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Teri Dobbins Baxter
University of Tennessee College of Law

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Teri J. Dobbins*

Justice is rarely free. In theory, everyone has equal access to the courts; in reality, access to the courts is dependent upon the financial resources of the litigant. Filing fees, discovery costs, and the economic cost of the time taken away from other income-producing activities to prosecute or defend a lawsuit make litigation all but impossible for many people. Even if many of these costs can be eliminated (for example, by filing in small claims court, *in forma pauperis* filings, or pro se litigation), this simply facilitates access to the system; it does not guarantee justice. The complexity of the court system and the laws make access to legal counsel necessary in many cases. Without access to counsel, access to the courts may be meaningless. Unfortunately, many people cannot afford to hire a lawyer to assist with their legal problems, particularly in disputes that have a low dollar value, or those in which the remedy sought is not monetary.[1] The result is that many of the legal needs of the poor are not being met.[2]

The lack of access to courts and counsel has particular significance in the law of contracts. Obtaining housing, health care, employment, and consumer purchases are all contractual transactions. An inability to negotiate, understand, or enforce contract rights in these areas can affect a person's life in fundamental ways. Access to counsel may ensure that a party is not taken advantage of, it may ensure that a party's obligations are understood, and it may ensure that a party's rights are adequately protected so that performance can be fully rendered without undue hardship.

Indeed, access to counsel before a contract is entered into may help prevent disputes from occurring. Unlike in criminal and tort cases, people become parties to contracts voluntarily.[3] Consequently, there is a rare opportunity to obtain legal advice before the legal relationship is formed and to apply that advice to avoid

* Assistant Professor, Saint Louis University School of Law. Duke University, B.A. 1993, J.D. 1997.

[1] For instance, if a party is seeking an injunction or specific performance of a contract, or is defending against a claim with no counterclaim for damages, there is no possibility of a damages award that can be used to pay attorney fees.

[2] *See, e.g.*, AMERICAN BAR ASS'N, AN AGENDA FOR JUSTICE: ABA PERSPECTIVES ON CRIMINAL AND CIVIL JUSTICE ISSUES 78 (1996) [hereinafter ABA AGENDA FOR JUSTICE] ("Today, the simple truth is that large segments of our population are denied meaningful access to justice and most people rarely consult lawyers or utilize the civil justice system."); Hedieh Nasheri & David L. Rudolph, *Equal Protection Under the Law: Improving Access to Civil Justice*, 20 AM. J. TRIAL ADVOC. 331, 331-332 (1997) ("Because of the excessive attorneys' fees and delays involved in litigating a case, low income citizens are unable to afford litigation, and are often forced to forgo valid claims."); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004) ("According to most estimates, about four-fifths of the civil legal needs of low income individuals, and two- to three-fifths of the needs of middle-income individuals, remain unmet.").

[3] Usually, there is no way for people to avoid becoming victims of a crime or tort. On the other hand, all parties to the contract must agree to be bound.

misunderstandings or conflicts. This ability to take advantage of counsel at all stages of the relationship—negotiation, formation, performance, and enforcement—is unique to the law of contracts. Unfortunately, many lower-income[4] and other disadvantaged persons lack the resources to employ or consult with an attorney at all or any of these stages of the contractual relationship.[5] The result is that a large segment of society is unable to take advantage of the laws designed to protect and enforce their rights.

For decades, scholars, practitioners, and advocates have pushed for reforms in the legal system to remedy this inequity.[6] Most of these efforts have focused on enabling low and middle-income people to engage lawyers to represent them in litigation.[7] Other efforts have focused on changing the court system to make it more accessible and more manageable to those without counsel or developing alternative dispute resolution programs.[8] Few efforts have focused on the ways in which economic status affects the ability to influence the creation and development of the law, how income influences and limits people at the negotiation and formation stage of contracting, or on how a breach may affect a lower-income person more severely than a wealthier person. Yet understanding the disparate impact of lack of counsel on the poor and other disadvantaged persons in all of these contexts is key to understanding the true scope of the problem of unequal access to justice and to implementing meaningful reforms. Once this problem is understood, potential solutions can be better evaluated and solutions tailored to the unique characteristics of lower-income contracting parties can be successfully implemented.

Part I of this Article explores the ways in which lower-income persons are excluded from the creation and development of contract law. Part II discusses how economic status may negatively impact contract negotiation, formation, and enforcement in ways that are not experienced by more affluent persons.[9] Part III briefly examines some current and proposed methods of granting greater access to counsel and the courts, and describes the advantages and disadvantages of each method in the context of the needs of lower-income persons at all stages of contractual transactions.

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[4] The term "lower-income" is used to reflect the fact that the lack of access to justice is not just a problem for low-income persons; many middle-income persons are unable to afford legal assistance. Rhode, *supra* note 2 at 371 (noting that millions of moderate-income persons are unable to hire an attorney to handle their legal problems).

[5] CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, AMERICAN BAR ASS'N, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 4 (1996) [hereinafter CONSORTIUM AGENDA FOR ACCESS].

[6] *See, e.g.*, ABA BLUEPRINT FOR IMPROVING THE JUSTICE SYSTEM (1992); NO ACCESS TO LAW ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM (Laura Nader ed., 1980); James W. Meeker & John Dombrink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2225 (1993); Nasheri & Rudolph, *supra* note 2; Rhode, *supra* note 2.

[7] *See, e.g.*, CONSORTIUM AGENDA FOR ACCESS, *supra* note 5 at 10-14.

[8] *See, e.g.*, Talbot D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 73 FLA. B. J. 12, 12 (1999) ("This access problem traditionally has been addressed through individual solutions—pro bono services, alternative dispute resolution, funding for legal services, and so forth."); Meeker & Dombrink, *supra* note 6 at 2225-26 (advocating changes in the civil court system to give low and moderate income persons access to the civil justice system).

[9] To a lesser extent, other disadvantaged groups such as immigrants and non-English speakers are discussed.

I. Economic Status and the Creation and Development of the Law

Laws are not created by magic. They are created by legislators and judges, each of whom is influenced by their own experiences, beliefs, and biases and those of the people with whom they interact. If none of those experiences or interactions include lower-income persons, their views and needs may not be taken into consideration when laws are being drafted, debated, and challenged.

A. Legislative Influence (or lack thereof)

Although the law of contracts is generally created and developed by common law, it is influenced and often supplemented or superseded by legislative enactments. Many federal and state statutes such as consumer protection statutes, the Bankruptcy Code, Uniform Commercial Code, the Equal Opportunity Credit Act, and the Magnuson-Moss Warranty Act, are part of the law of contracts. Courts also look to the statutes enacted by legislatures when resolving issues of public policy.[10] Thus, legislatures have significant influence on the development of contract law.

Legislators are elected representatives of the communities they serve and, as such, have direct responsibility for creating and modifying the law. This position gives them a great deal of power. But few, if any, have sufficient knowledge of every relevant subject to rely solely on their own judgment when deciding what policies and statutes should be enacted, repealed, or modified. Thus, they rely on staff members and other members of the public to inform and advise them regarding proposed legislation.[11]

On the other hand, the members of the communities governed by these laws naturally seek to influence the law though these individual legislators and the legislatures as a whole.[12] The importance of these lobbying efforts is evidenced by the millions of dollars that are spent on lobbying each year at the local, state, and national level.[13] Yet, lower-income persons rarely have the same degree of access or influence on their legislators as their wealthier counterparts.[14] The poor cannot afford to hire lobbyists to represent their views, nor are they always consulted, or their views and experiences taken

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[10] *See, e.g.*, Ransburg v. Richards, 770 N.E.2d 393, 396 (Ind. Ct. App. 2002) ("in certain circumstances a court may declare an otherwise valid contract unenforceable if it contravenes the public policy of Indiana"); Johnson v. Structured Asset Services, Inc., 148 S.W.3d 711, 726 (Tex. App. 2003) ("Contracts are subject to the public policy of the State.").

[11] *Recommendations of the Conference on the Delivery of Legal Services to Lower-income Persons*, 67 FORDHAM L. REV. 1751, 1751 (1999) [hereinafter Recommendations]

[12] Commonly referred to as "lobbying." The Merriam Webster Dictionary 435 (1997).

[13] *See* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1126-27 (1994).

[14] *See* Recommendations, *supra* note 11 at 1751 (noting that low income persons have limited access to the legislators and the legislative process).

into consideration, with respect to issues of public policy.[15] Even well-intentioned legal services organizations who have a voice in politics may fail to include lower-income persons on the boards or in the meetings where policies are developed and priorities are established.[16]

Some barriers to access are erected by the legislatures themselves. Legislation has been repeatedly proposed, and in some cases passed, preventing legal services agencies that receive certain types of funding (particularly federal funding) from representing people in specific types of litigation, such as class action lawsuits, labor boycotts, political redistricting, or welfare reform.[17] Federal statutes also prohibit the use of Legal Services Corporation funds for lobbying.[18] These restrictions on the use of funding force legal services providers to choose between accepting funding and refraining from engaging in activities or litigation that they believe to be beneficial to the communities and clients they serve, or turning down the funding.[19] While agencies may seek to find alternative funding sources, in most cases they are unable to find an amount from other sources that is equal to the rejected government funding, thus leaving the agency incapable of serving as many clients as would be possible otherwise.[20]

Lower-income clients, on the other hand, may be unable to pursue particular types of actions because the only legal counsel available and willing to represent them is barred from doing so. This prevents this class of citizens from effectively participating in all aspects of the creation and development of the law and may prevent enactment of legislation that could benefit lower-income or other disadvantaged persons.[21]

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[15] Laurence E. Norton, II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601, 601 (1997) ("The poor have almost no role in the process of enacting laws that they must live by and that will govern any court case involving them. They have no money to contribute to the campaigns of elected officials. They vote in disproportionately small numbers . . . and nearly all of the lawyers available to them through legal services are prohibited from advocating for them in the legislative process."); Recommendations, *supra* note 11 at 1751-52 ("Legislative access to legal expertise from lawyers representing the poor is particularly important because impoverished segments of society have particularly limited abilities to wield influence in the legislative arena, as well as limited abilities to obtain representation to challenge problematic legislation, and, therefore, are particularly vulnerable to poorly designed legislation.").

