

# UNAUTHORIZED PRACTICE OF LAW AND MEANINGFUL ACCESS TO THE COURTS: IS LAW TOO IMPORTANT TO BE LEFT TO LAWYERS? \*

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\* See Gillian K. Hadfield, *Legal Services Wanted; Lawyers Need Not Apply*, PSMAG (June 28, 2011), <http://www.psmag.com/legal-affairs/legal-services-wanted-lawyers-need-not-apply-32128/> (quoting Mark Chandler, general counsel at Cisco Systems Inc., as saying “[l]aw is too important to be left to lawyers”).

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## INTRODUCTION

In the United States, people with legal problems have two options for handling their issues: Either retain a lawyer or proceed pro se.<sup>1</sup> It is well-established that the legal profession does not meet the needs of many, or most, low-income litigants.<sup>2</sup> Many low-income people may abandon their legal claims altogether.<sup>3</sup> Those who do litigate, and who cannot afford legal services in the private market, can attempt to retain pro bono counsel or obtain representation from legal aid providers; however, these methods do not, and cannot, provide legal services to all those in need.<sup>4</sup> Most litigants have no choice: They must proceed pro se.<sup>5</sup>

Despite the systematic inability of the legal profession to fulfill the legal needs of the whole community, unauthorized practice of law

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<sup>1</sup> See Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. PROF. LAW. 79, 85. Unbundled legal services, which involve legal services from a lawyer who does not undertake full representation of the client, present a potential middle ground between the two extremes of self-representation and representation by an attorney. See generally Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453 (2011).

<sup>2</sup> See, e.g., Rigertas, *supra* note 1, at 85–87 (“[O]ne cannot debate that the U.S. legal profession is not meeting the civil legal needs of the population.”); Editorial, *Addressing the Justice Gap*, N.Y. TIMES, Aug. 24, 2011, at A22.

<sup>3</sup> See, e.g., LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1–3, 25–26 (Sept. 2009), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf); Laura K. Abel, *Turner v. Rogers and the Right of Meaningful Access to the Court*, 89 DENV. U. L. REV. 805, 810 (2012) (“[S]tudy after study shows that, at most, 20% of the legal needs of low-income communities are satisfied; and in civil cases concerning the lives of low-income people, the vast majority of litigants are unrepresented.”).

<sup>4</sup> Rigertas, *supra* note 1, at 96–97 (“If legal aid and pro bono services continue to be viewed as the panacea to the lack of access to the legal system, then the legal profession should concede that universal access to the legal system is not even a goal.”). The inability of legal services providers to serve all those in need has been compounded by the economic conditions of the last few years: IOLTA/IOLA revenue—interest on lawyers’ (trust) accounts—which is a major funding source of legal aid services in every state, have seen record lows in recent years due to poor interest rates. See, e.g., TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 16 (Nov. 2012), available at [http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT\\_Nov-2012.pdf](http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT_Nov-2012.pdf) [hereinafter NEW YORK TASK FORCE] (discussing the state of IOLA funding since the financial collapse). While facing shortcomings in funding, the Legal Services Corporation (LSC) has reported one person is turned away for every person that is helped by LSC funded programs. LEGAL SERVS. CORP., *supra* note 3, at 1.

<sup>5</sup> See *infra* Part I.C.2.

(UPL) rules restrict options for legal assistance from nonlawyers.<sup>6</sup> Though UPL rules vary among the states, these laws generally make it illegal for anyone who is not admitted to the state's legal bar to provide any type of legal assistance.<sup>7</sup> UPL rules purport to protect consumers by maintaining the integrity and competence of people who render legal services.<sup>8</sup> The rules properly aim to protect consumers from nonlawyers who fraudulently present themselves as qualified legal services providers.<sup>9</sup> However, in the name of providing protection to consumers, UPL rules have the effect of creating a monopoly for the legal profession, which has been unresponsive to the needs of low-income litigants.<sup>10</sup> Restrictions on nonlawyer practice have been criticized for many years.<sup>11</sup> Recently, however, there has been a renewed focus on increasing the ability of nonlawyers to serve the needs of low-income litigants, such as through the licensing of nonlawyers to perform certain legal tasks less expensively than a lawyer.<sup>12</sup>

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<sup>6</sup> For an excellent general overview on UPL rules and their enforcement during the 20th century, see Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981). UPL may also refer to rules which regulate a lawyer's ability to practice law in jurisdictions where he is not admitted to the bar, as well as laws restricting legal practice by lawyers who have been disbarred. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.5. (2013). Such rules are outside the scope of this Note, which focuses on UPL restrictions on the provision of legal services by nonlawyers.

<sup>7</sup> See, e.g., Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2581 (1999). For a discussion of UPL rules see *infra* Part I.B.

<sup>8</sup> See MODEL CODE OF PROF'L RESPONSIBILITY EC 3-1 (1983) ("The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services.").

<sup>9</sup> Protecting consumers from fraudulent people who claim to be lawyers is a serious concern; this is particularly true in the context of immigration law, where nonlawyers known as "notarios" often prey on vulnerable immigrant populations. See, e.g., *About Notario Fraud*, AM. B. ASS'N, [http://www.americanbar.org/groups/public\\_services/immigration/projects\\_initiatives/fightnotariofraud/about\\_notario\\_fraud.html](http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud.html) (last visited Apr. 14, 2014). Although this Note advocates for an increased role of the nonlawyer in bridging the justice gap, it recognizes that protection of consumers is of utmost importance.

<sup>10</sup> See Denckla, *supra* note 7, at 2581 ("This type of prohibition overwhelmingly affects people of limited means, who are unable to retain a lawyer based on an inability to pay fees or, in the case of a pro bono lawyer, based on limited availability of free legal help.").

<sup>11</sup> See, e.g., Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883, 883-84 (2004) (arguing that "legal aid lawyers must take the lead in advocating for reform" of UPL rules); Michele Cotton, *Experiment, Interrupted: Unauthorized Practice of Law Versus Access to Justice*, 5 DEPAUL J. SOC. JUST. 179, 183-86 (2012) (discussing prominent advocates for nonlawyer assistance over the past forty years); Rhode, *supra* note 6, at 99 (arguing in 1981 that "it is time for the profession to relinquish the barricades").

<sup>12</sup> See, e.g., Hon. Jonathan Lippman, Chief Judge of the State of N.Y., Twentieth Annual Justice William J. Brennan Lecture on State Courts and Social Justice: The Judiciary as the Leader of the Access to Justice Revolution 18-19 (Mar. 11, 2014), available at <http://ncforaj.org/wp-content/uploads/2014/03/CJ-Lippman-Brennan-3-11-14.pdf> ("[W]e must look at our legal regulatory framework, first, to see if our unauthorized practice of law rules

This Note will argue that the current UPL regime has serious constitutional deficiencies and reflects poor policy in a country committed to equal justice under the law. In light of the Supreme Court's repeated recognition of a constitutional right of meaningful access to the courts,<sup>13</sup> this Note will argue that a state's interest in having UPL rules is outweighed by low-income litigants' interests in seeking affordable legal services. States should take steps to modify their UPL rules to allow for a litigant to seek legal assistance from a trained lay advocate, such as a nonlawyer licensed to perform certain legal services.

Part I of this Note provides background on unauthorized practice of law rules and the right of access to the court: Part I.A explores the history and rise of prohibitions on nonlawyer practice; Part I.B looks at UPL rules today, their purpose, their scope, and how they affect nonlawyer assistance; Part I.C reviews the right to proceed pro se and situation of the pro se litigant today; Part I.D examines the constitutional right of meaningful access to the courts. Part II provides analysis of the right of access to the courts in the context of UPL rules and argues that the constitutional implications of prohibiting nonlawyer legal assistance to low-income litigants demonstrates that states should ease UPL rules to facilitate access to justice. Part III proposes that UPL rules could be relaxed while still ensuring the provision of competent legal assistance.

## I. BACKGROUND

### A. *History and Rise of Unauthorized Practice of Law Prohibitions*

Understanding the purpose and scope of UPL rules requires a brief background in the history of the regulation of the legal profession. Up until the end of the nineteenth century, regulation of American legal activity generally did not prohibit nonlawyer practice of law.<sup>14</sup> Accounts of the history of the early American legal profession indicate that the only regulations of legal activity generally attempted to suppress the

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should be modified in view of the crisis in civil legal services and the changing nature of legal assistance needs in society; and, second, to identify if, short of full admission to the bar, there are additional skill sets . . . that can be licensed to provide low-bono or less costly services to help those in need of legal assistance.”).

<sup>13</sup> See *infra* Part I.D.

<sup>14</sup> See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 5 AM. B. FOUND. RES. J. 159 (1980). Although Christensen states that “[p]roscriptions on the practice of law by nonlawyers . . . go back to the very beginning of the legal profession in America,” his account is littered with evidence that nonlawyers in fact were allowed to practice law for much of the early part of American history. *Id.* at 161–65.

professional practice of law.<sup>15</sup> Early colonial documents often protected the right of litigants to proceed pro se, or to choose whomever they desired to represent them.<sup>16</sup> The eighteenth century saw a short-lived rise in professional lawyers attempting to exercise a monopoly on legal services through the formation of local bar associations, which established credentials for the study of law; the credentials were then adopted by the courts, and thus effectively limited practice before courts to those who were accepted by the bar.<sup>17</sup> However, by the middle of the nineteenth century, most states had essentially no restrictions on the unauthorized practice of law.<sup>18</sup> To the extent that states had licensing requirements, they could be fulfilled by most individuals who wanted to engage in legal practice.<sup>19</sup> At the end of the nineteenth century, the power of bar associations grew again, and states gradually began to regulate who could appear in court by establishing minimum educational standards.<sup>20</sup> The period following the Great Depression is when UPL rules emerged in their modern form.<sup>21</sup>

In the 1930s, as bar associations around the country began to view infringement on the provision of services by lay practitioners as a larger

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<sup>15</sup> These regulations stemmed from the public's distrust of lawyers. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 81–82 (1973); see also Laurel A. Rigertas, *Lobbying and Litigating Against "Legal Bootleggers"—The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 73–76 (2009) (discussing the low status of lawyers during the colonial period).

<sup>16</sup> See *Faretta v. California*, 422 U.S. 806, 828–30 (1975). For example, the influential Pennsylvania Frame of Government of 1682 explicitly provided that “in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves; or, if unable, by their friends.” *Id.* at 828 n.37 (internal quotation marks omitted). Such provisions reflected the utopian view that lawyers were not needed in colonial America, but instead litigants should present their own case appealing to a sense of justice. *Id.* at 828–30; see also FRIEDMAN, *supra* note 15, at 81; Christensen, *supra* note 14, at 162.

<sup>17</sup> Christensen, *supra* note 14, at 165–69.

<sup>18</sup> *Id.* at 169–75; see also Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 429 (2001) (“In the middle of the nineteenth century the legal market was virtually unregulated.”).

<sup>19</sup> For example, some states allowed anyone over twenty-one, all residents, or all registered voters to appear before the courts. Christensen, *supra* note 14, at 171. However, certain types of litigation were not permitted to be handled by laymen. See *id.* at 174.

<sup>20</sup> See *id.* at 176. The progress of establishing educational standards was slow, and would not occur in every state until about 1940, mainly because new requirements would have prohibited many practicing attorneys who were not formally trained. *Id.* The UPL rules prior to the Great Depression were very different in character to those that would develop later in the twentieth century, and these early versions essentially only prohibited the practice of law by corporations, by court officials, and by untrained laymen who appeared in court. See Rhode, *supra* note 6, at 7–8.

