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Stratification of the Legal Profession: A Debate in Need of a Public Forum

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Abstract

The American legal profession is not meeting the legal needs of the population. Ordinary citizens' demand for legal services continues to rise, but those services are increasingly unaffordable. Despite increasing demand for legal services, recent law school graduates struggle to find professional employment opportunities, particularly ones that can provide salaries to meet their rising debt obligations. Furthermore, legal education continues to provide a general program of education while legal practice is increasingly specialized. Meeting the future legal needs of society will require radical changes in the delivery of legal services. The legal profession, however, has not been sufficiently innovative about meeting this challenge.

Modern discussions about increasing access to legal services either focus on increasing access to free or low cost legal services provided by lawyers or deregulating the legal profession. Another approach, the stratification of the legal profession, has not been adequately explored as a way to increase access to legal services. Specifically, stratification would involve the training, education and licensure of professionals—other than lawyers—to provide some legal services. For example, a one-year program that focused on housing law could lead to a limited license as a housing advocate. This might be an effective way for the private marketplace to provide affordable legal services in areas of high consumer demand while protecting consumers from incompetent services. The health care field provides an analogy for this model.

The greatest barrier to exploring the stratification of the legal profession is limited public participation in the debate. The power of the state judiciaries to define and regulate the scope of the legal profession's monopoly has largely precluded public participation in this debate. Accordingly, there is insufficient external pressure on the legal profession to reexamine

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the scope of its monopoly and consider other options. These deficiencies can be illustrated by comparing the judiciaries' regulation of legal services to the legislatures' regulation of health care services. This article proposes reforms to increase public participation in the debate on the scope of the legal profession's monopoly. If the judicial branches do not take the lead in allowing for public participation and exploring alternative models for the delivery of legal services, they risk losing all control over the scope of the legal profession's monopoly.

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“If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.”

—Judge Learned Hand¹

I. Introduction

The legal profession is not meeting the legal needs of society and it will not do so without radical changes in the delivery of legal services. Most importantly, the cost of legal services in the marketplace needs to be driven down. Modern discussions about increasing access to legal services either focus on increasing access to free or low cost legal services provided by lawyers or they focus on deregulating the legal profession. Another approach, the licensing of professionals—other than lawyers—to provide legal advice and representation has not been adequately explored. The exploration of such options, however, will not happen without greater external pressure on the legal profession to reassess the scope of its exclusive monopoly. Adequate forums for public participation that could provide such external pressure do not, however, presently exist in most states because the judiciaries have the exclusive power to define the scope of the legal profession’s monopoly.

This article argues three main points. First, the American legal profession, as it is currently structured, cannot meet the legal needs of the population.² Traditionally the legal profession has responded to the population’s unmet legal needs by encouraging lawyers to provide more pro bono work, supporting legal aid programs, developing court sponsored self-help resources and expanding access to unbundled legal services.³ These are all commendable efforts to increase access to legal services that should be continued, but they have not

1. Legal-Aid.org, <http://www.legal-aid.org/en/las/thoushaltnotrationjustice.aspx> (last visited Feb. 20, 2011).

2. See *infra* Section II.A.

3. See *infra* Section II.B-D. Unbundled legal services permit lawyers to provide limited representation for a portion of a matter instead of assuming responsibility for an entire legal matter. See, e.g., ABA MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2009) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”). In 1996 an ABA report recommended that the expansion of unbundled legal services was an important goal to increase access to legal services. AM. BAR ASS’N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 11 (1996); see also FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE at xv (2000) (concluding that an “unalterable path toward self-representation” supported the conclusion that the unbundling of legal services is the best path toward increasing access to the legal system). One practicing lawyer has predicted that “the problem of unmet legal needs, if not solved by lawyers, ‘will be solved by technology.’” William Henderson and Rachel M. Zahorsky, *Paradigm Shift*, A.B.A. J. 40, 42 (July 2011). “The relative high price of legal services creates opportunities for new entrants.” *Id.*

come close to filling the gap in the delivery of legal services.⁴ There is no reason to believe they will do so in the future. The profession must acknowledge that more innovation is needed.

Second, the stratification of the legal profession has not been adequately explored as a way to increase access to legal representation, particularly in judicial proceedings. The term “stratification” in this article means specifically the licensing of legal professionals to provide legal advice and representation independent of lawyer supervision, but with less education than a three-year Juris Doctorate. For example, instead of graduating from a three-year law school with six-figure student loans, a person could graduate from a twelve- or eighteen-month program that focused exclusively on an area of high consumer need—such as housing law, family law or immigration law—with much lower debt. That person would then receive a limited license to provide legal advice and representation in that specialized area. With less debt, that person might be able to charge fees that are more affordable for low- and middle-income people. Such a model may also be consistent with the increased specialization of legal practice.⁵ Furthermore, a one-size-fits-all three-year program of general legal education may not be the best model in today’s world.⁶ This conversation needs to be developed in the current discussions about increasing access to legal services.

Third, this article argues that stratification will not be adequately explored until there is a forum where the public can meaningfully participate in the debate. The state judiciaries have generally claimed the exclusive power to regulate legal services, which has excluded the legislatures and the public from discussions about the regulation of legal services. Thus, the legal profession has been shielded from outside voices that can lead to robust debates, the vetting of ideas

4. See *infra* Section II.A.

5. See THOMAS MORGAN, *THE VANISHING AMERICAN LAWYER* 14-15 (2010) (arguing that lawyers will not be employable in the future unless they have an expertise in an area of substantive law as well as knowledge of the non-legal aspects of their clients’ problems); Quintin Johnstone, *An Overview of the Profession in the United States, How that Profession Recently has been Changing, and Its Future Prospects*, 26 QUINNIPIAC L. REV. 737, 798 (2008) (predicting that in the long term lawyers will not exist as a separate occupation; instead there will be many licenses based on specialty fields).

6. Deborah Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 715 (1996) (“As the practice of law becomes increasingly specialized and distinctions between lawyers and nonlawyers become increasingly blurred, the current “one size fits all” model of legal education appears more and more anachronistic.”). There have been renewed discussions among leaders in legal education about whether three years of education, as opposed to two years, are necessary to train someone enough to award them a Juris Doctorate, however, these discussions still focus on a one-size-fits all model of legal education. See David Van Zandt, *Reduce Credit Requirements*, N.Y. TIMES (July 25, 2011) (former Dean of Northwestern University School of Law arguing that the ABA should reduce the number of credit hours required to graduate from law school) available at <http://www.nytimes.com/roomfordebate/2011/07/21/the-case-against-law-school/reduce-credit-requirements-for-law-school>; see also MORGAN, *supra* note 6, at 196-99 (discussing past proposals to reduce law school programs from three to two years).

and the creation of innovative solutions.⁷ This lack of public participation has constrained innovation in the delivery of legal services.⁸ As a result, when faced with a civil legal problem, a person in the United States has two choices—to retain a lawyer or to handle the legal matter pro se.⁹ In theory, and generally speaking in practice, there are no other options because there is no right to counsel in civil matters.¹⁰

This article compares these limited options to the broad spectrum of choices that consumers have in the health care field where legislatures, through their police powers, have stratified the health care profession and provided consumers with a

7. Many scholars have discussed the lack of public participation in the regulation of the legal profession. *See, e.g.*, Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 154 (2011) (describing the American legal profession as a “politically unaccountable regulator” that prevents the public from voting “or otherwise express[ing] its views on how the policymaker is executing on policy.”); Benjamin Hoorn Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 *GA. L. REV.* 1167, 1200 (2003) (“State supreme courts are . . . particularly inaccessible to lobbying from the public.”); Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 *U. ARK. LITTLE ROCK L. REV.* 1, 16-19 (1989-90) (discussing the lack of public participation in the regulation of the legal profession); Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 *MINN. L. REV.* 619, 636-41, 646 (1978) (discussing the lack of public participation in the regulation of the legal profession).

8. *See infra* Section III.C for a discussion of the power to define the scope of the legal profession’s monopoly.

9. *Faretta v. California*, 422 U.S. 806, 819 (1975) (holding that the Sixth Amendment provides individuals with a constitutional right to represent themselves pro se in criminal proceedings). Because individuals do not have a right to counsel in civil cases, it follows that they also have the right to represent themselves pro se in civil actions in order to have access to the courts. *See, e.g.*, *Muka v. N.Y. State Bar Ass’n*, 466 N.Y.S.2d 891, 903 (1983) (“The right to represent oneself in both civil and criminal matters is basic to our system of justice.”). Both federal and state legislatures have affirmed this right by statute. *See, e.g.*, 28 U.S.C. §1654 (2006) (“In all courts of the United States the parties may plead and conduct their own cases personally. . . .”); N.Y. C.P.L.R. 321 (McKinney 2003) (“A party . . . may prosecute or defend a civil action in person or by an attorney. . . .”); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. d (2000) (“Every jurisdiction recognizes the right of an individual to proceed ‘pro se’. . . .”); ABA Standing Committee on the Delivery of Legal Services, *AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS* 6 (November 2009) available at http://www.abanet.org/legalservices/delivery/downloads/prose_white_paper.pdf (“The traditional services offered by lawyers combined with the more recent innovations in the courts result in a dichotomy in many states, however, where people are either represented by a lawyer or proceed with their matter on a *pro se* basis, relying on resources other than lawyers.”).

10. *See, e.g.*, Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 *LAW & SOC. R.* 79, 79-80 (2007) (discussing the lack of guaranteed counsel for issues in civil law). Some limited exceptions to the two options presented are discussed *infra* Section III.C. Even in the absence of a right to counsel in civil cases, judges will on rare occasions appoint counsel in a civil case. *See, e.g.*, *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221, 1235-1236 (D. Neb. 1995) (analyzing the court’s inherent power to appoint counsel in a civil case, although declining to exercise the power under the facts presented).

wide spectrum of choices.¹¹ A person with a medical problem can seek help from individuals with a wide variety of training and skills, as well as a wide range of cost. Depending on the ailment and the treatment desired, a person can choose to see a physician, a chiropractor, a podiatrist, a physician's assistant, a nurse practitioner, a midwife, or an acupuncturist, just to name a few.¹² In providing these options, the legislative process has allowed for the inclusion of all of the stakeholders in the debate over what services different health care professionals can safely provide to consumers. This inclusive process has put external pressure on physicians—who have an economic interest in maintaining the broadest possible monopoly—and forced them to cede parts of their territory in order to increase access to health care, lower costs and provide consumers with choices.¹³

This article argues that there are lessons that the legal profession can learn from the health care profession's story of stratification, which would not have occurred if physicians were the only voices in the debate. Specifically, this article concludes with some possible ways to reform the legal profession's stronghold on the regulation of the delivery of legal services in ways that would allow the public to participate in assessing the viability of licensing professionals to provide legal advice and representation, particularly in areas where there is high consumer need and low availability of affordable legal services.

Part II of this article surveys data regarding access to legal services in civil matters and discusses the ways that people obtain legal assistance. Part III compares the history of the medical profession, which relied on legislatures to create licensing requirements for their profession, to the history of the legal profession, which relied on judiciaries to create licensing requirements for their profession. This section explores how this difference has impacted the development of the professions, particularly the range of options available to consumers seeking health care services as opposed to consumers seeking legal services. This section argues that the

11. Evidence suggests that this increased spectrum of consumer choices has increased access to health care services. *See infra* note 265.

12. For example, in California, the following licenses, among others, are available in the health care field: CAL. BUS. & PROF. CODE §§ 1000-04 (West 2003) (chiropractors); CAL. BUS. & PROF. CODE §§ 2080-99, *et seq.* (West 2003) (physicians and surgeons); CAL. BUS. & PROF. CODE §§ 2505-21 (West 2003); (midwives and nurse-midwives); CAL. BUS. & PROF. CODE §§ 2834-37 (West 2003) (nurse practitioners); CAL. BUS. & PROF. CODE §§ 2830-33.6 (West 2003) (clinical nurse specialists); CAL. BUS. & PROF. CODE §§ 2940-51 (West 2003) (psychologists); CAL. BUS. & PROF. CODE §§ 3500 (West 2003) (physician's assistants); CAL. BUS. & PROF. CODE §§ 3610-15 (West 2003) (naturopathic doctors); CAL. BUS. & PROF. CODE §§ 4935-49. (West 2003) (acupuncturists). Moreover, in the area of health care, courts have found that consumers can knowingly pursue completely unconventional and unregulated treatments, which may even result in their death. *See, e.g., Boyle v. Revici*, 961 F.2d 1060, 1063 (2d Cir. 1992) (holding that patient who knowingly received non-standard and non-FDA approved cancer treatment assumed the risk of harm thereby barring her estate from any recovery after she died).

13. *See infra* Section III.B.

public's ability to use the legislative forum to challenge the scope of practice for physicians is an important aspect of ensuring that limits on non-physician activities are for the protection of the public. The legal profession lacks a comparable forum where the public can challenge the scope of the legal profession's monopoly.

Part IV proposes that there are lessons that the legal profession can learn from the health care profession. A key lesson is the necessity of a more inclusive process to assess the role of lawyers and, accordingly, the role that licensed independent professionals, such as housing advocates, might be able to play in the provision of legal services. The best means to accomplish this may vary by jurisdiction due to different legal histories and political environments. Thus, this section sets out several different approaches that could create a more democratic forum to assess the scope of the legal profession's monopoly and its potential stratification.

II. Access to Legal Services in Civil Matters

A. An Overview of Access to Legal Services in Civil Matters

Consumers have few options to access legal services for civil matters. A person can try to retain and pay a lawyer in the private marketplace, try to retain a free or reduced cost lawyer through services such as legal aid and law school clinics, or try to retain a lawyer who volunteers his or her services pro bono. If a person cannot retain a lawyer through one of these avenues, then the person will generally have to handle his or her legal matter pro se.¹⁴ A recent American Bar Association ("ABA") report stated that in many courts "*pro se* is no longer a matter of growth, but rather a status at a saturated level."¹⁵

Some scholars have concluded that "American-style civil legal assistance has never aspired to ensure universal access."¹⁶ It may be debatable whether this is an aspiration, but one cannot debate that the U.S. legal profession is not meeting the civil legal needs of the population.¹⁷ Several comprehensive reports over the past twenty years confirm this conclusion. The most recent national report, the final

14. The few areas where nonlawyers can provide some assistance are discussed in Section III.C.

15. ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 4 (November 2009) available at http://www.abanet.org/legalservices/delivery/downloads/prose_white_paper.pdf.

16. Sandefur, *supra* note 10, at 104.

17. See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 103 (2004); DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 1-3, 26-29 (2006); Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1884 (1999); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 2, 20 (2008) (noting that 65% of aliens in immigration court during 2005 were unrepresented); see also *infra* Section II.A.

report of the ABA's 1994 Comprehensive Legal Needs Study ("1994 ABA Report"), assessed the legal needs of low- and moderate-income households.¹⁸ That study found that about half of low- and moderate-income families face a legal problem each year, but no effort is made to resolve a large number of those problems by using the legal system.¹⁹ The reasons given for staying away from the justice system included costs, doubts that it would help, a sense that the problem was not serious, or a desire to handle matters on their own.²⁰

More recent reports, while not on a national scale, continue to confirm that unmet civil legal needs continue at similar, or perhaps greater, numbers than the 1994 ABA Report found. In 2007, the Legal Services Corporation ("LSC") published a report on access to justice (the "2007 LSC Report").²¹ It surveyed its own data regarding unmet legal needs, in addition to analyzing nine recent state studies.²² It concluded that the 1994 ABA Report may under-represent the current justice gap in America and found that "only a very small percentage of the legal problems experienced by low-income people (one in five or less) are addressed with the assistance of either a private or legal aid lawyer."²³

Similarly, a 2005 Illinois study found that low-income residents of Illinois faced over 1.3 million civil legal problems in 2003.²⁴ The most common areas of legal needs were consumer issues, housing issues, family law issues, and debt collection issues.²⁵ The report concluded that low-income households in Illinois had legal assistance for only one out of every six of these legal problems, which meant

18. AM. BAR ASS'N CONSORTIUM ON LEGAL SERV. AND THE PUB., LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994), available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf>.

19. AM. BAR ASS'N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE at vii (1996). The foregoing publication is the final report of the findings contained in a 1994 study. AM. BAR ASS'N CONSORTIUM ON LEGAL SERV. AND THE PUB., LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994), available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf>. See also Legal Services Corporation, DOCUMENTING THE JUSTICE GAP IN AMERICA 9 (2007), available at <http://lsc.gov/sites/default/files/lsc/images/justicegap.pdf> which analyzes more recent state studies and suggests that the 1994 ABA study may underrepresent the current level of need.

20. AGENDA FOR ACCESS, *supra* note 19, at vii.

21. Legal Services Corporation, DOCUMENTING THE JUSTICE GAP IN AMERICA (2007), available at <http://www.lsc.gov/justicegap.pdf>.

22. *Id.* at 3, 5-14. LSC issued a 2009 update to this report that included studies from another seven states, which reaffirmed similar conclusions. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 13-18 (2009), available at http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

23. JUSTICE GAP (2007), *supra* note 19, at 9.

24. LAWYERS TRUST FUND OF ILL. ET AL., THE LEGAL AID SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS 1 (2005), available at <http://www.ltf.org/docs/legalneeds.pdf>. Almost 49% of low-income households in Illinois experienced legal problems in 2003. *Id.*

25. *Id.* at 1-2.

that the subject population handled about 1.1 million legal problems without legal assistance.²⁶ The lack of access to the legal system is also increasingly becoming a middle-class problem.²⁷

The recent economic downturn may be making access to justice even more elusive. The LSC's 2010 annual report states that "LSC programs have seen dramatic spikes in cases related to the economy: mortgage foreclosure cases up 128 percent; unemployment compensation cases up 80 percent; domestic violence cases up 9 percent."²⁸ As a result, agencies funded by the LSC had to turn away over 1 million cases in 2009 due to inadequate resources to service the clients.²⁹ For low- and middle-income Americans, more often than not their journey into the legal system is made alone or not made at all.³⁰

B. Option One—Retaining a Lawyer in the Private Marketplace

Retaining a private lawyer in the marketplace is the predominant way that people in the United States obtain legal services.³¹ However, despite a large demand for legal services and a substantial supply of attorneys, the supply and demand frequently do not meet in the marketplace due to the cost of legal services.³² For low- and middle-income Americans, the cost of obtaining legal assistance in

26. *Id.*

27. People in the middle class will not qualify for legal aid, but they also cannot afford the high costs of attorneys. George C. Harris, Derek F. Fornan, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn From the Medical Profession's Shift to a Corporate Paradigm*, 70 *FORDHAM L. REV.* 775, 790-95 (2001).

28. LEGAL SERVICES CORPORATION, 2010 ANNUAL REPORT 2, available at <http://www.lsc.gov/pdfs/LSC-2010-Annual-Report-FINAL.PDF>.

29. LEGAL SERVICES CORPORATION, 2009 ANNUAL REPORT, page 24, available at http://www.lsc.gov/pdfs/annual_report_2009_35_years_as_americas_partner_for_equal_justice.pdf. From 2008 to 2009 LSC reported a 63% increase in unemployment cases, a 37% increase in food stamp cases and a 50% increase in foreclosure cases. *Id.* at 20.

30. See Rebekah Diller and Emily Savner, BRENNAN CENTER FOR JUSTICE, A CALL TO END FEDERAL RESTRICTIONS ON LEGAL AID FOR THE POOR 1 (2009), available at http://brennan.3cdn.net/7e05061cc505311545_75m6ivw3x.pdf ("Study after study finds that 80 percent of the civil legal needs of low-income people go unmet.").