[16] Michelle S. Jacobs, *Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?* 48 FLA. L. REV. 509, 518 (1996) (discussing critique that the legal services community has failed to include the voice of the poor on their boards or in policy discussions).

[17] Rhode, *supra* note 2 at 379.

[18] *See* Norton, *supra* note 15 at notes 9-18; 42 U.S.C. § 2996e(d)(4) (prohibiting the Legal Services Corporation and any recipient of funds from the Corporation from "advocating or opposing any ballot measures, initiatives or referendums"); 42 U.S.C. § 2996e(d)(5) (prohibiting the Legal Services Corporation from undertaking class actions suits).

[19] Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369, 378-79 (1998); Rhode, *supra* note 2 at 379. The restrictions on the use of funds leave legal services programs faced with an "unpalatable choice. They can do without federal funds and help far fewer individual clients, but in a more effective fashion. Or they can handle greater numbers of cases, but only for politically acceptable claimants, and in ways least likely to promote broader social reforms." Rhode, *supra* note 2 at 379.

[20] Rhode, *supra* note 2 at 379.

[21] *See* Meeker & Dombrink, *supra* note 6 at 2225 ("a concerted effort to simplify and clarify the law could reduce some of the need for attorneys' services for those who cannot afford them"). Some scholars have

Indeed, even legislation designed to protect or inform can be rendered useless, or even harmful, if those affected are not consulted before laws are enacted. Many consumer protection statutes designed to remedy the power imbalance that often exists between consumers and sellers are too complicated, burdensome, incomprehensible, or completely unknown to lower-income consumers. For example, Article 2 of the Uniform Commercial Code (U.C.C.), adopted in each of the fifty states,[22] gives every buyer an implied warranty of merchantability if the seller is a merchant with respect to the kinds of goods sold.[23] That warranty exists in every such contract for the sale of goods unless disclaimed.[24] The disclaimer need not be in writing, but if it is, the disclaimer must be conspicuous.[25] Inclusion of a disclaimer of merchantability is assumed to give the buyer adequate notice that no such warranty is included. Most lay people are unlikely to know what the term "merchantability" means.[26] Consequently, a disclaimer may not alert the buyer that the seller is not responsible if the product is not "fit for the ordinary purposes for which such goods are used."[27]

While this confusion is not limited to lower-income persons, the impact on that group may be greater. Low cost items are more likely to be sold without a warranty.[28] Wealthy buyers may be surprised and frustrated by the lack of warranty on such items, but the loss suffered if a low cost item is defective is unlikely to significantly impact them. Substitute goods can be purchased or defective items can be repaired at the buyer's cost without the wealthy buyer suffering much (if any) economic hardship.[29] Lower-

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suggested a requirement that all legislation be written such that the average non-lawyer can understand it. *Id.* at 2226.

[22] All references herein are to pre-amended Article 2 of the Uniform Commercial Code. The amendments were approved at the NCCUSL 2002 Annual Meeting, but the amended version has not yet been adopted by any state.

[23] U.C.C. § 2-314(1).

[24] U.C.C. §§ 2-314(1), 2-316

[25] U.C.C. § 2-316(2), Comment 4.

[26] While the term "merchantable" is not defined in the U.C.C., § 2-314 does state that, "goods to be merchantable must be at least such as:

> (a) pass without objection in the trade under the contract description; and
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> (b) in the case of fungible goods, are of fair average quality within the description; and
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> (c) are fit for the ordinary purposes for which such goods are used;
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> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
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> (e) are adequately contained, packaged, and labeled as the agreement may require; and
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> (f) conform to the promise or affirmations of fact made on the container label if any."

[27] U.C.C. § 2-314(2)(c).

[28] *See* Stephen Hetcher, *Changing the Social Meaning of Privacy in Cyberspace*, 15 HARV. J. L. & TECH. 149, 193 (2001).

[29] For example, consider a $50 reconditioned window unit air conditioner that stops working after a few hours of use. If the buyer takes the unit back to the store only to have the seller point out the disclaimer of

income buyers, on the other hand, may not be able to afford to repair defective goods and will be left with goods of little or no value and no means of acquiring replacements.[30]

B. Common Law Development

Lower-income persons are less likely to be able bring suit and much less likely to take a case to trial, much less appeal, than wealthier persons.[31] Thus, the development of the common law of contracts is based disproportionately on cases involving large dollar amounts and relatively wealthy parties. This is particularly important when issues of public policy are at stake. When determining what public policy requires in a particular situation, the courts necessarily look to the litigants to help ascertain the views and needs of the public. If none of the litigants represents or considers the views and needs of lower-income persons, then the court is less likely to take them into consideration when making pronouncements and decisions based upon public policy. Courts may also look to the legislature to determine public policy[32] but, as noted above, lower-income persons have less influence on that branch of the government so the resulting laws may not reflect their views.[33] Consequently, the development of the common law proceeds without sufficient input from the lower-income segment of the community.

Even more discouraging is the lack of participation of lower-income persons in election or appointment of the judiciary.[34] Few people of any income level have the opportunity to observe members of the judiciary first-hand or review their opinions and

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the warranty of merchantability and explain the consequences of that disclaimer, the wealthy buyer may be frustrated or even angry but can afford to simply shop elsewhere to purchase a new unit or have the existing unit repaired. The buyer is unlikely to give the matter much additional thought, other than, perhaps, to resolve not to deal with that seller again.

The lower-income buyer in the same circumstances may not have the money to replace or repair the defective unit. Consequently, that buyer has nothing to show for their purchase and will suffer the consequences of not understanding the meaning of the disclaimer.

[30] "Individuals at the economic margin are much less able to 'lump it' when faced with a denial of rights or benefits." Rhode, *supra* note 2 at 377.

[31] *See* Norton, *supra* note 15 at 607 (condemning legislation preventing legal services lawyers from bringing class action lawsuits and arguing that "many unlawful state actions will go unchallenged because the lawyer time and resources required to bring the suits significantly outweigh the results that can be achieved in individual lawsuits"). *See* also Marc Galanter, *Contract in Court: Or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577 (2001) (analyzing statistics regarding the characteristics of contract litigants, trials, settlements, and awards).

[32] *See, e.g.*, A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (considering legislative enactments governing family relationships when deciding whether contract with fertility clinic that allowed wife to have embryos implanted after separation from her husband and against husband's wishes was enforceable).

[33] *See* discussion Part I.A. *supra*.

[34] Indeed, low income persons are less likely to vote than wealthier persons. *See* John Powell, *Campaign Finance Reform is a Voting Rights Issue: The Campaign Finance System as the Latest Incarnation of the Politics of Exclusion*, 5 AFR. AM. L. & POL'Y REP. 1, 29 n. 150 (2002).

decisions.[35] Moreover, most people, particularly non-lawyers, have even less basis for evaluating the effectiveness of judges.[36] Members of the bar, therefore, play an important role in determining which judges get elected or retained.[37] Because relatively few attorneys work with lower-income persons, they may not take the needs of this population into consideration when evaluating or voting for judges.[38]

II. Impact of Class on Contract Negotiation, Performance, and Enforcement

Economically disadvantaged persons face many obstacles to contracting long before any dispute over performance or enforcement arises. In fact, people may be most vulnerable, and the most harm may occur, during the contract negotiation and formation stage. If their disadvantaged status creates inequities in the terms of the contract, then performance according to the terms may result in unforeseen hardships.[39] In these cases, access to counsel or the courts is meaningless, except in those few cases in which equitable doctrines such as unconscionability, duress, or undue influence provide relief.

A. Contract Negotiation and Formation

i. Limited access to information

Economically disadvantaged persons may accept unfavorable terms in contracts because they lack access to information that would help inform their choices. Wealthier persons have access to newspapers, television, magazines, and the internet; all of these

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[35] Frances Kahn Zemans, *In the Eye of the Beholder: The Relationship Between the Public and the Courts*, 15 JUST. SYS. J. 722, 729 (1992) (noting that "63 percent to 77 percent of the [1978 survey] respondents reported knowing very little about the courts").

[36] Zemans, *supra* note 35 at 729-30 (Noting that the public has no real context for evaluating judges beyond their decisions in individual or highly publicized cases; "[u]nlike other public office-holders, judges are little known to the citizenry at-large."); *See* John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L. J. 837, 860 (1990) (citing survey finding that twenty percent of those casting votes in a 1972 election did not vote in supreme court contests while only four percent failed to vote in the presidential race; "a 1976 Texas survey reflected that eighty-five percent of the voters were unable to name a single judicial candidate").

[37] This influence may be in the form of rating or evaluating judges or in the form of contributions to judicial campaigns. *See* Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 744 (2002) (concluding that state and local bar associations are able to influence the judicial selection process through identifying nomination commission members and evaluating judges); Scott D. Weiner, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 193-94 (1996) (noting that judicial elections have become increasingly competitive and the plaintiffs' and defendants' bars "vie for control of the state judiciary by bankrolling their respective candidates").

[38] ABA AGENDA FOR JUSTICE, *supra* note 2 at 78 ("Fewer than 1% of U.S. lawyers 'are engaged full-time in representing poor people or otherwise unrepresented interests in civil matters.'").

