UTILIZING NONLAWYER ADVOCATES TO BRIDGE THE JUSTICE GAP IN AMERICA

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I. INTRODUCTION

"The lack of access to attorneys, and the corresponding lack of access to justice, is one of the greatest problems the United States legal system faces today."[1] In fact, only one in five legal problems experienced by poor Americans is addressed with the assistance of a lawyer.[2] This lack of assistance for poor Americans has been called the "justice gap." The justice gap in America is so severe that it has repeatedly lead commentators to question the appropriateness of the phrase "equal justice under law" being inscribed over the entrance to the United States Supreme Court building.[3] One commentator has even said that the system is instead one where "mandatory injustice prevails."[4]

In this note, I advocate significant systemic change as a solution to America's justice gap problem. First, I will examine the history of the legal aid system in America to show the system's extreme funding problems. Second, I will examine the steps that have already been taken by the legal profession to deal with the justice gap issue. Third, I will examine the problems that remain, even after all the efforts of the legal community have been taken into account.

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1. Chris Sanders, *Credit Where Credit is Due*, 74 TENN. L. REV. 241, 241 (2007).

2. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 16 (Sept. 2009) [hereinafter DOCUMENTING THE JUSTICE GAP 2009], *available at* http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf. Legal Services Corporation (LSC) compared seven separate studies conducted in seven separate states using "fundamentally similar methodolog[ies]." *Id.* at 14. "All seven state studies found a similarly large gap between the level of legal needs reported by low-income households and the percentage of those needs for which legal help was received." *Id.* at 16.

3. *See* Earl Johnson, Jr., *Justice for America's Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393, 393 (2009) (stating the principal stated on the United States Supreme Court building is "public rhetoric"); J. Anne Lazarus, *Pro Bono: A Case for Judicial Intervention, or How the Judiciary Can Help Bridge the Justice Gap in America*, PA. B. ASS'N Q., Apr. 2009, at 47, 47 (stating the principal stated on the United States Supreme Court building is "nothing more than an unrealized ideal"); J. Patrick E. McGann, *Pro Se Litigants: Fulfilling the Promise of Equal Justice*, CHI. B. ASS'N REC., Apr. 2009, at 30, 30 (stating that the words on the United States Supreme Court building "provide nothing more than false hope unless every litigant has meaningful access to the justice system").

4. David C. Leven, *Justice for the Forgotten and Despised*, 16 TOURO L. REV. 1, 8 (1999). Some have suggested that to have meaningful access to the courts, inmates only need to have libraries. *Id.* at 7. In arguing against this notion and in favor of adequate funding for a Prisoner Defense Fund, David Leven observes that, "[t]he truth is that the highway of justice usually ends before it reaches poor communities and prisons." *Id.* at 8.

Seeing the steps that have been taken and the little progress that has been made, I will lastly argue for a broader systemic change.

II. BACKGROUND

A. Civil Legal Aid in America

The first civil legal assistance program in the United States began in 1875 in New York City with the German Immigrants' Society, which later became the Legal Aid Society of New York.[5] In the years that followed, legal aid spread throughout other major cities in the United States.[6] By 1965, most major cities had some form of legal aid program.[7] These programs were totally dependent on private charity, because federal and state governments did not recognize an obligation to provide legal assistance for the poor in civil matters.[8] This resulted in the nation's earliest legal aid system being a "patchwork of programs" that existed mostly in urban areas.[9]

The federal government began to unify this patchwork in 1965 as a part of President Lyndon Johnson's war on poverty.[10] In 1965, the Federal Office of Economic Opportunity (OEO) created the Federal Legal Services Program.[11] The OEO funded service providers throughout the country[12] without placing restrictions on the use of funding.[13] The OEO also increased national funding

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5. Klaus Sitte, *A Mile Wide and an Inch Deep No More: Achieving Access to Justice in Rural Montana*, 70 MONT. L. REV. 273, 274 (2009); Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 UDC/DCSL L. REV. 35, 36 (2007).

6. Houseman, *supra* note 5, at 36.

7. *Id.* In 1965, the nation's legal aid network was comprised of 157 organizations that employed over 400 lawyers. *Id.* These organizations operated on a combined budget of approximately $4.5 million. *Id.*

8. Johnson, *supra* note 3, at 394.

9. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (June 2007) [hereinafter DOCUMENTING THE JUSTICE GAP 2007], *available at* http://www.lsc.gov/justicegap.pdf. As a result of the concentration of legal services in urban areas, many regions were not being served at all. *Id.* A 1980 LSC study showed that forty percent of poor people in the United States lived in regions that were not served by legal services. *Id.*

10. Sitte, *supra* note 5, at 273. In 1965, "Lyndon Johnson declared an 'unconditional war on poverty,' asking Americans to join him in that effort." *Id.* (citation omitted). The war on poverty was a "short-lived" war "that turned out to be a mere 'skirmish.'" Johnson, *supra* note 3, at 394 (citation omitted).

11. Houseman, *supra* note 5, at 36.

12. Sitte, *supra* note 5, at 274.

13. Houseman, *supra* note 5, at 37. "OEO did not require programs to provide specific kinds of legal services or to handle particular kinds of cases. The only earmarking of funds was for Native Americans and migrant farm workers . . . ." *Id.*

for legal services from $5.4 million to $45 million ($200 million in 2008 dollars).[14]

In late 1975, the Legal Services Corporation (LSC) took over the Federal Legal Services Program.[15] LSC is a nonprofit organization that is not a federal agency or department, but "is headed by a bipartisan Board of Directors."[16] LSC's original and remaining goal is to provide "equal access to justice for those who cannot afford to pay an attorney."[17] In its early years of existence, LSC expanded legal services programs so that assistance could be obtained in almost every county in every state in the United States.[18] In its first five years, LSC increased the federal investment in legal services to $321 million[19] in the year 1981.[20] This figure was considered "'minimum access' funding."[21]

LSC's spending soon brought resentment from members of the government.[22] In 1982, the LSC budget was decreased by twenty-five percent.[23] Following this decrease LSC funding slowly rose, but did not reach its 1981 level again in the 1980s or early 1990s.[24] Then, in 1996, LSC received another substantial budget reduction—this time it was cut by thirty percent.[25] LSC funding has yet to reach its 1981 high water mark in inflation adjusted dollars.[26] As of 2006, LSC funding was down 54.5% from what it was in 1980.[27]

In addition to cutting funding for LSC in 1996, Congress also imposed a large number of restrictions on the manner in which LSC funds could be utilized.[28] Some notable restrictions included a ban on class action lawsuits and litigating cases that involved abortion.[29] Additionally, the restrictions force

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14. Johnson, *supra* note 3, at 394.