31. This appears to be true even for low-income persons. AMERICAN BAR FOUNDATION, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 3 (October 7, 2011) (stating that evidence suggests that low-income people who seek out legal assistance have most of their contacts with private attorneys in fee-based arrangements rather than with legal aid or pro bono attorneys) available at http://www.americanbarfoundation.org/research/Pursuing_Law_s_Promise.html.

32. See Editorial, *Addressing the Justice Gap*, *THE N.Y. TIMES* (Aug. 23, 2011) (discussing the growing justice gap and suggesting that allowing nonlawyers to handle some legal matters would help address the gap); see also Johnstone, *supra* note 5, at 739 ("The available supply of [legal service providers] has been even greater than that needed to fill the demand. One important and troublesome exception to this is that the demand from poor persons unable to pay for needed legal services exceeds the supply.").

the marketplace has become increasingly prohibitive. Nationwide household income has decreased five percent since 1999.³³ In 2010, 46.2 million people fell below the poverty line—the highest level in fifty-two years.³⁴ While income has gone down, lawyers' average billing rates increased 7.7 percent in 2007, 4.3 percent in 2008 and 2.5 percent in 2009.³⁵ In 2009 the national average billing rate for senior partners was \$357 an hour and for mid-level associates it was \$219 an hour.³⁶ Furthermore, as Professor Hadfield has argued, the cost of legal services is largely determined by a bidding war between commercial interests and individuals for access to limited resources.³⁷ Because commercial interests have more money, they tend to prevail and individuals are priced out of the market.³⁸

In many types of cases the availability of a contingency fee agreement can provide a means to finance litigation and obtain access to counsel that a person could not otherwise afford.³⁹ There are, however, many types of cases where this type of financing arrangement is not feasible, such as defense work, or where there is no market for the contingency fee case.

To compound the issues in the marketplace, the cost of legal education has risen 317 percent in the past twenty years.⁴⁰ Law students frequently take out six-

33. Carol Morello, *About 44 Million in U.S. Lived Below Poverty Line in 2009, Census Data Show*, THE WASH. POST (Sept. 16, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/16/AR2010091602698.html>.

34. Sabrina Tavernise, *Soaring Poverty Casts Spotlight on 'Lost Decade.'* THE N.Y. TIMES (Sept. 13, 2011).

35. Law.com, THE NAT'L L.J. 2009 Law Firm Billing Survey, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202436068099&slreturn=1&hblogin=1> (last visited Feb. 15, 2011).

36. THE NAT'L LAW JOURNAL AND ALM LEGAL INTELLIGENCE, SURVEY OF LAW FIRM ECONOMICS, (2009), available at http://pdfserver.alm.com/nlj/SLFE_graphics.pdf. This survey was of 187 firms, most of them with fewer than 150 attorneys. *Id.* Fees have steadily increased in past decades. For example, between 1975 and 1985 hourly rates increased about 100%, with the average hourly rate for a senior partner being \$70 an hour in 1975 and \$141 an hour in 1985. D. Weston Darby, Jr., *Are You Keeping Up Financially?*, 71 A.B.A. J. 66 (Dec. 1985).

37. Gillian K. Hadfield, *The Price of Law: How Much the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 956 (2000).

38. *Id.*

39. Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is it Price Competitive?*, 25 CARDOZO L. REV. 65 (2003); see also Jack Zemlicka, *Firms Explore Flat Rate for Divorce*, WIS. L.J. (Nov. 16, 2010), available at <http://wislawjournal.com/blog/2010/11/16/firms-explore-flat-rate-for-divorces/>. Obtaining meaningful data about the cost of legal services for ordinary citizens, however, is difficult because studies on legal fees focus on the corporate markets. Hadfield, *supra* note 7, at 129-30.

40. David Segal, *Law School Economics: Ka-Ching!*, THE N.Y. TIMES (July 16, 2011). The average amount borrowed by a student enrolled in a three-year law school program was \$37,637 between the years of 1992-1993 and rose to \$77,300 between 1999 and 2000. THE ABA COMMISSION ON LOAN REPAYMENT AND FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 17 (2003), available at <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lrapfinalreport.authcheckdam.pdf>. In 2009, the average law school debt was upwards of \$100,000. Kathy Kristof, *The Great College*

figure loans and then need to find employment with salaries high enough to repay those loans.⁴¹ Such salaries, which at the largest firms have increased eighty-six percent in the last sixteen years, require increasing legal fees to finance.⁴² In the absence of more affordable options in the marketplace, rising legal fees will continue to allow commercial interests to dominate the market to the exclusion of individual consumers, who will increasingly have to rely on government-funded or subsidized legal services.

The growing number of unemployed lawyers has resulted in some commentators arguing that the legal profession is overcrowded and that legal reforms should focus on reducing the number of lawyers and, accordingly, reducing the number of law schools.⁴³ Reducing supply, however, would only further increase the cost of legal services and limit the availability of legal services, particularly to the lower and middle classes.⁴⁴ While it may make sense for private legal employers, such as large law firms, to view the demand and supply of legal services through the lens of their clients' current utilization of lawyers, the legal profession as a whole should assess demand by considering the population's need for legal services. The profession is not a pure business that should only respond to the economics of the marketplace; it is also a public service that has an obligation to try to meet the demand of the entire population.⁴⁵ The profession as a whole needs to drive prices

Hoax, FORBES (Feb. 2, 2009), available at <http://www.forbes.com/forbes/2009/0202/060.html>. Top schools such as Northwestern University School of Law charge annual tuition of \$47,202 (which does not include housing, living expenses, books, etc.) and with fewer top paying firms hiring and paying large salaries that an associate can use to pay down debt, the Dean of Northwestern opined, "It doesn't make sense to go to law school unless you go to a pretty good one." Ameet Sachdev, *Law School Tuition Hikes Spark Talk of Bubble*, CHICAGO TRIB., (April 27, 2010).

41. WILLIAM E. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 188 (2007). "Studies find that most law students need to earn around \$65,000 a year to get the upper hand on their debt." David Segal, *Is Law School a Losing Game?*, THE N.Y. TIMES (Jan. 8, 2011). The media has heavily covered the grim employment prospects for recent law school graduates. *See, e.g., id.* ("Since 2008, some 15,000 attorney and legal-staff jobs at large firms have vanished, according to a Northwestern Law study. . . . And with corporations scrutinizing their legal expenses as never before, more entry-level legal work is now outsourced to contract temporary employees, both in the United States and in countries like India."). The debt from law school frequently makes it impracticable for new lawyers to take lower paying jobs that provide services to more segments of the population than those provided by big law firms. *See* Catherine Rampell, "At Well-Paying Law Firms, a Low-Paid Corner," THE N.Y. TIMES (May 23, 2011) ("Lower salaries make it even more difficult for newly minted lawyers to pay off their law school debt.").

42. HOW MUCH DO LAW FIRMS PAY NEW ASSOCIATES? A 16-YEAR RETROSPECTIVE (October, 2011), available at http://www.nalp.org/new_associate_sal_oct2011.

43. *See, e.g.,* Karen Sloan, *ABA Tells Senator It is No Position to Regulate the Number of Law Grads*, NAT'L L.J. (July 22, 2011) (on-line edition, copy on file with author).

44. *See* Benjamin Hoorn Barton, *Why Do We Regulate Lawyers? An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 441 (2001).

45. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT, Preamble and Scope, Paragraph [6]: A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.

for legal services down, not up.⁴⁶ A failure to do this will insure that the law will predominately exist to serve the nation's wealthy individuals and corporations.

A person who cannot afford to pay a lawyer to handle an entire matter might be able to retain a lawyer for partial assistance through unbundled legal services, which permits an individual to retain a lawyer for limited services or advice instead of hiring an attorney to handle an entire matter.⁴⁷ In 1996 the ABA recommended the expansion of unbundled legal services as an important goal to increase access to legal services.⁴⁸ As a result, in 2000 the ABA amended Model Rule 1.2(c) to allow a lawyer to provide representation limited in its scope.⁴⁹ About forty states have since adopted rules that explicitly allow unbundled legal services.⁵⁰ But the legal profession has not fully embraced this type of practice, according to the ABA Standing Committee on the Delivery of Legal Services' 2009 Report:

[L]awyers who provide personal civil legal services frequently do not meet the needs of *pro se* litigants. While they offer the full spectrum of legal services, lawyers are often unwilling to separate or unbundle their services and provide a limited scope of representation to litigants, although they typically do so when representing business interests and in transactional matters.⁵¹

C. Option Two—Retaining a Lawyer through Legal Aid

If a person cannot afford to hire an attorney in the private marketplace, a person could seek representation through legal aid. Legal aid, as the term is used in

Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

46. See William Henderson and Rachel M. Zahorsky, *Paradigm Shift*, 97 A.B.A. J. 40, 46 (July 2011) ("For most lawyers, survival will depend upon their ability to harness technology to deliver greater value to clients at a cost that declines—yes, declines—over time.").

47. See, e.g., ABA MODEL RULES OF PROF'L CONDUCT R. 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

48. AM. BAR ASS'N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 11 (1996); see also FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE at xv (2000) (concluding that an "unalterable path toward self-representation" supported the conclusion that the unbundling of legal services is the best path toward increasing access to the legal system).

49. ABA MODEL RULES OF PROF'L CONDUCT R. 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

50. The ABA has summarized Rule 1.2(c) as it is adopted by the states. See AmericanBar.org, State Adaptation of Model Rules of Professional Conduct 1.2(c) and 6.5, available at http://www.americanbar.org/groups/legal_services/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html (last visited Feb. 15, 2011).

51. ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 6 (November 2009), http://www.abanet.org/legalservices/delivery/downloads/prose_white_paper.pdf.

this article, includes programs federally funded by the Legal Services Corporation and programs funded through other sources, including law school clinics.⁵² Legal aid services, however, are perpetually insufficient due to funding limitations. The LSC, which is the largest provider of civil legal aid, has been inadequately funded for over two decades.⁵³ The 2007 LSC Report on access to justice concluded that inadequate resources caused its agencies to turn away fifty percent of persons seeking legal assistance, which amounts to about 1 million cases a year.⁵⁴ This figure was reconfirmed in the LSC's 2009 report, *Documenting the Justice Gap in America*.⁵⁵ The next largest funding source for civil legal aid programs comes from Interest on Lawyer Trust Accounts, but these funds have been plummeting during the recent economic downturn,⁵⁶ while the number of people who have legal needs has simultaneously increased.⁵⁷

52. See Sandefur, *supra* note 10, at 83-84 (discussing sources of civil legal assistance). The Legal Services Corporation (hereinafter LSC) is a federally funded nonprofit corporation that provides funding to 136 independent non-profit legal aid programs around the nation. See Legal Services Corporation, <http://www.lsc.gov/about/lsc.php> (last visited Feb. 16, 2011) for information about LSC.

53. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 1-2, 18 (2007), available at <http://www.lsc.gov/justicegap.pdf> (discussing inadequate federal funding since 1981); Legal Services Corporation, <http://www.lsc.gov/about/lsc.php> (last visited Feb. 16, 2011) (stating that it is "the largest provider of civil legal aid for the poor in the nation.").

54. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 5-8 (2007), available at <http://www.lsc.gov/justicegap.pdf>. Also, some of the types of cases that LSC funded organizations can handle have been circumscribed for political reasons. See BRENNAN CENTER FOR JUSTICE, A CALL TO END FEDERAL RESTRICTIONS ON LEGAL AID FOR THE POOR 1-2 (2009), available at http://brennan.3cdn.net/7e05061cc505311545_75m6ivw3x.pdf; see also Sandefur, *supra* note 10, at 104; Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1043-1054 (Special Issue 2006).

55. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 9 (2009), available at http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

56. BRENNAN CENTER FOR JUSTICE, THE IMPACT ON THE RECESSION ON THE ABILITY OF THE POOR AND WORKING POOR TO OBTAIN HELP WITH PRESSING CIVIL LEGAL NEEDS, 2-10 (June 25, 2010), available at (http://brennan.3cdn.net/d77b2cd7a573fd7271_c1m6b56y9.pdf) (providing a state-by-state summary of the massive decline in IOLTA interest since 2007); Emily Savner, *Expand Legal Services Now*, NAT'L L.J. (June 28, 2010) ("In some states, vast IOLTA shortfalls, along with the state budget cuts, are forcing legal aid programs to close offices, lay off staff and assist fewer clients.").

57. See BRENNAN CENTER FOR JUSTICE, THE IMPACT ON THE RECESSION ON THE ABILITY OF THE POOR AND WORKING POOR TO OBTAIN HELP WITH PRESSING CIVIL LEGAL NEEDS 11-20 (June 25, 2010) (providing a state-by-state summary of the increased demand for legal services during the nation's economic downturn), available at http://brennan.3cdn.net/d77b2cd7a573fd7271_c1m6b56y9.pdf; Emily Savner, *Expand Legal Services Now*, NAT'L L.J. (June 28, 2010) ("More and more people are seeking the help of their local legal aid offices, programs are reporting that requests for assistance are skyrocketing, telephone intake lines are jammed with calls and wait times in their offices are growing from minutes to hours."). It is somewhat ironic that while there are an increasing

An April 20, 2010 letter from the National Conference of Bar Presidents to the United States House of Representatives urged Congress to increase funding to LSC and made the following points:

The justice gap has grown and is likely to continue to grow this year as our country struggles to emerge from the current economic crisis. At the same time demand for help has increased, other major sources of funding for legal aid (including state appropriations, private giving and Interest on Lawyers' Trust Accounts revenue) are declining or are under severe stress.⁵⁸

The current focus on reducing government spending could result in cuts to LSC funding in the upcoming years.⁵⁹

The 2007 LSC Report concluded that the nation's capacity to provide civil legal assistance would need to be increased to five times the current capacity in order to provide the necessary access to civil legal assistance, which is an increase LSC cannot accomplish alone.⁶⁰ Similar to the LSC report's conclusions, the 2005 Illinois Report acknowledged that the challenges to remedying the lack of legal services "are beyond the power of the legal aid system to address on its own."⁶¹ That report listed a variety of strategies to try to meet these needs, including pro bono services by attorneys.⁶²

D. Option Three—Pro Bono Assistance

Many attorneys provide valuable pro bono work to persons of limited financial means; most, however, do not.⁶³ Providing pro bono assistance is considered

number of people with unmet legal needs, there are also an increasing number of lawyers looking for work. It is a clear market distortion when there is a large demand and a large supply that cannot meet up because the rates that lawyers charge (frequently to meet their law school debt) are unaffordable to those who need the services. *See, e.g., Ameet Sachdev, Law School Tuition Hikes Spark Talk of Bubble*, CHICAGO TRIB. (April 27, 2010) (discussing increases in law school tuition and the challenging job market).

58. Letter from the National Conference of Bar Presidents, to the United States House of Representatives (April 20, 2010) (on file with author), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/legal_services/2010apr20_ncbpletter.authcheckdam.pdf. Funding for LSC increased 0.5% in 2008, 11.3% in 2009 and 7.7% in 2010. LEGAL SERVICES CORPORATION, FACT BOOK 2010 3 (2010) available at http://www.lsc.gov/lscgov4/LSC_2010_Fact_Book.pdf.

59. Andrew Ramonas, *Legal Services Braces for Cuts*, NAT'L L. J. (Nov. 15, 2011); see also Johnstone, *supra* note 5, at 739.

60. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA 4 (2007). Nationwide there is one attorney providing personal civil legal services per 525 people; but for low-income people there is one legal aid attorney per 6,861 people. *Id.* at 16-17.

61. LAWYERS TRUST FUND OF ILL. ET AL., THE LEGAL AID SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS 5 (2005), available at http://www.ltf.org/docs/legal_needs.pdf.

62. *Id.* at 5-8.

63. Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413 (2003) (empirically studying factors that influence whether attorneys take on pro bono work and suggesting

an ethical and professional obligation of attorneys, but, it is an obligation that has remained a largely unmet aspiration.⁶⁴ It is questionable whether the majority of lawyers believe that they have such an ethical or professional responsibility or, even if they believe it, whether they have the time to provide such services.⁶⁵ Despite ethics rules that encourage attorneys to take on pro bono work, such efforts have not resulted in the majority of attorneys providing pro bono assistance.⁶⁶ For example, in 2009 there were 84,777 attorneys registered in Illinois, however, according to mandatory reporting requirements, only about a third of them—27,200—provided pro bono service during the year.⁶⁷ Furthermore, of the pro bono

changes in education and employment settings that could help the profession realize its aspirations). On average, attorneys provide 30 minutes a week of pro bono service. However, much of that time is not actually aid to the indigent, but instead favors for friends and family. *Id.* at 413, 429-30. Also, their financial contributions to legal aid organizations are less than 0.1% of their income. *Id.* at 417. *See also* DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 1, 18-21 (2006); Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 HOFSTRA L. REV. 699, 710-15 (2009) (discussing data on lawyer participation in pro bono work); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 2, 22 (2008) (“less than fifty percent of lawyers undertake pro bono work in a given year.”); Sandefur, *supra* note 10, at 85, 97 (“18 percent of the lawyers in 40 states, participated in formally organized pro bono programs serving the civil needs of the poor in 1997.”). This article does not intend to denigrate the pro bono work that individual attorneys have done, which is commendable. The profession, however, can be too self-congratulatory about its pro bono efforts in light of the volume of unmet legal needs and the amount of pro bono work collectively provided. As a monopoly charged with providing access to justice, the legal profession should not be satisfied with its performance. *See, e.g.*, DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 1-2 (2006) (discussing a pro bono awards ceremony where lavish praise was given for trivial amounts of volunteer service).

64. *See, e.g.*, ABA MODEL RULES OF PROF'L CONDUCT R. 6.1 (2004) (“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.”) The ABA was unsuccessful with its efforts in 1983, 1993 and 2001 to have the Model Rules of Profession Conduct require some amount of pro bono service as a mandatory obligation. Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 426 (2003). *See also* Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 2, 4 (2008) (contending that “[a] lawyer’s duty to serve those unable to pay is not an act of charity or benevolence alone, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the profession effective control of the legal system.”).

65. DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 31-32 (2006). There is some evidence that levels of pro bono services tend to ebb and flow with the economy. *See* Sandefur, *supra* note 10, at 86-87.

66. AM. BAR ASS'N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 26-28 (1996) (noting that “[f]ewer than one in six private attorneys participate in pro bono programs”).

67. ATTORNEY REGISTRATION AND DISCIPLINARY COMM'N, HIGHLIGHTS FROM THE 2009 ANNUAL REPORT 3-4 (2009), available at <https://www.iardc.org/AnnualReport2009.pdf>. Illinois is one of seven states that mandate reporting pro bono hours. *See* AbaNet.org, State Reporting Policies,

hours performed, only half of them were legal services provided directly to persons of limited means.⁶⁸ There is no reason to believe that the volume of pro bono participation will substantially change in the foreseeable future.⁶⁹ Furthermore, even if every attorney provided fifty hours of pro bono service a year, that would still not close the justice gap—more would be required.⁷⁰

E. Option Four—Pro Se Representation

A majority of low-income and many middle-income persons do not have access to affordable legal counsel for their civil legal matters, so if they use the legal system they do so pro se.⁷¹ There has been a rise in pro se representation,⁷² which

<http://www.abanet.org/legalservices/probono/reporting/pbreporting.cfm> (last visited Feb. 20, 2011). Other states with mandatory reporting also have a substantial number of attorneys who do not perform pro bono services. For example, in Florida, only 52 percent of attorneys reported that they provided pro bono services between 2000 and 2006. PRO BONO: LOOKING BACK, MOVING FORWARD I (Sept. 2008), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/7FD055DEE2A2AD84852575270060D32C/\\$FILE/Pro%20Bono%20Report%20final%20110908.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/7FD055DEE2A2AD84852575270060D32C/$FILE/Pro%20Bono%20Report%20final%20110908.pdf?OpenElement).

