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## IF WE DON'T GET CIVIL *GIDEON*: TRYING TO MAKE THE BEST OF THE CIVIL-JUSTICE MARKET

*Thomas D. Rowe, Jr.\**

Several years ago I served as board president of the Legal Services Corporation affiliate for Durham and some neighboring North Carolina counties. Before going to a national conference of legal-services providers for the indigent, I noticed on the program a panel about market approaches; out of interests both academic and practical, I signed up. But for reasons unknown to me that was the only panel, or one of very few, that got scrubbed.

During my service it became clear to me how unlikely it is, I would guess even with a more liberal President and Congress, that leading sources of civil legal services for those unable to afford them—such as public subsidy, pro bono, and law-school clinics—will ever fill more than a modest or moderate fraction of the perceived needs.<sup>1</sup> Much of my academic work has treated various aspects of civil-justice reform, often dealing with attorney-fee shifting<sup>2</sup> and more broadly with civil-litigation incentives.<sup>3</sup> This symposium lets me try, by drawing on my experiences with legal services and prior scholarly work, to broaden my focus and consider what market-

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\*Elvin R. Latty Professor Emeritus, Duke University School of Law. I am grateful for research support received from Duke's Eugene T. Bost Research Professorship of the Charles A. Cannon Charitable Trust No. 3. I also appreciate comments on an early-stages presentation of this project by faculty at Pepperdine University School of Law.

1. See, e.g., LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 4 (2007), available at <http://www.lsc.gov/justicegap.pdf> ("Only a very small percentage of the legal problems experienced by low-income people (one in five or less) are addressed with the assistance of either a private attorney (pro bono or paid) or a legal aid lawyer."); Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004) ("[A]bout four-fifths of the civil legal needs of low income individuals, and two- to three-fifths of the needs of middle-income individuals, remain unmet.").

2. See, e.g., Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651; Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139 (Winter 1984).

3. See, e.g., Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation—Background Paper*, 1989 DUKE L.J. 824.

oriented or market-regulation approaches might be most practical and helpful in trying to satisfy unmet civil legal-service needs<sup>4</sup>—and to think about how much it appears that such approaches may be able to succeed in doing so. To the extent that they likely cannot, that raises the urgency of pursuing the likes of civil-*Gideon* efforts<sup>5</sup> and public-subsidy increases.

I come from this angle not because of an ideological commitment to market approaches, nor am I suggesting unmixed reliance on the market. Indeed, I'd favor more public funding for, and pro bono provision of, civil legal services for the needy.<sup>6</sup> Rather, I start from the premise, accepted with some reluctance, that we are not likely to come close to filling the gaps, much less adopt a quite different approach for civil legal services—say, a broad civil version of *Gideon v. Wainwright*<sup>7</sup>—like the sometimes-advocated single payer for medical care that would radically alter the calculus. We therefore face a situation with characteristics like those that the Nobel-winning economist Kenneth Arrow identified several decades ago as distinguishing medical care from many other markets, which seem to apply as well to the civil-legal-services sector: service demand that is (some-

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4. Professor Herbert M. Kritzer, in an important article, reports findings that in several nations the correlation between income and retaining a lawyer appears relatively low, while the nature of a dispute is a much more important determinant. Herbert M. Kritzer, *To Lawyer or Not to Lawyer: Is That the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875, 900 (2008). That point hardly eliminates the significance of trying to structure markets for civil legal services so as to eliminate or reduce unwarranted barriers to access.

5. See generally Howard H. Dana, Jr., *Introduction: ABA 2006 Resolution on Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 501 (2006). The American Bar Association House of Delegates in 2006 unanimously approved a report calling upon federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction. *Report to the House of Delegates*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, 508 (2006).

