

WHY STATE COURTS SHOULD AUTHORIZE NONLAWYERS TO PRACTICE LAW

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INTRODUCTION

Although lay representation was prevalent at the time of this country's founding, some colonies and states restricted parties' ability to retain anyone other than a lawyer to appear in court on others' behalf.¹ Through the late nineteenth century, state courts enforced rules that made parties choose between employing lawyers as advocates or advocating for themselves.² Legislative and judicial restrictions on nonlawyers' ability to assist others with legal problems *outside* court appear to be an early twentieth century innovation. In 1919, New York's high court ruled that a new law prohibiting

1. See Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 462-65 (1993).

2. See, e.g., *Hittson v. Browne*, 3 Colo. 304 (1877); *Cobb v. Judge of Super. Ct. of Grand Rapids*, 5 N.W. 309 (Mich. 1880).

nonlawyers from practicing law barred a notary from preparing customers' legal documents.³ The court explained that “preparatory study, educational qualifications, experience, examination and license by the courts are required . . . to protect the public.”⁴ The practices of “medicine, surgery, dentistry and other callings” are now treated similarly, “and the list is constantly increasing as the danger to the citizen becomes manifest, and knowledge reveals how it may be avoided.”⁵ During the Great Depression, other states adopted similar laws forbidding “the unauthorized practice of law,” or “UPL” for short.⁶ In many states, practicing law without authorization became a crime.⁷ In general, the necessary authorization came in the form of a law license acquired by graduating from law school,⁸ passing a bar examination,⁹ and demonstrating the requisite moral character.¹⁰

3. See *People v. Alfani*, 125 N.E. 671 (N.Y. 1919). *Alfani* departed from the ordinary policy at that time of “imposing sanctions [for unauthorized practice of law violations] only against those who fraudulently styled themselves ‘attorneys’ or undertook to represent others in court.” Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 111 n.29 (1976). On the day it decided *Alfani*, the same court decided *People v. Title Guarantee & Trust Co.*, in which it held that a guarantee and trust company did not violate New York’s law on the unauthorized practice of law by preparing similar legal documents, such as a simple chattel mortgage and bill of sale, that are incidental to its other services. See 125 N.E. 666, 669–70 (N.Y. 1919). The court distinguished the cases on the ground that *Alfani* held “himself out as engaged in the preparation of legal instruments, and [gave] advice in connection with their execution,” *id.* at 670, whereas the corporation was not engaged in the business of preparing legal instruments but prepared the simple instruments ancillary to other work that it was authorized to perform, *id.* at 670–71 (Pound, J., concurring); *id.* at 671 (Crane, J., concurring).

4. *Alfani*, 125 N.E. at 673.

5. *Id.*

6. See Laurel A. Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 QUINNIPIAC L. REV. 97, 102 (2018) (noting that the “UPL movement exploded during the Great Depression”); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 8–9 (1981) (describing UPL legislation and enforcement during the Great Depression).

7. See Rhode, *supra* note 6, at 11 & n.39 (listing thirty-seven states with misdemeanor UPL laws).

8. In some states, one can still “read for the bar” by apprenticing rather than attending law school. Kim Kardashian is a famous contemporary example of one pursuing this path. See Chloe Melas, *Kim Kardashian West, Esq. in 2022?: You Better Believe It*, CNN (June 29, 2019, 11:27 AM), <https://www.cnn.com/2019/06/28/entertainment/kim-kardashian-reading-the-law/index.html> [<https://perma.cc/FZ37-BRES>].

9. Wisconsin has traditionally recognized the “diploma privilege,” allowing graduates of one of the state’s law schools to be admitted to its bar without passing a bar examination. See Carsen Nies, *For More Equitable Licensure, Washington State Needs Diploma Privilege, Not the Bar Exam*, 20 SEATTLE J. SOC. JUST. 287, 309 (2021). Increasingly, there have been calls for other states to dispense with the bar examination for state law school graduates. See, e.g., *id.* at 312–13.

10. For a trenchant critique of this requirement for admission to the bar, see Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985). See also Deborah L. Rhode, *Moral Character: The Personal and the Political*, 20 LOY. L.J. 1 (1988).

Historically, bar associations have played a key role in enforcing UPL restrictions.¹¹

Many legal scholars question the UPL laws' utility, regarding them as an overly restrictive, protectionist impediment to low-income individuals' ability to secure necessary help with their legal problems.¹² Professor Deborah L. Rhode led the charge, beginning with a 1976 empirical study that she coauthored as a law student¹³ and continuing throughout her academic career.¹⁴ This Essay, dedicated to Deborah's memory, offers another critique of the UPL restrictions. It begins with two stories, separated by a half century, that illustrate how, if not for UPL laws, nonlawyers might help low-income individuals with civil legal problems. It then questions the comparison between legal and medical practice that has bolstered courts' defense of UPL laws, and it argues that developments in the medical field weigh in favor of liberalizing UPL enforcement. Although there are many unknowns, this Essay concludes that courts should experiment by authorizing paralegals and members of other professions to provide various types of legal assistance.

I. TWO UPL LAWSUITS

This part explores two stories drawn from UPL lawsuits involving nonlawyers seeking to prepare legal documents for low-income individuals. The first, *Florida Bar v. Brumbaugh*,¹⁵ was a UPL enforcement action brought around half a century ago; the other, *Upsolve, Inc. v. James*,¹⁶ is a current First Amendment challenge to New York's UPL law. At the center of these suits are two groups of low-income people with legal problems: the community surrounding Marilyn's Secretarial Service on the outskirts of

11. See generally Rhode, *supra* note 6, at 11–44 (describing bar committees' UPL enforcement efforts as mostly "center[ing] on lay form preparation and related advice," and as being seldom triggered by consumer grievances).

12. See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 81–91 (2004).

13. Cavanagh & Rhode, *supra* note 3. For a reflection on the significance of this work, among Rhode's others, see Nora Freeman Engstrom, *She Stood Up: The Life and Legacy of Deborah L. Rhode*, 74 STAN. L. REV. ONLINE 1 (2021). For another early work criticizing UPL laws, see Roger Hunter & Robert Klonoff, *A Dialogue on the Unauthorized Practice of Law*, 25 VILL. L. REV. 6 (1979).

14. See, e.g., Rhode, *supra* note 6; Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 135–38 (2000) (advocating for expanding opportunities for nonlawyers, subject to regulation, to provide legal assistance); Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public?: Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2014); DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 41–45 (2015) (arguing that courts bar nonlawyers from providing legal assistance "without respect to its quality or cost-effectiveness"); Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429 (2016) (advocating for research and education on access to justice).

15. 355 So. 2d 1186 (Fla. 1978).

16. Complaint, *Upsolve, Inc. v. James*, No. 22-cv-00627 (S.D.N.Y. Jan. 25, 2022), ECF No. 1.

Ocala, Florida,¹⁷ and the community served by Reverend John Udo-Onkon in New York’s South Bronx neighborhood.¹⁸ Often, members of these groups, and others like them, cannot afford to retain lawyers and cannot find free lawyers to help with their civil legal problems. Consequently, the fundamental question that these stories pose is whether low-income individuals with legal problems are likely to be better off with nonlawyers’ legal advice than with no legal advice at all.

A. *An Old Story*: Florida Bar v. Brumbaugh

Decided almost a half century ago, *Florida Bar v. Brumbaugh* illustrates how courts have used UPL laws to enforce “lawyers’ monopoly,” that is, lawyers’ exclusive legal right to perform certain services relating to the law.¹⁹ The Supreme Court of Florida’s analysis continues to exemplify state courts’ strict enforcement of UPL laws, notwithstanding significant social changes, including growing concern over the inaccessibility of lawyers for low-income individuals with legal problems. This section briefly recounts Ms. Brumbaugh’s story, the court’s decision, and the ruling’s aftermath.

1. Marilyn’s Secretarial Service and Its Customers

In the late 1970s, Marilyn Brumbaugh operated Marilyn’s Secretarial Service in Ocala, Florida, for which she placed classified ads in the local newspapers.²⁰ Local residents who read the ads came to her to type their resumes and other documents.²¹ This was in the days before laptop computers.

Ms. Brumbaugh sold blank forms for legal documents that customers could fill in and then ask her to type up.²² If someone asked how to fill in a blank, she offered help, having taught herself enough law, she believed, to prepare divorce papers, wills, and custody papers.²³ If you wanted a do-it-yourself, no-fault divorce, for a modest fifty dollars, you could go to Marilyn’s Secretarial Service to buy the forms, get help completing them,

17. See Kevin Spear, *Typist’s Trade Is Divorce Shop Owner Barbers in Do-It-Yourself Service*, ORLANDO SENTINEL (Mar. 26, 1988), <https://www.orlandosentinel.com/news/os-xpm-1988-03-26-0030020242-story.html> [https://perma.cc/YW5V-VTNL].

18. Complaint, *supra* note 16.

19. Lawyers’ monopoly over legal services, enforced by UPL laws, is widely criticized because of its impact on low-income individuals who cannot afford a lawyer. See, e.g., W. Bradley Wendel, *Foreword: The Profession’s Monopoly and Its Core Values*, 82 FORDHAM L. REV. 2563, 2565–66 (2014) (“[B]y and large the legal profession seems unconcerned that its vigorous efforts to enforce its monopoly over the provision of legal services is exacerbating existing social disparities.”). For an argument that lawyers’ monopoly should be challenged under antitrust law to expand access to affordable legal assistance, see Renee Newman Knake, *The Legal Monopoly*, 93 WASH. L. REV. 1293 (2018).

20. *Brumbaugh*, 355 So. 2d at 1189–90.

21. *Id.*

22. *Id.*

23. *Id.*

have the forms typed up into legal papers to be filed in court, and learn how to file them yourself.²⁴

The Florida Bar caught wind of Ms. Brumbaugh's business and sought to shut it down, although the bar lacked evidence that her customers were unhappy with her services or that courts found fault with the papers she prepared.²⁵ The bar asserted not that she impersonated a lawyer but that she held herself out as a secretary while practicing law.²⁶ She was jailed.²⁷

Marilyn Brumbaugh defended herself in the Supreme Court of Florida. It was *David vs. Goliath*: Ms. Brumbaugh, a former cosmetic sales manager turned small business owner vs. the Florida Bar, which represented all the lawyers in the state of Florida.²⁸

2. The Supreme Court of Florida's Decision

The state supreme court reached three conclusions: (1) that selling kits with forms and instructions about how to get a divorce is not "the practice of law"; (2) that assisting people in completing the published forms *is* "the practice of law"; and (3) that, because she was not a lawyer, Ms. Brumbaugh was not authorized to practice law, not even to the limited extent of helping customers complete these forms.²⁹ The court devoted most of its analysis to the first issue, briefly dispensing with the other two.

a. Does Publishing and Selling Written Legal Materials Constitute the Practice of Law?

It might now seem obvious that publishers can produce, and vendors can sell, self-help materials for people with legal problems.³⁰ But the Florida Bar, which sought to forbid Ms. Brumbaugh from selling kits with forms and instructions about how to get a divorce, had precedent on its side. In the early 1970s, the Supreme Court of Florida said that although it was permissible to sell simple legal forms, one could not market instructions on *how* to fill them

24. *Id.* Deborah Rhode's coauthored 1976 study reported that "published kits and personalized assistance in document preparation" for pro se litigants seeking no-fault divorces "rang[ed] in price from \$3 to \$180," and that "[t]ypically kits have contained samples of legal forms necessary to secure a decree of marital dissolution, together with instructions on how to complete them." Cavanagh & Rhode, *supra* note 3, at 109.

25. *Brumbaugh*, 355 So. 2d at 1190.

26. *Id.*

27. Spear, *supra* note 17.

28. *See id.*

29. *See Brumbaugh*, 355 So. 2d at 1190.

