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Alternative Legal Professionals and Access to Justice: Failure, Success, and the Evolving Influence of the Washington State LLLT Program (The Genie is Out of the Bottle)

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ALTERNATIVE LEGAL PROFESSIONALS AND ACCESS TO JUSTICE: FAILURE, SUCCESS, AND THE EVOLVING INFLUENCE OF THE WASHINGTON STATE LLLT PROGRAM (THE GENIE IS OUT OF THE BOTTLE)

Stephen Daniels & James Bowers***

INTRODUCTION: ACCESS IS THE BOTTOM LINE

A. Context: There's More to the Problem Than You Might Think

The existence of a civil justice gap is wide, uncontested, and shows no signs of narrowing. Research dating back to the 1970s documents a significant shortfall in the availability of civil legal services for many people.[1] On the demand side, the problem is deeper than the perennial concern with legal services for the poor and includes a significant share of the American populace.[2] On the supply or delivery side, it goes beyond the perpetually inadequate legal aid models or pro bono schemes aimed largely at that traditional demand-side concern alone.[3]

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1. *See generally* BARBARA CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY (1977); A.B.A., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf [hereinafter A.B.A. FUTURE]; LEWIS CREEKMORE ET AL., LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGapFullReport.pdf.

2. *See* Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, *in* MIDDLE INCOME ACCESS TO JUSTICE 222, 232–39 (Michael Trebilock et al. eds., 2012); Gillian Hadfield, Professor, U.S. Cal., Summary of Testimony at the Chief Judge's Hearing on Civil Legal Services in New York 1 (Oct. 1, 2012), https://richardzorza.files.wordpress.com/2012/10/hadfield-testimony-october-2012-final-2.pdf; John T. Broderick, Jr., *The Changing Face of Justice in a New Century: The Challenges It Poses to State Courts and Court Management*, 24 THE CT. MANAGER 25, 62 (2009).

3. *See* Daniel M. Taubman, *Has the Time Come to Revise Our Pro Bono Rules*, 97 DENVER L. REV. 395, 405–06 (2020); Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 117–18 (2013); ANDREA L. MILLER ET AL., NAT'L CTR. FOR STATE COURTS, AN EVALUATION FRAMEWORK FOR ALLIED LEGAL PROFES-

In response, academic commentators, bar groups, and those working in and around state courts are giving increasing attention to a range of access-enhancing innovations, many of which share a greater role for non-lawyers. One stands out, what we call "alternative legal professionals" (ALPs).[4] By this, we mean licensed or regulated non-lawyers authorized to perform substantive law-related work without an attorney's supervision.[5] They are the most controversial and the most important because they could disrupt – by way of an innovation – the way legal services are delivered. The growth of these legal professionals reflects, in essence, a rethinking of legal services and the way in which they are delivered. ALPs are the subject of this Article.

Four issues, in addition to the perennial concern over the adequacy of legal services for the poor, are notable in recent discussions relevant to the availability of legal services – especially for those working in and around state trial courts. These courts are where the challenges of access are the most acute and immediate. Personified by *pro se* litigants, trial courts are the site of the gap's most public, regular, and practical face. These issues add new twists to the consideration of access and that gap.

The first issue may be the most important. It speaks broadly to the demand for legal services and affordability. Access is not free, and it is not cheap. Cost is an endemic barrier and not just for the poor. It is the lack of resources to hire an attorney for matters that may seem small to the outside observer but are of immediate importance to the people involved, matters that require some action by a court. Though talking about personal injury cases and the contingency fee, the general point is well-made by a Texas lawyer who said:

> [N]inety percent of the people out there make their living, they pay for their kids to go to school, they pay to take care of their kids, they pay for their mortgage, they pay for their one or two cars, and at the end of the month, they may have $100 left over if they're the lucky ones. . . . And so, for someone to have the ability to go hire a

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SIONAL PROGRAMS: ASSESSING IMPROVEMENTS IN ACCESS 2 (2021), https://www.ncsc.org/__data/assets/pdf_file/0028/64468/ALP-Evaluation-Framework.pdf.

4. The National Center for State Courts uses the acronym ALP – Allied Legal Professional – to describe a much broader range of actors than Alternate Legal Professionals. MILLER ET AL., *supra* note 3, at 5.

5. A more formal definition may be: "a legal professional licensed to provide legal services or practice law without the supervision of a licensed lawyer, or who is authorized to provide representation or legal services and is subject to regulatory oversight by a State or Federal agency." *Jurisdictions' Activity on Alternative Licensed Legal Professionals: May 2015*, NAT'L ORG. B. COUNS. 1, n.1 (May 18, 2015), https://cdn.ymaws.com/www.inbar.org/resource/resmgr/Conclave/Alt_license_table_May_18__20.pdf [hereinafter *Jurisdictions' Activity*].

> lawyer on anything other than a contingency, you know, I think it's a fiction.[6]

Of course, while the contingency fee may provide access to legal services, it does so only in few legal matters and then only if the likely return to the lawyer is sufficient to turn a profit.[7] More often one is left to their own devices. Times of economic distress may make the challenge of affordability more visible and pressing. One state chief justice called worsening economic conditions for many during the Great Recession the "elephant in almost every room" and said: "Increasingly, many of those without counsel are middle-class and small businesses. The poor now have company."[8] To make the same point, another chief justice quoted a trial judge in her state as saying: "We have many more middle-class persons who have been caught up in the recession. . . . They come to court, embarrassed and distraught, and the only thing I can tell them is that I cannot do anything."[9]

A Utah Licensed Paralegal Practitioner (LPP), an ALP, addressed the issue in light of COVID-19 and her family law work saying, "it's made it much more busy . . . it's been crazy . . . people [are] emotional and they're locked up together, and then have the stress of . . . [t]heir finances, [and] some people don't have jobs." She went on to say people cannot afford a lawyer and cannot figure things out their own. Individuals like her are an affordable option, since "you don't have to refinance your house to [get] a lawyer."[10]

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6. Stephen Daniels & Joanne Martin, *Damage Caps and Access to Justice: Lessons from Texas*, 96 OR. L. REV. 635, 648 (2018) (emphasis omitted).

7. On the business model of contingency fee practice see HEBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 1–19 (2004) [hereinafter KRITZER, RISKS].

8. Broderick, Jr., *supra* note 2, at 26–27. At the time, he was the New Hampshire Chief Justice. *Id.* at 27; *see also* A.B.A. FUTURE, *supra* note 1, at 11–14.

9. Barbara Madsen & Stephen R. Crossland, *The Limited License Legal Technician: Making Justice More Accessible*, 67 NWLAWYER 23, 24 (2013) [hereinafter Madsen & Crossland, *More Accessible*]. Madsen was the Washington State Chief Justice at the time. *Id.* at 23; *see also* Stephen R. Crossland & Paula C. Littlewood, *The Washington State Limited License Legal Technician Program: Enhancing Access to Justice and Ensuring the Integrity of the Legal Profession*, 65 S.C. L. REV. 611, 615 (2014) [hereinafter Crossland & Littlewood, *Enhancing Access*]; Barbara Madsen, *The Promise and Challenges of Limited Licensing*, 65 S.C. L. REV. 533, 537 (2014) [hereinafter Madsen, *Promise*].

10. Zoom interview with Amber Alleman, a Utah Licensed Paralegal Professional (LPP), (Feb. 25, 2021) (on file with authors). Utah licensed its first LPP in 2019. *See* Catherine J. Dupont, *Licensed Paralegal Practitioners*, 31 UTAH B.J., May–June 2018, at 16, 18, https://www.utahbar.org/wp-content/uploads/2019/02/LPP-Article-Cathy-Dupont2.pdf; *see also* Dalton Courson, *Limited-Scope Representation: Preparing for the COVID-19 Influx of Cases*, A.B.A. (Mar. 25, 2021), https://www.americanbar.org/groups/litigation/committees/access-justice/articles/2021/winter2021-limited-scope-representation-preparing-for-the-covid-19-influx-of-cases/.

The second issue speaks to supply broadly and the demographics of the legal profession. Specifically, what can be called a replacement issue, considering the sharp decline in law school enrollment over the last decade and the aging of the profession. A Colorado Supreme Court subcommittee looking at an ALP was direct in saying, "[t]he bulk of Colorado's attorneys are nearing retirement age, and the state's law-school enrollment is going down."[11] Similarly, a 2013 report of an Illinois State Bar Association commission (looking at the impact of law school debt on the delivery of legal services) pointed to a shrinking supply of lawyers as current members of the Bar retire and fewer students go to law school, saying, "[a]s those lawyers age and retire over the next fifteen years, there are fewer younger lawyers to replace them . . . ."[12] Pushing back on the often heard complaint of too many lawyers, that report said, "[c]ontrary to popular belief, there are not too many lawyers in America; instead, there are too many lawyers with student debt preventing them from providing affordable legal services to the middle class."[13]

Also speaking to the supply side, a third issue points to the often-overlooked geography of services – underserved, and even non-served areas.[14] A 2014 *ABA Journal* cover story on the need for lawyers in rural areas summarized the issue as follows:

> [W]ithout an attorney nearby, rural residents may have to drive 100 miles or more to take care of routine matters like child custody, estate planning and taxes. For people of limited means, a long drive is a logistical hardship, requiring gas, a day away from work and

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11. James Carlson, *Colorado Studying New Limited Legal License*, COLO. SUP. CT. (Spring 2015), https://coloradosupremecourt.com/Newsletters/Spring2015/Colorado%20studying%20new%20limited%20legal%20license.htm.

12. ILL. ST. B. ASS'N, SPECIAL COMMITTEE ON THE IMPACT OF LAW SCHOOL DEBT ON THE DELIVERY OF LEGAL SERVICES: FINAL REPORT, FINDINGS & RECOMMENDATIONS 25 (2013), https://www.isba.org/sites/default/files/committees/ISBA%20Law%20School%20Debt%20Report.pdf.

13. *Id.* at 21. While easing student debt and/or lowering the cost of legal education are certainly necessary, doing so will not be some kind of magic answer to the justice gap.

14. This third issue is not unrelated to the second. The Illinois Bar debt report noted, "[a]t least compared to larger counties . . . smaller counties are underrepresented by lawyers . . . [and] lawyers in smaller counties are disproportionately older." *Id.* at 24. Additionally, a 2015 Illinois State Bar report on law school curriculum said, "[t]he young lawyers who start [in rural areas] are not staying; they are not taking over the practices of retiring practitioners in rural Illinois. Ultimately, this will negatively impact the quality and quantity of legal services available in those areas. This alarming trend continues." ILL ST. B. ASS'N , REPORT & RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON THE IMPACT OF CURRENT LAW SCHOOL CURRICULUM ON THE FUTURE OF THE PRACTICE OF LAW IN ILLINOIS 21 (2015), https://www.isba.org/sites/default/files/committees/Impact%20of%20Current%20Law%20School%20Curriculum%20on%20the%20Future%20of%20the%20Practice%20of%20Law%20in%20Illinois.pdf.

> sometimes an overnight stay. And census information shows that rural communities are disproportionately poor.
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> . . . .
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> All this creates a "justice gap," with legal needs going unmet because potential clients can't find a lawyer, or they can't afford the lawyers they can find.
>
> . . . .
>
> [T]he legal needs of low- or moderate-income Americans are going unmet because the demand is so much greater than the supply of help.[15]

A 2017 Oregon State Bar task force pointed to the same problem: "[r]ural access issues include geography, a shortage of lawyers in rural areas, conflict issues for lawyers practicing in sparsely populated areas, economic means to hire a lawyer, and failure of individuals to identify that they have a legal issue."[16]

The final issue, interestingly, speaks to the perceived failures of legal education and the quality of services. Noting that the young lawyers going to rural areas are not necessarily the best and brightest, a 2015 Illinois State Bar report argued that the current curriculum produces "graduates [who] lack the practice-ready skills necessary for success in the profession."[17] The 2014 American Bar Association Task Force on the Future of Legal Education went further and actually called for the consideration of a formally trained and licensed legal professional to provide certain basic legal needs without the oversight of a lawyer.[18] Perhaps someone not unlike the LPP quoted above. The implication here is that law schools are not willing or able to produce

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15. Lorelei Laird, *In Rural America, There Are Job Opportunities and a Need for Lawyers*, A.B.A. J. (Oct. 1, 2014, 5:40 AM), http://www.abajournal.com/magazine/article/too_many_lawyers_not_here._in_rural_america_lawyers_are_few_and_far_between.

16. OR. ST. B., FUTURES TASK FORCE: REPORTS AND RECOMMENDATION OF THE REGULATORY COMMITTEE AND INNOVATIONS COMMITTEE 72 (2017) [hereinafter OREGON FUTURES]; *see also* Grant Gerlock, *Lawyer Shortage in Some Rural Areas Reaches Epic Proportions*, NPR (Dec. 26, 2016), https://www.npr.org/2016/12/26/506971630/nebraska-and-other-states-combat-rural-lawyer-shortage. Lindsay Stafford Mader, *Way Out Yonder*, 78 TEX. B.J. 524, 525 (2015). Following up on *Oregon Futures*, the Oregon State Bar Board of Governors approved, in 2019, a new task force to "develop a regulatory framework for licensing paralegals consistent with the recommendations of the OSB Futures Task Force Report . . . ." OR. ST. B., Paraprofessional Licensing Implementation Committee Charge, https://paraprofessional.osbar.org/files/Paraprofessional-Licensing-Implementation-Committee-Charge.pdf (last visited Mar. 3, 2022).

17. ILL. ST. B. ASS'N, *supra* note 12, at 6.

18. Jay Conison, *The Report and Recommendations of the ABA Task Force on the Future of Legal Education: Its Significance for Bar Admissions and Regulation of Entry into the Legal Profession*, 83 B. EXAMINER, Dec. 2014, at 16.

appropriate professionals to meet the needs of those for whom access is most problematic – not just the poor, but all except the most affluent.[19]

In light of these issues, many argue for significant change – even pondering "models that may not yet exist."[20] Implicit in thinking about such models is the judgment that the legal profession will never be able to substantially close the gap.[21] Something different is needed – enter ALPs. Said two long-time observers and access activists, "[i]ndeed, one of the most intriguing developments in response to the crisis of access to justice in our state courts has been the increasing interest at high levels of the legal system in considering new roles for non-lawyer legal practitioners to provide a range of civil legal services."[22]

This idea of non-lawyer practitioners has been discussed and has been in the air, so to speak, for some time. It has been a topic of interest in the academic literature and among reformers concerned with access.[23] There were even formal considerations of ALPs in the past, but nothing came of these initiatives largely because of the bar's

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19. *See* Separate Statement from Philip G. Schrag, Professor, Geo. U. L. Ctr., to Memorandum from A.B.A. on the Task Force on Financing Legal Education 57–62 (June 17, 2015), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.pdf.

20. Albiston & Sandefur, *supra* note 3, at 120; *see also* N.Y.C. B. Ass'n, Narrowing the "Justice Gap": Roles for Nonlawyer Practitioners 4 (2013).

21. Writing in 1970, Barlow Christensen lamented, "the ideal would perhaps be to have all legal problems, large or small, given the full custom treatment by a top quality lawyer. . . . There are just not enough lawyers to give all problems that kind of treatment, and even if there were, clients could not afford it." Barlow F. Christensen, Lawyers for People of Moderate Means: Some Problems of Availability of Legal Services 51 (1970); *see also* sources in *supra* note 3.

22. Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 Fordham Urb. L.J. 1259, 1262, 1293, 1306 (2014); *see generally* Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized Practice Enforcement*, 82 Fordham L. Rev. 2587 (2014); Rebecca Sandefur & Thomas Clarke, Roles Beyond Lawyers: Summary, Recommendations and Research Report of an Evaluation of the New York City Court Navigators Program and Its Three Pilot Projects (2016); A.B.A. Future, *supra* note 1, at 40–41. For a meta-analysis of empirical research on non-lawyers v. lawyers, see generally Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 Am. Soc. Rev 909 (2015) [hereinafter Sandefur, *Elements of Professional Expertise*].

23. *E.g.*, Christensen, *supra* note 21, at 47–53; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 77–80 (1981); Herbert M. Kritzer, Legal Advocacy: Lawyers and Nonlawyers at Work *passim* (1998) [hereinafter Kritzer, Legal Advocacy]; *see generally* Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 Fordham L. Rev. 2241, 2241 (1999). The issue continues to be a topic of interest in the academic literature.

opposition.[24] Perhaps the best evidence that the ALP idea was in the air is a 1995 American Bar Association commission: American Bar Association Commission on Nonlawyer Practice (ABA Commission). This ABA Commission conducted a substantial amount of research and spoke favorably about the idea of an ALP, but to no avail.[25] Its fate is also evidence of the legal profession's (or at least the organized bars') long-time opposition to creating an ALP – a formidable obstruction keeping this genie in the bottle.[26]

B. The Previously Unthinkable: Alternative Legal Professionals

Non-lawyer actors of various kinds have existed and worked within the legal system for some time. Their roles stretch over a continuum running from court navigators and document preparers to ALPs. Some – the least controversial – deal with the symptoms or surface issues surrounding access – helpful but not really addressing the gap itself. For example, there is something called a "Court Navigator" to provide very basic help to *pro se* litigants in housing court matters and consumer debt matters in New York City.[27] For many years, Arizona has had certified legal document preparers who can "provide document preparation assistance and services to individuals and entities not represented by an attorney," however, the program notes that

24. Some contemporary commission or task force reports reference such discussions in the past that led to no action. OREGON FUTURES, *supra* note 16, at 3. For instance, the Oregon task force noted, "[t]wenty-five years ago, a task force of the Oregon State Bar developed a proposal for licensing nonlawyers to provide limited legal services to the public in civil cases. . . . At the time of that 1992 report, seven other states had considered or were considering similar proposals." *Id.*

25. *See generally* A.B.A. COMM. ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS (1995), https://www.paralegals.org/files/ABA_Commission_on_Non-Lawyer_Practice.pdf. The commission's report and recommendations were not taken to the American Bar Association's House of Delegates for approval in 1995; *see* KRITZER, LEGAL ADVOCACY, *supra* note 23, at 12–13.

26. *See generally* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors–or Even Good Sense?*, 5 AM. B. FOUND. RES. J. 159 (1980) (for an overview of how unauthorized practice rules were used to restrict the marketplace for legal services); *see also* RICHARD L. ABEL, AMERICAN LAWYERS 40–73, 112–126 (1989); Rhode, *supra* note 23, at 77–80.

27. N.Y.C. Housing Ct., *Volunteer Opportunities*, CT. NAVIGATOR PROGRAM (Feb. 10, 2014), http://www.courts.state.ny.us/courts/nyc/housing/rap.shtml. Instituted in 2014, the unpaid navigator can:

> [P]rovide general information, written materials, and one-on-one assistance to eligible unrepresented litigants [and] provide moral support to litigants, help them access and complete court forms, assist them with keeping paperwork in order, in accessing interpreters and other services, explain what to expect and what the role of each person is in the courtroom.

Id.

"[l]egal document preparers may provide general legal information but may not give legal advice."[28]

At the other end of the continuum are ALPs in one form or another. Most generally, ALPs are "a legal professional licensed to provide legal services or practice law without the supervision of a licensed lawyer, or who is authorized to provide representation or legal services and is subject to regulatory oversight by a State or Federal agency."[29] Few such ALPs exist and, until quite recently, only in very narrow and specialized areas. At the federal level, one can find patent agents licensed to practice before the U.S. Patent and Trademark Office or enrolled agents admitted to practice before the Internal Revenue Service. One can also find ALPs at the state level in some specialized administrative areas.[30] Such ALPs, however, by their very nature, cannot address a substantial gap involving civil matters in state courts.

In 2012, the Washington State Supreme Court did more than thinking. It did the previously unthinkable, unthinkable because of the long-time opposition of the organized bar and unauthorized practice laws. It created something new and different – what its proponents saw as an innovation. It created a model that heretofore had not existed and has the potential to change the delivery of legal services by changing *who* may deliver the services.[31] The Washington State Supreme Court created a new mid-level professional called a limited licensed legal technician, or LLLT,[32] and did so despite dogged opposition from the organized bar and concerns over feasibility.[33] This

28. *Legal Document Preparer Program*, ARIZ. JUD. BRANCH, http://www.azcourts.gov/cld/Legal-Document-Preparers (last visited Sept. 5, 2021); *see also* A.B.A. COMMISSION ON THE FUTURE OF LEGAL SERVICES, ISSUES PAPER CONCERNING NEW CATEGORIES OF LEGAL SERVICE PROVIDERS, OCTOBER 16, 2015, at 5–11 (2015), https://www.americanbar.org/content/dam/aba/publications/bridge/documents/lspissuespaper.pdf [hereinafter A.B.A. ISSUES PAPER] for a summary of state-level non-lawyer actors.

29. *See generally Jurisdictions' Activity*, *supra* note 5.

30. See A.B.A. ISSUES PAPER, *supra* note 28, at 3–4 for a summary of federal-level non-lawyer actors. These actors have operated quite successfully. *See* KRITZER, LEGAL ADVOCACY, *supra* note 23, at 111–49; Anna E. Carpenter et al., *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 LAW & SOC. INQUIRY 1023, 1046–47 (2017); *see generally* Sandefur, *Elements of Professional Expertise*, *supra* note 22.

31. We highlight *who* to emphasize and distinguish this innovation from others, like LegalZoom, that are about *how* to deliver legal services.

32. *In re* The Adoption of New APR 28 – Limited Practice Rule for Limited License Legal Technicians, Order No. 25700-A-1005 (Wash. 2012), http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf [hereinafter *Wash. State Limited Practice Rule*].

33. *See* Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. 75, 89, 124–27 (2013). The organized bar's traditional opposition to non-lawyer actors is a prime example of a profession zealously guarding its boundaries to maintain its monopoly control over a field of work. *See* ABEL, supra

is a formally trained (at minimum a two-year program with certain course requirements plus substantial clinical requirements), licensed and regulated professional, authorized to provide a narrowly prescribed set of legal services without the supervision of a licensed attorney in a well-defined practice area – family law.[34]

By creating the LLLT, Washington State let the ALP genie out of the bottle and provided an opportunity for other states.[35] If Washington State could do the unthinkable, why not our state? Indeed, its key proponents in Washington State enthusiastically promoted it to other states as a significant innovation to emulate. Following Washington State's lead, a number of states have formally considered the Washington model as a way of delivering legal services and dealing with the justice gap. Interestingly, as interest in this idea spread, the Washington State Supreme Court brought the LLLT program to an abrupt end in 2020, but it is not clear that doing so will put that genie back in the bottle.

This Article explores the diffusion of the Washington State idea and its fate. It focuses on the "four corners" states: Arizona, Colorado, New Mexico, and Utah. Each has been deeply involved in considering the idea of an ALP, and the outcome in each has been very different. Colorado and New Mexico have not rejected the idea of an ALP but are continuing to formally study it (Colorado has had two special subcommittees). Utah has recently implemented a program that is somewhat different than Washington's, but not radically so. Arizona is in the early implementation stages of an ALP program that goes far beyond anything considered by the other three states or Washington. More than the others, the Arizona program seems to be as much about the reordering of legal services than just a way to address the justice gap.

To explore the ALP idea and its fate, this Article is framed by five key terms or concepts that are important for understanding what is happening and where things may be going. First is "analogy." Reasoning by analogy is basic for lawyers. Analogies can be used strategically to define, explain, understand, and even justify certain actions or plans, especially if it is something unfamiliar or potentially controversial. In short, how we talk about something like ALPs is important if for no other reason than the controversy that surrounds them.

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note 26, at 40–73, 112–26; Christensen, *supra* note 26, at 159; ELIOT FREIDSON, PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE 23–46 (2d ed. 1988).

34. *See generally Wash. State Limited Practice Rule*, *supra* note 32.

35. *See infra* note 87.

Second is "innovation." When we talk about innovation, we usually have in mind something new and different that offers itself as a solution or improvement addressing a problem or need. In this regard the starting point is the Washington State LLLT program which was authorized by the Washington State Supreme Court in 2012, and Washington licensed its first LLLT in 2015.[36] As noted above, the LLLT program was promoted as an innovation for others to copy.

Third is "opportunity." Regardless of the perceived benefits, innovations do not just happen or come out of nowhere. They are tied to opportunities – a crisis or a focusing event that, according to some, arguably disrupts things to such an extent that a possibility appears (but only a possibility) for favored policies or new directions in some area. Their implementation is not guaranteed.[37] Opportunity does not mean an absence of opposition and, with regard to ALPs, opposition from the legal profession is a major factor.

Fourth is "experiment." Experiments always involve skepticism or uncertainty but also a systematic path to a resolution. They presume an unknown end even if started with some degree of optimism. Here, experiment refers to an idea's start in the real world, its initial implementation. Interested parties watch to see if and how it works and whether they might emulate it. While promoted as a successful innovation by its proponents, some also called the LLLT an experiment (it is hard to be both). Others see the program more as an experiment. It is the old Brandeisian idea of states as laboratories and learning from the experiences of others. The Washington State Supreme Court sunsetted the experiment in 2020, judging it a failure.[38]

Fifth is "evolution." Experiments are observed and potential innovations evaluated. As others learn, an innovative idea may die or may change in light of those evaluations. The Washington State LLLT program has been closely watched by other states and by commentators. Some rejected the idea – there are no guarantees.[39] None copied it exactly. Others, however, watched and evaluated it and then recon-

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36. *See Legal Profile: Michelle M. Cummings*, WASH. ST. B. ASS'N, https://www.mywsba.org/PersonifyEbusiness/Default.aspx?TabID=1538&Usr_ID=000009148365 (last visited Sept. 5, 2021).

37. *See* JOHN W. KINGDON, AGENDA, ALTERNATIVES, AND PUBLIC POLICIES 94–100 (2nd ed. 1995).

38. Letter from Debra L. Stephens, Chief Justice, Wash. Supreme Court, to the Wash. State Bar Ass'n 1 (June 5, 2020), https://www.wsba.org/docs/default-source/about-wsba/governance/supreme-court_lllt-sunset_letters-combined.pdf [hereinafter Letter from Debra L. Stephens].

39. STATE B. MONT., WORKING GROUP LIMITED LICENSE LEGAL TECHNICIAN REPORT TO THE COURT RE AF 11-0765, at 6–7 (2017), https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=194530.

figured it in various ways, meaning additional experiments surrounding the basic idea of an ALP. The evolution is ongoing and does not necessarily move in a particular direction. Once started by Washington State, and despite the ending of that program, it may have no particular endpoint.

I. The Importance of Analogies

Using analogies is a common way of trying to make an argument, especially for something novel or supposedly innovative. To help understand the novel, analogies may borrow labels or even provide models. In doing so, they can bring along certain connotations – positive or negative. In other words, making comparisons to the familiar helps in understanding and evaluating. They are also used strategically to build support for something or for opposition. Analogies play an important role and appear throughout discussions of ALPs and the problems ALPs may or may not address.

Perhaps the most obvious analogy is the use of "justice gap" to label as a problem the challenges many people face in getting legal representation and services when needed. It is a simple visualization of the difference between a rule of equality, or equal treatment, in the legal system and reality. As such, it brings the implication of a difference that demands closure if we are to ensure justice.

An analogy mentioned earlier deals with one popular non-lawyer actor who can help narrow the gap – court navigators. A number of states have created them in some form or another.[40] They guide or help people coming to the courthouse with legal matters to find their way through the building without playing any substantive role. The analogy is descriptive, positive, and neutral – almost altruistic because the navigators are often volunteers.

Other analogies are more important in the discussion of ALPs. Among them is the idea of "innovation" itself. We think of it as referring to something not just new but something new and helpful in a practical way – we are or will be better off because of the innovation. The Washington State program, as well as the basic idea underneath it of non-lawyers practicing law to some degree, is widely characterized – in this positive sense – as an innovation. It is a solution, at least a partial one, to the justice gap problem. For instance, the first line of a preliminary evaluation of the LLLT program by National Center for

40. *See* Mary E. McClymont, Just. Lab. Geo. L. Ctr., Nonlawyer Navigators in State Courts: An Emerging Consensus (2019), https://georgetown.app.box.com/s/t2zf6mjv2x74w944t8ejbsku7i2jc7mc.

State Courts official Thomas Clarke and Professor Rebecca Sandefur reads, "[t]he Washington State Supreme Court and the Washington State Bar Association created an innovative program to expand the provision of legal services."[41] The evaluation was generally positive.[42] It concludes saying, "[t]his program should be replicated in other states to improve access to justice."[43] A blog post bemoaning the program's recent demise referred to it as innovative as well as "pioneering" and "groundbreaking" – again highlighting the positive impact of such programs.[44]

As this suggests, labeling the Washington State program as an innovation portrays it as a successful solution to the gap problem. But again, neither the Washington State program nor the underlying idea of ALPs can yet offer a real track record to bolster its status as an innovation. The preliminary evaluation noted above, in fact, only said the program *could* succeed if it were properly supported, not that it already had.[45] We will address the idea of innovation in more detail in the Article's next Part.

Given that the ALP idea is a somewhat speculative solution rather than a proven innovation, another analogy has been used. Interestingly, it is one that may not be all that consistent with the idea of innovation – "experiment." As we noted earlier, experiments always involve skepticism or uncertainty. The idea also implies a systematic and empirical path to a resolution we can accept and in which we can have confidence – in other words, it is not just someone's pipe dream.

The experiment analogy was prominently used by Washington State Chief Justice Barbara Madsen in touting the LLLT program not long after its initial approval and before there were any LLLTs licensed. In

41. THOMAS M. CLARKE & REBECCA L. SANDEFUR, AM. B. FOUND., PRELIMINARY EVALUATION OF THE WASHINGTON STATE LIMITED LICENSE LEGAL TECHNICIAN PROGRAM 3 (2017), http://www.americanbarfoundation.org/uploads/cms/documents/preliminary_evaluation_of_the_washington_state_limited_license_legal_technician_program_032117.pdf.

42. *Id.* But see Rebecca M. Donaldson, *Law by Non-Lawyers: The Limits to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE U. L. REV. 1, 2 (2018) for a decidedly different assessment. Donaldson's research suggests that on purely practical grounds – primarily financial matters and practitioner interest – the Washington State program may not succeed in lowering costs and expanding access. *Id.* at 18–19.

43. CLARKE & SANDEFUR, *supra* note 41, at 15.

44. Bob Ambrogi, *Washington, State That Pioneered Licensed Legal Technicians, Cancels the Program*, LAWSITESBLOG (June 9, 2020), https://www.lawsitesblog.com/2020/06/washington-state-that-pioneered-licensed-legal-technicians-cancels-the-program.html. Ambrogi praised the program earlier characterizing it as an "ambitious experiment." Robert Ambrogi, *Who Says You Need a Law Degree to Practice Law?*, WASH. POST (Mar. 13, 2015), https://www.washingtonpost.com/opinions/closing-the-justice-gap/2015/03/13/a5f576c8-c754-11e4-aa1a-86135599fb0f_story.html [hereinafter Ambrogi, *Who Says*].

