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Experiment, Interrupted: Unauthorized Practice of Law Versus Access to Justice

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EXPERIMENT, INTERRUPTED:
UNAUTHORIZED PRACTICE OF LAW
VERSUS ACCESS TO JUSTICE

Michele Cotton

I. THE PROBLEM OF ACCESS TO CIVIL JUSTICE AND
POTENTIAL SOLUTIONS

According to the 2011 report of the World Justice Project, the United States ranks twentieth out of twenty-three “high-income” countries in the ability of people to access and afford civil courts. The only countries that ranked lower were Poland, Croatia, and Italy. Hardly ignorant of the difficulties that Americans with civil legal problems face, the U.S. Department of Justice (DOJ) began an Access to Justice Initiative in March 2010 in an attempt to address what it describes as our “access-to-justice crisis.”

The problem of access to civil justice is of course the most serious for low-income persons, who are at a particular disadvantage in the legal marketplace. In the U.S., most low-income people with civil legal problems handle them on their own or...
not at all. Although some free and pro bono lawyers are available, demand for assistance substantially exceeds supply. The result is not simply that low-income people have less access to justice but also, given their greater economic and social vulnerability, that the consequences of lack of access are more significant.

The two most commonly-proposed strategies for improving the situation are “mandatory pro bono” requirements for lawyers and a “civil Gideon” rule or ruling that would mandate legal representation for persons with civil cases (just as the Supreme Court’s Gideon ruling did for criminal cases). However, neither of these options is likely to become a reality anytime soon. Although mandatory pro bono requirements have often been recommended, no State has adopted them, and existing ethical rules leave pro bono contributions aspirational.

The President and Chief Executive Officer of the Pro Bono Institute recently asked in the National Law Journal, “Is it time for mandatory pro bono?” Her answer, “despite the unparalleled dimensions of the current crisis, is not yet.” Similarly, a civil Gideon ruling or rule has also yet to be put into effect in any jurisdiction, and the U.S. Supreme Court recently rejected the latest effort to establish a constitutional basis for appointment.
ment of counsel in civil cases. Finding the funding to pay for lawyers to handle civil cases for those who cannot afford them will in any event be difficult to accomplish in the current fiscal and political environment.

Another idea sometimes proposed to improve access to justice is allowing trained nonlawyers to assist low-income persons with their civil legal problems. Such an approach would be considerably less expensive than civil Gideon and would not require the financial sacrifice from lawyers of mandatory pro bono. It would expand the “pie” of available resources and permit entities such as community groups and academic institutions to be tapped as a potential source of free legal services to low-income persons. Indeed, it might make sense for simpler, “lower-stakes” legal problems to receive the attention of nonlawyers with some basic legal knowledge and access to relevant information, rather than expend the scarce and valuable resource of a lawyer’s time on such matters. Nonlawyer assistance thus could be a cost-effective and appropriate partial solution to the civil access to justice problem.

The main obstacle to pursuing this solution is the State laws against the unauthorized practice of law (UPL) that prevail in most jurisdictions. Most States define the practice of law so broadly or vaguely that it is difficult for nonlawyers to assist

10 Turner v. Rogers, 131 S. Ct. 2507 (2011) (no right to counsel in case involving civil contempt proceedings against parent who failed to abide by child support order).
11 Definitions include broad statutory and judge-made rules including, for example: “[a]ny action taken for others in any matter connected with the law,” GA. CODE ANN §§19-50(6) (2011); “the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill,” Continental Cas. Co. v. Cuda, 715 N.E.2d 663 (Ill. App. Ct. 1999), citing People ex rel. Illinois State Bar Ass’n v. Schafer, 404 Ill. 45, 51 (1949); “performing any legal service for any other person, firm or corporation, with or without compensation, . . . or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation . . . ,” N.C. §§84-2.1; “directing and
people with legal problems without being accused of violating laws against UPL. Nonetheless, because the problem of access to justice is so dire and because other potential solutions are unlikely to be achieved in the near future and likely to be insufficient even if achieved, nonlawyer assistance remains an important option to consider. For example, in 1998, the Fordham University School of Law Conference on the Delivery of Legal Services to Low-income Persons made a number of recommendations supporting the greater involvement of nonlawyers in the provision of legal services.13 Indeed, the conference participants concluded that “experimentation with nonlawyer advocacy was managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered or secured . . . .” Massachusetts Conveyancers Ass'n, Inc. v. Colonial Title & Escrow, Inc., 2001 WL 669280 (Mass. 2001), citing Matter of Shoe Manufacturers Protective Association, 295 Mass. 369, 372 (1936). A listing of State definitions, though not completely up to date, may be found at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf.

12 Courts have frequently acknowledged the vagueness of their State’s definition. See, e.g., Pope v. Savings Bank of Puget Sound, 850 F.2d 1345, 1351 (9th Cir. 1988) (definition of practice of law “elusive of precise definition”); Francorp, Inc. v. Siebert, 211 F. Supp. 2d 1051, 1056 (N.D. Ill. 2002) (“Illinois courts have not adopted a precise definition of ‘practice of law.’ . . . [T]he line between consulting and practicing is sometimes a blurry one.” (citations omitted); In re Mothershed, 2001 Ariz. LEXIS 63, 12 (“no clear definition of ‘practice of law’” in Arizona); Lukas v. Bar Assoc. of Montgomery County, Inc., 35 Md. App. 442, 443; 371 A.2d 669 (1977) (“We shall not endeavor to formulate a precise definition of the practice of law.”); Dressel v. Ameribank, 468 Mich. 557, 569; 664 N.W.2d 151 (2003) (Weaver, J., concurring) (“This Court has long held that the ‘practice of law’ defies precise definition”); West Va. State Bar v. Earley, 144 W. Va. 504, 518; 109 S.E.2d 420 (1959) (“it is generally recognized that it is extremely difficult, perhaps impossible, to formulate a precise and completely comprehensive definition of the practice of law or to prescribe limits to the scope of that activity”).

necessary in light of the unmet civil legal needs of low-income people.”

But the question is how such experiments can even happen, given the chilling nature of UPL restrictions. To provide some insight into the difficulties involved, this Article does a post-mortem on a recent failed experiment in Maryland that attempted to use nonlawyers to provide free assistance to low-income persons with civil legal problems. Although the experiment was designed to conform to Maryland law on UPL, it still did not get very far. The Article also considers possible approaches for future experiments with nonlawyer assistance, in light of this experience. Although every State has its own unique situation, most States resemble Maryland in having substantial unmet legal needs and expansive laws against UPL. Thus, the lessons from this Maryland experiment are more generally applicable, and can serve as a guide to other efforts to explore this option to improve access to justice.