68. ATTORNEY REGISTRATION AND DISCIPLINARY COMM’N, HIGHLIGHTS FROM THE 2009 ANNUAL REPORT 3-4 (2009), available at <https://www.iardc.org/AnnualReport2009.pdf>. The report states that 27,200 attorneys reported pro bono hours for 2009, totaling approximately 2.2 million hours. However, the report states that only about 1.1 million of those hours were for legal services provided directly to people of limited means. *Id.* at 4. Illinois has a broad definition of reportable pro bono service, which includes services such as “legal services to charitable, religious, civic, or community organizations in matters in furtherance of their organizational purposes.” ILL. S. CT. R. 756(f)(1)(c). See ATTORNEY REGISTRATION AND DISCIPLINARY COMM’N, HIGHLIGHTS FROM THE 2009 ANNUAL REPORT 3,12 (2009), available at <https://www.iardc.org/AnnualReport2009.pdf>, for a three-year chart breaking down the types of pro bono services provided.

69. In fact, in Illinois, the percentage has remained constant at around 32-33% of registered attorneys since Illinois began collecting such data in 2006. The numbers reported annually can be found in the Illinois Supreme Court’s Annual Reports, available at <http://www.state.il.us/court/supremecourt/annreport.asp>. See also DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 13-18 (2006) (discussing failed efforts to make the performance of pro bono work mandatory); Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1879 (1998-99) (“Pro bono legal service efforts have barely made a dent in the hugely unmet need for legal representation among the poor.”).

70. See Barry, *supra* note 69, at 1885 (arguing that even if all attorneys provided 50 hours of pro bono work, “with the unmet need for legal services placed at approximately 9.1 million, it would be difficult to yield a significant impact. . .”); Hadfield, *supra* note 7, at 152 (arguing that if every lawyer provided 100 hours of pro bono service a year that would not begin to address the legal needs of ordinary households).

71. *Supra* Section II.A.

72. LAWYERS TRUST FUND OF ILL. ET AL., THE LEGAL AID SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS 3 (2005), http://www.robparal.com/downloads/legal_needs_study.pdf; ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 4-5 (November 2009), available at http://www.abanet.org/legalservices/delivery/downloads/prose_white_paper.pdf. See also DEBORAH L. RHODE, ACCESS TO JUSTICE 81-82 (2004) (discussing the growth of self representation); Mike

has been accompanied by an explosion of Internet resources and do-it-yourself legal materials over the past several decades.⁷³ To assist with the rise in pro se representation, courts and legal aid programs are trying to help people represent themselves by providing tools such as self-help centers. These centers have resources such as basic information on legal rights and responsibilities, advice desks that are staffed by attorneys who can provide limited assistance to pro se parties, and Internet resources.⁷⁴ Some courts have also used paralegals to provide information about the basic court processes, assist with filling out the appropriate court documents and otherwise assist pro se litigants in general informational ways, but without providing any legal advice.⁷⁵

A rationale for providing pro se education has been articulated as follows: “A better-educated pro se litigant may still fare better if she were represented by counsel, but the alternative—leaving the litigant in total ignorance—is clearly much worse, for both the litigant and the court.”⁷⁶ As one scholar has argued:

[O]bdurate attachment to paternalistic ideas about protecting the public from anything but professional assistance is ignoring reality. . . . The fact that the legal profession has resisted much more than a feel-good approach to responding to the paucity of legal representation makes the need for such projects [for alternative service models] all the more acute.⁷⁷

Stuckey, *The Home You Save Could be Your Own*, MSNBC.COM, Jan, 29, 2009, <http://www.msnbc.msn.com/id/28877173/> (discussing the current housing foreclosure crises, which is causing an increasing number of people to represent themselves pro se); Molly McDonough, *More Americans Go Pro Se, Even in Complex Matters*, A.B.A. J. (Nov. 25, 2008) (concluding that while many who chose to proceed pro se are considered low income, this is increasingly becoming a middle class problem) available at http://www.abajournal.com/news/article/more_americans_go_pro_se_even_in_complex_matters.

73. The market for Internet based self-help legal assistance and do-it-yourself kits is thriving and consumers are driven by the affordability and necessity of such means. Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 121-123 (2000). The popularity of these alternatives is a sign of the lack of affordable legal assistance. *Id.* at 146. See also William Henderson and Rachel M. Zahorsky, *Paradigm Shift*, A.B.A. J. 40, 46 (July 2011) (“Incomes of ordinary middle-class citizens have stagnated while the relative price of legal services has risen. Unmet legal needs are on the rise, opening the door for inexpensive, Web-based legal services providers that essentially offer do-it-yourself kits for many personal or business legal needs.”).

74. LAWYERS TRUST FUND OF ILL. ET AL., *THE LEGAL AID SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS* 3 (2005), <http://www.ltf.org/docs/legalneeds.pdf>; ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, *AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS* 4-5 (November 2009) http://www.abanet.org/legalservices/delivery/downloads/prose_white_paper.pdf.

75. Barry, *supra* note 69, at 1891-92, 1917-18. The line between “information” and “advice” can, however, be a challenging one to draw. *Id.* at 1889-90.

76. *Id.* at 1882.

77. *Id.* at 1888.

This idea that “something is better than nothing” has fueled the creation of pro se resource centers and clinics as an acceptable “something.”⁷⁸ But perhaps the public would like to be offered a little more.⁷⁹

F. Increasing Options for Legal Services

When a substantial portion of the population lacks meaningful access to the legal system, the rule of law is threatened.⁸⁰ As one court noted, “a substantial disparity in access to legal representation caused by indigency of one of the parties threatens the adversarial system’s ability to produce a just and fair result.”⁸¹ Furthermore, for the population to believe that the legal system exists to help them determine their rights and obligations, the individuals in that population must have some sense that they can meaningfully use that system.⁸² The increasing cost of attorneys,⁸³ coupled with the limited availability of free or low cost legal services,⁸⁴ leaves many people with no access to lawyers to help them navigate the legal system, which threatens the rule of law.⁸⁵

While legal aid and pro bono services are important and commendable efforts that provide some people with access to the legal system, the legal profession must recognize that neither has come close to providing legal representation to all persons in need of access.⁸⁶ If legal aid and pro bono services continue to be viewed

78. *Id.* at 1893 (discussing hopes that pro se litigants could benefit from even limited advice).

79. *Cf.* Barton, *supra* note 44, at 448 (“[W]e allow self-representation, but not unlicensed representation; a sign that unauthorized practice rules are aimed at suppressing competition and not protecting the public.”).

80. See Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 431 (2003); *cf.* Gillian K. Hadfield, *Don’t Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies*, 46 DEPAUL L. REV. 401, 416-419 (2007); ILLINOIS RULES OF PROF’L CONDUCT, Preamble [6] (2010) (“a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a democracy depend on popular participation and support to maintain their authority.”).

81. *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221, 1228-29 (D. Neb. 1995) (holding that the court has the inherent power to appoint an attorney to represent an indigent litigant and, in support of that holding, discussing the funding cuts to the Legal Services Corporation).

82. DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE* 27-28 (2006).

83. See, e.g., *The Going Rate*, PARTNER’S REPORT 6 (June 2006) (discussing national average of a 5% rate increase for all firm sizes from 2005-06).

84. See *supra* notes 21-30 and accompanying text.

85. See David Pimentel, *Constitutional Concepts for the Rule of Law: A Vision for the Post-Monarchy Judiciary in Nepal*, 9 WASH. U. GLOBAL STUD. L. REV. 298, 329 (2010); Naresh Singh, *Legal Empowerment of the Poor: Making the Law Work for Everyone*, 103 AM. SOC’Y INT’L PROC. 147, 147-8 (2010).

86. See *supra* notes 60-61 and accompanying text. See also LEGAL SERVICES CORPORATION, *DOCUMENTING THE JUSTICE GAP IN AMERICA* 4 (2007) (“Only a very small percentage of the legal problems experienced by low-income people (one in five or less) are addressed with the assistance of either a private attorney (pro bono or paid) or a legal aid lawyer.”).

as the panacea to the lack of access to the legal system, then the legal profession should concede that universal access to the legal system is not even a goal.⁸⁷

Furthermore, the expansion of legal aid and pro bono services rely on government funding, private monetary donations or private donations of pro bono services. Discussions about increasing access to legal services rarely consider how to decrease prices for legal services in the marketplace. Any consideration of this topic is usually focused on deregulating the legal profession.⁸⁸ In other words, some argue that the prohibitions on the unauthorized practice of law have prevented competition in areas where nonlawyers could be providing legal services without undue harm to consumers. Increased competition from nonlawyers could help drive down the prices of legal services.⁸⁹

Deregulation may be appropriate for some areas. In many respects, we already have some deregulation and competition from nonlawyers. For example, tax accountants routinely provide advice about compliance with the tax laws without being licensed to practice law.⁹⁰ There are, however, many areas where legal

87. See William J. Dean, *The 2000 Survey of Pro Bono Activity by New York Law Firms*, N.Y.L.J. (May 7, 2001). Dean argues that major increased funding for legal services and greater participation by lawyers in pro bono work are essential for the aspiration of "Equal Justice Under Law" to become a reality. However, the constant refrain for such increases has not resulted in them. *Id.*

88. See Clifford Winston and Robert W. Crandall, *Time to Deregulate the Practice of Law*, WALL STREET J. (August 21, 2011).

89. The Federal Trade Commission has frequently expressed concerns that prohibiting laypersons for engaging in conduct that does not require specialized legal training—such as conducting real estate closings, writing advocacy letters, writing amicus curie briefs and serving as mediators—limits consumer choice and increases the costs of services to consumers. See, e.g., Letter from the staff of the Fed. Trade Comm'n Office of Policy Planning, Bureau of Competition, and Bureau of Econ. to Carl E. Testo, Counsel for the Rules Comm. of the Superior Court of Conn. (May 17, 2007), available at <http://www.ftc.gov/be/V070006.pdf> (expressing concerns that a proposed rule to define the practice of law would be interpreted in an overly broad manner and would have a negative impact on consumers and competition); Letter from Dep't of Justice and Fed. Trade Comm'n to N. C. State Bar Ethics Comm. (December 14, 2001), available at <http://www.ftc.gov/be/V020006.shtm> (expressing opposition to recent opinions requiring the presence of an attorney at all real estate closings and providing empirical data regarding the increased costs to consumers when nonlawyers cannot compete in the area of real estate closings); see also John P. Brown, *The Pros and Cons of Competition*, in LEGAL SERVICES FOR THE POOR 155-157 (Douglas J. Besharov, ed. 1990). Increased competition from nonlawyers may even have an added impact of increasing pro bono services by lawyers. Sandefur, *supra* note 10, at 88, 100, 102 (suggesting that greater participation in pro bono programs may be correlated with the legal profession's perception that it is under threat from other occupations).

90. Quintin Johnstone, *An Overview of the Profession in the United States, How that Profession Recently has been Changing, and Its Future Prospects*, 26 QUINNIPIAC L. REV. 737, 742 (2008). The marketplace is also pushing the boundaries of what constitutes the unauthorized practice of law. See, e.g., Roger Parloff, *Can Software Practice Law?* CNN MONEY, June 30, 2011, available at http://features.blogs.fortune.cnn.com/2011/06/30/can-software-practice-law/?iid=HP_River (discussing a recent lawsuit against LegalZoom, which has been in business since 2001, alleging that its self-help software is illegally practicing law without a license).

training and education, as well as licensing conferred upon the demonstration of minimal qualifications, are important aspects of consumer protection, particularly when a person is acting in a representative capacity on behalf of another in judicial or quasi-judicial proceedings. Under our current system, a person acting in a representative capacity usually must be a licensed attorney, which requires three years of full-time legal education, although there are exceptions, particularly in the area of administrative proceedings.⁹¹ There are additional areas in which there is a high consumer demand for legal services where perhaps someone with less training and education than a J.D. could competently provide some of those services.⁹²

For example, what if someone could be licensed as a housing advocate? Perhaps such an advocate could provide legal advice in residential real estate closings, evictions, landlord-tenant disputes and foreclosure proceedings—areas of high consumer need—without any supervision by a licensed attorney. A person with a housing advocate license would have to complete an educational program focused on this specialization. A thirty-credit one-year program could, for example, require courses in state civil procedure, contracts, property, real estate transactions, professional responsibility, landlord-tenant law, and an intensive practicum or clinical course in these areas that would focus on developing a market-ready skill set.⁹³ There could be an examination focused on these substantive areas and continued education requirements. Where would a member of the public, or even the legal profession, go to advocate for the creation of such a program? How would this impact legal education?

The idea of nonlawyers providing some legal services has been explored more by academics than it has by lawmakers.⁹⁴ Many scholars who have examined the issue have concluded that there are some legal services that nonlawyers could provide competently.⁹⁵ Comparative studies with other countries that allow nonlaw-

91. There are a few exceptions to this general proposition as discussed *infra* Section III.C.

92. See Barton, *supra* note 44, at 441 (“The current regulation of lawyers aimed at remedying the problem of incompetent practitioners, however, is not calibrated to needy subsections of the market.”).

93. *Id.* at 458-61 (suggesting a six month program of legal education that focuses on skills).

94. See, e.g., Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 209-212 (1980), Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV., 1, 22-23 (1989-90), Russell G. Pearce, *Revitalizing the Lawyer-Poet: What Lawyers Can Learn from Rock and Roll*, 14 WIDENER L. J. 907, 921 (2005); Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 38 (1981) (33% of respondents believed that UPL did not pose any harm or threat to the public good).

95. See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 15, 87 (2004); Deborah Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 709-13 (1996). Other countries have allowed nonlawyers to perform some services that only lawyers may provide in the United States. There has been no evidence of consumer harm from these policies. *Id.* at 89; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4, cmt. c (2000) (noting that in the few states that have allowed extensive nonlawyer provision of legal services, there has been no indication of any significant risks to consumers);

yers to provide services that could be considered the practice of law further support this conclusion.⁹⁶

Some scholars have suggested that state legislatures limit the scope of lawyers' monopoly by providing some avenues of competition.⁹⁷ However, there are systemic impediments to this approach; namely that many state legislatures do not have the power to authorize nonlawyers to engage in activities considered the unauthorized practice of law. In the overwhelming majority of states the power to define the scope of the legal profession's monopoly is the exclusive province of the judicial branch. Thus, the state legislatures have no scalpel with which to carve the contours of lawyers' monopoly or to carve out areas where nonlawyers can compete.⁹⁸ For a point of comparison, think about all of the consumer options that the legislatures have created in the area of health care services. The development of the many types of licensed professions in the health care field, as opposed to the lack of any licensed professionals other than J.D.s in the field of legal services, is a contrast worthy of exploration.

III. A Tale of Two Professions: The Legal and Medical Professions

Both the legal and medical professions lay claim to being more than businesses or trades seeking to protect the interests of their members. By controlling entry into their professions and the quality of the services provided, they also

Alan Morrison, *Making Competition Work*, in *LEGAL SERVICES FOR THE POOR* 150-155 (Douglas J. Besharov, ed. 1990); Daniel C.W. Lang, *Utilizing Nonlawyer Advocates to Bridge the Justice Gap in America*, 17 *WIDENER L. REV.* 289, 302-03 (2011); *but see* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 *AM. U. L. REV.* 1537 (2005); Carl M. Selinger, *The Retention of Limitations on the Out-of-Court Practice by Independent Paralegals*, 9 *GEO. J. LEGAL ETHICS* 879, 881-896 (1996) (discussing potential problems that could result from officially sanctioning nonlawyer practice).

96. *See, e.g.*, Hadfield, *supra* note 7, at 136-39 (discussing the use of nonlawyers to provide legal services in other countries such as the United Kingdom and the Netherlands).

97. *See, e.g.*, Tom Lininger, *From Park Place to Community Chest: Rethinking Lawyers' Monopoly*, 101 *Nw. U. L. REV. COLLOQUY* 155, 175-76 (2007) (arguing that state legislatures should "roll back the legal monopoly that is responsible for the inaccessibility of legal services" and using the dental industry as a point of comparison).

98. These impediments are described more fully in Section IV *infra*. *See also* Lininger, *supra* note 97, at 180 (discussing relaxing UPL statutes without discussing that most UPL statutes do not, and cannot, define the conduct they prohibit so relaxing them will not likely radically change lawyers' monopoly). Several challenges have been raised to the constitutionality of statutes that punish undefined conduct, i.e. the unauthorized practice of law, but no challenge has been successful. *See, e.g.*, *State v. Foster*, 674 So.2d 747, 750-51 (Fla. Dist. Ct. App. 1996); *State v. Wees*, 58 P.3d 103, 107-08 (Idaho Ct. App. 2002); *Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. Sturgeon*, 635 N.W.2d 679, 685 (Iowa 2001); *Mont. Supreme Court Comm'n on Unauthorized Practice of Law v. O'Neil*, 147 P.3d 200, 215 (Mont. 2006); *State v. Rogers*, 705 A.2d 397, 401 (N.J. Super. Ct. App. Div. 1998); *State v. Hunt*, 880 P.2d 96, 99-100 (Wash. Ct. App. 1994); *see also* *LAS Collection Mgmt. v. Pagan*, 858 N.E.2d 273, 276 (Mass. 2006) ("Statutes may provide penalties for the unlicensed practice of law, but may not extend the privilege.").

provide a public service—protecting the population’s health or upholding citizens’ legal rights.⁹⁹ On this basis, both professions claim a right of self-regulation and protection from market competition.

A salient difference, however, is that the legal profession reinforces its right to self-regulate and control the scope of its monopoly by asserting constitutional protection from legislative intervention under the separation of powers doctrine.¹⁰⁰ The medical profession, on the other hand, has had to rely on the state legislatures to pass acts that created its monopoly and defined its scope of practice. This difference, in large part, has resulted in different developments in the professions. The field of health care has become stratified, with legislatures creating different types of licensed professionals who can provide some services with different levels of training. The legal profession, on the other hand, has no similar counterpart.

A. History of the Legal and Medical Professions

The development of the legal and medical professions has many historical parallels. Both professions began with no or few standards for education, training and licensure, which allowed unscrupulous practitioners to prey on the public causing harm to the reputation and integrity of both professions.¹⁰¹ Both professions created professional associations as a way to organize and promote the integrity and honor of their professions. The American Medical Association (“AMA”) was created in 1847¹⁰² and the American Bar Association (“ABA”) was created in 1878.¹⁰³ The convention that founded the AMA resolved “to institute a National Medical Association for the protection of their [the profession’s] interests, for the maintenance of their honour and respectability, for the advancement of their knowledge, and the extension of their usefulness.”¹⁰⁴ Similarly, the ABA’s initial constitution stated its object was “to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor or the profession of the law, and encourage cordial intercourse among the members of the American Bar.”¹⁰⁵

99. See, e.g., MORRIS FISHBEIN, A HISTORY OF THE AMERICAN MEDICAL ASSOCIATION 1847 to 1947 439-40 (1947) (in 1938 the president of AMA said that one of the aims of the medical profession was to protect “the public against medical frauds, falsely labeled foods, drugs and appliances.”); CARLETON B. CHAPMAN, PHYSICIANS, LAW, AND ETHICS 103 (1984) (discussing a medical society in Boston in the 1730s that “began to proclaim the need to regulate the practice of medicine in the public interest.”). Regarding the legal profession, see *infra* notes 110-11 and accompanying text.

100. See *infra* Section III.C.

101. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 498-500 (3d ed. 2005) (regarding the legal profession); see *infra* note 106 and accompanying text regarding the medical profession.

