

Access to Justice and Public Confidence in Courts: Whose Law Is It Anyway?

*Bridget Mary McCormack**

Thanks very much to the team at Cato for the invitation to join you today. It is an honor to be part of your Constitution Day celebration. I was the lucky beneficiary of your excellent work while serving on the Michigan bench; thank you for what you do.

Introduction and Road Map

My topic today is the massive market failure of the civil justice system and its role in undermining the rule of law. I'll start with a description of the current state of civil justice in America. I want us all to be on the same page before I turn to diagnosing some of the causes of the brokenness. After that diagnosis, I will describe some ripples of change I see on the horizon and what's at stake if we don't get it right.

Here is my thesis: We can't go on like this. But first, a word about what I am *not* talking about and what you should not infer from my remarks. Please don't take my focus on the *civil* justice system to mean that the criminal justice system is ably serving the rule of law. In most jurisdictions, you can be punished for conduct that a jury has said you did not commit. That's not great for the rule of law. And what happens if you are represented by ineffective counsel when the state seeks to terminate your parental rights and you lose your kids as a result of that inadequate representation? In almost every jurisdiction, there is no process for addressing that wrong. It's a too-bad-so-sad rule.

OK, back to the topic I came to discuss.

* President and CEO, American Arbitration Association, and former Chief Justice, Michigan Supreme Court. I am grateful to Cato for the opportunity and to Ishika Toor and Clare Clement for research assistance.

I. The Civil Justice Gap

Justice system data are hard to come by, but *some* data about the civil justice system capture its failures. The Legal Services Corporation's 2022 *Justice Gap* report found that 92 percent of the civil legal problems of low-income people get either no or inadequate help.¹ That is a six-percentage-point increase over the prior study from 2017.² And it isn't a COVID-19 pandemic blip. During that same period, total revenue to legal aid programs *increased* by 31 percent.³

And there is this: The National Center for State Courts estimates that both parties have lawyers in only 24 percent of civil cases in state courts, which is where about 95 percent of civil litigation occurs.⁴ In other words, in more than three-quarters of civil cases, at least one party struggles to navigate a legal system where rules are written in a language that the person doesn't speak or understand.

And this: Every year, the World Justice Project ranks the world's countries on their compliance with various measures of the rule of law. One of those measures is the accessibility and affordability of civil justice. The most recent Rule of Law Index, released in late 2023, ranks the United States 115th out of 140 countries on the accessibility and affordability of civil justice.⁵ Among the 46 wealthiest countries in the world, the United States ranks . . . 46th.⁶

Many countries do justice better than we do. In a popular idea of our justice system—the one we see on TV and teach in our law

¹ See MARY C. SLOSAR, LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 7 (Apr. 2022), <https://lsc-live.app.box.com/s/xl2v2uraitobbzrhuhwtjlgioemp3myz1>.

² Cf. NORC AT THE UNIV. OF CHICAGO, LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 6 (June 2017), <https://lsc-live.app.box.com/s/6x4wbh5d2gqxwy0v094os1x2k6a39q74>.

³ See Jim Sandman, "Where Is the Outrage?," Keynote Speech (excerpts) at the *Stanford Law Review's* Symposium "Access to Justice" (Mar. 21, 2023), in PENN CAREY L., NEWS & EVENTS, <https://www.law.upenn.edu/live/news/15655-where-is-the-outrage>.

⁴ PAULA HANNAFORD-AGOR, DIRECTOR, NCSC CENTER FOR JURY STUDIES, NAT'L CTR. FOR ST. CTS., *CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 31 (2015), https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf.

⁵ See WORLD JUSTICE PROJECT, *WJP RULE OF LAW INDEX: CIVIL JUSTICE FOR UNITED STATES* (2023), <https://worldjusticeproject.org/rule-of-law-index/country/2023/United%20States/Civil%20Justice>.

⁶ See *id.* This is referenced as the "income rank" of the United States for subfactor 7.1, accessibility and affordability of civil justice.

schools—both parties are represented by lawyers who present evidence and make legal arguments for their clients, and the best legal argument wins. That popular idea is a fiction in the vast majority of civil cases in the United States today.

The high rate of litigants without a lawyer is particularly troubling because of the kinds of cases they manage on their own: high-stakes cases. They are high stakes not because billions of dollars are on the line but because they often involve something more fundamental—shelter, personal safety, family, or financial stability.

This state of affairs is relatively new. As recently as the start of the last quarter of the 20th century, lawyerless litigants were the exception. The rate steadily rose until, by the early 2000s, we were seeing the numbers we have today. In 1977, two Yale Law students did a study of 2,500 divorce cases in two trial courts in Connecticut and published their results as an unsigned “project” in the *Yale Law Journal*.⁷ The students were Deborah Rhode and her husband-to-be, Ralph Cavanagh. They found that 2.7 percent of the divorce cases that they studied involved an unrepresented litigant.⁸ They also cited a then-recent study in San Mateo County, California, showing that 20 percent of divorce petitioners were proceeding without lawyers. They characterized this as “an unprecedented surge” in self-representation.⁹

Of course, there are many government services that people navigate without experts. What are the consequences of lacking an expert to help you navigate our justice system? I now turn to what the lack of a lawyer means in practice.