15. Houseman, *supra* note 5, at 37.

16. *Id.* The Board of Directors is made up of eleven members who are all "appointed by the President and confirmed by the Senate." *Id.* A maximum of six members of the board are permitted to be from any one political party. *Id.* The president of the LSC is appointed by the Board of Directors and acts as LSC's chief operating officer. *Id.*

17. DOCUMENTING THE JUSTICE GAP 2007, *supra* note 9, at 1.

18. Houseman, *supra* note 5, at 37.

19. Johnson, *supra* note 3, at 394. This increase represented five times greater funding than was experienced prior to the LSC's creation. *Id.*

20. DOCUMENTING THE JUSTICE GAP 2007, *supra* note 9, at 2.

21. *Id.* at 1-2 & n.1. "Minimum access" funding is "two lawyers, with appropriate support, per 10,000 low-income people." *Id.* at 1 n.1.

22. *See* Sitte, *supra* note 5, at 274-75. "Opponents considered Legal Aid lawyers 'a bunch of ideological ambulance chasers doing their own thing at the expense of the rural poor.'" *Id.* at 275 (citation omitted).

23. *Id.*

24. *Id.*

25. *Id.*; Houseman, *supra* note 5, at 38.

26. *See* Johnson, *supra* note 3, at 394.

27. Houseman, *supra* note 5, at 48 (figure calculated using 1980 dollar conversions).

28. *Id.* at 38; Sitte, *supra* note 5, at 275.

29. Houseman, *supra* note 5, at 39. Among others, additional restrictions prohibit: assisting undocumented aliens, representing incarcerated persons, advocating in front of legislative bodies, collecting attorney's fees from adverse parties, and representing parties in redistricting cases. *Id.* at 38-39.

those who accepted LSC money to refrain from engaging in a restricted activity through the use of funding received from other sources.[30] As a result, an organization must completely refrain from performing LSC restricted activities if it accepts any LSC funding.

In response to these imposing restrictions, many LSC funded providers relinquished their LSC funding and began to search for non-LSC funding sources.[31] This caused state governments, other public sources,[32] and private organizations to be targeted as potential funding sources to help fill the gap.[33] As discussed below, the legal profession itself also recognized the need for, and began actively pursuing, other methods of solving the justice gap problem.

B. Efforts to Solve the Justice Gap Problem

1. Increase Funding

The first major funding source that legal aid organizations can benefit from is interest on lawyer's trust accounts (IOLTA). [34] These accounts were first developed in the 1980s[35] and are typically created through a state bar organization.[36] IOLTAs generate interest from client funds which are held in a lawyer's trust account.[37] The interest produced is then paid to a nonprofit

30. *Id.* at 39.

31. *Id.* The 1996 restrictions left legal aid lawyers with an ethical conflict as their ability to provide competent representation was limited by the restrictions. *See* Liza Q. Wirtz, Note, *The Ethical Bar and the LSC: Wrestling with Restrictions on Federally Funded Legal Services*, 59 VAND. L. REV. 971, 993 (2006). Many have argued for the repeal of LSC restrictions, some even asserting that the restrictions "have denied countless people equal access to justice." Rebekah Diller & Emily Savner, *Restoring Legal Aid for the Poor: A Call to End Draconian and Wasteful Restrictions*, 36 FORDHAM URB. L.J. 687, 689 (2009). In the 2010 budget, the restriction on pursuing attorney's fees was lifted. *President Signs LSC Funding Increase into Law*, LSC UPDATES (Legal Servs. Corp., Wash., D.C.), Dec. 17, 2009, http://www.lsc.gov/press/updates_2009_detail_T246_R28.php.

32. These other public funding sources are largely comprised of IOLTA revenues, which represent the second largest source of funding for legal aid. Jay Carlson, Note, *Interest or Principles?: The Legal Challenge to IOLTA in Washington State*, 74 WASH. L. REV. 1119, 1119 (1999).

33. Houseman, *supra* note 5, at 39; Johnson, *supra* note 3, at 394-95.

34. Johnson, *supra* note 3, at 395 (stating that IOLTA revenues comprise the bulk of public funding sources); Sitte, *supra* note 5, at 278. IOLTA funding, along with governmental funding, is "inconsistent and unstable." *Id.* at 279. When interest rates are low, IOLTA funding drops drastically. This has negatively impacted legal aid organizations in the past. For example, the Montana Legal Services Association was forced to close one office and to lay off staff members in two other offices as a result of decreased IOLTA funding in 2002. *Id.*

35. Carlson, *supra* note 32, at 1122-23.

36. Sitte, *supra* note 5, at 278. *But see* Carlson, *supra* note 32, at 1123 (indicating that the Supreme Court of Washington created the state's IOLTA program in 1984).

37. Sitte, *supra* note 5, at 278. These funds are typically negligible or held for too short of a time to earn interest on their own, but when pooled together they are able to earn interest. *Id.*

organization, which distributes the funds. [38] Typically, a significant percentage of this revenue is dedicated to funding legal services.[39]

Other major sources of funding come from a variety of contributors. As of 2007, twenty-eight states had allocated a portion of court filing fees and fines to fund legal aid.[40] Twenty-eight states also had some form of funding from state appropriations.[41] A few states have also used "state abandoned property funds, punitive damage awards, and other governmental initiatives" to generate income.[42] Some states have even considered instituting a lawyers' occupational tax, and taxes on money judgments.[43] Funding has also been sought from private organizations[44] and private parties, especially members of the bar.[45]

Thanks to the contributions from all sources described above, the nation's total legal aid budget was approximately $1.3 billion in 2009.[46] Although this amount may sound substantial, consider that if Congress had simply kept the LSC's 1981 funding level even with inflation, LSC's budget alone would have exceeded $730 million in 2008.[47]

2. Increase Public Service

Although funding has slightly increased over the years, it still "remains totally inadequate" to provide for the legal needs of low-income persons.[48] To combat this reality, the legal community has sought to increase the amount of

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38. Carlson, *supra* note 32, at 1122. For example, in the state of Washington the Legal Foundation of Washington (LFW) is paid by IOLTA revenues. *Id.* at 1124. LFW in turn distributes the funds to legal services programs throughout the state. *Id.*

39. *See id.* at 1122; Sitte, *supra* note 5, at 278.

40. Houseman, *supra* note 5, at 51 n.68; *See, e.g.*, Ed Harnden, *Funding Legal Aid: We Must Do Better*, OR. ST. B. BULL., Aug.-Sept. 2006, at 70 (stating that "[a] portion of Oregon court filing fees goes to help fund legal aid").

41. Houseman, *supra* note 5, at 51 n.68.

42. *Id.* at 51-52.

