or intuition, rather than empirical evidence, to determine whether a particular type of help is needed to provide meaningful access to court.[60] That is entirely appropriate when a litigant claims that a particular type of help is needed to overcome an absolute roadblock to meaningful participation. For instance, common sense is all that is required to determine whether a person confined to a wheelchair needs help getting to a second-floor courtroom.[61] Common sense suffices to determine whether imposition of a fee at a particular stage in a case will preclude an indigent litigant from participating in that stage.[62] The same is true of the cases in which indigent litigants argue that the state should pay for tests, experts, and other types

55. Turner v. Rogers, 131 S. Ct. 2507, 2519–20 (2011); *see also id.* at 2524 (Thomas, J., dissenting) ("'The record is insufficient' regarding alternative procedures because '[t]hey were raised for the very first time at the merits stage here; so, there's been no development'" (quoting Tr. of Oral Arg. 49, 43)).

56. Barton & Bibas, *supra* note 40, at 989 n.108("[T]he Court, reaching the issue *sua sponte*, did not have the benefit of research or briefing on the various procedures with which states are experimenting to facilitate *pro se* access to civil justice.").

57. *See, e.g.*, Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 380–81 (2008) (chiding court of appeals for balancing probative value of evidence against possible prejudicial effect, and remanding case for trial court to make that determination in the first instance); Pullman-Standard v. Swint, 456 U.S. 273, 291–93 (1982) (holding that court of appeals should not have considered evidence that trial court failed to consider, and remanding to trial court for consideration of that evidence in the first instance).

58. *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981).

59. *See* Fed. R. Evid. 702 (permitting expert testimony only when "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue").

60. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.").

61. *See* Tennessee v. Lane, 541 U.S. 509, 529 (2004).

62. *See* M.L.B. v. S.L.J., 519 U.S. 102, 106–07 (1996) (record preparation fee in appeal of termination of parental rights); Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (right to waiver of court costs on basis of indigence in divorce case); Griffin v. Illinois, 351 U.S. 12, 17–19 (1956) (right to free transcript for first appeal from criminal conviction).

of necessary evidence.[63] Likewise, common sense may suffice when a litigant seeks an opportunity to present documentary evidence or live testimony.[64]

But intuition is inadequate to the task of determining whether counsel is necessary for a litigant to have meaningful access, and whether less expensive types of assistance along the spectrum of pro se help will suffice to allow a pro se litigant to participate meaningfully in his case. The *Turner* Court wrote that for many defendants facing civil contempt for failure to pay child support, a form would enable them to demonstrate their inability to pay.[65] But will just any "form" enable the average litigant to provide the court with necessary information? Depending on font, sentence and word length, and line spacing, as well as on the education levels and cognitive capacities of the particular litigants, the form may be incomprehensible to a large percentage of litigants.[66]

Intuition is not only an insufficient tool for determining whether a pro se litigant has meaningful access; it is a biased one. That is to say, it will not only render the wrong result, but more often than not it will result in pro se litigants being denied the assistance they need for meaningful access. Judges are more likely to believe that the substance and procedures of the cases they hear are comprehensible to the average person than they are to believe that the cases are complicated and incomprehensible.[67] Judges, after all, have received three years of legal training aimed at instilling familiarity with law and procedure.[68] They have experience

63. *See* Little v. Streater, 452 U.S. 1, 16–17 (1981) (state must pay for blood grouping tests sought by an indigent litigant).

64. *See* Richardson v. Wright, 405 U.S. 208, 209 (1972) (declining to reach merits after Social Security Administration began providing benefits recipients with notice and an opportunity to submit rebuttal evidence).

65. Turner v. Rogers, 131 S. Ct. 2507, 2519 (2011).

66. *See* Nat'l Cancer Inst., *Simplification of Informed Consent Documents*, CANCER.GOV (Aug, 8, 2011), http://www.cancer.gov/clinicaltrials/patientsafety/simplification-of-informed-consent-docs/page2 ("Use of active voice, short sentences, personal pronouns, clear page layout with 'white space' borders, and large fonts make documents easier to read.").

67. SELF-REPRESENTATION LITIG. NETWORK, TOUR GUIDE: A SELF-GUIDED TOUR OF YOUR COURTHOUSE FROM THE PERSPECTIVE OF A SELF-REPRESENTED LITIGANT 5 (2008), *available at* http://www.courts.ca.gov/partners/documents/tourguide.pdf ("[A] judge or administrator may not even observe barriers that may exist for uninitiated members of the public in an environment that is so familiar to him or her . . . ."); JOHN M. GRAECEN, RESOURCES TO ASSIST SELF-REPRESENTED LITIGANTS: A FIFTY-STATE REVIEW OF THE "STATE OF THE ART" 23 (National ed. 2011) ("[S]tate level forms committees made up of judges and attorneys are incapable of achieving the objective of third grade forms comprehension without the assistance of language experts. . . . The inherent bias of legally trained professionals is towards the use of familiar and precise legal terminology because specific legal terms are used in statutes and case law and have acquired an accretion of accepted meaning and nuance that seems difficult or impossible to convey in a few words of plain English. The legally trained mind seems invariably to favor precision in legal meaning over general understandability when choosing the words to use in a form."), *available at* http://www.msbf.org/selfhelp/GreacenReportNationalEdition.pdf. Of course, there are many judges who have a deep understanding of the problems faced by pro se litigants. My point here is simply that judges have a tendency to underestimate the difficulty of self representation.

68. WILLIAM M. SULLIVAN ET AL., SUMMARY, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 5 (2007), *available at*

in the workings of their own courtrooms and the case law, laws, and rules used therein. And they do not have a large stake in the cases before them, unlike the litigants, who may have difficulty thinking clearly in a case involving the potential loss of a child, home, or livelihood.[69]

There are two types of empirical data that courts could consider to more rigorously assess whether a particular type of assistance is sufficient to provide a litigant with meaningful access. First, courts could assess the tasks litigants need to perform in that type of case, the obstacles to performing those tasks, and the interventions that would suffice to enable litigants to overcome those obstacles. This Article will use the term "process analysis" to describe that method. Second, courts could consider "outcome" studies, which compare the outcomes of those cases in which the intervention was provided with those in which the intervention was not provided.[70]

As the Article describes below, *Turner*'s reliance on intuition in lieu of empirical data to determine whether a litigant has meaningful access is of a piece with the Court's analytical style in two other seminal cases in which unrepresented people sought attorney assistance: *Lassiter v. Department of Social Services* and *Walters v. National Association of Radiation Survivors*.[71] As this section shows, taken together, the cases evince a willingness to reach conclusions that certain litigants have meaningful access even in the absence of reliable evidence.

A. Process Analysis

Courts could rely on process analysis to assess claims that a certain type of assistance is necessary to allow a litigant to obtain meaningful access. Using this method, a researcher would compile a list of all the tasks that a litigant must perform in that type of case, and then assess the obstacles that litigants face in performing those tasks and whether the assistance requested will allow a litigant to perform the tasks.[72] Michael Turner presented this type of evidence when he argued that the willfulness or ability to pay determination can be complex.[73] For example, a

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http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf ("Within months of their arrival in law school, students demonstrate new capacities for understanding legal processes, for seeing both sides of legal arguments, for sifting through facts and precedents in search of the more plausible account, for using precise language, and for understanding the applications and conflicts of legal rules.").

69. *See* Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 601, 625 (2010) ("When a pro se litigant's income, assets, healthcare and well-being are on the line, he or she faces formidable emotional barriers to articulating a clear case and proving facts. In the best circumstances it is difficult to keep a clear head and an objective view of the strengths and weaknesses of the case.").

70. *See* Abel, *supra* note 47, at 299–300 (using this typology).

71. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24–25 (1981); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 326 (1985).

72. Abel, *supra* note 47, at 304.

73. Brief for Petitioner at 35–36, 46, Turner v. Rogers, 131 S. Ct. 2507 (2011) (No. 10-10).

defendant may have to show not only that he is unemployed, but that he has not made any unwise choices about how to spend his money.[74] The *Turner* Court also had before it evidence that many parents facing civil contempt have little education,[75] and that defendants often fail to assert meritorious defenses in these cases.[76]

However, as described above, there was no evidence before the Court regarding whether the Court's solution—notice, a form, a hearing at which the judge could question the defendant, and a finding—would enable either Mr. Turner or the typical litigant to adequately present a defense, given the litigant's educational background, cognitive abilities, and the complexity of the case. Thus, to complete the process analysis by determining that the solution would in fact provide meaningful access, the Supreme Court relied solely on unsupported contentions offered in an amicus brief.

In *Walters*, the Supreme Court rejected the district court's explicit factual findings regarding the difficulty of self-representation. In that case, veterans who were injured in U.S. atomic bomb tests challenged a statute barring attorneys from accepting more than $10 to represent veterans seeking disability benefits from the Veterans Administration. Considering this claim, the district court reviewed what it characterized as "a full factual presentation as to the actual operation and effect of the $10.00 limit."[77]

Holding that the plaintiffs were highly likely to succeed on their claim that the $10 cap violated the veterans' due process rights, the district court judge found that "[t]he undisputed factual evidence submitted by the plaintiffs in this case shows that both the procedures and the substance entailed in presenting [disability] claims to the VA are extremely complex."[78] He also found that "neither the VA officials themselves nor the [non-attorney] service organizations are providing the full array of services that paid attorneys might make available to claimants."[79] He concluded that "[i]t is highly unlikely that veterans or their families will,

74. *Id.* at 35 n.20.

75. *Id.* at 47; Brief for the National Association of Criminal Defense Lawyers et al. as Amici Curiae Supporting Petitioner at 9 Turner v. Rogers, 131 S. Ct. 2507 (2011) (No. 10-10) ("A 2002 study of fathers with child support obligations found that 41% of indigent fathers did not have a high school diploma—double the rate for those whose income was not below the poverty threshold.").

76. Brief for the National Association of Criminal Defense Lawyers et al., *supra* note 75, at 14 (2002 HHS study showed that low-income parents are typically ordered to pay a greater proportion of their income than is statutorily allowed).

77. Nat'l Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1312 (N.D. Cal. 1984), *rev'd*, 473 U.S. 305 (1985).

78. *Id.* at 1307–08, 1319–20 (citing numerous depositions and affidavits).

79. *Id.* at 1310, 1320–23 (characterizing this conclusion as being based on "a great deal of evidence regarding . . . the extent to which VA employees or service organization representatives are able to aid veterans in gathering supporting materials and presenting their claims").

without the use of an attorney, prove able to build and present their cases as ably as an attorney."[80]

The Supreme Court reversed, concluding that in most cases an attorney was unnecessary, faulting the district court's process analysis as incorrect. The Supreme Court held that while some cases might be complex, the district court had not attempted to calculate how often that was the case.[81] Defining "complex" as involving tricky legal questions, the Court stated that such cases were only "a tiny fraction of the total cases pending."[82] Most cases, the Court stated, concerned "simple questions of fact, or medical questions relating to the degree of a claimant's disability."[83] The Court thus disagreed with the district court's reading of the evidence, substituting its own judgment about the difficulty of the tasks involved in litigating veterans' disability cases for the district court's factual findings.[84]

Taken together, *Turner* and *Walters* evince a view of judicial intuition as being sufficient to assess both a pro se litigant's ability to conduct litigation tasks and the utility of various types of legal assistance. The *Turner* Court viewed the issue as so straightforward that it held that the Constitution *required* trial courts to provide forms and other sorts of assistance to pro se litigants, even though there was no evidence in the record regarding the utility of that assistance. The *Walters* Court baldly stated that the district court judge who had reviewed a voluminous record was simply wrong in his assessment of the difficulty of veterans' benefits litigation.

B. Outcome Analysis

Another method to determine the value of a potential type of legal assistance is outcome analysis, which compares the outcomes in cases in which the intervention is used with those cases in which the intervention is not used. Apparently, there were no outcome studies before the Court in *Turner*. While such evidence was considered in *Lassiter* and *Walters*, the evidence in both cases had serious flaws, and in the end the Court did not rest its opinions in either case on the outcome evidence before it.

The gold standard in outcome comparison studies involves randomly assigning some subjects to a control group (which does not receive the intervention) and others to a treatment group (which does receive the

80. *Id.* at 1323.
81. *Walters*, 473 U.S. at 329.
82. *Id.* at 329–30.
83. *Id.*
84. And, as Justice Brennan's dissent noted, instead of merely holding that the district court had abused its discretion and returning the case to that court for a full trial on the merits, the Supreme Court decided the case on the merits, "bootstrapping its way past the rule that we may 'intimate no view as to the ultimate merits' in preliminary-injunction cases." *Id.* at 356 (Brennan, J., dissenting).

intervention).[85] Randomization allows researchers to attempt to ensure that the effects they are observing result from the intervention itself rather than from some other factor.[86] For instance, without random assignment, researchers comparing the outcomes of cases in which litigants had legal representation with cases in which litigants did not have such representation cannot know whether the litigants with lawyers had stronger cases to begin with. Perhaps the litigants with stronger cases tried harder to find lawyers, or perhaps the lawyers accepted only the strong cases. Either instance would be an example of what statisticians call selection bias.[87]

A possible selection bias problem plagued studies proffered by the parties in *Lassiter*.[88] There, the Court held that Abby Gail Lassiter's due process rights were not violated when South Carolina terminated her right to a relationship with her infant son William, in a proceeding in which she was not represented by counsel.[89] In a footnote, the Court acknowledged that both the state defendant and a law journal had conducted "surveys purporting to reveal whether the presence of counsel reduces the number of erroneous determinations in parental termination proceedings." The Court dismissed both studies as "unilluminating."[90]

As Justice Brennan noted in his dissent, both studies found that parents who were represented by counsel had a significantly higher success rate than parents who were not represented by counsel.[91] These results could have been the consequence of selection bias because they were not based on random samples.[92] Justice Brennan found them persuasive, however. He rejected the possibility of selection bias, writing that because "no evidence in either study indicates that the defendant parent who can retain or is offered counsel is less culpable than the one who appears unrepresented, it seems reasonable to infer that a sizable number of cases against unrepresented parents end in termination solely because of the absence of counsel."[93] The majority did not respond to this line of reasoning. It made no attempt to grapple in any real way with the studies, or to determine whether the cases in which counsel makes a difference are the vast majority or are outliers.

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85. D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. (forthcoming 2012); Abel, *supra* note 47, at 299–300.

86. Greiner & Pattanayak, *supra* note 85.

87. *Id.*

88. *See* Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 733, 742-43 (2006) (noting that in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Supreme Court underestimated the "risks of error . . . in most contested and litigated cases when litigants are unrepresented").

89. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981).

90. *Id.* at 29 n.5.

91. *Id.* at 46 n.15.

92. *See* discussion *supra* note 85 and accompanying text.

93. *Lassiter*, 452 U.S. at 46 n.15.

In contrast to the *Lassiter* majority's cursory dismissal of the outcome studies presented in that case, the *Walters* majority harshly criticized the trial court's refusal to rely on outcome studies. The district court judge noted that the plaintiffs had gathered "a great deal of evidence" through "extensive discovery."[94] Both sides had presented outcome comparison studies—"statistics comparing the relative success of those few attorneys who represent . . . claimants before the VA notwithstanding the $10.00 fee limit with that of other representatives."[95] The veterans claimed that the statistics demonstrated that veterans with attorneys were more successful while the government claimed they showed that veterans with attorneys were no more successful than those without.[96] The judge declined to decide who was right. Instead, he dismissed the statistical evidence as irrelevant, writing:

> The success rate of those few attorneys who are now taking [disability] cases on essentially a pro bono basis is a completely inadequate predictor of the success rate of paid attorneys. Not only may paid attorneys be able to devote more time and resources to the cases, but they may also develop substantial expertise in the complicated legal areas involved with SCDD claims.[97]

The Supreme Court chided the district court for rejecting the outcome data proffered by the parties, stating:

> We have the most serious doubt whether a competent lawyer taking a veteran's case on a *pro bono* basis would give less than his best effort, and we see no reason why experience in developing facts as to causation in the numerous other areas of the law where it is relevant would not be readily transferable to proceedings before the VA.[98]

The Supreme Court's critique was apparently based entirely on the Court's intuition; the Court did not point to any evidence to support its claim. According to the Court's reading of the statistics, "[r]eliable evidence before the District Court showed that claimants represented by lawyers have a slightly better success rate before the [Board of Veteran Appeals] than do claimants represented by service representatives, and that both have a slightly better success rate than claimants who were not represented at all."[99] In the end it did not matter, however. The Court concluded that under the *Mathews v. Eldridge* test for due process violations, the government's interest in keeping the proceedings non-

94. Nat'l Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1310 (D. Cal. 1984).

95. *Id.* at 1317. Apparently, neither study relied on random assignment or used any other technique to deal with selection bias.

96. *Id.*

97. *Id.* (relying on deposition testimony by director of Compensation and Pension Service for the Department of Veterans Benefits).

98. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 328 (1985).

99. *Id.* at 331.

adversarial outweighed any advantage the veterans might obtain from having a lawyer.[100]

There are some striking similarities between the treatment of outcome studies in *Lassiter* and *Walters*. First, in both cases, at least one of the parties offered an outcome study as evidence of the extent to which attorneys do or do not make a difference in particular types of cases. However, there were serious flaws in the studies. None of the studies used randomization, so it was impossible to know whether the outcomes observed were the result of attorney representation or of some other factor. In *Walters*, the outcome studies had another potential problem: while the plaintiffs were seeking the ability to pay attorneys at a market rate, there were no attorneys yet handling those cases at a market rate. As a result, the studies could not assess the efficacy of market rate representation.

Second, at least some of the judges in both cases attempted to determine whether the studies were probative of the difference an attorney would make. However, the judges do not appear to have had testimony from any statistical experts to help them make this determination. As a result, they were forced to use their own intuitions about the difference that legal representation would make in the case.

Third, in the end, the Court did not base its holdings on the statistical evidence. The *Lassiter* Court held that no matter how much difference a lawyer might make, Ms. Lassiter could not show that she was prejudiced by the lack of counsel; the *Walters* Court held that the value of keeping the proceedings non-adversarial outweighed any increase in accuracy that a lawyer might impart.

IV. CONCLUSION

We do not yet know how courts will apply *Turner*; too little time has elapsed since it was issued. The choices are clear, however: *Turner* may come to stand for a definition of meaningful access to the courts as including the ability to identify and present arguments and evidence regarding the central issues in a case. Or, it may come to stand for the proposition that the meaningful access standard is toothless, given the instinctive belief of many judges that self-representation is easier than it really is.

The outcome may depend on whether future cases involve empirical evidence. Unfortunately, there is a shortage of reliable data concerning what kind of legal assistance various types of litigants need to obtain meaningful access.[101] A few social scientists are attempting to fill the

100. *Id.*

101. Greiner & Pattanayak, *supra* note 85; Jeffrey Selbin et al., *Access to Evidence: How an Evidence-Based Delivery System Can Improve Legal Aid for Low- and Moderate-Income Americans*,

void. A randomized study by University of California at Irvine law professor Carroll Seron found that lawyer representation made a large difference in whether tenants facing eviction in New York City kept their homes.[102] Harvard law professor James Greiner and statistician Cassandra Wolos Pattanyak are working their way through an ambitious agenda of randomized outcome studies examining the effects of offers of attorney representation and other types of legal assistance.[103] They report that offers of representation in unemployment insurance cases by a Harvard Law School clinic did not affect the likelihood that the claimants would prevail, although they were unable to reach a conclusion about whether the actual use of representation affected the outcome.[104] Preliminary results from another of their studies, involving full-fledged lawyers handling eviction cases in a Massachusetts district court (a court of general jurisdiction), found that the clients were far more likely to retain possession of their homes when they received full representation than when they received only limited legal assistance involving advice and help filling out forms.[105] In a third study, however, full-fledged lawyers handling eviction cases in a specialized housing court in Massachusetts had no greater effect on their clients' ability to retain possession whether they provided full legal representation or just limited assistance.[106] American Bar Foundation researcher Rebecca Sandefur has conducted a meta-analysis of the existing studies regarding the effects of attorney representation, leading her to conclude that attorneys have a larger effect on the outcome of their clients' cases in procedurally complex cases than in cases in which the procedures are relatively straightforward.[107] These and similar studies hold out a promise that some day we may have enough outcome studies for courts to conclude confidently that a particular type of assistance is or is not necessary for a litigant to obtain meaningful access in a civil case.

We are not yet there, though. There simply are too few reliable outcome studies to be able to reach conclusions extending much beyond the specific findings of each study. The outcomes of these particular studies

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AMERICAN PROGRESS 6 (June 2011), http://www.americanprogress.org/issues/2011/06/pdf/evidence.pdf; Abel, *supra* note 47, at 301–02.

102. Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 419 (2001).

103. Greiner & Pattanayak, *supra* note 85.

104. *Id.*

105. D. James Greiner et al., The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future (Mar. 29, 2012) (forthcoming Harvard Law Review), *available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1300384#show1948286.

106. D. James Greiner et al., How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in Massachusetts Housing Court (Mar. 12, 2012) (unpublished paper) *available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1300384#show1880078.

107. Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 51-52 (2010).

may well depend on the characteristics of the particular lawyers who handled the cases, the substantive law in that particular jurisdiction, or procedures in the courts in which the cases were handled.[108] In contrast to the small number of rigorous outcome studies that have examined the effect of attorney representation, a recent New Jersey Supreme Court opinion regarding the reliability of eyewitness identifications rested on the conclusions of a special master who had reviewed "testimony by seven experts and . . . more than 2,000 pages of transcripts along with hundreds of scientific studies."[109]

For now, courts may have to rely more on careful process analysis to assess litigants' abilities. The expertise psychiatrists have amassed regarding the capabilities of criminal defendants may be helpful here.[110] The expertise of the many court officials, legal aid attorneys, and others who staff self-help centers may prove useful, too.[111] Only when meaningful access cases start focusing on these types of hard data can we expect that the courts will begin providing truly meaningful access.

108. Greiner & Pattanayak, *supra* note 85 (cautioning "that studies of the kind we conduct here are heavily dependent on context," and writing that "with numerous studies, we could begin to make more informed guesses as to which aspects of context matter most, and to base policy and funding decisions on these more informed guesses").

109. State v. Henderson, 208 N.J. 208, 217-18 (2011).

110. *See generally* Brief for Am. Psychiatric Assoc & Am. Acad. of Psychiatry and the Law as Amicus Curiae in Support of Neither Party, Indiana v. Edwards 554 U.S. 164 (2008) (No. 07–208), 2008 WL 405546.

111. *See* John D. Graecen, *Resources to Assist Self-Represented Litigants: A Fifty-State Review of "State of the Art"* MICHIGAN STATE BAR FOUND. (2011), http://www.msbf.org/selfhelp/GreacenReportNationalEdition.pdf (describing self-help programs and insights that the people who staff them have gained).

THE EVOLUTION OF UNBUNDLING IN LITIGATION MATTERS: THREE CASE STUDIES AND A LITERATURE REVIEW

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Perhaps the most famous "bundle" in United States law is the metaphor used to conceptualize property rights. Law students learn that one way to understand property is as a bundle of rights: the right to possess, the right to exclude, the right to sell, the right to destroy, the right to devise, etc.[1] One reason to conceptualize anything in terms of a bundle is to consider what happens if someone or something—the state, a third party—unties the binding or pulls out one of the sticks. In property, this thought exercise helps students understand many of the doctrines taught in the canonical first year course, including easements, adverse possession, and the rule against perpetuities.

Forrest "Woody" Mosten, whom some called the "Father of Unbundling" in the practice of law,[2] no doubt had all this in mind when, in the 1990s, he began traveling the nation with a bundle of popsicle sticks tied together with a ribbon. To each stick, Mosten attached a label that represented some aspect of legal practice, such as researching the law or negotiating with opposing parties.[3] During his presentation, Mosten would untie the ribbon and wave around the now-separated popsicle sticks to emphasize his point that unbundling in the practice of law was possible and desirable.[4] Mosten's road show comprised part of a trend towards the recognition, legitimization, and promotion of limited legal assistance[5] in litigation matters. The trend began in California[6] and since has spread to almost every state in the nation,[7] with most of the action

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1. *See, e.g.*, JOSEPH WILLIAM SINGER, PROPERTY 2 (3d ed. 2010).

2. MADELYNN M. HERMAN, LIMITED SCOPE LEGAL ASSISTANCE: AN EMERGING OPTION FOR PRO SE LITIGANTS NATIONAL CENTER FOR STATE COURTS (2003), *available at* http://www.ncsconline.org/WC/Publications/KIS_ProSe_Trends03.pdf; *Unbundling Legal Services*, MOSTEN MEDIATION, http://www.mostenmediation.com/books/unbundlinglegal.html (last visited May 27, 2012).

3. In an article published in the early 1990s, Mosten identified seven sticks, including the two mentioned above. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 423 (1994).

4. Telephone Interview with Jonathan Asher, Exec. Dir., Colo. Legal Servs. (Dec. 19, 2011).

5. Unbundled legal services go by a number of names, including discrete task representation, limited assistance representation, and limited scope representation, among others.

6. Telephone Interview with M. Sue Talia, Private Family Law Judge (Feb. 7, 2012).

7. *See generally Court Rules*, AM. BAR ASS'N, http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html (last visited Dec. 14, 2011).

occurring in the last two decades.[8] Although some continue to fight the trend,[9] these opponents appear to be losing the battle, and losing badly.[10]

Given the ubiquity of the trend toward unbundling in litigation matters as well as the public nature of some of the opposition,[11] it is unsurprising that the concept has received some attention in academic and professional journals. Indeed, one of the two purposes of our contribution to this symposium issue is to provide a bibliography of sources discussing the concept. We do so in Part III. Our second purpose, however, is to address a lacuna in this literature concerning the answer to the following question: how does a movement toward mainstreaming of limited assistance in litigation matters begin, develop, and spread? To start to answer this question, we interviewed relevant persons, and reviewed relevant documents and literature, in three states: Colorado, Massachusetts, and Alabama.[12]

A preview of our findings is as follows: Although we hesitate to draw conclusions from a discussion of only three states, we did notice several similarities in those we studied. First, in all three states, unbundled representation had been actively practiced, in the context of litigation matters, by legal aid providers (joined in some cases by pro bono attorneys) years before a recognizable movement toward mainstreaming of unbundling began. In some instances, these legal assistance programs were highly visible, in that they included providing representation to eligible clients in the hallways outside of courtrooms, in mediation sessions, and even in court colloquies and motion arguments. What we find notable about this fact is that in each of the three states, few of the private bar or judicial actors we interviewed mentioned the legal assistance experience as providing a source of lessons learned, or a possible model, for a more generalized move towards unbundling (until we asked). In Massachusetts, for example, legal assistance programs operated lawyer for the day (LFTD) programs in family and housing courts for years be-

8. M. SUE TALIA, ROADMAP FOR IMPLEMENTING A SUCCESSFUL UNBUNDLING PROGRAM 3 n.2 (2005); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 461 n.32 (2011); *see also* Margaret Graham Tebo, *Loosening Ties: Unbundling Legal Services Can Open Door to New Clients*, 89 A.B.A. J. 35 (2003).

9. For example, although not technically an unbundling matter, the Texas Family Bar continues to oppose the plans formulated by the Texas Supreme Court, made in consultation with the Texas State Bar and the Texas Access to Justice Commission, to develop and to make available standardized pleading and order forms for divorce cases. *See* Richard Zorza, *For Texas Advocates, No Good Deed Goes Appreciated*, ACCESS TO JUSTICE BLOG (Jan. 23, 2012), http://accesstojustice.net/2012/01/23/for-texas-access-advocates-no-good-deed-goes-appreciated/.

10. *See Court Rules*, *supra* note 7.

11. *See, e.g.*, John L. Kane, Jr., *Debunking Unbundling*, 29 COLO. LAW. 15 (2000) (guest editorial by a United States Senior District Judge arguing against unbundling).

12. Our selection of these three states was not scientific. We chose Colorado because we thought it might be of interest to readers of the *Denver University Law Review*. We chose Massachusetts because both of us currently reside there. We chose Alabama because it seemed likely to be different from Colorado and Massachusetts.

fore the Massachusetts Supreme Judicial Court authorized what it labeled its "Pilot Project" on limited assistance representation (LAR).[13] Further investigation turned up links between legal services and pro bono efforts on the one hand and the unbundling movement on the other.[14] Yet the lessons drawn from the former efforts were limited. Those with whom we spoke described the pilot project as an essential coalition-building measure, necessary to convince the stakeholders involved of unbundling's efficacy;[15] the previous experiences of those in legal services and pro bono programs were not considered sufficient to persuade. This disconnect between what was already happening in legal assistance and what was thought to be revolutionary in the private bar may hint at deeper themes concerning the distinct worldviews among types of litigators and among judicial actors performing conceptually similar tasks and occupying similar public spaces. We hope to explore these themes in future work.

Second, while the movement toward recognition, legitimization, and promotion of limited assistance in litigation matters germinated in different places in different states, it eventually had to include a coalition of leaders in the private bar, judges and justices of state appellate and supreme courts, administrators of state ethical rules and guidelines, and others. Moreover, with respect to the judiciary, an unbundling movement turned a key corner when judges agreed to give up a cherished power, namely, the power to decide whether to allow an attorney who had formally entered a piece of litigation on a limited basis to withdraw. That is, to induce attorneys to enter a piece of litigation for a particular hearing or for a single aspect of the matter, courts had to pre-commit to allow litigators to withdraw after aspect of the case had concluded.

Third, no one we interviewed knew whether unbundling worked. That is, no one knew whether the movement to legitimize unbundling in litigation matters (which has consisted primarily of making and advertising changes to ethical rules, judicial guidelines, and rules of civil procedure) had any serious effect on the way in which the private bar conducted business, on the number or percentage of litigants who self-represented in court hearings or during other phases of litigation, or on any discernible aspect of access to justice.[16] Although some with whom we spoke cited examples of individual attorneys or offices offering à la

13. Mass. Sup. Jud. Ct., Order In Re: Limited Assistance Representation (Apr. 10, 2009), *available at* http://www.mass.gov/courts/sjc/docs/Rules/Limited_Assistance_Representation_order1_04-09.pdf.

14. For example, the various committees responsible for devising and implementing the pilot project included members from the legal services and pro bono communities. Telephone Interview with Cynthia J. Cohen, Assoc. Justice, Mass. App. Ct. (Mar. 27, 2012).

15. *Id.*

16. *See, e.g.*, Telephone Interview with Gregory Hobbs, Assoc. Justice, Colo. Sup. Ct. (Jan. 9, 2012) (lamenting the dearth of statistical evidence on the use of unbundled legal services and other access to justice interventions).

carte services for litigation matters, and some cited the value of easily-limited representation as a recruitment tool for pro bono groups, no one could point to (nor did our independent research unearth) a credible study or evaluation purporting to assess the effect of a statewide movement or of an individual program that offered unbundled representation.[17] This is not to say that we know that unbundling is ineffective; rather, our point is one of ignorance. We do not know what the effects of LAR movements or programs are on a macro or micro level. Indeed, no one knows even whether the changes states made to their ethical and other rules have resulted in a greater availability and usage of unbundled services.[18]

We proceed as follows. In Part I, we define what we mean by unbundled legal services in litigation matters; rehearse the justifications proponents offer to support it; then review briefly the laws, ethical rules, codes of judicial conduct, and informal practices that must be altered to mainstream unbundling. In Part II, we provide our short case studies of the evolution of limited-scope representation in Colorado, Massachusetts, and Alabama. In Part III, we discuss the bibliography we compiled.

I. WHAT IS THE UNBUNDLED PRACTICE OF LAW IN LITIGATION MATTERS?

A. Our Definition

We propose the following definition of the unbundled practice of law in litigation matters[19]: unbundling occurs when a licensed attorney provides a limited set of legal services, in a litigation matter, accompanied by the expectation that the client will proceed pro se on all other aspects of the matter.[20] The services provided are less than the set of services ordinarily expected in the context of a traditional "full" attorney–

17. One of us recently coauthored two studies evaluating unbundled legal assistance programs vis-à-vis offers of full representation. D. James Greiner et al., The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future (Jan. 18, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1948286; D. James Greiner et al., How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court (Mar. 12, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078.

18. Telephone Interview with Jonathan Asher, Exec. Dir., Colo. Legal Servs. (Mar. 29, 2012).

19. We use this term to include matters that have not yet reached litigation (or administrative adjudication), but will do so if not settled.

20. The American Bar Association Section on Litigation has identified thirteen different varieties of limited scope legal assistance. AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 16–38 (2003). The most important of these varieties for our paper are (1) preparing or reviewing documents and pleadings (also called ghostwriting), (2) stand-alone interviews and advice, (3) Lawyer of the Day programs, and (4) representation in an initial case or proceeding that affects the result of a subsequent case or proceeding in which the client appears pro se. Our definition excludes two of the ABA categories: collaborative lawyering and group representation. Although collaborative lawyering may technically be limited-scope representation under our definition, as the lawyers determine they will not represent the parties in court, it differs from unbundling as we conceive it for the purposes of this paper.

client relationship. This definition is intentionally limited in several ways. First, we exclude the provision of legal services by law students, paralegals, and other non-attorney but legally trained personnel. We do not intend to suggest that such services are unimportant in any sense. Our purpose in this paper, however, is to illuminate certain aspects about the behavior of licensed attorneys and their counterparts in adjudicatory systems, and we limit our definition accordingly.

Second, we intentionally focus on unbundled services "in litigation matters," meaning matters that already are or will soon be before judicial or agency decision makers. Again, this limit is simply to focus our Article. We do not intend to suggest that LAR outside of an adjudicatory process is unimportant. To the contrary, our point here is that in many ways, litigation is the last frontier for unbundling in the practice of law. For reasons not entirely clear to us, it has been thought to present the most difficult setting in which unbundled representation might operate. Discrete task representation has long been standard practice outside of the adjudicatory context, particularly in transactional work and estate planning. For example, clients have frequently hired lawyers to draft contracts, but not to represent them in the precursor negotiations.[21]

Third, we limit our consideration of LAR to settings in which the client is expected to self-represent in the portions of the matter that the lawyer will not handle. We make this clarification because, in the course of our interviews, we were reminded of the routine practice of separating representation in, among other places, insurance defense.[22] For instance, a lawyer for an insurance company may represent an insured on a claim but not any counterclaims arising from the same incident, with the expectation that the insured will retain separate counsel for the counterclaim.[23] Again, we do not intend to suggest that this practice is uninteresting, but merely that this practice implicates concerns different from those we focus on here.

Although we do not discuss further the legal services or practices excluded in the three previous paragraphs, the above discussion helps to highlight a major point of this Article: the bundle of sticks constituting legal representation has always been tied loosely, if it was tied at all, even in the litigation context. What has changed in the past two decades

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21. *See* Bradley A. Vauter, *Unbundling: Filling the Gap*, 79 MICH. B.J. 1688, 1689 (2000).

22. Telephone Interview with John Lebsack, Shareholder, White & Steele P.C. (Jan. 9, 2012).

23. *Id.* The insurance lawyers choose this route because providing the client with full representation may represent a conflict of interest. *Id.* The conflict of interest arises because the insurance company may have a financial incentive to settle a claim on terms to which the opposing litigant will agree only if the insured drops (or otherwise settles) a counterclaim on terms the insured does not find desirable. *See* Ethical Duties of Attorney Selected by Insurer to Represent Insured, Colo. Ethics Op. 91 § II(C)(2) (Jan. 16, 1993), *available at* http://www.cobar.org/index.cfm/ID/386/subID/1812/CETH/Ethics-Opinion-91:-Ethical-Duties-of-Attorney-Selected-by-Insurer-to-Represent-Insured,-01/16/93/.

is that the looseness of the tie has been recognized, legitimized, and encouraged by a number of actors in the legal system.

We close this subsection with an attempt to apply our definition, *i.e.*, to determine what services our definition encompasses. To begin, we recognize that there is a broad continuum of services that ranges from information provision, such as informing a potential client of the hours and location of a courthouse, to some kind of service that unquestionably constitutes unbundled representation, such as arguing a motion on a client's behalf. In our view, however, definitions others have proposed, such as a hard line at the courtroom door,[24] or distinctions among degrees of ghostwriting,[25] are either insufficiently inclusive or borderline impossible to apply in practice. We suggest one helpful tool in drawing concededly difficult[26] lines is to say that when an attorney's conduct arguably implicates ethical or legal duties apart from those that govern the relationship between the client and the attorney, then the conduct has moved beyond information provision and into the realm of unbundled legal practice.

Ours is a definition of inclusion, not exclusion: conduct that implicates no external relationship might still constitute unbundled representation. But a definition of inclusion can be useful. Under our use of the term, unbundled representation includes contacting or negotiating with an opposing party or attorney on a client's behalf, even if the attorney expressly limits the effort to a single conversation over the telephone, because such conduct arguably implicates opposing counsel's duties regarding contact with represented parties. Our definition of unbundling also includes ghostwriting, instructing the client on particularized arguments to make at a hearing, and appearing on a client's behalf as part of a LFTD program because such conduct arguably implicates[27] duties owed to the tribunal.

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24. *See Profile: "Unbundled" Legal Services Attorney Panel, Maricopa, Arizona*, UNBUNDLED LAW, http://www.unbundledlaw.org/old/Program Profiles/Maricopa profile.htm (last visited May 27, 2012) (describing the panel as providing advice outside of the courtroom but not limited appearances within it).

25. *See* Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1166–67 (2002) (noting the existence of such ethics opinions and explaining that such standards are ripe for inconsistent application).

26. Some of the ethical opinions and other writings we reviewed for this Article were difficult to understand regarding how and where to draw the line between information provision and the practice of law. *See, e.g.*, Mass. Bar Ass'n Ethics Op. 98-1 (May 29, 1998), *available at* http://www.massbar.org/publications/ethics-opinions/1990-1999/1998/opinion-no-98-1.

27. Our point here is not to suggest that, because an ethical or legal duty is arguably triggered, one or another form of disclosure or some other course of conduct is ethically or legally compelled. Jurisdictions may, and in fact already have, differed on what sorts of disclosure they require of attorneys who have, say, ghostwritten documents. *Compare* ME. R. CIV. P. 11(b) (requiring a ghostwriting attorney to include a full signature block on all documents submitted to the court), *and* Kan. Bar Ass'n, Ethics Op. 09-01 (Nov. 24, 2009) (requiring "any document prepared by the attorney is marked 'Prepared with the Assistance of Counsel.'"), *with* CAL. R. COURT 3.37(a) (requiring no disclosure at all). Rather, our point is that conduct that arguably implicates such duties of or to the

In terms of examples of specific programs, Hennepin County, Minnesota, maintains a self-help center in a court frequented by pro se litigants where court employees provide referrals, answer questions, and maintain a public computer with access to court records.[28] This is not unbundling. The center also has a "Legal Access Point" at which an attorney offers litigants 15-minute advice sessions;[29] depending on what is said in those sessions, these might constitute unbundled representation. Perhaps the most difficult case for our purposes is the instructional clinic, in which a knowledgeable person teaches attendees about a particular kind of legal proceeding, the applicable law, and useful strategies. Courts,[30] legal aid organizations or pro bono groups,[31] and law students[32] can all provide clinics. The courts in Ventura County, California organize this type of clinic weekly.[33] Volunteer attorneys, law students, and paralegals sponsor each clinic, which begins with an overview of the court system and then proceeds into the details of a specific family law topic.[34] Each evening, a filing clerk examines each participant's pleadings and then files them.[35] Our sense is to exclude informational clinics, even those conducted by lawyers, from the definition of unbundling unless the clinics include lawyers' eliciting facts from litigants, then using those facts to provide advice designed to shape pleadings. This practice essentially constitutes a limited form of ghostwriting, and for the reasons stated above it is included in our definition.

B. What Are the Alleged Benefits of Unbundling in Adjudication?

Having defined what we mean by unbundling in litigation, a second question arises: why pursue it? In other words, what arguments have proponents of unbundling marshaled to support the movements we describe in Part II? Essentially, proponents' arguments fall into four major categories: access to justice, increased client choice, judicial administration, and business opportunities.

First, proponents of discrete task representation have argued that it facilitates access to justice. By allowing a set of persons who cannot afford to hire a lawyer for an entire matter to hire one for discrete tasks within that matter, the argument runs, unbundling allows clients to real-

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tribunal requires examination to decide what ethical and legal rules should apply, and conduct of this nature should be included in a definition of unbundled assistance.

28. Brenda Star Adams, *Unbundled Legal Services: A Solution to the Problems Caused by Pro Se Litigation in Massachusetts's Civil Courts,* 40 NEW ENG. L. REV. 303, 328 (2005).

29. *Id.*

30. Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 122 (2002).

31. *Id.* at 123.

32. *See* Margaret Martin Barry, *Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?* 67 FORDHAM L. REV. 1879, 1898–99 (1999).

33. Buxton, *supra* note 30, at 122.

34. *Id.* at 122.

35. *Id.*

ize their goals more cheaply, easily, and quickly.[36] Second, proponents have contended that unbundling empowers the class of clients who actually could afford bundled legal services. This is a straightforward anti-paternalism argument: consumers should be allowed to buy exactly what they want to and no more.[37] Third, proponents have suggested that unbundling constitutes a response to the pro se litigation crisis that has afflicted the adjudicatory systems of state courts, as well as state and federal administrative agencies, for some time. The idea here is that having an attorney engage in discrete tasks will facilitate settlements, understandable pleadings, and smooth adjudicatory proceedings.[38] Fourth, proponents have asserted that discrete task representation represents a coherent business model. According to this view, attorneys can access a heretofore untapped market, namely, potential clients with income or assets sufficient to allow them to purchase some but not all of the sticks in the traditional representation bundle.[39]

Because other authors have thoroughly explored these justifications, we have little to add here except for the observation that each of these justifications depends on assumptions that, to our knowledge, have never been credibly evaluated. Perhaps the most important of these assumptions is the idea that every little bit helps, and each little bit helps a little more. In other words, with respect to the set of things that lawyers do, a little is better than nothing, some is better than a little, more is better than some, and a lot is better than more. Our view is that, a priori, there is little reason to believe (or to disbelieve) this assumption in the unbundling context, particularly with respect to the access to justice rationale. Perhaps, like a small dose of antibiotics, a small amount of lawyering can be ineffective, or even harmful, as at least some previous research in a somewhat analogous context has suggested.[40]

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36. *See id.* at 122–23; *see also* John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2728–29 (1999); Alicia M. Farley, Note, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 565–66 (2007); David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959, 974–75 (1998); *cf.* Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?* 11 GEO. J. LEGAL ETHICS 915, 956–57 (1998); Fred C. Zacharias, *Reply to Hyman and Silver: Clients Should Not Get Less Than They Deserve*, 11 GEO. J. LEGAL ETHICS 981, 987–88 (1998).

37. FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE 9 (2000).

38. Comment, *A National Conference on 'Unbundled' Legal Services*, 40 FAM. CT. REV. 26, 28 (2002). Some with whom we spoke contended that this purpose trumped all others, and that because of this fact courts were the primary movers behind the unbundling movement in most states. *E.g.*, Telephone Interview with Cynthia J. Cohen, *supra* note 14. Associate Justice Cohen served as Chair of the Supreme Judicial Court Steering Committee on Self-Represented Litigants. *Id.*

39. MOSTEN, *supra* note 37, at 11.

40. *See, e.g.*, JOHN M. GREACEN, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 20 (2002), *available at* http://www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf. After finding that visiting a

C. What Must a Jurisdiction Do to Mainstream Unbundling?

We discuss here the set of steps that jurisdictions typically have taken to recognize, legitimize, and promote limited legal assistance in litigation matters. Jurisdictions have taken these steps in part to allay a variety of attorney fears,[41] which include malpractice suits, court sanctions, or judges that refuse to release them from cases despite contracts with clients limiting their involvement.[42] Based on our limited survey of three states, it appears that unbundling rules have evolved in a rough conceptual order, beginning with basic rule changes or ethical opinions permitting unbundling and moving toward more comprehensive revamping of rules.[43] Although we present these changes in something like a conceptual order, we recognize that they do not always evolve in this sequence. The process has been evolutionary and can proceed step by step or via convulsive change. States sometimes changed their rules, surveyed the resulting landscape, and realized new possibilities for change.

Preliminary steps typically began with amendments or interpretations to the equivalent to ABA Model Rules of Professional Conduct 1.2(c) and 6.5. With respect to the former, all fifty states have a rule equivalent to ABA Model Rule of Professional Conduct 1.2(c).[44] On its

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self-help center did not make it more likely that litigants would prevail, the authors state: "The Van Nuys Legal Self Help Center evaluation concluded that litigants who had received Center services, who then lost their unlawful detainer cases, were more likely to perceive that they had not been prepared than litigants who had not visited the Center. In other words, visiting the Center appears to have increased a litigant's expectations of his or her own ability to perform in court." *Id.*

Our sense of caution on this score is heightened by Forrest Mosten's list of sample personal characteristics that might make a client an appropriate candidate for an unbundled relationship. This list includes handling details well; following through on deadlines; reading technical documents effectively; having at least one year of college education; and possessing sufficiently functional eyesight, hearing, and other physical conditions. MOSTEN, *supra* note 37, at 27. Almost any population will have a wide variation on these characteristics, so it is hard to know whether the lower-to-middle-income population that is allegedly benefited by the availability of an unbundled market for legal services possesses these skills in sufficient quantity to allow unbundling to have a significant access-to-justice impact.

41. LIMITED REPRESENTATION COMM. OF THE CAL. COMM'N ON ACCESS TO JUSTICE, REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS 15 (2001) *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/ca2001unbundlingreport.authcheckdam.pdf.

42. *See, e.g., id.* (reporting the findings of a focus group that discussed attorneys' resistance to limited scope representation). The malpractice worry is slowly being put to rest by malpractice insurers, who are actually seeing lower rates of malpractice suit for attorneys who provide discrete task representation. ABA SECTION OF LITIGATION, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 52-54 (2003).

43. For example, some states that have joined the party later than others, such as Alabama, examined the universe of state approaches to unbundling rules and regulations before adopting any rules. This process allowed them to adopt both the basic rules and the more specific rules at the same time. Telephone Interview with Henry Callaway, Member, Hand Arendall, LLC & Tracy Daniel, Exec. Dir., Ala. Law Found. (Jan. 5, 2012).

44. REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT (2011), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/access_across_america_first_report_of_the_civil_justice_infrastructure_mapping_project.pdf.

face, this rule might appear to authorize limited legal services.[45] However, the rule by itself has often been insufficient to convince the bar that providing unbundled services was ethical and legal, and in any event, states interpreted the rule's text in widely varying ways.[46] For example, the Alabama State Bar released an ethics opinion in 2010 interpreting Rule 1.2(c) to allow ghostwriting and other unbundled legal services,[47] but Massachusetts' interpretation (since effectively overruled by other rule changes) was narrower in that it permitted only limited advice while barring ghostwriting and more substantial aid to otherwise pro se litigants.[48] Meanwhile Mississippi's 1990 opinion specifically condoned only limited advice given to small businessmen during clinics held by the Chamber of Commerce.[49] Similarly, most states have adopted ABA Model Rule of Professional Conduct 6.5, which governs conflicts of interest for limited legal service programs,[50] or a substantial equivalent.

But these rule changes have ordinarily provided insufficient balm for the fears attorneys associate with unbundling, particularly regarding whether a judge will honor a limited representation agreement by allowing an attorney to withdraw from a case once the attorney has appeared to argue a motion or conduct a single hearing. While some organizations had well-established relationships with judges who allowed limited scope representation and withdrawal,[51] mainstreaming of unbundling depended on firmer assurances.[52]

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45. For example, Rule 1.2(c) is cited in a Colorado ethics opinion that authorizes insurance defense attorneys to represent insureds on claims but not counterclaims. Colo. Ethics Op. 91 (Jan. 16, 1993), *available at* http://www.cobar.org/index.cfm/ ID/386/subID/1812/CETH/Ethics-Opinion-91:-Ethical-Duties-of-Attorney-Selected-by-Insurer-to-Represent-Insured,-01/16/93/.

46. For instance, the Massachusetts Bar Association raised concerns that substantial attorney involvement in otherwise pro se litigation would be unethical; the opinion deemed appropriate "only background advice and counseling . . . ." Mass. Bar Ass'n Ethics Op. 98-1, *supra* note 26. For another view, see UNBUNDLEDLAW, *supra* note 24, which described RPC 1.2 as authorizing advice outside of the courtroom but not limited appearances within it. Note that in Massachusetts, Opinion 98-1 has since been supplanted by a MBA resolution endorsing LAR. Tricia Oliver, *Delegates Complete Full Agenda at November Meeting in Springfield*, MASS. LAWYERS J., (Jan. 2011), *available at* http://www.massbar.org/publications/lawyers-journal/2011/january/delegates-complete-full-agenda-at-november-meeting-in-springfield.

47. The Unbundling of Legal Services and "Ghostwriting," Ala. State Bar, Ethics Op. 2010-1 (2010), *available at* http://www.alabar.org/ogc/fopDisplay.cfm?oneId=424. As we discuss in Part II, this ethics opinion was the first step in a still-ongoing process. Telephone Interview with Henry Callaway & Tracy Daniel, *supra* note 43.

48. Mass. Bar Op. 98-1, *supra* note 26.

49. Miss. Bar Ass'n Op. 176 (Sept. 7, 1990), *available at* http://www.msbar.org/ ethic_opinions.php?id=438.

50. Forty-three states and the District of Columbia have adopted Rule 6.5 or its equivalent. SANDEFUR & SMYTH, *supra* note 44. Of the seven states that have not adopted Rule 6.5, three (West Virginia, Mississippi, and Kansas) have ethics opinions that permit unbundling in some form. Mississippi, however, discussed *supra*, does not contemplate limited scope representation for pro se or indigent litigants.

51. *See, e.g.*, Telephone Interview with Richard MacMahon, S. Coastal Legal Services (Feb. 1, 2012); *see also* Telephone Interview with Judge Dina Fein, First Justice, Massachusetts Housing Court, Western Division (Jan. 27, 2012).

52. *See* Telephone Interview with Daniel M. Taubman, Judge, Colo. Court of Appeals (Jan. 3, 2012); *see also* Telephone Interview with Adam Espinosa, Assistant Regulation Counsel, Colo.

Overall, states have addressed four primary areas in order to mainstream unbundling: the attorney–client relationship, the duty of candor to the court, the relationship with opposing counsel, and judicial conduct. We discuss each in turn.

1. The Attorney–Client Relationship

States have examined the set of rules governing the reasonableness of limited scope representation for a given client, including informed consent and competency of representation. Rule 1.2(c) has been mentioned above, but other rules are implicated,[53] and the collective interaction of these rules has required clarification.[54] Those states wishing to incentivize unbundling also have considered the following issues unanswered by the text of professional conduct rules:

- What does competent representation look like in the limited representation context?[55]

- What is informed consent to limited representation?[56] What risks and benefits should a client considering limited scope representation be apprised of?[57] How would a stock paragraph in an engagement letter that explained the alternatives read?

- Are there circumstances in which limited scope representation is per se unreasonable?[58] What about per se reasonable?

2. The Duty of Candor to the Court

The ABA's comments on Model Rule of Professional Conduct 3.3 establish that an attorney is responsible for pleadings and other litigation documents.[59] This commentary has created confusion for attorneys wish-

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Supreme Court (Jan. 10, 2012) (noting attorneys' fears that they would enter an appearance that would not be honored by the presiding judge).

53. For example, the attorney competency requirement is not set forth within 1.2(c) but rather in Model Rule 1.1, which governs all representations. MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

54. *See* Telephone Interview with Daniel M. Taubman, *supra* note 52 (discussing the necessity of understanding how the definition of informed consent, which requires disclosure of both the risks and benefits of a specific choice, interacts with the choice to proceed pro se or with limited representation).

55. The requirement of competency is imposed by MODEL RULES OF PROF'S CONDUCT R 1.1.

56. Informed consent is required by MODEL RULES OF PROF'L CONDUCT R. 1.2(c).

57. *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (defining "informed consent" as an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonable alternatives to the proposed course of conduct").

58. For example, some have suggested it would be per se unreasonable to limit the scope of representation in a criminal matter by defending only one of the charges against a client from a single incident. *See, e.g.*, Adam Espinosa, *Ethical Considerations when Providing Unbundled Legal Services*, 40 COLO. LAW. 75, 76 (2011). Others have suggested that some problems may be so complex that competent advice cannot be provided in a limited service context. *See, e.g.*, Emily K. Spitser, The Ethics of Unbundling Legal Services in America: Re-visiting American Legal Ethics at the Turn of the Millenium 39 (2002) (unpublished manuscript) (on file with authors).

59. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt.

ing to engage in certain forms of unbundled representation, with ghostwriting serving as the primary focus of the resulting debate. States have considered the following questions implicating the duty of candor:

• What information, if any, must a ghostwriting attorney provide on any documents filed with the court? A full signature block?[60] The attorney's name?[61] A statement that the document was prepared with professional legal assistance?[62] Or no disclosure at all?[63] Do the answers to these questions depend on whether the lawyer composes an original document as opposed to assisting as a litigant fills out a pre-existing standardized pleading form? If so, how much of a pleading may a lawyer compose before she triggers the different (presumably higher) duties attendant to composition of an original pleading?

• Must other assistance, such as coaching a client on how to argue a motion, be disclosed to the court? If so, what other assistance?[64] How and when should such disclosure be made?

3. Relationship with Opposing Counsel

Limited scope representation necessarily implicates existing rules about contact with represented parties, as a party engaging a lawyer on a limited basis will, at times, be unrepresented. Therefore, states have been forced to consider the following questions:

• Who does an opposing party or attorney contact, the client or the lawyer? Does the answer to this question change at different points in the proceeding, and if so, what facts charge opposing counsel with notice that a direct contact with the client would be unethical? [65]

• On whom will process be served?[66]

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60. *See* ME. R. CIV. P. 11(b).

61. *See* IOWA R. CIV. P. 1.423(1).

62. *See* N.M. R. PROF'L. CONDUCT 16-303(E).

63. *See* CAL. R. CIV. PROC. 3.37(a).

64. *See* Mass. Bar Op. 98-1, *supra* note 26 (suggesting that "on-going behind the scenes representation," if not disclosed, "runs a risk of circumventing the whole panoply of ethical restraints that would be binding upon the attorney if she was visible"). Again, we note that the Massachusetts Bar Association has since endorsed LAR. Oliver, *supra* note 46.

65. Some, but probably not enough, clarification can come from court-approved forms to use when making and ending a limited appearance. *See* Mass. Probate & Family Ct., Notice of Limited Appearance, *available at* http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/documents/noticeoflimitedappearance.pdf; Mass. Probate & Family Ct., Notice of Withdrawal of Limited Appearance, *available at* http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/documents/noticeofwithdrawaloflimitedappearance.pdf; Colo. Ct. Form JDF 630, Civil Notice of Limited Appearance, *available at* http://www.courts.state.co.us/Forms/renderForm.cfm?Form=795; Colo. Ct. Form JDF 632, Civil Notice of Completion by Att'y, *available at* http://www.courts.state.co.us/Forms/renderForm.cfm?Form=797.

66. *See, e.g.*, VT. R. CIV. P. 79.1(b); N.D. R. CIV. P. 5(b)(1).

4. Judicial Conduct

Experience has shown that the cooperation of the presiding judge was essential for effective unbundled representation. Again, a primary emphasis of unbundling efforts has been to obtain a judicial commitment to allow attorneys to withdraw when they have exhausted their obligations under unbundled agreements. For this reason, many states adopted more comprehensive rules governing entrance and withdrawal of limited appearances. These additional rules constrained a judge's discretion to prevent an attorney from withdrawing from a case.[67] Apart from this question, states have also considered the following questions implicating judicial conduct:

- How much help can a judge provide to litigants, and does the answer to this question vary according the nature of an attorney's involvement?[68]

- How liberally should pleadings be construed, and does the answer to this question vary according to how extensively an attorney has ghostwritten the pleading?

- How should a judge treat pleadings where it is unclear if the party is represented?[69]

- Should federal judges behave differently than state judges?[70]

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67. These rules can appear either in a state's rules of civil procedure or a state's rules of professional conduct. *See, e.g.*, N.D. R. CIV. P. 11(e); NEB. RULE OF PROF'L CONDUCT 501.2; IOWA R. CIV. P. 1.404(3)-(4).

68. For example, Delaware has developed a set of judicial guidelines for dealing with pro se or partially-represented litigants, which recommends that a judge use her "discretion to assume more than a passive role in assuring that during litigation the merits of a case are adequately presented through testimony and other evidence," while remaining "neutral in the consideration of the merits and in ruling on the matter." DEL. S. CT., DELAWARE'S JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS 1.1 (2011), *available at* http://courts.delaware.gov/supreme/AdmDir/ad178guidelines.pdf. Other states have rules addressing adjudication with self-represented parties; these rules vary in the level of judicial engagement and intervention they encourage. *See, e.g.*, MASS. JUD. INST., JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS (2006), *available at* http://www.mass.gov/courts/judguidelinescivhearingstoc.html. One person with whom we spoke suggested that Massachusetts was the first state to adopt a comprehensive set of rules. Telephone Interview with Cynthia J. Cohen, *supra* note 14.

69. Several states have enacted a presumption that a party is unrepresented. *See, e.g.*, UTAH R. PROF'L CONDUCT 4.2, 4.3; WASH. R. PROF'L CONDUCT 4.2, 4.3.

70. This has been a major issue in Colorado, where a federal judge excoriated ghostwriting early in the development of unbundling. *See* Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1231–32 (D. Colo. 1994), *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996). The Colorado federal courts have affirmed this position, refusing to adopt Colorado state rules of professional conduct that would permit ghostwriting or other forms of unbundling. *In the Matter of Rules of Professional Conduct*, Amended Administrative Order 1999-6 (Apr. 10, 2000), *available at* http://www.cod.uscourts.gov/Documents/Orders/99-AdminOrder-6.pdf. This is not to say that the federal courts are uniformly opposed to ghostwriting; rather, some types of federal court proceedings, such as immigration hearings, have provided models for state attempts to implement limited scope representation. Email from Dianne Van Voorhees, Exec. Dir., Metro Volunteer Lawyers, to Molly Jennings, (March 29, 2012 2:25:26 PM EDT) (on file with authors).

II. HOW UNBUNDLING FOR LITIGATION MATTERS HAS EVOLVED

In this Part, we provide the results of our attempt to understand how unbundling for litigation matters evolved in our three study states. We begin with a very brief national overview before turning to Colorado, Massachusetts, and Alabama.

Nationally, the first rumblings of unbundling in litigation matters we found occurred in the early 1970s with the establishment of private legal clinics. These clinics focused on legal services that could be standardized, such as divorces and bankruptcies.[71] They represented a move toward a consumer-friendly legal market and enjoyed success in the 1970s.[72] According to Mosten, as legal clients joined broader consumer trends, they began demanding more control over and understanding of the court system.[73] The traditional private bar eventually picked up this momentum.[74]

Attorneys like M. Sue Talia and Mosten began advocating broader use of unbundled legal services as a method of increasing business for the small-firm or solo practitioner.[75] Done correctly, they emphasized, limited scope representation was a "low risk practice, of great service to the courts and litigants and profitable to the lawyer."[76]

Elsewhere, courts and legal services providers turned to unbundling to increase the number of clients they could serve. For instance, Maricopa County, Arizona began an unbundling project in 1994 in its superior court that referred pro se litigants to attorneys who, for a fee, advised them on legal strategy or procedure.[77] Further, groups such as North Central Alabama Legal Services have offered assistance completing forms for simple family law cases since the 1980s.[78]

Unbundling reached a visible national stage with the first national conference on the subject, held in Baltimore in 2000.[79] Panel topics included "Unbundled Practice and Pro Bono Opportunities" alongside "Successful Models for Unbundled Practice: Pioneers in the Field,"[80]

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71. Mosten, supra note 3, at 425; Henry J. Reske, *New Niche for Firm that Led a Revolution*, 80 ABA J, 22 (1994), at 22. Two examples of clinic-based law firms are Jacoby & Myers and Hyatt Legal Services. *Id.*

72. Reske, *supra* note 71, at 22.

73. Mosten, *supra* note 3, at 425.

74. *Id.*; *see also* Reske, *supra* note 71, at 22 ("Like the Romans when they conquered the Greeks, the traditional forms of law firms have maintained their dominance by learning from those they have overcome.").

75. *See, e.g.*, Telephone Interview with M. Sue Talia, *supra* note 6.

76. M. SUE TALIA, *ROADMAP FOR IMPLEMENTING A SUCCESSFUL UNBUNDLING PROGRAM*, 1 (2005), *available at* http://www.ajs.org/prose/South%20Central%20Notebook%20Contents/Tab%206/Roadmap%20for%20Implementing.pdf.

77. UNBUNDLED LAW, *supra* note 24.

78. Telephone Interview with Tom Keith, Legal Services Ala. (Jan. 18, 2012).

79. *Conference Program*, UNBUNDLED LAW, http://unbundledlaw.org/old/program/program.htm#WORKSHOPS AND MATERIALS (last visited May. 28, 2012).

80. *Id.*

demonstrating the alternative justifications of limited service representation as an access to justice measure and as a new business model. In 2002, the American Bar Association finalized changes to the Model Rules of Professional Conduct to provide bare-bones authorization for unbundling, including proposed amendments to Rules 1.2(c) and 6.5 (both discussed above).[81] More recently, the ABA Standing Committee on Delivery of Legal Services announced its plan to introduce a resolution in support of unbundled legal services at the ABA's 2013 mid-year conference.[82] These changes, limited as they were, complimented an increased focus on unbundling at the state level, to which we now turn.

A. Colorado

In Colorado, unbundling in litigation matters began with localized coalitions among legal services groups, pro bono efforts, and individual courts. As a 1998 Colorado ethics opinion would subsequently note, the Denver District Court established an "Information and Referral Office" around 1996, staffed by attorneys who provided limited legal advice and would refer clients to attorneys offering unbundled legal services.[83] At this time, it was not 100% clear that these efforts were legal and ethical, although the involvement of the local court system no doubt provided substantial cover to attorneys engaged in the practice. The current director of Colorado Legal Services explained to us that the legal services attorneys involved "put the huge unmet need [of the otherwise unrepresented] ahead of rule evolution."[84] Similarly, the Metro Volunteer Lawyers program, which provided pro bono volunteer opportunities for Den-

81. *Ethics 2000 Commission*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html (last visited May 29, 2012). Rule 1.2(c) was amended to "more clearly permit, but also more specifically regulate" limited scope representation agreements. *Reporter's Explanation of Changes: Rule 1.2*, AM. BAR ASS'N, *available at* http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule12rem.html (last visited May 28, 2012). Rule 6.5 was amended in order to permit attorneys to participate in LFTD programs without fear of violating conflict-of-interest rules. *Reporter's Explanation of Changes: Rule 6.5*, AMERICAN BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule65rem.html (last visited May 11, 2012).

82. *See Standing Committee on the Delivery of Legal Services*, AM. BAR ASS'N, http://www.americanbar.org/groups/delivery_legal_services.html (last visited July 30, 2012). The resolution confirms that the ABA supports limited scope representation as a means of increasing access to justice and that the ABA will work to increase public awareness of limited scope representation. AM. BAR ASS'N, STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., REPORT TO THE HOUSE OF DELEGATES (July 19, 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/2012%20limited%20scope%20representation%20report%20ls_del.authcheckdam.pdf

83. Colo. Bar Ass'n, Ethics Op. 101 (Jan. 17, 1998), add. 2006, *available at* http://www.cobar.org/index.cfm/ID/ 386/subID/1822/CETH/Ethics-Opinion-101:-Unbundled-Legal-Services,-01/17/98.

84. Telephone Interview with Jonathan Asher, *supra* note 4.

ver-area lawyers, had begun providing legal advice through its LFTD program in the early 1990s.[85]

According to participants, these programs worked because the lawyers in charge of individual programs had strong relationships with judges in courts inundated with pro se litigants, judges who were willing to be flexible in attempts to restore some sense of order to the courtroom.[86] The existence of these programs, which predated the statewide push towards unbundling, induced Colorado legal aid attorneys and pro bono program administrators to play a somewhat unusual and partly behind-the-scenes role. That is, despite the fact that they were already actively engaged in the unbundled practice, legal aid and pro bono attorneys did not initiate the statewide effort to mainstream that practice. Rather, when that effort began, these attorneys sought to shape the resulting rule amendments to assure that their preexisting programs would be deemed ethical and otherwise permissible.[87]

The movement toward recognizing, legitimizing, mainstreaming, and promoting unbundling began when Forrest Mosten gave several presentations in the early 1990s on the concept.[88] Despite a 1994 opinion by a Colorado federal district judge excoriating ghostwriting,[89] the Denver Bar Association requested a formal opinion from the Ethics Committee of the Colorado Bar Association in 1996.[90] In January 1998, the Ethics Committee responded by adopting Ethical Opinion 101, which concluded that unbundling was permissible under Colorado's Rules of Professional Conduct.[91] The opinion permitted unbundling in the broadest sense, limiting it only by the lawyer's duty to provide competent representation for her client.[92]

The ethics opinion was swiftly followed by a rules change. In July 1999, the Colorado Supreme Court amended Rules of Professional Conduct 1.2, 4.2, and 4.3, as well as Rule 11 of the Colorado Rules of Civil

85. Telephone Interview with Dianne Van Voorhees, Exec. Dir., Metro Volunteer Lawyers Program (Jan. 12, 2012); Telephone Interview with Gina Weitzenkorn, Mills & Weitzenkorn P.C. (Jan. 12, 2012); Telephone Interview with Gregory Hobbs, *supra* note 16 (acknowledging that in its original form, this program consisted of pro se divorce clinics, at which lawyers taught pro se litigants how to fill out the forms needed to obtain a divorce).

86. Telephone Interview with Gina Weitzenkorn, *supra* note 85. The judges in the district court where the Metro Volunteer Lawyers programs began providing rooms and access to the necessary court files.

87. Telephone Interview with Jonathan Asher, *supra* note 18.

88. Telephone Interview with Daniel M. Taubman, *supra* note 52; Telephone Interview with Jonathan Asher, note 4.

89. Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1231–32 (D. Colo. 1994), *aff'd on other grounds*, 85 F. 3d 489 (10th Cir. 1996).

90. Letter from Steven C. Choquette & Jon S. Nicholls, co-chairs of the Denver Bar Ass'n Legal Servs. Comm., Barbara G. Chamberlain, Dir. of the Thursday Night Bar Program, and David B. Ells, Dir. of the Colo. Bar Ass'n Pub. Legal Educ., to Kathie J. Fliss, Colo. Bar Ass'n Ethics Comm. (Oct. 9, 1996) (on file with author) [hereinafter Choquette Letter].

91. Colo. Bar Ass'n, Ethics Op. 101, *supra* note 83 (referencing the 2006 addendum).

92. *Id.*

Procedure, in order to permit unbundling for pro se litigants without filing a notice of appearance.[93] These rules permitted ghostwriting (but insisted that the attorney's name, address, telephone number, and registration number appear on the pleading).[94] The swift adoption of these new rules was possible because of the relatively limited objection to unbundling from either state judges[95] or the private bar.[96]

The interviews and other research we conducted made clear that in the consideration of these rule changes and in the deliberations regarding what role unbundling should play in Colorado practice, the experiences of the Denver-based programs discussed above played only a limited part. These programs did, however, play some role. For example, the Denver Bar Association's 1996 request to the Colorado Bar Association's Ethics Committee for an opinion on unbundling[97] was in part spurred by the Bar's desire to clarify the ethical status of some of its pro bono efforts, and these programs were identified as examples in subsequent presentations to the private bar.[98] But few of the persons we interviewed mentioned these programs until we asked about them. Rather, the rule changes were expected to expand unbundling in the private bar with two goals in mind: making legal services more affordable for middle-income Coloradans and increasing pro bono participation.[99] To accomplish this, the Colorado and Denver Bar Associations collaborated to hold several events designed to encourage unbundling.[100] The bench also worked to increase use of unbundling as an access to justice tool, most recently through the Access to Justice Commission, created through appointments by the Colorado bar and the Colorado Supreme Court.[101] Despite the efforts of the bench and bar, private attorney involvement in unbundling remained low.[102] Bar-sponsored pro bono organizations

93. Raymond P. Micklewright, *Discrete Task Representation a/k/a Unbundled Legal Services*, 29 COLO. LAW. 5 (January 2000); Colo. Bar Ass'n, Ethics Op. 101, *supra* note 83.

94. COLO. R. CIV. P. 11(b) (2012) (providing that an attorney's name on the ghostwritten pleading does not constitute an appearance).

95. The federal judiciary in Colorado remained hostile toward limited scope representation, issuing administrative order 1999-6 in April 2000, reaffirming its disapproval of ghostwriting. Colo. Bar Ass'n, Ethics Op. 101, *supra* note 83 (referencing the 2006 addendum). The district court affirmed this position yet again in 2002, adopting local rules that integrated all state rules of procedure and professional conduct except those mentioned in administrative order 1999-6. *Id.*

96. One justice suggested that the private bar may have been more willing to support unbundling because a mandatory pro bono rule was also on the table at the same time these rules were adopted. Telephone Interview with Gregory Hobbs, *supra* note 16.

97. Choquette Letter, *supra* note 90.

98. Email from Dianne Van Voorhees, Exec. Dir., Metro Volunteer Lawyers, to Molly Jennings (March 29, 2012 2:25:26 PM EDT) (on file with author).

99. Telephone Interview with Jonathan Asher, *supra* note 4.

100. Loren Ginsburg, *BBR: Unbundling Legal Services?*, THE DOCKET, 15 (May 1998) (reporting on the Colorado Bench/Bar Retreat panels on unbundling); *Unbundling Your Legal Practice: How to Offer Limited Legal Services* (flyer advertising a continuing legal education event in Denver on September 10, 1997).

101. Colorado Access to Justice Commission formed. COLO. BAR ASSOC., *Access to Justice Commission*, http://www.cobar.org/page.cfm/ID/20129 (last visited Dec. 9, 2011).

102. Telephone Interview with Adam Espinosa, *supra* note 52.

sought to use limited scope representation both to serve more people and to entice more attorneys to volunteer,[103] but the effectiveness of this effort remained unclear.

In the late 2000s, attorneys began to change their perspective on unbundling, perhaps due to deteriorating economic conditions.[104] The bench and bar made further efforts to emphasize unbundling to the private bar. Adam Espinosa, a Colorado Assistant Regulation Counsel, and Colorado Court of Appeals Judge Daniel Taubman began giving presentations to private bar lawyers on how unbundling worked under Colorado law.[105] At these presentations, attorneys frequently raised an issue existing Colorado rules did not address: how could an attorney entering a case for a specific purpose be certain she would be able to withdraw once that purpose was served?[106] The Colorado Supreme Court responded to this concern by adopting amendments to Colorado Rule of Civil Procedure 121 that abrogated the judge's discretion to keep an attorney on a case after filing a limited appearance.[107]

We draw the following lessons from the Colorado experience. First, legal aid providers and pro bono groups made informal arrangements with local courts to enable unbundled representation for litigation matters years before changes in rules mainstreamed the practice. Second, rule changes were iterative; initial changes were found insufficient, and a sustained effort was necessary. A key moment in the process occurred when courts gave up the discretion regarding whether to allow an attorney who entered a case for a limited purpose to withdraw after that purpose had been fulfilled. Third, in Colorado, resistance came primarily from the federal courts; the movement to mainstream unbundling had powerful allies in the state bench, the bar, and the office of disciplinary counsel, among others. Even with such allies, changes made thus far have taken over fifteen years to put in place.

B. Massachusetts

Like Colorado, Massachusetts was home to a number of providers who assisted clients on a limited-scope basis before rule changes and ethics opinions mainstreamed unbundling. Early LFTD programs began

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103. Telephone Interview with Dianne Van Voorhees, *supra* note 85.

104. Telephone Interview with Adam Espinosa, *supra* note 52.

105. *Id.*

106. *Id.*

107. Adam Espinosa & Daniel M. Taubman, *Limited Scope Representation Under the Proposed Amendment to CRCP 121, §1-1*, 40 COLO. LAW. 89 (Nov. 2011). Along with the new rule, the Colorado courts adopted JDF forms 630, 631, and 632 which an attorney may file to indicate a limited appearance. Zachary Willis, *State Judicial Issues Forms Allowing Limited Appearances by Attorneys for Pro Se Parties*, CBA CLE LEGAL CONNECTION (last visited May 28, 2012), http://cbaclelegalconnection.com/2011/11/state-judicial-issues-forms-allowing-limited-appearances-by-attorneys-for-pro-se-parties/.

in the late 1980s and early 1990s.[108] These programs began by offering limited advice and counseling to pro se litigants, gradually expanded to include representation in mediation sessions,[109] and moved from there to having attorneys argue motions or engage in court colloquies.[110] Ordinarily, these programs were staffed by a combination of legal aid providers and pro bono attorneys; in some cases, legal aid providers specialized in full representation, while litigants referred to bar-pro bono groups during triage often received limited services.[111] Meanwhile, even apart from the legal aid context, attorneys and clients also began to engage in unbundled arrangements, whereby the scope of representation was dictated by some combination of the client's gumption and ability to pay for legal services.[112]

As was true in Colorado, Massachusetts's movement toward legitimizing unbundling began with an early ethics opinion, adopted in 1998.[113] By that time, Massachusetts had already (in 1997[114]) adopted Model Rule 1.2(c). Unlike Colorado, however, Massachusetts's ethics opinion initially envisioned a narrower role for unbundling. The ethics opinion distinguished "limited background advice and counseling" from ghostwriting and "more extensive services," permitting only the former.[115] On its face, then, the ethics opinion left unclear the ethical status of a number of forms of unbundling, such as LFTD representation in settlement discussions and mediation sessions.

Some judges did try to capitalize on the early momentum generated by the rule adoption and the ethics opinion. A year after the adoption of the ethics opinion, a committee of the Massachusetts Probate and Family Court released a report that suggested "controlled unbundling" as a potential solution to the pro se crisis.[116] A feature of "controlled unbun-

108. Telephone Interview with Ilene Mitchell, Admin. Office of the Mass. Probate & Family Ct. (Jan. 19, 2012).

109. Telephone Interview with Sandy Moskowitz, Former Dir. of the Bos. Housing Ct. LFTD Program (Jan. 30, 2012). In Boston, the mediation component was added to the program in the early 2000s. *Id.*; *see also* email from Stephanie Lee, Boston Bar Ass'n (Feb. 6, 2012) (on file with author). Programs outside of Boston followed suit, offering representation in mediation sessions run by housing specialists. Ross Dollof & Patricio Rossi, *Mediation Project Gets Results for North Shore Tenants*, 16 LEGAL SERVS. REPORTER 1, 12-14 (2006) (discussing the decision by Neighborhood Legal Services, Inc. to create a LFTD program that extended representation to mediation sessions in the Northeast Housing Court); *see also* Telephone Interview with Judge Dina Fein, *supra* note 51.

110. Telephone Interview with Sheila Casey, Exec. Dir., Neighborhood Legal Servs., Inc. (March 30, 2012) (stating that in 2006, the NLS lawyer for the day program began engaging in court colloquies and motion arguments on behalf of clients).