[39] *See* Jacobs, *supra* note 16 at 514. Professor Jacobs notes that "[h]aving one's day in court may be a hollow victory for a poor person" if the person does not know what arguments to assert or if the court cannot or does not hear and understand the arguments the person is making. *Id.* Similarly, having a day in court is not helpful if the person has bargained away their rights in an enforceable contract so that there is no remedy available.

allow them to shop around for prices or make informed decisions about whether and from whom to purchase goods or services. Without easy access to these sources, a person may accept whatever terms are offered simply because they are unaware that other, better options exist.[40]

Wealthier persons may also have a better sense of the economic worth of various goods and services, based on past experiences and access to the various sources mentioned above, so that even if they have not researched or read information regarding a particular product or service, they have a general idea of what they should expect to pay. They may also have access to information regarding what others have been willing to pay for the same goods or services.

ii. Access to counsel

Much of the focus on access to justice is concerned with access to counsel and the courts after a dispute arises. However, access to counsel at the negotiation or formation stage may prevent the dispute from ever occurring. Having a lawyer explain proposed terms and the associated risks or obligations is useful in making an informed decision about whether to enter into the contract, and in negotiating reasonable or favorable terms. For a lower-income person without easy access to free legal advice, consulting a lawyer may not be feasible even for high dollar or "high-impact"[41] contracts.[42] Consulting a lawyer is out of the question for every day consumer transactions.[43] The cost of entering into such contracts without a full understanding of the related risks and obligations can be disastrous.[44]

Without legal counsel, people may enter into contracts that impose burdens or risks that the disadvantaged party did not intend or foresee. If the contract is enforceable

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[40] *See* David I. Greenberg, *Easy Terms, Hard Times, Complaint Handling in the Ghetto*, 379-415 in NO ACCESS TO LAW ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM (Laura Nader ed., 1980). In this essay on the infamous Walker-Thomas furniture company (of Williams v. Walker-Thomas Furniture fame), David I. Greenberg commented on the quasi-monopoly held by stores in lower-income areas and commented that by "[u]tilizing the consumer's ignorance, dependency, and lack of information, Walker-Thomas obscures the governing legal rules and is able to manipulate the customer's expectations concerning total cost and financing charges, product quality, and collection requirements." *Id.* at 384.

[41] The term "high impact" contracts is used in this Article to refer to contracts with the potential to have a serious impact on the party's life, such as residential leases, credit card contracts, employment contracts, mortgages, armed services enlistment.

[42] ABA AGENDA FOR JUSTICE, *supra* note 2 at 78 (noting that less than a quarter of low income households obtain legal counsel for matters related to employment, housing, or finance; only slightly more than a quarter of moderate income households bring such problems to the justice system).

[43] Even wealthy people are unlikely to consult a lawyer before every consumer transaction but, as mentioned above, the impact of any loss related to unfavorable or misunderstood terms is less than that suffered by lower-income consumers.

[44] For example, a person who signs a lease with a merger clause that includes terms different than those orally promised by the lessor (higher lease rate, longer term, penalty clauses for late payments, utilities not included when lessor orally represented that such costs were included in the rent) may be stuck paying a higher rate or incurring additional costs each month that they cannot afford. The buyer who gives a security interest to the seller may not be aware of the seller's right to repossess the item on default (as determined by the secured party) without judicial involvement or approval. *See* discussion at Part I.B.ii. *infra*.

and cannot be set aside on equitable grounds, then access to a lawyer and the courts will be meaningless because the disadvantaged party has no grounds for complaint or defenses to enforcement. At best, the lawyer may be able to secure a settlement on more favorable terms than the party would be able to negotiate on his or her own.

iii. Meaningful choice of contracting partners

The doctrine of unconscionability is often defined and discussed in terms of a lack of meaningful choice.[45] While courts do not always require a literal lack of options,[46] the poor may truly have no choice when it comes to contracting for particular goods or services. Wealthier persons are more likely have the ability to shop around or decline to purchase goods if the price is unacceptable. If a person has no car and must walk or rely on public transportation to shop, if they must leave their neighborhood, if they must bring small children to shop with them, if they work during the most convenient shopping hours, or if they have physical limitations that make shopping difficult, their options may be limited.[47]

Similarly, a person who is unable to read or speak English may be forced to shop in areas or stores where the salespeople speak their language.[48] Non-English speakers may not be able to understand information regarding the transaction even if that information is readily accessible, if it is accessible only in English. Those who are illiterate may not understand terms that are included in a written contract but that were not disclosed orally during negotiations. The lack of choice is even more significant when the buyer has a need for particular goods or services, so that the person must enter into a contract with someone. In those circumstances, even a bargain that the buyer knows is unfavorable is likely to be accepted.

This lack of options may make lower-income persons more susceptible to pressure to accept unfavorable terms, to modify the contract in ways that are disadvantageous, or to forego enforcement of contract rights. Persons who have options have leverage. They can refuse to accept onerous terms and refuse to agree to unfavorable modifications. Furthermore, they can credibly threaten to enforce their contractual rights and follow through if necessary. A person who has a need for goods or services available from a particular seller and no ability to obtain them elsewhere (though they may be available in other places), has no leverage in contract negotiations.

In some cases, sellers are reluctant or even unwilling to enter into contracts with members of disadvantaged groups on terms as favorable as those with their more advantaged counterparts.[49] In those cases, if members of a the targeted group are

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[45] WILLISTON ON CONTRACTS § 18:9 (2004).

[46] Carlson v. General Motors Corp., 883 F.2d 287, 295-96 (4th Cir. 1989).

[47] *See* Greenberg *supra* note 40 at 382. "The shopping radius of poor people is quite narrow. Community leaders stress time and again the need for residents to recognize the cheaper prices and better quality available in suburban stores and in other parts of the downtown area." *Id.*

[48] Julian S. Lim, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CAL. L. REV. 579, 608 (2003).

[49] Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America,* 1994 UTAH L. REV. 147, 150 (noting that "discriminatory service narrows blacks' choices regarding where to consume, and impedes their ability to enter into efficient commercial transactions"). Ian Ayers' study of new car negotiations in the Chicago area showed that white women paid 40% higher

unwilling to pay the higher prices, they may be unable to enter into a contract with a discriminating seller. If all (or all reasonably available) sellers of particular goods or services discriminate against buyers of a particular class, a buyer in that class may have no meaningful choice with respect to a contract for those goods or services. Although these buyers may pay more, the terms may not be so one-sided as to be unconscionable or the discrimination so blatant as to be obvious. In fact, the targeted class may not even be aware that they are being treated unfairly or discriminated against. In those cases, there is no deterrent for this discriminatory behavior or practical remedy for the buyer.[50]

Viewed against this backdrop, equitable doctrines such as unconscionability can be viewed not as a means of rescuing ignorant or pathetic victims of their own poor choices, but instead as a means for achieving justice for capable, intelligent, but disadvantaged persons.[51] But these doctrines do not provide relief simply because a better deal could have been struck had the party had better information or other choices. Instead, relief is provided only when the terms are "shocking" and compel judicial intervention.[52] A person who pays slightly more for goods or services is unlikely to prevail on an unconscionability theory. Indeed, if the disparity is small, the potential recovery may not justify the cost of arguing the matter in or out of court.

Classifying the contract as one of adhesion is also unlikely to provide relief in many cases. Although contracts of adhesion are treated differently under the law, they are presumptively enforceable.[53] A court will only refuse to enforce a contract or term that was not within the reasonable expectations of the adhering party or that is

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markups than white men; black men paid more than twice the markup of white men; and black women paid more than three times the markup of white male subjects. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991). *See also* Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109-110 (1995) (using improved methodology and confirming the results of the 1991 study with respect to white male testers paying the lowest amount but revealing that black male testers were charged higher prices than black female testers).

[50] Of course, if discrimination based on age, race, gender, or certain disabilities can be proved, a remedy may exist under federal or state laws. *See, e.g.*, Mannell v. American Tobacco Co., 871 F.Supp. 854 (E.D. Va. 1994) (recognizing federal and state laws providing remedies for discrimination based on race, gender, and disability); Thomas v. Saint Francis Hospital and Medical Center, 990 F.Supp. 81 (D. Conn. 1998) (discussing federal law prohibiting discrimination based on race, gender, and religion). However, proving discrimination is often difficult, particularly when prices are negotiated and the seller can attribute the final price to many factors unrelated to race or gender (negotiating strategy, inventory volume, etc.).

[51] *See* Austin, *supra* note 49 at 151. Professor Austin notes that discrimination against blacks "is facilitated by a complex ideology about blacks and their money that is compatible with the notion that black consumption is deviant behavior." *Id.* Merchants justify cheating African Americans by reasoning that "they cheat themselves either by being unsophisticated and incompetent consumers or by making it difficult for a decent ethical person to make a profit from doing business with them." *Id.*

[52] *See, e.g.*, El Paso Natural Gas Co. v. Minco Oil & Gas Co., 964 S.W.2d 54, 62 (Tex. Ct. App.—Amarillo, 1997) ("[R]egardless of grounds proffered as illustrative of substantive abuse, they must be sufficiently shocking or gross to compel the courts to intercede. Indeed, the same must be said *vis-a-vis* procedural abuse; the circumstances surrounding the negotiations must be shocking.").

[53] *See, e.g.*, Graham v. Scissortail, 623 P.2d 165, 172 (Cal. 1981) (stating that contracts of adhesion are enforceable unless rendered unenforceable on some other grounds).

unconscionable.[54] Most complaints regarding pricing are not likely to qualify as terms that were beyond the reasonable expectation of the adhering party since the adhering party is usually well aware of the price being paid. The party is only unaware that a lower price could be obtained from a different merchant or in a different store. In other words, while the adhering party knows the price, he or she does not understand the true market value of the goods or services. If the term itself is within the reasonable expectation of the adhering party, then the contract or term will be enforced unless it is unconscionable. As discussed above, this is unlikely in many cases.[55]

Some may argue that relatively small discrepancies in price should not concern courts or policy makers. This might be true if the higher prices were only being paid by persons with significant discretionary income, but even a small cost differential may have a relatively large impact on the overall economic position of a lower-income person. Paying higher prices for goods and services means that their few dollars must stretch even farther. This disproportionately severe impact on lower-income individuals is not considered in most discussions of unconscionability or elsewhere in the law of contracts.