43. George Schatzki, *The Survival of Legal Services for the Poor in Connecticut*, 70 CONN. B. J. 313, 327 (1996).

44. *Id.* at 328. The major contributors from this category include large, for profit organizations which can often be persuaded to donate to legal services for the poor (or at a minimum to provide legal services for their employees). *Id.* Additionally, foundations and non-profit funds are often used to address specific needs, especially when those needs "coincide with the interests of some foundations." *Id.*

45. Leven, *supra* note 4, at 20. The Bar has been particularly targeted because, as members of the legal profession, the Bar is seen as having a "special obligation to ensure the integrity of our justice system." *Id.*

46. ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POL'Y, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009 2 (2009), *available at* http://www.clasp.org/admin/site/publications/files/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-2.pdf. LSC's budget was $390 million in 2009. *Id.* at 10. LSC's budget was increased to $420 million in 2010. *FY 2010 Appropriation*, LEGAL SERVICES CORPORATION, http://www.lsc.gov/about/FY2010app.php (last visited Nov. 21, 2010).

47. Johnson, *supra* note 3, at 396. LSC's 2008 budget was actually $340 million. *Id.*

48. Houseman, *supra* note 5, at 67.

public service in which lawyers engage. When lawyers voluntarily provide free services to poor clients, it is known as *pro bono publico* (for the public good), or "pro bono" for short.[49] Lawyers have traditionally performed pro bono services, as the organized bar has generally accepted their special obligation to work towards equal justice for all.[50] However, the huge disparity between the number of legal aid attorneys and the number of private attorneys has led many to expect the private bar to do more to shoulder the burden.[51] As a result, many look to increased pro bono efforts from lawyers to close or eliminate the justice gap.

Many states, local or state bar associations, and the American Bar Association (ABA) have considered requiring members of the bar to provide a certain number of pro bono hours per year.[52] Currently, the ABA Model Code of Professional Responsibility "urges" lawyers to perform at least fifty hours of pro bono legal services each year.[53] This language is the result of the ABA's failed attempt to make the fifty hours of pro bono service each year a requirement.[54] The requirement failed for a number of reasons. First, lawyers across the country almost unanimously opposed it.[55] Second, the requirement was even opposed by legal services organizations.[56] They feared that forced involvement of attorneys who did not actually wish to be performing legal aid work would lead to a decrease in the quality of legal services that were provided to the poor.[57]

With the failure of mandatory pro-bono, state bar associations and other organizations have sought to incentivize pro bono work. As of 2007, eleven states had implemented voluntary pro bono reporting, and five states had implemented mandatory pro bono reporting. [58] Florida was the first state to implement voluntary reporting, and has reported significant increases in pro

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49. Steven C. Krane, *President's Message: Not Just Another* Pro Bono *Message*, N.Y. ST. B. ASS'N J., Jan. 2002, at 5, 5.

50. Schatzki, *supra* note 43, at 328.

51. Sanders, *supra* note 1, at 243.

52. *See generally* Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 103-47 (2002) (explaining the legislative history of pro bono responsibilities in professional regulations).

53. MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 1 (2002). Comment 1 states that "[e]very lawyer . . . has a responsibility to provide legal services to those unable to pay . . . . The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually." *Id.*

54. *See* Maute, *supra* note 52, at 138-47.

55. *Id.* at 141-46.

56. *Id.* at 140.

57. *Id.* at 141.

58. Houseman, *supra* note 5, at 58. Mandatory pro bono reporting rules require attorneys to submit annual reports detailing their pro bono activities during the year. *Id.*

bono services over time.[59] As an additional incentive, by 2007, eight states allowed attorneys to use pro bono work for credit toward their continuing legal education requirements. [60] While this measure may be effective in increasing pro bono service, it has been criticized as being at odds with the purpose of continuing legal education programs.[61] For this reason, commentators have suggested alternative incentives for pro bono work, such as pro bono tax credits.[62]

Despite these efforts, the entire bar averaged less than one half hour of pro bono service per week in 2007.[63] Some have attributed this statistic to the fact that many lawyers do not feel qualified to enter into the area of poverty law.[64] Whatever their reasons may be, it is clear that, in reality, lawyers probably will not solve the justice gap problem through pro bono efforts.

3. Reduce Need

While funding remains inadequate and lawyers are unable to close the justice gap through their public service, the legal profession has attempted to decrease the legal needs of the poor through minor systemic changes. The most common method of decreasing the legal needs of the poor is to aid and encourage pro se litigants.[65] The idea behind this tactic is that the disadvantages that pro se litigants face can be decreased through proper education and/or support services.[66]

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59. Sanders, *supra* note 1, at 244. Florida lawyers reported approximately 560,000 hours of pro bono service in 1994. *Id.* By 2002, this number rose to approximately 1,310,000 hours. *Id.* Monetary donations by Florida attorneys increased from about $875,000 to approximately $2,530,000 over the same time period. *Id.*

60. Houseman, *supra* note 5, at 59.

61. Sanders, *supra* note 1, at 246. The "goal of CLE programs [is] to ensure that all practicing attorneys maintain the level of skill necessary to properly represent their clients." *Id.*

62. *Id.* The Pro Bono Tax Credit incentive was originally proposed by Jason Thiemann. *Id. See* Jason M. Thiemann, *The Past, The Present, and The Future of Pro Bono: Pro Bono as a Tax Incentive for Lawyers, Not a Tax on the Practice of Law*, 26 HAMLINE J. PUB. L. & POL'Y 331, 337-83 (2005).

63. *Id.* at 243. Additionally troubling is the idea that a great deal of what lawyers call "pro bono" is actually either just "favors for friends, family, or clients, or cases where fees turn out to be uncollectible"—not free legal aid to the poor. *Id.*

64. "[P]overty law is now a specialty. Few private attorneys are willing to delve into the quagmire of federal housing regulations, for example." Sitte, *supra* note 5, at 285 (citation omitted).

65. A pro se litigant is a litigant who represents himself/herself in a court proceeding. Sometimes litigants do this as a matter of choice, however pro se litigation is often the result of the litigant being unable to afford legal counsel. *See* BLACK'S LAW DICTIONARY 1341 (9th ed. 2009).

66. Lazarus, *supra* note 3, at 54. "While guarantee[ing] civil representation for all litigants in this country is not a realistic goal at this time, improving court support for self-represented litigants can help to diminish this disadvantage." *Id.* "One way to substantially improve court support for *pro se* litigants is to increase the resources that are available to them." *Id.*

To aid pro se litigants, many legal aid organizations have created self-help programs that are either independent, or associated with the courts.[67] These programs are often run through self-help centers where pro se litigants can come for assistance in their efforts.[68] Some self-help programs only provide information to the litigants, while others provide legal advice and assistance with drafting legal documents.[69] Many legal services programs have also created legal hotlines[70] or legal help websites[71] for their clients or the general public to use to seek advice or information about their legal issues.

The legal profession has also begun to authorize the "unbundling" of legal services to aid pro se litigants.[72] Unbundling allows lawyers to enter into limited representation of clients.[73] In this way, pro se litigants can hire an attorney for a small, yet complicated aspect of their case.[74] Thus, pro se

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67. Houseman, *supra* note 5, at 42.