A. Equal Justice under Law without Lawyers?

The lawyers in the room know the fundamental legal fiction that we are all charged with knowing the law. For those of you who are not lawyers, ignorance of the law is never a defense to any claim or charge.¹⁰

⁷ See generally Deborah L. Rhode & Ralph C. Cavanagh, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 *YALE L.J.* 104 (1976).

⁸ See *id.* at 149–50.

⁹ See *id.* at 110 n.25.

¹⁰ See generally Paul Matthews, *Ignorance of the Law Is No Excuse?*, 3 *LEGAL STUD.* 2, at 174–92 (July 1983), <https://www.cambridge.org/core/journals/legal-studies/article/abs/ignorance-of-the-law-is-no-excuse/31F800ED44C5CF1FAFA1562889D8ED0D>.

There is a lot of law to know! Take crimes, for example. “According to best estimates—and estimates are all we have—there are about 4,500 federal crimes in the United States Code, and more than 300,000 federal crimes dispersed throughout federal regulations.”¹¹ And each state has a similar offering.

Fortune-telling is still a crime in most jurisdictions.¹² And in North Carolina, it is a crime if your bingo game lasts more than five hours,¹³ or if you play bingo while intoxicated.¹⁴ In Vermont, it’s still a crime for a woman to get false teeth without getting permission from her husband.¹⁵

There isn’t one place to find out what the law is. No resource explains in plain language what exactly the law requires of you or provides for you. Do you know what happens to your stuff if you die without a will? I asked Google and got this answer: If you die without a will, you are “intestate,” and a probate court will apply the intestacy laws of the state where you reside to determine how to distribute your property among your next of kin. Naturally, I next asked what the intestacy laws of Michigan are.

Things went downhill from there. One result seemed to be a link to a Michigan statute, but the link didn’t work. The rest were lawyers’ websites, one scarier than the next. Here is one example: “Dying without a Will may become a less-than-ideal situation. For example, the Court could find that a distant relative that you never intended to give your money or property to could be entitled to your Estate, leaving the people you love with nothing. To avoid this scenario, at a minimum, you should have a Last Will and Testament drafted that outlines who should receive your money and property.” Yikes.

Many people have some familiarity with some parts of the U.S. Constitution. But even when we know the particular words in a

¹¹ GianCarlo Canaparo & Zack Smith, *Count the Crimes on the Federal Law Books. Then Cut Them.*, THE HERITAGE FOUND. (June 24, 2020), <https://www.heritage.org/crime-and-justice/commentary/count-the-crimes-the-federal-law-books-then-cut-them>.

¹² See David L. Hudson, Jr., *Fortune Telling*, FREE SPEECH CTR. (July 2, 2024), <https://firstamendment.mtsu.edu/article/fortune-telling/>.

¹³ See N.C. GEN. STAT. § 14-309.8.

¹⁴ See *id.* § 18B-308.

¹⁵ See Anna Fridman, *The Law That Won’t Be Missed*, 18 THE CATALYST 2, AT 7 (May 2013), <https://www.isba.org/committees/women/newsletter/2013/05/thelawthatwontbemissed>.

constitutional provision, we don't generally know what they mean in practice. The words have been interpreted by judges for 200 some years, and it's those interpretations that are in fact the rule of law. The *latest* interpretations, I should say.

And judicial interpretations of the Constitution aren't always very intuitive. Most of us know that we have a constitutional right to be tried by a jury of our peers if we are accused of a crime. But in most cases, exercising that right will mean exposing yourself to significantly longer punishment if convicted. And judges have found that consequence to be perfectly constitutional.¹⁶ We have a right to a jury trial-ish.

As for statutes, you might find your way to reading them online. But after spending 10 years trying to make sense of many statutes with six other people trained and paid to do just that who disagreed regularly—well, best of luck. Then there are other legal principles that are also judge-made but are more freewheeling and can overlay constitutional or statutory law. These “rules of decision” are generally not tied directly to any language in a constitution or statute. Google “mootness,” “ripeness,” “standing,” or “qualified immunity.” To have access to a comprehensive collection of these judicial pronouncements about the law, also known as . . . *the law*, you need a subscription to the most user-unfriendly search engine you'll ever interact with.

There's more still. There are also sets of rules that govern how you can use the law in courts. And a particular rule of law will often be different from state to state, sometimes even from courthouse to courthouse. Within a single courthouse, the rules for how to interact with a court can differ from courtroom to courtroom. That's right: In addition to sorting out the legal rules and principles and court rules that govern your dispute, you better check Judge Whatshername's website for any special rules that you have to follow. That is, if she has a website. If she doesn't, you can try to call her office and see whether they can fax you her standing order.

I wish we could take a short field trip right now to an eviction docket or a debt collection docket. I think it would shock all of

¹⁶ See NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 40–42 (2018), <https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct>.

us. In some places, you can see some dockets online—a pandemic bonus. I watched some eviction cases recently before a thoughtful judge in Michigan. I’m going to read you one short eviction hearing transcript:¹⁷

JUDGE. We’ll come to order. The record may reflect we’re next concerned with a summary proceedings matter involving Courtyard Apartment versus Joshua Salinas . . . and all other occupants. . . . Counsel . . . is appearing on behalf of the plaintiff Courtyard. The defendant has failed to appear as I understand it. Not in the hallway either.