B. Performance and Enforcement

i. Understanding the Terms and Recognizing a Breach (Knowledge is Power)

The courts and legal scholars generally proceed on the long-standing presumption that everyone knows the law and their rights and will act accordingly.[56] However, in reality, not everyone has the same level of knowledge. It is much easier to escape liability for breach if the non-breaching party is unaware of his or her rights or the rules governing contract formation, performance, or interpretation.[57] While most American consumers are at least somewhat ignorant regarding the rules of contract, in consumer transactions, a merchant is likely to know at least the basic laws governing sales contracts (at least those favorable to the merchant) while the consumer may know none. The consumer may not be aware that laws even exist governing such things as when or whether a written contract is required for a contract to be enforceable, when a response is

[54] *Id.* at 172-73.

[55] *See id.*; Bernstein v. GTE Directories Corp., 827 F.2d 480, 482 (9th Cir. 1987) (enforcing limitation of liability clause in adhesion contract when the adhering parties had notice of the term at issue and gave understanding consent and the agreement was not unconscionable).

[56] *See, e.g.*, State v. Armstrong, (N.M. 1924) ("[t]he inhabitants of this state, whether English-speaking or Spanish-speaking, are presumed to know all previously adopted laws of this state and of the United States having general operation within this state"); State v. Helderle, (Mo. 1916) ("every rational man is conclusively presumed to know the law"); 29 AM JUR 2D EVIDENCE § 283 (2005) ("[a] rule frequently stated is that everyone is presumed to know the law").

[57] For example, a party may believe themselves bound by a written agreement even though it is unenforceable for lack of consideration. A party may believe themselves bound by an oral agreement (perhaps witnesses are willing to testify that they heard the promisor make the promise) even though it is unenforceable under the applicable statute of frauds.

an acceptance versus a counteroffer, when the consumer is allowed to cancel the contract[58], or what terms become part of a contract.

The consumer may be unaware that certain consumer protection laws exist or what it lawful or unlawful in consumer credit transactions.[59] Non-English-speaking persons may not understand their rights even if they are spelled out in the contract.[60] These persons also may be disproportionately impacted by presumptions in the law of contracts, such as the presumption that the parties have read and understand their contracts.[61] Finally, popular media images of the law and the legal system may leave people with incorrect or misleading impressions about their rights and obligations, particularly since contract law varies by state (a fact unknown to most non-lawyers).[62]

ii. Remedies as Regulators of Performance

Contract remedies assume the ability to bring suit. This assumption is crucial because it is understood that parties honor their contracts at least in part to avoid a lawsuit. If the threat of suit does not exist, there is no incentive (other than the morality of the party) to act in accordance with the contract terms.[63] A party who knows that the other party is unlikely or unable to sue for breach of contract (even if liability is clear) can breach the contract with impunity or compel modifications or concessions that would otherwise be refused.[64]

Article 9[65] of the Uniform Commercial Code is an example of a statute that gives tremendous power to one party in a contractual relationship (the secured party) with the only check on that power being the right to file suit to redress abuses or dereliction.[66] If

[58] Some state statutes allow the consumer to cancel the contract if it was made in the consumer's home or any place other than the salesman's place of business by giving written notice of cancellation. *See, e.g.*, TexasLawHelp.org (link to Contracts Frequently Asked Questions).

[59] *See* Rhode, *supra* note 2 at 380 ("[M]any potential [legal services] clients are unaware of matters that could benefit from lawyers' assistance. For example, parties may not know that they are entitled to certain benefits or that their consumer loans fail to meet legal requirements.").

[60] Lim, *supra* note 48 at 608.

[61] *Id.* at 604.

[62] Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1241 (2001).

[63] This is not to imply that most people are motivated only—or even primarily—by the threat of legal action. It is suggested that those who have no ability to seek redress in the courts are particularly vulnerable to those who are.

[64] Similarly, the party may threaten to sue for breach of contract even when there has been no breach in order to coerce the other party to agree to modifications or concessions to avoid the cost or hassle of litigation.

[65] All references to U.C.C. Article 9 are to Revised Article 9, which has been universally adopted.

[66] *See* U.C.C. §§ 9-601-628, governing the rights and remedies of secured parties and debtors after debtor default.

the debtor is in default, the secured party has the right to take possession of and sell the collateral without any court involvement.[67]

Because default is determined by the terms of the parties' agreement, the secured party can decide—without judicial confirmation—when a default has occurred.[68] This means that one party to the contract (often a financial institution or other sophisticated commercial entity) has the power to act as the judge of the other's performance under the contract. If the secured party concludes that there has been a breach (default), then that party is entitled to deprive the other party (the debtor) of her property without any neutral third party confirming that assessment. If the debtor does not believe that she is in default, or if she believes that the secured party has acted improperly in the seizure or sale of the collateral, she must file suit to have the matter resolved by the courts.[69]

If the debtor declines (or is unable) to obtain judicial intervention, the secured party decides—again without court involvement or approval—how, when, where, to whom, and at what price to sell the collateral. Article 9 requires every aspect of the sale to be "commercially reasonable"[70] but the secured party need not prove compliance with this request unless the debtor[71] files suit in court objecting to the sale.[72] Again, if the debtor cannot or does not seek court intervention, the secured party need never justify his actions or the resulting sale price to anyone.[73] No matter how egregious the secured party's actions or departure from the legal standard, it will go unpunished and the dispossession of the debtor's property will be permanent unless the *debtor* or other interested party institutes legal action.[74]

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[67] Section 9-609 gives the secured party the right to take possession of the collateral without judicial process if it can be accomplished without a breach of the peace. Section 9-610 gives the secured party the right to dispose of the collateral so long as every aspect of the disposition is commercially reasonable. No judicial involvement or approval is required, although the secured party must give the debtor notice of disposition. §§ 9-611 – 9-614. The secured party is authorized under § 9-610(b) to conduct a private or public sale (at the secured party's discretion), distribute the proceeds in accordance with § 9-615, and walk away without ever having to answer to any judicial authority. If the debtor or a secondary obligor believes that the secured party has failed to comply with Article 9, he may seek a court order restraining collection, enforcement, or disposition of the collateral, or seek damages for the secured party's noncompliance. § 9-625. However, the action must be instituted by the debtor or secondary obligor. If they fail to seek court intervention, then the court will not be involved in the repossession, disposition, or allocation of proceeds.

[68] Section 9-601(a) simply says: "After default, a secured party has the rights provided in this part, and, except as otherwise provided in Section 9-602, those provided by agreement of the parties." "Default" is not defined in Article 9. See Comment 3 to § 9-601. Thus, whether a default has occurred depends upon the obligations set out in the parties' agreement. *Id.* The secured party need not get confirmation by the court that the debtor is in default before exercising the rights referenced in § 9-601.

[69] U.C.C. § 9-625.

[70] § U.C.C. 9-610(b).

[71] Other obligors or parties with a security interest in the collateral may also seek damages for noncompliance, but as with the debtor, no action will be taken unless the obligor or other secured party institutes an action in court. *See* § 9-625(c).

[72] U.C.C. § 9-624, 625.

[73] *See* U.C.C. §§ 9-601-628.

[74] *Id.*

iii. Disparate impact of breach

If a party breaches a contract with a low income or otherwise disadvantaged person, the impact on that person may be more severe than on a wealthier person. For example, if a mechanic does a faulty repair that ends up costing a wealthy consumer an additional $200, it is an inconvenience to a wealthy person, but even if that person chooses not to pursue any judicial (or even extra-judicial) remedies, he or she can afford to get the car fixed and go on with life.

A lower-income person in the same situation may not have an additional $200 to get the car fixed properly. Without the repairs, they cannot drive the car. Without the car, they may not be able to get to work on time or get the kids to daycare. No work, no paycheck; no paycheck, no rent; no rent, no home . . . . The impact of a $200 breach is significantly different, but the remedy under traditional contract principles is the same—$200—since the other damages may not recoverable under traditional contract law. Even if they are compensable, the party must first bring suit and successfully prove the breach and right to damages. Given the costs of litigation, it is rarely feasible to litigate small dollar claims.[75]

Even if a product is inexpensive, many people do not have any money to replace a product that is not merchantable[76] and filing suit to recoup the loss is simply not a realistic option. The party must resort to non-judicial remedies (such as calling Better Business Bureau or picketing in front of the manufacturer's place of business), but none of these is guaranteed to resolve the problem or secure a replacement product. It might be assumed that the loss of an inexpensive item will not significantly impact even a lower-income consumer, but such as assumption would be incorrect. An item such as a thermometer, a smoke detector, or fire extinguisher may be important even if it is not especially costly. Such items cannot just be written off, but will have to be replaced, causing an unnecessary drain on scarce financial resources.

iv. Access to counsel

While wealthy consumers may not know the precise rules or laws governing a particular transaction, they have the ability to investigate to learn their rights either by asking family, friends, or acquaintances who are lawyers or by hiring a lawyer. Once their rights are understood, wealthy people have the ability to hire a lawyer to negotiate or, if necessary and worthwhile, sue to enforce their rights.

Lower-income persons may not know any lawyers; they may not know that some lawyers will give free consultation or work on contingent fee basis; they may not know how to do any research on their own. Thus, they may remain ignorant of their rights. Even if they are confident that they have a right to performance or compensation, they may have no means of enforcing that right. The difficulties may be compounded when a person is the defendant in a contract lawsuit. Even if a person has a valid defense, they might not realize it; if aware of the defense, may not know how or when to assert the

[75] It may be worthwhile to pursue a claim in small claims court, but there are still costs associated with such claims. *See* discussion *infra* at Part III.F.

[76] *See* U.C.C. § 2-314.

defense.[77] They may not even realize the need for a lawyer until it is too late (time for answering has passed, default judgment entered, statute of limitations has run).[78] The consequences can be far-reaching even if the dollar amount of the damages is relatively small.

v. Ability to engage legal counsel

Identifying a potential lawyer is only the first step. The lawyer must be willing to take the case. If the dollar amount is small or the merits at all questionable, a lower-income party is unlikely to be able to find a lawyer willing to take the case on terms the party can afford. If the lawyer charges an hourly rate, the fees are likely to exceed any potential damages award almost instantly. The lawyer is unlikely to be willing to take the case on a contingent fee basis because even a relatively large percentage of a small award will not compensate the lawyer for his or her time spent on the case (40 percent of a $500 award is only $200—not sufficient to justify litigating even a simple breach of contract case unless it can be settled almost immediately).