102. FISHBEIN, *supra* note 99, at 31.

103. FRIEDMAN, *supra* note 101, at 495-98 (discussing the organization of the bar in the late nineteenth century).

104. CHAPMAN, *supra* note 99, at 105.

105. *Proceedings of the First Meeting of the American Bar Association*, 1 A.B.A. REPORTS 30 (1878) (Constitution of the American Bar Association).

After organizing on the national level, both professions sought to improve their reputation through education, training and licensing requirements that would curb unauthorized practitioners.¹⁰⁶ As one description of the AMA's efforts stated:

From the very first the American Medical Association has prosecuted its war on quackery and more than any other agency in our country can take credit for the vast improvement that has occurred in the abolition of nostrums, secret medicines and quackery. . . . numerous important evils result from the universal practice of allowing persons almost wholly ignorant to engage in apothecaries and still greater from the universal traffic in secret medicines.¹⁰⁷

As part of this "war on quackery," the AMA's 1847 Code of Ethics prohibited doctors from consulting with "irregular practitioners," which it defined as those "untrained in anatomy, physiology, pathology, and organic chemistry."¹⁰⁸ The AMA's early resolutions regarding ethics proclaimed that physicians' duties to the public included "warn[ing] the public against the devices practiced and the false pretensions made by charlatans."¹⁰⁹

Similarly, the ABA made concerted efforts to curb the unauthorized practice of law, most notably in 1919 when the Conference of the Delegates of State and Local Bar Associations met at the annual ABA meeting and discussed ways to stop nonlawyers from performing legal services and then again in the early 1930s when the ABA formed a Committee on the Unauthorized Practice of Law.¹¹⁰ An early report of the Committee explained, "The practice of law by unauthorized persons

106. FISHBEIN, *supra* note 99, at 248 ("The American Medical Association had been organized primarily to raise the standard of medical education."). Medical education was a topic raised constantly at AMA meetings. *Id.* at 48-49, 161, 243, 250, 258, 293; *see also* OLIVER GARCEAU, *THE POLITICAL LIFE OF THE AMERICAN MEDICAL ASSOCIATION* 14 (1941 *reprinted* in 1961) (discussing early medical societies that were "primarily concerned with the elevation of educational standards and the licensing of qualified practitioners.").

107. FISHBEIN, *supra* note 99, at 103 ("[In the middle of the nineteenth century], [t]he American medical profession was in the process of organizing itself partly, if not primarily, to establish its supremacy over other types of healers and to raise standards of medical education.").

108. CHAPMAN, *supra* note 99, at 112. The Code of 1847 was replaced by the "Principles of Medical Ethics" in 1902, which did not have such an absolute ban on consultation with "irregular physicians." *Id.* at 113. Similarly, since its 1937 amendment to the 1908 Canons of Ethics, which added Canon 47, the ABA has considered it unethical for a lawyer to aid and abet the unauthorized practice of law. AMERICAN BAR ASSOCIATION, *OPINIONS OF THE COMMITTEE OF PROFESSIONAL ETHICS* 193-94 (1967).

109. FISHBEIN, *supra* note 99, at 39-40. The AMA's Journal published a series of articles to expose charlatans who claimed to have devised cures for a variety of illnesses. *Id.* at 426. It also published other articles exposing what it believed to be unqualified medical schools or unproven treatments, some of which resulted in libel suits against the organization. *Id.* at 495-533.

110. Laurel A. Rigertas, *Lobbying and Litigating Against "Legal Bootleggers"—The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 94-95 (2009).

is an evil because it endangers the personal and property rights of the public and interferes with the proper administration of justice. It is not an evil because it takes away business from lawyers.”¹¹¹

Both professions, however, have a financial interest in the monopoly they eventually achieved.¹¹² As part of their efforts to deflect criticism that their professions are more interested in protecting their members’ economic turf than protecting the public, both professions have claimed that their unlicensed competitors actually create more business for them. For example, doctors opined that, “[p]erhaps the grand hoaxes do cut into the doctor’s practice a bit, though many feel the advantage is in the other direction when a quack leaves a mangled wreckage for the doctor to work on.”¹¹³ Likewise, a 1931 ABA report stated, “As a matter of fact, unauthorized and, hence, unskillful practices are more apt than not to create business for the lawyer.”¹¹⁴

Both the AMA and the ABA promulgated codes of ethics in order to raise the standards of their professions and to give a high moral purpose to their endeavors, which would help legitimize the monopolies that they sought.¹¹⁵ In other words, ethical standards that put the patient or client’s interests first are a significant basis for “special social and economic privileges.”¹¹⁶ Both professions use the idea of “professionalism” as a shield from outside critique in many ways. The idea of professionalism has been subject to criticism. As one scholar said regarding the AMA:

The members of this group are doctors, and belong therefore to a profession. Professionalism is a concept freely used to seal off the group from critical inquiry. It spreads an odor of sanctity. Members of a profession are assumed to act in certain ways which are beyond criticism or even beyond the layman’s comprehension.¹¹⁷

From the beginning of their professional organization, both professions also believed deeply in their ability to clean their own house and regulate themselves.

111. *Report of the Special Committee on Unauthorized Practice of the Law*, 56 A.B.A. REPORTS 477 (1931); see also *Montana Supreme Court Comm’n on the Unauthorized Practice of Law v. O’Neil*, 147 P.3d 200, 213 (Mont. 2006) (“the primary reason for prohibiting the unauthorized practice of law is to protect the public from being advised and represented by unqualified persons not subject to professional regulation.”).

112. See, e.g., GARCEAU, *supra* note 106, at 26 (quoting a description of the AMA as “essentially a business institution, a vested economic interest.”).

113. *Id.* at 171.

114. *Report of the Special Committee on Unauthorized Practice of the Law*, 56 A.B.A. REPORTS 477 (1931).

115. CHAPMAN, *supra* note 99, at 106-07, 111 (“[T]he leaders of the AMA seem to have thought that wide distribution of the [Ethics Code of 1847] would convince the layman of its selflessness and noble intent.”).

116. *Id.* at 123.

117. GARCEAU, *supra* note 106, at 5.

The first president of the AMA told its members “that the medical profession always cleans its own house, that it does not need extraneous assistance in bringing about reform.”¹¹⁸ Another early AMA president said: “Eschewing politics, proposing to control medicine alone and seeking no aid from State or Church, we should become a law unto ourselves, or rather act above all law save the divine, since it is quite certain that we alone must protect the honor of the medical profession.”¹¹⁹

In reality, however, the medical profession has had to rely on legislatures and licensing statutes to regulate entry into the profession.¹²⁰ In comparison, the legal profession has truly been able to self-regulate by successfully asserting that the judicial branches have a right to regulate attorneys under the separation of powers doctrine.¹²¹ This difference in the regulation of the professions has played a key role in one area where the development of the professions has sharply diverged—competition from other types of licensed professionals.

B. Regulation of Health Care Professionals—

A Legislative Process

As the medical profession sought to legitimize its field, it sought legislation to bring about licensing requirements.¹²² However, the lack of scientific understanding in the early stages of the healing professions resulted in competing schools of thought about what caused disease and what cured the human body. This resulted in the creation of a variety of early health care professions—botanic doctors, homeopaths, Eclectics, “regulars,” to name a few.¹²³ The AMA, which represented the educated “regular” physicians, opposed other schools of thought and tried to exclude them from the statutory licensing process.¹²⁴ However, the regular

118. FISHBEIN, *supra* note 99, at 41; *see also* GARCEAU, *supra* note 106, at 6 (“[A] profession is a group whose code of ethics is powerful enough to raise individual conduct about the level which it would otherwise attain.”).

119. CHAPMAN, *supra* note 99, at 111.

120. PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 102 (1982).

121. *See, e.g.*, *Hanson v. Grattan*, 115 P. 646, 647 (Kan. 1911) (holding the legislature can prescribe qualifications for the admission and disbarment of attorneys, to which courts have deferred in order to avoid friction between branches of government); *In re Thatcher*, 22 Ohio Dec. 116, 1912 WL 849, at *1, *2-4 (1912) (holding that the general assembly may provide that an attorney found guilty of moral turpitude shall not be permitted to practice in any court; however, it may not say that any particular applicant shall practice as an attorney); *People ex rel. Wayman v. Chamberlin*, 89 N.E. 994, 997 (Ill. 1909) (holding that the power of the court to disbar an attorney is an inherent power that is independent of any statute on the subject); *but see* Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 630 (1978) (disputing the rationale that the public should be excluded from participating in lawyer regulation because of lawyers’ superior knowledge).

122. STARR, *supra* note 120, at 102.

123. *Id.* at 93-102.

124. *Id.* at 99-100.

physicians did not have the political clout to bring about such legislation without partnering with competing schools of thought, such as the homeopaths and Eclectics.¹²⁵ This partnership in the 1870s and 1880s led to successful lobbying for licensing requirements, but the price for the regular doctors was the legitimization of other types of health care professionals in those licensing statutes.¹²⁶ Thus, from its early history, the health care field had several types of licensed professionals. As one author wrote about the AMA in the 1940s:

The AMA would like to be the sole voice and final arbiter on all matters touching upon health. It has not in recent times been accorded any such monopoly. Though it commonly dominates state licensing boards, it does not itself grant or withhold licenses, and it cannot prevent cults from securing licenses of their own . . . bills are sometimes passed giving public position to unorthodox practitioners.¹²⁷

Furthermore, once scientific developments gave legitimacy to medicine, the evolution of the medical profession quickly created opportunities for support roles by other subordinate health care professionals.¹²⁸ For example, once hospitals gained mainstream acceptance, physicians needed access to their facilities, but they did not want to become paid employees of hospitals.¹²⁹ Instead, they wanted to maintain their professional independence, which left a need for other health care professionals to staff the hospitals and serve a variety of support roles, such as laboratory technicians, nurses and anesthetists.¹³⁰

While physicians recognized a role for subordinate health professionals, they did not condone professional independence for these groups. Instead, the physicians only supported the creation of other health care professionals to the extent that they functioned under the supervision of physicians.¹³¹ While physicians could assert this position, they could not prevent other groups of professionals from

125. *Id.* at 102.

126. *Id.* However, even these early licensing statutes had minimal requirements to become licensed. *Id.* at 104.

127. GARCEAU, *supra* note 106, at 165-66; *see also* Francis Helminski, "That Peculiar Science:" *Osteopathic Medicine and the Law*, 12 L. MED. & HEALTH CARE 32, 32 (1984) ("The legal bounds of osteopathic practice were eventually expanded by the legislatures, who were more sensitive to direct popular pressure than were the courts.").

128. STARR, *supra* note 120, at 220-21.

129. *Id.*

130. *Id.* at 221-22.

131. *Id.* at 220-22. In fact, Starr writes that this was achieved in part by "the employment in these auxiliary roles of women who, though professionally trained, would not challenge the authority or economic position of the doctor." *Id.* at 221. In the early history of the nursing profession physicians considered the services that nurses delivered to be quite distinct from the services that physicians delivered, so it does not appear that physicians saw nurses as a threat to their professional monopoly. *See also* FISHBEIN, *supra* note 99, at 77-78 (discussing the role of the nurse as taking care of the sick and providing them aid and comfort).

contesting the scope of physicians' monopoly and lobbying for licensing laws that would give them the right to practice independently in areas that could otherwise be considered the unauthorized practice of medicine. The legislative process provided a forum for all of the interested stakeholders to advocate for their positions.

1. *A Case Study—Nurse Practitioners*

Nurse practitioners' ("NPs") successful effort to carve out a broader scope of practice within the healthcare system is an example of how a democratic forum—in their case the legislature—can expand consumers' options. NPs are one of four categories of advanced nurse practitioners; the other three categories being nurse anesthetists, clinical nurse specialists and nurse midwives.¹³² All advanced nurse practitioners are registered nurses ("RNs") who have completed advanced education and clinical practice beyond the education that is required for RNs.¹³³ In 2009, advanced nurse practitioners made up about eight percent of the RN workforce.¹³⁴

While physicians did not initially perceive a threat to their monopoly from the presence of other health care professionals, such as nurses, membership in such professions expanded rapidly. This growth led to the creation of organized interest groups that were able to challenge the scope of physicians' monopoly in the legislatures. For example, in the 1900s the AMA made no resistance to the presence of nurses in the health care field and, in fact, was an advocate of increased training programs for nurses, particularly during war times.¹³⁵ In 1880, "there were only 15,601 nurses; by 1900 the number had increased to 120,000."¹³⁶

Following the lead of doctors, nurses organized and formed the National League for Nursing in 1894, which later became the American Nurses Association ("ANA"), to give nurses a collective voice in the legislative and agency rule-making process.¹³⁷ Much like doctors, nurses sought to use legislative acts to eliminate competition from untrained providers and to increase the power and prestige of their profession.¹³⁸ Around the turn of the twentieth century, the ANA and other

132. PETER I. BUERHAUS, ET AL., *THE FUTURE OF THE NURSING WORKFORCE IN THE UNITED STATES: DATA, TRENDS AND IMPLICATIONS* 3 (2009).

133. *Id.*

134. *Id.*

135. FISHBEIN, *supra* note 99, at 77-78, 305-06.

136. Gerald E. Markowitz and David Rosner, *Doctors in Crisis: Medical Education and Medical Reform During the Progressive Era, 1895-1915* 189, in *HEALTH CARE IN AMERICA* (Ed. Susan Reverby and David Rosner) (1979). The number of midwives also rose and there were 5,000 osteopaths, 5,000 Christian Scientists, as well as numerous chiropractors and others who the profession viewed as competition. *Id.*

137. MATHY D. MEZEY AND DIANE O. MCGIVERN (eds.), *NURSES, NURSE PRACTITIONERS: EVOLUTION TO ADVANCED PRACTICE* 268 (1993).

138. *Id.*

nurses' organizations lobbied legislatures to legitimize and regulate nurses by passing registration statutes for the nurses.¹³⁹ The early registration statutes only allowed the term "registered nurse" to be used by "a person of good character who had completed an acceptable nursing program and passed a state board examination."¹⁴⁰ Registration acts differed from the later nurse practice acts because the registration acts did not define an exclusive scope of practice for nurses; instead, they only mandated qualifications if a person was going to use the title "registered nurse."¹⁴¹ Others could still hold themselves out as "nurses" and provide the same services without any special qualifications, training, licenses or registration.¹⁴²

After successfully getting legislatures to pass registration acts in the early 1900s, the nursing profession next sought to have licensing statutes passed during the mid-1900s. The goal of these statutes was to define the scope of practice for nurses and to restrict the use of the term "nurse," as well as the performance of tasks considered nursing, to those who obtained a license from the state.¹⁴³ For example, New York passed the first mandatory licensing act in 1938, which established two levels of nurses—registered professional and practical—and made it illegal for anyone to practice nursing without a license at one of those levels.¹⁴⁴ In order to advance the enactment of similar statutes, the ANA adopted the following model definition of nursing in 1955:

[T]he performance, for compensation, of any act in the observation, care and counsel of the ill, injured or infirm, or in the maintenance of health or prevention of illness in others, or in the supervision and teaching of other personnel, or the administration of medications and treatments prescribed by a licensed physician or dentist, requiring substantial specialized judgment and skill based on knowledge and application of the principles of biological, physical and social science. *The foregoing shall not be deemed to include acts of diagnosis or prescription of therapeutic or corrective measures.*¹⁴⁵

139. Jane Greenlaw, *Sermchief v. Gonzales and the Debate over Advanced Nursing Practice Legislation*, 12 L. MED. & HEALTH CARE 30 (1984). In an argument against leaving the contours of the definition of nursing to the courts, the author argues, "The influence that nurses can have on a court's decision is minimal, whereas nurses can and do have a significant role in legislation and agency rule-making. *Id.* at 31. See also Francis Helminski, "That Peculiar Science:" *Osteopathic Medicine and the Law*, 12 L. MED. & HEALTH CARE 32, 34 (1984) (discussing courts inclination to restrict the activities of osteopaths in the early 1900s; the legal creation of the profession took place in the legislatures despite opposition from organized traditional medicine); MEZEY AND MCGIVERN, *supra* note 137, at 268 (discussing the history of the state nurse practice acts).

140. MEZEY AND MCGIVERN, *supra* note 137, at 268.

141. *Id.*

142. *Id.* This is similar to the term "paralegal" today; there are no special qualifications, training, licenses or registration required for one to hold him or herself out as a "paralegal."

143. *Id.* at 268-69.

144. *Id.* at 269.

145. *Id.* (emphasis added).

This definition was included in many state laws, however, the inclusion of the last sentence was a limitation on nurses' scope of practice that later had to be revised to allow for the evolution of the role of advanced practice nurses.¹⁴⁶

The nurse practitioner role was formalized in 1965 with the creation of an educational program at the University of Colorado.¹⁴⁷ The role has expanded over time, but today nurse practitioners are generally defined as "licensed independent practitioners who practice in ambulatory, acute and long term care as primary and/or specialty care providers."¹⁴⁸ They are licensed as registered nurses and have graduate degrees.¹⁴⁹ The services they provide generally include diagnosing and managing acute episodic and chronic illnesses; ordering, conducting and interpreting diagnostic and laboratory tests; and prescribing pharmacologic agents.¹⁵⁰ Obtaining legislative authority for this scope of practice happened over several decades and arose from both changes in the population's need for health care services as well as contemporaneous legislative battles with physicians.

The rise of nurse practitioners was possible, in part, because in the mid-twentieth century physicians became increasingly "specialized and the number of those providing general medical care declined, creating shortages in poor urban and rural communities."¹⁵¹ Also, the rise of chronic illnesses and an aging population in the mid-twentieth century changed the skills and knowledge necessary to meet patient needs.¹⁵² These circumstances created a gap in access to health care that needed to be filled.¹⁵³ "Growing alienation of patients from their physician providers created an opportunity for educated allies such as nurses to gain knowledge and the public's permission to apply it."¹⁵⁴ Thus, "the onset of new types of providers, such as nurse practitioners in the 1960s, provided an opportunity *for society* to question more openly how and why certain professional groups, such as physicians, claimed such vast cultural authority over health care and if, indeed, these claims remained legitimate and enduring."¹⁵⁵

146. *Id.* at 269-70.

147. JULIE FAIRMAN, MAKING ROOM IN THE CLINIC 5 (2008); MEZEY AND MCGIVERN, *supra* note 137, at 270-71.

148. American Academy of Nurse Practitioners, Scope of Practice for Nurse Practitioners, <http://aanp.org/NR/rdonlyres/FCA07860-3DA1-46F9-80E6-E93A0972FB0D/0/2010ScopeOfPractice.pdf>. See also FAIRMAN, *supra* note 147, at 6.

149. MEZEY AND MCGIVERN, *supra* note 137, at 5.

150. *Id.*

151. FAIRMAN, *supra* note 147, at 3; see also MEZEY AND MCGIVERN, *supra* note 137, at 60-61, 271.

152. FAIRMAN, *supra* note 147, at 23.

153. *Id.* at 134.

154. *Id.* at 24. See also MEZEY AND MCGIVERN, *supra* note 137, at 6 ("Advanced practice nursing opportunities continue to increase in response to the demand for access to primary care for increasing numbers of uninsured and underinsured, to medicine's failure to convince physicians to enter primary care specialties, and to the emerging political leverage of nurses.")