COUNSEL. He’s not.

JUDGE. Alright. [Counsel,] anything for the record? Good afternoon.

COUNSEL. Good afternoon, Your Honor. For the record, if it pleases the Court, . . . I’m with the law firm of Swistak Levine and I represent Courtyards. This particular matter is set for a second hearing after a magistrate call a week ago. Mr. Salinas failed to appear at that time as well, so this is a second consecutive failure to appear. This matter is a health hazard matter. We’re seeking immediate turnover of the property. So . . . we would ask that a judgment for possession be entered at this time and that we be allowed to submit a writ immediately and that an order for eviction be issued as soon as the fees and the form is received by the Court.

JUDGE. Alright. Do you have someone available for brief testimony in support of the default judgement today?

COUNSEL. I don’t. Miss Soto, she has been with us before, is the property manager. . . . She is ill at the moment, and this was a summary proceeding and I thought that we could possibly do that.

. . .

JUDGE. So on this the notice to quit was served August 4. I would note that the notice to quit indicated in bold face type “**landlord will seek immediate issuance of writ of restitution.**”

¹⁷ For a recording of the proceedings, see *Brent Weigle’s Personal Meeting Room*, ZOOM starting at 11:10 (Sept. 8, 2023), <https://tinyurl.com/3dnu76vp>.

The options given to the tenant were to remove the health hazards, repair and allow inspection by the landlord within seven days, or move out. Again, that was served—and proof of service shows August 4—on the defendant. Complaint was then filed in this particular matter for termination of tenancy based upon health hazard or damage to the property. And paragraph nine, it's the standard scale DC form 102b, has checked in boldface: "**The plaintiff requests,**" and then in regular type, "an immediate order of eviction." That was filed with the Court properly, and the lawsuit was mailed. A certificate of mailing was perfected for a mailing done on August 17. And the lawsuit is posted; proof of service . . . indicat[es] it was posted attached to the premises on August 26. Under MCR 4.201, that is sufficient notice in the Court's view for a default judgment for possession only. . . . The defendant's dog unattended in the apartment, not cleaned up after. The apartment is in terrible condition, horrible condition, no personal service goes to the next hearing. Plaintiff will likely ask for the immediate order. Under the totality of the circumstances and based on the content—I should also indicate as required by court rule the lease was attached to the complaint and it's signed by our defendant. On the totality of circumstances, a default judgment may enter for possession, and plaintiff may submit contemporaneously with that a request for an eviction order. I will sign both the possession judgment and the writ of restitution, as well if they're provided to the Court.

COUNSEL. Thank you and we will also get the fee for the writs to you as quickly as possible so that it may be effectively served.

* * *

How much of that would Mr. Salinas have understood if he were there? Why did the judge ask for a witness and then not require one? Is there a rule that requires testimony? Is it a court rule? A statute? How would you figure that out if you were not a lawyer? Did the tenant have any defenses? How would you figure that out? When you say it all out loud it starts to sound . . . not very fair. It is not justice to compel people who can't afford a lawyer to play by the rules of a system designed only for those who can. It is wrong.

II. How Did We Get Here?

How did we get here? The American legal system was built by lawyers for lawyers at a time when everyone had a lawyer. Four industrial revolutions passed, and the complexity of our economy and society changed dramatically. Yet almost no updates have been made to our legal processes. A surgeon dropped from 1890 into a modern surgical suite would be confused and lost. But a lawyer who practiced in the Iron County, Michigan, Courthouse in 1890 would feel entirely at home in that courthouse today.

A. Change Management in Legal Profession

Why hasn't change come for the legal profession the way it's come for so many other industries? Where is the civil justice Netflix? Why are lawyers terrible at solving problems that require innovation and collaboration and also excellent at boxing out others who might be better at it?

Part of it is cultural: Our training and culture are risk-averse and backward-looking. We are trained to believe that incremental change leads to lasting solutions with less conflict. And lawyers are committed to the way we have always done things. One of our most essential decisionmaking norms is *stare decisis*: What was decided before governs what we decide today. And a strong cultural norm favors the status quo: "We all did it this way, so you should too."

Part of it is practical: We lawyers (and judges) attend to emergencies first, and we always have emergencies. We focus on lots of critical immediate problems, which keep us from focusing on the structural problems. I've been meaning to write a law review article for 30 years for which I have a great title: "Let's Do Emergencies Last." This is true for individual lawyers and judges, as well as institutions. Each stakeholder group may work in good faith to address the immediate problems squarely in its wheelhouse, but none have time to step back and explore upstream solutions.

Part of it is lack of resources: Except for those lawyers in Big Law (a small minority of those in the profession), lawyers' priorities are structured around financing their practices and paying their employees. Courts struggle to keep the lights on, keep judges trained, and pay court staff a living wage. There is minimal funding for technology, data collection, evidence-based study, and reform. And the competing priorities of dispensing daily justice are formidable.