<sup>21</sup> See Rhode, *supra* note 6, at 6–9; see also Rigertas, *supra* note 15, at 93 (acknowledging that the formalized bar's concerns about UPL reached its apex in the 1930–40s, while pointing out that the concern in fact began earlier in the twentieth century).

problem, bar associations sought to enact UPL statutes and rules or to broaden laws already on the books.<sup>22</sup> The broadened rules essentially prohibited all law-related activities by nonlawyers, not just appearances before a court.<sup>23</sup> As prohibitions on the unauthorized practice of law became more common, the issue of defining what actually constituted the practice of law arose.<sup>24</sup> The American Bar Association took the position that it was in the profession's best interest not to precisely define the practice of law,<sup>25</sup> and throughout the twentieth century many statutes were incredibly vague, often defining the practice of law circularly as work that is traditionally done by lawyers.<sup>26</sup> Thus, determining what constituted the practice of law, and inversely its unauthorized practice, was largely left to the courts to decide on a case-by-case basis.<sup>27</sup> As for enforcement of the new UPL prohibitions, it was the organized bar that often took the lead in bringing enforcement actions.<sup>28</sup> Many alleged violations were settled by agreements between the legal bar and competing professional groups, without any judicial involvement.<sup>29</sup>

## B. *Unauthorized Practice of Law Rules Today*

### 1. Purpose of UPL Rules

Several different rationales have been put forward in defense of UPL rules,<sup>30</sup> but the main justification is that UPL prohibitions protect

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<sup>22</sup> See Rhode, *supra* note 6, at 7–9.

<sup>23</sup> See Denckla, *supra* note 7, at 2581 (“UPL restrictions often prohibit nonlawyers from either giving out-of-court legal advice or helping prepare legal documents, except where no accompanying advice is given.”).

<sup>24</sup> See, e.g., Rhode, *supra* note 6, at 45–47.

<sup>25</sup> See MODEL CODE OF PROF'L RESPONSIBILITY EC 3-5 (1983) (“It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law.”); Rigertas, *supra* note 15, at 108–18 (noting that ABA's Standing Committee on UPL repeatedly took the position that it was unwise to define the practice of law). However, some members of the bar took the opposite position that practice of law should be precisely defined. *Id.* at 115–16.

<sup>26</sup> See, e.g., Rhode, *supra* note 6, at 45–48.

<sup>27</sup> See Denckla, *supra* note 7, at 2589–93 (summarizing the contours of the UPL case law).

<sup>28</sup> See Rhode, *supra* note 6, at 7–13 (providing a detailed account of the bar's enforcement of UPL up through the early 1980s and discussing the sources of its power to enforce UPL).

<sup>29</sup> *Id.* at 44–45. However, by the 1980s, the bar no longer entered into such formal negotiations with other professional groups due to antitrust concerns voiced by the U.S. Justice Department. *Id.* at 9–10.

<sup>30</sup> See, e.g., Denckla, *supra* note 7, at 2593–99 (grouping rationales for UPL into four categories: client protection, effective administration of justice, professional discipline, and minimizing competitive practices). Many of the rationales for UPL are reflected in the ethical considerations of the ABA Model Code of Professional Responsibility (1983), particularly

consumers from unqualified and incompetent practitioners.<sup>31</sup> Related to this main concern are additional motivations such as the protection of the effective administration of justice,<sup>32</sup> the fact that only lawyers are subject to special ethical regulations and a system of professional discipline,<sup>33</sup> and a minimization of competitive practices among lawyers.<sup>34</sup> Although UPL rules are promulgated in the interest of protecting the public, some commentators have expressed skepticism at this purported justification.<sup>35</sup>

Critics of UPL point out that these justifications rest on faulty or untested assumptions, such as that a lawyer is always more competent than a nonlawyer for a given task, or that in a free market consumers will choose incompetent nonlawyers.<sup>36</sup> For example, some argue that consumers of legal services look toward indicia of reliability other than licensing when determining the competence of a provider, and that broad consumer protection statutes are more effective at protecting consumers from incompetent and fraudulent providers than are UPL statutes.<sup>37</sup> Most importantly, empirical evidence demonstrates that nonlawyers can be just as effective as lawyers at resolving certain legal issues.<sup>38</sup> In fact, some studies have suggested that a nonlawyer who is

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Canon 3. See, e.g., Denckla, *supra* note 7, at 2593; Association of the Bar of the City of New York, Committee on Professional Responsibility, *Prohibitions on Nonlawyer Practice: An Overview and Preliminary Assessment*, 50 THE RECORD 190, 194–95 (1995) [hereinafter N.Y.C. Bar].

<sup>31</sup> See Barton, *supra* note 18, at 436 (describing protection of the public as the most common rationale); Denckla, *supra* note 7, at 2593. The ABA Model Code of Professional Responsibility states that “[t]he prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services.” MODEL CODE OF PROF’L RESPONSIBILITY EC 3-1 (1983).

<sup>32</sup> N.Y.C. Bar, *supra* note 30, at 195 (“This argument posits that the incompetence of nonlawyers will result in a flood of unnecessary claims in the court system, delay caused by procedural errors, and more litigation arising from improperly prepared documents . . .”). Although effective operation of the court system is a very important interest, the fact that so many litigants proceed without any form of legal assistance at all sufficiently undercuts this justification. See *infra* Part I.C.2.

<sup>33</sup> MODEL CODE OF PROF’L RESPONSIBILITY EC 3-3 (“A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer.”). Related to this rationale is that communications to a lawyer are protected by attorney-client privilege, whereas those to a nonlawyer are not. *Id.*

<sup>34</sup> Denckla, *supra* note 7, at 2598 (“Without UPL, the fear is that lawyers will behave competitively for clients like any other business, which will ultimately hurt clients, harm the legal system, and erode professional discipline.”).

<sup>35</sup> See, e.g., Rhode, *supra* note 6, at 3–5 (stating that if enforcement of UPL rules are in the public’s interest “the public has remained curiously unsupportive of the war effort”).

<sup>36</sup> See, e.g., Denckla, *supra* note 7, at 2594–99 (presenting counterarguments to each of the justifications for UPL).

<sup>37</sup> Cantrell, *supra* note 11, at 891–95.

<sup>38</sup> See *id.* at 885–91 (summarizing empirical studies on the effectiveness of nonlawyers); Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 1014 (1998).

familiar with a given forum or area of law may make a better advocate than a lawyer with more general legal knowledge.<sup>39</sup>

## 2. Scope of UPL Rules

A fairly recent Connecticut Superior Court Rule demonstrates the broad scope of UPL prohibitions.<sup>40</sup> Enacted in 2007, the lengthy rule codifies the common law in Connecticut and specifically details what constitutes the practice of law in the state;<sup>41</sup> the rule is consistent with case law from other jurisdictions.<sup>42</sup> The judiciary implemented the rule to supplement a state statute that makes it a felony to engage in the unauthorized practice of law.<sup>43</sup> The Connecticut judiciary added the new rule because it “establishes a clear definition of the practice of law” and “makes it clear what is the unauthorized practice of law.”<sup>44</sup> The rule starts with a broad general definition: “The practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person.”<sup>45</sup> The rule elaborates, explicitly listing categories of activities that are included in the practice of law, such as holding oneself out to be a lawyer, providing

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<sup>39</sup> Cantrell, *supra* note 11, at 886–88 (citing HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998)).

<sup>40</sup> CONN. SUPER. CT. R. 2-44A. The very lengthy rule takes the opposite approach of many statutes enacted during the twentieth century when it was the ABA’s position that it was unwise to define the practice of law. *See supra* notes 24–26 and accompanying text.

<sup>41</sup> Letter from Maureen K. Ohlhausen, Dir. Office of Pol’y Planning, Jeffrey Schmidt, Dir. Bureau of Competition & Michael A. Salinger, Dir. Bureau of Econ., Fed. Trade Comm’n, to Carl E. Testo, Counsel, Rules Comm. of the Superior Court 3 (May 17, 2007) [hereinafter *FTC Letter*], available at <http://www.ftc.gov/be/V070006.pdf> (“The Proposed Rules would codify the definition of the practice of law, which historically has been defined in Connecticut through court decisions.”).

<sup>42</sup> *Cf. Denkla, supra* note 7, at 2588–92 (summarizing case law for what is and is not considered the practice of law).

<sup>43</sup> CONN. GEN. STAT. § 51-88 (2014). In short, the statute prohibits people who are not admitted as attorneys from practicing law or holding themselves out as attorneys, but does not define the practice of law. *Id.* The statute and court rule reflects the typical balance of power between the judicial and legislative branches: While legislatures frequently statutorily proscribe the unauthorized practice of law, the judiciary has reserved the power to actually determine what constitutes the practice of law. *See Rigertas, supra* note 15, at 118–23. Prior to 2013, violation of the Connecticut UPL provision was only a misdemeanor, punishable by a \$250 fine; however, in order to allow for increased enforcement against “notarios,” see discussion *supra* note 9, Connecticut made a violation a class D felony, punishable by five years in prison. Thomas B. Scheffey, *Turning Unauthorized Practice Into A Felony*, CONN. L. TRIB. (May 31, 2013), <http://www.ctlawtribune.com/PubArticleCT.jsp?id=1202602401434&slreturn=20140007140629>.

<sup>44</sup> SUPER. CT. OF CONN., MINUTES OF THE ANNUAL MEETING JUDGES OF THE SUPERIOR COURT 14 (June 29, 2007) [hereinafter *JUDGES’ MINUTES*], available at [http://www.jud.ct.gov/committees/judges/judgeannual\\_minutes\\_062907.pdf](http://www.jud.ct.gov/committees/judges/judgeannual_minutes_062907.pdf).

<sup>45</sup> CONN. SUPER. CT. R. 2-44A(a).



advice with regard to legal rights or responsibilities, drafting legal documents, or representing any person in court.<sup>46</sup> It goes on to list certain limited activities that are excluded from the practice of law; these exceptions reflect both the traditional exclusion of certain professions—such as mediators and accountants—from the definition of the practice of law, as well as constitutional concerns, such as First Amendment protections to sell legal forms and to lobby the government.<sup>47</sup>

Interestingly, before Rule 2-44A was finalized, the rule's broad scope attracted the attention of the staff of the Federal Trade Commission (FTC).<sup>48</sup> The FTC staff, while acknowledging that certain services could only be provided by attorneys, argued that the proposed rule was overly broad and would harm consumers.<sup>49</sup> In a letter to the Connecticut Rules Committee, the FTC staff cited the lack of evidence of consumer harm from the provision of services by nonlawyers, and specifically noted that in certain contexts nonlawyers are able to provide services cheaper, which keeps down fees charged by attorneys.<sup>50</sup> The Connecticut judiciary did not consider the FTC's concerns, and made no changes to the proposed rule.<sup>51</sup>

### 3. UPL Rules and Nonlawyer Assistance

UPL rules have not prevented all forms of nonlawyer assistance.<sup>52</sup> Nonlawyers are generally permitted to provide legal information, as

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<sup>46</sup> *Id.* at (a)(1)–(6).

<sup>47</sup> *Id.* at (b); Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2247 (1999) (discussing First Amendment limitations on UPL prohibitions).

<sup>48</sup> See FTC Letter, *supra* note 41. The letter expressed the views of the FTC's Office of Policy Planning, Bureau of Competition, and Bureau of Economics, not that of the Commission itself, and was part of an advocacy effort by the FTC staff to encourage competition among lawyers and nonlawyers. *Id.* at 1 n.1, 2–3.

<sup>49</sup> *Id.* at 4 (“The FTC Staff recognizes that there are some services requiring the specialized knowledge and skill of a person trained in the practice of law that should be provided only by attorneys. However, allowing non-attorneys to compete in the provision of certain types of services that do not require such knowledge and skill permits consumers to select from a broader range of options, considering for themselves such factors as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient.”).

<sup>50</sup> *Id.* at 5–6. In increasing the penalty for unauthorized practice, Connecticut's legislature apparently thought that the harm from nonlawyer practitioners was a real concern; however, the unregulated practice of notarios is not likely what the FTC staff had in mind in advocating for increased competition in the provision of legal services. See *supra* note 43.

<sup>51</sup> See JUDGES' MINUTES, *supra* note 44 (making no mention of the FTC letter in adopting the new rule); Rules Comm. of the Superior Court, *Practice Book and Code of Evidence Revisions Being Considered by the Rules Committee of the Superior Court*, 68 CONN. L.J. 45, 78C (2007) (publishing the proposed Rule 2-44A which is identical to the enacted rule).