45. *See* CLARKE & SANDEFUR, *supra* note 41, at 9–12.

recounting a speech on the program given to other state chief justices, she said there "were jaws dropping . . . I also saw signs of enthusiasm. Many of the chief justices expressed genuine interest in this experiment."[46] Although not using the word, comments in her opinion approving the program reflect the experiment idea: "No one has a crystal ball. . . . There is simply no way to know the answer to this question without trying it."[47] Regardless, it is a take on experiment that seems to foresee the outcome beforehand.

Others have used the experiment idea differently – more critically and almost derisively to say there is not much there. Lawyer Rebecca Donaldson's sharp, negative assessment of the LLLT program said, "[t]he model offers a bold experiment to expand access to justice, and its champions acknowledge it as just that–an experiment."[48] Donaldson is no defender of the legal profession's efforts to protect its turf; but based on what is essentially just a thought experiment on her part, she argues that the LLLT program cannot be successful on its own terms.[49] It is also a take on experiment that seems to foresee the outcome beforehand.

As important, Donaldson does not think it goes anywhere near far enough. In her view, it is not really an innovation, which she sees as something that charts a new direction and challenges the way things are done. "Rather than creating new mixed-sector or other innovative legal delivery service models," she says, "LLLTs and Candidates [those in training to be LLLTs] stand to replicate existing models and their corresponding challenges."[50] Donaldson would rather see a broad rethinking of the delivery of legal services including a fair amount of deregulation. Analogies can be problematic, as here, when their underlying connotations admit to different uses, leaving us unsure of what to think about the thing in question – ALPs.

A commentator writing in the *Oklahoma Bar Journal* also characterized the program as an "experiment," but much more in the literal sense, saying:[51]

> When considering further nonlawyer representation such as the LLLT model, we should seek answers to the previously alluded to

46. Madsen, *Promise*, *supra* note 9, at 543.

47. *Wash. State Limited Practice Rule*, *supra* note 32, at 8–9; *see also* A.B.A. FUTURE, *supra* note 1, at 18 (showing limited data about the effectiveness of access-enhancing innovations).

48. Donaldson, *supra* note 42, at 8.

49. *See generally id.*

50. *Id.* at 41.

51. *See generally* Michael Speck, *The L in Triple LTs: The Limited Nature of Licenses for Legal Technicians*, 88 OKLA. B.J. 749 (2017), https://www.okbar.org/barjournal/apr2017/obj8811speck/.

> empirical questions, such as: To what extent, and in what settings, are nonlawyer representatives effective?
>
> . . . .
>
> If the data indicates that nonlawyer representation has been effective thus far, why wouldn't we consider LLLTs as one means of improving access to justice? If this form of assistance, properly regulated, is both effective and affordable, shouldn't we study it as one of many tools?[52]

With this commentator's approach in mind, we will return to the idea of experiment later in the Article.

Lacking a readily familiar reference point in the legal arena, some ALP proponents have turned to the healthcare arena for help and analogies that are likely to be familiar, non-threatening, and positive. Most important are physician's assistants (PA) and especially nurse practitioners (NP). Although PAs and NPs are not the same, one or both (sometimes interchangeably) serve as an actual model for a legal equivalent. They are tangible analogies with very different implications for the role an ALP might play. The healthcare analogies are also the most problematic because they are also used as just simple figurative comparisons (at times used with little care for the realities) to something familiar with no real implications for the role an ALP might play.

In a 2019 presentation on the Washington State LLLT program to the Illinois Supreme Court Commission on Professionalism, Washington State Bar Association Executive Director (and major LLLT proponent) Paula Littlewood used the idea of non-physician professionals generally (PAs and NPs) and their rise to explain the development and purpose of the LLLT program in delivering legal services (accompanied by a slide showing white-coated medical professionals).[53] Just as not every medical need requires a physician, not every legal need requires a licensed attorney. Related, she also emphasized the idea that non-physician professionals are less costly and more prevalent and accessible, noting a future decline in the number of attorneys and the costs of attorneys' assistance.[54]

Littlewood was by no means the first to use the healthcare analogy in this way as a simple reference point. In a 2009 address to state court managers on the challenges facing their courts, including *pro se* liti-

52. *Id.*

53. 2Civility - Illinois Supreme Court Commission on Professionalism, *Paula Littlewood: LLLTs: A New Delivery System for Legal Services*, YOUTUBE (Sept. 24, 2019), https://www.youtube.com/watch?v=QQaR-uy5IeA.

54. *Id.*

gants, New Hampshire Chief Justice John Broderick said, "[i]n the world of medicine, there are physician's assistants to deal with a subset of patients who need help but may not need . . . to see a doctor. If medicine can adapt, so can the legal professional."[55] In testifying before a New York task force on access issues in 2012, Professor Gillian Hadfield was more forceful asking, "where are our nurse practitioners? Our legal systems desperately need the equivalent of nurse practitioners."[56] An *ABA Journal* article on the legal technician model by a supportive author used the PA as a reference point in the article's opening. Using the example of a family member needing care, the article noted that "it was not an emergency-room situation . . . he was seen by a physician's assistant who was more than capable of diagnosing his condition and providing a remedy–all without a doctor present."[57]

Simple comparisons to a general idea for elucidation are one thing, using the healthcare analogy as an actual model for a legal equivalent is another. Some do argue for a legal equivalent, but equivalent to what? As the paragraph above suggests, there can be some haziness as to what is being talked about if you think beyond the simple comparison. For instance, in a 2015 presentation to the Utah Supreme Court Task Force to Examine Limited Legal Licensing, Thomas Clarke of the National Center for State Courts specifically referenced NPs and PAs as models for an LLLT-type professional.[58] He was not arguing for one as opposed to the other but saying there are different healthcare possibilities as models.

Others are much more specific and intentional in their use of a healthcare analogy, especially NPs. As a major part of his 2013 overview of the early history of the Washington State LLLT program, Professor Brooks Holland included a strong argument in its favor. In making that argument he turned to the NP saying, "the development of nurse-practitioner programs in the medical profession may illustrate the potential of the legal-technician program to occupy its own

55. Broderick, Jr., *supra* note 2, at 29.

56. Hadfield, *supra* note 2, at 38.

57. Mary Juetten, *The Path Forward for the Legal Technician Model*, A.B.A. J. (May 11, 2018), https://www.abajournal.com/news/article/the_path_forward_for_the_legal_technician_model.

58. Meeting Minutes from the Utah Supreme Court Task Force to Examine Limited Legal Licensing (Oct. 1, 2015), https://www.utcourts.gov/committees/limited_legal/minutes/2015-10-01.pdf. "Mr. Clarke mentioned that there is potential for such a role. The nurse practitioner and physician assistant models in the health care system were referenced relative to being created as new roles with separate training requirements and regulatory oversight." *Id.*

equitable share of the legal market."[59] He played out this idea with a detailed discussion of the NP role (much of the detail in footnotes).[60]

The 2017 Oregon Futures Task Force was also intentional. It saw a NP equivalent in a possible future and said:

> Many observers have called for the licensing [of] a legal paraprofessional, who would serve as the legal equivalent of a nurse practitioner, and meet all of a person's "basic" legal needs. That may be the future of the law—a world in which all attorneys are specialists and all "routine" legal work is performed by well-qualified but less expensive nonlawyers.[61]

There is a reason for intentionally using NPs as an analogy and this is best seen by looking at the difference between what PAs and NPs are. They are not the same and should not be used interchangeably, each having its own practical implications.[62] Most importantly, PAs work only under a physician's direction and have less training. NPs, also known as Advanced Practice Registered Nurses, "can prescribe medication, examine patients, order diagnostic tests, diagnose illnesses, and provide treatment, much like physicians do," and in fact, NPs – unlike PAs – have what is referred to as "full practice authority in 25 states, meaning that they do not have to work under the supervision of a doctor."[63] They typically have graduate-level training and train to work in a particular specialty area.[64]

Another key difference between NPs and PAs may be important for using them as an analogy for a non-lawyer legal professional. One explanation for a general audience captures that difference nicely. It

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59. Holland, *supra* note 33, at 124.

60. *Id.* at 124–28 and accompanying footnotes.

61. OREGON FUTURES, *supra* note 16, at 21.

62. This has rarely been examined in detail, but see THOMAS M. CLARKE, UTAH STATE COURTS UTAH STATE BAR: NON-LAWYER LEGAL ASSISTANCE ROLES: EFFICACY, DESIGN, AND IMPLEMENTATION, NAT'L CTR. FOR STATE COURTS 11 (2015); Rebecca L. Sandefur & Thomas M. Clarke, *Designing the Competition: A Future of Roles Beyond Lawyers? The Case of the USA*, 67 HASTINGS L.J. 1467, 1488 (2016).

63. Terri Heimann Oppenheimer, *Nurse Practitioners*, NURSE.ORG CAREER GUIDE SERIES (Sept. 20, 2021), https://nurse.org/resources/nurse-practitioner/; *see also Nurse Practitioner vs. Physician's Assistant: Which Career is Right for You?*, MASTERSINNURSING.COM, https://www.mastersinnursing.com/guide/nurse-practitioner-vs-physician-assistant-which-career-is-right-for-you/ (last visited Sept. 5, 2021) [hereinafter *Nurse Practitioners vs. Physician's Assistant*].

64. *Nurse Practitioners vs. Physician's Assistant*, *supra* note 63. While ALP programs are aimed at particular areas of legal practice and require training and licensing accordingly, none requires graduate-level training or even a BA given the nature of the work an ALP would perform. *Id.*

says the two professionals have "different viewpoints and philosophies about patient care."[65] It goes on to say:

> It's a nuanced distinction that can be further explained like this: The nursing model looks more holistically at patients and their outcomes, giving more attention to a patient's mental and emotional needs as much as their physical problems. The medical model places a greater emphasis on disease pathology, approaching patient care by looking primarily at the anatomy and physiological systems that comprise the human body.[66]

It is not clear whether the legal commentators pointing to the NP as a model, like Holland, have this difference in mind.

If they do, they are talking not just about a new legal practitioner but a different orientation to providing legal services given the NP's patient-centered, holistic approach. "Nursing has long looked at treating not just the disease, but rather the patients. Nursing also views patients as part of a larger system."[67] The American Association of Nurse Practitioners (AANP) describes nurse practitioners as having a unique approach with an "emphasis on the health and well-being of the whole person. With a focus on health promotion, disease prevention, and health education and counseling . . . ."[68]

An envisioned mid-level legal professional akin to the NP would have an analogous orientation and be trained accordingly. This would mean more than a new professional. In a short discussion of NPs as a model, Sandefur and Clarke say that NPs are not "limited doctors," but represent a new medical role. Thinking about a mid-level legal professional as something different than a limited lawyer would allow the design of something new "to start fresh on training, regulation, and quality control . . . designed from the ground up as a new conception."[69] It is worth noting that the move toward NPs in healthcare has not been without its own controversy.[70]

An NP-like legal professional would, in practice, mean a broad rethinking of the nature of legal services (what could happen since

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65. *Id.* Dawn Pascale, *Deciding Between NP or PA: Which Career Is a Better Fit for You*, MEDSOURCE CONSULTANTS, https://medsourceconsultants.com/deciding-between-np-or-pa-which-career-is-a-better-fit-for-you/ (last visited Sept. 5, 2021).

66. Pascale, *supra* note 65.

67. Christine E. Freda, *Nurse Practitioner Versus Physician Assistant*, 27 NEPHROLOGY NURSING J. 260, 260 (2000).

68. AM. ASS'N NURSE PRACTITIONERS, *What's a Nurse Practitioner (NP)?*, https://www.aanp.org/all-about-nps/what-is-an-np#unique-approach (last visited Sept. 5, 2021).

69. Sandefur & Clarke, *supra* note 62, at 1486.

70. *See* Holly Fletcher, '*Turf War' Pits Tennessee Doctors Against Nurse Practitioners*, THE TENNESSEAN (Sept. 14, 2016), https://www.tennessean.com/story/money/industries/health-care/2016/09/14/turf-war-pits-tennessee-doctors-against-nurse-practitioners/89780404/.

Washington State's program let the ALP genie out of the bottle). In an article concerned more with the theoretical aspects of empirical research on access, Professors Catherine Albiston and Rebecca Sandefur argue for a quite broad approach to questions surrounding access, saying "[i]f we truly wish to address a crisis in access to justice, we need a broader understanding of both what access to justice means and what the current lack of access entails."[71] They argue for a framework that goes beyond thinking just about the poor. Access and civil justice musts for them are pervasive issues for most people and recognizing this "makes it possible to frame access to justice as a universal issue rather than a concern limited to stigmatized groups such as the poor, immigrants, or the disabled."[72]

Albiston and Sandefur's argument is based on the nature of legal service itself, and not just its delivery model. Although they do not talk explicitly in terms of an approach akin to the NP's, there is a certain similarity. Their approach, not unlike the NP, is more holistic. It is more inclusive of factors surrounding the people in their lived contexts and includes a unique idea of effectiveness. Formal access for an individual to address a specific legal issue is not enough. Instead, we should look beyond mere case outcomes for an individual. Albiston and Sandefur's perspective posits that:

> The theoretical move of redefining effectiveness more broadly shifts focus from individualistic measures limited to legal remedies to consider how legal problems affect the well-being of claimants, their families, and society in multiple, interconnected ways. Legal representation, in this view, can provide support to individuals across many dimensions, and representation can have far-reaching effects beyond the individual client.[73]

Albiston and Sandefur say we need to think about the supply side of legal services and about "service delivery models that may not yet exist."[74]

Whether those using the NP analogy have the full model in mind is not clear – it remains to be seen. As we will see later, Arizona is coming the closest to implementing an NP equivalent.

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71. Albiston & Sandefur, *supra* note 3, at 105.

72. *Id.* at 119.

73. *Id.* at 113.

74. *Id.* at 119–20.

II. The Innovation

A. To Address a Problem

When we talk about innovation, we usually have in mind something new and different that offers itself as a proven solution or improvement addressing a problem or need. The need here is generally couched in terms of civil access or the justice gap, but with regard to ALPs, it tends to be a narrower and more specific part of that larger problem. ALPs are primarily seen as a solution to the problems surrounding *pro se* litigants in state trial courts – those who cannot afford the services of a lawyer, especially, but not exclusively in, family law matters.

This is well illustrated by a statement from the 2017 Oregon State Bar Futures Task Force: "As a joint family-law task force concluded in 2011, the high number of self-represented litigants has become a permanent feature of Oregon's legal system."[75] It also became clear in interviews and observations of the Colorado Supreme Court Subcommittee on Providers of Alternative Legal Services (PALS) that *pro se* litigants were the problem needing a solution.[76] In its preliminary report and recommendation to the Colorado Supreme Court, PALS stated the problem thus:

> There is a vast number of litigants who are representing themselves in lawsuits across the state, in large part because of an inability to afford legal counsel. Statistics show the inability of a great many Coloradans to afford representation by a lawyer in judicial proceedings, resulting in a high number of pro se litigants.[77]

It is not just that *pro se* litigants can gum up a courthouse's work by not knowing their way around the building; the process involved; the official forms needed to be completed; and how or what to do when they eventually go into the courtroom. They need help that judges, clerks, and other court personnel are barred from providing. Such litigants are the everyday public face of the justice gap. The questions are how to help these *pro se* litigants and who can do it. As one Colorado

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75. Oregon Futures, *supra* note 16, at 21.