111. Telephone Interview with Richard MacMahon, *supra* note 51.

112. *See* PROBATE & FAMILY CT. PRO SE COMM., PRO SE LITIGANTS: THE CHALLENGE OF THE FUTURE 42 (1995), *available at* http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/prosefinalreport.pdf (noting that, in the probate and family court, "it is becoming more common that litigants are retaining attorneys but using them selectively depending on the nature of the court appearance.").

113. Mass. Bar Ass'n, Ethics Op. 98-1, *supra* note 26.

114. MASS. R. PROF'L CONDUCT. 1.2 (2012).

115. Mass. Bar Ass'n, Ethics Op. 98-1, *supra* note 26.

116. PROBATE & FAMILY CT. PRO SE COMM., *supra* note 112, at 42–43.

dling" was that the judge retained discretion as to whether to permit an attorney to withdraw from a case entered for a limited purpose once that purpose was resolved.[117] This suggestion triggered the common attorney fear of indefinite commitment to a case, as articulated above, and opposition in the private bar halted further movement toward "controlled unbundling."[118]

For a year or so after the release of the report suggesting "controlled unbundling," little changed in Massachusetts.[119] Then, Massachusetts Chief Justice Margaret Marshall convened an access to justice conference in March 2001, which she followed about six months later with the establishment of the Supreme Judicial Court Steering Committee on Self-Represented Litigants.[120] The Steering Committee began meeting in April 2002 and started work on several initiatives, including a blue-ribbon Working Group on expanding access to legal representation.[121]

In an effort to reassure the private bar that its concerns would receive serious attention, the Group's co-chairs were selected from nominations by the Boston Bar Association and Massachusetts Bar Association.[122] The Steering Committee also assured that the Working Group's membership included representatives of legal aid organizations that had experience with unbundled programs.[123] The Working Group issued several reports and recommendations. One report argued that ghostwriting was not unethical and that concerns regarding duty of candor to the court could be addressed by including an annotation on a court document noting that it was prepared with assistance of counsel.[124] The Group further recommended that Massachusetts engage in a pilot project testing the provision of unbundled legal services. The Steering Committee on Self-Represented Litigants received this recommendation with caution, fearing the reaction of the private bar, but at a subsequent meeting of the Massachusetts Bar Association, attorneys and judges who had previously opposed LAR thought the idea of a pilot project worth trying.[125]

The pilot program began in two courts but soon expanded to include a third; it was only open to attorneys who had completed training in LAR.[126] An advisory group for the pilot program included representa-

117. Interview with Cynthia J. Cohen, Assoc. Justice, Mass. App. Ct. (Jan. 9, 2011).

118. Interview with Jayne Tyrrell, Dir. of Massachusetts Interest on Lawyers Trust Fund Accounts (Dec. 20, 2011).

119. Interview with Cynthia J. Cohen, *supra* note 117.

120. *Id.*

121. *Id.*

122. *Id.*

123. Telephone Interview with Cynthia J. Cohen, *supra* note 14.

124. *Id.* The Working Group also pushed Massachusetts to adopt Model Rule of Professional Conduct 6.5, which governs conflict checking for attorneys involved in pro bono limited representation programs.

125. *Id.*

126. Interview with Cynthia J. Cohen, *supra* note 117. *See generally* Suffolk, SS. Supreme Judicial Court, Order In Re: Limited Representation Pilot Project, (Aug. 1, 2006), *available at*

tives from various sectors of the bar, including legal aid and pro bono groups.[127] The advisory group also proposed the term "limited assistance representation" instead of "unbundling" so as to separate the concept from the "controlled unbundling" idea.[128] After receiving positive reactions (drawn in large part from surveys of judiciary staff) regarding the pilots, the Steering Committee issued a report recommending that LAR be made available in all of the state trial courts.[129] The Massachusetts Supreme Judicial Court issued an order empowering each of the state's seven trial court departments to authorize LAR, and the departments in turn issued the appropriate orders.[130] These orders required attorneys to undergo LAR training; further, entry and exit from a piece of litigation was to be effectuated automatically by filing appropriate notices, thus removing the need for a court order permitting the withdrawal.[131] Some reports suggest that LAR has been used to leverage pro bono assistance, but has not caught on in the fee for service context, at least in the state's housing courts.[132]

We draw the following conclusions from the Massachusetts experience. First, unbundling was an established part of several legal assistance programs run both by legal aid providers and by pro bono attorneys prior to the Massachusetts Supreme Judicial Court's "pilots." Further, under applicable court rules, legal aid and pro bono attorneys were subject to the same ethical strictures as the private bar.[133] Despite these facts, these programs were not seen as providing sufficient information for judgments regarding how challenges such as contact with represented parties and entry/withdrawal from pending litigation should be addressed statewide. Instead, the "pilots" were considered necessary to address these issues.

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http://www.mass.gov/courts/sjc/limited-rep.html. The program began in the Boston Family Court and the Springfield Family Court. Interview with Cynthia J. Cohen, *supra* note 117. It later expanded to the Deadham Probate and Family Court in Suffolk, SS. Supreme Judicial Court, Amended Order In Re: Limited Representation Pilot Project, (June 28, 2007), *available at* http://www.mass.gov/courts/sjc/limited-rep.html.

127. Telephone Interview with Cynthia J. Cohen, *supra* note 14.

128. *Id.*

129. *Id.*; *see also* THE SUPREME JUDICIAL COURT STEERING COMMITTEE ON SELF-REPRESENTED LITIGANTS, ADDRESSING THE NEEDS OF SELF-REPRESENTED LITIGANTS IN OUR COURTS: FINAL REPORT AND RECOMMENDATIONS (2008), *available at* http://www.mass.gov/courts/sjc/ report-self-rep-litigants.html.

130. Interview with Cynthia J. Cohen, *supra* note 117; *see, e.g.*, Mass. Housing Ct. Dept., Standing Order 1-10, Limited Assistance Representation (Aug. 30, 2010), *available at* http://www.mass.gov/courts/courtsandjudges/courts/housingcourt/housing-standing-order1-10.pdf.

131. The orders of the various Massachusetts trial court divisions resemble one another. Telephone Interview with Judge Dina Fein, First Justice, Mass. Housing Ct., W. Div. (March 26, 2012).

132. Telephone Interview with Judge Dina Fein, *supra* note 51. Judge Fein suggested further marketing programs targeted at the state bar to promote interest in unbundling on a fee-for-service basis.

133. *See, e.g.*, Mass. Housing Ct. Dept., Standing Order 1-01, Lawyer for a Day Program (Sept. 10, 2001), *available at* http://lawlib.state.ma.us/source/mass/rules/housing/standingorder1-01.html.

Even today, Massachusetts legal and ethical rules as applied in certain courts draw a line between, say, LAR as part of a LFTD program (which are typically run by legal aid providers and pro bono attorneys) versus limited appearances by attorneys not associated with such a program. For example, an attorney who appears in the Massachusetts Northeast Housing Court to argue a motion as part of that court's LFTD program is governed by Massachusetts Housing Court Standing Order 1-01, need not file a notice of limited appearance or a notice of withdrawal of limited appearance, and need not have completed any special training.[134] In contrast, when a lawyer's appearance to argue a motion is separate from the Northeast Housing Court's LFTD program, her appearance is governed by Massachusetts Housing Court Standing Order 1-10. This latter order requires that the lawyer file a notice of limited appearance and a notice of withdrawal of limited appearance, and the lawyer must have undergone LAR training.[135] We confess that we are uncertain as to the conceptual distinction between these two situations, particularly given that Massachusetts Housing Court Standing Order 1-01 expressly provides that the Rules of Professional Conduct apply in full to LFTD attorneys.[136]

Second, in Massachusetts, there was substantial opposition to unbundling at the inception of the movement, and this opposition led to another iterative process towards mainstreaming. Third, a key sticking point in the process was whether courts would give up the discretion regarding whether to allow an attorney who entered a case for a limited purpose to withdraw after that purpose had been fulfilled. Progress was only possible after courts made clear that they would in fact do so.

C. Alabama

Alabama's rule changes and official adoption of unbundling rules happened later than the other states surveyed. Nevertheless, some legal aid providers and pro bono groups began providing various forms of unbundled assistance before the organized bar began seriously considering rule changes that mainstreamed the practice. For instance, responding to both the wave of pro se litigants experienced by Alabama state courts

134. Telephone Interview with Sheila Casey, *supra* note 110; Mass. Housing Ct. Dept., Standing Order 1-01, *supra* note 133. For a similar understanding in family court, see Telephone Interview with Ilene Mitchell, *supra* note 108.

135. Mass. Housing Ct. Department Standing Order 1-10, *supra* note 130, at 1–2. For a similar regime in family courts, see Memorandum from Paula M. Carey, Chief Justice of the Massachusetts. Probate and Family Court to All Judges, Registers, Chief Probation Officers, Judicial Case Managers, and Family Law Facilitators of the Probate and Family Court Re: Ltd. Assistance Representation (May 8, 2009), *available at* http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/documents/memorelarstatewide.pdf.

136. Mass. Housing Ct. Dept., Standing Order 1-01, *supra* note 133; *see also* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV 1987, 2046 (1999) (describing pro se interventions as lying along a spectrum rather than on one side or the other of a hard-and-fast line).

and to funding cuts,[137] Legal Services of North Central Alabama[138] began creating pro se forms in the mid-1980s without the advance approval of the courts.[139] Feeling it was irresponsible to hand out the forms without direction, Legal Services of North Central Alabama also began providing limited advice to pro se litigants looking to use the forms.[140] Furthermore, legal services attorneys in Alabama have for years engaged in limited representation in the form of telephone negotiations with opposing parties without formally entering cases.[141]

Movement towards mainstreaming began within the organized bar in 2000, later than in Colorado and Massachusetts.[142] At that time, Chief Justice Perry Hooper and Alabama State Bar president Wade Baxley nominated an access to justice task force.[143] When Chief Justice Hooper retired in 2001, however, the task force stopped meeting.[144] A subcommittee organized by the Alabama State Bar Committee on Volunteer Lawyers Programs/Access to Legal Services attempted to continue the work of the task force, but after gathering some pro se forms and holding a few meetings, the subcommittee found it lacked the authority to go further.[145] In 2004–2005, the bar put together a task force that produced two concrete recommendations to improve access to justice: (1) appointing a committee to develop and distribute pro se forms and (2) enabling limited scope representation.[146] This committee report, while highlighting potential benefits of unbundling, failed to convince the bar to take affirmative steps. The Alabama State Bar chose to focus on increasing the number of pro se forms and essentially tabled the limited scope representation recommendation, citing concerns about the unauthorized practice of law.[147]

In 2007, the Supreme Court of Alabama renewed the focus on unbundling (along with several other measures) by establishing an Access

137. Interview of Tom Keith by Kenneth Cain, Jr. (July 26, 1992), *available at* http://www.ll.georgetown.edu/nejl/Tom_Keith_trans.cfm.

138. At the time, Legal Services of North-Central Alabama was its own organization. In 2004, all the legal services organizations in Alabama merged into one group, Legal Services Alabama. *About Us*, LEGAL SERVICES ALABAMA, http://www.legalservicesalabama.org/ about_us/ (last visited May 29, 2012).

139. Telephone Interview with Tom Keith, *supra* note 78; Interview of Tom Keith by Kenneth Cain, Jr., *supra* note 137.

140. Telephone Interview with Tom Keith, supra note 78; Telephone Interview with Stacey Haire, Attorney, formerly of Legal Services of North Central Alabama (Jan. 20, 2012).

141. Telephone Interview with James Chipley, Attorney, Legal Services of Alabama (February 22, 2012).

142. Telephone Interview with Tom Keith, *supra* note 78; ACCESS TO JUSTICE TASK FORCE, ACCESS TO JUSTICE? SELF-REPRESENTED LITIGANTS IN THE ALABAMA COURT SYSTEM 2 (2005).

143. *Id.*

144. *Id.*; Dana Beyerle, *Justice Hooper to Retire*, GADSEN TIMES, Oct. 8, 2000, at B1, B8.

145. ACCESS TO JUSTICE TASK FORCE, *supra* note 142, at 2–3.

146. *Id.* at 4, 6; Telephone Interview with Henry Callaway & Tracy Daniel, *supra* note 43.

147. Telephone Interview with Henry Callaway & Tracy Daniel, *supra* note 43.

to Justice Commission (ATJ Commission).[148] While the order establishing the ATJ Commission did not specifically reference unbundling, the Commission financed a state bar Pro Bono Committee that began looking into unbundling as a response to the pro se crisis.[149] This Committee began to develop a set of rule changes to promote limited scope representation that, it was hoped, would provide sufficient specificity for attorneys considering unbundling their practices.[150] The proposed changes, based on lessons learned from other states, included (1) clarification of what must be included in a limited scope representation agreement, (2) how to determine if a party was represented or unrepresented, (3) permission for ghostwriting if document includes notation that it was prepared with assistance of counsel, and (4) an automatic withdrawal provision for limited scope attorneys.[151]

Momentum grew in 2010, when the Alabama State Bar General Counsel's office issued Ethics Opinion 2010-01, stating that the rules as they stood permitted ghostwriting and limited scope representation.[152] Although the Commission noted that the ethics opinion did not provide sufficient guidance to induce private attorneys to incorporate unbundled legal services into their practices,[153] certain pro bono groups took the opinion as sufficient initiative to launch new programs to serve the underrepresented.[154]

Finally, the Alabama State Bar Board of Bar Commissioners approved the Pro Bono Committee's proposed rule changes in November 2011, after which they were sent to the Alabama Supreme Court for approval.[155] The Alabama Supreme Court adopted the new rules on March 26, 2012.[156]

We draw the following lessons from the Alabama experience. First, as in Colorado and Massachusetts, legal aid and pro bono groups were pursuing unbundled representation in litigation matters before alterations to court and ethics rules mainstreamed the practice. Yet again, this expe-

148. *About Us*, ALA. ACCESS TO JUSTICE COMM'N (2009), http://alabamaatj.org/about_us.html (last visited May 29, 2012).

149. Telephone Interview with Henry Callaway & Tracy Daniel, *supra* note 43.

150. *Id.* The proposed rule changes will affect Alabama Rules of Professional Conduct 1.1, 1.2, 4.2, and 4.3, as well as Alabama Rules of Civil Procedure 11 and 87. Memorandum from Henry Callaway on behalf of the Pro Bono and Public Service Committee to the Alabama State Bar Executive Committee (July 22, 2011) (on file with author).

151. Memorandum from Henry Callaway, *supra* note 150.

152. Ala. State Bar, Ethics Op. 2010-1, *supra* note 47.

153. Memorandum from Henry Callaway, *supra* note 150.

154. Telephone Interview with Kelli Mauro, Exec. Dir., Birmingham Volunteer Lawyers Program (Jan. 26, 2012).

155. Minutes of the Ala. State Bar Bd. Comm'rs Meeting 6 (Nov. 4, 2011), *available at* http://www.alabar.org/bbc/minutes/1111/Minutes_Board%20Meeting_November42011.pdf; Telephone Interview with Henry Callaway & Tracy Daniel, *supra* note 43.

156. Ala. Sup. Ct., Order Approving Amendment to Rules 1.1, 1.2(c), 4.2, & 4.3 of the Ala. Rules of Prof'l Conduct (Ala. Mar. 26, 2012), *available at* http://www.alabar.org/media/img/Ala-Sup-Ct-Order%20-LSR.pdf.

rience was thought to have limited relevance to the mainstreaming effort. Second, Alabama learned from the experience of other states and, in doing so, was able to propose a more comprehensive set of rule changes.[157] Third, opposition within Alabama to the concept of unbundling has been somewhat muted, and the organized private bar for the most part has been a proponent, not an obstacle, to mainstreaming.

D. Common Conclusions

We articulated our view of the lessons common to all three states in the Introduction to this Article. To avoid too much repetition, we simply summarize our views here. First, in all three states, legal aid providers (joined in some cases by pro bono providers) had actively practiced unbundled forms of representation in litigation matters in years before a recognizable mainstreaming movement began. Second, the movement toward recognizing, legitimizing, and promoting limited assistance in litigation matters had to include a coalition of leaders in the private bar, the judiciary, administrators of state ethical rules and guidelines, and others. Third, no one knows whether the mainstreaming efforts have in fact realized the goals they were designed to promote.

III. THE BIBLIOGRAPHY

The final part of this paper consists of a bibliography of sources concerning unbundling, which is available at www.denverlawreview.org. We limit this bibliography to sources that focus on the definition of unbundling we laid out in Part I, *supra*—for instance, we have excluded sources that deal primarily with collaborative lawyering[158] and law student clinics, both of which fall beyond the scope of this paper. Further, we exclude the numerous state bar publications on unbundling[159] because of the volume of such publications, the difficulty in obtaining them, and the fact that many are listed elsewhere.[160] The national bar publications

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157. Persons involved with the push for unbundling in Alabama had gone so far as to hire a consultant familiar with the California experience to generate ideas and to facilitate more comprehensive moves. Telephone Interview with Henry Callaway & Tracy Daniel, *supra* note 43 (discussing the hiring of M. Sue Talia, Private Family Law Judge, as a consultant).

158. Collaborative lawyering involves a lawyer-client relationship limited by an agreement that "the lawyer will not represent the client in court in an adversarial proceeding against the other party at any time." Susan L. Amato, *Collaborative Family Law: Setting the Framework for Effective Collaborative Practice*, *in* UNDERSTANDING COLLABORATIVE FAMILY LAW: LEADING LAWYERS ON NAVIGATING THE COLLABORATIVE PROCESS, WORKING WITH CLIENTS, AND ANALYZING THE LATEST TRENDS 179 (2011). If an agreement between the parties is not reached, none of the collaborative professionals will participate in any adversarial court proceeding involving these parties. *Id.*

159. We have included two pieces from Colorado publications because they represent a high-profile debate on the propriety of unbundling between the state and federal courts in the State. *See* Kane, *supra* note 11 (describing support for unbundling); Micklewright, *supra* note 93 (same).

160. The ABA Standing Committee on the Delivery of Legal Services, for instance, maintains a bibliography of sources relating to unbundling, which includes many relevant state bar publications. *See Pro Se/Unbundling Resource Center: Articles*, ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, http://apps.americanbar.org/legalservices/delivery/delunbundart.html (last visited May 28, 2012).

included in our bibliography accurately reflect the content of many of the state bar articles, which tend to describe recent developments in state law.

The sources are organized into the following categories:

- *Problem/Trend Descriptive*: These sources explore the problem of pro se litigation and trends in unbundling.

- *Empirical*: These pieces take an empirical look at unbundling's efficacy or provide a framework for future empirical work.

- *Ethical*: Pieces in this category consider the ethical implications of unbundling.

- *Legal*: Sources in this category analyze the rules of civil procedure or professional conduct relevant to unbundling.

- *Operational*: These articles consider the steps a practitioner must take to unbundle his practice.

- *Ghostwriting*: Articles in this category look at issues unique to ghostwriting.

- *Judicial Role*: These pieces suggest varied best practices for judges faced with parties using limited representation.

- *Court-Based Delivery Systems*: These sources explore unbundling services provided through court-based self-help centers.

- *Clinics*: Articles in this category consider the effectiveness of pro se clinics, whereby a legal services organization teaches pro se litigants how to proceed before they go to court.

- *Elder Lawyering*: These sources appraise issues specific to unbundling for elderly clients.

- *Hotlines*: These pieces investigate the use of hotlines for delivery of unbundled legal services.

JUDICIAL SUPPORT FOR PRO BONO LEGAL SERVICE

JUSTICE GREGORY J. HOBBS, JR.†

Access to justice is the single most compelling reason for a legal profession. The day we take our oath as attorneys, we swear never to refuse the cause of the defenseless or the oppressed.[1] A core value of the legal profession is to provide legal services without fee to persons of limited means and organizations serving their needs.

Colorado Rule of Professional Conduct 6.1 recognizes this core value for lawyers and judges alike: "Each lawyer has a professional responsibility to provide legal services to those unable to pay."[2] In addition, judges "should fulfill their pro bono publico responsibility by performing services or participating in activities . . . for improving the law, the legal system or the legal profession."[3]

Judicial support for pro bono legal service is thus housed within Colorado Rule of Professional Conduct 6.1 and enjoys the unstinting assistance of the Colorado Bar Association and local bar associations.[4] Lawyer suggestions for rule changes have resulted in a number of new or amended rules adopted by the Colorado Supreme Court, along with chief justice directives, to aid attorneys in performing their pro bono responsibilities.[5]

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† Justice, Colorado Supreme Court. Justice Hobbs has served on the court since his appointment by Governor Roy Romer in 1996. Prior to his appointment, Justice Hobbs practiced at Hobbs, Trout & Raley P.C. and Davis, Graham & Stubbs; served as the First Assistant Attorney General, Natural Resources Section, State of Colorado, as an Enforcement Attorney with the United States Environmental Protection Agency; and as a law clerk for Judge William E. Doyle of the United States Tenth Circuit Court of Appeals. Justice Hobbs also previously taught sixth grade in New York City and served in the Peace Corps in South America.

1. In accordance with Colorado Rule of Civil Procedure 201.14, a Colorado licensed attorney swears an Oath of Admission administered by the Colorado Supreme Court that states "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed." *Colorado Attorney Oath of Admission*, COLO. BAR ASS'N, http://www.cobar.org/index.cfm/ID/1653/CETH/Colorado-Attorney-Oath-of-Admission/ (last visited Apr. 1, 2012); *see also* Greg Hobbs, *Access to Justice—The Single-Most Compelling Reason for a Legal Profession*, COLO. LAW. Apr. 2011, at 59, 59, *available at* http://www.cobar.org/tcl/tcl_articles.cfm?articleid=6982.

2. COLO. RULES OF PROF'L CONDUCT R. 6.1 (2011).

3. *Id.*

4. *Id.*

5. Outstanding examples of lawyers who helped steer major rule changes through the Colorado Supreme Court committee rulemaking process include Jon Asher and Dianne Van Voorhees in regard to Colorado Rule of Civil Procedure 11(b) (limited scope representation rule); Ilene Bloom in regard to the commentary to Colorado Rule of Professional Conduct Rule 6.1, Sara Crocker, *Profile of the New DBA President: A New President in Bloom*, DOCKET, July–Aug. 2011, at 4, 4, *available at* http://www.cobar.org/docket/doc_articles.cfm?ArticleID=7142; and John Gleason in regard to the Pro Bono Emeritus rule in Colorado Rule of Civil Procedure 223, JoAnn Vogt, *New Rule Allows*

LIMITED SCOPE REPRESENTATION RULES

Colorado attorneys are authorized by the Colorado Rules of Civil Procedure and the Colorado Rules of Professional Conduct to undertake limited representation of self-represented parties, pro bono or for a fee.[6]

Under Colorado Rules of Civil Procedure 11(b) and 311(b), attorneys may provide drafting assistance to self-represented parties who file pleadings in court proceedings.[7] The pleading filed by the self-represented party must identify the assisting attorney.[8] The attorney's assistance in preparing the pleading does not constitute an entry of appearance.[9] Without the necessity of any disclosure, attorneys may assist self-represented parties to fill out pre-printed and electronically published forms issued through the Colorado Judicial Branch for use in court.[10]

Under Colorado Rule of Civil Procedure 121 Section 1-1(5), attorneys may make limited appearances in court on behalf of self-represented parties in specified proceedings with consent of those parties.[11] Leave of court is not required for the attorney to make or complete the limited appearance.[12] In addition, the consent, notice of limited appearance, and completion of limited appearance forms are available at the web page of the Colorado judicial branch.[13]

Retired and Inactive Lawyers to Provide Pro Bono Legal Services, COLO. LAW., Sept. 2007, at 75, 75, *available at* http://www.cobar.org/tcl/tcl_articles.cfm?articleid=5228.

6. COLO. R. CIV. P. 11(b); COLO. R. CIV. P. 311(b); COLO. RULES OF PROF'L CONDUCT R. 6.1.

7. COLO. R. CIV. P. 11(b); COLO. R. CIV. P. 311(b).

8. *Id.*

9. *Id.*

10. *Id.*

11. COLO. R. CIV. P. 121 § 1-1(5); *see also* Adam J. Espinosa & Daniel M. Taubman, *Limited Scope Representation Under the Proposed Amendment to C.R.C.P. 121, § 1-1*, COLO. LAW., Nov. 2011, at 89, 89, *available at* http://www.cobar.org/tcl/tcl_articles.cfm?articleid=7300 (discussing the reasons for adopting of the now-effective COLO. R. CIV. P. 121 § 1-1(5)).

12. COLO. R. CIV. P. 121 § 1-1(5).

13. *Judicial Department Form 630: Notice of Limited Appearance by Attorney with Consent of Pro Se Party Under C.R.C.P. 11(b) and 121, Section 1-1(5) in a Civil Matter*, COLO. STATE JUDICIAL BRANCH (Oct. 2011), http://www.courts.state.co.us/Forms/renderForm.cfm?Form=795 (general civil matter form); *Judicial Department Form 631: Consent to Limited Appearance by an Attorney Under C.R.C.P. 11(b) and 121, Section 1-1(5) in a Civil Matter*, COLO. STATE JUDICIAL BRANCH (Oct. 2011), http://www.courts.state.co.us/Forms/renderForm.cfm?Form=796 (general civil matter form); *Judicial Department Form 632: Notice of Completion of Limited Appearance under C.R.C.P. 11(b) and 121, Section 1-1(5) in a Civil Matter*, COLO. STATE JUDICIAL BRANCH (Oct. 2011), http://www.courts.state.co.us/Forms/renderForm.cfm?Form=797 (general civil matter form); *Judicial Department Form 1334: Notice of Limited Appearance by an Attorney with Consent of Pro Se Party under C.R.C.P. 11(b) and 121, Section 1-1(5) in a Family Law Matter*, COLO. STATE JUDICIAL BRANCH (Oct. 2011), http://www.courts.state.co.us/Forms/renderForm.cfm?Form=798 (domestic relation matter form); *Judicial Department Form 1335: Consent to Limited Appearance by an Attorney under C.R.C.P. 11(b) and 121, Section 1-1(5) in a Family Law Matter*, COLO. STATE JUDICIAL BRANCH (Oct. 2011), http://www.courts.state.co.us/Forms/renderForm.cfm?Form=799 (domestic relation matter form); *Judicial Department Form 1336: Notice of Completion of Limited Appearance under C.R.C.P. 11(b) and 121, Section 1-1(5) in a Family Law Matter*, COLO. STATE

Colorado ethical rules allow attorneys and clients to agree upon limited scope representation for all types of legal service regardless of whether a court appearance occurs. Colorado Rule of Professional Conduct 1.2(c) provides that "[a] lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[14] Under Colorado Rule of Professional Conduct 1.0(e), "informed consent" requires the lawyer to communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[15] Furthermore, clients and attorneys must enter into a limited-scope-representation and fee agreement. For the protection of both parties, prudence suggests this should be done in writing.[16]

The Colorado Supreme Court, working with its Judicial Advisory Council, adopted the limited representation rules (also known as the "unbundling" rules) because, for example, 75% to 85% of domestic civil cases filed in Colorado trial courts involve at least one pro se party, many of whom presumably are persons of limited means who cannot afford an attorney and need pro bono assistance.[17] Others cannot afford the full range of legal services an attorney can provide. Colorado trial and appellate judges agree that it would be better for all parties to be represented, but, failing that, some attorney help is preferable to no help.[18]

COURT RULES TO ASSIST PRO BONO LEGAL SERVICE

Colorado Rule of Professional Conduct 6.1 sets forth a goal of fifty hours of pro bono legal service per year by each Colorado licensed attorney.[19] A "substantial majority of the fifty hours" should be "without fee or expectation of fee to persons of limited means or charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means."[20]

The Commentary to Rule of Professional Conduct 6.1 contains a recommended pro bono policy for all Colorado licensed attorneys and firms.[21] Without intending to be restrictive, the Commentary identifies

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JUDICIAL BRANCH (Oct. 2011), http://www.courts.state.co.us/Forms/renderForm.cfm?Form=800 (domestic relation matter form).

14. COLO. RULES OF PROF'L CONDUCT R. 1.2(c) (2008).

15. *Id.* R. 1.0(e).

16. Adam J. Espinosa, *Ethical Considerations When Providing Unbundled Legal Services*, COLO. LAW., Sept. 2011, at 75, 75, *available at* http://www.cobar.org/tcl/tcl_articles.cfm?articleid=7208.

17. Memorandum from Veronica Marceny, Office of the State Court Administrator, Colorado State Judicial Branch, to author (on file with author).

18. During his sixteen years as a member of the Colorado Supreme Court, the author has consistently heard this from trial judges throughout the state.

19. COLO. RULES OF PROF'L CONDUCT R. 6.1 (2008).

20. *Id.*

21. *Id.* R. 6.1 cmt.

categories of matters qualifying as pro bono service.[22] It also suggests how a small, medium, or large law firm might establish procedures for administering its pro bono program.[23]

Colorado Rule of Civil Procedure 260.8 provides for attorneys to receive up to nine hours of Continuing Legal Education credit per three-year reporting period for uncompensated pro bono representation or mentoring of another lawyer or law student providing the representation.[24]

Chief Justice Directive 98-01 provides for a waiver of filing fees and certain costs for indigent persons in civil cases.[25] When an attorney receives a pro bono case from a legal services provider, the provider makes the indigency determination, and the attorney taking the case effectuates the filing fee and cost waiver by signing and filing the applicable judicial branch form.[26] Legal services providers typically have malpractice insurance that covers pro bono attorneys,[27] but an attorney taking an individual matter from such a provider should verify this, if she or he does not carry suitable coverage.

Colorado has a pro bono emeritus program for attorneys who choose not to engage in the practice of law other than pro bono work for indigent or near-indigent clients. Under Colorado Rule of Civil Procedure 223, for a small one-time administrative fee of $50, the Colorado Supreme Court waives annual registration fees for otherwise inactive attorneys who take pro bono cases for indigent persons under the auspices of a legal services provider.[28] Attorneys in good standing who are licensed in other states are eligible to practice for pro bono clients in Colorado under this type of registration.[29]

Chief Justice Directive 06-03 addresses interpreter services in court-related proceedings.[30] This directive has been amended to introduce a

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22. *Id.*

23. *Id.*

24. COLO. R. CIV. P. 260.8.

25. Michael L. Bender, *Chief Justice Directive 98-01: Costs for Indigent Persons in Civil Matters*, SUPREME CT. COLO. (Aug. 2011), http://www.courts.state.co.us/Courts/Supreme_Court/Directives/98-01Amended8-12-11withAttachmentARevised3-12.pdf.

26. The legal services provider and the attorney sign JDF Form 203. *Judicial Department Form 203: Certification of Determination of Indigency*, COLO. STATE JUDICIAL BRANCH (Aug. 2011), http://www.courts.state.co.us/Forms/renderForm.cfm?Form=140. The legal services provider maintains and fills out JDF Form 205. *Judicial Department Form 205: Motion to File Without Payment of Filing Fee or Waive Other Costs Owed to the State and Supporting Financial Affidavit*, COLO. STATE JUDICIAL BRANCH (Aug. 2011), http://www.courts.state.co.us/Forms/renderForm.cfm?Form=142.

27. *See Volunteer with MVL*, METRO VOLUNTEER LAW., http://209.240.137.109/volunteer-with-mvl/ (last visited Apr. 7, 2012).

28. COLO. R. CIV. P. 223.

29. *Id.*

30. Michael L. Bender, *Chief Justice Directive 06-03: Directive Concerning Language Interpreters and Access to the Courts by Persons with Limited English Proficiency*, SUPREME CT. COLO.,

more comprehensive provision of language services, not only for indigent persons, but all persons involved in Colorado court proceedings.[31] The Colorado Judicial Branch website maintains a large variety of self-help forms and information for use in court proceedings, available to the public without charge.[32]

COLORADO SUPREME COURT PRO BONO RECOGNITION PROGRAM

Through its Pro Bono Recognition Program, the Colorado Supreme Court asks all law firms, in-house counsel groups, and government attorney groups, whatever their size, to commit to an average of fifty hours of pro bono legal services per Colorado licensed attorney annually across the firm or group, prorated for part-time attorneys.[33] This averaging mechanism recognizes that some attorneys in the firm or group might have more than fifty hours, offsetting those who have less. A substantial majority of these hours should be for indigent persons or organizations that serve the indigent.[34]

Each year, the Colorado Supreme Court recognizes those law firms, in-house counsel groups, and government attorney groups that commit to this goal and the firms that achieved this goal in the prior calendar year. These firms self-report their commitment and achievement to the court. At a presentation ceremony, the court presents a certificate of pro bono commitment and service to each of these firms and groups, signed by the seven justices. In addition, members of the court travel to local bar association events to award these certificates and recognize attorneys receiving local bar association awards for their pro bono work.

The commitment list has grown from 45 firms in 2006 to 211 firms, in-house counsel groups, and government attorney groups in 2012.[35] Of these 211 firms and groups, 163 achieved the 50-hour per attorney goal, on the average, across the firm or group in calendar year 2011.[36] The Colorado Judicial Branch website publishes the Colorado Supreme Court's pro bono recognition list and it is updated on a continual basis.[37] *The Colorado Lawyer*, the Colorado Bar Association's monthly publica-

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1 (June 2011), http://www.courts.state.co.us/Courts/Supreme_Court/Directives/CJD%2006-03%20amended%2006-11.pdf.

31. *Id.* at 2.

32. *Forms*, COLO. STATE JUDICIAL BRANCH, http://www.courts.state.co.us/Forms/Index.cfm (last visited Apr. 28, 2012).

33. Chief Justice Mary J. Mullarkey, *Chief Justice's Invitation to Participate in Pro Bono Commitment and Annual Recognition of the Commitment's Achievement*, COLO. STATE JUDICIAL BRANCH, http://www.courts.state.co.us/userfiles/File/SupCtCJInviteProBonoLegalSvcsRecogProg_1.pdf (last visited Apr. 28, 2012).

34. *Id.*

35. *Colorado Supreme Court Pro Bono Legal Service Commitment and Recognition Program RPC 6.1*, COLO. STATE JUDICIAL BRANCH, (Feb. 27, 2012), http://www.courts.state.co.us/Courts/Supreme_Court/Pro_Bono.cfm.

36. *Id.*

37. *Id.*

tion, also publishes this list.[38] Annually, in the last week of October, the chief justice issues a proclamation honoring pro bono week in connection with the American Bar Association's annual observance.[39]

A pro bono civil appeals appellate program has been established, with forty lawyers signing up thus far, to take cases in the Colorado Court of Appeals and the Colorado Supreme Court for unrepresented parties who qualify for pro bono assistance.[40]

COLORADO ACCESS TO JUSTICE COMMISSION

The Colorado Supreme Court and the Colorado Bar Association have jointly chartered an Access to Justice Commission and local Access to Justice Committees across the state. Their purpose is to work with the Judicial Advisory Council, attorneys, the courts, community organizations, Colorado Legal Services, Metro Volunteer Lawyers, other local legal service providers, the Colorado Legal Aid Foundation, Colorado General Assembly, the American Bar Association, the Legal Services Corporation, and the U.S. Congress, among others, to help design, implement, and fund legal services, and pro bono and self-help programs for indigent persons and self-represented parties.[41] The chief justice of the Colorado Supreme Court appoints four members to the twenty-member Commission: a county court judge, a district court judge, a court of appeals judge, and a supreme court justice.[42]

The Commission has helped to obtain approximately $500,000 in appropriations annually from the Colorado General Assembly to the judicial branch for grants to legal service providers in aid of persons and families who suffer domestic abuse.[43] Nevertheless, based on testimony the Commission received at hearings throughout the state, up to 90% of indigent persons qualifying for representation by paid legal service attorneys are turned away for lack of adequate staff.[44] Pro bono attorney services and financial contributions to funding legal service providers are in desperate demand throughout the state. In May of 2012, at the request of

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38. Supreme Court of Colo., *Colorado Supreme Court Pro Bono Legal Services Commitment and Recognition Program*, COLO. LAW., Apr. 2012, at 102, 102, *available at* http://www.cobar.org/tcl/tcl_articles.cfm?articleid=7517.

39. *See* Press Release, Colorado Judicial Branch, Colorado Chief Justice Proclaims Pro Bono Week (Oct. 25, 2010) *available at* http://www.courts.state.co.us/Media/Press_Docs/pro%20bono%20proc%20PR%20FINAL.pdf.

40. *See* Katayoun A. Donnelly & Geoff Klingspom, *Colorado's New Pro Bono Program for Civil Appeals*, COLO. LAW., Sept. 2011, at 15, 15, *available at* http://www.cobar.org/tcl/tcl_articles.cfm?articleid=7196.

41. *See* Colo. Access to Justice Comm'n, *Commission Bylaws*, COLO. BAR ASS'N art. I–II (2007), http://www.cobar.org/index.cfm/ID/3218/DPWAJ/Commission-Bylaws/.

42. *Colo. Access to Justice Commission*, COLO. BAR ASS'N (2012), http://www.cobar.org/index.cfm/ID/3213/DPWAJ/Access-to-Justice-Commission/.

43. Colorado Access to Justice Commission, *The Justice Crisis in Colorado, A Report on the Civil Legal Needs of the Indigent in Colorado*, COLO. BAR ASS'N 5 (Jan. 2008), http://www.cobar.org/repository/Access%20to%20Justice/08ATJ_FULLReport.pdf.

44. *Id.* at 10.

the Colorado Access to Justice Commission and the Board of Governors of the Colorado Bar Association, the Colorado Supreme Court approved short term emergency funding for Colorado Legal Services in the amount of $1,500,000.00 over the next two years from Attorney Regulation Funds held by the court.[45]

FAIR FIELD FOR DECISION

The coin of the legal profession is time, money, and faithful service. Colorado Rule of Professional Conduct 6.1 encourages attorneys and judges to honor all three by contributing financially to legal services and providing, or assisting in the provision of, pro bono legal services to those who cannot afford attorneys to solve the legal quandaries that others face in and out of court.[46]

Judicial rules and canons recognize that a self-represented party pitted against a represented party should have a fair field for decision. Pro bono representation, limited representation of self-represented parties for a fee, and self-help instructional materials support access to justice, the single most compelling reason for a legal profession.[47]

The Colorado Code of Judicial Conduct, Comment to Canon 2, Rule 2.2, Impartiality and Fairness, states that "[i]t is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard."[48]

The Comment to Canon 2, Rule 2.6, Ensuring the Right to Be Heard, recites some steps that a judge may take to ensure that self-represented litigants' rights are heard:

> (2) The steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable, explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirement as represented litigants.[49]

The Colorado Supreme Court has not adopted mandatory pro bono service or reporting rules. Whenever the imposition of one or both has been raised as a possibility, the Colorado Bar Association, a voluntary

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45. Order of Chief Justice Michael Bender (May 17, 2012).
46. COLO. RULES OF PROF'L CONDUCT 6.1(b)(3) (2008).
47. *See* Justice Greg Hobbs, *Access to Justice: The Single Most Compelling Reason for a Legal Profession*, OKLA. BAR J., Mar. 12, 2011, at X, Y.
48. COLO. CODE OF JUDICIAL CONDUCT Canon 2 R. 2.2 cmt. 4 (2010).
49. COLO. CODE OF JUDICIAL CONDUCT Canon 2 R. 2.6. cmt. 2 (2010).

bar association, has urged the court not to do so. At the same time, it has dedicated considerable efforts, staffing, and funds to supporting pro bono legal services by attorneys. The supreme court asks all firms and groups to commit to the pro bono commitment and recognition program.

Both of Colorado's law schools, the University of Colorado Law School and the University of Denver Sturm College of Law, expect their students to perform pro bono legal services in cooperation with Colorado licensed attorneys.[50] We know from experience that new attorneys who we swear into the bar want an interesting professional livelihood that includes pro bono service for those who cannot afford an attorney. Let's meet the oath to which we all subscribed! Do pro bono.

50. *See Academic Requirements*, UNIVERSITY OF DENVER STURM COLLEGE OF LAW, http://www.law.du.edu/index.php/registrar/course-information/required-courses/academic-requirements (last visited Apr. 28, 2012); *Overview*, UNIVERSITY OF COLORADO LAW, http://www.colorado.edu/law/about/mission.htm (last visited Apr. 28, 2012).

THE ACCESS TO JUSTICE "SORTING HAT": TOWARDS A SYSTEM OF TRIAGE AND INTAKE THAT MAXIMIZES ACCESS AND OUTCOMES

RICHARD ZORZA, ESQ.†

INTRODUCTION

One of the most memorable images in the first Harry Potter film, a film built on such images, is that of Harry wearing the Sorting Hat and finding out from the slightly hesitant voice provided by Leslie Philips that he is to join Gryffindor House.[1] The Hat thinks aloud, providing a certain transparency to a difficult decision.

We know far less, however, about the processes by which the millions of people who approach courts, legal aid intake systems, and hotlines are directed into them, or the access services they do or do not receive, or indeed the consequences of those choices. All we really know is that these processes are fragmented, inconsistent, and non-transparent. We also know that these access systems feed into a relatively predictable court process, in which procedures are governed by case type, such as family law, landlord tenant, small claims, or subsets of those, and, with the exception of some jurisdictions, in which relatively few access services are as yet provided to litigants as part of the processing of the case.[2] The very differing needs of cases are not reflected in the ways those cases are processed by the courts.

The importance of building a transparent and defensible sorting system has recently increased dramatically. When the Supreme Court in

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† Mr. Zorza is coordinator of the Self-Represented Litigation Network. Special thanks to the following: Laura Abel, Deborah Chase, Tom Clarke, Professor Russell Engler, John Greacen Professor James Greiner, Bonnie Hough, Claudia Johnson, Karen Lash, Susan Ledray, Ed Marks, Professor Michael Milleman, Tina Rasnow, Glenn Rawdon, Professor David Udell, Cynthia Vaughn, and the Honorable Laurie Zelon.

1. HARRY POTTER & THE SORCERER'S STONE (Warner Bros. 2001). Disclosure: The author of this paper still does not know how or why at his school in England he was assigned to the slightly less romantically named "A Club." In any event, the opinions in this paper are those of the author alone, and not of any clubs, "houses," or organizations with which he has been associated.

2. It is an interesting question why we know so little about these systems. In part, our lack of knowledge about this issue is just a conseqence of the general lack of research on civil aspects of the court system. There may, however, be a different force at work. A focus on triage would, and indeed will, require honesty about the consequences of scarcity, not just as a general matter, but in concrete cases, and that can be difficult for those in charge of the systems to deal with. *See generally* Earl Johnson, Jr., *Justice for America's Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393 (2009); Meehan Rasch, *Development: A New Public-Interest Appellate Model: Public Counsel's Court-Based Self-Help Clinic and Pro Bono "Triage" for Indigent Pro Se Civil Litigants on Appeal*, 11 J. APP. PRAC. & PROCESS 461 (2010); Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 PACE L. REV. 741 (2007).

Turner v. Rogers[3] reversed a child support civil contempt incarceration for failure to provide procedures that would ensure sufficient fairness and accuracy to a self-represented litigant, and indicated that the procedures needed would depend on the particular circumstances of the case, it was in effect endorsing the need for triage, at least in cases in which such accuracy and fairness were not protected by the provision of counsel. It is of interest that in a recent speech Justice Breyer, the author of *Turner*, urged those with views to engage in the debate on the need for triage.[4]

The need for attention to the overall problem is also increased by the focus that some courts are now starting to pay to the possibility of treating cases less uniformly. For a generation most courts have had in place systems of caseflow management, essentially case aging tickler systems. Many of these systems now employ "differentiated caseflow management," which manage these systems differently based on case complexity. [5]The new change, of potentially immense significance, is that some courts are considering or experimenting with treating the entire processing of the case differently depending on its attributes, including issues to be decided, rather than case type.[6]

The understanding of the need for triage has also increased with the cuts to legal aid and court budgets, and the realization that 100% access to justice cannot realistically be achieved by funding a traditional lawyer in all cases. The California Shriver Pilot statute assumes that there must be a process of triage and indicates the general criteria to be used in that program.[7] The practical reality is that without an integrated well-

3. Turner v. Rogers, 131 S. Ct. 2507 (2011). A different article in this Symposium Issue analyses how prior cases, together with *Turner*, create a right of access, as opposed to a right to counsel, and how that right can be met in many ways. Implicit in that analysis is the idea that there is a right to triage to decide which of those services is required to obtain access. Indeed, such a right with respect to whether counsel is needed in a particular case dates at least to *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), although sadly the access community has long ignored that aspect of the case, focusing instead on the no-automatic right-to-counsel holding of the case as an example of the hostility of the system to access. *See generally Archive for Symposium on* Turner v. Rogers, CONCURRING OPINIONS, http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers (last visited April 10, 2012).

4. Justice Stephen Breyer, *Speech to National Legal Aid and Defender Association Annual Conference*, NAT'L LEGAL AID & DEFENDER'S ASSOC. (December 9, 2011), http://www.nlada100years.org/audiopage?q=node/13002.

5. THOMAS M. CLARKE & VICTOR E. FLANGO, *Triage: Case Management for the 21st Century*, 2011 NAT'L CTR. FOR STATE COURTS: FUTURE TRENDS IN STATE COURTS 146, 146 (2012).

6. This idea, and the first experiments are detailed in CLARKE & FLANGO, *supra* note 5, at 147–48. As discussed below, attributes might include case complexity, relationship of the parties, whereas, case type tends to derive from the formal legal issue at hand.

7. The statute lists the following factors as to whether counsel is to be provided:

> Case complexity[, w]hether the other party is represented[, t]he adversarial nature of the proceeding[, t]he availability and effectiveness of other types of services, such as self-help, in light of the potential client and the nature of the case[, l]anguage issues[, d]isability access issues[, l]iteracy issues[, t]he merits of the case [, t]he nature and severity of potential consequences for the potential client if representation is not provided[, and w]hether the provision of legal services may eliminate or reduce the need for and cost of public social services for the potential client and others in the potential client's household.

designed, transparent, and intellectually defensible triage system, there is simply no chance of achieving either improvements in court efficiency or significant expansion in access, let alone the 100% access that is the only defensible ultimate goal.[8]

In fact, of course, there are multiple complex systems already in place, particularly on the litigant services side. The problem is that those systems are often ad-hoc, frequently not intentionally designed, rarely publicly described, almost never based on objective research, and not integrated with each other. This results in inconsistency, lack of credibility, inefficiency, and failure to service many in legal need.

This Article attempts to start the process of discussion and design that is needed to put such an integrated system in place.

The main suggestions in the paper are as follows:

- Recognize and design around the fact that there are two different triage processes: one dealing with how a court will handle a case and one dealing with how litigants will obtain the services they need to interact with the court and other players. (This would include situations in which going to court would not be involved.) The questions are whether this triage is being done thoughtfully and effectively, and how we can best ensure that all systems use their resources well.

- Develop an agreed upon set of core principles that would guide the design of triage processes.

- Consider, as one possibility, a process in which a trained assessor makes recommendations for both sets of triage based upon relatively general protocols.

- Consider as an alternative system one in which an algorithm makes the recommendations based upon information provided by litigants, the court, and access providers to a web gateway, while being sensitive to the risks of non-human decision-making.

- In either possible system, the decision about the track to which a court assigns a matter should be based upon the kind of tasks the court will need to do, rather than the case type.

A.B. 590 § 6851(b)(7) (Cal. 2009); *see also* AMERICAN BAR ASSOCIATION, ABA MODEL ACCESS ACT §3 (2010).

8. *See* Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 95 JUDICATURE 156, 166–167 (2011); Richard Zorza, *Courts in the 21st Century: The Access to Justice Transformation*, 49 JUDGE'S J. 14, 17 (2010); Russell Engler, *Toward a Context-Based Civil Right to Counsel*, 40 CLEARINGHOUSE REV. 196 (2006). While not the subject of this paper, the author believes that the other *sine qua non* for creation of 100% access is system simplification. While this is excruciatingly hard to achieve in practice, there is probably a better chance than ever before of progress, largely because of the parallel and intersecting financial crises faced by courts, legal aid, and indeed the private bar.

- In either possible system, the decision about the services the litigant will receive should be based upon the tasks the litigant will need to perform in the track to which she has been assigned, and her capacity to perform those tasks given the kinds of services provided.

- Be sensitive during the design process to the fact of the relative lack of validation of theories about the impact of different services upon outcomes.

- At least in the case of the tech-based algorithm, use a presumption-based system, in which the tasks and services would be presumed based upon the court track, the stake, the relationship (including power relationship) between the parties, the case type, and the prior presence of an attorney on the other side. The presumptive result would then be modified based upon the capacity of the litigant and based upon data not necessarily directly relevant to the case, including potential information relating to ability to prosecute the case on their own, language spoken at home, literacy level, and prior experiences in court.

- Recognize that at least one of the reasons for the lack of progress in this general area has been fear of the consequences of identifying individual cases in which services are required but cannot be provided for resource reasons.

- Faced with these resource limitations, build the system so that the system would change its behavior to match service need and availability. This could be done in ways that either protect those with lower capacity or those facing the highest stakes and most difficult issues.

- Ensure that the system produced ongoing reporting of the mismatch between litigant services need and capacity, and these results could then be used to design new service components and argue for additional resources.

The paper starts by discussing the analytically foundational relationship between triage in different parts of the system (Part I). It then suggests a set of principles under which any triage system should operate (Part II) and briefly assesses the current system against those principles (Part III). The paper then proposes and assesses two very different alternative models: one based on individualized assessment and one using technology to apply formal protocols (Parts IV and V). The paper concludes by discussing the potential problems associated with deploying either of these models (Part VI)

I. THE RELATIONSHIP BETWEEN COURT PROCESS TRIAGE AND LITIGANT SERVICE TRIAGE

Until now, triage has been discussed, if at all, only in either the court or legal aid context. This works for each system only if the other system is not doing triage. If the organization focuses only on access

services for individuals, or only on the court's process, then the system the organization is building will be aimed at a moving target that will itself respond differently depending on how the other is behaving, leading to endless loops and confusion.

The only way to think rationally about this problem is to analyze not only the needs and potential of triage with respect to access services such as might be provided to individuals needing access to justice services, including but not only as litigants, but also to integrate that with consideration of the needs and potential of the court's overall caseflow system and its division of cases. The goal is to figure out how the two processes can work together to provide both optimum case handling from the court's point of view (described as court process triage) and access from the individual's point of view (described as individual services triage).

There are a variety of ways of breaking up the analysis of the triage systems, although all lead to the conclusion that an ideal system would be structured to make all the decisions about case processing and individual services in one process—or at least one that seems integrated to its users.

- *Individual Services versus Case Processing Focus*

In this division, there are separate triage systems for services provided to individuals, compared to the court processes that are provided to all the parties—usually together. In this division, court self-help and forms services would fit under individual services and be triaged together with full representation services. This is the approach assumed in the remainder of this paper, although the other approaches are detailed for clarity. This approach is chosen because it most accurately reflects the needs of litigants and other individuals. It does, however, require closer working relationships between courts and non-court service organizations.

- *Service Provider Focus*

In this division, each provider system gets their own triage system. The court and legal aid each triages into their own system, and it treats the other system as fixed—until of course it changes its behavior. The theory here would be that this would reflect management and political reality. Under this division, court self-help services would be allocated in the court category. This system would be easiest to administer from a strictly bureaucratic perspective.

- *Neutral versus Advocacy Services*

Under a third option, probably the most analytically correct, the distinction would be between services provided under a neutral banner and those provided as advocacy. Under this division, forms assistance would

be treated as neutral if provided outside the attorney–client relationship, regardless of the provider.[9]

It is possible to imagine systems in which the court decides what process is appropriate, and the other part of the system then decides what people need in terms of services to participate appropriately in that process.[10] Alternatively, service institutions or advocacy systems could first decide what services will be provided, and the court could then use those determinations as one of the bases for its process choice decision.

But it is much better to attempt to design a system that works as one, i.e., one in which the court system (or the case processing system or the neutral service system) decides what process it will put the case through in the same general process that it is decided what other services will be provided to individuals to help them negotiate that process, or through non-litigation processes. The system built will need to allow for the case posture to change and be iterative in order to bring additional resources to bear.

II. PRINCIPLES FOR TRIAGE AND INTAKE

Any broad system of court and access services triage and intake is going to have to be acceptable to a wide variety of stakeholders and participants. As such, it must be designed on strong foundations that respect differences in perspective and permit collaboration between organizations with very different cultures, budgets, and institutional needs.[11] The best foundation seems to be a set of commonly agreed upon principles that can be used to resolve differences. The following are offered as a first cut and apply regardless of the choices suggested in Part I:[12]

1. Universality

- Everyone in need should be able to use the system, get into the system, and get the help they need to obtain access to justice.

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9. For discussion on related topics and some of the relatvely limited writing on this issue, see Paul R.Tremblay, *Acting 'A Very Moral Type of God': Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999); Justine A. Dunlap, *I Don't Want to Play God—A Response to Professor Tremblay*, 67 FORDHAM L. REV. 2601 (1999).

10. Although there would be complexities for problems that occur outside court processes, such as the writing of a will.

11. Courts, for example, must be neutral, are under pressure to move cases quickly with limited resources, and to reflect social policy choices. Civil legal aid programs may have substantive reform agendas (fighting poverty, protecting the rights of the disabled), often operate under restrictions imposed by funders, and have a desire to maintain their independence from the judiciary. Law school clinics have a need to select the cases that will provide their students with the best learning opportunities.

12. These proposed principles are based in significant part on a set that were brainstormed by a working group at the 2012 Technology Initiative Grants Conference. For more information, see Richard Zorza, *Exciting Triage Progress at TIG Conference*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (January 15, 2012), http://accesstojustice.net/2012/01/15/exciting-triage-progress-at-tig-conference/. Special thanks to those who participated in that meeting, as well as to Tom Clarke, who proposed a restructuring that was close to the final product in this paper.

• The system should provide actual court access and actual services help to everybody who uses it, providing help at an appropriate level of meaningful assistance.

2. Consistency and Predictability of Triage Outcomes

• The system should be consistent in who is provided with what services or goes into which court processes.

3. User Focus, Control, Support, and Choice

• The system should be user-friendly, user-oriented, and user-directed (if it is to meet user needs, not just or even primarily those of the organizations participating).

• The system should allow users maximum control over the paths and services they use, consistent with cost issues.[13]

• The system should offer multiple ways for users to enter and move between service options and choices (such as deciding to seek legal assistance after first attempting self-help).

• The system should include varied user support systems.

• The system should minimize the need for users to provide repeated information.

• The system should get people directly linked to, and trackably processed by, the organizational resources from which they need a response.

• The system should have the capacity to export data directly into multiple, standardized organization intake or information systems and tools—it should not be just a referral system.

• The system should have built into it the up-to-date case-acceptance criteria and service availability data, so that there are no "dead-end" hand-offs.

• The system should include mechanisms for follow up in order to minimize multiple, duplicative, or incorrect referrals.

4. Comprehensiveness of Problems and Services

• The system should be comprehensive in the range of problems identified and addressed.

• The system should take advantage of legal analysis, social science research, and ongoing analysis of existing case and intake data to be able to ask sufficient questions to make sure that it identifies and responds to an appropriately holistic range of a person's issues.

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13. The impact of cost issues may be very different in the court process versus litigant services areas of triage.

- The system should include access to all service mechanisms, including court access services, legal aid programs, law school clinics, providers of unbundled services, informational websites, document assembly systems, online chat, pro bono, and private lawyer referral systems.

- The system should be expandable to include future delivery modalities.

5. Cost Benefit and Impact Maximization

- The system should connect people to the highest level of needed and useful access services assistance that is available to them, consistent with cost-effectiveness.

- The system should allocate scarce assistance resources where they will have the biggest impact.

- The system should direct cases into routes and services that involve the least cost and inconvenience for both litigants and the system, consistent with a fair determination.

6. Transparency

- The system should be transparent in the patterns of its operations, while providing privacy to individual users.

7. Evidence Based

- Individual service acceptance and priority criteria should be informed by and reflect research and ongoing data analysis.

- The system should be "self-learning" so that it provides better responses and improved outcomes as there is more experience.

III. THE CURRENT SYSTEM, AND HOW IT STACKS UP AGAINST THESE PRINCIPLES

Not to put too fine a point on it, but the current system seems like an almost complete antithesis of one that would be in compliance with the above principles.

It has four main groups of component elements: a national network of legal aid, pro bono, and clinic intake systems; a patchwork of court based service selection systems operated by those courts that provide access services; systems of websites that provide information and tools, and various courts and state systems that do the same thing; and bar operated referral services that include low and middle income components. In addition, court diversion into mediation offers some elements of triage, at least where it follows protocols, or is discretionary rather than

fully automatic for a case type. The near chaos of this system reflects the broader fragmentation in the systems that actually deliver services.[14]

A. The Current System

1. Court Process Triage

Currently, courts triage by dividing cases by case type and then generally putting all the cases of the same type within the same queue.[15] They may well split within overall types—divorces go into a different queue than guardianships. Sometimes there is branching—the uncontested go on a different calendar call, but that is the extent of the triage. The decision is made on the papers alone and limited to an extremely short list of factors.[16]

However, as Clarke and Flango point out, differentiated case management systems do treat cases differently based on some estimate of anticipated complexity and workload.[17]

As a general matter, however, there is little system, little logic, and not enough focus on the overall system and its needs.

2. Legal Aid, Clinic, and Pro Bono Intake Systems

The legal aid, clinic, and pro bono systems are scarcity based. The task of their systems is to allocate extremely limited advocacy resources among an overwhelming pool, and to do so in a system that is characterized by provider fragmentation and lack of coordination or central planning. For most organizations, the issue is whether to provide the traditional full services of an attorney (done in the minority of cases), to provide brief services probably limited to that provided during a phone call, or to refer to online or group services.

Actual sorting occurs in the following ways:

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14. This fragmentation is both described and labeled in REBECCA L. SANDEFUR & AARON C. SMYTH, AMERICAN BAR ASSOCIATION, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT ix (2011) ("The results [of the research] are sobering. They underscore a fundamental absence of coordination in the system, fragmentation and inequality in who gets served and how, and arbitrariness in access to justice depending on where one lives."). Funders are not funding holistic systems—rather bits of fragmented systems. To the degree that different systems have different resources available it is natural that some systems will be more developed and sophisticated than others.

15. CLARKE & FLANGO, *supra* note 5, at 146.

16. Some courts push all divorce cases into mediation—and then add a minor triage element by providing an exemption for domestic violence cases. There is also talk of treating supposed "high conflict" cases differently. Although this approach has come under criticism from the advocacy community for treating both parties as equally to blame for the extent of the conflict.

17. CLARKE & FLANGO, *supra* note 5, at 146. It should be noted that the system described in Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 PACE L. REV. 741 (2007), is highly elaborate, with use of scaling of conflict, dangerousness, etc, in detirming triaging into more consentual and less adversarial processes. That paper has an extensive bibliograpy.

• Organizations have priorities (indeed, if funded by the Legal Services Corporation, they are required to have them).[18] They can rarely, if ever, take all of the cases within the priorities.

• Organizations limit intake by day and time of day, and often have long phone waits.

• Organizations require interviews with an advocate, in which discretionary and essentially unguided decisions about the value of representation services are made.[19]

• Some states have integrated intake phone lines that refer to the most appropriate organization that then makes a decision whether to accept the case.[20]

• Finally, it should be noted that categorical triage occurs when a statutory or constitutional role results in a right to counsel, which is then met by a government agency, private lawyers paid by the state, or by a non-profit operating under contract.

No state can reasonably claim to have a system that is making broadly defensible choices about who is getting what level of service, although most do not provide services to those who do not benefit. In many states, huge amounts of provider and litigant time are wasted in "pinball" referral systems.[21]

3. Court-Based Litigant Service Allocation

More and more courts are providing informational services to a significant segment of their litigant population. At this point about 70% of states do so in at least some locations.[22] Over time, these services are expanding more deeply into the overall processing of the case. Early in the development of these services, they were limited to the provision of

18. LSC grantees are required to establish priorities. 45 C.F.R, §1620.3(a) (2000). LSC has also made suggestions for the priorities process, and for priorities. LEGAL SERVICES CORPORATION, SUGGESTED LIST OF PRIORITIES FOR LSC RECIPIENTS ADOPTED BY THE BD. OF DIR. OF THE LEGAL SERV. CORP (1996).

19. For example, the Legal Services of New Jersey hotline procedure is explained at *Statewide Hotline*, LEGAL SERV. OF N.J. (April 16, 2012), http://www.lsnj.org/StatewideHotline.aspx.

20. LSC has collected resources on hotlines at http://lri.lsc.gov/search/node/hotlines. In the early to mid 2000s the Legal Services Corporation made TIG grants available to fund the integration of advanced telephony systems to streamline intake procedures in various programs. Prior to that set of grants, the Agency on Aging, had funded senior legal hotlines in multiple states. These experiments in coordinated intake, using telephony, yielded a good set of examples of how legal aid groups could reform their intake systems to be able to do more and better intakes, and ultimately end up with better cases to represent, than the traditional "walk in the door" approach. However, not all legal aid groups abandoned the 1970s approach of letting potential clients self select by distance to the intake locations—and to date in many states, legal aid groups are content with taking cases near their office catchment areas—rather than proactively looking for cases for their full service area and with certain criteria for extended services and litigation.

21. It cannot be avoided that the fragmentation is made worse by restrictions on LSC funding.

22. SANDEFUR & SMYTH, *supra* note 14, at 11.

forms (without assistance in filling them in) but now include non-private one-on-one consultations about the status of the case based on the file and what needs to be done, review of the sufficiency of completed forms, services to assist in moving procedurally stuck cases, etc.[23]

To provide such services, court centers have to engage in some form of triage. This is because they have to provide services to all, and yet their resources are severely limited. A few self-help programs perform triage using a list of services—referrals and in-house—with service criteria. Some self-help centers are starting to bring in house more pro bono services. In the final analysis, those who cannot be referred out, or put into a particular internal service, are simply served as fast as possible consistent with daily demand. At this stage there is much individual discretion in the system.

At other centers, informal interviews conducted by the author of the paper with self-help center directors in California revealed a number of triage perspectives like the following, caught in reconstructed quotes:

- "We refer when we can, then for everyone else we try to help."
- "I try to figure out what tasks a person needs to do to handle the case, and whether they can do them. If not I try to find a referral, but there is not always one there."
- "Sometimes it is just a matter of doing the best I can to help them, knowing that in the end, nothing I can do is going to make much difference."[24]

Put another way, it is an informal system with each court's procedures depending very much on the availability of referrals—which then go into the systems described above in subpart 2, the legal aid, clinic, and pro bono intake systems, with all their uncertainties.

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23. The current state of such informational services is illustrated by CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, GUIDELINES FOR THE OPERATION OF SELF-HELP CENTERS IN CALIFORNIA TRIAL COURTS 9 (2008) (Guideline 15):

> Basic core services most frequently include the following: Interview and assessment; Assistance with pleadings and fee waiver applications; Document review; Procedural information, including but not limited to explanation and clarification of court orders and the process by which to obtain, enforce, and modify orders; Assistance with understanding service requirements and methods; Preparation for hearings; Completion of orders after hearings and judgments; and Drafting stipulations. Additional services that self-help centers should consider offering include but are not limited to: Mediation or other settlement assistance; Readiness reviews for calendar appearances; Case status meetings; and Courtroom assistance, including but not limited to answering questions from litigants, explaining procedures, conducting mediations, preparing orders after hearing, and otherwise assisting litigants without making an appearance or advocating on their behalf.

24. One Center director noted to the author that there are litigants who have difficulty understanding the limits upon what courts can do.

4. Legal Aid and Court Website Services

There is now a wide mosaic of website services available. Every state has an LSC supported site intended to provide a full range of legal information, as well as referral information, to the self-represented.[25] This includes broad information about non-litigation situations.

The court system is more varied, with many states having strong informational systems, and others providing much more limited information.[26] Some local courts have detailed information, and most courts have at least some online presence.[27]

Some of these sites provide links to forms, or online forms generators, but coverage is varied as to both content and geography.[28]

There are almost no examples of good diagnostic tools helping litigants figure out whether they should be using forms or an alternative approach.

5. Bar Referral Services

Bar referral systems are usually, but not always, operated by local or state bar associations. Many, but not all, offer low cost referrals and make no differentiation except in broad areas of practice such as family law. A small number will refer for unbundled services. The intake systems include the gathering of no information about the case. In short they are business referral systems, not triage systems.

6. Unbundled Diagnosis by Private Attorneys

Most of the small but growing number of attorneys who offer unbundled or discrete task representation include in the process a diagnostic interview in which they work with the client to decide who does what.[29] While this process is not generally considered part of the triage system, it in fact plays this role since it helps litigants decide what they can do on their own and what they will have to pay an attorney to do. The experience of these attorneys will be very valuable in developing broader diag-

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25. LAWHELP.ORG, http://lawhelp.org, (last visited Apr. 3, 2012) (provides access to all states' self-help webistes).

26. *State Court Websites*, THE NAT'L CTR. FOR STATE COURTS, http://www.ncsc.org/information-and-resources/browse-by-state/state-court-websites.aspx (last visited April 3, 2012).

27. *Virtual Self-Help lawcenter*, CONTRA COSTA CALIFORNIA COURT, http://www.cc-courthelp.org/ (last modified April 13, 2012).

28. The Texas Access to Justice Commission recently surveyed the country as to availability of forms. *See Statewide Uniform Forms*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG, http://richardzorza.files.wordpress.com/2012/01/3-states-forms-info-final.pdf (last visited April 3, 2012). *See generally,* JOHN GREACEN, RESOURCES TO ASSIST SELF-REPRESENTED LITIGANTS: A FIFTY-STATE REVIEW OF THE "STATE OF ART," available at http://www.msbf.org/selfhelp/GreacenReportMichiganEdition.pdf (2011) (providing a more general study of the Michigan Bar Foundation).

29. *See* MODEL RULES OF PROF'L CONDUCT 1.2(c) (requiring this diagnostic process).

nostic processes, and the tools they use to help litigants decide what tasks they can do themselves may well offer prototypes for the task capacity analysis recommended below.

B. Does the Current System Satisfy the Proposed Principles?

Sadly, the current system does not even begin to satisfy the proposed principles. It is neither predictable, nor consistent, nor comprehensive. It is not user-oriented, efficient, or transparent. It fails to meet any of the above principles—indeed, in many cases it fails to even attempt to do so.

To be direct about this is not to criticize the good faith, the hard work, or the intellectual capacity of those who direct the system. Rather, it is to be honest about our collective failure to deliver a defensible system.

IV. ALTERNATIVE MODEL ONE: AN ASSESSMENT MODEL

The next section of this Article lays out a possible model, one based on a human-based assessment of the needs of the case, and the people involved. The section begins by summarizing the steps involved to decide both the most appropriate court process and the services needed by litigants in that track, and then goes on to discuss the potential appeal of the approach.

A. How the Model Might Work

This model attempts both to triage cases into the appropriate court process track and to ensure that litigants get the assistance and services they need to present their cases fully in the track. For reasons of comprehensiveness, it assumes sufficient resources to provide counsel when required—an optimistic assumption. (We cannot refuse to consider what a system should look like because we do not yet have the resources to support it, but we would have to consider how to modify it to function if insufficient resources were available.)

The general approach[30] of this model is for all litigants without previously retained counsel to have an assessment staffer, possibly associated with the court, to review filed papers and interview parties. In addition, the assessment staffer should do each of the following:

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30. Richard Zorza, *After Turner: A Proposed "Attorney Diagnosis" Approach to Triage for Access to Justice*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (Sep. 6, 2011), http://accesstojustice.net/2011/09/06/after-turner-a-proposed-attorney-diagnosis-approach-to-triage-for-access-to-justice/ [hereinafter Zorza, *After Turner*]. The idea is explored in more detail in a follow-up post. Richard Zorza, *Questions and Answers About the Attorney Diagnosis Proposal*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (Sep. 12, 2012), http://accesstojustice.net/2011/09/12/questions-and-answers-about-the-attorney-diagnosis-proposal/ [hereinafter Zorza, *Question and Answers*].

• Make a recommendation as to which of the available tracks into which the case would be placed, including a super-simple uncontested track.

• Assess what services are needed to enable each litigant to obtain access to justice, taking into account the full range of available services. If one or more parties do not have prior counsel and are financially eligible, make a recommendation for or against appointment of counsel for such parties, taking into account the nature of the case, the merits and the stakes for the litigant, and, most important of all, the sufficiency of alternative lower cost access services.

• In cases in which counsel is not provided, provide informational services to both sides, or refer for unbundled services or to a variety of forms of additional informational services.

In order to ensure consistency and fairness, the screener would operate under a protocol, discussed below, but the ultimate decision would include the totality of the circumstances and involve discretionary judgment with a written, if brief, decision.[31] Decisions would be subject to review by a judge, on the papers, upon request by a party. The cost of the screening process could be supported by an enhanced filing fee, which would be waived as appropriate, while counsel costs would have to be provided by other mechanisms. To the extent that counsel were not available for financial reasons, even with full cooperation with and referrals to legal aid, pro bono programs, and law school programs, a full record of that unavailability would at least be clear.[32]

Below are the proposed steps in the process.

1. Initial Intake

When a litigant takes an initial action in a case, the intake person would determine if the case were contested, to the extent known, and would evaluate the person's financial eligibility status, which would be used in subsequent assessment. Such intake might be done by a self-help center, by a court clerk, or in a social service or administrative agency office, and would not necessarily require a formal filing of a pleading, although the filing of a pleading would automatically trigger this process.[33] Referral would be made into the assessment system in all but a

31. One commentator on an early draft of this paper felt that the discretionary component of the option violated the transparency principle. The statement of reasons for the recommendation should resolve this issue, and reviewability should address consistency concerns.

32. To the extent that the screening had found counsel required, but the system had failed to provide counsel, questions might arise under *Turner* as to compliance with due process requirements. Note that in at least one state, the overall payment mechanism has been structured to automatically pay for counsel when found to be constitutionally required. MASS GEN. LAWS ch. 211D, § 5 (2011).

33. Community-based programs might well reach many who would never come to court, particularly for non-litigation matters.

small number of cases in which no individualized assessment would be needed.

2. Assessment, Track Assignment, and Referrals

In this key step the assessor diagnoses the person's legal needs and may recommend that counsel be appointed. The assessor can also recommend the provision of unbundled services or refer for self-help. It is the belief of this writer that the assessor should be an attorney and should have a limited, confidential, but non-exclusive confidentiality relationship with all the parties, as discussed below.

The assessor:

a. Reviews any paperwork and interviews the parties if needed

The interview can be joint or separate, as requested by the parties.[34] The interview should include the gathering of data required for the making of the determinations described in the steps below.

b. Screens for categorical eligibility for counsel services

The screening attorney would first screen for certain forms of predetermined categorical eligibility of either one party or both parties to receive a lawyer, such as child-custody with domestic violence cases or tenants over 65 (other categories to be determined). The categories for such eligibility will have been established in the overall system protocols based in part on legal aid program criteria and on analysis under *Turner* given the specific procedures in the court.

c. Makes an analysis of most appropriate court process track

Among the possible tracks:[35]

- Non litigation situations (which would mean a jump to the next step, with the process possibly then being managed by a services program rather than by the court)
- Uncontested cases requiring no court involvement beyond approval
- Uncontested cases requiring non-judicial court involvement to optimize agreement and decisions for fairness and/or finality
- Contested cases amenable to alternative dispute resolution

34. The parties should be asked in private and individually if they wish to have individual interviews to minimize the risk of coercion. As a general matter, uncontested matters, to the extent to which they need an interview, are likely to be appropriate for joint interviews. *See* Zorza, *After Turner*, *supra* note 30.

35. If the system were expanded to include administrative agency disputes, some of which end up in court, this list of tracks might be expanded.

- Contested cases requiring single final resolution between parties
- Contested cases requiring extensive supervision of the pre-trial process
- Contested cases likely to require ongoing decision-making and/or compliance activity

Note that this selection of tracks is ultimately derived from an analysis of the tasks that the court, either the judge or staff, is going to have to do to conclude the case satisfactorily. While this is surely only a very initial list of possible tracks, the court task approach is probably the best way to approach the analysis.

d. Identify the most cost effective services for each of the parties to obtain access to justice within that track taking into account merit and stakes, including counsel if needed

In identifying the appropriateness and sufficiency of services, the assessor would apply a set of standards and would consider i) the facts of the case, ii) the track tentatively chosen, iii) the complexity of the governing procedural and substantive law, and iv) the parties' particular capacities (including literacy, linguistic capacity, mental capacity, and amenability to negotiation, case complexity, and, arguably of particular importance, whether opposing party would have counsel[36]).

The process would be guided by a protocol, which would ultimately focus on the tasks needed to be performed by or on behalf of the litigant.[37] For each litigant, the assessor needs to consider whether particular tasks are likely to be needed in this case, whether the litigant has the capacity to complete them on her own in the court track as it actually operates,[38] and if not, what kind of service or assistance is needed.[39] The assumption is that the cheapest service, consistent with access, would be chosen. For example, the checklist, to be filled out separately for each party, might look like the following:

36. Note the risk of circularity. When both parties enter the system without counsel, the assessor should consider the impact of providing counsel to both, neither, or one. It may be that the capacity of one of the parties makes it necessary to appoint counsel, and that this will then trigger the need for counsel for the opponent. In such a case, the search for alternative assistance services may be highly cost effective. *See* Zorza, *Questions and Answers*, *supra* note 30.

37. This approach is drawn from that used in some existing self-help programs. *See, e.g.*, CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, *supra* note 23, at 4 (Guideline 6).

38. *See* Zorza, *After Turner*, *supra* note 30. It is important to note that as the court gets better at making itself litigant-friendly, more of these tasks can be performed with services on the left side of the chart. This provides a powerful financial incentive to such simplification.

39. *Id.* In some cases a mix of services might be needed, such as both a guardian *ad litem* and an attorney.

Task Oriented Triage Checklist[40]

Task Name	Needed?	Perform on own?	Perform with online info/tools	Perform with available informational assistance	Perform with available unbundling assistance	Requires counsel to perform	Important
Filling Out Online Pleading Forms.							
Complete Service							
Identify Issues and Needs							
Manage Negotiation/mediation							
Request Discovery							
Respond to Discovery							
Prepare Evidence							
Present Own Case -- Self							
-- Witnesses							
-- Documents							
-- Other Exhibits							
Cross Examine							
Summary of evidence/closing							
Prepare Judgment							
Enforce Judgment							

It is important to note that this grid would expand with the availability of additional service modalities such as legal technicians[41] or lay advocates.[42]

e. Screens for merit and stakes

For all persons diagnosed as potentially requiring appointment of counsel or other high margin cost systems, the assessor would determine whether there was sufficient significance of the matter at issue for the party by applying appropriate standards as to whether the case was non-frivolous whether the matter was important enough for the state to invest resources.

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40. The experience of attorneys who currently diagnose as part of the discrete task representation process would be very valuable in elaborating this list.

41. Order, Washington State Supreme Court (June 15, 2012) http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf (establishing Limited Practice Rule for Limited License Legal Technicians). For a summary and discussion of the Rule, see Richard Zorza, *Important Step Forward with Washington State Legal Technician Rule*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG, http://accesstojustice.net/2012/06/19/important-step-forward-with-washington-state-legal-technician-rule/.