<sup>52</sup> In New York, for example, even without regulatory oversight, nonlawyers already provide a number of services, particularly in proceedings before administrative agencies in which federal and state law allow for a greater role by lay advocates. NEW YORK TASK FORCE,

distinguished from legal advice or representation; however, drawing the line between information and advice can be difficult.<sup>53</sup> A recent attempt at using nonlawyer graduate students at the University of Baltimore to provide limited legal assistance to low-income clients highlights the obstacles and chilling effects UPL rules can present, and the difficulty in drawing the line between information and advice.<sup>54</sup> The proposed project was to work in conjunction with a legal services provider and was aimed at providing free assistance to Baltimore residents who had been turned away from the provider, and who were designated as having a “low-stakes” legal issue.<sup>55</sup> Individuals would receive full disclosure of the students’ limited ability to assist them, and students only planned to supply litigants with limited assistance and information.<sup>56</sup>

The students’ proposal, which was designed to fit within advisory opinions previously issued by the Maryland Attorney General, strained the plain text of the state’s UPL statute<sup>57</sup> and engendered objections from clinical faculty at the university’s law school before the project could get off the ground.<sup>58</sup> Eventually the Attorney General’s office weighed in, agreeing with the clinicians that there was no statutory authority for the project since everything the students proposed to do constituted a violation of the state’s UPL rules.<sup>59</sup> The project’s experience demonstrates the chilling effect broad UPL rules can have upon those who seek to assist low-income litigants and how even non-

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*supra* note 4, at 37.

<sup>53</sup> Rigertas, *supra* note 1, at 95 n.75 (describing how nonlawyers can provide legal information, but not advice, at self-help desks). For example, a Florida family court rule describes the types of information self-help desk personnel are allowed to provide, such as information about legal services, available authorized forms, docket information, and court process; however, they are prohibited from providing legal advice, recommending a specific course of action, or providing interpretation of legal terminology. FLA. FAM. L. R. PROC. R. 127.50.

<sup>54</sup> For a full discussion of this project, which students of the Legal and Ethical Studies masters program at the University of Baltimore attempted to conduct, see Cotton, *supra* note 11, at 189–220. The students involved were neither lawyers nor law students; however, the students were to be supervised by an attorney. *Id.* at 191, 193.

<sup>55</sup> *Id.* at 191, 194.

<sup>56</sup> *Id.* at 191, 193.

<sup>57</sup> *Id.* at 196–205. Maryland law lists several broad categories of activities that are included in the practice of law, such as “preparing or helping in the preparation of any form or document that is filed in a court or affects a case that is or may be filed in a court” and “giving advice about a case that is or may be filed in a court.” MD. CODE ANN. BUS. OCC. & PROF. § 10-101(h) (LexisNexis 2014).

<sup>58</sup> Although Cotton suggests that the clinical faculty may have been motivated by a rule of professional responsibility that forbids a lawyer to facilitate UPL, it is possible that the clinicians were simply the first to recognize that the proposed project could violate existing state law; a law school’s clinical faculty are presumably well versed in a state’s UPL rules as such provisions affect law student clinics. See Cotton, *supra* note 11, at 194–95.

<sup>59</sup> *Id.* at 195–96, 205–06.

profit groups offering limited nonlawyer assistance can run into problems under a state's UPL regulatory scheme, particularly if the state's law is unclear.<sup>60</sup>

### C. *Pro Se Litigants*

#### 1. Right to Proceed Pro Se

Despite the rise in UPL rules over the course of the twentieth century, these prohibitions have generally not affected litigants who choose to represent themselves.<sup>61</sup> In *Faretta v. California* the Supreme Court held that a criminal defendant has a constitutional right to represent himself.<sup>62</sup> The *Faretta* Court inferred from the structure of the Sixth Amendment<sup>63</sup> that an accused has a right to waive assistance of counsel, and therefore overturned a conviction where a state court judge refused to let the defendant present his own case.<sup>64</sup> In a federal court, the ability to represent oneself predates the Sixth Amendment,<sup>65</sup> as there is a long standing statutory right to proceed pro se in both criminal and

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<sup>60</sup> *Id.* at 196 (“As this experience indicates, accusations of UPL can chill or kill lay efforts to help low-income people with their civil legal problems. . . . [B]road or vague definitions of the practice of law make it difficult for such projects to fight the accusation.”).

<sup>61</sup> See Denckla, *supra* note 7, at 2591 (describing self-representation as a major exception to UPL rules).

<sup>62</sup> 422 U.S. 806 (1975).

<sup>63</sup> In pertinent part, the Sixth Amendment reads: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI. The Sixth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. See *Faretta*, 422 U.S. at 818 (“Because these rights [enumerated in the Sixth Amendment] are basic to our adversary system of criminal justice, they are part of the ‘due process of law’ that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States.”).

<sup>64</sup> *Faretta*, 422 U.S. at 819 (“Although not stated in the [Sixth] Amendment in so many words, the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment.”). The Court noted that throughout history, defendants typically had represented themselves and found that the right to counsel in the Sixth Amendment was intended to “supplement the primary right of the accused to defend himself,” even if the defendant might be better served by appointed counsel. *Id.* at 830, 834. The Court concluded that “[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored . . .” *Id.* at 834.

<sup>65</sup> As the court in *Faretta* notes,

[s]ection 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that ‘in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel . . .’

The right is currently codified in 28 U.S.C. § 1654.

*Id.* at 812–13.

civil cases.<sup>66</sup> Additionally, prior to *Faretta*, most state constitutions protected the right to proceed pro se, and the highest courts in many states had found that the right is protected by the United States Constitution.<sup>67</sup>

Some federal courts have noted, by way of dicta, that there is no constitutional right to self-representation in the civil context.<sup>68</sup> However, the fact that there is not a comprehensive constitutional right to counsel in civil cases,<sup>69</sup> combined with much of the Court's reasoning in *Faretta*<sup>70</sup> and the recognition of a constitutional right of access to the courts,<sup>71</sup> suggests that there would in fact be a constitutional right to proceed pro se in civil matters.<sup>72</sup> Nevertheless, all states recognize such a right.<sup>73</sup> Given that a litigant is always permitted to represent himself,

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<sup>66</sup> 28 U.S.C. § 1654 (2012) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

<sup>67</sup> See *Faretta*, 422 U.S. at 813–14.

<sup>68</sup> See, e.g., *Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985) (finding right to self-representation was solely statutory, not constitutional); *O'Reilly v. New York Times Co.*, 692 F.2d 863, 867–68 (2d Cir. 1982) ("[T]he right to self-representation in civil cases conferred by § 35 of the Judiciary Act of 1789, although not enjoying the constitutional protection subsequently afforded to the right of self-representation in criminal cases, is a right of high standing . . . ." (citation omitted)).

<sup>69</sup> See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (holding that the Fourteenth Amendment's Due Process Clause did not require the state to provide counsel to an indigent litigant who faced incarceration in a civil contempt hearing for failing to pay child support but did require certain alternative procedures). For a discussion of *Turner*, see *infra* notes 114–21 and accompanying text.

<sup>70</sup> Although *Faretta* was based on the Sixth Amendment, which only applies to criminal proceedings, much of the Court's analysis holds true to civil proceedings as well. For example, the Court emphasized the unbroken historical practice of the right to proceed pro se and recognized that the personal choice to proceed pro se "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Faretta*, 422 U.S. at 812–32, 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

<sup>71</sup> See *infra* Part I.D.

<sup>72</sup> Since the right to proceed pro se is statutorily protected in federal courts, and recognized in all the states, the issue of whether it is a right secured by the federal Constitution has never been squarely addressed. Presumably if the Constitution does not protect the civil litigants' right to proceed pro se, that right could only be denied if the government provided legal counsel; otherwise, preventing a civil litigant from representing himself would violate the constitutional right of access to the courts if he could not afford an attorney. See *Rigertas, supra* note 1, at 83 n.9 ("Because individuals do not have a right to counsel in civil cases, it follows that they also have the right to represent themselves pro se in civil actions in order to have access to the courts."); see also discussion *infra* Part I.D.

<sup>73</sup> See, e.g., RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. d (2000) ("Every jurisdiction recognizes the right of an individual to proceed 'pro se' . . . . The right extends to self-preparation of legal documents and other kinds of out-of-court legal work as well as to in-court representation."). However, "a person appearing pro se cannot represent any other person or entity, no matter how close the degree of kinship, ownership, or other relationship." *Id.*

some argue that he should be allowed to choose to be assisted by a nonlawyer if he so desires.<sup>74</sup>

## 2. Rise of the Pro Se Litigant

Although proceeding pro se can be viewed as a right, resolving a non-criminal legal issue without the help of an attorney is generally not resorted to by choice.<sup>75</sup> There are multiple factors that may lead someone to choose to represent himself, such as lack of complexity of a legal issue or a desire for independence.<sup>76</sup> However, the significant increases in levels of pro se litigants in recent years suggest that, in most situations, the cost of accessing legal services is the major reason.<sup>77</sup> Although court administrators have responded to the increases in self-representation and are becoming better situated to accommodate unrepresented litigants, such as through self-help centers, these resources have a limited ability to replace personalized legal assistance.<sup>78</sup>

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<sup>74</sup> Professor Rhode has suggested that since a criminal defendant may conduct his own defense, even to his detriment, that “in civil contexts, where there is no constitutional entitlement to a lawyer’s assistance, and where the costs of errors are so much less significant, a litigant’s desire to seek lay services is also entitled to deference.” Rhode, *supra* note 6, at 94. A related argument is that since UPL does not, and cannot, prohibit self-representation, UPL rules are not an effective way of protecting consumers from unqualified providers of legal services. See Barton, *supra* note 18, at 447–48 (“If the purpose of licensing and unauthorized practice laws is truly to protect the public from serious harms, it would seem that pro se representation should be banned as well. . . . Nevertheless, we allow self-representation, but not unlicensed representation; a sign that unauthorized practice rules are aimed at suppressing competition and not protecting the public.”).

<sup>75</sup> See *supra* notes 1–5 and accompanying text.

<sup>76</sup> ABA COMM’N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW RELATED SITUATIONS 34 (Aug. 1995) (listing reasons given for litigants proceeding pro se).

<sup>77</sup> See Rigertas, *supra* note 1, at 96 (“The increasing cost of attorneys, coupled with the limited availability of free or low cost legal services, leaves many people with no access to lawyers to help them navigate the legal system . . . .” (footnotes omitted)). The ABA has reported:

When going to state court, most people proceed *pro se* most of the time. High volume state courts, including traffic, housing and small claims, are dominated by *pro se* litigants. Over the course of the past 20 years, domestic relations courts in many jurisdictions have shifted from those where litigants were predominately represented by lawyers to those where *pro se*’s are most common. In these areas of the courts, *pro se* is no longer a matter of growth, but rather a status at a saturated level.

ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 4 (Nov. 2009) (footnote omitted) [hereinafter ABA PRO SE LITIGANTS].

<sup>78</sup> See ABA PRO SE LITIGANTS, *supra* note 77, at 5. The ABA additionally noted that services for pro se litigants in the private marketplace “are limited by state-based statutes governing the unauthorized practice of law.” *Id.* at 5 n.11; see also Abel, *supra* note 3, at 810 (“[C]ourts, civil legal aid programs, and community organizations are experimenting with techniques to help

Furthermore, empirical evidence demonstrates that pro se litigants have measurably worse results than represented litigants in many types of civil litigation, particularly where the adverse party is represented.<sup>79</sup> The inability to secure legal assistance and the corresponding rise in self-representation also adversely affects the functioning of courts due to the inefficiency that comes with courts being flooded with inexperienced users.<sup>80</sup> Further, commentators have noted that lack of accessible legal services threatens the rule of law as people lose faith in the civil justice system's ability to administer justice.<sup>81</sup>

#### D. *Right of Meaningful Access to the Court*

Although many litigants today cannot afford legal representation, constitutional law generally requires that they be allowed meaningful access to the courts despite their inability to pay for many of the costs associated with litigation. The Supreme Court has repeatedly found that there is a fundamental constitutional right of meaningful access to the courts, despite no such explicit guarantee in the Constitution.<sup>82</sup> One line

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unrepresented litigants in court. These include websites and computer kiosks with online information and forms, self-help centers, attorney-for-a-day programs, and more.”)

