

TIPPING THE SCALES OF JUSTICE: THE ROLE OF THE NONPROFIT SLIDING SCALE LAW FIRM IN THE DELIVERY OF LEGAL SERVICES

*Mitch**

Most research on providing legal services for low-income clients has focused on (1) government-funded programs, (2) private donor-funded programs, and (3) pro bono programs. Despite the valuable services these programs provide, a well-documented justice gap persists. Other models for the delivery of legal services exist, but are not well known or understood. One such approach has existed for years without scholarly study: the nonprofit organization that only serves low-income clients and receives its funding primarily on the basis of sliding-scale fees paid by clients. Based upon the author’s personal experience starting a nonprofit Sliding Scale Law Firm (SSLF), and informed by interviews with attorneys working at SSLFs across the country, Part I of this article describes the structure of these nonprofit SSLFs. Part II addresses the role that the SSLF model fills in the overall system of legal service delivery: SSLFs reduce the justice gap by providing services to clients who cannot obtain free legal services, but cannot afford to hire an attorney at prevailing market rates.

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INTRODUCTION

“Last year, I felt my kids were no longer safe because their other parent started abusing drugs,” said Pat,¹ a financially struggling single parent with two elementary-aged children. “I went to Affordable Justice, Inc.² They represented me and filed the right court motions just as the kids’ other parent went on a drug binge, went missing for a while, and eventually checked into a treatment center. I never thought I could afford a lawyer because attorneys usually charge hundreds of dollars per hour. My kids would have remained in a dangerous situation without help from Affordable Justice, Inc.”

Pat works full-time, earning \$14.50 per hour, which is well above the federal minimum wage, but still only earns \$29,000 annually. For many people in Pat’s situation, there is little or no money left in their monthly budget after paying for food, clothing, and shelter for themselves and their children. When people like Pat encounter legal issues, they are often too poor to hire an attorney at prevailing market rates, which are frequently more than \$250 per hour.³ Nevertheless, they are

1. Names and identifying information have been changed or removed to protect confidentiality.

2. Fictitious name of the nonprofit sliding scale law firm. *See supra* note 1.

3. *See* RONALD L. BURDGE, U.S. CONSUMER LAW ATTORNEY FEE SURVEY REPORT 2013–2014, at 12 (2015), <https://www.nclc.org/images/pdf/litigation/fee-survey-report-2013-2014.pdf> (finding an average hourly rate of \$361/hour). *See generally* Lester Brickman, *Effective Hourly Rates of Contingency Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653 (2003).

considered too wealthy to qualify for federally funded legal assistance.⁴

It is often said that necessity is the mother of invention. Because millions of Americans need legal services but cannot afford or qualify for them,⁵ more non-traditional methods for providing legal services are needed.⁶ Part I of this paper describes an understudied approach to delivering legal services that was born out of this necessity⁷: the non-profit sliding scale law firm. Part II explains the role nonprofit sliding scale law firms play: providing legal aid to those who cannot afford or access legal services through traditional nonprofit organizations or traditional private law firms, tipping the scales of justice into balance for everyone.

I.

THE BASIC STRUCTURE OF NONPROFIT SLIDING SCALE LAW FIRMS (SSLFs)

Sliding scale law firms (SSLFs) charge clients for legal services provided. Now, almost any lawyer in private practice can adjust or “slide” the rate each client is charged based on that client’s income. Charging some clients or customers more than others is called price discrimination, and it is common practice not only in the for-profit airline industry but also in nonprofit sectors such as healthcare and higher education.⁸ Price discrimination based upon income allows an

4. Appendix A, 82 Fed. Reg. 10,442 (codified at 45 C.F.R. 1611), <https://www.federalregister.gov/documents/2017/02/13/2017-02823/income-level-for-individuals-eligible-for-assistance>.

5. In a recent survey, the Legal Services Corporation estimated that over 944,000 people who actively sought legal services were turned away by programs because of a lack of available resources. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9, 11 (2009) [hereinafter DOCUMENTING THE JUSTICE GAP]. This number would not include those who did not qualify for services because of income. *Id.* Studies on the lack of lawyers for people of limited means generally underestimate the need. See Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 534 (2013).

6. This paper uses the phrases “providing legal services,” “delivery of legal services,” “direct legal services,” and “legal representation” interchangeably. Regardless of the phrasing, the meaning throughout the paper is legal representation of client(s) by lawyer(s).

7. For a look at low fee or “low bono” work by private, but not necessarily non-profit, firms, see generally Luz E. Herrera, *Encouraging the Development of Low Bono Law Practices*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1 (2014). For an explanation of the need for further study of service delivery methods, see Rhode, *supra* note 5, at 534.

8. With in-house scholarships and other financial aid, colleges and universities often charge students vastly different tuition amounts. See, e.g., *Financial Aid In-*

organization to serve people with a broader range of incomes than it could if everyone paid the same price. Higher-income clients pay more, effectively subsidizing lower-income clients who pay less. While any law firm that ever uses any price discrimination might be considered a sliding scale law firm, this paper is focused exclusively on nonprofit SSLFs that are tax-exempt under § 501(c)(3) of the Internal Revenue Code.

While not intended to provide an exhaustive or comprehensive description of every individual SSLF, this paper brings together insights from SSLF practitioners with diverse geographies and legal practice areas. Tax-exempt SSLFs have been serving clients for decades. But, due to their independent nature, the lack of any SSLF-specific association, and a dearth of scholarly study, many incorrectly think that the SSLF is a new development. As recently as 2017, the American Bar Association (ABA) described SSLFs as “fairly new.”⁹ However, the idea of charging sliding scale fees has long been suggested as part of an overall system of delivering legal services.

Might legal services be better provided to people of moderate means through some special kind of facility, such as a low-cost legal service bureau or something of the sort? The question is not new. Karl Llewellyn commented in 1938 about the need for a facility to provide legal help to people who can pay something, but not full fees, for the services they require. The same idea was discussed in 1947 by Reginald Heber Smith, who, like Llewellyn, saw a possibility that such agencies might grow out of bar-sponsored lawyer referral services.¹⁰

Moreover, the SSLF model has been recognized and approved by the IRS since at least the 1960s.¹¹ While it is unclear exactly when the first SSLF started, the practice of charging sliding scale fees to clients who could not otherwise afford an attorney dates back to at least 1770, when John Adams defended eight British soldiers accused of murder-

Depth, YALE UNIV., <http://admissions.yale.edu/financial-aid-prospective-students> (last visited Aug. 13, 2017) (explaining grants available to students and the varying costs to families based on income).

9. Stephanie F. Ward, *Pro Bono and Low Bono: Can Nonprofit Firms Bridge the Access Gap?*, A.B.A. J. (Jan. 1, 2017), http://www.abajournal.com/mobile/mag_article/low_bono_access_justice.

10. BARLOW F. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES* 205 (Am. Bar Found. ed., 1970); see also JEANNE CHARN & RICHARD ZORZA, *CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS: BELLOW-SACKS ACCESS TO CIVIL LEGAL SERVICES PROJECT 14–17* (2005), <http://www.garybellow.org/Text.pdf>.

11. See Rev. Rul. 69–161, 1969-1 C.B. 149.

ing five Bostonians during what became known as the Boston Massacre.¹²

A. Methodology

This article is a product of both extensive interviewing as part of a qualitative study on SSLFs and the author's career as a legal service provider. The author cofounded an SSLF in 2004, worked there full-time for five years, and remains on its board of directors. In addition, the author currently serves as a full-time clinical director at the University of Wisconsin Law School. Background data and interview questions about SSLFs were informed by these experiences. Based upon interviews with other founders and attorneys working at SSLFs across the United States, the author describes the general characteristics of SSLFs and explores the challenges and opportunities they navigate. The author identified more than thirty SSLFs. The Institutional Review Board (IRB) research protocol for this study, however, prohibits naming the firms or individuals interviewed for this paper. Lists of many of the SSLFs can be found online.¹³

This article is intended to inform and inspire others to consider the SSLF model as an accessible, complementary, sustainable model that provides access to justice for clients who otherwise could not qualify for or afford an attorney.