30. Contemporary courts generally permit commercial publications that help people address their own legal problems, whether because the publications constitute educational or informational material (and not the provision of "legal advice") or because their publication is protected by the First Amendment in any event. The battleground has shifted to whether online providers of assistance are engaged in the unauthorized practice of law and, even if they are, whether theirs is constitutionally protected activity. *See, e.g.*, Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & C.R. L. REV. 255 (2011).

out,³¹ for instructions might make the forms useful, not merely educational. In a 1973 decision, the court worried that people who followed the instructions might be harmed, whether because the forms and instructions did not accurately take account of evolving law or because they failed to account for the law's complexity.³² Analogizing to medical practice at the time, the court viewed Florida's UPL law as a necessary preventive measure: "Law, like medicine, can result in unsuspected complications from 'home remedies.' Perhaps 'an ounce of prevention is worth a pound of cure' here too."³³

In Ms. Brumbaugh's case, decided only a few years later, the court changed its mind. It acknowledged a constitutional problem with banning publications for the purpose of protecting people like her customers from the possibility that those publications might be inaccurate or misleading.³⁴ Given the First Amendment right to freedom of speech, the court said, the state cannot protect people by leaving them completely in the dark.³⁵ It "must assume that our citizens will generally use such publications for what they are worth in the preparation of their cases."³⁶

b. Does Helping Complete Simple Legal Forms Constitute the Practice of Law?

Having established that vendors like Ms. Brumbaugh could sell legal forms, the Florida court turned to the question of whether helping customers to complete the forms constitutes "the practice of law," which may be undertaken only by individuals who were authorized to do so—typically, lawyers.³⁷ The court gave this question short shrift, regarding it as obvious that anyone offering help in completing form divorce complaints was practicing law.³⁸

In enforcing UPL laws, courts generally employ vague and occasionally circular definitions of "the practice of law."³⁹ These give courts leeway to make individual judgments about the utility and dangers of nonlawyers' assistance. Often, courts' judgments are based on empirical assumptions

31. See *Florida Bar v. Stupica*, 300 So. 2d 683 (Fla. 1974); *Florida Bar v. Am. Legal & Bus. Forms, Inc.*, 274 So. 2d 225 (Fla. 1973). Deborah's coauthored 1976 study reported that at least five state courts had enjoined the sale of kits to obtain no-fault divorces and that in four other states, bar associations or, in New York, the state attorney general, had sought or were seeking an injunction. See Cavanagh & Rhode, *supra* note 3, app. 1 at 167.

32. See *Am. Legal & Bus. Forms*, 274 So. 2d at 227.

33. *Id.*

34. See *Brumbaugh*, 355 So. 2d at 1192–93.

35. See *id.* at 1193.

36. See *id.*

37. See *id.* at 1193–94.

38. *Id.*

39. See Rhode & Ricca, *supra* note 14, at 2588–89.

about the complexity of particular work and the capacity of nonlawyers to do it—assumptions that are untested and unproven.⁴⁰

To the Florida court, practicing law meant giving advice or assistance that would require “legal skill and a knowledge of the law greater than that possessed by the average citizen.”⁴¹ In other words, if you need someone with above-average legal skill and knowledge to help you with your important legal problem, anyone giving you advice is practicing law, even if they never claim to be a lawyer and even if they help for free. Under its definition, the court said, Ms. Brumbaugh was practicing law by helping customers fill out simple do-it-yourself divorce forms.⁴² Because people with legal problems, like those seeking a divorce, were likely “to place their trust in” those offering to help them, the court said, those assisting must “have at least a minimal amount of legal training and experience.”⁴³

c. Whether to Authorize Ms. Brumbaugh to Provide Legal Assistance

The last question, which was raised by the case but not so much as acknowledged by the court, was whether to allow Ms. Brumbaugh’s customers to go to her for help. This might have turned on whether she had at least the “minimal amount of legal training and experience” necessary to help them fill out do-it-yourself divorce forms. Even if not just anyone could help fill out divorce forms, perhaps Ms. Brumbaugh could. After all, she had just demonstrated the quality of her self-education in the law by beating the Florida Bar on a legal question involving the First Amendment. Could Ms. Brumbaugh’s customers be allowed to decide for themselves that, through self-education and experience, she had achieved above-average skill and knowledge of the law? (Perhaps not as deep or as broad as a law school graduate, but as much as would be needed to help people fill out no-fault divorce forms and to explain how to file them.)

The court did not meaningfully confront this question. It simply assumed that nonlawyers like Ms. Brumbaugh are incapable of doing anything that falls within the court’s definition of “the practice of law.”⁴⁴ Since preparing legal documents constitutes the practice of law, it followed that Ms. Brumbaugh was unqualified, notwithstanding the simple nature of the divorce documents and the minimal knowledge needed to prepare them.⁴⁵ Of course, this should not have been a foregone conclusion, given how the Florida court defined the practice of law. After all, its definition encompassed anything requiring above-average legal knowledge—or “at

40. *See, e.g.*, Cavanagh & Rhode, *supra* note 3, at 105 (concluding that injunctions against the sale of kits to obtain a no-fault divorce “have been based on assumptions which are not supported by the assembled data”).

41. *Brumbaugh*, 355 So. 2d at 1191 (quoting *State v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962)). The Florida courts continue to use this standard in UPL enforcement cases. *See, e.g.*, *Florida Bar v. TIKD Servs. LLC*, 326 So. 3d 1073, 1077–78 (Fla. 2021).

42. *See Brumbaugh*, 355 So. 2d at 1189, 1193.

43. *Id.*

44. *See id.* at 1191.

45. *See id.* at 1193–94.

least a minimal amount of” legal knowledge⁴⁶—rather than anything requiring three years of law school. One can acquire knowledge of the law—more than the average person possesses—in other ways, such as through less demanding training, self-study, or experience. Graduates of paralegal programs, among others, surely have above-average knowledge of the law, albeit less knowledge than the average lawyer. If they train to provide services in a particular area of law, rather than obtaining the kind of general education in the law afforded by law schools, they may even acquire more relevant knowledge of their area of legal practice than the average lawyer possesses. But the Florida court gave no thought to the possibility that Ms. Brumbaugh had above-average legal knowledge and, indeed, just the right amount of legal knowledge necessary to be helpful to people in completing forms that her customers would otherwise complete on their own. Instead, the court applied a flat rule that only a Florida law license would suffice to authorize practicing law.

Consequently, Ms. Brumbaugh’s customers could go to a lawyer, if they could afford one; otherwise, the court left them entirely on their own, ostensibly for their own protection. The court told Ms. Brumbaugh that she could be a vendor and a typist but not an advisor—customers could purchase forms from her along with written explanations, and she could type whatever customers conveyed in writing.⁴⁷ The ban on customers’ verbal instructions, however, would prevent Ms. Brumbaugh from responding with advice or answers to questions about how to fill out the forms.

d. A Coda: The Medical Analogy Redux

A concurring judge summed it all up: the laws giving lawyers a monopoly over certain tasks are not “designed solely to produce high legal fees by discouraging competition.”⁴⁸ They are meant to protect the public. He wrote: “Just as the public must be protected from physical harm inflicted by those who would prescribe drugs and perform surgery without proper training, so must we provide protection from financial and other damage inflicted by pseudo-lawyers.”⁴⁹

In the eyes of her community, Ms. Brumbaugh may have been a friend and neighbor, or a typist and entrepreneur. But in the eyes of this Florida jurist, she had evidently been a “pseudo-lawyer.”

46. *See id.* at 1193.

47. *Id.* at 1194 (“Marilyn Brumbaugh may not make inquiries nor answer questions from her clients as to the particular forms which might be necessary, how best to fill out such forms, where to properly file such forms, and how to present necessary evidence at the court hearings While Marilyn Brumbaugh may legally sell forms in these areas, and type up instruments which have been completed by clients, she must not engage in personal legal assistance in conjunction with her business activities, including the correction of errors and omissions.”).

48. *Id.* at 1195 (Karl, J., concurring).

49. *Id.* at 1194.

3. A Postscript

Around a decade later, in 1988, a local newspaper reported that Ms. Brumbaugh was still operating and advertising a combination thrift shop and typing service on the outskirts of Ocala, across the street from a trailer park.⁵⁰ She now used a computer to generate divorce and adoption forms. She had raised her prices to sixty dollars for a simple divorce and eighty-five dollars for one involving children, but she also accepted clothing and household items as payment. She endeavored to keep current on the law, maintaining a set of Florida statutes that she updated annually, and sought to preserve a good reputation by generating good work. She got referrals from lawyers in the county, and judges and lawyers accepted the papers she typed. To avoid returning to jail, she said, she avoided giving advice about how to fill out the forms.

The Florida court's decision narrowed the options available to people who could not afford a lawyer to help with their legal problems or who, for any number of reasons, did not want to see a lawyer or would simply prefer getting help from people like Ms. Brumbaugh.⁵¹ Less intrepid secretarial services hesitated to follow Ms. Brumbaugh into the business of selling and typing simple legal documents—although by 1988, the state courts themselves had gotten into the business of distributing do-it-yourself divorce kits.⁵² Ms. Brumbaugh appreciated that she could still sell forms and type information into them, but she did not accept the idea that lawyers had an exclusive right to advise people about the law. “The laws are made for all of us,” she told a reporter, “not just the Florida Bar, not just the lawyers.”⁵³

B. A Pastor and His South Bronx Community

In early 2022, around a half century after Marilyn Brumbaugh's case, more than 100 residents of the South Bronx signed a petition filed in a New York federal lawsuit.⁵⁴ They were congregants and neighbors of a Bronx pastor, Reverend John Udo-Okon, who founded the Word of Life Church in one of the city's poorest neighborhoods—as the reverend put it, a “disproportionately poor and disproportionately Black” community “that is

50. The facts in this section are from Spear, *supra* note 17.

51. The bar sometimes seems to assume that anyone who can afford or otherwise obtain a lawyer's services will (or should) prefer help from a lawyer to help from a friend, neighbor, or other. But that assumption is highly contested. As Professor Rebecca L. Sandefur has discussed, many people may have reasons to prefer help from others. See Rebecca L. Sandefur, *Access to What?*, DÆDALUS, Winter 2019, at 49.

52. Spear, *supra* note 17.

53. *Id.* An internet search shows that Marilyn Brumbaugh was born Marilyn Mingus. By 1988, her marriage to Dick Brumbaugh had ended and she was married to Arthur Nelson. When she died in 2019 at age 90, she was survived by five children, five grandchildren, and two great-grandchildren. The notice in the *Ocala StarBanner* said: “Some may remember her from her legal services and/or her thrift stores. She was a friend to many.” *Marilyn Nelson*, Ocala-NEWS (Feb. 20, 2019), <https://www.ocala-news.com/2019/02/20/marilyn-nelson/> [<https://perma.cc/3ZB2-3Z99>].

54. Declaration of Rev. John Udo-Okon ¶ 20, *Upsolve, Inc. v. James*, No. 22-cv-00627 (S.D.N.Y. Jan. 25, 2022), ECF No. 7-2.

trapped in cycles of poverty that have existed throughout generations.”⁵⁵ He serves not only the community’s spiritual needs but also its earthly needs, for example, by providing food to local households and enlisting field workers to vaccinate local residents.⁵⁶ One of the community’s greatest unmet needs, he has found, is legal help. In particular, community members are harassed by debt collectors, but they cannot afford lawyers.⁵⁷ People often come to him with this legal problem.⁵⁸ This is unsurprising, since debt collection cases are a big problem in the South Bronx and in other low-income communities of the city and throughout the country.⁵⁹ Nationally, debt collection cases are brought by banks and other lenders, hospitals, utility and telecommunications companies, auto lenders, educational lenders, sellers of goods on installment plans, and especially debt buyers who purchase debt for pennies on the dollar from credit card companies and other creditors.⁶⁰ Low-income communities of color are hardest hit.⁶¹

There is a range of possible defenses in debt collection cases. People often can fight the claims successfully or settle them favorably by challenging plaintiffs to show that the debt was incurred and unpaid, or by arguing that the plaintiff is not the right party to bring the lawsuit, or that they themselves are not the right party to be sued. But mostly, people do not defend themselves. Over 70 percent of defendants default—meaning that they do not file an answer or show up in court.⁶² Some default judgments in debt collection lawsuits result from “sewer service,” which is “the practice of falsely claiming to serve litigants with notice of the lawsuit when no notice was ever provided.”⁶³ But nationwide, that has not been reported to be the

55. *Id.* ¶¶ 4, 19.

56. *Id.* ¶¶ 5–6.

57. *Id.* ¶¶ 8–13.

58. *Id.* ¶ 17.