II. THE POTENTIAL OF NONLAWYER ASSISTANCE

The idea that trained nonlawyers might help improve access to justice has attracted some prominent advocates. For example, over forty years ago, Supreme Court Justice William O. Douglas observed:

It may well be that until the goal of free legal assistance to the indigent in all areas of the law is achieved, the poor are not harmed by well-meaning, charitable assistance of laymen. On the contrary, for the majority of indigents, who are not so fortunate to be served by neighborhood legal of-

14 Id. at 1762-63 ("The Group opined that it was unacceptable to sacrifice quality of access for quantity of access. Nonetheless, we felt that experimentation with nonlawyer advocacy was necessary in light of the unmet civil legal needs of low-income people.").
fices, lay assistance may be the only hope for achieving equal justice at this time.\(^{15}\)

Professor Laurence Tribe of Harvard Law School promoted the idea more recently. He pointed out to the attendees at the 2010 American Bar Association Pro Bono Publico Awards Luncheon that “even if all the lawyers in this room rededicated themselves to pro bono work, and we increased funding for civil legal services five-fold, we still wouldn’t have enough lawyers to meet all the needs of the poor and working class.”\(^{16}\) He suggested that nonlawyers be given more of an ability to provide legal services – even as he recognized that lawyers might be reluctant to consider that prospect:

Many outside this room view lawyers as the problem, believing that they don’t want to see others helping with even the simplest and most straightforward legal issue, because that would cut into their business. My advice: prove them wrong. Work with your state bar associations to make sure that rules of professional practice more realistically reflect the requirements for meeting people’s desperate need for legal help – help that can come from those with background and training different from our own.\(^{17}\)

The organized bar and the courts generally take the position that allowing nonlawyers more of a role would be harmful to consumers.\(^{18}\) However, this conclusion has been disputed. David Vladeck, former Professor at Georgetown Law School

\(^{17}\) *Id.*
\(^{18}\) See *In re Arons* 756 A.2d 867(Del. 2000), which involved special education consultants who had been serving as representatives to parents in Individuals
and current Director of the Bureau of Consumer Protection at the Federal Trade Commission, has remarked:

[T]he Bar has refused to address the problem [of unmet needs] by easing restrictions on non-lawyer practice. Concerns about the quality of lay assistance cannot be the real answer because study after study has shown that trained lay advocates can effectively represent people in standardized legal proceedings – and even in complex ones when they are specially trained. The ABA commissioned a blue ribbon panel to study the merits of relaxing restrictions on lay advocacy, and that panel strongly recommended that the reins be eased considerably. But the ABA House of Delegates has refused to act on these recommendations... .19

Professor Deborah Rhode at Stanford Law School has taken a similar position, concluding that “virtually no experts believe that current prohibitions [on nonlawyer assistance] make sense” and noting that “[c]omparative research finds that . . . lay specialists can perform as effectively as attorneys. In the one reported survey of consumer satisfaction, nonlawyers rated higher than lawyers.”20 According to Prof. Rhode, “[a]lmost all of the scholarly experts and commissions that have studied the issue [of expanding nonlawyer assistance] have recommended in-

with Disabilities Education Act (IDEA) administrative hearings. In finding that such assistance constituted UPL, the court remarked:

This Court does not exercise its inherent authority to regulate the practice of law for the purpose of protecting the financial interests of the lawyer. Our role is to insure that the public will enjoy the representation of individuals who have been found to possess the necessary skills and training to represent others. Id. at 874.

creased opportunities for such assistance” but “[a]lmost all of the major decisions by judges and bar associations have ignored those recommendations.” 21

Notwithstanding UPL restrictions, the reality is that many people who cannot get a lawyer will receive the assistance of nonlawyers. Their neighbors, co-workers, friends and/or family will do the best they can to help. This low-quality informal assistance that unrepresented low-income people get goes on unimpeded, because it is practically beyond the reach of UPL restrictions.22 But better-quality assistance from trained nonlawyers is not available, because it is any organized and formal provision of assistance that is most likely to be prosecuted as UPL.23 The consequence of insisting that low-income people must be assisted by lawyers is generally to ensure that they get no real help at all – making the perfect the enemy of the good.

By contrast, other countries allow nonlawyers to provide some kinds of legal services. Professor Gillian Hadfield of University of Southern California’s School of Law has argued that the U.S. could improve access to justice by permitting individuals who are not lawyers to provide legal services, as there are in other countries such as England, Australia and the Nether-

22 See People v. Landlords Professional Services, 215 Cal. App. 3d 1599 (1989), in which the defendant argued that the State’s definition of legal advice would apply “to friends who give opinions or advice about each other’s legal problems.” The court responded that “[w]hile it is true the inherent and necessarily general nature of any definition of legal practice may allow the formulation of hypothetical situations that render the definition unworkable, we need not be concerned with such a reductio ad absurdum argument in this case. Our research has found no case in which one friend was either enjoined from giving legal advice to a friend or prosecuted for the giving of such advice.” Id. at 1609.
23 See Lawline v. American Bar Association, 956 F.2d 1378, 1381 (7th Cir. 1992), which “use[d] law students, paralegals and lawyers to answer legal questions from the public without charge over the telephone and to assist them in representing themselves in routine legal matters,” prior to being enjoined as UPL. Id. at 1382.
lands. She notes that “[i]n the U.S., people and businesses have only one place to go for all their legal help – lawyers who graduated from an ABA-approved law school,” while “[e]veryone else who offers legal advice is engaged in the unauthorized practice of law.” Of course, the U.S. does have legal paraprofessionals, but such persons work under the direct supervision of lawyers who remain responsible for their work and can be disciplined for failing to exercise sufficient control. Accordingly, paraprofessionals only incrementally increase the availability or affordability of legal services. Professor Hadfield argues that “[t]he United States urgently needs to expand capacity for non-lawyers to meet the legal needs of ordinary Americans in innovative and less costly ways” and “dislodge the idea that the highest value is to provide a state bar licensed lawyer from an ABA-accredited school to everyone who needs legal help.” Although it may boggle the American legal mind, according to Hadfield, “[t]he U.K. has never had an unauthorized

25 Quoted in David Segal, For Law Schools, a Price to Play the A.B.A.’s Way, N.Y. TIMES, Dec. 17, 2011.
26 See, e.g., MODEL RULES OF PROF’L CONDUCT R. 5.3 (2004) (stating “The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work” (emphasis added)).
27 See, e.g., Attorney Grievance Comm’n of Maryland v. Hallmon, 343 Md. 390; 681 A.2d 510 (1996) (attorney subject to professional discipline for insufficient oversight of a lay assistant handling zoning board hearing, as demonstrated by the attorney’s lack of knowledge of the hearing strategy and factual details of the case).
28 Hadfield, supra note 24.
29 Quoted in Segal, supra note 25.
practice-of-law rule: Anyone may provide legal advice, so long as he or she doesn’t call him- or herself a solicitor.”

Along the same lines, the DOJ and Federal Trade Commission have been arguing that lawyers’ monopoly on legal services disadvantages consumers. Over the last decade and a half, these federal agencies have approached a dozen States as well as the ABA to advocate for narrower definitions of the practice of law and of what constitutes UPL. For example, in 2009, the DOJ urged the Montana Supreme Court to reject a broad definition of the practice of law proposed by its Commission on the Unauthorized Practice of Law. According to the DOJ, such a broad definition would force the citizens of the State “to hire a lawyer to provide a host of services where legal expertise should not be necessary.” The letter noted the threat such a law posed to “lay organizations, advocates, and consumer associations that provide citizens with information about legal rights and issues and help them negotiate solutions to problems.” The Montana Supreme Court subsequently determined that it did not have the constitutional authority to define the practice of law and dissolved its UPL Commission. However, that is not to say the climate for nonlawyers in that State to provide assistance improved; rather, the situation was left ambiguous. Most States continue to have broad definitions of the practice of law and broad concepts of UPL that prevent or inhibit the involvement

32 Id. See letter dated April 17, 2009.
of nonlawyers in providing assistance to unrepresented persons.\textsuperscript{34}

The use of trained nonlawyers to provide some forms of legal assistance is an approach that could expand the availability of help to low-income persons with legal problems, would be lower cost than other options, and could provide assistance of sufficient quality (and in most cases better than no assistance at all). Such use of nonlawyers is an approach that has thoughtful advocates in the legal academic community and in government. But few experiments in nonlawyer assistance have been attempted because of the continued obstacle represented by UPL restrictions – which, as the attempted experiment in Maryland indicates, can operate as a substantial restraint on innovative approaches to improving access to justice.