<sup>79</sup> Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 46–66 (2010) (summarizing numerous studies). Professor Engler noted that in hearings before administrative agencies having representation improved success rates by 15–30%. *Id.* at 58. In housing court, a represented tenant is much less likely to be swiftly evicted. *Id.* at 48–49. In child custody battles, joint custody was 15% more likely if both parents were represented, as opposed to just one of the parents. *Id.* at 51.

<sup>80</sup> NEW YORK TASK FORCE, *supra* note 4, at 15–16. The task force reported that New York State Attorney General testified that “eliminating the justice gap is not only a matter of fundamental fairness, it will improve the efficiency and effectiveness of our judicial system and improve the quality of the outcome and will save the [S]tate money.” *Id.* at 16 (alteration in original) (internal quotation marks omitted).

<sup>81</sup> See Rigertas, *supra* note 1, at 96 (noting that inability to access lawyers threatens the rule of law); cf. Laura Abel, *Language Access in the Federal Courts*, 61 DRAKE L. REV. 593, 599 (2013) (noting that in the context of language access, inequalities in the courtroom may cause members of the public to “justifiably lose faith in the ability of the courts to administer justice”).

<sup>82</sup> See, e.g., *Christopher v. Harbury*, 536 U.S. 403, 412–15 (2002) (citing cases recognizing right of access to the courts); *Bounds v. Smith*, 430 U.S. 817 (1977). The Court has pointed to numerous constitutional provisions in determining the existence of this right, particularly the Article IV Privileges and Immunities Clause, First Amendment Petition Clause, Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses, but has described the constitutional basis for the right of access to the courts as “unsettled.” *Harbury*, 536 U.S. at 415 n.12. Several Justices have criticized the unsettled origin of the right. *Id.* at 422 (Thomas, J., concurring in the judgment) (“I find no basis in the Constitution for a ‘right of access to courts’ that effectively imposes an affirmative duty on Government officials.”); *Bounds*, 430 U.S. at 839 (Rehnquist, J., dissenting) (“[A] ‘fundamental constitutional right of access to the courts’ . . . is found nowhere in the Constitution.”).

of cases has addressed prisoners' right to obtain meaningful access to the courts without interference from state prison authorities.<sup>83</sup> Other cases have dealt with the exclusion of indigent litigants, both criminal and civil, from the courts through various fees.<sup>84</sup> Many cases dealing with violations of the right of access to the courts have involved situations in which the government's policies inhibit a litigant from bringing a suit.<sup>85</sup> Inherent in all right of access claims is an underlying legal issue the litigant has not been allowed to present to a court.<sup>86</sup>

### 1. Prisoners' Right of Access to the Court

On many occasions the Supreme Court has recognized a right of access to the courts for prisoners.<sup>87</sup> Generally, this right prevents state prison authorities from interfering with prisoners' ability to appeal their convictions, file habeas petitions, and assert constitutional claims.<sup>88</sup> Much of the litigation in the line of cases dealing with prisoners' right of access to the courts has involved the extent to which a state must provide prisoners with legal assistance and law libraries.<sup>89</sup> The high-water mark for prisoners' right of access came in *Bounds v. Smith*, in which inmates at a state facility claimed that the state failed to provide law libraries.<sup>90</sup> The Court held that the states have "affirmative obligations to assure all prisoners meaningful access to the courts."<sup>91</sup> The Court in *Bounds* acknowledged that libraries were not the only permissible way for prisoners to have meaningful access to the courts,

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<sup>83</sup> See, e.g., *Lewis v. Casey*, 518 U.S. 343 (1996); *Bounds*, 430 U.S. 817. Although this line of cases deals with the rights of prisoners, it is necessary to understand the Supreme Court's overall approach to determining what constitutes meaningful access to the courts. For a comparison between nonlawyer assistance and prisoners' right of access, see *infra* Part I.D.1.

<sup>84</sup> See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Griffin v. Illinois*, 351 U.S. 12 (1956). For further discussion, see *infra* Part I.D.2.

<sup>85</sup> *Harbury*, 536 U.S. at 413 (describing cases where "systematic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time").

<sup>86</sup> *Id.* at 415 ("[O]ur cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court."). The Court has explained that the requirement of an underlying claim is part of the doctrine of standing, which requires an actual injury. *Lewis*, 518 U.S. at 349 ("It is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.").

<sup>87</sup> See, e.g., *Lewis*, 518 U.S. at 354 (citing cases).

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., *Bounds v. Smith*, 430 U.S. 817 (1977).

<sup>90</sup> *Id.* at 818 ("Respondents alleged, in pertinent part, that they were denied access to the courts in violation of their Fourteenth Amendment rights by the State's failure to provide legal research facilities.").

<sup>91</sup> *Id.* at 824.

but that other forms of legal assistance provided by the state—including services by nonlawyers—would be constitutionally acceptable.<sup>92</sup>

The Supreme Court's most recent decision dealing with prisoners' right of access came in *Lewis v. Casey*,<sup>93</sup> where state prisoners alleged a violation of the standards set forth in *Bounds*.<sup>94</sup> The Court in *Lewis* sharply limited *Bounds*, holding that the previous decision had gone too far, exceeding the law established in prior cases.<sup>95</sup> The *Lewis* Court was specifically concerned with placing an affirmative duty on the states, holding that states did not have to "enable the prisoner to *discover* grievances, and to *litigate effectively* once in court."<sup>96</sup> The *Lewis* Court reaffirmed that law libraries are just one permissible way to ensure the right of access to the courts, and that there is not a particular right to law libraries.<sup>97</sup> The Court repeated a line from *Bounds*, saying that "meaningful access to the courts is the touchstone."<sup>98</sup>

## 2. Indigent Litigants and Access to the Court

Another body of case law dealing with meaningful access to the courts involves the extent to which state courts must waive various court fees in order to allow indigent litigants to either appeal a judgment or enter the courts in the first instance.<sup>99</sup> This line of cases dates back to *Griffin v. Illinois*,<sup>100</sup> which involved a criminal defendant who could not afford the trial transcript required for an appeal.<sup>101</sup> Relying on both the Equal Protection and Due Process Clauses of the Fourteenth Amendment,<sup>102</sup> the Court held that the state could not solely provide

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<sup>92</sup> *Id.* at 830–31 (“[L]aw libraries are one constitutionally acceptable method to assure meaningful access to the courts . . .”).

<sup>93</sup> 518 U.S. 343.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 354 (“It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present.” (citations omitted)).

<sup>96</sup> *Id.* at 354.

<sup>97</sup> *Id.* at 351.

<sup>98</sup> *Id.* (internal quotation marks omitted).

<sup>99</sup> *See, e.g.,* *Boddie v. Connecticut*, 401 U.S. 371 (1971).

<sup>100</sup> 351 U.S. 12 (1956).

<sup>101</sup> *Id.* at 13–15. Under Illinois law, a free transcript was provided only to indigent defendants who had received the death penalty or were appealing their conviction on claims of state or federal constitutional errors. *Id.* at 15. The petitioners in *Griffin* “alleged that there were manifest nonconstitutional errors in the trial which entitled them to have their convictions set aside on appeal and that the only impediment to full appellate review was their lack of funds to buy a transcript.” *Id.*

<sup>102</sup> *Id.* at 17 (“Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.” (internal quotation marks omitted)). *Griffin* involved a felony conviction where the defendants faced incarceration, but



appellate review to defendants who were able to purchase transcripts while denying review to defendants who could not afford the transcript.<sup>103</sup>

Later, in *Boddie v. Connecticut*,<sup>104</sup> the Supreme Court reached a similar result as in *Griffin*, but in the civil context. The Court invalidated a state court filing fee as applied to welfare recipients, which prevented them from obtaining a divorce in the state's courts.<sup>105</sup> The Court held that given the fundamental importance of marriage combined with the fact that state courts were the only means for obtaining a divorce, due process required the state to provide access to its courts in order for litigants to dissolve their marriages.<sup>106</sup> The Court relied on the Due Process Clause of the Fourteenth Amendment, using both procedural and substantive grounds.<sup>107</sup> Procedurally, the Court stated that in this context due process required a "meaningful opportunity to be heard."<sup>108</sup> Substantively, the Court stressed the fundamental nature of the interest in marriage.<sup>109</sup>

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the holding in *Griffin* was later extended to non-felony cases where a defendant did not face incarceration but where there was possibility of collateral consequences. *Mayer v. Chicago*, 404 U.S. 189 (1971). The Court has made clear that the Constitution does not require a state to provide appellate review, but to the extent a state provides such review, it cannot limit the right to appeal to those who can afford it. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 606 (1974) ("[C]ases [after *Griffin*] invalidated similar financial barriers to the appellate process, at the same time reaffirming the traditional principle that a State is not obliged to provide any appeal at all for criminal defendants.").

<sup>103</sup> *Griffin*, 351 U.S. at 19 ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").

<sup>104</sup> 401 U.S. 371 (1971).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 374 ("Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.").

<sup>107</sup> *Id.* at 375. Justice Douglas, concurring in the judgment only, criticized the majority for relying on substantive due process, rather than following *Griffin* and relying on the Equal Protection Clause of the Fourteenth Amendment because this was a case where "[t]he more affluent can obtain a divorce; [but] the indigent cannot." *Id.* at 384 (Douglas, J., concurring). Justice Brennan, concurring in part, joined the majority opinion in so far as it based its decision on procedural due process, concluding that it is a denial of due process to exclude a litigant from the courts based on inability to pay. *Id.* at 387 (Brennan, J., concurring in part). Justice Brennan would not limit this rationale to those cases such as divorce where the state was the exclusive means of settling a dispute; indigent defendants' "right to be heard in some way at some time extends to all proceedings entertained by courts." *Id.* at 387-88.

<sup>108</sup> *Id.* at 377 ("[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.").

<sup>109</sup> *Id.* at 376 ("As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society.").

In subsequent cases, the Court focused on the fact that the litigation touched upon a fundamental right, saying that this was crucial to the decision in *Boddie*.<sup>110</sup> The Court also has made clear that *Boddie* was an exception and not the rule.<sup>111</sup> Only in cases where the interest the litigant sought to vindicate in court was fundamental has the Court used heightened scrutiny and held that the Constitution requires the waiver of fees.<sup>112</sup> The general rule is that such restrictions on the right of access to the courts are subject to rational basis review.<sup>113</sup>

In addition to requiring the waiver of certain fees, the Supreme Court has held that the Constitution may require a state to provide an indigent litigant with certain “alternative procedures” in order to assure a fair proceeding.<sup>114</sup> In *Turner v. Rogers* the petitioner, Michael Turner, was sentenced to twelve months in jail for failing to pay his child support.<sup>115</sup> Turner appealed, arguing that the Constitution required he be provided counsel in the civil contempt proceeding.<sup>116</sup> Essentially, had Turner received some form of legal assistance, he would have been able to avoid incarceration by demonstrating to the judge that he was unable to pay his child support—he simply had no funds with which to pay the \$5728.76 he owed and no amount of jail time could coerce him to comply with the child support order.<sup>117</sup>

The Supreme Court held that the Due Process Clause of the Fourteenth Amendment did not automatically require the state to provide Turner with counsel.<sup>118</sup> However, the Court nevertheless concluded that Turner’s incarceration violated the Due Process Clause

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<sup>110</sup> See *M.L.B. v. S.L.J.*, 519 U.S. 102, 113–17 (1996).

<sup>111</sup> *Id.* at 114.

<sup>112</sup> *Id.* For example, in a termination of parental rights case, the Court held that the state court could not deny the indigent defendant the opportunity to appeal due to inability to afford trial transcript, since upbringing of children is a fundamental right and because the proceeding was quasi-criminal. *Id.* at 116–17, 124. However, in a case involving a filing fee for bankruptcy proceedings, the filing fee was permissible because discharging bankruptcy was not deemed fundamental. *United States v. Kras*, 409 U.S. 434, 444–45 (1973). Additionally the Court stated “[i]n contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors.” *Id.* at 445.

<sup>113</sup> *M.L.B.*, 519 U.S. at 123–24.

<sup>114</sup> *Turner v. Rogers*, 131 S. Ct. 2507, 2512 (2011).

<sup>115</sup> *Id.* at 2513. South Carolina, where the case took place, enforces its child support orders through civil contempt proceedings. *Id.* at 2512. If the parent is found to be in contempt, he can “be imprisoned [for up to twelve months] unless and until he purges himself of contempt by making the required child support payments.” *Id.* at 2513. If, however, the parent is unable to pay, he may not be held in contempt. *Id.* at 2512–13.