42. Richard Zorza, *Non-Lawyer Assistance in the Courtroom—the UK Model*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG, http://accesstojustice.net/2011/12/02/non-lawyer-assistance-in-the-courtroom-the-uk-model/; Russell Engler, *Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice for Middle-Income Earners*, *in* MIDDLE INCOME ACCESS TO JUSTICE (Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., 2012).

f. Makes Referral and/or Recommendation

If the assessor diagnoses that informational services are sufficient, then a referral is made directly. If the assessor determines that brief pro bono unbundled or other uncompensated legal assistance is available or sufficient, then a referral is made (permitting ultimate control over intake to remain in legal aid programs). If it is determined that a compensated unbundled or full service attorney is required, then the assessor attorney would complete a Recommendation Form for review by the selected decision maker.

3. Where Counsel is Recommended, Final Decision Maker Decides to Appoint or Deny Counsel

The decision maker would review the assessor's recommendation and make the final decision ex parte, on the papers, as to whether counsel would be appointed for either or both parties.[43] The decisional materials would be confidential and not open to discovery. Ideally, retired judges would serve in this role pro bono. Having retired judges perform this role preserves the decision makers' independence, while maintaining a judicial perspective.[44]

The overall approach should appeal to a variety of funding, bar, court, and service delivery constituencies since it offers the following benefits:

- *Financial Efficiency and Incentives*

The approach promotes cost effectiveness by putting simpler cases into lower-cost court processes and by providing more expensive services, such as counsel, only for those who need it most. It also creates incentives for communities to establish funding for its functions, primarily by making conspicuous the need for counsel and the consequences for justice. It also builds in long-term incentives for developing the most cost-effective alternatives. The cost of the process is reduced by having, as in medical triage, different levels of professional skills applied during different steps.

43. A process of further interlocutory review would run the risk of being be highly cumbersome, and while there would always be the possibility of review as part of a later appeal on the merits, such a right would be illusory as a practical matter in most cases, as *Turner* illustrates. Zorza, *After Turner*, *supra* note 30.

44. *Id.* One possibility is to have a volunteer panel of three members decide. They could be pulled from those with experience as bench officers, legal services attorneys, and government attorneys. This would provide a good balance in terms of experience identifying and evaluating the criteria.

- *Financial Viability*

Because communities can adjust the financial and substantive screening standards, this approach thus does not commit communities to an uncontrollable service entitlement system.

- *Broad Legitimacy*

As the approach becomes increasingly grounded in research-based knowledge of the effectiveness of different forms of assistance, and since decisions are made by trained assessors, possibly attorneys, and confirmed by judges, it will be perceived as broadly legitimate and as supporting the efficiency of court operations.

- *Middle-income Options*

The approach anticipates that some communities might determine to offer services to a middle-income population on a partially subsidized basis, while charging others nothing, and still others full cost. It also allows communities to determine to fund diagnostic screening for all through a flexibly waived, enhanced filing fee (with a simple formula to determine financial eligibility). These elements would make the adoption of a 100% access system much more palatable.

- *Flexibility.*

The approach is flexible, allowing for variations and changes in categorical eligibility, in the standards governing the screening process, in the ways that existing non-profit providers can participate in the provision of services, in how court processes can be made more effective, and in the relationship to other players in the system.

B. Problems Implementing the Proposal

The biggest problem is cost—both the administrative cost of the system and the cost of providing counsel to those for whom it is found necessary.

As to administrative cost, this could be covered by an increased waiveable filing fee. Litigants would reap the benefit of improved diagnosis and referral. Moreover, in a different version, multiple assessors might interview the parties and meet to decide on the track. This would make it possible for them to provide actual unbundled assistance at the same time as the assessment interview, increasing the efficiency of the system.

As to the cost of counsel, that will be a problem in any true triage system. This proposal would reduce costs by moving people to lower cost services whenever possible and would also incentivize changes in the underlying tracks and case processing, which would further reduce costs of counsel. This is both a minimum cost and a cost minimizing system.

Moreover, some of the costs of counsel could be covered by use of existing legal aid, pro bono, and law school clinic resources.

V. ALTERNATIVE MODEL TWO: A TECH-ENABLED GATEWAY

The second model also aims to select both the court process track and the services to be provided to litigants, but it replaces the individualized assessor with a tech-enabled gateway which would line up information about the case and the litigants with a protocol and with information about available services in order to make appropriate referrals.

Perhaps the greatest advantage of the use of technology is that it makes it possible to get needs of all parties in the mix without violating confidentiality concerns. The system would gather information from all parties and would then simultaneously use the algorithm to assign the case to a court process track, identify the services litigants would need to function in that track, and make referrals consistent with those needs as well as the policies and capacities of providers. To function as a 100% access system, this system would also need to be a system of residual provision of counsel.

An additional advantage is its ability to modify its choices based on updated information. For example, an assignment to the uncontested track would change quickly with the filing of a contesting responsive pleading.

A. How the System Might Work

1. Initiation and Information Submission

While the system would end up processing cases through the same protocol, cases could be initiated in a wide variety of ways: from the triage/intake portal online, from the portal at a kiosk in the court or legal aid program, by electronic filing in the court, or in other ways in cooperation with other agencies or web gateways.

The initiation process would include the submission of data that would: 1) establish the case (initial pleading information), 2) permit the system to make a preliminary court processing track decision (including the non-litigation track), 3) permit the system to make a preliminary assessment of the level of services needed to permit the person to pursue and present their case, and 4) attempt to match the litigant to actual available services, including consideration of programs' eligibility criteria. The data submitted for the last item would be kept confidential.[45]

45. *Id.* This might require a change in law. Or, that portion of the intake process could be under the control of a non-court agency. The user would have to know which information would be kept confidential.

A variety of support mechanisms would be available to help the litigant. Help would be available in person at the court, by chat and co-browsing over the Internet, or in person at community centers and libraries.

2. Communication to Other Party

In litigation situations, the system would then communicate to the opposing party that the action was being commenced and would give them an opportunity, at the same range of locations, to provide the same responsive information. This could be done electronically or by traditional service.[46]

3. Party Response or Failure

A responding party would submit the same information, except that the interface for the portion that responded to the legal claims would be structured to reflect the asserted claims. The same assistive services would be available.

A failure to respond would be a key piece of data impacting the allocation of both track and services below. If response is required, this would mean a higher engagement track and higher services. If not, then the opposite.

4. Simultaneous Assignment to Track and Identification of Service Needs

The system would then be in a position to complete initial court track and litigant service decisions. These would be subject to change based on future changes in status in both components of the system.

These would be based on the same criteria as those described above in Part V. However, rather than rely on the judgment of an individual assessor, the system would ask questions from which the kind of court processing needs and litigant capacity decisions could be made according to a somewhat more formal protocol.

Assessing the court track would be done by asking questions that:

- Determine the court history between the parties;
- Estimate the level of conflict between the parties;[47]
- Look at the stake in terms of finality and complexity;

46. Electronic service would probably require a change in law in many jurisdictions, although this is now changing. *See* Richard Zorza, *ABA Journal Discusses Electronic Service/Notice and the Self-Represented*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG, http://accesstojustice.net/2011/10/05/aba-journal-discusses-electronic-servicenotice-and-the-self-represented/ (Oct. 5, 2011).

47. *Cf.* Salem, Kulak & Deutsch, *supra* note 2, at 747–49.

• Find out about whether the parties have prior compliance issues with courts or other government agencies; and

• Estimate, using answers to questions in the section below, whether additional engagement from judge or court staff may be necessary, resulting in assignment to a particular sub-track.[48]

The system would also use historical data on the case type to impact the weighting of these factors. For example, it would know the history of compliance with a particular class of small claims cases, or the relationship between the age of the children and the extent of the need for ongoing supervision of child visitation.

5. Integration into Court System

The choice of court track would then be passed to the court, with the court's systems being responsible for establishing scheduling, etc. Major changes in the court status, such as filing a late responsive pleading, would trigger a re-referral to both parts of the triage system.

6. Identification of Need for and Availability of Services

The selection of court track will provide the first major data element in determining the need for services for each of the litigants. The major factors include what issue is at stake, the opponent (including power relationship and if other already has counsel), capacity of the party, the relationship between them, and the tasks needed to be performed in this context.

The capacity/task relationship will have to be assessed using questions that are often indirect. One approach to each of the tasks described above in Part IV may be to identify other equivalent tasks, whether the litigant does them on their own or with help and how hard they find them. Here are examples of questions (which will ultimately need validation).

Finalization of Pleadings

• What does an automated assessment of comprehensiveness of pleadings (including literacy level), tell the system about the person's capacity?

• Do you complete your own tax returns (1040 or 1040-EZ)?

• Do you have difficulty completing health insurance forms on your own?

Presentation of Evidence

48. Alternatively, these engagement issues might be managed within tracks and the services provided be treated within the litigant services triage process. *See* Zorza, *After Turner*, *supra* note 30.

• Do you find it easy to tell the doctor what is wrong with you when you visit?

• When you call a store with a problem, are you able to explain the problem?

Preparation of Judgment

• Do you find it easy to understand and remember what a doctor tells you to do? If you do not understand, are you able to comfortably ask for a clearer explanation until you do understand?

• Do you think you have good follow-up skills? Do you take notes to help remember what you need to do? Do you write down questions so you won't forget to ask them later?

• Are you able to break down projects into separate discrete tasks and perform those tasks in a logical order?

While none of these questions are perfect, and while some may raise difficult privacy and other social policy concerns, they do provide a way of developing a better picture of capacity. [49]

Education level, primary language, and age may also be relevant.

The goal then is to have an algorithm that can make at least a preliminary screen. Particularly as more and more contested cases start with an initial appearance that has a triaging role, or by a referral to a court self-help service, such preliminary screening can be reviewed by an individual who can then make a non-technology assessment of the appropriateness of the systems initial decision.

The algorithm itself might be built on a presumptive model. In other words, stake, power relationship, and court track might be used to develop a presumptive list of needs and sufficient services for each situation, with that presumption then being tested by capacity measuring questions such as the ones above.

The algorithm has to be able to adjust based on the relationship between capacity and demand, with limited resources requiring a higher threshold of need as capacity declines or demand increases. So, the presumption line has to move based on this match, and the system has to know how to move the presumption line. However, the algorithm can only change in steps over significant time periods, or the consistency principle would be violated.

49. This set of questions, and indeed the attempt to assess capacity, is viewed by some as paternalistic. The problem is that for triage to be effective it has to take into account individual capacity, and we know that the traditional demographic information is just not sufficient to allow for this assessment. *See* Zorza, *supra* note 38.

7. Referrals

Referrals to certain programs may require no appointment or acceptance—examples would be online tools or walk-in programs. Others may require appointment setting or acceptance by the service provider.

The system would generate notices to the litigant telling them which services they have been found to need and directions where to go when no follow up as to detail is needed.

For referrals to providers with independent intake, the system would match the litigant's detail again with available programs eligibility criteria and attempt to obtain electronic acceptance of the referral. This might require simultaneously sending data about the litigant to several programs.[50]

8. Follow Up for Completion of Referral and Download of Data

The system should not hand off the referral process to the litigants but should attempt to complete it, sending the litigants only the information that they need to confirm appointment time or the equivalent. The system should also have an electronic capacity to follow up to check that the referral link has been made.

9. Appeal to a Human

At least until research has much more fully validated the protocols and their criteria, users should be given the option at the end of the process of requesting a conversation, possibly by phone, to explain why they feel that they would not be able to manage their cases with the level of assistance offered under the system. Such a conversation would be informed by the materials produced by the system in aid of the analysis, and might be particularly necessary in limited-English proficiency situations.[51]

10. Activity if Service Needs Can Not Be Met with Existing Capacity

Unless there is a radical change in funding, a system like this will result in findings of service needs that cannot be met. This requires that the algorithm be able to adjust to provide services to those most urgently in need—something the algorithm should relatively easily produce if it can do its primary job. This can be done either by automatically adjusting the grid of presumptive need generated by the facts of the case or by changing the system of modifying those presumptions when sufficient services are not available.

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50. This might require change in ethics rules. The ABA should consider changing the Model Rules to facilitate this process.

51. Interview with Associate Justice Laurie Zelon, California Court of Appeals.

In addition, it should produce ongoing reporting about this service gap. There are those who think that one reason these systems have not made better progress analyzing triage is that they have not been willing to face the programmatic reality of the consequences of the service gap.

B. Problems Implementing the Design

1. Service Capacity Issues

The biggest challenge by far, of course, is that the resources are not there to provide all the access services. While the author strongly believes that a system such as this would be far cheaper to implement than a classic right to counsel for all approach, the total cost of this system will be hard to calculate until a pilot is attempted.

There are two possible strategies to follow. A small pilot in a small area would give good data on total cost, as well as on savings relative to traditional models. Indeed, if, as some advocated, the Shriver Pilot had been focused on one county with the kind of approach described here, then the pilot might have provided just that kind of data.[52]

The second strategy, as described above, would be to design the service triage system so that it adjusts its behavior based on the match between resources and need. There are actually two ways to do this, at least in the tech version. In one, the presumptions of service need inferred from the situation grid would be changed if need exceeded capacity. In the other, the presumptions would stay the same, but the formula for adjusting those presumptions would change based on availability of services. The first is more effective at protecting those with capacity issues. The second is better at making sure that those facing higher stake, higher conflict issues have counsel but would be less protective of those with lower capacity.

2. Court Track Restructuring Issues

The process of persuading a court to modify its segmentation of cases will be difficult. Clarke and Flango have it right; we need not to focus on case type but on the issues to be decided and the processes needed.[53] However, case type as the dominant paradigm is hundreds of years old, and is supported by systems of judicial and staff specialization, computer software, physical design of courthouses, etc.

It might well be much easier to start a complexity and service court track experiment in a new court. This was the model used in the highly successful Midtown Community Court, which tested a variety of treat-

52. JUDICIAL COUNCIL OF CALIFORNIA, FACT SHEET: SARGENT SHRIVER CIVIL COUNSEL ACT (AB 590) (FEUER) (2011), *available at* http://www.courts.ca.gov/documents/AB-590.pdf.

53. Thomas M. Clarke & Victor E. Flango, *Case Triage for the 21st Century*, 26 COURT MANAGER 14 (2012).

ment and community engagement innovations at the same time in Manhattan in the early 1990s.[54] As one who participated in the project, the author can report that he finds it hard to imagine the project succeeding without the flexibility provided by the ground up space, staff, and technology build-up.

3. Court Legal Aid Integration Issues

For courts, with their strong neutrality commitment and cultures, the concept of having their operational and technology systems so tightly interwoven with those of service providers, such as legal aid, will be a source of significant anxiety. On the technology side, it should be noted, however, that it is not proposed that legal aid operates the integrated triage system, rather that the integrated system communicate with both court and legal aid systems—and indeed with those of other neutral service providers. Thus data would only go from the central system as needed to enable processing in the system to which it went. The triage system would be built both technically and legally to avoid compromising confidential data.

In the non-tech option, the assessor would also have confidential information from both sides, and rules would need to be established to protect the confidentiality of that information—in a sense the role has some similarities to that of a mediator who meets privately with both sides and communicates only that which is authorized to be communicated.

4. Legal Aid Autonomy Issues

Legal aid programs are likely to fear loss of control over caseload—always a risk in moving towards any system of provision of counsel services other than by complete legal aid intake autonomy.[55]

The access benefits of this system are just too great for a rational legal aid provider to reject; however, some programs are likely to retain some discretion over intake and certainly some discretion to handle cases other than those coming in through this system. These would be matters for negotiation. Legal aid programs would have huge costs by moving to this system.

5. Protocol Development

Both models proposed in this paper assume some form of protocol. The non-tech system would function well with limited protocols. The

54. *Midtown Community Court*, CENTER FOR COURT INNOVATION, http://www.courtinnovation.org/project/midtown-community-court (last visited April 20, 2012)..

55. Lonnie Powers, Jim Bamberger, Gerry Singsen & De Miller, *Key Questions and Considerations Involved in State Deliberations Concerning an Expanded Civil Right to Counsel*, MGMT. INFO. EXCHANGE J., Summer 2010, at 10.

tech system would require much more sophisticated protocols, which would lead to clear decisions.

While those protocols will initially be based on consensus discussions among advocates, courts, and research experts,[56] in the long term, the data coming out of the system should make possible first protocol component validation and then lead to the suggestion of new components.

6. Legitimacy of Protocols

Legitimacy of the protocols, particularly the litigant service protocols, is likely to be a major issue. Many advocates believe that the decision to provide counsel is almost equivalent to deciding what the ultimate decision by the court on the merits will be, so they see any triage process as determinative.[57]

Ironically, much of the access community is likely to accept the legitimacy of individualized assessment more easily than that of automated protocols. This is because it reflects the way they work and uses skills with which they are comfortable. It is, however, far less transparent and far more likely to reflect unconscious bias.[58]

7. Cost Issues

Deploying this system will not be cheap for courts, legal aid, or whoever takes responsibly for the system as a whole. While it will ultimately save court time, focus litigant services where needed, and eliminate huge waste in current referral systems, it cannot be avoided that establishing and operating the system will require initial investments.

The author recommends a small start and that the development of protocols be supported by national resources, either from the federal government or from foundations. He also believes that federal investment in pilots is highly appropriate. If the federal funding is provided for

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56. A proposal for the funding of such a design process has been approved by the State Justice Institute. The proposal was submitted jointly by the National Center for State Courts and the Self-Represented Litigation Network.

57. Recent studies cast some doubt on the universality of this conclusion. *Archive for the 'Symposium (What Difference Representation?)' Category*, CONCURRING OPINIONS, http://www.concurringopinions.com/archives/category/representation-symposium (last visited Apr. 8, 2012). More recent research is discused at Zorza, *Exciting Triage Progress at TIG Conference*, *supra* note 12; Richard Zorza, *More Greiner et al Offers of Counsel Studies—The Debate Continues—Newsmaker Interview Planned*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (Oct. 24, 2011), http://accesstojustice.net/2011/10/24/more-greiner-et-al-offers-of-counsel-studies---the-debate-continues---newsmaker-interview-planned/.

58. It would be wise to build in statistical reporting systems designed to identify such asymmetrical outcomes early in the use of the process. *See* Richard Zorza, *Avoiding the "Shut Down Effect" from Uncertain Research Results*, CONCURRING OPINIONS (Mar. 28, 2011, 5:25 PM), http://www.concurringopinions.com/archives/2011/03/avoiding-the-shut-down-effect-from-uncertain-research-results.html.

research, the general protocols and software should work across the country, greatly reducing costs.[59]

8. Management Issues

The state would have to decide who would build such a system and who would administer it. As Professor Sandefur notes, no state has any agency playing a coordination role that approximates the need.[60] This writer believes that responsibility must be taken by a body such as the Access to Justice Commission, which combines the authority of its appointing authority from the state supreme courts with the legitimacy of the range of its participants.[61]

9. Possible Limited Deployment—Track or Service Assignment Only

It should be noted that either of the two kinds of triage envisioned in this paper could be piloted independently of the other. This would be politically far simpler but would obviously lose some of the power of the experiment.

CONCLUSION

We will never build either an efficient court system or a 100% access-to-justice system without a triage system. In the past, we have shied away from the attempt to do so, in part because of fear of the complexity any system would require.

While the author understands that the thoughts in this paper represent only a small step in launching an ultimate design process, he hopes that these initial ideas will act as a spur for a comprehensive and creative discussion of how to build the system that is so desperately needed.

In particular, this paper highlights that any effectively functioning system is going to have to be skillfully and legitimately coordinated. It is hoped that this paper will also encourage states to start to wrestle with the problem of how to establish a system to do so and that state players will start to take responsibility for thinking about the triage function, even before it is practicable to start to deploy it. Professor Dumbledore would ask no less.

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59. Compare the systems that have been deployed to support web information portals, www.lawhelp.org, and document assembly, www.lawhelpinteractive.org. Both systems integrate court and access to justice resources.

60. SANDEFUR & SMYTH, *supra* note 14, at 9.

61. Laurence Tribe, Professor Harvard Law School, Keynote Address at the Conference of Chief Justices (Jul. 26, 2010) (urging the adoption of Commissions in all states), *available at* http://www.scribd.com/doc/35916291/10-07-26-Prof-Laurence-Tribe-s-Keynote-Remarks-at-the-Annual-Conference-of-Chief-Justices-s.

TRAINING LAWYER-ENTREPRENEURS

LUZ E. HERRERA†

INTRODUCTION

The Great Recession has caused many new attorneys to question their decisions to go to law school.[1] The highly publicized decline in employment opportunities for lawyers has called into question the value of obtaining a law degree.[2] The tightening of the economy has diminished the availability of entry-level jobs for law graduates across employment sectors.[3] Large law firms are laying-off lawyers,[4] bringing in smaller first year associate classes,[5] hiring more contract and experienced

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1. The Great Recession began at the end of 2007 but was accelerated in the summer of 2008 when investment banks closed, and transactional corporate work began to dry up. Corporate law firms began layoffs, hiring freezes and explored other ways to lower their overhead, placing more attorneys in the marketplace for legal work. James G. Leipold, *The Changing Legal Employment Market for New Law School Graduates*, THE BAR EXAMINER, Nov. 2010, at 6–10. For the impact of the Great Recession on large law firms, see Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 28–40 (2011).

2. *See* David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1, *available at* http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=print; *see also* Bill Hebert, *What is the Value of a Law Degree?*, CALIFORNIA BAR JOURNAL, Feb. 2011, http://www.calbarjournal.com/February2011/Opinion/FromthePresident.aspx, and *What is the Value of a Law Degree? Part 2*, CALIFORNIA BAR JOURNAL, Mar. 2011, http://www.calbarjournal.com/March2011/Opinion/FromthePresident.aspx.

3. NALP reported that the employment rate of 85.6% was the lowest employment rate since 1994 when rate reported was 84.7%. *See* NALP, *Class of 2011 Has Lowest Employment Rate Since Class of 1994*, NALP BULLETIN (July 2012), http://www.nalp.org/0712research; *See also* NALP, *Law School Grads Face Worst Job Market Yet Less than Half Find Jobs in Private Practice*, NALP PRESS RELEASE (July 2012), http://www.nalp.org/uploads/PressReleases/Classof2011ERSSSelectedFindingsPressRelease.pdf.

4. Jonathan D. Glater, *The Lawyer Squeeze: Layoffs and Closings in a Field Thought to Resist Downturns*, N.Y. TIMES, Nov. 12, 2008, at B1. Debra Cassens Weiss, *BigLaw Laid Off More than 12,000 People in 2009, the Worst Year Ever*, ABA JOURNAL (Jan. 4, 2010), http://www.abajournal.com/news/article/biglaw_laid_off_more_than_12000_people_in_2009_the_worst_year_ever; Martha Neil, *Chadbourne Bids Final Farewell to 11 Deferred Members of Class of 2009*, ABA JOURNAL (Mar. 17, 2010), http://www.abajournal.com/news/article/chadbourne_bids_final_good-bye_to_11_deferred_members_of_class_of_2009/.

5. *See* Karen Sloan, *Its Tough Out There*, THE NATIONAL LAW JOURNAL (Feb. 27, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202543428380&slreturn=1; Gerry Shih, *Downturn Dims Prospects Even at Top Law Schools*, N.Y. TIMES, Aug. 26, 2009, at B1; Molly McDonough, *Summer Associate Offers Plummet, Hitting 17-Year Low*, ABA JOURNAL (Mar. 3, 2010), http://www.abajournal.com/news/article/summer_associate_offers_plummet_hitting_17-year_low/; *see also* Burk & McGowan, *supra* note 1, at 32–34.

lateral attorneys.[6] Government entities and public interest organizations have suffered furloughs, and hiring freezes,[7] and are relying more on volunteers than on new employees to get the work done.[8] To complicate matters, the baby boomer generation of lawyers is retiring later and contributing to a lack of new job opportunities.[9] As a result, a large number of recent law graduates are unemployed, under-employed, or are working in settings that do not require a bar license.[10] James G. Leipold, executive director of the National Association for Law Placement (NALP), reported that "members of the law school graduating classes of 2009 and 2010 have faced the worst entry-level legal employment market in 50 years and perhaps ever, and the market for the classes of 2011 and those that will follow is likely forever changed."[11] The latest figures released by 198 of the 201 law schools accredited by the American Bar Association (ABA) confirm Leipold's prediction. Only 55% of law students graduating in 2011 reported having full-time, long-term jobs requiring a law degree, at nine months after graduation.[12] The change in the job market

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6. Claire Zillman, *The New Normal*, THE AMERICAN LAWYER, Dec. 2010, at 67. Leigh Jones, *Faced with Data Explosion, Law Firms Tap Temp Attorneys*, THE NATIONAL LAW JOURNAL (Oct. 14, 2005), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1128947761813; Leipold, *supra* note 1, at 10. *But see* NALP, *Lateral Hiring on the Rise after Two Years of Decline*, NALP BULLETIN (April 2011), http://www.nalp.org/april2011_lateral_hiring.

7. Ed O'Keefe, *Justice Department Lawyers Say They'll Quit If Regional Offices Close*, WASH. POST, OCT. 18, 2011, *available at* http://www.washingtonpost.com/politics/justice-department-lawyers-say-theyll-quit-if-regional-offices-close/2011/10/18/gIQA0JzNvL_story.html; John Eligon, *District Attorney Cuts Jobs; Law Firms' Earnings Rise*, N.Y. TIMES, APR. 29, 2011, *available at* http://cityroom.blogs.nytimes.com/2011/04/29/district-attorney-cuts-jobs-law-firms-earnings-rise/; Patrick McDonnell, *L.A. City Attorney's Office Says Budget Cuts Are 'Threat to Public Safety'*, L.A. TIMES, JAN. 4, 2011, available at http://articles.latimes.com/2011/jan/20/local/la-me-0120-city-attorney-20110120; Jason Ryan, *Attorney General Holder Orders Hiring Freeze; Discusses Tight Justice Department Budget*, ABC NEWS (Jan. 4, 2011), http://abcnews.go.com/Politics/justice-department-attorney-general-eric-holder-orders-hiring/story?id=12749770&page=1#.UAs9YaBDQww; Alex Williams, *No Longer Their Golden Ticket*, N.Y. TIMES, Jan. 17, 2010, *available at* http://www.nytimes.com/2010/01/17/fashion/17lawyer.html?scp=1&sq=no%20longer%20their%20golden%20ticket&st=cse.

8. Leipold, *supra* note 1, at 7–10.

9. *See* Barbara Rose, *Not Done Yet*, ABA JOURNAL (April 2010) (discussing the reluctance or inability of lawyers to retire); *see also Lawyer Retirement Flash Survey*, ALTMAN WEIL, INC. 1, http://www.altmanweil.com/dir_docs/resource/d5bc07ce-97c2-4d82-abbe-c5f89ae5296a_document.pdf (reporting that 61% of attorneys surveyed plan on continuing to work in some capacity after retirement).

10. *See* Debra Cassens Weiss, *New Lawyer Says Waitress Job Pays More than Small Law Firms*, ABA JOURNAL (Aug. 14, 2009, 8:20 AM), http://www.abajournal.com/news/article/new_lawyer_says_waitress_job_pays_more_than_small_law_firms/; *see also* Menachem Wecker, *In Tough Job Market, Law Grads Use J.D.s for Nonlegal Work*, U.S. NEWS & WORLD REP. (Sept. 30, 2011), http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2011/09/30/in-tough-job-market-law-grads-use-jds-for-nonlegal-work; Debra Cassens Weiss, *Nontraditional Careers for Law Grads Include Cartoonists and Service Dog Trainers*, ABA JOURNAL (Oct. 3, 2011), http://www.abajournal.com/news/article/nontraditional_careers_for_law_grads_include_cartoonists_and_services_dog_tr/.

11. Leipold, *supra* note 1, at 6.

12. Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J. (June 25, 2012), *available at* http://online.wsj.com/article/SB10001424052702304458604577486623469958142.html; *see*

masks a long standing but rarely recognized reality. Law jobs, particularly for new attorneys, have never been abundant.

Historically, most attorneys in the United States have created their own jobs by establishing solo and small law firms. The latest ABA market research indicates that about three-fourths of all attorneys work in private practice.[13] Of those attorneys, almost half identify as solo practitioners and approximately 14% work in small law offices with five or less lawyers.[14] ABA market research found that in 2005, only 16% of attorneys in private practice work in law firms of more than 100 attorneys.[15] In fact, the number of lawyers in private practice working in law firms of more than 50 attorneys has never accounted for even one-fifth of the private bar.[16] Attorney demographics confirm that the majority of lawyers in private practice are self-employed.[17] Regardless of the large number of lawyers in solo practice, few law graduates enter the profession understanding the opportunities and challenges of starting their own law firms.

The reality of self-employment has not been well-received by many new graduates. Fewer opportunities in the job market have spawned blogs, editorials, articles and letters from and about angry and greatly disappointed new lawyers who viewed law school as their ticket to a six-figure salary upon graduation, but instead found poor job prospects and student debt equivalent to a home mortgage.[18] A group of law graduates

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also Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES (July 14, 2012), *available at* http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html.

13. The American Bar Foundation published *The Lawyer Statistical Reports* in 2012, 2004, 1994. The reports respectively report that in 2005 75% of all lawyers worked in private practice. Those figures were 75% in 2000 and 73% in 1991. The corresponding 1985 report also reports that 68% of all lawyers were in private practice in 1980. ABA MKT. RESEARCH DEP'T, LAWYER DEMOGRAPHICS (2012), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf.

14. *Id.* (showing that in 1980 and 2005 49% of private practitioners identified as working in solo practice). The 2000 report shows 48% and the 1991 report states that 45% of private sector attorneys worked as solo practitioners. *Id.*

15. *Id.* The largest proportion of lawyers working in law firms with more than 100 attorneys was reported in 2005, only three years before massive layoffs. The numbers for 1991 and 2000 were 13% and 14%, respectively. The 1980 data only measured law firms with more than 51 lawyers, so it is unclear how many of them worked in law firms of more than 100 lawyers. *Id.*

16. In the late 1950s, only 38 law firms in the United States had more than fifty lawyers. *See* Marc S. Galanter, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 749 (1990). In 1960, it is estimated that only two percent of attorneys practiced in law firms of over 50 attorneys. In 1980, this number grew to 18%, still less than one-fifth of the total amount of practicing attorneys in the private practice. Marc Galanter, *"Old and in the Way": The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1092 (1999).

17. The percentage of existing solo practitioners has consistently been greater than that of large law firms. The percentage was 64% in 1960, 52% in 1970, 49% in1980, 45% in 1991, and finally 48% in 2000. Barbara A. Curran, *American Lawyers in the 1980s: A Profession in Transition*, 20 LAW & SOC'Y REV. 19, 30 (1986).

18. Encarnacion Pyle, *Law Grads: Lots of Debt, Few Jobs*, THE COLUMBUS DISPATCH (Mar. 26, 2012), http://www.dispatch.com/content/stories/local/2012/03/26/law-grads-lots-of-debt-few-jobs.html; Segal, *supra* note 2.

initiated lawsuits against their law schools alleging, among other things, misrepresentation and fraud.[19] Although the particular claims of the lawsuits vary, all of them accuse law schools of reporting exaggerated employment statistics in order to lure prospective students into law schools.[20] As a result of the public dissatisfaction of recent law graduates and the high cost of legal education,[21] the number of applications to ABA accredited law schools declined in 2011.[22] In December 2012, the Law School Admissions Council reported an additional decline of 22%.[23]

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19. As of July 20, 2012 the following law schools have been sued over their employment and salary reports: Albany Law School, Brooklyn Law School, California Western School of Law, Chicago-Kent College of Law, Florida Coastal School of Law, DePaul University College of Law, Golden Gate University School of Law, John Marshall Law School, Maurice A. Deane School of Law at Hofstra University, New York Law School, Southwestern Law School, Thomas M. Cooley Law School, Thomas Jefferson School of Law, University of San Francisco Law School, and Widener University School of Law. *See* Karen Sloan, *Law School Sued Over 'False' Employment Statistics*, THE NATIONAL LAW JOURNAL (May 27, 2011), available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202495481202&Law_school_sued_over_false_employment_statistics&slreturn=1&hbxlogin=1; *see also* Martha Neil, *Honors Grad Working as Doc Reviewer Sues Law School, Says She Was Misled by US News Stats*, ABA JOURNAL (May 27, 2011), http://www.abajournal.com/news/article/honors_grad_working_as_doc_reviewer_sues_law_school_says_she_was_misled_by_/; Sophia Pearson, *New York Law School Sued by Students over Claims About Graduates' Success*, BLOOMBERG (August 10, 2011), http://www.bloomberg.com/news/2011-08-10/new-york-law-school-sued-by-students-over-claims-about-graduates-success.html; Peter Fulham, *Law Grads Sue Alma Maters for $450M*, SLATE (August 12, 2011), http://slatest.slate.com/posts/2011/08/12/law_school_lawsuit_thomas_cooley_new_york_law_school_sued_by_stu.html; Martha Neil, *12 More Law Schools Sued Over Reporting of Law Grad Employment and Salary Stats*, ABA JOURNAL (February 1, 2012), http://www.abajournal.com/news/article/12_more_law_schools_sued_in_consumer-fraud_class_action_re_reported_law/; Karen Sloan, *Fresh round of litigation targets 12 law schools over jobs data*, THE NATIONAL LAW JOURNAL (February 1, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202540950653; Shannon Rasberry, *High Student Loan Debt, Unemployment Lead to More Lawsuits against Law Schools*, Student Loans Blog (February 14, 2012), http://studentloansblog.nextstudent.com/2012/02/14/high-student-loan-debt-unemployment-lead-to-more-lawsuits-against-law-schools/. The lawsuit against New York Law School was dismissed on March 21, 2012. *See* Alexandra Gomez-Jimenez v. N.Y. Law Sch., 943 N.Y.S.2d 834 (Sup. Ct. 2012). The lawsuit against Thomas Cooley Law School was dismissed on July 20, 2012. *See MacDonald v. Thomas M. Cooley Law Sch.*, No. 1:11-CV-831, 2012 WL 2994107 (W.D. Mich. July 20, 2012).

20. *See* Jack Crittenden, *Employment Data Under Fire*, THE NATIONAL JURIST, Sep. 2010, at 5 (manipulating of employment data by law schools scrutinized); Segal, *supra* note 2; Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Transparency at U.S. Law Schools*, 32 PACE L. REV. 1 (2012) (calling for regulation of the collection and presentation of employment data at ABA-approved law schools).

21. The ABA reported that in 2009 the average annual cost of law school tuition and fees was $35,743 for private schools and $18,472 for resident students at public law schools. *Section on Legal Education, Statistics from ABA-Approved Law Schools, Law School Tuition 1985–2009*, ABA, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_tuition.authcheckdam.pdf (last visited July 22, 2012). These figures represent an increase in tuition of 73% for private schools and 150% for public schools since 1999. *See id.*

22. Although the number of ABA applications reached an all-time high in 2010 at 602,252, this figure dropped 11% to 536,200 in 2011. *LSAC Volume Summary*, LAW SCH. ADMISSION COUNCIL, http://www.lsac.org/LSACResources/Data/PDFs/LSAC-volume-summary.pdf (last visited, May 15, 2012). Similarly, the number of individuals sitting for the Law School Admissions Test dropped by almost 26% in a two year period, from 171,514 exams taken in 2009–2010 to 129,958 in 2011–2012. *LSATs Administered*, LAW SCH. ADMISSION COUNCIL, http://www.lsac.org/LSACResources/Data/lsats-administered.asp (last visited May 15, 2012). *See*

The future of the legal profession is uncertain. Some predict that large law firms are unlikely to rebound to pre-recession hiring.[24] It is also not anticipated that government, academic, and public interest sectors will represent more than a small fraction of available law jobs.[25] The most consistent and largest employment sector for lawyers will continue to be solo practice. If the largest segment of our law students will eventually work for themselves,[26] then law schools should provide direction about what it means to be a self-employed lawyer. Like their predecessors, the self-employed lawyer of the twenty-first century must learn how to think like a lawyer and find a niche within the business of law. However, to make a living in an increasingly complex and competitive legal market, self-employed lawyers must also become lawyer-entrepreneurs.[27]

This Article does not offer a comprehensive understanding of the study of entrepreneurship.[28] Nor does it engage the discussion of the tension between professionalism standards and personal gain.[29] Instead, this piece focuses on what law schools can do to help the thousands of self-employed lawyers who must embrace entrepreneurial models to survive in a competitive market. Part I of this Article considers how technology and the need for more affordable legal services require the transfor-

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also David Segal, *For 2nd Year, A Sharp Drop in Law School Entrance Tests*, N.Y. TIMES, Mar. 20, 2012, at B1.

23. *Three-Year ABA Volume Comparison,* LAW SCH. ADMISSION COUNCIL, http://www.lsac.org/lsacresources/data/three-year-volume.asp (last visited December 20, 2012).

24. William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—And It May Be a Sign of Lasting Change,* ABA JOURNAL (July 1, 2011 4:40 AM), http://www.abajournal.com/magazine/article/paradigm_shift (re-examining some long-standing assumptions about lawyers and the clients they serve within the context of the demands of a rapidly globalizing world); *see also* Maulik Shah, *The Legal Education Bubble: How Law Schools Should Repond to Changes in the Legal Market,* 23 GEO. J. LEGAL ETHICS 843, 845–52 (2010) (discussing how the legal market was impacted by the Great Recession).

25. Since 1980, no more than 8–9% of all lawyers worked in the government sector. During that period, only 1% of lawyers where employed in education. Legal aid and public defender lawyers were 2% of the profession's population in 1980 but their numbers declined to constitute 1% of the lawyer population as of 1991. *See* ABA MKT. RESEARCH DEP'T, *supra* note 13.

26. *ABA Serves Solo and Small-Firm Lawyers with New Online Resource Center*, ABA (Jan. 19, 2012), http://www.abanow.org/2012/01/aba-serves-solo-and-small-firm-lawyers-with-new-online-resource-center/ (reporting that approximately 435,000 attorneys are in solo practice). There were 1,245,205 total attorneys in the U.S. in April 2012. *See* ABA MKT. RESEARCH DEP'T, *supra* note 13.

27. *See* David G. Blanchflower & Andrew J. Oswald, *What Makes an Entrepreneur?*, 16 J. LAB. ECON. 27 ("The simplest kind of entrepreneurship is self-employment.").

28. For an overview of the literature on entrepreneurship, see David E. Pozen, *We Are All Entrepreneurs Now,* 43 WAKE FOREST L. REV. 283, 284–315 (2008) (comparing traditional and new conceptualizations of the entrepreneur in the academic literature).

29. For a discussion on the tension between professionalism and commercialization of legal services, see generally ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development*, 37 ARIZ. ST. L.J. 255 (2005); David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit,* 17 GEO. J. LEGAL ETHICS 203 (2004); Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1 (1998); Deborah L. Rhode, *The Professionalism Problem,* 39 WM. & MARY L. REV. 283 (1998); *see also* MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 177 (1977) (discussing how lawyers' social structure is at odds with its professional ideals).

mation of solo attorneys into lawyer-entrepreneurs. It explores how technology and client preferences are impacting the practice of law for self-employed lawyers that address personal legal services. Part II summarizes the findings of several empirical studies that help us understand what it means to be a self-employed lawyer. It considers the challenges and opportunities of lawyers as entrepreneurs. Part III posits that Millennial generation lawyers are good candidates to become lawyer-entrepreneurs. It contemplates a future where Millennial lawyer-entrepreneurs, if properly supported, can exploit technology to increase access to justice and achieve their personal goals. Part IV documents a sample of existing and emerging efforts by law schools to train self-employed lawyers. This section focuses specifically on the emergence of networks supporting solo and small firm lawyers, attorney incubator programs and post-graduate residencies. Part V offers recommendations for law schools committed to advancing the training of lawyer-entrepreneurs. The perspective offered here is informed by my experience launching a solo practice in 2002,[30] my involvement in a national conversation about the lack of affordable legal services,[31] as a mentor to lawyers starting their law practices, and is supported by empirical research.

I. LAW IN THE MILLENNIAL AGE

Today's law graduates are entering the profession at a time when technology is drastically changing all aspects of our society, including the business of law. The same technology that permits a U.S. lawyer to service her clients from the comfort of her laptop facilitates the provision of legal services from India to U.S. companies at a fraction of the price.[32] In the last decade, thousands of legal jobs, primarily involving document preparation and legal research, have been sent abroad.[33] The long-term impact of outsourcing is yet to be determined, but what is clear is that the

30. Luz E. Herrera, *Reflections of a Community Lawyer*, 3 MOD. AM. 39, 41–43 (2007), *available at* http://www.wcl.american.edu/modernamerican/documents/Herrera.pdf.

31. Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1, 6–8 (2009) (arguing for inclusion of Main Street lawyers that charge low bono fees in national efforts to increase access to justice).

32. Carole Silver, *Putting Legal Process Outsourcing in Context: Why Globalization Matters*, 20 No. 2 PROF. LAW. 26, 26–27 (2010) (referring to Mark Ross of Integreon who says that real estate work costs 1/20th of what it cost 10–20 years ago and is done by paralegals, junior associates, or contract attorneys).

33. *See* James R. Faulconbridge et al., *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, 28 NW. J. INT'L L. & BUS. 455, 455–59 (2008) ("[U]nderstanding how existing geographies of globalization of law and lawyers, alongside new geographies of professional partnership and legal work, have created opportunities and challenges for global law firms."); Carole Silver et al., *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Global*, 22 GEO. J. LEGAL ETHICS 1431, 1438–45 (2009) ("The patterns of staffing overseas offices reveal that the firms are substantially invested in the local and also pursue a path of diffusion."); Milton C. Regan, Jr., & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2166–67 (2010) (discussing whether the trend of law firms producing goods and services by relying on the supply chains that extend beyond the formal boundaries of the organization will continue).

delivery of legal services has drastically changed.[34] Technology has facilitated the entry of new players that offer affordable alternatives to routine services that many attorneys in solo practice provide. The use of technology to facilitate the delivery of legal services is making legal information more accessible and driving down profit margins of many lawyers. In addition to the new non-lawyer competitors, self-employed lawyers that provide personal services compete with paralegals and other non-lawyer providers.[35]

In his thought-provoking book, *The End of Lawyers?*, futurist Richard Susskind argues that information technology and the commoditization of legal services will "fundamentally transform legal services."[36] He explains the entry of new technology-adept non-lawyer competitors have forced lawyers to deliver more services at lower prices.[37] Susskind argues that the delivery of legal services will evolve through a spectrum where traditional, one-on-one, personalized services will be only a small portion of the overall legal services delivered.[38] He characterizes non-routine, customized work that requires personal interaction with a client as "bespoke" work. Bespoke work is specifically tailored to the particular needs and characteristics of the client. It is the primary mode of legal services delivery championed by lawyers who make their living by customizing their service.[39] Susskind argues that consumers prefer a highly "commoditized" service that has been standardized, systematized, packaged, and offered at a fraction of the cost of bespoke work.[40] A commoditized legal service is described "as an IT-based offering that is undiffer-

34. Henderson & Zahorsky, *supra* note 24.

35. For a discussion of the first wave of competitors that threatened to "delawyer" the legal profession, see Gerry Singsen, *Competition in Personal Legal Services*, 2 GEO. J. LEGAL ETHICS 21, 24–40 (1989) (discussing the emergence of legal services providers in the early 1980s); *see also Reality Sinks In,* ABA JOURNAL (August 2012) (reporting that 92 percent of respondents of the 2012 *Law Firms in Transition Survey* said that "price competition will be a permanent fixture of the post-recession legal marketplace")

36. RICHARD SUSSKIND, THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES 27 (2008).

37. *Id.* at 27 (offering examples of attorneys asked to take work for fixed prices and to have much more transparency in their billing). New non-lawyer competitors include companies that offer clients to outsource legal work, entrepreneurial publishers, professional managers and investors who fund non-lawyer companies that facilitate disruptive legal technology such as document assembly and embedded legal knowledge in software programs to replace the need for lawyers in routine legal work.

38. *Id.* at 28–29.

39. *Id.* at 29. Susskind explains that the term bespoke is a word commonly used in the UK to describe a highly customized product. He explains that individuals refer to "bespoke software" they refer to "software that is specifically written for one client". He further explains by explaining the contrast between a "bespoke suit," a suit that is tailored to fit one specific individual, and a "off-the-peg suit" designed for many people.

40. *Id.* at 31–32; *cf.* CARROLL SERON, MANAGING ENTREPRENEURIAL LEGAL SERVICES: THE TRANSFORMATION OF SMALL-FIRM PRACTICE IN LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 75 (Robert L. Nelson ed., 1991) (discussing empirical research showing that legal services consumers prefer lawyers who are older, work in their own offices and are conveniently located).

entiated in the marketplace" by the consumer and is made available by disruptive legal technologies.[41]

Disruptive legal technologies include systems, techniques, or applications that radically change the way an industry operates.[42] Susskind identifies ten disruptive legal technologies that are already making legal services highly available by becoming accessible to multiple providers whose competition lowers pricing to the consumer.[43] Examples of such disruptive legal technologies include automated document assembly, the internet as an electronic legal marketplace, embedded legal knowledge, workflow management, and online legal guidance.[44] Such innovations allow for competitive pricing for routine legal services and diminish the role of a lawyer as service provider. Susskind concludes that in this new paradigm, the success or failure of lawyers will depend on their willingness to change the way they practice by welcoming new ways of organizing and delivering legal work.[45] Susskind's message is not that disruptive legal technology will make law and lawyers less relevant, but that technology has transformed the legal market to be a buyer's market.[46]

In the United States, legal services consumers are confirming part of Susskind's hypothesis that they will opt for a less personalized service if the alternative is too costly. The typical legal services consumer in the U.S., makes approximately $25 per hour,[47] and is priced out of the services lawyers provide even at low attorney rates of $125–$150 an hour.[48] A study by the World Justice Project found the United States ranked the lowest among 11 developed nations in providing access to justice to its citizens.[49] The primary model for delivering legal services offers options to a small fraction of those who qualify under specific poverty guide-

41. *Id.* at 32.

42. *Id.* at 99.

43. *Id.* at 31.

44. *Id.* at 99–146. Chapter 4 describes automated document assembly, instant connectivity (blackberries, social media, Skype), the internet as an electronic legal marketplace, e-Learning, online legal guidance, legal open-sourcing, closed legal communities, workflow and project management, and embedded legal knowledge. Chapter 5 describes online dispute resolution. *Id.* at 147–180.

45. *Id.* at 269.

46. *Id.* at 270.

47. The hourly rate for consumers is calculated based on a median annual income of $50,020 and assumes a forty-hour workweek over fifty weeks. According to new data derived from the monthly Current Population Survey, real median annual household income in January 2012 was $50,020. Gordon Green & John Coder, *Household Income Trends: January 2012*, SENTIER RESEARCH, LLC, 2 (Mar. 2012), http://www.sentierresearch.com/reports/Sentier_Research_Household_Income_Trends_Report_January_2012_12_03_01.pdf.

48. Richard S. Granat, *eLawyering for a Competitive Advantage—How to Earn Legal Fees While You Sleep*, 2–3 (2008), http://meetings.abanet.org/webupload/commupload/EP024500/relatedresources/eLawyering_for_Competitive_Advantage.pdf.

49. *See* Mark David Agrast et al, *Rule of Law Index*, THE WORLD JUSTICE PROJECT, 103 (2011), http://worldjusticeproject.org/sites/default/files/wjproli2011_0.pdf; Steven Seidenberg, *Unequal Justice: U.S. Trails High-Income Nations in Serving Civil Legal Needs*, ABA JOURNAL (June 1, 2012 1:50 AM), www.abajournal.com/magazine/article/unequal_justice_u.s._trails_high-income_nations.

lines[50] and to those who can afford to pay attorney fees at market rates.[51] Legal services consumers generally perceive lawyers as an inefficient use of their money and time.[52] A 1993 survey revealed that a majority of Americans believe that the phrases "greedy" and "make too much money" properly describe lawyers.[53] Individuals with legal problems will opt for resources that are most affordable and convenient even when they understand that the services provided may be sub-optimal compared to what an attorney can provide.[54] It is estimated that there is a latent legal services market with an annual worth of $20 billion "that is not currently being served by the legal profession."[55] The legal profession's inability to meet the needs of its citizens is documented by national and state studies.[56]

Venture capitalists have begun to address the need of the average legal services consumers. Investors are showing interest in the legal informatics market that provides lawyer alternatives to consumers.[57] In

50. The Legal Services Corporation set income eligibility guidelines for free legal services in 2012 at 125% of federal poverty guidelines set forth by the Department of Health and Human Services. *See Income Level for Individuals Eligible for Assistance*, 77 Fed. Reg. 21 (Feb. 1, 2012) (to be codified at 45 CFR Part 1611), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-02-01/html/2012-2098.htm. For a family of four living in the contiguous United States, annual income at 125% of the federal poverty guidelines is $28,813. *Id.* Through different sources of funding, some legal aid organizations are able to offer free legal services to individuals at 200% of the poverty guidelines. A family of four under 200% of poverty can make no more than $46,100 per year in the contiguous U.S. *Id.*

51. What an attorney charges for a service depends on a number of actors which include the difficulty of the legal matter, the location where the services are rendered and the experience of the attorney. There are currently websites that provide legal services consumers with ideas of how much attorneys in a geographic region charge per basic service. *See* ATTORNEY FEE, http://www.attorneyfee.com/ (last visited July 31, 2012).

52. Granat, *supra* note 48, at 3. Richard S Granat, *Online Legal Services and Virtual Lawyering: What Is it, Why Is it Important and What Do You Do Now?*, DIRECT LAW, 4 (Aug. 1, 2011), http://www.directlaw.com/virtual-lawyering-for-competitive-advantage.pdf.

53. *See* PETER D. HART RESEARCH ASSOCIATES, A SURVEY OF ATTITUDES TOWARDS LAWYERS AND THE LEGAL SYSTEM 13 (1993) (finding that Americans rate lawyers as third from the bottom, higher only than stockbrokers and politicians, when rating nine professions); *see also Legal Services Benchmarking, Report 11516*, BDRC CONTINENTAL (June 2012), http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/individual_consumers_use_of_legal_services_lsb_report_17_07_12_ii.pdf (an empirical study that explores how British citizens make decisions about their legal needs).

54. Robert Capps, *The Good Enough Revolution: When Cheap and Simple Is Just Fine*, WIRED (August 24, 2009), http://www.wired.com/gadgets/miscellaneous/magazine/17-09/ff_goodenough?currentPage=4 (discussing how in various industries, including the legal industry, customers will sacrifice quality for an inexpensive and convenient alternative).

55. Granat, *supra* note 48, at 1.

56. LSC reports that only one-fifth of those who require civil legal services in this country receive them. *See Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 18 (2009), http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf; Herrera, *supra* note 30, at 5–6; *see also* Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 PROF. LAW. 79, 85–87 (2012) (arguing that the U.S. legal profession is not meeting the civil legal needs of the population); Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1040–41 (2006).

57. Legal informatics refers to the application use of technology for the organization, storage, and distribution of legal information.

2011, Nolo Press, the leading publisher of self-help law books and software, was purchased by a new media company for $21 million.[58] In the same year, well-regarded venture capitalists invested $41 million for minority shares of LegalZoom, the leading provider of online legal forms for individuals and small business, and another $18.5 million in Rocket Lawyer, provider of legal forms and information.[59] Entities such as LegalZoom, Rocket Lawyer, Nolo Press, and similar entities not licensed to practice law, have already identified the legal market as the next industry ripe for disruption by commoditization.[60] LegalZoom alone reported more than two million customers and revenue of more than $100 million in 2011.[61]

The market for more affordable alternatives to lawyers will continue to grow unless and until the legal profession offers legal services consumers what they need and want.[62] Lawyers working in courts and legal aid organizations were amongst the first to integrate technology into their existing structures to meet the demand for their services.[63] Every state in the country has an online platform to help self-represented litigants with automated forms and legal information.[64] Since 2000, the Legal Services

58. Nolo was purchased by Internet Brands, Inc, in 2011. Daniel Fisher, *Entrepreneurs Versus Lawyers*, FORBES (Oct. 24, 2011, 6:00 PM), http://www.forbes.com/forbes/2011/1024/entrepreneurs-lawyers-suh-legalzoom-automate-daniel-fisher.html. Internet Brands has a subsidiary company called Experthub which is the lead generator for Nolo Network. See *About Us*, NOLO, http://www.nolo.com/about.html (last visited May 14, 2012); *see also* Richard Granat, *Nolo Is Acquired by Registered Brands as Part of Legal Roll Up* ELAWYERING BLOG (Apr. 30, 2011), http://www.elawyeringredux.com/2011/04/articles/selfhelp-law/nolo-is-acquired-by-internet-brands-as-part-of-legal-roll-up/.

59. *Id.*; *see also* LEGALZOOM, http://www.legalzoom.com (last visited May 14, 2012); ROCKET LAWYER, http://www.rocketlawyer.com (last visited May 14, 2012).

60. For a discussion of market disruptors, see Ken Docor, *The Newsonomics of Amazon vs. Main Street*, NIEMAN JOURNALISM LAB (July 26, 2012 10:00 AM) (explaining Amazon's disruption of retail business), http://www.niemanlab.org/2012/07/the-newsonomics-of-amazon-vs-main-street/; *see also* REID HOFFMAN & BEN CASNOCHA, THE START-UP OF YOU 19–21 (2012) (discussing different companies such as Netflix who disrupted the movie rental industry and replace organizations such as Blockbuster).

61. Pascal-Emmanuel Gobry, *This Profitable, $100 Million Revenue Startup Doesn't Want to Go Public*, BUS. INSIDER (July 26, 2011), http://articles.businessinsider.com/2011-07-26/tech/29970662_1_ipos-ivp-techcrunch; LEGALZOOM, *supra* note 59; *see also* Legalzoom.com, Inc., Registration Statement Under the Securities Act of 1933 (Form S-1) (May 10, 2012), *available at* http://xml.10kwizard.com/filing_raw.php?repo=tenk&ipage=8258454. *But see* Reynolds Holding & Anthony Currie, *Do-It-Yourself Law Firm IPO Looks a Bit Too Feisty*, SLATE (July 24, 2012) (questioning the valuation of Legalzoom.com considering lawsuits and reporting two years of losses in 2009 and 2010), http://www.slate.com/blogs/breakingviews/2012/07/24/do_it_yourself law firm ipo looks a bit too feisty .html.

62. Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121 (2000) (claiming that the rise of the self-help movement is motivated by the lack of affordable legal services).

63. Ronald W. Staudt, *Technology for Justice Customers: Bridging the Digital Divide Facing Self-Represented Litigants*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 71, 73–77 (2005) (describing statewide internet platforms to offer free legal information and facilitate access to justice); *see also* John T. Broderick, Jr., & Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, AT A21 (Jan. 2, 2010) (defending limited scope representation as a vehicle to help self-represented litigants),

64. For a list of websites to assist self-represented litigants, see LAWHELP.ORG, http://www.lawhelp.org/ (last visited July 31, 2012).

Corporation has awarded technology grants to legal services providers to develop programs using technology to increase the delivery of legal services to those who cannot afford it.[65] These grants have produced technological innovations that help legal aid organizations reach a greater number of legal services consumers.[66] A LSC grant has funded the creation of "Apps for Justice" clinics at law schools, where law students will partner with legal aid organizations to develop new applications to facilitate legal form automation.[67] These creations help address the "justice gap" for low-income individuals, but this same technology is also used by new market competitors to drive down the price of legal services.[68] The demand for affordable legal services makes it more difficult for lawyers who want to stop the proliferation of these new market competitors. Allegations by lawyers that Legalzoom and other new competitors are engaging in unauthorized practice of law have not resulted in the type of injunctive relief that many self-employed attorneys and bar associations seek.[69]

Attorneys in solo practice have an opportunity to leverage technology to provide more cost-effective services to their potential client base. Self-employed attorneys can also provide greater options to the community of legal services consumers who are not finding alternatives they can afford in the attorney marketplace. The last national legal services survey revealed that 75% of low-income respondents contracted with a private lawyer and that 68% of them actually paid a fee for those services.[70]

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65. *Technology Initiative Grants*, LEGAL SERVICES CORPORATION, http://tig.lsc.gov/about-us/background (last visited July 31, 2012).

66. Over $40 million in Technology Initiative Grants have been distributed and have been crucial in developing states' legal services websites. For more on the impact of these grants *see TIG's Impact, Legal Services Corporation*, http://tig.lsc.gov/about-us/tigs-impact (last visited July 31, 2012).

67. *Apps for Justice Wins Future Ed Contest,* ITT CHICAGO-KENT COLLEGE OF LAW (April 20, 2011), http://www.kentlaw.iit.edu/news/apps-for-justice-wins-future-ed-contest; *see also* Ronald W. Staudt, *All the Wild Possibilities: Technology that Attacks Barriers to Access to Justice,* 42 LOY. L.A. L. REV. 1117 (2009) (describing the prominence of technology that "allows lawyers to build guided Internet interviews for prospective clients and self-represented litigants").

68. The Legal Services Corporation (LSC) defines the Justice Gap as the "difference between the level of legal assistance available and the level that is necessary to meet the needs of low-income Americans". *Documenting the Justice Gap in America*, LEGAL SERVICES CORP. 1 (September 2009), http://www.lsc.gov/justicegap.pdf.

69. Legalzoom denies allegations that it engages in the unauthorized practice of law but has paid millions to settle lawsuits against it. *See* Daniel Fisher, *Non-Lawyers Find It Hard Avoid Breaking Bar's Vague Rules*, FORBES (July 25, 2011, 10:06 AM), http://www.forbes.com/sites/danielfisher/2011/07/25/non-lawyers-find-it-hard-avoid-breaking-bars-vague-rules (discussing non-lawyer battles with bar regulators who monitor unauthorized practice of law activites). For LegalZoom's perspective on claims of unauthorized practice of law, see *Perspectives*, LEGALZOOM, http://www.legalzoom.com/perspectives (last visited May 14, 2012). *See also* Holding & Currie, *supra* note 61.

70. *Legal Needs and Civil Justice: A Survey of Americans*, ABA 9–11 (1994), *available at* http://www.abanet.org/legalservices/downloads/sclaid/lpegalneedstudy.pdf; *see also* Herrera, *supra* note 31, at 37–38 (citing *ABA Legal Needs Study*, ALGODONES ASSOCIATES 7 (1998), http://www.algodonesassociates.com/legal services/assessing needs/ABA%20Legal%20Needs.pdf.); *see also Access Across America: First Report of the Civil Justice Infrastructure Mapping Project*, AMERICAN BAR FOUNDATION 3 (October 7, 2011) (stating that evidence suggests that low-income

Large corporate law firms do not generally service low- and middle-income clients.[71] The majority of the American population who addresses their legal problems will therefore look to self-employed lawyers or less expensive non-lawyer alternatives to address their legal needs. Solo lawyers are key players in delivering legal services to the majority of the U.S. population. As a result, solo practice is more than a career path of last resort. It is the most enduring segment of the bar that has consistently helped individuals in our society navigate the democratic legal system we live in.

While the commoditization of legal services may spell doomsday for many self-employed attorneys, lawyer-entrepreneurs view disruptive legal technologies as tools to become more competitive and profitable. Lawyer-entrepreneurs understand the opportunities that exist in offering affordable legal services, particularly to populations that are underserved. They learn how to maximize technology to continue to deliver a personalized product at a competitive price to be viable in the post-Great Recession era. Lawyer-entrepreneurs build their expertise and their client base by providing quality legal services and developing a trusted reputation in their community. As a lawyer-entrepreneur's client base and reputation grows, her success will be measured by her ability to incorporate technology to grow her market share of both the latent legal services market and the community of clients who can afford bespoke services.

The eLawyering Task Force of the Law Practice Management Section of the ABA has become the bar's most important link to connecting solo lawyers to the technology they need to become lawyer-entrepreneurs.[72] Bill Paul, former ABA president responsible for forming the eLawyering Task Force, described eLaywering as "the utilization of the Internet and e-mail networks for the delivery of legal services."[73] The eLawyering Task Force is well aware of the impact that the hundreds of legal information websites are having on the solo bar providing personal legal services. They estimate that in an eighteen month period more than 50,000 no-fault divorces were processed by online services, translating into approximately $100,000,000 in lost revenue to family law attorneys nationwide.[74] The eLawyering Task Force has done extensive research

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people who seek out legal assistance have most of their contacts with private attorneys in fee-based arrangements rather than with legal aid or pro bono attorneys), http://www.americanbarfoundation.org/research/Pursuing_Law_s_Promise.html.

71. *See* discussion of *Chicago Lawyers* and *Urban Lawyer* studies *infra* Part III.

72. Granat, *supra* note 48, at 1 ("The legal information industry of self-help books/forms has gone on-line. It has the solo and small law firm segment of the legal profession squarely in its sights.").

73. Erin Walsh, *Some Call It eLaywering*, 12 A.B.A. BUS. L. SEC. 3 (2003), http://apps.americanbar.org/buslaw/blt/2003-01-02/walsh.html.

74. Granat, *supra* note 48, at 2. Richard Granat estimates the $100,000,000 figure by calculating the 70,000 online divorces that were filed on legal information websites by $1,500, which is the average fee an attorney charges for filing an uncontested, no-fault divorce. *See also* Granat, *supra* note 52.

on consumer preferences, and its members understand that there is little lawyers can do to stop the continued commoditization of legal services.[75] This new market for legal services offers consumers greater options and therefore forces attorneys to alter their pricing structures and strategies for getting clients. The eLawyering Task Force encourages attorneys to maximize technology to supplement their existing offering of legal services.

To become lawyer-entrepreneurs, solo lawyers need greater instruction on how to maximize the use of technology to reach untapped markets. The impact of technology on the legal profession will be most profoundly felt by the self-employed lawyers providing personal legal services. As technology facilitates a more competitive legal market, which drives down the prices of legal services self-employed, lawyers will have to become well-versed in technology and in communicating their competitive advantage in order to compete with less expensive non-lawyer providers. Lawyer-entrepreneurs must focus on developing law practices that facilitate legal service delivery for their clients to be successful in a market with non-lawyer competitors. New ways of organizing and delivering legal work through disruptive technologies means that lawyer-entrepreneurs have a greater capacity to be responsive to the needs of legal services consumers. Lawyer-entrepreneurs acknowledge that to remain competitive lawyer-entrepreneurs must integrate the latest technology into their law practices to offer affordable, accessible, and quality legal services.

Richard S. Granat, a lawyer-entrepreneur who has co-chaired the eLawyering Task Force since 2001, has embraced the concept of eLawyering and virtual law practices.[76] A Maryland licensed attorney and formerly an adjunct professor at the University of Maryland, Granat has been a long-time advocate of more options for moderate-income consumers and the role of the solo bar in increasing access to legal services.[77] Through his virtual law firm, Granat serves self-represented individuals on family law matters by automating forms that clients complete by filling out an online questionnaire that automatically populates court-approved family law forms. This process enables Granat to review a first draft and offer advice to a client at a fixed price similar to those

75. *See generally Legal Services*, YOUGOV (2010), http://sixthsense.yougov.com/general-market-reports/legal-services/legal-services.aspx.

76. A virtual law practice allows an attorney to deliver legal services through the Internet. The primary element of a virtual law office is an online client portal where attorneys and clients communicate in a confidential platform. Virtual law offices are a complement to a traditional law practice. *See* Stephanie L. Kimbro, *About the Author*, VIRTUAL LAW PRACTICE, http://virtuallawpractice.org/about/ (last visited May 14, 2012).

77. Richard S. Granat, *About Richard Granat*, ELAWYERING BLOG, http://www.elawyeringredux.com/promo/about/ (last visited May 14, 2012).

offered by non-lawyer websites.[78] Granat admits that such a practice requires a higher volume of clients, but he also relies on technology to generate the additional traffic. He reports spending approximately 15% of his gross revenue on marketing through search engine optimization and pay-per-click advertising.[79] Granat devotes only 250 hours a year to run his Maryland law firm from his Palm Beach Gardens home.[80] He reports a net profit of $45,000 for his part-time practice, which requires no face-to-face interactions.[81]

Similarly, Stephanie Kimbro runs a virtual law firm that caters to low- and moderate-income clients who need help with small business transactions and estate planning.[82] She unbundles legal services work and uses payment plans to reduce the cost of legal services.[83] Like Granat, Kimbro works from home or other remote locations and does not have in-person meetings with clients.[84] She started her virtual law firm "to create a better work/life balance for herself as a mother of two young children."[85] She transitioned to a virtual law firm model after starting a more traditional law practice and finding that many of the individuals who sought her services could not afford to subsidize her overhead.[86] The virtual law firm allowed her to have a more flexible schedule, to attend to her children's needs, and to reduce the cost of her services that make her accessible to a larger group of potential clients.[87]

Integrating technology into a traditional law practice and creating a virtual law firm platform does not mean that client relations are unimportant to lawyer-entrepreneurs. The ability to quickly respond to client inquiries and to efficiently personalize communications requires that lawyer-entrepreneurs effectively communicate with their clients in a timely manner. Kimbro emphasizes the need for a client-centered approach and insists that good customer service is paramount to a successful practice.[88] She suggests that the primary goals for attorneys building an online client base are to "(1) build the reputation of your online practice as a secure, efficient, and affordable site to receive legal services, and (2) build your reputation as a responsive lawyer who pays attention to the individual online clients' needs."[89] Since clients' legal problems

78. Richard S. Granat & Stephanie L. Kimbro, Serving Clients of Moderate Means with On-Line Legal Services 6 (April 26, 2011) (unpublished manuscript, on file with author).
79. *Id.*
80. *Id.* at 7.
81. *Id.* at 6.
82. *Id.* at 7.
83. *Id.*
84. *Id.*
85. *Id.* at 8.
86. *Id.*
87. *Id.*
88. STEPHANIE KIMBRO, VIRTUAL LAW PRACTICE: HOW TO DELIVER LEGAL SERVICES ONLINE 91 (2010).
89. *Id.*

often transcend various areas of law, lawyer-entrepreneurs are recreating the concept of solo and small law firms. Recently, Kimbro joined other lawyer-entrepreneurs at Burton Law and is assembling a group of "remote virtual practitioners in [North Carolina] to provide clients with more holistic care."[90] Lawyer-entrepreneurs affiliate with like-minded lawyers who can provide their clients with expertise in various areas of law. These affiliations have many of the benefits of larger traditional law partnerships but can reduce overhead and permit greater autonomy.[91]

Lawyer-entrepreneurs view technological innovations as a tool and not a substitute to the "brand promise" an attorney needs to build a thriving law practice. Granat describes a "brand promise" as an attorney's definition of who she wants to be and how she conveys herself and her services to others.[92] An online platform can help attorneys with expertise and a stable reputation build a law practice that provides fixed priced services.[93] He cautions new attorneys to see a virtual presence as one part of their marketing plan to attract clients.[94] Launching a virtual presence must come after an attorney defines his identity in the profession by understanding what type of lawyer he wants to be and what client base he will represent.[95] Other success factors Granat identifies are a lawyer's ability to maintain a physical office presence that allows for face-to-face client meetings, and developing a solid network of professionals that can serve clients' needs.[96]

Lawyer-entrepreneurs understand the importance of balancing viability with accessibility. New ways of organizing and delivering legal work through disruptive technologies means that lawyer-entrepreneurs have a greater capacity to be responsive to the needs of legal services consumers. Lawyer-entrepreneurs believe that the privilege of being a lawyer comes with a responsibility to serve the public. Like Granat and Kimbro, lawyer-entrepreneurs see technology as an opportunity to develop products that consumers need and want. The demand for affordable legal services will continue to grow as the most diverse and techno-

90. Email from Stephanie L. Kimbro to Luz Herrera, Assistant Professor of Law, Thomas Jefferson School of Law (August 5, 2012) (on file with author). For a bio on Stephanie Kimbro, see *Stephanie Kimbro*, BURTON LAW, http://burton-law.com/lawyers/stephanie-kimbro (last visited May 14, 2012).

91. *See This Is Burton*, BURTON LAW, http://www.burton-law.com/this-is-burton/ (last visited May 14, 2012) ("We use the latest technology available not as crutch, but as the driving force to advance client service. We meet with clients personally. However, our lawyers are not contained within a typical brick and mortar setting under one roof. Technology allows our lawyers to practice in a greater geographic footprint while maintaining a work environment as if we are sitting in a office next to one another.").

92. Richard S. Granat, *Virtual Law Practice: Success Factors* 3 (2011), *available at* http://info.directlaw.com/blog-1/.

93. *Id.* at 3

94. *Id.*

95. *Id.*

96. *Id.* at 4.

logically savvy generation in U.S. history plays a more prominent role as both consumers and providers of legal services.[97]

II. UNDERSTANDING THE SOLO BAR

For law schools to develop programs that help train law students to become lawyer-entrepreneurs, law school staff need to understand the common opportunities and challenges of self-employed attorneys. Although, there is not an abundance of scholarship that focuses on the contemporary solo lawyer, some key empirical studies cast light on the formation and daily lives of self-employed lawyers.

The most cited study of solo attorneys is Jerome Carlin's *Lawyers on Their Own.*[98] Carlin's work is now more than 50 years but it continues to be the most cited authority on solo practitioners.[99] In his work, Carlin characterizes attorneys in solo practice as a group of unsophisticated and financially unstable attorneys that give more deference to the dollar than to professional standards.[100] He notes that individual practitioners are classified into a lower class of the metropolitan bar, consisting of practices of residual matters and clients.[101] The majority of the lawyers Carlin interviewed were first generation lawyers who attended law schools that required only a high school degree or equivalent as a prerequisite to study law.[102] These lawyers were men who primarily grew up in immigrant communities and who saw law school as an opportunity for social mobility.[103] They decided to attend law school to become professionals and to be well regarded by their families and communities.[104] Most learned to practice law by observing more senior attorneys and working for free or for little pay for one to two years while starting their own

97. *See* discussion of Millennials *infra,* Part IIIB.

98. JEROME E. CARLIN, LAWYERS ON THEIR OWN 17–18 (1962). In his Methodological Note, Carlin explains that of the 93 interviewed only 67 were in fact attorneys in full-time independent practice, 6 were young lawyers just getting started but who had jobs elsewhere, 11 were no longer practicing law and 9 were never in private practice. Although Carlin's first chapter includes the results of all attorneys interviewed, the remaining study focuses on the 67 attorneys in full time law practice. *Id.* at 212–15.

99. *But see* CARROLL SERON, THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL FIRM ATTORNEYS (1996) (examining the work lives of solo and small-firm lawyers in New York). *See also* Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners*, 70 FORDHAM L. REV. 847 (2001) (examining the social environment in which solo and small firm attorneys receive mentoring, training, and advice from colleagues).

100. CARLIN, *supra* note 98, at 17–18 (1962).

101. *Id.*

102. The concern at this time period was focused more on recruiting as many students as possible rather than looking for quality students. *Id.* at 6.

103. *Id.* at 3.

104. *Id.* at 3–4. One subject explained, "Principally it was a question of going into some pursuit that involved respect, dignity. Among Jewish people professions are very important. And with my parents, they had little or no education, their children should have professions. There was a certain amount of appeal. Professional men were looked up to then. At one time in former years, the almighty dollar was not as important as it is today."

practices.[105] They reported working for other lawyers but ultimately leaving because of disputes over fees or low compensation. Many of these lawyers ventured on their own after learning that they could make more money on their own than as employees. "I was very dissatisfied," explained one lawyer.[106] "I collected in fees the second year I was there over $600,000 and I got $25 a week. It was unfair. I quit without having another job."[107]

The subjects of Carlin's interviews expressed disappointment that becoming a lawyer did not facilitate the upward social mobility they had imagined.[108] Once they hung up their shingles, most of these lawyers had "little freedom in choice of clients, type of work, or conditions of practice."[109] They generally worked for small business owners and individuals whose legal problems were classified in eight general areas: business-corporate work, real estate, tax, personal injury, divorce, collections, criminal law and probate/estate practice.[110] Carlin found that attorneys in solo practice took on legal work that more established attorneys did not want to take and also performed routine legal work that could be performed by non-lawyers.[111] Much of the work solos took on in the early years of practice required a great investment of time for a small amount of money.[112] Lawyers starting their own practices worked in non-legal jobs to make ends meet and reported that "income in the early years barely reach[ed] subsistence level."[113]

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105. *Id.* at 8.
106. *Id.* at 11.
107. *Id.*
108. *Id.* at 173–85.
109. *Id.* at 206.
110. *Id.* at 41–122.
111. "Lower-level" lawyers performed work for working-class individuals and small businessmen that were essentially the same as a broker, such as referring the client to "upper-level" lawyers. *Id.* at 114–15.
112. *Id.* at 13–14.
113. *Id.* at 14–17. To illustrate a common path and client base when starting a practice, Carlin uses the example of a young lawyer whom he names Ronald who worked as a telephone solicitor for a local window shop the year after completing law school and spent the first 18 months after passing the bar working three different jobs for other small firm lawyers. He began conceptualizing his practice by entering into an informal agreement with friends with the hope that such an agreement would lead to a partnership. When one of the friends decided he did not want to share his success with the others, Ronald opted to enter into a space-for-service arrangement with two other lawyers who paid him for legal work on an hourly basis while Ronald set up his own practice. The interview with Ronald revealed that the bulk of his clients were family members, friends, and individuals within his personal network with personal legal problems. His only corporate client was an insurance company whose owner was an acquaintance of his brother-in-law. When asked about the financial viability of his practice Ronald confesses,

> "It's really touch and go. I don't know whether I'll make it. I may have to give up the practice . . . . I could make a lot more money doing something else. I was offered $10,000 at the lumber yard, and I had a $7,500 offer from the Illinois Commerce Commission."

Despite higher earning potential elsewhere, Ronald explains his decision to continue a career in law because working in a profession is more valued by his family and community.

Carlin found that another common characteristic of the solo bar was the lawyers' propensity to violate the recommended ethical canons of the time.[114] Carlin justified the attorneys' inability to follow the recommended ethical practices because competition to secure clients and make a living required these lawyers to solicit potential clients,[115] exercise political influence,[116] and engage in fee-splitting arrangements with both referral sources and clients.[117] Carlin concluded that most lawyers in his study were dissatisfied with their own status within the profession.[118] He characterized them as "men of fairly high ambition who haven't made it."[119]

Two subsequent studies of the various sectors of lawyers in Chicago offered additional insights into the solo and small firm bar. Each reinforced Carlin's portrait of solo lawyers as lawyers who command the lowest status within the legal profession. The first empirical study of a cross-section of all Chicago lawyers in 1975 (*Chicago Lawyers*) found the profession was divided into one of two distinct hemispheres: lawyers who represented corporate interests and lawyers who represented the interests of individuals and small businesses.[120] The prestige, income, networks, and relationships of lawyers were found to be primarily determined by an attorney's client-base.[121] Attorneys who served corporate clients enjoyed greater prestige and income than attorneys who provided legal services to individuals and small businesses.[122] *Chicago Lawyers* found that a lawyer's client base was a function of ethno-religious and class background.[123] Further, it showed that demographic characteristics reflected the type of law schools lawyers attended.[124] Lawyers that attended elite law schools were less likely to practice in solo or small firms.[125]

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114. The Canons of Ethics in place during the time of Carlin's study were adopted by the ABA in 1908. These canons were considered best practices and not requirements for lawyers. The Model Code of Professional Responsibility adopted by the ABA in 1969 was the first set of ethics regulations that states adopted as requirements. *See* LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 38–39 (2d ed. 2008); *see also* Leslie Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 312 (2004) (describing findings about ethical practices of 41 attorneys in solo and small firms in the New York metropolitan area).