III. THE EXPERIMENT

Maryland, like most States, has a problem with providing legal assistance to all who need it.\textsuperscript{35} In Maryland, as elsewhere, low-income civil litigants lack any right to appointed counsel in most civil cases, and the majority of low-income persons with civil legal problems must pursue their legal rights unassisted.\textsuperscript{36}

\textsuperscript{34} See supra notes 10 and 11.
\textsuperscript{35} Benjamin L. Cardin & Robert J. Rhudy, \textit{Symposium: Expanding Pro Bono Legal Assistance in Civil Cases to Maryland's Poor}, 49 MD. L. REV. 1 (1990) (noted that a 1987 Maryland survey found that the typical low-income household in Maryland experienced an average of more than three legal problems each year, and only about 20 percent of these legal needs could be addressed by existing services); \textit{Id.} at 5-6; Standing Committee of the Court of Appeals on Pro Bono Legal Service, \textit{State Action Plan and Report 4} (2006) (available atfcns] http://www.courts.state.md.us/probono/pdfs/stateactionplan 12-18-06.pdf) (noting that in 2004, it was similarly found that 80 percent of persons seeking assistance from the State's free legal services provider were not accepted for legal representation).

\textsuperscript{36} Maryland Access to Justice Commission, \textit{Implementing a Civil Right to Counsel in Maryland} 9 (2011) (noting that it has been estimated that each year about 470,000 low-income persons in Maryland have a civil legal prob-
The State of Maryland is not indifferent to the plight of these persons. It has been working to try to address the problem through various strategies, including through its own Access to Justice Commission. However, none of the sixty-two recommendations in the Maryland Commission’s 2009 Interim Report and Recommendations mention nonlawyer assistance,\(^{37}\) nor did its 2010 report give any attention to that option.\(^{38}\) Rather, the Commission’s emphasis has been on obtaining funding to pay for lawyers to provide representation to low-income persons who have cases involving “basic human needs” – in other words, on bringing about the adoption of a version of civil *Gideon.*\(^{39}\) Achieving this goal is as unlikely in Maryland as it is in other jurisdictions.\(^{40}\) Mandatory pro bono seems similarly unlikely to be adopted in Maryland.\(^{41}\) The cost of the Commission’s civil *Gideon* recommendation – $107 million\(^{42}\) – is a significant impediment. Even if the recommended version of civil *Gideon* were implemented in the State, it would leave a great many le-

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39 *Implementing,* supra note 36.


41 Cardin and Rhudy, *supra* note 35, at 17, observe that the “MSBA [Maryland State Bar Association] leadership opposed a mandatory pro bono rule until the effects of efforts to expand voluntary pro bono efforts under concerted, bar, court, and legal services program cooperation have been tried and assessed.” In 1989, presumably after such assessment, a voluntary recruitment plan was adopted. Deborah Sweet Byrnes and Sharon E. Goldsmith, *The Maryland Judicial Commission on Pro Bono, Report and Recommendations* 8 (2000), http://www.courts.state.md.us/probono/pdfs/probono.pdf. *See also* Schwinn, *supra* note 40, at 101-02, recommending a civil *Gideon* rule rather than mandatory pro bono.

42 *Implementing,* supra note 36, at 10.
gal problems unaddressed. As is the case with many such proposals, it would only apply to the most serious of civil legal matters.

This is the context in which the effort was recently undertaken by the Legal and Ethical Studies (LEST) masters degree program at the University of Baltimore in Maryland to expand access to civil justice by using nonlawyers to assist low-income persons with certain legal problems. The graduate students in the LEST program are not lawyers or law students, nor are they engaged in the professional study of law. Rather, they study the legal system from a humanistic perspective. Although lacking the screening and intensive training of law students, the students in the LEST program nonetheless are at least graduate students who have some basic legal knowledge and the ability to do legal research. The LEST project proposed to use these students to assist low-income people in Baltimore City who had been turned away for representation by a local legal services provider, and who were referred by that provider as having legal problems capable of resolution by nonlawyers. The referrals would have been for “low-stakes” legal problems that did not involve complicated legal issues. Some of those referred would probably have been persons whose ability to handle their legal problems was compromised by lower education levels, lack of familiarity with the system, health problems and/or language barriers. Others would have been persons who had the capacity to pursue their claims on their own, with a little assistance and support.

The following description was given of a typical problem the LEST project might help with:

43 See, e.g., California’s Sargent Shriver Civil Counsel Act (Cal. Gov. Code § 68650 (2011) et seq.) which establishes a fund for pilot projects for appointment of counsel “to represent low-income parties in civil matters involving critical issues affecting basic human needs,” § 68651(a), such as child custody cases, § 68651(b)(2)(A).
44 For further description see http://www.ubalt.edu/cas/graduate-programs-and-certificates/degree-programs/legal-and-ethical-studies/.
A person has been unable to get a security deposit back from the landlord. The student could assist by doing legal research that indicated when a landlord might or might not legally be entitled to retain the security deposit. Based on that information, if the person wanted to pursue the matter further, the student could assist the person with contacting the landlord in the manner specified by the law. If the landlord was unresponsive, the student could let the person know any legal options, including the possibility of filing a small claims court action. If the person decided to pursue a small claims case, the student might assist the person with filling out the court-provided forms to do so. The student might also assist the person with organizing the materials and evidence for the presentation of the case in small claims court.45

The project also proposed that students could handle some problems that might require an administrative hearing, including, for example, the following:

A person has been denied unemployment insurance benefits on the grounds that the person voluntarily left work. The student could assist by doing legal research on labor and employment law to help the person decide whether to continue pursuing unemployment insurance benefits. If the person believes, based on the research, that such benefits should be paid, the student could help the person obtain an administrative hearing and gather the factual evidence supporting the claim for presen-

45 Letter dated Nov. 23, 2010 to the Office of the Attorney General, Educational Affairs Division (hereinafter “first letter” or “Nov. 23 letter”). This letter and the other correspondence discussed in this Article can be found at http://legalandethicalstudiesubalt.wordpress.com/2012/02/01/correspondence_with_ag_office/.
tation at the hearing. If the student felt capable, and the person desired such assistance, the student might represent the person at the hearing, as permitted by law.46

Further description provided a sense of the scope of the LEST project as well as its limitations:

In general, students would help the referred individuals by supplying them with the relevant legal information and explaining such information, laying out the options available and working through possible scenarios, filling out forms and helping with the drafting of letters, organizing evidence for presentation and assisting with the process of finding any missing materials, and, where legally permissible, providing representation at administrative hearings. Students would receive training on relevant areas of law and would be advised and supervised by one or more attorneys. Referred individuals would receive full disclosure of what they could and could not expect in the way of assistance from the project.

Students would not do any of the following: give suggestions to the person about what course of conduct to take; draft pleadings for any court of law (beyond assistance with filling out of court-

46 Id. The plan for the project also included this additional example not discussed here:

A person has fallen behind in mortgage payments and fears foreclosure is imminent. A student could go over the lending documents with the person and help the person understand the lender's rights and obligations. The student could also help the person work up a budget and explore different scenarios for mortgage payment. The student could let the person know about any loan modification programs for which the person might be eligible, as well as other legal and practical options that person could consider.
supplied forms for pro se litigants); draft documents such as contracts or wills; assist any person with a lawsuit or administrative case involving a large sum of money or with any legal claim that would be appropriate to a contingency fee arrangement; or assist any person with a claim that involved a matter of criminal law or family law. Further, the supervising attorney would refer back to the sender any matter that in his or her judgment was not appropriate for any reason for graduate student assistance.\textsuperscript{47}

The services would be provided free of charge; instead, participating students would get course credit. If all went as planned, the project would run as an internship course each semester and could assist a steady stream of low-income people. A local legal services provider was receptive to the idea, and plans began to move forward toward establishing the criteria and process for referrals. Before that could happen, however, the clinical professors at the university’s law school objected to the project and concluded that it could not go forward because it constituted UPL.