Bar examiners are competing for resources with underfunded court systems. They must try to stretch their dollars to ensure that a new version of the old exam is error-free, ready to be administered on the appointed day, and graded promptly and fairly.

Finally, part of it is bar federalism: Bar examiners in each state work separately, often duplicating work, and often missing the others' insights.

B. Stakeholder Silos

Legal system stakeholders react to one another but rarely collaborate. Law schools have primarily built their curricula to accommodate a complex web of state licensing requirements, educational accreditation requirements, and university policies, further structured by a ranking system built on criteria that lock in an anachronistic vision of the profession.

Although law schools and courts operate independently, they are, in fact, interlocking systems. Each is dependent on and reactive to the other. And each is bound by funding models, traditions, and cultures. These entrenched qualities of law schools and courts have, over time, magnified the gap between those who become lawyers and those who need the justice system to protect their rights and ensure that their problems are resolved fairly. Neither courts nor law schools have direct control over the other. Both serve many other stakeholders, from state legislatures to alumni to bar associations to university presidents. In most jurisdictions, state supreme courts and law schools interact very rarely. In a system characterized by self-regulation and licensure federalism, there is no obvious first mover for systemwide reform.

C. And Lawyers Are Often Resistant to Allowing Others to Help

Let me turn to the supply side of the legal services market. According to American Bar Association (ABA) data, in 2018, around 84 percent of law school graduates were employed in positions requiring bar passage or where a JD provides an advantage.¹⁸ But the ABA data

¹⁸ See ABA legal education section releases employment data for graduating law class of 2018, AM. BAR ASS'N (Apr. 29, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/04/aba-legal-education-section-releases-employment-data-for-graduat/>.

have been criticized for overstating employment rates by including short-term and nonprofessional jobs. The organization Law School Transparency has suggested that full legal employment is likely 10–20 percent lower.¹⁹

America’s lawyers devote three years and hundreds of thousands of dollars to “learn the law.” Some graduate with crippling debt, and a significant number of them are underemployed. But I don’t mean to suggest that this market mismatch is a solution waiting to happen. We’re not going to lawyer our way out of the civil justice problem. If the paying work available now is not enough to keep our current roster of lawyers fully employed, the 92 percent of our neighbors who can’t afford to pay lawyers to help with their justice problems will not close that gap in our current model.

D. UPL

But those who can’t afford lawyers can’t get help from anyone else, either. In most states, anyone who is not a lawyer risks criminal punishment for the unlicensed practice of law. The definitions of “the practice of law” and “the unauthorized practice of law” (UPL) are not uniform and not easily understandable. But most restrictions on UPL prohibit people from giving out-of-court legal advice or helping prepare legal documents.²⁰

This wasn’t always the case in the United States. At the Founding, while only lawyers could advocate in most courts, you could get help from your family and friends with legal problems outside of court. That started to change in the early part of the 20th century when courts prohibited legal help by people who were not lawyers outside of courthouses, too. This prohibition first applied when legal help was given for a fee, and then eventually when it was given at all.²¹ Now, lawyers’ monopolies across the country

¹⁹ See *Limits of Our Reports*, LAW SCHOOL TRANSPARENCY (Oct. 2018), <https://www.lawschooltransparency.com/help/Limits-of-the-LST-Reports>.

²⁰ See generally Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581 (1999).

²¹ Alan Houseman & Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States*, *CTR. FOR LAW AND SOCIAL POL’Y* (May 2018), https://www.clasp.org/sites/default/files/publications/2018/05/2018_securingequaljustice.pdf.

restrict anyone who is not a lawyer from helping another person with a legal problem.

It isn't like that in other professions where resources are critical to basic human needs. You don't go to a surgeon or doctor every time you have a medical problem. Sometimes, a physician assistant or a nurse practitioner is the right fit for your health care needs. Eighty-two percent of all health care workers have a bachelor's, associate's, or vocational degree, and only 9.3 percent have an MD (Doctor of Medicine) or DO (Doctor of Osteopathic Medicine) degree. In contrast, 80 percent of legal service workers have a law degree.²² We could have legal nurse practitioners, if lawyers wanted to.

* * *

This might sound like a requiem for the modern U.S. legal system, but I see hopeful ripples.

III. How Does the Jenga Tower Fall?

The current systemic barriers to improving access to justice seem to me like a Jenga tower; if the right pieces are pulled out, all of them could fall quickly. And a number of pieces are being pulled out, which I'll organize for today in three buckets: regulatory reform, litigation, and other stuff.

A. Regulatory Reform

Start with regulatory reform. You likely know this story. Two state supreme courts have attempted to be first movers to address the civil justice crisis.