B. The § 501(c)(3) Tax-Exempt Sliding Scale Law Firms

Section 501(c)(3) of the Internal Revenue Code provides that organizations founded and operated exclusively for charitable purposes

12. AM. BAR ASS'N, DIALOGUE ON JOHN ADAMS AND HIS LEGACY 7 (Howard Kaplan ed., 2011), www.americanbar.org/content/dam/aba/images/public_education/dialogue_on_john_adams_and_his_legacy.pdf; see also REGINALD HEBER SMITH, JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES 133–36 (1921) (noting that legal aid organizations have been charging clients low fees for services since 1888 or before).

13. For a listing of some nonprofit sliding scale law firms (SSLFs), see *List of Nonprofit and Sliding Scale Law Firms, Similar Organizations, and Other Resources*, OPEN LEGAL SERVS., <http://openlegalservices.org/about/resources/> (last visited Apr. 13, 2017). See also *ABA Affordable Legal Services: Innovative Services to Help People of Modest Means Obtain Legal Help*, AM. BAR ASS'N, www.americanbar.org/groups/delivery_legal_services/resources/programs_to_help_those_with_moderate_income.html (conduct in-page search for “sliding”) (last visited Oct. 3, 2016); *Welcome to the Revolution in Affordable Legal Services*, OPEN LEGAL SERVS., <http://openlegalservices.org/about/revolution/> (last visited Oct. 3, 2016) [hereinafter *Welcome to the Revolution*].

qualify for exemption from federal income tax.¹⁴ A law firm is considered a charitable § 501(c)(3) nonprofit even if it charges clients for services, provided that (1) the fees are based upon clients' ability to pay, and (2) all of the firm's clients are indigent or unable to otherwise afford legal services.¹⁵

Confusion arises because the label "public interest law firm" is often used colloquially to describe different types of organizations, including nonprofit SSLFs. However, under IRS regulations, a public interest law firm is prohibited from representing individual clients for a fee.¹⁶ Consequently, nonprofit SSLFs are not "public interest law firms." Rather, nonprofit SSLFs are considered "legal aid organizations" by the IRS.¹⁷ Legal aid organizations and public interest law firms are two separate and distinct types of organizations, each of which is recognized as tax-exempt for different reasons.

1. *SSLFs Are Not Public Interest Law Firms*

Any litigation by IRS-defined public interest law firms must represent a broad public interest rather than a private, individual interest.¹⁸ Common examples of public interest law firm litigation include cases regarding environmental protections, urban renewal, prison reform, freedom of information, and injunction suits challenging governmental and private action or inaction.¹⁹ To ensure that public interest law firms are only taking cases that could make a broad public impact, such firms are prohibited from seeking or accepting attorney fees from its clients.²⁰ If attorneys recover fees, the sum of fees collected (awarded by courts and received from clients) cannot exceed fifty percent of the cost of the firm's legal functions.²¹

14. I.R.C. § 501(c)(3) (2012).

15. Rev. Rul. 78-428, 1978-2 C.B. 177; *see also* IRS, *The Concept of Charity, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1980* (Feb. 1980), <https://www.irs.gov/pub/irs-tege/eotopicb80.pdf>.

16. Rev. Proc. 75-13, 1975-1 C.B. 662, modified, Rev. Proc. 92-59.

17. The IRS has recognized at least four separate types of organizations that engage in litigation as charities. *See, e.g.*, Rev. Rul. 80-278, 1980-2 C.B. 175, 3 (exempting an organization whose principal activity was environmental litigation); *Internal Revenue Manual* 4.76.9.4 (Apr. 1, 2003) (stating test to determine exemption for public interest firms that engage in litigation); IRS, IRS EXEMPT ORG. BUSINESS MASTER FILE EXTRACT 3, 12 (Apr. 2004), https://www.irs.gov/pub/irs-soi/eo_info.pdf.

18. Rev. Rul. 75-74, 1975-1 C.B. 152.

19. *Id.*

20. Rev. Proc. 75-13, 1975-1 C.B. 662; *see also* Rev. Rul. 75-76, 1975-1 C.B. 154.

21. Rev. Proc. 92-59, 1992-2 C.B. 411.

2. *SSLFs Are Legal Aid Organizations*

Providing legal service is ordinarily a commercial activity and, absent special circumstances, does not qualify as a charitable activity. However, legal aid organizations have been recognized as charitable, § 501(c)(3) tax-exempt organizations for many years. The classic legal aid society model was created to provide legal services to indigent persons who would otherwise be financially incapable of obtaining them, and that purpose has long been a basis for tax-exempt status under § 501(c)(3).²² By providing essential legal services to indigent persons, legal aid organizations relieve the poor and distressed; therefore, their litigation activity is charitable. Furthermore, an organization providing legal services to indigent persons can be tax-exempt under § 501(c)(3) despite charging for its services.²³ However, fees must be based on the indigent clients' limited abilities to pay rather than on the type of service rendered.²⁴

In contrast to the IRS definition of a public interest law firm, the services provided by legal aid organizations such as nonprofit SSLFs are provided to private individuals, and are not required to further any broader public interest.²⁵ Typical litigation by a legal aid organization often involves divorce and domestic relations, consumer debt issues, criminal defense, rental housing, and other personal legal problems. The charitable classification of legal aid organizations rests on the basis that they provide essential services to the poor who are otherwise unable to obtain them and they provide such services in a charitable manner.

One key difference between a for-profit law firm that uses price discrimination and a § 501(c)(3) nonprofit SSLF is that all clients of a tax-exempt nonprofit should be indigent or otherwise financially incapable of affording counsel.²⁶ This important distinction bars granting tax-exempt status to any law firm that occasionally (though commendably) charges some low-income clients a reduced fee while otherwise charging clients prevailing market rates.

22. R. James Steiner & Carol J. Holahan, *History of Legal Aid in the United States*, 18 UPDATE ON L. RELATED EDUC. 6, 6 (1994); *The History of the Legal Aid Society*, LEGAL AID SOCIETY, <http://www.legal-aid.org/en/las/aboutus/ourhistory.aspx> (last visited Apr. 24, 2017).

23. Rev. Rul. 78-428, 1978-2 C.B. 177.

24. *Id.*

25. IRS, *Exempt Organizations Continuing Professional Education (CPE) Technical Instruction Program for Fiscal Year 1984*, at 1 (Jan. 1984); see also *supra* note 13.

26. IRS, *The Concept of Charity*, *supra* note 15, at 24. But see I.R.C. §§ 509(a)(2), 513 (regarding exceptions and qualified exclusions).

A second key distinction between these entities is that the fee charged by a nonprofit SSLF must be based solely upon a client's ability to pay. At a for-profit law firm, price discrimination may be based upon the level of services rendered or the type of client served. For example, a real estate lawyer might offer a full, "turn-key" package of advice and services for a homebuyer at one price or a simple review of closing documents for a lower price. A lawyer might also charge a well-informed, repeat homebuyer one hourly rate while charging a first-time homebuyer a higher hourly rate. In contrast, every flat fee or hourly rate charged by a nonprofit SSLF must consider only the client's ability to pay.²⁷ That is, regardless of whether the matter involves drafting a generic will or drafting the detailed wishes of an eccentric client seeking to bequeath various items to dozens of different heirs, the hourly rate can only vary by the client's ability to pay. Similarly, whether representing a client at a bail hearing or in a criminal jury trial, an SSLF attorney must base the clients' fees on their abilities to pay.