It should be noted that the law school clinicians might have felt ethically required to object to such a project, whatever their views may have been about its value. A little like the directive from Leviticus that “thou shalt not suffer a witch to live,” the rules of professional conduct for lawyers in some States mandate that “[a] lawyer shall not assist another person in the unauthorized practice of law.”\textsuperscript{48} Maryland currently has no such rule, but it did at one time.\textsuperscript{49} The clinicians may have been moti-

\textsuperscript{47} Id.
\textsuperscript{48} See Rule 5.5(d) in North Carolina; Rule 5.5(e) in Idaho; Rule 5.5(e) in North Dakota.
\textsuperscript{49} Maryland’s Rules of Professional Conduct Rule 5.5 at one time stated: “A lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” Cited in Attorney Grievance Comm’n of Md. v. Hallmon, 343 Md. 390, 393
vated in any event by an abundance of caution to avoid the appearance of a questionable collaboration. Of course, there are alternative scenarios one can imagine—such as the clinicians saying, "If you get accused of UPL, we will take your case as impact litigation that could benefit poor people!"—but such alternative scenarios call for more anti-establishment fervor than is found on the average law school campus.50

The clinicians declined to withdraw their objection unless the Maryland Attorney General's office made a determination that the proposed activities of the project did not involve UPL. Accordingly, the LEST program sent the AG's office the descriptions above of what the project proposed to do, and indicated that the professors at the law school clinic had concluded that the project involved UPL.51 The AG's office responded with

n.1; 681 A.2d 510 (1996). However, Maryland's current version of the rules do not specifically impose such a requirement. See Maryland Lawyer's Rules of Professional Conduct, Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law. The current rule requires lawyers to abide by the regulations that apply to the legal profession in the jurisdiction in which the lawyer practices, and not to assist another lawyer in evading the rules of that jurisdiction. See 5.5(a): "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." This rule is quite different from its former version. See also Comment [1], which indicates that "Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer's assisting another person" (emphasis added). Further Comment [3] states as follows: "A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se."

50 But see State Bar of Mich. v. Cramer, 399 Mich. 116; 249 N.W.2d 1 (1976), where the Michigan Clinical Law Program submitted an amicus brief on behalf of a nonlawyer found in contempt for assisting clients by preparing divorce papers.

51 Supra note 45. The fact that the law school clinicians objected was included at their specific direction.
two memoranda\textsuperscript{52} that agreed with the conclusion of the clinicians. Indeed, the memoranda concluded that virtually every aspect of the plan for the project involved UPL and that no version of it could go forward. And so the experiment was halted before it could begin.

As this experience indicates, accusations of UPL can chill or kill lay efforts to help low-income people with their civil legal problems. This result is not only unfortunate in terms of the public benefit that is lost, but sometimes, as in the particular case of the LEST project, difficult to justify in terms of applicable law. Despite the conclusions of the AG's office, the proposed activities of the LEST project probably did not constitute UPL under Maryland law. However, in Maryland, as in many States, broad or vague definitions of the practice of law make it difficult for such projects to fight the accusation.

IV. The Legal Justification for the Experiment

Maryland's Business Occupations and Professions Law Title 10 defines the practice of law,\textsuperscript{53} forbids its unauthorized practice\textsuperscript{54} and makes such unauthorized practice a criminal misdemeanor.\textsuperscript{55} The statutory definition is sufficiently broad that it could indeed be construed to prohibit any and all of the activities in which the students in the LEST project proposed to engage:

\textsuperscript{52} Memoranda dated Jan. 24, 2011 and Mar. 1, 2001 from State of Maryland, Office of the Attorney General, Educational Affairs Division (hereinafter "initial memorandum" or "Jan. 24 memorandum" and "followup memorandum" or "Mar. 1 memorandum"). The followup memorandum from the AG's office was in response to a second letter from the LEST program on Feb. 9, 2011 (hereinafter "followup letter" or "Feb. 9 letter."). These memoranda may be found at http://legalandethicalstudiesubalt.wordpress.com/2012/02/01/correspondence_with_ag_office/.


(1) "Practice law" means to engage in any of the following activities:
   (i) giving legal advice;
   (ii) representing another person before a unit of the State government or of a political subdivision; or
   (iii) performing any other service that the Court of Appeals defines as practicing law.

(2) "Practice law" includes:
   (i) advising in the administration of probate of estates of decedents in an orphans' court of the State;
   (ii) preparing an instrument that affects title to real estate;
   (iii) preparing or helping in the preparation of any form or document that is filed in a court or affects a case that is or may be filed in a court; or
   (iv) giving advice about a case that is or may be filed in a court.\textsuperscript{56}

However, despite the apparent broad scope of Title 10, Maryland's Attorney General has in fact previously interpreted Maryland law as permitting nonlawyers to engage in activities like those that were planned for the LEST project.

According to the Maryland AG, not all uses of the law qualify as UPL. Rather, use of the law at higher levels of complexity is generally necessary for an activity to be understood as involving the practice of law. As a 2005 Maryland AG opinion remarks, "The preparation and interpretation of legal documents and the application of legal principles to complex problems has been held to constitute the practice of law when it requires 'more

\textsuperscript{56} Md. Code Ann. Bus. Occ. & Prof § 10-101(h). Some exceptions to its sweeping scope are set out in § 10-102 and § 10-206, but they would not have provided the proposed LEST project with any cover.
than the most elementary knowledge of law.’” 57 Thus, as long as the activities of the graduate students participating in the LEST project involved the most basic legal concepts and did not involve applying legal principles to complex problems, they should not have been considered the practice of law.

Further, under the AG’s interpretation of Maryland law, the graduate students should have been able to offer persons with legal problems information about their potential legal options. A 1995 Maryland AG opinion concluded that “the simple act of providing information about legal rights, as opposed to offering advice about such rights and what to do about them, is not unauthorized.” 58 Accordingly, lay persons have been recognized as entitled to give domestic violence victims information about their rights and remedies, including their right to seek an order of protection, 59 and social workers have been recognized as entitled to give birth parents information about their statutory rights, including their right to revoke consent to an adoption. 60

Thus, it would seem that the graduate students could have shared and explained the results of basic legal research. For example, a graduate student could run a search for “security deposit” through a legal database and print out statutes and cases for the use of the person and help the person understand what rights and remedies such law made available, including, for example, the right to sue for treble damages. 61

However, the students could not have helped a person decide which rights or remedies to pursue, as the 1995 AG opinion explained that nonlawyers “must be careful to limit their activity to the unadorned conveyance of information about what rights

59 Id. at 138.
and remedies exist."\textsuperscript{62} Nonlawyers could not help persons decide "whether to invoke any of their rights or pursue any of their potential remedies."\textsuperscript{63} Accordingly, as explained in a 1994 AG opinion, "the line of unauthorized practice is potentially crossed when someone who is not a lawyer purports to give professional advice about another person's legal situation or suggests a course of conduct based on an interpretation of the law; [but] the line is not crossed by the unadorned provision of information."\textsuperscript{64} So long as the students gave information about the law and did not make suggestions about how best to proceed in applying it to a person's situation, they would not be engaged in UPL according to Maryland AG opinions. For example, a student who told a person that treble damages were statutorily available for an improperly-withheld security deposit could not tell the person that she was entitled to treble damages herself or that she should sue to try to obtain such damages.

In addition, under the AG's interpretation of Maryland law, the graduate students should also have been able to help persons fill out court-provided forms, such as those that would have been used to contest a withheld security deposit. For example, the 1995 Maryland AG opinion had concluded that a nonlawyer could "assist a [domestic violence] victim to prepare a legal pleading or other legal document on her own behalf by defining unfamiliar terms on a form, explaining where on a form the victim is to provide certain information, and if necessary transcribing or otherwise recording the victim's own words verbatim."\textsuperscript{65} That opinion added that it was important that the nonlawyer not summarize or select from the wording that the victim used, as that would involve legal judgment. Based on this AG opinion, it would seem that the students participating in the LEST project

\textsuperscript{62} 80 Op. Att'y Gen. Md. at 142.
\textsuperscript{63} \textit{Id}.
\textsuperscript{64} 79 Op. Att'y Gen. Md. at 176.
\textsuperscript{65} 80 Op. Att'y Gen. Md. at 139. A similar 2005 opinion that concluded that the completion of certain standardized legal forms by a bank loan office was not UPL. 90 Op. Atty Gen. Md. at 101.
could have helped persons understand and fill out court-provided forms, such as those for a small claims case, as long as the students did not make any decisions for them about how to present their information to the court.

