

Five Broad New Ideas to Cut Through the Access to Justice-Commercialization-Deregulation Conundrum

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ABSTRACT

Most of the current deregulation discussion focuses on permitting both non-lawyers and lawyers to do more than currently authorized. While such changes would presumably contribute to solving the problem of increasing access to justice while maintaining quality and consumer protection, such discussions alone are unable to offer any realistic hope of achieving the 100 percent access to justice services for all envisioned by the recent Resolution of the Conference of (State Court) Chief Justices and the Conference of State Court Administrators. This Article discusses the potential for fully achieving that 100 percent goal by integrating broad regulatory changes with largely positive economic incentives on courts, bar and legal aid designed to increase efficiency and reduce costs, and with politically achievable ways of bringing in additional resources.

The five proposed solutions are:

- A. Releasing non-profit legal-serving entities from almost all regulation, while moving the subsidy system of legal aid to a genuinely competitive model;*
- B. Deploying a mix of more limited de-regulation on the bar as a whole, combined with inter-related mandated sliding fees and broad tax incentives, for both litigants and providers;*
- C. Maintaining almost all regulation, but placing the obligation of ensuring and providing 100 percent access to justice services on the bar as a whole, while giving the bar the authority to tax its members to fulfill that obligation and modify regulation;*
- D. Internalizing all costs of access to justice into the court system, in order to incentivize court simplification and some appropriate deregulation; and*

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E. Allowing for broad National Technology Limited Practice Licenses on condition of free services for the poor and reasonable ones for middle income, and with appropriate regulatory relaxations.

This Article proposes and applies a seven question conceptual framework for assessing these approaches and their long-term utility:

- *Does it ensure that everyone with significant legal need would be appropriately served, regardless of financial or other barriers?*
- *Does it provide the resources to fill the resource gap?*
- *Would it meet the political and economic requirements of being highly cost effective?*
- *Would services be varied, flexible and matched to need?*
- *Would the solution incentivize changes in the system as a whole?*
- *Would the solution protect the consumer, either through the relevant traditional formal values of the profession or through some other means such as a structuring of market incentives?*
- *Could one be sure that any new resource mechanism would not introduce or exacerbate any additional general non-neutrality into the system?*

TABLE OF CONTENTS

INTRODUCTION 686

I. CRITERIA FOR ASSESSMENT OF INTEGRATED SYSTEMIC SOLUTIONS, WHICH INCLUDE COMBINATIONS OF REGULATORY CHANGE WITH BROADER STRATEGIC CHANGES IN ACCESS APPROACHES 689

A. THE SOLUTION MUST ENSURE THAT EVERYONE WITH SIGNIFICANT LEGAL NEED WILL BE APPROPRIATELY SERVED, REGARDLESS OF FINANCIAL OR OTHER BARRIERS 689

B. THE SOLUTION MUST EXPLAIN HOW IT WILL PROVIDE THE RESOURCES TO FILL THE RESOURCES GAP 690

C. AS A POLITICAL AND ECONOMIC REQUIREMENT, THE SOLUTION MUST ENSURE HIGH COST-EFFECTIVENESS 690

D. AS AN INTELLECTUAL COROLLARY, THE SOLUTION MUST SHOW HOW THE SERVICES WILL BE VARIED, FLEXIBLE AND MATCHED TO NEED 691

E. THE SOLUTION MUST SHOW HOW IT WILL INCENTIVIZE CHANGES IN THE SYSTEM AS A WHOLE 692

F.	THE SOLUTION MUST SHOW HOW QUALITY AND PROTECTION OF THE CONSUMER WILL BE MAINTAINED, EITHER THROUGH THE RELEVANT TRADITIONAL FORMAL VALUES OF THE PROFESSION OR THROUGH SOME OTHER MEANS SUCH AS A STRUCTURING OF MARKET INCENTIVES	692
G.	THE SOLUTION MUST SHOW HOW THE RESOURCE MECHANISM DOES NOT INTRODUCE OR EXACERBATE ANY ADDITIONAL NON-NEUTRALITY INTO THE SYSTEM.	692
II.	RANGE OF VARIED INTEGRATED SYSTEMIC SOLUTIONS AND A PRELIMINARY ASSESSMENT COMPARED TO THE STATUS QUO	693
A.	BROAD DEREGULATION OF LICENSED, GENUINELY NONPROFIT SERVICE PROVIDERS WITH COMPETITIVELY DISTRIBUTED SUBSIDIES	693
1.	THE SYSTEM	693
2.	ASSESSMENT OF CONSEQUENCES	695
B.	REGULATORY REFORM, SLIDING SCALE FEES, AND TAX INCENTIVES	697
1.	THE SYSTEM	697
2.	ASSESSMENT OF CONSEQUENCES	700
C.	MAINTENANCES OF REGULATION, RESPONSIBILITY FOR ONE HUNDRED PERCENT ACCESS TO JUSTICE ON THE BAR, AND GRANTING THE BAR SELF-TAXING AUTHORITY	701
1.	THE SYSTEM	701
2.	ASSESSMENT OF CONSEQUENCES	704
D.	INTERNALIZING COSTS TO THE COURTS AS THE CHEAPEST COST AVOIDER	705
1.	THE SYSTEM	705
2.	ASSESSMENT OF CONSEQUENCES	707
E.	NATIONAL SAFE HARBOR FOR TECHNOLOGY-DELIVERED SERVICES, ON CONDITION OF FREE DELIVERY TO POOR, REASONABLE PRICES TO MIDDLE INCOME, AND OTHER ACCESS CONDITIONS	707

1. THE SYSTEM	707
2. ASSESSMENT OF CONSEQUENCES	710
F. THE ONGOING PATH OF SLOW CHANGE IN THE STATUS QUO.	710
III. CHART: SUMMARY ANALYSIS OF OFFERED SOLUTIONS	712
A CONCLUDING NOTE	713

INTRODUCTION

Many of us who think about the possible impact of deregulation and commercialization on access to justice end up profoundly ambivalent about the likely effect of change. There is both fear and hope. Hope that these trends will provide cheaper and more flexible services. Fear that they will reduce quality and fail to provide promised benefits to those most in need.

Notwithstanding a very significant recent resolution by the two highly influential national state court leadership bodies, the Conferences of Chief Justices (CCJ) and of the Conference of State Court Administrators (COSCA), expressing the groups' commitment to the "aspirational goal" of 100 percent access to justice services (CCJ Resolution),¹ and urging specific steps to move towards that goal, our legal system is as yet failing abysmally to provide civil access to justice for all but the richest.² This is as much a middle class problem as

1. The Resolution endorses 100 percent access to justice as an "aspirational goal" and urges working with the state Access to Justice Commissions and others to deploy recognized advances and to develop the needed strategies, including the establishment of achievable and measurable outcome, to do so. The Resolution notes that "these advances include, but are not limited to, expanded self-help services to litigants, new or modified court rules and processes that facilitate access, discrete task representation by counsel, increased pro bono assistance, effective use of technology, increased availability of legal aid services, enhanced language access services, and triage models to match specific needs to the appropriate level of services." *Conference of State Court Administrators Resolution 5: Reaffirming the Commitment to Meaningful Access to Justice for All*, NAT'L CENTER FOR STATE COURTS, http://www.ncsc.org//media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20All_final.ashx [https://perma.cc/HU33-GC9U] (last visited Mar. 2, 2016). One reason to hope that the Resolution will have the desired effect is the recent announcement by the National Center for State Courts, of the "Justice For All," project, funded by the Public Welfare Foundation. The Project will support state-level funding to implement the Resolution by providing strategic plan guidance, grants and technical assistance, <http://www.srln.org/system/files/attachments/JFA%20Fast%20Facts%20Final.pdf> [https://perma.cc/G6CP-8HJL] (last visited May 18, 2016). For examples of the scope and influence of the Conferences and their Resolutions see generally THE HISTORY OF THE CONFERENCES OF CHIEF JUSTICES (3rd ed. 2009), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Web%20Documents/CCJ%20History%2061709.ashx> [https://perma.cc/DL3T-H8GF].

2. See *Rule of Law Index 2015*, WORLD JUSTICE PROJECT 30 (2015), http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf [https://perma.cc/M3QL-Q6LG] (last visited April 21, 2016) (showing the United States is ranked 21st for access to justice across the world).

a poor person's problem.³ Despite growing pressure from commercial interests,⁴ technological changes,⁵ advocates in the United States,⁶ and expanding alternative approaches outside the United States,⁷ opposition to radical change has remained strong over time within the institutions of the profession,⁸ and indeed the profession itself.⁹ A parallel sign of hope, however, is the January 2016 passage by the American Bar Association House of Delegates of Resolution 105, *ABA Model Regulatory Objectives for the Provision of Legal Services*. The action represents at the minimum an acknowledgement by the ABA of the growing emergence of additional access-friendly forms of legal services beyond the traditional lawyer one. The approved Objectives include, as Objective C, “*Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems.*”¹⁰

Notwithstanding the huge steps that the CCJ/COSCA Resolution represents, and the ABA Resolution has the potential to represent, there is still no identified political and financial path by which the many innovations cited in the CCJ Resolution will lead to anything even approaching that 100 percent goal. To a certain extent, the legal profession now knows a lot about the services that need to be delivered to those in need so that they may obtain access to justice, but it has

3. See, e.g., Jerome A. Collins, *Maine Voices: No Justice When Cost Leaves Middle Class Without Legal Representation*, PORTLAND PRESS HERALD (Mar. 12, 2014), <http://www.pressherald.com/2014/03/12/maine-voices-no-justice-when-cost-leaves-middle-class-without-legal-representation/> [https://perma.cc/X7P9-CJQA].

4. See, e.g., *Latest Legal Victory Has LegalZoom Poised for Growth*, ABA J. (Aug. 11, 2014), http://www.abajournal.com/magazine/article/latest_legal_victory_has_legalzoom_poised_for_growth [https://perma.cc/4MW6-ZJBB].

5. See, e.g., *Center for Access to Justice & Technology*, IIT CHICAGO-KENT COLLEGE OF LAW, <https://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology> [https://perma.cc/R5AG-AMKW] (last visited June 16, 2016).

6. See Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 68 HASTINGS L.J. (forthcoming 2016) (proposing regulatory flexibility in who is allowed to perform what tasks and authorization of national practice licensing).

7. For analysis of the UK system, see *id.* at 18–25.

8. See, e.g., Taysen Van Itallie, *American Bar Association Should Improve Access to Legal Services*, NJ.COM (Sept. 20, 2012), http://blog.nj.com/njv_guest_blog/2012/09/american_bar_association_shoul.html [https://perma.cc/C2GG-FJSK] (noting “ABA inaction will likely stall reform, even as the cost and access crisis escalates”).