59. CAROLINE RATCLIFFE, SIGNE-MARY MCKERNAN, EMMA KALISH & STEVE MARTIN, URBAN INST., HOW DO NEW YORKERS PERCEIVE THEIR FINANCIAL SECURITY? 9 (2015); PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 14 (2020), <https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf> [<https://perma.cc/7MBB-HWBH>]; Ed Garcia Conde, *Over 50% of Bronx Neighborhoods Experiencing High or Extreme Poverty*, WELCOME2THEBRONX (June 8, 2017), <https://www.welcome2thebronx.com/2017/06/08/over-50-of-bronx-neighborhoods-experiencing-high-or-extreme-poverty/> [<https://perma.cc/9WCQ-Y9N8>] (noting that the Bronx has a higher rate of high or extreme poverty than any other New York City borough).

60. PEW CHARITABLE TRS., *supra* note 59, at 11.

61. *See, e.g.*, ANNIE WALDMAN & PAUL KIEL, PROPUBLICA, RACIAL DISPARITY IN DEBT COLLECTION LAWSUITS: A STUDY OF THREE METRO AREAS (2015), <https://static.propublica.org/projects/race-and-debt/assets/pdf/ProPublica-garnishments-whitepaper.pdf> [<https://perma.cc/BVX8-5NSX>] (finding that debt collection suits disproportionately impact Black communities).

62. *See* PEW CHARITABLE TRS., *supra* note 59, at 16.

63. Brief of *Amici Curiae* Consumer Law Experts, Civil Legal Services Organizations, and Civil Rights Organizations in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 10–12, *Upsolve, Inc. v. James*, No. 22-cv-00627 (S.D.N.Y. Apr. 13, 2022), ECF No. 57. Notable efforts have been made in New York City to reduce the incidence of sewer service. *See, e.g.*, N.Y.C. BAR ASS’N, OUT OF SERVICE: A CALL TO FIX THE BROKEN PROCESS SERVICE INDUSTRY (2010); *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 97 (2d. Cir. 2015) (affirming class certification in action against defendants alleged to have used false

big problem. Most people who are sued to collect on a debt simply do not respond when they receive the complaint—they do not go to a legal services office or bar association to try to get free help from a lawyer, they do not file an answer, and they do not go to court. A recent study found that around a quarter of all civil cases in America are debt collection cases, and around 70 percent of those cases result in default judgments.⁶⁴ Most of those defendants who respond to the lawsuits have no lawyers.⁶⁵ Unsurprisingly, those with lawyers get better results.⁶⁶ For those who default or do not defend themselves successfully, the results are harsh: “Courts routinely order consumers to pay accrued interest as well as court fees, which together can exceed the original amount owed. Other harmful consequences can include garnishment of wages or bank accounts, seizure of personal property, and [in some states] even incarceration.”⁶⁷

No doubt, the reasons why people do not respond to these lawsuits vary. Some people may not realize what the complaint means, that they are likely to do better if they respond, what a judgment against them might mean—or even that they had any defense at all. They may not want to seek help from someone they do not know and trust, they may find the idea of going to a lawyer or to court intimidating or unaffordable, or they may choose to view such events as fate.

To make it easier to respond, the New York court system has approved a check-the-box answer form for use in debt collection cases.⁶⁸ The form is intended to be used by people who do not have lawyers.⁶⁹ When people asked Reverend Udo-Onkon for help, he could direct them to the website to download the answer form and follow the instructions. But that may not be the kind of help that he thinks people coming to him want and need. Barriers of language and reading comprehension may impede people’s ability to complete forms themselves. Moreover, these forms are not self-explanatory. People may need help filling them out. For example, there is a box to check

affidavits of service to obtain default judgments in debt collection cases); Caroline E. Coffey & Johnson M. Tyler, *Public Interest Lawyers Are Key in Passage of Landmark Legislation to Stem “Sewer Service” in New York City*, 44 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 405 (2010).

64. See PEW CHARITABLE TRS., *supra* note 59, at 6, 16.

65. See *id.* at 13–14.

66. See *id.* at 14–15 (“[A]nalyses from jurisdictions across the country indicate that when consumers are represented by attorneys, they are more likely to secure a settlement or win the case outright.”).

67. *Id.* at 2. For a report on a jurisdiction where debtors are frequently jailed, see Lizzie Presser, *Ambulance, Judge, Jail: When Medical Debt Collectors Decide Who Gets Arrested*, PROPUBLICA (Oct. 16, 2019), <https://features.propublica.org/medical-debt/when-medical-debt-collectors-decide-who-gets-arrested-coffeyville-kansas/> [https://perma.cc/8HP2-H7GQ].

68. See N.Y. CTS., WRITTEN ANSWER: CONSUMER CREDIT TRANSACTION (2015), <https://nycourts.gov/LegacyPDFS/rules/CCR/forms/Consumer-Credit-Answer.pdf> [https://perma.cc/5MLR-FGWN].

69. See *Find the Help You Need to Represent Yourself in NY Courts, Common Defenses in a Debt Collection Case*, N.Y. CTS., <https://nycourts.gov/courthelp/MoneyProblems/defenses.shtml> [https://perma.cc/P6RF-HD4X] (Aug. 4, 2022).

when you were served with a complaint if “service was not correct as required by law.”⁷⁰ But the form does not explain when service is unlawful or how that law applies to any given person’s situation.⁷¹ Under the heading “Defenses,” one can check boxes for defenses such as “Statute of limitations,” “Violation of the duty of good faith and fair dealing,” “Unjust enrichment,” “Unconscionability,” and “Laches.”⁷² These are legal terms, and members of the community might not understand from the short legal explanations accompanying them what they conceptually and practically mean and whether they apply to the individual’s particular situation.

When people ask for his help, the reverend might encourage them to go to a legal services office, to court, or elsewhere to try to find a free lawyer, or to wait for a free lawyer to visit the neighborhood if that is a possibility. He would presumably do that in some situations—for example, if someone came to him after a judgment was entered against them and their wages were being garnished, because there would be a need to respond immediately, and he might be unable to offer the necessary help. But knowing the individual members of the community as well as the reverend does, when they find him in the neighborhood and seek to rely on him, he might not want to turn them away or tell them they must go elsewhere for help filling out the court-approved answer form. People who are reluctant to seek help from someone unknown to them or to travel outside of the community might have faith and take comfort in his advice because he is with them, they know and trust him, and, in addition to advice and direction about how to fill out forms and file them, he might offer empathy and encouragement that they would not get from a website and perhaps do not expect from lawyers or other strangers.

Presumably, with the benefit of experience, the reverend might also advise people who come to him with debt problems—and who are being dunned for repayment—even before they are served with a suit. Legal problems ordinarily arise well before suits commence.⁷³ For example, a business debtor might retain a lawyer to give advice well before allegedly defaulting. Low-income people subjected to debt collection efforts might similarly benefit from legal advice about how to respond.⁷⁴ However, until they

70. N.Y. CTS., *supra* note 68.

71. *See id.*

72. *Id.*

73. Indeed, people may have legal needs not only prior to the initiation of litigation but with respect to matters that are not subject to litigation, and lawyers are not necessarily best equipped to assist in meeting all of these needs. *See generally* Kathryn M. Young, *What the Access to Justice Crisis Means for Legal Education*, 11 U.C. IRVINE L. REV. 811, 812–14 (2021) (arguing that lawyers are not necessarily best suited to addressing justice problems, particularly those that are nonjusticiable).

74. Resolving a debt collection dispute before a complaint is filed may be in the best interest of the debtor as well as the creditor. *See* UTAH BAR FOUND., UTAH BAR FOUNDATION REPORT ON DEBT COLLECTION AND UTAH’S COURTS 37 (2022), <https://www.utahbarfoundation.org/static/media/UBF2022.912d30c10e5681bf5f8c.pdf> [<https://perma.cc/HK9P-WG3X>] (finding that defendants may benefit from out-of-court resolutions but that “consumers may be reluctant to engage with plaintiffs outside of court for a number of reasons, including lack of information about how to respond or the consequences

receive a complaint, people from low-income communities are unlikely to seek, or have access to, help from lawyers.

The reverend's own education and experience are the essential assets here, but he is also willing to undergo training to make sure that his help is informed by basic instruction⁷⁵—so that, in addition to the knowledge he may bring based on his education or analytical skills, he would also have the above-average legal knowledge that may be needed to be even more effective in providing this type of help. In fact, a not-for-profit advocacy group called Upsolve has set up a program to offer this training, for free, to Reverend Udo-Okon and others like him. This is no fly-by-night organization: Upsolve has successfully developed software to enable people to produce the forms needed to file for personal bankruptcy.⁷⁶ It is branching out, and it wants to train people like Reverend Udo-Okon and others who are embedded in communities—including in locations distant from the courts—to help people who are being sued for allegedly not paying their debts. Upsolve's training program would teach the reverend and others to help members of their communities use the court-approved answer forms and advise them on how to file the forms, when to go to court, and what to do when they get there.⁷⁷

But the reverend believes that even if he gets training, he is not allowed to help his community in the way that he would like to because, in New York, practicing law without a license is a crime. He may be right. Historically, the New York courts have been leaders in slamming the door on low-income people's ability to get legal help from anyone other than a lawyer.⁷⁸ In a landmark ruling in 1919, New York's high court said that the law forbidding the practice of law by people without a law license not only targets people falsely claiming to be lawyers, but also those running businesses that offer

of not responding, power imbalance between represented plaintiffs and unrepresented defendants, fear of being scammed, or belief that engaging with the case may require a greater investment of time, money, and effort than they are able to expend”).

75. Declaration of Rev. John Udo-Okon, *supra* note 54, ¶¶ 22–23.

76. See UPSOLVE, <https://upsolve.org> [<https://perma.cc/Y6XN-N892>] (last visited Feb. 6, 2023).

77. See generally Complaint, *supra* note 16. The “Community Navigator” program is another example of a program sponsored by a not-for-profit organization that trains community members to assist their neighbors with legal problems. See MARGARET HAGAN, KATE CROWLEY RICHARDSON & SACHA STEINBERGER, COMMUNITY NAVIGATORS: THE ROLE OF COMMUNITY NAVIGATORS TO REDUCE POVERTY AND EXPAND ACCESS TO JUSTICE 9–11 (2022), <https://legallink.org/wp-content/uploads/2022/04/Community-Navigators-Legal-Link-Working-Paper.pdf> [<https://perma.cc/NN3H-8EDR>]. Participants' assistance is limited by UPL laws, but Legal Link, the organization sponsoring the program, “recognizes the need for UPL restrictions to be modernized.” *Id.* at 14.

78. See, e.g., *People v. Alfani*, 125 N.E. 671 (N.Y. 1919); see also *In re Co-operative Law Co.*, 92 N.E. 15, 16 (N.Y. 1910) (prohibiting corporations from directly or indirectly engaging in the practice of law); Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000) (recounting the historical background of *In re Co-operative Law Co.*). But see *N.Y. Cnty. Laws' Ass'n v. Dacey*, 234 N.E.2d 459 (N.Y. 1967) (excluding publications from UPL restrictions).

legal services.⁷⁹ It applies, for example, to a notary public who charges a fee to draft legal documents.⁸⁰

The 1919 decision did acknowledge that “[a]ll rules must have their limitations, according to circumstances and as the evils disappear or lessen.”⁸¹ For example, the court noted that people can draft their own wills and legal papers, and they can “[p]robably . . . ask a friend or neighbor to assist” them.⁸² But over the past century, the court has never clarified whether neighborly help in drafting legal documents falls on the right side of the line. Courts have also acknowledged that nonlawyer professionals may give advice on the law incidental to their professional work.⁸³ For example, New Jersey’s high court of equity observed seventy-five years ago that an “architect . . . must be familiar with zoning, building and fire prevention codes” in order to “draw[] plans and specifications in harmony with the law.”⁸⁴ If the architect advises a client about the codes’ requirements, the court said, the architect is not practicing law, “provided [that] no separate fee is charged for the legal advice or information, and the legal question is subordinate and incidental to a major non-legal problem.”⁸⁵ In Reverend Udo-Onkon’s situation, a New York state court could say that when people in the neighborhood ask their pastor what to do after they get served with a complaint, and the reverend downloads an answer, helps them fill it out, and advises them on how to file it and when to show up in court, that need not be prohibited as the business of practicing law.⁸⁶ The court could view it simply as neighborly help or as part of—or incidental to—the reverend’s ministry, just like when an architect advises a client about the fire code. But the New York high court has never shown an inclination to say that.