Finally, nonprofit SSLFs and for-profit firms may be distinguished by their governance structures. A for-profit firm can have a single lawyer-owner, a number of partners, or many attorney shareholders.²⁸ The power to make firm governance decisions is linked to the ownership rights of those lawyers, and the firm's owners may direct it to serve any purpose they deem appropriate. The for-profit firm is often driven by the profit motive, i.e. the principle that businesses exist to maximize profits. In contrast, the lawyers in a § 501(c)(3) SSLF generally do not have ownership rights because no stock is issued.²⁹ Any tax-exempt nonprofit must be organized and operated to further the purpose that justifies tax exemption. Thus, from the moment it is created, any nonprofit SSLF must declare and serve its charitable purpose. Each of the nonprofit SSLFs interviewed for this paper is governed by a volunteer board of directors that sets overarching policy, provides oversight, and helps with marketing and fundraising. Most SSLF boards are comprised primarily of attorneys but often in-

27. Consistent with for-profit firms and the Model Rules of Professional Conduct, the total fees that a nonprofit SSLF charges may increase if a client requests more services or hours of work. MODEL RULES OF PROF'L CONDUCT r. 1.5(a)(1)–(8) (AM. BAR ASS'N 2015).

28. Shareholders are issued shares in corporate structures such as C corporations. In LLCs, ownership stems from members and their respective units or ownership percentages. *Choose A Business Structure*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/starting-business/choose-your-business-structure> (last visited Aug. 11, 2017).

29. See, e.g., Garth Seehawer, *The New Nonstock Corporation Law*, 71 WIS. L. 10, 11 (1998); *Kansas Nonprofit Corporations*, LAWFORCHANGE.ORG, www.lawforchange.org/NewsBot.asp?MODE=VIEW&ID=2346 (last visited Oct. 26, 2015).

clude other business professionals, and may even include former clients and community members.³⁰

C. Fee Structures and Eligibility

In general, all nonprofit SSLFs employ a sliding-scale which looks to potential clients' ability to pay to determine whether they are eligible for services and, if so, the rate at which they will be charged. However, each SSLF sets its own eligibility rules and client rates similar to the way each airline sets its own frequent flyer eligibility requirements and seat prices.³¹

Some SSLFs charge a rate based upon a client's income while others consider income, assets, and expenses. Some look at a client's hourly pay, while others look at monthly, weekly, or annual pay. Some require documentation such as pay stubs or tax returns; others require sworn statements of eligibility. Most of the SSLFs interviewed for this paper require clients to notify the SSLF if their financial situation changes during the course of representation.

Some SSLFs serve clients with incomes up to 400% of the Federal Poverty Level (FPL), while others go up to 250, 300, or 350%. The range varies based in part upon the particular locale's average cost of living. In general, if a person can afford an attorney at average local market rates, he or she is not eligible for services from a nonprofit SSLF. Interviews revealed that the majority of SSLF clients do not earn anywhere near the upper end of their firms' respective eligibility scales.

D. Cost Savings and Sustainability

All of the SSLFs interviewed are able to remain financially viable while charging low fees by employing a variety of cost-saving measures.³² First, they save on infrastructure and materials. While

30. Some states' ethics rules explicitly allow non-lawyer board members, while others require all board members to be lawyers. Compare UTAH R. PROF'L CONDUCT 5.4, with FLA. BAR REG. R. 4-8.6. Lawyers interested in creating a nonprofit SSLF should familiarize themselves with both the IRS regulations as well as their state's requirements. See also Stacy Brustin, *Legal Services Provision Through Non-Profit Multidisciplinary Practice: Encouraging Holistic Advocacy, While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787 (2002).

31. For a discussion of factors that any law firm might consider in setting sliding-scale fees, along with illustrative calculators, see CHI. BAR ASS'N, PRICING TOOLKIT FOR ATTORNEYS SEEKING TO SERVE LOW- AND MODERATE-INCOME CLIENTS (2016), <https://chicagobarfoundation.org/pdf/jep/pricing-toolkit.pdf>; *Sliding-Scale Fee Calculator*, TWO RIVERS LAW, <https://tworiverslaw.net/ssc/index.html> (last visited May 21, 2017).

32. See, e.g., *Welcome to the Revolution*, *supra* note 13.

many for-profit law firms are filled with expensive art, granite counters, marble floors, and leather chairs, nonprofit offices are much more modestly outfitted.³³ Money saved on sales and property taxes also helps keep client fees low.³⁴ Similarly, many vendors offer discounts for § 501(c)(3) organizations on office materials and software that further reduce expenses.³⁵ Interviews with SSLF attorneys revealed that it is very hard for solo practitioners to sustain a nonprofit SSLF because solo practitioner firms lack economies of scale.³⁶ The cost of office space and a subscription to Internet, phone, and legal research services can be either borne by one attorney or divided among several attorneys in a mid-size firm, with the latter arrangement allowing for the lower client fees essential to the nonprofit SSLF model. Furthermore, one cannot underestimate the invaluable, intangible benefits of having colleagues with which to commiserate and consult.

Nonprofit SSLFs also spend less than for-profit firms on personnel costs. Interviewees indicated that their SSLF salaries were less than what they could make in private practice, but were roughly equal to that of an attorney at a traditional nonprofit legal organization.³⁷ While attorneys could earn more money in for-profit private practice, the attorneys attracted to SSLFs all said they were more interested in expanding access to justice than they were in maximizing their own personal income. Supplementing their altruism, attorneys at nonprofit tax-exempt SSLFs can benefit from income-based loan repayment and loan forgiveness programs.³⁸

33. *Id.*

34. *See, e.g.*, WISC. DEP'T OF REV., SALES TAX EXEMPTIONS FOR NONPROFIT ORGANIZATIONS (2016), <https://www.revenue.wi.gov/DOR%20Publications/pb206.pdf>; *Sales Tax Exemption for Nonprofit Organizations*, MINN. DEP'T OF REV., http://www.revenue.state.mn.us/businesses/sut/Pages/Nonprofit_ES.aspx (last visited Aug. 11, 2017); *see also* Gail Sessoms, *How Can a 501(c)(3) Also Be Sales Tax Exempt?*, CHRON, <http://smallbusiness.chron.com/can-501c3-also-sales-tax-exempt-14251.html> (last visited Aug. 11, 2017).

35. *See, e.g.*, Gabrielle Sharaga, *What TechSoup Offers Foundations: Registering Your Foundation with TechSoup*, TECHSOUP (June 6, 2017) <http://www.techsoup.org/support/articles-and-how-tos/what-techsoup-offers-foundations>; ONTIMESUPPLIES.COM, <https://www.ontimesupplies.com/non-profit-office-supplies.html> (last visited Aug. 11, 2017); *How Does the Donation Process Work?*, GREENSTANDARDS, <http://greenstandardsltd.com/for-nonprofits/> (last visited Aug. 11, 2017).

36. *See, e.g., infra* notes 38–39.

37. For data on the median pay for public interest positions, see William Henderson, *The Market for Recent Law Graduates*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS* 184, 192 (Samuel Estreicher & Joy Radice eds., 2016) [hereinafter *BEYOND ELITE LAW*].

