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Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges

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Abstract:

Most informed observers of the Canadian and American legal systems accept the existence of a significant crisis in access to justice. One possible solution is to permit paralegals, notaries or other licensed individuals with training more limited than that enjoyed by a licensed attorney to practice in certain areas of law. This paper supports these developments, arguing for a regulated and incremental introduction of new legal service providers into the legal services market. It considers the appropriate training and scope of practice for new legal service providers, and some of the associated opportunities and challenges.

Keywords:

Access to justice, legal ethics

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Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges

Alice Woolley* and Trevor Farrow**

I. Introduction

Most informed observers of the Canadian and American legal systems accept the existence of a significant crisis in access to justice. Evidence shows growing numbers of self-represented litigants, inadequate support for legal aid, far more reported legal issues than there is access to affordable legal assistance, and costly legal services and legal processes out of reach of most middle and low-income citizens.¹ Bridging this “justice gap” has become the focus of modern access to justice reform efforts.²

One possible solution is to reduce or eliminate the exclusive rights to practice law enjoyed by lawyers in the US States and Canadian Provinces.³ Under these proposals, which are gaining increased attention and support,⁴ paralegals, notaries or other licensed individuals with training more limited than that enjoyed by a licensed attorney, would be permitted to practice in certain areas of law, either alone or under a lawyer’s supervision. For example, in December 2014 a Task Force of the Law Society of British Columbia⁵ recommended that new categories of legal service providers should be created to practice in areas such as family law, employment law, debtor/creditor law, and as legal representatives at mediations

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¹ For recent discussions of the current access to justice crisis, see e.g. Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, November 2013) [*Reaching Equal Justice*], online: CBA <http://www.cba.org/CBA/equaljustice/secure_pdf/EqualJusticeFinalReport-eng.pdf>; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) [*Roadmap for Change*], online: CFCJ <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>.

² See e.g. *Roadmap for Change*, *ibid* at pt. 3; Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, An Updated Report of the Legal Services Corporation (Washington, DC: Legal Services Corporation, September 2009), online: LSC <http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf>; Legal Services Corporation, *2013 Annual Report* (Washington, DC: Legal Services Corporation, 20 July 2014), online: LSC <<http://www.lsc.gov/sites/lsc.gov/files/LSC/Publications/AnnualReport2013/LSC2013AnnualReportW.pdf>>.

³ For example, s. 106(1) of the Alberta *Legal Profession Act* limits “practise as a barrister or as a solicitor” to persons who are members of the Law Society of Alberta, and s. 109 makes contravention of that requirement an offence, punishable by a fine or, for repeat offenders, a period of imprisonment. *Legal Profession Act*, RSA 2000, c. L-8.

⁴ See e.g. Gillian Hadfield, “Lawyers, make room for nonlawyers” Special to CNN (25 November 2012), online: CNN <<http://www.cnn.com/2012/11/23/opinion/hadfield-legal-profession/>>.

⁵ In Canada lawyers are licensed through, and regulated by, provincial law societies.

and arbitrations.⁶ The Task Force acknowledged that the nature of the training received by these new legal service providers should inform the precise type of services they would be permitted to provide, but that such providers “should be permitted to provide legal information and advice, assist in drafting, filling out forms, coaching, interpreting substantive and procedural law and, with some limitations, be permitted to provide advocacy services.”⁷ In Ontario, where paralegals are regulated by the Law Society of Upper Canada, some of these steps have already been taken.⁸ In the American context, Washington State, for example, has created “limited license legal technicians” who can provide services in the area of family law for issues not requiring court appearances.⁹

This paper supports these developments, arguing that unless lawyers radically increase their accessibility, and in some cases fundamentally alter their model and scope of service delivery, regulators should permit new legal service providers to deliver meaningful legal assistance to clients. If done in the right way, introducing new providers into the legal services market, and removing the exclusive power of attorneys to provide legal services, could substantially improve access to justice. In our view, the right way involves an incremental and regulated approach, one that focuses on two core aspects: 1) ensuring the appropriate training for new providers, and 2) ensuring the appropriate definition for their scope of practice. It also, though, requires that we address the challenges created by what would be a significant change in our approach to the delivery of legal services. These include our collective willingness to embrace the role of new legal service providers as “lawgivers” – as persons who, albeit to a more discrete and defined extent – occupy the same social role that lawyers do as intermediaries between the citizen and the state.

More specifically, we argue that new providers should be trained in ways that are accessible – i.e., in terms of time and cost for completion – while providing them with the necessary knowledge, skills and professional attributes required for their permitted areas of practice. Legal service providers who have not had to complete an undergraduate degree followed by three years at an ABA accredited law school and a state bar examination, can reasonably be expected to charge significantly less for their services than do lawyers. At the same time, a less lengthy and intense training program ought to be sufficient to provide the necessary knowledge, skills and ethical reflection required for the delivery of legal services to the public in discreet areas.

⁶ Law Society of British Columbia, REPORT OF THE LEGAL SERVICES REGULATORY FRAMEWORK TASK FORCE, December 5, 2014.

⁷ Id at para. 96. Nova Scotia has also announced that it is considering moving toward a more open legal services market. Nova Scotia Barristers’ Society, President’s Report, Fall 2015: <http://nsbs.org/sites/default/files/cms/publications/society-record/nsbssrvol33no1fall2015.pdf#page=5>.

⁸ See *Law Society Act*, By-Law 4, May 1, 2007, as amended.

⁹ Robert Ambrogi, “Who says you need a law degree to practice law”, Washington Post, March 13, 2015: http://www.washingtonpost.com/opinions/closing-the-justice-gap/2015/03/13/a5f576c8-c754-11e4-aa1a-86135599fb0f_story.html?postshare=1061426401569331.

The scope of practice for new legal service providers ought to be focused primarily on areas of significant legal need in which legal services are not currently available, and for which new legal service providers can be given the skills and knowledge necessary to provide competent legal services. In addition, and importantly, the mandate of new legal service providers must not be unduly narrowed, or focused on that which is merely technical. They should be provided with a broad enough scope of practice to permit them to provide meaningful access to law for their clients. Governance by law – the rule of law – is not self-executing; it requires “lawgivers:”¹⁰ persons who both ensure that the law is available to the citizenry¹¹ and that the citizenry can access the procedural rights and protections that the system provides.¹² While access to justice ought not to be defined merely as “access to law,” even achieving access to law needs to mean more than technical access to legality – e.g., form completion. It needs to mean at least: access to the rule of law; to accurate information about what the law does or does not require; and to the processes, systems of argument and evolving principles that the rule of law necessarily incorporates. All lawgivers do not need to have the training and licensing that lawyers do now.¹³ They can have narrower roles within the legal system than those occupied by lawyers. But the constraint on their roles ought not to be such as to prevent those who retain them from having access to *law*, understood fully, not formalistically.

Permitting new legal service providers will create significant challenges. It will be difficult to get the training right, and to define the scope of practice appropriately. Having legal service providers occupy the same complex ethical space that lawyers do now is essential to ensuring meaningful access to justice, but it will create cultural challenges, both for ensuring that those providers have the capacity to make complex ethical choices properly, and that lawyers and society are willing to accept their doing so.¹⁴

Nonetheless, we believe that new legal service providers are an essential part of the access to justice solution. The key will be to ensure a considered approach, one which focuses on identifying the appropriate training and the appropriate scope

¹⁰ David Luban, *LEGAL ETHICS AND HUMAN DIGNITY* 102 (2007).

¹¹ We use the term “citizenry” not to connote the legal status of the “citizen” but rather more generically to refer to all persons governed by, and participating in, a system of laws.

¹² Jeremy Waldron *The Concept and the Rule of Law* 43 *GEORGIA L REV* 1 (2008-9).

¹³ And indeed, the process for training and licensing lawyers has evolved significantly over time, and varies from jurisdiction to jurisdiction.

¹⁴ The scope and bases for ethical choices, and the proper role for lawyers’ moral views in the legal profession, are much debated topics. For an early but still useful account, see e.g. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues* 5 *HUMAN RIGHTS* 1, 1 (1975-76). For a current collection and summary of these issues, see e.g. Alice Woolley *et al.*, eds., *Lawyers’ Ethics and Professional Regulation*, 2d ed. (Toronto: LexisNexis, 2012) at c. 1. In fact, the two of us often take different views on the right balance between lawyer, client and societal interests (which was a motivating factor in choosing to join forces on this project). See e.g. Alice Woolley, “In Defence of Zealous Advocacy” in Alice Woolley, *Understanding Lawyers’ Ethics in Canada* (Markham, ON: LexisNexis Canada, 2011) at 33; Trevor C.W. Farrow, “Sustainable Professionalism” (2008) 46:1 *Osgoode Hall LJ* 51.

of practice and, ultimately, one which helps to facilitate a social or cultural shift in our expectations about the role such providers can occupy within a system of laws.¹⁵

To develop this argument, Part II discusses the current access to justice crisis, and in particular, how the growing gap in legal services, which negatively impacts the overall wellbeing of individuals and society in general, provides a compelling reason for seriously exploring alternatives to traditional legal services. To provide a normative foundation for that exploration, Part III considers jurisprudential conceptions of the rule of law. It uses the concept of the rule of law to identify the role that legal service providers, whether lawyers or not, must play to contribute to access to justice. Part IV then sets out our perspective on how incorporating new providers into the legal services market could help respond to the access to justice crisis, including our preliminary perspective on what that incorporation ought to look like, including the challenges and complexities involved, and some preliminary thoughts on how those might be addressed.