155. FAIRMAN, *supra* note 147, at 10 (emphasis added).

In the 1970s the role of the nurse practitioner was still evolving and unclear both in practice and legally.¹⁵⁶ During the 1970s, nurse practitioners began to divide into specialty practice organizations, such as the National Association of Pediatric Nurse Associates and Practitioners.¹⁵⁷ The growth of the nursing profession “challenged the basic tenets of medical dominance and provided the evidence for policy makers that different models of patient care were viable.”¹⁵⁸ Legislative efforts to expand nurses’ scope of practice and define their professional role were numerous. For example, in 1973 “a survey of state nurses’ associations found that 54 percent anticipated legislation amending current nurse practice acts in that year alone.”¹⁵⁹

Physicians were only open to the idea of joint practice between physicians and nurses “as long as the traditional power differential remained in place and physicians controlled clinical practice.”¹⁶⁰ In other words, physicians were open to some collaboration between the professions, but they were not going to relinquish any of their turf voluntarily.¹⁶¹ However, through the legislative process, they did end up having to cede some of their territory.

Today, there is a wide range of legislation in the states regarding the scope of practice for NPs and whether or not they may have an autonomous practice or must collaborate with a physician.¹⁶² What is common among all states, however, is that the legislatures have enacted Nurse Practice Acts, which define and regulate the scope of nurse practitioners’ practices.¹⁶³ Thus, there is a legislative forum for NPs to have a seat at the table to advocate for their profession and to challenge the scope of physicians’ monopoly.¹⁶⁴ “Nurse practitioners are part of the constant change, however subtle, on who has the authority to provide health care at particular times and places.”¹⁶⁵

156. *Id.* at 145.

157. *Id.* at 158.

158. *Id.* at 160.

159. *Id.* at 145. “Forty-eight percent of the fifty state associations surveyed anticipated legislation amending the medical practice act—46 percent of those changes were to enlarge the physician’s delegatory power, and 50 percent were intended to extend the authority of the medical board to regulate other health personnel such as physician assistants and nurse practitioners through joint promulgation.” *Id.*

160. *Id.* at 155.

161. *Id.* at 183.

162. The American Academy of Nurse Practitioners’ website provides a state by state guide of these differences. <http://www.aanp.org/AANPCMS2/LegislationPractice/StatePracticeEnvironment/>.

163. The American Academy of Nurse Practitioners’ website provides a link to the Nurse Practice Act in every state. <http://www.aanp.org/AANPCMS2/LegislationPractice/StatePracticeEnvironment/>.

164. In fact, the American Academy of Nurse Practitioners’ website has a link to a brochure called “When Did You Last Talk with Your Legislature?” that gives nurse practitioners pointers on communicating with legislators and advocating for the profession. Available at <http://www.aanp.org/NR/rdonlyres/8299193D-8F89-4B48-8895-5A6E57205067/0/WhenDidYouLastTalkWithYourLegislator411.pdf>. See also FAIRMAN, *supra* note 147, at 9.

165. FAIRMAN, *supra* note 147, at 7.

There are many battles that have taken place in legislatures about the role of nurse practitioners,¹⁶⁶ but one specific example is the NPs' pursuit for prescriptive privileges.¹⁶⁷ Nurse practitioners' prescriptive authority has been the result of legislative efforts and battles in every state. Doctors have fought against the expansion of nurse practitioners' scope of practice by arguing, among other points, that if nurses wanted to be doctors, i.e. prescribe medicine, then they should go to medical school.¹⁶⁸ Nurses, having access to the legislative forum, have successfully pushed back against this position.

For example, in 2000 the NPs in Virginia successfully lobbied the legislature to pass a bill that expanded their scope of practice and allowed some prescriptive authority. In 2000, thirty-four other states had broader prescriptive authority than the NPs in Virginia.¹⁶⁹ Prescription drugs fall into two broad categories; first, legend drugs, which are not narcotics (such as antibiotics) and narcotics, which are divided into five schedules.¹⁷⁰ Virginia's NPs backed a bill in the legislature for broad prescriptive authority for all types of drugs, but the Medical Society proposed amendments to the bill that would have limited their prescriptive authority to legend drugs and only one class of narcotics (Schedule V, which contains low narcotic drugs such as cough medicines with codeine).¹⁷¹

Nurse practitioners used several tools to advance their position. They met with a state senator to discuss "the potential benefits such [broad] legislation would have for increasing access to health care services, particularly in rural and underserved areas."¹⁷² They also used scientifically based research data to argue the safety and efficacy of NP practice.¹⁷³ The varied use of NPs around the country and in different settings had produced a body of studies regarding the quality and cost-effectiveness of NPs, as well as studies that criticized their quality and cost-effectiveness.¹⁷⁴ Policymakers could consider all of this data.

In the spring of 2000, the Virginia legislature passed a new law that gave NPs the legal authority to prescribe legend drugs and controlled schedules III, IV

166. MEZEY AND MCGIVERN, *supra* note 137, at 365-67 (summarizing some of the legislative gains made by nurses).

167. Nurses have also used their political leverage to lobby for the right to receive direct reimbursement from insurers and government programs, such as Medicaid, as well as for hospital staffing privileges. *Id.* at 13.

168. ARLENE W. KEELING, *NURSING AND THE PRIVILEGE OF PRESCRIPTION 1893-2000* 139 (2007).

169. *Id.*

170. *Id.*

171. *Id.* at 139-40.

172. *Id.* at 141.

173. *Id.* at 146.

174. *Id.* at 146-47, 152-54; MEZEY AND MCGIVERN, *supra* note 137, at 70-76, 343; *see also* INSTITUTE OF MEDICINE, *THE FUTURE OF NURSING: LEADING CHANGE, ADVANCING HEALTH* 9 (2010) (discussing the need to continue gathering data to inform changes in nursing practice and education).

and V—a compromise between what NPs sought and physicians' sought.¹⁷⁵ Nurse practitioners in other jurisdictions have had similar successes. In 2004 there were 115,000 nurse practitioners in the United States. Ninety-six percent of nurse practitioners prescribed medications and sixty-five percent of them were authorized to write prescriptions for controlled substances and some narcotics.¹⁷⁶

If physicians were the sole voice in this debate and controlled the debate, it is almost certain that nurse practitioners would not have the scope of practice that they have today. A legislative forum in which NPs, consumers and other interest groups could advocate was a critical component. As one commentator has written:

In 1990, New Hampshire nurses were successful in “carving out” the requirement for physician supervision from their prescriptive authority statute. This scenario, which could be repeated often in the future, is contingent on electing legislative representatives sympathetic to nursing, thus creating public demand for nurses to offer these services.¹⁷⁷

Moreover, in these legislative forums, policy makers are not simply asking whether acts, such as prescribing medicine, fall within the definition of the “practice of medicine.” Clearly it does.¹⁷⁸ Instead, legislatures are asking whether professionals other than physicians can perform some of the same services without harming consumers and, if so, then authorizing other professionals to perform such services when they meet certain training, education and licensing standards.

Physicians' stance against a broad scope of practice by nurse practitioners continues. For example, in 2003 the American Academy of Pediatrics, citing concerns about public safety, published a policy statement that speaks against independent nurse practitioners (even in medically underserved areas), against direct third-party payments to nurse practitioners and against prescriptive privileges for nonphysician providers.¹⁷⁹ The AMA similarly advocates for its members. For example, in 2006 the AMA created a partnership that was focused on defeating leg-

175. KEELING, *supra* note 168, at 154.

176. FAIRMAN, *supra* note 147, at 6.

177. CHRISTINE M. SHEEHY AND MARIANNE C. MCCARTHY, *ADVANCED PRACTICE NURSING: EMPHASIZING COMMON ROLES* 61 (1998).

178. As one writer scholar wrote:

The line [between nursing and medicine] is elusive because it is incapable of definition. Some acts are legally performed by both physicians and nurses, and thus are both medical and nursing acts, depending upon who is performing them. The area of shared turf is increasingly steady, frustrating efforts to delineate exclusive definitions of medicine and nursing.

Jane Greenlaw, *Sermchief v. Gonzales and the Debate over Advanced Nursing Practice Legislation*, 12 L. MED & HEALTH CARE 30, 30 (1984).

179. FAIRMAN, *supra* note 147, at 183; for a discussion on third party reimbursement for nurses, see MEZEY AND MCGIVERN, *supra* note 137, at 322-41.

islation proposed in several states that would expand the practice of other health care providers.¹⁸⁰ But its position does not go unchallenged. “In response, twenty-six other health provider organizations—including those representing nurse practitioners, physical therapists, and psychologists—formed the coalition for patients’ rights.”¹⁸¹ There is a place for all of these stakeholders to participate in the debate and influence the outcome.

C. Regulation of Lawyers—A Judicial Process

The regulation of lawyers has taken a very different path than the regulation of health care professionals. While doctors have relied on legislatures to pass laws that would define the scope of their monopoly and adopt licensing requirements, lawyers relied on the state supreme courts. The result of this difference is that the legislative process has been heavily used as a forum to challenge the scope of physicians’ monopoly and explore the role of other health care professionals. With respect to the legal profession, however, the use of the legislative process to expand the delivery of legal services has been extremely restricted and frequently unsuccessful as a matter of state constitutional law.¹⁸² The alternative routes to regulate the delivery of legal services—judicial rulemaking and constitutional amendments—both have their own limitations regarding public participation and effectiveness. While one can find some examples of nonlawyer activities being explored through each of these forums, collectively the efforts are weak and limited when compared to the robust legislative exploration of licensing a wide range of health care professionals.

Starting around the turn of the twentieth century the state supreme courts asserted that, under the separation of powers doctrine, they had the exclusive power to regulate the admission, discipline and disbarment of attorneys.¹⁸³ This conclusion put the responsibility on the courts to determine the training and qualifications for those who would be granted a license to practice law.¹⁸⁴ It also largely precluded the legislatures from participating in the regulation of lawyers.¹⁸⁵

180. FAIRMAN, *supra* note 147, at 188.

181. *Id.*, see also KEELING, *supra* note 168, at 146 (discussing the AMA’s opposition to legislation that expanded the scope of practice for other health professionals).

182. See, e.g., *Bennion v. Kassler Escrow, Inc.*, 635 P.2d 730, 736 (Wash. 1981) (holding that legislature lacked the constitutional power to authorize escrow agents to prepare certain legal documents); *Meunier v. Bernich*, 170 So. 567, 577 (La. Ct. App. 1936) (holding that legislature lacked constitutional power to exempt certain activities by claims adjusters from the definition of the practice of law).

183. Rigertas, *supra* note 110, at 82-91. Historically this was not always the position of every state court. See, e.g., *In re Miller*, 244 P. 376, 380 (Ariz. 1926) (“We are of the opinion that under its police power the Legislature has the right to say what qualifications a citizen must possess in order to be permitted to practice law the same that it may determine the requirements for practicing medicine, dentistry, pharmacy, or any other profession, vocation or calling.”).

184. Rigertas, *supra* note 110, at 89-91.

185. *Id.* at 89.

Despite the state supreme court's exclusive jurisdiction over the regulation of lawyers, lawyers interested in curbing the unauthorized practice of law in the early 1900s tried to lobby state legislatures to enact legislation that would broadly define the scope of the legal profession's monopoly.¹⁸⁶ These efforts failed and by the 1930s the legal profession dramatically changed its strategy and began to argue that the legislatures had no power to define the practice of law; only the courts had that power.¹⁸⁷ This was an effective strategy. Starting in the 1930s and 40s, state supreme courts have held that, under the separation of powers doctrine, they have the inherent and exclusive power to define what acts constitute the practice of law and what acts constitute the unauthorized practice of law.¹⁸⁸

Defining the practice of law has been difficult for the courts. Only a few state supreme courts have adopted a rule that attempts to define the practice of law and their efforts leave much to be answered.¹⁸⁹ In the absence of a supreme court rule defining the practice of law in the majority of states, the practice of law has

186. *Id.* at 92-102.

187. *Id.* at 116-18.

188. Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 636-41 (1978); RIGERTAS, *supra* note 110, at 118-19; *see e.g.*, *Neal v. Wilson*, 873 S.W.2d 552, 557 (Ark. 1994) ("The power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government."); *Unauthorized Practice of Law Comm. of Supreme Court of Colo. v. Employers Unity, Inc.*, 716 P.2d 460, 463 (Colo. 1986) ("The Colorado Supreme Court has the exclusive authority to define and to regulate the practice of law."); *State Bar Ass'n of Conn. v. Conn. Bank & Trust Co.*, 131 A.2d 646, 656 (Conn. Super. Ct. 1957) ("The power to regulate, control and define the practice of law reposes in the judicial department.").

189. *See, e.g.*, ALASKA BAR R. 63; ARIZ. SUPREME COURT R. 31; ARK. CONTINUING LEGAL ED. BD. REG. §2.02; CONN. RULES FOR THE SUPERIOR COURT §2-44A; KY SUPREME COURT R. 3.020; UTAH SUPREME COURT R. 1 (2005); VA. SUPREME COURT R., Part 6, §1; WA GEN. R. 24; WY. SUPREME COURT R. 11.1. In 2002 the ABA attempted to draft a model definition of the practice of law. Task Force on the Model Definition of the Practice of Law—Draft (9/18/02), http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition.html. Criticism of the efforts came from lawyers who did not think it was wise to try to define the practice of law, from consumer advocacy groups who thought it would further harm the 38 million low- and moderate-income households, and from the Federal Trade Commission and Department of Justice who were concerned about raising costs for consumers and limiting their competitive choices. *See, e.g.*, Letter from Anthony E. Davis and W. William Hodes to the ABA Task Force on the Model Definition of the Practice of Law on behalf of the Association of Professional Responsibility Lawyers (December 12, 2002), <http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/aprl.authcheckdam.pdf>; Comments submitted by Thomas M. Gordon to the ABA Task Force on the Model Definition of the Practice of Law on behalf of HALT (December 20, 2002), <http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/halt.authcheckdam.pdf>; Letter from R. Hewitt Pate, et al. to the ABA Task Force on the Model Definition of the Practice of Law on behalf of the FTC and DOJ (December 20, 2002), <http://www.justice.gov/atr/public/comments/200604.htm>. The ABA abandoned its efforts to adopt a model definition of the practice of law. Report to the House of Delegates, <http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm.authcheckdam.pdf>.

largely been defined in the decisional law on a case-by-case basis.¹⁹⁰ State courts struggle with the task of articulating a definition in their case law and acknowledge the difficulty.¹⁹¹ Some courts have veered away from trying to define the practice of law in any broad sense, but instead only assess the conduct involved in the specific case before it. As the Supreme Court of Florida explained, “Many courts have attempted to set forth a broad definition of the practice of law. Being of the view that such is nigh onto impossible and may injuriously affect the rights of others not here involved, we will not attempt to do so here.”¹⁹² The courts’ may be correct in concluding that defining the practice of law is almost impossible. Instead, it may be easier instead to define what acts nonlawyers may perform, instead of trying to define those acts that are within the exclusive scope of lawyers’ monopoly.¹⁹³

190. A handful of legislatures did adopt definitions of the practice of law in the 1930s and some of those definitions remain on the books today. RIGERTAS, *supra* note 110, at 116-17.

191. *See, e.g.*, *Creditors’ Serv. Corp. v. Cummings*, 190 A. 2, 9 (R.I. 1937) (“What constitutes the practice of law is extremely difficult, if not unwise, to even attempt to define, and so the determination of any issue that presents this question must be left to the facts of each case.”); *Cowern v. Nelson*, 290 N.W. 795, 797 (Minn. 1940) (“The line between what is and what is not the practice of law cannot be drawn with precision.”); *People ex rel. Illinois State Bar Ass’n v. Schafer*, 87 N.E.2d 773, 776 (Ill. 1949) (“It would be difficult, if not impossible, to lay down a formula or definition of what constitutes the practice of law.”); *State ex rel. Florida Bar v. Sperry*, 140 So.2d 587, 591 (Fla. 1962) (“Many courts have attempted to set forth a broad definition of the practice of law. Being of the view that such is nigh onto impossible and may injuriously affect the rights of others not here involved, we will not attempt to do so here. Rather we will do so only to the extent required to settle the issues of this case.”); *Denver Bar Ass’n v. Public Utilities Comm’n*, 391 P.2d 467, 471 (Colo. 1964) (“There is no wholly satisfactory definition as to what constitutes the practice of law; it is not easy to give an all-inclusive definition”); N.Y. Code Prof. Resp. EC 3-5 (McKinney 2006) (“It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law.”). Some legal commentators have also agreed. *See, e.g.*, Ralph T. Catterall, *The Unauthorized Practice of the Law*, 19 A.B.A. J. 625 (1933) (“It is impossible to define the practice of the law.”); John G. Jackson, *The Unauthorized Practice of the Law*, 12 NEB. L. BULL. 332, 334 (1933-34) (“[statutes] should not undertake to define the practice of law, such a definition having been found neither practicable nor advisable, as self-limiting and inviting evasion.”); *but see* Soha F. Turfler, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903 (2004).

192. *State ex rel. Florida Bar v. Sperry*, 140 So.2d 587, 591 (Fla. 1962).

193. The health care field has had some definitional problems too, but that has not prevented the development of a stratified profession. *See* CHAPMAN, *supra* note 99, at 135-39 (discussing debates about “what is medicine”). For example, in Missouri there was a question about whether the nursing practice act would authorize “advanced nursing” or whether additional legislation needed to clarify that those engaged in advanced nursing were not engaged in the practice of medicine. The Missouri court held that additional legislation was unnecessary because the legislation authorized a broad scope of practice for nurses. The court declined “to draw that thin and elusive line that separates the practice of medicine and the practice of professional nursing.” Jane Greenlaw, *Sermchief v. Gonzales and the Debate over Advanced Nursing Practice Legislation*, 12 L. MED & HEALTH CARE 30, 30 (1984).

1. *Regulation of Nonlawyer Activities by State Supreme Courts*

Courts can use their rulemaking powers to carve out areas where nonlawyers may provide some services that compete with lawyers. The Arizona and Washington Supreme Courts, however, are the only ones that have regulated and authorized some nonlawyer activities through their rulemaking powers. The limited use of rulemaking in this manner may be a result of the legal profession's dominance over the rulemaking process, which will be discussed more fully in Section IV *infra*.

In 1983 the Washington Supreme Court adopted a rule that created limited practice officers ("LPOs").¹⁹⁴ In Washington, LPOs are nonlawyers who the court has authorized to "select, prepare and complete legal documents incident to the closing of real estate and personal property transactions."¹⁹⁵ In order to become certified, LPOs must be at least eighteen years of age, be of good moral character and take an examination that satisfies the requirements established by the Limited Practice Board (the "Board").¹⁹⁶ The Board consists of nine members whom the Supreme Court appoints; at least four of those members must be admitted to the practice of law in the State of Washington.¹⁹⁷ LPOs have their own Rules of Professional Conduct¹⁹⁸ and they have continuing education requirements.¹⁹⁹ However, while LPOs are authorized to select and prepare forms the Board has approved for certain types of transactions, the rule states that LPOs "cannot give legal advice as to the manner in which the documents affect the clients."²⁰⁰

The Arizona Supreme Court has also used its rulemaking powers to authorize some activities by nonlawyers. Arizona Supreme Court Rule 31 authorizes nonlawyers to perform activities such as appearing in a representative capacity in some administrative proceedings.²⁰¹ The Arizona Supreme Court has also created Certified Legal Document Preparers ("LDPs"), who are nonlawyers certified to provide document preparation assistance without the supervision of an

194. WASH. ADMISSION TO PRACTICE RULE 12. See also Robert C. Farrell, *Limited Practice Officers and Admission to Practice Rule 12: Taking or Not?*, 23 SEATTLE U. L. REV. 735 (2000).