38. The federal government encourages attorneys to work for tax-exempt nonprofits like SSLFs by allowing them to make lower student loan payments and have their loan balances forgiven after ten years. 34 C.F.R. §§ 685.208, 685.219 (2016); *see also*

It is important to note that SSLFs are not sustained solely by idealism; they are also sustained by client fees and tax-deductible donations from supporters. Half of all businesses fail within the first five years.³⁹ SSLFs that have sustained, long-term success (defined as operating for more than ten years)⁴⁰ generally have one or two major focus areas with consistent client demand. For example, at most of the SSLFs interviewed for this article, a major focus area was family law. In order for idealistic lawyers to sustain any firm (and especially one supported by client fees and donations), they must guard against the temptation to do too many different things. They must also guard against the temptation to chase or become overly dependent on fickle grant funding.⁴¹ For SSLFs, which (by definition) operate on below-market rates, sustainability requires not only legal skills but also business management and fundraising acumen.⁴²

E. Complementary, Not Competitive

Some SSLF attorneys reported that the private bar responded to their emergence with apprehension.⁴³ Solo practitioners and small firms often voice concerns that SSLFs will reduce their business as clients seek out lower fees. It is true that solo and small firms often perform work similar to that done by nonprofit SSLFs. For-profit firms may even formally or informally slide or reduce their fees for low-income clients. When these lawyers hear about a new firm that plans to charge lower-than-market rates, some incorrectly assume the nonprofit SSLF is simply setting out to undercut their rates by using tax-exempt status. None of the SSLFs interviewed for this paper, however, aim to compete with private, for-profit lawyers.

Laura A. Calloway & Brad Carr, *Survey of New Admittees Regarding Law Student Debt and Post-Law School Employment*, 72 ALA. LAW. 193, 193 (2011); Jeanine L. Debor, *From the ACBA: Loan Repayment Assistance Programs Ease Debt for Public Interest Attorneys*, 12 LAW. J. 3 (2010); AM. BAR ASS'N COMM'N ON LOAN REPAYMENT & FORGIVENESS, *LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE* (2003), <http://www.americanbar.org/content/dam/aba/migrated/mar ketresearch/PublicDocuments/lrapfinalreport.authcheckdam.pdf>.

39. See *Business Employment Dynamics*, BUREAU OF LABOR STATS., https://www.bls.gov/bdm/us_age_naics_00_table5.txt (last visited July 4, 2017).

40. *Id.*

41. For a cautionary account of the difficulties of sustaining a nonprofit law firm, see Geoffrey A. Schoos, *Working on the Outskirts of Hope: One Independent Legal Services Organization's Struggle to Survive and Serve Rhode Island's Low Income Communities*, 18 CUNY L. REV. 229 (2016).

42. For a detailed overview of the economic challenges of running a firm based on low fees, see Herrera, *supra* note 7, at 1.

43. See, e.g., Schoos, *supra* note 41, at 249.

Nonprofit SSLFs instead complement existing firms and hope to see those firms flourish. There are countless families who get in a bind, cannot afford an attorney, and then lose their car, job, or home. Worse than the loss of property is the associated loss of stability for their children or other dependent family members.⁴⁴ Unresolved legal problems and any associated housing or financial instability contribute to generational poverty.⁴⁵ For example, a low-income parent who cannot access a consumer or employment attorney may illegally lose their home or job. That loss could disrupt a child's education. Children who fall behind in school or drop out entirely have limited earning potential in adulthood.⁴⁶ Thus, both those of modest income and those in generational poverty develop an ever-growing lack of familiarity with, or even a deep distrust of, the legal profession.⁴⁷

Imagine an individual whose only interactions with the legal system included a prosecutor convicting and incarcerating family members or creditors repossessing his or her belongings. Even among much of working-class America, lawyers are viewed as luxuries for the rich. Worse, lawyers are also seen as people to avoid, people who never offer value, or people who do not help with the problems in peoples' lives.⁴⁸ What if a lawyer at an SSLF interrupted a family's spiral into generational poverty by successfully defending a family member from a criminal charge, stopping a wrongful eviction, or helping with other legal problems that commonly impact low-income clients? Both the parents and their children would be more likely to have a positive perception of the justice system and the legal profession because those institutions provided helped when it was needed. The

44. HEATHER SANDSTROM & SANDRA HUERTA, URBAN INST., THE NEGATIVE EFFECTS OF INSTABILITY ON CHILD DEVELOPMENT: A RESEARCH SYNTHESIS 5-7 (Sept. 2013), www.urban.org/research/publication/negative-effects-instability-child-development-research-synthesis/view/full_report.

45. Generational poverty is defined as a family being in poverty for two or more generations. See *Facts About Poverty*, URBAN VENTURES, <http://www.urbanventures.org/facts-about-poverty/> (last visited October 26, 2015).

46. See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 299 (2016).

47. Scott L. Cummings, *What Good Are Lawyers?*, in *THE PARADOX OF PROFESSIONALISM, LAWYERS AND THE POSSIBILITY OF JUSTICE*, (Scott L. Cummings ed., 2011); Ann Juergens, *Toward a More Effective Solo and Small Firm Practice Model*, in *BEYOND ELITE LAW*, *supra* note 37, at 384.

48. Contrary to the notion that Americans are overly litigious, research shows that they typically do not recognize their civil justice issues as legal problems, and only twenty-two percent of them take their problems to someone outside of their immediate social network. REBECCA SANDEFUR, *ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 5* (2014); see also Rebecca Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443 (2016).

current SSLF clients are then more likely to be future private law firm customers due to their increased trust in the legal system. The parents are more likely to have a greater disposable income as a result of avoiding an illegal judgment debt or foreclosure, and the children are more likely to have a greater earning potential because their home was more stable and their education less disrupted.⁴⁹

The existence of nonprofit SSLFs that only represent those who cannot afford prevailing market rates means fewer for-profit lawyers will have to slide their fees down. Instead, private attorneys can and should refer such clients to the nonprofit SSLFs, thus freeing up more of their time to work for higher paying clients. When private lawyers understand and embrace the nonprofit SSLF model, they can take higher paying clients, earn more money in less time, and enjoy a larger pool of potential clients in the future.

F. Staffing

SSLFs utilize a wide range of staffing arrangements. Some SSLFs have only full-time attorneys on staff. Others have full- and part-time attorneys, as well as some non-attorney office staff on the payroll. All SSLFs interviewed keep overhead costs low by engaging volunteers or student interns and law clerks to assist with office duties. These options help students obtain sought-after work experience, making them more attractive candidates to potential employers. The attorneys who create or work for SSLFs have a wide range of experience levels: Some are recent graduates, but many have five to ten years of experience before starting or joining their SSLFs, and others have been practicing attorneys for more than twenty years. Rather than viewing themselves as firms designed only for recent graduates or for experienced attorneys in early retirement, all of the SSLFs interviewed expressed that a staff with a mix of experience levels is an ideal arrangement.

49. See SANDSTROM & HUERTA, *supra* note 45, at 15–28; see also E. Clinton Bamberger, Jr., *Legal Aid: An Opportunity for the American Bar*, 42 N.D. L. R???. 287 (1966) (“Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope and ambition.”).

G. Client Selection, Services, and Practice Areas

Nonprofit SSLFs offer a range of legal services in both civil and criminal law.⁵⁰ Some provide full representation while others provide unbundled or limited-scope representation.⁵¹ Some SSLFs do only trial work; others do trial work, transactional work, and appellate work. Most focus all or a majority of their resources on direct legal services, but some also engage in community legal education efforts. SSLF attorneys provide services in a variety of practice areas including family law, consumer law, housing law, employment law, immigration law, mental health, and any other legal issues experienced by local low-income clients.