II. Access to Justice

There is a widely accepted access to justice problem in the Canadian and American justice systems. According to the Chief Justice of Canada, “we do not have adequate access to justice in Canada.”¹⁶ Similarly, the United States Department of Justice identifies an access to justice “crisis” in the American civil and criminal justice system.¹⁷ In many ways, the same can be said of justice systems everywhere.¹⁸ Given some of our other discussions on the issue of access to justice,¹⁹ we will be relatively brief here. And although the legal and regulatory systems – and the challenges facing those systems – are clearly different in different countries (including Canada and United States), for the purpose of this discussion, we will treat the issue of access to justice, and many of the specific challenges, as being more or less of universal concern.

¹⁵ For a general discussion about necessary shifts in legal culture, see *Roadmap for Change*, *supra* note 1 at 6.

¹⁶ Rt. Hon. Beverley McLachlin, P.C., from “Forward” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at ix. For general commentary, see e.g. *Reaching Equal Justice*, *supra* note __; *Roadmap for Change*, *ibid*; Trevor C.W. Farrow, “A New Wave of Access to Justice Reform in Canada” in Adam Dodek and Alice Woolley, eds., *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver and Toronto, UBC Press, 2016) c. 8.

¹⁷ United States Department of Justice, “The Access to Justice Initiative” (March 2010), online: <<http://www.justice.gov/atj>>.

¹⁸ See e.g. The World Justice Project, *Rule of Law Index 2014* (Washington, DC: The World Justice Project, 2014), online: <http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf>. For a recent court-based account, see e.g. Judiciary of England and Wales, *The Lord Chief Justice’s Report 2015* (London: Judicial Office, 2016) at 1, online: https://www.judiciary.gov.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf.

¹⁹ See e.g. Alice Woolley, “Imperfect Duty: Lawyers’ Obligation to Foster Access to Justice” (2008) 45:5 *Alberta L Rev* 107; Trevor C.W. Farrow, “What is Access to Justice?” (2014) 51:3 *Osgoode Hall LJ* 957.

Justice issues challenge all of us. According to current research – from a recent Canadian national legal needs study²⁰ – approximately 50% of adult Canadians will experience a legal problem over any given three year period. Americans have similar legal experiences.²¹ Put simply, all of us will face some form of legal problem over the course of our lifetime.²² Having said that, legal problems more significantly and negatively impact those with fewer resources and members of equity seeking groups;²³ put differently, inaccessibility is not created equally.²⁴ Further, legal problems tend to cluster, meaning that one unresolved legal problem tends to lead to a second, third, and so on²⁵ – which further aggravates access to justice challenges for the more marginalized in society. We also know that more and more people deal with their legal problems on their own or with minimal assistance.²⁶ Although people do not access legal services for several reasons, cost is typically identified as a significant factor.²⁷ Those able to access legal assistance – typically in the form of a lawyer or other legal service provider – will have more success in dealing with their problems than those who cannot access legal assistance.²⁸ Leaving legal problems inadequately resolved, or unresolved altogether, has negative impacts on our individual and collective wellbeing.²⁹ In

²⁰ Ab Currie, Trevor C.W. Farrow, Les Jacobs and Nicole Aylwin, “Everyday Legal Problems and the Cost of Justice in Canada” (Toronto: Canadian Forum on Civil Justice, 2015), online: <<http://www.cfcj-fcj.org/cost-of-justice>> [“Everyday Legal Problems”].

²¹ Rebecca L. Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study* (8 August 2014), online: American Bar Foundation <http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf>.

²² *Reaching Equal Justice*, *supra* note __ at 32.

²³ See e.g. Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007) at 23-26; Pascoe Pleasence *et al.*, *Causes of Action: Civil Law and Social Justice* (Norwich: Legal Services Commission, 2004) at 14-31.

²⁴ “What is Access to Justice?”, *supra* note __ at 972.

²⁵ See e.g. Currie, *The Legal Problems of Everyday Life*, *supra* note __ at 49-51; Pascoe Pleasence *et al.*, “Multiple Justiciable Problems: Common Clusters and their Social and Demographic Indicators” (2004) 1 J. Emp. Legal Stud. 301; Pleasence *et al.*, *Causes of Action*, *supra* note __ at 37-44.

²⁶ See e.g. Trevor C.W. Farrow *et al.*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, A White Paper for the Association of Canadian Court Administrators (Toronto and Edmonton: 27 March 2012) at 14-16; Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (May 2013) at 33-35.

²⁷ See Ontario Civil Legal Needs Project, *Listening to Ontarians* (Toronto: Ontario Civil Legal Needs Project Steering Committee, May 2010) at 32, 39-40. See generally *Roadmap for Change*, *supra* note 1 at 4.

²⁸ Canadian Bar Association, Standing Committee on Access to Justice, “Toward National Standards for Publicly-Funded Legal Services” (Ottawa: Canadian Bar Association, April 2013) at 18, citing Russell Engler, “Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?” (2010) 9:1 Seattle J. for Soc. Just. 97 at 115, citing Rebecca Sandefur, “Elements of Expertise: Lawyers’ Impact on Civil Trial and Hearing Outcomes” (26 March 2008) at 24; Sean Rehaag, “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment” (2011) 49 Osgoode Hall L.J. 71 at 87. See further *Roadmap for Change*, *supra* note 1 at 4.

²⁹ See “Everyday Legal Problems and the Cost of Justice in Canada”, *supra* note __. See further *Roadmap for Change*, *supra* note __ at 2; *Accessing Justice in the Contemporary USA*, *supra* note __;

addition to increased stress, social and health-related problems for individuals, unresolved legal problems have significant knock-on costs for the state. For example, according to current Canadian Forum on Civil Justice research, legal problems, and in particular inadequately or unresolved legal problems, cost the state approximately \$248 million each year in additional social assistance, \$458 million in additional unemployment benefits, and over \$40 million in additional health care costs (and likely much more).³⁰

In addition to the question of whether ordinary citizens can access legal services, there is the further – and more foundational – question of what access to justice means. Are we talking about simply access to lawyers or legal service providers, or are we talking about more fundamental questions of substantive and distributive justice? Clearly both are important – in addition to caring about procedural fairness and access to basic legal services, people care equally if not more about the ability to access the basic elements of social life and human flourishing. For example, according to one respondent in a recent study, “We’re not even talking access to justice ... we’re talking access to food, to shelter, to security, to opportunities for ourselves and our kids and until we deal with that, the other stuff doesn’t make sense.”³¹

For the purpose of this discussion, there are several aspects of this access to justice discussion that should be of particular interest and concern. Specifically, we know that unresolved issues have significant economic and other health and social impacts on individuals and society. This is not simply a matter of convenience or taste; rather, what we are discussing involves the legal, economic, social, and medical wellbeing of individuals and of society. We also know that, although people who can access legal assistance are significantly better off than those who cannot, an increasing number of people are not getting the legal assistance they need – often because of cost. If lawyers could, under current regulatory and economic models, adequately bridge the growing gap between the legal services that people can access and the services that they need, the issues raised in this paper would largely be moot. The problem, of course, is that lawyers do not bridge that gap – at least not sufficiently to meet the growing justice needs of modern, pluralistic communities. This is certainly the case for low and middle income members of society.³² It is also particularly the case in certain areas of law, such as family law,³³ as well as in certain stages and aspects of the legal process, such as early intervention,

Currie, *The Legal Problems of Everyday Life*, *ibid.* at 73; Nigel J. Balmer *et al.*, *Knowledge, Capability and the Experience of Rights Problems* (London: Public Legal Education Network, March 2010) at 25-26, 42-43.

³⁰ See “Everyday Legal Problems and the Cost of Justice in Canada”, *supra* note __.

³¹ See “What is Access to Justice?”, *supra* note __ at 971.

³² See generally Trebilcock, Duggan & Sossin, eds., *Middle Income Access to Justice*, *supra* note __.

³³ See e.g. Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Group, Final Report, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013), online: CFCJ

<[\[fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf\]\(http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf\)>.](http://www.cfcj-</p></div><div data-bbox=)

alternative dispute resolution, triage and prevention.³⁴ Whether lawyers can or will fill this gap is an open question – one that has led to important discussions around innovation and reform within the Bar, although not at this point to radical change in how lawyers provide services to the public.³⁵ Nothing argued in this paper ought to dissuade legal regulators from getting out in front of this issue, becoming part of the solution as opposed to being left behind by an increasingly impatient and inadequately serviced public.³⁶ There clearly is a market for unmet legal needs. So far, the Bar has not been willing or able to provide those services. As such, pending radical change within the legal profession, the growing deficiency in the system's current legal capacity suggests that other kinds of legal service providers should be permitted to step in to fill the gap.