The reverend is unwilling to risk breaking the law. He will not give people advice in filling out court answer forms in debt collection cases unless a court so permits.⁸⁷ Likewise, Upsolve will not train him to give that advice unless a court so permits, because it does not want to be accused of aiding and abetting people in practicing law without a license.⁸⁸ At present, there is no form of authorization available from the state court, short of a license to practice law, that would let the reverend provide this advice with Upsolve’s training.

79. *Alfani*, 125 N.E. at 674.

80. *See id.*

81. *Id.*

82. *Id.* At that time, parties in low-stakes litigation could also ask friends to advocate for them in court. *Id.*

83. *See, e.g., Auerbacher v. Wood*, 53 A.2d 800, 802–03 (N.J. Ch. 1947); *People v. Title Guarantee & Tr. Co.*, 125 N.E. 666, 669–70 (N.Y. 1919).

84. *See Auerbacher*, 53 A.2d at 802.

85. *Id.*

86. In *Alfani*, when the New York high court first applied the state’s UPL law to a nonlawyer who did not hold himself out as a lawyer, the court emphasized that the notary in question was engaged in a commercial enterprise—the “business” of preparing legal documents. 125 N.E. at 673 (“To make it a business to practice as an attorney at law, not being a lawyer, is the crime.”).

87. *See Complaint*, *supra* note 16, at 25.

88. *See id.* at 24–25.

And so, Upsolve and Reverend Udo-Okon asked a federal court to rule that the reverend has a constitutional right under the First Amendment to give legal advice to his congregants and neighbors—with the benefit of Upsolve’s training—when members of the community receive a complaint in a debt collection case and seek his help.⁸⁹ As applied to the reverend, the law has the effect of shutting down a conversation that might ordinarily feel like a natural extension of his ministry: someone comes to him with a problem, and he gives them advice about how to deal with it. His community evidently sees it that way, too. Along with his own declaration in the case, the reverend filed a petition signed in one day by over 100 New Yorkers who said that they were interested in and would benefit from free legal advice from Reverend Udo-Okon so that they can access their legal rights in court.⁹⁰

This is much like Marilyn Brumbaugh’s case,⁹¹ although in 2022, there is even less cause for concern about the risks of incompetence or exploitation in the reverend’s case and others like it. The reverend would be helping his community members in the normal course of his pastoral interactions with them and providing his advice for free, not for money or used clothing. He would first receive training by a not-for-profit organization with a proven record and then proceed to use forms that the court has already approved. Even apart from Upsolve’s program, the internet makes legal knowledge more accessible to people like the reverend than it was a half century ago. And there is now a greater appreciation of the “justice gap”—that is, the gap between low-income individuals’ legal needs and the available resources, including lawyers, to assist them.⁹²

In May 2022, a federal district judge granted a preliminary injunction against the enforcement of New York’s UPL law against Upsolve.⁹³ The court found that the advice that the reverend proposes to give is constitutionally protected and that, as applied to the proposed advice, the state’s UPL law fails to satisfy strict scrutiny, both because there is no compelling reason for forbidding the reverend’s assistance and because the restriction is not narrowly tailored to serve its purposes.⁹⁴ The state attorney general filed a notice of appeal the next month,⁹⁵ and as of this writing, the appeal is pending.

89. *Id.* at 3.

90. See Declaration of Rev. John Udo-Okon, *supra* note 54, ¶ 20.

91. See *supra* Part I.A.

92. See, e.g., LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017) (“[T]he justice gap [is] the difference between the civil legal needs of low-income Americans and the resources available to meet those needs 86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help.”).

93. See *Upsolve, Inc. v. James*, No. 22-cv-627, 2022 U.S. Dist. LEXIS 93388, at *37–45 (S.D.N.Y. May 24, 2022).

94. See *id.*

95. See Notice of Appeal, *Upsolve, Inc. v. James*, No. 22-cv-627 (S.D.N.Y. June 22, 2022), ECF No. 77.

II. INTERROGATING THE LAWYER-DOCTOR ANALOGY

Strict UPL enforcement means that people cannot get legal advice from anyone other than a lawyer about how to deal with their specific legal problems. If a legal services office turns people away because they do not meet income or other eligibility requirements, or because the office lacks enough staff lawyers to help every eligible individual, paralegals conducting intake may give information but not give legal advice about how these people might best address their particular legal problems on their own.⁹⁶ People also may not obtain advice from nonlawyer professionals—social workers, librarians, local clergy—who are in their neighborhood, whom they know and trust, and who have greater knowledge of the law. For example, these professionals may not identify which legal forms to use and may not offer to help fill them out, even if they possess greater education and literacy, and even if their training and experience in the law are substantially above average.⁹⁷ If a suit is filed against low-income people (as in debt collection cases), or people file an action on their own (as in divorce cases), they may receive information, but not legal advice, from court personnel once they reach the courthouse.⁹⁸ In court proceedings, judges may decide not to strictly enforce procedural requirements against unrepresented people who make mistakes, but judges cannot give legal advice without compromising their own neutrality.⁹⁹ The *Brumbaugh* decision presupposes that people with serious legal problems who cannot secure legal assistance are better off on their own.

Courts applying UPL laws sometimes analogize the legal profession to the medical profession,¹⁰⁰ which, like law, is a learned profession.¹⁰¹ In

96. This may be true principally in theory because, when turning away prospective clients, paralegals, many receptionists, and other nonlawyers in legal services offices may be tempted to offer suggestions that cross the line between legal information and legal advice.

97. See Memorandum of Law on Behalf of *Amicus Curiae* National Center for Access to Justice at Fordham University School of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 16, *Upsolve, Inc. v. James*, No. 22-cv-00627 (S.D.N.Y. Mar. 1, 2022), ECF No. 28-1 (arguing that Upsolve's program would address the need for legal assistance outside the courthouse "by allowing community members to meet with qualified professionals in the community . . . where daily interactions are part of community life" because "[t]h[o]se professionals have familiar faces, [and] an established reservoir of trust and confidence with the community members"). This Essay's author served as cocounsel on this amicus brief as well as on one subsequently filed on the NCAJ's behalf in the court of appeals.

98. For a recent discussion of the restriction on court personnel's provision of "legal advice," criticizing the concept's vagueness, see Lauren Sudeall, *The Overreach of Limits on "Legal Advice,"* 131 *YALE L.J.F.* 637 (2022).

99. For discussions of how much judges may assist pro se litigants without sacrificing judicial neutrality, see, for example, Drew A. Swank, *In Defense of Rules and Roles, the Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 *AM. U. L. REV.* 1537 (2005); Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 *GEO. J. LEGAL ETHICS* 423 (2004).

100. See *supra* text accompanying notes 5, 32, 33.

101. See *United States v. Laws*, 163 U.S. 258, 266 (1896) ("Formerly, theology, law, and medicine were specifically known as 'the professions'; but as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name.

Brumbaugh, the concurring judge asserted that the need to forbid anyone but lawyers from providing legal assistance is as compelling as the need to forbid anyone but doctors from performing surgery or prescribing drugs.¹⁰² As discussed below, the regulation of medicine does have much to teach us, but courts have been drawing the wrong lessons from it. In fact, as discussed in Part II.A, nondoctors, including both lay people and other professionals, have a robust role in providing medical care. As discussed in Part II.B, this, in part, reflects the medical field's greater respect for people's autonomy to choose their own care—even if the profession regards some choices as unwise—and its openness to empiricism and experimentation to ascertain preferable modes of care. Part II.C argues that a similar openness to experimentation with alternative providers would be at least as strongly justified in the legal field as in the medical field. Therefore, a comparison to the modern medical profession argues for loosening the UPL laws' restraints on nonlawyer providers of legal care.

A. *Lessons for Courts from the Nondoctor's Role in Providing Medical Care*

1. The Legal Profession Trails the Modern Medical Profession in Authorizing Alternative Roles for Professionals

Courts comparing law to medicine overlook an obvious and important difference: in contrast to the legal profession, the medical profession has established stratified roles for many different categories of medical professionals, many of which do not require as much training and experience as medical doctors.¹⁰³ Nurses, nurse practitioners, physicians' assistants, emergency medical technicians, and other medical professionals are trained, tested, licensed, and regulated. They also learn when to refer a patient to a physician because of the complexity or riskiness of the medical problem or treatment. In contrast, most states, including New York, recognize only one category of legal professionals who are entitled to practice law independently: lawyers.¹⁰⁴ Lawyers all get the same expensive training that, in theory, qualifies them to practice any kind of law, and is followed by postgraduate continuing legal education and self-education.

The word implies professed attainments in special knowledge, as distinguished from mere skill . . .”).

102. Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1195 (Fla. 1978).

103. For an extensive and enlightening discussion on how the legal profession might benefit from stratification comparable to what exists in the medical profession, see Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. PROF. LAW. 79; see also Darcy Mills & Leah Ritter, *A Prescription for Increased Access to Justice: Lessons from Healthcare*, 2022 U. ILL. L. REV. ONLINE 45, 53 (“[E]xpanding availability of trained, supervised assistants is part of the solution to the parallel crises of insufficient medical and legal care. In both contexts, a multi-pronged approach to innovation should be welcomed rather than feared.”).

104. See *supra* notes 1–11 and accompanying text.

Of course, lawyers can employ paralegals and other categories of nonlawyers to convey their advice to clients, to prepare initial drafts of papers, and to perform other work under lawyers' supervision.¹⁰⁵ But there is plenty of evidence that the legal profession can serve the public equally well or better by expanding the range of people who are trained and certified to independently perform certain legal tasks for clients, essentially as the medical profession has done with certain medical tasks. In *Upsolve*, for example, the reverend seeks the opportunity to perform basic tasks such as selecting forms intended for pro se litigants, helping pro se litigants complete the forms, encouraging pro se litigants to show up in court, and advising them what to do when they get there.¹⁰⁶

Federal administrative law has led the way here. In immigration proceedings, where there is a dearth of legal representation, parties can get help from "accredited representatives" of recognized nonprofit organizations and from other categories of nonlawyers.¹⁰⁷ In patent proceedings, nonlawyer patent agents are authorized to represent parties upon passing an examination.¹⁰⁸ In both settings, nonlawyers acting independently may provide legal advice and other assistance that would be regarded as the practice of law under conventional definitions. Therefore, these models are different, on one hand, from models in which nonlawyers provide information (not advice) or other limited help that UPL laws permit,¹⁰⁹ as well as from models in which nonlawyers act as lawyers' agents carrying out lawyers' direction. The administrative agencies have not reported that these other classes of authorized professionals, who substitute for lawyers in immigration and patent cases, are serving the public poorly.

In some states, legislatures and courts have followed suit by expanding the legal tasks that certified professionals other than lawyers may perform

105. Expanded use of nonlawyers under lawyers' supervision potentially increases legal services available to low-income clients by making lawyers' time more efficient. See, e.g., Matthew Longobardi, Note, *Unauthorized Practice of Law and Meaningful Access to the Courts: Is Law Too Important to Be Left to Lawyers?*, 35 CARDOZO L. REV. 2043, 2076–77 (2014) (discussing New York pilot program that expands roles of trained and supervised nonlawyers in housing court and debt collection cases). But the requirement that nonlawyers receive lawyers' supervision limits not only the tasks they can perform but their utility, too.

106. Complaint, *supra* note 16.

107. See 8 C.F.R. § 292.1 (2022). See generally Beenish Riaz, *Envisioning Community Paralegals in the United States: Beginning to Fix the Broken Immigration System*, 45 N.Y.U. REV. L. & SOC. CHANGE 82 (2021) (advocating for the expansion of paralegals' role in immigration cases).

108. See Donald J. Quigg, *Nonlawyer Practice Before the Patent and Trademark Office*, 37 ADMIN. L. REV. 409 (1985). In 2016, the U.S. Court of Appeals for the Federal Circuit recognized that, like confidential attorney-client communications, clients' confidential communications with patent agents may be protected from compelled disclosure. See *In re Queens Univ.*, 820 F.2d 1287 (Fed. Cir. 2016).