<sup>116</sup> *Id.* at 2514.

<sup>117</sup> See *id.* at 2512–13, 2516.

<sup>118</sup> *Id.* at 2520. The court ultimately left open the question of whether there may be a right to counsel in other similar cases, such as where the opposing party was the government or was represented by counsel—here the custodial parent was seeking enforcement of the child support order and was also proceeding pro se—or in cases where the issue was “unusually complex.” *Id.*

because the state did not provide Turner with “alternative procedural safeguards.”<sup>119</sup> Specifically, the Court suggested that the state needed to take several safeguards: the state had to provide notice to Turner that his ability to pay was the critical issue in the proceeding; the state had to elicit information about Turner’s financial circumstances through the use of a form; the state had to give Turner an opportunity to respond to statements and questions about his financial status; and the judge had to make a specific finding on Turner’s ability to pay the arrearage.<sup>120</sup> Therefore, *Turner* demonstrates that even in situations where a state is not obligated to affirmatively assist an indigent litigant—such as through provision of counsel or the waiver of fees—the Constitution may require a state to utilize procedures that will assure the fairness of the legal system.<sup>121</sup>

## II. ACCESS TO THE COURTS AND NONLAWYER ASSISTANCE

Considering that there is a well-established right of meaningful access to the courts, constitutional issues arise when low-income litigants are effectively blocked from meaningfully pursuing their claims through their inability to obtain affordable legal services. This Part considers the constitutionality of UPL rules through the lens of indigent litigants who are unable to afford legal assistance.<sup>122</sup> Right-of-access cases often deal with the quantity and quality of assistance a state must *provide* to indigent litigants in order to facilitate the litigants’ ability to access the court;<sup>123</sup> however, *Lewis v. Casey* can be understood as refocusing the issue on what the state must *refrain* from doing so as not to impede the litigants’ access to the courts.<sup>124</sup> Even where a state has no affirmative obligation to assist a litigant, *Turner* teaches that the

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 2519–20. The Court relied on United States Solicitor General’s recommendations in adopting these particular safeguards, and noted that these safeguards were not the “only possible alternatives” that could “assure the ‘fundamental fairness’ of the proceeding even where the State does not pay for counsel for an indigent defendant.” *Id.* In fact, the Court even suggested that assistance from a nonlawyer, such as a “neutral social worker,” could be “constitutionally sufficient.” *Id.* at 2519.

<sup>121</sup> *See id.* at 2519–20.

<sup>122</sup> The constitutionality of UPL rules is often viewed through the lens of the nonlawyer would-be practitioner. *See, e.g.,* Hurder, *supra* note 47, at 2247 (discussing First Amendment limitations on UPL rules from the standpoint of organizations or individuals that wish to engage in legal activities).

<sup>123</sup> *See supra* Part I.D. For example, as noted above, much of the litigation in the prisoners’ right of access cases involved to what extent state prison authorities must provide legal assistance or law libraries to prisoners. *See, e.g.,* Bounds v. Smith, 430 U.S. 817 (1977). Similarly, in *Turner* the main question was whether South Carolina had to provide Turner with a lawyer. *Turner*, 131 S. Ct. 2507.

<sup>124</sup> 518 U.S. 343 (1996); *see supra* note 96 and accompanying text.

Constitution may require a state to use procedures that assure fairness to the litigant.<sup>125</sup> The issue then, in the context of prohibitions on nonlawyer assistance, is whether a state has a sufficient interest in totally excluding nonlawyers from the practice of law in order to justify the sweeping UPL prohibitions that exist in most jurisdictions. Although this Part ultimately concludes that any UPL rules would likely withstand constitutional attack, actually balancing the state's interest against the interests of litigants reveals that our current UPL regime represents a poor way of effectuating the state's interests in protecting consumers and administering justice.

A. *Examining the State's Interest in Prohibiting Nonlawyer Assistance*

The Supreme Court's decision in *Johnson v. Avery* is particularly relevant to the discussion of right of access in the face of restrictions on nonlawyer assistance.<sup>126</sup> In *Avery*, the Court struck down a prison regulation that prohibited prisoners from assisting each other in filing habeas petitions—the regulation effectively restricted the practice of law by nonlawyer prisoners, known as “jailhouse lawyers,” who assist other inmates with legal matters.<sup>127</sup> Despite recognizing the state's interest in the regulation of its prisons, the Court held that any such regulations must be invalidated where federal constitutional rights supervene—in this case, the prisoners' right of access to the courts.<sup>128</sup>

*Avery* dealt with a prison regulation; however, the similarity of the prohibition to UPL rules was not lost on the Court.<sup>129</sup> The Court rejected a rationale used by the Sixth Circuit in upholding the prison rule: The power of the state to restrict the practice of law to licensed

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<sup>125</sup> See *supra* notes 114–21 and accompanying text.

<sup>126</sup> 393 U.S. 483 (1969). It should be noted that *Avery* preceded *Bounds v. Smith* as one of the cases examining the right of access to the courts for a prisoner. See *supra* Part I.D.1. *Avery* formed part of the basis for the Court in *Bounds*, and to the extent that *Bounds* is limited by *Lewis v. Casey*, *Avery* is subject to those same restrictions. *Lewis*, 518 U.S. at 354–55. However, the *Lewis* Court cited the decision in *Avery* as part of the “well established” right of access to the courts. *Id.* at 350.

<sup>127</sup> *Avery*, 393 U.S. at 484, 490. The particular prison regulation provided that: “No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters.” *Id.* at 484 (internal quotation marks omitted).

<sup>128</sup> *Id.* at 486 (“There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene.”). The Court was particularly concerned with the prisoners' right to bring a petition for the writ of habeas corpus. See *infra* notes 161–63 and accompanying text.

<sup>129</sup> *Avery*, 393 U.S. at 490 n.11.

attorneys.<sup>130</sup> The Court swiftly dismissed this argument in a footnote, stating that “[t]he power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights.”<sup>131</sup> Even in light of the prisoners’ forfeiture of many basic rights, the Court in *Avery* still found that the state’s interest did not outweigh the prisoners’ constitutional right to access the courts.<sup>132</sup>

Justice Douglas’s concurring opinion in *Avery* took the comparison between the prohibition on jailhouse lawyers and UPL rules much further.<sup>133</sup> Justice Douglas explicitly stated that many legal claims in the modern world, particularly those dealing with administrative agencies, could be, and should be, handled by nonlawyers.<sup>134</sup> Justice Douglas criticized the legal profession for having a “closed-shop” mentality,<sup>135</sup> and stated that nonlawyers should be permitted to assist with legal problems, so long as they do not misrepresent themselves as lawyers.<sup>136</sup> Concluding that the provision of legal services should never be thought to be the “exclusive prerogative of the lawyer,” Justice Douglas stated that the cooperation of laymen is necessary for the right of access of courts to be available to the indigent.<sup>137</sup>

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<sup>130</sup> *Id.*; *Johnson v. Avery*, 382 F.2d 353, 356 (6th Cir. 1967), *rev’d*, 393 U.S. 483 (1969) (“In no case has the Constitution been read to grant an untrained and unlicensed person the right to practice law.”).

<sup>131</sup> *Avery*, 393 U.S. at 490 n.11 (citing *NAACP v. Button*, 317 U.S. 415 (1963)). Additionally, in rejecting the UPL analogy, the Court also noted that the writ of habeas corpus is specifically contemplated to be one that is prepared by laymen. *Id.*

<sup>132</sup> *Id.* at 490 (“[U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners.”). Recently, the Court addressed a case with facts somewhat similar to *Avery*, finding that the First Amendment did not provide special protection to communications between a nonlawyer prisoner law clerk and another prisoner whom the clerk sought to help. *Shaw v. Murphy*, 532 U.S. 223 (2001). In the case, an inmate, Tracy, had been charged with assault, and the petitioner Murphy had attempted to provide Tracy with assistance; however, under a prison rule, Tracy had been assigned a different clerk. *Id.* at 225–26. Although the Court found that the prisoner had no First Amendment right to give legal assistance, the continuing vitality of *Avery*’s right to receive legal assistance was not questioned. *Id.* at 230. The unanimous Court even cited *Avery* approvingly, albeit for the proposition that the state must be able to impose reasonable restrictions on the activities of jailhouse lawyers. *Id.* at 231.

<sup>133</sup> *Avery*, 393 U.S. at 491–98 (Douglas, J., concurring).

<sup>134</sup> *Id.* at 491 (recognizing that certain types of claims “require[] no special legal talent.”). Today, administrative hearings are generally an exception to the UPL framework, as nonlawyers are routinely allowed to appear in such hearings. *See, e.g.*, CONN. SUPER CT. R. 2-44A(b)(2) (excluding practicing before an administrative agency from the definition of the practice of law); *see also supra* Part I.B.2.

<sup>135</sup> *Avery*, 393 U.S. at 491–92 (Douglas, J. concurring).

<sup>136</sup> *Id.* at 498 (“Laymen—in and out of prison—should be allowed to act as ‘next friend’ to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar.”).

<sup>137</sup> *Id.* (“The cooperation and help of laymen, as well as of lawyers, is necessary if the right of (r)easonable access to the courts is to be available to the indigents among us.” (footnote omitted) (internal quotations marks omitted)). Even Justice White’s dissent, which was joined

Justice Douglas's arguments and observations are more relevant today than they were forty-five years ago. In the years since *Avery*, the legal profession has not embraced the cooperation of nonlawyers, and the legal needs of most low-income people go unmet.<sup>138</sup> In arguing that certain types of legal issues do not necessarily require the special skill of a lawyer, Justice Douglas demonstrated that UPL restrictions, like court fees,<sup>139</sup> should bend in the face of an indigent litigant's right of access to the courts.<sup>140</sup> Given the lack of affordable legal services outside of prison today, an indigent litigant should have a right to seek legal assistance from a nonlawyer, just as the prisoners in *Avery* had the right to obtain legal assistance from fellow inmates, whenever the litigant's interest in having nonlawyer assistance outweighs the state's interest in prohibiting that assistance.

Determining whether UPL restrictions are constitutionally required to yield to accommodate nonlawyer assistance to low-income litigants first requires identifying the state's interest in such rules. All the justifications for UPL rules are legitimate and important state interests—there is no doubt that a state may make laws aimed at protecting consumers of legal services from incompetent practitioners and maintaining effective administration of justice.<sup>141</sup> However, in looking at these interests, it is possible that UPL regulations are not always necessary to achieve these goals.<sup>142</sup> For example, consumer protection statutes safeguard against fraudulent provision of all kinds of services, not simply legal services.<sup>143</sup> Additionally, many cases are already litigated by nonlawyer pro se litigants, who are untrained in rules of procedure, but who nevertheless have a right to represent themselves in court; this influx of unrepresented litigants hampers the

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by Justice Black, expressed agreement with this conclusion, stating, "I am inclined to agree with Mr. Justice DOUGLAS that it is neither practical nor necessary to require the help of lawyers. As the opinions in this case indicate, the alternatives are various and the burden on the States would not be impossible to discharge." *Id.* at 502 (White, J., dissenting). Although the dissenting justices thought that the prison regulation should be upheld, they did not question the existence of the right to access the courts; instead the dissent argued that the Court should not encourage a possibly incompetent jailhouse lawyer to assist a fellow inmate, because "unless the help the indigent gets from other inmates is reasonably adequate for the task, he will be as surely and effectively barred from the courts as if he were accorded no help at all." *Id.* at 499. This concern is similar to the justification for UPL rules based on the possible incompetence of a nonlawyer. *See supra* Part I.B.1. Interestingly, the dissent indicated that perhaps the state should be obligated to provide assistance in the case of an illiterate or uneducated prisoner, and suggested that the assistance would not necessarily have to come from a lawyer. *Avery*, 393 U.S. at 502 (White, J., dissenting).

<sup>138</sup> *See supra* note 3 and accompanying text.

<sup>139</sup> *See supra* Part I.D.2.

<sup>140</sup> *Avery*, 393 U.S. at 491–98 (Douglas, J., concurring).