Traditional nonprofit law firms are limited by government or private funding, which impose restrictions on client income eligibility standards and on the types of cases they can accept.⁵² For example, most of the federal funding for civil legal aid cannot be used to provide desperately needed immigration law services. In contrast, nonprofit SSLFs have greater autonomy over their practice areas and case selection. Some SSLFs provide immigration law services, criminal defense services, or civil legal services. At an SSLF, the clients and attorneys determine the practice area. If an SSLF attorney is interested in a particular area of law, and there are low-income clients who need services in that area, then the SSLF could provide those services.⁵³

50. While the right to a lawyer in criminal cases is technically guaranteed by the Sixth Amendment, U.S. CONST. amend. VI, the reality is that outdated eligibility standards and underfunded public defender offices leave many who are charged with crimes without access to a lawyer. See Samantha Sunne, *Guilty and Charged: Why Your Right to a Public Defender May Come with a Fee*, NPR (May 29, 2014), <http://www.npr.org/2014/05/29/316735545/why-your-right-to-a-public-defender-may-come-with-a-fee>.

51. The American Bar Association defines these terms as follows: “‘Limited Scope Representation’ refers to the concept of a lawyer agreeing with a client to handle only some part(s) of the client’s legal matter. The term ‘unbundling’ is sometimes used to refer to this method of client service.” *Limited Scope Representation*, AM. BAR ASS’N, https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/limited_scope_unbundling.html (last visited Aug. 11, 2017). For a description of unbundled services and limited-scope representation, see Russell Engler, *Limited Representation and Ethical Challenges*, in *BEYOND ELITE LAW*, *supra* note 37, at 431.

52. See, e.g., *infra* Sections II.C–D.

53. See generally Rhode, *supra* note 6, at 533–34. Additional questions that merit greater study include whether SSLF attorneys have more control over what services are offered and whether SSLF clients are more engaged and satisfied with their attorneys and case outcomes, as compared to litigants who obtain free legal services.

II.

THE ROLE OF SSLFs IN THE DELIVERY OF LEGAL SERVICES

Even with their basic structure and status as a § 501(c)(3) nonprofit explained, SSLFs still attract confusion. In particular, many outsiders question the purpose of or need for such firms. Most of these questions stem from both a lack of familiarity with the traditional methods for delivering legal services and from a failure to consider alternative methods, like SSLFs, that seek to provide access to justice at low cost for millions of people that do not qualify for traditionally-funded legal services.⁵⁴ This section seeks to address these questions and clarify the role nonprofit SSLFs play in the overall system of legal services.

A. *Why a Nonprofit?*

“Our mission is to provide legal services to low-income people who desperately need it and can’t get help elsewhere.”⁵⁵

“So, why do you want to be a nonprofit?” our lawyer repeatedly asked my colleagues and me when we created a nonprofit SSLF over a decade ago. This question is important and should be addressed by anyone looking into starting an SSLF. It is also a question posed to the attorneys who participated in interviews for this paper.

Our lawyer expanded on her basic “Why?” question, adding, “Why don’t you create a Limited Liability Company (LLC) and do righteous work for the little guy? Sure, sometimes you take a few cases for those who can pay you what you’re worth, and that will help you do some of the charitable work that you want to do. Why not go that route?”

SSLF attorneys interviewed for this paper reported various reasons for starting their nonprofit firms. Many had friends or colleagues who started their own traditional, for-profit small law firms and were unhappy because the practice areas and clientele that could pay their firms’ bills did not match the attorneys’ interests. Why endure years of law school and accumulate considerable student debt just to work a

54. “The needs of moderate- and middle-income people have never been a policy focus of the academy or the access to justice community.” Jeanne Charn, *Evolution of Legal Services in the United States*, in *BEYOND ELITE LAW*, *supra* note 37, at 164–65. Most studies only focus on legal services provided to the poor through traditional methods like government-funded programs, and the result is “a bit like assessing . . . the U.S. health care system by asking only how well Medicaid and free clinics work.” Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans*, in *BEYOND ELITE LAW*, *supra* note 37, at 22.

55. Telephone interview with SSLF founder (Nov. 6, 2015).

job that is not aligned with one's values and interests? For people who became lawyers to help the underserved get access to justice, how does charging \$300 or more per hour advance that goal?⁵⁶

A nonprofit tax-exempt structure allows these idealistic attorneys to engage in the kind of law practice they seek: providing direct services to low-income people in need. The SSLF structure means that the attorneys do not (and cannot) gravitate toward serving more and more traditional clients (with relatively high incomes), which would limit their time and resources available to serve low-income clients. Founders incorporated their service-oriented goals into the mission of the nonprofit. Moreover, because the nonprofit SSLF structure is funded by client fees, attorneys can consistently provide services, even when private donor or government grant funding is low or nonexistent.

B. *Why a Nonprofit Sliding Scale Law Firm?*

In addition to being able to practice the type of law they want to practice and serving the low-income clients they want to serve, incorporating as a nonprofit SSLF provides additional advantages to practitioners in comparison to traditional nonprofit legal services organizations. Staying true to the particular legal issues they are passionate about was noted as an important factor of overall job satisfaction by interviewees. SSLF attorneys observed that the instability of funding for traditional nonprofits and government legal work can force attorneys to completely alter their practice based on the funder's political preferences and restrictions.⁵⁷ Because SSLFs are funded by paying clients, they are not strictly beholden to political whims or a funder's wishes in contrast to government-funded organizations or traditional grant- or donor-funded nonprofits.

To understand why an attorney would choose to work at or start an SSLF, one must have a basic overview of the legal services landscape in the United States. An idealistic attorney looking to serve low-income clients has several traditional paths for employment. The "Big Three" traditional approaches for providing direct legal representation to those in need are (1) government-funded organizations, i.e. public defenders and the Legal Services Corporation; (2) privately funded organizations; and (3) *pro bono* efforts. A brief overview of these approaches shows they do tremendous good, but the justice gap persists

56. BURDGE, *supra* note 3, at 12.

57. *See, e.g.*, GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992). The limitations on traditional legal delivery models are discussed in this seminal work.

for those who make too much money to qualify for the government funded organizations but too little to afford the high cost of the private bar.⁵⁸

C. Government-funded Organizations (GFOs)

GFOs receive the vast majority of their funding from federal, state, or, in some cases, local government. By relying on government funding for their financial viability, these organizations often struggle with budget cuts and limitations on what services they can offer.⁵⁹

1. Public Defenders

Public defenders' offices may be the most well-known type of GFO, but they are often misunderstood by the public.⁶⁰ Many attorneys interested in providing criminal law services to low-income clients look for jobs at a public defender office rather than considering the alternative: doing criminal defense work for low-income clients at an SSLF.

It is a common misconception that a public defender's services are completely free. Many public defenders charge an application fee and then an additional fee once representation has begun.⁶¹ Another common misconception is that anyone can obtain a public defender for any court proceeding. Public defenders are generally only available for indigent clients who are involved in criminal proceedings.⁶² Moreover, public defender offices around the country find themselves overworked and sometimes unable to provide adequate representation because of their caseloads and private attorney reimbursement rates which remain at, or barely above the standards set in the 1970s and 1980s.⁶³ For example, the New Orleans public defenders are so over-

58. *Id.* at 27–28.

59. *See, e.g.,* Schoos, *supra* note 41.

60. *When The Right to a Lawyer Applies Only If You Have Money*, LEGAL SERVS. CORP. (Sept. 2, 2015), <http://www.lsc.gov/media-center/blog/2015/09/02/when-right-lawyer-applies-only-if-you-have-money-pine-tree-legal>.

61. An NPR Survey found that forty-three states charge some sort of public defender fee or court cost to those utilizing the service. *See Guilty and Charged Series: State by State Court Fees*, NPR (May 19, 2014), <http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>.

62. *See generally Public Defender Frequently Asked Questions*, Cook Cty. Gov't, <https://www.cookcountyl.gov/service/frequently-asked-questions> (last visited Aug. 11, 2017). *See also* Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011).