1. Utah

In 2020, the Utah Supreme Court established a Licensed Paralegal Practitioner (LPP) program that allows qualified nonlawyers to provide limited legal services in debt collection, landlord-tenant

²² See Bill Henderson, *Mindshare Matrix for Legal Professionals* (349), LEGAL EVOLUTION (Jan. 15, 2023), <https://www.legalevolution.org/2023/01/mindshare-matrix-for-legal-professionals-349/>.

disputes, and family law matters. Critics (lawyers) initially argued that LPPs might increase consumer confusion and harm.²³

To become an LPP in Utah, individuals must possess an associate’s or bachelor’s degree and then complete an approved LPP education program, exams, and apprenticeship. LPPs must adhere to professional conduct rules and complete 12 hours of continuing education annually.²⁴ The Utah LPP program aims to address substantial unmet legal needs while maintaining consumer protections through licensing requirements, especially among low- and moderate-income populations.²⁵ In the first two years following the launch, more than 75 individuals had been approved as LPPs and began providing services across Utah.²⁶

2. Arizona

In 2021, the Arizona Supreme Court adopted rules to create a new licensing program allowing qualified nonlawyers to provide specific legal services.²⁷

Arizona licenses legal paraprofessionals (LPs) who meet specific education and training requirements set by the Arizona Supreme Court. To qualify, individuals must possess an associate’s degree or higher and complete an LP education program approved by the court. LPs must adhere to rules of professional conduct and complete annual continuing education.²⁸

²³ See, e.g., *Supreme Court Regulatory Reform Proposal-Comment Period Closes July 23, 2020*, UTAH STATE CTS. (Apr. 24, 2020), <https://legacy.utcourts.gov/utc/rules-comment/2020/04/24/supreme-court-regulatory-reform-proposal-comment-period-closes-july-23-2020/> (listing comments criticizing the proposed rule, including one saying that “it seems like a disaster waiting to happen”).

²⁴ See *Licensed Paralegal Practitioner (LPP) Program: Overview and Information*, UTAH STATE BAR (Jan. 2024), <https://www.utahbar.org/wp-content/uploads/2024/02/LPP-Qualifications-Website-J24.pdf>.

²⁵ See *Licensed Paralegal Practitioner (LPP): Program Overview*, UTAH STATE CTS., <https://www.utcourts.gov/en/about/miscellaneous/legal-community/lpp.html>.

²⁶ See *id.* (“In a recent survey conducted by the Utah Supreme Court’s LPP Steering Committee, more than 200 paralegals expressed an interest in getting licensed as an LPP. The majority were interested in establishing an LPP practice within a law firm, while about a third were interested in starting an independent LPP firm.”).

²⁷ See *Legal Services Reforms: Alternative Business Structures (ABS) Frequently Asked Questions*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/accesstolegalservices/Questions-and-Answers/abs>.

²⁸ See Ariz. Code Judicial Admin. §§ 7-210(I)-(J), <https://www.azcourts.gov/Portals/0/admcode/pdfcurrentcode/7-210%20Legal%20Paraprofessional%20Amended%2008-2024.pdf?ver=EzUU2uMO8k59V70-Jy2sWA%3d%3d>.

LPs can provide specific legal services in family law, landlord-tenant disputes, debt collection defense, and administrative appeals. They can prepare legal documents, advise clients on procedural issues, and represent clients in certain administrative hearings. But they can't appear in court or negotiate on a client's behalf.

Arizona's LP program launched in January 2022. From January 1 to December 31, 2022, 25 legal paraprofessionals were approved.²⁹ As of January 2023, 10 more applications had been processed and were recommended for licensure.³⁰

In addition to creating the Legal Paraprofessional Program, the Arizona Supreme Court amended Rule 5.4 of the Rules of Professional Conduct. Rule 5.4 prohibits lawyers from sharing legal fees or forming partnerships with nonlawyers for law practice. The rationale for the rule is to prevent outside influence over lawyers' independent professional judgment.³¹

Arizona's revised Rule 5.4 allows for alternative business structures and nonlawyer ownership of law firms in Arizona, provided that specific requirements are met. For example, lawyers must still retain majority control of the firm and be responsible for ethical and professional conduct. And firms must not allow nonlawyer involvement in matters of legal judgment.³²

²⁹ See *Board of Nonlawyer Legal Service Providers' Annual Report on the Status of the Legal Paraprofessional Program* 5, SUP. CT. OF ARIZ. (Apr. 2023), https://www.azcourts.gov/Portals/26/Final%202022%20NLSP%20Board%20Report%20to%20Supreme%20Court%202023-05-09.pdf?ver=8vuBVt_Zj5sf9lwHXuk-NQ%3d%3d.

³⁰ See *id.*

³¹ See ABA MODEL RULE 5.4: Professional Independence of a Lawyer – Comment, *Law Firms and Associations*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer/comment_on_rule_5_4/.

³² “Nonlawyers may partner with lawyers. Nonlawyers may own, have an economic interest in, manage, or make decisions in, an Alternative Business Structure that provides legal services. Lawyers will be permitted to split fees.” *Legal Services Reforms: Alternative Business Structures (ABS) Frequently Asked Questions*, ARIZ. JUDICIAL BRANCH, <https://www.azcourts.gov/accesstolegalservices/Questions-and-Answers/abs>. However, “only lawyers and other individuals licensed or certified by the Arizona Supreme Court are permitted to provide legal services,” and “[a]t least one lawyer licensed to practice law in Arizona must be appointed by the ABS to serve as its compliance lawyer.” *Id.* For further discussion of the reforms in Arizona and some of their implications, see Kenneth R. Cunningham et al., *Arizona Non-Lawyer Ownership in Law Firms & Implications for Accounting Firms*, BLOOMBERG LAW (Nov. 2020), <https://www.bloomberglaw.com/external/document/XA9M2V18000000/corporate-compliance-professional-perspective-arizona-non-lawyer>.