195. WASH. ADMISSION TO PRACTICE RULE 12(a).

196. WASH. ADMISSION TO PRACTICE RULE 12(c).

197. WASH. ADMISSION TO PRACTICE RULE 12(b)(1).

198. Limited Practice Officer Rules of Professional Conduct, *available* at <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Admissions/Limited-Licenses-and-Special-Programs/Nonlawyers-and-Students/Limited-Practice-Officers/>.

199. WASH. ADMISSION TO PRACTICE RULE 12(f).

200. WASH. ADMISSION TO PRACTICE RULE 12(e)(2)(v). The Washington Supreme Court also enacted General Rule 24, which defines the practice of law and explicitly carves out some exceptions to the definition, such as acting a legislative lobbyist, Acting as a lay representative authorized by administrative agencies or tribunals and serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator. WASH. S. CT. GEN. R. 24 (2002). The Washington State Bar Association proposed this rule to the Supreme Court. 1 WASH. PRAC., METHODS OF PRACTICE § 3:27 (2011 ed.).

201. *E.g.*, ARIZ. SUPREME CT. R. 31(d)(1), (5), (6) and (8) (West 2011).

attorney.²⁰² LDPs must sit for and pass an examination, must be at least eighteen years old, must be of good moral character and meet some minimal education requirements.²⁰³ They also have a Code of Conduct²⁰⁴ and continuing education requirements.²⁰⁵ LDPs can prepare and provide legal documents without the supervision of an attorney and they can provide general legal information.²⁰⁶ They may not, however, “provide any kind of specific advice, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options or strategies.”²⁰⁷ In other words, neither Washington nor Arizona’s Supreme Courts have used their rulemaking powers to create a new category of licensed professionals who could give consumers any legal advice or provide any limited representation. They essentially only authorize the clerical act of filling out forms at the customers’ direction.

2. *Regulation of Nonlawyer Activities by State Constitutional Amendment*

Arizona provides one example of nonlawyer regulation by constitutional amendment. The Arizona Constitution was amended in 1962 to allow real estate brokers and salesmen to prepare deeds, mortgages, leases and contracts for the sale of realty.²⁰⁸ Real estate brokers started the campaign to amend the constitution after a 1961 Arizona Supreme Court decision, which held that real estate brokers’ participation in these activities was the unauthorized practice of law.²⁰⁹ The Court’s opinion was based on the separation of powers doctrine and the court’s inherent power to regulate the practice of law.²¹⁰ In response to this opinion, the realtors started an initiative petition to amend the constitution that was put on the ballot

202. ARIZ. SUPREME CT. R. 31(d)(24) (West 2011) and ARIZ. CODE OF JUDICIAL ADMIN. §7-208.

203. ARIZ. CODE OF JUDICIAL ADMIN. §7-208(E)(3)(b).

204. ARIZ. CODE OF JUDICIAL ADMIN. §7-208(J). Procedures for disciplinary proceedings against certificate holders who fail to comply with their obligations can be found in ARIZ. CODE OF JUDICIAL ADMIN. §7-201(H).

205. ARIZ. CODE OF JUDICIAL ADMIN. §7-208(L).

206. ARIZ. CODE OF JUDICIAL ADMIN. §7-208(F)(1).

207. ARIZ. CODE OF JUDICIAL ADMIN. §7-208(F)(1).

208. AZ CONST. §26, reads:

Any person holding a valid license as a real estate broker or a real estate salesman regularly issued by the Arizona State Real Estate Department when acting in such capacity as broker or salesman for the parties, or agent for one of the parties to a sale, exchange, or trade, or the renting and leasing of property, shall have the right to draft or fill out and complete, without charge, any and all instruments incident thereto including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty, and bills of sale.

209. *State Bar v. Arizona Land Title & Trust Co.*, 366 P.2d 1, 13 (Ariz. 1961); see also Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem that Won’t Go Away*, 34 ARIZ. ST. L.J. 585, 587-88 (2002).

210. *State Bar v. Arizona Land Title & Trust Co.*, 366 P.2d 1, 9 (Ariz. 1961).

after it was supported by twice the number of signatures needed.²¹¹ After spirited campaigns by the bar and the realtors, the voters adopted the constitutional amendment in the 1962 general election.²¹²

3. *Regulation of Nonlawyer Activities by State Legislatures*

As a result of the state supreme courts' power to define the scope of lawyers' monopoly legislatures, and accordingly the public, have been largely excluded from debates about what legal services nonlawyers could provide to consumers. Compared to legislative activity regulating health care services, legislative activity regulating legal services has been very constrained. In most states, it is likely that a legislative act that defined the practice of law, particularly in the context of carving out some activities from the exclusive domain of lawyers' scope of practice, would face a successful constitutional challenge and be invalidated by the courts.

For example, in 1936 the Louisiana Supreme Court held unconstitutional a statute that exempted some activities of insurance claims adjusters from the definition of the practice of law.²¹³ The court explained the legislature's lack of authority to enact such a statute as follows:

If the courts have the inherent power to prescribe rules and regulations for those seeking admission to the bar and if the court has the authority to discipline or disbar members of the legal profession, *it follows that the scope of power residing in the judiciary embraces the right to define, by court rules, or by adjudication as cases may arise, the acts constituting the practice of law*; for, if it were otherwise, the Legislature could, as it has attempted to do in this case, nullify and render ineffective the inherent judicial authority, by providing that a certain course of conduct by laymen is not the practice of law, in the face of previous adjudications by the court describing and defining the functions of the lawyer in the pursuit of his profession.²¹⁴

In 1981 the Supreme Court of Washington reached a similar conclusion in *Bennion v. Kassler Escrow, Inc.*²¹⁵ The Washington legislature had enacted the Escrow Agent Registration Act, which authorized escrow agents and officers to "select, prepare, and complete documents and instruments relating to . . . contracts for sale or

211. Barlow F. Christensen, *Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense*, 1980 AM. B. FOUND. RES. J. 159, 197 (1980); see also Rose, *supra* note 209, at 587-88.

212. Christensen, *supra* note 211, at 197; see also Rose, *supra* note 209, at 587-88.

213. *Meunier v. Bernich*, 170 So. 567, 577 (La. Ct. App. 1936) ("When the Legislature passes a statute which attempts to define the practice of law, it directly impinges upon the constitutional grant of power bestowed upon the courts respecting the regulation of the conduct of the members of the legal profession.").

214. *Id.* at 575 (emphasis added).

215. *Bennion v. Kassler Escrow, Inc.*, 635 P.2d 730, 736 (Wash. 1981).

purchase of real and personal property.”²¹⁶ This legislative act was an attempt to reverse a 1978 case in which the Washington Supreme Court held that the preparation of legal instruments and contracts that create legal rights was the practice of law.²¹⁷

In the *Bennion* case, a law firm brought suit against a registered escrow agent and argued that the agent was engaged in the unauthorized practice of law and that the legislation authorizing the escrow agents’ activities was unconstitutional.²¹⁸ The Supreme Court of Washington agreed that the act was unconstitutional and explained how the legislature had usurped the court’s power:

[T]he power to regulate the practice of law is solely within the province of the judiciary and this court will protect against any improper encroachment on such power by the legislative or executive branches. In passing [the act], allowing lay persons to practice law, the legislature impermissibly usurped the court’s power. Accordingly, [the act] is unconstitutional as a violation of the separation of powers doctrine.²¹⁹

In California, however, the legislature has succeeded in authorizing nonlawyer legal document assistants and unlawful detainer assistants to assist with the preparation of legal documents in a ministerial manner without supervision by a lawyer.²²⁰ A legal document assistant in California is defined as:

Any person who . . . provides, or assists in providing, or offers to provide, or offers to assist in providing, for compensation, any self-help service to a member of the public who is representing himself or herself in a legal matter, or who holds himself or herself out as someone who offers that service or has that authority. This paragraph does not apply to any individual whose assistance consists merely of secretarial or receptionist services.²²¹

Legal document assistants and unlawful detainer assistants need to be registered in the county of their principal place of business and in any county where they provide services.²²² They must also be bonded in an amount of \$25,000 to \$100,000,

216. *Id.* at 731-32. The preparation of legal documents has frequently been considered the practice of law by state courts. *See, e.g.*, *King v. First Capital Fin. Serv. Corp.*, 828 N.E.2d 1155, 1162 (Ill. 2005) (“All parties agree, and we concur, that the [nonlawyer] defendants’ preparation of notes and mortgages in this case constitutes the practice of law.”); *Chicago Bar Ass’n v. Kellogg*, 88 N.E.2d 519, 527 (Ill. App. Ct. 1949) (“According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and . . . the preparation of legal instruments of all kinds. . .”).

217. *Bennion v. Kassler Escrow, Inc.*, 635 P.2d. at 732.

218. *Id.* at 731.

219. *Id.* at 736.

220. CAL. BUS. & PROF. CODE § 6400, et seq. (West 2003).

221. CAL. BUS. & PROF. CODE § 6400(c)(1) (West 2003).

222. CAL. BUS. & PROF. CODE § 6402 (West 2003). Registration eligibility is defined in CAL. BUS. & PROF. CODE § 6402.1 (West 2003).

depending on the number of assistants in a business.²²³ However, the act prohibits such assistants from providing “any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms, or strategies.”²²⁴

Although the California legislation has never been the subject of a constitutional challenge, at the time of its creation the State Bar did raise questions about the legislature’s authority to act in this area:

The State Bar last year expressed concern that putting paralegals under the regulatory authority of an executive branch department would pose constitutional problems. “We note that the practice of law has always been under the inherent, plenary power of the Supreme Court,” former State Bar General Counsel Diane Yu wrote. . . .²²⁵

Perhaps no one has challenged the constitutionality of the statute because the legislative history states that the act was intended to codify the holding of a California case, *People v. Landlords Professional Services*.²²⁶ That case held that clerical services—such as providing forms to a client, filling out forms at the direction of a client, and filing and serving forms at the direction of a client—did not constitute the practice of law.²²⁷ Therefore, the legislature was not carving out an area from lawyers’ scope of practice and authorizing nonlawyers to provide services in that area; it was simply regulating activities that the California courts had already held was not the practice of law.

State legislatures have been somewhat more active in authorizing nonlawyers to appear in a representative capacity in administrative proceedings.²²⁸ There is a split among the state courts regarding the constitutional propriety of these statutes. Some state courts have invalidated them and some state courts have found them constitutional, although their rationales differ.

Some courts have upheld such statutes as constitutional by reasoning that a statute permitting a nonlawyer to represent a person in an administrative proceed-

223. CAL. BUS. & PROF. CODE § 6405 (West 2003).

224. CAL. BUS. & PROF. CODE § 6400(g) (West 2003); *see also* CAL. BUS. & PROF. CODE § 6401.5 (“This chapter does not sanction, authorize, or encourage the practice of law by nonlawyers.”).

225. *Assembly Votes 42-29 to Approve Bill to Regulate Independent Paralegals*, Metropolitan News Company (Nov. 19, 1998).

226. SB 1418, Senate Floor, 8/25/98.

227. *People v. Landlords Prof’l Servs.*, 215 Cal.App.3d 1599, 1608 (1989); *see also* SB 1418, Senate Floor, 8/25/98.

228. *See, e.g.*, 820 ILCS 405/806 (authorizing nonlawyers to represent claimants before the Illinois Department of Employment Security); COLO. REV. STAT. §8-74-106(e) (providing that “All interested parties shall have the right to be present or to be represented by an attorney or other representative at the hearing” before the Industrial Claim Appeals Panel). *See also* *Eagle Indem. Co. v. Indus. Accident Comm’n*, 18 P.2d 341, 342-43 (Cal. 1933) (holding that the Legislature did have the authority to permit nonlawyers to appear before the Industrial Accident Commission subject to judicial inquiry regarding the propriety and reasonableness of the legislature’s act).

ing was not authorizing that individual to practice law. For example, the Illinois legislature passed the Unemployment Insurance Act, which states, in part: “Any individual or entity in a proceeding before the Director or his representative, or the Referee or the Board of Review, may be represented by a union or any duly authorized agent.”²²⁹ Dismissing a claim that a representative acting under this statute was engaged in the unauthorized practice of law, an Illinois appellate court held that:

[T]he statute is not authorizing a “union” or “duly authorized agent” to engage in the practice of law. The statute instead limits representation to “any proceeding before the Director or his representative, or the Referee or the Board of Review.” Thus, the representation by a “union or any duly authorized agent” is limited to administrative hearings and does not extend to courts of law.²³⁰

Illinois courts have further reasoned that the acts of the nonlawyer representatives did not including giving legal advice and, therefore, they were not engaged in the practice of law.²³¹

A couple of other state courts have upheld similar statutes by reasoning that public policy grounds warranted upholding the statute even though the nonlawyers’ authorized acts did constitute the practice of law. For example, in Colorado, a statute authorized nonlawyers to appear in a representative capacity on behalf of claimants for unemployment benefits.²³² The Unauthorized Practice of Law Committee of the Supreme Court of Colorado (“UPL Committee”) petitioned the court to enjoin nonlawyers from engaging in activities such as preparing and filing written documents; giving legal advice to the employer and the employer’s present employees; eliciting testimony at the hearing; presenting closing arguments to the referees and therein quoting specific sections of the Colorado Revised Statutes;

229. 820 ILCS 405/806.

230. *Grafner v. Dept. of Employment Sec.*, 914 N.E.2d 520, 531 (Ill. App. Ct. 2009); *see also Sudzus v. Dept. of Employment Sec.*, 914 N.E.2d 208, 214-17 (Ill. App. Ct. 2009) (holding that, while the General Assembly has no authority to grant laymen the right to practice law, the Unemployment Insurance Act was not granting such a right by allowing nonattorneys to represent claimants in administrative hearings); Jeffery Parness, “Yes” to Nonlawyers in Illinois Administrative Adjudications, 97 ILL. B.J. 636, 636 (Dec. 2009).

231. *Perto v. Board of Review*, 654 N.E.2d 232 (Ill. App. Ct. 1995) (holding that representation by nonlawyer before the Department of Employment Security did not constitute the practice of law because no legal advice was given); *see also* Virginia State Bar Unauthorized Practice of Law Committee, Op. 155 (1992), available at <http://www.vsb.org/site/regulation/virginia-upl-opinion-155> (advisory opinion stating that a layperson’s appearance in front of an administrative agency does not constitute the practice of law).

232. *Unauthorized Practice of Law Committee of Supreme Court of Colorado v. Employers Unity, Inc.*, 716 P.2d 460, 461 (Colo. 1986); *see also* Gregory T. Stevens, *The Proper Scope of Non-lawyer Representation in State Administrative Proceedings: A State Specific Balancing Approach*, 43 VAND. L. REV. 245, 267 (1990) (discussing the State Supreme Court of Arizona’s holding that non-lawyers could provide limited representation in administrative hearings on public policy grounds).

and, in short, making a record of the proceedings on the claim. The UPL Committee's petition also argued that the statute authorizing these activities was unconstitutional insofar as it permitted nonlawyers to practice law.²³³

The Colorado Supreme Court found that the activities of the nonlawyers did constitute the practice of law, but it did not enjoin the nonlawyers from continuing to do so and it did not hold that the statute was unconstitutional.²³⁴ First the court concluded that "the General Assembly does not have the constitutional authority to determine who can practice law before administrative agencies."²³⁵ The court then reasoned that, exercising its own authority to regulate the practice of law, it would not hold the statute unconstitutional because it "conforms to the judiciary's authority to regulate the practice of law."²³⁶ The court explained that, as a matter of public policy, these nonlawyer services were economical and were of no proven harm to consumers:

Lay representation in this field has been accepted by the public for 50 years. It poses no threat to the People of the State of Colorado. Nor is it interfering with the proper administration of justice. No evidence was presented to the contrary.

In general, the amounts involved do not warrant the employment of an attorney. The average weekly benefit in 1983 was \$148.20. Because many claimants are reemployed before their 26-week eligibility period expires, it is impossible to predict with any certainty what the aggregate amount of benefits received by a claimant will be. Lay representation has proven cost effective.

As a matter of public policy, the benefits of the present system of lay representation serve the best interests of the public.²³⁷

A few courts, however, have held that these types of legislative acts encroach on the judicial branch's exclusive jurisdiction to regulate the practice of law and, accordingly, they have held that the statutes were unconstitutional.²³⁸

233. *Unauthorized Practice of Law Committee of Supreme Court of Colorado v. Employers Unity, Inc.*, 716 P.2d at 461.

234. *Id.* at 463.

235. *Id.*

236. *Id.* at 463-64.

237. *Id.* at 463; *see also* *Hunt v. Maricopa County Employees Merit System Comm'n*, 619 P.2d 1036, 1038-39 (Ariz. 1980) (adopting, in part, legislation that authorized lay representation in administrative proceedings based on the public interest).

238. *See, e.g., Turner v. Kentucky Bar Ass'n*, 980 S.W.2d 560, 563 (1998) (holding unconstitutional a statute that authorized non-attorneys to act as legal representatives in proceedings before the Department of Workers' Claims); *Washington Attorney AGO 61-62 No. 6* (1961) (advisory opinion stating that "[a]pppearance by non-attorney in a representative capacity before a state administrative agency in a 'contested case' constitutes the unauthorized practice of law. Whether an appearance in other administrative proceedings constitutes the unauthorized practice of law depends upon facts of each case and requirements of protection of the public interest.').

It is also worth noting that federal courts and agencies have asserted that they have the right to determine who will appear before them and neither the state courts nor legislatures can invalidate this power.²³⁹ The United States Code also allows federal agencies to determine whether nonlawyers may appear in administrative proceedings in a representative capacity.²⁴⁰ Accordingly, the executive and legislative branches of the federal government have authorized nonlawyers to perform services that could otherwise be considered the practice of law. For example, §110 of the Bankruptcy Code authorizes nonlawyers to prepare bankruptcy petitions for a fee.²⁴¹ Federal statutes and regulations also authorize nonlawyers to appear in a representative capacity in many types of administrative proceedings; for example, proceedings before the Internal Revenue Service, the National Highway Traffic Safety Administration, and patent prosecutions before the United States Patent and Trademark Office.²⁴² The Department of Homeland Security has also authorized accredited representatives, who are not lawyers, to represent aliens in immigration proceedings.²⁴³

However, much like similar state statutes, even when federal statutes and regulations authorize nonlawyers to perform acts that overlap legal services, there is usually little or no training, education or licensure required that would provide

239. *E.g.*, *Sperry v. Florida*, 373 U.S. 379, 383-85 (1963) (holding that Florida could not enjoin a nonlawyer from preparing and prosecuting patent applications in Florida when a federal statute authorized nonlawyers to appear in patent proceedings); *United States v. Louisiana*, 751 F. Supp. 608, 614 (E.D. La. 1990) (holding that district courts are granted broad discretion to determine to resolve who would be permitted to appear before it and how appearances would be conducted).

240. 5 U.S.C. § 555(b) (permitting federal agencies to determine whether nonlawyers may appear in administrative proceedings in a representative capacity).

241. 11 U.S.C. §110. The Bankruptcy Code defines a “bankruptcy petition preparer” as “a person, other than an attorney for the debtor or an employee of such attorney under the direct supervision of such attorney, who prepares for compensation a document for filing.” 11 U.S.C. § 110(a)(1) (emphasis added).