9. LAKE RESEARCH PARTNERS & TORRANCE GRP. *Expanding Civil Legal Aid: Strategies for Communications with Lawyers*, 27–29, 46 (2014), <http://voicesforciviljustice.org/wp-content/uploads/LRP-TTG-Analysis-of-CLA-2014-Research-Findings-with-lawyers-for-Voices-website1.pdf> [https://perma.cc/FG3N-PT6L] (last visited June 16, 2016) (opposition to forms, self-help services, etc.; reluctance to change practice to make more accessible).

10. *ABA Model Regulatory Objectives for the Provision of Legal Services*, ABA, <http://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/105.pdf> [https://perma.cc/V7NT-UZ7R] (last visited May 18, 2016). Indeed, the Conference of Chief Justices also passed a Resolution just before the ABA's action. *Recommending Consideration of ABA Model Regulatory Objectives for the Provision of Legal Services*, <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/02012016-Recommend-Consideration-ABA-Model-Regulatory-Objectives-Provision-Legal-Services.ashx> [https://perma.cc/UY7H-76SQ] (last visited May 18, 2016).

not thought through the institutional arrangements that can sustain those services beyond calling for more money.

If not achieved through institutional change, it is hard to imagine complete or partial deregulation alone solving the problem. Deregulation might well reduce cost, making it easier for those in need to find affordable services. But we should be skeptical as to how far price reductions would go to fill the gap. Such deregulation could also harm at least some access interests.¹¹

This article therefore proposes five alternative strategies for combining a deregulation approach with other structural changes to cut through this conundrum.¹²

The goal is to offer solutions, each of which minimizes the dangers of and maximizes the chances of success of deregulation/liberalization, by providing generally positive incentives that would help make needed resources available.¹³ This article posits some requirements for a viable one hundred percent access to justice system and analyses the overall consequences of each approach. Among the requirements is the protection of the consumer. The analysis of this element includes the promotion of those values of the profession that are genuinely associated with the protection of the consumer, rather than the profession itself.¹⁴

While some of these proposals may seem initially unpalatable, members of the bar should consider the likely long-term alternative: surrender to increasing and ultimately complete deregulation.

11. Some of the ways that such harm would occur would be lack of quality control, depersonalization through commoditization, and the possible lowering of what might be called the “pro bono rent,” that comes from the higher legal fees provided by the professional monopoly making it easier for lawyers to provide pro bono services.

12. See generally Dana Remus, *Reconstructing Professionalism 3* (), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676094 [<https://perma.cc/V4UE-3Z4N>] (last visited June 16, 2016) (“I argue that reforms to the legal profession should not just seek efficiency in the delivery of legal services; they should seek to empower lawyers to facilitate and mediate relationships pursuant to law, rather than wealth or power.”).

13. The value of the general approach taken by this Article would appear to be strongly supported by a World Bank cross-jurisdictional study of judicial reform. *Judicial Reform*, WORLD BANK RES. OBSERVER, Spring 2003, at 61, 80, http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2013/04/08/000333037_20130408125211/Rendered/PDF/764420JRNOR00S00Box374378B00PUBLIC0.pdf [<https://perma.cc/O9PL-CUWJ>] (“The four basic schools of thought about judicial reform point to different factors as the main cause of judicial inefficiency—inadequate resources, excessive access, poor incentives, and complex procedures. A review of the evidence shows that the first two are insufficient to explain judicial inefficiency in most countries. Instead, the evidence suggests that inadequate incentives and overly complicated procedures account for most of the problem. Although incentive-oriented reforms can be effective, incentives alone will not end chronic judicial inefficiency. Most cases of judicial stagnation require simplifying procedures and increasing their flexibility.”).

14. For a fascinating breakdown of the very different ways that such regulatory goals can be achieved, see Hadfield & Rhode, *supra* note 6, at 13–17 (prescriptive, performance-based, management-based, competitive regulation approaches, or combination thereof, also recognizing different needs in different areas of substance and practice.).

I. CRITERIA FOR ASSESSMENT OF SYSTEMIC SOLUTIONS, WHICH INCLUDE COMBINATIONS OF REGULATORY CHANGE WITH BROADER STRATEGIC CHANGES IN ACCESS APPROACHES

A. THE SOLUTION MUST ENSURE THAT EVERYONE WITH SIGNIFICANT LEGAL NEED WILL BE APPROPRIATELY SERVED, REGARDLESS OF FINANCIAL OR OTHER BARRIERS

The following proposed definition of “one hundred percent access to justice” is intended to be as comprehensive as possible.¹⁵ In the practical political world, compromise is likely to be needed, but it is important for initial analytic purposes to be comprehensive.

A jurisdiction is providing 100 percent access to justice in its legal system when available justice services are such that any individual who: 1) either might gain by seeking the assistance of a legal institution to protect their significant interests, or 2) who might gain from assistance in preventing another from using the institution to impinge on their interests, or 3) might derive benefit from legal information or assistance services in the protection of or advancing of their interests, is sufficiently informed about such services to be able to decide whether they wish to seek such services, to be able to take the steps required to obtain them if they choose, and can in fact obtain such services if sought.

Such services must be available without excessive burden, regardless of the individual’s financial resources or other barriers such as language or capacity.

In decision-making environments, such available and accessible services must be sufficient to ensure that the facts and the law are sufficiently placed before the decision-maker so that a neutral decision-maker can make the decision on the facts and the law, unless an individual seeking to protect their rights decides, upon appropriate information, that they do not want to pursue their case.

It is important to note that this definition focuses on “access” rather than on the merits of obtaining actual justice. It is assumed that the jurisdiction’s code of judicial conduct ensures that, if issues are properly presented, a just solution will be obtained.¹⁶ Yet, if governing law does not provide for justice, then sufficient

15. This definition builds upon an earlier one offered in Richard Zorza’s Access to Justice Blog, *Towards a Definition of One Hundred Percent Access to Justice*, ACCESS TO JUSTICE BLOG (Sept. 3, 2015), <http://accesstojustice.net/2015/09/03/towards-a-definition-of-one-hundred-percent-access-to-civil-justice/> [<https://perma.cc/34LJ-LDZ2>]. The comments to that blog post were extremely helpful in focusing and refining this definition. See Richard Zorza, *Reflections on Two Comments on 100% Access to Justice Definition*, ACCESS TO JUSTICE BLOG (Sept. 6, 2015), <http://accesstojustice.net/2015/09/06/reflections-on-two-comments-on-100-access-to-justice-definition/> [<https://perma.cc/RQ4M-8GRJ>] (last visited Feb. 16, 2016).

16. See generally ABA MODEL CODE OF JUDICIAL CONDUCT, http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html [<https://perma.cc/S2B6-53BN>] (last visited June 16, 2016) (especially Comment 4 to Rule 2.2 on judicial engagement). With respect to the

services to attempt to bring the governing law into accord with principles of justice should be included in this definition.

B. THE SOLUTION MUST EXPLAIN HOW IT WILL PROVIDE THE RESOURCES TO FILL THE RESOURCES GAP

It is important not only to understand the extent of this problem, but also not to overstate it. Many studies generally conclude that only twenty percent of legal need is met for poor people.¹⁷ Far less is quantitatively known about unmet middle class need.¹⁸ However, these estimates assume that all legal needs must be met in the traditional lawyer-only way. In fact, as assumed in many of the solutions here, the total cost of filling the gap can be reduced very significantly by the kind of triage and continuum of varied services model anticipated in the CCJ Resolution.¹⁹ In such a system, services to be provided would be sufficient to meet the standard articulated in Part II A, and would be provided by a mix of services—from websites, online forms, self-help information centers, non-lawyers, discrete task representation, as well as, when needed, traditional full representation. Key to success will be including a front-end triage system that makes sure that the right services go to the right people.²⁰

C. AS A POLITICAL AND ECONOMIC REQUIREMENT, THE SOLUTION MUST ENSURE HIGH COST-EFFECTIVENESS

The overall cost of the system must be reasonable, at least to whoever is carrying the burden.²¹ Each element or component of service or management

judicial role with the self-represented, see Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004).

17. *Documenting the Justice Gap*, LEGAL SERVICES CORP. (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [<https://perma.cc/N59A-Z6UJ>] (last visited April 21, 2016) (updated report on unmet need for legal aid eligible population).

18. For the first broad research in a long time, beyond the more focused “needs studies” collected in *Documenting the Justice Gap* report cited above, see Rebecca Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, AM. BAR FOUND. (Aug. 8, 2014), <https://richardzorza.files.wordpress.com/2014/08/sandefur-accessing-justice-in-the-contemporary-usa-final.pdf> [<https://perma.cc/4F2J-EP9J>].

19. In calling for the 100 percent “aspirational goal,” the Resolution relies upon the piloted “continuum of meaningful and appropriate services to secure effective assistance for essential civil legal needs” and references “triage models to match specific needs to the appropriate level of services.” CCJ Resolution, *supra* note 1.

20. Richard Zorza, *The Access to Justice “Sorting Hat”: Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 U. DENV. L. REV. 659 (2013); Thomas Clarke et al., *Triage Protocols for Litigant Portals: A Coordinated Strategy Between Courts and Service Providers*, NAT’L CENTER FOR STATE COURTS (Dec. 2013), <http://nscs.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/2045> [<https://perma.cc/CT8D-GSKQ>].

21. For the dramatic international expenditure comparisons showing how far we appear to be from sufficient dedication of resources, see Earl Johnson, *Justice for America’s Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393, 393, 424 (2009).

must also be efficient. Finally, any “outside” investments must be productive so that the shift does not mean that the system is now paying for costs that have previously been provided without cost.²² In some solutions all of this will be done by the market; in others it might be done by systems of price control or regulation, such as a sliding scale. Overall, such cost control is less important if the system is calling for outside resources, rather than if the costs are being paid by those within it, such as lawyers. An ideal system would be built so that the incentives would be such that the decision-makers would have a strong interest in minimizing costs in all parts of the system.²³

D. AS AN INTELLECTUAL COROLLARY, THE SOLUTION MUST SHOW HOW THE SERVICES WILL BE VARIED, FLEXIBLE AND MATCHED TO NEED

As the Resolution shows, there is consensus that a range of services will be required to ensure quality and cost control, regardless of the solution chosen.²⁴ Moreover, there will have to be some way of allocating cases to service types, at both the macro and individual level (i.e., triage).²⁵

Building a solution in which the costs of the system were internalized to those who could create a variety of service modalities would make it more likely that such modalities would be created and allowed to be used as broadly as possible. Similarly, putting responsibility for triage into the hands of those who would bear the costs of error would provide incentives for the creation of a triage system that would push cases to the cheapest way of providing services. To the extent that a wrong triage decision could be made to always result in additional service costs, the incentives would work to bring the system into balance. An example would be courtroom costs, made necessary by the failure of the initial access services resulting in cases coming back to court. Placing triage, service, and courtroom costs in the same budget system would tend to provide the incentives for appropriate triage.²⁶

22. For example, in a properly resourced system, there may be less incentive for lawyers to do pro bono. Of course, while currently deeply opposed by the organized bar, making pro bono mandatory would offer a solution. Esther Lardent, *Is it Time for Mandatory Pro Bono?*, NAT'L L. J. (2011), http://www.probono.net/ok/news/article.392264-Is_it_time_for_mandatory_pro_bono. [<https://perma.cc/4Y97-YZM9>] (last visited April 21, 2016).