The graduate students could also seemingly have provided persons with a “general orientation or overview about court proceedings,” as the 1995 AG opinion also specifically permitted.⁶６ Therefore, the students could presumably have told them about how a courtroom generally functions, such as how the room would be set up, who presents their case first and who gets to ask questions when. But they could not have gone into any kind of technical detail; they could not have “provide[d] information about the legal aspects of judicial proceedings, such as how to present a case, call witnesses, cross-examine witnesses, introduce documents, and the like” as that “requires a specialized knowledge ordinarily beyond the purview of a layperson.”⁶⁷

It should be noted that the activity of allowing nonlawyers to provide and explain legal information, as permitted by the AG opinions, is not without some risk. A nonlawyer explaining the meaning of unfamiliar legal terms is not as likely as a lawyer to give an accurate explanation. Even so innocuous an activity as a nonlawyer handing a person a printout of a case or statute may create the unintended and perhaps mistaken impression that the person qualifies for the relief described in that case or statute. But the AG has not made such risks the basis for preventing nonlawyers from conveying and explaining basic legal information about rights and remedies. In fact, allowing lay persons to provide such information to domestic violence victims and birth parents considering adoption – as Maryland AG opinions do⁶⁸ – presents risks with higher stakes than those likely to have been created by the LEST project, which planned to avoid all matters

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⁶⁷ Id.
where the consequences of mistake or misunderstanding were so dire.

The LEST project did come closer to the edge of UPL insofar as it proposed to help persons with “working through possible scenarios” and “organizing evidence for presentation.” If working through possible scenarios meant simple role-playing that allowed a person to practice what she intended to do in court—and did not involve the student in legally evaluating the approach or recommending any changes based on the achievement of legal objectives—then such an activity would be consistent with Maryland AG opinions. The student could, of course, have made recommendations based on nonlegal criteria, such as “speak more slowly.” Likewise, if the organizing of materials and evidence involved performing tasks like helping the person put documents into labeled files and making lists of the witnesses the person wanted to call and the documents she intended to present, those would be mechanical functions that did not require “specialized knowledge.”

It would not seem that assisting a person with logistical and practical preparations that allowed for a more orderly presentation would cross the line over into UPL, but rather the line would be crossed with any suggestion to the person of how to present the case in court to make it more legally effective.

In terms of the activities associated with potential court cases, such as the withheld security deposit that might lead to a small claims case in district court, the graduate students proposed engaging in activities that the AG had concluded simply did not constitute the practice of law. However, insofar as assistance in administrative fora was concerned, such as the example involving an unemployment insurance benefits claim, the graduate stu-

69 Mechanical or clerical functions involving the law are not unauthorized practice. See 90 Op. Att’y Gen. Md. at 104-05.

70 “A lay advocate who advised a victim on how her case should be presented or defended would violate BOP §10-206.” 80 Op. Att’y Gen. Md. at 143.
dents were proposing to engage in activities that did constitute the practice of law. Maryland's Title 10 includes as part of the definition of the practice of law "representing another person before a unit of the State government or of a political subdivision." Further, in administrative hearings involving unemployment benefits, the rules allow the parties "to cross-examine witnesses, to call witnesses on their own behalf, to inspect documents, and to offer evidence in explanation or rebuttal." Such activities include those that have been described in AG opinions as involving the practice of law. However, the students still were not proposing to engage in unauthorized practice. The rules governing administrative hearings contesting denials of unemployment insurance benefits (similar to the rules for certain other administrative hearings) state that claimants may not only be represented by an attorney but also "by any other authorized agent, but the agent may not charge or accept payment for the representation." This regulation would appear to give the graduate students legislative permission to represent claimants in that forum and engage in the activities associated with such representation.

Indeed, the Maryland AG has interpreted such legislative permission as allowing nonlawyers to represent persons in administrative hearings, notwithstanding the language in Title 10. In a 1993 opinion, the AG considered the situation where a law en-

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72 COMAR 09.32.06.02 (G) (2011).
73 Unauthorized Practice of Law, supra note 58 at 143 ("how to present a case, call witnesses, cross-examine witnesses, introduce documents, and the like, requires a specialized knowledge ordinarily beyond the purview of a layperson").
74 For example, persons denied Emergency Assistance to Families with Children (the Maryland equivalent of Temporary Assistance to Needy Families) are given regulatory permission to be represented by non-lawyers in fair hearings under Maryland Regulations. Md. Code Regs. 07.01.04.10G (2011). "The appellant may be represented by a lawyer, relative, friend, or other individual." Id.
75 Md. Code Regs. 09.32.11.02F(3) (2011).
For enforcement officer was authorized by statute “to be represented by counsel or any other responsible representative of his choice” before a hearing board.76 The AG concluded that “representation of a law enforcement officer before a hearing board unquestionably involves tasks that are part of the practice of law. The hearing is an evidentiary one, calling for technical knowledge like the grounds for claims of privilege and skills like the conduct of cross-examination.”77 Nonetheless, the opinion concluded that the statute “authorizes a law enforcement officer to be represented by the person of the officer’s choice, even if the representative is not at lawyer, at any stage of the . . . process prior to court review.”78 Along the same lines, a 1980 AG opinion had similarly concluded that the Workers Compensation Commission could allow nonlawyer practice before it and suggested that “in . . . simpler cases, claimants (and employers) might well be able to pursue their claims quite competently, and perhaps more economically, with nonlegal assistance.”79 Thus, where such legislative permission exists, the graduate students should have been allowed to represent claimants in administrative hearings, as that would be the authorized practice of law.

It should be added that administrative fora are not as complex in procedure and evidence as court proceedings. For example, the claimant in an unemployment insurance benefits case does not have to worry about formal pleadings, motion practice or discovery, and the hearings are “conducted informally in a manner to ascertain the substantial rights of the parties, and the hearing examiner or Board of Appeals may not be bound by common law or statutory rules as to the admissibility of evidence or by technical rules of procedure.”80 To the extent that

77 Id. at 258.
78 Id. at 262.
assistance of nonlawyers in administrative fora involves the practice of law, it would not be at a very high level.

Further, the practice of nonlawyers in administrative fora is not unusual. It has been observed that lawyers who represent clients in quasi-judicial administrative proceedings increasingly find themselves sharing the market with nonlawyers. Nowadays, lay advocates often represent workers in grievance arbitrations, workers' compensation proceedings, social security disability hearings, administrative tax appeals, and the like.81

The difference between the courts, where nonlawyers are generally not permitted to appear on behalf of parties, and administrative hearings, where nonlawyer representation sometimes occurs, may be understood as reflecting differences between judicial and legislative functions:

[B]ecause the structure of agencies falls under legislative control, the separation of powers doctrine means that the legislature has the constitutional authority to oust the court’s otherwise exclusive jurisdiction over the practice of law in agency proceedings. Therefore, nonlawyer representation of persons in a state administrative proceeding can, by legislative action, be converted to an “authorized” practice of law.82

Maryland’s permissions for nonlawyers to represent persons in certain administrative hearings are similar to those found in other jurisdictions and may be based in similar theories.