76. "Washington was the first to do something about the problem of too many pro se litigants in certain areas." Telephone Interview with Alec Rothrock, Chair, Colo. Supreme Court Advisory Comm. Subcomm. on Providers of Alternative Legal Services (Oct. 24, 2019). "Everybody seemed to know of the LLLT as a way to assist pro se litigants." In-person interview with Daniel M. Taubman, Judge, Colo. Court of Appeals (Nov. 8, 2019).

77. Preliminary Report of the Subcommittee on Providers of Alternative Legal Services (PALS) of the Colorado Supreme Court Attorney Regulation Advisory Committee 2 (2019) [hereinafter PALS Preliminary Report].

subcommittee member said, it is "[t]he [age-]old question – deny people any help or allow some help by non-lawyers."[78]

Court navigators or helpers, for instance, are certainly useful, but they address just minor, non-substantive measures. They are palliative, not a solution. The Washington State LLLT program is something quite different; it created the first mid-level, licensed ALP and is considered a pioneer and trailblazer in this respect.[79]

B. The Washington State LLLT Program: Letting the Genie Out of the Bottle

In the order approving the program, Chief Justice Barbara Madsen laid out concisely the reasoning for the LLLT program, writing, "[o]ur adversarial civil legal system is complex. It is unaffordable not only to low-income people but . . . moderate income people as well. . . . Every day across this state, thousands of unrepresented (pro se) individuals seek to resolve important legal matters in our courts."[80] The Washington State Bar Association (WSBA) administers the program, and its website describes the LLLT program as follows:

> **Affordable Legal Services in Family Law by a Legal Technician**
>
> A limited license legal technician, also known as a legal technician or a LLLT, is licensed by the Washington Supreme Court to advise and assist people going through divorce, child custody, and other family law matters in Washington.
> Legal technicians provide limited legal services in family law by consulting with and advising clients, completing and filing necessary court documents, and assisting pro se clients at certain types of hearings and settlement conferences. They also help with court scheduling and support clients in navigating the legal system. LLLTs are well trained, experienced, and competent licensed legal professionals who may be able to provide you with the legal help you need. If you cannot afford a lawyer, a legal technician might be an affordable option for your family law matter.[81]

78. Telephone Interview with Alec Rothrock, *supra* note 76.

79. *See* ALICIA MITCHELL-MERCER & S.M. KERNODLE-HODGES, PROPOSAL FOR A LIMITED PRACTICE RULE TO NARROW NORTH CAROLINA'S ACCESS TO JUSTICE GAP 9–10 (2021), https://ncbarblog.com/wp-content/uploads/2021/03/Justice-for-All-Proposal-for-Limited-Practice-Rule-to-Supreme-Court-and-North-Carolina-State-Bar-Final.pdf.

80. *Wash. State Limited Practice Rule*, *supra* note 32, at 4. In her conclusion, Madsen characterized the program as a "good start," but not *the* solution to the justice gap. *Id.* at 11. "[I]t is a limited, narrowly tailored strategy designed to expand the provision of legal and law related services to members of the public in need of individualized legal assistance with non-complex legal problems." *Id.*

81. *Limited License Legal Technicians*, WASH. ST. B. ASS'N (Oct. 8, 2021), https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians.

Like lawyers in Washington State, LLLTs are members of the WSBA and operate under its auspices. LLLTs must carry malpractice insurance and are subject to discipline. They have their own rules of professional conduct based on the rules for attorneys.[82] There are substantial educational, testing, and experiential requirements for maintaining a license as an LLLT. As found on the WSBA website, the current requirements are:[83]

> **Limited License Legal Technician License Requirements**
> There are three key requirements to be licensed as a legal technician: **education, examination, and experience.**
>
> **Education Requirements**
>
> **Have an Associate's degree** or higher, in any subject
> **Complete the Core Education:** 45 credits of legal studies courses that must be taken at a school with an ABA-approved or LLLT Board-approved paralegal program or at an ABA-approved law school. Must include the following subjects:
>
> Civil Procedure, minimum 8 credits
> Contracts, minimum 3 credits
> Interviewing and Investigation Techniques, minimum 3 credits
> Introduction to Law and Legal Process, minimum 3 credits
> Law Office Procedures and Technology, minimum 3 credits
> Legal Research, Writing, and Analysis, minimum 8 credits
> Professional Responsibility, minimum 3 credit
>
> **Paralegals with 10 years or more experience:** You may qualify for a *waiver* of the core education and AA degree.
>
> **LLLT Family Law Practice Area Education**: Provides detailed knowledge of the Family Law practice area.
>
> **[Three Examinations Required:]**
>
> **General Paralegal Exam**
> **LLLT Family Law Practice Area Examination**
> **LLLT Professional Responsibility Examination**
>
> **Experience Requirement**

82. Wash. Sup. Ct. R., *Limited License Legal Technician Rules of Professional Conduct (LLLT RPC)*, https://www.courts.wa.gov/court_rules/pdf/APR/GA_APR_llltRPC.pdf (last visited Sept. 5, 2021).

83. *Become a Legal Technician*, WASH. ST. B. ASS'N (Oct. 8, 2021), https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/become-a-legal-technician. The original rules required 3,000 hours of experience. *See* Crossland & Littlewood, *Enhancing Access*, *supra* note 9, at 621.

> Obtain 1,500 hours of substantive law-related work experience as a paralegal or legal assistant supervised by a lawyer prior to licensing.
>
> Experience must be acquired no more than three years prior to passing the LLLT Practice Area exam and must be completed by July 31, 2022.[84]

The first LLLT was licensed to practice in June of 2015.[85] As of this writing, there are sixty-eight licensed and active LLLTs in Washington.[86]

C. The Importance of the Breakthrough: Can't Put the Genie Back

Washington was the first state to implement this innovation, and it was done despite dogged opposition from the organized bar and concerns over feasibility.[87] The general idea of an ALP, however, was not new, and neither was the organized bar's opposition. It was a topic of interest in academic literature long before the Washington State program.[88] And it was for reformers concerned with access as well. In short, the ALP idea was – so to speak – among those in the air for the community of those concerned with access before the creation of the Washington State program. Or as political scientist John Kingdon said about public policy more generally, "[m]uch as molecules floated around in what biologists call the 'primeval soup' before life came into being, so ideas float around in these [policy] communities. . . . Some ideas survive and prosper; some proposals are taken more seriously than others."[89]

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84. *Become a Legal Technician*, *supra* note 83.

85. *See Legal Profile: Michelle M. Cummings*, *supra* note 36. Michelle M. Cummings, license number 101LLLT, was admitted on June 25, 2015. *Id.*

86. *See Legal Directory*, WASH. ST. B. ASS'N, https://www.mywsba.org/PersonifyEbusiness/LegalDirectory.aspx?ShowSearchResults=TRUE&LicenseType=LLLT&Page=0 (last visited Mar. 21, 2022).

87. *See* Letter from Paula C. Littlewood, Exec. Dir., Wash. State Bar Ass'n, to Barbara A. Madsen, Chief Justice, Wash. Supreme Court (Dec. 20, 2011) (on file with authors). "Current Position of WSBA: The WSBA opposes proposed APR 28." GR 9 Cover sheet, Memorandum from the Wash. State Bar Ass'n on Suggested Rule Admission to Practice Rules (APR), to Wash. Supreme Court 1 (Dec. 20, 2011) (on file with authors). *See also* Holland, *supra* note 33, at 124–27. The organized bar's traditional opposition to non-lawyer actors is a prime example of a profession zealously guarding its boundaries to maintain its monopoly control over a field of work. *See* Abel, *supra* note 26, at 40–73, 112–26; Christensen, *supra* note 26, at 166; ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 247–79 (1988).

88. *E.g.*, Christensen, *supra* note 26; Rhode, *supra* note 23; KRITZER, LEGAL ADVOCACY, *supra* note 23; Hurder, *supra* note 23. The issue continues to be a topic of interest in the academic literature. *See* sources cited in *supra* note 3.

89. KINGDON, *supra* note 37, at 116–17.

There were even formal considerations of ALPs in the past, but they all came to nothing largely because of the bar's opposition. For instance, the 2017 Oregon Futures Task Force noted, "[t]wenty-five years ago, a task force of the Oregon State Bar developed a proposal for licensing nonlawyers to provide limited legal services to the public in civil cases. . . . At the time of that 1992 report, seven other states had considered or were considering similar proposals."[90] Perhaps the best evidence that the ALP idea was in the air (or in the policy soup) long before the Washington State program is the 1995 ABA Commission mentioned earlier. It conducted a substantial amount of research across the country and spoke favorably about the idea of an ALP, but to no avail.[91]

The originators of the Washington State program saw it as a big innovation – as an innovation or template for other states to not only consider but also emulate. We noted earlier Chief Justice Madsen's presentation about the program to her fellow chief justices and her overall enthusiasm and genuine interest.[92] The reaction, she said, left her "optimistic that the Triple LT program will be a model that others can emulate."[93]

In a 2015 piece written by two of the most important of the program's originators, Stephen Crossland (former WSBA chair and longtime chair of the LLLT Board) and Paula Littlewood (WSBA Executive Director, 2007-19) are clear. In the piece's conclusion, they said, "[b]eyond crafting a creative partial solution to its own state's legal services crisis, the Washington Supreme Court has blazed a path that other states may pursue or, at the very least, closely consider in formulating their own solutions to the justice gap."[94] A 2018 law review article of theirs moved the idea of diffusion to the forefront of their narrative. The abstract's opening line says, "Washington's 2012 adoption of a Limited License Legal Technician (LLLT) rule has been a topic of great interest throughout the United States and elsewhere."[95]

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90. OREGON FUTURES, *supra* note 16, at 3.

91. *See generally* A.B.A. COMM. ON NONLAWYER PRACTICE, *supra* note 25. The commission's report and recommendations were not taken to the American Bar Association's House of Delegates for approval in 1995. *See* KRITZER, RISKS, *supra* note 7, at 12–13.

92. Madsen, *Promise*, *supra* note 9, at 543.

93. *Id.*

94. Paula Littlewood & Stephen Crossland, *Alternate Legal Service Providers: Filling the Justice Gap*, *in* THE RELEVANT LAWYER: REIMAGING THE FUTURE OF THE LEGAL PROFESSION (Paul Haskins ed., 2015). This volume was a publication of the American Bar Association's Standing Committee on Professionalism, Center for Professional Responsibility. *See id.*

95. Stephen R. Crossland & Paula C. Littlewood, *Washington's Limited License Legal Technician Rule and Pathway to Expanded Access for Consumers*, 122 DICKINSON L. REV. 859, 859 (2018).

In a practical sense, the Washington State program is the on-the-ground beginning of an innovation story and not the denouement. Washington State was the first adopter and started a process of sorts. The development of the program and its creation have been closely followed. In short order, the idea of an ALP to enhance access reached a real place on the legal policy agenda in other states, having reached the agenda of commissions or task forces in at least eighteen states.[96] In Colorado, for instance, the entity was originally called the Supreme Court Advisory Committee Subcommittee on the Limited License Legal Technician, with the Washington State program as the starting point. A member of that subcommittee said, "Washington was the first to do something about the problem of too many pro se litigants in certain areas."[97] Similarly, another member said,[98] "[e]verybody seemed to know of the LLLT as a way to assist pro se litigants."[99] In Utah, the Supreme Court Task Force to Examine Limited Legal Licensing described its charge as, "[s]pecifically, the court asked us to . . . examine the Limited Licensed Legal Technician Program in the State of Washington – as well as other similar programs."[100]

As the first adopter, the Washington State program has been at the middle of almost all discussions of ALPs and access.[101] Some of the key players in its development and adoption in Washington have become key communicators, even policy entrepreneurs, for the program's spread to other states. They have appeared before a number of state commissions and task forces, and they have written for legal

96. This figure comes from *Jurisdictions' Activity*, *supra* note 5 and updated by the authors. *See also* Hunter Metcalf, *Limited License Legal Technicians Take First Steps Towards Bridging Access to Justice Gap*, U. DENVER IAALS BLOG UPDATES (Aug. 17, 2015), http://iaals.du.edu/blog/limited-license-legal-technicians-take-first-steps-towards-bridging-access-justice-gap ("Washington's inaugural class of limited license legal technicians (LLLTs) have taken their initial test to become the first of their kind. Seven of the nine who took the state's LLLT exam passed . . . .").

97. Telephone Interview with Alec Rothrock, *supra* note 76.

98. *Id.*

99. In-person interview with Daniel M. Taubman, *supra* note 76.

100. UTAH STATE COURTS, UTAH SUPREME COURT TASK FORCE TO EXAMINE LIMITED LEGAL LICENSING: REPORT AND RECOMMENDATIONS 7 (Nov. 18, 2015), https://www.utcourts.gov/committees/limited_legal/Supreme%20Court%20Task%20Force%20to%20Examine%20Limited%20Legal%20Licensing.pdf.

101. *See generally* COLO. SUPREME COURT ADVISORY COMM. SUBCOMM. ON LTD. LICENSE LEGAL TECHNICIAN, ABOUT US: LLLT MATERIALS 02-13-15 (Feb. 13, 2015), https://www.coloradosupremecourt.com/PDF/AboutUs/LLLT/LLLT%20Materials%20%2002-13-15.pdf [hereinafter COLO. LLLT]. The first five (of seven) items – materials – were all on the Washington State Program, which was the subcommittee's starting point. *Id.*

audiences extolling the program.[102] Materials about and from the Washington State program are prominent in the work of commissions and task forces.[103]

The Washington State program's influence is evident. It is a key reference point for considering ways of enhancing access even if not the one followed – it is the idea that cannot be simply ignored. For instance, the report of the Texas Commission to Expand Legal Services noted, "we had robust discussions about programs that permit nonlawyer professionals to provide certain legal services, such as Washington State's limited license legal technician program. But we initially urge the Court to prioritize less complicated initiatives, focusing on those that would increase modest-means clients' access to lawyers."[104]

The LLLT program, given the legal profession's long-time opposition to ALPs, is a breakthrough having the potential to reconfigure the delivery of legal services. The potential is not in what the program itself could literally do. Afterall, the first "L" in LLLT is for "Limited," and compared to what a licensed attorney is allowed to do, the LLLT's range is severely limited. The potential is in doing the previously unthinkable and providing the impetus for broader and bolder discussions of who can deliver legal services. It widened the opening for those discussions.

III. Opportunity

A. Window for Change

The creation of the LLLT program in Washington State marked an important first in the delivery of legal services. In doing so, it did something else and opened a potential window of opportunity for other states with an interest in ALPs. The program's key originators and proponents in Washington State have certainly seen it this way. The opening line of the 2018 Crossland and Littlewood law review article noted in the previous Part reinforces this idea: "There are rare moments in history when the opportunity and need for systemic change presents itself for an industry. The legal profession and legal

102. "At the Working Group's July [2017] meeting, the Executive Director of the Washington State Bar, Paula Littlewood, and the Chairman of the Washington LLLT Commission, Steve Crossland, made a presentation explaining the program." State B. Mon., *supra* note 39, at 2; see also Carlson, *supra* note 11 for Paula Littlewood appearing in Colorado in early 2015. For the 2015-2018 meeting minutes, see *LLLT Board Meeting*, Wash. St. B. Ass'n, https://www.wsba.org/connect-serve/committees-boards-other-groups/LLLT-board (last visited Sept. 5, 2021) (follow "Full Calendar," then search for years).

103. *See* Colo. LLLT, *supra* note 101.