109. Navigator programs are an example. See, e.g., MARY E. McCLYMONT, JUST. LAB & GEO. L. CTR., NONLAWYER NAVIGATORS IN STATE COURT: AN EMERGING CONSENSUS 17 (2019), https://www.ncsc.org/__data/assets/pdf_file/0024/53691/Justice-Lab-Navigator-Report-6.11.19.pdf [<https://perma.cc/9PVN-NRKS>] (reporting that managers of navigator programs who were interviewed for this study emphasized that navigators give legal information, not legal advice).

independently of lawyers. For close to 20 years, Arizona has allowed people to be certified as “legal document preparers.” They are allowed “to prepare or provide legal documents, without the supervision of an attorney, for an entity or a member of the public who is engaging in self-representation in any legal matter.”¹¹⁰ When it created this professional role, the Arizona Supreme Court recognized that it “has inherent regulatory power over all persons providing legal services to the public, regardless of whether they are lawyers or nonlawyers,” and that “the need to protect the public from possible harm caused by nonlawyers providing legal services must be balanced against the public’s need for access to legal services.”¹¹¹ Similarly, California licenses “legal document assistants” to prepare court documents (though not to give legal advice).¹¹² The educational requirements are far less demanding than they are for lawyers, and, as a result, the state reportedly has now licensed more than 30,000 legal document assistants.¹¹³ Presumably, document preparers have proven by their example that a lot of legal work does not require a law license because the Arizona Supreme Court recently approved a new class of legal professionals—licensed paralegals. They are allowed to give legal help, subject to professional conduct rules, in areas that the court regards as not so complex—i.e., family law (such as in divorce cases), administrative law, and certain civil and criminal court cases.¹¹⁴ And Delaware recently authorized nonlawyers, under the auspices of legal aid offices, to represent tenants in eviction cases.¹¹⁵

Various groups have urged state courts to do more of this. In New York, for example, a commission appointed by the chief judge recently urged the court to allow social workers to perform some legal tasks with additional training. The commission’s working group observed that

[t]he drafting of documents might traditionally have been considered the practice of law but today, with the Do-It-Yourself Kiosks whose documents have already been pre-approved by the [Office of Court Administration], social workers should be permitted to read the existing instructions about

110. CODE OF JUD. ADMIN. § 7-208 (ARIZ. SUP. CT. 2021).

111. *Id.*

112. *Paralegal Certification in California*, PARALEGALEDU.ORG, <https://www.paralegaledu.org/california/> [<https://perma.cc/RA5U-FSNP>] (last visited Feb. 6, 2023).

113. *Id.*

114. Press Release, Ariz. Sup. Ct., Arizona Supreme Court Leads Nation in Tackling Access to Justice Gap with New Tier of Legal Services Providers (Dec. 9, 2021), [https://www.azcourts.gov/Portals/0/LP%20Program/LP%20Exam%20Statistics/120921LSP\(1\).pdf](https://www.azcourts.gov/Portals/0/LP%20Program/LP%20Exam%20Statistics/120921LSP(1).pdf) [<https://perma.cc/H7MW-WWJ2>].

115. See Order Adopting Rule 57.1 of the Rules of the Supreme Court of Delaware (Del. Jan. 28, 2022), <https://courts.delaware.gov/forms/download.aspx?id=167228> [<https://perma.cc/MQ9Y-84L5>]. For additional examples, see Karen Sloan, *Non-Lawyer Licensing Movement Gains Steam with Oregon Approval*, REUTERS (July 20, 2022, 12:56 PM), <https://www.reuters.com/legal/legalindustry/non-lawyer-licensing-movement-gains-steam-with-oregon-approval-2022-07-20/> [<https://perma.cc/NNM9-XYAQ>].

such documents and to explain them to the tenant-litigant without running afoul of prohibitions on the practice of law by non-lawyers.¹¹⁶

For the legal profession, the courts' authorization of nonlawyer professionals has been piecemeal, highly selective, haphazard and, in some places, unofficial.¹¹⁷ State courts have never gotten together to create nationwide categories of licensed legal professionals who have authority to perform discrete legal tasks, and only a few high state courts like Arizona's have authorized nonlawyers to provide discrete legal assistance without a lawyer's supervision.

To the extent that courts are experimenting with the certification of legal professionals to do limited tasks, they are acting in an area where there is a lot of uncertainty: Will clients use nonlawyer professionals because they are less expensive or more accessible or for other reasons? Will clients get good enough outcomes with nonlawyer professionals? Which tasks can people other than lawyers be trained and certified to perform well enough, and what training and oversight are sufficient? Will nonlawyers abide by professional conduct rules governing lawyers and, if their communications with clients are not privileged, will clients be prejudiced as a result? The Utah Supreme Court is allowing experimentation, having created a so-called "regulatory sandbox" in which nonlawyers or organizations other than law firms can provide legal services on a trial basis.¹¹⁸ That way, rather than relying on assumptions about what people other than lawyers are and are not capable of doing, the court can gather evidence. Among Utah's recent innovations is a program to train nonlawyers to serve as licensed paralegal practitioners, who are authorized to engage in the practice of law in discrete areas such as specified family law matters (including temporary separation, divorce, custody, and support matters) and debt collection matters in which the amount in issue is no more than the limit for small claims court.¹¹⁹ But openness to experimentation is the exception; for the most part, the legal profession remains resistant to change, lagging far behind the medical profession when it comes to opening the door to certifying other types of legal professionals.

116. COMM'N TO REIMAGINE THE FUTURE OF N.Y.'S CTS., REPORT AND RECOMMENDATIONS OF THE WORKING GROUP ON REGULATORY INNOVATION 41 (2020), https://www.nycourts.gov/LegacyPDFS/publications/RWG-RegulatoryInnovation_Final_12.2.20.pdf [<https://perma.cc/8ZGK-8B66>].

117. See, e.g., Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 *FORDHAM L. REV.* 1315, 1316 (2021) (finding that some judges in domestic violence cases "rely[] on a shadow network of nonlawyer professionals to substitute for the role counsel has traditionally played").

118. Press Release, Utah Cts., Utah Supreme Court to Extend Regulatory Sandbox to Seven Years (May 3, 2021), <https://www.utcourts.gov/utc/news/2021/05/03/utah-supreme-court-to-extend-regulatory-sandbox-to-seven-years/> [<https://perma.cc/LF2H-WJXR>]; see also Deno G. Himonas & Tyler J. Hubbard, *Democratizing the Rule of Law*, 16 *STAN. J.C.R. & C.L.* 261, 273–78 (2020) (describing Utah's regulatory sandbox).

119. UTAH SUP. CT. R. PRO. PRAC. 14-802; see also Deno Himonas & Timothy Shea, *Licensed Paralegal Practitioners*, *UTAH BAR J.*, May–June 2016, at 16.

2. The Legal Profession Trails the Medical Profession in Allowing People Without Professional Training to Provide Basic Help, Alternative Help, and Urgently Needed Help

As others have observed, the analogy to the regulation of medical care overlooks that not all medical care is as complex or dangerous as performing surgery or prescribing medication, and, consequently, not everything requiring above-average medical knowledge falls in the exclusive province of doctors and other licensed medical professionals (or others acting under their supervision).¹²⁰ Nonprofessionals with modest training and experience may perform many conventional medical procedures. Ordinary people may need training to give mouth-to-mouth resuscitation, use a defibrillator, perform the Heimlich maneuver or give injections, but they do not need a professional license following years of medical education. The amount of training needed is proportional to the complexity of the medical task. We do not call ordinary people “pseudo-doctors” or punish them for practicing medicine without a license when they perform tasks like these that they have learned to do. By analogy, helping people fill out do-it-yourself divorce forms may require above-average legal knowledge without necessarily requiring a law license—or any license or certification at all.

The analogy to the regulation of medical care also overlooks the extent to which people with medical problems have autonomy to eschew doctors and other conventional medical care in favor of alternative remedies afforded by others.¹²¹ People with health problems may turn to chiropractors, acupuncturists, kinesthesiologists, nutritionists, or masseuses, or to providers of herbal medicine, including purveyors of traditional treatments such as Ayurveda or reiki. Some alternative providers of medical care may or must be licensed, but not all.¹²² No doubt, the conventional medical profession looks skeptically on most alternative providers and believes that people with serious medical problems should see doctors and other conventional medical professionals. However, the types of medical tasks reserved exclusively to doctors and other conventional medical professionals is limited.

In contrast, for the *Brumbaugh* court, any task calling for above-average legal knowledge presumptively required a law license.¹²³ The Supreme

120. See Gillian D. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1214 n.82 (2016); see also Rebecca Love Kourlis & Neil M. Gorsuch, *Legal Advice Is Often Unaffordable. Here's How More People Can Get Help*, USA TODAY (Sept. 17, 2020, 3:15 AM), <https://www.usatoday.com/story/opinion/2020/09/17/lawyers-expensive-competition-innovation-increase-access-gorsuch-column/5817467002/> [https://perma.cc/3HJA-GPX2] (“Just imagine if only the surgeon were allowed to diagnose your sore throat.”).

121. See generally Anna C. Smith, *The Regulation of Complementary and Alternative Medicine (CAM) in South Carolina: What is Happening and What Needs to Change*, 70 S.C. L. REV. 1049 (2019) (reporting that South Carolina does not regulate the provision of complementary and alternative medical care, such as homeopathy and naturopathy, and that more than 40 percent of the state’s residents avail themselves of such care).

122. See *id.*

123. See *supra* notes 37–39 and accompanying text.

Court of Florida still looks to the *Brumbaugh* decision when it has a question about what kind of help nonlawyers can provide.¹²⁴ If anything, the court has come to think of the *Brumbaugh* decision as too permissive. In 2015, the court was asked whether Medicaid planners who are not lawyers may help prepare documents that people need to become eligible for Medicaid.¹²⁵ Medicaid applicants are allowed to spend down some of their assets to pay for a caregiver to provide personal care during the hours when they do not get care from their nursing homes or assisted living facilities.¹²⁶ To accomplish this, they need a personal service contract with the caregiver.¹²⁷ The Florida court decided that nonlawyers may not draft these contracts because of the risk that, if they do a bad job, the applicants will have tax liability or may even be accused of fraud.¹²⁸ What is more, the court forbade publishing companies from marketing legal kits and forms in Florida that help people prepare documents such as these because of the harm that could result.¹²⁹ The court said that social changes since 1978, when it decided Marilyn Brumbaugh’s case, and “especially the use of the internet,” called for it to crack down on the publication of legal forms.¹³⁰

What these kinds of decisions ignore—and fail to take away from the analogy to the professional regulation of medicine—is that there may be simple legal advice and assistance that people can provide with less than three years of law school, just as ordinary people can learn to provide simple, and often urgently needed, medical assistance. There are online courses to learn such medical procedures as first aid and cardiopulmonary resuscitation (CPR). Nonlawyers may become competent to perform some legal tasks with an equivalent amount of training or self-education—and with far less than a three-year course of law school instruction.

This is not to suggest that all legal tasks can be competently performed by nonlawyers with a modicum of training and experience; nor is this to suggest that, with respect to all legal problems, nonlawyers would usefully expand the available options even if they could generally perform competently. It would be hard to make the case for lay defenders in criminal cases, when defendants face the possibility of prison and, if indigent, have a constitutional right to a lawyer (if not to a well-qualified one or to one whom they select). Perhaps courtroom advocacy in many civil cases is similarly high-stakes and complicated. Perhaps there are other reasons to forbid friends, neighbors, and nonlawyer professionals from serving as courtroom advocates even if they are capable. Courts might believe lawyers are necessary to preserve the integrity of court proceedings or simply to keep the proceedings running smoothly by making sure advocates know what they are doing and answer to

124. See, e.g., Fla. Bar re Advisory Opinion—Medicaid Plan. Activities by Nonlawyers, 183 So. 3d 276, 285 (Fla. 2015).

125. *Id.*

126. *Id.*

127. *Id.* at 280, 285.

128. *Id.* at 285.

129. *Id.*

130. *Id.*

the court, although courts and legislatures still recognize some exceptions to the ban on lay courtroom advocacy.¹³¹ Perhaps, as New York's high court once suggested, people need skilled assistance especially when it comes to drafting legal documents because there is no judge in the room to protect the client from the drafter's "[i]gnorance and stupidity."¹³² Perhaps every legal task requires some training or self-study—at least the kind of teaching easily accessible on the internet. But surely not everything that calls for above-average knowledge of the law is the legal equivalent of surgery, requiring the legal profession's equivalent to medical school, an internship, and a medical residency.