<sup>141</sup> *See* discussion *supra* Part I.B.1.

<sup>142</sup> *See supra* Part I.A., I.B.1.

<sup>143</sup> *See* Cantrell, *supra* note 11, at 891–95.

functioning of the courts and cuts against the administration of justice as a justification for UPL rules.<sup>144</sup> At best, it can be said that there is not a perfect fit between the UPL rules and the asserted justifications.

Further, even though regulation of the courts and the practice of law is typically a legitimate state interest, the Supreme Court's decision in *Boddie* raises some questions as to the legitimacy of the monopolistic nature of the UPL regime.<sup>145</sup> In *Boddie*, the Court stated that the state's monopoly—providing the sole avenue for dissolution of a marriage—raised problems for court's legitimacy if it could deny relief based on ability to pay.<sup>146</sup> The monopoly in *Boddie* is not unlike the legal monopoly created by UPL rules, giving lawyers the sole ability to practice law in a state.<sup>147</sup> The Court in *Boddie* pointed out that generally there were alternatives to judicial process to settle private disputes, but distinguished divorce from other contracts that can be rescinded without judicial involvement.<sup>148</sup> The Court held that the state's monopoly over binding dispute resolution was legitimate, so long as there were other means of resolving disputes.<sup>149</sup> Because UPL rules grant those who are admitted to the bar a monopoly on legal advice and representation, they function very similarly to the exclusive mode of resolving disputes the Court said was unconstitutional in *Boddie*.<sup>150</sup> Like the Connecticut judiciary's monopoly on providing a divorce, the fact that UPL rules contribute to the inability of low-income litigants to

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<sup>144</sup> See *supra* Part I.C.2.

<sup>145</sup> See *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

<sup>146</sup> *Id.* (“[T]he judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant’s full access to that process raises grave problems for its legitimacy.”); see also *id.* at 380–81 (“[W]e conclude that the State’s refusal to admit these appellants to its courts, *the sole means in Connecticut for obtaining a divorce*, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and, in the absence of a sufficient countervailing justification for the State’s action, a denial of due process.” (emphasis added)).

<sup>147</sup> Although there are similarities between the judicial monopoly on divorces and UPL rules, there are some significant differences. First, UPL rules do not force a litigant to hire a lawyer because as noted above there is a right to proceed pro se; however, as previously discussed, the fact that there is a right to proceed pro se cuts against many of the justifications for UPL rules in the first place. See *supra* Part I.C.1 (analyzing right to proceed pro se). A related difference is that, whereas the Connecticut courts provided the only avenue for divorce, UPL is not so restrictive in choice of legal advice; although it restricts a litigant from seeking advice of the members of one profession, litigants are generally free to seek the lawyer of their choice; again, the main barrier to legal services is cost.

<sup>148</sup> *Boddie*, 401 U.S. at 376 (“Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval.”).

<sup>149</sup> *Id.* at 375–76 (“The legitimacy of the State’s monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain.”).

<sup>150</sup> *Id.* at 376.

obtain legal advice raises grave problems for the legitimacy of the current legal licensing regime, cutting against the states' interests in having such licensing systems.

B. *Balancing Litigants' Rights Against State Interests*

The Supreme Court's decision in *Avery* and Justice Douglas's concurrence lends support to the position that UPL rules should yield where a litigant's interest in accessing the courts outweighs the state's interest in prohibiting nonlawyers from providing legal services. This is similar to what the Court did in *Boddie*: It balanced the state's interest in having court fees against the litigants' interests in accessing the courts in order to dissolve their marriages.<sup>151</sup> However, the outcome of such an inquiry depends on the level of scrutiny applied to the regulations. In *Boddie*, the Court used a form of heightened scrutiny and rejected the state's argument that the use of fees to prevent frivolous litigation and to recoup costs justified blocking the litigants from court, holding that these interests were not "sufficient to override the interest" of the litigants in accessing the courts.<sup>152</sup> In contrast, UPL rules would certainly be upheld if a reviewing court only used a rational basis test, which is how such regulations would typically be reviewed.<sup>153</sup> However, if UPL rules were treated like the fees in *Boddie*, and the state's interest was seriously weighed against the litigant's interest, UPL rules could be viewed as unconstitutional.

The case for using a *Boddie*-like form of heightened scrutiny on UPL rules is bolstered by looking again at *Avery* and comparing the state's interest in the administration of its prisons to the state's interest in regulating the practice of law.<sup>154</sup> *Avery* effectively held that a prisoner's interest in accessing the courts outweighed the state's interest in prohibiting jailhouse lawyering.<sup>155</sup> Prisoners generally have fewer rights than average citizens,<sup>156</sup> which makes it reasonable for a state to

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<sup>151</sup> *Id.* at 377, 381; see also discussion *supra* Part I.D.2.

<sup>152</sup> *Boddie*, 401 U.S. at 381.

<sup>153</sup> See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 123 (1996) (stating that state court fee requirements are generally subject to rational basis review). Rational basis review, or minimum scrutiny, typically results in courts finding laws to be constitutional so long as there is any conceivable rational basis for the regulation.

<sup>154</sup> For example, in *Lewis*, the Court stated that although the state cannot restrict litigants from attacking their sentences and challenging their conditions of confinement, "[i]mpairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Lewis v. Casey*, 518 U.S. 343, 355 (1996).

<sup>155</sup> *Johnson v. Avery*, 393 U.S. 483, 490 (1969).

<sup>156</sup> However, prisoners are not completely divested of their constitutional rights, and even have specific constitutional protections relating to the conditions of their confinement. U.S. CONST. amend. VIII. Thus, prisoners possess certain rights that free citizens do not have, as



place greater limits on a prisoner's ability to access the courts than a free citizen's.<sup>157</sup> In fact, since *Avery*, the Court has held that it will be very deferential to state prison administrators in most circumstances and will use rational basis review for prison regulations, even where they impinge on constitutional rights.<sup>158</sup> Since infringements on free citizens' constitutional rights are not accorded the same level of deference as prison regulations, perhaps a heightened form of scrutiny should apply to regulations of the practice of law which hamper the right of access to the courts for those outside of prison. However, this is inconsistent with how courts have applied the *Boddie* cases, which generally hold that heightened scrutiny is the exception, not the rule.

The Supreme Court has generally only used heightened scrutiny and invalidated regulations that restrict access to the courts when the denial of access implicates fundamental interests.<sup>159</sup> Other regulations are upheld under rational basis review.<sup>160</sup> Even the Court's decision in *Avery* rested, in part, on an important right available only to prisoners: the writ of habeas corpus.<sup>161</sup> The Court stressed the importance the writ has in the constitutional framework<sup>162</sup> and found that the prison rule in question effectively forbade illiterate and poorly educated inmates from exercising their right to file habeas petitions.<sup>163</sup> The Court later extended the right recognized in *Avery* outside the context of habeas petitions,

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states are constitutionally required to provide food, clothing, and medical care to prisoners because prisoners are deprived of the ability to provide for their own needs. *See, e.g., Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

<sup>157</sup> *See, e.g., Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (“[T]he constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large.”).

<sup>158</sup> *Lewis*, 518 U.S. at 361; *see also Turner v. Safley*, 482 U.S. 78, 89 (1987) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

<sup>159</sup> *See supra* Part I.D.2.

<sup>160</sup> *See supra* note 113 and accompanying text.

<sup>161</sup> The writ of habeas corpus “serves as the primary procedural vehicle through which those detained by the government may challenge the legality of their detentions. Put simply, habeas corpus restricts government’s ability to imprison its citizens for any reason it wants—or for no reason at all.” Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1362 (2010). The Constitution restricts Congress’s power to suspend the writ of habeas corpus. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

<sup>162</sup> *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (“This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme . . . . Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed.”).

<sup>163</sup> *Id.* at 485–87. (“There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that.”).

holding that prison regulations could not restrict the prisoners from assisting each other in preparing legal documents to vindicate other fundamental rights, such as civil rights violations, when other legal assistance available to the prisoners was inadequate.<sup>164</sup>

The Court's recognition of right of access for prisoners alleging violations of constitutional rights is analogous to the Court's willingness to waive court fees for certain types of civil actions where fundamental interests are at stake.<sup>165</sup> By only waiving fees in cases where the underlying interest is fundamental, the Court has essentially foreclosed the argument that the right of access to the courts itself is a fundamental right that deserves heightened scrutiny.<sup>166</sup> Thus, the analysis for whether UPL rules impinge on a right of access to the courts depends in part on the importance of the underlying legal issue the litigant seeks to resolve.<sup>167</sup>

Currently UPL rules prevent nonlawyer assistance across the board; the rules are broad and apply the same way, restricting any type of nonlawyer assistance no matter what sort of legal issue a litigant has.<sup>168</sup> Thus, certain types of cases dealing with fundamental rights—potentially those dealing with marriage or the custody of children<sup>169</sup>—should be treated differently under right of access to the courts doctrine.<sup>170</sup> In these cases, UPL restrictions, insofar as these schemes limit a litigant's access to legal assistance, would be the most inconsistent with the right of meaningful access to the courts. In such

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<sup>164</sup> *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). The prisoner in *Wolff* was challenging, inter alia, a regulation whereby the warden appointed one prisoner to be a "legal advisor," and only this prisoner could assist fellow inmates with preparing legal documents. *Id.* at 577–78. At issue was whether the sole legal advisor provided enough assistance to the prison population to satisfy *Avery* and justify restricting other prisoners from assisting each other with legal matters. *Id.* at 577–79. This in turn depended on whether *Avery* applied exclusively to habeas petitions, or more broadly to civil rights violations. *Id.* at 579. The Court rejected the argument that *Avery* was limited to the writ of habeas corpus, holding that "[t]he right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579. The Court left it to the district court to decide if the one legal advisor could provide the adequate level of assistance, and suggested that the prison could appoint more advisors if the prison "insists on naming the inmates from whom help may be sought." *Id.* at 580.

<sup>165</sup> See *supra* Part I.D.2.

<sup>166</sup> The Supreme Court has been clear that meaningful right of access to the courts requires having a valid underlying legal issue and is not a right in and of itself. See *supra* note 86 and accompanying text.

<sup>167</sup> See *supra* Part I.D.2.

<sup>168</sup> See *supra* Part I.B.2.

<sup>169</sup> See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (requiring waiver of transcript cost for indigent litigant in termination of parental rights suit); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (requiring waiver of court fee for indigent litigant to get a divorce).

<sup>170</sup> This is because the Court has only employed heightened scrutiny where fundamental interests are at stake. See *supra* Part I.D.2.

instances, it is clear that UPL rules must be modified in order to maximize the ability of litigants to secure assistance in cases dealing with fundamental rights.

Even though cases involving fundamental rights might often be ones best suited for a highly-trained lawyer, this is not true of all situations; for example, uncontested divorce is frequently cited as a situation that could be handled by a nonlawyer.<sup>171</sup> In cases where the underlying interest is fundamental, there might be a better argument for a right to counsel—or counsel may already be statutorily provided<sup>172</sup>—but this is undoubtedly not true of all cases, and so far the Supreme Court has not recognized a right to counsel in most civil cases.<sup>173</sup> Although a civil right to counsel would be desirable from an access to justice standpoint, it presents a very heavy burden on the states; however, increasing the ability of nonlawyers to fill the justice gap could be achieved by modifying the current regulatory regime of the legal profession, which could be done without placing such a burden on the states.<sup>174</sup>

### C. *A Right of Meaningful Access to Nonlawyer Assistance?*

The extension of the meaningful access to the courts doctrine, beyond the scope of the current doctrine, would be necessary in order to constitutionally allow litigants to turn to nonlawyers in the types of cases where the inability to access legal services is the greatest.<sup>175</sup> The distinction the Court made in *Lewis*—between the state’s duty to refrain from impeding a litigant’s ability to access the courts, as opposed to affirmatively assisting the litigant<sup>176</sup>—combined with the teaching of *Turner*—that the state has to use procedure which assures fairness to indigent litigants<sup>177</sup>—provides the basis for an argument that UPL rules should be treated differently under the right of access to the courts doctrine than other barriers to the right of access, regardless of the

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<sup>171</sup> See, e.g., Rhode, *supra* note 38, at 1014 (“As experts have long noted, many nonlawyer specialists are equally or more qualified than lawyers to provide assistance on routine matters.”); see also Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 702–04 (1996).