23. For example, a system in which external expenditures were carried by the courts would provide incentives for court simplification. *See generally*, *Externality*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Externality> [<https://perma.cc/48AX-QER2>] (last visited April 21, 2016).

24. CCJ Resolution, *supra* note 1.

25. Clarke et al., *supra* note 20.

26. *See generally id.*; Johnson, *supra* note 21, at 420.

E. THE SOLUTION MUST SHOW HOW IT WILL INCENTIVIZE CHANGES IN THE SYSTEM AS A WHOLE

The needed cost efficiencies and political support will not occur unless the changes in one part of the system provide incentives for, or include mandates for, changes in the others. A truly reformed system will require mutually reinforcing changes in courts, bar and traditional legal aid.²⁷ An ideal solution will sufficiently change the environment such that responsive changes will occur automatically.

F. THE SOLUTION MUST SHOW HOW QUALITY AND PROTECTION OF THE CONSUMER WILL BE MAINTAINED, EITHER THROUGH THE RELEVANT TRADITIONAL FORMAL VALUES OF THE PROFESSION OR THROUGH SOME OTHER MEANS SUCH AS A STRUCTURING OF MARKET INCENTIVES

Several of the options discussed below in Part III assume the removal of all or most of the traditional mechanisms that are justified as providing consumer protection, broadly defined.²⁸ If there is less control at the front end, there has to be some combination of aggressive enforcement at the back end (more like traditional consumer protection), raising the costs of non-compliance, or imposing liability for non-compliance on a broader range of institutions, or some other newer mechanism. It should be noted that crowd-sourced feedback on providers may offer a very significant new tool for quality control.²⁹

G. THE SOLUTION MUST SHOW HOW THE RESOURCE MECHANISM DOES NOT INTRODUCE OR EXACERBATE ANY ADDITIONAL NON-NEUTRALITY INTO THE SYSTEM

The current system, of course, produces massive non-neutrality, given the data suggesting that whether or not a litigant has a lawyer,³⁰ as well as their class

27. Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, JUDICATURE, Jan.–Feb. 2011, at 156.

28. Of course, consumer service contains many elements beyond reduction of error. See Remus, *supra* note 12, at 24–33, 38 (elements of the relational value of lawyering; rejecting “hasty embrace of the market exchange model” and advocating “pursue change from within the professional form”). It is, of course far from clear that the traditional consumer protection mechanisms are effective. Reports of bar discipline suggest that many reported violations are technical, rather than substantive, dealing with issues like client security funds. An example of reporting of a state’s (Washington) statistics by complaint type is *Lawyer Discipline System Annual Report*, WASH. STATE BAR ASS’N 7 (2014), http://www.wsba.org/~media/Files/Licensing_Lawyer%20Conduct/Discipline/2014%20Lawyer%20Discipline%20System%20Annual%20Report.ashx. [https://perma.cc/Q9BZ-P4S7] (last visited Feb. 12, 2016).

29. For a somewhat skeptical analysis of the value of online reviews of lawyers, see, e.g., *Are Online Attorney Reviews a Fair Representation?*, LEGALINK MAG., <http://www.legalinkmagazine.com/2014/11/are-online-attorney-reviews-a-fair-representation/> [https://perma.cc/ARS3-MEQM] (last visited March 4, 2016).

30. Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, SEATTLE J. SOC. JUST. 9, 51 (2010), [http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1076&context=sjsj&sei-redir=1&referer=https%3A%2F%2Fscholar.google.com%2Fscholar%3Fhl%3Den%](http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1076&context=sjsj&sei-redir=1&referer=https%3A%2F%2Fscholar.google.com%2Fscholar%3Fhl%3Den%2F)

credibility,³¹ has a very large impact on court outcomes. So any move towards one hundred percent access to justice can only reduce this non-neutrality at a general level, although it is unlikely to remove it entirely. The concern here, however, is that a more radical change in the system might introduce additional non-neutralities. For example, increasing the control of the bar over the system might be feared as strengthening those who already have some access to lawyers through informal systems, by making the few who already have access gain even more. Alternatively, placing more resources under local control might reduce *de facto* access for those perceived as threatening to that control.³² Or, might relying on triage exacerbate bias towards those able to “game” access to services, a topic not yet generally explored?³³

II. RANGE OF VARIED INTEGRATED SYSTEMIC SOLUTIONS AND A PRELIMINARY ASSESSMENT COMPARED TO THE STATUS QUO

A. BROAD DEREGULATION OF LICENSED, GENUINELY NONPROFIT SERVICE PROVIDERS WITH COMPETITIVELY DISTRIBUTED SUBSIDIES

1. THE SYSTEM

One possible way of moving aggressively to one hundred percent is to permit very broad deregulation of nonprofit service providers, and combine that with converting to a governmental funding mechanism that distributes funding under genuine competition. Quality control would be achieved by establishing a special licensing process for the nonprofit service providers groups, supported by consumer protection enforcement. This system would build on, empower, and provide very significant incentives for the already rapidly proliferating group of nonprofit law firms,³⁴ including particularly the incubators currently spreading

26q%3Drebecca%2Bsandefur%26btnG%3D%26as_sdt%3D1%252C21#search=%22rebecca%20sandefur%22 [https://perma.cc/7EKQ-BA6B] (last visited Mar. 2, 2016). For a highly critique of the reliability of the many studies on this topic, see James Grenier & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference does Representation (Offer and Actual Use) Make?*, 121 YALE L. J. 2118 (2011).

31. For public perceptions of this issue, see, e.g., Memorandum from GBA Strategies to National Center for State Courts, *Analysis of National Survey of Registered Voters* 4 (Nov. 17, 2015), http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/SoSC_2015_Survey%20Analysis.ashx [https://perma.cc/493S-792M] (62 percent think the poor are treated worse, and 70 percent think the wealthy are treated better).

32. The history of attempts to limit the substantive areas in which legal aid can work, the clients they can represent, and the legal techniques they can use, is not salutary. See, Alan Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2188–2207 (1999); Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J. L. & POL’Y, 33 (2000) (history and impact of attempt to cut off environmental advocacy).

33. Compare to the discussion in Grenier & Pattanayak, *supra* note 30, at 49 n.150.

34. Such firms are proliferating because of their ability to raise money from donations, foundations, and government, and to a certain extent, are evolving as a parallel system to the traditional community-based provider network.

quickly among law schools.³⁵ It could also be structured to allow nonprofits in other fields, such as health,³⁶ to provide such legal services under the exemption.

It should be noted, however, that the current nonprofit provider community has been hostile to competitive distribution of funds,³⁷ relatively unenthusiastic about deregulation, and fearful of being perceived as providing second-class service,³⁸ with one significant exception concerning conflict checking in the context of limited scope services.³⁹

Such a system would permit nonprofits to use the whole panoply of potential services without restriction. This would include broad and flexible use of non-lawyers, within the broad discretion of the non-profit,⁴⁰ cross-state services, and high use of technology (including online advice). It would allow fees and co-payments with significant cost reductions to the nonprofit. With this flexibility, many current partnerships might choose to convert themselves into such nonprofits, making much more efficient the middle-income bar system. These together might incentivize the business of those that serve lawyers with online

35. The first incubator became operational in 2007, and now there are over 50 law school incubators in total. See *Incubator/Residency Programs Directory*, ABA, http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/program_directory.html [<https://perma.cc/3NHN-5HN2>] (last visited Nov. 8, 2015).

36. While medical-legal partnerships have rightly earned much praise, the question might be asked whether nonprofit health providers should be permitted to provide such services directly—and to do so in as efficient a manner as possible. See Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 *FORDHAM URBAN L. J.* 1259, 1277–78 (2014) [hereinafter Zorza & Udell, *New Roles*].

37. Notwithstanding the adoption of competitive bidding formalities by the Legal Services Corporation in 1996, “[T]here is currently little competition for LSC grants despite . . . [the] mandate.” See LEGAL SERVICES CORPORATION, Jeffrey E. Schanz, *Inspector General Legal Services Corporation, Testimony Before the Subcommittee on Commercial and Administrative Law House Committee on the Judiciary* 17 (Apr. 27, 2010), http://judiciary.house.gov/_files/hearings/pdf/Schanz100427.pdf [<https://perma.cc/E2AE-UP5U>] (opposing elimination of bidding mandate).

38. An example is “the Summer ’03 issue of the [Management Information Exchange] Journal, in which” legal aid executive directors

expressed concern about ‘McJustice’ and suggested that legal services should provide those lucky enough to get into the system with the best service possible and ignore the rest. They argued that it is better to achieve the ‘optimal outcome’ for ten clients than to obtain ‘favorable outcomes’ for one hundred clients

as quoted in Katherine Alteneder et al., *The Role of Technology in the Access Solution*, in *THE FUTURE OF SELF-REPRESENTED LITIGATION: REPORT FROM THE MARCH 2005 SUMMIT* 81, 91 n.137 (2005), <http://lawworks1.com/publicfiles/PDF's/FutureOfProSe.pdf> [<https://perma.cc/294Z-SU9P>] (last visited Feb. 11, 2016).

39. The legal aid community supported the addition of Model Rule of Professional Conduct Rule 6.5, exempting courts and nonprofit providers from certain aspects of conflicts and conflict checking rules for situations involving brief service and advice. See *MODEL RULES OF PROF’L CONDUCT R. 6.5* (2009) [hereinafter *MODEL RULES*].

40. See Richard Zorza, *Steps in New York Underline Speed of Acceptance of “Roles Beyond Lawyers,”* ACCESS TO JUSTICE BLOG (Mar. 31, 2015), <http://accesstojustice.net/2015/03/31/steps-in-new-york-underline-speed-of-acceptance-of-roles-beyond-lawyers/> [<https://perma.cc/F6KN-KMRA>] (discussing New York Court proposal to permit pilot).

services of all kinds because when the client services are provided by nonprofits, they would be free of regulatory constraints.