6. Those like me who favor more public funding and pro bono must acknowledge the objection that such approaches can deprive recipients of the legal services of the choice whether to have those services, versus money they can spend on those legal services or otherwise as they prefer. See, e.g., Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 YALE L.J. 1443, 1481-93 (2000) (reviewing ARTHUR L. LIMAN, *LAWYER: A LIFE OF COUNSEL & CONTROVERSY* (1998) (discussing the economics of pro bono civil legal services)). But the kind of change that would follow from this criticism would require rethinking of many other benefit schemes; Medicaid recipients, for example, cannot choose dollars over medical services.

7. 372 U.S. 335 (1963) (holding indigent defendant in state criminal prosecution constitutionally entitled to appointed counsel). One significant possibility on the national level may now be the relaxation of Congressional restrictions on Legal Services Corporation affiliates, barring them from handling class actions or claims for which attorneys' fees can be awarded. For discussion and criticism of the restrictions, see Rhode, *supra* note 1, at 388-91; see generally Henry Rose, *Class Actions and the Poor*, 6 PIERCE L. REV. 55 (2007).

times) irregular and unpredictable; service supply influenced not just by buyers' wishes but by suppliers' professional judgment of clients' needs, along with frequent informational asymmetry between provider and client about needs for, and likely consequences of, legal services; and limits, from educational and licensing requirements, on market entry of providers.<sup>8</sup>

This background sets the stage for an inquiry into ways of trying to make the best of the civil-justice market to move toward optimal access to civil justice for all. "Optimal," of course, is a key modifier and is not the same as "maximum," for other values and factors including sheer costs in a setting of finite-resource tradeoffs call for attention. Also significant is the need for screening of weak claims and defenses: whatever the emphases of access proponents and litigation-explosion alarmists, both weak nuisance claims that are brought for their settlement value and their perhaps too-often-overlooked flip side—obdurate defense against meritorious claims—strike me as legitimate concerns. So does the need to try to protect consumers of legal services from exploitation and incompetence. We also cannot overlook the factors of concerns for professionalism and the abiding existence of a considerable degree of self-regulation by the bar.

Three final preliminary points are the limits on how much new ground I can break; the importance of disaggregating the types of unmet needs for civil legal services; and the distinction between litigation and transactional needs. First, the market-oriented approaches that hold some promise have received considerable discussion in existing literature, on which I draw without purporting to add much. The main function of this essay can thus be bringing together in one place, and highlighting, the leading possibilities. Second, as to disaggregating types of unmet needs: the moderate-sized damage claim that is not worth a lawyer pursuing for a contingent percentage fee is one thing, and may respond to a fee-shifting measure that would give little or no help, say, to an indigent parent not near going to court yet but seeking school-accommodation measures or medicine for a learning-disabled or asthmatic child, or to someone in early stages of a landlord-tenant dispute over housing conditions. Such distinctions can clarify whether various kinds of unmet legal needs seem more or less amenable to market-oriented approaches—and to the extent that they may not be, the possible need to push for greater public funding.

Third, as for the litigation-transactional difference, of course the focus of this symposium is on access to legal representation in civil *litigation*. Still, it seems useful to address both aspects. Measures that may help with both,

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8. See Arnold S. Relman, *The Health of Nations*, THE NEW REPUBLIC, Mar. 7, 2005, at 23, 23-24.

or primarily on the transactional side, are likely to be efficiency improvements that lower the cost of legal services, such as nonlawyer representation, “unbundled” legal services that involve less than full lawyer participation and partial self-representation, and Web-based legal information or computerized expert systems. For litigation—in civil court cases and in administrative proceedings—fee-shifting policy changes might offer considerable help, particularly but not exclusively on the plaintiffs’ side.<sup>9</sup> The obstacles to the market-oriented changes needed to assure greater access may be mainly political (as they are with greater public funding), in that resistance to the likes of primarily one-way pro-prevailing-plaintiff fee shifting would probably be substantial. Further, market-oriented approaches requiring legislation would likely require changes primarily in state law, meaning that a single federal law could not do the trick even if Congress were favorably inclined.