But what does that look like? How far ought that change to go, and what kinds of limits should be placed on the work done by new legal service providers? The next section address these questions in terms of what, normatively speaking, would be necessary for new legal service providers to address the access to justice problem in a meaningful way.

III. Rule of Law

As noted in the previous section, providing meaningful access to justice cannot mean only access to law; it has to include access to the basic elements of social life and human flourishing. While law may be an effective hammer, not every problem implicating justice is a nail. Access to the law is, however, a crucial part – a necessary, if not sufficient part – of access to justice. As outlined above, without access to legal services, we know that people will be less successful in dealing with their legal issues, and as a result, will be less well off – individually and collectively. Many justice problems can only be meaningfully solved by access to law. To the extent that is the case, however, the access to law that people receive must be real and meaningful; a person granted access to a phantasm of law rather than law itself does not receive access to justice, and may in fact suffer injustice.

³⁴ See e.g. Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, Final Report, *Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 12 February 2013), online: CFCJ <<http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Prevention%2C%20Triage%20and%20Referral%20WG%20.pdf>> [*Responding Early, Responding Well*].

³⁵ See generally Action Committee on Access to Justice in Civil and Family Matters, Access to Legal Services Working Group, Final Report (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, May 2012), online: CFCJ <<http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Access%20to%20Legal%20Service%20Working%20Group.pdf>>.

³⁶ For current regulatory discussions (regarding alternative business structures), see e.g. Law Society of Upper Canada, Professional Regulation Committee, Report to Convocation (29 January 2015), online: LSUC <http://lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-january-2015-professional-regulation.pdf>.

But how do we know the difference between law and its phantasm? One answer could be that the rules applied are “right” – the rules that the legislature enacted or the courts articulated. But that answer presupposes a certainty and singularity to law that it generally (although not always) lacks.³⁷ A better answer can be found in thinking conceptually about what law is, about what it means for a society to be governed by law and for a person to have access to those laws.³⁸

Of course scholars contest this conceptual question. Asking, “what is law?” leads to argument as much as to answers. Yet focusing on specific areas explored by legal theory, rather than on broader and more general ethical issues, provides important insights into what it means for a society to be governed by the rule of law and, in turn, for a person to truly have access to law. Further, with respect to specific requirements for the rule of law – that, for example, laws ought to be clear and possible for people to comply with, etc. – there is far more agreement than on the larger question of whether compliance with those requirements makes a legal system moral,³⁹ or whether a system of laws which does not comply with them should be considered to be law at all. For the purpose of this collaborative paper, we take a fairly moderate, and jurisprudentially mixed, approach to this discussion, recognizing that a variety of jurisprudential approaches to these questions are possible (and, in fact, important for fully appreciating the complexity of what access to legality requires).

As a generally accepted starting point, the requirements of the rule of law can be understood as having formal and procedural aspects,⁴⁰ both of which flow from the moral relationship that law reflects and embodies. Rule by law is a mode of governance in which those governing respect the dignity and autonomy of the governed, the governed recognize the law’s legitimacy and authority through attitudes of respect and/or acts of compliance,⁴¹ and through law people create a form of moral association in which each person has “domains of conduct that are

³⁷ See further Trevor C.W. Farrow, “The Good, the Right, and the Lawyer” (2012) 15:1 *Legal Ethics* 163 at 169-170.

³⁸ For now, we do not need or purport to take up the further – and perhaps more challenging – discussion about what counts as justice (although we certainly recognize the important connections between law and justice).

³⁹ Jeremy Waldron interestingly argues that positivists make a mistake when they focus too heavily on the separation of law and morals, “particularly when the separability thesis is stated in a very dogmatic and broad-brush form”. Jeremy Waldron *Positivism and Legality: Hart’s Equivocal Response to Fuller* 83 *NYU L REV* 1135 at 1168 (2008). Of course theories located in deliberative democracy, communitarianism or natural law each has their own take on this discussion. See e.g. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge, MA: MIT Press, 1996); Michael J. Sandel, *Democracy’s Discontents: America in Search of a Public Philosophy* (Cambridge, MA: Belknap, 1996); John Finnis, *Natural Law and Natural Rights* (Oxford, UK: Clarendon, 1980).

⁴⁰ Jeremy Waldron *The Rule of Law and the Importance of Procedure* in *GETTING TO THE RULE OF LAW*, James E. Fleming ed., (NYU Press, 2011).

⁴¹ While the necessary attitude of the governed towards the law – whether they need to comply through respect or merely prudence – can be debated, Waldron persuasively argues that rule by law assumes voluntary compliance rather than enforced compliance.

genuinely free from the most common and effective forms of coercive interference.”⁴² Actual legal systems will achieve these moral relationships to a greater or lesser extent – as will they embody the requirements of the rule of law to a greater or lesser extent – but the moral ambition of mutual respect between the governed and governing, and amongst the governed, is a feature of selecting rule by law rather than rule by fiat or force. Further, the extent to which a legal system’s structures and processes foster or undermine those moral relationships is a legitimate criterion against which that system may be evaluated.

The formal requirements of rule by law reflect the mutuality of the relationship between the governed and the governing by ensuring that the governing create rules that are understandable and capable of being complied with, and the governed then understanding and complying with those rules.⁴³ The formal requirements of the rule of law are what Fuller calls law’s desiderata or what Nigel Simmonds calls its archetype: the qualities that all legal systems must aspire to if they are to achieve “a system of rules for governing human conduct” – i.e., law.⁴⁴ The formal requirements necessary to ensure that law is understandable include that it be “*knowable* in advance of the performance of the acts” that a particular law is to govern⁴⁵ and that it be clear: “obscure and incoherent legislation can make legality unattainable by anyone”.⁴⁶ The formal requirements necessary to ensure that law is capable of being complied with include that requirement directly (that

⁴² Nigel Simmonds *LAW AS A MORAL IDEA* (Oxford, 2007) 104. See also Lon Fuller *THE MORALITY OF LAW*, Revised ed. in which he conceives of law-making as being a bilateral relationship between the governed and governing (throughout, but explained most clearly at pp. 200-224, where he rejects the idea that law can be understood as a “one-way projection of authority” rather than as interactional) (Yale University Press, 1969). David Luban provides an excellent explanation of this aspect of Fuller’s theory, *Legal Ethics and Human Dignity*, note 10, *supra* at 99-130.

⁴³ Luban *Legal Ethics and Human Dignity* note 10, *supra* at 116 discussing Fuller: “The burden of understanding and complying with rules falls on those whom the rules govern; the reciprocal relationship between governors and the governed places a corresponding burden on the governor to make the rules understood and capable of being complied with.” Luban also helpfully divides Fuller’s desiderata into requirements going to clarity, requirements going to ability to comply and those which go to both.

⁴⁴ Fuller note 42, *supra* at 97. Waldron describes these requirements as formal rather than procedural because “They are formal and structural in their character: they emphasize the forms of governance and the formal qualities (like generality, clarity and prospectivity) that are supposed to characterize the norms on which state action is based”. Waldron, *The Concept and the Rule of Law*, note 12, *supra* at 7.

⁴⁵ Fuller expresses this requirement as that law be published, but as Simmonds fairly points out, the requirement that law be promulgated or published “sits only somewhat uncomfortably with the most obvious features of the common law: such as the fact that a rule may be articulated for the first time in the very case to which it is applied” Simmonds, note 42, *supra* at 160. For his part, Waldron uses the language of publicity, saying that “The norms should be public knowledge in the sense of being *available* to anyone who is sufficiently interested, and available in particular to those who make a profession of being public norm-detectors – lawyers as we call them – and who make that expertise available to anyone who is willing to pay for it” *The Concept and the Rule of Law* note 12, *supra* at 26

⁴⁶ Fuller note 42, *supra* at 63

law “should not command the impossible”⁴⁷) and that it be constant over time, without “too frequent and sudden changes.”⁴⁸ Requirements that aim at both making law understandable and making it possible to comply with include that the law be non-contradictory,⁴⁹ that law be prospective,⁵⁰ and that there be congruence between rules and official action.⁵¹

The formal requirements of law, which permit it to be understood and complied with, further allow the law to be largely self-applying, relying on the citizenry’s “capacities for practical understanding, for self-control, for the self-monitoring and modulation of their own behavior, in relation to norms that they can grasp and understand”. The law should not operate by “manipulating, terrorizing or galvanizing behavior” but rather by relying on and respecting the “dignity of voluntary action and rational self-control.”⁵²

The procedural requirements of the rule of law speak not to the formal structure of governance by rules, but rather to law in practice, to the need for “impartial administration” and fair procedure when law is applied. Those requirements can operate in tension with the formal requirements – since “procedures we cherish often have the effect of undermining the predictability that is emphasized in the formal side of the ideal”⁵³ – but are nonetheless central to accomplishing rule by law rather than through force or abuse of power.⁵⁴

The most obvious procedural requirement of the rule of law is that it have some system of dispute resolution – “institutions which apply norms and directives established in the name of the whole society to individual cases and which settle disputes about the application of those norms.”⁵⁵ That system of dispute resolution must also comply with procedural norms, with hearings before an impartial adjudicator where the participants enjoy due process. The system solves a practical

⁴⁷ Id at 77

⁴⁸ Id at 80

⁴⁹ Id at 65-70

⁵⁰ Fuller at 51-62. Fuller discusses the complexities and nuances around retrospective law-making in practice – the contexts in which it may be unavoidable or less problematic, while noting that “while perfection is an elusive goal, it is not hard to recognize blatant indecencies” (62).