81 Ted Schneyer, An Interpretation of Recent Developments in the Regulation of Law Practice, 30 Okla. City U.L. Rev. 559, 586 (Fall 2005). See also the discussion in Conference, supra note 7, at pp. 1763-65.
In short, the graduate students participating in the proposed LEST project should have been able to engage in its planned slate of activities, according to Maryland law as interpreted by the Maryland Attorney General's office and as established by other law.

V. THE MEMORANDA FROM THE MARYLAND ATTORNEY GENERAL'S OFFICE

In finding that the proposed LEST project in its entirety constituted UPL, the memorandum from the AG's office interpreted the relevant AG opinions not simply very narrowly but omitted many of the permissions they gave. For instance, the memorandum stated:

The [letter from the LEST program] suggests that the proposed activities of the LEST students would fall within the activities deemed permissible by the Attorney General in the referenced opinions. That may be the case, to the extent the students merely referred a client to written materials or transcribed the client's words verbatim on a form.

This description notably diminishes what has been identified as permitted. According to the AG opinions, nonlawyers can provide persons with information about legal rights and remedies and are not limited to doing so by "merely refer[ing] a client to written materials." Implicit in the AG opinions is the idea that nonlawyers can explain legal rights and remedies to persons, as long as the explanation does not involve more than elementary legal knowledge. Also omitted from the memoran-

83 Memorandum from Md. Att'y Gen. on Legal and Ethical Studies Outreach to Joseph Wood, Provost, University of Baltimore (Jan. 24, 2011).
84 Id.
85 80 Op. Att'y Gen. Md. at 142 ("the simple act of providing information about legal rights, as opposed to offering advice about such rights and what
dum’s description is anything about allowing students to “pro-
vide a general orientation or overview about the kind of pro-
ceeding involved,” which is also permitted under AG opin-
ions. The AG opinions also gave nonlawyers more latitude in
the preparation of court-provided forms, allowing them to assist
persons by explaining where the information is to be placed and
“defining terms in the instructions that might be unclear.” The
LEST program made an effort in a followup letter to convince
the assistant AG to modify the memorandum to include these
activities previously recognized as permissible, but a followup
memorandum from the AG’s office not only declined to do so
but also more decisively declared that the LEST project would
be “inconsistent with existing statutory authority” and therefore
its establishment was “not permitted by Maryland law.”

In general, the initial memorandum from the AG’s office fol-
lowed the pattern of describing what the project proposed to do
more broadly than in the description given in the letter from the
LEST program, while failing to take account of AG opinions
and what activities they said were permitted. For example, the
memorandum said:

The examples provided . . . involve a student
meeting with a client, reviewing the problems
presented by the client, determining relevant legal
principles, providing appropriate legal informa-
tion, explaining such information in the context of

to do about them, is not unauthorized”); 90 Op. Att’y Gen. Md. at 104 (“[t]he
preparation and interpretation of legal documents and the application of le-
gal principles to complex problems has been held to constitute the practice of
law when it requires ‘more than the most elementary knowledge of law.’”).
86 Id. at 143.
87 Id.
88 Feb. 9 letter, State of Maryland, Office of the Attorney General, Educa-
tional Affairs Division, http://legalandethicalstudiesubalt.wordpress.com/
2012/02/01/correspondence_with_ag_office/.
89 Mar. 1 memorandum, State of Maryland, Office of the Attorney General, Ed-
com/2012/02/01/correspondence_with_ag_office/.
the facts, and exploring potential options for pursuing legal rights and remedies. In my opinion, such activities fall within the "practice of law" in Maryland.  
The plan for the LEST project did indeed involve graduate students meeting with clients; providing legal information, including information about legal rights and remedies; and explaining the information. However, these were all activities approved in Maryland AG opinions, as discussed previously. It is not clear why the memorandum describes the students as "determining relevant legal principles" or "exploring potential options for pursuing legal rights and remedies" (emphasis added), or what it means by these descriptions. The graduate students would not be "determining" relevant legal principles, unless by that phrase the memorandum means merely determining what kinds of sources might assist the low-income person with the legal problem. A person who has a problem with a security deposit would benefit from copies of any statutes, regulations and/or cases that involve security deposits. It is true that the graduate student assisting a person with a security deposit problem might not print out all the cases that ever mentioned the term "security deposit" – she might omit cases that involve commercial establishments, for example, and stick only with cases involving residential property. But it does not require special expertise to make that kind of selection. As Maryland AG opinions indicate, it is not the application of legal principles per se that is prohibited but the application of ones that go beyond such elementary knowledge of the law.  
And the graduate students would be "exploring" options for pursuing legal rights and remedies only to the extent that they would let persons know of the existence of such rights and remedies – as permitted by the AG opinions.

With regard to the specific example of a person unable to get a security deposit back from a landlord, the memorandum from the AG’s office remarked as follows:

[The]he issue of whether a landlord may be legally entitled to retain a security deposit would involve review and analysis of a lease agreement in the context of applicable contract principles and other relevant law. The [letter] indicates that students would receive training on relevant areas of law and would be advised and supervised by one or more attorneys in handling matters for clients. In my opinion, such activities fall within the “practice of law” as defined by the General Assembly and the Court of Appeals.92

This description indicates that the graduate students would be making a determination whether the landlord was legally entitled to retain the security deposit and/or that the students would receive training in order to make such a determination. However, neither of these conclusions follows from the description of the LEST project’s proposed activities, and that fact was pointed out in a followup letter from the LEST program to the AG’s office. The followup letter explained that the students would receive training in order to understand what kinds of materials a tenant would need to consult in order to make her own decision about which legal rights to assert. For example, knowing that tenants need to consult their leases is something that students would learn. But whether it makes sense to consult the lease is a matter that involves the most basic legal knowledge and certainly does not involve applying legal princi-
blems to problems of any complexity. And the example given in the letter from the LEST program did not say that students would themselves make any determination whether a landlord would be entitled to retain a security deposit. Rather, it stated that the students would assist with legal research, which would include things like finding and printing out statutes and cases about security deposits and giving those to the persons assisted, to help with their decision-making about how to proceed. Nonetheless, the assistant AG did not address this discrepancy in her followup memorandum and did not modify her conclusion.

Of course, persons hearing legal information may draw conclusions about how that information applies to their own situations, but that does not transform the activity into the giving of legal advice. Indeed, as a 1994 Maryland AG opinion explained, "[c]ommerce and government would grind to a halt if every piece of information about a statutory right or obligation could only be communicated by a lawyer." Under the AG’s interpretation of Maryland law, it is the application of more than basic legal knowledge to the particular facts of a person’s situation and the conveyance to that person of legal advice about what course of conduct to pursue that separates what is permissible from what is impermissible for the lay person in this situation.

The initial memorandum from the AG’s office also concluded that the students were not permitted to assist persons with administrative hearings, as that would “fall within the statutory definition of the practice of law.” A followup letter from the

94 In addition, “the mere fact that the principles or rules stated . . . may be accepted by a particular [hearer] as a solution to his problem does not” change the behavior into UPL. New York County Lawyers’ Association v. Dacey, 28 A.D.2d 161. 173 (App. Div. 1st Dept. 1967) (Stevens, J.P., dissenting), rev’d 21 N.Y.2d 694 (“Order reversed and petition dismissed, with costs, on the dissenting opinion at the Appellate Division”).
LEST program asked how that conclusion harmonized with the provisions in Maryland law that seem to give nonlawyers the legal authority to represent claimants in certain administrative hearings. The followup memorandum from the AG’s office reaf-

firmed the conclusion that the students would not be allowed to provide representation in administrative hearings, and gave a ra-

tionale that is sufficiently difficult to parse that it is worth quot-

ing at length:

The provisions cited by the [letter] concern statu-

torily authorized exceptions to the general rule that individuals who are not attorneys may not re-

present others before Maryland governmental units. See 78 Op. Atty. Gen. 257 (a layperson may not represent another individual where such re-

presentation involved the practice of law without authorization in a statute or rule of court). . . .