The introduction of competition into the funding process, in a world in which any service modality were allowed, would result in a significant cost-per-case reduction, although funders would have to include mechanisms to protect quality. The Legal Services Corporation (“LSC”) competition process has not in practice offered a successful model.⁴¹ There would be nothing to stop national nonprofits from competing for national service contracts, which might provide for significant additional efficiencies. Moreover, as has occurred in both the nonprofit and profit-making sectors of the healthcare industry, consolidation would surely occur, at least making regulation easier.⁴²

Nonprofit licensing, which might be handled at the national level, would limit the income that individuals would be able to take out of such entities, thus minimizing the risk of lawyers using a nonprofit shell to avoid regulation of private sector lawyers.⁴³ This would (or should) minimize the extent to which private lawyers would see this solution as a threat rather than an opportunity.

The question of whether issuance of a license would require that certain managerial roles be played only by lawyers is left for another day,⁴⁴ but this article starts with the presumption that market and competition for funding would achieve what might be needed in this area.

As discussed below, this solution is weakest in the area of funding.

2. ASSESSMENT OF CONSEQUENCES

This model includes a delivery system that would, if sufficiently resourced, provide universal services and would do so with great flexibility. However, it is subject to resource limitations and cannot yet be considered a comprehensive solution. While it may have the potential to attract sufficient resources, the model as offered is far from demonstrating realistic sufficient sources to get to one hundred percent access to justice.

The combination of deregulation of nonprofits, encouragement of nonprofit status, and competitive bidding, has the potential to generate a high level of efficiency, because it provides great flexibility in service delivery and incentives for the use of that flexibility to achieve efficiency.⁴⁵ Of course such an

41. *Incubator/Residency Programs Directory*, *supra* note 35.

42. See Anna Wilde Mathews, *Health-Care Providers, Insurers Supersize*, WALL ST. J. (Sep. 21, 2015), <http://www.wsj.com/articles/health-care-providers-insurers-supersize-1442850400> [https://perma.cc/2JSZ-JUZQ].

43. Deborah L. Rhode & Amanda K. Packel, *Ethics and Nonprofits*, STAN. SOC. INNOVATION REV. (Summer 2009), http://ssir.org/articles/entry/ethics_and_nonprofits [https://perma.cc/42XA-ZMAE].

44. Legal Services Act 2007, c. X (Eng), which allowed non-lawyers to invest in law firms under certain circumstances; Hadfield and Rhode, *supra* note 6, at 20-21.

45. Hadfield & Rhode, *supra* note 6, at 20-21 (benefits of flexibility in multiple delivery systems in the new UK regulatory model).

achievement requires a culture shift and the absence of price fixing, allocation of territories, and any other techniques that would defeat the incentives for efficiency. A pilot would test both the ability to attract resources and the risk of incentive defeating techniques.

Designed as it is to permit maximum flexibility and triage, and designed with competitive incentives to right-sizing services, these goals should be met. The fact that this system is not necessarily fully integrated with court-based services such as self-help centers, might reduce the variety of services available.

The flexibility in the newly expanded nonprofit sector might encourage consideration of expansion of these changes to the market sector, additionally improving efficiency. The experience obtained in the nonprofit sector might also ensure that such expansion would be optimized.⁴⁶ Competitive pressures upon community-based legal aid funding might result in legal aid making efforts to urge courts to make efficiency changes that would then improve courts, bar practice, and traditional legal aid.⁴⁷

However, no matter how much more efficient such a non-regulated nonprofit market might be, no matter how much middle-income clients might be able to pay, and no matter how much would be saved by a true system of competition, the reality is that this system will require additional resources. While a much more efficient system would presumably attract more funding from many sources, it would be a gamble to assume that these sources alone would fill the gap.⁴⁸ Potential additional sources might include more formal adoption by the large-scale law firms of partner nonprofits, with enhanced contributions by the profit-making partner.⁴⁹

Whether deregulation in the nonprofit context will result in the parade of horrors listed in the general lawyer regulation context has not been empirically tested, although in those limited situations in which regulations have been relaxed in the non-profit or governmental context, there is no evidence that any

46. As a general matter, however, these do not appear to have been significant diffusions of deregulation in this manner. The Rule 6.5 distinction has not been expanded to other regulatory areas.

47. The current near total absence of such pressures on legal aid means that there has been little opportunity to test this theory. To the extent that legal aid programs, faced with excessive demand, have pressured courts for innovations such as self-help services that would support this theory. *See, e.g., Self-Help Centers*, MICH. LEGAL HELP, <http://michiganlegalhelp.org/organizations-courts/self-help-centers> [https://perma.cc/89RA-MRRW] (last visited May 19, 2016) (funded in part by the Michigan State Bar Foundation).

48. "Providing even one hour of attorney time to every American household facing a legal problem would cost on the order of \$40 billion," Hadfield & Rhode, *supra* note 6, at 2 (citing, Gillian K. Hadfield & Jamie Heine, *Life in the Law Thick World: The Legal Resource Landscape for Ordinary Americans*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* (forthcoming) (on file with author)).

49. A model might emerge from new non-profit partnerships with traditional firms, such as the one described in, *Georgetown Law, Arent Fox and DLA Piper Create Nonprofit Law Firm*, GEO. LAW (Apr. 13, 2015), <https://www.law.georgetown.edu/news/press-releases/georgetown-law-arent-fox-dla-piper-partner-to-create-nonprofit-law-firm.cfm> [https://perma.cc/XD35-VL7Y].

problems have surfaced.⁵⁰ Complaints against nonprofit providers are so rare as to be almost non-existent, although this may be more a function of low expectations.⁵¹ To the extent that consumer protection risks might be greater, those new risks are likely to come from the possible expansion of the nonprofit sector from conversion by solo or small practices into a nonprofit status.

The more difficult question is whether the introduction of real competition would increase the risk of consumer protection failures—in other words a race to the bottom.⁵² While the risk cannot be ignored, the culture of most legal nonprofits is so anti-competitive,⁵³ that they are not, at least in the short term, attuned to taking advantage of quality shortcuts. There appears to be little if any likelihood of additional general non-neutrality, since those served by the non-profits are currently so under-assisted.

B. REGULATORY REFORM, SLIDING SCALE FEES, AND TAX INCENTIVES

1. THE SYSTEM

A second possibility is to accompany broad deregulatory reform with the imposition of a universal sliding scale service mandated upon all who provide services within the otherwise largely deregulated structure. Funding would come from a mix of tax subsidies to providers and clients. Quality would be ensured by beefed-up after-the-event consumer protection regulation.

The core idea is to use the tax incentives to move towards a system in which providers would be able to provide their services more cheaply, and to require that services were provided even more inexpensively to those who could not afford full payment. The burden of proof on regulation would be on those who seek to maintain it.

It is truly astonishing, and surely would be politically unpopular when pointed out, that very often one side's legal costs are deductible while the others' are not, with the government effectively subsidizing one side over the other. Examples

50. This includes Rule 6.5 that relaxes conflict rules in the brief service and advice context for nonprofits and courts. See MODEL RULES R.6.5. There are no widely cited instances of problems of abuse of this rule.

51. *But see* Eric Schall, *Liability Trends for Nonprofit Organizations*, NONPROFIT RISK MANAGEMENT CENTER (2003), <http://www.nonprofitrisk.org/library/articles/trendb09002000.shtml> [<https://perma.cc/RS7W-Z4GV>] (last visited Feb. 11, 2016) (asserting there is a “rising tide of liability risks, some from previously unsuspected sources”).

52. The debate about such competition has been highly muted in the United States, at least recently. However, in the United Kingdom, such concerns resulted in a recent at least temporary retreat from purely price-based competition. Owen Bowcott, *Justice Secretary Scraps Plan to Award Legal Aid Contracts to Lowest Bidder*, THE GUARDIAN (Sept. 5, 2013), <http://www.theguardian.com/law/2013/sep/05/justice-secretary-legal-aid-contracts> [<https://perma.cc/CR7D-3EPA>].

53. See, as to lack of competition, Schanz, *supra* note 37 (opposing elimination of bidding mandate).

are landlord-tenant, credit card loans, and foreclosure.⁵⁴ It is even more astonishing when you realize that there is a strong correlation between wealth and deductibility, as in landlord-tenant and debt collection cases.⁵⁵ It is also noteworthy that expenditures on physical and mental health receive huge tax subsidies, but that individuals receive no deductions for legal health (except, for those relating to work, tax and estate planning).⁵⁶

Perhaps even more startling is that this disparity and subsidy for the rich in the legal system is apparently never challenged in the political arena or considered as a source of support for access to justice.⁵⁷ The complexity of the politics is underlined by the fact that a tax benefit for employer-provided legal insurance expired in 1992.⁵⁸

Among the elements of the tax reform regime would be: 1) making legal fees deductible whenever an opponent was represented and could deduct the cost of legal services, or when the opponent was a government entity, 2) making this credit available as a refundable credit⁵⁹ when the cost was aimed at maintaining family integrity health and safety (such as divorce, child support, housing, debt defense),⁶⁰ and 3) offering provider incentives for pro and low bono. (While the general rule that the value of volunteer work is not deductible as a contribution is surely necessary to avoid abuse,⁶¹ the situation is different when the work is being performed under an expensive and hard to obtain license, and when the

54. The rules are generally summarized in INTERNAL REVENUE SERVICE, U.S. DEP'T OF TREASURY, PUB. NO. 529, MISCELLANEOUS DEDUCTIONS (2015), <https://www.irs.gov/pub/irs-pdf/p529.pdf> [<https://perma.cc/R64B-A62E>] (last visited June 16, 2016) (explicitly excluding "personal legal expenses").

55. See, e.g., Ran Barniv et al., *The Relationship Between Deductibles and Wealth: The Case of Flood Insurance*, 22 J. INS. ISSUES 78, 78 (1999).

56. See, e.g., Jonathan Gruber & Larry Levitt, *Tax Subsidies for Health Insurance: Cost and Benefits*, 19 HEALTH AFF. 1, 72 (2000).

57. It cannot be ignored that such a tax subsidy system would be focused mainly on marketplace lawyers, rather than non-profits (who receive the benefits of the contribution deduction regime). Some LSC funded programs have made major efforts, particularly using technology, to maximize participation in the earned income tax credit (EITC) program. WBOC.com, *LSC Announces Toll-Free Number for Earned Income Tax Credit*, WBOC, <http://www.wboc.com/story/7971812/lsc-announces-toll-free-number-for-earned-income-tax-credit> [<https://perma.cc/2FWE-W2XA>] (last visited Feb. 10, 2016).

58. Jeremy Bryant Tomes, Note, *The Emergence of Group and Prepaid Legal Services: Embracing a New Reality*, 16 TRANSACTIONS: TENN. J. BUS. L. 25, 34 n. 70 (2014); see 26 U.S.C.A. § 120 (1976).