115. CARLIN, *supra* note 98, at 155–57.

116. *Id.* at 157–61.

117. *Id.* at 161–64.

118. *Id.* at 173–85.

119. *Id.* at 200.

120. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319-320 (1982). The *Chicago Lawyers* study did not focus on solo and small firm lawyer but instead randomly selected 777 lawyers from the full spectrum of lawyers in Chicago.

121. *Id.* at 127–28.

122. *Id.* at 134.

123. *Id.* at 167, 206.

124. *Id.* at 183, tbl.6.1 ("Percentage Distribution of Practitioners from Given Ethnoreligious Backgrounds by Type of Law School Attended (Whites Only)").

125. *See* Joyce Sterling et al., *The Changing Social Role of Urban Law Schools*, 36 SW. U. L. REV. 389, 398 (2007) (explaining that 63% of graduates from the top 10 elite law schools and 45% of the top graduates from schools ranked 11–32, are working in firms of more than 100 lawyers).

Twenty years later, a similar research team returned to Chicago to conduct interviews of a different set of attorneys which again spanned various practice settings.[126] The 1995 *Urban Lawyers* study described a more specialized and fragmented bar.[127] Large law firms with large corporate clients attracted a disproportionate number of graduates from prestigious law schools, but they began to hire from less elite schools to satisfy the demand for corporate work.[128] Although large law firms began to hire more women and minorities, most were from the most prestigious schools.[129] Approximately 5% of all local law school graduates were employed by the largest firms in Chicago.[130] Solo and small firms continued to primarily represent individuals with personal legal services[131] but found increased competition for a fixed amount of work.[132] Lawyers in solo and small firm practice earned less than their corporate counterparts had in 1975.[133] Only 6% of the attorneys surveyed reported hanging out a shingle upon graduating from law school.[134]

Findings of *Chicago Lawyers* and the *Urban Lawyers* studies establish that non-elite law schools are the primary producers of solo practitioners and that this group of attorneys occupies the least prestigious role in the profession. The most recent empirical study of lawyers confirms such findings. The *After the JD Project,* a national longitudinal study of attorneys admitted to practice in the year 2000, found that local law school graduates continue to dominate the small firm and solo practitioner sectors.[135] Law schools with a greater number of alumni who work in the personal services sphere are deemed less prestigious than those whose graduates work with corporate clients.[136] However, today's solo practitioners are more sophisticated and diverse than the lawyers inter-

126. JOHN P HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 6-7(2005).

127. Carroll Seron, *The Status of Legal Professionalism at the Close of the Twentieth Century: Chicago Lawyers and Urban Lawyers*, 32 LAW & SOC. INQUIRY 581, 582 (2007).

128. HEINZ, *supra* note 126, at 175.

129. *Id.* at 57–60.

130. *Id.* at 58 tbl. 3.1; *see also* Randolph N. Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 863, 875–76 (2007).

131. HEINZ, *supra* note 126, at 69–70 & tbl.3.2.

132. *Id. at* 162–65.

133. *Id.* at 317 ("Solo practitioners declined from 21 percent to 15 percent of practicing lawyers, but from 19 percent to 10 percent in income share . . . . In 1995, the 25 percent of lawyers with the highest incomes received 61 percent of total practice incomes, while the bottom 25 percent received only 6 percent.").

134. *Id.* at 142. In 1975, 13% of respondents reported starting their law practice immediately after law school. NALP reported an increase in the number of graduates who reported working as solo practitioners from 3.3% in 2008 to 5.7% in 2010. James Leipold, *The Legal Job Market for New Graduates Looks a Lot Like it Did 15 Years Ago (Only Worse), in* NALP'S EMPLOYMENT FOR THE CLASS OF 2010—SELECTED FINDINGS 1 (2011), http://www.nalp.org/uploads/Classof2010SelectedFindings.pdf.

135. *After the JD: First Results of a National Study of Legal Careers*, AMERICAN BAR FOUNDATION 25 (2004), http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf; *see also,* Jonakait, *supra* note 130, at 864 (stating that solo and small firm attorneys continue to principally render personal legal services and serve small businesses).

136. *Id.* at 864.

viewed by Carlin.[137] The solo bar includes a large percentage of women and experienced lawyers who choose solo practice because it offers greater flexibility and a better lifestyle than working in larger firms.[138]

The characterization of attorney self-employment as a choice and not a default decision is affirmed in two studies of solo and small firm lawyers in the New York metropolitan area. In 2001, Leslie Levin interviewed forty-one solo and small firm lawyers and found that "the typical solo or small firm practitioner who represents the middle-class client is not the undereducated and disillusioned lawyer who Carlin described forty years ago, but rather someone who often has chosen that form of practice and is generally satisfied with it."[139] She reports that practice areas of solo and small firm lawyers are more specialized and targeted to meet the legal needs of middle-class clients and that they receive "more mentoring and training than previously reported, usually while working in a law office with other lawyers who can provide substantial opportunities for observation."[140] Levin credits lawyer advice and mentor networks for helping new attorneys receive answers to their questions and finds that new lawyers develop their standards of ethical practices by relying on these communities of practice.[141] She acknowledges that technology has contributed to facilitating communication with colleagues, legal research, and law office management.[142] Levin confirms that attorneys in solo and small firm settings are more likely to be disciplined for ethical violations.[143] She explains that solo and small firm lawyers have fewer resources than their counterparts in larger firms to defend disciplinary actions[144] and attributes bias within the profession as another factor to consider in the disproportionate discipline of solo and small firm lawyers.[145]

Perhaps the most illuminating research on understanding attorneys in solo practice as entrepreneurs was conducted in 1989–1990 by Carroll Seron. Seron studied the work lives of 102 lawyers in solo and small firms in the New York metropolitan area who navigated law as a business.[146] For the attorneys Seron interviewed, the decision to "go solo" largely depended on their desire for autonomy and flexibility in their work setting as the impetus for starting their own businesses.[147] Women particularly reported opting out of the big firm practice to have more

137. Sterling et al., *supra* note 125, at 403–404.
138. Levin, *supra* note 99, at 849–850, 853.
139. Levin, *supra* note 99, at 896.
140. *Id.*
141. Levin, *supra* note 99, at 878.
142. Levin, *supra* note 114, at 316.
143. *Id.* at 898.
144. Levin, *supra* note 114, at 314.
145. *Id.*
146. SERON, *supra* note 99 at xi.
147. *Id.* at 12; *See also* CARLIN, *supra* note 98, at 184–86; CARROLL SERON, SOLO AND SMALL-FIRM PRACTICE, IN LAWYERS: A CRITICAL READER 35, 39 (Richard L. Abel ed., 1997).

flexibility in fulfilling their parenting roles.[148] Once an attorney made the decision to be self-employed or to work in a small law firm, the primary business concern was getting clients.[149]

Similar to Carlin's cohort, the attorneys interviewed by Seron expressed financial insecurity based on the vulnerability of the market and an uncertain client base.[150] Most of the attorneys identified referrals from former clients as the premier way of getting new clients.[151] They also cited referrals from professional colleagues as a secondary but important source of business.[152] Like the lawyers surveyed by Carlin, this group of lawyers saw friends and family as "a big but 'unfortunate' source of business" because they did not pay for their work.[153] Solo and small firm lawyers do not have an employer that can pool its resources to subsidize much pro bono. As a result, solos' financial well-being largely depends on their referral sources and their clients' ability to pay for legal services.

The attorneys Seron interviewed indicated their methods of creating a viable client base included, writing newspaper, magazine, and journal columns, presenting to groups, having articles written about them, creating brochures, and producing television and radio ads.[154] Their approach to advertising was determined by whether an attorney was more traditional or entrepreneurial in their approach to client development. Traditionalists did not view advertising as a professional activity but preferred relying on personal social networks to develop their client base. Activities they indicated led to paying work focused on involvement in their community through local organizations.[155] These attorneys believed that communication and personal client attention was the key to successful client development.[156] In contrast, entrepreneurs identified thoughtful market niches developed to target and maximize more expensive media advertising to potential clients.[157] These entrepreneurs were motivated to track which brochure, radio spot, or television advertisement yielded the best return on their investment.[158] Most solo and small practitioners iden-

148. CARLIN, *supra* note 98, at at 143.

149. SERON, *supra* note 147, at 42.

150. Women married to successful men and single attorneys expressed a greater sense of security than married baby boomer men. *Id.* at 15. What is notable from Seron's study is that women were less likely to belong to business development networks. Seron attributes such gendered difference to "a gendered economy of social capital or a differential access to 'extra' time." *Id.* at 55–56; *see also* SERON, *supra* note 147, at 36.

151. *See* SERON, *supra* note 99, at 140; *see also* SERON, *supra* note 147, at 36.

152. *See* SERON, *supra* note 99, at 140.

153. *Id.* at 54–55.

154. SERON, *supra* note 147, at 37; SERON, *supra* note 99, at 139.

155. Men were particularly more comfortable than women relying on personal social networks for client development. Seron attributes the difference to a function of time availability, acknowledging that women still bear a great deal of the household and child rearing responsibilities. SERON, *supra* note 99, at 139–40.

156. SERON, *supra* note 147, at 42.

157. *Id.* at 37.

158. SERON, *supra* note 99, at 139.

tified a mix of traditional relationship development and advertisement in the yellow pages or newspapers to get clients.[159]

Seron began her inquiry with a pilot study of self-described entrepreneurs who saw themselves as businesspersons first and lawyers second.[160] The pilot study guided the researcher to ask whether attorneys "view their work as a service business or a commercial venture[.]"[161] The pilot revealed that lawyers represented individual clients by managerial, entrepreneurial, and professional orientations.[162] She found that attorneys with managerial orientations systematized and standardized services.[163] Attorneys with a professional orientation placed a premium on the importance of developing a personalized client relationship based on trust and privacy.[164] Entrepreneurs were less risk-adverse and thrived on uncertainty.[165] The entrepreneurial lawyers in Seron's study were described as having "a crystal-clear sense of what they wanted and eventually got."[166] These individuals had an expectation of autonomy while in law school. They learned about the business of law and how to organize their practices to be successful.[167] Seron found that her subjects' decisions about transferring professional training into reputational skills and client development were best understood "by deeply embedded, and paradoxical, patterns of socialization."[168] She acknowledged that institutional and economic forces play an important role in developing a professional identity but concluded that social values and norms of the individual attorneys also explain how attorneys decide to become self-employed, get business, serve clients, and develop their public service ethos.[169]

The attorneys in Seron's study agreed that law school did not prepare them "to deal with clients, handle a case in local court, or work with other lawyers."[170] They described learning to practice by working for other solo or small firm practitioners, government, or legal departments of private companies.[171] A few described working in non-legal jobs before setting up their law offices.[172] These lawyers reported learning terminology and courtroom navigation in their first jobs, where they developed relationships with attorneys and court officials that later served as resources when researching how to build their own practice.[173] Another

159. SERON, *supra* note 147, at 137.
160. SERON, *supra* note 99 at 152.
161. *Id.* at 153.
162. *Id.* at 154.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 10–11.
167. *Id.* at 11.
168. SERON, *supra* note 99, at 139.
169. *Id.*
170. *Id.* at 6.
171. *Id.* at 8.
172. *Id.*
173. *Id.*

group described observing others and learning by trial and error.[174] The minority of lawyers who had mentors claimed an easier transition into practice, although the mentoring experience was not always positive.[175] These attorneys estimated that it took five years for them to become acquainted with the practice of law, and at the end of that self-taught period they learned that they also had to be proficient in running a business.[176] This entrepreneurial component seems more difficult for self-employed lawyers to master than the actual legal work.

Seron confirms that much of the work that comes to solos and small firms is routine in nature.[177] Entrepreneurs see the routine nature as an asset to serving more clients with fewer resources.[178] They standardize their practices to compete with non-lawyers who provide similar assistance at lower rates.[179] Many of these attorneys employ support staff that can tackle a greater volume of legal work and are more readily able to deliver the final product at a lower cost to the consumer.[180] The entrepreneurs in Seron's study maximized the use of emerging technology to increase their profit margin and thus lead innovations in the delivery of legal services.[181] While less entrepreneurial attorneys computerized legal forms and documents, only a quarter of the lawyers had computerized billing and calendaring systems in place.[182] Most lawyers indicated they did not use online legal research tools and reported a preference to communicate with support staff through dictation equipment.[183] All the women in part-time solo practice performed the support tasks themselves.[184] The most successful entrepreneurial practices operated on volume, computerized their systems, and had non-attorneys who sent letters and prepared pleadings with a click of a button.[185]

Seron's study also provides insight into how solo and small firm lawyers view the legal profession's creed that lawyers have to pay society back in exchange for their license to practice law.[186] Entrepreneurs believe that advertising and standardizing legal services fulfills their re-

174. SERON, *supra* note 147, at 35.
175. *See* SERON, *supra* note 99, at 10–11.
176. *Id.* at 10.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. SERON, *supra* note 99, at 137.
182. *Id.* at 76.
183. *Id.* at 77.
184. *Id.*
185. *Id.* at 52–55.
186. Comment 6 of the ABA Model Rules of Professional Conduct states, "A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel." MODEL RULES OF PROF'L CONDUCT pmbl. cmt. 6 (2002).

sponsibility for public service because of their ability to reach more consumers in need of legal services and to offer a lower price point.[187] Traditionalists, on the other hand, discuss public service from the perspective of volunteerism and are more in line with traditional notions of pro bono.[188] Both sets of attorneys shared anecdotes of not getting paid for a case, not charging a client, or agreeing to a pro bono request by a bar association, as public service.[189]

Seron concludes that the tension between professionalism and the commercialization of law actually produces creative professional paths.[190] She does not claim that one type of solo or small firm lawyer is better than the other. Instead she finds that there are many differences between these groups that lend themselves to a variety of approaches to the practice of law.[191] Seron's entrepreneurs "set out to organize firms in the media market of New York"[192] at a time when lawyer advertising was a well-recognized right but which was still largely contained to the confines of attorneys' social networks.[193] These attorneys incorporated technology into their law offices[194] and equated volume work with providing greater access to legal services.[195] The majority of attorneys viewed technology as an ancillary part of their practice that should be handled by their support staff.[196] Today, it is rare that attorneys in any practice area would consider not using technology to support their practice. The integration of technology in today's law practice is the characteristic that most differentiates today's self-employed lawyers from the ones previously studied.

As economic pressures and technological advances recreate our brick and mortar concept of law firms to virtual law offices that can operate from smart phones, the range of lawyers in solo practice will continue to evolve rapidly and transcend any area of practice or demographic. Lawyer-entrepreneurs must develop an expertise in law but they also consciously develop business models that integrate technology and use creative marketing techniques to create opportunities in untapped or underserved markets. Lawyer-entrepreneurs include today's law students and lawyers who have not yet learned to create their own opportunities.

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187. *Id.*

188. Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 HOFSTRA L. REV. 699, 703–04 (2009).

189. *Id.* at 716; *see also* SERON, *supra* note 99, at 132.

190. SERON, *supra* note 99, at 143.

191. *Id.* (stating that "there is a discontinuity between and among them" and "that there is room for diversity within this professional milieu").

192. *Id.* at 18.

193. *Id.* at 48–66.

194. *Id.* at 102 ("Unlike many of their ore collegially oriented peers, innovators do not describe themselves as 'computer illiterate' or 'dinosaurs.'").

195. SERON, *supra* note 40, at 88.

196. SERON, *supra* note 99, at 77–78.

III. MILLENNIALS AS LAWYER-ENTREPRENEURS

An article in the February 2012 issue of *Fast Company*, a self-described progressive business magazine, states that the current and future of business is "pure chaos."[197] It argues that the pace of change in our economy and culture is accelerated by the global adoption of technology and those that can adapt to a fast-changing and chaotic future will enjoy the most success.[198] The author advances the idea that individuals, regardless of age, who can "recaliberat[e] careers, business models and assumptions" are members of Generation Flux—the group that will fare well in today's society.[199] Changing business norms dictate that entrepreneurship is required not only to start up businesses but also to navigate a professional career.[200] Attorneys are no exception. Professionalization of attorneys may render lawyers one of the most unprepared groups to join Generation Flux.[201] However, Seron explains that "institutional and economic forces condition the development" of professional practices.[202]

A. Lawyers as Entrepreneurs

If environmental factors can influence the direction of professional paths, then self-employed lawyers can learn to approach their law practices through an entrepreneurial framework. Lawyer-entrepreneurs are not defined by any prevailing demographic profile, but by their ability to adapt to new opportunities.[203] Its membership ranks include young and old, men and women, and individuals of all ethnic backgrounds. Many of these lawyers will not initially see themselves as entrepreneurs, but they will nonetheless be operating their own small business as self-employed lawyers. An entrepreneurial approach to self-employment includes establishing a business with an operational infrastructure that allows the self-employed lawyer to generate a sustainable income.[204] Lawyer-

197. Robert Safian, *This Is Generation Flux: Meet the Pioneers of the New (And Chaotic) Frontier of Business*, FAST COMPANY (Jan. 9, 2012), http://www.fastcompany.com/magazine/162/generation-flux-future-of-business ("The future of business is pure chaos. Here's how you can survive—and perhaps even thrive.").

198. *Id.*

199. *Id.*

200. HOFFMAN & CASNOCHA, *supra* note 60, at 4–6 ("[To] adapt to the challenges of professional life today, we need to rediscover our entrepreneurial instincts and use them to forge new sorts of careers."). Reid Hoffman is the founder of LinkedIn.

201. LARSON, *supra* note 29, at 168 (1977) ("Because the legal profession mediates the institutionalized resolution of conflict, its expertise and its livelihood directly depend on the stability and legitimacy of a given institutional and legal framework. In the wider sense of the word, the legal mind is therefore inherently conservative.") For further discussion on how legal education instills conformity, see ERWIN SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL OR ORGANIZATIONAL MAN? (1964); Susan Strurm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 521–24 (2007).

202. SERON, *supra* note 99, at 139

203. HOFFMAN & CASNOCHA, *supra* note 60, at 49–79 (discussing the importance of adapting to Plan B or Plan Z when Plan A does not work the way you envision).

204. MICHAEL E. GERBER ET AL., THE E MYTH ATTORNEY XVII (2010) (explaining that the entrepreneurial myth is that "most attorneys don't own a true business-most own a job disguised as a legal practice").

entrepreneurs, like all lawyers, must learn to think like lawyers and pass all the barriers to entry into the legal profession.[205] Additionally, lawyer-entrepreneurs must also have or form the disposition necessary to run a business.[206]

Many lawyers are not business-savvy but this does not mean they cannot be taught to run viable law practices. Social scientists and economists tell us that lawyers tend to share particular characteristics but are much more ambivalent about what defines an entrepreneur.[207] Research concludes that individuals who go to law school exhibit more need for dominance, leadership, and attention than the general population.[208] These studies reveal that prospective law students enter the legal profession because they are interested "in the subject matter and a desire for intellectual stimulation" but also for money and prestige considerations.[209] Even after knowing the amount of debt that they will incur and the difficult job market that faces them, a significant population will continue to enroll in law school. In discussing her decision to attend law school, third year law student Farahnaz Ghaibi, explains, "I knew that law school was going to be expensive before I attended. But I came to law school because there were personal and professional goals that I wanted to meet."[210] Ms. Ghaibi is not alone.

Despite the outcry over employment statistics, a June 2012 survey of 645 prospective law students by Kaplan Test Prep found that a law school's job placement numbers ranked last in the factors that prospective students considered in their decision about where to apply to law school.[211] We can interpret this lack of priority on job placement on a

205. Barriers to entry include meeting state bar requirements such as exams and a satisfactory assessment of good moral character.

206. *Id.* at xviii ("The key to transforming your practice-and your life—is to grasp the profound difference between going to work *on* your practice (systems thinker) and going to work *in* your practice as an attorney . . . , it's the difference between going to work *on* your practice as an entrepreneur and going to work in your practice as an attorney.")

207. Howard H. Stevenson & J. Carlos Jarillo, *A Paradigm of Entrepreneurship: Entrepreneurial Management*, 11 STRATEGIC MANAGEMENT JOURNAL 17, 19–21 (1990) (providing an overview of why entrepreneurs act and stating that "it is extremely difficult to link particular psychological or sociological traits casually to patterns of complex behavior, such as entrepreneurship").

208. Susan Daicoff, *Lawyer Know Thyself: A Review of the Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV 1337, 1403–04 (1997) (summarizing the research on the literate on lawyer and law student personality traits). Lawyers exhibit similar characteristics to those of law students but are found to be more achievement-oriented, competitive, and aggressive when compared to non-lawyers. *Id.* at 1408–09.

209. *Id.* at 1404.

210. Interview with Farahnaz Ghaibi, Student, TJSL, in San Diego, California (April 2, 2012) (discussing her decision to attend law school).

211. Only 8 percent of respondents ranked job placement as the most important factor. The cohort surveyed found that 22 percent ranked location as their top consideration, 20 percent identified academic programming as their main factor and 13 percent considered affordability as their top criteria. *Kaplan Test Prep Survey: Despite Uncertain Employment Landscape, Law School Applicants Still Consider School Rankings Far More Important than Job Placement Rates When Deciding Where to Apply*, KAPLAN TEST PREP. (June 19, 2012), http://press.kaptest.com/press-releases/kaplan-test-prep-survey-despite-an-uncertain-employment-landscape-law-school-applicants-

misunderstanding of employment trends in the legal profession, a desire to be self-employed, or a belief that a law degree will bring more career advancement than they previously enjoy. Regardless of the reasons, most prospective and current law students do not see themselves as entrepreneurs, and most law schools do not encourage such personification of lawyers. Attorneys venture into solo practice for a variety of reasons. Some find it is the best vehicle to be independent, creative, innovative, and entrepreneurial. Others do it for greater flexibility with their time. Still, there is a significant segment that become self-employed by default after not landing a job of their choosing. Whether lawyers end up working for themselves due to few career options or if they deliberately hang up their shingle to fulfill other non-prestige driven goals, what is true of all these attorneys is that to survive in today's changing landscape, they must see themselves not just as lawyers but as entrepreneurs.

ActionCoach, an international consultant firm for small businesses, tells us that the first five phase of entrepreneurial development is to have a *self-employed* mindset.[212] The yearning for greater responsibility and control over one's life is the primary driver of entrepreneurial success.[213] The desire for greater autonomy must be combined with sufficient self-confidence to propel an individual to do the same work they performed as an employee but to do it on their own.[214] In this first phase of entrepreneurial development an individual must be willing to take risks and abandon a zone of security while at the same time create a system of support that encourages self-development.[215] The primary pitfall in this first phase is overconfidence that does not welcome the help of others' experiences, feedback, and talent.[216] A related trap is the tendency for the newly self-employed to want to do everything themselves instead of creating a team that will work on creating an enterprise.[217] Such an attitude is premised on the owner working for the business and not the business working for its owner. Whether an individual with a self-employed mindset can graduate to additional phases of entrepreneurial development largely depends on her ability to see herself as an enterprise and not as "the most important employee of [her] own self-employed venture."[218]

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still-consider-school-rankings-far-more-important-than-job-placement-rates; *see also*, Karen Sloan, *Survey Suggests Prospective Law Students Still Have Stars in their Eyes*, NAT'L L. J. (June 25, 2012).

212. *12 Essential Characteristics of an Entrepreneur*, ACTIONCOACH, http://www.actioncoach.com/_downloads/whitepaper-FranchiseRep5.pdf (last visited May 24, 2012). The additional phases of development for successful entrepreneurs are: to *lead and manage*, to develop the *attitude of owner/leader*, to *generate profits* by leveraging success from related business ventures; and materializing the goal. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

ActionCoach, defines an entrepreneur as a "businessperson who not only conceives and organizes ventures but also frequently takes risks in doing so."[219] It claims that successful entrepreneurs share the following twelve common traits: confidence, a sense of ownership, good communicators, perpetual students, team players, dedicated, optimistic, grateful, gregarious, system-oriented, lead by example, love learning, and are not afraid of success or failure.[220] Entrepreneurs have a strong sense of self-esteem and belief in their own abilities to meet challenges.[221] They take responsibility for finding solutions to problems.[222] Entrepreneurs are effective communicators. They develop a keen ear to hear what others say and learn to communicate to take advantage of available opportunities. Entrepreneurs love learning.[223] They conduct their own research, they ask questions, and they learn from their errors and failures. Entrepreneurs work in teams and automate processes to replicate consistent results.[224] They commit to meet specific goals and objectives and rise to meet challenges.[225] Entrepreneurs are appreciative of their own and others' accomplishments. They do not let shortcomings or disappointments create obstacles for future advancement.[226] They exhibit enthusiasm for their projects and can motivate themselves and others.[227] Finally, entrepreneurs allow themselves the opportunity to fail and more importantly, to succeed. Even if the personality traits of lawyers and entrepreneurs are not uniform, we know enough about lawyers who run their own business and successful entrepreneurs to help inform the development of lawyer-entrepreneurs. Creating opportunities for law students to develop the self-employed mindset will benefit the students in any career path they pursue as lawyers.[228]

Entrepreneurship flourishes when opportunities close and individuals are forced to be creative and innovative. Technology, globalization, and the increasing competition to deliver legal services have closed traditional opportunities and are forcing new attorneys to be more creative. Lawyers who are unemployed, underemployed, or making a living by taking on contract work are all potential lawyer-entrepreneurs. Lawyers need to be trained to create their opportunities from their very own laptops. Given job prospects in law and the particular characteristics of our

219. *Id.*

220. *Id.*; *see also* Vivek Wadhwa et al., *The Anatomy of an Entrepreneur: Family Background and Motivation*, THE KAUFFMAN FOUNDATION OF ENTREPRENEURSHIP (July 2009), http://www.kauffman.org/uploadedFiles/ResearchAndPolicy/TheStudyOfEntrepreneurship/Anatomy%20of%20Entre%20071309_FINAL.pdf.

221. *12 Essential Characteristics of an Entrepreneur*, *supra* note 212.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

current generation of law students, the Millennial generation of lawyers may be the best suited group of attorneys to become lawyer-entrepreneurs. This group has the potential to re-envision the legal profession and the delivery of legal services for the average consumer.

B. Millennials as Lawyer-Entrepreneurs

Members of the Millennial generation, born between approximately 1980 and 2000,[229] are well-positioned to become lawyer-entrepreneurs. Millennials are important to defining the future of the legal profession because they are entering the job market just as the "mood of global urgency and public action" is taking center stage.[230] They have been hit hardest in this recession since they are among the "last [to get] hired and the first to lose their jobs."[231] Increasing competition for employment and an uncertain economy mean that fewer job opportunities will force more Millennials to generate their own paychecks.[232] The Millennial generation is not the first to live through difficult economic times but they are entering the profession at a time of transition in the legal profession. The "pure chaos" that many Millennial lawyers are experiencing opens the door to transformative innovation.

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229. While there are various definitions of who belongs in the Millennials, most authors agree that Millennials were born between 1980 and 2000. *See* NEIL HOWE & WILLIAM STRAUSS, MILLENNIALS RISING: THE NEXT GREAT GENERATION 52 (2000) [hereinafter HOWE & STRAUSS, MILLENNIALS RISING] (setting the starting point for Generation Y at 1982); WILLIAM STRAUSS & NEIL HOWE, GENERATIONS: THE HISTORY OF AMERICA'S FUTURE, 1584 TO 2069, at 335 (1991) [hereinafter STRAUSS & HOWE, GENERATIONS] (setting Generation Y at those born between about 1982 and 2000); Joan Catherine Bohl, *Generations X and Y in Law School: Practical Strategies for Teaching the "MTV/Google" Generation*, 54 LOY. L. REV. 775, 778 (2008) (setting Generation Y at those born between 1977 and 2003); Stephanie Armour, *Generation Y: They've Arrived at Work with a New Attitude*, USA TODAY MONEY BLOG, (Nov. 6, 2005, 10:35 PM), http://usatoday.com/money/workplace/2005-11-06-gen-y_x.htm (setting Generation Y at those born between about 1977 and 2002).

230. NEIL HOWE & WILLIAM STRAUSS, MILLENNIALS GO TO COLLEGE: STRATEGIES FOR A NEW GENERATION ON CAMPUS 4 (2nd ed. 2007); MORLEY WINOGRAD & MICHAEL D. HAIS, MILLENNIAL MAKEOVER: MY SPACE, YOUTUBE, AND THE FUTURE OF AMERICAN POLITICS 87–108 (2008) (arguing that Millennials will be responsible for the next a political realignment that will result in significant institutional changes).

231. PEW RESEARCH CENTER, MILLENNIALS: A PORTRAIT OF GENERATION NEXT 39 (2010), *available at* http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf; *see also* Ronald Brownstein, *Children of The Great Recession*, THE ATLANTIC (May 5, 2010, 1:43 PM), http://www.theatlantic.com/special-report/the-next-economy/archive/2010/05/children-of-the-great-recession/56248/ ("Even in this dire climate, some Millennials are finding new ways to weather the storm, displaying the instinct for pragmatic problem-solving that generational theorists consider one of their defining characteristics.").

232. Brenna Hawley, *Millennials Show a Penchant for Entrepreneurship, Kauffman Survey Finds*, K.C. BUS. J. (Nov. 11, 2011, 7:30 AM), http://www.bizjournals.com/kansascity/news/2011/11/11/millennials-show-a-penchant-for.html (reporting on a recent survey that found that 54 percent of people ages 18–32 want to start their own business); *see also* Lani Rosales, *How Millennials are Conditioned to Be Entrepreneurs*, AGBEAT.COM (Mar. 15, 2012) (describing Millennials as the entrepreneur generation).

Neil Howe and William Strauss, who have written a series of books on generations in the United States,[233] explain that the Millennial generation is the largest generation of Americans ever born.[234] Howe and Strauss explain that Millennials fulfill the social role vacated by the GI Generation[235] and promise to be the next great generation of institution builders who can push society to new heights.[236] They describe Millennials as optimistic, confident, connected, diverse, team-oriented, and high achieving.[237]

Millennials' confidence and optimism stems from their belief that they are "special." These traits are attributed to the parenting approach of BabyBoomer and Generation X parents who raised their children with a sense that Millennials are important to society.[238] They were raised with a children-centric culture that gave birth to "helicopter parents" who hovered over their offspring to ensure their children's needs were met.[239] Millennials' constant parental praise instilled in them a high level of optimism—and confidence—in their future success.[240] Millennials believe they can accomplish any goal they set for themselves and are used to being rewarded merely for undertaking a task. [241] This same confidence and optimism is necessary to tackle the problem of the lack of access to legal services to the majority of Americans. While previous generations have been unable to properly address the large and growing issue of an

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233. Their books include: NEIL HOWE & BILL STRAUSS, 13TH GEN: ABORT, RETRY, IGNORE, FAIL? (1993); HOWE & STRAUSS, MILLENNIALS RISING, *supra* note 229; WILLIAM STRAUSS & NEIL HOWE, THE FOURTH TURNING: AN AMERICAN PROPHECY (1997); STRAUSS & HOWE, GENERATIONS, *supra* note 229; WILLIAM STRAUSS & NEIL HOWE, MILLENNIALS AND THE POP CULTURE: STRATEGIES FOR A NEW GENERATION OF CONSUMERS IN MUSIC, MOVIES, TELEVISION, THE INTERNET, AND VIDEO GAMES (2006).

234. The Millennial generation accounted for 27.7 percent of the population in the 2010 Census. CATALYST, GENERATIONS IN THE WORKPLACE IN THE UNITED STATES & CANADA 3 (2011), *available at* http://www.catalyst.org/file/501/qt_generations_8-16-11.pdf.

235. HOWE & STRAUSS, *supra* note 230, at 22.

236. *Id.* at 23; *see also* HOWE & STRAUSS, MILLENNIALS RISING, *supra* note 229, at 66 tbl.27.

237. HOWE & STRAUSS, *supra* note 230, at 59–60; HOWE & STRAUSS, MILLENNIALS RISING, *supra* note 229, at 43–44, 173–88; *cf. 12 Essential Characteristics of an Entrepreneur*, *supra* note 212 (describing the twelve characteristics of successful entrepreneurs).

238. HOWE & STRAUSS, *supra* note 230, at 59. Parents of Millennials touted family values, women opted for in vitro children, men wanted to be present at childbirth, and children became America's top priority. *Id.* at 60 ("As Millennials have absorbed the adult message that they dominate America's agenda, they come easily to the belief that *their* problems are the *nation's* problems, *their* future is the *nation's* future, and, by extension, everyone in America will naturally be inclined to help them solve those problems.").

239. Alan Galsky & Joyce Shotick, *Managing Millennial Parents*, THE CHRONICLE OF HIGHER EDUCATION (Jan. 5, 2012), http://chronicle.com/article/Managing-Millennial-Parents/130146/ (discussing parent who "hover" over their children's education).

240. Jeffrey Zaslow, *The Most-Praised Generation Goes to Work*, WALL ST. J., Apr. 20, 2007, at W, *available at* http://online.wsj.com/article/SB117702894815776259.html (stating that Millennials received so much praise that "employers are dishing out kudos to workers for little more than showing up"); *see also* Susan Daicoff, *The Future of the Legal Profession*, 37 MONASH U. L. REV. 7, 30 (2011) ("They have been called 'trophy kids' who have a sense of entitlement, as they have experienced school and extracurricular activities where 'no one loses' and everyone gets a 'thanks for participating' trophy"); Susan K. McClellan, *Externships for Millennial Generation Law Students: Bridging the Generational Gap*, 15 CLINICAL L. REV. 255, 256 (2009).

241. HOWE & STRAUSS, *supra* note 230, at 111.

inaccessible legal system, characteristics of the Millennial generation imply that they have the audacity to believe they have what it takes to address the problem and develop a better life–work balance. The Millennial demands work schedule flexibility to have more time for family and personal passions.[242] Most Millennials are interested in flexible work environments and would rather "bootstrap than to bow down to a corporate master that treats them poorly."[243] Millennials will look at system-oriented approaches as vehicles to create more family time and less professional pressure.[244] By creating their own business, Millennials can see a more equitable return from their work, have a more flexible working environment, and control the direction of their work.[245]

Millennials share a greater sense of global responsibility than previous generations.[246] They were raised to believe that the success of the nation is linked to their own success.[247] Millennials embrace the concept of "doing good while doing well," and will therefore be more prone to create low bono models of legal service delivery through technology that allow them to do more good and allow them to live well.[248] When discussing career trajectory a current student stated,

> Personally, I would love to be able to graduate and do pro bono or cost-effective legal work. However, when there is $100K of student loan debt suffocating finances, it's difficult to think that is a realistic idea.[249]

While the goal of every generation is to generate favorable profits, Millennials possess the mindset and potential to generate these same types of profits in a way that is also helping others. Millennials seek solutions for the pervasive problems facing the society.[250] Millennials have

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242. Meg Martin, *Managing the Millennial Associate*, 32 AUG WYO. LAW 58 (2009); *see also* Ashley Hacker, *Taming the Dragon of Golden Age Standards*, 11 T.M. COOLEY J. PRAC. & CLINICAL L. 275 (2009).

243. Rosales, *supra* note 232, at 6.

244. *Id.* at 6–7; *see also*, Navi Radjou et al., *Millennials Are the MacGyvers of Business*, HBR BLOG NETWORK (March 13, 2012, 4:02 PM), http://blogs.hbr.org/cs/2012/03/millennials_are_the_macgyvers.html (arguing that Millennials, like the TV character McGyver, are the do-it-yourself generation that can do more with less).

245. Lani Rosales, *How Millennials Are Conditioned to Be Entrepreneurs*, ENTREPRENEURS 10 (2012).

246. WINOGRAD & HAIS, *supra* note 230, at 103–04.

247. *Id.*

248. *See generally* ALAN DERSHOWITZ, LETTERS TO A YOUNG LAWYER (2001) (discussing the opportunities that young lawyers have to do good and do well). Low bono models of legal services refer to reduced rates for legal service. Although it is unclear where the term originated it begins to appear in the literature that discusses the development of the Law School Consortium Project. Low bono is a play on the concept of "pro bono" ABA Model Rule 6.1(b)(2) encourages the "delivery of legal services at a substantially reduced fee to persons of limited means" as a supplement to pro bono service. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2006).

249. Interview with Molly Fashola, Student, TJSL, in San Diego, California (Feb. 28, 2012) (discussing her reaction to a 12/17/2011 *N.Y. Times* article by David Segal).

250. Daicoff, *supra* note 240, at 30.

a desire to improve the world and are innovative enough to remake institutions, including legal ones, from the ground up.[251]

Millennials are also effective communicators who have strong social networks facilitated by social media.[252] Millennials have been referred to as digital natives because they grew up accessing the world from their laptops and cell phones.[253] They have evolved with the internet and view their smartphones, laptops, and similar devises as extensions of themselves.[254] Technology is their second natural language and that facilitates their ability to communicate with each other constantly regardless of geographic constraints.[255] Millennials seem better prepared than previous generations to develop effective virtual law office models by using technology to systemize their work and tap into their client market.

Millennials are a diverse lot who represent every economic sector and ethnic group in this country and beyond.[256] The latest demographic figures demonstrate that Millennials are a global generation, and in fact, non-white youth are often the "bigger contributors to this generation's emerging persona than white youths."[257] The 2010 Census reported that 12.4% of the U.S. population was foreign born[258] and that almost one-fifth of the population speaks a language other than English in their household.[259] Non-white Millennials accounted for 39% of the Millennial population and 11% reported at least one immigrant parent.[260] According to the Law School Admissions Council data, Millennials accounted for

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251. *Id.*

252. PEW RESEARCH CENTER, MILLENNIALS WILL BENEFIT AND SUFFER DUE TO THEIR HYPERCONNECTIVED LIVES 8–9 (2012), *available at* http://pewinternet.org/~/media//Files/Reports/2012/PIP_Future_of_Internet_2012_Young_brains_PDF.pdf; *see also* WINOGRAD & HAIS, *supra* note 230, at 167 ("Social networking sites such as MySpace and Facebook make it possible for Millennials to share their lives with many more people than anyone, in any other generation, could have possibly imagined.").

253. Bohl, *supra* note 229, at 776.

254. PEW RESEARCH CENTER, *supra* note 231, at 8-9.

255. Bohl, *supra* note 229, at 777.

256. *See LSAC Volume Summary—Matriculants By Ethnic and Gender Group*, LAW SCH. ADMISSIONS COUNCIL, http://www.lsac.org/lsacresources/data/vs-ethnic-gender-matrics.asp (last visited May 29, 2012) (reporting the following demographics enrolled in law school during in the Fall 2010 cycle: 46% Women; 34% Non-Caucasian of which 7.2% were Black; 7.1% Asian; 6.1% Latino, and 1.7 Puerto Rican).

257. HOWE & STRAUSS, *supra* note 230, at 41.

258. *Native and Foreign-Born Populations by Selected Characteristics: 2010*, UNITED STATES CENSUS BUREAU (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0040.pdf.

259. *Languages Spoken at Home: 2009*, UNITED STATES CENSUS BUREAU (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s0053.pdf (reporting that 57 million of the nation's 286 million residents above the age of five speak a language other than English).

260. PEW RESEARCH CENTER, MILLENNIALS: A PORTRAIT OF GENERATION NEXT 1, 10 (2010), *available at* http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf. The Pew Report also compares Millennials to the Silent Generation—people born from 1928 to 1945 whose parents immigrated to the U.S. in the late 1800s. Unlike the Silent Generation that had only 20% of non-Hispanic whites, ethnic and racial minorities make up 39% of the Millennial generation. *Id.* at 9.

82% of 2009 law school applicants.[261] The Millennial generation will produce the most diverse group of lawyers in U.S. history.[262] This diversity of lawyers reflects a complex population that requires lawyers who are attuned to the particular cultural nuances of each segment of society. Millennials who can comfortably navigate the cultural dimensions that surround the client communities they serve will find economic opportunities in traditionally underserved markets.[263] The growing diversity of lawyers allows solo and small firm lawyers to target market niches that reflect their personal interests and histories. Lawyer-entrepreneurs will develop their client base by addressing the legal needs of individuals who share their interests, passions, and life histories. Despite the diversity of interests, backgrounds, and approaches to law, Millennials are less willing to work in silos.

Millennials work effectively in teams. They prefer socializing in groups[264] and value the contributions of their cohorts.[265] Entrepreneurs similarly understand that a business requires an investment of resources from a larger constituency, so they assemble teams that can accomplish more than any individual.[266] Self-employed Millennial lawyers will continue to operate their own businesses, but they will be more likely to assemble law firms that leverage their collective power.[267] Millennials are likely to seek innovative, technology-based, sustainable, cooperative ways to practice and adjudicate law but are not likely to enjoy the solitary, isolated aspects of the traditional practice of law.[268] When I shared some of my ideas with a current student, a Millennial, he responded,

> I think my generation is even more willing to work with others, tear down borders, yet feel confident to go forth (take risks) to make systems more simple and fair. I feel large firms are a hegemonic reaction to overpower adverse clients and maximize profit. I see our genera-

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261. Kimberly Dustman & Phil Wandwerk, *Analysis of Law School Applicants by Age Group*, LAW SCHOOL ADMISSIONS COUNCIL (October 2010), http://lsac.org/LSACResources/Data/PDFs/Analysis-Applicants-by-Age-Group.pdf.

262. *See LSAC Volume Summary—Matriculants By Ethnic and Gender Group*, LAW SCHOOL ADMISSIONS COUNCIL, http://www.lsac.org/lsacresources/data/vs-ethnic-gender-matrics.asp (last visited May 29, 2012) (reporting the following demographics enrolled in law school during in the Fall 2010 cycle: 46% Women; 34% Non-Caucasian of which 7.2% were Black; 7.1% Asian; 1.6% Puerto Rican and 6.1% other Latinos).

263. Since 2000, the Latino community grew by 43% and accounts for the more than half of total growth in the United States. Karen Humes et al., *Overview of Race and Hispanic Origin: 2010 Census Brief* 3 (Mar. 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf. Lawyers who can navigate segments of this diverse cultural community that demands bilingual services will fare well in the next three or four decades.

264. Daicoff, *supra* note 240, at 20; *see also* HOWE & STRAUSS, *supra* note 230, at ch. 9.

265. Tom Gimbel, *Managing Millennials*, 26 NO. 6 LEGAL MGMT. 20 (2007) ("They are part of the no-person-left-behind generation, and they're willing to fight for what is fair.").

266. *12 Essential Characteristics of an Entrepreneur*, *supra* note 212; HOWE & STRAUSS, *supra* note 230, at 121; *see also* Brownstein, *supra* note 231.

267. See *Stephanie Kimbro*, *supra* note 90; *This Is Burton*, *supra* note 91.

268. *Id.*

> tion utilizing technology to level the playing field, pull power away from large firms, make the system more efficient and with confidence, work in a friendly team environment to progress society.[269]

All Millennials will not become lawyer-entrepreneurs, but those who forge forward to create new models of legal service delivery that will provide consumers with a more affordable product that fits their particular needs.[270]

Millennial generation law students have much to offer the legal profession. As law schools reevaluate their curriculum and their commitment to producing successful attorneys, they must not ignore the importance of providing prospective lawyer-entrepreneurs with the networks and tools they need to be successful. What lawyer-entrepreneurs need is a law degree that helps them be lawyers. In addition to substantive knowledge of law, law students need to know how to leverage technology to create income streams that will allow them to pay their living expenses and manage their educational debt.[271] To better prepare our law students we must elicit the assistance of others who are better versed in technology, business, and management. Lawyer-entrepreneurs need to graduate with business plans that target niche markets, use technology to create viable income streams and create work-life balance to lead happy lives.

IV. EXPERIMENTS IN TRAINING LAWYER-ENTREPRENEURS

Programs to train lawyer-entrepreneurs will require collaboration between law schools, bar organizations, and individuals with special skills to help lawyers establish viable business models. Law schools that are already collaborating with the practicing bar and professionals who support lawyer businesses are in a stronger position to develop programs that produce lawyer-entrepreneurs. Targeting skills programs to address the business needs of lawyer-entrepreneurs can benefit all students. Law firm partners, managing attorneys in government agencies, executive directors of nonprofit legal organizations, law school deans, and members of the judiciary are all lawyers that must understand the cost of delivering legal services to be successful leaders in their field. Attorneys who understand that every action to advance or curtail justice has a price tag are more likely to synthesize the various components that limit or

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269. Email from Eric Jon Bolt, TJSL student, to Luz Herrera, Assistant Professor of Law, Thomas Jefferson School of Law (Feb. 24, 2012) (on file with author) (responding to my statement that a diversity of approaches to lawyering is something Millennials welcome).

270. HOWE & STRAUSS, *supra* note 230, at 159 ("[H]igh-achieving Millennials will expect to create products that compete actively with 'real world' professional products."); *see also* PEW RESEARCH CENTER, MILLENNIALS: A PORTRAIT OF GENERATION NEXT 1, 13 (2010) (stating that Millennials see "technology use is the single most popular response").

271. *See* Segal, *supra* note 2 ("[W]hen the numbers are crunched, studies find that most law students need to earn around $65,000 a year to get the upper hand on their debt.").

avail our system of justice.[272] To understand legal need and how we can address it, lawyers need to understand that consumers of legal services want something more affordable than $10,000 retainers and hourly rates of $300. As legal aid and court budgets are cut, law schools can address the growing need for legal services and their alumni by facilitating programs that encourage newly minted lawyers to engage in some pro bono and set fees at rates lower than market for at least a segment of their clients. This section briefly highlights existing and emerging efforts by law schools to advance such models.

A. The Law School Consortium Project

The Law School Consortium Project (LSCP), funded by a grant from the Open Society Institute, was the latest coordinated law school effort to encourage more collaboration between law schools and the bar in an effort to support solo and small firm lawyers.[273] LSCP was formed by City University of New York School of Law, University of Maryland Law School, Northeastern University School of Law, and St. Mary's University School of Law in 1997.[274] LSCP was founded on the notion that law schools could help address the needs of low and moderate income individuals by offering training, mentoring, and support to solo and small-firm lawyers to serve their communities.[275] LSCP supported law schools' creation of support networks for solo and small-firm alumni to facilitate training and education of new lawyers while advancing an agenda for affordable legal services.[276] A group of law schools developed programs and formal networks,[277] and in 2009, the LSCP national board "went into a state of rest, having achieved its goal of establishing successful practitioner networks to assist solo and small-firm lawyers serv-

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272. There is a handful of emerging for-profit business ventures that seek to partner with law schools to help train their graduates. But since those programs do not focus on increasing access to justice, they have been excluded from discussion in this article. For an example of such an entity, see LAW BUSINESS WORLD, http://www.lawbusinessworld.com (last visited July 22, 2012).

273. For a history of the founding and more detailed description of the Law School Consortium Project, see Deborah Howard, *The Law School Consortium Project: Law Schools Supporting Graduates to Increase Access to Justice for Low and Moderate-Income Individuals and Communities*, 29 FORDHAM URB. L.J. 1245, 1245–47 (2002);

274. Kristin Booth Glen, *To Carry It On: A Decade of Deaning After Haywood Burns,* 10 N.Y. CITY L. REV. 7, 19–23 (describing how the Open Society Institute was used at CUNY School of Law).

275. Howard, *supra* note 273, at 1245–46.

276. *Id.* at 1246–47.

277. *Id.* at 1245 n.1. Although St. Mary's University School of Law withdrew from the LSCP in 2000, the following law schools were also members: University of Michigan School of Law, University of New Mexico School of Law, New York Law School, Rutgers University, Syracuse University School of Law, University of Tennessee College of Law, Thomas Cooley School of Law, and Touro Law Center. The University of California Berkeley School of Law, The University of California Davis School of Law, Golden Gate University School of Law, University of the Pacific McGeorge School of Law, University of San Francisco School of Law and Santa Clara University School of Law joined forces to form the Northern California Collaborative. *Law School Consortium Project*, UNIVERSITY OF CALIFORNIA, BERKELEY LAW, http://www.law.berkeley.edu/1103.htm (last visited May 31, 2012).

ing low and moderate-income individuals and communities nationwide."[278] Some of these law schools continue their efforts to provide support to their alumni who advance low bono work through solo and small firm practices, but the University of Maryland Francis King Carey School of Law (Maryland School of Law) and City University of New York (CUNY) School of Law and are the two that have already tested two models—the affiliated non-profit support center and the post-graduate incubator program.[279]

1. Maryland School of Law & Civil Justice, Inc.

Before the LSCP was formed, Maryland School of Law faculty and alumni began developing the concept of Civil Justice, Inc. (Civil Justice) —an independent non-profit organization affiliated with the Maryland School of Law.[280] Civil Justice operates a referral service that pairs a network of solo and small firm lawyers committed to increasing access to low- and moderate-income individuals.[281] Civil Justice offers mentoring and networking opportunities that include informal counseling by law school faculty and co-counseling arrangements with more experienced attorneys.[282] It also offers its members assistance in the management of their practices to help them comply with ethical obligations and run more effective law practices.[283] Civil Justice refers prospective clients to the solo and small firm bar who then negotiate their prices with clients.[284] Maryland School of Law supports Civil Justice by introducing the skill set required to operate small law firms in their curriculum program via its clinics, law practice management courses, and a professional responsibility course.[285] Membership fees, referral fees, and staff attorney fees from fee-shifting cases support Civil Justice.[286]

In January 2011, Maryland School of Law partnered with Civil Justice to introduce its Solo Practice Incubator for Justice (Maryland's Incu-

278. *The Law School Consortium Project,* UNIVERSITY OF MARYLAND SCHOOL OF LAW, http://www.law.umaryland.edu/programs/clinic/initiatives/lscp/ (last visited March 4, 2012).

279. Howard, *supra* note 273, at 1248–49.

280. Professors Michael Milleman and E. Clinton Bamberger worked with five alumni to create the concept of Civil Justice, Inc. *History,* CIVIL JUSTICE, INC., http://www.civiljusticenetwork.org/About/Historymission.aspx (last visited May 31, 2012).

281. *Member Benefits,* CIVIL JUSTICE, INC., http://www.civiljusticenetwork.org/ForAttorneys/Memberbenefits.aspx (last visited May 31, 2012).

282. *Id.*

283. *Id.*; *see also* Howard, *supra* note 273, at 1249 (explaining that Civil Justice, Inc. offers its members "mentoring; networking and peer technical assistance; practice management assistance; substantive law training; access to a listserv; legal products and services at a reduced rate; a client referral service; marketing services and opportunities; and mediation training").

284. *Member Benefits, supra* note 281.

285. Michael Millemann, *The Symposium on the Profession and the Academy: Concluding Thoughts,* 70 MD. L. REV. 513, 524 (2011).

286. For a list of past cases, see *Civil Justice Past Cases,* CIVIL JUSTICE, INC., http://www.civiljusticenetwork.org/About/CivilJusticePastCases.aspx (last visited June 5, 2012).

bator).[287] Participants in Maryland's Incubator work for six months out of Civil Justice's office across the street from Maryland School of Law.[288] They receive discounted office space, training on law office management, mentoring from attorneys that belong to the Civil Justice network and the opportunity to work on grant-funded initiatives that generate attorney fees.[289] The Career Development Office at Maryland School of Law oversees program management and Civil Justice attorneys provide training and guidance for new attorneys.[290] During their time in Maryland's Incubator, attorneys will develop a business plan that outlining case management, billing practices, marketing, and other necessary functions of their law office operations.[291] Although Maryland's Incubator is still in its initial stages of development, Civil Justice has become an important support structure for Maryland School of Law's alumni in solo and small firm practice.[292] Maryland School of Law has also partnered with its alumni to launch JustAdvice.[293] JustAdvice offers legal services consumers access to their alumni and other lawyers who are willing to provide a 30-minute consultation for $10 at clinics in family law, housing, criminal, employment, expungement, insurance, government benefits, tax and elder law.[294] The program addresses legal need but also exposes attorneys to a new group of prospective clients. Law schools are in a strong position to develop these symbiotic relationships to support their students and assist their local communities.

2. CUNY & Community Legal Resource Network

The City University of New York (CUNY) School of Law understands this opportunity well. CUNY School of Law has perhaps the most active and largest alumni support network and incubator for self-employed graduates. The Community Legal Resource Network (CLRN) is based at CUNY School of Law and operates primarily through a listserv that connects more than 300 attorneys who are otherwise isolated in solo and small firms.[295] The virtual community allows alumni to support and mentor each other while CUNY staff facilitates continuing legal education, discounts on law office management software and products, and coordinates initiatives such as the Incubator for Justice (CUNY's

287. Law School Solo Practice Incubators and Legal Residency Programs 25, Hanover Research (2012) (unpublished manuscript, on file with the author) [hereinafter Hanover Report].

288. *Id.*

289. Telephone interview with Leigh Maddox, Executive Director of Civil Justice, Inc. (July 14, 2012); *see also* Hanover Report, *supra* note 287, at 25-26.

290. *Id.*

291. *Id.*

292. *History*, *supra* note 280. Approximately 80 attorneys belong to the Civil Justice network. Hanover Report, *supra* note 287, at 26.

293. JUST ADVICE, http://justadvice.wordpress.com (last visited Dec. 20, 2012).

294. THE PEOPLE'S LAW LIBRARY: LEGAL SERVICES DIRECTORY, http://www.peopleslaw.org/node/762 (last visited Dec. 20, 2012)

295. *See Community Legal Resource Network (CLRN)*, CUNY SCHOOL OF LAW, http://www.law.cuny.edu/clinics/JusticeInitiatives/Community.html (last visited Apr. 13, 2012).

Incubator).[296] The program was founded to address the needs of students and the communities they went to law school to represent.

CUNY's Incubator, established in 2007, trains CLRN members in general law office management issues such as "billing, record-keeping, technology, bookkeeping and taxes while, at the same time, facilitating Incubator participants' involvement in larger justice initiatives and in subject-based training in immigration law, labor and employment and other topics that will arise continually as these attorneys build their practices."[297] The CUNY Incubator accommodates up to twelve attorneys into solo and small law firms over an eighteen-month period.[298] The attorneys independently operate their law firms but CUNY supports these attorneys by facilitating the space at an affordable rate. CUNY alumni pay $500 in rent for office space in downtown Manhattan, which is shared with an adjunct faculty member and alumna, Laura Gentile, who teaches law office management, is available to answer questions about law office procedures.[299] "I will teach them everything from how to analyze and select a malpractice policy, to how to manage their money so they never fall off the edge of doom," explains Gentile.[300] Participants in CUNY's Incubator receive training "to fine-tune their skills as both lawyers and micro-entrepreneurs. [Their] training provides participants with the skills to eventually launch solo practices in underserved New York City communities."[301] CLRN and the CUNY Incubator use their network to provide low-cost legal services to individuals in New York that would not otherwise have access to lawyers.

The CUNY Incubator has become the model program for other law schools seeking to support their self-employed graduates and address the need for more affordable legal services. Fred Rooney, former director of CLRN, is credited with establishing the CUNY Incubator and advising law schools on how to develop similar efforts. [302] The CUNY Incubator

296. *Id.*

297. *Id.*

298. Jonathan D. Glater, *Lawyers Learn How to Be Businesslike*, N.Y. TIMES, Jan. 9, 2008, at B6.

299. Richard Zorza, *NewsMaker Interview—Fred Rooney on the CUNY Incubator*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (Sept. 11, 2011). http://accesstojustice.net/2011/09/22/newsmaker-interview-fred-rooney-on-the-cuny-incubator/; *see also* Emily Sachar, *CUNY to Train Start-Up Lawyers in Business Basics to Enhance Justice*, CUNY LAW: A COMMUNITY OF JUSTICE 6 (2007), *available at* http://www.law.cuny.edu/giving-alumni/cunylaw/archive/07-fall-cunylaw.pdf.

300. Glater, *supra* note 298, at B6.

301. Zorza, *supra* note 299 (quoting Fred Rooney).

302. Fred Rooney reports that CLRN has provided technical support for the development of incubators at the following schools: California Western School of Law, Charlotte School of Law, Cleveland-Marshall School of Law, Florida International School of Law, Georgia State University School of Law, McGeorge School of Law, Pace Law School, Seattle University School of Law, Thomas Jefferson School of Law, University of California—Irvine School of Law, and University of Maryland School of Law. Email from Fred Rooney, Dir., CLRN at CUNY Law, to Luz Herrera, Assistant Professor of Law, Thomas Jefferson School of Law (March 30, 2012) (on file with author). In June 2012, Fred Rooney left CUNY to develop an incubator program in the Dominican Republi-

relies on various funding sources that subsidize the cost of rent for incubator participants and pays for CUNY personnel that provide support.[303] In addition to the law school, additional funding sources include private foundations, state workforce development funds, and elected officials.[304] Elected officials provide CUNY School of Law grants to coordinate their incubator participants into the various boroughs and offer legal services for free to their constituents. Rooney reports that his success in raising money is directly related to funders' interest in contributing to greater access to justice in underserved communities.[305] Incubator programs such as CUNY's give law schools the opportunity to offer greater support to their self-employed graduates and to address legal needs in their local communities.

B. Other Incubators

Other law schools have followed CUNY's example. In November 2010, the University of Missouri Kansas City (UMKC), in collaboration with the Missouri Bar Association and the Kansas City Metropolitan Bar Association, announced its own incubator.[306] The incubator, with the capacity to accommodate 8 to 10 lawyers, is housed next to the entrepreneurial clinical programs and across from the Kauffman Foundation of Entrepreneurship.[307] The UMKC incubator also provides support in law office management and mentoring to start law practices and is part of UMKC's ongoing commitment to encourage entrepreneurship. UMKC's commitment includes the Solo and Small Firm Institute, which has organized classes and a series of workshops focused on business planning, founding and operating a law firm.[308] UMKC reports that more than 150 graduates have completed the school's existing Solo and Small Firm Institute curriculum between 2004 and the summer of 2010.[309] The Solo and Small Firm Institute curriculum includes courses taught by faculty from the Missouri-Kansas City Henry W. Bloch School of Business and Public Administration.[310] The curriculum helps prepare graduates to apply for the incubator. To be eligible to participate in the incubator, applicants must submit a business plan that includes the intended practice

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can through a Fulbright Fellowship. Interview with Fred Rooney, in San Diego, California (July 24, 2012).

303. Hanover Report, *supra* note 287, at 17 (reporting that the incubator is financed by CUNY, private foundation funds, state fund sand participants' rent contributions).

304. *Id.*

305. Interview with Fred Rooney, in San Diego, California (July 24, 2012).

306. Steve Vockrodt, *UMKC Incubator Preps Lawyers for Small, Solo Practices*, KAN. CITY BUS. J. (Nov. 12, 2010), http://www.bizjournals.com/kansascity/print-edition/2010/11/12/umkc-incubator-preps-solo-lawyers.html?s=print.

307. *See Solo and Small Firm Incubator*, UMKC SCHOOL OF LAW, http://www.law.umkc.edu/Incubator (last visited Apr. 13, 2012).

308. *UMKC School of Law Launches Solo and Small Firm Incubator*, UNIVERSITY OF MISSOURI-KANSAS CITY (Oct. 29, 2010), http://www.umkc.edu/news/news-release.asp?id=959.

309. *Id.* The Solo and Small Firm Institute was launched in 2004. *Id.*

310. *Id.*

areas, a marketing plan, three years of financial projections, and a statement of commitment to offer free or low bono legal services to the local community.[311] The UMKC Incubator is supported by private donors, law firms, and local bar associations.[312]

Florida International University College of Law (FIU) has similarly developed the LawBridge program which it describes as "a post-graduate program that provides new lawyers an opportunity to enter an apprenticeship with elements akin to both a medical school residency and a business school entrepreneurial incubator."[313] The "LawBridge" program provides program participants with office space in downtown Miami and coaches them in a variety of areas related to law practice management, accounting and risk management.[314] LawBridge participants meet periodically with bankers, accountants, marketing experts, and other professionals to discuss various aspects of the business side of the legal profession.[315] The LawBridge program offers lectures and continuing legal education courses, as well as structured networking opportunities with other members of the legal profession.[316] FIU limits participation in the LawBridge program to alumni who are admitted to the Florida bar within twelve months of graduation.[317] Applicants must pay a $50 application fee and submit a resume, a statement of interest, and an executive summary of their business plan.[318] Once admitted, participants must sign a license agreement with FIU where participants agree to carry professional liability insurance, comply with ethics rules, attend continuing legal education courses, and participate in pro bono services.[319] While it is not clear that FIU's program encourages pro bono or low bono work, it has the potential to meet unmet legal needs in Miami.

In the summer of 2012, California Western School of Law (California Western) and Thomas Jefferson School of Law (TJSL) announced the launch of their incubator programs.[320] Both law schools received

311. *Application Process,* UMKC SCHOOL OF LAW, http://law.umkc.edu/careers-cle/solo-and-small-firm-application-process.asp (last visited July 2, 2012).

312. *Sponsors,* UMKC SCHOOL OF LAW, http://law.umkc.edu/careers-cle/solo-and-small-firm-incubator-sponsors.asp (last visited July 2, 2012).

313. *Law Bridge: A Legal Residency Program,* FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW, http://law.fiu.edu/alumni/lawbridge-a-legal-residency-program/ (last visited July 2, 2012).

314. *Id.*

315. *Id.*

316. *Law Bridge FAQs,* FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW, http://law.fiu.edu/alumni/lawbridge-a-legal-residency-program/lawbridge-faqs/ (last visited July 2, 2012).

317. *Id.*

318. *Law Bridge Solo Practice Incubator Application for Admission,* FLORIDA INTERNATIONAL UNIVERSITY COLLEGE OF LAW, http://law.fiu.edu/wp-content/uploads/2012/05/FIU-Law-Bridge-Application-11-08-11.pdf (last visited July 2, 2012).

319. *Id.*

320. Karen Sloan, *The Next Solo Incubator Will be in San Diego,* NAT'L L. J. (May 15, 2012); Doug Sherwin, *Cal Western Launches Incubator Program for Attorneys,* THE DAILY TRANSCRIPT (July 10, 2012).

technical assistance from Fred Rooney and have developed their programs to meet the legal needs of the local community.[321] California Western's affiliated program, Access to Law, asks its attorneys to pledge to provide a minimum of 100 pro bono hours per year.[322] TJSL works with the Family Justice Center to offer its clients legal information and consultations in the areas of immigration, criminal, and landlord tenant law. Both programs collaborate in offering continuing legal education courses to their alumni and are linked to lawyer networks similar to CLRN.[323] Both programs have individuals who counsel these new lawyers on how to developing low-bono opportunities to help build their client base and address local need. In anticipation of its launch, TJSL worked with MBA students at San Diego State University to develop law office manuals and a business plan guide for its incubator participants.[324] To develop a more robust pipeline into its incubator, TJSL also introduced the Solo Practice Concentration to its curriculum in August 2012.[325] Similar to the UMKC program, TJSL's Solo Practice Concentration attempts to get students ready for solo and small firm law practice before graduation day.

The Columbus Bar Association offers a model for law schools who wish to more directly collaborate with the organized bar and other law schools. In April 2011, in Columbus Ohio, the Columbus Bar Association launched a professional development center called Columbus Bar inc.[326] The "inc" in the program name is short for incubator and intends "to offer new lawyers valuable experience and ongoing education to help build their professional career, develop sound business management skills, and engender high ethical standards."[327] Columbus Bar inc selected a total of eight recent law graduates from Capital University Law School and Moritz College of Law to participate in a one year pilot program to help participants launch solo practices.[328] The incubator is housed in the same building as the Columbus Bar Association and through its attorney network offers participants mentoring on "client intake, billing practices, law office management, marketing, case management, discovery, and other practice-related topics."[329] Incubator participants pay rent for fully-furnished space but the bar association helps subsidize their costs by sending participants referrals from the bar's lawyer referral service. In exchange for the support and mentoring, partici-

321. *Id.*
322. Sherwin, *supra* note 320.
323. *Id.*; *see also* Sloan, *supra* note 320.
324. Hanover Report, *supra* note 287, at 29–30
325. Steve Semeraro, *Thomas Jefferson School of Law Commits to Solo Practice,* THOMAS JEFFERSON SCHOOL OF LAW (May 21, 2012), http://www.tjsl.edu/news-media/2012/6505.
326. *Columbus Bar Announces New Incubator Program,* COLUMBUS BAR ASSOCIATION (Jan. 21, 2011), http://www.cbalaw.org/articles/news/recent-news/2011/1631.
327. *Id.*
328. *Id.*
329. *Id.*

pants agree to take on pro bono cases from the Columbus Bar Association's Lawyers for Justice program.[330]

As law schools and bar associations look for ways to better support new attorneys starting their own law firms, more collaboration between bar associations, law schools, and even legal aid providers is likely to emerge.[331] In addition to programs that help law students prepare for solo and small firm practice, law schools are more seriously exploring the option of establishing non-profit law firms to provide post-graduate residencies that offer new attorneys additional opportunities for skill development.

C. The Law School Firm

More law schools are piloting projects that create opportunities for their graduates to learn to practice law by offering low bono work.[332] Like the incubator programs, these new efforts promise to offer legal services consumers reduced cost legal services. Although the idea of establishing nonprofit law firms as a training ground for attorneys is not new,[333] the idea for such a model has recently gained traction.

In their law review essay, *The Law School Firm,* Professors Bradley T. Borden & Robert J. Rhee propose that law schools establish nonprofit law firms that are separate from but affiliated with law schools. They acknowledge that among other considerations, ethics rules regarding fee sharing and law school accreditation standards would need to be modified for the model to work, but they encourage law schools to begin "a small-scale pilot program to see if the model is feasible".[334] Their thought piece offers a proposal for models that resembles a U.K. model of legal training that envisions two-years of law school curriculum with additional years of apprenticeship training.[335] Another option presented is

330. *Id.*

331. In November 2011, the Boston Bar Association's Task Force on the Future of the Profession recommended the appointment of a committee to explore the development of a pilot incubator program to provide lawyers assistance in setting up their own law firms. *Report of the Boston Bar Association Task Force on the Future of the Profession*, Boston Bar Association 3 (2011), *available at* http://www.bostonbar.org/docs/default-document-library/future-of-prof-task-force.pdf. The Chicago Bar Foundation has also set up a committee to establish a post graduate program that would support the development of practical skills and provide much needed legal pro bono services. State Bar of California President Jon Streeter formed the 21-member Task Force on Admission Regulation Reform to explore adding a practice training requirement for bar admission that has been dubbed by some as a "legal residency" program. *See* Don J. DeBenedictis, *Bar Mulls Apprentice Mandate,* L.A. DAILY J., Jan. 11, 2012. The task force will not release its recommendations until December 2013. *See* Don J. DeBenedictis, *Deans Defend Training at Schools*, L.A. DAILY J., June 13, 2012 (discussing caution raised by law school deans to any proposed requirement).

332. Email from Fred Rooney to author, *supra* note 302.

333. Jeanne Charn, *Service and Learning: Reflections on Three Decades of the Lawyering Process at Harvard Law School,* 10 CLINICAL L. REV. 75, 90 (2003) ("Finally, it was our hope that lawyers in law schools and lawyers in practice would collaborate to study and experiment with different allocations of their joint responsibility for preparing lawyers for practice.").

334. *Id.* at 3.

335. *Id.* at 4.

to retain the three year law degree but to offer opportunities at the law firm for third year students.[336] Several law schools have begun to experiment with the ideas of establishing law school law firms.

In November 2011, the University of Utah S.J. Quinney College of Law announced its collaboration with a privately owned law firm to work with their alumni to "expand the availability of legal services and service-learning opportunities."[337] The private law firm, University Law Group, works with recent graduates who pass the bar to provide legal services in the areas of employment law, family law, bankruptcy, small business formation, contract disputes, small claims, and small trusts and estates, in addition to research assistance.[338] An alumnus and former BigLaw[339] partner, Dennis Gladwell, oversees the pilot program.[340] Many University Law Group services are based on flat-rate fee arrangements of $40-$50 per hour.[341] University Law Group occupies temporary space at the law school and pays lawyers an hourly rate based on the type of work and the client's ability to pay.[342] It relies heavily on referrals from attorneys who cannot provide the representation needed by low- to-mid-level income families and individuals.[343] The program's goals are "to show that by serving low- and moderate-income Americans and small businesses with modest fees, the returns can be sufficient" and to provide students with additional opportunities to learn.[344]

In the fall of 2011, Pace Law School also announced the creation of a school supported law firm that helps launch new attorneys into their own practices.[345] Pace Community Law Practice will employ between five and seven of their law school graduates who will be classified as fellows and will be paid by the law school. Their work will include low bono and fee sliding cases.[346] The program is supported by a $100,000 foundation grant but the law school is raising money to support the pro-

336. *Id.* at 4–5.

337. *Utah Law School Offers "Low Bono" Services with Recent Graduates*, SALT LAKE TRIB., Nov. 18, 2011, http://www.sltrib.com/sltrib/news/52938370-78/law-services-legal-low.html.csp; *see also* Nic Dunn, *Law Group Offers Low Bono Help*, SALT LAKE CHRON., Nov. 22, 2011, http://www.dailyutahchronicle.com/?p=2559714.

338. *Utah Law School Offers "Low Bono" Services with Recent Graduates*, *supra* note 337.

339. "BigLaw" is a popular term used by many blogs and in the legal community to describe a law firm with a minimum of 101 attorneys that represent large corporations. *An Introduction to "Biglaw"*, TOP-LAW-SCHOOLS.COM, http://www.top-law-schools.com/introduction-to-biglaw.html (last visited Mar. 30, 2012).

340. Email from Dennis Gladwell (July 3, 2012) (on file with author).

341. *Id.*

342. Telephone interview with Dennis Gladwell (July 3, 2012).

343. *College of Law Announces University Law Group to Provide Low Bono Services to Underserved Populations*, UTAH L. TODAY (Nov. 17, 2011), http://today.law.utah.edu/2011/11/college-of-law-announces-university-law-group-to-provide-low-bono-services-to-underserved-populations/.

344. Dunn, *supra* note 337.

345. Karen Sloan, *Pace Solo Incubator Will Assist Low-Income Clients*, NAT'L L.J. (Nov. 15, 2011), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202532527024&slreturn=1.

346. *Id.*

ject.[347] The Pace Community Law Practice, although it employs its graduates, promises to introduce important topics, such as assistance with client development, malpractice insurance, and setting up a law practice, through the use of seminars.[348] The Pace model is a hybrid incubator and post-graduate residency program that promises to hire the lawyer participants and pay them approximately $42,000.[349] The Pace Community Law Practice is scheduled to open on the law school campus in the fall of 2012.[350]

The Arizona State University Sandra Day O'Connor College of Law (ASU Law School) also announced plans to create an affiliated nonprofit training law firm.[351] Dean Douglas Sylvester specified that the current plan includes providing five opportunities for 15 to 30 lawyers who would be supervised by five or six attorneys with experience in practice areas that include bankruptcy, family law, and business organization.[352] Plans for financing include private donations, law school funds, and charging clients reduced rate fees.[353] The un-named ASU Law School affiliated law firm indicated that although they are still fine-tuning their program, they anticipate having the law firm operating by 2013.[354]

These are only some examples of what law schools are doing to respond to the needs of recent graduates and the community. By no means is this overview intended to be inclusive and complete. It merely attempts to offer law schools working on similar efforts basic information to help in the development of such projects. Law schools are just embarking on their journey to train lawyer-entrepreneurs, but what is clear from existing and emerging efforts is that greater instruction on client development and law office management will be key components in supporting the development of self-employed lawyers.[355]

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347. *Id.*

348. *Id.*; *see also* Tierne Plumb, *Pace Law School Enters the In-House Law School Market*, PRELAW (Nov. 18, 2011), http://www.nationaljurist.com/content/pace-law-school-enters-house-law-school-market.

349. Bob Rozycki, *Pace Law to Launch Incubator for Recent Graduates*, Fairfield Co. Bus. J. (Nov. 28, 2011), http://westfaironline.com/17575/pace-law-to-launch-incubator-for-recent-graduates/.

350. *Id.*

351. Karen Sloan, *Think of It as a Residency for Lawyers*, NAT'L LAW J. (June 5, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202556661573&Think_of_it_as_a_residency_for_lawyers.

352. *Id.*

353. *Id.*

354. *Id.*

355. In addition to reduced office space, continuing legal education, and group rates for vendor services, post-graduate programs should facilitate relationships with microlenders, accountants, bookkeepers, technology support staff, and business consultants.

V. ADVANCING THE TRAINING OF LAWYER-ENTREPRENEURS

Neither limited job opportunities nor entrepreneurial lawyers are new to the legal profession.[356] However, the recognition by law schools that they need to do more to prepare their graduates for the practice of law is something that is beginning to resonate.[357] Unlike prior periods of economic recession, economic pressures have converged with changing law school accreditation standards that ask law schools to identify and measure the outcomes of their educational program.[358] These factors, coupled with an increasing demand for affordable legal services, create an unprecedented opportunity for local law schools to abandon outdated notions of prestige and to prepare lawyers to do the work legal services consumers need. A more competitive legal market that drives the prices of legal services down will require attorneys to become well-versed in technology and marketing in order to be viable. Law schools that develop substantive curriculum and post-graduate opportunities to support developing entrepreneurial skills and mindsets will become a more valuable legal education product.

As law schools debate about how to integrate skills into the existing law school curriculum,[359] law school personnel must confront their own

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356. SERON, *supra* note 40, at 64; *see also* LINCOLN CAPLAN, SKADDEN (1993) (recounting a story of opportunitism and innovation that lead to the rise of one of the country's largest law firms).

357. *A Survey of Law School Curricula: 2002–2010*, ABA, SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR (July 24, 2012), http://www.abanow.org/wordpress/wpcontent/files_flutter/1341346391LawSchoolCurriculaSurveyExecSummary.pdf (reporting an increase in skills instruction in law school as a result of ABA Standard 302(a)(4), which requires that students receive "other professional skills" instruction); *see also* Karen Sloan, *ABA: Law Schools Getting the Message on Practical Skills*, NAT'L L. J. (July 14, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202561943191&slreturn=20120620190759.

358. In October 2007, the Section of Legal Education formed a special committee to revise law school accreditation standards to promote measurement of outcomes. CATHERINE L. CARPENTER ET AL., REPORT OF THE OUTCOME MEASURES COMMITTEE (2008), *available at* http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf. The Section on Legal Education, has proposed changes to ABA Accreditation Standard 302, which provides for law schools to identified their desired learning outcomes of their students. Although the outcome standards are not yet adopted, a change in focus from input measures to output is inevitable. *See also* Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87 (2010) (arguing that the economic downturn may provide the impetus for changing law schools); *ABA President Names Task Force on the Future of Legal Education*, ABANOW (July 31, 2012), http://www.abanow.org/2012/07/aba-president-names-task-force-on-the-future-of-legal-education/.