Although they permit such assistance on an individual basis, these provisions do not authorize the practice of law by unauthorized individuals, nor are they intended to authorize nonlawyers to offer their services generally to the public or a segment thereof . . ..

As a general matter, the term “authorized repre-

sentative” may be used to refer to an individual who has been granted a power of attorney. The power of attorney does not give the representative the right to give advice on legal matters or appear in court. Rather, it gives the representative the right to act on the principal’s behalf only to the extent that the principal is permitted by law to act through an agent. See Ross v. Chakrabarti, 194 Md. App. 526 (2010). The term may also be used to refer to a union’s appointed collective bargaining representative. See., e.g., Md. Code, State
Personnel and Pensions, §3-101. Although these individuals may act of behalf of another individual under certain circumstances, they do not gain the authority to practice law without a license.

Any exception to the general rule must be statutorily authorized. A state agency is not empowered to grant such authority. See Md. Code, State Gov't, § 10-206.1 (an agency may not grant the right to practice law to an individual who is not authorized to practice law). . . .

The first and last paragraphs of this excerpt seem to recognize that the LEST project was relying on statutory exceptions to Title 10. It acknowledges that nonlawyers may, pursuant to such authorization, engage in activities that would otherwise constitute the practice of law, including representing persons in certain administrative proceedings, such as those involving unemployment insurance benefits. By what mysterious alchemy, then, do such statutory exceptions become unavailable to the graduate students in the LEST program to represent low-income persons in administrative hearings?

The case cited by the memorandum, Ross v. Chakrabarti, involved a nonlawyer who attempted, unsuccessfully, to use a power of attorney as a bootstrap to enable him to function as an attorney-at-law for another person in a court case. The reference to Ross seems inapposite, as he did not have the necessary statutory exception; instead, it was concerned with representation in a court case. And while it may be true, as the memorandum indicates, that some "authorized representatives" in administrative proceedings are persons who have been granted a power of attorney, nothing in Maryland law indicates that representation as described in the examples cited to the AG's office is limited to those with a power of attorney. In fact, in the 1993

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96 Supra note 89.
AG opinion cited in the memorandum and described earlier in this Article, “representation” has been understood in its conventional sense of functioning as an advocate on behalf of a party. 98

The reference in the memorandum to the fact that administrative agencies are not empowered to grant authority to nonlawyers to practice law seems similarly inapposite. A Maryland statute – not just a Maryland regulation – allows unemployment benefits claimants to be represented by nonlawyers, 99 and the regulatory permission is based on a delegation of statutory authority, as is generally the case with such provisions. The memorandum’s reference to State Government § 10-206.1 (the Maryland Administrative Procedure Act) is also of no discernible consequence. 100 That statute does indeed say, as the memorandum indicates, that “[a]n agency may not . . . grant the right to practice law to an individual who is not authorized to practice law.” But in the same section of the statute cited, it also says, though the memorandum does not mention it, that an agency may not “prohibit any party from being advised or represented at the party’s own expense by an attorney or, if permitted by law, other representative.” 101

98 The AG concluded that “representation of a law enforcement officer before a hearing board unquestionably involves tasks that are part of the practice of law.” 78 Op. Att’y Gen. Md. at 258.

99 Md. Code Ann. Lab. & Empl. § 8-507(a) (Claimants. – In a proceeding before a hearing examiner, a claimant may be represented by a lawyer or another agent authorized by the claimant) and § 8-5A-08 (Representation of parties (a) Claimants. – In a proceeding before a special examiner or the Board of Appeals, a claimant may be represented by a lawyer or another agent authorized by the claimant).

100 It should be noted that the Maryland APA is not applicable to many types of administrative proceedings in Maryland, including those involving unemployment insurance benefits claims, except for certain appeals. Md. Code Ann. State Gov’t § 10-203 (2011) establishes that “[t]his subtitle does not apply to . . . (5) unemployment insurance claim determinations . . . except as specifically provided in Subtitle 5A of Title 8 of the Labor and Employment Article . . . .”

Thus, no law or interpretation of law cited in the followup memorandum supports its conclusion that a graduate student could not assist or even represent a person in an administrative proceeding, where the law permits such assistance/representation and where a party so desires to receive it. The memorandum cryptically states that although statutory authorizations permit nonlawyer representation “on an individual basis,” they “do not authorize the practice of law by unauthorized individuals, nor are they intended to authorize nonlawyers to offer their services generally to the public or a segment thereof . . . .” If the statutes allow nonlawyers to engage in representation, then it is (under the criteria that the memorandum itself recognizes) not the practice of law by unauthorized nonlawyers. However, the memorandum implies that there is something impermissible about the students offering free assistance to low-income persons through referrals from a legal services provider – as that is the means of “offering the services” to a segment of the public – even if it would be otherwise permissible “on an individual basis.” But the memorandum cites no legal support for that conclusion and gives no further explanation as to how something permitted “on an individual basis” turns into something impermissible when done in a more organized way.

In short, the memoranda from the AG’s office concluded that all the activities the graduate students planned to engage in were prohibited. In doing so, it cherry-picked from AG opinions and took positions that were unsupported by law or that were even contrary to legal authority – as if the goal was to prevent the LEST project from going forward.

The 2005 Maryland AG opinion emphasized that the underlying purpose of Title 10 is to serve as “a consumer protection law.”¹⁰² If the goal of the statute is to protect the interests of the

consumer, then the overriding question should be whether the low-income person who cannot afford an attorney and is unable to secure free legal representation would be worse served by having no assistance at all or by receiving less-than-ideal assistance. There may in fact be situations where having no assistance at all would indeed be preferable, such as where the person has important interests at stake that could be irreparably harmed by bad nonlawyer assistance. An example might be situations involving family law and criminal law, which was why the LEST project had explicitly excepted such matters from referral. But where security deposits, unemployment benefits and the like are concerned, free assistance by graduate students with some training and access to legal information would seem to enhance the ability of low-income people to protect their legal rights, and therefore would not frustrate the Maryland statute’s purpose of protecting consumers. Interestingly, the 1995 AG opinion observed that “victims of domestic violence are being ‘preyed upon’ in ways far more threatening than the specter of inadequate representation. Lay advocates could help victims assert legal rights that they would otherwise have no means of pursuing.”\footnote{80 Op. Att’y Gen. Md. at 145.} This observation is similarly applicable to the low-income persons the LEST project proposed to assist.

VI. Some Lessons

The memoranda from the Maryland AG’s office should have concluded that most of the activities planned for the proposed LEST project were in fact consistent with Maryland law as interpreted by AG opinions and as otherwise permitted by law. But, as the law clinicians had pointed out to the LEST program, UPL is a quagmire. The law on UPL in Maryland, as in many jurisdictions, is sufficiently unsettled that it facilitates objections and accusations and therefore operates as a substantial constraint on what may be tried and what may succeed.
Accordingly, even given the existence of favorable AG opinions and other law, it may be necessary for projects like the one attempted by the LEST program to seek the endorsement of the judicial branch in order to go forward. Maryland's Title 10 indicates that the State's highest court, the Court of Appeals, may determine what constitutes the practice of law (and presumably what constitutes the unauthorized practice of law as well). Thus, a strategy for a project like this one might be to try to convince the Maryland Court of Appeals to adopt a facilitating rule, perhaps permitting nonlawyers to provide free assistance to low-income persons where such assistance meets certain criteria. Such a rule may not only help protect projects from accusations of UPL but might even broaden the scope of the services that such projects could provide. Because the Maryland courts have in the past identified the judiciary as the branch entitled to determine what constitutes the practice of law, getting such judicial approval may be necessary for activities involving matters that are likely to wind up in court.