59. "Refundable tax credits . . . are treated as payments of tax you made during the year. When the total of these credits is greater than the tax you owe, the IRS sends you a tax refund for the difference." *What Is the Difference Between a Refundable and a Nonrefundable Credit?*, INTUIT, <https://turbotax.intuit.com/tax-tools/tax-tips/Tax-Deductions-and-Credits/What-Is-the-Difference-Between-a-Refundable-and-a-Nonrefundable-Credit-/INF20170.html> [<https://perma.cc/FDV8-3PYE>] (last visited Feb. 10, 2016).

60. This would be in line with the Earned Income Tax Credit, which is refundable, but it would be in contrast to the Child and Dependent Care Tax Credit, which is not refundable. See Child and Dependent Care Tax Credit, TAX CREDITS FOR WORKING FAMILIES, <http://www.taxcreditsforworkingfamilies.org/child-and-dependent-care-tax-credit/> [<https://perma.cc/JU3X-TN3J>] (last visited Nov. 17, 2015).

61. See INTERNAL REVENUE SERVICE, U.S. DEP'T OF TREASURY, PUB. NO. 526, CHARITABLE CONTRIBUTIONS (2014), <https://www.irs.gov/pub/irs-pdf/p526.pdf> [<https://perma.cc/7N2Z-TPX3>] (last visited Mar. 19, 2016). For a justification for the general rule, see Michael Wyland, *Why Time Spent Volunteering is Not*

time donation represents an actual opportunity cost.)⁶² A system of caps would be needed,⁶³ and costs and quality would be monitored.⁶⁴

To qualify for tax benefits, services would need to be charged on a sliding scale, either with standardized rates, or possibly with a capped system pegged to the provider's median charges for all bills outside the sliding scale system. In other words, for either the lawyer or the client to get the tax subsidy, the attorney would have to charge less.

The tax benefits, if correctly structured, could provide a major incentive for the profession to accept deregulatory changes, particularly because the tax provisions would make current practice so much more competitive. Such incentives might even make it worthwhile to provide tax benefits for existing behavior. The revenue loss from providing a deduction from a significant portion of the legal economy might be significant, but if it incentivized use of more legal services, believers in the Laffer⁶⁵ curve would surely agree that the impact on revenues would be positive.

The deregulatory package would be designed to optimize the benefits of the tax benefits and the leveraging opportunities they would provide. The package would likely include dramatically increased authorization for non-lawyer practice⁶⁶ under formal supervision of lawyers, or in the nonprofit environment,⁶⁷ or with limits upon the tasks that can be performed⁶⁸ (and with those limits validated, rather than presumed). The question of who would regulate non-lawyer practice should be regarded as open.⁶⁹ These changes would reduce lawyers' prices, increase lawyers' flexibility, and provide alternatives, particularly in less

Tax-Deductible, NONPROFIT QUARTERLY (Dec. 21, 2012), <https://nonprofitquarterly.org/2012/12/21/why-time-spent-volunteering-is-not-tax-deductible/> [<https://perma.cc/GG7C-H3Z8>].

62. Such deductions could be replaced up to a certain percentage of time, could be capped at the average billed rate for the person providing the service, and could be limited to the value of direct legal services to low and middle-income people. Support for such an initiative might be increased by the inclusion of other professionals, including medical providers.

63. Examples of such caps would be those imposed by the EITC, so that the government would not provide unlimited funding to volunteers.

64. To monitor this, the IRS could impose a system of self-certification, with state bar associations providing accuracy checks and enforcement mechanisms if there is fraud.

65. Jude Wanniski, *Taxes, Revenues, and the "Laffer Curve,"* 50 THE PUB. INT., Winter 1978, at 3 (describing the napkin-sketch-origin story of asserted relationship between taxes and revenue).

66. Zorza & Udell, *New Roles*, *supra* note 36.

67. See Robert Ambrogi, *Three Notable Updates on Non-Lawyers Providing Legal Assistance*, LAW SITES (Mar. 2, 2015), <http://www.lawsitesblog.com/2015/03/three-updates-non-lawyers-providing-legal-assistance.html> [<https://perma.cc/7GU6-FZ5N>] ("[New York Court of Appeals Chief Judge] Lippman Calls for Non-Lawyer Legislation in New York").

68. See Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, A.B.A. J. (Jan. 1, 2015), http://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the [<https://perma.cc/5E4P-SRBN>].

69. New York has the court administer its program. See Ambrogi, *supra* note 67. Washington has its bar association do it. See *id.* at 67.

complex matters and cases.⁷⁰

Ownership and cross jurisdiction practice rules would be relaxed,⁷¹ and marketing and promotional rules largely removed (with the exception of those imposing a requirement of truth).⁷² These also would help drive prices down, increasing the leverage of the tax benefits.

2. ASSESSMENT OF CONSEQUENCES

While this system would not guarantee one hundred percent access to services, and while the results would obviously depend on the scale and legal structure of the tax incentives and their power to incentivize sliding scales, this solution has the potential to change attorney behavior, reduce prices, and increase pro bono activities.

Given the high percentage of legal assistance that has historically been shown to come from other than one hundred percent free legal aid,⁷³ it is perhaps a reasonable assumption that the bar to reaching one hundred percent under this system would be that the incentives were not yet large enough. A tax deduction/credit system is theoretically bottomless, although whether the costs of the level of incentives needed to ensure sufficient services is politically sustainable is a more complex question.

Efficiency depends upon the regulatory changes. The regulatory relaxation would need to be great enough to increase competition and reduce provider costs and fees greatly. One would hope that the tax benefit incentives would be sufficiently appealing to make possible negotiation of sufficient changes. The solution, as proposed, does not include any matching or referral mechanism. However, its deregulatory components allow for more varied services, and its removal of anti-competitive regulatory elements makes such services more likely to be sustainable. Similarly, the variety of services and the extent of deregulation, are likely to increase the provision of matching and referral systems.⁷⁴

70. See generally Zorza & Udell, *New Roles supra* note 36.

71. See generally *Comm'n on the Future of Legal Services*, ABA, http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html [<https://perma.cc/E3E7-Q8FH>] (last visited Nov. 17, 2015).

72. See *id.*

73. AM. BAR ASSOC., *LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS* (1994), http://www.americanbar.org/content/dam/aba/migrated/legal_services/downloads/sclaid/legalneedstudy.authcheckdam.pdf [<https://perma.cc/G98X-9C34>] (last visited June 16, 2016); See generally Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, ABA 4, 12–13 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf [<https://perma.cc/8G8D-A6C5>] (last visited Mar. 19, 2016).

74. One of the little-noticed quirks of the current system is the near monopoly status of bar-based lawyer referral systems. See *Policy*, ABA, http://www.americanbar.org/groups/lawyer_referral/policy.html [<https://perma.cc/7JYS-ZMAZ>] (last visited Mar. 19, 2016). Another is the constraint of online options. See *LRIS Response to Ethics 2020*, ABA, http://www.americanbar.org/groups/lawyer_referral/policy/response_to_ethics_twenty_

The pro bono tax changes should incentivize greater innovation in the traditional legal aid system, and deregulation of practice should allow legal aid to deliver services more efficiently. Less clear is whether the increased competition and lower prices for market-based legal services will provide sufficient incentives for court and process simplification. However, availability of lower-skilled assistance might make it more worthwhile for courts to increase investments in forms,⁷⁵ automated forms,⁷⁶ other access assistants,⁷⁷ as well as to change their practices so that less highly trained providers could function effectively in helping the court get the information it needed to make the best decisions.

The deregulatory components will heighten attention to the need for additional consumer protection. The most likely area of risk concerns the authorization to practice of less trained individuals. There is no reason that a process equivalent to the current one for lawyers cannot be established.⁷⁸ Making lawyers cheaper and alternative services available is unlikely to introduce any non-neutrality into the system. The correction of the imbalance in the current tax incentives system surely helps remove explicit non-neutrality, simply because less people will be without assistance.⁷⁹

C. MAINTENANCES OF REGULATION, RESPONSIBILITY FOR ONE HUNDRED PERCENT ACCESS TO JUSTICE ON THE BAR, AND GRANTING THE BAR SELF-TAXING AUTHORITY

1. THE SYSTEM

Under this comprehensive solution, the bar would retain its dominant position in the regulatory structure, but only on condition that the regulating bar and court

twenty.html][<https://perma.cc/3A59-8L74>] (last visited Mar. 19, 2016). These limitations appear to have significantly slowed the spread of innovation, at least in the discrete task representation context.

75. For a national survey, see John Greacen, *Resources to Assist Self-Represented Litigants—A Fifty-State Review of the “State of the Art,”* MICH. ST. B. FOUND. (June 2011), <http://69.89.27.130/selfhelp/GreacenReportNationalEdition.pdf> [<https://perma.cc/HV38-4DLC>]. More recent data can be found in the JUSTICE INDEX, <http://www.justiceindex.org> [<https://perma.cc/4X3C-H5AB>] (last visited Feb. 15, 2016). See *Research Methodology*, JUSTICE INDEX, <http://www.justiceindex.org/methodology/> [<https://perma.cc/CU5G-AMKW>] (last visited on Feb. 15, 2016).

76. See *Forms and Document Assembly*, CTR. ON CT. ACCESS TO JUST. FOR ALL, <http://www.ncsc.org/microsites/access-to-justice/home/Topics/Forms-and-Document-Assembly.aspx> [<https://perma.cc/R5AG-AMKW>] (last visited Nov. 17, 2015).

77. *Id.*

78. *Limited License Legal Technician Program*, WASH. ST. B. ASS’N, <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians> [<https://perma.cc/3JC9-A2Y4>] (last visited Nov. 19, 2015).

79. For example, the Washington State Limited License Legal Technician system is grounded almost completely in a desire to make sure that all in legal need get help. Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L. J. 75, 76, 78–79 (2013), http://mississippilawjournal.org/wp-content/uploads/2013/02/3_Holland_Final.pdf [<https://perma.cc/MG35-R639>].

together (or in non-delegation states the court itself)⁸⁰ would take affirmative responsibility for ensuring 100 percent access to justice.⁸¹ This would be accompanied by providing a mechanism to raise the resources to fulfill this responsibility by giving the bar and court the authority to tax⁸² the fees generated by the services provided by the profession, possibly with an option for tax waiver by provision of pro bono services. This would require some form of supervisory authority and would permit a range of different organizational options for service delivery. Since the profession would obviously like to keep the actual tax rate low, the incentives would support innovation in delivering services at low cost.