While very small dollar cases may be brought in small claims court, many claims exceeding the jurisdiction of such courts are still too small to warrant hiring an attorney. A $6,000 claim may exceed the jurisdiction of small claims court,[79] but few attorneys will be willing to take the case unless it can be settled quickly or won on summary judgment with little or no discovery required. If any more extensive effort is required, the attorney's fees are likely to exceed the damage award very early in the litigation process.[80] Even more troubling, a lower-income client may not be able to pay anything if he or she loses. Few attorneys will be willing to take a case where payment is limited if the claim is successful and non-existent if the claim is unsuccessful.[81]

Even if the recovery may be substantial, and the lawyer is willing to take the case on a contingent fee basis, they may require the client to pay for costs of filing, discovery (including depositions), copying, and other administrative costs. Even if these costs total only a few hundred dollars (and they can easily exceed that), it may be more than the

[77] Some affirmative defenses, such as laches, statute of limitations, or estoppel may be waived if not raised in a timely fashion.

[78] A 1992 U.S. Dept. of Justice Bureau of Justice Statistics Special Report stated that a quarter of contract cases in state courts in 1992 resulted in a default judgment because the defendant(s) failed to respond to the complaint or make a court appearance. While some wealthy defendants may deliberately allow a default judgment to be entered (if, for instance, they do not contest liability and intend to file for bankruptcy as soon as the judgment is filed), many of these cases may involve defendants who simple do not know what to do and cannot find a lawyer to help them.

[79] *See* James C. Turner & Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 U.D.C. L. REV. 177, 180-81 (2000) (listing dollar limit for small claims courts in all states and U.S. territories).

[80] Sixty hours and $100 per hour will consume the entire damage award (assuming, of course, that the client prevails—if the client loses, there may be no money with which to pay the attorney).

[81] ABA AGENDA FOR JUSTICE, *supra* note 2 at 78 ("Fewer than 1% of U.S. lawyers 'are engaged full-time in representing poor people or otherwise unrepresented interests in civil matters.'"). It must be noted that the cost of legal education is so high that many lawyers graduate from law school with substantial loan debt. [cite]. For many of these graduates, working for legal services or doing substantial pro bono work is not economically feasible.

client can afford to spend. The time away from work and otherwise spent dealing with litigation likewise may prove too burdensome.

This leaves the possibility of self-representation (or "pro-se litigation"), but pro-se litigation is not only extremely difficult and time-consuming, most people would have literally no idea how to file and prosecute a lawsuit on their own. Moreover, without an understanding of one's rights, prosecuting or defending a contracts action effectively is improbable. Legal Services programs provide attorneys for low-income clients, but they are understaffed, under-funded, and unable to accommodate everyone who needs their services.[82]

Wealthy persons may not bother to litigate small dollar contracts simply because the potential recovery is insufficient to warrant the time or expense. But if it is worthwhile, they have the funds to hire a lawyer. If they have a lawyer who represents them on other, more lucrative matters, the lawyer may be willing to take on a lower-dollar case at a reduced price just to keep a good client happy or in the hopes of building goodwill so that the client will hire him or her for more lucrative cases in the future. Alternatively, they may be willing to give sufficient guidance to allow the person to handle the case on their own, serving in an advisory capacity at little or no charge. A merchant may have an in-house counsel or lawyer on retainer to assert or protect his or her interests, so the relative cost of enforcement is low.

Class action suits provide one vehicle for lower-income persons to essentially pool their resources or grievances so that together there is sufficient incentive for a lawyer to take the case, but they can be slow, difficult, subject to numerous procedural challenges, and the rewards to the actual parties pale in comparison to the fees paid to the lawyers.[83]

vi. Quality of representation

Class can also affect the quality of the representation. Even assuming that the lower-income party can hire a competent attorney, they may not be able to afford the quality of representation that a wealthy or well-connected party can obtain.[84] Some witnesses may not be deposed, some discovery may not be conducted and some avenues may be left unexplored for the sake of controlling costs. Time may also be a factor since

[82] *See* Norton, *supra* note 15 at 613-14. The author discusses a 1989 American Bar Association report of the results of a national survey of low-income households conducted in 1987. "These households reported that legal representation was available to them for only 20 percent of their legal problems." *Id.* at 615. The author also cites a Pennsylvania Bar Association Task Force For Legal Services to the Needy report detailing the results of a telephone survey of 625 low income Pennsylvania households. "Sixty-seven percent of the households reported 'at least one civil legal problem within the past three years, [but] only 6% consulted a lawyer about the problem(s).'" *Id.* The author goes on to note that between 1990 and 1997, the number of cases legal services programs have handled has decreased by approximately 15%, demonstrating that even fewer low income people have access to counsel. *Id.* at 615-16. Moreover, legal services lawyers tend to take cases involving emergencies or necessities, such as domestic violence, eviction, and child custody and welfare cases. *Id.*

[83] Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 145 (2001).

[84] Jacobs, *supra* note 16 at 520 (noting that even dedicated legal services attorneys may not have the resources to provide the highest level of representation).

an attorney representing lower-income clients may need to take on a larger number of cases at any given time in order to make enough money to continue in practice. Such an attorney may lack the research and investigative resources that are available to attorneys who typically represent wealthier clients or who routinely take on high dollar cases.[85] This is not to suggest malpractice, but only to recognize that lower-income parties may have to settle for adequate or competent representation, while advantaged parties can insist on exemplary representation.[86]

III. Proposals to Increase Access

The problem of access has been noted and studied for years, and many proposals have been made, some of which are innovative and new and others that build upon practices in other countries or in the criminal context. A few of the more popular and controversial proposals are outlined below.[87] With each, advantages and disadvantages are noted and particular attention is paid to how well-suited the program is to the needs of lower-income contracting parties both before formation and after a dispute arises. While no one proposal is a panacea, most of the proposals can be used in conjunction with one another and together may provide substantially greater access to justice for lower-income persons.

A. Increased resources for Legal Services Programs

The most obvious problem facing legal services programs is lack of sufficient funding to serve all those who need their services. Several revenue sources have been proposed and explored. One of the largest sources of subsidies is the interest on lawyers' trust fund accounts.[88] Other suggestions include increased court filing fees,[89] a tax on gross revenues of law firms,[90] and increasing attorney registration fees or bar association dues.[91] By increasing funds available to legal services programs- especially funds that are not subject to the types of restrictions governing federal funds—the programs could help a larger number of people with a wider range of services. Increased funding would also allow legal services programs to expand to serve middle-income persons who might not currently qualify to receive legal services but who cannot afford to pay for legal assistance.

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[85] *Id.* at 520. A sole practitioner who specializes in low dollar cases or lower income clients may not have unlimited access to electronic databases such as Westlaw or Lexis, may not have paralegals or junior associates to do basic research and discovery, and may share secretarial services with other practitioners.

[86] Critics of mandatory pro bono hours for attorneys have also theorized that attorneys who are forced to work on cases for indigent clients will do only what is minimally required by the standards of professional conduct. Jacobs, *supra* note 16 at 520-21. *See* discussion *infra* Part III.C.

[87] No attempt is made to discuss all proposed or existing programs or to give an in-depth explanation of each program. Instead, a sampling of programs is identified and discussed for the purpose of acknowledging the variety of possibilities and demonstrating that few programs adequately address the needs of lower-income contracting parties, particularly outside of the litigation context.

[88] Rhode, *supra* note 2 at 387.

[89] *Id.*

[90] *Id.*

[91] *Id.*

B. "Civil Gideon" doctrine[92]

Many have argued that the right to counsel should be guaranteed in civil trials as it is in the criminal context.[93] Some argue that it should be available to indigent litigants in all civil cases[94] while others argue that it should be available only in certain cases such as eviction proceedings.[95] Although the Supreme Court has not recognized an absolute right to counsel in all civil cases, it has stated that due process may require appointment of counsel in civil cases under certain circumstances.[96] The Supreme Court has held that some interests, such as a parent's interest in maintaining parental rights, are sufficiently commanding and the risk of erroneous deprivation high enough that due process may (but will not always) require appointment of counsel before parental rights can be terminated.[97] Likewise, in many states, parents are entitled to appointment of counsel in custody or termination cases.[98] However, the courts have not expanded the right of counsel to all civil cases, instead holding fast to the presumption that the federal due process clause only requires counsel to be appointed when the litigant's liberty is at stake.

A federal statute authorizes courts to appoint counsel "to represent any person unable to afford counsel."[99] This statute does not confer an absolute right to counsel in

[92] Meeker & Dombrink, *supra* note 6 at 2226.

[93] *See, e.g.,* Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1 (2003); William L. Dick, Jr., *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627 (1989); Meeker & Dombrink, *supra* note 6; Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 527 (1988).

[94] Earl Johnson, Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. SOC. JUST. 201, 217 (2003).

[95] Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harv. C.R.-C.L. L. Rev. 557, 562 (1988).

[96] *See* Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Matthews v. Eldridge, 424 U.S. 319 (1976). In *Eldridge*, the Court identified three factors to be considered when deciding what due process requires: (1) the private interests at stake; (2) the government's interest; and (3) the risk that the procedures used will lead to an erroneous decision. Eldridge, 424 U.S. at 335; Lassiter, 452 U.S. at 27.

[97] In Lassiter, the Court weighed those three factors "against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." Lassiter, 452 U.S. at 27. The Court concluded:

[T]the parent's interest is an extremely important one (and may be supplemented y the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

Id. at 31.

[98] *See* Scherer, *supra* note 95 at 563.