68. *See, e.g.*, MD. ACCESS TO JUSTICE COMM'N, INTERIM REPORT & RECOMMENDATIONS 59 (2009), *available at* http://mdcourts.gov/mdatjc/pdfs/interimreport111009.pdf.

> Most Circuit Courts in Maryland offer Family Law Self-Help Centers, walk-in services where self-represented litigants can obtain forms and receive assistance in representing themselves in a family case. In smaller jurisdictions, the service may be available on a part-time basis, a few hours per week. Some larger jurisdictions offer full-time or nearly full-time services. In most courts, the service is provided by attorneys. Most courts offer the service by contracting with a local legal service provider or private attorney. Some courts have court-employed attorneys providing the service and a few offer or enhance the service by using *pro bono* attorneys. In most instances, the service is provided on-site in the courthouse. In some jurisdictions the program is offered off-site in community based locations . . . .

Id.

69. Sitte, *supra* note 5, at 282-83. Montana's Self-Help Law Unit "seeks to prepare clients for pro se representation by educating them about the court system and supplying them with well-prepared, accurate forms." *Id.* at 282. The Unit has incorporated online software called "HotDocs," which requests information through specific questions and then inserts the answers into legal forms or letters for customized and personalized documents. *Id.* at 283.

70. *See, e.g.*, *id.* at 281.

71. Montana has a website at www.MontanaLawHelp.org. This website was designed by a grant through LSC, and allows users twenty-four hour access to legal information that is designed to help low to moderate income Montanans with their most common legal needs. *Id.* at 283-84.

72. Lazarus, *supra* note 3, at 55.

73. *Id.*

74. *Id.* For a private attorney, unbundling assumes that someone who could not afford full representation by counsel may nonetheless still be capable of hiring an attorney for a small portion of their case. *Id.* Although this may allow private lawyers to reach down to represent those with lower incomes, it still leaves the impoverished without the option of a private attorney. It does, however, provide an important benefit for the impoverished because it can be utilized by legal aid organizations to increase their effectiveness.

litigants can receive the benefits of having representation, even though it may only be for a small portion of their case.[75]

Some states have also implemented "emeritus attorney pro bono rules."[76] These rules allow retired members of the bar to undertake pro bono representation of clients under certain conditions.[77] Retired members of the bar are encouraged to participate through bonuses, such as having the local bar association waive their annual fee, having courts waive admission fees, and having legal aid organizations provide malpractice insurance.[78]

Even with these efforts aiding them, pro se litigants are still at a severe disadvantage. As one commentator explains, "[i]f the judge tells you to call your first witness, you might as well be taking a final exam in quantum physics at MIT or Cal Tech. You don't understand the language, the procedural rules, or the substantive law, and there is nobody there to advise or represent you."[79] Chief Justice Broderick of New Hampshire asked what people would think if the emergency room told an uninsured patient that it "'can't provide medical advice about your abdominal pain, but there are some fabulous illustrated textbooks over there, and the instruments have been recently sterilized. Good Luck.'"[80] All analogies aside, aiding pro se litigants probably does decrease legal aid needs; however pro se litigants remain severely disadvantaged.[81]

Also problematic is the fact that pro se litigation places an increased burden on the courts. Pro se litigants typically do not present clear and concise cases with logical legal arguments.[82] This forces judges to become more active in their roles and perform more background research independently.[83] In this way, pro se litigation has the tendency to shift the legal system from an adversarial system to an inquisitorial system.[84]

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75. *Id.*

76. *Id.* at 56.

77. *Id.*

> Emeritus attorney *pro bono* rules vary from state to state, but typically seek to encourage volunteer emeritus attorney *pro bono* participation, while establishing guidelines to protect both the public and legal profession by requiring that the volunteer activity be performed under the auspices of a recognized legal services or other non-profit organization, the volunteer be a member of a bar in good standing, and the volunteer work be supervised by a lawyer licensed within that jurisdiction.

Id.

78. Lazarus, *supra* note 3, at 56.

79. Robert L. Rothman, *No House, No Custody, No Money, No Lawyer*, LITIG., Fall 2008, at 1, 1 (arguing for a right to civil representation).

80. R. Elton Johnson, III, *Crisis and Promise: The 2009 Hawaii Access to Justice Conference*, HAW. B.J., Sept. 2009, at 18, 18-19.

81. Johnson, *supra* note 3, at 415.

82. *Id.* at 414.

83. *Id.* at 413.

84. *Id.* at 413. Judges must ask the majority of questions, determine what law controls, and decide the outcome of the case without lawyers presenting arguments on both sides. *Id.*

4. Create Access to Justice Commissions

Recognizing the fact that the justice gap problem is not being resolved by the efforts of the legal profession, many states have created Access to Justice Commissions to investigate the underlying problems and causes of the justice gap. These commissions are charged with proposing possible solutions to the problem.[85] At the end of the day, most of these commissions have simply continued working on the justice gap problem within the same systemic framework as has been attempted previously through the methods described above.[86]

5. Create a Civil Right to Counsel

Many commentators have turned to a civil right to counsel as a means of bridging the justice gap. A civil right to counsel would entitle all citizens who could not afford representation to be appointed representation. In recent years, there has been an increased push for a civil right to counsel—at least in cases involving some form of necessity (food, shelter, etc.). As one commentator noted, "[j]ust thirty-five years ago, the United States Supreme Court held that a person facing felony charges had a right to [representation]. . . . How long will it be before low-income citizens about to lose their homes or sole source of income will have the same access to representation?"[87] The ABA has also been outspoken in advocating for some form of a civil right to counsel. In August 2006, the ABA passed resolution 112A, which states:

> RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.[88]

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85. *See* D.C. ACCESS TO JUSTICE COMM'N, ANNUAL REPORT FOR THE YEAR ENDING FEBRUARY 28, 2009 (2009), *available at* http://www.dcaccesstojustice.org/files/Access_20to_20Justice_20FINAL_20VERSION_1_.pdf.

86. *See id.* (the commission investigates public and private funding sources, legal needs, pro bono contributions, and pro se litigant services); ACCESS TO JUSTICE HUI, ACHIEVING ACCESS TO JUSTICE FOR HAWAI'I'S PEOPLE i, *ii-iii* (Nov. 2007), *available at* http://www.legalaidhawaii.org/HUI_Access_to_Justice.pdf (advocating for the following steps to be taken: Funding Civil Legal Services, Increasing Pro Bono Legal Services, Right to Counsel, and Self Representation and Unbundling).