63. *See* Sunne, *supra* note 50; *see also* Geoff Burkhart, *Public Defense: The New York Story*, 30 CRIM. JUST. 3, 13–14 (2015); Joe Forward, *Country's Lowest Pay Rate for SPD Appointments Equals Constitutional Crisis*, STATE BAR OF WISC.: INSIDE-TRACK (May 2017), <http://www.wisbar.org/NewsPublications/InsideTrack/Pages/Arti>

whelmed by the need for criminal legal counsel that the office has to turn away cases in order to provide their current clients with adequate representation.⁶⁴

While income eligibility for a public defender varies by state, many deny public defenders to anyone whose income is more than 125% of the poverty level, i.e. \$15,000 per year.⁶⁵ The outdated eligibility standards and limited funding for public defenders are upsetting, but not surprising. Because public defender offices are funded by the government, the office is continuously subject to political whims and budget cuts. Criminal defendants are rarely looked favorably upon and funding their defense is rarely a high priority.⁶⁶ In fact, for about as long as there have been politicians, there have been debates about who will be more “tough on crime.”⁶⁷ Similarly, for about as long as there have been taxes to support government expenditures, there have been political promises to lower those taxes and reduce such spending.⁶⁸ Given this backdrop, it remains unlikely that government will ever fully provide funding for the representation of everyone accused of a crime who cannot afford counsel.⁶⁹ Thus, examining the available criminal defense services brings into focus a service gap that SSLFs can fill: providing an attorney for people who do not qualify for a public defender and cannot afford counsel at prevailing market rates.⁷⁰

cle.aspx?Volume=9&Issue=9&ArticleID=25577 Caroline Hecker, *Missouri Auditor Finds Public Defender System Outdated*, KBIA (Oct. 11, 2012), <http://kbia.org/post/mo-auditor-finds-public-defender-system-outdated#stream/0>.

64. *Id.*

65. GIDEON at 50: A Three-Part Examination of Indigent Defense in America, Nat'l Ass'n of Crim. Defense Lawyers 13–14 (2014) [hereinafter *Gideon* at 50].

66. See generally JAMES S. KUNEN, HOW CAN YOU DEFEND THOSE PEOPLE?: THE MAKING OF A CRIMINAL LAWYER (1983); Abbe Smith, *Defending Those People*, 10 OHIO ST. J. CRIM. L. 277, 287 (2012).

67. See Peter Garnsey, Note, *Why Penalties Become Harsher: The Roman Case, Late Republic to Fourth Century Empire*, 143 NAT. L.F. 141, 152, 158 (1968).

68. See DONALD M. NICOL, THE LAST CENTURIES OF BYZANTIUM, 1261–1453, at 160 (2d ed. 1993).

69. See, e.g., JEANNE CHARN, LEGAL SERVICES FOR ALL: IS THE PROFESSION READY, 42 Loy. L.A. L. Rev. 1026–1028 (2009); see also THOMAS GIOVANNI & ROOPAL PATEL, BRENNAN CTR. FOR JUSTICE, *Gideon* at 50: Three Reforms to Revive the Right to Counsel I (2013).

70. Anyone making eight dollars per hour often is “too rich” to qualify for a public defender. GIDEON at 50, *supra* note 65. In addition, some SSLFs reported that they take appointments from the local public defender’s office, thereby serving not only those who do not qualify for a public defender, but also those who *do* qualify but cannot get one because of conflicts of interest or other reasons, including overwhelming public defender caseloads.

2. *The Legal Services Corporation (LSC)*

Just as there are many misconceptions about public defenders, there are also many misconceptions surrounding civil legal aid.⁷¹ For example, many people mistakenly believe the government provides free attorneys to low-income civil litigants.⁷² It does not, but the federal government does provide some support for civil legal aid through the Legal Services Corporation (LSC).⁷³

Over fifty years ago, the federal government began funding civil legal services, first through the Office of Economic Opportunity and then by creating the LSC.⁷⁴ Congress allocates funding to the LSC, which in turn distributes it to about 135 grant recipients across the country.⁷⁵ Most grantees are independent law offices that employ salaried staff attorneys who provide free services. A smaller number of grantees (often in rural areas) utilize a “judicare” model, in which private lawyers are compensated for their representation of eligible clients.⁷⁶

Although the LSC was founded on the ideal that everyone should have access to justice regardless of economic status,⁷⁷ it has never fully achieved that ideal due to a lack of funding and numerous restrictions on services such as prohibitions on immigration and criminal cases.⁷⁸ For decades, funding for LSCs has decreased.⁷⁹ After accounting for inflation, federal funding for civil legal services is now fifty percent less than it was in 1980.⁸⁰ Meanwhile, the cost of a legal

71. See *Civil Legal Aid in Maryland—The Facts*, BALTIMORE TIMES, (July 1, 2015), <http://baltimoretimes-online.com/news/2015/jul/01/civil-legal-aid-maryland-facts/>.

72. *Id.*

73. ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR L. & SOCIAL POL’Y, SECURING JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 1, 19 (2007).

74. *Id.*

75. *Id.* at 41.

76. *Id.* Through the judicare model of payments to private attorneys, the LSC is also collaborating with and supporting the development of private law firms with the goal of having them provide reduced-fee or low-bono work. HOUSEMAN & PERLE, *supra* note 74, at 24–25. In this way, the LSC supports the creation of SSLFs. See generally Luz Herrera, *Starting a “Low Bono” Law Practice*, in BEYOND ELITE LAW, *supra* note 37.

77. STRATEGIC PLAN 2012–2016, LEGAL SERVS. CORP. 2 (2012) [hereinafter STRATEGIC PLAN], www.lsc.gov/sites/default/files/LSC/lscgov4/LSC_Strategic_Plan_2012-2016—Adopted_Oct_2012.pdf.

78. See *id.* at 1–2; see also Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 620 (2009).

79. STRATEGIC PLAN, *supra* note 77, at 1–2.

80. ALAN E. HOUSEMAN, CTR. FOR L. & SOC. POL’Y, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2013, at 11 (2013), www.clasp.org/resources-and-

education has increased greatly, outpacing inflation and forcing graduates to seek high-paying jobs to pay off their debt instead of lower-paying public interest positions.⁸¹ The combined effect of lower funding, relatively low salaries, and higher student debt loads contributes to the serious shortage of lawyers available to low and moderate income people. Moreover, a growing national population⁸² and greater income inequality⁸³ have made the impact of this drop in funding even more severe. More and more people need help from legal services agencies whose budgets have grown smaller and smaller.

In addition to underfunding, the LSC faces a second major limitation preventing access to justice: restrictions on funding. The government giveth: the annual allocation by Congress to the Legal Services Corporation *is* the largest single source of funding for legal services.⁸⁴ But the government also taketh away: restrictions and limitations abound for the kinds of cases that can be handled and for service eligibility.

Congress has repeatedly placed restrictions on the kinds of cases that LSC grantees can accept.⁸⁵ Prohibitions have limited or barred lobbying, immigration work, class action cases, criminal law practice, and more.⁸⁶ Further, Congress has generally restricted LSC funds to people whose income is less than 125% of the poverty level,⁸⁷ depriving the working poor of access to LSC services. Depending on the state, 125% of the federal poverty guideline in 2016 was about \$14,850 for an individual, \$20,025 for a couple, and \$30,375 for a

publications/publication-1/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-3.pdf (“LSC funding today purchases less than half of what it did in 1980, the time when LSC funding provided what was called ‘minimum access’ or an amount that could support two lawyers for each 10,000 poor people in a geographic area.”).