104. Report of the Texas Commission to Expand Civil Legal Services: December 6, 2016, at 3 (2016), http://www.txcourts.gov/media/1436563/complete-cecls-report.pdf.

education are at such a crossroads, and the question presented for the profession is what path they will take forward."[105] The audacious message: Now is the time to follow Washington State's lead. Whether it is indeed *the* time remains an open question, but the LLLT program forced the issue.

An opportunity implies some kind of impediment or even resistance has been overcome, and an opportunity does not mean a change will necessarily occur. It means change may be possible. Change is not a simple or smooth and quick matter if for no other reason than path dependency, settled ways of doing things, or formal barriers. An idea's merits (real, claimed, or hoped for), while important, are not enough to gain agenda status and certainly not enough to be implemented.[106] The LLLT's creation may well have been a focusing event – maybe at a "crossroads" – leading others to see a potential window of opportunity for their states. Regardless of the LLLT program's specifics, its greatest and lasting importance may be the impression of impediment or resistance overcome – of letting the genie out of the bottle, with no chance of putting back.[107]

The key impediment or point of resistance – as we have noted – is the obvious one, the legal profession itself.[108] A 2011 statement, the year before the Washington State Supreme Court approved the LLLT program, from the president of the American Bar Association (ABA) illustrates the depth and tenor of the long-time opposition to non-lawyers delivering legal services. Then-president William Robinson responded to a 2011 *New York Times* editorial entitled "Addressing the Justice Gap."[109] Among other criticisms, the editorial said, "[a]nother step is to allow nonlawyers into the mix. The [ABA] has insisted that only lawyers can provide legal services, but there are many things nonlawyers should be able to handle . . . ."[110]

Speaking in his official capacity, Robinson took aim at the suggestion "to allow non-lawyers into the mix."[111] He said:

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105. Crossland & Littlewood, *supra* note 95, at 860.

106. *See* KINGDON, *supra* note 37, at 116–17.

107. The irony is that Washington State's program came to an end as other states continued their interest in ALPs and as the legal profession's strident opposition began to loosen.

108. This is most obviously seen in the rules prohibiting unauthorized practice, *see* Christensen, *supra* note 26. Opposition to other ways of delivering legal services, like ALPs, is usually cast in terms of consumer protection. *See infra* note 112.

109. *Editorial: Addressing the Justice Gap*, N.Y. TIMES (Aug. 23, 2011), https://www.nytimes.com/2011/08/24/opinion/addressing-the-justice-gap.html.

110. *Id.* In addition to arguing for non-lawyer actors, the editorial also argued for additional funding for legal services, additional pro bono efforts by lawyers, and changes to legal education to encourage more legal services work. *Id.*

111. *Id.*

> [A] rush to open the practice of law to unschooled, unregulated nonlawyers is not the solution. This would cause grave harm to clients. Even matters that appear simple, such as uncontested divorces, involve myriad legal rights and responsibilities. If the case is not handled by a professional with appropriate legal training, a person can suffer serious long-term consequences . . . .
>
> . . . .
>
> We must expand legal services for those in need, provided by first-rate trained lawyers.[112]

Consumer protection has long been the mantra, but it is difficult to find anywhere in the literature someone arguing for a "rush to open the practice of law to unschooled, unregulated nonlawyers . . . ."[113] Whatever one might think of the Washington State program's specifics or practicality, it does not open things up for "unschooled, unregulated nonlawyers." Protecting the profession and its monopoly on legal services seems paramount.

More recently the ABA has moderated its position somewhat, but ALPs remain controversial and not all that welcome. In 2016, the ABA's House of Delegates approved the *Model Regulatory Objectives for the Provision of Legal Services*, which deals with access-enhancing efforts involving non-lawyers generally.[114] The resolution passed "[a]fter extended and heated debate . . . [the heart of which] was over whether by adopting the resolution the House was endorsing the practice of law by nonlawyers."[115] While stopping far short of any kind of endorsement, then-ABA president William Hubbard said "that non-

112. William T. Robinson III, *Letter: Legal Help for the Poor: The View from the ABA*, N.Y. TIMES (Aug. 30, 2011), https://www.nytimes.com/2011/08/31/opinion/legal-help-for-the-poor-the-view-from-the-aba.html.

113. Rhode & Ricca, *supra* note 22, at 2607. "Almost all of the scholarly experts and commissions that have studied the issue have recommended increased access to licensed nonlawyer legal service providers." *Id.* The rare exception may be someone like George Leef in his 1988 Cato Institute policy paper, which argues for abolition of all unauthorized practice of law statutes and rules and the complete deregulation of legal services. George C. Leef, *The Case for a Free Market in Legal Services*, CATO INST. 1 (Oct. 9, 1998), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa322xa.pdf. His argument is based on the Hayekian idea of the fundamental importance of economic liberty – including the rights "to work, to trade, or to contract." *Id.* at 15. For Leef, truly free competition itself will protect consumers. *Id.* at 24. There are few takers in the literature for this approach. *Id.*

114. *See Resolution 105 Revised and Amended: ABA Model Regulatory Objectives for the Provision of Legal Services*, A.B.A. (Feb. 8, 2016), https://www.abajournal.com/files/2016_hod_midyear_105.authcheckdam.pdf.

115. Lorelei Laird, *ABA House Approves Model Regulatory Objectives for Nontraditional Legal Services*, A.B.A. J. (Feb. 8, 2016), https://www.abajournal.com/news/article/house_approves_proposed_model_regulatory_objectives_for_nontraditional_lega. Laird provides a good summary of the debate and the different interests involved. *Id.*

lawyer providers would continue regardless of what the House would do," and another speaker – chair of the ABA Commission on the Future of Legal Services, Judy Perry Martinez – noted that nontraditional providers "are already providing services for people of modest means."[116] The genie was out.

In 2020, the House of Delegates approved another access to justice resolution, also controversial, "encouraging states to adopt regulatory innovations to expand legal services to more Americans."[117] Even if the ABA still was not going to welcome ALPs into the fold, both resolutions, implicitly if not explicitly, create space for ALPs where there was little before. They can be seen as the recognition of a quickly moving diffusion process with its own momentum. Perhaps the Washington State program is indeed a focusing event and the ABA is, in effect, playing catch-up.[118]

The even limited success of these two resolutions illustrates the importance of leadership and leadership changes. In contrast to Robinson's views in 2011, the 2016 resolution was "a major project of immediate past ABA president William Hubbard."[119] Martinez was the president at the time the 2020 resolution was passed.[120]

B. The Window in Washington State

It is difficult to pinpoint a particular event or crisis that opened the window for Washington State's program. There was a general sense in the world of state courts that the Great Recession was important. Perhaps the most succinct statement comes from a 2009 speech by then New Hampshire Chief Justice John Broderick – quoted earlier, it is worth repeating. He told an audience of state court managers,

116. *Id.* Martinez was elected ABA President in August 2019, for a term ending one year later. A.L.I., *Judy Martinez is New ABA President* (Aug. 14, 2019), https://www.ali.org/news/articles/judy-martinez-abas-143rd-president/.

117. Matt Reynolds, *To Increase Access to Justice, Regulatory Innovation Should Be Considered, ABA House Says*, A.B.A. J. (Feb. 17, 2020), https://www.abajournal.com/news/article/resolution-115.

118. Colorado began its consideration of the LLLT program before Washington State had even licensed its first LLLT. COLO. SUPREME COURT, OFFICE OF ATTORNEY REGULATION COUNSEL: 2016 ANNUAL REPORT 13 (2016), https://coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2016%20Annual%20Report.pdf; *see supra* note 85.

119. Laird, *supra* note 115.

120. According to an A.B.A. Journal article reporting on the resolution:

> ABA President Judy Perry Martinez spoke at the meeting, citing a passage from the preamble of the ABA's Model Rules of Professional Conduct that states that lawyers should fight 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. . . . I'm not going to comment on the resolution itself, but that's pretty potent," Martinez said.

Reynolds, *supra* note 117.

"[i]ncreasingly, many of those without counsel are middle-class and small businesses. The poor now have company."[121] He continued, saying, "[i]t's not their fault they can't afford a lawyer, but it becomes our responsibility to deal with it."[122] Broderick was talking about the elephant in the room – the challenges of a changing legal environment facing state trial courts in the face of the Great Recession.[123]

The Great Recession (Recession), however, was not *the* impetus or animating force for the Washington State program and, in fact, the original LLLT proposal predated the Recession by years. It came in 2006, but the "proposal did not proceed far past the drawing board . . . because the WSBA Board of Governors, in March 2006, voted to reject it."[124] A comprehensive history of the program does not mention the Recession as an impetus. Instead, it focuses on the longstanding "access to justice crisis" in Washington State and nationally, with the emphasis on the various access to justice activities in Washington going back to the beginning of the century (especially the 2003 Washington State Civil Legal Needs Study).[125] Speaking of an "access crisis" is probably best seen as a rhetorical device rather than anything else. The issues surrounding access are more accurately seen as an almost permanent characteristic of the system, rather than as a crisis (unless, that is, a crisis can be a permanent characteristic).

This is not to say, of course, that the Recession had no effect on access or was unimportant in discussions in Washington State or elsewhere. Madsen and Crossland, for instance, quoted a Washington State trial judge in a 2013 article they wrote explaining the program.[126] That judge said: "We have many more middle-class persons who have been caught up in the recession. . . . They come to court, embarrassed and distraught, and the only thing I can tell them is that I cannot do anything."[127] The Recession may not have been *the* impetus else-

121. Broderick, Jr., *supra* note 2, at 27.

122. *Id.*

123. Similarly, Chief Judge Jonathan Lippman is quoted in the 2012 Task Force to Expand Access to Civil Legal Services in New York saying, "the point is that when the economy is at its worst, [that] is when this need [bridging the justice gap] is so fundamental and so basic . . . so it is now more than ever . . . ." TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK: REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 4 (2012), https://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT_Nov-2012.pdf; *see also* sources in *supra* note 13.

124. Holland, *supra* note 33, at 97.

125. *Id.* at 77, 78–90.

126. Madsen & Crossland, *More Accessible*, *supra* note 9, at 24; *see also* Crossland & Littlewood, *Enhancing Access*, *supra* note 9, at 615; Madsen, *Promise*, *supra* note 9, at 537.

127. Madsen & Crossland, *More Accessible*, *supra* note 9, at 24; *see also* Crossland & Littlewood, *Enhancing Access*, *supra* note 9, at 615; Madsen, *Promise*, *supra* note 9, at 537.

where. When asked about the Recession, a member of the Colorado subcommittee looking at ALPs said it was never discussed as a reason.[128] What was important were longstanding problems involving *pro se* litigants, especially in the family law arena.[129]

The Recession, however, did make an appearance in the Colorado subcommittee's discussions – in a letter from the President of the Colorado Bar Association announcing the state bar's opposition to an LLLT in Colorado. Among other objections, the president included: "Due to economic downturn in 2008, there is a generation of attorneys who are unemployed or underemployed. Bringing in another line of legal practitioners seems to ignore the needs of those attorneys trying to find work and undercuts their ability to find work and paying clients."[130] Here, the Recession is a reason not to create an ALP program. And protect lawyers.

Perhaps it is best to see the approval and implementation of the Washington State program not as a response to some "crisis" or specific societal/economic event in Washington State. It took a decade and was in no way inevitable.[131] Rather, it may have been the contingent result of matters internal to the WSBA and the Washington State Supreme Court. Specifically, long-time LLLT proponent Stephen Crossland became the 2011-12 WSBA president; Paula Littlewood, the WSBA executive director was a longtime access advocate;[132] and in 2010, Barbara Madsen became Washington State Supreme Court Chief Justice, she too being an LLLT champion.[133] It is difficult to say which of the three roles was the most important, but without an advocate on the court, nothing would move forward.

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128. Telephone Interview with Alec Rothrock, *supra* note 76.

129. *Id.* Another subcommittee member said the question was an interesting one but did not say it was a consideration. Telephone Interview with Undisclosed Subcomm. Member, Colo. Supreme Court Advisory Comm. Subcomm. on Providers of Alternative Legal Services (Oct. 22, 2019) (name withheld by request).

130. Letter from Loren M. Brown, President, Colo. Bar Ass'n, to Alec Rothrock, Chair, Colo. Supreme Court Advisory Comm. Subcomm. on Ltd. License Legal Technicians (Oct. 28, 2015) (on file with authors). Brown reiterated this and other points at the subcommittee meeting on October 30, 2015. Meeting Minutes from the Colo. Supreme Court Advisory Comm. Subcomm. on Ltd. License Legal Technicians (Oct. 30, 2015) (on file with authors).

131. *See* Holland, *supra* note 33, at 91–111.

132. *See* Lyle Moran, *Former Washington State Bar Leader Remembered as a Champion for Legal Innovation*, A.B.A. J. (Dec. 17, 2020), https://www.abajournal.com/news/article/former-washington-state-bar-leader-remembered-as-a-champion-for-legal-innovation.

133. "As chief justice, Madsen was instrumental in the development of a limited legal license technician program, the first in the nation, to address the critical justice gap for low- and moderate-income people." *Supreme Court Members: Justice Barbara A.Madsen*, WASH. CTS., https://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=SCbios.display_file&fileID=Madsen (last visited Sept. 5, 2021). Madsen served as Chief Justice from 2010 to 2017.

Seizing an apparent opportunity was the important thing. Regarding timing, at a 2014 conference, Littlewood said it was important "to get a rule through."[134] The path to the LLLT program's approval was long and contentious, not the least because of the Washington State Bar Association's opposition. Littlewood's statement can be seen as reflecting a sense of urgency and a strategic response to the realities and constraints surrounding the approval of the program and its implementation. It is a pragmatic statement about accomplishing what can realistically be done at a point in time – a foot in the door, a start – given the realities of the policy environment. The interests of the program's proponents went far beyond what was approved in 2012.[135]

Given this context, the interesting and important question is why the Washington State program has become so influential so quickly with no real track record yet to bolster it. Being in the policy soup or the academic literature, of course, is not enough for an innovation to take hold or to even get serious enough attention to be put on the agenda for key decision-makers. One might think the clear benefits of an innovation – if they existed – would put it on the agenda for serious consideration, but the policy process is not a rational one. As we noted above, an idea's merits are not enough to gain agenda status and certainly not enough to be implemented. Local contingencies and constraints are always important.

As the history of the Washington State program suggests, the process is inherently political and highly contingent. Again, leadership or leadership changes are crucial. In other states considering an ALP, there seems to be someone who knows of the LLLT program and the idea of ALPs and tries to start a process. In Utah, for instance, it was a member of the Supreme Court, Justice Deno Himonas, who chaired the committee looking into ALPs. A member of the Colorado subcommittee, in commenting on why Utah was so much farther ahead in its consideration of an ALP than Colorado, called Justice Himonas a "champion justice."[136] In Colorado, it appears to have been James

134. Elizabeth Chambliss, *Law School Training for Licensed "Legal Technicians"? Implications for the Consumer Market*, 65 S.C. L. REV. 579, 590 (2014).

135. In a letter to the Washington State Supreme Court, attorney Nancy Hawkins strenuously opposed the expansion of LLLT authority beyond family law, particularly debt and immigration matters, and criticized the ways in which the program's proponents were trying to expand. Letter from Nancy Hawkins, Attorney, to Cindy Phillips, Jud. Admin. Assistant, to C.J. Mary E. Fairhurst (July 16, 2018), https://www.courts.wa.gov/court_Rules/proposed/2018Jun/Prpsd%20Chngs-APR%2028%20and%20APR%2028%20Appendix%20Regs%202%20and%203/Nancy%20Hawkins%20-%20APR%2028.pdf [hereinafter Letter from Nancy Hawkins].