⁵¹ Id at 81-90. Simmonds would also add a requirement that law be enforced. This is fair insofar as a legal system which enforced no rules would have the same sorts of failures caused by Fuller’s befuddled monarch Rex. On the other hand, a legal system can have a certain number of rules that it does not enforce in any real or meaningful way without those rules being less law-like (which would not be true, say, of a law where the law was incongruent with official action). Seat belt laws may not, for example, be enforced very often, but they are a remarkably effective instrument of social change. In general, as discussed with respect to the procedural requirements of the rule of law, law relies far more centrally on voluntary compliance than it does on enforcement. We have not included Fuller’s requirement that law be general, because that requirement means only that a legal system have rules, which does not seem to add much (at least not to this discussion). We also do not take up the issue of customary law in this discussion.

⁵² Waldron *The Concept and the Rule of Law* note 12 at 28.

⁵³ Waldron *The Concept and the Rule of Law*, note 12, *supra* at 9.

⁵⁴ Id at 11.

⁵⁵ Id at 20.

problem – taking abstract norms and applying them to specific circumstances. It also represents law’s moral structure of respect for those to whom it applies – “Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with.”⁵⁶

While the formal requirements of legality emphasize the need for constancy over time, the procedural requirements equally emphasize law’s positivity, the ability of people to make law, to control law and, where necessary, to change law. Theoretically a legal system could exist without a democratically legitimate legislative body, but in “the real world... public activity of legislatures” is one of law’s definitive features.⁵⁷ While constancy over time permits law to be voluntarily complied with (and reliance on voluntary compliance reflects law’s moral structure), the simultaneous capacity to change it reflects law’s freedom, *our* collective freedom “to have whatever laws we like.”⁵⁸

Finally, the application of law in practice and through the courts manifests law’s systematicity, the requirement that the principles and precepts of law exist as a system that imposes a structure that constrains argument and interpretation while also permitting evolution over time.⁵⁹ Law’s systematicity – as a general matter – allows judges to “discover” law: provided a specific norm can be identified or justified within the system as a whole, that norm can be said to be part of the system.⁶⁰ It also allows people to interact with the law, to do more than take precepts and apply them to a set of circumstances – “the submissions that may be made on behalf of each party are not limited to a view of the facts and the citation of some determinate rule.”⁶¹ Instead, parties make claims and arguments about the principles and precepts that ought to apply to their situation given law’s existence as a system and form of argument. This iterative aspect of legality means, in turn, that the law does not exist as a set of rules superimposed on the citizenry. Rather, it “pays respect to the persons who live under it, conceiving them now as bearers of

⁵⁶ Id at 23-24.

⁵⁷ Id at 30. See further Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, UK, and New York: Oxford University Press, 1986) at 105.

⁵⁸ Waldron, *supra* note 12 at 31. For a general discussion of the role of courts and public dispute resolution in the context of the rule of law and democracy, see Trevor C.W. Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) c. 2.

⁵⁹ It is not entirely clear whether systematicity is properly characterized as a procedural or formal aspect of legality. We have included it as a procedural aspect because of its intimate relationship to the operation of law and to the system of dispute resolution.

⁶⁰ We recognize that theories about the judicial role, function and operation are varied and contested. See e.g. Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge, MA: Harvard University Press, 1997); Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986). See earlier Oliver Wendell Holmes, Jr., “The Path of the Law” (1897) in Oliver Wendell Holmes, *Collected Legal Papers* (New York: Harcourt, Brace & Howe, 1920; reprinted, New York: Peter Smith, 1952) 167. However, for our purposes here, we do need to come to ground on those debates.

⁶¹ Waldron *The Concept and the Rule of Law*, *supra* note 12 at 36.

individual reason and intelligence”⁶² who can be expected to think about and engage with the legal system that applies to them.⁶³

So this, then, is a widely shared and general view of law: a moral relationship between the state and the citizen, and amongst the citizenry, ensured through accomplishment of the formal and procedural requirements of the rule of law. With this general view in hand, we can now restate the question posed at the outset of this section: if access to justice includes access to law, and if the rule of law must at a minimum satisfy these formal and procedural requirements (at least to some degree), then what is necessary to ensure that people actually have access to law?

The formal requirements of law push law to be understandable, available and capable of being complied with. A legal system can structure its accomplishment of those formal requirements so as to reduce the need for people to have lawyers who make the law understandable and who know what to do to comply with it. It can use plain language drafting in legislation and judgments so as to accomplish clarity.⁶⁴ It can be especially careful to achieve stability (consistency) in legal rules where those rules are frequently accessed by people. It can ensure that information about what laws mean in practice is easily accessible, especially in the internet era.⁶⁵ The procedural requirements of law require systems of dispute resolution, and create law’s systematicity. In satisfying those requirements a legal system may use systems of dispute resolution that do not require parties to have access to lawyers, particularly through reducing reliance on traditional adversarial procedures.⁶⁶

Such mechanisms ought not to be discounted, and are important for reducing problems of access. In fact, much of the work of triage and early intervention, public legal education, and procedural simplification focuses on these elements of access to justice reform.⁶⁷ At the same time, however, in a pluralistic, modern polity, in which the law governs complex human and commercial interactions and enterprises, such efforts can only be partial and incomplete. To understand the law, to comply with it, to access its mechanisms for resolving disputes and to engage with and make arguments about what it actually means and how it ought to develop, one requires skills and knowledge beyond those possessed even by a well-educated and sophisticated member of the public. Engaging in the active deliberative process of legal analysis, law development, and law reform requires elements of judgment, ethical discretion, and professional reflection that go beyond a mechanical application of rules and norms.

⁶² Id.

⁶³ Id at 36.

⁶⁴ See e.g. *R. v. Armitage* 2015 ONCJ 64.

⁶⁵ See e.g. the Canadian Legal Information Institute, online: <https://www.canlii.org/en/>.

⁶⁶ See, e.g., Alberta’s Residential Tenancy Dispute Resolution Service, here: <http://www.servicealberta.ca/rtdrs/>. See further British Columbia’s Civil Resolution Tribunal, online: <https://www.civilresolutionbc.ca/>; and internationally, Rechtwijzer 2.0, online: <http://rechtwijzer.nl/> (for a brief description, see Hiil, “Rechtwijzer 2.0: Technology that puts justice in your hands”, online: <http://www.hiil.org/project/rechtwijzer>).

⁶⁷ See *Responding Early, Responding Well*, *supra* note 34, *supra*.

Satisfaction of the formal and procedural requirements of the rule of law requires the availability of “lawyers” – not necessarily people with law degrees from ABA approved law schools who have passed a state bar examination – but people who have the role of mediating between the citizen and the system of laws, and who allow the formal and procedural requirements of the rule of law to be more than mere abstractions. Specifically, the lawyer ensures that people do understand the law, that what is clear, consistent, congruent and stable to an expert is all of those things to a person who is not. The lawyer allows the law to be known to a person without institutional knowledge and expertise, and gives that person the information – and sometimes the representation – they need to have in order to comply with the law’s requirements. As Luban has argued, in articulating the formal requirements of the rule of law, Fuller imagined the lawyer as crucial, as the “architect of social structure” who advises clients about the law and facilitates interactions between a client and others.⁶⁸

The “lawyer” is still generally important for the proper functioning of the law’s system of dispute resolution (at least as it is currently configured), particularly in cases of any degree of complexity. The current rise of self-represented litigants in the court system does show that judicial systems can carry on without lawyers, but it also shows that it does so at considerable cost to the efficiency and fairness of that system.⁶⁹ In the theoretical terms set out here, lawyers ensure that those participating in the system are not treated like a “rabid animal” or “dilapidated house”; that their points of view are presented; and that their personalities are respected.⁷⁰

The most crucial role for a “lawyer” with respect to the procedural requirements of the rule of law may, however, be with respect to the law’s systematicity, the extent to which legal norms fit together and expand within “an organized body of law which is fathomable by human intelligence.”⁷¹ Law cannot be understood without considering its systematic complexity, and law cannot be accessed without having the ability to interact and engage with that systematic complexity, arguing about what its norms are and what its norms mean. If law necessarily governs our interactions through a complex system that respects us as “thinkers who can grasp and grapple with the rationale of that governance and relate it in complex but intelligible ways to [our] own view of the relation between [our] actions and purposes and the actions and purposes of the state,”⁷² then law must also provide us with the people who give us the ability to do those things when we alone cannot. The law must not rely on us as having an intellectual capacity and skill that we do not possess and cannot reasonably attain, but it can rely on some having the necessary intellectual capacity and skill that they then provide to those of us who lack it.