81. See John R. Kramer, *Will Legal Education Remain Affordable, By Whom, and How?*, 1987 DUKE L.J. 240, 240–41 (1987).

82. In 1980, the United States had 226.5 million people; in 2010, the national population grew to 308.7 million people. BUREAU OF THE CENSUS, U.S. DEP’T OF COMM., 1980 CENSUS OF POPULATION 1-19 (1980), http://www2.census.gov/prod2/deccennial/documents/1980/1980censusofpopu8011u_bw.pdf; PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

83. Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States*, PATHWAYS MAG., Winter 2008, at 6–7.

84. *Congressional Oversight*, LSC, <http://www.lsc.gov/about-lsc/who-we-are/congressional-oversight> (last visited Feb. 17, 2016).

85. Cummings & Rhode, *supra* note 78, at 620.

86. *Id.* See generally David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, Oregon Describe the Costs*, 17 YALE L. & POL’Y REV. 337 (1998).

87. 45 C.F.R. § 1611 et seq. (2015).

family of four.⁸⁸ This means that an individual who is working a full-time minimum wage job, which pays \$7.25 per hour, would not qualify for services. A person making \$41 a day (\$287 a week) is “too wealthy” for LSC services. That person is supposed to obtain “equal access to justice” using their weekly \$287 to hire a lawyer on the private market, many of whom charge more than \$287 per hour.

Even though LSC grantees are restricted by the types of cases they may take and the clients they may serve, insufficient funding forces LSC firms to turn away fifty percent of the *eligible* clients that seek help.⁸⁹ Thus, the majority of people in the United States who qualify for legal services (i.e., those who earn less than \$287 per week) still cannot obtain legal assistance because the federally funded agencies simply do not have the resources to take on their cases. Underfunding and practice area restrictions combine to create the following reality: more than eighty percent of legal problems experienced by low-income people are addressed without the assistance of counsel.⁹⁰

The need for alternative legal service providers is clear. As noted above, SSLFs provide criminal defense services to people who cannot obtain a public defender and to those who cannot afford counsel at prevailing market rates. Similarly, SSLFs also provide civil legal aid to people who make too much to qualify for LSC services but not enough money to hire a traditional for-profit attorney.

Although government funding has established public defenders and the LSC, the government has still failed to provide attorneys for millions of people in need. Often, when the government fails to provide a needed service, the private market fills the void. The next two sections briefly explain how private donors and private individuals have traditionally tried to provide legal services to those in need.

D. The Private Market and Privately Funded Organizations

Recall that a person making more than 125% of the Federal poverty guideline often does not qualify for legal assistance from LSC-funded organizations.⁹¹

While some markets have seen businesses thrive by selling “good enough” goods and services to low-income consumers (think McDon-

88. See *supra* note 3; see also, e.g., Mass. Law Reform Inst., *2016 Federal Poverty Level Guidelines*, MASSLEGAL SERVS.ORG (Jan. 2016), https://www.masslegalservices.org/system/files/library/2016%20Federal%20Poverty%20Level%20Guidelines_0.pdf [hereinafter MLRI].

89. DOCUMENTING THE JUSTICE GAP, *supra* note 5, at 6, 12.

90. *Id.* at 9, 16.

91. MLRI, *supra* note 88.

aid's, Target, and Wal-Mart), there is no analogue in the legal market. The myriad reasons for this are a topic for another paper. In short, the private market has produced Wal-Marts in every state selling low-cost goods, but there is no for-profit law firm equivalent. Despite well-documented demand and need, the private sector has failed to create "Law-Marts" in every state to provide low-cost legal services.⁹²

The private sector, however, has created a second traditional method or category for delivering legal services: privately funded organizations (PFOs). In contrast to GFOs, PFOs receive most of their funding from private donations, grants, and membership dues. One of the first privately funded organizations was the Legal Aid Society of New York, founded in 1876.⁹³ Similar, independent Legal Aid Societies have been established in several cities throughout the country. Other PFOs that provide legal services include the Sierra Club, the NAACP, the ACLU, and the Southern Poverty Law Center. Unlike GFOs, PFOs do not necessarily have to deal with government funding and other government imposed restrictions on the kinds of work they can do.⁹⁴ However, private foundation grants and individual donors often explicitly restrict or require that PFOs use their grants and donations for particular kinds of services.⁹⁵ Many PFOs are organized as public interest law firms as opposed to legal aid *organizations* and therefore must comply with the IRS limitations previously discussed, including limits on client fees and impact litigation fees.⁹⁶ Even absent explicit restrictions, many PFOs are implicitly limited in what they may do with their funding by their designated geographic area or prac-

92. See *Needs Assessments and Impact Studies*, AM. BAR. ASS'N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj_commission_self-assessment_materials1/studies.html (last visited May 25, 2017) (compiling studies).

93. Former Wisconsin Governor Edward Salmon created the German Legal Aid Society in 1876; it was later renamed the Legal Aid Society in 1896. See THE LEGAL AID SOCIETY, MILESTONES IN THE HISTORY OF THE LEGAL AID SOCIETY 1 (2012), http://www.legal-aid.org/media/165961/las_milestones_2012.pdf.

94. Many PFOs receive government grants, some of which carry restrictions similar to those faced by the GFOs. See, e.g., *Legal Services Trust Fund Program Grant Recipients*, STATE BAR OF CAL., <http://www.calbar.ca.gov/Access-to-Justice/Legal-Aid-Grants/Grant-Recipients> (last visited March 31, 2016) (restricting grant funds to only nonprofit organizations that provide free civil legal services to low-income Californians); *Who is Eligible?*, GRANTS.GOV, www.grants.gov/web/grants/learn-grants/grant-eligibility.html (last visited Oct. 31, 2015) (describing federal grant eligibility for for-profit organizations and small businesses).

95. See, e.g., *General Information on Grants and Funding*, APPALACHIAN REG'L COMM'N, www.arc.gov/funding/GeneralInformationAboutGrantsandFunding.asp (last visited Oct. 19, 2015) (noting that "[m]ost grants come with strings attached" and providing examples of grants for specific purposes).

96. See *supra* Section I.B.

tice niche. For example, the Legal Aid Society of New York is unlikely to use its donors' funds to provide services in Omaha, Nebraska. Similarly, the Natural Resources Defense Council may litigate environmental issues across the country but is unlikely to use its funding to help protect the rights of domestic abuse victims.

Group legal services are another type of PFO. Many are structured as prepaid legal insurance programs where members pay dues or an insurance premium in exchange for some level of legal services.⁹⁷ Similar to organizations like the Sierra Club and NAACP, a prepaid program's legal services are funded primarily through membership dues or donations, not by clients for hours of work performed. Having to pay a premium each month for an unused or underused service means that many low-income clients will not be able to easily join such programs. In addition, similar to the Sierra Club or the NAACP, the services provided by these PFOs tend to focus on issues of interest to donors and/or members rather than what a low-income client might need.

While the types of PFOs providing legal services vary, they are usually limited to a narrow field of cases or a narrow geographic service area by their collective funding sources. In part because of these limitations, lawyers have developed a method for providing legal services that is not limited by membership fees, grant restrictions, or politically imposed restrictions on cases and client eligibility: *pro bono* work.

E. *Pro Bono Efforts*

A third traditional method for delivering legal services is volunteer legal work, often referred to as *pro bono* work. Notably, there is disagreement about what counts as *pro bono* work.⁹⁸ An American Bar Association survey of the legal profession found that some lawyers define *pro bono* as only free legal services.⁹⁹ For others, it includes serving as a mediator, lobbying on behalf of *pro bono*

97. See, e.g., *Standing Committee on Group and Prepaid Legal Services*, AM. BAR ASS'N, https://www.americanbar.org/groups/group_prepaid_legal_services.html (last visited Aug. 11, 2017).

98. AM. BAR ASS'N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS vi (2013) [hereinafter SUPPORTING JUSTICE III], www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_Supporting_Justice_III_final.authcheckdam.pdf; see also Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 99 (2013).