242. *See, e.g.*, 26 C.F.R. § 601.502 (2009) (permitting certain nonlawyers to represent taxpayers before the Internal Revenue Service), 5 U.S.C. §500(c) (authorizing certified public accountants to represent persons in proceedings before the Internal Revenue Service); 49 C.F.R. §§ 511.71-511.73 (2009) (permitting nonlawyers to represent parties before the National Highway Traffic Safety Administration); 37 C.F.R. §11.7 (setting out requirements to practice before the United States Patent and Trademark Office, which does not include being licensed as an attorney for patent prosecutions); 37 C.F.R. §11 (defining “practitioner” before the United States Patent and Trademark Office to include nonlawyers who meet other qualifications); *see also Sperry v. Florida*, 373 U.S. 379, 383-85 (1963) (holding that Florida could not enjoin a nonlawyer from preparing and prosecuting patent applications in Florida when a federal statute authorized nonlawyers to appear in patent proceedings); Quintin Johnstone, *Unauthorized Practice of Law and State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 811 (2003) (discussing federal agencies permitting laymen to appear in a representative capacity).

243. 8 C.F.R. § 1292.1 and §1292.2; *see also* Who Can Represent Aliens in Immigration Proceedings, U.S. Dept. of Justice Fact Sheet, *available at* http://www.justice.gov/eoir/statspub/raroster_files/WhoCanRepresentAliensFactSheet10022009.pdf.

some measure of quality control and protection for consumers.²⁴⁴ For example, for a nonlawyer to be an accredited representative in immigration proceedings, the person must be of “good moral character,” and on his or her application “set forth the nature and extent of the proposed representative’s experience and knowledge of immigration and naturalization law and procedure,” however, there are no articulated minimum standards.²⁴⁵ The lack of minimum standards regarding training, education, and experience raises questions about the competency of accredited representatives and whether this option adequately protects consumers.

For instance, recently the Board of Immigration Appeal barred Father Vitaglione, a New York priest who was a nonlawyer accredited representative, from appearing in court.²⁴⁶ Father Vitaglione had 761 immigration cases in June 2010—more than the Legal Aid Society’s entire immigration unit in New York.²⁴⁷ He never turned down a case and did not charge any fees because, as he said “We have more lawyers than we have fire hydrants in this city and no one will help.”²⁴⁸ But the volume of his case load caused him to miss appearances and deadlines, and the quality of the legal work sometimes jeopardized cases.²⁴⁹ He was filling an enormous need in the system that is not being met by lawyers, but the outcome suggests there still needs to be adequate protection regarding the quality of services that nonlawyers provide to the public in such important proceedings.

4. *Unregulated Market Development of Nonlawyer Activities*

While statutes and rules authorize some nonlawyer assistance, nationwide that authorization is rare. Furthermore, the assistance authorized is usually limited to aiding in the preparation of documents; the nonlawyers may not give legal advice. Additionally, the legal profession’s efforts to increase access to justice have not created widespread access to legal services. It was predictable, therefore, that consumers’ growing demand for legal services would create an opportunity for profiteers of nonlawyer assistance to enter the marketplace. Commercial do-it-yourself document preparation services, for instance, have become widespread and demand for them is high.²⁵⁰ These services began in the 1960s and 1970s with

244. One notable exception is patent agents who are required to take the patent bar and demonstrate that he or she “[p]ossesses the legal, scientific, and technical qualifications necessary for him or her to render applicants valuable service.” 37 C.F.R. §11.7.

245. 8 C.F.R. §1292.2.

246. *See, e.g.*, Sam Dolnick, *Removal of Priest’s Cases Exposes Deep Holes in Immigration Courts*, N.Y. TIMES (July 7, 2011) (discussing a nonlawyer priest who had more immigration clients in New York than the Legal Aid Society’s entire immigration unit, but who was recently barred from continuing to handle immigration cases for failing to appear or appearing unprepared to hearings in 221 cases).

247. *Id.*

248. *Id.*

249. *Id.*

250. ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 5 (November 2009), *available at*

“do-it-yourself” books and have evolved with today’s technology to include a wide array of “do-it-yourself” software programs and web sites.²⁵¹ These services have also been afforded a fair amount of first amendment protection, particularly to the extent that they are merely providing information about the law.²⁵²

Overall, these services are occurring in an unregulated manner, which does little to provide the consumer protection that the legal profession deems so important.²⁵³ But they have also fueled significant debates about what constitutes the practice of law, such as, when is a computer program providing legal advice?²⁵⁴ These questions are resolved, for the most part, through lawsuits filed by lawyers and bar associations²⁵⁵ that seek to have the courts define these services as

http://apps.americanbar.org/legalservices/delivery/downloads/prose_white_paper.pdf (“Despite facing allegations of unauthorized practice of law, one online document preparation company reports serving over one million customers since operations began in 2001.”).

251. Steve French, *When Public Policies Collide. . . . Legal “Self-Help” Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93, 94 (2001) (stating that legal self-help books and do-it-yourself kits are the “logical predecessors of today’s legal software”). The former president of the Illinois State Bar Association lamented the flight of consumers from traditional legal services when he wrote, “Where would our nation be if its citizens became so disenchanted with our legal system that they abandoned it? If that notion seems absurd, consider the continued growth in the unauthorized practice of law, which has largely gone unchallenged by anybody but the ISBA [Illinois State Bar Association] and IRELA [Illinois Real Estate Lawyers Association].” Robert K. Downs, *Rebuilding our Credibility by Restoring Professionalism*, 93 ILL. B.J. 496, 496 (Oct. 2005).

252. See Derek Denkla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameter*, 67 FORDHAM L. REV. 2581, 2591-2 (1999).

253. Lawyers’ discussions about the unauthorized practice of law take note of potential harm to consumers. See, e.g., Ole Bly Pace III, *Preparing to Meet the Future*, 93 ILL. B.J. 224, 224 (May 2005) (“The unauthorized practice of law is a real danger to the citizens of our state.”); *King v. First Capital Fin. Serv. Corp.*, 828 N.E.2d 1155, 1162 (Ill. 2005) (“The State requires minimum levels of education, training, and character before granting a license to practice law. The purpose of doing so is to protect the public from potential injury resulting from laypersons performing acts that require the training, knowledge, and responsibility of a licensed attorney.”) However, lawyers must also acknowledge that they also have a property interest in their law license, which is greater when there is less competition. *Richard F. Mallen & Assoc. Ltd. v. Myinjuryclaim.com Corp.*, 769 N.E.2d 74, 76 (Ill. App. Ct. 2002) (holding that Illinois lawyers and law firms have standing to file a cause of action seeking to enjoin the unauthorized practice of law because of their property interest in their law license, which is a valuable interest entitled to protection).

254. See French, *supra* note 251, at 101 (explaining that the questions regarding what type of services self-help and do-it-yourself kits actually provide (i.e. whether or not they are providing legal services) have become the basis for vigorous discussion). Interactive software has presented the legal profession with a complex variety of issues that threaten to dissolve traditional notions of the practice of law. Cynthia L. Fountaine, *When is a Computer a Lawyer: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. CIN. L. REV. 147, 150 (2002). Whether or not interactive legal software is deemed to be the practice of law depends on what definition is being used to define the practice of law. *Id.* at 150-158.

255. Most state bar organizations and their unauthorized practice committees enjoy significant enforcement rights. Professor Deborah Rhode surveyed 55 jurisdictions and only 9% imposed

the unauthorized practice of law and enjoin them from operating.²⁵⁶ It is rare for consumers to claim they have been injured by the unauthorized practice of law and to file these lawsuits.²⁵⁷ Similarly, these lawsuits are rarely brought by state agencies, such as consumer protection agencies.²⁵⁸

any external checks on the process. Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 14 (1981). In a vast majority of states, bar committees are the only agencies that are actively involved in policing unauthorized practice. *Id.* at 19. Many courts do not monitor bar committee priorities or procedures. *Id.* at 56. Fifty-three percent of the surveyed jurisdictions stated that the bar has the sole authority in initiating any type of proceedings against a UPL violator. *Id.* at 17. Most unauthorized practice controversy centers on activities involving form preparation and related advice. Reported cases involving lay practitioners and the majority of committee enforcement is focused on the areas of real estate (22%), divorce (14%), trusts (11%), incorporation (6%), and probate (5%). In general, UPL concerns a vast amount of common commercial activity. *Id.* at 30.

256. See, e.g., *Ohio State Bar Ass'n v. Lineguard, Inc.*, 935 N.E.2d 337 (Ohio 2010); *Richard F. Mallen & Assoc. Ltd. v. Myinjuryclaim.com Corp.*, 769 N.E.2d 74, 76 (Ill. App. Ct. 2002) (holding that Illinois lawyers and law firms have standing to file a cause of action seeking to enjoin the unauthorized practice of law); *Illinois State Bar Ass'n v. United Mine Workers of America*, District 12, 219 N.E.2d 503 (Ill. 1966) (Illinois State Bar Association filed suit seeking to restrain defendant from alleged unauthorized practice of law); *People ex rel. Illinois State Bar Ass'n v. Schafer*, 87 N.E.2d 773 (Ill. 1949) (Illinois State Bar Association filed suit against realtor and alleged that he was engaged in the unauthorized practice of law); *Chicago Bar Ass'n v. Kellogg*, 88 N.E.2d 519 (Ill. App. Ct. 1949) (The Chicago Bar Association sued defendant to restrain him from the alleged unauthorized practice of law); see also Susan Hoppdock, *Enforcing Unauthorized Practice Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 734 (2001) (discussing how Illinois allows attorneys to sue those who violate UPL statutes on the grounds that licensed attorneys have standing because their rights are infringed upon by UPL violators); Helen W. Gunnarson, *Law Pulse*, 89 ILL. B.J. 564 (Nov. 2001) (detailing the Illinois State Bar Association's litigation efforts to curb the unauthorized practice of law).

257. Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3 (1981) Only 39% of jurisdictions surveyed reported any direct customer complaints and out of the 1188 inquiries, investigations and complaints reported by bar agencies, only 2% were a form of customer complaint about a specific customer injury. *Id.* at 33. Of the jurisdictions surveyed, 47% responded that the public is skeptical of the bar's capacity for self-regulation or are suspicious of the bar's self-interest in UPL. *Id.* at 40. Also, 26% of the jurisdictions responding stated that the public desired access to laypersons. *Id.* Jurisdictions including Alabama, Washington, West Virginia, Arkansas, Texas and the District of Columbia recognize the ability of a consumer (the aggrieved party) to sue UPL violators. Susan Hoppdock, *Enforcing Unauthorized Practice Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 734 (2001); see also Illinois Attorney Act 705 ILCS 205/1 et seq. (PA 94-659) (amended in 2007 to allow a private cause of action for consumers seeking damages for the unauthorized practice of law); Thomas D. Zilavy & Andrew J. Chevez, *The Unauthorized Practice of Law: Court Tells Profession, Show Us the Harm*, 78 WIS. LAW. 8 (Oct. 2005) (discussing the Wisconsin Supreme Court's denial of the State Bar's petition to provide a clear definition of the unauthorized practice of law because the Bar did not provide any evidence that that a problem exists).

258. Professor Rhode makes the argument that UPL enforcement should be given to "less partisan" groups such as consumer protection agencies. Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice*

When the scope of the legal profession's monopoly is largely determined on a case-by-case basis, public participation in the debate is severely constrained. The debate is primarily between the parties to the litigation and perhaps amicus curie. Furthermore, when the litigation results in settlement between private parties, as it frequently does, the court may not even make a determination about whether or not the defendant's conduct was the unauthorized practice of law.²⁵⁹

Issues relating to access to legal services and consumer protection should be debated in a forum that allows all interested parties to participate in the debate. While it is likely that there is more than one reason for the difference in the range of options consumers have for health care services versus legal services, this article posits that a key reason is the availability of a democratic forum to assess options in the health care field—the legislature—and the lack of a similar forum in the field of legal services. The legislative experience of the health care profession provides some guidance to the legal profession, which has not been subject to the external pressures of a democratic process that could force reexamination of the boundaries of the legal profession's monopoly.²⁶⁰ As one commentator said regarding medicine: “In the final analysis, the professions' privileges have to be

Prohibitions, 34 STAN. L. REV. 1, 62 (1981). However, the Illinois State Bar Association has noted little interest by state agencies to prosecute the unauthorized practice of law. Robert K. Downs, *If Not Now, When?*, 94 ILL. B.J. 8, 8 (Jan. 2006) (“We’ve done a pretty good job at fighting the unauthorized practice of law, but litigation is expensive and proceeds on a case-by-case basis. Overwhelmed, underfunded, and sometimes disinterested state and local authorities are unable to make UPL a priority.”) In contrast, the state of Montana in a Supreme Court Rule dated April 20, 2010 dissolved the UPL commission and directed all complaints concerning unauthorized practice of law to the Montana Office of Consumer Protection. See State Bar of Montana, <http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=195> (last visited March 8, 2011).

259. For example, the Illinois State Bar Association sued We The People USA, a document preparation service, and alleged that it was engaged in the unauthorized practice of law. The parties settled their dispute by a consent decree that defines what acts that We The People may perform. *Accord reached in UPL case of We the People*, <http://webarchives.isba.org/association/sept07bn/Accord.htm> (last visited February 26, 2011); see also Joseph G. Bisceglia, Midterm Report, 96 ILL. B. J. 64, 64-65 (Feb. 2008); Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 15-16 (1981). Out of the jurisdictions surveyed, 93% allowed the bar to reach informal agreements terminating any unauthorized practice of law, 84% of bar associations may issue cautionary or cease and desist letters, 76% of bar associations may issue informal opinion in response to UPL inquiries. 72% of bar committees may issue warning letters, 76% may negotiate agreements, and 68% may issue informal opinions on their own initiative. *Id.*

260. It would not be the first time the legal profession took some guidance from the medical profession. In 1942 the president of the ABA complimented the AMA on some of its legislative activities and said that their experience was an “invaluable aid” to the ABA. The ABA president said, “It always seems an anachronism to me, but nevertheless it was true, that here were the lawyers who would be expected to be the pioneers in a legislative group like this taking their lessons from their brother professionals the medics on how to do the job that the lawyers themselves ought to know how to do.” FISHBEIN, *supra* note 99, at 471.

deserved and frequently renewed. None are eternal.”²⁶¹ The same applies to the legal profession.

IV. How to Apply the Public Participation Lesson to the Field of Legal Services.

A key lesson that the legal profession can learn from the health care profession is that more inclusive participation in debates about the scope of professional monopolies helps promote innovation in the delivery of services. As one writer stated:

[G]overnmental action will be intelligent and appropriate only to the degree that the problem has been thrashed out all along the lines and particularly in the major interest groups involved. The study of government must not only assess the representativeness of group pressures but also the method and quality of group thinking.²⁶²

This idea is not foreign to the legal profession. As Judge Hand wrote about the First Amendment, “right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.”²⁶³

Currently there is not an adequate multitude of tongues regarding the delivery of legal services. As many scholars have asserted, there is little room for public participation regarding the regulation of legal services.²⁶⁴ There is no place for all of the major interest groups to debate. There is no effective way to assess the quality of group thinking among lawyers. Lawyers have been far too insulated from external pressure and ideas.

Another lesson that the legal profession can learn from the health care profession is that other types of licensed professionals can help increase access to services while protecting consumers. This article does not suggest that the statutory authorization of different health care professionals is a panacea to the health care access problems that plague our society.²⁶⁵ The solutions are far more complex, particularly in light of other dynamics, such as the role of private health insurance.

261. CHAPMAN, *supra* note 99, at 147.

262. GARCEAU, *supra* note 106, at 4.

263. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (J. Brennan quoting Judge Learned Hand); *see also* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 19 (1977) (discussing the need for fresh ideas from many sources in order to initiate change in federal rule-making procedures).

264. *See supra* note 7.

265. Although there is evidence to support their role in increasing access to health care. *Cf.* Benjamin G. Druss et al., *Trends in Care by Nonphysician Clinicians in the United States*, 348 *NEW ENGL. J. MED.* 130 (2003) (examining trends in outpatient care between 1987 and 1997 when the passage of legislation increased the scope and number of nonphysician clinicians, which resulted in an increase of the population who saw a nonphysician clinician from 30.6% to 36.1%); Edward S.

However, it is an important tool to help provide affordable access to healthcare while also protecting consumers through education, training and licensing requirements for practitioners.

For example, in 2011 the Institute of Medicine put out a report titled “The Future of Nursing: Leading Change, Advancing Health.”²⁶⁶ The committee that prepared the report was asked to assess what role nursing can assume “to address the increasing demand for safe, high-quality, and effective health care services.”²⁶⁷ The report concluded that, “[e]vidence suggests that access to quality care can be greatly expanded by increasing the use of RNs and APRNs in primary, chronic, and transitional care.”²⁶⁸ The report recognized that fully utilizing nurses will require continued changes to laws and regulations that limit their scope of practice and that, in many respects, a continued transformation of the nursing profession will be necessary to bring to fruition all the benefits it may provide.²⁶⁹ The legislatures, of course, provide the forum for the consideration and enactment of these changes.

Just like a surgeon is not required for every medical problem, perhaps a licensed attorney with a three-year J.D. is not necessary for every legal problem.²⁷⁰ Lawmakers have actively sought ways to increase affordable access to health care and one important tool has been to expand the role of nurses to provide some of the services traditionally provided by doctors. Lawmakers do not have similar tools regarding the delivery of legal services.

The most compelling argument for the judicial branches’ exclusive power to define the scope of practice for lawyers is that the lawyers are integral to the operation of the judicial branch, which is an independent branch of government. In order to maintain their independence, courts have rationalized that they need exclusive control over the licensed professionals who appear in its institutions.²⁷¹ This is the rationale that courts have used in their decisional law since the early 1900s to assert their exclusive jurisdiction over the regulation of lawyers, including

Sekscenski et al., *State Practice Environments and the Supply of Physician Assistants, Nurse Practitioners, and Certified Nurse-Midwives*, 331 *NEW ENGL. J. MED.* 1266 (1994) (analyzing the increase in the number of physician assistants, nurse practitioners and certified nurse-midwives in states with favorable practice environments for those professions and noting their ability to increase access to primary care); Tine Hansen-Turton, et al., *Nurse Practitioners in Primary Care*, 82 *TEMPLE L. REV.* 1235 (2010) (discussing the role of nurse practitioners in increasing accessibility to primary health care).

266. INSTITUTE OF MEDICINE, “THE FUTURE OF NURSING: LEADING CHANGE, ADVANCING HEALTH” (2011).

267. *Id.* at xi.

268. *Id.* at 27.

269. *Id.* at 5, 28-30, 278.

270. *Cf.* Gillian K. Hadfield, *The Price of Law: How Much the Market for Lawyers Distorts the Justice System*, 98 *MICH. L. REV.* 953, 997-98 (2000) (discussing the unified nature of the legal profession including the same training for all lawyers who then enter the marketplace where competition for services is dominated by corporate wealth over individual wealth).

271. *See* Rigertas, *supra* note 110, at 89-90.

defining their scope of practice.²⁷² However, even in light of this position, it does not necessarily follow that the courts' jurisdiction over the scope of practice for lawyers means that the public should not have a voice in the debate.

Because of the differences between the health care and legal professions—namely the separation of powers doctrine—using the legislative forum may not be a practical place to assess the stratification of the legal profession. However, the fundamental premise that a robust debate with many voices is the best way to lead to innovation can still be addressed within the unique context of the separation of powers problem. It is unlikely that one approach will work in every jurisdiction given the differences in the state constitutions, rulemaking powers, case precedent and political environments.²⁷³ Thus, using the example of creating a license for housing advocates who could provide legal services in certain areas, several possible approaches for a more democratic assessment of the stratification of the legal profession—and their pros and cons—will be discussed. Some of these approaches are currently available, but they each have significant limitations. A couple of other approaches that do not currently exist will also be proposed as possible reforms.