Federal administrative proceedings suggest the value of nonlawyers' assistance. Federal laws have compelled state courts to allow people who are not lawyers to represent parties in federal administrative proceedings. In Medicaid administrative proceedings, parties can get advice from anyone and bring anyone they want to the adversary proceeding to help them.¹³³ As a consequence, social workers, working independently, often help people obtain government benefits.¹³⁴ Some legal advocacy groups have made it part of their mission to train social workers to do this, while making lawyers available as backup, to give advice on problems that the social workers find difficult.¹³⁵ In special education hearings, parties may be accompanied and advised by anyone "with special knowledge or training with respect to the problems of children with disabilities."¹³⁶ Therefore, parents seeking special education benefits for their children can get help from other parents who have had experience with the same process. Some state courts do not like it, but federal law is the supreme law of the land.¹³⁷ No one has shown that parties to these proceedings would be better off without the option of getting advice from someone, or bringing along someone, who is not a lawyer.

*B. The Legal Profession Trails the Medical Profession in Allowing
Empirical Testing and Evaluation of Alternative Models of Providing
Professional Advice*

Unlike those in the medical profession who attempt to resolve medical uncertainty by testing, research, and experimentation, courts are comfortable making law by relying on unproven empirical assumptions without testing

131. See, e.g., *Burlington Police Dep't v. Hagopian*, 184 N.E.3d 789 (Mass. App. Ct. 2022) (police officer permitted to prosecute civil motor vehicle infraction); *Lexington Pub. Schs. v. K.S.*, 183 N.E.3d 372 (Mass. 2022) (assistant principal permitted to initiate and litigate judicial proceedings on behalf of the school district with a petition for a child requiring assistance).

132. *People v. Alfani*, 125 N.E. 671, 673 (N.Y. 1919).

133. See 42 C.F.R. § 435.908(b) (2022) (permitting Medicaid applicants to choose anyone to assist in the application or renewal process).

134. See NYCBA Comm. on Pro. Ethics, Formal Op. 2017-4 (2017) (addressing work of "a caseworker employed by, or working under the aegis of, a social services organization" and "assisting a Medicaid applicant in completing the application form").

135. See *id.*

136. 20 U.S.C. § 1415(h)(1).

137. See, e.g., *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379 (1963) (holding that federal law allowing nonlawyers to advocate in patent cases preempts the state's UPL law).

them. The medical profession's commitment to accumulating data and testing is everywhere apparent.¹³⁸ The U.S. Food and Drug Administration's licensing of pharmaceutical products for medical purposes requires testing that establishes the product's safety and efficacy.¹³⁹ Medical techniques are developed and refined. Medical knowledge is always developing, and conventional understandings are often discarded based on new studies that follow scientific standards. And public health suffers when empirical knowledge is suppressed or not pursued, such as when tobacco companies suppressed knowledge of tobacco's adverse effects on health.¹⁴⁰

In the development of the law, in contrast, courts often eschew the collection of data and experimentation, relying instead on anecdotes, impressions, received wisdom, and analogies—indeed, this is a hallmark of common-law development. This is sometimes because experimentation leading to empirical knowledge is not feasible.¹⁴¹ But often it is because untested assumptions are embedded so deeply that courts assume that they cannot be disproven. This is true with respect to the regulation of law practice in particular.¹⁴² Courts' weak analogy to the regulation of medical assistance is just one example.

When it comes to whether people other than lawyers—ordinary people, other professionals, or paralegals—would provide legal assistance safely and effectively, much is unknown. Undoubtedly, if permitted to provide legal assistance, some people who are not lawyers would give poor advice, draft inadequate documents, or fleece clients, just as some lawyers now do. But the risk may not be appreciably higher than it is for lawyers. Further, word of mouth might enable people to avoid incompetent providers, people might gravitate to members of the community whom they know and justifiably trust, and the harms from bad advice might be easily remediable. For these and other reasons, low-income individuals, on average, might be far better served by being able to take the risks posed by nonlawyer providers of legal help rather than being denied this alternative. Given that many of those denied access to nonlawyers will get no help at all, one might ask: is the UPL cure worse than the disease? Existing empirical evidence looks favorably on the use of nonlawyers,¹⁴³ and experimentation would help provide additional

138. See, e.g., Smith, *supra* note 121, at 1055 (discussing federally funded research into alternative medicine).

139. See *id.* at 1056 n.41.

140. See PHILIP J. HILTS, *SMOKE SCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP* (1996). For a discussion of lawyers' role in suppressing this medical knowledge, see STANTON A. GLANTZ, JOHN SLADE, LISA A. BERO, PETER HANAUER & DEBORAH E. BARNES, *THE CIGARETTE PAPERS* (1996); see also Bruce A. Green, *Thoughts About Corporate Lawyers After Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun"?*, 51 DEPAUL L. REV. 407 (2001).

141. See Rhode & Ricca, *supra* note 14, at 2587–88, 2603–04 (conducting study of over 100 UPL decisions and finding that courts "typically make[] sweeping assertions about the potential for injury, often unaccompanied by actual evidence").

142. See *id.*

143. See, e.g., Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883, 885–91 (2004) (reviewing empirical studies showing nonlawyers' competence to undertake legal work); Rebecca L. Sandefur,

information,¹⁴⁴ but experimentation in employing nonlawyers to assist the public is restricted or curtailed by UPL laws.¹⁴⁵

Answers to many other questions might further help courts to make wise decisions in their regulatory role. Nonlawyers may be capable of addressing some legal questions more proficiently than others. For example, they may provide more reliable help with no-fault divorces than with contested divorces because contested divorces are more complicated, nonlawyers are too prone to making errors, and errors are unlikely to be caught and corrected by court clerks, judges, and others. Some nonlawyers may be more qualified than others to help people with some legal problems. For example, social workers, perhaps with modest additional training, may be more reliable than librarians in helping complete legal forms. Some forms of nonlawyer assistance might be more trustworthy than others. For example, nonlawyers may be more capable of using templates in divorce and debt collection cases than in drafting legal documents from scratch.¹⁴⁶ If the regulation of law practice progressed in parallel with medical regulation—that is, with a commitment to empiricism and experimentation—courts would seek answers to these kinds of questions rather than offering timeworn bromides about “an ounce of prevention” to justify a virtually wholesale judicial prohibition on nonlawyer practice.¹⁴⁷

Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms, 16 STAN. J.C.R. & C.L. 283, 312 (2020) (“Consumers value and purchase legal services from providers who are not fully qualified attorneys. The legal work produced by nonlawyers can be as good as—and sometimes better than—that of lawyers. The current restrictions on nonlawyer practice are unsupported by evidence about nonlawyer quality or consumer demand.”).

144. For a discussion of Washington’s short-lived experiment in licensing paralegals as “Limited License Legal Technicians,” who can give advice on particular matters, see Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE U. L. REV. 1 (2018).

145. For a discussion of how UPL laws undermined experimentation with nonlawyers in Maryland, see Michele Cotton, *Experiment, Interrupted: Unauthorized Practice of Law Versus Access to Justice*, 5 DEPAUL J. FOR SOC. JUST. 179 (2016).

146. See, e.g., *Sussman v. Grado*, 746 N.Y.S.2d 548 (Sup. Ct. 2002) (finding that a paralegal engaged in UPL by preparing deficient papers for a turnover order, which the court clerk properly rejected).

147. See, e.g., D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2122–24, 2209 (2012) (arguing that because it will never be possible to provide lawyers to all low-income persons dealing with the legal system, it is important to study “service provider outreach, intake, and client selection systems” and to identify “cases in which some form of representation will make the difference between an unfavorable and a favorable outcome”); Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L.J. 1259, 1315 (2014) (advocating “rigorous evaluation and comparison” of “pilot projects and experiments” to ascertain “whether new categories of non-lawyer legal professionals can make a difference for the millions of people who proceed annually in civil legal matters without opportunity for any legal representation”).

*C. Experimenting with Alternatives to Conventional Professional Care
Is as Important in the Legal Field as in the Medical Field*

As discussed, courts have been reluctant to experiment with alternative providers of legal services based on now-dated analogies to the medical profession of a century ago. In the medical field, alternatives now abound, and people can make informed judgments about which to pursue based on information accumulated through study. If anything, for several reasons, the legal field should generally be equally (if not more) open to testing the efficacy of alternatives.

1. Legal Help Is Less Accessible than Medical Care

As a society, we view medical care as a necessity. Even if we fall short, we aspire to provide medical care to everyone who needs but cannot afford it. But we do not regard legal help as anything like a necessity, and it is not abundantly available.¹⁴⁸ We have no legal equivalent of Medicare, Medicaid, or the Patient Protection and Affordable Care Act.¹⁴⁹ A right to a state-funded lawyer is the exception. The U.S. Constitution provides a right to counsel in many, but not all, criminal cases,¹⁵⁰ and only in very few civil cases, such as juvenile delinquency cases.¹⁵¹ Some states and cities guarantee lawyers to some people who cannot afford them in some other cases. New York City recently began funding lawyers in housing court for low-income tenants in eviction cases, although reports say that, so far, there aren't enough lawyers to go around.¹⁵²

In fact, legal help is generally unavailable to people without financial means. While emergency rooms are not supposed to turn down patients with medical emergencies, people with limited resources are not entitled to lawyers even when they have legal emergencies. There is a vast literature about the justice gap and unmet civil legal needs substantiating that most people with legal problems have to fend for themselves when they cannot

148. See *supra* note 78 and accompanying text.

149. Pub L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).

150. See *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that indigent defendants' Sixth Amendment right to appointed counsel, recognized in *Gideon v. Wainwright*, 372 U.S. 335 (1963), does not apply in misdemeanor cases in which the accused is not at risk of imprisonment).

151. Compare *In re Gault*, 387 U.S. 1 (1967) (recognizing a due process right to appointed counsel in juvenile delinquency proceedings), with *Turner v. Rogers*, 564 U.S. 431 (2011) (finding that due process does not automatically entitle a parent to appointed counsel in a civil contempt hearing if the parent faces imprisonment for failing to make parental support payments).

152. *No Lawyers Left for Hundreds of NYC Eviction Cases This Month, Legal Aid Says*, NBC (Apr. 18, 2022, 7:30 AM), <https://www.nbcnewyork.com/news/local/no-lawyers-left-for-hundreds-of-nyc-eviction-cases-this-month-legal-aid-says/3649891/> [https://perma.cc/Q9WP-ZRY9].

afford a lawyer.¹⁵³ A recent survey found that, “[o]n an annual basis, 55 million Americans experience 260 million legal problems,” and those surveyed believed that “120 million [of those] legal problems are not resolved fairly every year.”¹⁵⁴ Those hit hardest include people with “lower income, women, [and] multiracial and Black Americans.”¹⁵⁵ Other studies over the years have agreed on the magnitude of the problem.¹⁵⁶

In *Brumbaugh*, the Florida court apparently assumed that if people with legal problems were not allowed to go to Ms. Brumbaugh for help, they would go to lawyers, but the limited availability of lawyers makes this assumption untenable. Experience confirms that most people who are denied access to alternative legal providers do not, in fact, retain lawyers. They either fend for themselves or just do nothing—what the literature describes as “lumping it,” that is, accepting their fate.¹⁵⁷ We know that to be true because in many courtrooms, most people have no lawyer—e.g., tenants in eviction cases, alleged debtors in collection cases, couples in family court. Banning so-called pseudo-lawyers is clearly not motivating people to obtain legal care from a lawyer; it is denying them any legal care at all.

2. The Harms of Nonlawyers’ Bad Legal Advice Are Less Dire than the Harms of Nondoctors’ Surgery or Prescriptions

No one died on Ms. Brumbaugh’s table. If her divorce papers were defective, and the court clerk therefore rejected them, her customers could stay unhappily married for slightly longer, return, and try again. In the legal realm, where malpractice is not fatal, we can allow people even more choice and have even greater tolerance for the risk that they will sometimes make a bad choice.

3. It Is Easier to Learn to Perform Discrete Legal Tasks, Such as Giving Advice or Preparing Papers in a Particular Area of Law, than to Learn to Be a Doctor

It is easier for an educated nonprofessional to provide competent legal assistance with a routine legal matter than for a nonprofessional to conduct

153. See, e.g., LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2022), <https://lsc-live.app.box.com/s/xl2v2uraitobbzrhwtjlgj0emp3myz1> [<https://perma.cc/8HRX-UH9J>].

154. HAGUE INST. FOR INNOVATION OF L. & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., JUSTICE NEEDS AND SATISFACTION IN THE UNITED STATES OF AMERICA 6 (2021), <https://iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf> [<https://perma.cc/M5PD-CVR7>].

155. *Id.* at 8.