<sup>172</sup> See, e.g., Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245, 245–47 (2006) (surveying the types of cases where counsel is often statutorily provided).

<sup>173</sup> See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

<sup>174</sup> See discussion *infra* Part III.

<sup>175</sup> For example, housing court is an area dominated by pro se litigants. ABA PRO SE LITIGANTS, *supra* note 77, at 4. However, the Supreme Court has not recognized a fundamental interest in housing. See, e.g., *Lindsey v. Normet*, 405 U.S. 56 (1972).

<sup>176</sup> See *supra* note 96 and accompanying text.

<sup>177</sup> See *supra* notes 114–21 and accompanying text.

nature of the interests at stake. The state's enforcement of UPL rules can be viewed as an action the state must refrain from taking so as not to impede the litigant's right of access, rather than an affirmative duty to help low-income litigants effectively present their cases. Thus, UPL rules can be distinguished from the fees in cases like *Griffin* and *Boddie*, which the Supreme Court has held that the states must waive.<sup>178</sup> In those cases the state is, in effect, forced to subsidize low-income litigants in order to ensure access to the courts;<sup>179</sup> however, allowing a litigant to seek less expensive legal assistance from a nonlawyer would not require the state to subsidize the litigation.<sup>180</sup>

UPL restrictions could be modified through a nonlawyer licensure scheme that would not impose as significant a financial burden on states and their taxpayers as having to waive various fees or provide counsel for every litigant; instead through a state's regulatory powers it can allow for the private marketplace to be more accommodating to those with limited means.<sup>181</sup> This is reminiscent of *Turner*, where the Court held that the state may be required to use systems which assure fairness to indigent litigants even when the state does not have to provide affirmative assistance to the litigant.<sup>182</sup> If alternative systems can be used which will increase access to the courts and do not otherwise financially burden the states, then the state's interests in having UPL rules should not be given as much weight when compared to litigants' interests in obtaining legal services, and the balancing test employed in *Boddie* should be applied regardless of whether a fundamental interest is at stake. This analysis fits within the concerns that extending the right of meaningful access imposes too heavy an affirmative burden on the states.<sup>183</sup>

Low-income litigants have a clear interest in having affordable legal assistance, regardless of whether the legal issues touch upon a constitutionally protected fundamental right. The evidence demonstrates that nonlawyers could effectively handle many more legal

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<sup>178</sup> See *supra* Part I.D.2.

<sup>179</sup> *Id.*

<sup>180</sup> See *infra* Part III.

<sup>181</sup> For a discussion of how states could regulate nonlawyers, and how allowing nonlawyers to provide legal assistance would drive down prices for legal services see *infra* Part III.

<sup>182</sup> See *supra* notes 114–21 and accompanying text.

<sup>183</sup> This concern is likely why the line of cases following *Boddie* has not been extended any farther. See, e.g., *Christopher v. Harbury*, 536 U.S. 403, 422 (Thomas, J., concurring in the judgment) (“I find no basis in the Constitution for a ‘right of access to courts’ that effectively imposes an affirmative duty on Government officials . . .”). On the other hand, Justice Stevens's dissent in *Lewis* articulated the view that the right of meaningful access to the courts does in fact provide an affirmative duty on the states. *Lewis v. Casey*, 518 U.S. 343, 405 (1996) (Stevens, J., dissenting) (“Indeed, our cases make it clear that the States must take certain affirmative steps to protect some of the essential aspects of liberty that might not otherwise survive in the controlled prison environment.”).

issues than are currently allowed under traditional UPL rules.<sup>184</sup> The states do not have weighty countervailing interests in totally excluding nonlawyers from facilitating access to the courts for the currently underserved population, and increasing access to nonlawyer assistance could be accomplished without substantially burdening the states.<sup>185</sup> However, other obstacles may protect UPL rules from constitutional attack.

First, it would be nearly impossible for a litigant to actually demonstrate that a state's UPL rules denied him access to the courts, even in situations where fundamental rights are implicated.<sup>186</sup> Unlike the fee at issue in a case like *Boddie*, a litigant who cannot afford a lawyer is not completely blocked from accessing the courts—proceeding pro se is always an option.<sup>187</sup> Even though numerous empirical studies demonstrate that a represented litigant fares better than a pro se litigant,<sup>188</sup> litigants who ended up representing themselves without success would have a difficult time establishing that it was a state's UPL rules that caused an unfavorable result, as opposed to an unviable underlying claim.

Furthermore, even if a violation of right of access to the courts could be demonstrated, this would not necessitate invalidation of UPL rules, as states could facilitate access through other means. As the Supreme Court has made clear in the prisoners' access cases, there is no particular remedy to a right of access denial. For example, the Court specifically rejected the argument that prisoners had a right to a law library in and of itself, and instead held that the state cannot unduly restrict a litigant from vindicating legal rights.<sup>189</sup> Additionally, in *Avery*, the Court did not find that the regulation prohibiting jailhouse lawyering was facially unconstitutional; in fact, it specifically noted that a state could permissibly enforce such a regulation if the state provided prisoners with attorneys, or even nonlawyer assistance through trained law student advocates.<sup>190</sup> However, since the State of Tennessee did not

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<sup>184</sup> See *supra* notes 38–39 and accompanying text.

<sup>185</sup> Rhode, *supra* note 38, at 1013–14 (“Virtually no experts believe that current prohibitions on such assistance make sense.”); see also *infra* Part III.

<sup>186</sup> A litigant may have a difficult time establishing that it was a state's UPL policy that resulted in an unfavorable result in litigating the underlying claim. See *Harbury*, 536 U.S. at 414–17 (discussing the pleading standard for denial of access to the courts claims).

<sup>187</sup> Self-representation is always an option. See *supra* Part I.C.1.

<sup>188</sup> See *supra* note 79.

<sup>189</sup> See *supra* Part I.D.

<sup>190</sup> *Johnson v. Avery*, 393 U.S. 483, 488–90 (1969). The Court did not hold that the state was required to provide lawyers or nonlawyers to assist inmates in filing habeas petitions, but stated that the fact that other states did provide such assistance “indicates that techniques are available to provide alternatives if the State elects to prohibit mutual assistance among inmates.” *Id.* at 489–90.

offer any other form of assistance, it could not constitutionally restrict prisoners from providing the assistance to each other; for illiterate or poorly educated prisoners, there were no other alternatives.<sup>191</sup> Thus, in the context of UPL rules, states could continue to experiment with other methods of facilitating access to courts, by providing counsel, or increasing programs that assist pro se litigants. However, these solutions are currently employed in most states and although extremely beneficial to the litigants they serve, they have not proven to be a viable means of serving all indigent litigants.<sup>192</sup>

Therefore it is doubtful that the current constitutional doctrine could be used to invalidate UPL rules. However, there is no question that actually balancing the state's interests in the UPL rules against the harms the rules inflict on low-income litigants demonstrates they should be modified. In order to avoid the uncertainties of litigation, to rectify possible constitutional deficiencies, and to further our Constitution's commitment to equal justice under the law, states should take serious steps on their own to modify their UPL rules to allow for greater access to justice for low-income litigants.

### III. LICENSING NONLAWYERS TO PROVIDE LEGAL SERVICES

Analyzing UPL rules through the context of the right of meaningful access to the courts reveals that the current UPL framework represents poor policy in an age when courts are overwhelmed with pro se litigants, and where the legal profession fails to meet the legal needs of most of the low-income population.<sup>193</sup> Therefore, states, particularly state judiciaries,<sup>194</sup> should consider ways that UPL rules could be modified in order to protect the state's interests,<sup>195</sup> while accommodating the greatest number of litigants who currently are underserved by the legal profession.<sup>196</sup> Allowing nonlawyers to provide legal assistance would help drive down costs for legal services, allowing more people to access affordable assistance.<sup>197</sup> Nonlawyers could be

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<sup>191</sup> *Id.* at 490 (“[U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners.”).

<sup>192</sup> See *supra* note 4 and accompanying text.

<sup>193</sup> See *supra* notes 1–5, 76–79 and accompanying text.

<sup>194</sup> State judiciaries have traditionally controlled the practice of law in their jurisdictions, as well as determined what constitutes the practice of law. See Rigertas, *supra* note 1, at 111–13.

<sup>195</sup> See *supra* Part II.A.

<sup>196</sup> See *supra* note 4 and accompanying text.

<sup>197</sup> Rhode, *supra* note 38, at 1016 (“Experience here and abroad suggests that increased competition between lawyers and nonlawyers is likely to result in lower prices, greater

trained and licensed less expensively than lawyers, and since they would not incur the large expenses associated with a current three-year law school, they would be able to provide services for which they are qualified less expensively than a lawyer.<sup>198</sup> The presence of nonlawyers in the marketplace will also create competition for lawyers in some instances and further drive down prices for routine legal transactions.<sup>199</sup> Finally, while increasing access to nonlawyers would allow more litigants to afford legal services in the first instance, trained nonlawyers could be more significantly utilized by legal services groups, allowing lawyers to focus on the most serious and complicated issues.<sup>200</sup>

A number of different scenarios can be imagined in which nonlawyers would be incorporated into our legal system. The most extreme option would be completely deregulating legal services, effectively repealing all UPL rules and all the rules for licensing lawyers along with it. Some commentators argue that this would undoubtedly drive down prices, while also creating more jobs in the legal services field.<sup>201</sup> Needless to say, such deregulation is as unlikely as it is unwise.<sup>202</sup> Complete deregulation would not adequately account for the

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efficiency, and more consumer satisfaction.”); Clifford Winston & Robert W. Crandall, *Time to Deregulate the Practice of Law*, WALL ST. J., Aug. 21, 2011, at A13 (arguing deregulation of legal services will lower costs for consumers).

<sup>198</sup> Rhode, *supra* note 38, at 1014–15 (“Three years in law school and passage of a bar exam are neither necessary nor sufficient to ensure competence in areas where need for routine services is greatest. Schools do not generally teach, and bar exams do not test, ability to complete routine forms for divorces, landlord-tenant disputes, bankruptcy, immigration, and welfare claims. For many of these needs, as one expert notes, retaining a lawyer is like hiring a surgeon to pierce an ear.”); Winston & Crandall, *supra* note 197.

<sup>199</sup> Winston & Crandall, *supra* note 197.

<sup>200</sup> See, e.g., Rhode, *supra* note 38, at 1016 (“[P]artnerships [between lawyers and lay practitioners] could increase access to cost-effective assistance . . .”).

<sup>201</sup> The increase in jobs would likely not be for J.D.s; instead, presumably, over time people may opt to not go through three years of law school to risk unemployment after graduation and instead would pursue paths that would allow them to provide legal services as a nonlawyer technician. See, e.g., Winston & Crandall, *supra* note 197 (“Entry deregulation would also expand individuals’ options for preparing for a career in legal services, including attending vocational and online schools and taking apprenticeships without acquiring formal legal education. Established law schools would face pressure to reduce tuition and shorten the time to obtain a degree, which would substantially reduce the debt incurred by those who choose to go to those schools.”).

<sup>202</sup> Bar associations would certainly fight, and rightfully so, any such efforts. See, e.g., Barton, *supra* note 18, at 489 (“Any lowering of entry barriers would be disastrous to existing lawyers who will have relied upon the current rate of pay for legal services to repay these sunk costs. If entry barriers shrank, and the price of legal services dropped, these lawyers would experience a devastating loss on their investment to become a lawyer. As such, arguments considering the ‘quality’ of the bar aside, lawyers will fight tooth and nail before a flood of lower-priced competitors enters every area of the legal market.”).

states' interests in the effective administration of justice,<sup>203</sup> and states would lack the ability to prevent truly incompetent people from providing legal services.<sup>204</sup>

A less extreme option would be to allow litigants to seek legal assistance from someone who the litigant knows not to be a professional attorney; thus repealing or relaxing UPL rules, but implementing no regulatory structure in its place. Under this arrangement, a nonlawyer would not be able to call himself an attorney, but could provide out-of-court advice and assistance.<sup>205</sup> The nonlawyer would not be able to represent a litigant in court. However, without any regulatory structure in place, there would be no way of ensuring that nonlawyers were competent, or that they were accessible to the types of litigants with the greatest needs.