99. SUPPORTING JUSTICE III, *supra* note 98, at 3.

organizations, and providing legal services at a reduced rate.¹⁰⁰ Still others consider *pro bono* to include non-legal community service work such as volunteer-coaching Little League games.¹⁰¹ Other lawyers consider free legal work provided to former clients to be *pro bono*.¹⁰² Finally, some lawyers consider writing off or writing down the fees they charged but did not collect as a sort of retroactive *pro bono* work.¹⁰³

In contrast to GFOs and PFOs, no outside funding dictates the income level, geographic area, or type of legal issues that lawyers can address by providing *pro bono* services. While *pro bono* work is not funded in a traditional sense, it is often supported by for-profit firms that allow attorneys to count some of their hours spent on *pro bono* service toward their annual billable hour requirements, and those firms might impose any number of limitations.¹⁰⁴ The major limitation on *pro bono* work—whether imposed directly by a lawyer’s firm or by the lawyer’s own finances—is that *pro bono* work can only be a small fraction of any attorney’s total hours. A full-time attorney may work 2,000 hours per year, and the ABA Model Rules of Professional Conduct state that “a lawyer should aspire to render at least [fifty] hours of *pro bono* public legal services per year.”¹⁰⁵

In reality, most lawyers do not meet the ABA’s aspirational *pro bono* goal.¹⁰⁶ Only nine states require lawyers to report *pro bono* service.¹⁰⁷ Twenty percent of lawyers provide no *pro bono* service, and forty-four percent admit to providing less than the suggested fifty hours per year.¹⁰⁸ While there are many laudable efforts by attorneys and bar associations to encourage or increase *pro bono* service, *pro*

100. *Id.* at 4.

101. See Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 425 (2003).

102. SUPPORTING JUSTICE III, *supra* note 98, at vii.

103. See, e.g., Dianne Molvig, *2005 Bench and Bar Survey: Lawyers and Judges Assess Key Issues Affecting the Legal System*, WIS. LAW. (2006), <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=79&Issue=4&ArticleID=1003> (“Several respondents noted that a sizable portion of their regular legal work is, in effect, *pro bono*, whether that be low-paying public defender or legal services cases or regular clients who can’t afford to pay.”).

104. See generally STATE BAR OF WISC., BRIDGING THE JUSTICE GAP: WISCONSIN’S UNMET LEGAL NEEDS 16 (2007), <https://www.wisbar.org/aboutus/reports/Documents/bridgingthegap.pdf> (describing the general structure and variability of law firm *pro bono* programs).

105. MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR ASS’N 2014).

106. *Pro Bono Reporting*, AM. BAR ASS’N, https://www.americanbar.org/groups/probono_public_service/ts/pbreporting.html (last visited October 25, 2015).

107. *Id.*

108. See SUPPORTING JUSTICE III, *supra* note 98, at vi.

bono efforts alone cannot bridge the justice gap. The ABA recently concluded that in order to provide some measure of assistance to all households with legal needs, every attorney in the United States would have to provide “over nine hundred hours” of *pro bono* work.¹⁰⁹

The following chart summarizes some key limitations on traditional methods for delivering legal services:

	Government Funded Organizations		Privately Funded Organizations	Pro Bono
	Public Defender	Legal Services Corporation	Private firms funded by Grants and Donors	Individual Attorney(s)
Largest funding source	Government	Government	Private donors	Volunteers
Limitations on practice areas	Yes ¹	Yes	Often limited by donors or grants to niche practice area(s)	No
Income eligibility limits	Yes—“too poor to hire a lawyer” ²	Yes—125% of the FPG ³	Grants may limit services to ~200% of the FPG	No

¹Limited to criminal law and a small set of other circumstances. *See supra* note 63.

²*Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The Supreme Court has struggled to define who qualifies as “too poor,” but the majority of states has adopted some multiple of the federal poverty guidelines to establish who is eligible for services. John P. Gross, *Part 2—Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel*, in *GIDEON* AT 50, *supra* note 66, at 1, 9–12 (2014).

³*See* 45 C.F.R. § 1611.3(b) (1977) (“Unless specifically authorized by the Corporation, a recipient shall not establish a maximum annual income level that exceeds one hundred and twenty-five percent (125%) of the official poverty threshold as defined by the Office of Management and Budget.”); *see also id.* § 1611.5(a)(3)–(4) (identifying exemptions for which the income ceiling may be raised to 200% of the federal poverty line).

109. AM. BAR ASS’N COMM’N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 14 (2016) (quoting Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, DAEDALUS, Summer 2014, at 83), <http://abafuturesreport.com/#download-full-report>; *see also* Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191 (2016).

F. Nonprofit Sliding Scale Law Firms: Part of the Legal Services Delivery Puzzle

Despite all the government-funded organizations, all the privately funded organizations, and all the *pro bono* work, a wide and well-documented justice gap persists.¹¹⁰ Millions of people in need of legal representation go without counsel because they cannot afford it.¹¹¹ Millions of people do not even attempt to use the legal system to enforce their rights.¹¹² The limitations of the three most common traditional methods have long led to calls for different methods for delivering direct legal services.¹¹³

	Nonprofit Tax-Exempt Sliding-Scale Law Firms (SSLF)
Largest funding source	Income-based fees from low and moderate income clients
Limitations on practice areas	Determined by attorney client practice area preferences and client needs
Income eligibility limits	Unable to afford prevailing market rates. (often 300-400% FPG, variations reflecting regional cost-of-living differences)

The response given by most interviewees to the question “Why would you want to create or work at a sliding scale nonprofit law firm?” had a simple, consistent answer: Using only the traditional models for the delivery of legal services, lawyers are unable to provide legal services for all who need them. Every day, thousands of people in United States need legal help but are unable to afford or access assistance through these traditional methods.

The ABA Model Rules declare: “Every lawyer has a professional responsibility to provide legal services to those unable to pay.”¹¹⁴ The rules further state that lawyers should provide “delivery of legal services at a substantially reduced fee to persons of limited means.”¹¹⁵ Combine this professional responsibility with the employment data

110. While more funding for traditional legal services delivery methods is certainly warranted, the legal need will not be resolved with increased funding and increased *pro bono* alone. Funding just one hour of legal aid services per household with legal needs would cost 64 billion dollars each year. Hadfield & Heine, *supra* note 55, at 50.

111. *See supra* Section II.C.

112. *Id.*

113. *See, e.g.,* LOPEZ, *supra* note 58 (calling for “rebellious lawyering”).

114. MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR ASS’N 2014).

115. *Id.* r. 6.1(b)(2).

that shows “legal education is producing too many graduates for the traditional legal economy to absorb.”¹¹⁶ The heretofore overlooked and understudied SSLF model could help address not just the needs of clients but also the needs of the legal profession. The role of the SSLF is not to replace any of the existing traditional legal service delivery methods, but to supplement their efforts. SSLFs are a piece of the legal services delivery puzzle. The limitations on traditional legal service providers have created a system with crucial justice gaps that the SSLF model can help to bridge.

CONCLUSION

Sliding scale law firms are misunderstood and understudied models for delivering legal services. This paper introduces the SSLF, describes its basic structure, and highlights the important role these firms play. While SSLFs differ from traditional methods for legal service delivery to indigent clients, they are neither replacements for traditional nonprofits nor competitors of for-profit attorneys. Rather, SSLFs are tipping the scales of justice back into balance by providing needed assistance for some of the millions who cannot obtain services from traditional legal delivery models and cannot afford to hire an attorney at prevailing market rates. Dozens of SSLFs across the country have been quietly filling this role for years, and are serving thousands of clients every year who otherwise would have gone unrepresented.

116. Henderson, *supra* note 37, at 184.