Arizona's rule change aligns with similar rules in England, Australia, and parts of Canada. It reflects the view that opening the door to new capital and business structures can increase access to legal services without undermining lawyers' duties to clients. More flexible rules facilitate financial investment in innovations like technology solutions for cost-effective legal services.³³

3. *Early evaluation of the Arizona and Utah programs:*

The sky hasn't fallen

Early evaluation of both programs has been encouraging. A team at Stanford conducted in-depth interviews with and analyses of authorized entities in Utah and Arizona up to June 30, 2022.³⁴ They found that innovations have emerged in five primary forms:

- *Traditional law firms* have adapted their business structures, service models, or capital structures, and make up 35 percent of the authorized entities. The motivation for their adaptation includes incorporating nonlawyer staff members or attracting external investments for technology or marketing purposes.³⁵
- *Law companies* like Rocket Lawyer and LegalZoom represent 38 percent of authorized entities. These companies have chosen to become regulated to employ lawyers.
- *Nonlaw companies*, which are newcomers to the legal sector, comprise 18 percent of entities. These companies often set up holistic service models combining law with other services, such as accountants.
- *Small-sector intermediary platforms* connect lawyers to potential clients.

³³ See David Freeman Engstrom et al., *Legal Innovation After Reform: Evidence from Regulatory Change*, DEBORAH L. RHODE CTR. ON THE LEGAL PRO. 4 (Sept. 2022), <https://law.stanford.edu/wp-content/uploads/2022/09/SLS-CLP-Regulatory-Reform-REPORTExecSum-9.26.pdf> (listing five types of innovation resulting from regulatory reform in the legal services market).

³⁴ See *id.* at 36–46.

³⁵ See *id.* at 4–7 (executive summary); *id.* at 24, 32, 44 (discussing marketing).

And finally,

- *Entities using nonlawyers to practice law* use the waivers for unauthorized practice of law that are available in Utah. One example, Rasa, uses artificial intelligence (AI) and non-lawyer experts to help Utah residents with criminal record expungements.³⁶

The Stanford team drew some thematic conclusions from their interviews. They found that lawyers are pivotal in the innovations of these new entities. Lawyers are developing new concepts and are actively involved in various roles, such as owners, investors, and compliance officers. The Stanford team also found that a significant proportion of these entities are selling primarily to individual consumers and small businesses, the PeopleLaw market. Most importantly, the team found that according to the data, these reforms haven't resulted in significant consumer harm. Both Utah and Arizona have reported relatively low complaints about the new entities.³⁷

But the regulatory reform story is one of two steps forward, 1.5 steps back. The year 2022 witnessed setbacks. California's initiative to introduce regulatory reforms met with significant resistance from the bar and the legislature, culminating in a legislative ban on specific reforms.³⁸ And the ABA issued a nonbinding resolution against states considering nonlawyer ownership changes.³⁹ But Oregon and Alaska both recently introduced legal paraprofessional programs. And other states are considering it.

³⁶ See *id.* at 6.

³⁷ See Shoshana Weissmann et al., *The World Needs More Lawyers*, REGUL. TRANSPARENCY PROJECT, FEDERALIST SOC'Y 9 (Sept. 28, 2023), <https://rtp.fedsoc.org/wp-content/uploads/The-World-Needs-More-Lawyers.pdf>.

³⁸ See Karen Sloan, *California lawmakers pull plug on legal industry reforms*, REUTERS (Aug. 29, 2022), <https://www.reuters.com/legal/legalindustry/california-lawmakers-pull-plug-legal-industry-reforms-2022-08-26/>.

³⁹ See Sam Skolnik, *ABA Sides Against Opening Law Firms Up to New Competition*, BLOOMBERG LAW (Aug. 9, 2022), <https://news.bloomberglaw.com/business-and-practice/aba-sides-against-opening-law-firms-up-to-new-competition>.

B. Litigation

Regulatory reform isn't the only Jenga piece that's been pulled out. Litigation is also having an impact.

1. Upsolve

In April 2019, the nonprofit organization Upsolve challenged New York's UPL statute as it applied to its program.⁴⁰ Upsolve provides a free web-based platform that helps low-income individuals file for Chapter 7 bankruptcy without an attorney. (Upsolve's CEO Rohan Pavuluri is not a lawyer.) Upsolve also wants to be able to help its users in debt collection actions. It would do so by having trained workers, who are not lawyers, "provide free legal advice on whether and how to respond to a debt collection lawsuit."⁴¹

Upsolve's planned conduct would trigger New York's UPL statute.⁴² Upsolve argued that New York's ban on the unlicensed practice of law violated the First Amendment by restricting free speech.⁴³ The federal district court ruled in favor of Upsolve, finding that New York's ban on the unlicensed practice of law was unconstitutional because it violated the First Amendment by being overbroad and infringing on Upsolve's free speech rights.⁴⁴ New York's attorney general has appealed to the Second Circuit.