However, it is evident that the legislature also has a role in determining the definition of the practice of law in Maryland (as is also the case in many other jurisdictions), insofar as it has enacted Title 10. Further, the Maryland courts have acknowledged this role of the legislature, and have implied that once the legislature

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105 Public Service Comm'n v. Hahn Transportation, Inc., 253 Md. 571, 583 (1969); see also Lukas v. Bar Ass'n of Montgomery County, 35 Md. App. 442, 447, cert. denied 280 Md. 733 (1977) ("The power to regulate and define what constitutes the practice of law is vested solely in the judicial branch of government and not the executive or legislative").
106 The court explains the relationship as follows in Hahn Transportation: Under our constitutional system of separation of powers, the determination of what constitutes the practice of law and the regulation of the practice and of its practitioners is, and essentially and appropriately should be, a function of the judicial branch of the government. In many States it has been held that the legislative branch cannot constitutionally exercise that judicial function although it may make implementing regulations.
islature has spoken, the courts continue to have an interpretive and interstitial role but do not trump legislative determinations. Thus, it may also be desirable or necessary for this kind of project to seek a statutory exception to Title 10, employing criteria similar to those for a judicial rule. Further, where legislative permission already exists for nonlawyer representation, as with administrative proceedings, the memorandum from the Maryland AG’s office indicates that such permission still may not be enough to allow nonlawyers to provide assistance in any kind of organized fashion without being accused of UPL. Thus, a further explicit exception to that effect may need to be legislatively adopted.

In addition to seeking statutory and court rule changes, another strategy available for such projects might be to pursue impact litigation. Maryland’s broad interpretation of UPL could be challenged on a number of grounds, including as violations of the constitutional right of petition, due process and free speech. The interpretation of UPL in the memoranda from the AG’s office could be seen as placing impermissible restrictions on the constitutional right of low-income persons to petition the government for a redress of grievances. By analogy, the right of “jailhouse lawyers” (prison and jail inmates) to provide legal ad-

In Maryland there has always been a comfortable accommodation in this area. . . .

Id. at 583.

107 As the court explains in Hahn Transportation, “The fact that the legislature has occasionally spoken in specified areas on unlawful practice does not mean that it has attempted to exclude judicial or quasi-judicial bodies from acting at all or in other areas. . . .” Id. Accordingly, where the legislature has spoken, the court continues to have some authority to regulate but the implication is that the role would be supplementary.

108 It has been observed that a State cannot block nonlawyers from providing representation in federal administrative fora, see Recommendations, supra note 13 at 1764 (“States may not prevent federal agencies from electing to permit nonlawyer practice based on the Supremacy Clause”).

109 The Supreme Court has recognized that certain burdens on the right of petition cannot withstand constitutional scrutiny. In NAACP v. Button, 371 U.S. 415 (1963) and In re Primus, 436 U.S. 412 (1978), the Court concluded
vice and to draft legal papers for other prison and jail inmates has already been recognized as constitutionally protected from UPL prohibitions. Further, the murky definition of UPL in Maryland arguably raises due process problems. The 1995 AG opinion acknowledged that the line was hard to draw between acceptable and unacceptable behaviors for nonlawyers, and as a result of the “inevitably imprecise definition,” courts were left to construe the matter on a case-by-case basis. The memorandum to the LEST program if anything reduces the clarity of the situation. The Maryland law criminalizing UPL thus runs the risk of failing to satisfy the due process requirement that the law give people specific notice of what acts are criminally forbidden.

The UPL restrictions in Maryland also may present First Amendment free speech problems. The initial memorandum’s statement that the graduate students were only allowed to refer persons to “written materials” and could not explain such materials would seem to be in violation of the First Amendment rights of both the graduate students and the persons assisted. In addition, one of the things the LEST project proposed to do was to have graduate students prepare how-to booklets that could be generally distributed to low-income persons with legal

that the bar could not prevent lawyers from soliciting clients for impact litigation to try to bring about a change in the law.

110 Johnson v. Avery, 393 U.S. 483, 485 (1969). But the Court has been reluctant to go further, implying in its dismissal of Hackin v. Arizona 389 U.S. 143 (1967), involving a nonlawyer assistant outside the jailhouse walls, that the logic might not be extended to other situations.

111 As the Supreme Court observed in Lanzetta v. New Jersey (1939), “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” 306 U.S. 451, 453. See also Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (“we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited”).

113 See Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (there is a First Amendment right to “receive information and ideas” as well as to convey them).
problems—an approach inspired by the fact that the existing court-distributed materials seem designed mainly to assist small business owners.\textsuperscript{114} The initial memorandum from the Maryland Attorney General’s office indicated that “preparing general information materials for general public distribution” would be permissible “if the student’s work is reviewed and approved by an attorney and merged into the work of the attorney,”\textsuperscript{115} echoing the ethical rule that applies to paraprofessionals assisting attorneys in the practice of law.\textsuperscript{116} But this limitation, while understandable as a matter of prudence, nonetheless may do too little to respect the students’ First Amendment rights to express their views of the law. Further, the preparation of such materials by nonlawyers may not constitute the practice of law at all and thus lies outside the reach of UPL statutes.\textsuperscript{117}

Finally, it might make sense for projects like this one to seek assistance from the agencies of the federal government concerned with antitrust policy and law. Such agencies have already expressed concerns to various States (not yet including Maryland) about the anticompetitive effect of overly restrictive definitions of the practice of law,\textsuperscript{118} and the advocacy of the fed-

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\textsuperscript{114} For example, the Maryland courts distribute a booklet entitled \textit{Small Claims} that was developed by the District Court of Maryland and Eliot M. Wagonheim. Wagonheim is identified on the cover of the booklet as the author of \textit{The Art of Getting Paid: The Business Owner’s Guide to Collecting Debts and Managing Receivables in Maryland}. Unsurprisingly, the booklet emphasizes debt collection, rather than issues that would be more likely to involve low-income persons, such as getting back a security deposit or addressing a consumer protection issue.

\textsuperscript{115} \textit{Supra} note 90.


\textsuperscript{117} See, e.g., \textit{Dacey}, 28 A.D.2d at 175 (“It cannot be claimed that the publication of a legal text which purports to say what the law is amounts to legal practice”).

\textsuperscript{118} The Maryland Attorney General’s office has taken note of federal overtures to the States in this regard. In its 2005 opinion, it remarked that

an expansive interpretation of the “practice of law” . . . might raise antitrust issues. The United States Department of Justice
eral agencies has evidently produced results in some jurisdictions. However, it should be noted that seeking federal intervention is hampered by its own set of complications.

In short, UPL restrictions that thwart experiments like the one attempted by the LEST program might be addressed through various means. Of course, any and all of these approaches are likely to face opposition. Thus, attempts to experiment with nonlawyer assistance to improve the access of low-income persons to justice are likely to require concerted and continuous effort.

VII. CONCLUSION

Given the size of the problem of access to civil justice in this country, and the harmful effects such lack of access has on low-income persons, it makes sense to consider the option of nonlawyer assistance as part of the solution to the problem. While it is also important to continue to work on ways to ensure that the most serious legal problems are handled by lawyers, the problem of access cannot be solved by lawyers alone. Indeed, for the foreseeable future, increasing the number of lawyers available to assist low-income persons with civil legal problems is probably the least feasible approach. Figuring out ways

and the Federal Trade Commission, in joint letters to various bar associations, have warned that statutes or rules that expansively define "the practice of law" may run afoul of the federal antitrust laws by limiting beneficial competition between lawyers and nonlawyers with respect to certain services, without providing a significant benefit to consumers of those services. 90 Op. Att’y Gen. Md. at 107. The AG’s opinion presented this information as part of its rationale for interpreting Title 10 more narrowly than its literal wording would seem to require.

See discussion in Part II of Montana.

around the problem represented by UPL restrictions is thus essential to ensuring that experiments with nonlawyer assistance are tried and real strides are taken to improve access to justice.