The core of this approach is that it gives the bar authority but holds it accountable for ensuring access to justice. The beauty of this approach is its intellectual consistency. The long-standing justification for the bar's effective self-regulation is its claim that the profession is dedicated to access to justice and alone can be trusted to provide it.⁸³ Whatever the validity of the claim in the past, its current absurdity,⁸⁴ together with the increasing pressure for deregulation as the solution,⁸⁵ opens the door to this kind of solution.

While the actual regulatory authority varies widely across the states, and while state supervision is required to preserve the anti-trust exemption,⁸⁶ as a general matter, lawyers are regulated by other lawyers.⁸⁷ While different states would end up with different mixes of authority between the Supreme Court and the organized bar, responsibility for access, and the power to obtain the resources to provide it, the core principle of integration of authority and responsibility would remain the same. The current authorities might set up a one hundred percent

80. Approximately two-thirds of states have unified bars, presumably with bar rather than court regulations. Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest?*, J. OF THE PROF. LAW., n. 4, 2008 at 53, 54.

81. In other words, moving from 100 percent as the aspirational goal of the Chiefs resolution, to an affirmative responsibility under the law.

82. The UK government has called for taxing large law firms to pay for legal aid, but this has met with substantial judicial resistance. See Owen Bowcott, *Lawyers' Levy? Michael Gove Threatens to Make Rich Law Firms Pay for Legal Aid*, THE GUARDIAN (June 23, 2015), <http://www.theguardian.com/law/2015/jun/23/michael-gove-rich-law-firms-help-secure-justice-for-all> [<https://perma.cc/F5UE-YBR4>]. The model proposed in this article is very different because it would give the bar full control over both regulation and expenditures.

83. See Maute, *supra* note 80, at n.4 (2008).

84. See Jerome A. Collins, *Maine Voices: No Justice When Cost Leaves Middle Class Without Legal Representation*, PORTLAND PRESS HERALD (Mar. 12, 2014), <http://www.pressherald.com/2014/03/12/maine-voices-no-justice-when-cost-leaves-middle-class-without-legal-representation/> [<https://perma.cc/8A5G-ZLWN>].

85. See Elizabeth Chambliss, *Two Questions for Law Schools About the Future Boundaries of the Legal Profession*, 36 J. OF THE LEGAL PROF. 329, 339–43 (2012).

86. See Richard Zorza, *Supreme Court Decision on Teeth Whitening Regulation Has Interesting Implications for Bar Monopoly*, ACCESS TO JUSTICE BLOG (Feb. 26, 2015), <http://accesstojustice.net/2015/02/26/supreme-court-decision-on-teeth-whitening-regulation-has-interesting-implications-for-bar-monopoly/> [<https://perma.cc/47CF-PWNJ>].

87. A controversial query for the future: might *North Carolina Board of Dental Examiners v. FTC*, 134 S. Ct. 1491 (2014) be extended to question the situation in which the state regulatory supervisor (and the court) are all by definition members of the supposedly supervised profession?

access body to organize and manage the delivery system, as well as push the innovations needed. The bar authority could provide the services needed for one hundred percent access in any of a wide variety of ways, including, most likely a combination. It might make competitive grants to current legal aid programs and to court based self-help programs to increase services. It might establish a middle-income subsidy sliding scale system to permit lawyers to expand services to this population.

It would surely seek some form of triage system (or delegate it to the attorneys from whom help is sought, provided they used a standard online protocol). Ideally this protocol would be developed in cooperation with the courts, and could be accessed in a number of ways.⁸⁸

The incentives would support the bar organization coming up with as many low cost options as possible in order to reduce the tax rate. Thus non-lawyer practice, online tools, unbundling, and broad self-help services would become very popular with much of the bar. Least popular would be a component of mandatory pro bono, although a system with a tax “work out” option through pro bono might be much less desperately unpopular.⁸⁹ The tax itself would be adjusted on a regular basis, and the design would require some careful attention.⁹⁰

For the bar as a whole (the taxpayers) the incentives would strongly push in the direction of close cooperation with the courts to simplify processes, reduce the number of hearings, and provide services in the courts.⁹¹ In the United States, bar-run public defenders have not been regarded as a success, but incentives for quality have been non-existent, and externally imposed budgets have been very low.⁹² In any event, an overall structure would have to be built to ensure quality

88. See *supra* note 18.

89. See, e.g., *Statement by the New York County Lawyers' Association in Response to the New York State Unified Court System Report: The Future of Pro Bono in New York State*, N.Y. COUNTY LAW. ASS'N (March 29, 2004), https://www.nycla.org/siteFiles/Publications/Publications60_0.pdf [<https://perma.cc/Z5H4-TYBB>] (opposing mandatory reporting of pro bono contributions or donations by attorneys, let alone mandatory participation).

90. Among the issues would be its progressivity, whether it would be levied on lawyer income or on underlying revenue, whether it would be imposed on all in the practice of law, or more broadly on all those admitted to the bar, and whether if imposed only on those in practice in the market or for marketplace organizations such as in-house counsel, or all included in practice regardless of the institution. Whether to establish a threshold below which the tax would be imposed, or if alternative means of fulfilling the access obligation should be provided, would also need to be explored.

91. In the US, we have little experience with the management of comprehensive mixed model systems such as this, although countries like the UK, Canada, and Australia have often placed significant management responsibility in the organized bar, and the lessons from that experience would be valuable. See, e.g., Maurits Barendrecht et al., *Legal Aid in Europe: Nine Different Ways to Guarantee Access to Justice?*, HIIL (Feb. 21, 2014), http://www.hiil.org/data/sitemanagement/media/Report_legal_aid_in_Europe.pdf [<https://perma.cc/5WAE-VW8K>].

92. See Ari Shapiro, *Report Calls Out Flaws in Public Defender System*, NPR (Apr. 15, 2009), <http://www.npr.org/templates/story/story.php?storyId=103108229> [<https://perma.cc/E999-QPT7>]; James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on*

and comprehensiveness, or the cost control incentives would drive these to the bottom. The suggestion is made that the enabling legislation for this system should include at all times a monitoring authority⁹³ and an alternative system, in which regulation would be radically reduced, and in which that reduction would be triggered automatically if quality and comprehensiveness of access goals were not met over a period of time.⁹⁴ Of course, the alternative system would maintain the taxing of attorney services, but with the bar losing control over both the setting of the rate and many of the forces that would impact the rate.

2. ASSESSMENT OF CONSEQUENCES

While details could be determinative, this solution has the potential to provide services to all in legal need. It has no inherent limits. However, designers and managers would need to be on guard against setting eligibility too narrowly.

The offered solution has no money cap and depends on no source outside the legal system, making sustainability significantly easier. It also provides incentives for those who will contribute to support a satisfactory system to be willing to do so, since the alternative of full deregulation would be perceived as against their interests. Moreover, as discussed elsewhere, the same incentives support efficiency.

While efficiency would depend on the details of deployment, incentives go in the direction of efficiency to keep total costs down. Moreover these forces would play out mainly between those engaged in the system, and would not depend generally on decisions made by those outside the system. This means the system would be much less vulnerable than most to outside manipulation.

For exactly the same reasons, the designers and funders (lawyers themselves) have every interest in allowing for as varied as possible services, and for an appropriate triage system. The only countervailing force might be professional anxiety that such reforms would spread to the bar as a whole—which may not necessarily be a bad idea.

The bar would likely want changes in courts to increase their own efficiency. If the courts were indeed significantly involved in the management of the bar/access system, they might feel an imperative to keep the bar happy and would help facilitate simplification changes. Indeed, this would reverse what are now at least perceived as perverse incentives, in which some courts, or at least clerks, are

Murder Case Outcomes (October 1, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884379 [<https://perma.cc/AX5D-HXK7>] (last visited June 16, 2016).

93. In order to avoid capture of the monitoring authority by the bar, it would be necessary for the outside authority not to be dominated by lawyers.

94. In other words, for example, one year of failure would not trigger the deregulation, but a second would put triggering into presumptive status with full scale planning launched, and the third year of failure would trip the trigger.

nervous about introducing efficiencies because they fear that the bar will see such changes as a revenue threat, and cease to support the clerks.

The current consumer protection system of bar qualifications would generally remain in place. However, responsibility for maintenance of effectiveness would now also be borne by the group that monitored the access to justice results of the bar-managed system. If the quality numbers or the access numbers were to fall below targets, self-regulation would be at risk. Therefore the incentives would be for the bar to maintain a sufficiently high standard.

Putting all the system under the charge of lawyers, most of who do not represent the poor, always has the risk of incentives for non-neutrality. Such could come from under-investment or from lack of interest in quality. Success in avoiding non-neutrality would depend on the supervision of the outside monitoring authority. On the other hand, the large role of the bar, from management to funding, might help protect the system from the substantive political pressures that government funding always seems to make possible.⁹⁵

D. INTERNALIZING COSTS TO THE COURTS AS THE CHEAPEST COST AVOIDER

1. THE SYSTEM

Given the well-recognized interplay between the management and costs of access to justice services, and those of the underlying courts for the litigants in which the services are provided, the current funding and management structure misallocates the incentives. As so often in government, costs generated by behavior on one budget are borne on a different budget.⁹⁶ Court complexity results not only in additional court expenditures, but also in community based legal aid expenditures, through case delay, additional hearings and the like.⁹⁷ Similarly, legal aid management decisions, or lack of decisions, can increase court costs, such as by increasing hearing need or postponing intervention until the last moment, when an earlier intervention would have saved time for all. There are few if any systems in place to allow batches of cases needing the same court and legal aid staff to be handled at the same time. Such system could result

95. See *Who We Are*, LEGAL SERVICES CORP., <http://www.lsc.gov/about-lsc/who-we-are> [https://perma.cc/R5AG-AMKW] (last visited Nov. 19, 2015); Alan W. Houseman, *Legal Aid History*, *National Center on Poverty Law*, <http://web.jhu.edu/prepro/law/Pre-Law.Forms.WordDocs/Public.Interest.Law.1.pdf> [https://perma.cc/R5AG-AMKW] (last visited Apr. 1, 2016).

96. See *supra* note 33.

97. Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 166 (2011) (discussion of cross-sector impacts of change in courts, bar, and legal aid: "One important point must be under-lined about this consensus: each step taken or supported by one of the stakeholders increases the impact upon access of steps taken by the others [listing examples]." "Such [streamlining procedures] reforms have improved efficiency and access in countries with such diverse legal traditions as those in Brazil, England, Japan, Peru, Scotland, and the United States"); Juan Carlos Botero et al., 18 WORLD BANK RES. OBSERVER 61, 82 (2003).

in radical reductions in waiting costs for legal aid and repeated hearing costs for all.