2. South Carolina case

The South Carolina NAACP has filed a federal lawsuit challenging that state's UPL statute.⁴⁵ The NAACP wants its members to be able to provide limited but critical guidance to low-income tenants facing eviction, like explaining the eviction process, possible defenses, and the importance of requesting a hearing before losing their homes by default. Like Upsolve, the NAACP believes that citizens have a First

⁴⁰ See *Upsolve, Inc. v. James*, 604 F. Supp. 3d 97 (S.D.N.Y. 2022).

⁴¹ Jonathan Petts, *How Do You Answer a Summons for Debt Without an Attorney?*, UPSOLVE (Aug. 21, 2024), <https://upsolve.org/learn/should-answer-summons/#>.

⁴² See N.Y. JUD. LAW. § 476-a.

⁴³ See *Upsolve*, 604 F. Supp. at 109–10.

⁴⁴ See *id.* at 120.

⁴⁵ See *S.C. State Conference of the NAACP v. Kohn*, No. 3:22-01007-MGL, 2023 U.S. Dist. LEXIS 4977 (D.S.C. Jan. 10, 2023) (denying motion to dismiss).

Amendment right to speak and associate by offering such guidance. Incidentally, you don't have to be a lawyer to be a magistrate who presides over eviction cases in South Carolina.⁴⁶

The judge paused the case for the plaintiffs to petition the state supreme court to determine whether the intended conduct would violate South Carolina's prohibition on the unauthorized practice of law because the state supreme court has exclusive jurisdiction over interpreting what constitutes the practice of law in South Carolina.⁴⁷

3. DOJ letter

The Antitrust Division of the U.S. Department of Justice (DOJ) has also weighed in on this issue. Recently, the DOJ submitted a letter in support of proposals to expand access to legal services in North Carolina.⁴⁸

In the letter, the DOJ argued that consumers benefit from competition between lawyers and nonlawyers. It pointed out that with many legal services priced out of reach, lower-cost options are sorely needed. The DOJ noted that unlike at the federal level where antitrust is statutory, the North Carolina Constitution (adopted in December 1776) says that "monopolies are contrary to the genius of a free state and shall not be allowed."⁴⁹

And the DOJ invoked the North Carolina Supreme Court, which has held that professional licensing restrictions cannot constitute "the creation of a monopoly or special privileges" and must instead be "an exercise of the [state's] police power for the protection of the public against incompetents and impostors." Thus, justifications for restraints on the delivery of legal services must be rooted in the protection of the public and not in the protection of lawyers from competition.

⁴⁶ See S.C. CODE ANN. §§ 22-1-10(B)–(C).

⁴⁷ The ACLU has since settled the suit "in exchange for historical eviction records and timely access to all new eviction filings." See *NAACP v. Kohn*, ACLU S.C. (Aug. 2023), <https://www.aclusc.org/en/cases/naacp-v-kohn>.

⁴⁸ See Letter from Maggie Goodlander, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., to N.C. Gen. Assembly (Feb. 14, 2023), <https://www.justice.gov/d9/pages/attachments/2023/06/14/414424.pdf>.

⁴⁹ See *id.* at 2 (quoting N.C. CONST. art. 1, § XXIII).

Federal agencies have long allowed nonlawyers to appear in proceedings, from Patent and Trademark tribunals to immigration courts.⁵⁰

C. The Other Stuff

Then there is the other stuff. The state chief justices have become fed up. A new committee of the Conference of Chief Justices will be targeting the barriers to providing better service to people with civil justice problems. They worry that the civil justice crisis undermines all of their work.⁵¹

Frontline Justice is a newly launched bipartisan national effort to reform civil justice work and workers.

And the public can play a tremendous role. When the Arizona Supreme Court was working on its regulatory reform package, it held public meetings and sought public feedback by survey. Lawyers surveyed about the reforms were overwhelmingly against them. But the public surveys produced the opposite results, and that input played a significant role in the success of reform.⁵²

And finally, the disrupter of all disrupters is generative AI, which I think could knock the tower over. Large language models (LLMs) are already transforming the business and practice of law, and legal education isn't far off. LLMs are automating many of the repetitive tasks that lawyers do, including analyzing data sets and writing code. GPT-4, an LLM released in March 2023, scored in the top 10 percent of takers of the Unified Bar Exam, and it did so in six minutes. This technology will democratize legal information. It can even a lot of playing fields.

⁵⁰ See, e.g., *Immigration Court Practice Manual*, ch. 2, §§ 1, 4, 5, 8, 9, <https://www.justice.gov/eoir/reference-materials/ic/chapter-2/1> (section 1(a) citing and linking to the remaining relevant sections).

⁵¹ See *Perspectives on Transforming Civil Justice in the United States*, NORC 1, 47 (Jan. 2020), <https://www.norc.org/content/dam/norc-org/pdfs/NORC1924%20Civil%20Justice%20Report%20final%2030January.2020%20V3.pdf>.