359. *See* Karen Sloan, *What Is Law School for, Anyway?*, NAT'L L. J. (Jan. 16, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202538352545&What_is_law_school_for_anyway (reporting the discussion on rethinking legal education at the 2012 Association of American Law Schools annual meeting in Washington, DC); Jessica Dopierala, *Bridging the Gap Between Theory and Practice: Why are Students Falling Off the Bridge and What are Law Schools Doing to Catch Them?*, 85 U. DET. MERCY L. REV. 429, 431–440, 2007-2008) (describing the criticisms of the case method and calls for change); Margaret Martin Barry et al., *Clinical Education for the Millenium: The Third Wave*, 7 CLINICAL L. REV. 1, 5–12 (2000) (describing challenges clinicians faced when forging clinical education in law schools). *See generally* ROBERT MACCRATE ET AL., ABA, SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, REPORT ON THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992); THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

assessment of prestige and develop a greater understanding of what most of their graduates must contend with in practice.[360] Law schools that are reluctant to acknowledge the need to train lawyer-entrepreneurs may be forced to acknowledge that they primarily produce solo lawyers. Once law school faculty and administrators combat their prejudices and find ways to compensate for their lack of emphasis on the work of attorneys that provide personal legal services,[361] law schools can begin to develop skills programs that produce lawyer-entrepreneurs.

Professor David Barnhizer points to external forces that will influence how law schools, particularly local law schools, will change in the coming decades.[362] He projects that the oversaturation of solo practitioners, a result of the disappearance of other law jobs, will be the factor that has the most significant effect on how law schools operate.[363] Barnhizer predicts that the number of attorneys working in solo and small firms will continue to rise as law schools produce approximately 40,000 new lawyers to an employment market with few jobs.[364] He argues that the economic vulnerability of solo and small firm lawyers will be a factor leading to the demise of local law schools.[365] Barnhizer cautions that unless law schools "learn to adapt to the changed conditions and still declining demand for lawyers as that job is traditionally conceived, some law schools will shrink dramatically. Others will disappear in the face of hardened and unforgiving competitive conditions."[366]

Barnhizer is not the only one, nor the first, to make these warnings. Perhaps the leading contemporary critic of legal education has been Richard Matasar, former dean of New York Law School. [367] Matasar penned a series of controversial articles aimed at urging academics to provide greater value to law graduates.[368] Matasar's faculty webpage

360. Jonakait, *supra* note 130, at 902-03 (arguing that most law school faculty are products of elite law schools and therefore do not possess sufficient understanding of the career paths of their graduates).

361. *See* Bryant G. Garth and Joanne Martin, *Law Schools and the Construction of Competence,* 43 J. LEGAL EDUC. 469, 499–507 (1993) (discussing conventional interpretations of teaching and practice). Academics tend to view corporate legal work as more intellectually challenging than personal service legal work and in doing so, place a lesser value of prestige on the work done by solo and small firm lawyers *See* HEINZ & LAUMANN, *supra* note 120, at 127–28; William Hornsby, *Challenging the Academy to a Dual (Perspective): The Need to Embrace Lawyering for Personal Legal Services,* 70 MD. L. REV. 420, 437 (2011).

362. David Barnhizer, *Redesigning the American Law School,* 2010 MICH. ST. L. REV. 249, 263–264 (2010).

363. *Id.* at 253. Barnhizer points out that although the percentage of attorneys in solo practice has remained consistent between 1980 and 2000, there was a 100% growth in the number of solo practitioners and a 35% increase in the number of lawyers in law firms of two to five attorneys. *Id.* at 283.

364. *Id.* at 266.

365. *Id.* at 288-89.

366. *Id.* at 269.

367. *Richard A. Matasar, Dean Emeritus,* NEW YORK LAW SCHOOL, http://www.nyls.edu/faculty/faculty_profiles/richard_a_matasar (last visited May 15, 2012).

368. *See* Richard A. Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics and Purity of the Hearth and Soul,* 48 FLA. L. REV. 781 (1996) (arguing that financial considerations and

explains, "[m]ost law schools have no chance to improve. They're mired in the past, beholden to special interest groups, and incapable of disrupting their own comfort levels."[369] Matasar describes his goals to reform legal education as two-fold: "First, to radically disrupt traditional approaches to legal education by emphasizing the need for professionalism and the need for educational institutions to be flexible; and second, to force the profession of law and the legal academy to think about ways they can work with each other."[370] His writings encourage academics to accept the difficult economic reality that most law graduates face, and call for law schools to be more "businesslike."[371]

In his 2005 article, *The Rise and Fall of American Legal Education*, Matasar suggests that law schools do not adequately train lawyers to practice law, make a living and "adequately support the debt he or she accumulates while in school".[372] He argues that "expensive schools with modest reputations will be in jeopardy" because their graduates will not be able to earn salaries large enough to pay their student debt.[373] According to Matasar, only the top 10% of the class at most law schools have the opportunity to earn jobs that allow them to pay off the student loans.[374] He argues that moderate prestige schools with high price tags will not survive unless they change.[375] Matasar's writings, although startling, provide a call to action for law schools to create greater value for its students.[376] Matasar argues that legal education must shift its primary mission from prestige-driven factors that promote law school rankings to actually providing what students need.[377] Although recent loan repay-

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accountability must drive higher education); Richard A. Matasar, *Does the Current Economic Model of Legal Education Work for Law Schools, Law Firms (or Anyone Else)?*, 82 N.Y. ST. B.A. J. 20 (2010) (responding to the question of whether the current model of legal education is good for lawyers or law firms); Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465 (2005) (foreshadowing the current critique of the value of a law degree) [hereinafter Matasar, *Rise and Fall*]; Richard A. Matasar, *The Two Professionalisms of Legal Education*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99 (2001) (describing legal education as a law school business that sells education to students and sells graduates to the legal profession).

369. *Richard A. Matasar, Dean Emeritus*, *supra* note 367 (accessed by searching previous versions of N.Y.L.S. faculty profiles in the Internet Archive index).

370. *Id.*

371. Matasar's critique is not just against law schools but also in the failures of the profession to be good teachers Richard A. Matasar, *Skills and Values Education: Debate About the Continuum Continues*, 46 N.Y.L.S. Sch. L. Rev. 395, 410 (2002-2003) (criticizing the bar for not rising to the call of the MacCrate Report). Despite his vocal critiques, Matasar was chastised for not bringing about greater reform as dean of New York Law School. David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 17, 2011, at BU1.; *see also* Paul L. Caron, *Class Actions Filed Against Cooley, NYLS Over Fraudulent Placement Data*, TAXPROF BLOG (Aug. 10, 2011), http://taxprof.typepad.com/taxprof_blog/2011/08/class-action-lawsuits.html.

372. Matasar, *Rise and Fall*, *supra* note 368, at 471–72.

373. *Id.* at 496.

374. *See* Debra Cassens Weiss, "*Law Dean Says Schools 'Exploiting' Students Who Don't Succeed*, A.B.A. J. (Jan. 10:27 A.M.), http://www.abajournal.com/news/article/law_dean_says_schools_exploiting_students_who_dont_succeed.

375. Matasar, *Rise and Fall*, *supra* note 367, at 496.

376. *Id.* at 498 ("[T]he task is clear: create real value for your students and the school might climb out of its predicament and rise.").

377. *Id.* at 112–13.

ment programs make it easier for law graduates to manage debt through income-based repayment programs, self-employed lawyers require more instruction on how to manage a law office.

At a law school symposium discussing the changes in law practice, William Hornsby, staff counsel in the ABA Standing Committee on the Delivery of Legal Services, called upon law schools to reassess their curriculum and offer greater instruction for solo and small firm lawyers.[378] Hornsby explains that the lack of preparation of the solo and small firm bar is primarily attributed to the lack of faculty experience with what it means to provide personal legal services.[379] He cites to a 2006 survey of law schools that reveals that less than half of law schools that responded taught any law office management courses.[380] The schools that include law practice management in their curriculum report that 80% of those classes are taught by adjunct faculty.[381] Further, the class is offered only to 15 to 50 students per year.[382] No school required the course.[383] Hornsby points to this lack of commitment to law practice management in law schools as a strong indicator that law school faculty does not understand or value the work of solo and small firm lawyers who are primarily providing personal legal services.[384]

Professor Debra Moss Curtis agrees that law office management is critical in the development of skills for future lawyers.[385] She points to The Carnegie Foundation for the Advancement of Teaching's report on *Educating Lawyers* and the 1992 *MacCrate Report* as just a couple of the many calls to introduce more law school instruction with skills necessary for lawyers to practice law.[386] She argues that providing greater skills instruction requires that law schools integrate law office management courses into the curriculum because lawyers "have an ethical duty to

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378. Hornsby, *supra* note 361, at 420.

379. *Id.* at 436.

380. A.B.A. STANDING COMM. ON PROFESSIONALISM, REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS 38 (2006), *available at* http://www.abanet.org/cpr/reports/LawSchool_ProfSurvey.pdf.

381. Hornsby, *supra* note 361, at 437.

382. *Id.*

383. *Id.*

384. *Id.*; *see also*, Levin, *supra* note 114, at 309–11 (reporting that attorneys in solo and small firm practice are most prone to attorney discipline due to the lack of support structure and characteristics of the legal problems they address).

385. *See* Debra Moss Curtis, *Teaching Law Office Management: Why Law Students Need to Know the Business of Being a Lawyer*, 71 ALB. L. REV. 201, 202 (2008).

386. *Id.* at 205 (referencing WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 87 (2007)). The MacCrate Report is the name commonly used to refer to a 1992 ABA Task Force on Law Schools and the Profession lead by Robert MacCrate, former ABA President. *Id.* at 208. Also referenced are: ABA, SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992); and ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).

manage legal work."[387] Professor Curtis offers ideas for content and integration of law office management courses in the curriculum before concluding that "[l]awyers and students alike believe that law office management belongs in the law school curriculum."[388] In a 2010 law review article, Professor Gary A. Munneke argues that managing a law practice is a key element of a lawyer's competency but such has not been sufficiently embraced by legal education or even the bar.[389]

In addition to learning to think like lawyers, tomorrow's law school graduates must also learn how to be lawyers that can adapt to new competitors, fast-changing technology, and a more global client base. To make a living as self-employed lawyers, Millennials must develop strong law office management structures that permit them to compete with larger law firms and non-lawyers that are able to provide greater breadth for a fraction of the cost.[390] Law schools cannot guarantee the economic viability of every one of its graduates, but they can provide a framework for its students and graduates to think about creating their own career opportunities. Law students who are training to also be entrepreneurs must fully understand the business of law, the use of technology in effective law practice management, and the ethical considerations that must govern their enterprises.[391]

To be successful, lawyer-entrepreneurs will need the support of their law schools. Most law schools are not currently equipped to graduate "our own garage guys who can transform how we do law."[392] Law schools that undertake the challenge of training lawyer-entrepreneurs should consider taking the following steps:

A. Educate Law School Personnel About Bar Demographics

To understand how to best advise students about their career opportunities, law schools must undertake the study of the career trajectories of their graduates. With that information law schools should develop initiatives to educate their personnel about the career opportunities available to its graduates. Faculty and career services staff, must know enough about the career opportunities and challenges in the most common practice settings for their graduates in order to advise their students about what to expect post-graduation. Each law school will have a unique set of market characteristics to consider depending on its geography, its status in the law school hierarchy, and the specific characteristics of its stu-

387. Curtis, *supra* note 385, at 208.

388. *Id.* at 228.

389. *See* Gary A. Munneke, *Managing a Law Practice: What You Need to Learn in Law School*, 30 PACE L. REV. 1207 (2010).

390. SUSSKIND, *supra* note 36, at 36–39.

391. THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 211–212 (2010) ("law schools should recognize that education about non-legal substantive issues").

392. Gillian K. Hadfield, *Equipping the Garage Guys in Law*, 70 MD. L. REV. 484, 489, 498 (2011) (calling for greater support from law schools to produce more innovative lawyers).

dent body. If a law school has a significant number of its graduates in solo and small firm practice, it should have personnel available to help students and alumni plan for self-employment.

B. Educate Students About the Work Lives of Self-Employed Lawyers

The predominance of attorney self-employment is not just a by-product of the recession. It is and has always been the largest sector of the bar. Advancing a legal education program that acknowledges the needs of future small-firm lawyers would communicate to prospective law students that they are buying a law degree that helps them be more self-sufficient. Law schools should communicate to their students that periods of unemployment, taking on contract work, working in temporary legal jobs, performing work that does not require a law degree, and even starting their own offices is part of the career trajectory for most lawyers.[393] If local law schools developed programs to train lawyer-entrepreneurs and advertise their commitment to help them develop viable law practices, then students may at least have a more realistic sense of a typical career path for self-employed lawyers.[394] Law schools that transform their curriculum into an educational program that prepares future lawyer-entrepreneurs may not immediately fare well in the current scheme of *U.S. News* rankings but will distinguish themselves as student-centric leaders of the local law school pack.

C. Integrate Delivery of Legal Services Courses in the Curriculum

Law schools should develop programs that explore how legal services are delivered. Law school graduates must understand what it takes to be a lawyer. Discussion of office management, consumer legal needs, legal informatics, and the business of law should be taught by full-time faculty and integrated into the third year curriculum.[395] These courses help students understand how legal services are delivered, the cost of

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393. Such an approach is consistent with one of Barnhizer's proposed solutions to create a different and more flexible educational world where students could opt to attend a law school that helps them prepare to meet specific goals. Barnhizer, *supra* at 362, at 306 ("There is no reason each law school should be all things to all students. Various ways exist in which American law schools could be "unbundled" and create a different and more flexible educational world.").

394. Jerome M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L. J. 225, 271–273 (2011) (discussing how law schools can help students establish realistic expectations about their law practice and their professional identity).

395. *See generally* Peter Toll Hoffman, *Law Schools and the Changing Face of Practice*, 56 N.Y.L. SCH. L. REV 203 (2012); Gary A. Munneke, *Managing a Law Practice: What You Need to Learn in Law School*, 30 PACE L. REV 1207 (2010); R. Lisle Baker, *Enhancing Professional Competence and Legal Excellence Through Teaching Law Practice Management*, 40 J. LEGAL EDUC. 375 (1990). *See also* G.M. Filisko, *Getting the Business*, ABAJOURNAL (Aug. 1, 2010 12:04 AM CDT), www.abajournal.com/magazine/article/getting_the_business/; John Palfrey, *The Law School Curriculum: What is Technology's Role*, NAT'L L. J. (Nov. 13, 2006) (advocating instruction on the importance of technology in law); David C. Cummings, *A Law School Course in Law Practice Management*, 45 WASH. ST. BAR NEWS 37 (1991).

providing such services and their role in the larger profession. Such curriculum can encourage students to develop plans to assess their unique contributions that will help them build networks, identify a client base, and fulfill their professional obligation to justice. Law schools that do not currently have personnel to offer such curriculum can look to other disciplines within the larger university, or work with the practicing bar to integrate some post-graduate education into existing law school programs.[396]

D. Develop Opportunities for Low Bono Legal Services

Students need opportunities for practical skills development where they can apply what they learn in their classes. Many law school clinical programs serve an important function by providing legal services to individuals that are not otherwise available to the indigent population.[397] There is also a growing population of near poor that can benefit from post-graduate programs that provide low bono legal services.[398] In addition to the examples of incubator and post-graduate programs provided in Part IV, law schools seeking to support lawyer-entrepreneur training should also experiment with fee-generating clinical programs.[399] Fee-generating clinical programs better simulate the practice settings of lawyer-entrepreneurs by incorporating client development and fee agreements into the clinical experience.[400] To minimize costs of new clinical programs while increasing options for students, recent graduates, and legal services consumers, law schools should experiment with offering unbundled legal services through collaborations with legal aid organizations and bar associations.[401] These collaborations expose law students to the needs of legal services consumers and the typical client base and is-

396. In an effort to support students starting their own law firms after graduation, Chapman University School of Law offers free subscription to Solo Practice University. Susan McRae, *Law Schools Are Branching Out*, L.A. DAILY J., May 29, 2012, at 1; *see also About* Us, SOLO PRACTICE UNIVERSITY, http://solopracticeuniversity.com/about/ (last visited July 2, 2012).

397. *See id.*

398. *Id.*; *see also* Jason DeParle et al., *Older Suburban and Struggling, 'Near Poor' Startle the Census*, N.Y. TIMES, Nov. 19, 2011, at A1 (reporting 2010 Census figures that report one-third of all Americans are poor or near poor), *available at* http://www.nytimes.com/2011/11/19/us/census-measures-those-not-quite-in-poverty-but-struggling.html?pagewanted=all.

399. Gary Laser, *Significant Curricular Developments: The MacCrate Report and Beyond*, 1 CLINICAL L. REV. 425 (1994); Cham, *supra* note 333, at 100–101. *But see* Martin Guggenheim, *Fee-Generating Clinics: Can We Bear the Costs?*, 1 CLINICAL L. REV. 677 (1995); *see also* Lisa G. Lerman, *Fee-for-Service Clinical Teaching: Slipping Toward Commercialism*, 1 CLINICAL L. REV. 685, 709–710 (1995) (warning law schools to carefully consider the possible pedagogical compromises that a fee generating clinical program model may create if such programs are seen as fundraisers).

400. Richard A. Matasar, *A Commercial Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 FLA. L. REV. 781, 792 (1996).

401. For example, in 2009 Maryland School of Law launched JustAdvice, a program that works pairs students with private lawyers to provide legal consultation and advice for a nominal fee of $10. Carol Sorgen, *Attorneys, Law Student's Offer 'Just' Advice*, THE BEACON (Dec. 23, 2010), http://www.thebeaconnewspapers.com/select-stories/careers-volunteers/attorneys-law-students-offer-'just'-advice; *see also About*, JUSTADVICE, http://justadvice.wordpress.com/about/ (last visited July 2, 2012).

sues that lawyer-entrepreneurs handle. At the same time, these programs provide additional options for individuals, nonprofits, and small businesses that do not otherwise qualify for free legal services and cannot find a affordable alternative in the market.

E. Keep Costs of Legal Education Down

Law schools cannot properly train lawyer-entrepreneurs without grappling with the impact that the high cost of legal education has on their livelihood. In addition to advising students about how to live frugally to minimize debt burdens, law school personnel must assess how their current expenditures contribute to the rising cost of tuition. Such self-assessment will not be easy or welcomed, but it is necessary and preferable to external prescriptions for change.[402]

CONCLUSION

I graduated from an elite law school at a time when its graduates had the opportunity to choose which six-figure salary they wanted. Neither its career services personnel nor its public interest advising program encouraged or mentored law students to open their own law firms. My law school offered no law office management courses. Classroom discussions did not acknowledge the role of self-employed lawyers. Although my clinical program taught me good client management, basic office management skills, and incorporated a community lawyer as an instructor, there was little focus on the role of solos in the delivery of legal services. I started my own law practice without much context or the necessary knowledge or skills to develop a viable model.

Without a plan or much mentoring, I eventually built a law practice that allowed me to pay my school loans, cover my living expenses, and meet my professional goals. Having my own practice allowed me to serve the client community that I wanted to serve. The experience offered me consistent lessons in humility and courage. I forged relationships with mentors, attended as many continuing legal education programs as I could afford, and developed a client base through trial and error. Practicing on my own was intellectually and emotionally challenging. It was also frightening and isolating. It does not have to be that way.

Law schools in the twenty-first century have the opportunity and responsibility to equip their graduates with the tools they need to be successful lawyers and entrepreneurs. Law schools can serve an important role not only in educating the emerging lawyer-entrepreneur but also in promoting greater access to justice. The millions of Americans who do not have access to lawyers and the thousands of attorneys who struggle

402. For proposals on how to reducing the cost of legal education, see Brian Tamanaha, Op-Ed, *How. to Make Law School Affordable*, N.Y. TIMES, May 31, 2012, at A27, *available at* http://www.nytimes.com/2012/06/01/opinion/how-to-make-law-school-affordable.html.

to establish viable law practices need alternatives to the current disjointed training model in the legal profession.

LAWYERS, LOYALTY AND SOCIAL CHANGE

DEBORAH J. CANTRELL[†]

ABSTRACT

Fundamentally, cause lawyers engage in their work to make social change. Scholars of cause lawyering have generated a robust and rich literature considering important issues, such as what kinds of advocacy strategies best generate social change and what features of the relationship between cause client and cause lawyer are critical to an engaged and mutual relationship. But, the literature has neglected a key aspect of the cause lawyer and client relationship: whether the particular kind of loyalty that exists as between them hinders or helps in achieving social change. This Article fills that void. It first illuminates the particular features of the kind of loyalty that is expected between cause lawyers and their clients, including features such as a mutually engaged relationship and a strict conception of friends and enemies. Labeling that loyalty as "hyper-loyalty," this Article scrutinizes whether the extreme fidelity required by hyper-loyalty helps produce actual social change. Drawing on multiple fields, including negotiation and cognitive psychology, this Article demonstrates that hyper-loyalty impedes social change by limiting the range of relationships that can be explored as sites for problem solving. The Article offers a way forward, suggesting that hyper-loyalty be replaced by relational loyalty. The three key features of relational loyalty are: constructing the architecture of social change so that it is a connected web of relationships instead of dyadic and oppositional; approaching that web of relationships with curiosity instead of advocacy; and responding with compassion to all contained in the web of relationships. This Article argues that relational loyalty inculcates a helpful dynamism in relationships, which both preserves mutual engagement between cause lawyer and cause client, while also creating unexpected opportunities to craft innovative strategies or pathways to social change.

INTRODUCTION

Imagine the following two attorneys: an anti-poverty cause lawyer[1] who is bilingual and works in a community in which most residents are

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† Associate Professor, University of Colorado Law School. Special thanks to the interdisciplinary group of scholars hosted by Fordham Law School who gave me detailed feedback, especially Russ Pearce, Amy Uelmen, Ian Weinstein, and Judy Povilus. Thanks also to Clare Huntington, Nestor Davidson, Emma Leheny, Howard Lesnick, Erik Pitchal, Jacob Rukeyser, and workshop colleagues at Colorado Law and University of Georgia Law School.

1. The term "cause lawyer" was coined by Austin Sarat and Stuart Scheingold, and replaced the phrase "public interest lawyer." *See* AUSTIN SARAT & STUART SCHENIGOLD, *Cause Lawyering and the Reproduction of Professional Authority, An Introduction, in* CAUSE LAWYERING: POLITICAL

recent immigrants and a government official who spent a couple of years working as a staff attorney at a legal aid office before moving into private practice, and ultimately being appointed to her current high-level position in the state's social services agency. Both the advocate and the government official went to the same elite law school. Both have shared professional connections. The advocate has been hearing from community members that the local government benefits office is refusing to provide supplemental nutritional assistance applications in any language other than English. When the advocate hears that the government official is holding a series of town hall meetings in the area, the advocate makes plans to attend to raise the issue of language accessibility. The advocate remarks to her colleagues how frustrating it is to see a very smart person like the government official working "for the enemy."[2] The advocate notes that even though she thinks the official's own legal aid background could be very helpful in problem-solving related to a particular issue, the advocate just cannot trust anyone who now works for the government. The advocate concludes that she had heard that the official was a nice person, which she had no reason to disbelieve, but she felt uninspired to try and forge any relationship with the official. The advocate planned to attend the meeting not with any belief that there would be a useful exchange between the participants, but because the advocate felt it was necessary to show the government official that the local community was strong and committed to opposing the agency's inappropriate behavior.

The vignette highlights a common feature of social change advocacy—that participants, including cause lawyers, identify strongly with their side of the issue and distrust—with a similar intensity—participants on the other side. In fact, this Article argues that such hyper-loyalty is considered a core condition and baseline requirement of the relationship between cause lawyer and cause client. In shorthand, it is part of the DNA of how a cause lawyer works.[3] That hyper-loyalty is laudable in many ways. It creates an expectation that the relationship between cause lawyer and cause client will carry over time and over multiple advocacy

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COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3–5 (Austin Sarat & Stuart Scheingold eds., Oxford Univ. Press 1998). The concept of cause lawyering differentiates between a lawyer who essentially is agnostic about who are her clients or what kind of outcome her clients may be seeking, and lawyers who commit to a particular kind of substantive work or a particular category of clients because the lawyer is committed to some broader set of social or political principles. *See* AUSTIN SARAT & STUART A. SCHEINGOLD, *What Cause Lawyers Do for, and to, Social Movements: An Introduction*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 3–4 (Austin Sarat & Stuart A. Scheingold eds., Stanford Univ. Press 2006); *see also* Deborah J. Cantrell, *Sensational Reports: The Ethical Duty of Cause Lawyers to Be Competent in Public Advocacy*, 30 HAMLINE L. REV. 568, 569–71 (2007) (providing a definition of "cause lawyer").

2. This vignette is based on many similar conversations that I heard during my own time as a public interest lawyer.

3. Nestor Davidson helpfully suggested the DNA metaphor.

efforts, and is not a one-off relationship of short duration.[4] The cause lawyer and client are in the struggle together.[5] It creates an expectation that the cause lawyer and the cause client fundamentally agree on at least some components of a "just" society. The cause lawyer and client *believe* in the struggle.[6] In its best form, it also forges a relationship that is mutual, reciprocal, and in which both cause lawyer and cause client understand and trust each other to bring relevant expertise to the advocacy work.[7] The cause lawyer and client are both *soldiers* in the struggle.[8]

Cause lawyers and cause lawyering scholars have focused intensively on the above features of the lawyer–client relationship, and the role of hyper-loyalty in fostering those features. However, they have done so while neglecting the central point of the cause lawyer-cause client relationship—to make actual social change. The unexamined assumption in the existing scholarship is that hyper-loyalty increases the possibilities for effective social change. This Article fills the unpropitious void in the scholarship by critically examining hyper-loyalty. It scrutinizes the assumed truth that because hyper-loyalty makes the cause lawyer and cause client feel better and stronger about their relationship, the relationship, in turn, helps the cause lawyer and cause client actually achieve social change.

This Article comes to a conclusion that may surprise many—that hyper-loyalty creates more potential to impede social change work than to assist such work. In particular, this Article identifies a particularly problematic consequence of hyper-loyalty, noted in the vignette above, which is that it encourages cause lawyers and cause clients to identify others either as friends or enemies, and to hold steadfast to that dichotomy. Drawing on a range of literature, including work on cognitive heuristics and biases, negotiation theory, and scholarship about intentional relationships in social movements, this Article demonstrates several ways in which hyper-loyalty impedes the flexibility needed to effect social change.

To avoid the negative consequences of hyper-loyalty, this Article re-envisions what it means for cause lawyers and cause clients to be loyal to each other. This Article recognizes the important starting contribution the existing literature made by insisting that the cause lawyer and the cause client must understand each other both as bringing expertise to the relationship, and that the relationship must be mutually engaged and re-

4. *See generally* Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 298–302 (1996) (describing several multi-pronged campaigns for which Bellow was the cause lawyer).

5. *See id.* at 302–03 (describing Bellow's own experiences as a cause lawyer).

6. *See id.* at 300.

7. *See id.* at 302–04 (describing the respectful relationship necessary for effective cause lawyering).

8. *See id.* at 300–04.

spectful. However, this Article then calls on cause lawyers and clients to create a more relational form of loyalty to each other, not by bringing distance to their own relationship but instead by situating their relationship within a larger web of relationships of participants engaged on an issue. The notion of a web of relationships, rather than hyper-loyalty's dyadic contest with friends on one side and enemies on the other, creates space for both cause lawyers and cause clients to expand the realm of participants with whom a connection may be explored. Whereas hyper-loyalty views exploring relationships across the line as disloyalty, relational loyalty understands exploration of the web of relationships as a method of fostering new, and at times unexpected, but useful, collaborators for social change.

This Article adds two additional key components to relational loyalty. First, drawing particularly on negotiation literature, relational loyalty calls on participants to approach others in the web of relationships with curiosity, not advocacy. The softening of a stance from advocate to inquirer is designed to create a more expansive dialogue, which, like the web itself, should bring forward new and possibly unexpected, but useful, information. Next, relational loyalty calls on participants to approach others in the web of relationships with compassion. This Article sharply distinguishes between compassion and acquiescence or capitulation. Compassion is not silence or the whitewashing of injustice. But the calling out of injustice need not happen only in righteous anger. It can happen more productively from a compassionate stance that looks for opportunity in the particular situation with particular people.

In Part I, this Article traces the development of hyper-loyalty as a core component of the relationship between cause lawyer and client. Then, it describes the legitimate concerns about how to build a respectful and mutual relationship between cause lawyers, who regularly come from elite backgrounds, and cause clients, who regularly come from underserved or underrepresented communities. It also describes the positive features of hyper-loyalty as a way of communicating and cementing trust between disparate participants, as a way of expressing mutual respect and acknowledging mutual expertise. Part II turns to the harmful aspect of hyper-loyalty detailing the ways in which it impedes cause lawyers and clients from achieving actual social change. Part III builds out the components of relational loyalty, including reframing participants as being situated within a web of relationships and approaching all with curiosity and compassion. Part IV acknowledges and addresses some potential concerns about moving from hyper-loyalty to a relational loyalty.

I. THE ROLE OF LOYALTY IN CAUSE LAWYERING

Scholars of cause lawyering, and cause lawyers themselves, take as an important truth that loyalty is a key feature of the relationship between

cause lawyers and their clients. In contrast to much for-profit lawyering, cause lawyering brings with it robust notions of solidarity between client and lawyer.[9] The proposition is that there is more solidarity between the cause lawyer and client because both of them understand their work together to be situated within a larger interest in social change. As Gary Bellow articulated the relationship, it is a "politicized orientation" with "the legal work . . . done in service to both individuals and larger, more collectively oriented goals."[10] Independent of their legal relationship, the lawyer and client are loyal to each other because of their shared commitment to their cause, whatever it may be. Their "cause loyalty" is stronger than the typical professional loyalty between lawyer and client. It is hyper-loyalty.

That hyper-loyalty is the expected norm in cause work is not surprising. Most cause lawyers, and many cause clients, are committed to "doing the work" in a long-term way.[11] They form long-term relationships with each other, and even though there may be individual changes over time between particular lawyers or clients, there is a strong level of general continuity between the cause lawyering shop and the lay advocacy community. For a historical example, think of the cause lawyers at California Rural Legal Aid who worked closely with Cesar Chavez and the United Farm Workers Union on several advocacy efforts.[12]

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9. *See* Bellow, *supra* note 4, at 302 (noting the importance of "mutuality" in the relationship between client and cause lawyer); *see also* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375 (1982) (calling for "counter-hegemonic" legal practice in which goal is to forge "authentic" political collaborative between client and cause lawyer); Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1384–85 (2009). *See generally* GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988) (highlighting the story of a Black South African village and the methods of the "outsiders" who worked with them to empower resistance as a model for change-oriented lawyering); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social* Change, 30 HARV. C.R.-C.L. L. REV. 407 (1995) (articulating a social change plan to aid immigrant workers as a whole, instead of individual clients only); William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1995) (defining the critical criteria for empowering organizational advocacy); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (New York Univ. Press 2001) (explaining the environmental justice movement); Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007) (suggesting the benefit to community lawyering of a more collaborative relationship among lawyers, clients, and third-parties such as interpreters); Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007) (discussing progressive public interest lawyers in the context of one campaign involving immigrant labor).

10. Bellow, *supra* note 4, at 300.

11. However, the privatization of *pro bono* legal work has somewhat altered that dynamic as private law firms have built out books of business focused on providing free legal services often related to cause lawyering. Because of very practical business concerns about conflicts of interest with paying clients, private firms often pick one or two causes on which to focus, pairing in a long-term way with one of two non-profit cause lawyering shops. *See generally* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

12. *See* Bellow, *supra* note 4, at 298.

Additionally, a constitutive part of social change, or cause, work is that cause advocates are pushing against the status quo. In order to mobilize a collective for action, there must be some sense that there is one group pushing for change and one group content with the status quo—in other words, some sense of "us" and "them."[13] The existing cause lawyering literature has focused heavily on what cause lawyers must do to ensure that there is a strong sense of "us" between cause lawyers and cause clients. The Article turns now to those particular features of hyper-loyalty.

A. The Ideal of Hyper-Loyalty

The ideal features of hyper-loyalty are straightforward. Lawyers and clients are equal and "co-eminent practitioners" in their work towards social change.[14] Clients are "not just sources of information on the problems they face, but [also are] active partners in working collectively to solve those problems."[15] Lawyers and clients both are careful to view each other as a "whole person,"[16] not as "cardboard"[17] cut-outs of what a lawyer or client is expected to be under mainstream views of the legal profession. Hyper-loyalty, however, is not an "oversentimentalized" sense of relationship.[18] As Gary Bellow has described it: "I surely influenced and argued with those I served, often loudly and long. But I, in turn, was influenced and argued with as well, and felt justified in asserting my views only because I also felt open to being overruled or outvoted."[19]

While hyper-loyalty can be between an individual lawyer and an individual client, it can also be between multiple lawyers and multiple clients or communities.[20] Nonetheless, it is dyadic in that it understands the core commitment to be between the lawyer(s) and the client(s)/community. While both lawyers and clients may look for opportunistic alliances with others, those alliances should neither weaken, nor necessarily expand, the hyper-loyalty that exists in the dyad.[21] By defini-

13. *See, e.g.*, ALBERTO MELUCCI, *The Process of Collective Identity*, *in* SOCIAL MOVEMENTS AND CULTURE: SOCIAL MOVEMENTS, PROTEST, CONTENTION 47–49 (H. Johnston & B. Klandermans eds., 1995) (noting that a collective must distinguish between itself and others in order to act and mobilize).

14. LOPEZ, *supra* note 9, at 29.

15. Piomelli, *supra* note 9, at 1385.

16. For an early, yet still very prescient, description of lawyers not seeing the client as a "whole person," see Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 21 (1975).

17. The phrase "cardboard clients" comes from Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 103–04 (2010).

18. Bellow, *supra* note 4, at 303.

19. *Id.* at 302–03.

20. In fact, some scholars insist that the better version of cause loyalty is between lawyers and communities, and that cause lawyers should be wary of individualized lawyer–client relationships. *See, e.g.*, Ashar, *supra* note 9, at 1880, 1921–24.

21. *See, e.g.*, Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 404–05 (2004) (providing an example of an

tion and by action, hyper-loyalty presumes there are others or groups of others to whom loyalty is not owed, and to whom displays of affinity are not permitted.

Interestingly, hyper-loyalty can come about directly as discussed above, but also indirectly as discussed below.

B. Two Indirect Routes to Hyper-Loyalty

The ideal of hyper-loyalty discussed above is a direct and intentional commitment to a relationship in which the cause lawyer and cause client stand together against others. Hyper-loyalty is in place because both lawyer and client desire their relationship to have that feature. However, a cause relationship can also indirectly become infused with hyper-loyalty. As described more fully below, that indirect infusion results from a cause lawyer compensating for other concerns about how she is in relationship with her client. Nonetheless, whether infused directly or indirectly, the consequence of hyper-loyalty is the same—cause lawyers and cause clients hold fierce notions of "us" and "them."

The first indirect route to hyper-loyalty comes from cause scholars' and lawyers' long-expressed worry that, historically and currently, the legal profession is predominantly populated by members of the elite.[22] As a result, lawyers from elite backgrounds have dominated cause lawyering. As one scholar articulated the concern: "There are . . . significant dangers when middle class lawyers get intimately involved in the task of organizing the poor. More articulate, better educated, aggressive by nature and training, some lawyers tend to dominate newly formed groups, even when they try not to . . . ."[23] Thus, there has been a sustained nervousness about whether cause lawyers, even with their good intentions, are capable of establishing and maintaining a mutual and reciprocal relationship with their clients.

The seminal critique of cause lawyers captured by elite culture is Gerald Lopez's *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice*.[24] Lopez coined the phrase "regnant lawyer" to

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environmental justice lawyer and low-income community thinking through whether to form an alliance with yuppie neighborhoods that also might be affected).

22. For an example of historical, socioeconomic information, see generally JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (Russell Sage Foundation, 1982). For socioeconomic information about newer members of the legal profession, see generally RONIT DINOVITZER ET AL., AFTER THE JD 20 (NALP Foundation & American Bar Foundation 2004) (noting that "newly admitted lawyers come generally from relatively privileged socioeconomic backgrounds."); Richard Sander & Jane Yakowitz, *The Secret of My Success: How Status, Prestige and School Performance Shape Legal Careers* 11, Brooklyn Law School, Legal Studies Paper No. 207; 5th Annual Conference on Empirical Legal Studies Paper; UCLA School of Law Research Paper No. 10-26 (2010) (analyzing data from the *After the JD* study), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640058.

23. Ruth M. Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1024 (1994).

24. LOPEZ, *supra* note 9.

describe those lawyers, cause or otherwise, who understand themselves as experts in charge of lay clients and who presume that lay clients bring no useful skills to the advocacy question at hand.[25] For Lopez,

> [Regnant lawyering] imposes unjustifiably limited relations between those working against subordination and those strategies available to wage the fight. It does not permit anyone in the fight, whether lay or professional, to experience others as part of a working team. And it almost laughs off anyone who wants to regard others as co-eminent practitioners.[26]

The regnant cause lawyer is disloyal to the client by failing to "express the highest regard for a client's understanding of his own situation . . . ."[27] Furthermore, the regnant cause lawyer is disloyal to a client or community of clients by failing to understand that everyone has an inherent ability to lawyer in the sense of having "built-in, problem-solving, domination-fighting capacit[ies]."[28]

For Lopez, the antidote to regnant lawyering is rebellious lawyering against subordination—what I have called the ideal of hyper-loyalty. As Lopes articulates it:

> [L]awyers must know how to work with, not just on behalf of, subordinated people. They must know how to collaborate with other professional and lay allies rather than ignore the help that these other problem-solvers may provide in any situation. . . . And, at least as importantly, they must open themselves to being educated by the subordinated and their allies about the traditions and experiences of subordinated life.[29]

From a commitment to rebellious lawyering, Lopez crafts a kind of hyper-loyalty between lawyer and client that requires the lawyer to constrain herself to ensure that the client is not subordinated within the lawyer–client relationship. Lopez's goal is to encourage cause lawyers to "nurture sensibilities and skills compatible with a collective fight for social change,"[30] implying mutual and reciprocal relationships between lawyer and client.

However, his consistent and thorough portrayal of most cause lawyers as regnant lawyers raises the risk that a lawyer who is trying to be rebellious will be so concerned about subordinating the client or client community that the lawyer will forego a mutual relationship for one in

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25. *Id.* at 24 (listing characteristics of a regnant lawyer).
26. *Id.* at 29.
27. *Id.* at 61.
28. *Id.* at 8.
29. Gerald Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1608 (1989).
30. LOPEZ, *supra* note 9, at 38.

which the lawyer is intentionally, and well-meaningly, subservient.[31] In other words, the hyper-loyalty displayed by the rebellious, yet cautious lawyer, causes her to recede in the relationship.

That is an understandable response by a cause lawyer who takes Lopez's critique seriously, and who is aware of the demographics of privilege within the legal profession.[32] Because it remains true that most lawyers come from elite socioeconomic backgrounds, a self-reflective cause lawyer would rightly be mindful that her elite background would have generated life experiences that may not match up with those of her "subordinated" clients. After reading Lopez, the cause lawyer would also be mindful of the way in which her legal education privileged a particular kind of analysis—thinking like a lawyer—which may prime her to see her client's issues through a limited problem-solving lens.[33] Thus, in an effort to make sure her regnant tendencies are kept in check, the cause lawyer intentionally restrains the ways in which she participates with her client so as not unintentionally to dominate the relationship.

The mutually engaged and reciprocal relationship coming from Gary Bellow's vision of hyper-loyalty is, in some ways, turned on its head, even though a version of hyper-loyalty is maintained. Under the above indirect route to hyper-loyalty, the cause lawyer is motivated to draw clear lines between "us" and "them" as a way to double check her own regnant tendencies. Keeping a forceful distance from "them," the non-subordinated, the elite, eases the cause lawyer's concerns that she might be trumping her clients in some way.

There is an even stronger version of indirect hyper-loyalty as a response to the risks of regnant lawyering. It is reflected by arguments of some cause lawyers that they should overtly embrace a model in which

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31. I am not the first scholar to suggest that Lopez portrays cause lawyers in an unnecessarily bleak way. *See* Ann Southworth, *Taking the Lawyer Out of Progressive Lawyering*, 46 STAN. L. REV. 213, 215 (1993).

32. DINOVITZER ET AL., *supra* note 22, at 20 (NALP Foundation for Law Career Research and Education, Overland Park, KS, & American Bar Foundation, Chicago, IL 2004) (noting that "newly admitted lawyers come generally from relatively privileged socioeconomic backgrounds"); *see also* Sander & Yakowitz, *supra,* note 22, at 9–11.

33. LOPEZ, *supra* note 9, at 4–5 (describing his own experience at Harvard Law School); *see also* STUART SCHEINGOLD & AUSTIN SARAT, *Beating the Odds: Cause Lawyering and Legal Education, in* SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 51, 60–71 (Stanford Univ. Press 2004); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1931–36 (2002) (discussing the shift from the case method to the clinical method of teaching and the benefits of the clinical approach); CHRIS GOODRICH, ANARCHY AND ELEGANCE: CONFESSIONS OF A JOURNALIST AT YALE LAW SCHOOL 245–55 (1st. ed. 1991) (describing the author's first experience in a clinical learning environment); ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 53–54 (Routledge 1992); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 87–90 (Carnegie Foundation 2007); Gillian K. Hadfield, *Equipping the Garage Guys in Law*, 70 MD. L. REV. 484, 487–90 (2011) (exploring the disconnect between attorneys and clients due to the current state of legal education).

lawyers must be subservient to "the people."[34] Under that view, "[o]rganized masses of people, not lawyers, play the critical roles [in social change], and the significant victories (or losses) occur outside the sphere of law. The more that lawyers try to implement social change directly, the more inimical their impact."[35] Under this model of lawyer loyalty as subservience, the risk of the regnant lawyering *always* is the reality of lawyering. That is because lawyers are too versed in a "rights" framing of social order, and that framing derives from and depends on the power-maintaining legal system.[36] Lawyers must step aside and subordinate rights "to the goal of building an authentic and unalienated political consciousness."[37] It is through political awareness and action that "the people" will create social change.[38]

Just as Lopez allowed for the possibility of a mutual and reciprocal relationship between his rebellious lawyer and her client, so, too, do the above lawyers. They call for cause lawyers to "seek to develop a relationship of genuine equality and mutual respect" with clients.[39] But, they remain extremely nervous about the fact that lawyers are sanguine that social change can happen through the power-maintaining legal system, and their nervousness comes through. For example, there has been blunt criticism of the development of federally funded legal aid as creating merely a "poverty industry" for legal professionals.[40] Given the warnings about lawyers' capture by the legal system, a cause lawyer committed to social change by political organizing will want to avoid lawyer domination. The risk-averse way to do so is to understand the hyper-loyalty she owes to her client as being unidirectional—that she is in service to, or subservient to, her client.

As with the cause lawyer worried about being a regnant lawyer, this variant on indirect hyper-loyalty calls on a cause lawyer to have a strong sense of "them" as a way of protecting cause clients. Thus, hyper-loyalty comes from an inward focus that is concerned about creating a kind of relationship between cause lawyer and cause client that protects the cause client. In this setting, hyper-loyalty is less focused outwardly on

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34. *See* Steve Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 21–22 (1984) [hereinafter Bachmann, *Lawyers, Law, and Social Change*]; *see also* Steve Bachmann, *Lawyers, Law, and Social Change—Update Year 2010*, 34 N.Y.U. REV. L. & SOC. CHANGE 499, 545–49 (2010) [hereinafter Bachmann, *Lawyers, Law, and Social Change—Update Year 2010*]; Gabel & Harris, *supra* note 9, at 375–79 (1982).

35. Bachmann, *Lawyers, Law, and Social Change*, *supra* note 34, at 4.

36. *See* Gabel & Harris, *supra* note 9, at 375 ("But the great weakness of a rights-oriented legal practice is that it does not address itself to a central precondition for building a sustained political movement—that of overcoming the psychological conditions upon which both the power of the legal system and the power of social hierarchy in general rest.").

37. *Id.*

38. *See* Bachmann, *Lawyers, Law, and Social Change*, *supra* note 34, at 6.

39. Gabel & Harris, *supra* note 9, at 376.

40. Bachmann, *Lawyers, Law, and Social Change—Update Year 2010*, *supra* note 34, at 548–49 (quoting then-Congresswoman Edith Green using the phrase "poverty industry").

concerns about whether the kind of cause relationship created produces good advocacy or social change.

It is a deep irony that the very elite training received by many cause lawyers actually can reinforce some of the forces that produce unidirectional hyper-loyalty. At the same time that a cause lawyer may commit to loyalty as service/subservience out of worry that she needs to keep her elitist legal training in check, that same notion of lawyer loyalty as service is embraced deeply by traditional, elitist legal training.[41] It is as if a peculiar feedback loop is created in which the cause lawyer reflects and worries about her elitist training, chooses a conservative course of behavior in response to that self-reflection, and that conservative course of behavior is then reinforced by the very elitist training the lawyer was trying to avoid.

That odd feedback loop can be seen by looking at Daniel Markovits's recent endorsement of lawyer loyalty as service, crafting it in terms of a lawyer's fidelity to her client.[42] For Markovits, fidelity calls on a lawyer to be "self-effacing" so that the "lawyer becomes able to work continually as a mouthpiece for her client."[43] Further, the purpose of the lawyer's self-effacement is rooted ultimately in goals of political legitimacy and democratic participation.[44] In other words, a lawyer is a faithful mouthpiece for her client as a way of ensuring that the client is able to genuinely and fully participate in the democratic processes of which the adversary legal system is a part.[45] The lawyer breaches that fidelity, and that commitment to the client's full democratic participation, if the lawyer substitutes her own value judgments for those of the client.[46]

The Markovits lawyer is anything but a rebellious lawyer. Markovits valorizes the adversary legal system as the place in which all kinds of disputes, including those related to social justice, are well resolved.[47] For Markovits, the good lawyer focuses her work in the legal

41. A few prominent defenses of lawyer loyalty as service are: Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 101–04 (2003); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 129–33 (President and Fellows of Harvard College 1993); TIM DARE, THE COUNSEL OF ROGUES?: A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE (Ashgate, 2009); DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (Princeton Univ. Press, 2010). For a helpful comparison of the differences between several loyalty as service models, see Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 505–21 (2011). Other defenses of the standard conception of lawyering include Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 Yale L. J. 1545 (1995), and MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (Matthew Bender, 2004).

42. MARKOVITS, *supra* note 41, at 90–99, 171–211.

43. *Id.* at 93.

44. *Id.* at ch. 8.

45. *Id.* at 184–190.

46. *Id.* at 185.

47. *Id.* at 190–99.

system because it is a place in which members of society can receive justice.[48] She is effective only to the extent she shows a kind of loyalty to her client that is unidirectional, and not mutual or reciprocal. The feedback loop is triggered for the well-intentioned, but cautious, rebellious lawyer when she tries to subordinate herself to her client out of worries about being a regnant lawyer, only to have such subordination magnified by traditional conceptions of the role a regnant lawyer ought to play.

Worrying about lawyer domination is the second indirect route to hyper-loyalty. In the second variation, the worry is that cause lawyers will understand their true loyalty to be to the cause, and thus view their clients as one of several pieces of an advocacy strategy to be deployed. As a result, clients become pawns, not empowered individuals.[49] Scholars have listed several negative consequences they believe result from such instrumental cause loyalty. Those include:

- Disempowering client communities, and disabling their potential for political activism and leadership;[50]
- Dismissiveness of clients' true narratives;[51] and
- Presumptuousness about law as an effective tool for social change.[52]

Of course, there also exists a more benign form of hyper-loyalty focused on the cause. It understands there are clients who are as committed to the cause as are the lawyers. The clients affirmatively wish to be agents in a larger strategy for social change, and do not view themselves as being used by the lawyers. In fact, the clients understand themselves to be equally situated with the lawyers and fully push back if they disagree with the way in which the lawyers want to portray or use them as the face of the cause.[53]

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48. Markovits situates the legal adversary system within a larger political system that must be understood as legitimate. *Id.* at 173–76 The adversary system is one part of the practical, applied way in which a democratic government can ensure its political legitimacy. *Id.* at 176–184.

49. *See* Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV. 109, 130 (2009) (summarizing critiques of cause lawyers, including their ascendancy over clients); *see also* Thomas M. Hilbink, *You Know the Type: Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 680–81 (2004) (discussing the lawyer's role in the category of cause lawyer Hilbink labels "elite/vanguard").

50. *See* Ashar, *supra* note 9, at 1918–20; Quigley, *supra* note 9, at 464–66; *see also* Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049, 1055 (1970).

51. *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 27–29 (1990); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L. J. 2107, 2111 (1991).

52. For a thoughtful summary of the debate, see Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights From Theory and Practice*, 36 FORDHAM URB. L.J. 603, 606–07 (2009); *see also* Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 LOY. J. PUB. INT. L. 11, 19 (2003) (discussing how lawyers believed litigation could be used to establish a constitutional right to live).

53. I, and other cause lawyers, have understood that such clients exist and are sought after by cause lawyers. *See generally* Cantrell, supra note 1. *See also* Bellow, *supra* note 4, at 302–04.

Nonetheless, because of the loud volume of the warnings about dominating cause lawyers, a well-intentioned cause lawyer may respond by standing back—either by tempering her own commitment to the cause or by assuming that it is more important to the client to focus on individual client interests if and when those interests should be in tension with larger cause goals. Thus, should the client raise individual interests, the well-intentioned cause lawyer would not try to persuade the client that she should set individual interests aside for cause interests. To do so would be to start down the slippery slope of lawyer domination. As with the first indirect route to hyper-loyalty, the result for such a conscientious cause lawyer is still hyper-loyalty, but a unidirectional, subservient version that runs from the lawyer to the client.[54]

Taking the above descriptions of hyper-loyalty, it is important to next more carefully examine a set of assumptions underlying hyper-loyalty. The following section turns to that inquiry.

C. The Assumptions Underlying Hyper-Loyalty

Whatever the route to hyper-loyalty, one of its key goals is supposed to be to assist cause lawyers and clients *to achieve* social change. Built into that goal are two assumptions. First, that there is a particular kind of relationship between cause lawyer and client that best facilitates and coordinates their shared social change efforts. It is one in which cause lawyers and clients are mutually engaged, with each acknowledging their own and the other's strengths and weaknesses. Second, that the shared relationship between cause lawyer and client excludes the "other side," whatever or whoever that may be at any particular time. In other words, that social change advocacy is most effective when cause lawyers and clients delineate clearly and firmly who is a friend and who is an enemy.

The first assumption about the internal relationship between cause lawyer and client is the one on which scholars and cause lawyers have focused, and from which the ideal of hyper-loyalty was developed.[55] It is not surprising that if one compares descriptions of mutually engaged and reciprocal relationships to those without such features, there is unanimous agreement that participants are more satisfied with mutually engaged relationships.[56] Scholars still fuss around the edges of what constitutes effective mutual engagement. For example, arguing that under-

54. I do want to be clear that cause clients can interrupt both forms of unidirectional, subservient hyper-loyalty. A cause client steeped in the ideal of hyper-loyalty, expecting her lawyer to engage with her in the ways that Gary Bellow has articulated, could call out her cause lawyer's subservient behavior and insist upon a mutual and reciprocal relationship. Note, however, that the cause relationship is still infused with hyper-loyalty, just an ideal form, not an indirect form. The key feature of hyper-loyalty still exists in the relationship—that both cause client and cause lawyer have strong and unyielding notions of "us" and "them."

55. *See supra* note 9 and accompanying text.

56. *Id.*

standing features of particular contexts is critical when a cause lawyer assesses how to remain "client-centered" in her work.[57] Or, that cause lawyers should focus more fully on situating legal work within "movements of resistance," which might, themselves, lead with non-litigation strategies.[58] Or, that cause lawyers have paid insufficient attention to the role of language in building or breaching cause loyalty with a client.[59] Or, finally, that cause lawyers cannot truly establish hyper-loyalty unless their work is also tied to community organizing.[60] None of the fussing, however, suggests any fault with the basic premise that mutual engagement is better than unilateral engagement.

Notice, however, that the strong endorsement of the benefits of a mutually engaged and reciprocal relationship does make problematic the version of hyper-loyalty arising out of a well-intentioned subservience of a cause lawyer to her client. Critically, subservient hyper-loyalty deprives both cause lawyer and client from the benefits of a robust conversation. In social change work, at any given moment reasonable people may disagree about the best strategy going forward. Cause lawyers may disagree with each other, cause clients may disagree with cause lawyers, and cause clients may disagree with each other. Those disagreements arise from many sources—differences in background, differences in training, differences in specialized knowledge, differences in prior experience on a related issue, differences in cognitive biases. Further, at any given moment, different people may have relevant expertise. For one decision-making moment, it may be that the client is the one with specialized knowledge, but in the next decision-making moment, it may be the lawyer. Subservient hyper-loyalty deprives the group of an important source of information and experience. Further, as Gary Bellow forthrightly noted, "Only a conception of clients as much weaker and manipulable . . . dictates a level of subservience that leaves the lawyer without her own vision and stake in the outcomes being pursued."[61]

Turning now to the second assumption about the necessity of identifying friends and foes. Upon critical examination, the assumption's flaws surface. First consider a key feature of social change work. The work requires cause advocates to regularly reassess strategies and to use multiple advocacy methods.[62] In one moment, litigation may lead; in another,

57. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 374 (2006).

58. Ashar, *supra* note 9, at 1879.

59. Ahmad, *supra* note 9, at 1045–46.

60. Quigley, *supra* note 9, at 456.

61. Bellow, *supra* note 4, at 304. For an assertive argument in favor of using strong persuasion with individual clients in a criminal defense setting, see Abbe Smith, *The Lawyer's "Conscience" and the Limits of Persuasion*, 36 HOFSTRA L. REV. 479, 481–81 (2007).

62. *See* Cummings & Rhode, *supra* note 52, at 603; Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 372–73 (2009); Marc L. Karin & Robin R. Runge, *Toward Integrated Law Clinics That Train Social Change Advocates*, 17 CLINICAL L. REV. 563, 568-69 (2011).

legislative lobbying; in another, community organizing. Further, seldom is it the case that only one advocacy method is in play at a time.[63] Most often, cause advocates utilize multiple methods at the same time.[64]

As a result, the "who," that is the "other side," is not static. While litigation may have a technical plaintiff and defendant, cause litigation generally has interested ancillary parties. As litigation develops, ancillary parties may change from being supporters to opponents. Take some of the recent education litigation as an example. In one lawsuit, challenging school conditions in California, filed by the ACLU of Southern California, ancillary supporters included teachers and their union.[65] However, the ACLU of Southern California then alienated teachers and their unions in a related lawsuit it filed challenging the way in which a school district implemented teacher lay-offs.[66]

Similarly, legislative work can result in groups who have had competing interests coming together either to push for or oppose a particular piece of legislation, even though the groups otherwise generally oppose each other's missions. That same dynamic can come into play in community organizing. Thus, as a practical matter, understanding who one's friends and enemies are is a fluid and dynamic process. But, robust notions of loyalty between cause lawyers and clients create conditions that encourage static notions of relationships. That, in turn, reduces the nimbleness necessary for cause lawyers and clients to perceive and pursue opportunities for social change. I more fully describe the problem in the next section.

II. THE HARMS OF HYPER-LOYALTY.

There are two helpful vantage points from which to consider the harms that can flow from cause loyalty. One vantage point relates to theories about decision making and problem solving. That vantage point helps illuminate the ways in which cause lawyers and cause clients may be subject to common decision-making errors because of the way hyper-loyalty frames the decision-making processes. The other vantage point relates to intentional choices available to cause lawyers and cause clients about the ways in which they might helpfully choose to be in relationship

63. There has been a steady and long critique of cause lawyers as too focused on litigation. *See* White, *supra* note 9, at 742. *See generally* LOPEZ, *supra* note 9. For a thoughtful summary of the debate, see generally Cummings & Rhode, *supra* note 52.

64. *See* Gordon, *supra* note 9, at 443–44; Quigley, *supra* note 9 at 466–70; Ashar, *supra* note 9, at 1922, 1924–25; Cantrell, *supra* note 1, at 574–75.

65. For background on the case, the settlement, and the first year's enforcement, see generally BROOKS M. ALLEN, ACLU FOUNDATION FOR S. CAL., THE WILLIAMS V. CALIFORNIA SETTLEMENT: THE FIRST YEAR OF IMPLEMENTATION (2005), http://www.decentschools.org/settlement/WilliamsReportWeb2005.pdf.

66. *See California Litigation*, ACCESS QUALITY EDUCATION, http://www.schoolfunding.info/states/ca/lit_ca.php3 (last visited June 14, 2012) (discussing *Reed v. California*).

with others, but which they forgo because of their commitments to hyper-loyalty. I will take each vantage point in turn.

A. The Role of Cognitive Biases and Loyalty

Starting first with well-known information about cognitive heuristics and bias. As is now well established, a notable feature of the way in which we make decisions is our use of heuristics and biases, or "rules of thumb," to quickly process information.[67] As has also been thoroughly demonstrated, those heuristics and biases can both help and impede accurate decision making.[68] Cause lawyers and cause clients are as prone to cognitive bias as are any other decision makers. However, within the cause lawyering relationship, those biases are triggered in particular ways because the cause lawyer and cause client hold strong notions of loyalty between themselves.

Consider one of the well-known biases: representativeness. The representativeness bias posits that when people are asked to determine how similar one thing is to another, they do so based on their own assessments of resemblance rather than on more accurate probability assessments.[69] For example, if I see a very thin person and an average-weight person both running on a path, I may assume that the thin runner is a long-distance runner and the average-weight person is not. That is because the thin runner resembles marathon runners I have seen during the Olympic Games, whereas the average-weight person does not. My assumption is based on how close the thin runner comes to my own representative image of marathon runners, not based on the mathematical probability that across all thin and average-weight runners it is more likely that thin runners are long-distance runners.[70]

Now consider cause lawyers and clients. Assume a low-income community in which a brownfield is situated. The community members have formed a neighborhood environmental justice group, which is being represented by an environmental justice lawyer. Recently, some yuppies have begun moving into the neighborhood and fixing up properties. The environmental justice group and its lawyer are considering whether to invite the yuppies to join the group.[71] In this case, the environmental

67. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS 19–23 (Yale Univ. Press 2008). The literature on cognitive heuristics and biases is long and rich. My description of the field in this Article necessarily will be short and summary. I will rely on a few sources to situate and support my summary, and readers who are interested in undertaking a more thorough-going investigation of the field are encouraged to review the bibliographies included in my source materials.

68. DANIEL KAHNEMAN, THINKING FAST AND SLOW 10–13 (Farrar, Straus & Giroux 2011).

69. THALER & SUNSTEIN, *supra* note 67, at 26–277, 30–31; *see also* KAHNEMAN, *supra* note 68, at 149–53; PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS 217–19 (Oxford Univ. Press 2010).

70. For other examples, see THALER & SUNSTEIN, *supra* note 67, at 26–31.

71. The beginning of this fact pattern comes from Piomelli, *supra* note 21, at 401–02.

justice lawyer worked with a different neighborhood group the year before and had the experience of a few more-resourced neighbors moving in and co-opting the community group. From the lawyer's perspective, the more-resourced neighbors then derailed the group's advocacy efforts. Through the force of the representativeness bias, the lawyer is certain that the current group of yuppies will have the same negative impact on this second neighborhood group. He sees a resemblance between the two groups, and focuses on that resemblance rather than on a more accurate assessment of the likelihood that the two yuppie groups will behave similarly. The cause lawyer's worries are magnified because of the hyper-loyalty that he feels towards the community group and its cause. His hyper-loyalty makes him focus on his concerns to such an extent that he is rigid in his opposition to the yuppies, even in the face of facts that suggest these yuppies are not like the others.

Further, the lawyer's certainty may not be checked by members of the neighborhood group because of their own sense of hyper-loyalty with the cause lawyer. Assume a mutual and reciprocal relationship between the environmental justice lawyers and members of the neighborhood group so that the lawyer is not carrying the day because he is bullying group members. The conversations between the lawyer and group members about the yuppies are engaged and fully participatory. Nonetheless, group members feel hyper-loyalty to the lawyer and believe in the lawyer's hyper-loyalty to them. That strong sense of loyalty means that they give the benefit of the doubt to the lawyer. If the lawyer feels so strongly about the yuppies, then there must be something there—whether that "there" is based on cognitive bias or not.

Thinking about the above challenge in a slightly expanded form, it is a challenge about the utility of stock stories.[72] Stock stories are the narrative version of the representativeness bias.[73] Based on our lived experiences, we create standardized narratives for what will transpire given a certain set of facts. Gerald Lopez gives the example of the stock story of "hailing a cab in Manhattan." He describes it as follows:

> Walk outside to a street where cabs pass frequently, stand at the edge of the sidewalk, wave to an unoccupied cab coming in your direction, the cab (perhaps swerving radically to get there—it's Manhattan) picks you up, tell the cabbie the destination, cabbie takes you (most likely on an "entertaining" ride and hopefully by the most direct route) there, pay (and tip or be castigated by) cabbie.[74]

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72. *See* Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 4–11 (2005); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3–9 (1984).

73. *See, e.g.*, BREST & KRIEGER, *supra* note 69, at 219–22.

74. Lopez, *supra* note 72, at 6.

Like all other cognitive heuristics, stock stories are both useful and lead to error. For example, in the cab stock story, when one travels to another location and presumes that the same stock story will apply, one might find oneself stranded without a cab. For example, in smaller locations where the stock story for that area is phoning a specific request for a cab.

Thinking through the use of stock stories in lawyering, scholars have noted the risk of a lawyer imposing her own stock stories on the facts rather than taking time to understand fully the perspectives of the client.[75] Notice how that concern interacts with hyper-loyalty to increase the chances that cognitive bias will occur. It is not only lawyers who are subject to stock stories, so are clients. But, a diligent cause lawyer aware of the risk that she may deploy her stock stories in a way that trumps her clients' concerns, might be inclined to dismiss her own stock stories. Then, the diligent and loyal cause lawyer will focus on finding her clients' narrative, and her hyper-loyalty to her clients can cause her to fail to subject the clients' narrative to the same scrutiny as she applied to her own narrative. The result is that the lawyer fails to discover her clients' erroneously-deployed stock story. Thus, the cause lawyer and client each erroneously assess their situation because of the strength of hyper-loyalty.

In writing about lawyer problem-solving, Linda Krieger and Paul Brest have comprehensively catalogued the range of cognitive biases and heuristics that impact lawyers and have noted that de-biasing efforts are "largely ineffectual."[76] As they consider the role of a lawyer as a "cognitive counselor," they worry that client-centered models of lawyering, while very respectful of client autonomy and participation, lead lawyers and clients to fall more easily to cognitive biases.[77] Given the ineffectiveness of other de-biasing techniques, Krieger and Brest hold out the most hope if lawyers fully engage their clients, yet also maintain some distance.[78] Presumably, they would also recommend the corollary to clients as a way for clients to navigate their lawyers' cognitive biases. Translating the Krieger/Brest recommendation into relevant terms for this Article, they would likely be skeptical that hyper-loyalty leads to effective decision-making, and would recommend to cause lawyers and

75. *See id.* at 11–14; *see also* Stephen Ellmann et al., *Narrative Theory and Narrative Practice*, *in* LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 139–42 (Thomson Reuters 2009); Carolyn Grose, *A Persistent Critique: Constructing Clients Stories*, 12 CLINICAL L. REV. 329, 330–332 (2006); Angela Harris, *Bad Subjects: The Practice of Theory and the Constitution of Legal Identity in Legal Culture*, 9 CARDOZO WOMEN'S L.J. 515, 522–23 (2003) (discussing how legal projects "undertaken in the name of equality and respect silence those voices" of subalterns, or socioeconomic outliers); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L. J. 2107, 2110–11, 2118–19 (1991) (discussing the competing narratives of clients and lawyers in poverty law).

76. BREST & KRIEGER, *supra* note 69, at 523–25.

77. *Id.* at 523–33.

78. *Id.* at 526, 533.

clients that they reconsider whether hyper-loyalty helps to create actual social change.[79]

B. Relational Choices of Cause Lawyers and Cause Clients

Now consider the kinds of intentional choices that cause lawyers and cause clients might make about their relationships with others, and whether hyper-loyalty impedes some helpful relationships from forming. This Article considers two possible constellations. The first is a calculated, instrumental choice by the cause lawyer and client to join with one another because of an opportunistic and strategic assessment that such a relationship will move the cause interest forward. Often, the strategic relationship relates to a particular issue or project. The next is a choice about relational advocacy—that the cause lawyer and client pay attention to advocacy choices that are designed to build community more broadly. While the examples are not exhaustive of intentional relational choices, they do represent common choices available to cause lawyers and clients.

Starting with instrumental choices, an easy example is the earlier one of an environmental justice neighborhood group joining with their new yuppie neighbors. The groups are considering the collaboration because of geographic coincidence: the two sets of neighbors now share a location and the location presents a problem. As noted before, cognitive biases may influence whether the groups even will consider collaborating, but they still may make an intentional choice to join together on the particular environmental issue related to their shared living space. Because of any number of perceived differences the groups have about each other, one would expect that group collaboration would develop cautiously and with concerns about whether the other group can truly be trusted.

Under the best circumstances, group members would approach the collaboration with inquisitiveness and openness.[80] Members would approach differences of opinion not as moments of irresolvable conflict, but as opportunities for reflective consideration and expression.[81] Imagining the ultimate ideal, the instrumental collaboration would lay the foundation for an inclusive, long-term relationship, one that might even lead to the dissolution of much of the sense of difference between groups. For example, through learning about each other while working on the environmental justice issue, community members might also discover that their neighborhood lacks an early childhood education pro-

79. I more fully consider what relational loyalty might look like in Part IV.

80. For this description, I am drawing upon the methodology created in the book by DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 25, 43 (Viking 1999). Under their methodology, the key is for discussants to shift focus to a "learning stance," in which each side approaches a conversation curious about the other side's "story." *Id.*

81. *Id.* at 200.

gram (ECEP) within easy commuting distance and that is affordable. The group might discover that some of their members would be interested in developing a home-based ECEP that they would staff and run. The environmental justice lawyer is able to connect the group to a community economic development lawyer who will provide free legal services to get the ECEP up and running, and then connect the group to another *pro bono* lawyer who will provide ongoing advice on maintaining a non-profit.[82] Then, when one of ECEP staffers mentions to a parent that she took an interesting class at the local YMCA on children's nutrition, that prompts the parent to organize a neighborhood kids gardening project, using open spaces between sidewalks and the roadway. The neighborhoods share the produce.[83] Under the best circumstances, the instrumental relationship is only the first node in an ever-expanding web of relationships.

The challenge that hyper-cause loyalty presents to those best circumstances is that it structurally maintains separation between the two groups, thereby reducing the possibility that an expanding web of relationships can occur. The environmental justice lawyer and the community group have already formed a relationship with strong expectations about loyalty, not only loyalty *to* each other but also loyalty together *against* others. Hyper-loyalty serves as a way of protecting the lawyer–client relationship, but it also builds out firm distinctions between insiders and outsiders, friends and enemies. That then means the cause lawyer and cause client can be disinclined to work robustly across lines for fear of being seen as disloyal. As Gary Bellow has noted, "some of the most complex tensions" in cause work come when the cause lawyer or client tries to work with other decision makers or power holders.[84] Further, when the relationship being contemplated by cause lawyer and cause client has a very instrumental purpose, hyper-loyalty can heighten the sense of "otherness" because the starting reason for contemplating an alliance is already very limited. Thus, the groups come into the collaboration having framed it as a one-time, limited engagement with each other. The protective shell created by hyper-loyalty might show itself in a myriad of subtle ways. The cause lawyer interrupting a meeting of the two groups when the conversation strays away from the environmental justice topic by saying, "Let's keep on topic everyone." The neighborhood group and the yuppies each having their own group names with

82. My hypothetical is based in part on a real non-profit based in New Haven, Connecticut, and called All Our Kin, which has received free legal support services, including non-profit advising through Yale Law School's clinical program. *See* ALL OUR KIN, http://www.allourkin.org/index.php (last visited Dec. 19, 2012).

83. This part of the hypothetical is based on the many youth urban garden projects going on across the country. *See, e.g.*, DENVER URBAN GARDENS, http://dug.org/ (last visited Dec. 19, 2012); THE BERKELEY COMMUNITY GARDENING COLLABORATIVE, http://www.ecologycenter.org/bcgc/ (last visited Dec. 19, 2012).

84. Bellow, *supra* note 4, at 304–06.

both being used in public communications instead of creating a shared name. And so on.

Of course, the challenge above is neither immutable nor preordained, as this Article will explore more fully in the next section. Group members and their lawyers assuredly could craft a shared relationship that is inquisitive and open, and that handles conflicts and difficult conversations as opportunities, not threats. My point here is that hyper-loyalty makes that harder, not impossible.

Consider now whether the disinclination to form an expanding web of relationships dissipates if the cause lawyer and cause client are committed to advocacy that includes community building. Examples of that kind of work include legal work in service of union organizing,[85] and legal work in service of organizing of a particular, or in a particular, community.[86] Key to law and organizing[87] is a commitment to the collective as a source of empowerment and power.[88] Thus, at the outset, cause lawyers and cause clients involved in law and organizing understand themselves to be in relationship through a collective, and through connections with others. Because of that commitment to relationship building, one might expect that hyper-loyalty would not hinder as much a cause lawyer or cause client seeing the potential of building relationships in unexpected directions. But, when one surveys descriptions of relationship building in the law and organizing literature, one finds fairly stark descriptions of friends and enemies, or "us" and "the other side." In other words, what counts as "community building" has very strict boundaries; the "us" might be larger, but there definitively is a "them" who should not be trusted.

For example, in a wonderfully detailed and descriptive recounting of law and organizing work with restaurant workers in New York City, Sameer M. Ashar describes workers, organizers, and lawyers ("us") moving forward against restaurant employers, federal courts, highly visible individuals who either owned local restaurants targeted by the workers or were the head of corporate restaurant chains, and local and state government officials ("the other side").[89] However, over the course of

85. *See* Emily Rae Woods, *Ned Burke: Labor Union Lawyer (In House)*, *in* BEYOND THE BIG FIRM 159–66 (Alan B. Morrison & Diane T. Chin, eds., Aspen Publishers 2007) (describing the career path of an in-house union lawyer and his commitment to core union organizing goals).

86. *See* Gordon, *supra* note 9, at 428–30; Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 460–65 (2001); Ashar, *supra* note 9, at 1879–80.

87. I am using this phrase loosely to refer to any kind of cause work in which organizing plays a key role, even though there are often differences in focus, and sometimes tension, between union organizing and other community organizing. *See e.g.*, Gordon, *supra* note 9, at 423–27 (criticizing unions for being focused only on bargaining for better contracts and for collaborating with business); Ashar, *supra* note 9, at 1891–93 (noting the rise of community-organized workers centers in response to the neglect of those workers by traditional unions).

88. *See* Quigley, *supra* note 9, at 455.

89. *See* Ashar, *supra* note 9, at 1889, 1898–99, 1911.

the description of the advocacy campaign, people in one category never move into the other.[90]

Similarly, in another stimulating article about creating a workers' center for immigrant workers in Long Island, the "other side" includes the following descriptions. Existing unions, with whom immigrant workers had mixed results, were described as "do[ing] nothing" for the workers.[91] Employees of federal and state labor-related agencies are described as "often systematically block[ing] claims made by immigrants, effectively preventing these claims from being addressed by the proper authorities . . . allow[ing] them to act as keepers of the gates, turning personal animosity against immigrants into policy."[92] Further, workers who came to the center for help would not receive legal services until they were "willing to fight collectively" and participate in the center's larger organizing campaign, creating the possibility that a worker could turn from insider to outsider if she decided against organizing work.[93] Again, outsiders do not become insiders over the course of the story, and the implied message from the strongly negative descriptions is that outsiders are irredeemable.[94]

Of course, when organizing a community, one reasonably needs to prioritize efforts. Organizing does not happen because of a magic community-building wand; it takes hard, sustained, persevering work. As one organizer describes it, community building includes, "consistent frustration . . . with its petty disputes, confusion, personality problems and the like."[95] It makes sense to figure out which folks can stand together most easily to start and then to move outward from there. It also makes sense to tie closely the use of scarce legal resources to larger goals of community building to ensure that individual work is coordinated with group goals. What hyper-loyalty does to that reasonable process of prioritizing, however, is to make more rigid and impermeable what should be a more fluid sense of who the community is.

For example, when a worker chooses not to participate in organizing, the lens of cause loyalty too quickly views the worker's decision as betrayal. The rationale might go something like this: "The rest of us have come together and have been putting in time and effort to make safer

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90. There is a necessary caveat to my conclusion. I am drawing it from a description that necessarily truncates a much larger, more nuanced, lived history of an advocacy campaign. Any advocacy campaign may very well have included moments of building unexpected relationships that did not make it into the description. I am not trying to create a "cardboard" cut-out of law and organizing, to borrow Kate Kruse's phrase. But, I am trying to highlight how much descriptions of that work refer to features I have identified as belonging to hyper-loyalty.

91. Gordon, *supra* note 9, at 413.

92. *Id.* at 420.

93. *Id.* at 443–44.

94. *See supra* notes 91–93. I add the same caveat to this description that I noted about the organizing campaign for restaurant workers.

95. Quigley, *supra* note 9, at 458 (quoting community organizer Ron Chisom).

workplaces for all of us. If you are not willing to put in the same time and effort as the rest of us, then that must mean you do not support our goals. If you do not support our goals, you stand against us." Hyper-loyalty prefers to understand the world as friends and enemies, thereby diminishing the chance that "friends" will understand the declining worker to have been motivated by a myriad of other possible benign reasons such as fear, or uncertainty about what organizing entails, or exhaustion from a too-long workday. The risk, then, is that the declining worker is left out of further conversations or efforts even though her worries may very well be able to be assuaged, and she could be eventually brought into the organizing work.[96] So, too, the employer labeled an "enemy," remains an enemy, even if further conversation would have revealed productive possibilities for engagement.

If current expressions of hyper-loyalty are too rigid, then what might a more expansive version of loyalty look like, and how would it increase the relationality that this Article has argued is so critical to effective social change work? It is to those questions that the next section turns.

III. RELATIONAL LOYALTY

First, relational loyalty does not mean lessening a lawyer's duty of confidentiality.[97] A cause lawyer and client, or client group, will still share information with each other forthrightly and freely, with clients assured that their communications will not be disclosed to others without their consent. Further, given that what the cause lawyer says to her clients may be as sensitive as what the clients say to the cause lawyer, a careful cause lawyer will take time with her clients to talk through various consequences to the clients and the cause of the clients disclosing the lawyer's communications.[98] The idea of relational loyalty is not to create a less-trusting relationship between cause lawyer and client; it is to create for both lawyer and client a more expansive web of relationships within which to create social change.