136. Jessica Yates, Remarks at the Meeting of the Colorado Supreme Court PALS Subcommittee (Sept. 13, 2019) (transcript on file with authors) (The meeting was open to the public.).

Coyle as the impetus. He was the head of the Colorado Supreme Court Office as Attorney Regulation Counsel and active with the National Organization of Bar Counsel. He, along with David Stark (chair of the Colorado Supreme Court Advisory Committee), was instrumental in the creation of the Colorado subcommittee and choosing its members.[137] In New Mexico, it was Chief Justice Judith Nakamura and in Arizona, Chief Justice Scott Bales.

Again, it seems that some in other states, especially supreme court members, were watching Washington State and its existence (not a proven track record) open a window of opportunity. As Richard Zorza's Access to Justice Blog said just days after the program's approval by the Washington State Supreme Court, "[l]ots of us have been watching this long-standing but very important saga."[138]

IV. EXPERIMENTS

A. The Unceremonious Demise of the Washington State LLLT Program

It seems unlikely that Chief Justice Madsen and the other originators of the LLLT program literally saw it as an experiment with all the uncertainty (and humility) that implies. They had no idea of whether the program would work or even how to assess it, and in the eyes of some, they seemed much too confident about it. Afterall, they were vigorously offering it as a template – an innovation – for other states. Just between 2015 and 2018, for instance, Crossland and Littlewood attended meetings and/or made presentations outside of Washington State at least 31 times (including six in Canada).[139] They were, in a sense, entrepreneurs, not experimenters. For others, the program is more likely seen as an experiment that would live or die based on its results in the real world, and not as an innovation whose practical worth was not so much confirmed as assumed. Washington State had little to offer, if for no other reason that it was still too new.

One critic, in a lengthy 2018 letter to the Washington State Supreme Court opposing expansion of the program "into debt issues or any

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The Subcommittee was formerly known as Colorado Supreme Court Advisory Committee Subcommittee on Limited License Legal Technicians.

137. Telephone Interview with Alec Rothrock, *supra* note 76. Coyle and Stark decided to create the Subcommittee on Limited License Legal Technicians after a presentation to the Supreme Court Advisory Committee on the Washington State program by Stephen Crossland and Paula Littlewood. *Id.*

138. Richard Zorza, *Important Step Forward with Washington State Legal Technician Rule*, ACCESS TO JUST. BLOG (June 19, 2012), https://accesstojustice.net/2012/06/19/important-step-forward-with-washington-state-legal-technician-rule/.

139. *See LLLT Board Meeting*, *supra* note 102.

other subject area," questioned that confidence and entrepreneurship.[140] She derisively noted, "[t]he program is marketed enthusiastically by Paula Littlewood and Steve Crossland . . . [they] travel to various other states and countries together . . . to talk up the LLLT program concept."[141] The idea being that they were talking up an unproven and unsustainable program. More specifically, the letter said:

> It also seems that the LLLT program is described by Crossland and Littlewood in their various travels as a "success." This seems to be an inaccurate description of the program. After years of funding, the program continues to operate at a substantial loss and has very few people working in the field. There is no proof that the program is truly meeting the needs of low-income people . . . .[142]

The letter, apparently, reflected the views of the program's opponents more generally and presaged the assessments leading to the program's sudden demise in 2020.[143]

The 2020 decision to sunset the LLLT program ended the experiment, but a 2019 dissent by Justice Steven Gonzalez foreshadowed that end. Gonzales voted with the majority in the 2012 order approving the program, but he dissented in a 2019 order that made a number of changes in the program.[144] He did so not because of any principled objections, but on practical grounds – as if assessing the results of an experiment. He noted the cost of the program for the WSBA (as did that 2018 letter) as well as the lack of any business plan that would allow the program to become sustainable:

> It did not take long to realize that the business model adopted by the LLLT program was incompatible with meeting the needs of low-income individuals and so the program shifted to becoming a mod-

140. Letter from Nancy Hawkins, *supra* note 135, at 1.

141. *Id.* at 4. Hawkins also raised the cost of Littlewood and Crossland's travels, which was one matter triggering a response letter to the Supreme Court from the WSBA president saying that no WSBA funds were involved and that the travels were the result of invitations to speak about the program. E-mail from Bill Pickett, President, Wash. State Bar Ass'n, to Wash. Supreme Court Justices (July 17, 2018, 8:16 PM), http://www.courts.wa.gov/court_Rules/proposed/2018Jun/Prpsd%20Chngs-APR%2028%20and%20APR%2028%20Appendix%20Regs%202%20and%203/Bill%20Pickett%20-%20APR%2028.pdf.

142. Letter from Nancy Hawkins, *supra* note 135, at 4.

143. Justice Susan Owens' dissent in the 2012 Washington Supreme Court Order approving the LLLT program centered on the cost of the program to the WSBA. *In re* The Matter of the Adoption of New APR 29–Limited Practice Rule for Limited License Legal Technicians, Order No. 25700-A-1005, at 5–6 (Wash. 2012) (Owens, J., dissenting), http://lawfilesext.leg.wa.gov/law/wsr/2012/14/12-13-063.htm.

144. *See generally In re* Proposed Amendments to APR 28–Limited License Legal Technician Rules, Order No. 25700-A-1258 (Wash. 2019) (Gonzalez, J., dissenting), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700-A-1258andAmendedRules.pdf [hereinafter *Gonzalez Dissent*].

> erate means effort. Without any evidence of success, the program has begun expanding the scope of legal services that LLLTs are allowed to provide. . . . We must address the issue of unmet legal needs, but we must do it wisely and carefully.[145]

In short, the program could not succeed on its own terms. The experiment, such as it was, failed.

The June 5, 2020, letter from Washington Chief Justice Debra Stephens to the WSBA sunsetting the program said:

> I am writing to you on behalf of the Supreme Court to advise you that the court voted by majority Thursday, June 4, 2020, to sunset the Limited License Legal Technicians (LLLT) Program . . . .
>
> . . . .
>
> The program was an innovative attempt to increase access to legal services. However, after careful consideration of the overall costs of sustaining the program and the small number of interested individuals, a majority of the court determined that the LLLT program is not an effective way to meet these needs and voted to sunset the program.[146]

In effect, the court said, as did Justice Gonzales earlier, that the experiment failed.

Justice Madsen wrote passionately to the WSBA in dissent, taking issue with the lack of any substantive process or actual assessment for the court's decision.[147] She noted that "the court sua sponte ended a completely viable licensing category that the public can draw on. There was no process. No questions. No comments. The public was not consulted."[148] She disputed the concern over the cost to the WSBA. She did not, however, literally say it was a success. She could not. Madsen did reference a preliminary evaluation of the program saying that it "found it was significant in helping create access to justice and was replicable"[149] – the Clarke and Sandefur evaluation mentioned earlier.[150] That preliminary evaluation, however, only said the

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145. *Id.* He echoes some of the practical problems regarding success on its own terms raised by Rebecca Donaldson in her 2018 critique of the program. *See* Donaldson, *supra* note 42.

146. Letter from Debra L. Stephens, *supra* note 38, at 1. Interestingly, Chief Justice Stephens was among the justices not in the majority.

147. Letter from Barbara A. Madsen, Justice, Wash. Supreme Court, to the Wash. State Bar Ass'n 1 (June 5, 2020), https://www.wsba.org/docs/default-source/about-wsba/governance/supreme-court_lllt-sunset_letters-combined.pdf [hereinafter Letter from Barbara A. Madsen].

148. *Id.*

149. *Id.* at 2.

150. *Id. See supra* note 36 and accompanying text. Madsen did not mention Donaldson's critique of the program. Donaldson, *supra* note 42.

program *could* succeed if it were properly supported, not that it already had.[151]

Madsen did point to something else in making her argument for the program – that it was an innovation spreading to other states. Other jurisdictions, she said, are paying attention to the LLLT program: "As a testament to this, other states are considering adopting similar licenses: efforts are underway in states such as Utah, California, Oregon, Colorado, New Mexico, Minnesota, Massachusetts, and Connecticut; and in Canada, British Columbia."[152] It is hard to know for sure what Madsen is intending to say regarding the program, but it would seem to be the idea that other jurisdictions are interested in a sustainable program that enhances access and not in a failed experiment. Interested yes, but not all were sure of the program's success or practicality.

B. A Brandeisian Laboratory

Some may have initially seen the program as an innovation to emulate and one or more of the proponents from Washington State were often among the first to speak with a task force looking at the LLLT program. Others, while positively inclined, were more pragmatic. Returning to Richard Zorza, "[t]he Washington State Supreme Court has now by Order approved a rule generally permitting non-lawyer legal technicians. . . . The project offers significant opportunities to get a much better picture of whether non-lawyer practice is practical."[153] It is the idea of Washington State as a Brandeisian laboratory.

Regardless of what the proponents in Washington State really thought in this regard, task forces, commissions, and committees in other states have looked at the LLLT program in just this practical way.[154] Even before the demise of the program, others were treating it as an experiment to examine, learn from, and perhaps – but only perhaps – to emulate. Those task forces have, in effect, been pragmatic empiricists. They look closely at the information available to them to

151. CLARKE & SANDEFUR, *supra* note 41, at 9–12.

152. Letter from Barbara A. Madsen, *supra* note 147, at 2.

153. Zorza, *supra* note 138.

154. Then ABA President William Hubbard is quoted in a 2015 ABA Journal article with regard to the Washington State program as saying, "[t]he states are the laboratories of invention. . . . This is a good example of that." Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, A.B.A. J. (Jan. 1, 2015), https://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the. Ambrogi himself called the LLLT program "an ambitious experiment to revolutionize access to legal services." Ambrogi, *Who Says*, *supra* note 44.

come to a decision as to whether such a program could be realistic and workable in their state. Their judgments of the experiment vary, but generally, the Washington State program has gone from being *the* model to the cautionary tale.

Still, on certain basic matters, these pragmatic empiricists do follow the lead of the Washington State program, although the specifics vary. Limitation is one. Envisioned is an ALP limited to specific practice areas and a limited scope of authority, with family law being one major area of attention. Of course, there is accountability with specific ethical standards and formal processes for enforcing them by the state bar.[155]

Consumer protection is another general area of agreement, which means appropriate training and licensing. Again, allowing for variation on the specifics, there is agreement on the need for educational requirements. This includes specific coursework (usually offered online), particularly in ethics and substantive practices areas, along with exams in ethics and substantive practice areas. There is also consensus on the need for substantial hands-on experience – working a substantial number of hours under the supervision of a licensed attorney.

There is agreement in following Washington State on an ALP program piggybacking on the existing system of paralegals.[156] They are seen as the foundation for the new ALP ranks, a cadre of professionals who can (hopefully) build that foundation quickly. As an incentive, experienced paralegals may be exempted from some entry and licensing requirements.[157]

Any entry requirements must strike a balance with sustainability – making the position attractive to a sufficient number of potential candidates through reasonable and affordable entrance requirements.[158] Afterall, ALPs are meant to help close the justice gap by making legal services more broadly available to those with limited means. Leaving aside the question of how many people would actually utilize (or have

155. *See* Robinson III, *supra* note 112.

156. *See* Michelle Cummings, *Why I Decided to Become a Limited License Legal Technician*, NWSIDEBAR (Sept. 18, 2015), https://nwsidebar.wsba.org/2015/09/18/why-i-decided-to-become-a-limited-license-legal-technician/. Cummings was the first to be licensed and, like most LLLTs and most LPPs in Utah, is a woman. *Id.* The ALP idea, in practice, is heavily gendered, perhaps because it is attractive to existing paralegals, and most paralegals are women. *See Paralegal Demographics and Statistics in the US*, ZIPPIA, https://www.zippia.com/paralegal-jobs/demographics/ (last visited Sept. 5, 2021).

157. Like paralegals, ALPs require no more than an associate degree. Here, ALPs are unlike the medical analogues we saw earlier that require a bachelor's degree or more.

158. Nonetheless, the 2020 Washington Supreme Court letter sunsetting the program did cite the "the small number of interested individuals" as a reason without stating any standard. Letter from Debra L. Stephens, *supra* note 38, at 1.

utilized) the services of an ALP,[159] sustainability has become a major concern not only in Washington State but also in other states as well.

While there may be agreement on the basic structure and outline of an ALP program, Washington State's entry requirements are seen as too onerous and likely to deter otherwise interested people from pursuing a career as an ALP. There was too much coursework beyond the associate degree and basic paralegal training (recall that NPs require a graduate degree). The amount of hands-on experience required – originally 3,000 hours – was especially problematic (in Utah its 1,500 hours).[160] Washington State also had a relatively long waiver requirement for experienced paralegals – ten years (in Utah seven years of relevant experience within a ten-year period). At the time other states were formally considering the Washington State program – 2015-2021 – the number of LLLTs was low. The first LLLT was licensed in 2015. By the end of 2016, there were nineteen licensed LLLTs, thirty-nine by the end of 2018, and fifty-three by the end of 2020. As of this writing, there were seventy-nine licensed LLLTs, of whom sixty-eight are active.

There is a final, and fundamental, aspect of sustainability that continues to raise questions – the business model for ALPs. The Washington State LLLT program is a private market model, meaning the LLLTs work as private businesses like law firms, creating their own independent, for-profit entities. This means they make a living from the fees charged to clients while having to cover the costs of doing business.[161] The sustainability of the Washington State private market model was always an open question, especially if the program was to create a cadre of independent LLLTs to offer services to those with low incomes.[162]

C. The Four Corners States

The Four Corners states – Arizona, Colorado, New Mexico, and Utah – have each formally considered an ALP with the Washington

159. It is a question with little data for providing any real answers.

160. For Utah, see *Licensed Paralegal Practitioner*, UTAH CTS., https://www.utcourts.gov/legal/lpp/index.html; for Washington, see Crossland & Littlewood, *Enhancing Access*, *supra* note 9, at 621.

161. *E.g.*, *Angela Wright, Family Law Legal Technician Services*, ANGELA WRIGHT, LLLT, https://www.angieslegaltech.com (last visited Sept. 5, 2021).

162. The program may be more sustainable as one serving moderate income people (although Washington State Justice Gonzalez sees this as evidence of failure). *See Gonzalez Dissent*, *supra* note 144. More likely it is sustainable as one serving moderate income people if the LLLT is working for a law firm, which would handle all the costs of doing business and charge the client at a lower rate for the LLLT's services than it would charge for an attorney to do the same work. *See id.*; Donaldson, *supra* note 42, at 71.

State program as the inspiration and starting point. The Utah Supreme Court Task Force to Examine Limited Legal Licensing received its charge in May of 2015 and Utah was the first, after Washington State, to approve an ALP program. Washington State was the starting point.[163]

1. Utah

The Utah Supreme Court Task Force to Examine Limited Legal Licensing issued its report and recommendations to the Utah Supreme Court in November of 2015 and recommended moving ahead with an ALP. [164] While recognizing the challenges of a private market business model, the task force recommended it nonetheless. [165] Based on that report, the Utah Supreme Court created the Paralegal Practitioner Steering Committee to begin the work of actually putting the private-market Licensed Paralegal Practitioner (LPP) program together.[166] The Committee began its work in February of 2016,[167] and the Court approved the necessary rules for the program on November 1, 2018.[168] The first LPPs were licensed in the fall of 2019, and the program became an additional experiment to consider because of its differences with the Washington State program.[169]

Created to enhance access to justice, the Utah LPP is "a mid-level legal provider that is a step up from a paralegal and a step down from a fully practicing attorney. A licensed paralegal practitioner (LPP) can do many of the things traditionally accomplished by attorneys while charging lower fees."[170] An LPP, however, cannot represent a client in court.[171] Like the LLLT, the Utah LPP can practice in the family law area, but unlike the LLLT, the LPP can also represent clients in forcible entry and detained cases and in small claims-level debt matters.[172]

163. *See* UTAH STATE COURTS, *supra* note 100, at 7; *see also Other Studies and Programs*, LICENSED PARALEGAL PRACT. COMM., https://www.utcourts.gov/utc/limited-legal/other-studies-and-programs/ (last visited Sept. 5, 2021); *Articles*, LICENSED PARALEGAL PRACT. COMM., https://www.utcourts.gov/utc/limited-legal/other-articles/ (last visited Sept. 5, 2021).