⁶⁸ Luban *LEGAL ETHICS AND HUMAN DIGNITY* note 10, *supra* at 104.

⁶⁹ See *supra* note __.

⁷⁰ Waldron *The Concept and the Rule of Law* note __ *supra* at [24].

⁷¹ Waldron *The Concept and the Rule of Law* note 12, *supra* at 3.

⁷² *Id.* at 36.

A further role for “lawyers” with respect to the rule of law is the most general one, arising from the role of law as a form of moral association in which each person has “domains of conduct that are genuinely free from the most common and effective forms of coercive interference.”⁷³ Ensuring that each of us has freedom from coercive interference other than through the mechanism of legality requires that we have access to some person or system that protects that freedom. The formal and procedural requirements of the rule of law are the systems that do so; the lawyer is the person, the one that can act protectively to ensure that the constraints placed upon our actions are only those that the law itself imposes. Although expressed somewhat differently, this idea of the function of legality informed Charles Fried’s early defence of the standard concept of the lawyer’s role – the lawyer’s partisan advocacy for clients. For Fried, the purpose of the lawyer was, in significant part, to ensure “the due liberty of each citizen before the law”.⁷⁴ Whether or not Fried’s strong concept of the lawyer as zealous advocate follows from the moral association of a system of law is debatable, and we are not necessarily convinced that the most notable feature of legality is its creation of “domains of conduct that are genuinely free from the most common and effective forms of coercive interference.” The ability of law to facilitate communities and cooperative endeavors seems to us to be of equal moral significance. At the same time, however, the legal system has this role to at least some extent, and lawyers facilitate its fulfillment of it; without access to “lawyers” that function of legality is impaired. When a system of law depends on this need for, and presumption of, available counsel, and then fails to deliver those services, it is difficult to describe that false promise as anything other than inaccessible.

One way to interpret the arguments made here is that the rule of law requires access to lawyers, traditionally understood. But another way to understand it is, rather, that the rule of law, and the complexity of the interface of law in and with complex modern communities, requires the assistance of meaningful and appropriate legal services. These services could be provided by anyone competent to do so, taking into account the nature of that person’s qualifications and experience, the nature of the legal problem at issue, and the nature of the legal services required. More importantly, once that competence is established, the nature of the services that the person provides ought to be the services necessary to allow for the realization of the rule of law. Which means that the legal service provider will – as appropriate given the legal problem at issue – advise the client as to what the law means and requires; provide the client with guidance as to what needs to be done to comply with the law; advocate for the client in resolving disputes; enable the client to make reasoned arguments about what the law ought to require in particular circumstances; and, finally, ensure that the law appropriately and properly respects the dignity, reason and autonomy of the legal

⁷³ Nigel Simmonds *LAW AS A MORAL IDEA* (Oxford, 2007) 104.

⁷⁴ Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship* 85 *YALE LJ* 1060 at 1075 (1975-1976).

service provider's client; all within the overall boundaries of what is required by a system that operates in the public interest.

IV. New Legal Service Providers and the Accomplishment of the Rule of Law

The prior two sections set out the problem of access to justice, the basics of what the rule of law requires, and the role that legal service providers must play to realize the rule of law. This section brings that analysis together to consider how new providers might, as a practical matter, be incorporated into the legal services market so as to better accomplish access to justice understood in light of the requirements of the rule of law. It also sets out some of the challenges and complexities that may arise from that approach.

A. Incorporating new providers into the legal services market

1. Why: The case for new legal service providers

As a threshold matter, to facilitate any kind of meaningful (perhaps radical) reform in the way justice services are provided requires a culture shift at all levels. According to the Action Committee,

Many dedicated people in our civil and family justice system do their best to make the system work and many reform efforts have been put forward in past years. However, it is now clear that the previous approach to access to justice problems and solutions, far from succeeding, has produced our present, unsustainable situation.

We need a fresh approach and a new way of thinking. In short, we need a significant shift in culture to achieve meaningful improvement to access to justice ... a new culture of reform.⁷⁵

In the case of new legal service providers, this requires that we not let the history, culture and the social position of lawyers determine the scope of practice of those providers. The approach must instead be to determine how such service providers can be licensed and deployed so as to best address the justice needs of the public that are as yet unmet.

A first step will be to view legal problems, and the services that are required to address those legal problems, from the perspective of those who need those services.⁷⁶ We must understand, for example, what a parent seeking services for his or her disabled child's concerns really are, and how those concerns can be resolved through navigation of the legal system and more generally, rather than seeking to shoehorn that parent's situation into existing paradigms for identifying and solving legal problems. This will further require identifying the full scope of services necessary to resolve that parent's concerns. Once we perceive properly what a

⁷⁵ *Roadmap for Change*, *supra* note 1 at 6.

⁷⁶ *Ibid.* at 7. See further "What is Access to Justice?", *supra* note 19 at 959-962.

person's legal needs are, accomplishing access to justice will require us to provide that person with the actual services sufficient to address and pursue those needs, rather than some fragmented portion of them. As was set out in the previous section, access to the system of laws may require complex analysis, advising and advocacy, and where it does so a person must be given those services for access to be accomplished.⁷⁷

Once the possibility of real reform is on the table, we need to realize that a range of justice needs – in a complex society – necessarily requires a range of available and accessible legal services and solutions. Not all problems in a rule of law based society require an experienced and highly skilled attorney. Having said that, the Home Depot approach to resolving legal problems on our own – doing our legal work by ourselves – can only take us so far. As the research indicates, accessing legal assistance, particularly for cases of any complexity, typically increases a client's chances of success.⁷⁸ In matters where, for example, the resolution of a legal problem requires contesting the meaning of legal norms, a person who does not regularly deal with the legal system is unlikely to be able to develop the skill necessary to pursue her own interests successfully. Further – and importantly – the self-represented litigant may not recognize the difference between arguments that legitimately contest the nature of the legal system and those which, in the context of a court room, are nonsensical.⁷⁹ The limits of a self-represented litigant's understanding of the language and culture of law may make even a legitimate perspective of that self-represented litigant hard for the legal system to discern.⁸⁰ There is a difference between replacing a light bulb and re-wiring a house.

Ultimately there is a balance to be struck between do-it-yourself or low cost legal assistance (through widely accessible legal information and services) and legal marginalization and victimization (through inaccessible legal assistance). One side amounts to legal empowerment, the other legal disenfranchisement. A person may successfully navigate the legal system with the assistance of someone with experience and wisdom but without the training enjoyed by a licensed member of the state bar, but that person will be effectively denied access to the legal system if the person advising her either lacks the necessary capacities or, through unduly restrictive licensing requirements, cannot provide the full extent of services that she needs. Success arises where the legal services available are reasonably sufficient for the legal needs for which they are provided. New legal service providers offer hope but also caution; the trick will be to identify credentials and a role for those

⁷⁷ See further "A New Wave of Access to Justice Reform in Canada", *supra* note 16 at 166-167.

⁷⁸ See *supra* note __ and accompanying text.

⁷⁹ See, e.g., *Meads v. Meads* 2012 ABQB 571. See generally *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, *supra* note 25.

⁸⁰ See, e.g., *R. v. Duncan* Ontario Court of Justice, March 2013 (<http://www.slaw.ca/wp-content/uploads/2013/04/DuncanMatthewAssaultPoliceARA2013MarchJudgment.pdf>). The judgment is discussed in Alice Woolley "Human Excellence in Judging", SLAW April 22, 2013 (<http://www.slaw.ca/2013/04/22/the-human-excellence-of-judging/>).

providers in which the services they provide match the true legal needs of the persons to whom they provide them.

In this search for a middle ground, analogies to other sectors of society may be more or less helpful. For example, comparing legal services to low cost travel, although seemingly attractive, is ultimately not that useful. There are of course more and less expensive airlines, which will provide different levels of service and comfort. But on a basic reading, at least for most routes, the result will be the safe carriage of passengers from points A to B; to that extent all airlines provide (or at least seek to provide) identical service. A better comparison is to other service providers such as accountants, financial advisors and doctors. In the case of medicine, for example, there are some procedures – taking Tylenol, applying topical ointment or a bandage, and taking one’s temperature – for which limited or no medical assistance is necessary. To the extent that some judgment or analysis is involved in *whether* such procedures should be followed, some assistance will be necessary (including perhaps from a nurse, a pharmacist, a physiotherapist etc.). And then of course, up the chain, diagnosing the underlying causes of pain or temperature, addressing and repairing injuries, and further, engaging in major surgery, will require a different, and typically more sophisticated level of training, knowledge, and professional judgment and expertise. None of this is at all surprising when it comes to healthcare. Why, then, is such a range of services and service providers not readily available when it comes to law? Clearly – taking a public first approach, particularly in light of the unsustainable status quo – a similar spectrum of legal services and service providers would make sense.