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96. Here I want to be careful not to caricature organizing work. I fully acknowledge that a key component of all good organizing training is working through community members' reluctances and worries about organizing. I am not trying to suggest that an organizer could not, or would not, engage with a reluctant worker to try and convince her to join in the organizing efforts. My suggestion is more modest—that hyper-loyalty mutes those efforts.

97. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.6 (2010), ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . .").

98. Recall that Rule 1.6 obligates the lawyer to preserve confidences, but does not place a similar obligation on a client. Similarly, the evidentiary privilege between attorney and client is held by the client, and an unaware client can easily waive the privilege unintentionally. Arthur Best, EVIDENCE 198 (7th ed. 2009) (noting that the attorney-client privilege is waived if a client inadvertently reveals a private communication had with an attorney without acting reasonably to prevent disclosure or taking prompt remedial steps).

A. A Web of Relationships

Actively looking for and creating a web of relationships requires cause lawyers and clients to concentrate more on the situations in which they are working than on the dispositions of the people involved. In other words, cause lawyers and clients must be prepared to examine all others in ways other than constitutively as friends or enemies. Drawing on the work of situationist scholars, the current patterned thinking of cause advocates and clients is to view those who are like-minded as good people, and those who are not as bad people, and to reject the possibility that specific features of the situation are the reason that someone is like-minded or not.[99] As noted earlier, hyper-loyalty exacerbates cognitive biases, like attributions to disposition as opposed to situation. But, actively looking to create an expansive web of relationships pushes cause lawyers and clients to consider the situation as creating behavior.

For example, a cause lawyer and her clients who are looking to change the pace at which local government benefits offices process applications might consider the role played by specific situations faced by department line employees in causing application delays instead of vilifying those line employees as elites who hate poor people. Paying attention to the situation may reveal factors that encourage building a connection with another. Maybe several department line employees share the same interviewing space, which creates pressure to move through applicant interviews quickly and curtly. Understanding the line employees to be connected in the web of relationships could result in efforts to create an expanded workspace, which may then give line employees more time with applicants.[100]

A powerful historical example of this kind of relational advocacy is Martin Luther King, Jr.'s work to build a "beloved community."[101] King repeatedly reminded advocates that maintaining a generalized hostile stance against all non-Black community members would fail to bring about long-term, steadfast social change.[102] As King noted in his *Letter*

99. For a thorough-going introduction to situationism, see generally Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003).

100. Having been a poverty lawyer, I know very well that my example can be pressed. What state agency really has the extra space contemplated by my hypothetical? If an agency had such space, why would it agree to give more over to benefits offices than to other needs? I agree that there are challenges to my hypothetical, but notice how many of the objections start from the presumption that the state's actors could never be believed to behave in a way conducive to anti-poverty work. Those objections start from the same dispositionist presumption that this Article asserts is unhelpful.

101. *See* MARTIN LUTHER KING, JR., *The Power of Nonviolence*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 12 (James M. Washington ed., 1986) [hereafter A TESTAMENT OF HOPE].

102. *See, e.g.*, MARTIN LUTHER KING, JR., *Nonviolence and Racial Justice*, *in* A TESTAMENT OF HOPE, *supra* note 101, at 7 ("A second point is that nonviolent resistance does not seek to defeat or humiliate the opponent, but to win his friendship and understanding."); *id.* at 10 ("In your struggle for justice, let your oppressor know that you are not attempting to defeat or humiliate him, or even to pay him back for injustices that he has heaped upon you. Let him know that you are merely seeking

From a Birmingham Jail, "I am cognizant of the interrelatedness of all communities and states. . . . We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly."[103] King's commitment to a beloved community stemmed from his theological understandings,[104] but it also allowed him to apprehend that greater social change was possible when one understood that people who acted badly in certain situations could still change their behaviors when pressed into other situations.[105] A relational sense of cause loyalty would mean that when a cause lawyer or cause client suggests building an unexpected relationship, she would not be considered disloyal, but would be understood as exploring whether there

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justice for him as well as yourself. Let him know that the festering sore of segregation debilitates the white man as well as the Negro."); *id.* at 14 ("God grant that as men and women all over the world struggle against evil systems they will struggle with love in their hearts, with understanding good will. *Agape* says you must go on with wise restraint and calm reasonableness but you must keep moving. We have a great opportunity in America to build here a great nation, a nation where all men live together as brothers and respect the dignity and worth of all human personality.")

103. *Id.* at 290

104. *See* MARTIN LUTHER KING, JR., THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR., chs. 3–4 (Clayborne Carson ed., 1998) (describing his introduction to nonviolence through Mohandas Gandhi, the influence of Reinhold Niebuhr, and his work with Dr. Edgar Brightman and Dr. L. Harold DeWolf). *See generally* KENNETH L. SMITH & IRA G. ZEPP, JR., SEARCH FOR THE BELOVED COMMUNITY: THE THINKING OF MARTIN LUTHER KING, JR. 11 (Judson Press 1974).

I also want to note here examples of "beloved communities" coming from other religious traditions. For example, Buddhism contains the concept of "dependent arising"—an account of interconnectedness between all things. *See* HUSTON SMITH & PHILIP NOVAK, BUDDHISM: A CONCISE INTRODUCTION 61 (2003). Judaism contains a moral obligation to "deem all of another's concerns as weighty as one's own." LENN E. GOODMAN, LOVE THY NEIGHBOR AS THYSELF 13 (2008). In the Catholic tradition, the Focolare Movement is based on the "spirituality of unity," which calls on a person to be a "gift for the other." Donald W. Mitchell, The Spirituality of Unity: A Gift for Our Times, Remarks at Fordham Law School (April 5, 2011) (manuscript on file with author); *see also* CHIARA LUBICH, ESSENTIAL WRITINGS 3 (Michel Vandeleene ed., 2007) (through the spirituality of unity, people are trying to become "the seeds of a new people that promotes a world of greater solidarity especially with the poorest and weakest, a world more united"); *id.*, at 280–81 (living a "culture of giving . . . could seem difficult, arduous, or heroic, [b]ut it is not, because the human person, made in the image of God who is love, finds fulfillment precisely in loving, in giving"). *See generally* THOMAS MASTERS & AMY UELMEN, FOCOLARE: LIVING A SPIRITUALITY OF UNITY IN THE UNITED STATES (2011) (describing US applications and projects). *See generally*, Deborah J. Cantrell, *What's Love Got to Do with It?: Contemporary Lessons on Lawyerly Advocacy from the Preacher Martin Luther King, Jr.*, 22 ST. THOMAS L. REV. 296 (2010) (discussing across multiple religious traditions the concept of "love of neighbor" and applying it as a lawyerly value).

105. This situationist account of Dr. King comes from Jon Hanson, *Martin Luther King, Jr.'s Situationism*, THE SITUATIONIST BLOG, http://thesituationist.wordpress.com/2008/01/20/1661/ (Jan. 22, 2007). Of course, changed behavior can come either voluntarily or coercively. Coerced social change comes with the worry that the bad behavior has not been eliminated, but redirected into a less obvious, but equally nefarious, channel. *See, e.g.*, Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251 (2011) (giving a detailed historical account of civil rights advocacy strategies that led to disparate impact, including strategic choices about the potential for driving discrimination underground if civil rights agendas were crammed down on employers). It may also be the case that some "bad" behavior is unconscious. *See, e.g.*, Mahzarin R. Banaji, Curtis Hardin & Alexander J. Rothman, *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC'L PSYCH. 272 (1993) (one of the early studies capturing the effects of nonconscious or implicit bias). Dr. Banaji is a leading researcher on implicit bias and is part of a larger group of researchers focused on that topic. *See* PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/backgroundinformation.html (last visited Apr. 8, 2011). I address those concerns in more detail in Section V.

is a moment to expand helpfully the web of relationships needed to create social change.[106]

B. An Approach of Curiosity

A related feature of relational loyalty is that cause lawyers and cause clients would approach other actors/participants with curiosity and not with animosity or with an advocacy agenda to start. This feature comes directly from the negotiation field.[107] As one set of researchers has observed, "[c]hanges in attitudes and behavior rarely come about because of arguments, facts, and attempts to persuade."[108] Instead, starting from a genuine "stance of curiosity" allows each conversant to focus truly on listening to the other side.[109]

For example, curiosity requires participants to inquire about the other's intentions, and not presume them.[110] That can be key in cause work given the propensity to frame a setting as "us" and "them," and the resulting propensity to presume bad intentions on the part of "them."[111] Curiosity also requires participants to be conscious about the ways in which they frame questions so that a question is not a cross-examination or an advocacy statement, but is a genuine inquiry: i.e., asking the agency person, "What would make it easier for a benefits worker to be able to have enough time for an initial interview?" instead of stating, in disguised question form, "You would agree, wouldn't you, that benefits workers must have more time for initial interviews?"[112] Finally, curiosity calls on participants to separate acknowledging points made by the other

106. For an example of unexpected transnational labor collaboration spurred by the adoption of new international law, see generally Tamara Kay, *Legal Transnationalism: The Relationship Between Transnational Social Movement Building and International Law*, 36 L. & SOC'L INQUIRY 419 (2011). I also understand the social change model of building a web of relationships to share as its distant cousin theories of democratic constitutionalism in which change advocates, courts, and legislators are all in relationship to each other in a dynamic contest over norms. *See* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 381–87 (2007); *see also* Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008) (arguing that Supreme Court dissents are an example of "demosprudence," which understands there to be a relationship of dialogue between the "lawmaking power of legal elites and the equally important, though often undervalued, power of social movements or mobilized constituencies to make, interpret, and change law"). Democratic constitutionalism remains a distant cousin to my approach in large part because it implicitly understands membership in any of the groups as impermeable. One is a member of the legal elite *or* a social movement, and one cannot, or does not, cross over.

107. *See* STONE, PATTON & HEEN, *supra* note 80, at 167–83.

108. *Id.* at 137.

109. *Id.* at 166–68; *see generally* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007) (asserting that cultural beliefs are resistant to change and positing that change might be assisted by creating the most robust marketplace of culturally-related positions); Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 3 (2011) (introducing the idea of "relational self-interest" as a way of bridging differences and seeing another's perspective).

110. *See* STONE, PATTON & HEEN, *supra* note 80, at 48–50.

111. *Id.* at 46 ("The conclusions we draw about intentions based on the impact of others' actions on us are rarely charitable.").

112. *See id.* at 172–77 for further examples.

side from agreeing with the other side.[113] Thus, a participant understands that she can acknowledge a challenge presented by the other side without agreeing with the conclusion the other side reaches based on the challenge.

For cause lawyers and clients who understand themselves as engaged in an important advocacy campaign for social change, stepping back from an advocacy stance can be challenging. The point of the work, after all, is to convince others to change. The worry is that taking a stance, other than as an advocate, might easily be misconstrued as giving in, or as signaling weakness. Hyper-loyalty feeds in to the idea that an advocacy stance is the way in which one signals strong solidarity with one's cause client, or one's cause lawyer. Imbuing loyalty with a sense of curiosity towards the other helps to move it towards a way of engaging with others that ultimately permits more effective advocacy.

C. An Approach of Compassion

A final feature of relational loyalty is cultivating compassion. It is certainly consonant with building a web of relationships and approaching others with curiosity. By compassion, I mean a willingness to try actively to understand another's position or conduct without vilifying the position or the person. Further, compassion requires a participant to meet hostility or other negative reactions with a reaction designed to de-escalate—although de-escalation does not mean capitulation.[114]

Compassion does not require agreeing with, or excusing another's position or conduct. A humorous vignette by noted insight meditation expert Sharon Salzberg helps illustrate the point. Salzburg describes a rickshaw trip to the train station in Kolkata (Calcutta) India in which a person tried to assault her from the street. She avoided being pulled from the rickshaw, and when she recounted the event to her teacher, he exclaimed that "with all of the lovingkindness in [her] heart," she should have taken her umbrella "and hit that man over the head with it."[115] As Salzburg goes on to explain, compassion requires one to live with "sympathy for all living beings," which allows a person "to name injustice without hesitation, and to act strongly, *with all the skill at our disposal*."[116] I emphasize the final component because what often constitutes "naming injustice" in social change work is expressing righteous anger—a response that emphasizes divides and differences between people or

113. *Id.* at 180-83.

114. *See* Deborah J. Cantrell, *Can Compassionate Practice Also Be Good Legal Practice?: Answers from the Lives of Buddhist Lawyers*, 12 RUTGERS J. L. & RELIGION 1, 73–74 (2010) (noting the critical role compassion plays for Buddhist lawyers and that a key feature of compassion is understanding, not avoiding conflict or capitulating to demands).

115. SHARON SALZBERG, LOVINGKINDNESS: THE REVOLUTIONARY ART OF HAPPINESS 131 (Shambhala Publications, Inc. 1995).

116. *Id.* at 131–32 (emphasis added).

groups. In contrast, when using the skill of compassionate response, injustice is still identified clearly and forthrightly, but with an eye towards identifying the myriad of conditions on which the particular situation depends so that opportunities for change might be identified.[117]

When compassion is joined with curiosity, participants increase their capacity to comprehensively and accurately map out the full contours of the situation for which a solution must be crafted.[118] That comprehensive map is more likely to illuminate unexpected ways forward than is a map created by participants who only distrust and dislike each other. Of course, the fact of creating a more comprehensive map of the situation does not itself guarantee that participants will find a solution. Creating a comprehensive map comes at the beginning of the process, and there will still be hard work ahead. During that hard work, it is likely that participants will have to rejigger their map many times as the situation develops and changes. Each time, that rejiggering will benefit from compassion, curiosity, and an effort to build out a web of relationships.

IV. IS THIS A RISKY UTOPIAN VISION OF CAUSE LAWYERING?

The foundational principles of this Article insist that social change is more likely to happen, or happens more thoroughly, when advocates work to build a web of relationships, and approach all others with curiosity and compassion. Those engaged in social change work may worry that the risks of failure presented by the approach are too high and the consequences too grave. More particularly, those skeptical of the approach may worry on a few related fronts. First, that the approach places elite cause lawyers in a position in which it is too easy for them to be coopted by the existing legal and political systems. Relatedly, that power dynamics in our society are structured in an intractable way that precludes building true relationships between those with power and those without. Finally, that social change work requires there to be a group that understands itself to have a grievance against others outside the group. Thus, a sense of "otherness" is a necessary precursor to social change work. The Article takes up each of those worries in turn.

Recall the earlier discussion of rebellious lawyering and its concern that predominantly elite cause lawyers are unable to step back and empower their clients to take the lead in developing and implementing an advocacy strategy.[119] If cause lawyers are affirmatively to build a web of

117. *See id.*

118. A training technique built from the combination of curiosity and compassion is "parallel universes." Created by Susan Bryant and Jean Koh Peters, the technique calls on the lawyer to create several parallel universes in which a different reason explains the client's conduct in each universe. In that way, a lawyer is reminded that any given outcome generally has multiple explanations or contexts. *See generally* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

119. *See* discussion *infra* Part I.B.

relationships, the worry is that they will focus on building relationships within the existing legal and political systems. As one activist described it, lawyers:

> [A]re trained to understand and be comfortable with the system even when they criticize it. Almost all lawyers, including community lawyers, want to succeed in the system. They want money, power, political advantage, respect or whatever their individual dreams are. Therefore, confronting the system or raising hell makes the lawyer very uncomfortable because it is not how the lawyer was trained to deal with the system, and the lawyer, without realizing it, is challenged individually because the lawyer is part of the system.[120]

Even benignly, elite cause lawyers who are conscientious about not dominating clients may subtly or unconsciously signal to clients that the best way for the clients to use the lawyer is to work within the system and to leave the lawyer out of those activities designed to challenge the system.[121] Given that the point of building a web of relationships is to accelerate the possibility of change, it is a bad consequence indeed if building the web results instead in the cooptation of social change and the reinforcement of the status quo.[122]

There are several countervailing efforts that cause lawyers and cause clients must bring to bear to avoid cooptation. The first is that both cause lawyers and cause clients must explicitly, intentionally, and mutually commit to the "web of relationships" or "relational loyalty" advocacy approach. There can be no unspoken assumptions between lawyer and client about what each other's motivations are, what assumptions are being made, and upon what predictions are being relied. The work engaged in by lawyer and client goes beyond simple technical efforts to comply or enforce the law, and it requires the lawyer and client to insist that the "moral perspective" of the work is transparently a part of the conversation.[123] Further, cause lawyers and cause clients must understand

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120. Quigley, *supra* note 9, at 459 (quoting community organizer, Ron Chisom).

121. For a succinct and useful historical account of lawyers' dominance within the political system, *see* Robert W. Gordon, *Are Lawyers Friends of Democracy?*, *in* THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 31, 33 (Scott L. Cummings, ed., 2011). To compare with accounts of lawyers and activists using the courtroom as political theater, see Gabel & Harris, supra note 9, at 379–89. The seminal critique of elite cooptation of social movements was issued in FRANCES PIVEN & RICHARD CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 297–300 (1977) (assessing the welfare rights social movement and concluding that grassroots, activist protest work was co-opted by elite lawyers who were most comfortable using a court-based, litigation-focused strategy built on existing legal structures).

122. For an interesting case study of how elites can both help and hinder social movement work, see Douglas NeJaime, *Convincing Elites, Controlling Elites*, 54 STUD. LAW, POL. & SOC'Y 175, 195–196 (2011) (considering elite impact in the U.S. marriage equality campaign).

123. *See* Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 268–270 (2006) (arguing that moral dimensions permeate most work between lawyer and client and that competent lawyering cannot happen without explicitly engaging those moral dimensions); *see also* Kruse, *supra* note 17, at 111 (arguing that current legal norms result in lawyers inappropriately

that they both are capable of robust moral conversations and that disagreement does not mean disloyalty.[124] Just as they are meeting others with curiosity and compassion, so too, must they meet each other.[125] Cause lawyers and cause clients also must commit themselves to self-reflecting on their own actions, both as a way of checking and analyzing one's own behavior and also as a way of trying to build out a set of good habits needed for a web-of-relationship approach to advocacy.[126]

Again, I am not asserting that the approach is effective *and* easy. I am asserting, however, that the challenges that will come up between cause lawyers and cause clients, and between both as to others, are navigable and surmountable. Nonetheless, the approach cannot be pursued successfully if pursued half-heartedly. Then again, social change work, in whatever its variety, has never been easy. So, if cause lawyers and cause clients are going to be working hard no matter, better to work hard using a model that offers more hope for change.

I now turn to the second concern: that the power differential between those in control and those pushing for social change precludes any kind of true mutual relationship. As a result, cause lawyers and cause

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assuming their clients are motivated only by self-interest instead of a broader range of moral commitments).

124. Recall Gary Bellow's warning to cause lawyers not to err by assuming their clients are weak and manipulable, and his description of his own vigorous conversations with clients. Bellow, *supra* note 4, at 297–300, 303–304. As Ascanio Piomelli has described it, "An essential aspect of collaboration is fully engaging with clients and groups: listening, but also challenging; learning, but also teaching; allowing others to reach different conclusions, but sometimes voicing disagreement . . . ." Piomelli, *supra* note 21, at 471.

125. For those concerned about an approach calling for mutual engagement, this is often the moment where the concern is raised about the possibility of a cause lawyer and cause client reaching a complete impasse. The unspoken assumption is that such irresolvable impasses will happen so often, and that the risk to client individual autonomy is so great, that *any* model of mutual engagement between lawyer and client is inappropriate. Note that this concern applies to all lawyer-client relationships, whether the work is social change or private interests. Many scholars, including me, have considered how mutual engagement and client autonomy can work in harmony, and for purposes of this Article, I take that point as already having been well-articulated. *See generally,* Katherine R. Kruse, *supra* note 17; Vischer, *supra* note 123; Cantrell, *supra* note 104.

126. There are many, many ways in which one might practice self-reflection, and I mention only two possible approaches here. One comes from the literature on mindfulness and lawyering, in which techniques such as mindfulness meditation are used to train good habits of attention and awareness. Exemplary of that approach is the work of Len Riskin. *See* Leonard L. Riskin, *Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 NEV. L. J. 289, 314–15 (2010); Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79, 83–85 (2004); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 23–27 (2002). For an example of social change lawyers using mindfulness in their work, see Angela Harris, Margaretta Lin & Jeffrey Selbin, *From the "Art of War" to "Being Peace": Mindfulness and Community Lawyering in a Neoliberal Age*, 95 CAL. L. REV. 2073, 2114–15 (2007). The second approach comes from the literature related to legal clinical pedagogy, in which the role of self-reflection for good student learning has been extensively studied. Some examples include J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55, 60 (1996); ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 127–28 (2007), *available at* http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf (noting that self-directed learning requires that a student not "only learn something, but . . . reflect critically on the extent of her or his learning").

clients must understand those in power as adversaries because to do otherwise risks easy cooptation, or worse. Social movement history in this country provides cautionary examples of power's easy ability to trump agitators—think of any number of examples of violent suppression of labor organizing,[127] or violent uses of force during civil rights boycotts.[128] Further, power also brings with it the power to ignore. If those in power do not acknowledge opposition, then there is a risk that such opposition is not seen as being a part of the contest at all. Thus, if one believes that the risks of cooptation or of being ignored are high, then one might determine that the best strategy for change is to place oneself or one's community in high and visible opposition to the "other." More succinctly, to embark upon a strategy exactly contrary to the approach recommended in this Article. Consider two examples of that strategy—one from the left and another from the right.

First, an example from the left: In March 1987, AIDS activists in New York City came together to form the group, ACT UP. ACT UP staged its first protest on Wall Street on March 24, 1987.[129] The day before the protest, one of ACT UP's original members, Larry Kramer, had an editorial published in the *New York Times* titled "The F.D.A.'s Callous Response to AIDS."[130] In the editorial, Kramer excoriated the FDA for being "intransigent in the face of this monstrous tidal wave of death." He then called out national and local government administrations saying that "when the histories of the Reagan and Koch administrations are truthfully written, this scandal will dwarf the political corruption in New York and the foreign policy blunders in Washington."[131] Kramer's blunt, if not hyperbolic, writing became exemplary of ACT UP's rigorous and confrontational approach to direct action. In an interview for ACT UP's oral history project, Kramer noted that he became known as "the Angriest Gay Man in the World."[132] He also described his efforts to push ACT UP to become "more militant" and to understand itself as "an army," including getting members to take shooting practice.[133]

127. *See generally* PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 323–28 (1st ed. 2010) (detailing labor unrest and response in unionizing development in America).

128. *See, e.g.*, KING, JR., *supra* note 104, at 78–82 (describing responses to the Montgomery, Alabama bus boycott during which Dr. King's house was bombed).

129. ACT UP 1987 Wall Street Action, ACT UP, http://www.actupny.org/documents/1stFlyer.html (last visited Dec. 19, 2012) (recreating the flyer of the first ACT UP action on March 24, 1987 for a "Massive AIDS Demonstration").

130. Larry Kramer, *The F.D.A's Callous Response to AIDS*, N. Y. TIMES, March 23, 1987, at A19.

131. *Id.*

132. Interview by Sarah Schulman with Larry Kramer, ACT UP Oral History Project (Nov. 15, 2003) at 14, *available at* http://www.actuporalhistory.org/interviews/images/kramer.pdf.

133. *Id.* at 16.

Picking up on Kramer's theme of ACT UP standing in clear opposition to the establishment, another early member of ACT UP described the group as follows:

> ACT UP, the organization, does exactly what its name says. We do demonstrations, and act in such a way that the authorities (and in this case we mean government officials, researchers, politicians, the church and the law) feel is inappropriate but ultimately accomplishes our goal by bringing into focus the problems which they are unwilling or afraid to address.[134]

ACT UP demonstrations included chants that highlighted themes like being at war or in a fight. For example, at the group's second anniversary protest in March 1989, protestors chanted, "We'll never be silent again, ACT UP, we'll never be silent again, ACT UP, fight back, fight AIDS . . . ."[135] Similarly, at an October 1988 demonstration outside of the FDA's office in Washington, DC, protestors chanted, "Forty-two thousand dead of AIDS, where was the FDA, seize control, seize control, seize control."[136]

Next, an example from the right: the Thomas More Law Center (TMLC).[137] TMLC focuses its advocacy efforts on supporting school districts in teaching "intelligent design" in science courses instead of evolution.[138] TMLC has portrayed itself as being deeply and inexorably "within a grand narrative of oppression and resistance" to the mainstream political and cultural power structures.[139] Thus, TMLC has crafted a kind of heroic resistance narrative that calls on its members to stand firmly against "the other."

Both ACT UP and TMLC made a similar calculation. First, that a call to a kind of "hyper hyper-loyalty" better mobilizes supporters than does an approach that suggests there are any affinities between a group's supporters and other groups. Second, that this hyper hyper-loyalty is a very effective way to banish the risk of cooptation because it insists that there could never be any common ground, ever, with the other side. Thus, there is no reason to talk with anyone or any group that is not already committed to issues in the same way as the group. For ACT UP, the point was not to negotiate with the FDA for *any* possible change in the approval process for AIDS-related medications, from the smallest to

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134. Jon Greenberg, *ACT UP Explained*, ACT UP, http://www.actupny.org/documents/greenbergAU.html (last visited Dec. 19, 2012).

135. *Detailed Scenes: Fight Back, Fight Aids*, ACT UP, http://www.actupny.org/divatv/synopsis75.html (last visited Dec. 19, 2012) (transcript of video documentary by James Wentzy).

136. *Id.*

137. *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 978–83 (2011) (describing Thomas More Law Center's approach to litigating "intelligent-design" education cases).

138. *Id.* at 978–79.

139. *Id.* at 980 (internal citations omitted).

the most significant. The point was to demand full capitulation by the FDA. In fact, ACT UP splintered when some of its members were perceived as agreeing to negotiate with the FDA and big pharmaceutical companies.[140] Similarly, the point of TMLC is not to accept *any* possible revisions to evolutionary teaching, but to accept only full use of an intelligent design curriculum. Under such a model, change only happens when it is crammed down on the other side, and change is an all or nothing proposition.

In some ways, the purity of the above approach is alluring. It offers up a simple narrative that there is a right way and a wrong way. There are no uncertain margins in which hard cases exist. Thus, there is no reason to be curious about conversing with someone who holds another position. It is better just to be a strong advocate. But the very features of that all-or-nothing approach that makes its group impermeable to cooptation and invisibility, also makes it impermeable to expansion. As described earlier, advocacy is often the least likely way to change a person's mind on an issue. The situation always is perceived as if it were a zero sum game, with winners and losers. Thus, standoffs, not change, are the more likely result.

Contrast the ACT UP/TMLC approach with another example from social movement work that provides a different understanding of power: a dynamic vision in which all actors have power, and power can be used to create space for a new, engaged dialogue and "to expand the sites, means, and agents of persuasion."[141] Concretely, I turn again to Martin Luther King, Jr. King, who insisted on calling out immoral and unconscionable behavior, including calling out the passivity and cooptation of black and white churches.[142] But, he did so adamantly and unrelentingly through the lens of his beloved community, and through his concept of nonviolence as "love in action."[143] King welcomed all into the civil rights movement so long as they trained in, and committed to, love in action.[144] King was steady in his belief that it was through engagement, not disengagement, that all members of a community would come to a commit-

140. *See* Interview by Sarah Schulman with Mark Harrington, ACT UP Oral History Project (March 8, 2003) at 58–59, *available at* http://www.actuporalhistory.org/interviews/images/harrington.pdf.

141. Piomelli, *supra* note 21, at 463.

142. MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM CITY JAIL (1963), *reprinted in* A TESTAMENT OF HOPE, *supra* note 101, at 298–99 ("let me rush on to mention my other disappointment. I have been so greatly disappointed with the white church and its leadership. . . . I felt that the white ministers, priests and rabbis of the South would be some of our strongest allies. Instead, some have been outright opponents, refusing to understand the freedom movement and misrepresenting its leaders . . . .)

143. MARTIN LUTHER KING, JR., *An Experiment in Love*, *reprinted in* A TESTAMENT OF HOPE, *supra* note 101, at 16–20 ("*Agape* is not a weak, passive love. It is love in action. *Agape* is love seeking to preserve and create community. It is insistence on community even when one seeks to break it.").

144. MARTIN LUTHER KING, JR., *Nonviolence: The Only Road to Freedom*, *reprinted in* A A TESTAMENT OF HOPE, *supra* note 101, at 54–61.

ment of equality.[145] Nothing about the approach was easy, nor was the change swift. But, change did come.[146]

A final concern with the approach presented in this Article may be that it defies a fundamental and necessary condition of social change—that there is an identifiable group that has a grievance against another.[147] Social movement theorists have posited that there is no movement until a group constructs an identity for itself that is in opposition to another.[148] That boundary drawing serves important functions of legitimating the group and spurring collective action.[149] The drawing of the boundary between "us" and "them" provides the glue that allows "us" to be effective collective actors. Without that glue, social movement work does not even begin.

In fact, the approach in this Article presumes that some sort of group boundary drawing does happen and has some practical utility. A cause lawyer and cause client must first self-identify as such, and in the process discern as a starting matter who else has the same problem that needs solving. There must be some initial conversations and organizing work that happens in order to build a group that has sufficient energy, resources, and skills to proceed with social change work. The group needs to be sufficiently cohesive so that its members' efforts can be coordinated and so that the group can assess how effective those efforts have been. Relational loyalty between cause lawyer and cause client still requires all of the above to occur; however, it encourages formation to happen in harmony with a set of expectations about how the group is situated more broadly within a web of relationships, and that advocacy efforts will be imbued with curiosity and compassion. Thus, whatever useful notions of "us" and "them" are needed at the beginning of organizing do not become so rigid and hardened to preclude expanding boundaries.

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145. *See* MARTIN LUTHER KING, JR., SHOWDOWN FOR NONVIOLENCE (1968), *reprinted in* A A TESTAMENT OF HOPE, *supra* note 101, at 64–72; MARTIN LUTHER KING, JR., THE ETHICAL DEMANDS FOR INTEGRATION (1963), *reprinted in* A TESTAMENT OF HOPE, *supra* note 101, at 117–25.

146. I do not mean my brief description of Dr. King's work to suggest that the civil rights movement was something other than a complicated and nuanced sociological, psychological, and political drama. My point is not to capture a complete picture of the civil rights movement, but to be clear about how straightforward were Dr. King's first principles, and to suggest that his first principles mattered to outcomes.

147. *See* Melucci, *supra* note 13, at 48 (a collective "makes the basic assumption that its distinction from other actors is constantly acknowledged by them, even in the extreme form of denial); *see also* Jennifer Fredette, *Social Movements and the State's Construction of Identity: The Case of Muslims in France*, 54 STUD. LAW, POL. & SOC'Y 45, 54 (2011) (arguing that there is no real Muslim social movement in France because Muslims currently have no "collective identity," but, instead, "there is great variation and even spirited disagreement" about identity, kinds of grievances, and goals of activism).

148. *See* Melucci, *supra* note 13, at 48.

149. *Id.* at 48–49.

CONCLUSION

Fundamentally, cause lawyers engage in their work to make social change. Scholars of cause lawyering have generated a robust and rich literature considering important issues such as what kinds of advocacy work best to generate social change and what features are critical to an engaged and mutual relationship between cause lawyer and cause client. But the literature has neglected a key aspect of that relationship—whether the particular kind of loyalty that exists between cause lawyer and cause client hinders or helps in achieving social change.

This Article has taken up that inquiry. It has demonstrated that cause lawyers and cause clients expect each other to show a heightened level of fidelity to each other, what I have labeled hyper-loyalty. A critical feature of hyper-loyalty is that cause lawyers and cause clients view the advocacy landscape as consisting only of friends and enemies. Further, because of several dynamics, including the force of cognitive heuristics and biases, and the force of intentional relationship choices, cause lawyers and cause clients maintain strict and rigid classifications between friends and enemies. Thus, cause lawyers and cause clients view any overtures to enemies as exceedingly disloyal behavior. The force and rigidity of hyper-loyalty diminishes the possibilities that cause lawyers and cause clients can create actual social change.

However, this Article provides a way forward by suggesting that hyper-loyalty be replaced by relational loyalty. The Article defines relational loyalty as having three critical features. First, that cause lawyers and cause clients understand the architecture in which they are situated to be a connected web of relationships instead of a dyadic and oppositional structure. Second, that cause lawyers and cause clients approach the web of relationships with curiosity instead of advocacy. Finally, that cause lawyers and cause clients respond with compassion to all contained in the web of relationships. This Article argues that relational loyalty inculcates a helpful dynamism in relationships, which in turn creates unexpected opportunities to craft innovative strategies or pathways to social change.

MARIJUANA AT THE CROSSROADS: KEYNOTE ADDRESS

SAM KAMIN†

INTRODUCTION

I would like to thank the editorial board of the *Denver University Law Review* for all of their hard work in putting this event together and for asking me to give the keynote address. This essay represents a distillation of the speech I gave at that event.[1]

In preparing this keynote, I was contacted by a reporter who would be covering this event wanting to know exactly what I would be saying during my remarks.[2] I told him that giving a keynote address at a conference about medical marijuana is sort of a procrastinator's dream; it is almost impossible to know in advance what you will be talking about because you have no idea what the state of the law will be in two or three days. During one of the conference's sessions one of the participants was leaving the stage and asked the other participants: "Has anyone Googled? Did anything happen while we were on stage?" That really is a pretty accurate encapsulation of the state of medical marijuana law and policy at the moment. This is an area where the state of the law, the facts on the ground, and the actions of law enforcement officials really are changing from day to day. If I had given this same talk a month earlier I might have spoken about a very different set of circumstances.

With that said, my goal in this essay is to provide an overview of where we are with medical marijuana law and policy today. Given how quickly things are changing, taking a step back from the daily details to paint a broad picture of current state of marijuana law and policy is a risky proposition. I then take the further imprudent step of tracing where I see the state of law and policy headed in this ever-changing area.

I. STATE OF THE NATION

When we talk about medical marijuana in the United States today what we have is a pyramid, a hierarchy of federal, state, and local regula-

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1. This essay also builds on my earlier work in this area. *See, e.g.*, Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147 (2012)

2. *See* Michael Roberts, *Marijuana at the Crossroads: Event Asks If MMJ Lawyers Are Breaking oath*, DENVER WESTWORD BLOGS (Jan. 26, 2012, 10:32 AM), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CC0QFjAB&url=http%3A%2F%2Fblogs.westword.com%2Flatestword%2F2012%2F01%2Fmarijuana_at_the_crossroads_event.php&ei=SDyKT4_3D4GO2AWc5by3CQ&usg=AFQjCNF12QFv275b14u_8apjCYL35byLKQ.

tion of marijuana. At the top of that pyramid we have federal law, and the federal law governing marijuana is quite clear. The Controlled Substances Act (CSA) which has been in place since the 1970s prohibits the cultivation, possession, sale, or distribution of marijuana and its derivatives.[3] Although you would not know it from the number of institutions brazenly selling marijuana around Denver, Colorado, and throughout much of the western United States, violation of the federal prohibition continues to carry with it the possibility of significant criminal penalties.[4]

What is more, doctors who are licensed by the Food and Drug Administration cannot prescribe marijuana for their patients, because marijuana is classified under the CSA as a Schedule 1 narcotic. The federal government has concluded, in its wisdom, that marijuana is a drug that has no legitimate medical use, has a high possibility for addiction associated with it, and therefore cannot be prescribed by any doctor who is federally licensed.[5]

At the same time that this clear prohibition exists at the federal level, we are experiencing a period of significant legal flux at the state level. Until relatively recently, marijuana was prohibited not just under the CSA but under the laws of every state in the union as well. Over the last twenty or so years, however, a number of states began lowering the penalties for possession of small amounts of marijuana and a number of local authorities enacted provisions making marijuana offenses their lowest enforcement priority.[6] For the last fifteen years, though, the most significant marijuana law reform in the states has been the passage of measures facilitating the medical use of marijuana. Currently seventeen states plus the District of Columbia have enacted some form of a medical marijuana provision.[7]

The medical marijuana laws of this state are emblematic of the broader trend. Using the initiative process, Colorado voters passed Amendment XX to the state constitution in the year 2000, which provides an affirmative defense to patients and caregivers who are in possession of a small amount of marijuana for medical purposes. Rather than repealing Colorado's laws against the possession and distribution of marijuana, Amendment XX simply states that some Colorado residents are immune from conviction under those laws.

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3. *See* 21 U.S.C. § 811 (2012).
4. 21 U.S.C. § 841(b)(1)(A)(vii) (2012).
5. *See* 21 U.S.C. § 812(b)(1) (2012).
6. *2006 Mid-Term Election Results Offer Mixed Bag for Marijuana Law Reform*, NORML.ORG NEWS RELEASES (Nov. 8, 2006), http://norml.org/news/2006/11/08/2006-mid-term-election-results-offer-mixed-bag-for-marijuana-law-reform.
7. *18 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last updated Apr. 20, 2012).

Thus, the state has permitted (or at least tacitly endorsed) that which the federal government has officially prohibited—the possession of marijuana.[8] This development is both contradictory and unproblematic from a federalism perspective. That is, it is a matter of black letter constitutional law that the federal government cannot commandeer state governments into helping federal officials enforce the CSA's continuing marijuana prohibition.[9] And the federal government, although free to prohibit marijuana under its Commerce Clause power,[10] cannot force the states to prohibit particular conduct that they do not wish to prohibit. Thus, there is nothing inherently illegitimate or inappropriate about the states choosing to decriminalize or even permit conduct that violates federal law.[11]

It is important to remember, however, that the federal courts have held that a state's adoption of medical marijuana provisions is irrelevant in a federal prosecution under the CSA.[12] That is, if a defendant is charged in a federal court with violation of the CSA, it is legally irrelevant that she was growing or distributing marijuana for medicinal reasons; it is a fact that cannot even be mentioned to a jury considering your guilt under that Act. Thus, while the federal government cannot force the people of Colorado to give up their medical marijuana provisions (and cannot force Colorado to help it enforce the CSA), it is equally true that the state cannot insulate its citizens from federal prosecution simply by passing a medical marijuana provision. Thus, to the extent that state medical marijuana laws are designed to protect state citizens from punishment from using marijuana for medical purposes, that goal is rendered almost fully ineffective by continuing federal prohibition. The fact that conduct permitted under state law is prohibited under federal law thus reduces the state provisions to something approaching mere symbolism.

Finally, it is important to remember in this context that marijuana is regulated not just at the state and federal levels, but by towns and municipalities as well. Again, the example of Colorado is illustrative. In our state, medical marijuana distribution can be zoned, including zoned completely out of business, at the city and county level. Local entities cannot prohibit people from using medical marijuana within their borders, but they can certainly choose to prohibit any stores from selling it within those borders. In other states, like California, much of the day-to-day management of medical marijuana is left by the state government to the counties. Unlike the anti-commandeering principle that prohibits the federal government from putting the states to work, California and other

8. It should be noted that Amendment XX does not explicitly permit the sale of marijuana, merely its possession; later regulations have eliminated this odd grey area from the law. *See* COLO. CONST. art. XVIII, § 14(2)(d).

9. *See* New York v. United States, 505 U.S. 144, 145 (1992).

10. Gonzales v. Raich, 545 U.S. 1, 2 (2005).

11. *See, e.g.*, Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VANDERBILT L. REV. 1421, 1446 (2009).

12. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001).

states explicitly require counties, even those that are ambivalent or worse about medical marijuana, to implement state policy.[13]

Thus, what we see nationwide in those states that have adopted some kind of medical marijuana provision is this odd hierarchy of regulation. We see continued prohibition at the federal level, increasing encouragement or permissiveness at the state level, and then a wide amount of discretion left to the municipality in terms of how the law actually operates on the ground. At a time of increased focus on the relative powers of the state and federal governments, it is worth noting that no other activity—not abortion, not healthcare, not handguns, not gay marriage—is treated as disparately by the three levels of government in this country as marijuana is.

II. THE COLORADO EXPERIENCE

A. Amendment XX

In order to give a better sense of how we arrived at this particular moment, it might help to give a little background on developments in Colorado. As we have seen, Amendment XX was passed by voter initiative in the year 2000,[14] and then almost literally nothing of note happened for the next eight years. Some caregivers took advantage of the increased clarity that the law gave them to help patients more openly, but the system was nothing like the one we have in Colorado today where there are two or three dispensaries within a few hundred yards of this university, and there are blocks in some of our business districts that seem to consist of nothing *but* dispensaries.

In fact, for the first eight years of medical marijuana in this state, there were never more than a very small handful of dispensaries doing business within the state. All of this changed when Barack Obama came to prominence and then was elected president in November of 2008. During his campaign Senator Obama hinted, in a guarded way, that marijuana law enforcement would not be a high enforcement priority for his administration. He talked about little old ladies who have cancer and how he did not see how their prosecution could serve any important federal principles.[15]

B. The Wild West

Throughout Colorado and elsewhere people took notice of the fact that we were leaving the Bush administration behind and moving to a new, perhaps more permissive, administration. Following President

13. *See* Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 467–68 (2008).

14. COLO. CONST. art. XVIII, § 14.

15. *See, e.g.*, Wayne Laugesen, *Obama's Medical Marijuana Campaign Promises*, GAZETTE.COM (May 5, 2011, 4:00 PM), http://www.gazette.com/articles/promises-117589-campaign-marijuana.html.

Obama's inauguration and early hints from his administration that marijuana would in fact be a low federal law enforcement priority, there was explosive growth in the number of dispensaries opening their doors in Colorado. We will never really know the extent of this growth because there was no statewide regulation of marijuana at that point; literally nobody was keeping track of how many dispensaries were opening in the state of Colorado. While there were press reports that famously blared that there were more dispensaries than Starbucks in Denver and that there were more than 1,000 stores open state-wide,[16] the truth is that no one knew for sure.

But what we did know, what we did have information on, is how many Coloradans were seeking to register for marijuana patient cards during this time. While there was no state-wide (and almost no local) regulation of dispensaries during this period, there *was* a state registry of marijuana patients kept by the Department of Health since Amendment XX's passage in 2000. When we look at how many applications were filed each month (and the running total of all applications throughout this period) what we see is approximately six years of virtually flat applications—some patients were registering prior to later years of the decade, but the numbers were small and growing slowly. And then, sometime about April of 2009, what you see is an enormous number of people signing up to get marijuana cards in Colorado.

16. Christopher N. Osher, *As Dispensaries Pop Up, Denver May Be Pot Capital, U.S.A.*, DENVER POST (Jan. 21, 2011, 12:41 PM), http://www.denverpost.com/ci_14112792.

The yellow line in this figure looks like the unchecked growth of an organism. And that's exactly what we had in Colorado during this time—there was nothing, except supply and demand, to put any restrictions on who could open a dispensary, where it could be located, how marijuana could be advertised, and so on.

And like any unregulated market—like any market, period—there were good actors and bad. There were dispensary owners interested in making medicine available to those who needed it and there were those out to make a quick buck. There were dispensaries that sold reliably dosed medicine and those who sold whatever green flammable material they could get their hands on. There were stores that were knowledgeable about various cannabis strains and their effects and there were stores using shock value to lure customers, any customers, into their stores.[17]

As a result of abuses—both perceived and real—the unchecked growth depicted above simply could not go on indefinitely. Furthermore, there was significant disagreement regarding whether dispensaries were even permitted under Amendment XX; while that amendment talks about caregivers and patients, it makes no mention of dispensaries. Many looked at the industry that popped up in 2009 and saw a reality that was not envisioned in the amendment passed by voters nine years earlier.

C. Out of the Wilderness and into the Light

It became clear, therefore, that 2010 would bring regulation. What was less clear was exactly what kind of regulation we were going to get. There was a strong push by law enforcement to essentially drive the dispensaries out of business, to go back to what we had pre-2009, where there were small individual caregivers helping two, or five, or ten folks, but we did not see storefronts doing commercial business and serving hundreds if not thousands of patients. Law enforcement made their case and the dispensaries—now organized into trade groups—made theirs. And, somewhat miraculously, the industry won. The marijuana industry—people who were in the business of selling a Schedule 1 substance for profit—prevailed in the state house over law enforcement and drug treatment professionals.

But the victory for the industry was a guarded one. With official endorsement came regulation. The legislature did not merely ratify the status quo; instead it passed a number of regulatory measures and empowered the Department of Revenue to create even more. As a result, Colorado has now developed a marijuana regulatory regime that is unique in the world. For the first time that anyone is able to discern, criteria had to

17. *See, e.g.*, Nick Lucchesi, *Sex Sells Medical Marijuana, Too: Meet the $5 Joint Lady on Federal*, DENVER WESTWORD BLOGS (July 27, 2010, 7:02 AM), http://blogs.westword.com/latestword/2010/07/sex_sells_medical_marijuana_too_meet_the_5_joint_lady_on_federal.php.

be created to determine who was authorized to sell marijuana, how they could do so, what sort of security systems they had to put in place, what records they had to maintain, and so forth.[18] Many in the industry bristled at this regulation, arguing that it would benefit first movers and large entities able to pay the cost of compliance at the expense of the mom and pop entities that had done the hard work of developing the industry throughout its early stages. And there is certainly some truth to this. But the crucial fact that lay at the bottom of the system was this: if an applicant satisfied the criteria the state set forth, she could receive a certificate allowing her to legally sell marijuana in this state.

And that is different than what happens in a state like California where most of the regulation and oversight are done at the county level and are comparatively haphazard and uneven. It is also different than what happens in Amsterdam, or Portugal, or other places overseas that have decriminalized or legalized marijuana or other drugs but where manufacture and sale remain very much a gray area. Here, we have made a conscious decision to eliminate gray areas; we have regulated in the sunshine and have created a transparent set of regulations to deal with the industry that has grown up in our state.[19]

And what do those regulations provide for? Take, for example, the vertical integration requirement which came into the 2010 bill at the very last minute;[20] it surprised a lot of people who were involved in the writing and passage of the bill. It said essentially that if you are in the business of selling marijuana you must grow seventy percent of that marijuana yourself—you cannot simply contract with a grower to purchase what you sell as you might have before 2009; instead, the new legislation required every retailer to become a manufacturer as well. Why did this happen? The legislative history on it is pretty spotty. But I think most people would agree now that the vertical integration requirement was an attempt by lawmakers to give federal law enforcement a very wide berth. The vertical integration requirement was designed to ensure that Colorado did not become a net importer (or exporter) of marijuana. Nothing would be more destructive to the nascent industry that Colorado was trying to regulate (and tax) than for large quantities of California or Mexican marijuana to be discovered en route to voracious Colorado consumers. Colorado lawmakers went out of their way to be sure that the externalities of marijuana cultivation were limited inside the state's borders in an attempt to avoid (or at least postpone) confrontation with federal officials.

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18. COLO. REV. STAT. §§ 12-43.3-402, -701 (2012).

19. It is important to remember that what we have is really two regulatory regimes. We have one in the Department of Revenue regulating dispensaries and one in the Department of Health certifying patients and beginning to formulate rules for testing the validity of what is sold in retail stores.

20. COLO. REV. STAT. § 12-43.3-402(4) (2012).

This is but one example of the scale and intensity of regulation that the medical marijuana industry is subject to in Colorado. Other examples—the seed-to-sale video surveillance of dispensaries, the limits on out-of-state ownership and investment, the criminal background checks—would tell a similar story.[21] Simply put, marijuana is regulated and taxed here in a way that it is not anywhere else. The result is an uneasy status quo that at least appeared to be a model for regulation in other states. Currently in Colorado patients who need marijuana can get it. You may have to get on a government list to get it, and a lot of people are chilled by that prospect. But compared to the way things were for marijuana patients before regulation—and in particular with the way they were before Amendment XX—marijuana patients are far better off. Cancer patients no longer have to meet sketchy characters in the park in the middle of the night to buy god knows what; they no longer have risk arrest or worse to obtain their medicine. Now they can meet a state-regulated entrepreneur in the daylight in an attractive retail shop, enjoy a range of options and engage in conversation with someone knowledgeable about the products and their effects.

III. AN UNEASY STATUS QUO

If things are so much better for marijuana patients today, why do I describe the status quo as uneasy? For one thing, the current situation is not necessarily consistent with medical marijuana as a strong state policy. That is, if the voters of this state care deeply enough about medical marijuana to provide for it in our state constitution, why do we let counties ban it? We would not let them ban abortion clinics, or libraries, or other entities that we have deemed constitutionally sacred; why do we allow them to zone or ban outright marijuana dispensaries?

Furthermore, it is not clear how many medical users are really just recreational users in disguise. There is still a sense among many in the state that medical marijuana is nothing but a wink and a nod, a foot in the door by those interested in full legalization.[22] At one of our panels, the distinction between medical use on the one hand and recreational use on the other was problematized. If a user of marijuana—or of whiskey, Ambien, steak, or Advil says: "I take this because it makes me feel better," is that medicinal use or is that recreation? We all take medicines or other substances because they make us feel better; this is certainly not a problem that is localized, particularized, or even most pronounced with regard to marijuana. Still, outside of the industry, the view persists that medical marijuana is a sham, that doctors are willing to write a recom-

21. *See* 1 COLO. CODE REGS. 212-1:1.205 (2012).

22. *See* Jerrod Menz, *Medical Marijuana Abuse: Youths Are Making a Mockery of Medical Marijuana Laws*, A BETTER TOMORROW (Mar. 29, 2009), http://abttc.net/medical-marijuana-abuse/156.

mendation for anyone who walks through the door and that the majority of patients are college students with "migraines."[23]

But the biggest problem we have with the status quo is the Sword of Damocles hanging over the industry: namely that the production and sale of marijuana remain a serious felony offense under federal law. The volume of marijuana that is grown and sold in Colorado's larger dispensaries is the sort of drug manufacture and distribution that can earn people something tantamount to a lifetime sentence under federal law.[24] And while it is unlikely that any marijuana dispensary owner in compliance with state law is going to federal prison any time soon, the fact remains that medical marijuana is an industry built entirely on conduct that the federal government continues to prohibit.

So on the one hand, things are perfectly sustainable. The industry is regulated, patients can get their medicines, the state gets its tax revenue and counties that object strenuously to the presence of dispensaries can exclude them. Everything is ok except that every sale in every dispensary is a violation of federal law. For those of you who remember the movie *Pulp Fiction*, it's as John Travolta said to Samuel L. Jackson when describing the hash bars in Amsterdam, "[W]ell they're legal but they aren't 100 percent legal." "Not 100 percent legal" is a particularly uncertain base on which to found a multi-million dollar industry.

And it is important to remember in this context that the vanishingly small risk of being sent to a federal penitentiary is not the only—or even the principal—influence that continuing federal prohibition has on the nascent marijuana industry. Given that every marijuana transaction in this industry is a federal crime, it is often hard for those in the industry to convince banks to do business with them. It is hard to get investors to put their money into a business that could be seized at any moment by the federal government. It is hard to get a lease when your landlord can evict you at any time because your business is one that violates federal law. It is hard to form any contractual relationship when any contract involving the sale of marijuana is almost certainly void because it constitutes a violation of federal law.[25] Thus, so much of predictability that we sought to achieve through our regulatory regime is lost because of this strong disagreement between state and federal policy at this point. Continued

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23. The facts paint a more complicated story. While early press reports did show that a small number of doctors were responsible for a disproportionate share of all marijuana recommendations, more recent public data shows that the average age of a registered marijuana patient in Colorado is forty two, *The Colorado Medical Marijuana Registry: Statistics*, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, http://www.cdphe.state.co.us/hs/medicalmarijuana/statistics.html (last updated Feb. 29, 2012).

24. *See* 21 U.S.C. § 841(b)(1)(A)(vii) (2012).

25. See, *$500,000 Marijuana Loan Up in Smoke*, http://abcnews.go.com/Business/500000-medical-marijuana-lawsuit-smoke/story?id=16322793 (reporting that an Arizona judge ruled unenforceable a pair of $250,000 loans made by two Arizona citizens to a Colorado dispensary).

federal prohibition means that no state government has the power to create legal certainty on its own.

Furthermore, patients do not know where they stand either. We heard a heartbreaking story at the conference from a member of the audience who said that she was trying to convince her mother to get a marijuana patient card to help her ease the pain of a broken hip. She told us that her mother was in terrible pain but that she was more afraid of going to prison. And the panel, to a person, said please tell your grandmother that no U.S. Attorney in the country wants to put her in prison, and that is almost certainly right. What it highlights, however, is that would-be patients are aware of the conflict between state and federal law and are chilled by the prospect of federal law enforcement—however remote it may be.

However, patients' concerns, like those of dispensary owners, are not limited to the fear of going to prison. Many are concerned that they will lose their kids, or their public housing, or other government benefits if they test positive for marijuana, or if they are found out as marijuana users. And this fear may be much more realistic. Many jobs do prohibit you from taking a controlled substance, or from violating any state or federal law. The provision of public housing is often premised on an agreement not to use drugs, or not to have them on the premises. A patient shown to use marijuana or to have it in the home might be less likely to be awarded custody in a divorce proceeding. So even patients who are not worried about going to prison have concerns that their other settled expectations will be lost if they use marijuana as medicine.

Furthermore, those providing services to the industry, whether they're doctors, lawyers, bankers or landlords, do not know where they stand either. For example, lawyers have a professional obligation not to knowingly encourage or knowingly assist in the commission of a crime.[26] Obviously, this does not prohibit an attorney from informing her client about the interaction between state and federal law and the existence and substance of Colorado's regulatory regime. Beyond that, though—when we move from informing to advising and assisting—what conduct is permitted and what is prohibited? Can an attorney incorporate a business whose primary—or sole—business is criminal? Can she write an employment contract for an employee whose every act will be criminal? Can she help a businessperson do the compliance work that will result in the issuance of a state license to sell marijuana?

The current contradictory state of the law obviously makes these incredibly difficult questions for a lawyer to answer. On the one hand, if Colorado has chosen to regulate and tax this industry, it seems obvious that those regulated by the state government should be allowed to seek

26. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2011).

legal advice in complying with that regulation. On the other, if every sale by every dispensary is a federal crime, it seems hard to argue that the attorney—by writing a lease, by doing compliance work, by incorporating a business—is *not* knowingly facilitating criminal conduct.

What is more, there is the possibility, however remote, of criminal prosecution for attorneys who have marijuana entrepreneurs as clients. A lawyer who intends to help and in fact does help her client engage in criminal conduct can be charged as an accomplice in that conduct;[27] an attorney who joins an agreement to engage in criminal conduct can be charged with conspiring to commit that conduct.[28] The specter of criminal prosecution is particularly disarming because, while attorneys are regulated at the state level, it is federal prosecutors who could charge an attorney with conspiring with or aiding and abetting her dispensary owner clients. While it might be far-fetched to imagine the same state that enacted medical marijuana provisions punishing attorneys for participating in that industry, it is less fantastical to imagine a federal prosecutor—who has sworn to uphold federal laws including the CSA—going after not only a dispensary, but its bank, its landlord, and its attorney as well.

So the fact that marijuana is legal but not 100 percent legal makes everybody in the industry—patients, practitioners, lawyers, doctors, landlords—uncertain with regard to exactly where they stand. Uncertainty by its very nature breeds instability. So if the status quo can't hold, where can we go from here?

IV. WHAT THE FUTURE HOLDS

As I stated at the outset, merely attempting to describe the state of the marijuana industry at the moment is hard, trying to predict the future in this area borders on the ridiculous. With that said, I see three possible ways forward from here. If we are not going to stay where we are—and, as I have argued, the current legal status of marijuana does not seem like a stable equilibrium—then where are we going? The first possibility is a federal crackdown that would cripple the industry nationwide. The next possibility is continued change in state law leading to an eventual paradigm shift in federal policy. Finally, I propose a third possibility inspired by what is going on in Colorado at the moment.

A. A Slow-Moving Crackdown

There is very good evidence that a slow-moving federal crackdown on the marijuana industry is already underway. We have seen federal enforcement actions in California, Montana, Washington state, and most recently here in Colorado. What has generally happened in these instances is that the United States Attorneys in these states have sent letters to

27. *See* 28 C.J.S. *Drugs and Narcotics* § 333 (2012).
28. *See* 18 U.S.C. § 371 (2012).

currently operating dispensary owners—and to their landlords—saying, essentially, "your operation is in violation of the CSA, you are to cease operations within the next 45 days."[29]

On the one hand, this is merely the federal government flexing its enforcement muscles. But on the other hand, it is a very unusual kind of federal enforcement. Generally speaking, the DEA is not in the practice of sending cease and desist letters to drug dealers; when the federal government has reason to believe that a large volume of drugs are being sold from a particular establishment, it obtains a search warrant and it serves that search warrant on the property, often very dramatically. What we have in the medical marijuana context is letters being sent asking dispensaries to kindly stop violating the Controlled Substances Act. Obviously, that is more than a little unusual. Another thing worthy of note in this context is that the federal government has been sending letters to landlords saying, in essence, "one of your tenants is violating our federal laws, could you ask them to stop or could you evict them, because we would really hate to have to come in and seize your property because of what they are doing."

The specter of civil forfeiture is enormously important in this context because it addresses what the industry considers one of its greatest assets—the inherent resource limits of federal law enforcement. A United States Attorney probably does not have the resources to prosecute each of the hundreds of dispensaries operating throughout this state. But of course, she does not really have to. Civil forfeiture with its streamlined procedures—property can be forfeited, for example, based on a simple showing that it was more probable than not that a crime was being committed—creates an end-run around the difficulties of criminal prosecution. What is more, sending letters to landlords essentially deputizes those individuals, requiring them to remove the offending tenants or face federal wrath.

These crackdowns started happening in 2011 and occurred in California, Washington, and Montana, primarily. During this period, Colorado—the one state with an extensive state regulatory regime—was spared. This led many to think that Colorado offered a model for how to avoid federal ire. Perhaps federal law enforcement officials, noticing the extensive work that Colorado had done to make sure that our dispensaries were neither importing nor exporting marijuana, that the criminal element had been kept out of the industry, that those selling marijuana were regulated and taxed, would choose to focus their attentions elsewhere. In

29. *See, e.g.*, Lisa Leff, *Calif. Pot Dispensaries Told by Feds to Shut Down: U.S. Prosecutors Send Letters Even Though State Law Allows*, MSNBC.COM, http://www.msnbc.msn.com/id/44806723/ns/us_news-crime_and_courts/t/calif-pot-dispensaries-told-feds-shut-down/ (last updated Oct. 6, 2011).

other states, without any sort of comprehensive registration and licensing provisions, federal pressure was necessary to keep the industry in check, some argued. Here, though, we can be trusted to keep an eye on things ourselves, and the feds will simply choose to leave us alone.

This, as I said out the outset, is why it's not wise to write these talks too far in advance. Just after New Year's 2012, twenty-three letters went out to dispensaries in Colorado, informing them that they were operating a medical marijuana dispensary within 1,000 feet of a school and that they had forty-five days to cease and desist or face forfeiture.[30] And the U.S. Attorney for Colorado has intimated that there are more letters coming.[31] He stated that he did not want to wait until all the letters were ready before he sent any out but that everyone in Colorado who was operating a dispensary within 1,000 feet of a school would be getting such a letter before long.

What is interesting about the Colorado letters, though, is what they do not say. The letters do not merely inform dispensary owners that they are in violation of the CSA and order them to close. Rather, federal officials sent letters only to those dispensaries operating within a 1,000 feet of a school because a separate provision of the United States Code provides for increased penalties for drug sales occurring in such proximity to schools.[32] Thus, the feds targeted those committing particularly egregious violations of the CSA, rather than all of those openly violating the CSA. This is the equivalent of telling a bank robber: "It's a crime to rob a bank, but it's a more serious one to do so with a firearm. Could you please stop robbing banks with firearms?"

As disappointed as so many in Colorado were when these enforcement letters went out in early 2012, therefore, I see some hope for optimism in them. The letters, at least so far, have only been sent to a subset of Colorado dispensary owners. While it would be hopeless optimism to conclude that the federal government is tacitly approving of the operation of the rest of the state's dispensaries by not sending them letters as well, there is at least some basis for believing that the federal crackdown here will be a limited one. We will see in the weeks and months ahead whether the rest of the businesses operating under state regulation will be allowed to proceed unmolested.

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30. *See, e.g., Medical Marijuana: Deadline Reached for Colo. Dispensaries Near Schools to Move or Shut Down*, HUFFINGTON POST (Feb. 27, 2012, 10:39 AM), http://www.huffingtonpost.com/2012/02/27/medical-marijuana-deadlin_n_1303712.html.

31. Twenty five more letters, with some minor changes, were in fact sent out in late March. *See* Michael Roberts, *Medical Marijuana: U.S. Attorney May Target Grows with Future Closure Letters*, DENVER WESTWORD BLOGS (Mar. 26, 2012, 11:29 AM). http://blogs.westword.com/latestword/2012/03/medical_marijuana_us_attorney_seizure_letters_25_dispensaries.php.

32. 21 U.S.C. § 860(a) (2012).

Other developments on the federal level are significantly less promising, however. Perhaps most ominous is the Harborside case, an audit of the largest dispensary in California and perhaps the world, in which the IRS invoked a Reagan-era provision stating that drug dealers could not deduct most of their expenses from their taxes.[33] There are not a lot of businesses in this country that can survive if they have to pay taxes on their gross receipts, and there's little reason to believe that the marijuana business is any different. IRS enforcement thus provides another powerful, non-criminal means of squeezing the industry—a federal prosecutor, concerned that she might not be able to obtain a conviction against a dispensary in a medical marijuana state, might see an IRS audit—or the specter of one—as a particularly effective tool in surprising the industry.

Banks, as I mentioned earlier, have been threatened as well. Not as directly as dispensaries, to be sure, but the federal government has raised the threat of money laundering charges against those doing business with marijuana dispensaries.[34] And, as with lawyers' ethical obligations under the model rules, a literal reading of the money laundering statute would seem to prohibit banks from providing services to those knowingly violating the CSA. As a result of these threats, the last bank willing to do business with Colorado dispensaries announced that it was closing its remaining marijuana accounts.[35]

Even the Bureau of Alcohol, Tobacco and Firearms has gotten involved in the federal government's multi-prong attack on the marijuana industry. A perfect storm of political criticism arose earlier this year when the Obama Administration indicated that those persons known to be users of medical marijuana were ineligible to possess firearms under federal law.[36] Montanans were particularly outraged that dispensary owners arrested there had been charged with an enhancement for the use of a firearm in connection with a drug crime; as one irate e-mailer told me after I was quoted in a local paper there: "This is Montana, all of us have guns."

What we see in all of these contexts is the federal government coming down on the marijuana industry in subtle, interconnected, but unmis-

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33. Lisa Leff, *Harborside Health Center, Oakland Pot Shop, Hit with $2.4 Million Tax Bill*, HUFFINGTON POST (Oct. 4, 2011, 8:19 PM), http://www.huffingtonpost.com/2011/10/04/harborside-health-center-tax-bill_n_995139.html.

34. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice (June 29, 2011), *available at* http://safeaccessnow.org/downloads/James_Cole_memo_06_29_2011.pdf ("Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.").

35. *See*, Michael Byars, *Colo. Bank to Close Medical Marijuana Accounts, Leaving Dispensaries Scrambling*, BOULDER DAILY CAMERA (August 23, 2011) http://www.dailycamera.com/boulder-county-news/ci_18743882.

36. *See* John Ingold, *ATF Say Medical-Marijuana Patients Are Prohibited from Owning Guns*, DENVER POST (Oct. 3, 2011, 1:00 AM), http://www.denverpost.com/news/marijuana/ci_19026921.

takable ways. Without a major crackdown, without SWAT teams, without an announced change in official policy, the second half of 2011 and the first half of 2012 have seen the federal government making things much harder on the marijuana industry. And certainly, the federal government has the capacity to make things very difficult indeed. They do not need to arrest everybody to make this industry go away; and as we have seen it is quite possible that they lack the resources to do so if they tried. But what they can do, what they appear to be in the middle of doing, is to make it extremely hard for marijuana businesses to do business.

B. Pressure at the Polls

Another possible way forward is continued pressure at the polls. That is, medical marijuana momentum of the last fifteen or so years—now eighteen states plus the District of Columbia—could become twenty states, twenty-five states, thirty states. At the point where you have thirty states and the majority of the nation's population living in a world where marijuana is legal within the state but illegal nationally, the pressure of those citizens' representatives in Washington to change law would become unavoidable.

Marijuana initiatives are expected to be on the ballot in a number of states this fall and we could see that momentum build before the end of this year. Marijuana advocates in as many as a dozen states will be seeking this fall to get medical marijuana provisions approved.[37] Interestingly, these advocates have focused nearly exclusively on the initiative process rather than the various state houses.[38] Perhaps this is why medical marijuana has so far been largely a western phenomenon; the overlap between states with an initiative and referendum process and states that have approved medical marijuana laws is quite pronounced.[39]

But it is not just medical marijuana that is on the ballot this fall. In California, Washington State, and Colorado, voters will have the option to approve full legalization—marijuana unmoored from the requirement of a doctor's recommendation. Despite the momentum that medical marijuana has developed at the polls nationwide, no state has yet been bold enough to take the federal prohibition head on and repeal its prohibition on possession and sale by adults.

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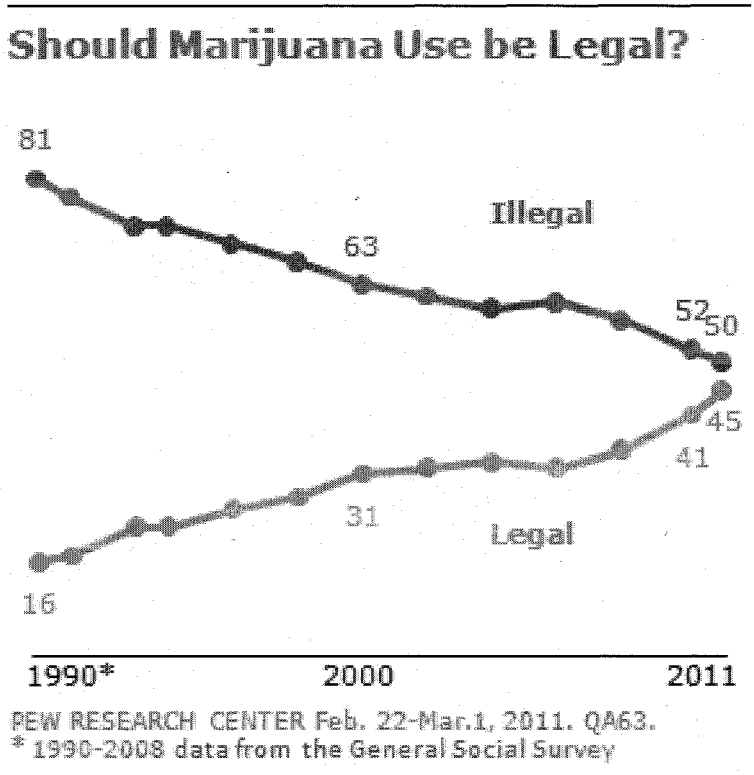
37. *12 States with Pending Legislation to Legalize Medical Marijuana*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481 (last updated May 8, 2012).

38. Two states have explicitly used the initiative process, but eight more have passed medical marijuana through the similar processes of ballots or propositions. *See 18 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, *supra* note 7.

39. *Compare Medical Marijuana States, Marijuana Laws, Medical Marijuana Laws*, MEDICAL MARIJUANA BLOG, http://www.medicalmarijuanablog.com/state-laws (last visited Apr. 15, 2012), *with* State-by-State List of Initiative and Referendum Provisions, INITIATIVE & REFERENDUM INSTITUTE AT THE UNIVERSITY OF SOUTHERN CALIFORNIA, http://www.iandrinstitute.org/statewide_i&r.htm (last visited Apr. 15, 2012).

The closest we have come thus far was Proposition 19 in California in 2010. There, California came within 8 percentage points of passing a full legalization provision.[40] Notably, the federal government came out very strongly against it in the closing days of the campaign. Attorney General Eric Holder, in a public statement, assured the voters of California that full legalization would not be tolerated by federal law enforcement. Again, it is important to remember that neither Attorney General Holder nor President Obama can force the voters of a state to approve a particular measure or to not approve another. By contrast what they can do in the context of marijuana laws is promise to enforce federal law more aggressively if provisions like Proposition 19 are enacted.

How likely is legalization to pass in one of these states in 2012? Figure 2 presents a national poll on whether marijuana should be legal. What is pretty amazing is in that in the twenty-two years since the poll was first taken, the gap in support for medical marijuana has gone from 65 percentage points (81 percent against and 16 percent in favor) to just 5 percentage points (50 percent against and 45 percent in favor). Thus, the overall trend is incredibly encouraging for marijuana supporters.



40. Lisa Leff & Marcus Wohlsen, *Prop 19 Supporters Vow to Push Marijuana Legalization in 2012*, HUFFINGTON POST (Nov. 3, 2010, 8:58 PM), http://www.huffingtonpost.com/2010/11/03/prop-19-results-marijuana_n_778050.html.

Closer to home, we see a similar story. A Public Policy Polling survey[41] (entitled, fabulously enough, "Colorado Favors Gay Marriage, Marijuana Use, Loves Tebow") shows continued strong support for medical marijuana but comparatively weak support for full legalization. While Colorado voters support medical marijuana by 68 percent to 25 percent, support for legalization of marijuana stood at just 49 percent (though only 40% were opposed; the rest were undecided).

Perhaps part of the reason that support for full legalization consistently lags behind support for medical marijuana is that legalization creates interesting tensions in the marijuana community itself. Allen St. Pierre, the head of NORML, which for years has been at the forefront of law reform when it comes to marijuana, said recently that it was time to admit that medical marijuana is a "farce" and to change the focus to outright legalization.[42] As dismissive of medical marijuana as St. Pierre was, there is reason to think that many in the medical marijuana community will be equally unimpressed with the prospect of full legalization. As I discussed above, things are in a pretty decent state for those who view marijuana as medicine. Many of those in the medical marijuana community worry that legalization will create both a public backlash—confirming the worst fears of those who long suspected that medical marijuana was just a gateway to full legalization—and that it will wake the oft-slumbering federal giant.

So, oddly, we see that a federal crackdown is underway at a time when a near-majority of the country supports the legalization of marijuana and large majorities in a number of states are in support of or have enacted medical marijuana provisions. So we see something of a collision course.

C. A Third Way?

A collision course, that is, unless there is a more cooperative way for the state and federal governments to interact with regard to marijuana. I conclude, therefore, on a hopeful note. And this hopefulness derives from what we have seen happen in Colorado. In this state we have moved in just a few years from a Wild West free-for-all, to the most regulated marijuana market anywhere in the world. We've gone from a place where anyone could sell marijuana anywhere without oversight or supervision to a regulatory regime with over seventy pages of meticulous reg-

41. *Colorado Favors Gay Marriage, Marijuana Use, Loves Tebow*, PUBLIC POLICY POLLING (Dec. 9, 2011), http://www.publicpolicypolling.com/main/2011/12/colorado-favors-gay-marriage-marijuana-use-loves-tebow.html.

42. Michael Roberts, *Medical Marijuana v. Recreational Use: NORML Controversy, Colorado Connection*, DENVER WESTWORD BLOGS (Jan. 25, 2012, 12:25 PM), http://blogs.westword.com/latestword/2012/01/medical_marijuana_norml_controversy_colorado.php

ulations.[43] These regulations cover such arcana as Display of License Required–Limited Access Area; Lock Standards in Medical Marijuana Licensed Premises; and, my personal favorite, Specifications for Video Surveillance and Recording of Medical Marijuana Licensed Premises.[44]

Is the Colorado medical marijuana regime perfect? Of course not. There are probably drugs sold by licensed providers to licensed patients that end up being sold to others; some of those others are almost certainly children. There are probably doctors writing prescriptions to patients in the absence of a bona fide doctor-patient relationship. Out-of-state money may be funding Colorado dispensaries; dispensaries may not be reporting all of their income; employees may be taking inventory and selling it on the street. The state has done its best to solve these problems but probably has not eliminated all of the bad actors in the industry or all of the opportunities for them to misbehave. The Colorado system is not perfect. It is just much, much better than any other state has done so far in regulating the medical marijuana industry. Yet, as long as the federal government maintains the CSA as an immutable constant, it doesn't matter how much thought a state puts into its medical marijuana regulation. It is simply rearranging the deck chairs on the Titanic.

Unless. The federal government could come to the conclusion that not all medical marijuana states are created equally. One thing that could follow from that is that Congress could go from making the Controlled Substances Act a rule, to making it a default. That is, Congress could conclude that the CSA applies—that marijuana is a prohibited substance—unless a state is able to convincingly regulate marijuana within its own borders. Congress could say to the states: Can you find a way to keep kids from buying? Can you find a way to make sure it is being sold in-state to people who are authorized to buy it? Can you find a way to make sure that organized crime is kept out of it? That the drugs do not end up on the streets? Can you track marijuana from seed to sale all of these pieces? If you can do those things we will allow you to do so and we will leave you alone. If you can come up with a sufficiently robust state regulatory regime we will allow you to use that regime, rather than us coming in from Washington and enforcing our own.

We have seen similar state-federal cooperation in other contexts. For example, under the Clean Water Act, the Environmental Protection Agency can authorize states to issue discharge permits within their own territories or to leave the issuance of these permits to the EPA itself.[45] In a very different context, the Supreme Court said something similar to the

43. *See Colorado Medical Marijuana Enforcement Division Rules*, COLORADO DEPARTMENT OF REVENUE, http://www.colorado.gov/cs/Satellite/Rev-MMJ/CBON/1251592984795 (follow "Current MMED Rules" hyperlink) (last visited Apr. 15, 2012).

44. *See* 1 COLO. CODE REGS. 212-1:10.105, 212-1:10.300-400 (2012).

45. *See* Clean Water Act, 33 U.S.C. § 1344(a), (g) (2012).

states in *Miranda v. Arizona*[46] with regard to the now famous Miranda warnings; it essentially told the states: "You need not necessarily use these warnings in every case but you must use something at least as effective."[47] In the habeas corpus setting, Congress has told the states that federal courts will apply a one year statute of limitations in federal habeas proceedings, unless the state meets certain criteria for the provision of counsel, in which case a shorter statute of limitations will apply.[48]

All of these are examples of cooperative federalism; of the federal government setting a goal and leaving it to the states to determine the best way to implement that goal. What is more, because the federal government is not requiring anything of the states in any of these examples—a state is free to allow the federal government to issue discharge permits, to use the warnings set forth in *Miranda*, or to choose not to opt-in to the counsel provisions—there is no infringement upon state autonomy. Thus, if the federal government were to determine that its goal was not a blanket ban on marijuana, but rather a regime in which marijuana was regulated, supervised by doctors, and taxed in a way that minimizes its negative externalities on society, a cooperative federalism solution would satisfy both federal concern about the dangers of recreational drugs and an increasing public support for the use of marijuana as medicine.

Now that you have finished reading this, please Google medical marijuana law and policy. You will likely find that what was true when you started reading this essay no longer is.

46. 384 U.S. 436 (1966).

47. *See id.* at 467 ("Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.").

48. *See* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2261 (2012).