[99] 28 U.S.C. § 1915(e)(1) (2005). This statute and its state counterparts are sometimes referred to as "poor persons statutes." Scherer, *supra* note 95 at 584-85.

any case, but it does give the trial court discretion to appoint counsel.[100] The "threshold issue" is whether the indigent litigant is likely to succeed on the merits of the claim.[101] Other factors to be considered include: the indigent party's ability to investigate and gather facts, the importance of cross-examination (particularly in cases in which the credibility of witnesses or parties is crucial), the indigent's ability to present his case, and the complexity of the issues raised in the case.[102] Many states have enacted similar statutes authorizing appointment of counsel to indigent parties in civil cases.[103]

Although it has been argued that courts applying these factors should appoint counsel to indigent civil litigants in a wide variety of cases, ranging from eviction suits to Article 9 deficiency suits, courts have exercised their discretion sparingly.[104] The reasons for this judicial reluctance are not clear, but some inferences may be made. First, the presumption against appointment of counsel in civil cases is long-standing and well-settled and the many statutes authorizing appointment of counsel do not do away with that presumption.[105]

Second, while appointment of counsel in all cases is a laudable goal, there are practical obstacles. In the criminal context, lawyers need only be appointed for the defendant. However, in the civil context, counsel could presumably be appointed for indigent plaintiffs and defendants. The cost and organizational requirements of this undertaking would be tremendous.[106] Given the apparent difficulty in providing adequate funding for criminal legal services and criticisms of the quality of representation provided by appointed lawyers in criminal cases, it is unlikely that the government (or even many taxpayers) would be enthusiastic about incurring the costs associated with appointing legal counsel in civil cases.

C. Pro Bono

While it seems clear that lower-income persons could benefit tremendously and that access to justice would be improved if more attorneys donated their time and resources to representing indigent clients, mandating pro bono work has faced strong opposition from members of the bar. Alleged constitutional grounds for objection include assertions that mandatory pro bono violates: the Thirteenth Amendment's prohibition against involuntary servitude; the Fifth Amendment takings clause[107]; the

[100] Burgos v. Hopkins, 14 F.3d 787, 789 (2d Cir. 1994).

[101] Burgos, 14 F.3d at 789 (citing Hodge v. Police Officers, 802 F.2d 58 (2d Cir. 1986).

[102] Burgos, 14 F.3d at 789; Hodge, 802 F.2d at 61.

[103] Scherer, *supra* note 95 at 585.

[104] Bindra & Ben-Cohen, *supra* note 93 at 11-12; Scherer, *supra* note 95 at 586-87.

[105] *See, e.g.*, 28 U.S.C. § 1915(e)(1); N.Y. C.P.L.R. § 1102 (McKinney 2005).

[106] Meeker & Dombrink, *supra* note 6 at 2226 (noting that adoption of "Civil Gideon" doctrine would dramatically increase access but "could prove very expensive").

[107] Jacobs, *supra* note 16 at 510. Forcing lawyers to work without compensation is alleged to be an impermissible taking.

First Amendment right to freedom of association[108]; and Fourteenth Amendment equal protection rights.[109]

Scholars and pro bono advocates have responded to each of the above objections,[110] yet proposals by various state bar associations to impose mandatory pro bono service have been vetoed by their memberships.[111] Nor have attorneys volunteered in great numbers.[112] Consequently, many bar associations have focused on ways to *encourage* pro bono service. In some states, lawyers must report the pro bono hours each year. In 1993 Florida adopted a pro bono statement in which the Florida Supreme Court voiced their expectation that lawyers would perform at least 20 hours per year providing direct legal services to the poor.[113] Alternatively, lawyers can contribute $350.[114] The pro bono service or contribution is not mandatory, but lawyers are required to report their pro bono hours or contributions.[115] As of 1998, nearly 70 of reporting lawyers participated in pro bono service.[116] In Maryland, the Court of Appeals established "an aspirational goal of at least 50 hours of pro bono service" per year for every lawyer and adopted a "mandatory reporting" requirement.[117] These reporting requirements provide positive feedback for those performing significant pro bono service and incentives (or "peer pressure") for those who are not.

Voluntary pro bono programs have the advantage of flexibility for the attorney. An attorney may choose to provide counseling services—including advice regarding contract negotiation or modification—as opposed to litigation assistance. The attorney

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[108] *Id.* This objection is based on the claim that forcing lawyers to represent clients whose beliefs conflict with the lawyer's beliefs and interests is a violation of the First Amendment right of freedom of association. *Id.*

[109] *Id.* The equal protection claim is based on the argument that other citizens are not required to perform free services for the benefit of the poor. *Id.*

[110] *Id.* at 510-11. According to Jacobs, the Thirteen Amendment involuntary servitude claim is unfounded because the lawyer is not required to perform the service; the lawyer can choose not to practice law and avoid the pro bono work. *Id.* The Fifth Amendment takings claim fails because "a taking only occurs when the thing taken is deprived of all value. Therefore, requiring a few hours per year of a lawyer's time does not constitute a taking." *Id.* The First Amendment claim fails because the lawyer need not adopt the pro bono client's beliefs any more than is necessary when the lawyer represents a paying client. *Id.* 510-11. The Fourteenth Amendment equal protection claim is untenable because "[l]awyers are not a protected class although, by virtue of their monopoly on the practice of law, they are already essentially a special group." *Id.* at 511.

[111] *Id.* at 509-510.

[112] Rhode, *supra* note 2 at 378. "The organized bar lobbies strongly for financial assistance from the government but has attracted relatively low levels of contributions from its own members; fewer than ten percent have accepted referrals from legal aid programs, and the average financial contribution from surveyed lawyers is less than fifty cents a day." *Id.*

[113] D'Alemberte, *supra* note 8 at 19.

[114] *Id.* at 19-20.

[115] *Id.* at 20.

[116] *Id.*

[117] Robert B. Kershaw, *Access to Justice in Maryland—A Visionary's Model*, 37 MD. B. J. 50, 51 (2004). Hours must be reported annually to the Maryland Court of Appeals.

may also choose when and which clients and cases to accept instead of waiting to be appointed by the court. This allows the attorney to choose pro bono cases within the attorney's specialty area and at times when the attorney's workload allows her to devote the necessary time and resources to the pro bono case. If the attorney does not have the time in a particular year to take on pro bono representation, the attorney may donate money to legal services programs that assist lower-income persons.

While programs to encourage pro bono activities and mandatory reporting rules may increase access to counsel, it is unlikely to prove sufficient to handle all of the legal needs of the poor. The limited resources will likely be devoted to the most pressing needs, which often means litigation assistance, leaving little or nothing for pre-contractual counseling or assistance.[118] Thus, pro bono programs remain an important, but insufficient, method of increasing access to justice for lower-income persons.

D. Increased Use of ADR

Alternative dispute resolution programs have grown tremendously in scope and frequency of use in the past two decades.[119] Mediation and arbitration have become especially popular and are viewed as less costly alternatives to litigation which free up judicial resources and ease the overburdened court system.[120] The programs are perceived to be especially helpful to indigent litigants since they are more informal and may be less intimidating, particularly if the litigant is unrepresented by counsel.[121]

Despite its advantages, even proponents acknowledge that ADR is not appropriate for every case.[122] Moreover, it is not always successful.[123] While arbitration or mediation may be effective if voluntary,[124] if involuntary they may serve as yet another barrier to justice. In fact, if non-binding, it may actually increase litigation costs. For example, some courts have the authority to order parties to mediation and the cost of mediation is an additional cost of court.[125] If the parties are open to mediation and

[118] As discussed above, many people would benefit more from assistance in negotiating or understanding contract terms before a contract is entered into than would benefit from litigation assistance after performance or breach. *See* discussion *supra* at Part II..

[119] *See, e.g.*, ABA AGENDA FOR JUSTICE, *supra* note 2.

[120] *Id.* at 89.

[121] Kershaw, *supra* note 117 at 52.

[122] *Id.* at 52-53.

[123] *Id.* at 53.

[124] Indeed, while the ABA strongly supports voluntary ADR, "because of its firm commitment to access to the courts and justice, it opposes enactment of any legislation that includes mandatory arbitration in federal courts." ABA AGENDA FOR JUSTICE, *supra* note 2 at 89.

[125] Fran L. Tetunic, *Florida Mediation Law: Two Decades of Maturation*, 28 NOVA L. REV. 87, 90 (2003) (noting that Florida courts can order parties to mediation); TEX. CIV. PRAC. & REM. § 154.021 (2005) (authorizing courts to order parties to alternative dispute resolution, including mediation); TEX. CIV. PRAC. & REM. § 154.054 ("Unless the parties agree to a method of payment, the court shall tax the fee for the services of an impartial third party as other costs of suit."); N.M. STAT. ANN. § 40-12-5 (2005) (requiring parents to pay for court-ordered domestic relations mediation); OHIO REV. CODE ANN. § 3105.091 (requiring parties to pay for court order conciliation programs).

settlement, it can decrease costs by moving the parties toward, or even achieving, a settlement or other resolution of the matter. But if even one party is opposed to mediation and is determined to move forward in the courts, then mediation is simply another cost that must be added to the cost of litigation and a delay to final adjudication of the claims.[126]

Moreover, the disparity between wealthy and poor is not eliminated in mediation or arbitration. Parties who can afford to hire counsel will often be represented at the mediation or arbitration.[127] In arbitration, the lawyer will assist the party in presenting evidence, identifying relevant issues and countering the other parties' arguments.[128] The unrepresented party is as adrift in the arbitration as in the courtroom.[129] In mediation, the lawyers can help their clients evaluate the mediator's recommendations and admonitions and give advice regarding settlement. The unrepresented party has no such advisor and must interpret and evaluate their options without that benefit.

In some cases, the mediator or arbitrator may be reluctant to give advice to an unrepresented party for fear of losing the appearance of neutrality or of unwittingly taking on the role of counsel to the unrepresented party who may come to view the mediator or arbitrator as their advocate.[130] If the mediator is unwilling or unable to advise the unrepresented party, then the mediation may be unproductive. Worse, the unrepresented party may feel pressured to settle, particularly after spending time and money on the mediation. In arbitration, failure to advise the pro se party may result in the party forfeiting rights and waiving valid arguments.[131]

Finally, ADR does nothing to increase access to justice before a controversy arises. By definition, ADR exists to resolve existing disputes, not prevent them. Because access to justice often requires access to counsel or advice before contract formation, ADR is an ineffective cure for many of the problems facing lower-income contracting parties.