A. Judicial Rulemaking

One approach that the housing advocacy group could use today is to propose a rule to the state supreme court to create licensed housing advocates. Both Washington and Arizona's Supreme Courts have used their rulemaking powers to authorize nonlawyers to provide some limited legal services, although the authorized activities do not include providing legal advice.²⁷⁴ There are a couple of advantages to judicial rulemaking. First, it allows the courts to retain control over the scope of the regulation of legal services, which resolves any separation of powers concerns. Second, it allows the judicial branch to be in a leadership position regarding access to justice, which is a fitting role.

Judicial rulemaking, however, is not a particularly democratic or transparent process.²⁷⁵ For example, in Illinois anyone may propose a rule, including a mem-

272. See *supra* note 188 and accompanying text.

273. See ABA COMMISSION ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 4 (1995) (“[E]ach state has a unique culture, a specific legal history, a distinct record of experience with nonlawyer activity and a current economic, political and social environment which will affect its approach to varied forms of nonlawyer activity.”).

274. *Supra* notes 194-207 and accompanying text.

275. See, e.g., Lynn A. Baker, *The Politics of Legal Ethics: Case Study of a Rule Change*, 53 ARIZ. L. REV. 425, 432-34, 444-46 (2011) (describing a recent rule change in Texas and the process used, which was dominated by lawyers); Benjamin Hoorn Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1188 (2003) (discussing the unique vulnerability that state supreme courts have to lobbying by lawyers). For a state-by-state summary of judicial rulemaking, see DONNA J. PUGH, ET AL., JUDICIAL RULEMAKING: A COMPENDIUM (1984); see also JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 6-8 (1977) (comparing federal rule-making to the legislative process

ber of the public, but that does not mean that the public will necessarily have an opportunity to weigh in on the proposed rule. Proposed rules are submitted to the Supreme Court Rules Committee (“Rules Committee”), which is made up of individuals the Supreme Court appoints.²⁷⁶ All of the individuals on the Rules Committee are lawyers.²⁷⁷ The Rules Committee will then review the proposed rule for merit, or if the rule is within the scope of another Supreme Court Committee, it will forward it to that committee for review.²⁷⁸ A proposed rule will not be set for public hearing unless the committee reviewing it finds that it has merit and recommends it for consideration.²⁷⁹

If a proposed rule is not recommended and does not go to a public hearing, the Rules Committee includes it in its annual report to the Supreme Court, which is to be made part of the public record.²⁸⁰ However, obtaining a copy of the Rules Committee’s annual report to see failed proposals is not particularly easy. They are not posted on the Illinois Supreme Court’s web site, but they are available in three-ring binders in Springfield, Illinois.²⁸¹

Thus, while the public can propose rules and participate in public hearings after rules are found to merit consideration, attorneys control the gateway to determining whether a rule warrants consideration. Perhaps this fact does not raise significant concerns when the rules relate to issues that are greatly informed by legal expertise, such as procedural rules. But this does raise concerns when the issue is the public’s access to the legal system. Judicial rulemaking does not adequately address the need for broader public participation in the debate. Reform is needed to achieve this goal.

and describing limits on public participation in the rule-making process). Judge Weinstein described his experience on the Advisory Committee on the Federal Rules of Evidence, in part, as follows:

Our proposed rules on privileges would have and an impact on a variety of groups such as doctors and newsmen, and yet there was only one occasion when outsiders addressed the group. It was a rather unsatisfactory session; two doctors appeared and there was a sense of annoyance at this interjection of outside persons into the committee’s deliberations.

Id. at 10.

276. IL. S. CT. R. 3(b). *See also* <http://www.state.il.us/court/supremecourt/rules/Process.asp> for a flowchart of the rulemaking process.

277. The Illinois Supreme Court’s web site only lists the following as members of the Rules Committee: “John B. Simon, Chair; Professor Keith H. Beyler, SIU School of Law, Reporter; Justice Thomas L. Kilbride, liaison officer.” <http://www.state.il.us/court/supremecourt/Committees.asp#rules>. The Court’s annual report, however, provides a full list of the committee members, all of whom are lawyers, although the most recent annual report available on-line is for 2009. http://www.state.il.us/court/supremecourt/AnnualReport/2009/AdminSumm/2009_Committees.pdf.

278. IL. S. CT. R. 3(d).

279. *Id.*

280. IL. S. CT. R. 3(b) and (d).

281. This is based on my research assistant’s research and telephone conversation with the Clerk of the Illinois Supreme Court. A former librarian of the Supreme Court used to post them on his personal blog, but since he stopped working there no one has taken over this task.

There are ways that the rulemaking process could be reformed to create a forum for a more democratic debate about delivery of legal services. One approach would be for the state supreme courts to set up special standing committees focused on access to justice and to appoint a broad spectrum of members to that committee to assess, among other approaches, the stratification of the legal profession. Proposed rules regarding access to justice could be proposed directly to this committee. The state supreme court could make sure that the legal profession did not comprise the majority of the committee members; therefore, determining whether a rule merited a public hearing would not be determined solely by the legal profession. This would keep the regulation of the legal profession in the judicial branch, which resolves the separation of powers problem, but create a more democratic process to assess innovation in the delivery of legal services.

The Illinois Supreme Court has used this approach in a more limited fashion, which demonstrates that such an approach is within its power. In April 2011, for example, the Illinois Supreme Court announced the formation of a special committee to study and formulate proposals to help improve the judicial process for mortgage foreclosures.²⁸² Notably, the committee consists of fourteen people “who have been on the front lines in dealing with the housing crisis,” including “judges, bankers, lawyers, a law professor and an official from the Illinois Attorney General’s office.”²⁸³ Noting that many consumers cannot afford to hire a lawyer, the Supreme Court charged the committee, in part, with providing uniform protocols throughout the state to deal with the explosion of foreclosures.²⁸⁴

The court could have been more expansive in addressing the problem. The court could have included representatives from consumer advocate and housing advocate groups in the committee. The court could have also asked this broad committee to explore ways to increase legal representation for persons in foreclosure proceedings, including the possibility of training and licensing nonlawyer housing advocates to assist consumers in their foreclosure proceedings. The committee could have had public hearings on this topic and proposed rules and regulations to license foreclosure advocates. This approach would have allowed for broader participation and an assessment of more innovative options.

Another approach would be for the state supreme court and the legislature to set up a joint commission or task force on the stratification of the legal profession and for both to pass parallel legislation/rules. This would provide the forum for an inclusive debate and eliminate the separation of powers question. Kentucky used

282. April 11, 2011, Press Release, Illinois Supreme Court Forms Special Committee to Ensure Fairness and Help Families Cope with Financial and Emotional Burdens in Foreclosure Proceedings, available at <http://www.state.il.us/court/media/PressRel/2011/041111.pdf>.

283. *Id.*

284. *Id.*

this approach when it adopted its rules of evidence in the 1990s.²⁸⁵ The legislature and the Kentucky Supreme Court engaged in a joint effort to draft evidence rules and then those rules were simultaneously passed by the legislature and adopted by the court.²⁸⁶ This eliminated any battle over who had the constitutional authority to enact evidentiary rules.²⁸⁷ It also necessarily allowed for a more inclusive debate.

Another avenue for this approach may be to utilize access to justice commissions to assess expanded delivery of legal services. The state supreme courts of about half the states have mandated the creation of access to justice commissions over the past decade.²⁸⁸ The mission of these commissions is generally to expand access to justice in civil legal matters. These commissions may be a logical place for courts to encourage the proposal of rules that would increase access to justice. While some commissions also have members of the legislature,²⁸⁹ overall they appear to be dominated by the legal profession.²⁹⁰

Membership of commissions would need to be examined to ensure that they are not dominated by the legal profession if they are going to explore intruding on the scope of the profession's monopoly. Also, the funding of these commissions would be an important consideration in ensuring democratic participation. For example, the Access to Justice Commission in the District of Columbia is privately funded predominantly by area law firms.²⁹¹ Lastly, the scope of such commissions may need to be redefined if they were to be used as a vehicle for innovative thinking because their mandates tend to encourage thinking within the traditional

285. Jeffrey A. Parness, *Survey of Illinois Law: The Ins and Outs of the New Illinois Evidence Rules*, 35 S. ILL. U. L. J. 689, 692-694 (2011).

286. *Id.*

287. *Id.*

288. For a state-by-state survey that identifies states with access to justice commissions, see AMERICAN BAR FOUNDATION, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 30-132 (October 7, 2011).

289. Wisconsin Access to Justice Commission website <http://wisatj.org/about/> (board members include members from the legislature).

290. See, e.g., District of Columbia Access to Justice Commission website <http://www.dccaccesstojustice.org/about.html> (listing commissioners who appear to all be attorneys and judges); Massachusetts Access to Justice Commission website <http://www.massaccesstojustice.org/> (listing commissioners who all but a couple appear to be attorneys and judges). The ABA's Definition of Access to Justice Commissions does not emphasize broad public participation. Instead it defines membership as "leaders representing, at a minimum, the state courts, the organized bar and legal aid providers. Its membership may also include representatives of law schools, legal aid funders, the legislature, the executive branch, and federal and tribal courts, as well as stakeholders from outside the legal and government communities." http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_of_a_commission.authcheckdam.pdf.

291. District of Columbia Access to Justice Commission website <http://www.dccaccesstojustice.org/about.html>.

parameters of increasing access, such as increasing funding for legal aid, increasing pro bono representation and increasing self-help resources for pro se litigants.²⁹²

Reforming the rulemaking process to allow for more public participation regarding the stratification of the legal profession and access to justice would be the easiest way to address separation of powers concerns. The regulation of the legal profession would remain in the judicial branch. A major limitation of this approach, however, is that it requires the judicial branch to take the initiative to create a forum for such a public debate and to give other stakeholders a voice in the process. The Courts have not historically been open to challenges from outsiders regarding the scope of the legal profession's monopoly. In fact, in 1995 the ABA Commission on Nonlawyer Practice issued a report that recommended:

[Each] jurisdiction's highest court should appoint a body of lawyers and nonlawyers to make an initial assessment of whether or not certain non-lawyer activity should be regulated. This is particularly desirable when the nonlawyer activity is closely related to the judicial process. The most difficult and controversial aspects of the assessment will likely concern whether to regulate legal technicians who provide legal advice to self-represented persons or who appear on behalf of clients in judicial proceedings.²⁹³

It has been over a decade since the Commission made this recommendation and there is little indication that the highest courts have pursued this recommendation. However, it would be fitting for the courts to take such a leadership role in light of access to justice problems and the courts' interest in promoting access to legal representation. The courts should also have some self-interest in having trained practitioners to assist people appearing in court.²⁹⁴ Lastly, if the judicial branch does not take a leadership role regarding alternative ways to delivery legal services, it risks losing control over the debate altogether.

B. State Constitutional Amendments

As was done in Arizona, an advocate such as a housing advocacy group could gain a voice in the debate today by proposing an amendment to the state's constitution that requires the state supreme court or legislature to create and oversee a system to license and regulate a new tier of licensed professionals, such as housing

292. See, e.g., Joseph L. Chairez, *Lawyers Helping Develop an Action Plan for Justice*, 49 ORANGE COUNTY LAWYER 5, 5 (August 2007); Chief Justice Karla M. Gray, *Mobilizing Judges, Lawyers, and Communities: State Access to Justice Commissions*, 47 JUDGE'S JOURNAL 33, 34 (Summer 2008).

293. ABA COMMISSION ON NONLAWYER PRACTICE, *NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS* 136 (1995).

294. Barton, *supra* note 44, at 458-61 (discussing how courts benefit from the availability of trained practitioners).

advocates.²⁹⁵ By amending the state constitution—the source of the separation of powers doctrine—the limitations posed by that doctrine are resolved.

A proposed constitutional amendment does advance the goal of broader societal participation in a debate about the scope of practice for lawyers. In the course of proposing constitutional amendments, depending on the state and the procedures used, there may be an opportunity for interested parties to debate in the state legislature, to appeal to the public through the media and advertisements, and to otherwise lobby their state legislatures and the public to advocate for their positions.

There are, however, some limitations and concerns. Constitutional amendments can be a fairly onerous way to experiment with solutions. Professor Charles Wolfram explained that constitutional amendments require, “coalition building, a political war chest, diligent effort, the right political climate including sympathetic handling by a mercurial and largely ill-informed media.”²⁹⁶ And, accordingly, they can be difficult to change if they do not work or need to be revised.

Constitutional amendments could also be a difficult way to create a wholly new profession. For example, the Arizona constitutional amendment, which authorizes some preparation of legal documents by real estate agents and brokers, does not contain any licensing or training requirements for real estate brokers. Legislatures, through their police powers, had already passed statutes that regulate and license real estate brokers and agents.²⁹⁷ However, suppose an amendment was passed to create a new limited license for housing advocates. A constitutional amendment would be an odd place to address the training, education and licensing required for such new professionals. The most likely solution would be to have the amendment specifically direct the judicial or legislative branch to undertake this task. For these reasons, constitutional amendments are a possible approach, but not the best approach.

Proposed constitutional amendments may, however, put the necessary pressure on a state supreme court to address a problem through its rulemaking powers due to fear of losing control over the issue. This is how the Washington Supreme Court was motivated to pass the rule creating Limited Practice Officers. After the

295. A constitutional amendment could also be used more broadly to completely shift the power to define the practice of law away from the courts and to the legislatures. Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 19-23 (1989-90) (proposing various approaches to reform lawyers' exclusive regulation of the legal profession including constitutional amendments and some legislative efforts); Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 624-25, 641-45 (1978) (examining the “legal and institutional barriers” that prohibit efforts by nonlawyers to reform the legal profession and discussing constitutional amendments as one possible remedy).

296. See Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 19 (1989-90).

297. See, e.g., 225 ILCS 454, *et seq.* (the Illinois Real Estate License Act of 2000).

Washington Supreme Court invalidated legislation that authorized laypersons to prepare documents incident to real estate closings, the escrow industry began lobbying for the introduction of a constitutional amendment to exempt them from the unauthorized practice of law rule.²⁹⁸ The escrow industry allowed the bill to die based on assurances that the matter was being addressed, which resulted in the Washington Supreme Court creating Limited Practice Officers.²⁹⁹ Thus, even if the public does not pass a constitutional amendment, some support for one may incite the judiciary to act instead of losing control.

C. Legislation

As with the health care field, a housing advocacy group could try to introduce a bill into the state legislature that would create licensed housing advocates. The legislature provides a forum for a multitude of stakeholders to participate in the debate and challenge the scope of practice restricted to lawyers.³⁰⁰ Legislatures are also a logical forum to devise a regulatory scheme for the training, education and licensing of stratified legal professionals. Also, because the judiciary does not control legislatures, lawyers would be subject to external influences during the reevaluation of the scope of its monopoly. These are strong advantages to a legislative forum. As a forum for public participation it is the most attractive option.

There are, however, practical limitations to this approach. The main barrier to using the legislative process to explore the stratification of the legal profession is the separation of powers doctrine, which generally precludes legislative involvement in the regulation of the legal profession.³⁰¹ In some states, however, the history of the relationship between the legislature and the judiciary regarding the regulation of the legal profession may make the legislature a possible forum to explore the stratification of the legal profession. Some courts have upheld limited legislative activity by reasoning that the legislature may assist the judicial branch, although the judicial branch retains the final power to review the "propriety and reasonableness" of the act.³⁰² However, even in these states, the state supreme

298. David R. Meyer, *Court Adopts Rule for Real Estate Closings*, THE BAR BULLETIN 21 (Jan. 1983).

299. *Id.*

300. See Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 19-20 (1989-90) (suggesting that legislatures try to reduce the broad scope of the definition of the unauthorized practice of law as one possible way to increase public participation in legal reform).

301. *Supra* Section III.C.

302. See, e.g., *Cowern v. Nelson*, 290 N.W. 795, 797 (Minn. 1940) (upholding the provisions of a statute permitting brokers to draw documents incidental to real estate transactions in which they acted as agents under a theory of comity); *State v. Cannon*, 221 N.W. 603, 605 (Wis. 1928) (reasoning that the court will defer to reasonable legislation, although "this deference is one of comity or courtesy, rather than an acknowledgement of power."); *Meunier v. Bernich*, 170 So. 567, 576 (La. Ct. App. 1936) ("Due to the fact that courts are not empowered to enact laws, the jurisprudence has approved legislation passed in aid of the courts' inherent powers.").

courts would likely view creating a whole new profession to compete with a segment of the legal profession as legislative overreaching.

Because of the separation of powers jurisprudence in most jurisdictions, exploring the stratification of the legal profession in the legislatures will be challenging if not impossible.³⁰³ However, it is an option that should not be completely disregarded because it is the most attractive option for an inclusive debate on the stratification of the legal profession. Furthermore, even if a state supreme court eventually struck down legislation authorizing new types of legal professionals, the process of enacting the legislation would have created a public forum to explore new ways to deliver legal services. It is possible that the judiciary would then find merit in the idea, respond to the public support for the idea, and subsequently adopt identical or similar ideas through its rulemaking powers.³⁰⁴

Lastly, perhaps there are some more creative ways to involve legislatures. For example, “in 1991 the Minnesota legislature passed a bill requiring the state’s supreme court to study the feasibility of licensing independent ‘specialized legal assistants.’”³⁰⁵ The court did appoint a committee, but the committee members were all members of the legal profession—judges, lawyers and traditional paralegals.³⁰⁶ There were no public hearings and the committee did not recommend the licensing of independent paralegals.³⁰⁷ If a legislature has the power to pass such a bill, perhaps it could mandate public hearings and a more diverse composition of the committee. Thus, the housing advocacy group could lobby the legislature to pass a bill mandating the state supreme court to study the feasibility of training and licensing housing advocates to provide legal advice and representation. The bill could also require that the committee’s membership not have a majority of members from the legal profession and to require public hearings on the topic.

V. Conclusion

Meeting the legal needs of ordinary citizens is a challenge that the legal profession has not been able to solve. The increased demand for legal services coupled with the increased cost of legal services has left a growing number of people

303. The only way to ensure that the state supreme courts could not find a legislative act unconstitutional would be to amend the state constitutions so that the power to define the practice of law resided in the legislative branches.

304. *See, e.g.,* Hunt v. Maricopa County Employees Merit System Comm’n, 619 P.2d 1036, 1041 (Ariz. 1980) (holding that a legislative act authorizing lay representation of employees in administrative hearings dealing with personnel matters was not within the scope of legislative power, but that the court would adopt the provision because it was in the public interest); *see also* Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 640 (1978).

305. ABA COMMISSION ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 70 (1995).

306. *Id.*

307. *Id.*

without any legal assistance. Meanwhile, the rising cost of legal education leaves many students with large loans that require substantial salaries to repay. And substantial salaries cannot be paid without charging substantial attorneys' fees.

Furthermore, while legal education continues to provide a general legal education, legal practice is increasingly specialized. A three-year one-size-fits-all Juris Doctorate may not be the best way to meet the future legal needs of the population. However, the inherent power of the judiciary to regulate the practice of law has created a systemic barrier to a public discourse about other options. Despite this, the scope of the legal profession's monopoly is being challenged by the private marketplace and by some limited authorization of nonlawyer legal activity, particularly in administrative proceedings. These areas demonstrate both the need for more options and the possibility that nonlawyers could be competent providers of some services. However, there has not been a robust public debate about the stratification of the legal profession.

As a regulated profession, the legal profession is not subject to the usual efficiencies of the marketplace; that is one of the effects of having a monopoly. However, this should not excuse the legal profession from having the scope of its monopoly reassessed by the public. After all, the privilege of the profession's monopoly largely flows from its responsibility to be public servants. As we can learn from the medical profession, a public debate is an important component to challenge the scope of a monopoly and to assess whether the current parameters of a monopoly continue to best serve the public interest. Innovation benefits from more voices. The legal profession should be at the lead of seeking out such innovation.