164. UTAH STATE COURTS, *supra* note 100, at 8–10.

165. It did not appear that the task force considered a publicly funded model.

166. *Meeting Minutes*, PARALEGAL PRACT. STEERING COMM (Feb. 18, 2016), https://www.utcourts.gov/utc/limited-legal/wp-content/uploads/sites/29/2016/02/2016-02-18-1.pdf.

167. *Id.*

168. *See Meeting Minutes*, *supra* note 166.

169. Lyle Moran, *Utah's Licensed Paralegal Practitioner Program Starts Small*, ABOVE THE L. (Dec. 12, 2019, 11:45 AM), https://abovethelaw.com/2019/12/utahs-licensed-paralegal-practitioner-program-starts-small/.

170. *About the Program*, UTAH ST. B., https://www.utahbar.org/licensed-paralegal-practitioner/lpp-about/ (last visited Sept. 5, 2021).

171. *Licensed Paralegal Practitioner*, *supra* note 160.

172. *Id.*

The LPP entry requirements are less onerous (less time consuming and less costly) than those for the LLLT. The LPP must have at least an associate's degree and 1,500 hours of hands-on experience.[173] Those hours are to include 500 hours of "substantive law-related experience" in family law if the LPP is to be licensed in that area, and 100 hours in each of the areas if the LPP is to be licensed in one or the other.[174] Also required is a specialized course in each area in which an LPP is to be licensed, and an ethics course, along with successfully passing examinations in each practice area and in ethics.[175] Also of note, there was a time-limited "grandfathering provision" that waived some entry requirements for paralegals with seven years of relevant experience in the preceding ten years.[176]

2. Colorado

The Colorado subcommittee considering an ALP also began in early 2015,[177] but unlike its Utah counterpart, it did not issue its report and recommendations to the Colorado Supreme Court until September 2019.[178] Its explicit starting point was the Washington State LLLT – its original name being Colorado Supreme Court Advisory Committee Subcommittee on Limited License Legal Technicians.[179] The subcommittee is interesting because of the practical issues with which it grappled, especially sustainability. While the explicit starting point was the LLLT program, as it struggled with those issues, the LPP program in neighboring Utah became the one from which the subcommittee wanted to watch and learn from. One subcommittee member said Utah "came late in the game [after Washington State] and they de-

173. *Id.*

174. *Id.*

175. *Id.* All courses being offered online. *Id.*

176. *Id.*; Scotti Hill, *Licensed Paralegal Practitioner Program Overview and Information*, UTAH ST. B. (2020), https://www.utahbar.org/wp-content/uploads/2020/12/LPP-Info_12_2020.pdf.

177. "On March 6, 2015, the Supreme Court Advisory Committee formed a subcommittee to study whether Colorado should implement a Limited License Legal Technician (LLLT) program to address access-to-justice issues." COLO. SUPREME COURT, *supra* note 118, at 13.

178. Meeting Minutes from Colorado Supreme Court Attorney Regulation Advisory Committee 1–4 (Sept. 13, 2019), https://www.coloradosupremecourt.com/PDF/Advisory%20Committee%20Minutes/Advisory%20Committee%20Minutes%209-13-19.pdf.

179. Telephone Interview with Alec Rothrock, *supra* note 76; *see* COLO. SUPREME COURT, OFFICE OF ATTORNEY REGULATION COUNSEL: 2015 ANNUAL REPORT 13, 46 (2015), https://coloradosupremecourt.com/PDF/AboutUs/Annual%20Reports/2015%20Annual%20Report.pdf.

cided to go ahead and pull the trigger . . . testing the waters to see what works."[180]

Another reason the Colorado subcommittee's longer process is interesting is the opposition from the Colorado Bar Association, especially its family law members.[181] A similar problem has plagued the LLLT program.[182] The state bar's opposition, however, did not end the subcommittee's work, although it appeared to always be a lurking worry. The subcommittee reconsidered its work, shifting away from family law matters and the LLLT model. In 2016, the subcommittee's name was changed to Provider of Alternative Legal Services Subcommittee (PALS) and its preliminary report and recommendations focused on landlord-tenant matters.[183] While the need is great in this area, it also represents an area of minimal controversy and in which little lawyer pushback would be expected.

In short, the Colorado subcommittee illustrates what can happen when a generally supportive examiner considers not just the political environment but the practical challenges as well. Perhaps most importantly, the Colorado subcommittee was stymied by the all too practical challenge of sustainability, specifically the private market business model used in both Washington State and Utah. The subcommittee arrived at no specific solution. It is, said one subcommittee member during a meeting, "really complex, deceivingly complex."[184] The question is who pays – an ALP program only works if it makes financial sense for the non-lawyer.[185] In a subsequent interview, this subcommittee member returned to the business model issue. If it is a private market model, they said, it would cut out the indigent or the money must come from somewhere else. If people are required to pay, it will cut out a huge swath of potential clients.[186]

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180. Telephone Interview with David Stark, Chair, Colo. Supreme Court Advisory Comm. on Attorney Regulation, and Member, Colo. Supreme Court PALS Subcomm. (Oct. 28, 2019).

181. The PALS subcommittee preliminary report noted, "Washington and Utah allow licensed non-lawyers to provide limited services in dissolution of marriage cases, but some Colorado lawyers have expressed concerns about the viability of non-lawyer advocates in family law cases that they believe should be handled by licensed nonlawyers." PALS Preliminary Report, *supra* note 77, at 7; *see also supra* note 130.

182. *See* Letter from Nancy Hawkins, *supra* note 135.

183. Colo. Supreme Court, *supra* note 179.

184. Alec Rothrock, Chair, Colo. Supreme Court PALS Subcomm., Remarks at the Meeting of the Colorado Supreme Court PALS Subcommittee (Sept. 13, 2019) (transcript on file with authors) (The meeting was open to the public.); *see also* PALS Preliminary Report, *supra* note 77, at 7–8.

185. PALS Preliminary Report, *supra* note 77, at 7–8.

186. Telephone Interview with Alec Rothrock, *supra* note 76.

A private market model seemed to be the only alternative given that public funding was unlikely. But even though both Washington and Utah are using the private model, there was the problem of insufficient information on whether the model worked considering who it was supposed to serve. This was a widely shared frustration among the Colorado subcommittee members given the source of the complexity. The subcommittee's preliminary report said, if it is a:

> [F]or-profit model, it must be sufficiently profitable to cover the cost of the educational and licensure requirements and enable the licensee to earn living. Profitability, in turn, requires licensees to be able to find clients who need assistance and can afford that assistance. This effectively eliminates indigent pro se litigants from the market for these services. Even pro se litigants of modest means may have difficulty affording the services of licensed nonlawyers. . . . [It] is tempting to assume that licensed nonlawyers would charge less than lawyers and, perhaps, considerably less. There is no guarantee of this proposition.[187]

Finding no way to decide on the business model, the subcommittee, in effect, punted the matter back to the Supreme Court of Colorado.

It did so by recommending an unusual pilot program. Focusing on landlord-tenant issues, it would take place in one rural and one urban county "using unpaid volunteers who would be duly vetted and trained."[188] It would be administered by the State Court Administrator's Office, or a non-profit corporation created for the purpose. The pilot would, hopefully, provide the kind information needed to do an evaluation and pave the way forward.[189] To outline this non-lawyer's authorized services, the report took Utah's list of services for LPPs.

In response to the subcommittee's recommendations, the Colorado Supreme Court created a new subcommittee in February of 2020. But rather than explore the pilot study, the subcommittee's charge was similar to the charge of the original 2015 subcommittee. It is charged with exploring "the possible creation of a regulatory regime for licensing qualified paraprofessionals to engage in the practice of law in defined contexts . . . in certain types of domestic relations matters . . . ."[190]

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187. PALS PRELIMINARY REPORT, *supra* note 77, at 7.

188. *Id.* at 10.

189. "The primary purpose of the pilot program would be to collect data on the level of interest of pro so litigants to be represented by the licensed nonlawyer volunteers and the efficacy of such representation." *Id.*

190. Order, *In re* Advisory Committee's Recommendation of a Pilot Program Concerning Paraprofessionals and Legal Services (Colo. 2020) (en banc), https://coloradosupremecourt.com/PDF/AboutUs/PALS/Order%20re%20PALS.pdf.; *see also* Avery Martinez, *Licensed Paralegal*

The concern over the business model has been resolved in favor of a private market model. A member of the second subcommittee was quoted as saying, "[t]he hope is to serve that clientele with a market-based approach."[191] The model is an ALP based largely on Utah's LPP, except being limited to certain family law matters. The suggested name is Licensed Paralegal Professionals (the same as Utah).[192] The training and licensing requirements are similar to Utah's as are the authorized activities. This includes 1,500 hours of hands-on experience, 500 in family law, and abiding by a set of rules of professional conduct based on those for lawyers (with the possibility of adding a requirement for malpractice insurance).[193] As of this writing, the preliminary report is still before the Supreme Court.

3. New Mexico

Like the original Colorado subcommittee, the Ad Hoc New Mexico Licensed Legal Technicians Work Group (Work Group) grappled with the practicalities of a private market ALP.[194] It too was animated by the Washington LLLT program and its potential. New Mexico is largely rural, relatively poor, with few lawyers beyond its larger cities and the question was whether an ALP like the LLLT would be beneficial in expanding access to legal services.[195] The Work Group looked at Arizona and Utah, but seemed more interested in Utah, which was about to license its first LPP. A work group member said it might be worth waiting to see how things worked in Utah since it was like New

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Professionals: Non-Attorneys in the Courtroom?, L. WEEK. COLO. (Oct. 1, 2020), https://lawweekcolorado.com/article/licensed-paralegal-professionals-non-attorneys-in-the-courtroom/.

191. Martinez, *supra* note 190.

192. COLO. SUPREME COURT ADVISORY COMM. PARAPROFESSIONAL & LEGAL SERVICES (PALS) SUBCOMM., PRELIMINARY REPORT 3 (Nov. 2020), https://paraprofessional.osbar.org/files/Colorado-Report-Paraprofessionals-And-Legal-Services-PALS-Subcommittee.pdf.

193. *Id.* at 3–11.

194. *In re* New Mexico Licensed Legal Technicians Work Group, Order No. 19-8110 (N.M. 2019) (on file with authors); *see also* Press Release, N.M. Admi. Office of the Courts, Supreme Court Work Group to Consider Non-Attorney Option for Providing Civil Legal Services in New Mexico (May 21, 2019) (on file with authors); Steve Terrell, *New Mexico to Study Letting Non-Lawyers Give Legal Help*, LAS CRUCES SUN NEWS (May 22, 2019), https://www.lcsun-news.com/story/news/local/new-mexico/2019/05/22/new-mexico-supreme-court-study-non-lawyers-legal-help-civil-services/3768736002/.

195. Ad Hoc N.M. Licensed Legal Technicians Work Group Research, Overview (July 23, 2019); *see also* AD HOC N.M. LICENSED LEGAL TECHNICIANS WORK GROUP, INNOVATION TO ADDRESS THE ACCESS TO JUSTICE GAP: REPORT TO THE NEW MEXICO SUPREME COURT 3–18 (2019), https://www-media.floridabar.org/uploads/2021/06/New-Mexico-Report-to-Supreme-Court-Ad-Hoc-Licensed-Legal-Technicians-Workgroup.pdf [hereinafter REPORT OF THE WORK GROUP].

Mexico in terms of rurality. [196] Another said they had talked to a bar official in Utah who thought most who wanted to become LPPs wanted to work in the Salt Lake City area.[197]

Washington State was the Work Group's focus because the LLLT program was the only one of its kind in operation at the time. Based on what information the Work Group had, there was concern about whether anyone would be interested in becoming something like an LLLT in New Mexico, especially in the areas of the state in most need. The small number of LLLTs in Washington State at the time was noted along with the fact that most were in urban areas. Was there a market of likely or even potential New Mexico LLLTs? Was there a market for their services given the private market business model – could a New Mexico LLLT even make a living? The lack of any actionable information led some on the Work Group to argue for market research to help, but that would take time and the Work Group had a deadline to report back to the Supreme Court of New Mexico.[198]

The Work Group found that they could not answer that question about an LLLT's benefits and practicalities because of the lack of actionable and useable information on how it was working on the ground. The Work Group did not recommend moving forward with an LLLT-like program, in part because of the Washington program's lack of demonstrable success and in part to wait on the progress of programs in other states. In the Work Group's estimation:

> Washington's program is not as successful at reducing access to justice as officials had hoped. This workgroup recommends that New Mexico continue to monitor and study other states that are implementing these types of programs. . . . The workgroup also felt that intensive survey work needed to be done before any recommendation could be made to move forward, as Washington's program is costly and has only yielded 37 active LLLTs. Research and survey work is imperative as there is no mechanism to gauge whether litigants would utilize such a program, whether people would choose being an LLT as career path and finally whether, even in a rural community, an LLT could earn a living.[199]

To summarize, the Washington State experiment is something short of a success, but it is not worthless. It provides important lessons, largely on what not to do.

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196. Member, Ad Hoc N.M. Licensed Legal Technicians Work Group, Remarks at Meeting (Nov. 15, 2019) (transcript on file with authors) (This was a meeting open to the public.).

197. *Id.* Some on the Work Group, emphasizing the depth of immediate need, argued for going ahead with an LLLT. *Id.*; *see also* REPORT OF THE WORK GROUP, *supra* note 195, at 38.

198. REPORT OF THE WORK GROUP, *supra* note 195, at 38.

199. *Id.*

4. Arizona

The assessment seems to be the same in Arizona. In late 2018, the Arizona Supreme Court created The Task Force on Delivery of Legal Services (Task Force).[200] Its charge was broad, but a key item was to "[e]xamine and recommend whether other non-lawyers, with specified qualifications, should be allowed to provide limited legal services, including representing individuals in civil proceedings in limited jurisdiction courts, [and] administrative hearings."[201] The Task Force made its recommendations to the Arizona Supreme Court in October of 2019,[202] and the Court approved those recommendations in August 2020.[203]

The Washington State and Utah programs were the ones they turned to along with the program in Ontario.[204] Each has a private market business model for its ALP. The idea of an ALP private market business model for an ALP, said one member of the task force, was the only alternative.[205] It was the only way forward. That member of the task force, Don Bivens, further stated, "money to have a really robust public complete legal services, I don't see that happening . . . we struggle to fund a legal service corporation at the levels we currently do."[206]

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200. *In re* Establishment of the Task Force on Delivery of Legal Services and Appointment of Members, Administration Order No. 2018-111 1–2 (Ariz. 2018), https://www.azcourts.gov/Portals/22/admorder/Orders18/2018-111.pdf?ver=2018-11-21-132501-367.

201. *Id.*

202. ARIZ. SUPREME COURT TASK FORCE ON THE DELIVERY OF LEGAL SERVICES, REPORT AND RECOMMENDATIONS 10 (Oct. 4, 2019), https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf?ver=2019-10-07-084849-750 [hereinafter ARIZ. TASK FORCE].