The best option to fully utilize nonlawyers would be to stratify the current legal profession through the use of a licensing system for nonlawyers.<sup>206</sup> Licensing nonlawyers would both increase access to affordable legal services and ensure that practitioners are competent. The advantage of the licensure approach would be that nonlawyers would only be permitted to practice in certain types of situations, and therefore a state could direct nonlawyer resources to practice areas of the greatest need. Additionally, states could ensure that nonlawyers only handle the types of claims that do not require the skills of a lawyer.<sup>207</sup>

Similarly, in some circumstances a nonlawyer could be permitted to accompany pro se litigants to court to assist them in the proceedings. For example, in England, courts have recognized a right known as a "McKenzie Friend."<sup>208</sup> A McKenzie Friend does not serve as a lawyer in

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<sup>203</sup> See, e.g., *id.* at 456 ("Given the current caseloads before both the federal and state courts, full deregulation would likely cripple court processes. As such, any revision of current entry regulations should be tailored to the legitimate needs of the courts." (footnote omitted)).

<sup>204</sup> See, e.g., N.Y.C. Bar, *supra* note 30, at 208–09 (suggesting minimum educational requirements for practicing nonlawyers, and that criminal conviction should prevent nonlawyer practice).

<sup>205</sup> This is perhaps the type of arrangement Justice Douglas envisioned. *Johnson v. Avery*, 393 U.S. 483, 498 (Douglas, J., concurring) ("Laymen—in and out of prison—should be allowed to act as 'next friend' to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar.").

<sup>206</sup> Professor Rigertas compares the legal profession to the stratification in the medical profession, where consumers have the option to choose from providers of different qualifications to treat different ailments, and suggests that "[j]ust like a surgeon is not required for every medical problem, perhaps a licensed attorney with a three-year J.D. is not necessary for every legal problem." Rigertas, *supra* note 1, at 127.

<sup>207</sup> Recall Justice Douglas's admonition that many claims "require[] no special legal talent." *Johnson v. Avery*, 393 U.S. at 491 (Douglas, J., concurring); see *supra* note 134 and accompanying text.

<sup>208</sup> The term is derived from the English case of *McKenzie v. McKenzie*, [1970] 3 All E.R. 1034, where the court found reversible error when a trial judge restricted a pro se litigant in a divorce from having a person who was not admitted to the bar sit with him during the



the traditional capacity, but instead can assist a pro se litigant in preparing and presenting his case.<sup>209</sup> Although the *McKenzie* Friend model is more about moral support than having a trained in-court advocate,<sup>210</sup> if used in conjunction with nonlawyer licensing this model can provide pro se litigants with meaningful access, by allowing nonlawyers to play a role in the courtroom.<sup>211</sup>

Importantly, as previously indicated, licensing nonlawyers in this way would present no costs that are not already incurred in the regulation of lawyers. Nonlawyers could be incorporated into the regulatory structure already in place for lawyers, and states could recoup costs through fees charged to newly licensed nonlawyers, as most states currently do with fees charged to lawyers now. Furthermore, the educational requirements and other qualifications could be modeled after existing regulatory structures for paralegals and legal assistants, with particularized training in the fields in which nonlawyers would be permitted to practice.

The State of Washington recently reformed its UPL rules to provide a framework that will allow for the use of nonlawyer assistance in certain cases.<sup>212</sup> The Washington Supreme Court adopted a new rule that provides for the licensing of “Limited License Legal Technicians,” who will be able to provide legal assistance and advice to unrepresented litigants, but who will not be able to represent clients in court.<sup>213</sup> The rule, which was opposed by the state bar, went into effect in September 2012;<sup>214</sup> however, the rule only set the ball in motion and did not

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proceeding and assist with the litigation. For a recent analysis of the *McKenzie* Friend model, see generally COMM. ON PROF'L RESPONSIBILITY, N.Y.C. BAR ASS'N, NARROWING THE “JUSTICE GAP”: ROLES FOR NONLAWYER PRACTITIONERS 22–23 (2013), available at <http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf>.

<sup>209</sup> See Richard Moorhead, *Access or Aggravation? Litigants in Person, McKenzie Friends and Lay Representation*, 22 CIV. JUST. Q. 133, 135–36 (2003) (available on Westlaw UK) (“Such a friend provides support ranges [sic] from a role similar to a legal expert (prompting the litigant to make useful points in representations, and examination of witness and giving advice) to the role of sympathetic supporter (who may help by taking notes, or offering comfort and moral support). Even an expert *McKenzie* friend does not take on the role of a lawyer; they are not (in theory at least) permitted to address the court or conduct examination of witnesses.”).

<sup>210</sup> *Id.*

<sup>211</sup> For a discussion of a New York pilot program similar to the *McKenzie* Friend model, see *infra* notes 223–25 and accompanying text.

<sup>212</sup> See In the Matter of the Adoption of New APR 28—Limited Practice Rules for Limited License Legal Technicians, No. 25700-A-1005 (Wash. July 4, 2012), available at <http://www.courts.wa.gov/content/publicUpload/PressReleases/25700-A-1005.pdf>.

<sup>213</sup> *Id.*

<sup>214</sup> *Supreme Court Adopts Limited License Legal Technician Rule*, WASH. STATE BAR ASSOC., <http://www.wsba.org/News-and-Events/News/Supreme-Court-Adopts-Limited-License-Legal-Technician-Rule> (last visited Mar. 1, 2014) (“While the Board of Governors [of the Washington State Bar Association] consistently opposed the rule during its development, it’s now time for the legal profession to participate and lead in the decision-making process to shape the best program possible.”).

authorize any nonlawyers to practice law.<sup>215</sup> Instead, the rule created a board comprised of both lawyers and nonlawyers—including necessary voices from outside the legal profession—to implement rules for the Legal Technicians.<sup>216</sup> In 2013 the board recommended family law as the first practice area in which nonlawyers would be licensed to practice; nonlawyer applicants will be permitted to apply for licenses in the summer or fall of 2014.<sup>217</sup> It is likely that no nonlawyers will practice in Washington until sometime in 2015.<sup>218</sup>

New York has also taken important steps in allowing nonlawyers to help fill the justice gap, primarily due to the fact that the reform has been championed by Chief Judge Jonathan Lippman of the New York Court of Appeals. In 2012 a New York task force, building on a 2011 report, recommended to Chief Judge Lippman that a pilot program for nonlawyers be initiated in either housing, foreclosure, or consumer credit areas.<sup>219</sup> In 2013, Chief Judge Lippman appointed a committee to continue to examine “the role that appropriately trained and qualified non-lawyer advocates can play in bridging New York’s justice gap” and to eventually “devis[e] . . . pilot program[s].”<sup>220</sup> In 2014, Chief Judge Lippman announced that several pilot programs were being

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<sup>215</sup> In the Matter of the Adoption of New APR 28, No. 25700-A-1005, *supra* note 212. The Rule provides for the creation of a Limited License Technician Board who will authorize nonlawyers who have certain educational qualifications to provide assistance to litigants in civil matters, such as through assistance completing forms, reviewing pleadings, and informing litigants of court proceedings. *Id.*

<sup>216</sup> WASH. ADMISSION TO PRACTICE R. 28(C)(1) (“The Board shall consist of 13 members appointed by the Supreme Court of the State of Washington, nine of whom shall be active Washington lawyers, and four of whom shall be non-lawyer Washington residents. At least one member shall be a legal educator.”); *Limited License Legal Technicians*, WASH. STATE BAR ASSOC., <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians> (last visited Mar. 1, 2014).

<sup>217</sup> *Limited License Legal Technicians*, WASH. STATE BAR ASSOC., <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians> (last visited Mar. 1, 2014).

<sup>218</sup> *See id.* Although the official timetable states that licenses will be begin being issued “in late Fall 2014/early 2015,” given the long lead time for the process already, it seems that the more conservative estimate is more likely.

<sup>219</sup> NEW YORK TASK FORCE, *supra* note 4, at 36, 39 (“[T]he Task Force recommends the implementation of a pilot program to permit appropriately trained non-lawyer advocates to provide out-of-court assistance in a discrete substantive area. Given the extent to which non-lawyer advocates and entities—such as housing counselors in the foreclosure area and credit counselors in the consumer credit area—are already providing help to low-income New Yorkers, the Task Force recommends that the pilot program be in an area such as housing assistance, consumer credit or, possibly, foreclosure.”).

<sup>220</sup> Press Release, N.Y. Unified Court Sys., Chief Judge Names Members of Committee Charged With Examining How Non-Lawyer Advocates Can Help Narrow New York’s Justice Gap (May 28, 2013), *available at* [http://www.nycourts.gov/press/PDFs/PR13\\_07.pdf](http://www.nycourts.gov/press/PDFs/PR13_07.pdf); *see also* THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 31 (2013), *available at* [https://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceReport\\_2013.pdf](https://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceReport_2013.pdf).

implemented, experimenting with two possible models of providing nonlawyer assistance at courthouses.<sup>221</sup>

The first program, which went into effect in February 2014, involves trained and supervised nonlawyers providing pro bono assistance in housing and debt collection cases through both general information help desks and “one-on-one assistance” outside the courtroom.<sup>222</sup> The second program resembles the *McKenzie* Friend model described above: Nonlawyer “Navigators” will be allowed to accompany pro se litigants in housing court.<sup>223</sup> The Navigator’s role is to inform the litigants of what to expect in the courtroom and to provide support and assistance to the litigant throughout the proceeding.<sup>224</sup> Interestingly, although the Navigator is not permitted to address the court, the judge will be permitted to call upon the Navigator to answer factual questions.<sup>225</sup>

Both Washington and New York have taken interesting and important steps in this area. Washington appears to be moving toward a model where professional nonlawyers can obtain licenses to provide certain services—and charge for them. New York’s pilot programs plan to provide another option for litigants who may currently be turned away from the established non-profit legal aid providers. Both models are important in closing the justice gap, and in theory could be used in conjunction in one state—with nonlawyers having increased roles in both the for-profit and non-profit sectors. Given the long time these reform efforts have taken in Washington and New York, other states should also examine the role nonlawyers can play, without waiting for the early results from Washington and New York. Undoubtedly, however, these programs should be closely studied and serve as models for improving access to justice throughout the country.

#### CONCLUSION

UPL rules have a long history of primarily serving the interests of the legal bar and do little to advance the interests of litigants and the states themselves. Given the values underlying the constitutional right of meaningful access to the courts, state judiciaries should look to increase the use of nonlawyers in order to allow for greater access to legal

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<sup>221</sup> HON. JONATHAN LIPPMAN, *THE STATE OF THE JUDICIARY 2014: VISION AND ACTION IN OUR MODERN COURTS* 7–9 (2014), available at <https://www.nycourts.gov/ctapps/soj2014.pdf>; see also Lippman, *supra* note 12, at 17–19.

<sup>222</sup> LIPPMAN, *supra* note 221, at 8.

<sup>223</sup> *Id.*; see also *supra* notes 208–10 and accompanying text.

<sup>224</sup> LIPPMAN, *supra* note 221, at 8.

<sup>225</sup> *Id.* at 8.

services and to uphold our Constitution's vision of equal justice under the law.

Although advocates have long argued that nonlawyers should play a greater role in the provision of legal services, the tide finally appears to be turning. Greater access to nonlawyers could soon be a reality in some states. The developments in Washington and New York will hopefully lead to more states modifying their UPL rules and carving out a role to be played by nonlawyers. Particularly in this time of budget deficits, when Congress and our state legislatures must make tough decisions about how to allocate public funds, all options must be on the table for increasing access to legal services. As Judge Hand once so eloquently put it: "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."<sup>226</sup>

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<sup>226</sup> Judge Learned Hand made these remarks at Legal Aid Society's seventy-fifth anniversary celebration on February 16, 1951. *Thou Shalt Not Ration Justice*, LEGAL AID SOC'Y, <http://www.legal-aid.org/en/las/thoushaltnotationjustice.aspx> (last visited Mar. 1, 2014) (internal quotation marks omitted).