87. Leven, *supra* note 4, at 23 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

88. ABA House of Delegates, ABA Resolution 112A, at 1 (Aug. 7, 2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

Commentators across the nation have developed a wide array of arguments supporting a right to counsel in civil cases involving basic human needs.[89] Many of these arguments focus on the importance of basic human needs and how these needs are as important—if not more important—than the right to freedom, which is given greater protections through the right to criminal counsel. These arguments appeal to the ideal of fundamental fairness.[90] Other arguments are based on a cost-benefit analysis in which the societal costs of not having a right to counsel are quantified and weighed against the costs that would be associated with a right to counsel.[91]

While several of the arguments in favor of a civil right to counsel are appealing, creating a right would not solve the underlying problem. Consider the state of legal aid in European countries (where our concept of a civil right to counsel came from). Most European countries that have a civil right to counsel still experience funding problems,[92] even though their systems are funded at significantly greater levels than civil legal aid in America.[93] Additionally, the European systems still rely extensively on the private bar to provide legal aid services.[94]

If the arguments in favor of a civil right to counsel were accepted in the United States, major changes would need to be instituted. Federal and state governments would suddenly have to spend far more per year on legal aid and lawyers would have to devote significantly more hours to legal aid services. This, perhaps, is the reason why many commentators still adhere to the view that a civil right to counsel "is not a realistic goal at this time" in America.[95]

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89. *See* Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 190 (2009); Johnson, *supra* note 3, at 422; Stephen Loffredo & Don Friedman, Gideon *Meets* Goldberg*: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273 (2009).

90. Brescia, *supra* note 89, at 228. Arguments based on the ideal of fundamental fairness or the reality of fundamental unfairness have been viewed as not persuasive enough to win over the support of the courts, legislatures, or general public when the right to shelter was involved. *Id.* at 229. Therefore, a cost-benefit approach has been attempted. *Id.*

91. *Id.* at 227-38. In the shelter context, costs of not having a right to counsel include "disruption at school and work, unsettling of social networks, and the costs associated with securing and moving property." *Id.* at 236.

92. Government funded legal aid is consistently a battle between the government's unwillingness to pay for extra time devoted to cases because of concerns over extortion. Johnson, *supra* note 3, at 406-07. This creates a cost containment issue. *Id.* England has experienced this problem, and there are concerns there that the government will offer legal aid contracts out for bid in the future, a move that shows "that the government is intent on squeezing out the last drop of 'excess' profit lawyers may have been earning out of their legal aid cases." *Id.* at 409.

93. Ireland's legal aid system is funded proportionally three times higher than that of the United State's. *Id.* at 402. England's legal aid system is funded proportionally ten times greater than that of the United State's. *Id.* at 408.

94. *Id.* at 402-03. A system in which "a substantial amount of the responsibility for representing the poor remains with the private bar" is called "judicare." *Id.* at 403.

95. Lazarus, *supra* note 3, at 54. *See also* Brescia, *supra* note 89, at 228. "[T]he courts are probably not sympathetic to a claim of a broad-based right, regardless of the simplicity of

The largest obstacle to implementing a civil right to counsel for states is in fact the costs associated with such a system.[96] These costs include both the cost of providing an attorney for those seeking assistance,[97] and the increased court costs that could arise as a result of both sides having counsel (i.e., more time negotiating each case, more motions and trials).[98] A theory that this Note will refer to as the Balance of Power Theory, actually suggests that a civil right to counsel could decrease court costs as a result of decreased litigation and that people with power would not bring as many cases if they knew that they would ultimately lose the meritless ones.[99] Despite the possibility of decreased court costs and the overwhelming support of the ABA, no state has yet adopted a right to counsel in civil matters.

III. ANALYSIS

A. Remaining Problem

Despite all of the aforementioned efforts that the legal community has taken to eliminate the justice gap in America, the legal needs of the poor are still not being met. In their 2007 report entitled "Documenting the Justice Gap in America," LSC reported that civil legal services are only able to help with about one-fifth of the legal problems experienced by low-income individuals.[100] This statistic was again confirmed in LSC's 2009 update to the report.[101] Additionally, for each client served by LSC, at least one person who sought help was turned away because of a lack of resources.[102]

Depending upon where the line for financial eligibility is drawn, between fifty and ninety million Americans qualified for legal aid as of late 2009.[103] Meanwhile, even using the lower figure of fifty million Americans, there is

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finding such a right through litigation, which would then leave the legislature with the responsibility of finding the funds to provide that right." *Id.*

96. Brescia, *supra* note 89, at 229-230.

97. *Id.* at 230-31.

98. *Id.* at 231.

99. *Id.* at 231-32.

100. DOCUMENTING THE JUSTICE GAP 2007, *supra* note 9, at 2. Nine states conducted studies of their own which support the conclusions of the ABA's study—the combined effect of the efforts of the private bar and public funding is only serving a relatively small amount of the legal needs of impoverished Americans. Houseman, *supra* note 5, at 44.

101. DOCUMENTING THE JUSTICE GAP 2009, *supra* note 2, at 13.

102. *Id.* at 6.

103. Johnson, *supra* note 3, at 395. LSC sets its eligibility standard at 125% of the federal poverty line, which makes fifty million Americans eligible for services. *Id.* Some programs that are not supported by LSC find that standard to be unrealistic and instead apply 200% of the federal poverty line as their standard. *Id.* Applying this standard, ninety million Americans (nearly one-third of the population) are eligible for legal aid. *Id.*

only one legal aid lawyer per 6,415 low-income Americans.[104] Comparatively, there is one lawyer per 429 people in the general United States population.[105] That means that the ratio of private attorneys to the United States general population is more than ten times larger than the ratio of legal aid attorneys to the United States poverty population.[106]

The susceptibility of legal aid to become severely under-funded in times of economic struggle is also problematic. This issue has been particularly brought to light through the recent economic conditions, which are causing severe problems for legal aid services.[107] IOLTA funding is down across the nation due to low interest rates and decreased deposits in lawyer trust accounts, and funding from governmental sources is constantly at risk of cuts during financial crisis.[108] To compound matters, during times of financial hardship, the demand for legal aid services typically rises. Between 2005 and 2008, the United States' population of persons that fell below 125% of the poverty line increased from 49.6 million to 53.8 million.[109] Considering the economic landscape of the years 2009 and 2010, it is highly probable that the number of Americans falling below 125% of the poverty line has further increased since 2008.

Some members of the legal profession, realizing that the justice gap problem has not been improving sufficiently, have recognized the need for broader and deeper systemic changes.[110] However, the proposed solutions only work within the framework of the legal system as it currently exists.[111]

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104. DOCUMENTING THE JUSTICE GAP 2009, *supra* note 2, at 20.

105. *Id.* The general population excludes those who fall below 125% of the poverty line. *Id.*

106. DOCUMENTING THE JUSTICE GAP 2007, *supra* note 9, at 17. This statistic is based on a study performed by the ABA and LSC staff looking at data from 2002. *Id.* at 15. In states where actual attorney statistics could not be obtained, projections based on the ABA Project to Expand Resources for Legal Services were used. *Id.* The "low-income" population was determined using census data and 125% of the federal poverty guidelines. *Id.* The number of private attorneys in the United States was achieved using ABA figures from 2000 by excluding judiciary members, government attorneys, legal aid lawyers, public defenders, lawyers in education, and retired or inactive lawyers. *Id.* The population was determined using 2000 census data. *Id.* at 16.