It may be more complicated to accomplish an appropriate matching between service providers and public needs in the legal context than in medicine. In medicine the health needs of one patient do not conflict with the health needs of another patient, except in a general distributive sense given scarce resources (e.g., where in a public health care system we allocate more resources to oncology than to joint replacement). But in law the legal claims made by one person may be in direct conflict with the legal claims made by another person. The effect of this conflict is that the legal needs of each depends on the legal services available to the other; if my opponent has a high end legal counsel, then my access to the legal system will be impaired to the extent that I do not have similarly qualified counsel. On the other hand, if we define legal needs in this relativistic way, we risk pursuing the perfect at the expense of the good. Further, it does not eliminate the essential insight that the medical analogy provides: not all legal needs are the same, and not all needs require service providers with identical training.

Nothing in this discussion takes away from the importance of lawyers to the functioning of the legal system. If anything, it highlights the need for sophisticated legal training and expertise for specific, complex and highly contested legal issues. This is particularly the case in a highly regulated world, in which open-textured laws and complex legal relationships often require creative analysis and judgment on matters of legal process, substance and principle. Further, nothing stops lawyers

from diversifying, through innovation, in order to provide further – perhaps lower cost or discount – versions of their services.⁸¹ And of course, some of that innovation – e.g. unbundling, off-shoring, legal insurance, etc. – is already happening.⁸²

Again, however, unless lawyers can demonstrate a meaningful likelihood of bridging the current and growing justice gap, and there is no evidence of that happening anytime soon (particularly on current regulatory and practice models), then the argument for prohibiting alternative service providers from entering the market for legal services appears tenuous at best. Put differently, the argument in favor of opening up that market has become overwhelmingly compelling, particularly for legal needs where lawyers are not accessible and other legal service providers could effectively and appropriately meet those needs. If nothing else, there is no obvious correlation between the particular training attorneys receive and their ability to offer the services their clients require to effectively access the system of laws in call cases. Over time and across jurisdictions lawyers have been trained through a range of academic and apprenticeship experiences, and have had a range of pre-existing qualifications prior to entering into their professional training. Lawyers have been admitted to professional training through the privilege of their birth, by undergraduate achievement or because of other relevant experience. While we can surmise that privilege does not reliably indicate the quality of services later provided, we have no real basis for assuming that our current system is the only way to identify those most suitable to provide the range of legal services that the public requires, and to train them to provide those services.

Having said all that, introducing this innovation requires a thoughtful approach to identifying the proper scope of practice for new legal service providers, and the training they need to receive. For example, to determine the scope of practice for new legal service providers involves identifying which legal needs require the type of bespoke legal services traditionally offered by lawyers. The market will have a perspective on that issue (i.e., through people who need such services choosing to pay for them), but it does not reliably determine that point given that having complex legal needs does not correlate to the ability to pay the prices currently charged to have those needs satisfied. Low (and middle) income clients have legal needs that demand the intelligent, analytical and adversarial counsel traditionally provided by good lawyers. Or, to put it slightly differently, low and middle income clients may need to navigate aspects of the rule of law – its systematicity and system of dispute resolution in particular – that require the sort of legal help that lawyers have traditionally offered.

What that means, however, is not that we only allow lawyers to provide sophisticated legal services. Rather, in looking to add new legal service providers we should define the necessary qualifications and mandate of those providers in

⁸¹ Although another issue on access is removing regulatory barriers to innovation.

⁸² See e.g. Access to Legal Services Working Group, Final Report, *supra* note __.

light of the legal needs that must be addressed, and what is necessary to address them. The answer cannot be that low and middle income members of the public either have to pay for a lawyer they cannot afford or do without the legal representation sufficient to meet their needs. Rather, the answer needs to be (at least in part) that new legal service providers have the mandate and capacity to do the things their clients require to access the system of laws, including in some instances providing something equivalent to bespoke legal services.

Freeing up other legal services may permit public funding for more complex legal needs, although recent fiscal and budgetary trends in the United States, Canada and elsewhere make this hope unlikely to be realized. This will remain a policy and practical question involving society's willingness to recognize that helping people address their legal problems will help those individuals and, in the end, help us all (in terms of our overall economic and social wellbeing). Legal insurance – private, public, opt-in or opt-out – may also prove to be a useful tool in making this a real, as opposed to an illusory question for more people.⁸³ Ultimately, however, we also have to accept that we cannot continue to permit only lawyers to provide legal services only to have those lawyers fail to do so at a price that those who need them can afford. On the current model, we are off-side the promise made by the profession collectively, and lawyers individually, to make legal services accessible to the general public.⁸⁴

2. How: Training and Scope of Practice for New Legal Service Providers

In our view these arguments make the case for allowing new providers into the legal services market. The more complicated normative, policy and practical questions, however, involve how we differentiate between various legal needs and problems, how we identify the qualifications required to address those legal needs and problems and, ultimately, what scope of practice we allow new legal service providers to offer. What problems can an online consultant or a paralegal resolve, and what problems need full access to more sophisticated legal counsel? What qualifications do online consultants, paralegals or other service providers need to have? And, finally, are there certain things that, even with respect to a particular legal problem, ought not to be done by an online consultant or other in-person legal service provider? This sub-section considers these matters at a general level, and then more specifically.

At the general level, one option is to carve out certain kinds of services for certain kinds of providers, based on the training and capacity of those providers. In Ontario, for example, different “licensees” are able to do different things. While lawyers enjoy what amounts to unlimited, plenary powers, paralegals (and like

⁸³ See e.g. Sujit Choudhry, Michael Trebilcock and James Wilson, “Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance” in Trebilcock, Duggan & Sossin, eds., *Middle Income Access to Justice*, *supra* note __ at c. 13.

⁸⁴ See e.g. Ontario’s *Law Society Act*, R.S.O. 1990, c. L.8, s. 4.2(2); *Law Society of Upper Canada*, By-Law 4 (2007), as amended, at s. 21 (“Oath”).

providers) are limited to specified roles within the legal system.⁸⁵ In Washington State the new limited license legal technicians practice in family law matters that are not before the courts.

In our view, this sort of approach would be an effective way to build on the traditions of the regulated Bar, which – in the end – provide some level of control and protection for the public. It does not need to be conservative. But it also maintains commitment to the important idea underlying lawyer licensing: that quality of legal representation matters as well as its availability. If legal regulators are willing to take this incremental although purposeful approach seriously, with an openness to both meaningful change and to allowing new legal service providers in areas where the public most requires them, a significant spectrum could be opened up, while at the same time grades or categories of “licences” could be retained.

Included in this general approach would be identifying appropriate training for new legal service providers, focused on ensuring that they have the knowledge, skills and professional attributes sufficient to provide competent services in discreet areas, while also ensuring that those qualifications are provided both at a reasonable cost and in reasonable time. Further, that training would vary with the type of new legal service providers; our approach does not assume that only one alternative to traditional legal services will be created.

A different approach would involve a much more fully open market, in which new legal service providers are simply permitted to offer services as they see fit, with consumers determining the desirability of purchasing such services. This of course might have the advantage of ensuring wide-ranging innovation and choice. And for many issues, this could very well be highly effective, particularly where people with existing regulatory licenses – e.g., accountants and social workers – expand their work into the domain of legal services. However, to the extent that we retain a need for a meaningful notion of the protection of the public interest, either to protect individual clients, or more generally, to ensure the just operation and deployment of legal services in the context of power imbalances and social inequity, then some element of regulation is warranted and desirable. Further, the market for legal services is notably imperfect, with the result that the forces of supply and demand cannot reliably ensure efficient prices or appropriate quality of services.⁸⁶ Whoever provides legal services to the public, some form of market regulation is warranted.

Regulation does not need to be heavy-handed, onerous or unresponsive to market forces. Indeed, market regulation should operate in conjunction with market forces – i.e., moving to incorporate and regulate market innovations as they develop – rather than by simply trying to prevent market innovation. Examples would be those jurisdictions in which pharmacists have taken on increased

⁸⁵ See *supra* note __ and surrounding text.