156. See AM. BAR ASS’N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994), https://www.wisbar.org/aboutus/membership/Documents/WisTAFApp_J_ABA_Legal_need_study.pdf [<https://perma.cc/4PL4-YVEG>].

157. See Emily S. Taylor Poppe, *Why Consumer Defendants Lump It*, 14 NW. J.L. & SOC. POL’Y 150, 157 (2019) (observing that consumers may not defend debt collection cases for various reasons, including that they “may not understand how to participate in the action” and that “participation requires debtors to find their way to unfamiliar or inconvenient courthouses, which may also interfere with work or childcare schedules”).

surgery, even routine surgery. Law is not human biology. It is the rules we collectively make for how we collectively regulate ourselves. Law is all around us, it is part of ordinary life and culture, it regulates almost everything we do: ours is a “law-thick world.”¹⁵⁸ As Marilyn Brumbaugh put it, “[t]he laws are made for all of us.”¹⁵⁹ A particular law or legal process should be accessible to ordinary people in a way that perhaps the inner workings of the human body, in all their complexity, are not. After all, you do not have to be a lawyer to write the law, even complicated law—many legislators are not lawyers. You do not have to be a lawyer to apply the law on the streets—police officers do it every day. You do not even have to be a lawyer to be a judge—upstate New York and other parts of the country have many justices who are not lawyers.¹⁶⁰

4. Unauthorized Practice Restrictions Encroach on People’s Autonomy to a Greater Extent in Law than in Medicine

Even when the law is very complicated, one might expect that as a matter of ordinary social interaction, people should have leeway to help each other understand and navigate the law. We all make frequent personal decisions about what the law requires—in effect, we constantly advise ourselves about the law and how to comply with it. We may have varying levels of personal knowledge, some acquired through experience and some through education. We can talk to each other about the law and our legal problems; no one could stop us. Why shouldn’t those who know more be allowed to advise those who know less? If you are allowed to buy a book and use it to try to figure out how to deal with your legal problem on your own, why can’t you get help from someone with personal experience in dealing with similar problems?

III. STATE COURTS’ ADMINISTRATIVE RESPONSIBILITY TO EXPAND THE AVAILABILITY OF LEGAL ASSISTANCE

The plaintiffs in *Upsolve, Inc. v. James* asked a federal district court to decide that New York’s UPL law is unconstitutional as applied to them. Courts had previously rejected First Amendment challenges to state-level UPL laws.¹⁶¹ But constitutional doctrine is evolving, the lawsuit was carefully constructed, and the speech and associational interests of people in

158. Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1708 (2008).

159. Spear, *supra* note 17.

160. See Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1311–15 (2022) (documenting that 32 states allow nonlawyers to serve as judges in courts adjudicating low-level cases). It seems something paradoxical that UPL laws forbid nonlawyers from assisting parties in judicial proceedings over which nonlawyers may preside.

161. See Michele Cotton, *Improving Access to Justice by Enforcing the Free Speech Clause*, 83 BROOK. L. REV. 111, 114, 118, 126–29 (2017) (reviewing constitutional challenges to UPL laws); see also Rhode, *supra* note 6, at 44–96 (analyzing the constitutionality of UPL laws in 1981). For an argument that the First Amendment does not restrict professional licensing, see Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501 (2019).

the South Bronx who have no counsel—and of those willing to help them—could not be lightly disregarded. The plaintiffs argued that the court should strictly scrutinize the UPL law as applied to the advice that Reverend Udo-Okon and others propose to give because it impinges on the plaintiffs’ freedom of speech and association as well as on the rights of those seeking their help.¹⁶² The state asserted that Upsolve and the reverend are engaged in “conduct,” not “speech,” and therefore a more deferential review of the state law is warranted.¹⁶³

Focusing on Reverend Udo-Okon’s discussion with a parishioner about how to answer a state-court complaint in a debt-collection lawsuit, the plaintiffs seemed to have the better of the argument.¹⁶⁴ Even when *lawyers* give legal advice, they are engaged in protected speech, not conduct.¹⁶⁵ At least without a compelling state justification, lawyers cannot be punished for giving good-faith but erroneous advice.¹⁶⁶ It seems obvious that when nonlawyers give advice to friends, neighbors, or parishioners about how to respond to their legal problems, they are engaged in speech, just as when they give advice about how to deal with difficult family relationships or how to cope with loss, tragedy, or trauma. Labeling one “the practice of law” or the other “the practice of therapy” does not transform it from speech into conduct. And to compound the problem, the speech in question is restricted based on its content: the law forbids Reverend Udo-Okon’s advice about how to deal with a suit but not about how to deal with spiritual crises or other personal problems. Because the reverend is simply being helpful, and not pursuing financial or commercial gain, this content-based restriction on his speech is subject to strict scrutiny rather than the less demanding review accorded to restrictions on commercial speech. The state must show that a

162. See Complaint, *supra* note 16, at 25–26.

163. Defendant Letitia James’ Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 11–13, *Upsolve, Inc. v. James*, No. 22-cv-00627 (S.D.N.Y. Apr. 15, 2022), ECF No. 58.

164. The reverend does not propose to charge parishioners for advice, and therefore his proposed advice is not incidental to a business that comprises the sort of conduct—the practice of law—that the state has great leeway to restrict for the public’s protection. When people receive friends’ and neighbors’ advice about how to respond to a complaint—or librarians’, social workers’, or pastors’ advice about how to fill out self-help legal forms—the interaction is speech about the law, and previous First Amendment decisions should require the state to offer a much more compelling justification for the restriction. Unless the federal court disposes of the case on some procedural ground, it will have to grapple with the question of how to describe the advice the reverend proposes to offer, and that his parishioners have indicated they seek, as well as whether the state has a strong enough reason to forbid him from giving that advice.

165. See *In re Vinluan v. Doyle*, 60 A.D.3d 237, 250 (N.Y. App. Div. 2009) (citing, among others, *In re Primus*, 436 U.S. 412, 432 (1978), and *NAACP v. Button*, 371 U.S. 415, 429 (1963)). Accordingly, the mere fact that lawyers are licensed professionals does not mean that their speech in the context of law practice is “professional conduct” exempt from First Amendment scrutiny. See *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018). For recent discussions of the constitutionality of restrictions on lawyers’ speech, see Bruce A. Green & Rebecca Roiphe, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, 50 HOFSTRA L. REV. 543 (2022); Bruce A. Green & Rebecca Roiphe, *Lawyers and the Lies They Tell*, 69 WASH. U. J.L. & POL’Y 37 (2022).

166. See *In re Vinluan*, 60 A.D.3d at 250–51.

criminal law forbidding this type of speech is narrowly tailored to serve a compelling state purpose.¹⁶⁷ The district court in Upsolve’s lawsuit found that the state could not meet this burden, and now the court of appeals will have an opportunity to consider the question.

But the constitutional question addressed to the federal court should not overshadow an equally important one implicitly posed to the state judiciary in its administrative capacity, namely, whether to authorize Upsolve or others to train nonlawyers to give modest legal advice and assistance in preparing legal documents. In general, state courts have a responsibility to improve the judicial process, and this is particularly so with respect to aspects of the process, such as the regulation of law practice, over which they have lawmaking authority.¹⁶⁸ Pursuant to this authority, a state judiciary has the power to authorize people who are not lawyers to perform legal tasks that one might describe as the practice of law.¹⁶⁹ So even if Reverend Udo-Onkon’s community does not have a constitutional right to provide help, the court should allow him to provide it either because it would do more good than harm or because it *might* do more good than harm, and the only way to find out is to grant authorization on an experimental and provisional basis.

New York State’s high court has various avenues for authorizing the reverend and others like him to give modest help to people with relatively simple legal problems. The court can simply say that a particular task, such as advising someone on how to fill in and file a court self-help answer form in a collection case, is not the practice of law, or that even if this task *is* the practice of law, anyone is allowed to do it, subject to conditions such as that the task not be compensated.¹⁷⁰ Or the state court can say that some

167. *Cf.* Holder v. Humanitarian L. Project, 561 U.S. 1, 26, 39 (2010) (upholding the constitutionality of a federal statute that prohibits providing “material support” to foreign terrorist groups because the statute did not suppress “pure political speech”).

168. *See generally* Bridget Mary McCormack, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 YALE L.J.F. 175, 189 (2021) (“As first-hand observers of the flaws in our legal system, judges are uniquely positioned to help fix them.”).

169. *See supra* text accompanying note 116.

170. Some state courts currently have mechanisms for making ad hoc decisions to authorize nonlawyers to provide certain legal assistance. For example, a UPL committee under the auspices of the Supreme Court of New Jersey recently authorized nonlawyers, without compensation, to advocate for parents in special education cases in the context of informal interactions and mediations with education officials. *See* N.J. Comm. on the Unauthorized Prac. of L., Op. 57 (2021). In special education cases, under federal law, nonlawyers, who are typically parents who have been through the process themselves, may advocate for parents in administrative hearings, but the federal law does not specifically authorize nonlawyer advocacy outside the hearings. The committee recognized that, although advocating outside the hearings constitutes the practice of law, parents inexperienced with the process would benefit from this assistance. It explained:

[T]here is little doubt that parents often need advocates, lawyer or non-lawyer, at such meetings. There is also little doubt that lawyers are more expensive than non-lawyer advocates and lower-income and even moderate-income parents would not be able to afford a lawyer. There are some pro bono lawyers but the need far exceeds the demand. Many parents would not qualify for pro bono assistance. There are far more non-lawyer advocates offering services pro bono through various non-profit organizations than there are lawyers offering such services [N]on-lawyer advocates are generally helpful to parents; . . . there is little

particular people who are not lawyers can do the task or be certified do it. As the courts have done in Arizona, the judiciary can create a separate process for people who are not lawyers to get training and certification, and be subjected to oversight and regulation, to allow them to perform particular tasks.¹⁷¹ Should New York's state judiciary authorize Upsolve to train, certify, and oversee people to give advice about how to prepare an answer in a debt collection lawsuit? If not, should it authorize other institutions—for example, educational institutions or bar associations—to create licensing programs to enable people to perform discrete legal tasks like this one without a law license? Which people and which tasks?

In Reverend Udo-Onkon's case, various individuals and groups submitted briefs on opposite sides as friends of the court.¹⁷² To some extent, there was agreement. Even those skeptical of Upsolve's solution agreed that there is a problem of predatory lending and debt collection abuses,¹⁷³ and they recognized that there are not enough free lawyers for "every low-income New Yorker sued by a debt collector"¹⁷⁴ and that there are a staggering

demonstrable harm to the public by permitting them to operate; . . . they provide a less-expensive option to parents and children; and . . . parents and children who use them are aware of the risk and willingly accept that risk [T]he public interest favors permitting non-lawyer advocates who have knowledge or training with respect to children with disabilities and their educational needs to engage in this activity.

Id. at 10–11.

171. *See supra* notes 110–15 and accompanying text.

172. *See, e.g., Amicus* Brief of Professor Rebecca L. Sandefur in Support of Plaintiffs' Motion for a Preliminary Injunction at 2–3, *Upsolve, Inc. v. James*, No. 22-cv-00627 (S.D.N.Y. May 24, 2022), ECF No. 38-1 ("Like countless others across the country, the vast majority of New Yorkers facing debt collection actions cannot afford counsel and are unable to adequately represent themselves Research concerning programs in other States and common law jurisdictions demonstrates the success of trained nonlawyers in helping overcome . . . access to justice barriers."); Brief of *Amici Curiae* Law Professors Who Study Access to Justice and Regulation of the Legal Profession in Support of Plaintiffs' Motion for a Preliminary Injunction at 1–2, *Upsolve, Inc. v. James*, No. 22-cv-00627 (Mar. 2, 2022), ECF No. 34-1 ("The threat of enforcement against individuals and organizations like Plaintiffs, coupled with the breadth of prohibited activity, creates a chilling effect that paralyzes civil rights organizations seeking to assist low- and moderate-income people facing debt collection actions, thereby serving as a systemic barrier to their ability to obtain meaningful access to the courts."); Brief of *Amici Curiae* the NAACP and the NAACP New York State Conference in Support of Plaintiffs' Motion for a Preliminary Injunction at 2, *Upsolve, Inc. v. James*, No. 22-cv-00627 (Mar. 1, 2022), ECF No. 25-1 ("By prohibiting the provision of free and straightforward legal advice to defendants in debt collection actions, the UPL rules not only perpetuate racial and socioeconomic disparities in the judicial system, they also threaten one of the bedrock guarantees on which this Nation's form of government was founded: the right to freely form political associations."); Brief for the Institute for Justice as *Amicus Curiae* in Support of Plaintiffs' Motion for Preliminary Injunction at 3, *Upsolve, Inc. v. James*, No. 22-cv-00627 (Mar. 3, 2022), ECF No. 45 ("[A]s applied to Plaintiffs, the [UPL] prohibition is a content-based restriction on speech. And like all content-based restrictions on speech, this application of New York's UPL prohibition is subject to strict scrutiny, which it is unlikely to survive.").