One starting point, for both transactional matters and some litigation, is considering just how restrictive the prohibitions on unauthorized practice of law should be. It would be unrealistic to advocate abolishing all professional licensing for lawyers, along with any restrictions on provision of legal services by nonlawyers, and relying purely on credentialing and consumer choice. Limits on prospective clients’ information about legal-service providers are a genuine concern and could leave them too exposed to exploitation and poor service. But provisions that have the effect of creating a somewhat-protected monopoly on providing a range of legal services need to be justified by true concern to protect clients from unqualified providers, rather than shielding lawyers from qualified nonlawyer competition. Although competitive practices can be strong *within* the legal profession, and have increased in recent decades with such developments as reduced restrictions on attorney advertising,<sup>10</sup> the American legal profession enjoys greater protection from nonlawyer competition than in some other nations such as England.<sup>11</sup>

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9. For those with substantial damage claims, of course, the well-established contingent percentage fee promotes access to justice without need to adopt fee-shifting rules. *See, e.g.*, Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 3, 9 (2010). But for those with smaller claims or who seek injunctive or declaratory relief, the contingent fee is no help.

10. *See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding that the First Amendment generally protects attorney advertising).

11. *See, e.g.*, Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 153-54 (2010) (discussing contrast between American unauthorized-practice restrictions and systems in the United Kingdom and the Netherlands, which “allow[] many non-lawyer service providers”); Herbert M. Kritzer, *Rethinking Barriers to Legal Practice*, 81 JUDICATURE 100, 100 (1997) (“[A]nyone in England may dispense legal advice or assist

Thus, a significant first area for consideration is relaxation of unauthorized-practice restrictions, through such measures as specialized representation by lay advocates before administrative tribunals<sup>12</sup> and use of trained paralegals with limited lawyer supervision (much as the medical sector does a considerable amount of service-providing through physicians' assistants and nurse practitioners).<sup>13</sup> Others, particularly Professors Kritzer and Rhode, have developed proposals including provision for various forms of regulation, which I should not repeat.<sup>14</sup> Here, of course, the resistance of the bar might be a significant factor<sup>15</sup>—as might the threat of antitrust enforcement if restrictions were perceived to be too anti-competitive.<sup>16</sup> But the obstacles to reform do not include lack of knowledge or ideas on what to do; we know of positive experience elsewhere and have the spadework done on what seem to be workable proposals.

Relaxing restrictions on unauthorized practice could make available less expensive providers of legal services for both litigation and transactional

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with a claim pursued outside the courts.”); Rhode, *supra* note 1, at 409 (“Other nations generally permit nonlawyers to provide legal advice and assistance with routine documents, and no evidence suggests that their performance has been inadequate.”).

12. See Earl Johnson, Jr., *Justice for America's Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393, 416-17 (2009) (discussing lay advocates in administrative proceedings); Kritzer, *supra* note 11, at 100-01 (reporting on English Citizens' Advice Bureaus with trained volunteers handling much client contact, and suggesting specialized training much shorter than law school for representation in specific areas).

13. See CHRISTINE PARKER, *JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE* 112 (1999) (discussing paraprofessionals' ability to function more on their own than they often do).

14. For proposals to relax unauthorized-practice restrictions, see, for example, HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 202-23 (1998) (after detailed reporting on studies summarized in Kritzer, *supra* note 11, advocating repeal of unauthorized-practice statutes with possible regulation in forms of forum sanctions, legal liability for malpractice, and independent disciplinary bodies); Kritzer, *supra* note 11, at 100 (discussing studies indicating advocacy by nonlawyers equally as good as, and sometimes better than, by lawyers, particularly in specific and narrow areas, and suggesting various types of regulatory controls); Deborah L. Rhode, *Meet Needs with Nonlawyers: It Is Time To Accept Lay Practitioners—and Regulate Them*, 82 A.B.A. J., Jan. 1996, at 104.