MEDICAL MARIJUANA AND THE POLITICAL SAFEGUARDS OF FEDERALISM

ROBERT A. MIKOS†

Medical marijuana has emerged as one of the key federalism battlegrounds of the last two decades. Since 1996, sixteen states have passed new laws legalizing the drug for certain medical purposes.[1] All the while, the federal government has remained committed to zero-tolerance, prohibiting the possession, cultivation, and distribution of marijuana for any purpose.[2] The federal government's uncompromising stance against medical marijuana seemingly exposes the states' vulnerability to the whims of the national political process, and it has inspired calls for the courts to step in and protect state experimentation from this and other instances of arguable congressional over-reaching.[3]

I suggest, however, that the true story of the battle over medical marijuana and its implications for the political safeguards of federalism is more nuanced and less gloomy than the standard account portrays. True, the political safeguards of federalism failed to prevent passage of the federal ban. Indeed, it seems very little consideration was given to states' rights when the ban was passed as part of the Controlled Substances Act (CSA) in 1970. And, ironically, the very forces that originally failed to prevent passage of the ban now preserve it against increasingly loud calls

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1. These states include California (1996); Oregon (1998); Washington (1998); Alaska (1999); Maine (1999); Colorado (2000); Hawaii (2000); Montana (2004); Nevada (2004); Vermont (2004); Rhode Island (2006); New Mexico (2007); Michigan (2008); New Jersey (2010); Arizona (2010); and Delaware (2011). See MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS, 6–8 (2011), *available at* http://www.mpp.org/legislation/state-by-state-medical-marijuana-laws.html.

2. 21 U.S.C. § 841 (2010).

3. I say "arguable" because I do not believe the federal marijuana ban actually constitutes congressional over-reaching, even though many others have espoused that view. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 42–43 (2005) (O'Connor, J., dissenting) (arguing that federal marijuana ban exceeds Congress's Commerce power as applied to the purely local production and consumption of the drug); Brief of the States of Alabama, Louisiana, and Mississippi as Amici Curiae in Support of Respondents at 2–3, Gonzales v. Raich, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 2336486 ("While the amici States may not see eye to eye with some of their neighbors concerning the wisdom of decriminalizing marijuana possession and use in certain instances, they support their neighbors' prerogative in our federalist system to serve as 'laboratories of experimentation.'" (footnote omitted) (quoting United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., Concurring))); Randy E. Barnett, *The Presumption of Liberty and the Public Interest: Medical Marijuana and Fundamental Rights*, 22 WASH. U.J.L. & POL'Y 29, 36–39 (2006) (recounting his advocacy on behalf of patients who challenged federal ban in *Gonzales v. Raich*).

for reform. But since the emergence of the medical marijuana movement in California in the mid-1990s, the political process has worked to undermine the federal ban's impact on medical use of the drug. The reality on the ground today is that the federal ban on marijuana is largely toothless. To be sure, it has bite in individual cases and it clearly shapes the way states regulate medical marijuana. But it hasn't stopped the medical marijuana movement. More than 400,000 people already use the drug pursuant to state medical marijuana programs.[4] Medical marijuana dispensaries have proliferated—at one point, they supposedly outnumbered Starbucks and McDonalds in Los Angeles County.[5] And nearly every year new states jump on the bandwagon and pass medical marijuana laws.[6]

The budding success of the medical marijuana movement offers a number of broader lessons about the power of the states in our federal system. In this symposium contribution, I use the case of medical marijuana to demonstrate that the national political process can protect states' prerogatives, even when Congress passes and the federal courts uphold legislation that arguably over-reaches. I suggest that political forces can help curtail the enforcement of federal laws post-enactment. Though these laws remain on the books, under-enforcement helps to preserve state prerogatives they supposedly supplant. I also briefly consider some shortcomings of these *de facto* constraints on the federal government's law-enforcement power, especially in comparison to formal *de jure* constraints on its lawmaking power.

The paper proceeds as follows. Part I briefly discusses the political safeguards literature and its focus on federal lawmaking. It also explains why medical marijuana poses a challenge to the political safeguards argument. Part II then discusses the political safeguards that exist at the law enforcement stage. It explains how the federal government's limited law enforcement capacity can help to undo at least some of the damage caused by (arguably) over-reaching federal legislation. Part III then identifies the shortcomings of relying exclusively on enforcement constraints to protect federalism. Nevertheless, it suggests that enforcement constraints can help to promote the values of federalism, even if imperfectly.

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4. *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1464 (2009) (estimating participation at 400,000 as of 2009).

5. *See* Roger Parloff, *How Pot Became Legal*, FORTUNE, Sept. 28, 2009, at 156, *available at* http://www.santabarbaraca.gov/NR/rdonlyres/82A61E58-3E97-4D45-864C-7CD80E1D72F1/0/FortuneMagazineArticle92809.pdf (reporting that medical marijuana dispensaries outnumber Starbucks and McDonald's locations combined in L.A. County).

6. *See* MARIJUANA POLICY PROJECT, STATE MEDICAL MARIJUANA LEGISLATION 2012 (2012), *available at* http://www.mpp.org/assets/pdfs/library/MMJBills2012.pdf (cataloguing pending state medical marijuana legislation).

I. POLITICAL SAFEGUARDS AT THE LAW-MAKING STAGE

The standard account of the political safeguards of federalism focuses on how the national lawmaking process helps to block the passage of legislation that threatens the states' constitutional prerogatives.[7] There are several features of the national political process that are supposed to keep Congress at bay. To illustrate the idea, I need only discuss a few.

First, the states have a strong voice and sympathetic ear in Washington. Nearly two-thirds of state governors maintain permanent offices in Washington, DC, through which they can lobby Congress on behalf of their states.[8] State lawmakers and executive officials also engage in coordinated lobbying campaigns, managed by organizations like the National Conference of State Legislatures.[9] What is more, it has been suggested that federal officials are prone to heed the demands of the states' lobbies because many of these officials began their careers in state government. As Larry Kramer explains, "A very high percentage of employees in all three branches of the federal government began their careers working for states. . . . With views shaped by this background and experience, these former state officials remain aware of and sympathetic to the concerns of state institutions—a feeling undoubtedly reinforced by continuing ties to friends and former colleagues still in the state system."[10]

Second, ordinary citizens may be reluctant to expand the federal government's authority vis-à-vis the states. As I have explained elsewhere,

> First, some citizens may fear that congressional action on one issue may lay the groundwork for federalizing related issues-issues on which they would prefer state control. Second, citizens may worry about how laws will be enforced by Executive branch officials in the federal government. . . . Since they trust state governments more than they trust the federal government, and since they generally exert more control over state executive officials (via direct election and re-

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7. The canonical work in the literature is, of course, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For a sampling of the literature inspired at least in part by Wechsler's thesis, see, for example, JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN (2008); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990); Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OH. ST. L.J. 1669 (2007); Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329 (2003).

8. JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 35 (2009).

9. Kramer, *supra* note 7, at 285 n.272.

10. *Id.* at 285.

> calls), citizens may prefer to have state officials administer the laws (and have state courts interpret them), and hence, may oppose congressional legislation that vests enforcement authority in federal officials. Third, citizens also care about government processes, and not just the outcomes of those processes. Some citizens value the opportunity to participate directly in lawmaking that is only available at the state level (via ballot initiatives, etc.) and thus may resist efforts to federalize policy domains that crowd out such opportunities. Moreover, some citizens value federalism itself; that is, they have opinions about which level of government ought to control various policy domains, and these federalism beliefs may temper their support for congressional proposals which, though appealing on the merits, intrude into domains they believe in principle should be controlled by the states instead.[11]

To the extent that members of Congress heed the preferences of their constituents, they might opt not to pursue legislation given what I have called the "[p]opulist [d]istaste for [f]ederalization."[12]

Third, the national law-making process is designed to impede congressional action. Bicameralism, presentment, and the Senate filibuster create several chokepoints at which federal legislation can be blocked.[13] By making it very difficult to enact federal laws, the Constitution "leave[s] the states free to govern" on many important issues.[14]

These features of our polity make the passage of federal legislation very difficult, but not *impossible*. What happens when these safeguards fail to block the passage of over-reaching legislation? This clearly happens. The corpus of federal criminal law alone is replete with examples. Any number of the 3,000 plus federal criminal provisions might seem to encroach upon state prerogatives.[15] (The exact number of violations depends on one's views regarding the proper national role in our federal system.)[16]

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11. Mikos, *supra* note 7, at 1673–74; *see also* Cindy D. Kam & Robert A. Mikos, *Do Citizens Care About Federalism? An Experimental Test*, 4 J. EMPIRICAL LEGAL STUD. 589 (2007) (using survey experiment to demonstrate that citizens' federalism beliefs and their judgments about the comparative trustworthiness of federal and state authorities could temper their support for congressional legislation).

12. Mikos, *supra* note 7 at 1691.

13. Clark, *supra* note 7, at 1339 (arguing that "[m]ultiple veto gates establish, in effect, a supermajority requirement[]" for the passage of federal laws); *see also* Mikos, *supra* note 7, at 1691 (concluding that the states' majoritarian-friendly lawmaking procedures gives them a decided advantage vis-à-vis Congress in satisfying citizens' policy preferences).

14. Clark, *supra* note 7, at 1329.

15. *See, e.g.*, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW (1998).

16. There are at least some federal criminal statutes that are uncontroversial, either because they serve a distinct federal interest—e.g., protecting the President—or because they target a "problem" the states readily acknowledge but are not capable of addressing—e.g., smuggling of narcotics across international borders.

The ban on medical marijuana is one prominent example. The ban obviously made its way through the "gauntlet"[17] that is the federal law-making process. The scheduling of marijuana was but one issue among many in the comprehensive federal drug reforms that were passed by Congress in 1970. Indeed, Congress chose to place marijuana on Schedule I—a categorization reserved for the most dangerous and least redeeming of substances—in spite of the misgivings of some prominent Nixon Administrative officials. In testimony before Congress in 1969, for example, Assistant Secretary of Health and Scientific Affairs Dr. Roger Egeberg recommended that Congress "make a clear legal distinction between marihuana and the hard narcotics, with which it has erroneously been associated in law and the public mind." [18] Despite Egeberg's protestations, however, Congress proceeded to list marijuana on Schedule I, and despite repeated petitions to revisit that decision,[19] marijuana has remained on that list for more than forty years.

For those who believe that Congress has no business regulating marijuana, the political safeguards failed in a very important sense. The political safeguards failed to stop Congress from running roughshod over state prerogatives concerning this important issue. The federal ban that was enacted makes no exceptions, for medical use or otherwise.[20] Even research employing the drug is permitted only sparingly.[21] Anyone who possesses, distributes, or cultivates marijuana pursuant to state law can be criminally prosecuted—among other things—for violating the federal ban.[22] State medical marijuana laws provide no defense against federal enforcement actions.[23]

What is more, as if to throw salt on the wound, the same forces that originally failed to block adoption of the federal marijuana ban now

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17. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEXAS L. REV. 1549, 1609 (2000).

18. Crime in America—Views on Marihuana: Hearings Before the House Select Comm. on Crime, 91st Cong. 7 (Oct. 14, 1969) (statement of Dr. Roger O. Egeberg delivered by Dr. Jesse Steinfeld).

19. *E.g.*, NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING (1972) (recommending de-criminalization of simple possession of marijuana); *see also* Gonzales v. Raich, 545 U.S. 1, 15 n.23 (2005) (recounting history of failed petitions before the DEA to re-schedule marijuana); Letter from Lincoln Chafee, Governor of R.I., & Christine Gregoire, Governor of Wash., to Michele Leonhart, Administrator, Drug Enforcement Administration (Nov. 30, 2011), *available at* http://www.governor.wa.gov/priorities/healthcare/petition/combined_document.pdf (detailing governors' recent petition to reschedule marijuana).

20. 21 U.S.C. § 841 (2010); *see also* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) (holding that the terms of the statute "leave no doubt that [a medical necessity] defense is unavailable" in criminal prosecutions under the CSA).

21. See *Mikos*, *supra* note 4, at 1433–34 (discussing federal government's apparent reluctance to approve research on medical uses for marijuana).

22. For a discussion of the civil sanctions that can be imposed against medical marijuana, see Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 634 (2011).

23. *See* Gonzales v. Raich, 545 U.S. 1, 29 (2005).

work to entrench it. Public opinion polls consistently show that more than 70% of American adults favor legalization of medical marijuana.[24] Yet, given the obstacles to federal lawmaking outlined above, it still seems unthinkable that Congress would act to reschedule marijuana anytime soon—even 70% support may not be enough.

II. THE POLITICAL SAFEGUARDS AT THE LAW ENFORCEMENT STAGE

So, does episodic overreaching by Congress demonstrate that the political safeguards of federalism are a failure? Does it bolster the case for more aggressive judicial review of federalism issues? In the context of medical marijuana, does it make the claim that *Gonzales v. Raich*[25]—a seminal Supreme Court case upholding the federal marijuana ban—was wrongly decided, and that the Court should have barred Congress from regulating some activities regarding marijuana?

Not necessarily. Putting aside debates over the legitimacy of relying exclusively on the political safeguards approach,[26] I suggest that the political safeguards haven't necessarily failed to protect state prerogatives. Even when the federal government passes over-reaching legislation, the political process may nonetheless preserve state prerogatives by curbing enforcement of such legislation.

Most federalism scholars pay too little attention to the important role that enforcement priorities could play in protecting states' rights.[27] From a legal realist perspective, enforcement clearly matters—it arguably "controls the effective meaning of the law."[28] In the extreme, an utter lack of enforcement of a law is tantamount to repeal of that law. Notably,

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24. *See* Mikos, *supra* note 4, at 1462 (discussing polling data).

25. 545 U.S. 1 (2005).

26. For the view that the Constitution requires judicial review of Congress's lawmaking powers, see, for example, Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 20 (1988) ("If the Constitution forbids federal interference with state autonomy, then the courts cannot abandon their duty to enforce that limit simply because the political process appears to provide a tolerable substitute for judicial review."); Saikrishna B. Prakash & John C. Yoo , *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1466–68 (2001); William W. Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1732 (1985).

27. For some noteworthy exceptions, see, for example, Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 899 (2000) ("Overlooked in much of the debate about federalization is the central role that prosecutors play in the federalization of crime—and the important role they can play in controlling federalization."); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 U.C.L.A. L. REV. 757, 759 (1999) (suggesting that "the nature and extent" of Congress's delegation of lawmaking authority to federal prosecutors "cannot be assessed simply by reference to the specificity of substantive lawmaking (or the lack thereof)", but must also consider Congress's "interactions with, and manipulation of, the federal enforcement bureaucracy"); *see also* Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 167 (2012) (examining Colorado's medical marijuana industry and concluding that "the disconnect between the law as written and the conduct on the ground may simply have gotten too great to be tenable going forward").

28. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 700 (2011).

of the 3,000 or so federal criminal laws now on the books,[29] many appear to be rarely (if ever) enforced.[30]

Enforcement of any law requires the ongoing appropriation of fiscal and political capital, both of which are in short supply. The federal government employs about 100,000 law enforcement agents.[31] That's a very large number, but it's still only enough to investigate, prosecute, and punish a tiny fraction of all criminal violations of federal law. And increasing the federal government's capacity to enforce all of its criminal laws vigorously would necessarily require raising taxes, a prospect that is generally disfavored (to put it mildly) by most voters.

Hence, every year, federal lawmakers must decide how to allocate this relatively fixed and finite level of resources across an expansive and growing set of enforcement priorities.[32] Not surprisingly, the squeaky wheel gets the grease in this process. The crisis that sparked federal legislation in some past year commonly fades away and is eclipsed by a new crisis that demands a portion of the enforcement pie. This means that law enforcement priorities may shift over time, even though the content of the law remains largely fixed. The appropriations process gives opponents of federal legislation the opportunity to scuttle it—*de facto*, if not *de jure*—on an almost annual basis. The old laws stay on the books (removing them is too difficult) but they can fade away, just like the crises that inspired them.

A similar process is played out in the Executive Branch. Congress budgets enforcement expenditures into categories,[33] but sometimes

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29. This figure is, at best, an estimate of the total number of federal crimes. *See* Mila Sohoni, *The Idea of "Too Much Law"*, 80 FORDHAM L. REV. 1585, 1603–06 (noting that it is impossible to tabulate precisely the number of federal crimes on the books).

30. *Cf. id.* at 1606–07 ("Federal criminal law enforcement accounts for only about 6 percent of the country's total felony prosecutions each year. A blinkered focus on metrics of numerosity obscures these substantive details, which have obvious relevance to the question whether the quantum of federal criminal law has exceeded the optimal level.").
It is revealing that more than two-thirds of all federal criminal prosecutions in 2011 involved just three broad crime categories: drugs (31%), immigration (28%), and fraud (13%). THOMAS F. HOGAN, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2011 ANNUAL REPORT OF THE DIRECTOR 17–19 (2011), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf. For more detailed data on the number of federal prosecutions by crime, see U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/fjsrc/ (last visited Dec. 18, 2012).

31. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: FEDERAL LAW ENFORCEMENT (last updated Dec. 18, 2012), http://www.bjs.gov/index.cfm?ty=tp&tid=74 (reporting 105,000 federal agents whose primary function is the "prevention, detection, and investigation of crime and the apprehension of alleged offenders").

32. To be sure, Congress cannot necessarily control the level of enforcement resources dedicated to particular crimes—e.g., marijuana distribution, health care fraud, etc. *See* Richman, *supra* note 27, at 798. However, Congress can (and does) achieve a less precise level of control over enforcement by assigning responsibility for particular crime types (e.g., drug offenses) to particular agencies (e.g., the DEA) and then controlling the funding of such agencies. *See id.* at 796–799.

33. For a breakdown of the Department of Justice's fiscal year 2012 budget, see DEPARTMENT OF JUSTICE, FY 2012 BUDGET & PERFORMANCE SUMMARY (2012),

agents have broad discretion in spending the funds they've been allocated. If they disagree with legislation or simply don't consider it a high priority, these agents can effectively scuttle it by refusing to enforce it—openly or *sub silentio*.[34]

I do not suggest that under-enforced laws are entirely irrelevant. Indeed, even un-enforced laws could have some impact on individual behavior, if people feel pressured to obey them due to moral obligations or social norms.[35] But the states' regulatory choices seem more likely to matter when the federal government doesn't enforce its own.

Now, consider how the political forces just discussed have helped to constrain enforcement of the federal ban on medical marijuana, thereby preserving state prerogatives at least to some extent. The federal ban hasn't quashed the medical marijuana movement—far from it. Sixteen states have legalized medical marijuana as a matter of state law, notwithstanding the federal ban.[36] Six of those states have done so after *Gonzales v. Raich* put to rest any serious doubts about Congress's authority to proscribe marijuana.[37] Marijuana use is rampant: "More than 14.4 *million* people regularly use marijuana in the United States. . . ."[38] This includes more than—and perhaps many more than—400,000 medical marijuana users in just sixteen states.[39] Oregon alone has 57,000 registered users.[40] Marijuana dispensaries have proliferated in some medical marijuana states. Before a local ordinance limited their number, as many as 1,000 dispensaries may have been operating in Los Angeles County alone.[41] Ten dispensaries will soon open in the District of Columbia, Congress's own backyard.[42] Unlike most illicit drug dealers, these dispensaries are operating in plain sight—in other words, they're not hiding from the federal government. The Discovery Channel even hosts a documentary series, *Weed Wars*, showcasing people who are unabashed about flouting the ban. And while the federal Executive continues to squeeze medical marijuana distributors, some of its actions suggest the federal ban is now

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http://www.justice.gov/jmd/2012summary/pdf/fy12-bud-summary-request-performance.pdf#bud-sum.

34. For a discussion of how federal prosecutors prioritize their limited enforcement resources, see generally Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221 (2003).

35. *See, e.g.*, TOM TYLER, WHY PEOPLE OBEY LAW (1990).

36. *See* MARIJUANA POLICY PROJECT, *supra* note 1.

37. *Id.*

38. Mikos, *supra* note 4, at 1464 (emphasis added) (citing SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH, fig. 2.1, *available at* http:// www.oas.samhsa.gov/NSDUH/2k7NSDUH/2k7results.cfm#Ch2).

39. *Id.* (estimating number of medical marijuana users in thirteen states as of 2009).

40. OR. HEALTH AUTH., OREGON MEDICAL MARIJUANA PROGRAM STATISTICS, http://public.health.oregon.gov/diseasesconditions/chronicdisease/medicalmarijuanaprogram/pages/data.aspx (reporting enrollment statistics for state medical marijuana registry).

41. *See* Parloff, supra note 5.

42. Tim Craig, *D.C. Council Approves Limits on Medical Marijuana Growth*, WASH. POST (Jan. 17, 2012), http://www.washingtonpost.com/local/dc-politics/dc-council-approves-limits-on-medical-marijuana-growth/2012/01/17/glQAxLNa6P_story.html.

"more of what you'd call a 'guideline' than an actual rule."[43] In Colorado, for example, the United States Attorney recently issued letters to twenty-three marijuana dispensaries, threatening them with civil and criminal penalties, that is, unless they *moved* (all of the dispensaries in question were located near schools). In other words, one United States Attorney is now asking individuals who are openly flouting federal law not to stop doing so altogether, but to do so more discretely.[44]

Why has the federal ban been so ineffectual at stopping the medical marijuana movement? In large part, it is because political realities severely curtail enforcement of it. To enforce a federal ban on medical marijuana *effectively* would entail monumental financial and political costs. It would take a massive commitment of new law enforcement resources to hire more agents, pursue more arrests, launch more prosecutions, and build more prisons just to dent the medical marijuana drug trade. The federal government already spends approximately $2.4 billion per year to combat marijuana.[45] Just imagine how much more it would take to seriously curtail this ubiquitous drug. All of this would require comparable increases in federal taxation—and Congress is reluctant to raise taxes, probably even to curb drugs.

But raising taxes to fund a troop surge in the war against medical marijuana would be especially unpopular. Medical marijuana now has a great deal of public support, apparently even among those who don't use it. As mentioned earlier, over 70% of the population supports legalization of the drug for medical purposes.[46] It stands to reason that most politicians who oppose medical marijuana will incur some political costs in so doing.

In the midst of this enforcement gap, states have been able to pursue modest medical marijuana reforms. People are willing to participate in state medical marijuana programs because the perceived benefits can be quite high and because the legal consequences under federal law are—at least on average—far from dire. States have been able to further weaken the deterrent influence of the federal ban. For one thing, "[b]y legalizing medical use of marijuana . . . state laws may have softened public attitudes towards it. The use of marijuana may seem more efficacious and less dangerous or wicked because it is permitted by state law."[47] In addition, "people may feel relieved of the [moral] obligation to obey the fed-

43. To paraphrase Captain Barbossa in PIRATES OF THE CARIBBEAN: CURSE OF THE BLACK PEARL (Disney 2003).

44. John Ingold, *All Targeted Colorado Marijuana Dispensaries Near Schools Shut Down, Feds Say*, DENBER POST (Feb. 28, 2012), http://www.denverpost.com/news/marijuana/ci_20064569.

45. JEFFREY A. MIRON, THE BUDGETARY IMPLICATIONS OF MARIJUANA PROHIBITION 9–10 (2005), *available at* http://www.cannabis-commerce.com/library/Miron_Report_2005.pdf; *see also* Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223, 230–31 (discussing expenditures on marijuana prohibition).

46. See *supra* note 24 and accompanying text.

47. Mikos, *supra* note 4, at 1472.

eral ban because state law permits marijuana use,"[48] especially "when they deem the state—and not Congress—as having the 'legitimate right to dictate their behavior' regarding marijuana use."[49] Finally, the "passage of . . . state [medical marijuana] laws, many by wide margins, signals that society is more likely to support than to censure medical use of marijuana," thereby removing the threat of social sanctions.[50] In short, by passing their own laws approving of marijuana, "[s]tates have succeeded at removing—or at least diminishing—the biggest obstacles curbing medical use of marijuana: state legal sanctions and the personal, moral, and social disapproval that may once have inhibited use of the drug."[51]

Importantly, the Supreme Court helps to ensure that these forces continue to constrain Congress. In particular, Congress can't sidestep the resource constraints and political gauntlet outlined above by commandeering the states' own lawmaking and law enforcement resources.[52] This is a crucial constraint on Congress, because the states have substantial law enforcement capacity—for example, they now handle 99% of all marijuana cases.[53] Congress can't duck the need to raise taxes—or the potential wrath that would be caused by an even more aggressive campaign against medical marijuana—by ordering state legislatures or state executives to help quash the drug. The anti-commandeering rule enables states to passively resist federal authority. The only thing the states may not do is actively facilitate violations of the federal ban—e.g., by growing the drug themselves or helping others to do so.[54]

III. ARE CONSTRAINTS ON FEDERAL LAW ENFORCEMENT NECESSARILY A GOOD THING?

Are these constraints on federal law enforcement a desirable supplement—or perhaps, even an alternative—to the other safeguards of federalism? In this part, I offer some very tentative thoughts concerning these questions.

First, it is important to note that resource constraints won't always prevent enforcement of over-reaching federal legislation. Marijuana is, in some respects, an unusually tough test for the federal government. The federal ban on the drug is tough to enforce in large part because the drug is so popular and so easy to grow. But other congressional prohibitions are comparatively easy to enforce. This is true, for example, when the

48. *Id.* at 1474.
49. *Id.*
50. *Id.* at 1478.
51. *Id.* at 1479; *see also* Robert A. Mikos, Compliance in Federal Systems (2012) (unpublished manuscript) (on file with author) (presenting empirical evidence that conflict between state and federal laws erodes compliance with restrictive regulations).
52. Printz v. United States, 521 U.S. 898, 935 (1997).
53. *See* Mikos, *supra* note 4, at 1443 n.90.
54. *See id.* at 1445–50, for a detailed explanation of the extent to which the anti-commandeering rule limits Congress's power to preempt state medical marijuana laws.

proscribed behavior is relatively uncommon. The federal Partial Birth Abortion Ban Act, for example, proscribes one abortion procedure that is relatively uncommon (the procedure was performed in about 4,000 cases per year, prior to the ban) and one that can be performed by only a very small cadre of specially-trained physicians.[55] Not surprisingly, it would seem that few people are willing to flout that ban (at least openly), even though thirty-two states apparently permit the procedure outright (pursuant to state law), and all of the rest permit the procedure in at least some cases (e.g., to protect the mental health of a pregnant woman) when federal law does not.[56]

Even when the behavior Congress targets is more commonplace, as with marijuana use, Congress can sometimes fill enforcement gaps by empowering private citizens to help enforce its laws. Federal employment discrimination laws provide a prime example. Congress has empowered the Equal Employment Opportunity Commission (EEOC) to enforce such laws, but the agency faces a daunting task: in 2011, for example, nearly 100,000 individuals brought employment discrimination claims to the agency's attention.[57] The agency, with a total staff of 2,470 and a budget of $367 million, cannot fully investigate and prosecute every such claim.[58] Indeed, it typically files a rather paltry number of suits against employers—only 300 in FY 2011.[59] However, the EEOC's litigation statistics clearly under-state the impact of federal employment law, at least in part because federal law creates a private right of action against employers who discriminate. In other words, aggrieved employees can bring suit directly against their employers (though sometimes, only after they have filed a charge with the EEOC), "thereby lessening the need for [the EEOC] to enforce the law."[60]

Second, even when the federal government cannot enforce its laws vigorously, it can still limit the states' regulatory options in important ways. The CSA, for example, makes it difficult for the states to monitor and control their medical marijuana exemptions. Among other things, it

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55. The prohibition is found in 18 U.S.C. § 1531 (2003). For a discussion of the frequency of the procedure, see *Gonzales v. Carhart*, 550 U.S. 124, 134–35 (2007).

56. For a survey of state laws governing partial birth abortion, see *Bans on "Partial-Birth" Abortion*, GUTTMACHER INSTITUTE (Dec. 1, 2012), *available at* http://www.guttmacher.org/statecenter/spibs/spib_BPBA.pdf.

57. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, CHARGE STATISTICS FY1997 THROUGH FY 2011, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

58. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC BUDGET AND STAFFING HISTORY 1980 TO PRESENT, *available at* http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm.

59. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC LITIGATION STATISTICS, FY 1997 THROUGH FY 2011, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

60. Mikos, *supra* note 4, at 1468 n.169. The number of suits brought by the EEOC (300 in 2011) compromises only a small fraction of the total number of employment and labor law suits filed in federal court (roughly 37,000 in 2002). *See* Ann C. Hodges, *Medication and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 369 n.27 (2004) (citing FEDERAL JUDICIAL CASELOAD STATISTICS tbl C-2 (2002)).

prevents the states from directly cultivating and distributing marijuana,[61] an approach that would undoubtedly enhance their ability to prevent diversion of the drug into the black market and to protect patient health. (Indeed, many states assumed ownership of all liquor stores following the repeal of Prohibition, in order to better control the consumption of alcohol.[62]) And some states have been reluctant to scrutinize individuals' eligibility to use marijuana under state law, out of fear that any information they gather about patients could be seized and exploited by federal law enforcement agents.[63]

Third, the constraints on the federal government's law enforcement power may not protect individual rights adequately, even when they do protect states' rights. With respect to medical marijuana, most people flouting the federal ban will never be caught or punished. That is why I have argued that "the states, and not the federal government, . . . have emerged the victors" in the battle over medical marijuana.[64] But some individuals have been and will continue to be prosecuted under the federal ban. To the extent the federal ban represents a usurpation of state power, these prosecutions will seem unjust in our constitutional system. And even if they are infrequent, the prosecutions may seem all the more arbitrary and unjust due to their infrequency.[65] We're much more comfortable in a world where troubling federal laws can't be enforced, but only the lawmaking safeguards or judicial safeguards could provide that assurance.

Lastly, it is important to recognize the danger that embracing open defiance of federal law could breed contempt for the rule of law itself.[66] The mode of preserving state prerogatives discussed herein hinges on private citizens being willing to defy federal law—the more the better. Some may applaud citizens who openly flout the federal marijuana ban,

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61. Mikos, *supra* note 4, at 1426 (arguing that state distribution and cultivation programs are preempted by the CSA); *see also* Mikos, *supra* note 22, at 662–63 (discussing the ease with which preemption challenges could be raised in state courts).

62. *See* Harry G. Levine & Craig Reinarman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 MILBANK Q. 461, 473–76 (1991) (suggesting that one of the primary means of controlling alcohol once Prohibition was repealed was through state ownership of retail distribution).

63. *See* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?* 161 U. PA. L. REV. 103 (2012).

64. Mikos, *supra* note 4, at 1425.

65. *Cf.* Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 948 (2005) (decrying disproportionate sanctions that arise as a result of federal case selection). There is another reason not everyone will enjoy the benefits of the enforcement safeguards. Namely, some people may feel a moral obligation to obey federal law, even if they know they will never be caught and punished for so doing. These people will only enjoy the benefits of state law if the federal law is repealed or invalidated by a court decision.

66. *See, e.g.*, David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1866 (2005). This is a danger, of course, that the Supreme Court itself has arguably invited, by refusing to impose a duty of fidelity upon the states. For an insightful discussion of competing views of responsibility to the central authority in federal systems, see generally Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731 (2004).

perhaps even hoping their actions will encourage others to do the same. But what happens if such actions also encourage defiance of other federal laws, such as federal school desegregation orders?

In spite of these concerns, the constraints on federal law enforcement power generate some important benefits for our federal system that should not be overlooked. In the gaps created by the under-enforcement of federal law, states have been able to craft new policies that better reflect local preferences regarding the medical use of marijuana. In sixteen different laboratories (far more, if local variations are included), policymakers are demonstrating the wisdom—or folly—of alternative approaches to medicine and drug abuse. The satisfaction derived and lessons learned from these experiments would never have emerged but for the federal government's inability to vigorously enforce its own zero-tolerance solution.

In the view of those who deem that federal policy oppressive, the states are also serving as a valuable check against federal tyranny. To be sure, they cannot shield their citizens from federal sanctions. But by giving medical marijuana use their blessing, the states might further erode support for and the efficacy of federal law. In this way, the states might serve as a modern instantiation of the Framers' vision of the states as checks on federal tyranny.

IV. CONCLUSION

The conflict over medical marijuana policy holds some important insights for the study of federalism more generally. Among other things, the conflict exposes the shortcomings of assessing the federal government's power vis-à-vis the states based on the mere existence of a federal law governing some (ostensibly) state domain. The law as written clearly matters, but how the law is enforced is perhaps a more accurate yardstick of federal power.

The federal government passed a stringent ban on marijuana more than four decades ago. Today, however, the federal government lacks the fiscal and political capital needed to enforce that ban aggressively and to quash the burgeoning medical marijuana movement. For example, the number of prosecutions now being brought under the CSA pales in comparison to the number of violations now occurring. In the gap between the federal ban as written and the federal ban as enforced, a growing number of states have begun to experiment with more tolerant approaches to marijuana policy. As long as the political process continues to underfund enforcement of the federal ban, it will provide some protection for state power.

ON THE MEDICINAL–RECREATIONAL DISTINCTION IN CANNABIS LAW

MARTIN D. CARCIERI†

I. INTRODUCTION

I begin by thanking the editors of the *Denver University Law Review* for inviting me to present my research at their timely symposium "Marijuana at the Crossroads."[1] As a legal scholar, I find it both exhilarating and frustrating to work in an area of law that is undergoing unprecedented yet long overdue and painstakingly slow change. The U.S. War on Drugs, especially the war on cannabis, has long raised serious questions of liberty, equality, justice, efficiency, federalism, and foreign policy. In the constitutional domain alone, this war implicates interests arising under the First, Fourth, Fifth, Sixth, Eighth, Tenth, Fourteenth, Fifteenth, and Twenty-first Amendments.[2] On the occasion of this symposium, I wish to offer a short essay[3] on a single though important aspect of the quickly changing landscape of American law in this area, the distinction between medicinal and recreational uses of cannabis.

To be sure, the line between these uses is often blurred. While some uses of cannabis are essentially medicinal, that is, and others essentially recreational, many uses have strong elements of both. Yet, like the distinction between law and morality,[4] medicinal and recreational uses must be understood as distinct for some practical purposes. In the sixteen states and the District of Columbia where cannabis has been approved for medicinal use,[5] the distinction between medicinal and recreational

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1. January 27, 2012, University of Denver, Sturm College of Law.

2. I have written on some of these issues elsewhere. *See* M.D. Carcieri, *Gonzales v. Raich: An Opening for Rational Drug Law Reform*, 1 TENN. J.L. & POL'Y 307 (2005); M.D. Carcieri, *Gonzales v. Raich: Congressional Tyranny and Irrelevance in the War on Drugs*, 9 U. PENN. J. CONST. L. 1131 (2007) [hereinafter Carcieri, *Gonzales v. Raich*]; M.D. Carcieri, *Rawls and Reparations*, 15 MICH. J. RACE & L. 267 (2010) [hereinafter Carcieri, *Rawls*]; M.D. Carcieri, *Obama, the Fourteenth Amendment, and the Drug War*, 44 AKRON L. REV. 303 (2011) [hereinafter Carcieri, *Obama*]; and M.D. Carcieri, *California's Proposition 19: Selective Prohibition and Equal Basic Liberties*, 46 U.S.F. L. REV. 479 (2012) [hereinafter Carcieri, *California's Proposition 19*].

3. In the spirit of a short essay, and to avoid redundancy, I shall not provide extensive argument on all aspects of the topics I touch upon, and invite the interested reader to see where I have developed them in my previous work.

4. *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 597 (1958).

5. *See, e.g.*, Chris Roberts, *Rolling Paper: Looking at the Current State of Safe Access*, SF WKLY. (July 20, 2011), http://www.sfweekly.com/2011-07-20/culture/medical-marijuana-safe-access-update-chris-roberts/; Dana Mattioli, *High Hopes at Miracle-Gro in Medical Marijuana Field*, WALL STREET J., June 14, 2011, http://online.wsj.com/article/SB10001424052702304665904576383832249741032.html.

use has concrete legal significance. In those states, whether adults caught by police with small amounts of cannabis can avoid arrest and criminal charges will often turn on whether they can produce a physician's authentic note approving use of cannabis for medicinal purposes. Under federal law and the law of other states, by contrast, the distinction between medicinal and recreational use is legally meaningless. All cannabis use is a crime under such laws, although punishment for conviction varies.

Yet what about constitutional law—is the medicinal–recreational distinction significant there? I have two answers. As an *empirical* matter of Supreme Court case law, I submit that the distinction is less significant than one might have assumed. I shall illustrate this by showing how the medicinal–recreational distinction shows up under Commerce Clause and Fourteenth Amendment analysis. As a *normative* matter of how citizens should vote on upcoming state ballot initiatives seeking to replace cannabis prohibition with regimes of regulation and taxation, I submit that the distinction should be no barrier to support for such measures. The bottom line is that since government, for good reasons, does not require that even dangerous, highly addictive drugs like alcohol or tobacco be consumed solely for medicinal purposes, the equal liberty principle at the core of our Constitution forbids it to do so with a less dangerous, less addictive substance like cannabis.

II. THE EMPIRICAL DOMAIN OF U.S. CONSTITUTIONAL LAW

A. Commerce Clause

As of this writing, in consolidated landmark rulings, the Supreme Court has recently upheld the constitutionality of the individual mandate at the heart of the 2010 Patient Protection and Affordable Care Act.[6] Although the majority rejected Congress's authority to impose the mandate under its commerce power, and upheld it only under the taxing power, these cases have kept the Commerce Clause on the front pages of major newspapers for several months. As it happens, the last major decision in this area was *Gonzales v. Raich*.[7] In *Raich*, the Court affirmed Congress's commerce power to enact, and oversee strict enforcement of the federal Controlled Substances Act (CSA),[8] particularly its complete ban on any use of any amount of cannabis for any purpose, even by adults and even in the privacy of their homes.[9]

By the time the Court heard *Raich,* it had developed a two-part rule to test the limits of Congress's commerce power. First, the activity targeted by Congress must be commerce, or at least economic activity. If

6. Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).
7. 545 U.S. 1 (2005).
8. *See id.* at 33.
9. *Id.* at 42.

that initial requirement is satisfied, then Congress may regulate the activity so long as it has a rational basis to conclude that, in the aggregate, the activity exerts a substantial effect on interstate commerce.[10] For our purposes, the key point is that the threshold inquiry is only whether the activity targeted is economic, *regardless of whether such activity is done for a medicinal or recreational purpose.*[11] From a Commerce Clause perspective, then, medicinal and recreational uses are identical insofar as the activity targeted by federal law—consumption of cannabis—is the same regardless of whether it takes place for medicinal or recreational purposes.[12]

B. Fourteenth Amendment

While it has addressed other aspects of cannabis law,[13] the Supreme Court has never specified the standard of review—the level of scrutiny—that laws imposing cannabis prohibition must survive upon challenge under the Fourteenth Amendment. Lower federal and state supreme courts addressing the issue have held that such laws are subject to mere rational basis scrutiny, which they generally survive.[14] On a correct read-

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10. *See* United States v. Lopez, 514 U.S. 549, 557–560 (1995); United States v. Morrison, 529 U.S. 598 (2000).

11. Such a limited inquiry suggests why States under their police power, not Congress under its commerce power, should presumptively be allowed to legislate in this area where the activity in question is not interstate commerce.

12. In his controlling opinion, Justice Stevens concedes that the medicinal–recreational distinction is meaningless from a commerce clause perspective, and that both types of use are on the same side of the boundary between what Congress can and cannot reach under its commerce power. *See Raich,* 545 U.S. at 25–29. I agree with him on these points, but disagree about which side of the line they are both on. Beyond the problems with stretching the word "commerce" of Art. I, § 8, cl. 3 to be synonymous with the broader term "economic," at least some human activity must be non-economic. Otherwise, not only can Congress regulate any activity it wants, which is flatly inconsistent with the commerce clause's grant of power to regulate only that which is commerce, but we are also left with a very impoverished view of society, one in which there is never any distinction, for example, between marital sex and prostitution. In this spirit, the private adult use of cannabis, whether for medicinal or recreational purposes, cannot simply be reduced to economic activity—done either to maximize one's chances of financial gain or to minimize one's chances of financial loss. I submit that it is rather generally done, under either category, simply to feel better.

Justice Stevens relied heavily on the analogy between *Raich* and *Wickard v. Filburn,* 317 U.S. 111 (1942), a New Deal era case in which Congress's power to regulate a farmer's production and consumption of wheat was upheld under the Commerce Clause. Yet not only is *Wickard* inapposite insofar as Congress was in that case truly *regulating* an interstate market with the Agricultural Adjustment Act, while the Controlled Substances Act involved in *Raich* is an attempt to *destroy* an interstate market using federal criminal law, but Justice Stevens cherry picks *Wickard* out of a range of relevant precedents. He ignores the force of later cases like *Lopez* and *Morrison* as well as of earlier landmark cases like *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824). Even so staunch a Federalist as John Marshall saw the need to draw clear lines between what Congress can and cannot reach under the Commerce Clause. I thus agree that while key constitutional words like "commerce" must have some breathing room, they must also have limits. Otherwise, quite simply, a written Constitution is a sham. As Marshall saw and explained in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), this is not an option. *See generally* Carcieri, *Gonzales v. Raich, supra* note 2.

13. Besides *Raich,* see United States v. Oakland Cannabis Buyers' Coop., 582 U.S. 483 (2001), which held that there is no medical necessity exception to the Controlled Substances Act.

14. *See, e.g.*, Raich v. Gonzales, 500 F.3d 850, 866 (9th Cir. 2007); United States v. Fogarty, 692 F.2d 542, 547 (8th Cir. 1982); NORML v. Bell, 488 F. Supp. 123, 134 (D.D.C. 1980); State v. Sunderland, 168 P.3d 526, 539 (Haw. 2007) (Moon, C.J., concurring and dissenting); State v.

ing of the Court's leading, relevant Fourteenth Amendment case law, however, I have argued that such laws are properly subject to strict scrutiny.[15] I have justified this partly on grounds that the racist origins and racially disparate impact of cannabis prohibition establishes a suspect classification,[16] but primarily because laws imposing cannabis prohibition burden the fundamental right of bodily autonomy (i.e., presumptive control over the boundaries and contents of our bodies).[17]

Strict scrutiny, of course, is an ends–means analysis. The medicinal–recreational distinction might thus be relevant as government tries to show that the ends and means of cannabis prohibition are constitutionally adequate. Yet the key point for our purposes is that before ends and means can be assessed, the applicable *level* of ends–means scrutiny must be established, and at this crucial, threshold stage of inquiry, the distinction is irrelevant. Whether cannabis is used medicinally or recreationally, that is, cannabis prohibition burdens the fundamental right to control the contents and boundaries of one's body, triggering strict scrutiny on that account.

The United States government might be able to provide reasons for prohibition of private adult cannabis use that would survive the rigor of strict scrutiny. However, judging from the longstanding quality of propaganda on the Drug Enforcement Administration and Office of National Drug Control Policy websites, this seems doubtful. Indeed, it is not clear that such prohibition can even pass rational basis scrutiny. Thus, beyond Congress's dubious commerce authority to make private adult cannabis use a federal crime, even state cannabis prohibition, with the legitimacy flowing from the police power, is on weak ground under a faithful reading of Fourteenth Amendment case law. My point, however, is that the medicinal–recreational use distinction is irrelevant to the crucial, threshold Fourteenth Amendment question of the applicable level of scrutiny.

III. THE NORMATIVE DOMAIN OF FUTURE STATE BALLOT INITIATIVES

Yet there is more. As interesting as the U.S. constitutional law of cannabis may be, the Supreme Court is not where the action is on reform in this area. Indeed, the action is not even in the federal government, as Congress has long been intransigent on this issue,[18] and the Obama Ad-

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Maalan, 950 P.2d 178, 183–184 (Haw. 1998); Seeley v. State, 940 P.2d 604, 612 (Wash. 1997); State v. Smith, 610 P.2d 869, 874 (Wash. 1980).

15. *See generally* Carcieri, *Obama*, *supra* note 2. Laws banning heroin, cocaine, and methamphetamine might pass strict scrutiny. My point is that, on a correct reading of the case law, strict scrutiny would apply to them, too.

16. See Carcieri, *Obama*, *supra* note 2, at 324–326, since those pages in my Akron article present my (brief) case that cannabis prohibition embodies a suspect classification for Fourteenth Amendment purposes.

17. *See id.* at 311–323.

18. Congress has, for example, long refused even to instruct the DEA not to harass sick patients in states with medical cannabis laws. *See, e.g.*, *Hinchey Encouraged by Record House Support*

ministration, in full re-election mode, has recently increased harassment of cannabis dispensaries in California and Colorado.[19] Fortunately, we are not doomed to wait for any of the three branches of the national government to be the catalyst for rational reform in this area. In 2012, cannabis law-reform momentum is with the States, where voters on upcoming measures seeking to replace cannabis prohibition with regimes of taxation and regulation[20] are not bound by the technical rules of ends–means analysis under the Fourteenth Amendment.

Turning to the normative question, regardless of whether government could satisfy strict scrutiny of cannabis in court, this should still not matter for voters contemplating upcoming revisions of California's Proposition 19.[21] The reason is that where the law, for reasons well and widely understood,[22] merely regulates the consumption of dangerous drugs like alcohol and tobacco, the prohibition of less dangerous substances like cannabis violates the core principle of constitutional democracy on which we all depend, the principle of equal basic liberties.[23] In a free society, where the law creates a presumption of liberty, each person has a vital interest in not having his liberty denied while others are allowed an equal or more harmful liberty. Civil liberty is thus fused with equality, yielding the equal liberty principle. A core command of this principle, embodied in the Rawlsian idea of "justice as regularity,"[24] is that "similar cases be treated similarly. Men could not regulate their actions by means of rules if this precept were not followed."[25]

In this light, as well as the insignificance of the medicinal–recreational distinction under U.S. constitutional law, I submit that this

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for Medical Marijuana; Vows to Keep Fighting for Amendment, STATES NEWS SERVICE, July 25, 2007.

19. *See* Henry K. Lee, *Judge Won't Block Federal Crackdown on Medical Pot*, SAN FRANCISCO CHRONICLE, Dec. 1, 2011, http://www.sfgate.com/bayarea/article/Judge-won-t-halt-federal-medical-pot-crackdown-2339891.php; Felisa Cardona, *25 Colorado Medical Marijuana Dispensaries Told to Move Away from Schools or Close*, DENVER POST, Mar. 23, 2012, http://www.denverpost.com/breakingnews/ci_20240930/25-dispensaries-told-move-away-from-schools-or.

20. Notwithstanding misleading opinion/editorial commentary in top California newspapers, Proposition 19 received 46% of the vote in 2010. *See generally* Carcieri, *California's Proposition 19*, *supra* note 2. At this writing, revisions of Proposition 19 have qualified for placement on the 2012 ballot in Colorado and Washington, yet the parallel campaign in California is in disarray. *See* Joe Mozingo, *Effort to Put Marijuana Legalization Measure on Ballot Is in Disarray*, LOS ANGELES TIMES, Mar. 10, 2012, http://articles.latimes.com/2012/mar/10/local/la-me-pot-initiatives-20120310.

21. Proposition 19 would have changed California cannabis law from a regime of prohibition to one of regulation and taxation. *See* Carcieri, *California's Proposition 19*, *supra* note 2, at 480 n.8. Colorado and Washington have now qualified initiatives modeled on Proposition 19 for their November 2012 ballots. *See* Mozingo, *supra* note 20.

22. Not only did the U.S. repeal alcohol prohibition as a policy, economic and constitutional failure, *see* U.S. CONST. amend. XXI, but in a free society, adults must presumptively be allowed to decide what goes in their bodies.

23. *See* Carcieri, *Rawls*, *supra* note 2, at 53, 171-227; Carcieri, *California's Proposition 19*, *supra* note 2, at 484-491.

24. Carcieri, *Rawls*, *supra* note 2, at 208.

25. *Id.* at 209; *see also* Carcieri, *Obama*, *supra* note 2, at 323–324.

distinction should be no barrier to voting for state ballot initiatives seeking to replace cannabis prohibition with regimes of taxation and regulation. Beyond the CSA's dubious legitimacy under the Commerce Clause, and even beyond doubts that federal or state cannabis prohibition could survive rational basis scrutiny (never mind the strict scrutiny that would properly apply), the inconsistency of merely regulating dangerous, addictive drugs like alcohol and tobacco while prohibiting and thus criminalizing less dangerous, less addictive drugs like cannabis deeply violates the equal liberty principle.

Measures like Proposition 215[26] in 1996 effectively used medicinal use as a wedge issue, a way to lay the foundation for measures like Proposition 19, fourteen years later. Yet because prohibition of private adult recreational use is just as suspect from the perspective of equal basic liberties as prohibition of private adult medicinal use, voters can support upcoming measures like those in Washington and Colorado with a clear conscience, knowing that they are voting to remove a profound, longstanding injustice in their law.

26. Cal. Health & Safety Code § 11362.5 (West Supp. 2012); *see* Carcieri, *Gonzales v. Raich*, *supra* note 2, at 1132.

WHEN MAY A PROBATION CONDITION ALLOWING USE OF MEDICAL MARIJUANA VIOLATE THE CODE OF JUDICIAL CONDUCT? JUDICIAL RESPECT FOR THE LAW AND PROMOTING PUBLIC CONFIDENCE IN THE JUDICIARY

FREDERIC RODGERS†

INTRODUCTION

Judges in states that have legitimatized medical marijuana, such as Colorado, are faced increasingly with the question of whether they must order persons to whom they grant probation in criminal cases to refrain from medical marijuana use. Under federal law it is "unlawful for any person to knowingly or intentionally possess" marijuana.[1] Any person who violates the prohibition may be sentenced to prison for "not more than one year."[2]

Notwithstanding federal law, the Colorado Medical Use of Marijuana Amendment provides an exception from the state's criminal laws for any patient in lawful possession of a "registry identification card," authorizing the holder to use marijuana for medical purposes.[3] While possession of marijuana remains a criminal offense in Colorado,[4] a patient's medical use of marijuana within the limits set forth in the Amendment is deemed "lawful."[5]

Against this legal backdrop, judges recognize that probation is a privilege, not a right.[6] Many convicted persons, including inter alia, im-

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1. 21 U.S.C. § 844(a) (2006); *see also* § 802(6) (2006); § 812(b)(1), (c), sched. I (c)(10) (2006) (defining marijuana as a Schedule I controlled substance).

2. *See* § 844(a). (defining possession of a controlled substance as a federal crime subject to imprisonment of not more than one year); *see also* § 829(a),(b) (2006) (establishing conditions for the lawful prescription of drugs); Gonzales v. Raich, 545 U.S. 1, 27–28 (2005) (holding that, under federal statutes, marijuana has no acceptable medical uses).

3. COLO. CONST. art. XVIII, § 14(2)(b).

4. COLO. REV. STAT. § 18-18-406(1) (2012).

5. COLO. CONST. art. XVIII, § 14(4)(a).

6. *See* People v. Colabello, 948 P.2d 77, 79 (Colo. App. 1997). *Gonzales v. Raich* was decided on commerce clause grounds, not preemption under the supremacy clause (Art. VI). 545 U.S. at 22; *see also* People v. Mentch, 195 P.3d 1061, 1068 (Cal. 2008) (holding that an individual must do more than simply supply a patient with medical marijuana to qualify as a "primary care-giver"); State v. Mullins, 116 P.3d 441, 446 (Wash. Ct. App. 2005) (same).

paired drivers, gain this privilege, especially first offenders. When a defendant is granted probation, the court suspends what might be a harsher punishment, if consistent with the offender's potential for rehabilitation and the safety of the community.[7] In effect, probation is a contract between the court and the convicted person, allowing him or her to avoid jail by good conduct and following all the terms of probation. If the defendant breaches those terms, the judge revokes probation and imposes another sentence.[8] The same reasoning applies to juvenile offenders.[9] The question then becomes, can a judge impose a probation condition banning marijuana use when the defendant is a medical marijuana user.?

ETHICAL CONSIDERATIONS

The American Bar Association's Model Code of Judicial Conduct (the Code) provides a template for each state to adopt as its own Code of Judicial Conduct.[10] Colorado's 2011 Code of Judicial Conduct follows the language of the ABA Code in all pertinent respects: Canon 1 requires in Rule 1.1(A) that "[a] judge shall comply with the law, including the Code of Judicial Conduct."[11] Rule 1.2 states that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[12] Canon 2 in Rule 2.2 requires that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.[13] The Code's definition of "'law' encompasses court rules and orders as well as statutes, constitutional provisions, and decisional law."[14] Comment 2 in Canon 2 says, "[a]lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question."[15]

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7. Holdren v. People, 452 P.2d 28, 30 (Colo. 1969).

8. *See* Gagnon v. Scarpelli, 411 U.S. 778, 780, 791 (1973) (defendant's probation was revoked and his original sentence reinstated for "associat[ing] with known criminals" in violation of his probation terms and being "involved in, and arrested for, a burglary;" the Supreme Court, on habeas corpus petition later held that due process entitled defendant to hearing before revocation of probation).

9. *See In re* Gault, 387 U.S. 1, 4–5, 7–9 (1967) (juvenile's probation revoked and juvenile "committed . . . as juvenile delinquent to State Industrial School" until age 21 or "discharge by due process of law;" the Supreme Court, on habeas corpus petition, held that the revocation of probation did not meet procedural due process requirements); *in re* B.L.M., 500 P.2d 146, 147–48 (Colo. App. 1972) (juvenile's probation revoked after state presented evidence that juvenile was involved in criminal activity in violation of terms of his probation).

10. MODEL CODE OF JUDICIAL CONDUCT pmbl. (1990) (amended 2010).

11. COLO. CODE OF JUDICIAL CONDUCT, Canon 1, R. 1.1(A) (2011).

12. *Id.* R. 1.2.

13. *Id.* Canon 2, R. 2.2.

14. *Id.* at 4.

15. *Id.* at Canon 2 cmt. 2.

MANDATORY CONDITIONS OF PROBATION

The American Bar Association Standards Relating to Sentencing Alternatives and Procedures (1968), the ABA Standards Relating to Probation (1968), and the ABA Standards for Traffic Justice (1974) each encourage the use of probation in preference to incarceration as long as such a sentence does not unduly diminish the seriousness of the offense.[16] Probation has been described as "a matter of grace."[17] Trial judges are alert to an offender's potential for rehabilitation, and many face the reality of overcrowded jails when making decisions on whether to grant probation.[18] Drug and alcohol treatment providers are a large part of the therapeutic landscape, and many successes are realized by addicted persons who genuinely desire to recover.

In Colorado, as in all other states, "probation is a statutory creation and the terms of probation must be derived from the applicable statute."[19] Colorado law identifies mandatory and discretionary conditions for probation, and states:

> [C]onditions of probation shall be such as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life and to assist the defendant in doing so. The court shall provide as [an] explicit condition[] of every sentence to probation that the defendant not commit another offense during the period for which the sentence remains subject to revocation.[20]

In considering probation, the court necessarily considers community protection, the seriousness of the offense, "and the offender, in that order."[21] Standard conditions of probation require no excessive consumption of alcohol or controlled substances.[22] Monitoring by toxicology testing or Antabuse™[23] may also be a requirement. Persons on probation waive certain privacy rights enjoyed by other members of society, such as the right to be free from unreasonable searches and seizures, and they

16. ABA ADVISORY COMM. ON SENTENCING AND REVIEW, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 63–64, 240 (1967) (Probation Standards § 1.3; Sentencing Alternatives Standards §§ 2.3 and 5.3; Traffic Standards § 4.3).

17. Gehl v. People, 423 P.2d 332, 334 (Colo. 1967).

18. Many Colorado county sheriffs place numeric limits on non-violent prisoners the county jail will hold, and may ask judges to release non-violent prisoners to meet the limits. The author has been contacted by county sheriffs in four counties—Adams, Gilpin, Jefferson, and Summit—about such limits and releases.

19. People v. Brockelman, 933 P.2d 1315, 1318 (Colo. 1997).

20. COLO. REV. STAT. § 18-1.3-204(1) (2012).

21. Logan v. People *ex rel.* Alamosa Cnty., 332 P.2d 897, 899 (Colo. 1958); *see Brockelman*, 933 P.2d at 1318–19.

22. *See* COLO. REV. STAT. § 18-1.3-204(2)(a) (2012).

23. 14 ROBERT DIETER, COLO. PRAC., CRIMINAL PRACTICE & PROCEDURE § 6.46 (2d ed.) (2011).

must accept the inevitable random visit by the probation officer as well as drug and alcohol screening.[24]

State laws also require a person on probation not to violate any federal, state or local laws or orders of court.[25] While the possession of marijuana remains unlawful under federal law,[26] the highly publicized October 19, 2009 Department of Justice memo on marijuana enforcement brings little clarity to the situation.[27] Marijuana remains on the controlled substances list and thus is *ipso facto* illegal, but the memorandum states that the U.S. government will not prosecute compliant patients in states permitting marijuana use by persons with debilitating medical conditions[28]. Under this state of the law, an applicant for probation who participates in a legal marijuana compassionate use program squarely presents a sentencing judge with a real-life conundrum on how to apply seemingly conflicting federal and state laws.[29]

EFFECT OF LOCAL RULES OF COURT ON SENTENCING A MEDICAL MARIJUANA PATIENT TO PROBATION

Six of Colorado's twenty-two judicial districts are governed by blanket chief judge orders forbidding the use of medical marijuana for anyone on supervised probation, thus restricting trial judges' options.[30] Two districts (i.e., the third and nineteenth) allow probationers to continue their prescribed use of medical marijuana.[31] In the remaining districts, judges have addressed the issue on a case-by-case basis,[32] until the recent case of *People v. Watkins*.[33] In that case, the Colorado Court of Appeals vacated a trial court's order approving a defendant's use of marijuana for

24. *See* COLO. REV. STAT. § 18-1.3-204(2)(a)(X) (2012); United States v. Knights, 534 U.S. 112, 118–19 (2001).

25. *See, e.g.*, COLO. REV. STAT. §18-1.3-204 (2012); People v. Colabello, 948 P.2d 77, 78, 80 (Colo. App. 1997).

26. Controlled Substances Act, 21 U.S.C. §§ 801, 812, 844(a) (2006).

27. Memorandum from Deputy Attorney Gen. David W. Ogden to Selected United States Attorneys 1–2 (Oct. 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf. Deputy Attorney General Ogden's memorandum announced that federal prosecutorial priorities should not target "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." *Id.* Nonetheless, it states that the "prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority," and that it "does not 'legalize' marijuana or provide a legal defense to a violation of federal law. *Id.*

28. *Id.*

29. Under principles of federalism as expressed in the U.S. Constitution, "states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." Addington v. Texas, 441 U.S. 418, 431 (1979). This freedom extends to the "great latitude" given the states "under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)).

30. Jeffrey Wolf, Deborah Sherman, & Nicole Vap, *Colo. Judges Play Doctor with Medical Marijuana Cards*, 9NEWS.COM (Feb. 4, 2010, 12:27 PM), http://www.9news.com/rss/story.aspx?storyid=132165.

31. *Id.*

32. *Id.*

33. No. 10CA0579, 2012 WL 310776 (Colo. App. Feb. 2, 2012).

medical purposes while on probation.[34] The court of appeals concluded that state criminal law[35] requires that probation sentences include a condition that probationers not commit criminal offenses, including federal offenses, notwithstanding the Colorado Medical Use of Marijuana Amendment.[36]

Appellate courts, faced with the question of whether courts have authority to impose a sentencing condition that denies a qualifying patient the right to use medical marijuana in accordance with permitted state use, have reached divergent results.[37] Some Colorado trial judges have expressed some discomfort with the strictures of the *Watkins* decision and with local chief judge orders limiting their exercise of judicial discretion to fashion the terms of probation to the unique needs of individual cases.[38] They point to cases in other jurisdictions which seem to reach a result contrary to *Watkins*, such as *People v. Tilehkooh*,[39] in which the California Court of Appeal reversed a probation revocation for marijuana possession for "failure to obey all laws" because state courts do not enforce federal law.[40] In *City of Garden Grove v. Superior Court*,[41] that same California court also held that federal law did not preempt state law on the issue of medical marijuana and probation, so that the defendant was entitled to have the marijuana evidence returned to him after criminal charges had been dismissed.[42] Similarly, in *People v. Bianco*,[43] the same court held that trial judges must be free to "impose conditions of probation that [may] impinge on a defendant's constitutional rights if they are 'narrowly drawn' and 'reasonably related to a compelling state interest in reformation and rehabilitation.'"[44]

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34. *Id.* at *7.

35. COLO. REV. STAT. § 18-1.3-204(1) (2012).

36. *Watkins*, 2012 WL 310776, at *7. Attorney Sean McAllister sought review of the decision in the Colorado Supreme Court, stating that "[t]he Court of Appeals is undermining Colorado law and trying to enforce federal law on their own . . . . Judges don't have the expertise to decide what a defendant needs for his health care needs. It should be up to the doctor." Felisa Cardona, *Colorado Court of Appeals Nixes Medical-Pot Use for Those on Probation*, DENVER POST, Feb. 8, 2012, at 4B. However, the Supreme Court denied certiorari, but Chief Justice Bender and Justice Márquez would have granted as to "[w]hether trial courts have the discretion to allow a seriously ill Colorado probationer to use medical marijuana during a term of probation after the court considers the individual circumstances of the case and the offense for which probation is imposed." Watkins v. People, No. 12SC179, 2012 WL 1940753 (Colo. May 29, 2012).

37. *See, e.g.*, People v. Tilehkooh, 113 Cal. App. 4th 1433, 1438, 1447 (2003); City of Garden Grove v. Superior Court, 157 Cal. App. 4th 355, 386 (2007); People v. Bianco, 93 Cal. App. 4th 748, 750–51 (2001).

38. Interviews with trial judges participating in ethics programs the author presented in 2009–11.

39. 113 Cal. App. 4th 1433 (2003).

40. *Id.* at 1438, 1447. *Accord* State v. Nelson, 195 P.3d 826, 833–834 (Mont. 2008) (using the same analysis, the trial court exceeded its jurisdiction requiring defendant to comply with all federal laws).

41. 157 Cal. App. 4th 355 (2007).

42. *Id.* at 386, 391.

43. 93 Cal. App. 4th 748 (2001).

44. *Id.* at 754–55 (quoting People v. Hackler, 13 Cal. App. 4th 1049, 1058 (1993)).

Although the *Watkins* court distinguished the cases permitting judges to authorize medical marijuana patients to continue their use of marijuana while on probation, this decision raises questions regarding judicial independence and the extent to which a judge must exercise judicial restraint under the Code of Judicial Conduct in applying the law, regardless of personal philosophy. The Colorado Supreme Court has expressed its discomfort with a statute that established a classification of marijuana that was contrary to the "overwhelming weight of [scientific] authority."[45] In that case, the court recognized its ethical responsibility to give great deference to a legislative classification, even one with which it strongly disagreed. Although the majority encouraged the legislature to amend the questionable law and demonstrate that it "is in touch with scientific reality," nonetheless it left reforming the law to the General Assembly.[46] In the dissenting opinion, Justice Lee disagreed, quoting Chief Justice John Marshall in *Marbury v. Madison*,[47] who declared "it is emphatically the province and duty of the judicial department to say what the law is,"[48] concluding that "[a] [c]ourt is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared."[49] Later, when the Colorado Supreme Court confronted the same issue in *People v. Bennett*,[50] it again deferred to the legislature, "[a]t least for the time being."[51] After the issue arose for the third time in *People v. Steed*,[52] the Court referred to Canon 2 of the Code of Judicial Conduct[53] saying, "[p]erhaps a dissent may be written in a succeeding case or two, but in our minds the Code of Judicial Conduct should bury the idea of a judge dissenting on the same issue Ad infinitum."[54] The court's comment in *Steed* may be explained by the legislature at last having followed the court's recommendations and amended the law, although not in time to benefit the *Steed* appellant.

Several cases from other jurisdictions are helpful in understanding the tension between judicial reactions to statutes restricting judges' discretion and prevailing notions of judicial independence. A New Mexico judge objected to his chief judge's order transferring juvenile cases out of his court and dispersing them among the other judges' divisions of the court.[55] Enraged, Judge Castellano purported to countermand the chief

45. People v. Summit, 517 P.2d 850, 852 (Colo. 1974).
46. *Id.* at 851–54.
47. 5 U.S. (1 Cranch) 137 (1803).
48. *Id.* at 177.
49. *Summit*, 517 P.2d at 855 (Lee, J., dissenting) (quoting Chastleton Corp. v. Sinclair, 264 U.S. 543, 547 (1924)).
50. 536 P.2d 42 (Colo. 1975).
51. *Id.* at 430.
52. 540 P.2d 323 (Colo. 1975).
53. COLO. CODE OF JUDICIAL CONDUCT, Canon 1, R. 1.1 (2010) (stating that "[a] judge should comply with the law").
54. *Steed*, 540 P.2d at 326 n.3.
55. *In re* Castellano, 889 P.2d 175, 180–81 (N.M.1975).

judge order and held the court administrator in contempt for refusal to follow his directions, sentencing her to jail. The state supreme court stepped in, prohibiting his actions, and ultimately removed him from office for, inter alia, failure to follow the law, in violation of Canons 1 and 2 of the Code.[56] Similarly, an Indiana trial judge was reprimanded for failing to obey an appellate court mandate to vacate an improper sentence, which caused a prisoner to spend an extra year in prison.[57] An Ohio judge was suspended for false and incendiary statements made during a television interview that were critical of the appellate court that had just reversed one of his decisions.[58] A Wisconsin trial judge who refused to follow his chief judge's order setting trial court hours and threatened to "go public" with untruthful stories about the chief judge was suspended for failure to follow the law and attempted extortion.[59]

In jurisdictions with laws permitting use of marijuana by persons diagnosed with debilitating medical conditions and without superseding appellate opinions or other requirements restricting the probation option, the sentencing judge considering probation must carefully review the offender's pharmaceutical regimen. If the offender is demonstrably incapable of controlling his or her behavior when under the influence of any drugs—legal or illegal—probation would be an ill-considered sentence. However, an offender who is prescribed any drug (including medical marijuana) that has the potential to impair ability to drive, but who at the same time is willing to abide by the law and not drive a car while taking that drug, might be a good candidate for probation, if not otherwise indicated by the facts.

Clearly, courts may order a probationer to abstain from alcohol and controlled substances as a condition of probation.[60] Equally certain is that courts may prohibit the use of illegal drugs.[61] Judges know that a probationer who professes to work toward rehabilitation may lead a law-abiding life and be a safer driver if on a program of monitored abstention from either legal or illegal intoxicants.[62] Judges recognize that community safety and protection are furthered when an alcoholic in recovery is on a monitored sobriety program. With alcohol prohibited, this probationer is more likely to work through the recovery program successfully;[63] from this a judge may infer that a successful recovery program will reduce the

56. *See id.* at 182–85.

57. *In re* Newman, 858 N.E.2d 632, 633–36 (Ind. 2006).

58. Office of Disciplinary Counsel v. Ferreri, 710 N.E.2d 1107, 1108, 1111 (Ohio 1999).

59. *In re* Judicial Disciplinary Proceedings Against Crawford, 629 N.W.2d 1, 3, 11 (Wis. 2001); *see also In re* Lokuta, 11 A.3d 427, 43–32, 449–50 (Pa. 2011); Cal. Comm'n on Judicial Performance, *Public Admonishment of Judge Anthony C. Edwards* 2 (Feb. 7, 2012), http://cjp.ca.gov/res/docs/public_admon/Edwards_2-7-12.pdf (ruling that judge abused his authority and violated his duties to "respect and comply with the law" and to "be faithful to the law").

60. COLO. REV. STAT. § 18-1.3-204(2)(a)(VIII) (2012).

61. *Id.* §§ 18-1.3-204(1), (2)(a)(VIII)).

62. *Id.* §§ 18-1.3-204(2)(a)(VIII) (XIV.5), 42-4-1307(7)(b)(VI) (2012).

63. *See id.* § 18-1.3-204(1).

likelihood of the offender returning to drinking or drugging and driving. However, a prohibition of prescribed medication use is rarely a provision of probation.[64]

Should the same rationale governing alcohol use also apply to medical use of marijuana? If the offender demonstrates a propensity to drive a vehicle while impaired by prescribed medications of any kind, a judge may deem the defendant a danger to society and decline to grant probation. Whether the drug of choice is alcohol, Vicodin™, NyQuil™ or marijuana, a judge may regulate its use as a requirement of probation.[65] However, the difference under the law between these substances turns on whether the use is recreational or medically therapeutic. Few have the temerity to argue with a straight face that alcohol use is therapeutic. True, it may relax, relieve tension, and provide a pleasurable high to the drinker, but its medical use is limited to local sterilization. Medication, whether available over the counter or by prescription only, is arguably different. A speaker at the Marijuana at the Crossroads Symposium at the University of Denver Sturm College of Law opined that differentiating marijuana from the other drugs because of its recent history as a recreational drug does not settle the question.[66]

JUDGES' CHOICES

Judges need to examine their own state's law on medical marijuana, in particular whether it provides immunity or an affirmative defense to a marijuana patient or provider. It is reasonable to question the wisdom of

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64. While possession of marijuana remains a criminal offense in Colorado, *id.* § 18-18-406(1), a patient's medical use of marijuana within the limits set forth in the Amendment is deemed "lawful" under subsection (4)(a) of the Amendment. COLO. CONST. art. XVIII, § 14(4)(a). Under the Amendment, however, a physician does not prescribe marijuana, but may only provide "written documentation" stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana. COLO. CONST. art. XVIII, § 14(2)(c)(II); Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 973 (Colo. App. 2011) (stating that "a physician's inability to prescribe marijuana under Colorado law is reflected in the very physician certification" which specifies that '[t]his assessment is *not* a prescription for the use of marijuana'"). Therefore, a defendant's physician's certification does not constitute a "written lawful prescription" as required by the terms of his probation.

The Colorado Supreme Court denied certiorari in *Beinor* but Chief Justice Bender and Justice Márquez would have granted as to the following issues:

> Whether the medical marijuana provisions of the Colorado Constitution, article XVIII, section 14, confer a right to use medical marijuana or merely protection from criminal prosecution.
>
> Whether petitioner was erroneously disqualified from receiving state unemployment compensation benefits under 8–73–108(5)(e)(IX.5),for violating his employer's zero–tolerance drug policy by having marijuana in his blood, notwithstanding his authorization to use medical marijuana.

Beinor v. Industrial Claim Appeal Office, No. 11SC676, 2012 WL 1940833 (Colo. May 29, 2012).

65. COLO. REV. STAT. § 18-1.3-204(2)(a)(VIII), (XV) (2012).

66. Jill Lamoureux-Leigh, a representative of Colorado marijuana dispensary owners and active with Colorado state regulatory activities. *See* Chase Squires, *Grass Confusion: DU Law Panel Tackles Tangled Marijuana Laws*, DENVER POST, Feb. 9, 2012, at 14C, http://yourhub.denverpost.com/denver/grass-confusion-du-panels-tackle-tangled-marijuana-laws/VmSaSuasj1UEnxHoawxO8J-ugc.

converting a recreational drug to a medical drug by popular vote.[67] Many judges fear that state initiatives approving medical marijuana are simply a back-door approach to legalizing all drugs.[68] Some are chiefly concerned that marijuana use violates the law regardless of whether the federal government intends to enforce it against medical users and, thus, is incongruous with the requirement that a probationer be law-abiding.[69] In their view, the Code of Judicial Conduct renders unethical a sentencing judge's decision to overlook the illegality of marijuana use under federal law, despite its state-sanctioned medical use.[70]

Each case before a judge must be carefully examined on its own merits and the applicable law. A judge's comfort level may be elevated by evidence at sentencing about the defendant's medical condition and the effects of prescribed marijuana upon it. If any applicant for probation appears to be using any prescribed medication in bad faith, such use may serve as a factor in the judge's weighting of the community safety and protection sentencing goals in deciding the probation issue. Judges may determine that a defendant's marijuana use for medical purposes is in bad faith if there exists no debilitating medical condition to support the patient's placement on the state registry of qualified medical marijuana users.[71] Other factors which may influence a judge to determine bad faith medical marijuana use are: (1) the marijuana use is reasonably related to the crime for which the defendant was convicted; (2) a demonstrated likelihood that the defendant will possess marijuana for non-medical purposes, or in greater quantities than permitted for medical purposes under law; (3) a demonstrated tendency on the defendant's part to become addicted to drugs; or (4) a demonstrated likelihood that medical marijuana use will undermine a court ordered substance abuse treatment program.[72]

Whether marijuana prohibition eventually goes the way of the Eighteenth Amendment to the U.S. Constitution and the Volstead Act is unknowable.[73] It is important not to sentence by rote, formula, and man-

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67. As Ninth Circuit Court of Appeals Judge Alex Kozinski stated in his concurrence in *Conant v. Walters*, while the allowance of medical marijuana "may seem faddish or foolish . . . the public record reflect[s] a legitimate and growing division of informed opinion on this issue." 309 F.3d 629, 640 (9th Cir. 2002) (Kozinski, J. concurring). "A surprising number of health care professionals and organizations have concluded that the use of marijuana may be appropriate for a small class of patients who do not respond well to, or do not tolerate, available prescription drugs." *Id.* at 640–41.

68. Interviews with judges attending programs the author presented 2009–11. *See supra*, note 38.

69. *Id.*

70. *Id.*

71. *See* COLO. REV.STAT. § 18-18-406.3(2)(a) (2012).

72. People v. Lent, 541 P.2d 545, 548 (Cal.1975).

73. Alcohol prohibition under the Eighteenth Amendment in 1919, U.S. CONST. amend. XVIII, was repealed fourteen years later by the Twenty-first Amendment in 1933. U.S. CONST. amend. XXI.

datory guidelines.[74] In states where the law provides complete immunity to a qualifying medical marijuana user, appellate courts have resolved the issue without regard to questions of judicial ethics.[75] Resolving inconsistencies and harmonizing conflicting views have always been a part of the judicial job description.[76] The current anomalous state of the law on medical marijuana is one of the challenges judges must face, but it is not insurmountable.

74. In *United States v. Booker*, the Court held that the federal sentencing guidelines, previously mandatory, should be treated as merely advisory to cure a constitutional deficiency in the system. 543 U.S. 220, 259 (2005) (Breyer, J.).

75. *See Tilehkooh*, 113 Cal. App. 4th at 1438, 1447; *City of Garden Grove*, 157 Cal. App. 4th at 386; *Bianco*, 93 Cal. App. 4th at 750–51 n.41; *see also Nelson*, 195 P.3d at 833–34.

76. The Colorado rules of statutory construction offer little guidance. *See* COLO. REV. STAT. § 2-4-201–216 (2012). In particular, the preference favoring local over general applicability of conflicting statutes in § 2-4-205 applies to conflicts in state law, rather than conflicts between federal and state law.