203. Second Order, *In re* Restyle and Amend Rule 31; Adopt New Rule 33.1; Amend Rules 32, 41, 42 (Various ERs from 1.0 to 5.7), 46–51, 54–59, 60, and 75–76, Order No. R-20-0034 (Ariz. 2020); *see also* Lyle Moran, *Arizona Approves Nonlawyer Ownership, Nonlawyer Licensee in Access-to-Justice Reforms*, A.B.A. J. (Aug. 28, 2020), https://www.abajournal.com/web/article/arizona-approves-alternative-business-structures-as-part-of-access-to-justice-reforms.

204. Stephen Crossland and Paula Littlewood made one of the first presentations to the Task Force, and the Task Force reviewed a number of items on the Washington State program. Agenda, Ariz. Supreme Court Task Force on Delivery of Legal Services (Feb. 13, 2019) (on file with authors). Steven Johnson, a member of Utah's Limited License Practitioner Committee, also appeared before the Task Force to explain the Utah program. *Id.* They all appeared at the beginning of the Task Force's work. *Id.*

205. Zoom Interview with Don Bivens, Chair, Ariz. Supreme Court Task Force on the Delivery of Legal Services (Apr. 9, 2021) (transcript on file with authors).

206. *Id.* As well as being chair of the Task Force, Bivens is now chair of the Arizona Board of Nonlawyer Legal Service Providers. *Board of Nonlawyer Legal Serv. Providers*, AZCOURTS.ORG (Jan. 2021), https://www.azcourts.gov/Portals/0/LP%20Program/NLSP%201-27-21%20Meeting/Board%20of%20Nonlawyer%20Legal%20Service%20Providers%20Members.pdf?ver=2021-01-27-162621-113.

For the Arizona Task Force, the Washington State program was about lessons learned and about mistakes not to make. Particularly important in this regard were the LLLT requirements. "They made the restrictions so onerous to become a legal technician that . . . you might as well go to law school,"[207] stated Bivens. Utah was a more useful source because Utah was constructing a program with the shortcomings of the Washington program in mind. The Arizona requirements are similar to Utah's.[208]

There was, however, some disagreement on the program recommended to the Supreme Court. Appellate Judge Peter Swann was the lone dissenting vote during the Task Force's deliberations on the non-lawyer program.[209] He objected to the very idea of such a program saying "Arizonans are not clamoring for more lawyers. Nor is there a public thirst for practitioners who never attended law school and charge a 'mere' $100 per hour."[210] Rather, he said the public "rightfully" wants "a system of justice that is itself more scalable and responsive to its diverse needs – a system it can navigate for free."[211] Swann does not believe that non-lawyers with minimal legal training and experience can properly represent client interests.[212] He repeated these concerns, almost verbatim, in a lengthy Opposition Statement attached to the Task Force's report and recommendations.[213]

Swann was also critical of the Task Force's work in this area, leaving too much undone. He further stated that, "[t]he sweeping recommendations of the Task Force to create a new class of practitioner, the LLLP, have been the product of a few days of discussion, and the details are left to a future steering committee. . . . Put simply, the concept is not fully baked."[214] The details Swann said were missing – laying out the program's requirements, licensing standards, ethical standards, and the scope and nature of the new paraprofessional's authority – were included in the final program which went into effect on January 1, 2021.[215] That program will be discussed in the next section.

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207. Zoom Interview with Don Bivens, *supra* note 205.

208. *Id.*

209. ARIZ. TASK FORCE, *supra* note 202, at 57–65.

210. *Id.* at 62.

211. *Id.* at 62–63.

212. *Id.* at 63–64.

213. *Id.* 57–65. Swann had other objections as well. *Id.* He was more favorably inclined to a navigator program. *Id.*

214. *Id.* at 64.

215. ARIZ. CODE OF JUD. ADMIN. § 7-210, Legal Paraprofessional (2021), https://www.azcourts.gov/Portals/0/admcode/pdfcurrentcode/7-210%20New%2001-2021.pdf?ver=2020-11-05-165322-110.

One final indicator of the fate of the Washington State experiment – beyond its sunsetting – is found in a recent proposal made to the North Carolina Supreme Court.[216] It recommends the creation of a North Carolina Legal Technician.[217] The report summarizes recent actions in other states regarding ALPs, including Washington State and the four states on which this Article focuses.[218] The activities of each state included were concisely described, with the Washington State program characterized as "the trailblazer."[219]

Washington State, however, gets extended treatment because it was once the inspiration for the proposal and "no one wants their name on a failed project."[220] Over sixteen pages the proposal set out to explain what happened, note the objections to the Washington program, and try to respond to them.[221] Ultimately, the proposal concludes that the program's demise "was more about attorney opposition to the program."[222]

Unfortunately, that defense falls far short, more rhetoric than a hard substantive defense on the merits. What it does do is lay out in detail the many problems the Washington program has faced and glosses over the concerns other states have had with the program. One comes away from the defense with a fair amount of skepticism about the program. What it offers is an explanation of why Washington State is more of a cautionary tale than a model.

V. Evolution Rather Than Conclusion and Assessment

> *There must be power in the States and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.*
>
> . . . .
>
> *[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.*[223]

Having said that others have seen the Washington's LLLT program as a kind of Brandeisian laboratory – an experiment of sorts from

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216. *See generally* Mitchell-Mercer & Kernodle-Hodges, *supra* note 79.
217. *Id.* at 34–36.
218. *Id.* at 9–16.
219. *Id.* at 9.
220. *Id.* at 17.
221. *Id.* at 16–31. It seems the demise of the Washington program was an "oh shit!" moment for the proposal's author.
222. *Id.* at 25.
223. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932), (Brandeis J., dissenting).

which they might learn – we could have the concluding section of the Article as an assessment of sorts. That, however, is not possible. The experiment idea presumes, before it is emulated or not, that the experiment's outcome can tell us whether the proposed innovation works and how. This is not exactly what has happened, however, because we do not know if the LLLT innovation "works." We do not even know what "works" means. The sunsetting of the program by the Washington State Supreme Court really tells us little. It is not grounded in any systematic evaluation, or even an unsystematic evaluation. It offers no real guidance beyond the message that opposition from the bar and the state supreme court are important – that champions and institutional constraints matter.

There are no standards – agreed upon or otherwise – on which to assess the Washington State experiment.[224] There is not a clear consensus of the goals beyond the anodyne idea of narrowing the justice gap. The lack of standards and clear goals have bedeviled states considering such a program and they are left to their own devices in trying to assess the program and whether it might work in their state and how. Does an ALP narrow the justice gap and what would that mean? Would it help courts in constructively dealing with *pro se* litigants? Would it lessen the number of *pro se* litigants? Given a private market model (and this seems to be the only alternative), are there people interested in being an ALP? Can they make a living – make a living serving people whose incomes make hiring an attorney problematic? How many ALPs in a state are enough – is there a target? How long does a program need to be in operation to provide sufficient evidence of "success" or "failure?"

One can continue posing such questions, but these are the kinds of questions that task force members ask and there are few, if any, answers. Regardless, interest in an ALP program continues with new experiments in place or on the horizon. The idea pioneered by Washington State is not going away, as the North Carolina and second Colorado subcommittee show. So, instead of assessment, we should be talking about evolution and how the idea is changing in practice.

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224. The National Center for State Courts recently began the first steps of a general framework for developing standards, but it is only a first step. *See generally* MILLER ET AL., *supra* note 3. This effort is some of the best evidence that the genie is out of the bottle. The authors had hoped that a planned evaluation of the Washington State program, following up on an earlier preliminary evaluation (CLARKE & SANDEFUR, *supra* note 41), would provide empirical material on which to build an assessment model, but the evaluation was not done because of the program's demise. Discussion with Paula Hannaford-Agor, Co-Author of AN EVALUATION FRAMEWORK FOR ALLIED LEGAL PROFESSIONAL PROGRAMS: ASSESSING IMPROVEMENTS IN ACCESS (June 2, 2021).

One thing seems relatively certain – the basic model created by Washington State still frames the discussion. It is a trained, licensed, and regulated professional performing "substantive law-related work without attorney supervision" in narrowly defined legal areas and within a private market business model. There are disagreements over what kind and how much training, the nature of regulation, the scope of authority, and so on. These are variations on a basic theme, and we need to think in terms of evolution with this in mind.

This means not thinking of evolution as some straight-line process leading inexorably to a particular end. It is not like the Whig theory of history – of change moving progressively toward some better world. The evolution is a constant process of change and adaptation and does not necessarily move in a particular direction and it can move in multiple directions. The ALP idea varies its exact shape in the face of the constraints within a state and the local concerns driving the interest. The evolution is perhaps best seen as a bush (its base or roots the basic idea or model) with several branches (the different ways in which states try to design and implement a program of their own).

So far, the branches are few, as it is still relatively new. It starts with Washington, followed by Utah. While Utah is not significantly different than Washington in terms of the basic structure of the program, there is an important difference with Utah allowing LPPs to work in more areas. Utah also has differences on requirements, but not really all that different. The same can be said of the North Carolina proposal. The second Colorado subcommittee's recommendation has training and licensing requirements closer to Utah, but like Washington, limiting this professional to certain family law areas.

Although not discussed here, Minnesota has taken a somewhat different and cautious approach.[225] After looking at both Washington and Utah, Minnesota has embarked on a two-year pilot project to evaluate a paraprofessional program as a means of reducing unmet legal needs for low- and modest-income people; one that will improve court efficiency; and one that is sustainable. Two legal areas are involved: landlord-tenant and family law.

Two characteristics of the program are most salient in differentiating it.[226] One makes it quite different in that the paraprofessional is not independent. To go back to analogies, it is more like a PA than NP

225. *Legal Paraprofessional Pilot Project*, MINN. JUDICIAL BRANCH, https://mncourts.gov/Help-Topics/Legal-Paraprofessionals-Pilot-Project.aspx (last visited Sept. 5, 2021).

226. *Id.*; *see also* IMPLEMENTATION COMMITTEE FOR PROPOSED LEGAL PARAPROFESSIONAL PILOT PROJECT, REPORT AND RECOMMENDATIONS TO THE MINNESOTA SUPREME COURT (2020).

in one key way. They must work under the supervision of an attorney (it is not clear if this would change if the program moves forward after the pilot period). The other allows the paraprofessional to actually appear in court, which is something neither Washington nor Utah allows (and neither does the North Carolina proposal or the program outlined by the second Colorado subcommittee).

On another branch, the Arizona program will allow its ALP to "[a]ppear before a court or tribunal on behalf of a party" in certain situations and to work independently.[227] The Arizona program goes much farther than any other and it may be the experiment others will be watching since it takes a bold approach. Although the idea does not appear in the Task Force Report and Recommendations, the Arizona program is being characterized as akin to a NP.

The term "nurse practitioner" appears in a public opinion survey, done for the Task Force, exploring support in Arizona for the proposed legal paraprofessional program. Among the questions asked was one using the NP analogy to explain and justify the program:

> Q15. Like nurse practitioner . . . .
>
> . . . .
>
> In the past, only doctors could perform most, if not all, medical procedures – even on smaller issues like drawing bold or treatment for the flu. The creation of nurse practitioners helped improve health care and treat more people. This proposal would create a similar legal role, sort of like a nurse practitioner for limited legal services.[228]

Survey respondents were asked on a 5-point scale (with 5 as the highest score) whether they would support the proposal, and the average for this question was 4.18.[229] The analogy appears in a News Release announcing the Arizona Supreme Court's approval of the Legal Paraprofessional (LP) program and other changes. "In many ways, LPs would be the legal system's equivalent of nurse practitioner in the medical field."[230]

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227. ARIZ. CODE OF JUD. ADMIN. § 7-210, Legal Paraprofessional at 7 (2021), https://www.azcourts.gov/Portals/0/admcode/pdfcurrentcode/7-210%20New%2001-2021.pdf?ver=2020-11-05-165322-110.

228. ARIZ. SUPREME COURT TASK FORCE ON THE DELIVERY OF LEGAL SERVS.: STATE OF ARIZONA PUBLIC OPINION SURVEY JANUARY 24, 2020 (N=400) 6 (2020), https://www.azcourts.gov/Portals/215/Documents/Opinion%20Poll%20Results.pdf?ver=2020-03-06-113334-443.

229. *Id.*

230. News Release, Ariz. Supreme Court, Arizona Supreme Court Makes Generational Advance in Access to Justice 1–2 (Aug. 27, 2020), https://www.azcourts.gov/Portals/201/Press%20Releases/2020Releases/082720RulesAgenda.pdf.

The NP term is used to help explain, and justify, the Arizona legal paraprofessional on the Arizona Judicial Branch webpage: "This professional is often compared to a nurse practitioner in the medical field."[231] It was also used by a member of the Arizona Task Force in an interview, who said, "the model we were really looking at . . . was . . . one in the medical profession . . . the nurse practitioner."[232]

If we think back to the earlier discussion of the NP analogy, the Arizona program represents something much different than what was done in Washington or Utah. Although not literally a legal equivalent, the program seems to be as much about the reordering of legal services than just a way to address the justice gap. Family law is the only specific civil area of practice mentioned in the rules governing the Arizona Legal Paraprofessionals, and that is because of some specific limits of their authority in this area.[233] Otherwise, the LP can engage in any civil matter before a municipal or justice court or Arizona administrative agency – can "appear before a court or tribunal on behalf of a party."[234]

Perhaps the one thing that really makes the Arizona program stand out is the LPs' ability to handle certain minor criminal matters. This is unique and shows how bold the program is. The Arizona LP can handle criminal misdemeanor matters before municipal or justice courts "where, upon conviction, a penalty of incarceration is not at issue."[235] The whole discussion of ALPs, from Washington onward, has always been about civil access to justice. This part of the Arizona program may be the best evidence that at its heart, the program is ultimately about reordering the delivery of legal services – moving beyond just closing the justice as we typically talk about it.

Of course, considering the scrutiny given to the Washington program, the question will be – can it work? This assumes we develop some minimum standards to use in trying to answer that question and that appears to be far off and perhaps impossible. Best practices may be developed for some aspects of a program like Arizona's, but best practices usually mean figuring out ways to do something a bit better using agreed upon standards (which is a good thing). It is not about the underlying question of whether it makes sense to do something in the first place or to continue doing it.

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231. *Legal Services Reforms, Legal Paraprofessionals (LP Questions & Answers*, ARIZ. JUD. BRANCH, https://www.azcourts.gov/accesstolegalservices/Questions-and-Answers/lp (last visited Sept. 5, 2021).

232. Zoom Interview with Don Bivens, *supra* note 205.

233. ARIZ. CODE OF JUD. ADMIN. § 7-210, at 8.

234. *Id.* at 7. LPs cannot represent clients in agency appeals. *Id.* at 8.

235. *Id.* at 8.

To a certain extent, a bold program like Arizona's, or even more timid ones like Washington's or Utah's, are a leap of faith. Nothing is certain, even though the advocates – as those in Washington – seem to have all the faith in the world. The same may be true for those in Arizona. Ultimately, Chief Justice Madsen was right to say, "[n]o one has a crystal ball. . . . There is simply no way to know the answer to this question without trying it."[236] Those answers will take some time, and a number of Brandeisian experiments producing different branches will eventually provide not *the* answer but a range of practical answers. The lack of "hard evidence" or "systematic assessment" cannot become a barrier for exploration and evolution.

236. *Wash. State Limited Practice Rule*, *supra* note 32, at 8–9; see also A.B.A. FUTURE, *supra* note 1, at 18 on limited data about the effectiveness of access-enhancing innovations.