107. DOCUMENTING THE JUSTICE GAP 2009, *supra* note 2, at 6.

108. *Id.*

109. *Id.*

110. Leven, *supra* note 4, at 17.

111. *See id.* David Leven, who urges members of the legal profession to become agents of systemic change, advocates doing that through the confines of the legal system as it currently exists. *Id.* at 17. When answering the question of what can be done to fix the problem, his first thought is that "Congress must dramatically increase appropriationS [sic]." *Id.* He goes on to encourage funding and pro bono services from the private bar. *Id.* at 20. The problem with these solutions is that they have all been in place for years, and have not worked. He pins his final hopes on a judicially created civil right to counsel. *Id.* at 23. He is not alone in pinning his final hopes on a judicially created right to civil representation as a solution to the justice gap issue. *See* Johnson, *supra* note 3, at 398-410, 422 (examining the rights based legal aid systems of other industrial democracies throughout the world and concluding that we should have a civil right to counsel in America).

Most of these solutions have already been attempted, some for as many as fifty years. The problem persists.

In order to make equal access to justice or a civil right to counsel even remotely practical, the system itself needs to be changed. While I applaud the efforts of the legal community in attempting to increase funding and decrease demand, new avenues must be seriously explored. Broader systemic changes that make legal representation significantly more affordable are necessary. These changes would allow the funding levels that have been achieved to be stretched further and provide legal services for many more impoverished Americans.

B. Proposed Solution: Nonlawyer Advocates

Imagine if the healthcare system only had doctors and nurses. No nurse practitioners.[112] No physician assistants.[113] No paramedics or EMTs.[114] Instead, in this imaginary system physicians have an exclusive right to "practice medicine." Physicians would not be able to handle the medical demands of the nation's population. The system would collapse. Physicians would be forced to choose which patients' problems were worthy enough to be treated. They would likely choose to treat those who could afford to pay, and an entire class of low-income persons would be without meaningful access to medical care.[115]

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112. *Frequently Asked Questions*, AM. ACAD. OF NURSE PRACTITIONERS, http://www.aanp.org/NR/rdonlyres/A1D9B4BD-AC5E-45BF-9EB0-DEFCA1123204/4271/FAQsWhatisanNP83110.pdf (last visited Nov. 21, 2010) (stating that Nurse Practitioners are licensed by the states in which they practice and typically are nationally certified in their area of specialty). Nurse Practitioners can care for and diagnose many health problems, and in some states can even work independently of physicians. *Id.*

113. *Becoming a Physician Assistant*, AM. ACAD. OF PHYSICIAN ASSISTANTS, http://aapa.org/about-pas/becoming-a-physician-assistant (last visited Nov. 21, 2010) (stating that Physician Assistants work under a physician and can perform many tasks delegated to them by their supervising physicians); *Frequently Asked Questions*, AM. ACAD. OF PHYSICIAN ASSISTANTS, http://www.aapa.org/about-pas/faq-about-pas (last visited Nov. 21, 2010) (stating that Physician Assistants are nationally certified, licensed, and can write prescriptions in all fifty states).

114. U.S. Dept. of Labor, Bureau of Labor Statistics, *Emergency Medical Technicians and Paramedics* (Dec. 17, 2009), http://www.bls.gov/oco/pdf/ocos101.pdf (stating that Paramedics and EMTs are required to be licensed in all fifty states, where they typically treat medical emergencies and trauma in pre-hospital settings). Paramedics can provide from basic to complex emergency medical services depending upon their certification level, and most can also administer medications. *Id.*

115. I recognize that the health care system is not a model system in many ways. However, despite the cost issues that cause many Americans to be unable to afford medical care, any person can get medical care for emergency situations for free from the emergency room. If you have a civil law emergency (something that could jeopardize your housing or family situation) and you are poor, there is a strong possibility that you will not be served.

Sound familiar? That is how the legal system is operated in America. There are not enough lawyers to handle all of the legal claims in America, yet lawyers are the only ones permitted to "practice law." Lawyers take clients who can afford to pay them, and the rest are taken on a pro bono basis (in very limited circumstances) or are referred to legal aid organizations. Legal aid organizations cannot handle the demand due to a lack of available funds,[116] so they establish criteria for excluding potential clients.[117] As a result, a large segment of society is denied meaningful access to justice.[118]

Although there are several areas in which the legal system could be reformed to cut costs, the reform that I am advocating here involves using nonlawyers as advocates. Nonlawyers are already being used as advocates in administrative hearings such as welfare hearings.[119] Because the procedures in this forum (and many others forums like it) are rather informal and the substantive law can be found in a manual, lay advocates can typically "provide quality representation to welfare recipients."[120] As a result of the successes of nonlawyer advocates in these areas, several states have begun exploring expanded possibilities for nonlawyer advocates with their access to justice commissions.[121]

My proposal expands the role of nonlawyer advocates and envisions specialized, educated, trained, certified, and possibly licensed professionals, who, while not lawyers, are permitted to engage in the practice of law within a discrete area of expertise. These professionals would be permitted to represent clients in court for the matters for which they have been trained. Using nonlawyer advocates, the costs of legal representation could be dramatically reduced, stretching the nation's legal aid budget to serve more people.

In arguing for an expanded role for nonlawyer advocates, I will first explain how the relative simplicity of many cases makes them prime candidates for trained nonlawyer advocates. Second, I will address the issue of the educational requirements of a nonlawyer advocate. Next, I will examine possible work experience requirements and the possibility of licensure. Finally, I will address anticipated concerns about the proposal.

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116. DOCUMENTING THE JUSTICE GAP 2007, *supra* note 9, at 1.

117. Brescia, *supra* note 89, at 225-26. Because of insufficient funding, legal aid organizations are unable to serve all persons who seek their services. *Id.* at 225. In an effort to ensure that their services are given to clients who can benefit from them the most, legal services organizations engage in a form of "triage" where they set priorities and create criteria for accepting clients. *Id.* at 225-26.

118. Leven, *supra* note 4, at 17. This denial "undermines our very democracy." *Id.*

119. Johnson, *supra* note 3, at 416.

120. *Id.* at 417.

121. *See, e.g.*, *Delivery of Legal Services*, N.H. ACCESS TO JUSTICE COMM'N, http://www.courts.state.nh.us/access/about/deliv.htm (last visited Nov. 21, 2010). The New Hampshire Access to Justice Commission has a nonlawyer assistance subcommittee which investigates roles for nonlawyer advocates in court proceedings. *Id.*

1. Relative Simplicity

Currently, lawyers take two seemingly inconsistent positions when addressing the possibility of nonlawyer advocates. On one hand, they say that certain types of cases are simple enough that a minimally educated person can become knowledgeable enough to represent themselves.[122] On the other hand, they do not believe that a lay advocate, a person properly educated in a specific area of law who is not a lawyer, could provide adequate representation for another person in court.[123]

The only possible way to reconcile these two views is if the term "lay advocates" is used to refer to someone with no formal legal education. If that is the case, then it is understandable that lawyers would not want lay advocates representing people in court. However, my proposal envisions someone more credentialed than a lay advocate. It envisions someone who would actually have a specialized formal education, practical experience, and possibly even licensure.