15. See, e.g., Rhode, *supra* note 1, at 407 (“In 2001, the ABA voted to strengthen enforcement efforts, and in 2003 it considered a task force proposal for a stringent model definition of unauthorized practice.”). *But cf.* A.B.A. COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 112 (1995) (“States should consider allowing nonlawyer representation of individuals in state administrative agency proceedings.”).

16. See, e.g., Rhode, *supra* note 1, at 407 (“[T]he Justice Department, Federal Trade Commission, and the ABA's own antitrust division protested that the proposal would inappropriately restrict client choices and increase prices.”); The Associated Press, *Justice Department Blasts ABA Stance on Nonlawyer Services*, LAW.COM, Dec. 27, 2002, <http://www.law.com/jsp/article.jsp?id=1039054500927>.

services. So could the “unbundling” of legal services so that parties can pay for limited legal assistance when proceeding more or less pro se.<sup>17</sup> But such an approach could call for great care—especially in litigation—to handle issues such as direct contact between a party with limited representation and counsel for a represented party.<sup>18</sup> Prepaid legal insurance plans, sometimes provided by unions or as an employee benefit, may both reduce potential clients’ reluctance to consult a lawyer and sometimes provide limited service in the manner of unbundled approaches.<sup>19</sup> Further, artificial intelligence using expert systems may permit computer evaluation and advice, helping contain problems with the increasing amount of pro se representation and holding out the promise of improving access by “massively reduc[ing] legal costs.”<sup>20</sup>

The principal measures discussed thus far would involve a lowering of regulatory barriers to market competition (such as unauthorized-practice reform) or relying on market developments (as with efficiencies from provisions of computerized expert systems). Various other measures, involving legal tweaks influencing market actors’ incentives, should help specifi-

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17. See, e.g., A.B.A. STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., PRO SE/UNBUNDLING RESOURCE CENTER, available at <http://www.abanet.org/legalservices/delivery/delunbund.html>; SUPREME JUDICIAL COURT OF MASS., IN RE: LIMITED ASSISTANCE REPRESENTATION (Apr. 10, 2009, eff. May 1, 2009) (order broadening limited-assistance representation from pilot trial courts to all trial courts in state), available at [http://www.mass.gov/courts/sjc/docs/Rules/Limited\\_Assistance\\_Representation\\_order1\\_04-09.pdf](http://www.mass.gov/courts/sjc/docs/Rules/Limited_Assistance_Representation_order1_04-09.pdf); Rhode, *supra* note 1, at 419-21; John T. Broderick, Jr. & Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 2, 2010, at A21 (Chief Justices of New Hampshire and California noting increase in pro se representation and advocating provision of “unbundled” legal services as now allowed in 41 states).

For a more radical proposal, see Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)* (Feb. 25, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1540763](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1540763) (arguing for pro se court reform—change and simplification of procedures in specialized courts, such as ones handling child-support/child-custody, landlord-tenant, and small-claims cases, that have pro se matters as a large part of their dockets—as more promising approach than civil *Gideon* to dealing with legal problems of the poor).

18. See A.B.A. SECTION OF LITIGATION, MODEST MEANS TASK FORCE, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 107-13, 143-44 (2003), available at <http://www.abanet.org/litigation/taskforces/modest/report.pdf> (discussing existing approaches and calling for clarification of communication rules).

19. See, e.g., A.B.A. COMM’N ON NONLAWYER PRACTICE, *supra* note 15, at 88-91 (discussing possible benefits of and issues with prepaid legal insurance). For further discussion of group legal services, see Rhode, *supra* note 1, at 417-18.