To a certain extent, recent innovations in court management have reflected the ways that additional court-based services for litigants can be cost savers. Self-help services are now generally regarded as cost savers, and this argument has been used to support additional such investments.⁹⁸ However, at this point neither courts nor nonprofit providers of legal access services experience significant incentives to increase efficiency let alone work together to increase each other's efficiency.⁹⁹ Courts are reluctant to even mention possible cost savings that they have achieved, or might achieve, for fear of triggering budget cuts imposed by their funders. Legal aid programs, often operating in a very low competition environment, not only experience no incentives, but also may fear that increases in efficiency will result in reduced budgets.

So a potential solution is to integrate access services and court costs into one budget, thereby creating an environment in which the overall budget would be helped by cooperation. It would also be necessary to create incentives for that reduction with steps such as limiting cost of living increases (COLAs), and imposing hiring freezes unless targets were missed in the system as a whole.

The core funding would come from current court and access to justice (legal aid) funding, now put under one umbrella. Given that all litigants would receive many more actual services, and in a more integrated way, there would be a strong argument for increasing filing fees,¹⁰⁰ with, of course, continued or expanded fee waiver systems.¹⁰¹

Flexibility in lawyer practice rules would make the costs of the system as a whole less, and this budget structure would therefore be made more financially realistic with such changes, even if limited. The court's interests in cost control with such a newly integrated budget would increase their enthusiasm for such

98. JUDICIAL COUNCIL OF CALIFORNIA, THE BENEFITS AND COSTS OF PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS: RESULTS FROM LIMITED DATA GATHERING CONDUCTED BY SIX TRIAL COURTS IN CALIFORNIA'S SAN JOAQUIN VALLEY (2009), http://www.courts.ca.gov/partners/documents/Greacen_benefit_cost_final_report.pdf [https://perma.cc/R5DG-ALKW] (last visited June 16, 2016).

99. *Improving the Legal Aid System: A Public Discussion Paper*, LEGAL AID REV., Sept. 2009, at 59, <http://www.justice.govt.nz/policy-and-consultation/legal-aid-review/documents/legal-aid-review-discussion-paper.pdf> [https://perma.cc/R5AG-JSGF] (perhaps unique general discussion of potential for of structuring legal aid payments system to change court processes and costs, in this case in New Zealand).

100. CONFERENCE OF STATE COURT ADMINISTRATORS, 2011-2012 POLICY PAPER COURTS ARE NOT REVENUE CENTERS 7-11 (2012), <http://www.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx> [https://perma.cc/R5AG-UNDF] (last visited May 19, 2016).

101. See, e.g., Pam James, *Access to Justice—State Courts Must Waive All Fees for Indigent Civil Litigants*, MSRC (June 12, 2013), <http://mrsc.org/Home/Stay-Informed/MRSC-Insight/June-2013/Access-to-Justice-%E2%80%93-State-Courts-Must-Waive-All-Fees.aspx> [https://perma.cc/R5AG-AMKW]; NAT'L CENTER FOR STATE COURTS, PRINCIPLES FOR JUDICIAL ADMINISTRATION 17 (July 2012), <http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Judicial%20Administration%20Report%209-20-12.ashx> [https://perma.cc/J9DH-AMKW] (waivers must be available to ensure access).

changes, and the bar's interest in keeping low filing fees might reduce opposition to flexibility.

2. ASSESSMENT OF CONSEQUENCES

Resources are a major uncertainty with this solution, since the only source of new money is possibly increased filing fees. However, this model could produce some of the greatest cost savings, because it aligns incentives so effectively.

The solution largely removes the disincentives, and adds the potential for significant incentives for efficiency. However, whether these are taken up depends on political questions within the institutions.

Similarly, whether these are set up depends on the creativity of the decision-making structure. While the closer relationship between the components should make the planning and deployment of a range of services much easier, it would be up to the players to make them happen.¹⁰² The triage system would be much easier to bring together under this solution, since much of the institutional reluctance to build a joint system should be dissolved by common leadership and incentives.

This solution may provide the greatest cross component incentives system-wide. However, it adds no extra consumer protection elements. It also runs the significant risk that by removing potential institutional conflict between court and traditional nonprofit organizations; it may reduce consumer protection incentives.

Similarly, there may be an additional risk of cross institutional-pressure to bury conflict, and thus reduce the inherent neutrality that comes from this division of roles. It would be necessary to build outside structures able to take legal positions against the common interests of the court/nonprofit combination.

E. NATIONAL SAFE HARBOR FOR TECHNOLOGY-DELIVERED SERVICES, ON CONDITION OF FREE DELIVERY TO POOR, REASONABLE PRICES TO MIDDLE INCOME, AND OTHER ACCESS CONDITIONS

1. THE SYSTEM

Another approach would be to create a system of "safe harbors" and incentives designed to maximize the legal technology entrepreneurs' possible contribution to a comprehensive access solution,¹⁰³ This section explores the concept,

102. Compare the success of state Access to Justice Commissions in coordinating projects. ABA RESOURCE CENTER FOR ACCESS TO JUSTICE INITIATIVES (Apr. 2015), http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/lis_sclaid_atj_checklist.authcheckdam.pdf [https://perma.cc/K9SJ-WJCY].

103. An energetic group of well-connected tech entrepreneurs is moving aggressively to deliver legal services over the Internet. See e.g., Shan Li, *Technology is Bringing Legal Advice and Documents to the Masses*, L.A. TIMES (Feb. 17, 2015), <http://articles.latimes.com/2014/feb/17/business/la-fi-legal-startups-20140218> [https://perma.cc/R5AG-AMKW]; Blair Janis, *How Technology is Changing the Practice of Law*, 31 GP SOLO,

identifies the major barriers perceived by the industry to their general effectiveness, proposes an incentivizing regulatory structure designed to minimize barriers and maximize access contributions, and briefly suggests the regulatory mechanism that might be employed.

The legal technology entrepreneurs believe that they are significantly stymied by the current regulatory structure.¹⁰⁴ Therefore the services tend to focus on provision of legal information, often as a free teaser;¹⁰⁵ document assembly, often with nominally formal review of the documents;¹⁰⁶ and referral systems.¹⁰⁷ While the volume of claimed use of these services is high, and while it may be assumed that most of these users are among the not so rich, we do not really know how much they are used by, or useful to the poor or near poor.

Given that these companies are so limited in the services they can lawfully provide (at least directly),¹⁰⁸ they might be willing, in exchange for the opportunity to expand their business model that would be given by deregulation, to accept requirements that would ensure that they would make a major contribution to solving the access problem.

Ownership rules are the most resented, because they prevent capital hiring lawyers to provide legal services under a traditional business model.¹⁰⁹ Interstate practice prohibitions mean that companies, if they do find a way to provide services, need lawyers from every state.¹¹⁰ Bar association monopolies in referrals are viewed as interfering with the profitability of referral business.¹¹¹

On the other hand, some companies seem unable to apply the distinction between legal information and advice,¹¹² and are known to sometimes take publicly available forms and charge large fees for access to materials available

May/June 2014, http://www.americanbar.org/publications/gp_solo/2014/may_june/how_technology_changing_practice_law.html [<https://perma.cc/K9SJ-WJCU>].

104. Examples are collected at e-Lawyering Blog. See *Category Archives: Unauthorized Practice of Law*, E-LAWYERING BLOG, <http://www.elawyeringredux.com/articles/unauthorized-practice-of-law/> [<https://perma.cc/5AT6-PPYS>] (last visited Apr. 6, 2016).

105. An example of what is described as free legal advice being used to attract those who might be interested paying for a lawyer is at <http://www.avvo.com/free-legal-advice> [<https://perma.cc/R5AG-AMKW>] (last visited Feb. 12, 2016).

106. For an example of document review included with a plan, see <https://www.legalzoom.com/legal-document-review/legal-document-review-overview.html> [<https://perma.cc/K9DS-WJCI>] (last visited May 19, 2016).

107. For a referral system, see *Find a Lawyer*, AVVO, <http://www.avvo.com/find-a-lawyer> [<https://perma.cc/5QF5-Y443>] (last visited Apr. 1, 2016).

108. Examples of enforcement attempts are collected at e-Lawyering Blog. See *Category Archives: Unauthorized Practice of Law*, E-LAWYERING BLOG, <http://www.elawyeringredux.com/articles/unauthorized-practice-of-law/> [<https://perma.cc/R5AG-AMKW>] (last visited Feb. 12, 2016).

109. MODEL RULES R. 5.4.

110. MODEL RULES R. 5.5.

111. MODEL RULES R. 7.2.

112. See *Category Archives: Unauthorized Practice of Law*, E-LAWYERING BLOG, <http://www.elawyeringredux.com/articles/unauthorized-practice-of-law/> [<https://perma.cc/R5RT-FHVI>] (last visited Apr. 1, 2016).

for free.¹¹³ These problems do not strengthen the argument for deregulation.

The third and often ignored factor is that technology might allow for a higher level of quality control, thus reducing the risks of deregulation, or rather making the new system of modified regulation simpler and more reliable. The ultimate conclusion is surely that technology-based legal delivery will need to be regulated, but that the new underlying rules will need to reflect the changed opportunities and risks of the different environment.

The following might be among the elements of such a system, modified in part from the Washington State Limited License Legal Technician regulations.¹¹⁴

- Requirement of a national technology limited practice license, which would allow employees of a suitably qualified tech system to provide limited practice nationally.
- The employees would be allowed, either themselves or through technology tools, to provide legal information, make recommendations for a course of conduct, and prepare legal documents, including those requiring legal judgment.
- Services permitted could be expanded upon demonstration that the use of technology provided sufficient guarantees of quality and consumer protection.
- Services would have to be provided for free to all who are clients of public benefit programs, and at a regulated price for all under a more generous income threshold. The “reasonableness” would be a function of marginal cost, not what the market would bear.
- To receive such a license, a business would have include services that serve the needs of the poor and middle-income groups identified such as evictions, domestic violence, and consumer credit.
- Plain language and multilingual rules would apply.
- Algorithms would be subject to disclosure and audit.

Such a system might be appropriately established by national regulation by a body such as the Federal Trade Commission, since this is an interstate matter, and cannot sufficiently be regulated state by state.¹¹⁵

113. See, e.g., Richard Zorza, *Montana Supreme Court Commission On Self-Represented Litigants Wins Case on Use of Its Copyrighted Forms*, ACCESS TO JUSTICE BLOG (June 30, 2011), <http://accesstojustice.net/2011/06/30/montana-supreme-court-commission-on-self-represented-litigants-wins-case-on-use-of-its-copyrighted-forms/> [<https://perma.cc/R5AG-AMKW>] (last visited Apr. 1, 2016).

114. See *Limited License Legal Technician Program*, WASH. STATE BAR ASS’N, <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians> [<https://perma.cc/K5DG-WKCI>] (last visited Nov. 19, 2015).