Instead of dismissing the idea entirely because of a perceived lack of educational qualifications, the legal profession should explore training methods that would make nonlawyers capable of properly advocating for someone else in court. Commentators have already identified entire areas of law, such as family law, which are considered simple enough that direct representation by a lawyer is "not always necessary."[124] Although providing a lawyer may not be necessary and may be cost prohibitive, providing a nonlawyer advocate could potentially solve both problems—a nonlawyer

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122. Many commentators justify only providing information or limited assistance to pro se litigants based on the notion that the cases in which they represent themselves are simple. *See, e.g.*, Sitte, *supra* note 5, at 282. However, few commentators actually attempt to say that the information provided to pro se litigants by self help centers is sufficient or ideal. In fact, one commentator stated that "[i]t rarely can turn even a college-educated litigant—to say nothing of the typical lower income individual—into someone capable of constructing and presenting a persuasive case consistent with the rules of evidence and focused on the issues critical to making the correct decision." Johnson, *supra* note 3, at 415.

123. The relative simplicity of many representations makes them prime candidates for nonlawyer advocacy. As discussed above, lay persons are already being used as advocates in administrative hearings. However, when addressing whether to expand this concept to representation in courts, many commentators express doubts. Earl Johnson Jr. writes:

> Whether this lay advocate model could be transferred beyond the administrative arena to the courts is an open question and a problematic proposition, especially given the monopoly the legal profession enjoys over representation in the judicial system. To give that monopoly to non-lawyer advocates in certain cases in the regular courts neither appears feasible nor wise. Nor is the option of guaranteeing lower income litigants access to only lay advocates to face full-fledged lawyers in judicial proceedings.

Johnson, *supra* note 3, at 417.

124. Sitte, *supra* note 5, at 282.

advocate would decrease costs while having adequate training to diminish the disadvantages of pro se litigation.

2. Education

The only suggestion along the lines of a nonlawyer advocate that has been seriously advanced by a commentator involved using paralegals.[125] Paralegal is another name for a legal assistant. Paralegals are trained individuals who can "perform the same tasks as an attorney except for appearing in court, submitting signed documents to a court, and providing direct legal advice to clients."[126] The major problem with allowing paralegals to engage in the practice of law independently is that the paralegal profession does not have adequate regulatory safeguards.[127] Paralegal education can range from a certificate program to a Baccalaureate Degree.[128] California is the only state that directly regulates paralegals, and there currently are no mandatory certification examinations for paralegals.[129]

Despite this fact, law offices have used paralegals to improve their profitability for years.[130] Paralegals improve profitability because they work under the supervision of an attorney, perform the same substantive legal work as the attorney, and receive significantly lower pay than the attorney.[131] Since law offices essentially allow paralegals to do a sizeable amount of their legal work, it seems contradictory to then say that they are not qualified to perform certain kinds of complex legal work or representation. Certainly, there could be a method for teaching paralegals or similarly trained professionals to become effective at representing clients in court. The central issue is what education and certification programs are sufficient to ensure that they are qualified to practice law.

That brings up the question of how much education is really necessary to practice law within a discrete area. Keep in mind that my proposal envisions nonlawyer advocates who would be specifically trained to operate in one forum dealing with one particular type of law. Thus, you would have a

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125. Johnson, *supra* note 80, at 20. The "adjunct provider," as envisioned by a Hawaii Panel discussion, is a specialized individual who could provide services that are relatively routine in nature. *Id.* The panel suggests using adjunct providers in areas where legal needs are not currently being met by lawyers to increase the efficiency of legal services provided to the poor. *Id.* Possibly the reason that this proposal did not gain much traction was that it was proposed in the context of an "expanded utilization of paralegals," and no substantive standards or educational requirements were proposed. *Id.*

126. Timothy P. Flynn, *Should More Be Done To Credential Paralegals?*, MICH. B.J., Mar. 2001, at 52, 53.

127. *See id.* at 59-60.

128. *See* ABA Standing Committee on Paralegals, *Career Information*, http://www.abanet.org/legalservices/paralegals/career.html (last updated Aug. 14, 2008) [hereinafter ABA Paralegal *Career Information*].

129. *Id.*

130. Flynn, *supra* note 126, at 53; ABA Paralegal *Career Information*, *supra* note 128.

131. Flynn, *supra* note 126, at 53.

"divorce court advocate," or something to that effect. Taking that into account, I would imagine a two-year education (after high school graduation) would be sufficient, and may even prove to be excessive. A law degree only involves three years of full time legal education.[132] A specialized training program could be relatively brief and still be more than adequate to teach students to navigate a specialized area of law.[133]

If the proper procedures were put in place, these educational programs could become a reality. First, these programs would have to be approved by a higher authority. The ABA already approves paralegal education programs,[134] and could probably adapt those regulations for nonlawyer advocate programs fairly easily. Second, there would need to be an examination for certification—that is, something similar to the bar exam but on a significantly scaled back level. Several independent organizations currently offer paralegal examinations that could be adapted to nationwide or administered as state specific exams.[135]

3. Licensure

In addition to an abbreviated education, some form of certification or licensure should be put in place to ensure that all nonlawyer advocates are qualified in their areas of expertise. As part of this licensure requirement, I would first recommend a mandatory internship period. The mandatory internship model is applied in many professions.[136]. Under this model, a

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132. You must have a Baccalaureate Degree to be admitted to law school; however, that degree can be from any program. As a result, many students graduate law school with only three years of "legal" education.

133. Most law schools teach all of their legal research and writing courses within the first two years of law school, and most legal topics are taught over one or two semester-long courses. As a result, it is my position that a specialized professional could be properly educated in legal research, writing, and a specific area of law in (at most) two years.

134. ABA Paralegal *Career Information*, *supra* note 128.

> In 1974 the American Bar Association established the first Guidelines for the Approval of Paralegal Education Programs and in 1975 approved the first group of paralegal education programs. The ABA Guidelines were developed to promote high standards of quality for the education of paralegals. The Guidelines have been revised several times since their initial adoption to keep pace with changes in the utilization of paralegals and in higher education.

Id.