⁵² "An overwhelming 80.3% of the public supported the proposal that was adopted as Legal Paraprofessionals." *Legal Services Reforms, Legal Paraprofessionals (LP): Questions and Answers*, ARIZ. JUDICIAL BRANCH, <https://www.azcourts.gov/accesstolegalservices/Questions-and-Answers/lp> (click "Does the public support the concept of Legal Paraprofessionals?") (last visited Aug. 24, 2024).

Of course, there will be problems to solve along the way. If AI learns from biased data (which are a lot of data), it learns biases. But humans who make decisions in courts right now also have biases. And there is no code to run to fix those. And there are many unanswered legal questions. Would TikToking the prompts you used in GPT-4 to respond to your eviction notice constitute the unlicensed practice of law? What about the technologists who built the models that can train on legal information and then answer legal questions?⁵³ Many of these questions remain untested and uncertain.

Conclusion: Constitution Day

Why am I talking about this on Constitution Day?

Some meat-and-potatoes constitutional questions are wrapped up in the unlicensed practice of law challenges. These restrictions can infringe on First Amendment freedoms of speech, press, assembly, and petitioning the government. But I have something more fundamental in mind.

The rule of law is an idea built on a foundation of public confidence. What if the public loses confidence? Today, about 1,400 eviction cases were heard in the City of Detroit district court. Most of them were heard without lawyers. Many defendants didn't show up. Some had legal defenses. Others didn't but might have been able to work out a resolution that would have made a difference. Tomorrow, there will be another 1,400.⁵⁴

* * *

During the COVID-19 pandemic, courts across the country pivoted to remote proceedings to continue to administer justice and keep the public safe. It was easier in some places than in others. And we learned a lot. We were running an experiment, whether or not we were interested in the results. We learned that default rates in cases

⁵³ See, e.g., PA. BAR ASS'N COMM. ON LEGAL ETHICS & PROF'L RESP. & PHILADELPHIA BAR ASS'N PROF'L GUIDANCE COMM., JOINT FORMAL OP. 2024-200 ETHICAL ISSUES REGARDING THE USE OF ARTIFICIAL INTELLIGENCE 13 (May 22, 2024), <https://www.pabar.org/Members/catalogs/Ethics%20Opinions/Formal/Joint%20Formal%20Opinion%202024-200.pdf>.

⁵⁴ This information comes from a conversation I had with the chief judge of that court, the Hon. William C. McConico, in preparation for this address.

where people must navigate courts without lawyers dropped significantly when people had remote options for appearing.⁵⁵

In retrospect, this seems obvious. Yes, technology can be a barrier for some people. But other barriers can be more substantial: transportation, childcare, a job with no time off, a disability. A car is more expensive than a smartphone.

Legal aid lawyers estimated that their ability to provide representation increased sevenfold when they could eliminate transportation and parking. More people showed up for jury duty than ever.

When it was safe to go back into courts, we had choices. We could go back to doing things the way we always had. Or we could take account of these new data, which showed that giving people a remote option made it far more likely they could resolve their disputes, more likely they would be represented, and more likely they could serve as jurors. Courts make the rules about *how* they administer justice. With some exceptions, they returned to doing things the way they always had.

In Michigan, we published a proposed rule change and took public input on whether to continue some hearings remotely. The public hearing on the rule change was the most attended public hearing in my 10 years on the bench. The court adopted the rule change, but with dissents.⁵⁶ I responded to my dissenting colleagues in a concurrence to the order, which ended with this: “The judiciary should not and cannot be the only institution that does not benefit from the lessons learned from the COVID-19 pandemic and the accelerated innovation it brought. More importantly, the public who have traditionally been excluded from full participation in many of our courts should not lose a valuable new tool for accessing justice. Ours is a government instituted for the people, after all.”⁵⁷

⁵⁵ See Bridget Mary McCormack, *Why Do Lawyers and Judges Hate Evidence?*, ABA LITIG. J. (Aug. 13, 2023), <https://www.americanbar.org/groups/litigation/resources/litigation-journal/2023-summer/remote-proceedings-why-lawyers-judges-hate-evidence/>.

⁵⁶ See Order, ADM File No. 2020-08 (Mich. Aug. 10, 2022) (McCormack, C.J., concurring), https://www.courts.michigan.gov/4a42b2/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2020-08_2022-08-10_formor_pandemicamdts.pdf, at 22. For the dissenting opinions, see *id.* at 22–24 (Zahra, J.); *id.* at 24–39 (Viviano, J.).

⁵⁷ *Id.* at 22.

Access to Justice and Public Confidence in Courts

Public confidence in courts is declining. It is declining in federal courts more than state courts, but in state courts too.⁵⁸ The rule of law is just a set of ideas that is only as strong as the public's confidence in those ideas. When the rules are hostile to you, you might stop caring about the rules. We all have a tremendous amount at stake when the rule of law is wobbly. Lawyers and judges are uniquely positioned to shore it up. If we want to. I hope we do.

Happy Constitution Day.

⁵⁸ See *The State of State Courts: A 2022 NCSC Public Opinion Survey*, NAT'L CTRS. FOR STATE CTS. 4–6 (2022), https://www.ncsc.org/__data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf.