115. *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority*, FED. TRADE COMM’N (2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> [<https://perma.cc/48EB-Y596>] (last visited Apr. 6, 2016).

2. ASSESSMENT OF CONSEQUENCES

Such a system would certainly have the potential to serve all. However, it would not deal with more complex legal situations, or with courtroom representation. If referrals to lawyers were required for case completion, it is not clear where the subsidy for such individualized services would come from.

While the cross subsidy amounts would depend on the specifics of where eligibility lines were drawn, given the low marginal costs that such enterprises should be able to achieve, there is reason for optimism.

The technology industry would surely be able to deliver efficiency. Technological triage has to potential to do the sorting, however this solution does not purport to provide the full range of services. Those companies would thus have incentives to develop the services that would allow a technology licensed to fill those gaps. Surely the availability of cheap competition would incentivize efficiency and lower prices among providers, and allow for highly cost effective public private partnerships.

While currently consumer protection of those using online legal services appears to be poor, and while a commercial tech delivery system would certainly increase incentives for corner cutting, the countervailing force is that monitoring algorithms to cut the risk could be deployed. The initial technology practice licenses should be provisional, and subject to regular review. It would be very important to ensure that network effects did not drive this to a monopoly or oligopoly system.

F. THE ONGOING PATH OF SLOW CHANGE IN THE STATUS QUO

With the “aspirational goal” of one hundred percent access established by CCI and COSCA,¹¹⁶ we have to assess the chances of meeting this goal without major institutional change. Maintaining the status quo, even with the incremental-changes world of court services, legal aid and bar associations, may well result in little change in the overall access picture. Continuing incremental increases in the use of webpage distribution of legal information,¹¹⁷ use of free- and market-based online document assembly,¹¹⁸ expansion of online-marketed and con-

116. NAT'L CENTER FOR STATE COURTS, *supra* note 1.

117. Graham Greenleaf, *The Global Development of Access to Free Legal Information*, A HISTORY OF LEGAL INFORMATICS 54 (2014), <https://books.google.com/books?id=r22MBAAAQBAJ&pg=PA54&lpg=PA54&dq=history+of+legal+information+on+the+internet&source=bl&ots=ILUQQcR54u&sig=yIDsr97R2Bb2cqxrFj9FjxWybHo&hl=en&sa=X&ved=0ahUKEwj95In4prTKAhWMej4KHYznBscQ6AEITTAG#v=onepage&q=history%20of%20legal%20information%20on%20the%20internet&f=false> [https://perma.cc/R5AG-AMKW] (last visited Feb. 12, 2016).

118. Richard S. Granat, *Document Assembly over the Internet*, *Law Practice Today* (Dec. 2011), http://www.americanbar.org/publications/law_practice_today_home/law_practice_today_archive/december11/document-assembly-over-the-internet.html [https://perma.cc/R5AG-AMKW].

nected unbundling,¹¹⁹ and triaging in courts and the nonprofit sector,¹²⁰ will all contribute to some improvements. However, the mechanisms of price ratcheting,¹²¹ funding pressures,¹²² lack of real competition,¹²³ and likely ever increasing procedural complexity,¹²⁴ will tend to increase barriers to access.

In terms of the tests articulated and applied above, the only hope of serving all people regardless of socio-economic status is by dramatic increases in self-help funding from court budgets, incentive court simplification, and highly aggressive triaging. Without a new paradigm, there is little hope of sufficient resources even for this approach and it will be hard to promote efficiency because the current incentives still work the other way. Consumer protection is unlikely to change, unless the politics of the profession change.

Moreover, the ongoing increases in economic inequality, reduction in funding, legal doctrinal change at the federal level, and other underlying pressures are likely to reduce neutrality. The overall consequences of failing to make paradigm changes will include continued gross misallocation of access resources and gross impacts on the fairness of our legal system, which will continue to depend not only on who can afford counsel, but, for those who cannot, who wins the access-to-services lottery. The impacts upon the economic system will include erroneous resolution of disputes, economic inefficiencies, and lack of trust in the system.

The chart below summarizes and compares the possible impacts of the five proposed solutions with those of a continued path of incremental change.

119. Stephanie Kimbro, *Offer Unbundled Legal Services to Compete in Today's Legal Market*, LAWYERIST (Sept. 4, 2014), <https://lawyerist.com/76215/now-trending-unbundling-legal-services/> [<https://perma.cc/X5DJ-WKFU>].

120. *See supra* note 20.

121. *See, e.g.*, Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the Corporate Practice of Law* 21–25 (Nov. 2012) (unpublished manuscript), http://www.masonlec.org/site/rte_uploads/files/Hadfield%20Cost%20of%20Law%20November%20%202012%20FINAL.pdf [<https://perma.cc/L9SH-QAID>] (“The crux of the problem is cost”).

122. NAT'L CENTER FOR STATE COURTS, *FUNDING JUSTICE: STRATEGIES AND MESSAGES FOR RESTORING COURT FUNDING* 2 (2012), http://www.justiceatstake.org/media/cms/Funding_Justice_Online2012_D28F63CA32368.pdf [<https://perma.cc/K4SD-WJDI>] (last visited May 19, 2016) (court funding challenges).

123. *Cf.* Gillian Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 *STAN. L. REV.* 102 (2008).

124. Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, *AM. SOC. REV.*, Sep. 2015, at 1 (meta-study showing that procedural complexity correlates with value, if any, of providing counsel, relative to substantive complexity).

III. CHART: SUMMARY ANALYSIS OF OFFERED SOLUTIONS

Requirement	Deregulation of nonprofits, with competitive grants	Limited Deregulation, Sliding Fees and Tax incentives	Continued Bar-based regulation, bar responsible for access, lawyer taxing by bar	Internalizing all access costs into the court system	National Safe Harbor for Technology-Delivered Services, Free for Poor	Comparison of assessment of this requirement for all solutions
<i>Serves All?</i>	Only with sufficient resources, not inherent to model.	Not certain, but likely, particularly if incentives adjustable.	Yes, provided eligibility set appropriately.	Subject to details of system established.	Only simpler solutions within the limited license.	Bar responsibility and tax incentives models appear to have greatest chance of success.
<i>Provides Sufficient Resources?</i>	Not inherent in model.	Yes, unless incentives were not politically sustainable.	Yes, unless politics intrudes.	A major area of uncertainty.	Likely for the limited services, given potential for efficiencies.	Bar and tax benefits systems offer best chance by far. Non-profit deregulation unlikely enough.
<i>Efficient?</i>	High.	Dependent upon extent of regulatory changes.	Depends on details.	Opportunities, but depends on politics within the institutions.	Very high.	Nonprofit might be most likely to be efficient, because of full deregulation in safe environment.
<i>Varied Services, Matched to Need?</i>	Somewhat, lack of court integration has risks in this area.	Deregulation should encourage.	Yes, strong incentives.	Depends on institutions. Triage should be much easier.	Incomplete range of services, with effective triage.	Most likely in bar and court-internalized solutions, with triage easiest in court internalized solution.
<i>Incentivizes Changes in all Parts of the System?</i>	Likely with the bar, possible with the courts.	Lack of court integration may offer limits in this area.	Depends on court involvement.	Very high chance of cross maximized change.	Should put major efficiency pressures on other segments.	Most likely with court-internalized solution. Additional risk solutions.
<i>Consumer Protection Risks?</i>	Little change likely.	Some potential risk from non-lawyer services.	Little likely change.	Risk from removal of role distinctions between court and legal aid.	Higher risk. Perhaps monitoring algorithms could control the risk.	1. Some risk from non-lawyer services in some models. 2. Lowest in nonprofit dereg. 3. Court-internalized may have additional.
<i>Avoids additional general non-neutrality?</i>	Little risk.	Little if any risk.	Risk of lawyers interests producing non-neutrality.	Risk of less neutrality from court-legal aid integration.	Important that monopoly and oligopoly be restricted by license process.	Little risk, except possibly from court-internalization solution.

Requirement	Deregulation of nonprofits, with competitive grants	Limited Deregulation, Sliding Fees and Tax incentives	Continued Bar-based regulation, bar responsible for access, lawyer taxing by bar	Internalizing all access costs into the court system	National Safe Harbor for Technology-Delivered Services, Free for Poor	Comparison of assessment of this requirement for all solutions
<i>Summary of Assessment of Each Solution.</i>	<ol style="list-style-type: none"> 1. Significant increase in access. 2. Full 100% would require additional resources. 3. Low risk. 	<ol style="list-style-type: none"> 1. High chance of 100% access, provided regulatory changes permit efficiencies. 	<ol style="list-style-type: none"> 1. High change of success provided players willing to adopt the bargain. 2. Court involvement needed. 	<ol style="list-style-type: none"> 1. Likely to increase access greatly. 2. Full 100% would require additional resources, could be raised from within this system. 3. Neutrality risks. 	<ol style="list-style-type: none"> 1. Not all services. 2. Significant reduction in costs, increase in efficiency, and change incentives. 3. Higher consumer protection risks. 	Depends on estimates of politics with both lower case and capital “P”.

A CONCLUDING NOTE

The adoption of the CCJ Resolution, with its endorsement of recent innovations,¹²⁵ shows that the models exist to make it theoretically possible to achieve one hundred percent access to justice, even without the institutional changes offered in this Article.

But the problem is not lack of new ideas about services or how to deliver those services. Rather the challenge is finding the strategy and resources to get these ideas adopted.

The solutions offered in this Article are therefore designed to change the overall regulatory, institutional and political environment to provide compelling positive incentives for the adoption of those services.

All five solutions offer a significant chance of a major impact on access to justice, with the problems being as much political as technical. The hope is that the combinations of elements in each solution will transform the politics of potential change. For example one would hope that the enthusiasm of the nonprofit sector for its deregulation would provide sufficient incentive for its members to abandon their opposition to competition. Similarly, the huge potential benefits of the tax incentives approach for the bar, might lead it to accept an otherwise objectionable sliding fees component. Hopefully allowing the bar continued self-regulation will be so appealing that it would be willing to take responsibility for access to justice even to the extent of a tax on its revenues to support that access. Similarly the internalizing of costs into the courts might be so appealing in its budgetary expansion opportunities, that the courts would be willing to take the ongoing responsibility for access services. Finally, the

¹²⁵ *Supra* note 1.

technology practice license might be so embraced by the industry, that it would access the access pricing conditions here suggested.

But that is the whole point. Behavior will only be changed by incentives. A change strategy will only be successful if it builds a political coalition that leverages the interests of all internal and external stakeholders so that they embrace a broader approach, rather than being allowed to cherry-pick individual ideas for maximum advantage. Even if not ultimately adopted, active consideration of these more radical options might be worthwhile as increasing enthusiasm, energy and resources for a dramatic acceleration of the current incremental, but far less threatening, path.