135. *Id.* The National Association of Legal Assistants has offered a certification examination since 1976. *Id.* The National Federation of Paralegal Associations offers the Paralegal Advanced Competency Examination. *Id.* NALS, the association of legal professionals, offers two paralegal certifications, and The American Alliance of Paralegals also offers certification. *Id.*

136. The most commonly recognized mandatory internship model is found in the education of medical doctors, who are required under most medical school curriculums to go through a period of internships. *See, e.g.*, *Curriculum,* DREXEL UNIV. COLL. OF MED.,

nonlawyer advocate could become licensed by spending a given number of years interning under a lawyer or previously licensed nonlawyer advocate. This internship would be performed after completing the necessary education but before sitting for a certification examination. The mandatory internship period would ensure that nonlawyer advocates are properly exposed to a specialized area of legal representation before they are permitted to engage in representation themselves.

The licensure model could also be used to limit the practice areas of nonlawyer advocates. This could be achieved by granting specific licenses for particular practice areas, such as limiting the court or substantive area of law that a nonlawyer advocate could practice in. Thus, you could have licensed family court nonlawyer advocates, welfare benefits nonlawyer advocates, and so on. Another possible limiting factor could be the types of clients that a nonlawyer advocate could represent, such as clients within specific income brackets.

C. Anticipated Concerns

1. Difficulty of Implementation

The first argument I anticipate is that the system I am proposing will be too difficult to implement, especially considering the fact that many states have failed to even require paralegal certification.[137] This proposal is far different than paralegal certification. Paralegals would still exist and perform the jobs that they have now. A wholly separate profession, which paralegals could join, would be able to become certified to represent individuals in specific areas of law.

Other professions find ways to expand and specialize when demand requires them to. Take, for example, the medical profession's development of nurse practitioners. Nurse practitioners did not even exist until 1965, when the University of Colorado started the nation's first nurse practitioner program.[138] Today, there are approximately 140,000 nurse practitioners in the United States, and there is a licensure process for nurse practitioners in every state

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http://www.drexelmed.edu/Home/Admissions/MDProgram/WhyDrexel/Curriculum.aspx (last visited Nov. 20, 2010). States also require licenses for a large number of professions beyond medical doctors. *See*, *e.g.*, *History of the Bureau*, PA. DEP'T OF STATE, http://www.dos.state.pa.us/ portal/server.pt/community/general_information/12501 (last modified Dec. 8, 2009, 10:54 AM) (stating that Pennsylvania has twenty-nine separate licensure bodies). Many of these professions also have mandatory internship requirements. *See, e.g.*, 49 PA. CONS. STAT. §§ 9.46, 9.84 (2010) (explaining Pennsylvania's work experience requirements for architects).

137. *See, e.g.*, R. Elton Johnson, III, *Mandatory Supervised Paralegal Regulation is in the Public Interest*, HAW. B.J., July 2004, at 32, 32 (stating that in 2002, the Hawaii Supreme Court rejected mandatory certification of paralegals because of a lack of support for the concept).

138. *Frequently Asked Questions*, *supra* note 112.

and the District of Columbia.[139] The health care industry found a way to evolve to meet the demands that it faced. So too should the justice system.

2. Reduction of Lawyer Jobs and/or Salaries

The second argument I anticipate is that this proposal will replace lawyers, or cause lawyers' salaries to decrease. Both of these concerns could potentially occur, but it is unlikely for two reasons. First, lawyers would be the ones creating these positions. With this power, lawyers could simply restrict the areas in which nonlawyer advocates could practice to areas that they currently are unable to fully serve (as detailed above). Due to the expansive legal needs that are currently unmet, nonlawyer advocates could be utilized without displacing many lawyers.[140] Second, nonlawyer advocates would be on a separate and lesser pay scale than lawyers due to their confined areas of practice. Lawyers would still be needed to handle more complex matters and issues involving multiple areas of law.

3. Increase in Legal System Costs

The third argument that I anticipate is that my proposal will create increased legal system costs that the system cannot handle. The first of these costs would come from the salaries of the nonlawyer advocates. Although nonlawyer advocates would be less expensive than lawyers, if nonlawyer advocates were representing persons who previously were unrepresented, then the costs of the nonlawyer advocates would become an additional cost to the legal system. My suggestion to partially offset this cost would be for states to take the money they are now using to attempt to educate pro se litigants and apply it to nonlawyer advocate salaries.

An additional legal system cost that could be problematic would come from an increased caseload. If nonlawyer advocates were utilized to accept more cases, court costs associated with litigation (such as an increase in cases filed and an increase in motion practice within those cases) could increase. The counter argument is twofold. First, allowing people to properly assert their rights should never be an argument against increased representation of the

139. *Id.*

140. This proposition assumes the availability of funding for these positions—funding that does not independently exist today. If the positions were not somehow absorbed through court sponsored programs or funded through another new funding source, then lawyer positions would likely be displaced. However, I do not find this to be a problematic position for two reasons. First, the areas in which lawyers will be displaced will be fairly simple areas of the law—areas in which someone could be adequately trained quickly. The education and expertise of a lawyer is likely better utilized in more complex situations. Second, causing lawyers to reach into more complex areas of practice could actually lead to increased average lawyer salaries and a greater appreciation and respect for lawyers among clients.

underserved. Second, court costs could actually decrease. Judges would not have to spend time trying to figure out the issue, the law, and the proper resolution of cases involving pro se litigants. Instead, adversarial representation would bring efficiency back to the courts. Additionally, with a balance of power[141] coming from the poor being represented, fewer meritless cases would be brought against the poor, and legal costs could actually decrease over time.

IV. CONCLUSION

Despite the efforts of legal professionals to raise funds, volunteer, and decrease needs, we know that only about twenty percent of the legal needs of the nation's impoverished population are being met. Worse yet, this statistic is not improving. Broader systemic changes are necessary to ensure that all Americans have meaningful access to justice.

I propose the utilization of nonlawyer advocates to significantly decrease legal costs to the poor. A nonlawyer advocate would be a specialized, educated, trained, certified, and possibly licensed professional who could represent clients in court, submit signed documents, and give legal advice—all within their discrete areas of expertise. Using nonlawyer advocates would allow the nation's current legal aid budget to serve a significantly larger number of poor persons annually.

I realize that this proposal will not be easy to implement and that more plausible and practical solutions may exist. I also recognize that I do not even have a calculable fraction of the wrinkles of my proposal ironed out. Despite all of this, the driving force behind my proposal—the concept that the American Legal System needs to be radically changed in order to close the justice gap in America—certainly makes sense. It is time for the legal community to begin a conversation about broader systemic changes that will enable its members to live up to their obligation to ensure justice for all. To this end, the legal community must first realize that they cannot solve the justice gap problem on their own. Changes must be made—such as allowing nonlawyers, in limited circumstances, to represent others. This proposed change, or others like it, may be the only way to put an end to the justice gap in America.

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141. Brescia, *supra* note 89, at 231. In the context of housing evictions, there is "a belief that with a greater balance of power in the courts, unscrupulous landlords would bring fewer cases for fear that cases of questionable or borderline merit would result in protracted litigation, ultimately ending in the landlord's defeat." *Id.* at 231-32.