20. See *AI Am the Law: Computing: Software That Gives Legal Advice Could Shake Up the Legal Profession by Dispensing Faster and Fairer Justice*, THE ECONOMIST, Mar. 12, 2005, at 34, 36; Richard Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263, 273-81 (2009) (discussing prospects for and limits of “The Computer as Lawyer”); Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 1007-10 (2007) (discussing “Internet Sources of Pro Se Assistance”).

cally on the litigation side, particularly for plaintiffs.<sup>21</sup> To begin with approaches affecting liability for attorneys' fees, I have long expressed skepticism about broad loser-pays fee-shifting, at least outside business litigation involving more or less well-matched adversaries. While the loser-pays approach could encourage strong small claims (and discourage weak ones), the effective strict-liability threat of down-side exposure would be highly likely to deter reasonable but not sure-winner claims of plaintiffs with modest means.<sup>22</sup>

For tort litigation, I have developed proposals for primarily one-way pro-prevailing-plaintiff fee shifting, coupled with a formal offer-of-settlement provision letting defendants try to stop the clock on plaintiffs' fee entitlement and sanctions (which could be on either lawyer or client) for bringing or continuing baseless claims.<sup>23</sup> Such an approach should have the corrective-justice benefit of providing fuller compensation to prevailing plaintiffs, a goal not fully served when a contingent percentage fee comes out of the plaintiff's recovery. It ought as well to provide incentives for lawyers to take meritorious cases, while affording fairness and filtering for defendants by its offer and sanction provisions. We more or less have this approach already in the civil-rights area,<sup>24</sup> and my impression is that it works fairly well. Further, of course, it can help with claims for injunctive and declaratory relief as well as, or even more so than, with those for damages.

A more limited measure that is not widely used but is on the books in North Carolina is a fee-shifting entitlement for prevailing plaintiffs' counsel in cases recovering an amount smaller than a statutorily specified sum.<sup>25</sup>

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21. In some types of litigation, such as suits for money damages, defendants' ability to afford counsel is of little concern because such cases are unlikely to be filed unless defendants can pay a judgment. Cases like evictions, of course, are another matter.

22. See, e.g., Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 329 (1998).

23. See *id.* at 334-44 (discussing details of primarily one-way pro-prevailing-plaintiff proposal for tort litigation). See also 2 AM. LAW INST., REPORTERS' STUDY, ENTERPRISE RESP. FOR PERSONAL INJ. 267-316 (1991). The Study was not a document adopted by the A.L.I. but was commended by its Council, the Institute's governing body, as "a comprehensive, systematic, and scholarly analysis that should occupy a prominent place in the continuing discussion of tort liability." *Statement of the Council Re: Restatement of the Law Third, Torts: Products Liability*, 14 A.L.I. REP., Oct. 1991, at 1.

24. See 42 U.S.C. § 1988(b) (2000) (authorizing award of attorney's fee to prevailing party as part of costs in actions under several civil-rights statutes); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418-19 (1978) (explaining reasons for difference in approaches to fee awards to prevailing plaintiffs and defendants in Title VII litigation).

25. See N.C. GEN. STAT. § 6-21.1 (2008) (for personal-injury and property-damage suits, and for suits involving unwarranted refusal by insurance company to pay claim, authorizing

With such claims not worth pursuing on a contingent-fee basis, some incentive is needed if attorney—or, for that matter, qualified nonlawyer—involvement is regarded as desirable. The sum should probably be a good deal higher than North Carolina's current \$10,000, for even significantly larger claims can be uneconomical to pursue without a fee shift. And it seems important that fee recoveries be allowed to approximate or even exceed the recovery, at least in cases of unjustifiably strong defense resistance, lest the fee incentive fall short of what would make the claims worth pursuing. It is, finally, not inconceivable to render some help to access by providing for pro-prevailing-*defendant* fee shifting. For the perhaps somewhat uncommon defendant who prevails in a collection or eviction proceeding, for example, allowing a reasonable fee award might enable those with strong defenses to obtain counsel rather than proceed pro se or default. A 1984 survey of state fee-shifting statutes found 8.4% of 1,974 statutes unearthed to award fees to prevailing defendants, although it did not give examples.<sup>26</sup>