173. *See* Brief of *Amici Curiae* Consumer Law Experts, Civil Legal Services Organizations, and Civil Rights Organizations in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *supra* note 63, at 10–12.

174. *Id.* at 5.

number of default judgments in debt collection lawsuits.¹⁷⁵ Some legal services organizations nevertheless opposed Upsolve’s plan to train nonlawyers. They noted that consumer debt cases sometimes present complicated questions¹⁷⁶ and that there may be different kinds of legal questions and processes depending on the kind of debt.¹⁷⁷ They suggested that the reverend’s availability may discourage some people from seeking lawyers’ help,¹⁷⁸ and that some may be better off showing up in court without a lawyer in the hope of being treated more leniently by the judge precisely because they have gotten nobody’s help.¹⁷⁹ They argued that it would be better for the reverend to dispense legal *information*—for example, about where to look for a free lawyer or where to get court forms—rather than *advice* about which forms to select or which boxes to check.¹⁸⁰

Further, the legal services groups opposing Upsolve and Reverend Udo-Onkon asserted that letting people like the reverend perform legal tasks would create a two-tiered system of justice: those with money would go to lawyers, and those without resources would go to paralegals, or pastors, with less training than lawyers.¹⁸¹ A possible subtext is that allowing low-income people to obtain help from trained certified nonlawyers will undermine advocacy for “civil *Gideon*,” that is, indigent civil litigants’ right to appointed counsel in high-stakes cases.¹⁸² For years, the legal services bar has sought government funding for lawyers for low-income clients in housing, child custody, public benefits, and other civil cases in which the stakes are high

175. *Id.* at 11–12.

176. *Id.* at 4, 13–15.

177. *Id.* at 13–14.

178. *Id.* at 19.

179. *Id.* at 15.

180. *Id.* at 20–21.

181. *See id.* at 19–20 (arguing that permitting Upsolve to operate “would immediately relegate low-income New Yorkers, including low-income New Yorkers of color, to receiving questionable legal advice.”). When nonlawyers limit the scope of their assistance, either because their authority to provide legal assistance is restricted or because their expertise is limited, clients receive a different form of assistance than they would receive from a lawyer who represented them completely. *See* Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 HASTINGS L.J. 1367, 1374–75, 1380 n.50 (2016). But the same is true when lawyers themselves limit the scope of their representation—a practice that legal services offices and pro bono lawyers employ to address lawyers’ scarcity and that the bar has encouraged as an alternative to providing no legal assistance whatsoever. *See, e.g.*, Deborah L. Rhode, Kevin Eaton & Anna Porto, *Access to Justice Through Limited Legal Assistance*, 16 Nw. J. HUM. RTS. 1, 18–20 (2018) (reporting on an empirical study finding that limited legal services were cost-effective in a family court context); MODEL RULES OF PRO. CONDUCT r. 6.5 (AM. BAR ASS’N 2002) (liberalizing conflict-of-interest restrictions when lawyers provide limited-scope pro bono assistance). When lawyers are not available to provide full representation to low-income clients, the salient question is whether nonlawyers are as capable of providing the limited services that lawyers are otherwise available to provide. Unless nonlawyers are supplanting better-quality services that lawyers are available to provide, nonlawyers’ role ameliorates the existing two-tiered system of justice.

182. *See* Rebecca Aviel, *Why Civil Gideon Won’t Fix Family Law*, 122 YALE L.J. 2106, 2108 (2013) (“The term ‘civil *Gideon*’ now commonly serves as a shorthand for the idea that the right to appointed counsel for indigent criminal defendants recognized in *Gideon* should be extended to civil cases involving interests of a sufficient magnitude.”).

but there is no categorical federal constitutional right to counsel (as there is in criminal cases). The availability of nonlawyer assistance, they worry, would reduce the urgency for lawyers' assistance without providing the level of service available from lawyers.

On the other hand, we have a two-tiered system of justice *now*. Those with money can go to lawyers. Most of those without money get no legal assistance at all. There is no realistic possibility that lawyers will soon be afforded to low-income individuals in debt collection cases on a national scale.¹⁸³ So the question is, how are people without lawyers better off now and in the foreseeable future? By having a choice to get help from someone they know in their community who is more knowledgeable about the law, and perhaps even legally trained, but who is not a lawyer? Or by being denied that opportunity, in the hope that they will then be motivated and able to go find a free lawyer or go to court on their own without legal advice? There is good reason to think that, with some types of legal problems, trained nonlawyers can provide as good or better assistance than the average lawyer, but even if not, paraprofessionals can improve the prospects of those who would otherwise lack legal assistance. Again, the analogy to medical care is instructive. Universal health care is imaginable only because the health-care system is not entirely reliant on doctors to provide or supervise all medical care.

Whether to authorize nonlawyers to perform certain legal tasks—and which nonlawyers, which tasks, and subject to what conditions—are not the kinds of questions courts decide every day in courtrooms. They cannot be answered by legal reasoning. They certainly cannot be answered by simply comparing lawyers to doctors. These questions put courts in the position of rule makers, like legislatures or administrative agencies. They can best be answered by experimentation—by trial and error—to see how people who cannot afford lawyers are best helped by others, whether by social workers and other professionals, by friends and neighbors, or by pastors.¹⁸⁴

Undoubtedly, questions about nonlawyers' preferable role in meeting unmet legal needs would benefit from more study. In the case of consumer debt cases, for example, it would be useful to better understand why people in low-income communities are defaulting in such large numbers; why many, such as more than 100 members of Reverend Udo-Onkon's community, want a nonlawyer's legal help rather than help that may be available from a lawyer,

183. See Latonia Haney Keith, *Poverty, The Great Unequalizer: Improving the Delivery System for Civil Legal Aid*, 66 CATH. U. L. REV. 55, 87 (2016) ("The economics of a traditional legal practice make it challenging, if not impossible, for lawyers to offer their services to low-income and often modest-means individuals. As such, developing a skilled profession that can offer a subset of legal services at a lower cost (akin to nurse practitioners) has great potential to serve many more clients than feasible within the existing legal services delivery model.").

184. For a review of alternative ways in which nonlawyers can assist in the provision of legal assistance to low- and middle-income clients, see Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L.J. 1259 (2014). See also Rebecca L. Sandefur & Thomas M. Clarke, *Designing the Competition: A Future of Roles Beyond Lawyers?: The Case of the USA*, 67 HASTINGS L.J. 1467 (2016).

someone supervised by a lawyer, or an information provider; and how these people would benefit or be prejudiced by nonlawyers' help. As discussed, it would be better for courts to regulate the profession based on empirical understandings gained through experimentation than to prohibit experimentation within the profession based on assumptions that are unproven and questioned by many—as vulnerable people suffer the consequences.

Even if courts are too uncertain about the utility of nonlawyers' legal assistance to permanently liberalize current UPL restrictions, courts cannot justify continuing to do nothing about the access-to-justice problem based on shopworn assumptions about the harms that nonlawyers might inflict or based on optimism about alternative cures, such as the expansion of pro bono assistance, the possibility of expanded public funding for lawyers, technological solutions, or the simplification of legal processes. People with legal problems have an immediate need for help—there is no likelihood that there will ever be enough lawyers to serve low-income clients in matters such as debt collection defense, and many will reasonably prefer others' help over dealing with their legal problems entirely on their own.

CONCLUSION

Courts justifying UPL laws have analogized the legal profession to the medical profession, positing that it is just as important to protect people in need of legal services from malpractice and fraud committed by nonlawyers as it is to protect people with health concerns from harms caused by quack doctors. The analogy overlooks the fact that much conventional medical care, as well as alternative care, can lawfully be provided with or without a license, and with less demanding training than that required of doctors. Some advocates and academics, such as Deborah Rhode, have argued that the regulation of law practice should learn from this example by identifying legal work (such as assistance in completing legal forms) that can be done by nonlawyers, licensed paralegals, or members of other professions, rather than remaining within lawyers' exclusive domain.¹⁸⁵ In other words, the comparison between medicine and law argues *for*, not against, expanding alternatives for people with legal needs.

Although there are unanswered questions about what courts should or should not authorize, unanswered questions should inspire experimentation, not inaction. Regulating legal practice, including by deciding whom to authorize to provide legal assistance, is an essential judicial role, and one that is not adequately fulfilled by licensing and regulating lawyers while excluding others from the practice of law.

For example, the high court of New York should make *Upsolve* unnecessary by authorizing qualified nonlawyers, such as the reverend, to help community members, without compensation, to complete forms approved by the court. The court should not wait any longer for others to

185. See, e.g., RHODE, *supra* note 12, at 90–91.

solve the problem of access to justice for low- and middle-income New Yorkers such as those in the reverend's South Bronx community. It is abdicating its administrative responsibility by its inaction.¹⁸⁶ The state court cannot plausibly take the view that nonlawyers are so dangerous that they should be forbidden from advising others to the full extent that the Constitution allows. It should instead allow people to obtain—within their own communities—the basic legal advice they need to complete self-help answer forms that respond to the legal problems they confront. It should allow people to get help from trusted individuals in the community with greater knowledge, including by allowing those individuals to get trained to give advice about how to address problems that may require above-average knowledge of the law (but not a law license). At the same time, the court should consider how nonlawyers might increase available legal help in rural areas where, as *Brumbaugh* illustrates, communities may have different access-to-justice problems and even fewer legal resources.¹⁸⁷

There are many legal tasks for which you should have to be a lawyer. But just as delivering CPR does not require a medical license, not all legal tasks should require a law license. For many, a different, less demanding training and certification in law should be enough. For some tasks, self-education should be enough. In New York and nationally, state courts should create an institutional process—comparable to the existing process for licensing and disciplining lawyers—to authorize nonlawyers to provide discrete forms of legal assistance and, when warranted, to certify and regulate nonlawyer providers of legal services.

186. For almost three decades, segments of the organized bar in New York and nationally have advocated revising UPL laws to allow nonlawyers to be trained and certified to provide narrowly prescribed services that fall within the broad definition of “legal assistance”—that is, “particularized types of legal work that tends to be simpler, more standardizable, and less risky than the traditional legal services provided by members of the bar.” N.Y.C. BAR ASS’N, PROHIBITIONS ON NONLAWYER PRACTICE 32 (1995), <https://www2.nycbar.org/pdf/report/uploads/95033-ProhibitionsonNon-LawyerPractice.pdf> [https://perma.cc/87LV-2H2H] (citing 1994 draft report by an American Bar Association commission); see also Letter from Debra L. Raskin, N.Y.C. Bar President, to Janet DiFiore, C.J. of the State of N.Y., at 5–6 (Apr. 7, 2016), <https://www2.nycbar.org/pdf/report/uploads/20073066-ChiefJudgeDiFioreTransitionLetterFINAL4.7.16.pdf> [https://perma.cc/YMG9-2DCP] (supporting legislation proposed by the Office of Court Administration to create a pilot program “for the delivery of legal services” by nonlawyer advocates that would include certification requirements, employment of nonlawyer advocates by nonprofits, and a narrow definition of nonlawyer advocates’ roles); N.Y.C. BAR ASS’N, NARROWING THE “JUSTICE GAP”: ROLES FOR NONLAWYER PRACTITIONERS 32 (2013), <https://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf> [https://perma.cc/RAM7-QCEQ] (presenting proposals to “(1) permit ‘courtroom aides’ to participate in judicial and administrative hearings beyond those in which they are authorized to participate now; and (2) permit ‘legal technicians’ to provide specified forms of assistance outside judicial and administrative hearings”).

187. See generally Michele Statz, Robert Friday & Jon Bredeson, “*They Had Access, but They Didn’t Get Justice*”: Why Prevailing Access to Justice Initiatives Fail Rural Americans, 28 GEO. J. POVERTY L. & POL’Y 321 (2021) (describing the unique access-to-justice problems in rural communities).