⁸⁶ See Woolley “Imperfect Duty”, *supra* note 19.

responsibilities for prescribing certain medications (expanding the scope of regulated work of current service providers) or jurisdictions that have worked with ride-share companies like Uber to allow the service but to preserve regulatory goals within the jurisdiction in relation to public safety (allowing new service providers into a regulated market).⁸⁷ Regulation may also be relatively minimal, particularly where it can rely on existing regulation, or where the legal services provided are straightforward, or the market operates effectively to regulate quality and cost of services. Given what is at stake, however, and in particular the vulnerability of those with the highest needs for access to justice, we maintain the need for some form of regulation to protect the public interest in ensuring the adequacy of legal services. Regulation has costs, but it also has significant benefits.

This, then, is the general model of reform we would support: a range of new legal service providers, qualified and licensed to provide services that meet the public's legal needs, particularly in areas that lawyers do not provide such services. What ought that to look like in more concrete and specific terms?

With respect to the permitted scope of service for new providers, we recognize the importance of ensuring that new legal service providers do not offer services they are not competent to provide, and of protecting the public from inadequate legal representation. On the other hand, we also think it essential to define the scope of service in a way that allows those providers to actually provide access to the system of laws. As set out in Part II, accessing a system of laws requires being given the opportunity to understand and voluntarily comply with its requirements, to participate in its systems for dispute resolution and to engage with the structure of arguments and reasoning that, as much as formal rules, are how a system of laws governs our conduct and interactions with each other. It requires allowing us to access what the law provides and to avoid restraints that the law does not permit the state or others to impose upon us. If my service provider is not a lawyer, she still needs a mandate sufficient to allow her to do these things for me.

This suggests that restrictions on service providers are better grounded in areas of legal needs, such as landlord and tenant, employment, family law (with perhaps some restrictions in high conflict cases), rather than being based on specific tasks within an area of need. Having access to someone who can help you fill in a form may be better than nothing, but it is not the access to the "lawgiver" that access to justice requires, especially where the client cannot afford any more comprehensive legal services. The appropriate scope of practice must vary with the

⁸⁷ By referencing Uber, we recognize that – at least in some jurisdictions (like Toronto) – creating new rules that purport to regulate new service providers do not always work or are not always complied with. Regulation is often the first step; compliance and shifting consumer culture are often the more difficult steps. For some of the recent challenges and public debates, see e.g. Jennifer Pagliaro and Betsy Powell, "Toronto council votes to regulate Uber" *Toronto Star* (30 September 2015), online: http://www.thestar.com/news/city_hall/2015/09/30/toronto-council-debates-uber-role-in-taxi-industry.html; Editorial, "Solve this Uber-mess" *Toronto Star* (29 December 2015) A12; Readers' Letters, "Regulation or Uber alles?" *Toronto Star* (2 January 2016), online: http://www.thestar.com/opinion/letters_to_the_editors/2016/01/02/regulation-or-uber-alles.html.

type of legal service provider – an internet service provider may likely have a different scope of practice than a paralegal, consultant or other legal service provider. The key goal must be to open up the market sufficiently so that in areas where the public has significant legal needs which lawyers are not meeting, a range of new legal service providers can fill the gap to provide full access to legality. To the extent that there are truly tasks within these areas that only lawyers can effectively provide, then those areas should be the focus for other access to justice initiatives, whether increased public funding for legal aid or other changes to the operation of the legal system. The point being that the need for lawyers for discreet tasks must not become a barrier to new legal service providers providing effective access to the system of laws.

On a similar note, the definition of the scope of practice must encourage collaboration and interdisciplinary responses to access to justice problems. To leverage any gains from opening up legal services to a range of publicly-focused options, we need to view legal problems not as isolated issues of tort or contract, but rather – as the public experiences them – simply as “problems” (that might engage legal, financial, social, health and other issues, requiring a range of services that include, but are not limited to, legal tools). New legal service providers need to be part of a broader approach to providing assistance to those with needs that may not fit neatly into current categories, but which share the common quality that they are needs that do not have affordable solutions available. Opening up these possibilities will allow us more meaningfully and appropriately to address people’s real problems on their terms in accessible, affordable and, ultimately, in more effective and efficient ways.

With respect to qualifications, training programs would vary depending on the scope of practice the service provider will be authorized to have. All programs should, however, have the goals of accessibility and what we might loosely describe as efficiency. The programs should be affordable and available to high school graduates or university graduates seeking to increase their employability. Like the skilled trades, who combine classroom learning with apprenticeships, they should combine grounding in the intellectual practice and culture of law with paid apprenticeships and other sorts of skills-based experiential learning. The programs should be short but intense. Useful analogies could be found in the programs for training pharmacy assistants, the certified management accountant designation⁸⁸ or dental hygienists. The point being to create a training program that provides the most effective training for the services the provider will be offering, in the shortest possible time at the lowest possible cost.

The training and service mandate of new providers must also be informed by a general sense of the ethics and morality of their role as “lawgivers”. While the scope of practice of new providers will be different from that of lawyers, within that scope of practice they must be understood as having the same duties to provide

⁸⁸ Which has now been merged with the Chartered Accountants.

resolute advocacy for their clients within the boundaries of legality. Like lawyers they ought not to seek for clients that which the law does not provide but can be made to give.⁸⁹ But also like lawyers they ought to facilitate their clients' identification and pursuit of their needs and interests, rather than what they think their clients' needs and interests ought to be. The exact parameters of the ethical space that these providers occupy will – like that of lawyers – be contested. We do not intend here to suggest a specific response to that controversy. The point is only that as new legal service providers occupying the same practice space as lawyers in permitting the interaction between the governed and the legal system, they necessarily also occupy the same ethical space as lawyers. The role they occupy must be defined so as to permit them to occupy that space, and the training they receive needs to ensure that they are competent to do so.

Finally, these general points need to be combined with the observation that enormous variation will exist between different sorts of new legal service providers and, as a consequence, proper variation will also exist between the scope of practice of those providers and the training they receive. An Internet source that facilitates self-representation has a far different appropriate scope of service and training/licensing than does a licensed notary or paralegal. The regulatory challenges posed by this more varied legal services market are, as a consequence, significant, but the opportunities for providing a real solution to access to justice through this more varied market are as well.

The final section will consider some of the challenges and complexities of these recommendations.

3. The challenges: Problems with permitting new legal service providers, and thoughts on solutions

The proposals offered here do pose some real risks and challenges, both practically and normatively, which this section will identify and, at least on a preliminary basis, address. The nature of the challenges, and the appropriate response, depends, though, on the nature of the initiatives that are undertaken. The discussion here is thus necessarily preliminary and somewhat tentative.

a) Getting the training right

As a practical matter, identifying the right match between credentials, training and scope of practice so as to ensure quality of service at an affordable price will remain a challenge. No one set out to design a legal services market in which lawyers are unaffordable for the majority of legal needs, yet we have ended up with a market with those features. Further, for every effort made to improve training or credentials so as to increase the quality of legal services, we risk making those services more unaffordable. We also lack good data as to the sorts of credentials and training necessary to produce quality legal services; most of our

⁸⁹ Tim Dare THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE (Farrenham: Ashgate Publishing Limited, 2009) p. 78

current training and credentialing practices are informed by tradition and culture more than by empirical testing and rigorous analysis. All we know for sure is that our current system produces many very good lawyers and some not so good ones; we do not know how we could get more of the former and less of the latter, or whether we could get something close to the former at much lower cost. Further, it is far from clear – and in fact is counter-intuitive – that addressing the many legal needs that the public have, particularly those that are increasingly unmet, requires the same kind of lengthy and expensive training as currently provided, at least not in every case.

As identified in the previous section, there are models to draw from in other professions and trades, as well as in those jurisdictions that have adopted new legal service providers. Further, educational institutions have significant experience and expertise in creating training and licensure programs in a range of areas; it ought to be possible to use that experience and expertise to create training programs appropriate for the legal services being offered by graduates of those programs.

It is also possible that, with certain forms of service delivery or for very discrete areas of practice, little or no additional training is required. A social worker or accountant may be able to provide law-related services based on his or her existing training and competencies. The key, as always, will be to ensure the match between the services being provided and the skills and knowledge of the person providing them, while also aiming to make the training more affordable and accessible than traditional legal education.

b) New legal service providers and ethical complexity

A further challenge arises from the complex ethical space that we have suggested new legal service providers ought to occupy, in which they act at the intersection of the citizen and the system of laws. As is clear from the extensive literature on lawyers' ethics, occupying that role may put new legal service providers in the position where they may be pursuing interests that are lawful but not moral, or which are lawful and morally arguable, but contrary to popular opinion. They may argue for positions that they do not agree with, and they may invite factual inferences they do not believe in. They may, in short, engage from time to time in what Daniel Markovits' has provocatively described as the lying and cheating required by the lawyer's role.⁹⁰

That lawyers occupy this challenging and often problematic ethical space is at least part of the reason why they are sometimes an unpopular and occasionally despised profession. Lawyers are able to continue to do so, however, at least in part because, along with their complicated social status, they also enjoy considerable

⁹⁰ Daniel Markovits, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* (Princeton: Princeton University Press, 2008) p. 35. Because all of this is contested ethical terrain (what is morally required by the lawyer's role), about which even the two of us disagree from time to time, we do not take it up further here – nor do we need to for the purpose of this discussion.

prestige, both socially and culturally. The cultural and literary narrative around lawyers valorizes as well as vilifies.