Other litigation-side proposals have been somewhat more theoretical so far. There has been considerable academic discussion of the sale of single claims<sup>27</sup> or auctions for large numbers of small claims.<sup>28</sup> This idea is based somewhat on the theory that if lawyers can in effect buy a third or 40% of a claim or group of claims with a contingent percentage fee, should someone—lawyer or otherwise—be able to buy 100% of a group of related claims and pursue them on a consolidated basis more or less as if an assignee? Prior experience with litigation of individual and small groups of claims would be necessary to establish a basis for bidding. Even defendants might be allowed to bid, with the claims regarded as settled and the proceeds distributed to the claimants if the defendants bid highest. There has also been discussion, mainly in Great Britain, of a contingency legal aid fund, which might be initially supported by a government stake but then expected to pay its own way by taking percentages of recoveries in cases it

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award of reasonable attorney fee when amount recovered is \$10,000 or less). Such an approach could be in addition to a broader primarily one-way pro-prevailing-plaintiff fee-shifting scheme, particularly if fees in damage cases under that scheme were calculated on a percentage-of-recovery basis—which, without more, would leave many small claims not worth pursuing.

26. See Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 330 (Winter 1984).

27. See generally Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697 (2005) (discussing economic and noneconomic issues in alienability of claims).

28. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 105-16 (1991) (advocating experiment with auction approach to large-scale, small-claim class and derivative suits).

supported.<sup>29</sup> In addition, Ontario and Quebec have funds to support class actions, with the Quebec fund having been quite active.<sup>30</sup>

On the transactional side, the main market-oriented hope appears to be with improvements to efficiency and concomitant cost reductions, several forms of which were discussed above in the context of measures that could help with both litigation and transactional matters. Relaxation of unauthorized-practice rules to let qualified nonlawyers, including paralegals with limited lawyer involvement, aid clients by providing legal services in non-litigation situations, is worth further exploration,<sup>31</sup> as may be some expanded use of prepaid legal services.<sup>32</sup>

Having surveyed the possibilities, I find myself not terribly optimistic about the extent to which market measures of the sort discussed here can adequately meet the legal needs of the poor and those of modest means.<sup>33</sup> Particularly with transactional needs, people generally need *some* money to take advantage of even low-cost services. It may also be a stretch to expect that awards in fee-shifting regimes, if they could be enacted, would be adequate in comparison to market rates paid by clients with resources. (Maybe I better understand now why that panel was called off, although I still think that the effort of working through the possibilities is worthwhile.)

Improvements do seem possible, especially when it comes to making pursuit of smaller claims viable through fee-shifting measures (notwithstanding the political obstacles to their enactment), and improved efficiency through such measures as relaxation of unauthorized-practice restrictions and allowing unbundled delivery of legal services. I fear, however, that what Professor John Leubsdorf wrote many years ago remains true: “Although market reforms might reduce the cost of legal services and enable indigents with valuable claims to finance legal proceedings by borrowing against their claims, many poor people with perceived legal needs

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29. See JUSTICE (SOCIETY), CLAF: PROPOSALS FOR A CONTINGENCY LEGAL AID FUND 1 (1978); David Capper, *The Contingency Legal Aid Fund: A Third Way to Finance Personal Injury Litigation*, 30 J.L. & SOC’Y 66 (2003).

30. See Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT’L L. 125, 136-38, 145-46 (2003) (discussing workings of funds in Quebec and Ontario, and proposals for similar funds in Australia).

31. See *supra* text accompanying notes 13-14 (discussing possible relaxation of rules on unauthorized practice of law).

32. See, e.g., Molly Selvin, *No Joke: Lawyers at Bargain Rates*, L.A. TIMES, May 20, 2007, at C1; *supra* text accompanying note 19.

33. See PARKER, *supra* note 13, at 41 (regarding it as “naive” to expect market approaches to let a majority afford needed legal services, but noting that they can help those with some resources to spend on legal services and when litigation can provide a source for fees).

would remain without lawyers.”<sup>34</sup> That likelihood in turn brings us back to the centrality of increased funding for legal services, whether by expanded appropriations or some form of civil *Gideon*, as a major element in narrowing the gaps now existing for access to civil justice.

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34. John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1035 (1982) (citations omitted).