E. Non-lawyer representation

Lawyers are not the only persons with the knowledge to help lower-income persons navigate the legal system or decipher the law of contracts. Court personnel, paralegals, and even lay persons familiar with the legal system or a particular area of the

[126] *See, e.g.*, Texas Parks and Wildlife Dept. v. Davis, 988 S.W.2d 370 (Tex. App. 1999) ("While a court may compel parties to participate in mediation, it cannot compel the parties to negotiate in good faith or settle their dispute."); Graham v. Baker, 447 N.W.2d 397 (Iowa 1989) (reversing sanctions against party who attended mediation but refused to negotiate).

[127] Under American Arbitration Association's rules parties have the right to be represented but they are not required to have representation. Jonathan D. Canter, *The Employment Arbitrator and the Pro Se Party*, 57 DISP. RESOL. J. 52 (2002) (citing AAA Rule 16).

[128] *See id.* at 52-53.

[129] *Id.* (noting that employment law is complex and "it is a rare employee whose job or experience covers the legal issues of an employment dispute. Pro se employees are likely to be first-timers, who don't speak or think in the language of the forum, who don't know what they don't know.").

[130] *Id.* at 54-55.

[131] *Id.*

law may be able to provide valuable assistance to lower-income persons in a significant percentage of cases. However, rules regulating the practice of law often prevent these persons from sharing their knowledge.

Some non-profit organizations such as the American Association of Retired Persons (AARP) faced challenges because the organization is a non-profit corporation governed by a Board of Directors, none of whom were lawyers.[132] The rules regulating lawyers who are supervising by non-lawyers are designed to protect clients by ensuring that their lawyers are subject to the control and influence of their clients and not their non-lawyer employers.[133] Public interest corporations and other entities seeking to provide legal services to the public may do so without running afoul of these rules by taking care to set up the legal services component of their operations within certain guidelines that recognize and protect the lawyer's special duty to the client.[134]

The guidelines referenced above apply only when an actual lawyer is providing the legal advice to the client. Different concerns arise (and different rules apply) when lay persons seek to provide legal advice without any lawyer involvement. In those cases, the rules are designed to protect the public from unqualified persons who, through their ignorance of the law, may fail to help or may even put their "clients" in a worse position.[135] It is clear that some non-lawyers are very knowledgeable and provide information and assistance that would otherwise not be available. While non-lawyer assistance may be an effective way of increasing access to justice, particularly for lower-incomer persons, the use of non-lawyers without any involvement or oversight by attorneys presents significant risks that cannot be ignored.

Non-lawyer representation is likely to be most helpful with discreet issues within the experience and expertise of the non-lawyer advocate. But a person who has a variety of legal problems may end up getting only some of their concerns addressed by a non-lawyer advocate. This may lead to some problems not being addressed at all, or being handled piecemeal instead of in a comprehensive manner. More troubling is the lack of

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[132] See Wayne Moore, *Are Organizations that Provide Free Legal Services Engaged in the Unauthorized Practice of Law?* 67 FORDHAM L. REV. 2397 (1999). The challenge discussed in the article came from one of the staff attorneys who informed his boss that he could no longer represent clients outside of the corporation because he feared it would run afoul of the District of Columbia rules of ethics governing the practice of law. *Id.* at 2397.

[133] *Id.* at 2401-02.

[134] *See* discussion of In re Co-operative Law Co., 92 N.E. 15 (N.Y. 1910), In re Education Law Center, 429 A.2d 1051 (N.J. 1981), and subsequent cases and statutes in Moore, *supra* note 132 at 2399-2404. The New Jersey Supreme Court ruled that public interest organizations would be allowed to provide legal services if certain criteria were met: "(1) the role of the corporation is that of a 'conduit or intermediary to bring the attorney and client together'; (2) '[o]nce a staff attorney is retained by a client, there can be no interference in the attorney-client relationship by the organization;' (3) 'the corporation must be liable for any damages arising from the attorney's malpractice;' (4) '[d]eterminations of which cases to accept and all decisions concerning how such cases are to be handled' are made by lawyers, either on staff or on the board; and (5) the board 'take[s] special precautions not to interfere with its attorney's independent professional judgment in . . . handling [a] matter.'" Moore, *supra* note 132 at 2403 (quoting In re Education Law Center, Inc., 429 A.2d 1051, 1058-59) (internal citations omitted).

[135] Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2243 (1999); ABA Model Rule of Professional Conduct 5.5 (1998).

recourse for bad advice. There is no malpractice remedy available and lay advocates are not subject to discipline by the bar as a lawyer would be. Moreover, there may not be any remedy available in tort, particularly if the advice were free and the non-lawyer status were disclosed.

Unions and other labor organizations provide another form of non-lawyer assistance. In some unions, members have the right to legal representation in various types of employment disputes.[136] The organization also serves as an advocate for its members by negotiating contracts on their behalf.[137] Such organizations provide access to justice in contractual relationships in ways that few other programs can. By providing assistance at all stages, and not simply after the contract has been formed and a dispute has arisen, parties can make better informed (and presumably more advantageous) decisions about whether to contract and on what terms.

These organizations are not without drawbacks, however. There are inevitable costs to being represented by a group, particularly in contract negotiation. The representative must do what is best for the group as a whole, even when that conflicts with what may be in the best interests of individual group members.[138] Membership also typically costs money and may be mandatory for certain jobs.[139] Finally, members may be bound by contracts and terms to which the member objects simply by virtue of membership.[140]

F. Small Claims Court

Small claims courts are an excellent option for persons whose claims are too small to warrant the cost of litigation in the traditional court system but too significant to the litigant to forgo entirely. The courts are designed to reduce the time and cost involved in adjudicating claims.[141] Procedures and forms may be less complicated[142] and

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[136] *See, e.g.*, Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 205 (1991) (noting that "[t]he AFL-CIO reports that it offers as part of its membership the right to representation in various workplace legal matters").

[137] Patrick Hardin & John E. Higgins, Jr., THE DEVELOPING LABOR LAW 1858-1861 (4th ed. 2001) (noting statutory mandate that the union representative be the exclusive representative of all of the employees in the bargaining unit and discussing the duties of the organization to the employee).

[138] *Id.* at 1859 (noting that the union representative may make contracts that have provisions unfavorable to some members of the craft represented so long as the contracts are not discriminatory based on "irrelevant and invidious considerations such as race.")

[139] These are called "union shops" and require membership as a condition of employment. *Id.* at 1968.

[140] *Id.* at 1858-60.

[141] Turner & McGee, *supra* note 79 at 178. Hearings may last only a few minutes and are heard within a short time after the complaint is filed. *Id.*

[142] Plaintiffs in small claims court may need to fill out only one simple form. *Id.* Hearings may last only a few minutes and are heard within a short time after the complaint is filed. *Id.* Evidentiary rules are also relaxed. In New York, for example, hearsay is admissible (although a judgment may not rest on hearsay alone) and the best evidence rule does not apply. Gerald Lebovits, *Small Claims Courts Offer Prompt Adjudication Based on Substantive Law*, 70 N.Y. ST. BAR J. 6, 10 (1998). Despite the lenient evidentiary rules, substantive law governs claims. *Id.* Consequently, the parol evidence rule (which is substantive) applies. *Id.*

some courts have advisors to help unrepresented parties navigate the system.[143] Small claims courts have limited jurisdiction, with the most significant restriction being dollar limits, restrictions on the type of cases that can be heard, and the remedies available.[144] Monetary jurisdictional limits range from $1,000[145] to $25,000.[146] Most small claims courts cannot hear domestic relations or landlord-tenant cases and remedies are limited to money damages.[147] Many jurisdictions allow decisions from small claims courts to be appealed.[148] Parties typically are not represented by counsel (although attorneys are allowed in the majority of states).[149]

The obvious advantage of small claims courts is that the simplified forms and more lenient procedures allow lower-income persons to pursue and defend against claims more effectively. The lower cost and reduced delay make it possible to get into court and pursue the claim, while the simplified procedures put unrepresented parties at less of a disadvantage. Courts that employ advisors to assist litigants throughout the process are especially laudable.

However, there is the risk that unrepresented parties in small claims courts will not know what claims to pursue. In those instances, the relaxed procedures and rules will not rescue the litigant. Moreover, the relatively informal procedures give the judge a lot of discretion which is likely to go unchallenged (or even unrecognized) by unrepresented parties, even if the discretion is abused. The low dollar limit in many jurisdictions also excludes a large percentage of claims that cannot realistically be pursued by lower-income persons in general jurisdiction courts.[150] Finally, as with all other litigation-oriented solutions, small claims courts will not aid those parties who have entered into unwise but enforceable contracts.

G. Changes to the Court System

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[143] Turner & McGee, *supra* note 79 at 178.

[144] *Id.* at 180.

[145] The jurisdictional limit for small claims court in Virginia as of December 1999 was $1,000. *Id.* (confirmed as of 2004 at www.halt.org).

[146] The jurisdictional limit for small claims court in Tennessee is $15,000 in counties of more than 700,000 population and $25,000 in other counties. *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] For example, the majority of jurisdictions do not allow claims greater than $5,000 to be brought in small claims court. A $6,000 claim is likely to be of great importance to a lower-income person, but many people would find it difficult or impossible to litigate a $6,000 claim without counsel in general jurisdiction courts. Furthermore, the cost of hiring an attorney will almost always exceed the expected award, even if the claim is successful. Consequently, there remains no access to justice for lower-income persons with these types of claims. *See also* discussion *infra* at Part II. Proposals to raise the dollar limit have been made by groups such as HALT—An Organization of Americans for Legal Reform. Turner & McGee, *supra* note 79 at 177-78.