New legal service providers do not, however, enjoy that cultural and social history and status, and will not have the exclusive admission and licensing practices that grant prestige. This may mean that society has a much harder time accepting their occupation of this complex ethical space. Which may in turn make legislators or regulators simply unwilling to grant new legal service providers the scope of practice they need in order to offer their clients access to the system of laws in a meaningful sense. This will undermine the efficacy of new legal service providers to address access to justice. Or, alternatively, new legal service providers may push their credentialing and licensing practices towards greater elitism and status over time. In the Canadian accounting profession the three different licensed service providers who traditionally had varied admission practices, have now merged into a single profession with common licensure. That may have some benefits in terms of regulatory efficiency, but it does risk reducing the affordability of services over time.

Further, it may be more difficult in a short and intense training program to inculcate the professional identity or intuitions that help lawyers navigate the complex ethical territory of providing resolute advocacy within the boundaries of legality.⁹¹ There may consequently be a risk that new legal service providers have even more problems making ethical decisions than lawyers.

This risk is more difficult to address than those associated with training, insofar as it cannot be addressed through deliberate regulatory choice – i.e., creating cultural change and ethical practices cannot be something that is simply decided upon. At the same time, however, leadership and commitment to allowing new legal service providers to truly be legal service providers, to be “lawgivers,” would make a significant difference. This leadership and commitment may follow from some specific regulatory decisions. First, where appropriate, new legal service providers must be expressly stated to have the same core ethical obligation as lawyers do – to provide advocacy within the bounds of legality. Second, new legal service providers need to receive ethics training and education in their program, and to have the opportunity to create professional cultures and communities to foster their ethical identities and intuitions. Third, new legal service providers need to be regulated in a way that fosters compliance with their legal and ethical duties to clients and to the legal system, and to be subject to regulatory consequences when they fail to do so. Fourth, as far as possible, new legal service providers should become part of the leadership and decision-making process of the overall regulatory regime.⁹²

These steps have the capacity to start a shift in the perception around new legal service providers, and to increase acknowledgement of the ethical role they

⁹¹ For more on the role of professional intuitions see: Alice Woolley, “Intuition and Theory in Legal Ethics Teaching” (2012) 9 University of St. Thomas Law Journal 285-324.

⁹² See e.g. the inclusion of paralegals as part of the governing Benchers process in Ontario (Law Society of Upper Canada, Benchers (2014), online: <http://www.lsuc.on.ca/with.aspx?id=1136>).

could play within the legal system. Not all of them will be required for every legal service provider – the more discrete and limited the work being done, the less necessary it will be to take any one of these regulatory initiatives. While access to law requires navigation of the formal and procedural structure of legality, that does not mean that the satisfaction of every need requires the assistance of someone providing services of this kind. As noted earlier, in some cases the legal system can take steps to allow people to access the law without the assistance of a legal service provider at all, or one who provides much more discreet assistance. Where the services are more limited in this way, the ethical space occupied by that legal service provider will not be the same as the lawyer, and the training and validation of that provider may also be different, and approached differently from a regulatory perspective.

Again, the key point is that in those cases where new legal service providers do need to be a conduit through which their clients can access the formal and procedural requirements of law, regulators need to take steps to ensure that those providers are properly supported, validated and regulated. Specifically, that they are supported in fulfilling their ethical obligations of providing resolute advocacy for their clients within the bounds of legality and in pursuit of the public interest.

c) Creating injustice

Another risk relates to the tendency of new legal service providers to reify existing power structures, both within the legal services market and in society as a whole. Those with the most money will be able to afford the most highly qualified legal assistance, and will consequently have greater capacity to achieve their desired legal outcomes. Those with the best socio-economic backgrounds will be more likely to attain those high qualifications and, in turn, to earn the higher salaries associated with the work available to those with those qualifications. In short: the most privileged will occupy the most privileged legal roles, and will enjoy the benefits of the services people occupying those roles can provide. New legal service providers may, at least based on current trends, come disproportionately from less privileged, marginalized, immigrant or racialized communities.

This problem is not one that has an obvious solution, or for which there is even a clear path through which to identify a solution. The problems of social inequality are significant, and are reflected in existing regulatory challenges and issues of access to justice. At the same time, however, that a solution to one aspect of inequality does not eliminate inequality altogether, may not be a good enough reason not to undertake it.

d) Crowding out lawyers

Another concern that we anticipate being raised is that, with new service providers, there will not be enough work to go around to keep current providers busy. Put simply, competition will increase in an already crowded market for legal services. While this may be an issue in the short run, we see two possible responses to this concern. First, based on current access to justice research, there is a

significant portion – majority – of people who are not able to access legal services (for a variety of reasons including cost, marginalization, location, etc.). Although it may be that traditional service delivery models – dominated by bespoke legal services largely based on hourly billing – are not ideal methods to reach many of those people, there is certainly no lack of work to go around for those who are interested in matching up their services to the kinds of legal needs that are often most pressing and are not currently being met. The issue is not necessarily an overcrowded market; rather, it is the challenge of matching up those who are willing and able to provide accessible services with those in need.

Second, to the extent that current service models are not up to the challenge of filling the access to justice gap, making space for new providers will hopefully – through natural progressions of innovation and market opportunities – allow those new providers to find ways of accessing legal markets and providing services to those with needs that are not currently being met (and likely will not be met by traditional providers, at least not on current models of service delivery). As such, there is no real loss of business for current providers, but rather new opportunities for new providers (or for those who are willing to adapt). This does not need to be a zero sum discussion: opening up regulatory opportunities expands the pie of service opportunities.

This discussion reminds us of the anxieties of lawyers in the late 1970s and 1980s with the arrival of significant efforts to expand opportunities and requirements for alternative dispute resolution. At first blush it looked as though ADR was designed to – ideally – to take over the world of civil disputes (leaving litigators with little to do but for some high conflict cases). As it turned out, not only did the sky not fall, the serious embrace of ADR increased the amount of work that was available (although accessing that new work required lawyers to adapt and expand the way that they provide at least some of their services). And of course these kinds of changes in regulation and trends in practice bring required adaptations to the ways lawyers – and students – are trained (in law schools, continuing education programs, college-based offerings, and the like). No aspect of the legal system will be left untouched by this discussion.

e) Concluding thoughts

We do not have comprehensive solutions to any these challenges; we think they raise real and significant issues with the position we have taken. Further, we anticipate that once a more specific approach to new legal service providers is identified, further challenges and issues will arise in relation to the training and scope of practice for those providers. If, for example, the training used is too extensive or, on the other hand, does not ensure the skills and knowledge sufficient for the services being provided, new issues and problems will arise. We simply make two observations: first, the significance of the access to justice crisis means that we cannot stop looking for solutions, even if we recognize that the solutions have some problems. The cost of doing nothing has become too high. Second, as much as anything our goal in this paper is to raise these issues for further discussion

and consideration. These issues are real, but they do not negate the possibilities that new legal service providers offer to ease the access to justice problem. And through further discussion and dialogue we can, hopefully, come up with specific proposals that allow for the realization of the possibilities and minimization of the risks.

V. Conclusion

Creating successful regulatory change is difficult. Realizing benefits can be harder in practice than it seems in the abstract, and there may be unanticipated costs and hazards that arise after the change is implemented. In this paper we have nonetheless argued in favor of a significant regulatory change: removing lawyers' exclusive right to practice law and allowing new providers to enter the legal services market. We have based this argument in the overwhelming significance of the access to justice crisis, the recognition that not all legal problems require the services of a lawyer and the observation that there is no particular reason to believe that the current approach to admitting and training lawyers is the only way to create competent legal practitioners who serve diverse legal needs. We have also argued, however, that for this regulatory change to succeed it must orient towards allowing new legal service providers to offer services that truly allow the public to access the system of laws: to serve as an intermediary between the governed and the governing, and to allow the governed access to the formal and procedural requirements of the rule of law.

This, in turn, leads to some more specific recommendations: that new legal service providers be licensed and authorized to provide services within particular domains, that those providers have sufficient power to access the full scope of legality within those areas, that the training for new legal service providers be accessible and efficient, that different approaches be taken to different providers based on the capacities of those providers and, finally, that any approach be multi-disciplinary, recognizing that access to justice "problems" do not neatly divide into the legal and the non-legal.

We can – and have – identified some of the real challenges posed by these recommendations. Introducing new legal service providers may reify existing power structures, create social discomfort and have service providers who do not have the training and professional intuitions necessary to be ethical legal practitioners. It requires a cultural shift in how we perceive the role of new legal service providers in society. We know that these recommendations are not silver bullets, and much remains to be worked out. But we hope nonetheless that legislators, regulators and educators will push much further with serious explorations of these proposals.