REFLECTIONS ON MEDICAL MARIJUANA PROSECUTIONS AND THE DUTY TO SEEK JUSTICE

ALEX KREIT†

Whatever else may be said of state medical marijuana laws, few would disagree that they have generated a wide array of difficult legal issues. During the sixteen years since California passed the first modern state medical marijuana law, the Supreme Court alone has reviewed two medical marijuana cases. In 2001, the Court prevented medical marijuana caregivers from relying on the common law defense of medical necessity in *United States v. Oakland Cannabis Buyers' Cooperative*,[1] concluding that under the federal "Controlled Substances Act, the balance already has been struck against a medical necessity exception."[2] Just four years later, in *Gonzales v. Raich*,[3] the Court affirmed the federal government's authority under the Commerce Clause to prosecute the noncommercial, intrastate cultivation and possession of medical marijuana.[4] Meanwhile, federal trial and circuit courts have considered a variety of issues, including whether sick and dying patients have a fundamental right to medical marijuana;[5] whether physicians have a First Amendment right to recommend medical marijuana to patients;[6] and whether a provision of the Controlled Substances Act (CSA) designed to provide immunity to state and local undercover officers also shields a medical marijuana grower deputized by the City of Oakland.[7] State courts have faced an even more varied set of legal questions, with cases that present issues specific to state medical marijuana laws,[8] as well as cases that call on courts to address the relationship between federal and state marijuana laws.[9]

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1. 532 U.S. 483 (2001).
2. *Id.* at 499.
3. 545 U.S. 1 (2005).
4. *Id.* at 26–27, 32–33 (upholding federal prohibition of intrastate, noncommercial cultivation and possession of medical marijuana because it was an essential part of the broader regulatory scheme governing controlled substances).
5. Raich v. Gonzales, 500 F.3d 850, 859, 866 (9th Cir. 2007) (discussing how medical marijuana has not yet achieved the classification of a fundamental right that would be constitutionally protected).
6. Conant v. Walters, 309 F.3d 629, 636 (9th Cir. 2002) (analyzing the interaction of the First Amendment with the ability of a doctor to discuss medical marijuana with his or her patient).
7. United States v. Rosenthal, 454 F.3d 943, 947–48 (9th Cir. 2006).
8. *E.g.*, People v. Colvin, 137 Cal. Rptr. 3d 856, 857–58 (Ct. App. 2012).
9. *See* Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461, 467 (Ct. App. 2008) (considering federal preemption of state medical marijuana laws).

In the midst of these disputes, the application of rules of professional conduct to attorneys who practice medical marijuana law has received comparably little attention. Within the past few years, however, more attorneys have begun to consider this important issue, primarily as the result of two state ethics opinions. Both opinions focused on the application of Rule 1.2(d) of the American Bar Association's Model Rules of Professional Conduct to attorneys who advise medical marijuana patients and caregivers. Model Rule 1.2(d) provides the following:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[10]

It is not difficult to see how this provision might present a difficult question in the context of medical marijuana law. For example, is an attorney who advises her client in the negotiation of a lease to open a medical marijuana dispensary in compliance with this rule? In 2010, Maine's Bar Association became the first to weigh in on the question of "whether and how an attorney might act in regard to a client whose intention is to engage in conduct which is permitted by state [medical marijuana] law . . . but which . . . is a federal crime."[11] The Maine Commission advised a "case by case" evaluation of whether an attorney's advice on establishing a medical marijuana distribution business would run afoul of Model Rule 1.2(d), but cautioned that "participation in this endeavor by an attorney involves a significant degree of risk."[12] In 2011, the State Bar of Arizona became the second official ethics body to address this issue and adopted a position that appears to be somewhat more favorable than Maine's for medical marijuana attorneys. According to the Arizona opinion, "A lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act . . . , despite the fact that such conduct potentially may violate applicable federal law" at least in certain circumstances.[13]

The application of Model Rule 1.2(d) to attorneys who advise patients and providers on how to comply with state medical marijuana laws undoubtedly presents a focused and pressing question of professional ethics. This essay argues that medical marijuana prosecutions raise equally challenging—albeit more nebulous—ethical problems. In particular, the prosecution of medical marijuana patients and providers pre-

10. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2011).

11. Maine Ethics Opinion No. 199 (2010) (Advising Clients Concerning Maine's Medical Marijuana Act).

12. *Id.*

13. State Bar of Arizona Ethics Opinion 11-01 (2011) (Scope of Representation).

sents difficult and important questions about the exercise of discretion in light of the prosecutor's duty to seek justice. This essay does not seek to offer prosecutors specific advice about how to view medical marijuana prosecutions. Instead, it aims to illuminate some of the ethical issues a conscientious prosecutor should thoughtfully consider in deciding whether and how to pursue a medical marijuana prosecution.

Part I provides an overview of the prosecutor's ethical duty to seek justice and not merely to convict. Part II considers how this ethical duty may be implicated in federal and state medical marijuana prosecutions. I argue that medical marijuana cases can present particularly difficult ethical challenges for prosecutors because they involve a uniquely conflicted area of law that makes the careful exercise of prosecutorial discretion all the more important. Part III offers concluding remarks.

I. THE DUTY TO SEEK JUSTICE

Because of their unique role in the criminal justice system, prosecutors are subject to special ethical duties. While a criminal defense attorney is obligated to zealously advocate for her client, a prosecutor acts as a representative of the sovereign. She "is not simply a lawyer advocating the government's perspective of the case" but "is the alter ego of the [State] exercising its sovereign power of prosecution."[14] In this role, a prosecutor has a great deal of power in the form of nearly unfettered discretion to decide which cases to pursue and which charges to bring.[15] In recognition of the prosecutor's unique "responsibility of a minister of justice and not simply that of an advocate,"[16] Model Rule 3.8 provides for "Special Responsibilities of a Prosecutor," outlining specific requirements prosecutors should follow—for example, the obligation to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[17] However, a prosecutor's ethical obligations extend beyond specific requirements. They are grounded in a general duty

14. United States v. Singleton, 165 F.3d 1297, 1299–1300 (10th Cir. 1999).

15. *See* United States v. Oakes, 11 F.3d 897, 899 (9th Cir. 1993) ("[W]e have no jurisdiction to review prosecutors' charging decisions, absent proof of discrimination based on suspect characteristics such as race, religion, gender or personal beliefs."); *see also* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 649 (1997) ("Despite the significant ramifications of the forum selection decision, there is little administrative direction or judicial oversight to guide federal prosecutors in exercising their discretion to choose among offenders eligible for federal prosecution."). Some states courts have been more receptive to arguments to constrain prosecutorial discretion, though even in those states, prosecutors retain a great deal of power in deciding who to prosecute and what charges to bring. *See, e.g.*, Jersey v. Lagares, 601 A.2d 698, 32 (1992) (holding that aspects of New Jersey's mandatory minimum drug sentencing scheme impermissibly delegated judicial sentencing powers to the prosecutor and requiring prosecutors to adopt guidelines to govern their decisions to seek enhanced sentences under the law).

16. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2011).

17. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2011).

under the ABA's Criminal Justice Standards "to seek justice, not merely to convict."[18]

Though the prosecutor's duty to "seek justice" is well ingrained in the criminal justice system and supported by a rich history,[19] the admonition is also highly generalized. The duty to seek justice is not a rule that typically requires a particular course of action in a particular setting—"it does not set forth permissible and impermissible conduct, and it does not set out criteria for how prosecutors are supposed to determine what is just."[20] The broad nature of the injunction leaves open the possibility that it may "point in contradictory directions"[21] in a given case, and may even tempt a prosecutor to reflexively stretch the concept of "seeking justice" to fit his own preferences in every case. As one commentator put it: "What prosecutor doesn't think that he or she is 'seeking justice'?"[22] Indeed, some believe the duty should be abandoned because it is "unworkably vague for purposes of meaningful interpretation and application."[23]

Though it may be difficult to draw precise instruction from the duty to seek justice because of its fluid nature, many professional ethics scholars and practicing prosecutors have worked to give shape and structure to this broad ethical obligation so that it may help guide prosecutors in engaging in ethical reasoning. A thorough review of the deep literature in this area is beyond the scope of this essay; an impression of different conceptions of the duty is sufficient to appreciate why medical marijuana cases might pose difficult ethical challenges for prosecutors.

Some commentators have relied on the duty to seek justice to counsel prosecutors to follow a particular course of action in response to a legal problem. One commentator recently argued, for example, that the obligation to seek justice should lead prosecutors to voluntary refrain from seeking peremptory challenges.[24] Others have articulated different visions for understanding the duty to seek justice and considered how the duty might relate to some of the different responsibilities of a prosecutor.

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18. ABA Standard for Criminal Justice 3.1-2(c) (1993).

19. *See generally* Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L.J. 607, 612–18 (1999) (outlining the history of the prosecutor's duty to "seek" or "do" justice).

20. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV 635, 637 (2006).

21. Green, *supra* note 19, at 622.

22. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 378 (2001).

23. Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337, 1339 (2004); *see also* Lissa Griffin & Stacy Caplow, *Changes to the Culture of Adversarialness: Endorsing Candor, Cooperation and Civility in Relationships Between Prosecutors and Defense Counsel*, 38 HASTINGS CONST. L.Q. 845, 850 (2011) (describing proposed revisions to the Criminal Justice Standards that describe "the prosecutor with more nuance and complexity" than implied through analysis of prosecutor's duty to seek justice).

24. Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 372 (2010).

In *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, Fred C. Zacharias outlines a theory of the duty to seek justice based on prosecutorial power, arguing that "the fear of unfettered prosecutorial power is the impetus for the [prosecutor's] special ethical obligation."[25] By contrast, Bruce A. Green argues that a role-based justification for the duty to seek justice "best explains ordinary intuitions about the nature of prosecutors' special ethical obligations"[26] and may carry different practical implications for prosecutors than a power-based conception.

To better understand some of the considerations that may be implicated by the duty to seek justice, it may be helpful to briefly examine one recent account of the ethical obligation in more detail. In *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* R. Michael Cassidy attempts to give meaning to the special ethical obligations of prosecutors by looking to Aristotle's framework of virtue ethics.[27] Cassidy contends that virtue ethics is a useful tool for understanding the duty to seek justice because employing consequentialist or deontological theories to inform professional ethics decisions can present difficulties. Virtue ethics, Cassidy argues, can address the shortcomings of other theories because it is a teleological philosophy in which "[t]he proper threshold question" is "not 'what should one do?' but 'what kind of person should one be?'"[28] Singling out Cassidy's theory for closer inspection here is not meant as an endorsement of his approach. Instead, it is meant to serve as an example that highlights some of the different considerations and issues that may relate to the duty to seek justice.

Cassidy believes there are four key virtues that are important for guiding prosecutors in seeking justice: (1) Fairness, (2) Courage, (3) Honesty, and (4) Prudence.[29] By understanding and aiming to possess these virtues, Cassidy argues, prosecutors can more effectively engage in ethical reasoning to help guide their decision-making process in difficult cases. The virtue of fairness,[30] for example, "is concerned with right relations towards others"[31] and encompasses ideas like a concern for the well being of others for their own sake. In the context of making a deal with an accomplice for testimony, this virtue might counsel a prosecutor to be

25. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 58 (1991).

26. Green, *supra* note 19, at 625.

27. *See generally* Cassidy, *supra* note 20, at 640–53 (section of the article discussing Aristotle and ethics).

28. *Id.* at 643–44.

29. *Id.* at 646–49.

30. Though this virtue is typically described as the virtue of justice, Cassidy adopts the "construction of justice as fairness . . . to avoid the obvious tautology that would result from attempting to identify the contours of a prosecutor's duty to 'seek justice' with reference to this cardinal virtue." *Id.* at 647–48.

31. *Id.* at 647.

attuned to whether the defendant making the deal played a more significant role than the person he is testifying against and to weigh that consideration in deciding what might be a fair deal, or whether to make a deal at all.[32] While fairness emphasizes reciprocity and equal treatment, "[c]ourage is the virtue that enables an individual to do what is good notwithstanding harm, danger or risk to themselves."[33] In the context of plea bargaining, for example, a prosecutor might rely on this virtue to reject a deal that is too lenient in exchange for testimony, even if doing so means risking a conviction of the other accomplice.[34] The virtue of honesty requires a person to be comfortable with incongruity and to be "willing to accept circumstances and other people for the way they are, rather than feeling the need to make them consistent with his own predispositions."[35] For a prosecutor making a deal for testimony, this virtue would counsel him to be mindful to affirmatively seek out checks to ensure that the informant is being truthful when he testifies, rather than leaving the task entirely to cross-examination by the defendant's attorney.[36] Finally, the virtue of prudence—also referred to as "practical wisdom"—aims to guide us in moral reasoning by outlining a three-step process of deliberation, judgment and decision for resolving ethical problems.[37] Cassidy argues that this virtue is particularly important for prosecutors because "we expect prosecutors—like judges—to be impartial in assessing the propriety of potential courses of action, and to come to a decision only after careful and balanced deliberation about the public interest."[38]

For present purposes, the particulars of Cassidy's vision are secondary to more fundamental points about the duty to seek justice that it helps to illuminate. Specifically, as the discussion above indicates, many of the most difficult ethical problems that a prosecutor faces cannot easily be reduced to a neat set of guidelines or factors that will inevitably lead to a particular outcome. A prosecutor who is deciding whether to offer a sentence reduction to a defendant in exchange for her testimony (and, if so, how much of a reduction) should surely be guided by the duty to seek justice in exercising this discretion. The different factual permutations that arise in practice make it impossible to formulate a precise ethical rule for this circumstance, but the duty to "seek justice" can provide prosecutors real guidance nonetheless. The duty can help a prosecutor identify and appreciate the ethical considerations involved in each case and provide a meaningful framework to guide her in ethical reasoning. Though in any given case, a range of different outcomes may be ethically

32. *See id.* at 664–67.
33. *Id.* at 648.
34. *Id.* at 660–61 ("A prosecutor must have the courage to say no and mean it . . . .").
35. *Id.* at 648–49.
36. *Id.* at 662–63.
37. *Id.* at 649.
38. *Id.* at 651.

defensible, the duty to seek justice can guide a prosecutor in picking among these options.

Indeed, it is when prosecutors are called upon to exercise discretion in ambiguous factual and legal settings that the duty to seek justice can provide the most value. In these situations—which implicate important ethical questions but where formulating precise ethical rules may be impossible—the injunction to seek justice provides prosecutors with an ethical vision to guide their decisions. The Model Code of Professional Responsibility explains the prosecutor's "duty is to seek justice, not merely to convict" by reference to prosecutorial discretion, noting that the "special duty exists because . . . the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute."[39]

II. ETHICAL CONSIDERATIONS IN MEDICAL MARIJUANA PROSECUTIONS

Medical marijuana prosecutions can present especially challenging ethical problems for the prosecutor who aims to conscientiously follow the duty to seek justice. In the medical marijuana setting, the law can often be ambiguous and limited resources may require a prosecutor to select a handful of people for prosecution from a large group of similarly situated individuals. These considerations may lead some prosecutors to pursue medical marijuana prosecutions only in rare instances—for example, where an individual is relying on a state's medical marijuana law as a pretext for clearly unlawful activity.[40] Other prosecutors, however, have not been so restrained. For these prosecutors, determining how to exercise their discretion in the context of medical marijuana prosecutions may be especially difficult. This section considers two examples that highlight some of the ethical problems that prosecutors who decide to pursue medical marijuana cases may face.

A. Federal Medical Marijuana Prosecutions

Though sixteen states and the District of Columbia[41] have adopted medical marijuana laws, it remains illegal to possess, cultivate, or distribute the plant for any purpose under federal law.[42] After California

39. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980); *see* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 36 (1998) (arguing that prosecutorial charging decisions "raise fundamental questions about the duty and responsibility of the prosecutor to seek justice for all parties—defendants as well as victims—and to assure that all parties receive equal protection under the law").

40. *See* Memorandum from David W. Ogden, Deputy Attorney Gen., to U.S. Attorneys (Oct 19, 2009).

41. MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST 1 (2011), *available at* http://www.mpp.org/assets/pdfs/library/State-by-State-Laws-Report-2011.pdf.

42. *See* Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1135 (D.C. Cir. 1994) (upholding the DEA's denial of a petition to reclassify marijuana under federal law

enacted its medical marijuana law in 1996, the federal government immediately took action to try to effectively block implementation of the law.[43] These early efforts included threats to revoke the Drug Enforcement Administration (DEA) registrations of physicians for recommending medical marijuana,[44] civil suits under the CSA to enjoin the operation of medical marijuana dispensaries,[45] and criminal prosecutions of medical marijuana caregivers.[46] The Supreme Court's 2005 decision in *Gonzales v. Raich* left little doubt that the federal government could constitutionally prosecute individuals whose actions conformed with state medical marijuana laws—from the largest dispensary operator to an individual patient in possession of a small quantity of marijuana for personal medical use.[47] Federal drug enforcement officials enthusiastically exercised this power during the 2000s,[48] with nearly 200 raids of medical marijuana dispensaries by 2008[49] and a significant number of criminal prosecutions.[50] Despite federal efforts, states have continued to adopt medical marijuana laws at a steady pace,[51] and there has been a sharp increase in the number of medical marijuana patients and dispensaries in states that permit them.[52] Most of these dispensaries operate in the open like any other business, promoting themselves through advertisements and clearly marked signage, and, in one instance, even becoming the subject of a reality television series on the *Discovery Channel*.[53]

During the Bush administration, there did not appear to be a particular method for selecting medical marijuana providers to target for federal prosecution. In one high profile case from 2008, for example, the federal

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after the Administrator determined that marijuana did not have a currently accepted medical use in treatment in the United States).

43. *See* Alex Kreit, *Beyond the Prohibition Debate: Thoughts on Federal Drug Laws in an Age of State Reforms*, 13 CHAP. L. REV. 555, 565–72 (2010) (describing federal efforts to interfere with California's medical marijuana laws).

44. *See* Conant v. Walters, 309 F.3d 629, 633 (9th Cir. 2002).

45. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 486–487 (2001).

46. *See, e.g.*, Federal Cases, AMS. FOR SAFE ACCESS, http://www.safeaccessnow.org/section.php?id=184 (last visited May 9, 2012) (providing an overview of federal medical marijuana prosecutions).

47. *See, e.g.*, Alex Kreit, *Rights, Rules, and* Raich, 108 W. VA. L. REV. 705, 706 (2006) (describing the scope of the *Raich* decision).

48. For a more detailed discussion of federal efforts to interfere with state medical marijuana laws, see Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 674–75 (2009).

49. *See* MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST S-1 (2008), *available at* http://www.mpp.org/assets/pdfs/download-materials/SBSR_NOV2008_1.pdf (providing an overview of state medical marijuana laws).

50. *See, e.g.*, AMS. FOR SAFE ACCESS, *supra* note 46.

51. *See* MARIJUANA POLICY PROJECT, *supra* note 41, at 1.

52. *See, e.g.*, Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1427–28 (2009) (describing why state medical marijuana laws have been able to operate effectively despite federal efforts to interfere with them).

53. *See* Austin L. Ray, *'Weed Wars' Star on Politics, Activism and Wellness*, CNN.COM (Jan. 25, 2012 10:23 AM), http://www.cnn.com/2012/01/25/showbiz/tv/weed-wars-steve-deangelo/index.html (describing the reality television show).

government prosecuted Charlie Lynch, a Morro Bay, California dispensary operator who had the support of town officials—including the mayor and city councilmembers, who attended his store opening ceremony.[54] Lynch was convicted,[55] and at sentencing, District Court Judge George H. Wu indicated some displeasure with having to impose a one-year jail sentence for Lynch. The *New York Times* reported that Wu "talked at length about what he said were Mr. Lynch's many efforts to follow California's laws on marijuana dispensaries" before concluding: "I find I cannot get around the one-year sentence . . . ."[56] People like Lynch, Judge Wu lamented, "are caught in the middle of the shifting positions of governmental authorities."[57] During the same period that the federal government was prosecuting Lynch, however, other dispensaries continued to operate openly throughout the state, many of them engaged in more questionable methods of operation. Six months before Lynch's trial, for example, a dispensary operator in Los Angeles held a press conference to announce the installation of a 24-hour medical marijuana vending machine at his establishment.[58] Asked about the development, Drug Enforcement Administration Special Agent Jose Martinez told the press: "Once we find out where [the vending machine is] at, we'll look into it and see if they're violating laws."[59] The comment is somewhat baffling considering that the location of the machine was announced to the press and its illegality under federal law could not be clearer.

The incongruity between the federal response to Lynch and the marijuana vending machines is almost surely the result of limited federal law enforcement resources. As Robert A. Mikos explained in his insightful article, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, "[t]hough the CSA certainly threatens harsh sanctions, the federal government does not have the resources to impose them frequently enough to make a meaningful impact on proscribed behavior."[60] As a result, prosecutors have been faced with a situation where large numbers of people are openly defying federal law but they only have resources to prosecute a handful of them.

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54. *See* John Stossel, Andrew Sullivan & Patrick McMenamin, *California Man Jailed for Medical Marijuana*, ABCNEWS.COM (June 11, 2009), http://abcnews.go.com/Business/Stossel/story?id=7816309&page=1#.T43tftVGz-A.

55. *See* United States v. Lynch, No. 07-0689, 2010 WL 1848209, at *1 (C.D. Cal. April 29, 2010) (providing a history of the case).

56. Solomon Moore, *Prison Term for a Seller of Medical Marijuana*, N.Y. TIMES, June 12, 2009, at A18.

57. *Lynch*, 2010 WL 1848209, at *23.

58. *See* Associated Press, *Pot Vending Machines Take Root in Los Angeles*, MSNBC.COM (Jan. 30, 2008, 7:01AM), http://www.msnbc.msn.com/id/22910820/ns/health-health_care/t/pot-vending-machines-take-root-los-angeles/#.T2pzA1FJQfk.

59. *Id.*

60. Mikos, *supra* note 52, at 1464; *see also id.* at 1464–69 (describing why the federal government lacks the resources to prosecute all but a small number of medical marijuana providers in more detail).

This presents a difficult problem for deciding how to exercise prosecutorial discretion in a way that is consistent with the duty to seek justice.

To be sure, every charging decision may implicate prosecutorial discretion[61] and commentators have noted the lamentable absence of "a systemic effort to define the principles that should govern prosecutorial decision-making."[62] Moreover, drug prosecutions generally have been cited as a particular area of concern in this regard.[63] In one particularly notorious example of questionable federal decision-making in drug enforcement, then-United States Attorney for the Southern District of New York Rudy Giuliani instituted a program called "Federal Day," in which "the feds would choose a day, without advance notice, to prosecute low-level dealers in federal court."[64] In most other contexts, however, a federal prosecutor's charging decision is likely to mean the difference between prosecution at the state or federal level,[65] and criminals who remain free do so only by eluding authorities and concealing their activity. By contrast, when a federal prosecutor pursues charges against a medical marijuana operator, the decision to prosecute is not a choice of venue but the difference between a prison term and freedom. Those who escape prosecution do not do so by avoiding detection; they operate as openly as any other business, and yet only a small fraction of them are prosecuted. As a result, federal prosecutors who insist on pursuing medical marijuana cases must decide how to choose between a number of easy targets for conviction, knowing that the handful they charge may face severe penalties while the rest may continue to operate out in the open. In these circumstances, conscientious prosecutors should be especially mindful of the duty to seek justice and avoid the temptation to engage in decision-making that "would offend common notions of justice [like making decisions] on the basis of a dart throw, a coin toss or some other arbitrary or capricious process."[66]

In recent years, the already difficult ethical problem facing federal prosecutors in this area has become even more complex as the result of federal pronouncements indicating an intent to stop medical marijuana prosecutions altogether. As a presidential candidate, Barack Obama said that he did not think it was a good use of federal resources to interfere with state medical marijuana laws, explaining, "I'm not going to be using

61. For a discussion of other Department of Justice efforts to centralize the exercise of prosecutorial discretion, see, for example, Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1442 (2008) ("The project to achieve nationwide uniformity in sentencing . . . became, from the perspective of Main Justice, a project to achieve nationwide centralization of prosecutorial power . . . .").

62. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 842 (2004).

63. *See, e.g.*, Clymer, *supra* note 15, at 649.

64. ETHAN BROWN, SNITCH: INFORMANTS, COOPERATORS & THE CORRUPTION OF JUSTICE 20 (2007).

65. *See* Clymer, *supra* note 15, at 649–51.

66. United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (1992).

Justice Department resources to try to circumvent state laws on this issue."[67] Not long after being confirmed as Attorney General, during the first 100 days of the Obama Presidency, Eric Holder was asked about medical marijuana prosecutions and replied, "What the president said during the campaign, you'll be surprised to know, will be consistent with what we'll be doing here in law enforcement."[68] Consistent with that position, Holder announced that "[t]he policy is to go after those people who violate both federal and state law."[69]

A few months after Attorney General Holder's comments to the press, Deputy Attorney General David Ogden issued a memo to all United States Attorneys that advised federal prosecutors "not [to] focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[70] The memo was thought to be the realization of Obama's statements as a candidate and to signal an end to federal interference with state medical marijuana laws. It was widely reported that the memo meant an end to federal raids of medical marijuana dispensaries, so long as they were operating lawfully under relevant state law. The *New York Times* ran a front-page article about the memo under the headline *U.S. Won't Prosecute in States That Allow Medical Marijuana*, reporting that "[p]eople who use marijuana for medical purposes and those who distribute it to them should not face federal prosecution, provided they act according to state law, the Justice Department said Monday in a directive with far-reaching political and legal implications."[71] It does not appear that the White House, the Department of Justice, the Drug Enforcement Administration, or any individual United States Attorneys took steps to dispel this impression in the days and weeks following the release of Ogden's memo. Indeed, in at least one case, the Department of Justice moved to have a Santa Cruz medical marijuana collective's lawsuit seeking to enjoin federal medical marijuana prosecutions on the basis of the Tenth Amendment dismissed as moot because of the memo.[72] Assistant United States Attorney Mark Quinlivan explained

67. Tim Dickinson, *Obama's War on Pot*, ROLLING STONE (Mar. 1, 2012), http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216.

68. Bob Egelko, *U.S. to Yield Marijuana Jurisdiction to States*, S.F. CHRON., Feb. 27, 2009, at A-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/02/26/BA2016651R.DTL.

69. Scott Glover, *U.S. Won't Prosecute Medical Pot Sales: Atty. Gen. Holder's Statements Is Hailed as a Landmark Change in Policy and Echoes a Pledge by Obama*, L.A. TIMES, Mar. 19, 2009, at 1.

70. Memorandum from David W. Ogden, *supra* note 40.

71. David Stout & Solomon Moore, *U.S. Won't Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES, Oct. 20, 2009, at A1.

72. *See, e.g.*, Joint Stipulation of Dismissal Without Prejudice, Santa Cruz v. Holder, Civil Action No. 03-1802 JF (N.D. Cal. Jan. 21, 2010).

to the court that, in light of the Ogden memo, "the plaintiffs would be seeking to enjoin, basically, a policy that is in the past."[73]

Consistent with the Ogden memo, federal raids and prosecutions of medical marijuana dispensaries slowed for a short period but did not stop. Indeed, even as the Ogden memo was released, United States Attorneys continued prosecuting medical marijuana operators, without much clarity as to whether they believed the operators were out of compliance with state law or whether they had decided not to follow the Ogden memo's advice about the use of federal law enforcement resources.[74] One of these prosecutions took place in San Diego against James Stacy, who operated a medical marijuana collective called Movement in Action, taking "great care to make sure that his cooperative was formed and operated in compliance with California law."[75] Stacy became a federal defendant just ten weeks after opening his collective in the late summer of 2009.[76] During a joint investigation involving the DEA and the San Diego County Sheriff's Office, a local undercover agent obtained a medical marijuana recommendation under false pretenses and then purchased medicine from Movement in Action. Not surprisingly, Stacy sought to rely on the Ogden memo to block his prosecution, filing a motion to dismiss the indictment based on an entrapment by estoppel theory. Stacy argued that public statements by Attorney General Holder had led him to believe his conduct was lawful under federal law and that the Ogden memo meant he could not be prosecuted if he was operating in compliance with California law. The prosecutor successfully argued, however, that the Ogden memo created no legally enforceable right. "Even if Defendant's prosecution were contrary to the guidance set forth in the Memorandum," the court explained, there is no legal basis "for dismissing an indictment because it is contrary to internal Department of Justice guidelines."[77] Because Stacy's compliance with California law and his reliance on the widely reported Obama policy would not provide him

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73. Transcript of Oral Argument, Santa Cruz v. Holder, Civil Action No. 03-1802 JF (N.D. Cal. Oct. 30, 2009).

74. *See, e.g.*, Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 643–45 (2011) ("Of course, one might expect the DOJ to heed its own policy, in which case judicial enforcement of the NEP would be unnecessary. In reality, however, the DOJ is a fragmented agency, one in which several autonomous decision-makers help shape enforcement policy.").

75. United States v. Stacy, 696 F. Supp. 2d 1141, 1143 (S.D. Cal. 2010).

76. *See* Teri Figueroa, *Medical Marijuana Activist Speaks of Legal Battle*, N. COUNTY TIMES (Apr. 3, 2011, 9:00 PM), http://www.nctimes.com/news/local/vista/article_7a1e1e18-8935-54e5-b60b-569bedc74a41.html.

77. *Stacy*, 696 F. Supp. 2d at 1149. Though Stacy's case is noteable because of its timing in relation to the Ogden memo, other federal medical marijuana defendants have received much longer sentences. *See, e.g.*, Rebecca Richman Cohen, Opinion *The Fight Over Medical Marijuana*, N.Y. TIMES, Nov. 7, 2012, http://www.nytimes.com/2012/11/08/opinion/the-fight-over-medical-marijuana.html (describing the case of Chris Williams, a Montana medical marijuana operator facing a mandatory minimum sentence of more than 80 years).

with a defense in federal court, he ultimately accepted a plea deal and was sentenced to two years of probation.[78]

Perhaps sensing that there would be no internal repercussions for ignoring the Ogden memo,[79] the number of federal medical marijuana raids, prosecutions, and threats of prosecution slowly began to increase during 2010.[80] By the end of that year, claims that these efforts exclusively targeted individuals who were in violation of both state and federal law were losing credibility and began to fall by the wayside. It was becoming clear that the federal approach to medical marijuana under President Obama was not much different than it had been under President Bush.[81] In June 2011, likely in recognition of the fact that many prosecutors had decided not to follow the Ogden memo in good faith, Deputy Attorney General James M. Cole issued a second memo.[82] Ostensibly, the Cole memo was issued to provide additional "guidance"[83] regarding the Ogden memo but, in reality, it directly contradicted it. Notwithstanding the Ogden memo's instruction not to "focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana,"[84] Cole's memo advised that "[t]he Ogden Memorandum was never intended to shield [medical marijuana dispensaries] even where those activities purport to comply with state law."[85]

By the beginning of 2012, the Obama administration had largely abandoned any pretense of taking a more deferential approach to state medical marijuana than previous administrations. The over-100 raids on dispensaries during Obama's first three years in office is on pace to exceed the number under Bush. Indeed, in a 2012 article summarizing the Obama administration's approach to medical marijuana, *Rolling Stone* writer Tim Dickinson argued, "over the past year, the Obama administration has quietly unleashed a multiagency crackdown on medical cannabis that goes far beyond anything undertaken by George W. Bush."[86] Somewhat astonishingly, some Obama officials have continued to make public statements indicating that only those who are in violation of state medi-

78. *See* Figueroa, *supra* note 76.

79. *See* Mikos, *supra* note 74, at 645–46 (arguing that the Ogden memo "may not have much influence over prosecutions brought by U.S. Attorneys" because it is legally unenforceable and cannot easily be enforced internally).

80. *See, e.g.*, Kris Hermes, *Has the Federal Government Changed Its Policy on Medical Marijuana Enforcement or Just Changed Its Reasons for Continued Interference?*, AM. FOR SAFE ACCESS (Feb. 3, 2011, 8:22 AM), http://safeaccessnow.org/blog/?p=1228 (describing the medical marijuana raids that occurred following the release of the Ogden memo).

81. *See* Dickinson, *supra* note 67 (reporting on the developments that led federal prosecutors to disregard Ogden's memo).

82. *See* Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys (June 29, 2011).

83. *Id.*

84. Memorandum from David W. Ogden, *supra* note 40.

85. Memorandum from James M. Cole, *supra* note 82.

86. Dickinson, *supra* note 67.

cal marijuana laws will face federal criminal prosecution. In March 2012, for example, U.S. Attorney for the Eastern District of California Benjamin Wagner discussed the federal crackdown on medical marijuana, stating that his office had "reserve[ed] criminal prosecution for the most flagrant violators of not only federal law but state law."[87] In response to requests to release local medical marijuana prosecutorial guidelines, however, Wagner demurred, "I'm not in a position to be of much comfort." He continued, "You don't ask the CHP, 'How many miles over the speed limit can I go before you pull me over?'"[88] Similarly, in June 2012, Attorney General Holder told a House Judiciary oversight committee that "We limit our enforcement efforts to those individuals, organizations that are acting out of conformity with state law . . . ."[89] Notwithstanding Holder's statement, U.S. Attorneys have threatened to prosecute state and local government *employees* for administering their own medical marijuana laws.[90] It is difficult to see how prosecuting state officials for implementing state law could possibly be consistent with a policy of limiting enforcement to those who are out of compliance with state law.

Though Ogden's memo and Holder's statements may not create legally enforceable rights—particularly in light of the 2011 Cole Memorandum—they should certainly give federal prosecutors reason to think carefully about how to pursue medical marijuana cases in light of their ethical duty to seek justice. Though some have tried to downplay the significance of Attorney General Holder's 2009 statements and the Ogden memo,[91] to pretend that they were not intended to announce a shift in federal policy and signal that state medical marijuana laws would operate free from federal interference is disingenuous at best. They were universally reported in the media in that light, without objection from federal officials. Moreover, some federal prosecutors—including, most recently, Attorney General Holder—regrettably continue to make public remarks implying that only individuals whose conduct does not comply with state medical marijuana laws will face federal prosecution. A federal prosecutor who hopes to act ethically in exercising her discretion cannot be blind to the reality that many people did—and still may—reasonably believe that their compliance with state medical marijuana laws will protect them

87. David Downs, *U.S. Attorney Breaks Silence on Medical-Marijuana Battle*, NEWSREVIEW.COM (Mar. 8, 2012), http://www.newsreview.com/sacramento/u-s-attorney-breaks-silence-on/content?oid=5379500.

88. *Id.*

89. Stephen Dinan, *Holder Says No Effort to Shut Down All Medical Marijuana*, WASH. TIMES, June 7, 2012, http://www.washingtontimes.com/blog/inside-politics/2012/jun/7/holder-no-effort-shut-down-all-medical-marijuana/.

90. *See, e.g.*, Mike Baker, *States Reassess Marijuana Laws After Fed Warnings*, ASSOCIATED PRESS, May 3, 2011, *available at* http:// http://www.huffingtonpost.com/huff-wires/20110503/us-medical-marijuana-feds/ ("Washington state's two U.S. attorneys warned that even state employees could be subject to prosecution for their role in marijuana regulation.").

91. *Id.* ("U.S. attorneys have said in their recent memos that they would consider civil or criminal penalties for those who run large-scale operations—even if they are acceptable under state law.").

from federal prosecution. Although they may be mistaken in believing this, it certainly counsels caution in pursuing medical marijuana prosecutions. Indeed, because the Ogden Memorandum has not been rescinded, there is an argument to be made that an ethical federal prosecutor should seek to act in accordance with its advice and only take legal action against individuals who are truly operating outside the bounds of state medical marijuana laws.[92] Federal prosecutors who do not feel bound to faithfully follow the policy outlined in Ogden's memo, however, should at least consider the impressions it created when deciding what tools to use in pursuing medical marijuana prosecutions.[93]

B. State Medical Marijuana Prosecutions

Because of the complex and unusual relationship between state and federal law with respect to medical marijuana, federal medical marijuana prosecutions present particularly challenging ethical problems with respect to the exercise of prosecutorial discretion. Medical marijuana prosecutions by local officials in some states also pose concerns with respect to the ethical duty to seek justice. This is because some state medical marijuana laws are unusually ambiguous and have been subject to wildly divergent interpretations in different localities. To be sure, not all state medical marijuana laws suffer from this problem. Colorado, for example, has adopted a thorough and precise regulatory structure to govern the medical marijuana market.[94] California stands at the opposite end of the spectrum, with fundamental questions about the law still unresolved sixteen years after passage of the state's Compassionate Use Act.[95]

Though news accounts of large, professionally run medical marijuana stores in California[96] may lead one to assume that the state's law clearly contemplates and regulates storefront dispensaries, their legality is actually premised almost entirely on a single provision of California law. The relevant statute, enacted by the California legislature in 2004, provides that medical marijuana patients and their caregivers may "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes."[97] In some parts of California, medical marijuana providers and law enforcement are in agreement

92. *See, e.g.*, Leslie C. Griffin, *The Prudent Prosecutor,* 14 GEO. J. LEGAL ETHICS 259, 307 (2001) (arguing that the legal role of individual prosecutors "does not permit unfettered moral discretion" and that "[p]rosecutorial discretion requires attention to office policies and procedures").

93. *See* Cassidy, *supra* note 20, at 636.

94. *See* Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 150–51 (2012) (describing Colorado's medical marijuana laws).

95. *See* Peter Hecht, *California Supreme Court's Daunting Task: Unite Pot-Dispensary Rulings*, SACRAMENTO BEE, Mar. 13, 2012, at 1A ("When it comes to rulings on medical marijuana, California courts have a case of multiple personality disorder.").

96. *See, e.g.*, Roger Parloff, *How Marijuana Became Legal*, CNNMONEY, Sept. 18, 2009, *available at* http://money.cnn.com/2009/09/11/magazines/fortune/medical_marijuana_legalizing.fortune/.

97. CAL. HEALTH & SAFETY CODE §11362.775 (West 2012).

in interpreting this provision to allow for storefront medical marijuana "collectives or cooperatives" that operate more-or-less like food cooperatives. In Oakland, for example, the Harborside Health Center has over 30,000 patients registered in its database and, though it operates as a nonprofit as required by California law, generates annual revenues of about $20 million.[98]

In other parts of the state, however, local law enforcement officials have adopted a significantly more restrictive interpretation of the "collective and cooperative" provision.[99] In San Diego, for example, District Attorney Bonnie Dumanis has made clear that she does not believe storefront dispensaries are permitted under California law.[100] Instead, her office has argued that the law allows only literal collective cultivation, meaning that most (or possibly all) medical marijuana collective members would need to contribute physical labor to cultivation efforts to operate lawfully.[101] Though her office clearly believes that California's medical marijuana does not permit operations like Oakland's Harborside, Dumanis has never clearly articulated exactly what she believes the law does allow. This has resulted in a significant amount of confusion and has complicated efforts by cities within the county to pass ordinances to regulate dispensaries. In 2010, the San Diego County grand jury issued a report criticizing Dumanis's office for failing to provide "clear and uniform guidelines under which qualified medical marijuana patients can obtain marijuana."[102] The grand jury recommended "that the District Attorney's Office should publish a position paper to outline what it considers the legal and illegal operation of medical marijuana collectives and cooperatives."[103]

Instead of releasing guidelines, however, Dumanis's office has limited pronouncements about its view of the law to a case-by-case series of criminal prosecutions. In perhaps the most well-known case, her office prosecuted Jovan Jackson for operating a medical marijuana collective

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98. *See* Parloff, *supra* note 96.

99. *See, e.g.*, Chris Lindberg, *Room for Abuse: A Critical Analysis of the Legal Justification for the Medical Marijuana Storefront "Dispensary,"* 40 SW. L. REV. 59, 103 (2010) (arguing for a more restrictive interpretation of California's medical marijuana laws).

100. On September 10, 2009, for example, Dumanis said that there was "no such thing right now" as a "legitimate medical marijuana dispensar[y]" in San Diego. Eric Wolff, *District Attorney: There Are No Legal Medical Marijuana Dispensaries Right Now*, LAST BLOG ON EARTH (Sept. 10, 2009), http://lastblogonearth.com/2009/09/10/district-attorney-there-are-no-legal-medical-marijuana-dispensaries-right-now.

101. *See* Lindberg, *supra* note 99, at 117–18 ("To cultivate whether individually or as a group, you have to plant, water, fertilize, protect from pests, and prune, i.e., cultivate. If some members of the group do not participate in the cultivation, then they are not among those who cultivated collectively or cooperatively.").

102. *Medical Marijuana in San Diego,* SAN DIEGO COUNTY GRAND JURY (June 7, 2010), http://www.sdcounty.ca.gov/grandjury/reports/2009-2010/MedicalMarijuanaReport.pdf.

103. *Id.*

known as Answerdam.[104] Answerdam was operated in a similar fashion to other storefront dispensaries in the state and so fell into the disputed area of California's law.[105] At the close of trial, the prosecutor argued that the jury should not be instructed on California's medical marijuana "collective and cooperative" provision because Jackson's storefront operation was illegal as a matter of law. The Judge disagreed, instructed the jury on the medical marijuana defense, and the jury promptly acquitted Jackson. After the trial, the jury held a press conference in which the foreperson explained that "the prosecution gave his . . . kind of narrow definition [of a collective] during the closing arguments, but there was nothing in the law that really backed that up."[106] Somewhat incredibly, after Jackson's acquittal, Dumanis's office prosecuted him a second time for running the same medical marijuana collective, which had continued to operate during the first trial.[107] This time, however, the trial court granted the prosecutor's motion to deny Jackson's medical marijuana defense and he was convicted.[108]

San Diego County's District Attorney is far from alone in advancing a narrow interpretation of California's medical marijuana law, and courts are currently split on its meaning. Two recent decisions interpreting California's "collective and cooperative" provision are instructive. In *People v. Colvin*,[109] decided February 23, 2012, the Second Appellate District overturned a trial court decision that denied a medical marijuana defense to a man charged with "transporting in his car about one pound of marijuana from one medical marijuana establishment to the second."[110] The trial court reasoned that Colvin did not qualify for the defense because "the transportation here had nothing to do with the cultivation process."[111] The appellate court reversed in a decision that found the statute allows medical marijuana cooperatives that operate like "[a] grocery cooperative [which] may have members who grow and sell the food and run a store out of which the cooperative's products are sold. But not everyone who pays a fee to become a member participates in the cooperative other than to shop at it."[112] Less than one week after *Colvin*, on February 29, 2012, the Court of Appeal for California's Second Appellate District came to a much different conclusion about what the state's

104. Brief for Appellant at *1–2, People v. Jackson, No. D058988, 2011 WL 6402248 (Cal. App. 4 Dist. Nov. 21, 2011).

105. *See id.*

106. *Id.* at *12 (first alteration in original).

107. *Id.*

108. Shortly before this essay went to press, Jackson's conviction was overturned. *See* People v Jackson, 210 Cal. App. 4th 525 (2012).

109. 137 Cal. Rptr. 3d 856 (Ct. App. 2012).

110. *Id.* at 857.

111. *Id.* at 859.

112. *Id.* at 863; *see also id.* (criticizing the State's position because it "does not specify *how* many members must participate [in the cultivation process] or in *what* way or ways they must do so, except to imply that Holistic, with its 5,000 members and 14 growers, is simply too big to allow any 'meaningful' participation in the cooperative process").

medical marijuana law allows in *Lake Forest v. Evergreen Holistic Collective*.[113] *Lake Forest* concerned the validity of a local ban on medical marijuana dispensaries. As in *Colvin*, the *Lake Forest* court "reject[ed] the City's suggestion . . . that a patient or primary caregiver personally must engage in the physical cultivation of marijuana" for a collective operation to be lawful.[114] But, while *Colvin* permitted a medical marijuana defense for transportation between two collectives under the collective and cooperative provision, *Lake Forest* concluded that medical marijuana collectives must cultivate and store all marijuana on the same site as it is dispensed in order to be lawful.[115] According to *Lake Forest*, transportation between dispensaries of the sort involved in *Colvin* is not authorized under California's medical marijuana laws. Instead, "a qualified patient [may] transport medical marijuana from the cultivation site in an amount limited to his or her personal medical need."[116]

In sum, courts and prosecutors across California are currently divided on the question of what sorts of entities and activities the state's medical marijuana law permits. Some believe that the law legalizes only cooperatives in which every member contributes labor to the cultivation project; others argue that medical marijuana cooperatives may operate like food cooperatives; still others conclude that storefront operations are allowed, but only so long as they abide by certain conditions (like growing and storing all marijuana on site). As a result, a collective that may be welcomed by prosecutors in one county might face stiff criminal penalties in another. This is not to imply that where there is disagreement about what the law means, it is unethical to bring prosecutions. But, when there is so much uncertainty in the law, the duty to seek justice should lead prosecutors to carefully consider their decisions to ensure defendants are treated with fairness and honesty.[117] For example, a dutiful prosecutor who interprets California's law more narrowly than colleagues in other jurisdictions may wish to consider issuing clear guidelines before bringing prosecutions so that those who wish to abide by the law can do so. Whatever course of action a prosecutor decides to take, she should be sure not to overlook—and, indeed, give serious consideration to—the ethical considerations involved in pursuing prosecutions amidst fundamental disagreements about the meaning of the law she is planning to enforce.

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113. *See* 138 Cal. Rptr. 3d 332, 337 (Ct. App. 2012).

114. *Id.* at 352; *see id.* ("A person may participate in a lawful cooperative without any requirement that he or she personally must create goods to stock the shelves of a consumer cooperative or grow the produce in an agricultural one.").

115. *Id.* at 351 ("[S]ection 11362.775 requires that any collective or cooperative activity involving quantities of marijuana exceeding a patient's personal medical need must be tied to the cultivation site.").

116. *Id.*

117. *See* Cassidy, *supra* note 20, at 640.

III. CONCLUSION

Amidst the increasing focus on the ethical obligations of private attorneys who represent medical marijuana providers, there is a risk that the ethical duties of the attorneys who prosecute them may be overlooked. This essay attempts to shed light on this issue, and argues that, in comparison to the ethical problems facing private attorneys, medical marijuana prosecutions present equally compelling—albeit less precise—ethical questions. Because of the unique relationship between state and federal laws concerning medical marijuana and the unusual history of federal enforcement, federal prosecutors who pursue medical marijuana cases should carefully evaluate how they exercise their discretion. In many states with medical marijuana laws, hundreds of dispensaries currently operate in the open like any other business and federal drug enforcement officials have the resources to prosecute only a small percentage of them. Moreover, statements by federal officials may have understandably led some of these operators to believe that complying with state law will provide them with some measure of protection from federal prosecution. In this setting, the decision to bring a federal prosecution carries especially significant consequences. Similarly, in states with ambiguous medical marijuana laws, state prosecutors face difficult decisions about how to exercise their discretion in a manner that is most consistent with the duty to seek justice.

Though this essay sketches some of the ethical problems facing prosecutors in the context of medical marijuana law, it does not advocate any particular course of action for prosecutors. Some of the prosecutorial tactics discussed above appear to be on shakier ethical ground than others. For example, months after Eric Holder announced the Obama administration's "policy is to go after those people who violate both federal and state law,"[118] James Stacy found himself facing federal prosecution for operating a dispensary that appeared to be in compliance with California law and that was no different than hundreds of other dispensaries openly operating throughout the state. Within the State of California, San Diego's district attorney has ignored a county grand jury's request for prosecutorial guidelines and, instead, left dispensary operators to guess at how her office will view their operation.

Reasonable minds may disagree about how the duty to seek justice relates to these examples. But, at a minimum, they should give conscientious prosecutors a reason to be carefully attuned to this duty when exercising discretion in the medical marijuana context. In particular, prosecutors who decide to pursue action against medical marijuana caregivers should consider whether it may be more consistent with the duty to seek justice to take some action short of prosecution as an initial step. Increas-

118. Glover, *supra* note 69, at 1.

ingly, federal prosecutors have sent warning letters to dispensary operators and landlords before pursuing legal action against them. There may be public policy-based reasons to disagree with even this sort of federal interference into state medical marijuana laws.[119] From an ethical perspective, however, this approach would seem to be preferable to filing charges without warning in light of the unique legal uncertainties in this area of the law.[120] The open-ended nature of a prosecutor's ethical obligations may make it difficult to draw more definitive conclusions than this. Though the injunction that prosecutors "seek justice" is notoriously vague and cannot be easily reduced to precise advice, however, this should not diminish its importance.

119. *See, e.g.*, Kreit, *supra* note 43, at 556 (arguing that because the federal government does not have sufficient resources to block the implementation of state medical marijuana laws, its efforts to interfere result in a less regulated market and are counter-productive).

120. *See* Cassidy, *supra* note 20, at 640.

IS ASSISTING MEDICAL MARIJUANA DISPENSARIES HAZARDOUS TO A LAWYER'S PROFESSIONAL HEALTH?

ALEC ROTHROCK†

Colorado Rule of Professional Conduct 1.2(d) states, in part, that a lawyer shall not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal."[1] A lawyer who provides legal services to a medical marijuana dispensary does not assist in his client's violation of *Colorado* criminal laws banning the possession and sale of marijuana as long as the dispensary qualifies as a caregiver under article 18, section 14 of the Colorado Constitution and complies with that section and other legal requirements.[2]

Is the lawyer therefore in compliance with Colo. RPC 1.2(d)?

The answer is "no," not if the same conduct violates federal criminal law.

The analysis and answer are no different under Amendment 64 to the Colorado Constitution with respect to a lawyer's assistance of a client in the recreational marijuana business.[3]

I. IS MEDICAL MARIJUANA LEGAL?

In 2000, Colorado voters passed an amendment to the Colorado Constitution creating limited exemptions from C.R.S. § 18-18-406, which makes unlawful the possession, use, and sale of marijuana.[4] Since that time, hundreds of medical marijuana dispensaries have opened for business in the State of Colorado.

As with any new business owner, a lawyer may be engaged to provide a variety of legal services incident to the creation of the business, including:

- forming the entity that will operate it;
- drafting and negotiating buy-sell agreements among the owners;
- drafting and negotiating loan documents or documents raising capital for the business;

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1. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).
2. COLO. CONST. art. 18, § 14.
3. *Id.* art. 18, § 16.
4. *Id.* art. 18, § 14.

- assisting in preparing applications for required licenses;
- registering trademarks;
- helping to draft and negotiate the documents necessary to purchase or rent the property from which the business operates; and
- furnishing an opinion letter opinion regarding the client's legal rights and risks.

And that is just to get the business up and running, to say nothing of the need for legal services to the ongoing business.

Yet 21 U.S.C. § 841(a)(1)[5] continues to make the possession, use, and sale of marijuana illegal at the federal level, even though it affects some purely intrastate activities.[6] Indeed, in the so-called Ogden Memo, adopted in October 2009, the United States Department of Justice directed federal prosecutors to focus their resources elsewhere than on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana"; however, the memo confirmed that the conduct remains illegal under federal law.[7] Since the release of the Ogden Memo, U.S. Attorneys in different jurisdictions have taken less sanguine public positions on the enforcement of 21 U.S.C. § 841(a)(1).[8]

II. COLORADO RULE OF PROFESSIONAL CONDUCT 1.2(D) DECONSTRUCTED

A. Colorado Rule of Professional Conduct 1.2(d) Applies to Conduct Made Criminal Under any Law

Colorado Rule of Professional Conduct 1.2(d) applies to conduct made criminal under any law. It states as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[9]

Colorado Rule of Professional Conduct 1.2(d) thus prohibits the distinct activities of (1) counseling a client to engage in criminal conduct

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5. 21 U.S.C. § 812(c) lists "marihuana" as a controlled substance within the meaning of 21 U.S.C. § 841(a)(1).

6. Gonzales v. Raich, 545 U.S. 1, 22 (2005).

7. Memorandum for Selected United States Attorneys from David W. Ogden (Oct. 19, 2009), *available at* http://blogs.usdoj.gov/blog/archives/192.

8. *E.g.*, Letter from John F. Walsh, United States Attorney, to Stanley L. Garnett, District Attorney (Mar. 20, 2012), *available at* http://www.justice.gov/dea/pubs/states/newsrel/2012/den032012.pdf

9. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).

and (2) assisting a client in criminal conduct. The lawyer must also "know" that the client's conduct is criminal. These terms are described below. First, however, there is a threshold question about whether Rule 1.2(d) prohibits lawyer counseling and assistance of conduct that is not illegal under state law but is illegal under federal law.

For purposes of Rule 1.2(d), if certain conduct is criminal under any jurisdiction's law, the fact that it is not criminal under the concurrently applicable law of another jurisdiction is irrelevant. Also, a federal no-prosecution policy is not a change in the law, and by its nature, it is temporary.

Ethics opinions from two other states reach diametrically opposed conclusions regarding the effect of the federal government's no-prosecution policy on lawyers' obligations under Rule 1.2(d). A Maine ethics opinion states that Rule 1.2(d)

> does not make a distinction between crimes which are enforced and those which are not. So long as both the federal law and the language of the Rule each remain the same, an attorney needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law. . . . [T]here is no guarantee that, with a change in policy, administration, or resources, the federal law might ultimately be enforced to the chagrin of lawyers whose conduct enabled the dispensaries.[10]

In contrast, an Arizona ethics opinion interprets the Ogden Memo as creating a "safe harbor for conduct that is in 'clear and unambiguous compliance' with state law" unless and until a court holds that federal law preempts Arizona's medical marijuana law.[11] The Arizona opinion concludes by stating that it "decline[s] to interpret and apply" Rule 1.2(d) in a way that prevents lawyers from assisting clients in engaging in activities authorized by state law, "thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits."[12]

Arizona's opinion is flawed. It suggests that Arizona's medical marijuana law either displaces federal law within the State of Arizona or protects Arizona citizens from the application of federal law. If this was the intent of the opinion, it represents a misunderstanding of federalism. If, instead, the intent of the opinion was to hold up the current no-prosecution policy as a "safe harbor," it ignores the clear words of Rule 1.2(d) and incautiously encourages Arizona lawyers to rely on a policy

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10. Maine Op. 199, "Advising Clients Concerning Maine's Medical Marijuana Act" (July 7, 2010).

11. Section IV, Analysis, Arizona Op. No. 11-01 (February 2011).

12. *Id.*

that could change at any time. Like it or not, the federal law remains unchanged and in force in every corner of Arizona.

B. Discussing the Legal Consequences of a Proposed Course of Conduct and Making Good Faith Arguments Under the Law

Lawyers have an important role in the medical marijuana business. Colorado Rule of Professional Conduct 1.2(d) in fact permits them to engage in this role. Specifically, Rule 1.2(d) permits lawyers to "discuss the legal consequences of any proposed course of conduct with a client and . . . counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[13] There is no more important function for lawyers in our society.

Colorado Rule of Professional Conduct 1.2(d) permits—and clients expect lawyers to give—an "honest opinion about the actual consequences that appear likely to result from a client's conduct."[14] Provided the lawyer does not encourage the client to break the law, discussing the "legal consequences" of a proposed course of conduct may include a discussion not only of what the law is, but also of the likelihood of its enforcement in a given situation.[15] In a working paper, Professors Sam Kamin and Eli Wald of the University of Denver Sturm College of Law, relying on the *Restatement (Third) of the Law Governing Lawyers*, agree with this point and argue that a lawyer can "advise a client that enforcement of the law, at least vis-à-vis dispensaries operating within the confines of the state's regulatory apparatus, is a low priority."[16] Such advice would not violate Rule 1.2(d); whether it is sound advice at the time it is given is another matter.

Lawyers are not ethically responsible if the client uses this information to engage in a crime or fraud. The lawyer's responsibility may be "especially delicate" when the "client's course of action has already begun and is continuing."[17] A lawyer may not "continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent."[18]

A leading treatise offers the example of the lawyer who advises a client that it is unlawful to claim certain tax deductions but also that the likelihood that the Internal Revenue Service will discover them in an

13. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).
14. *Id.* 1.2 cmt. 9.
15. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1588 (1995).
16. Sam Kamin & Eli Wald, *Medical Marijuana Lawyers: Outlaws or Crusaders?* 27 (2012), *available at* http://works.bepress.com/sam_kamin/3.
17. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 10.
18. *Id.*

audit is minimal.[19] According to the authors, there is no "wholly satisfactory" answer to whether the lawyer assisted the client in criminal conduct, in violation of Rule 1.2(d), or simply explained the law and the legal consequences of the client taking the deductions.[20]

Applying the analysis of a 1985 ABA Formal Ethics Opinion, however, if the lawyer had a good faith belief that the deductions were lawful, or that there was a good faith argument in support of taking them, Rule 1.2(d) would not prohibit the lawyer from advising the client about the option of taking the deductions. This would be the case even if the lawyer believed that it was more likely than not that the client's position would fail if challenged.[21]

Counseling or assisting a client to make a "good faith effort to determine the validity, scope, meaning or application" of a law does not mean advising a client to break the law without telling anyone.[22] The lawyer must advise the client to affirmatively challenge the law either to test its validity or applicability in the client's circumstances or to protest against what the client considers a greater evil.[23] This is what the Comment to Rule 1.2(d) describes as a "course of action involving disobedience."[24]

For example, a New Hampshire lawyer advised her client—the mother in a child abuse case—to violate a statute making it unlawful to disclose information without the court's permission that might identify the child or parent involved in a hearing in such a case.[25] In hopes of currying public favor, the mother gave extensive documentation about the hearing to a local newspaper. In a subsequent lawyer discipline case, the lawyer argued that the Comment authorizing a "course of action involving disobedience" permitted her to "self-determine the validity of the

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19. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 5.14, at 5-47 to -48 (3d ed., 2012 Supp.). Another commentator expressed the view that Rule 1.2(d)'s language permitting a lawyer to discuss the legal consequences of a proposed course of conduct must refer to circumstances in which either the client's intentions or the law itself is ambiguous. Otherwise a lawyer could "discuss" with a client "various methods of operating a proposed drug-smuggling ring, murdering a political rival or disgruntled spouse, or cheating a trusting business partner," as long as the lawyer's advice remained "personally uncommitted" and did not "heat up to the level of 'counsel' or 'assist.'" CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 694 (1986).

20. 1 HAZARD & HODES, *supra* note 19, § 5.14, at 5-48.

21. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 352 (1985).

22. *See* W. William Hodes, *Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?*, 87 KY. L.J. 1019, 1022 n.7 (1999) (writing that this part of Rule 1.2(d) "requires distinguishing between good faith test case litigation, classic civil disobedience by appealing to higher law, and *surreptitious* civil disobedience, which is no different than law-breaking" (emphasis in original)).

23. 1 HAZARD & HODES, *supra* note 19, § 5.15, at 5-48, -49.

24. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 12 (2012).

25. Werme's Case, 839 A.2d 1 (N.H. 2003).

statute and advise her client to disobey it because she concluded that [it] is unconstitutional" under the First Amendment.[26]

The New Hampshire Supreme Court disagreed. It observed that the Comment modified a rule that required a "good faith effort to determine the validity, scope, meaning or application" of the law. There were at least two "good faith" options available to the lawyer: (1) seek permission from the court in the child abuse case to disclose the information, and (2) file an action seeking a declaratory judgment that the statute was unconstitutional.[27] The New Hampshire Supreme Court affirmed a reprimand issued by an inferior disciplinary tribunal.[28]

C. The Counseling Prohibition

On the prohibited side of the Rule 1.2(d) spectrum, a lawyer may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."[29] For example, a Minnesota criminal defense lawyer was found to have counseled clients to engage in criminal conduct by referring female clients to another client who operated a prostitution business if they could not afford to pay his fees.[30]

A 1952 ABA Formal Opinion admonishes that there is a "sharp distinction . . . between advising what can lawfully be done and advising how unlawful acts can be done in a way to avoid conviction."[31] The legal distinction is sharp but the factual difference may be subtle. As the Comment to Rule 1.2 points out, sometimes there is a fine line between presenting an analysis of the law and suggesting the means by which the client may violate it.[32]

A leading authority refers here to a distinction between "innocent discussion" and "active participation"—passive/active distinction.[33] Another authority describes the counseling prohibition in much the same way, stating that it prohibits a lawyer from advising a client about the legality of proposed conduct "with the intent of facilitating or encouraging the client's action."[34] Perhaps this active/passive distinction, or focus on the lawyer's intent, is what the Comment means when it states that a

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26. *Id.* at 2.
27. *Id.* at 3.
28. *Id.*; *see* 1 HAZARD & HODES, *supra* note 19, § 5.15, at 5-48 (implying that client must act "openly").
29. COLO. RULES OF PROF'L CONDUCT R. 1.2(d) (2012).
30. *In re* Olkon, 605 F. Supp. 784, 790 (D. Minn. 1985).
31. ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 281 (1952); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-5 (1980) ("A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.").
32. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 9.
33. 1 HAZARD & HODES, *supra* note 19, § 5.13, at 5-40.
34. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. a (2000).

lawyer may not "knowingly" counsel a client to engage in criminal (or fraudulent) conduct,[35] an adverb absent from the Rule itself.

This focus on the lawyer's state of mind suggests a subjective analysis. One of these same legal authorities states that it also is important to understand the "level of certainty that the client will actually misuse the information."[36] This inquiry is objective in nature.

A classic law school hypothetical that illustrates the counseling prohibition is that of the lawyer who advises a client about which countries do not have extradition treaties with the United States.[37] Another is the lawyer whose client has a "large amount of undeclared income in cash who wants to know how *small* a cash transaction must be before banks are relieved of the duty to report it."[38]

D. The Assisting Prohibition

Rule 1.2(d)'s prohibition against assisting a client in conduct the lawyer knows to be criminal is the most significant impediment to a lawyer who provides legal services to a client in the medical marijuana industry. "Assistance" is a term that requires some connection between the lawyer's conduct and the client's criminal conduct. However, the proximity of the connection leaves bar prosecutors with considerable latitude, checked only by the disciplinary tribunal and superior appellate tribunals.

The Comment to Colorado Rule of Professional Conduct 1.2(d) offers limited help in circumscribing the term. It states, "The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed."[39] "Criminal" can be substituted for "fraudulent" in this sentence. If the lawyer believes that the client expects the lawyer to provide this kind of assistance, another Rule of Professional Conduct requires the lawyer to "consult" with the client about the limitations on the lawyer's assistance.[40] Several Colorado attorney discipline cases involve prohibited assistance to a client, including the lawyer who assisted his client in criminal impersonation by failing to disclose her true identity to the district attorney or the court in a criminal trespass case,[41] and the lawyer who assisted a client in emptying his bank

35. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 9.
36. 1 HAZARD & HODES, *supra* note 19, § 5.13, at 5-40.
37. *Id.* at 5-40.1 (emphasis in original).
38. *Id.*; *see also* People v. Gifford, 76 P.3d 519, 520 (Colo. O.P.D.J. 2003) (holding respondent lawyer counseled client was in violation of Colo. RPC 1.2(d) by advising client to offer real estate to his ex-wife in exchange for ex-wife's and another witness's recantation of testimony in a pending criminal matter).
39. COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 10.
40. *Id.* 1.4(a)(5); *accord id.* 1.2 cmt. 13.
41. People v. Casey, 948 P.2d 1014 (Colo. 1997).

accounts and supplying him with money preparatory to fleeing with his minor child to avoid a child custody order.[42]

A leading treatise states that both the counseling and assisting prohibitions in Rule 1.2(d) "track[ ] standard principles of accessorial liability."[43] For example, "Pursuant to 18 U.S.C. § 2, a defendant may be charged as a principal in the commission of a substantive criminal offense whenever he 'aids, abets, counsels, commands, induces or procures its commission. . . .' In order to prove a crime of aiding and abetting, the government must prove that the defendant associated with the criminal venture, that he purposefully participated in it, and that he sought by his actions to bring it about."[44]

An ABA Formal Opinion holds that assisting a client in a crime or fraud may include a lawyer's failure to disavow her own work product if she discovers that her client has used the work product to further a crime or fraud.[45] The example given in the ABA Opinion is that of outside counsel to a small lighting fixture company that was in the process of obtaining a $5 million unsecured loan from a bank. After issuing an opinion of counsel attesting to, among other things, the enforceability of the company's lighting fixture contracts against the client's customers, outside counsel discovers that for the past three years, the chief executive officer and the treasurer of the company have been creating millions of dollars worth of false lighting installation contracts. In other words, a material portion of outside counsel's opinion letter is false. Outside counsel believes that her continuing representation of the client in the matter would "discourage inquiry into the soundness of the loan and perhaps even encourage the bank to make further extensions of credit." The opinion concludes that the lawyer must withdraw from the representation of the company in that matter and disavow her opinion letter, even if doing so will effectively disclose information that the lawyer is obligated to keep confidential.[46]

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42. People v. Chappell, 927 P.2d 829 (Colo. 1996).

43. 1 HAZARD & HODES, *supra* note 19, § 5.12, at 5-36. Engaging in criminal conduct usually constitutes disciplinable conduct, whether or not the lawyer is convicted. COLO. R. CIV. P. 251.5(b); COLO. RULES OF PROF'L CONDUCT R. 8.4(b) (2012).

44. United States v. Wang, 898 F. Supp. 758, 761 (D. Colo. 1995); *see also* COLO. REV. STAT. § 18-1-603 (2012) ("A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.").

45. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 366 (1992).

46. *See* . COLO. RULES OF PROF'L CONDUCT R. 1.16(a)(1) (lawyer must decline or withdraw from representation if representation would violate Colo. RPC 1.2(d), inter alia, or "other law"). Colo. RPC 1.2 cmt. 10 and Colo. RPC 4.1 cmt. 3 state that if necessary to avoid assisting a client in a crime or fraud, a lawyer not only must withdraw from the representation but also must "disaffirm an opinion, document, affirmation or the like." The latter goes on to state that in "extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under [Colo. RPC 4.1(b)] the lawyer is

Examples of improper "assistance" tend to arise in a non-litigation setting. In a litigation setting, a lawyer's representation of a client related to medical marijuana is less likely to constitute impermissible "assistance" if the client's conduct is completed, or if the client is making a "good faith effort to determine the validity, scope, meaning or application of the law," as discussed above.

An isolated criminal defense representation involving allegedly illegal use or possession of marijuana does not constitute assistance of the crime in violation of Rule 1.2(d), even though the lawyer's objective in the representation is to gain or preserve the client's freedom, which, at a basic level, permits the client to engage in the same conduct again.[47] After all, the same could be said about virtually any criminal defense representation.

Criminal defense representation for past conduct is not permissible, however, when a lawyer "accepts a retainer from an organization, known to be unlawful, and agrees in advance to defend its members when from time to time they are accused of crime arising out of its unlawful activities." [48] For a lawyer to undertake such an arrangement, the enterprise must be "lawful."[49] This distinction conjures an image of swarthy men involved in organized crime, but from the perspective of federal law, a dispensary owned by Rotary Club members also may be considered an "unlawful" organization.

But the entire purpose of some litigation is to permit the client to engage in conduct illegal under federal law. A lawyer who fights to obtain unemployment compensation for an employee discharged from employment for using marijuana in compliance with state medical marijuana law, but in violation of the employer's "zero-tolerance drug policy," assists the client's continued violation of federal law prohibiting the use of marijuana.[50] However, the lawyer does not violate Rule 1.2(d) if the

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required to do so, unless the disclosure is prohibited by Rule 1.6." In turn, Colo. RPC 1.6(b)(3) and (4) permit a lawyer to reveal information relating to the representation in order to prevent fraud by a client or substantial financial injury that may result from a client's crime or fraud, but only if the client has "used the lawyer's services."

47. People v. Sexton, No. 10CA1206, 2012 WL 503648 (Colo. App. Feb. 16, 2012).

48. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 281 (1952); *accord* United States v. Castellano, 610 F. Supp. 1151, 1165–66 (S.D.N.Y. 1984) (quoting ABA Formal Op. 281 with approval); *see also id.* ("[I]t need hardly be [be]labored that an attorney may not agree with an illegal syndicate to represent its members or employees with respect to future violations of the law." (second alteration in original) (quoting *In re Abrams*, 266 A.2d 275 (N.J. 1970)) (internal quotation marks omitted)).

49. *See* COLO. RULES OF PROF'L CONDUCT R. 1.2 cmt. 12 (2012) (stating Rule 1.2(d) "does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise"); ABA Defense Function Standard 4-3.7(c) ("Defense counsel should not agree in advance of the commission of a crime that he or she will serve as counsel for the defendant, except as part of a bona fide effort to determine the validity, scope, meaning, or application of the law, or where the defense is incident to a general retainer for legal services to a person or enterprise engaged in legitimate activity.").

50. Beinor v. Indus. Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011).

representation constitutes a "good faith effort" to determine the "meaning" of the unemployment compensation statute involved. A lawyer who challenges a trial court's restriction on a divorce client's parenting time, imposed because the client's use of medical marijuana allegedly endangered the client's minor child, assists the client's violation of federal law but does not violate Rule 1.2(d) if the lawyer's services represented a good faith effort to determine the application of law of child endangerment.[51]

Similarly, a lawyer who seeks to permit a client on probation to use medical marijuana notwithstanding a condition of the client's probation requiring him not to "commit another offense" while on probation assists the client to violate federal law, but does not violate Rule 1.2(d) if the action constituted a good faith effort to determine the meaning of a state probation statute and the medical marijuana provisions of the Colorado Constitution.[52] A lawyer who represents a dispensary in opposing a zoning ordinance that has the effect of closing the client's operation is seeking to keep the client stay in business, a business activity that violates federal law, but does not violate Rule 1.2(d) if done in a good faith effort to determine the validity of the ordinance.[53]

E. Knowledge of Criminal Conduct

With respect to both the counseling and assisting prohibitions, the lawyer must "know" that the client's conduct is criminal. Knowledge means actual knowledge of the fact in question. [54] A reckless state of mind does not constitute knowledge.[55] However, knowledge may be, and often must be, inferred from the circumstances.[56]

It is not clear from Colorado Rule of Professional Conduct 1.2(d) whether the emphasis of the knowledge requirement is on the lawyer's awareness of the client's activities or on the lawyer's awareness of their criminal nature.[57] It may be both, although it is doubtful that a lawyer's ignorance of the law would excuse a violation of Rule 1.2(d).

Nor is willful ignorance of a client's activities likely to serve as a valid defense to a Rule 1.2(d) violation. In a 1981 informal opinion, the ABA Committee on Ethics and Professional Responsibility construed a virtually identical rule in the ABA Model Code of Professional Respon-

51. *In re* Marriage of Parr & Lyman, 240 P.3d 509 (Colo. App. 2010).

52. People v. Watkins, 282 P.3d 500 (Colo. App., 2012).

53. Giuliani v. Jefferson Cnty. Bd. Cnty. Comm'rs, No. 11CA1919, 2012 WL 5360940 (Colo. App. Nov. 1, 2012).

54. COLO. RULES OF PROF'L CONDUCT R. 1.0(f).

55. *Id.* 1.0 cmt. 7A.

56. *Id.* 1.0(f).

57. *Compare id.* 1.2(d) ("[L]awyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is criminal or fraudulent." (emphasis added)), *with id.* 1.2 cmt. 9 ("Paragraph (d) prohibits a lawyer from *knowingly* counseling or assisting a client to commit a crime or fraud." (emphasis added)).

sibility to mean that "[a] lawyer must be satisfied, on the facts before him and readily available to him, that he can perform the requested services without abetting . . . criminal conduct and without relying on past client crime . . . to achieve results the client now wants. Otherwise, the lawyer has a duty of further inquiry."[58] This language is not inconsistent, at least according to some commentators, with a lawyer's operating assumption that a client is using the lawyer's counsel for lawful purposes.[59]

In their paper, Professors Kamin and Wald rely on the *Restatement (Third) of the Law Governing Lawyers* to argue that a lawyer does not assist a client within the meaning of Rule 1.2(d), unless the lawyer has an "actual intent to encourage the commission of the crime."[60] The *Restatement* defines "assisting" in this context as "providing"—with the "intent of facilitating or encouraging the client's action"—"other professional services, such as preparing documents, drafting correspondence, negotiating with a nonclient, or contacting a governmental agency."[61]

One problem with this interpretation is that Rule 1.2(d) itself does not require proof of the lawyer's intent, and the *Restatement* does not have the force of law. Although some Rules of Professional Conduct, including Rule 1.2(d), require bar counsel to prove a lawyer's knowledge of certain facts, few if any require bar counsel to prove the lawyer's intent. The lawyer's intent is generally relevant as a matter of proof only for purposes of determining the appropriate sanction for a rule violation.[62]

III. APPLICATION OF COLORADO RULE OF PROFESSIONAL CONDUCT 1.2(D) TO REPRESENTATION OF MEDICAL MARIJUANA DISPENSARIES

In most instances, a lawyer will know when a client is engaging a lawyer's services to establish a medical marijuana dispensary. This will usually be the client's stated purpose in consulting the lawyer, and the client needs no encouragement from the lawyer to embark on the venture. The client may even request that the lawyer analyze the laws—state and federal—that apply to the operation of the proposed business. So far, so good under Colorado Rule of Professional Conduct 1.2(d). For the lawyer, the delicate ethical concern lies in knowing the difference be-

58. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981).

59. Michael M. Mustokoff, Jonathan L. Swichar & Cheryl R. Herzfeld, *The Attorney/Client Privilege: A Fond Memory of Things Past An Analysis of the Privilege Following* United States v. Anderson, 9 ANNALS HEALTH L. 107, 118 (2000).

60. Kamin & Wald, *supra* note 16, at 29.

61. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94 cmt. a (2000).

62. *E.g.*, *In re* Roose, 69 P.3d 43, 48 (Colo. 2003) (discussing difference between knowledge and intent for purposes of determining appropriate level of discipline under ABA Standards for Imposing Lawyer Sanctions).

tween "directing, suggesting, or assisting in criminal . . . conduct, on the one hand, and providing information about the law . . . on the other."[63]

It is possible to draw distinctions under Colorado Rule of Professional Conduct 1.2(d) between conduct that does and does not further a client's federal criminal conduct. With the exception of the legal opinion, all of the activities described above would likely fall under the vague definition of assistance, unless perhaps dispensary activities are only one possible business activity of the enterprise. The proximity of the lawyer's services to the dispensary's core activities is likely to be a critical factor, so helping a small dispensary is more ethically risky than helping a far flung enterprise whose activities may or may not include these core activities.

It is readily apparent that drawing lines between providing information, on one hand, and providing counseling or assistance, on the other, is largely a self-defeating exercise. There are a good many public policy reasons why Rule 1.2(d) should not smother lawyer assistance to clients in the medical marijuana industry, but these reasons do not change the plain wording of Rule 1.2(d). And, of course, Colorado Rule of Professional Conduct 1.2(d) is not interpreted one way for medical marijuana violations of federal law and another way for all other crimes. Lawyers who represent medical marijuana dispensaries in a business setting almost cannot help but violate the rule.

The possible disciplinary consequences for this conduct are an entirely different matter. They depend on matters largely outside lawyers' control, namely the initiation of a request for investigation with Colorado's Office of Attorney Regulation Counsel (OARC), and OARC's prosecution policy.

No Colorado lawyer has been publicly disciplined, or even subjected to public charges, based on counseling or assisting a client to participate in the medical marijuana business in compliance with state law. There is no indication that OARC interprets Colorado Rule of Professional Conduct 1.2(d) in the elastic way that federal courts have historically interpreted the Commerce Clause in federal constitutional jurisprudence. OARC's policy on disciplinary prosecution for providing standard legal services to state-law abiding members of the medical marijuana industry seems to be one of tolerance, not unlike the policy on criminal prosecution taken by the Justice Department in the Ogden Memo. Of course, just as the dispensaries must rely on the criminal prosecution policy of the current President's administration, so too must Colorado lawyers rely on the disciplinary prosecution policy of OARC and its supervisor, the Colorado Supreme Court.

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63. Pepper, *supra* note 15, at 1588.