Several changes to the legal system in general and the civil court system in particular have been proposed in the effort to increase access to justice.[151] Some of the proposed changes include requiring all legislation to be written in terms understandable by the average citizen without legal training;[152] removing specific types of disputes from the general adversarial system;[153] changing hours of court operation to include nights and weekends to allow those who must work during the day to come to court without having to take time off;[154] use of "courts on wheels" where mobile units bring court services to underserved communities;[155] and use of court ombudspersons to handle questions, direct people to the appropriate court personnel or office, and provide direction to government and court services.[156]

H. Fee Shifting

Many scholars have advocated using some form of fee shifting as a means of giving lower-income persons access to the courts.[157] Some states currently mandate by statute that the prevailing party in certain classes of cases or under specific conditions should be awarded attorney fees in addition to traditional damages; it is allowed under some federal statutes as well.[158] Courts will also enforce provisions in contracts stating that attorney fees should be awarded to the prevailing party in any litigation regarding the

[151] *See, e.g.*, Meeker & Dombrink, *supra* note 6 at 2225-2229.

[152] *Id.* at 2226.

[153] *Id.* at 2227. Examples given include worker's compensation, no-fault divorces, no-fault auto insurance, medical malpractice, and products liability suits. *Id.* These cases would presumably be handled in specialty courts or administrative hearings.

[154] *Id.* at 2228.

[155] *Id.* at 2229.

[156] *Id.* Other proposed changes include increase use of alternative dispute resolution, increased dollar amount limits in small claims courts, increased outreach and education of the public. *Id.* at 2225-2229.

[157] *See, e.g*, Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); M. Isabel Medina, *Award of Attorney Fees in Bad Faith Breaches of Contract in Louisiana—An Argument Against the American Rule*, 61 TUL. L. REV. 1173 (1987).

[158] *See, e.g.*, Alaska Court Rule 82 (awarding attorney's fees to the prevailing party in all civil cases and setting the amount of the award based on the amount of the judgment, whether the claim was contested, and whether the claim went to trial); Nev. Rev. Stat. 18.010 (awarding attorney's fees to the prevailing party in cases in which the recovery was no more than $20,000 and the opposing party had no reasonable complaint or defense or brought complaint or defense for harassment); Tex. Civ. Prac. & Rem. §§ 38.001-38.002 (awarding reasonable attorney's fees to the prevailing party in certain categories of cases, including contract cases).

contract.[159] Fee shifting is alleged to benefit lower-income parties because it makes low dollar cases potentially profitable for the prevailing plaintiff. The party gets the benefit of the entire award rather than having to use the award to pay their attorney's fees and the attorney receives all of his fees even if those fees exceed the amount of the award.[160] If the case is strong and the plaintiff likely to be successful, then even a low-income person may be able to find an attorney willing to represent him.[161]

The disadvantage of fee shifting for lower-income persons is that if the party loses, rather than walk away with nothing, he must pay the winning party's attorney fees.[162] Insolvent parties or parties with no non-exempt assets have nothing to lose, so litigating claims is relatively risk free.[163] But for moderate-income parties or parties with only a few assets, the risk of litigating may be too high.[164] Fee shifting may discourage such parties from litigating all but the most airtight cases.[165] Of course, fee shifting has no effect on access to counsel before litigation.

I. Making the Law More Accessible

Perhaps more than any other proposal or program, simplifying the law and educating the public about their rights and obligations under the law has the potential to impact the lives of lower-income persons profoundly. Because people enter into contracts voluntarily, they have the ability to make choices about the terms of those contracts as well as whether to enter into the contract at all. Being informed about the law governing contracts in general and special rules governing particular types of contracts—such as consumer, employment, and housing contracts—allows people to make more informed and, hopefully, better choices. But the very structure of the American civil legal system makes it difficult for non-lawyers to understand all aspects of all areas of the law. The law is complex. The mixture of precedent, statutes, and regulations that make up the law of contracts are beyond the comprehension of almost anyone without formal legal training or extensive experience.[166] Additionally, the law is

[159] John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1578 (1993)

[160] John V. Tunney, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 626, 650-51 (1974) ("Were attorneys assured of recompense for their time and service, emphasis would be placed on the merits of these small claims, which would almost inevitably be promoted.").

[161] *See, e.g., id*; Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L. J. 651, 663-664 (describing increased access to justice as one rationale given for fee shifting).

[162] *See* Tunney, *supra* note 160 at 651-52.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 651.

[166] After all, if the law could be understood by lay persons without legal training, there would be no need for three years of law school before a person is admitted to the bar of any jurisdiction.

dynamic; it is ever evolving and changing. Few people have the time or resources to stay abreast of the changes.

Nevertheless, it is possible to educate a substantial portion of the public with regard to some of the laws that most directly and profoundly affect their everyday lives. Some states have taken advantage of technological advances and make information available on the internet.[167] The TexasLawHelp.org site advertises itself as a "one stop, online resource for free and low-cost civil legal assistance in Texas."[168] The site includes answers to common legal questions in a variety of areas, including: family law, domestic violence, consumer law,[169] wills and estates, housing, public benefits, health, elder law, immigration, disability, employment, civil rights, and migrant workers.[170]

The consumer law link includes a section on contracts which answers questions such as: Am I responsible for a contract signed by my underage child? When is an oral contract legally binding? What does it mean for me if I co-sign a loan for a friend or relative? What can I do if I've changed my mind about a contract that I've signed? What should I do if the salesperson tells me something different than what the contract he or she is asking me to sign says?[171] The site also contains links to the Texas Attorney General's website, which explains the role of the attorney general's office and includes information about consumer rights and remedies and the process for filing consumer complaints.[172] The legal assistance link lists organizations that provide free and low cost legal services to low-income persons along with the criteria to qualify for such services.[173] The courts links explains the jurisdiction of each of the state courts, including specialty courts.[174] Portions of the site are available in Spanish and several of the legal services organizations provide service in Spanish.[175]

Resources such as the TexasLawHelp.org website are among the few that are not limited to litigation assistance. Instead, they give all citizens free and immediate access to information that can help them make better informed choices in their personal and professional lives. Information on the internet is available 24 hours a day, every day of the year. Unlike printed materials, websites and links can be updated easily at little or no cost. The ability to include links to other websites gives citizens access to a greater range of information and resources while still allowing them to access only what they need

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[167] *See, e.g.*, TexasLawHelp.org. The site was launched by the Texas Equal Access to Justice Foundation and Texas Access to Justice Commission. *New Website Envisions Access to Justice, Anywhere*, 66 TEX. B. J. 469 (2003).

[168] *Id.*

[169] This link includes automobiles, bankruptcy, contracts, credit reports and credit access, debt collection, federal income tax, foreclosure, identity theft, mobile homes, consumer finance, public utilities, small claims court, unfair sales practices and consumer fraud. *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id*; (Texas attorney general website).

[173] TexasLawHelp.org.

[174] *Id.*

[175] *Id.*

instead of forcing them to wade through stacks of documents or call scores of phone numbers to find the relevant information.

Unfortunately, technology is still often associated with wealth. Even though the cost of personal computers and internet access has decreased dramatically over the last decade, many lower-income persons still have limited access to the internet. Many schools, public libraries, and community centers allow free public access to the internet,[176] but the demand often exceeds the limited supply. At best, these users will have only periodic access to the legal internet resources. Furthermore, there are many persons (particularly those who finished their formal education before computers became ubiquitous or those who do not use computers at their jobs) who are still uncomfortable with computers and do not know how to access information on the internet, much less how to download forms.

> Perhaps more disheartening is the disclaimer posted on the website:
> **Information Not Legal Advice.** This web site has been prepared for general information purposes only. The information on this web site is not legal advice. Legal advice is dependent upon the specific circumstances of each situation. Also, the law may vary from State to State, so that some information in this web site may not be correct for your jurisdiction. Finally, the information contained in this web site is not guaranteed to be up to date. Therefore, the information contained in this web site cannot replace the advice of competent legal counsel licensed in your state.[177]

From a liability perspective, it is understandable that such a disclaimer is given, but it may be discouraging for the lower-income person who accesses the website in search of legal information and advice because they cannot afford to hire an attorney to read that the site sponsors do not guarantee the accuracy of the information provided and advise hiring an attorney.

For these reasons, information still must be made available in more traditional mediums and forums. Documents with referral lists as well as substantive information can be made available in public places such as libraries, courthouses and other government buildings, as well as community centers and other agencies that serve lower-income persons. Legal hotlines can be established to answer questions and make referrals.[178] Programs can be conducted for community, religious, or outreach groups. Training sessions can be held for community advocates.[179] These are unlikely to educate large segments of the population, but they will help some, particularly those without internet access, who would otherwise have no access to this information.

Conclusion

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[176] *New Website Envisions Access to Justice, Anywhere*, 66 TEX. B.J. 469 (2003).

[177] *Id.*

[178] Recommendations, *supra* note 11 at 1769; Several states have developed statewide hotlines. Houseman, *supra* note 19 at 370.

[179] Recommendations, *supra* note 11 at 1770-71; Houseman, *supra* note 19 at 400, 424-25.

No one can deny that we as a nation have fallen far short of the goal of equal access to justice for all. Lower-income persons are denied access to counsel and to courts and, as a result, many of their legal needs continue to be unmet. Given the necessity of entering into contracts to find employment, housing, food, clothing, and all of the goods and services that are necessities in our culture, the lack of access to legal help has a significant and detrimental impact on those who can least afford to forfeit their rights or defend themselves against attacks by others. Unfortunately, many of the programs proposed and implemented by those working diligently to alleviate poverty and increase access to justice do not fully meet the needs of lower-income contracting parties. In particular, too little attention is paid to the importance of legal assistance in the negotiation and formation stages and too little emphasis is placed on educating people about their rights in terms they understand. By examining the ways in which economic status affects all aspects of contractual relationships, strategies and solutions can be developed that are tailored to the unique characteristics of contracting parties. Only when contracting parties have a say in the development of contract law, a clear understanding of their rights and obligations under the law, and the ability to enforce and defend those rights will the ideal of equal access to justice be a reality.