

Comment

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Where's Robin Hood?

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INTRODUCTION

An immense amount of pressure is placed on the summer position that law students accept after their first year. It's the first real look at non-doctrinal legal work, it influences the choice of classes taken over the rest of law school, and it's the first shot at setting up future employment. I knew I was interested in tax law, but due to the strict first-year curriculum, I had no tax classes, no practical knowledge, and no experience in tax law, making me a highly unattractive candidate unlikely to get a tax position. Luckily, I was offered an interview with a low-income taxpayer clinic at a statewide nonprofit in Oregon. We spoke for about an hour, I informed the interviewers that my complete lack of experience was matched only by my eagerness to learn, and they offered me the position about three hours after the interview.

At the time, I was ecstatic, but after working at the nonprofit for months, I understood that interaction more fully. The clinic was desperate for help. A law student with no experience was hastily snatched up as quickly as possible because they were sorely in need of more minds and resources.

Because of the extreme lack of resources, I was given a baptism by fire. The downtown Portland clinic is one of only two in the state and has only one attorney overseeing the clinic, its clients, and its interns. This left me with an abnormal amount of independence to advocate, write, and manage clients' cases. With that independence, I was able to mimic the role and responsibilities of an actual legal aid attorney, getting an intimate window into the lives of clients and communities in need. What I saw is that, despite best efforts, there are not enough resources for civil legal aid services to provide adequate assistance to low-income folks who would otherwise have no access to our justice system.

Although I gained invaluable skills and knowledge about the law, the main lesson I learned is that our legal system is profoundly failing our community. A failure that is maintained by apathy toward our most vulnerable residents. A failure that is exacerbated by the fact that these

residents are in the worst position to help themselves. A failure that demands not only the attention of society generally but, most importantly, the attention of the legal community. Lawyers cannot consider themselves officers of the court and protectors of justice when a large portion of our community has virtually zero access to that justice. As the National Legal Aid and Defender Association eloquently puts it: “This puts justice out of reach for low-income people, and undermines a fundamental principle of our nation, that: the amount of money a person has should not determine the quality of justice they receive.”¹ Legal aid is our state’s tool to provide free legal services to these precariously situated individuals; however, most citizens do not receive any help at all.

My summer experience starkly contrasts how the legal world is typically portrayed in pop culture—big-name clients, ultra-wealthy attorneys, and endless money to supply endless legal battles—which certainly exists far above the struggles of civil legal aid efforts. To be more succinct, there is plenty of money in this industry; there is just an incredible disparity based on which clients are being served. This creates the reality in which only those with deep pockets have access to justice, not everyone to whom the legal code of ethics obligates. This system is in dire need of a reallocation of resources that would rival the feats of Robin Hood.

Although this Comment focuses on legal aid efforts in Oregon, this miscarriage of justice is by no means unique to that state. Recent statistics have revealed that individuals all over the United States are in dire need of civil legal aid assistance.² For example, legal aid programs in Massachusetts had to turn down 64% of eligible low-income residents, 1.8 million New York litigants had no representation for qualifying cases, and 98% of defendants in debt collection cases in Utah were unrepresented.³ Just north of Oregon in Washington, 75% of low-income residents faced a significant legal issue over the course of a single year, but 75% of them could not get any legal assistance.⁴

¹ *What Is Legal Aid?*, NAT’L LEGAL AID & DEF. ASS’N, <https://www.nlada.org/tools-and-technical-assistance/civil-legal-aid-resources/what-legal-aid> [https://perma.cc/LDN3-A8TF].

² COMM’N ON THE FUTURE OF LEGAL SERVS., A.B.A., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES [hereinafter AMERICAN BAR ASSOCIATION] 12–13 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf [https://perma.cc/F8DY-QJCU].

³ *Id.* at 12.

⁴ *Id.* at 13.

Moreover, the average number of civil legal issues faced by low-income Washingtonians have nearly tripled over the course of a decade, from 3.3 in 2003 to 9.3 in 2014.⁵ There are countless more examples that illustrate the nationwide deficit.

I

OVERVIEW OF THE TOPIC

The Oregon State Legislature should prioritize restructuring civil legal aid funding. In its current state, the system for delivering legal aid services to qualifying low-income Oregonians is vastly underfunded and dependent on unstable, inadequate sources. The current structure cuts off the most vulnerable members of a community from a justice system that operates to serve only well-funded clients.

To structure this discussion, I begin by explaining a brief history of civil legal aid, covering its advent and evolution over the past six decades and reviewing the various sources of funding that make legal aid possible. From there, the discussion specifically analyzes Oregon's legal aid landscape. Currently, the vast majority of qualifying Oregonians with legal issues do not have access to civil legal aid services despite an unprecedentedly high need. Industry leaders and community members all point to one main fatal flaw in the legal aid services delivery system—lack of money. After an illustration of the current funding programs and respective breakdown percentages, the analysis will pivot to current efforts aimed at solving the lack of funding.

While many different ideas have been floated, I focus on a few of the main programs being implemented: charitable donations, pro bono hours from attorneys, loan forgiveness, and self-help infrastructure. Each one of these programs is meant to create wider access to civil legal services by relieving the strain on current resources through either adding more funding, adding more legal minds, or reducing the demand. But none has been successful alone or when implemented in conjunction with another.

It is within this current crisis that I propose a tax-based solution to increase government funding for civil legal aid services in Oregon. Rather than creating more money out of thin air, a tax-based solution

⁵ CIV. LEGAL NEEDS STUDY UPDATE COMM., WASH. STATE SUP. CT., 2015 WASHINGTON STATE CIVIL LEGAL NEEDS STUDY UPDATE 3 (2015), https://www.srln.org/system/files/attachments/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf [<https://perma.cc/8WUU-LF7Q>].

would reallocate funds within the legal industry from the highest resourced areas (firms) to the lowest (civil legal aid services). This plan is not meant to be an exclusive remedy but rather an additional source of funding to supplement the currently unstable and inadequate efforts. Further, it's worth discussing this crisis through the lens of a shared obligation across the legal community to provide equal access to justice. In framing this issue as a socially productive fiscal policy, one can see the community-wide economic and social benefits of prioritizing tax revenue funds for these services.

The analysis concludes with a discussion of the general apathy that characterizes this crisis. Failure to adequately fund legal aid services results from an apathy that is directly linked to historic and systemic racism toward the ethnic and racial minorities that disparately experience legal problems. All around the world there are successful examples of public and private funding for legal aid; however, our leaders continue to fail the community in a way that completely erodes faith in the system.

II

HISTORY AND CURRENT STATUS OF LEGAL AID

A. Background of Legal Aid on a National Scale

Civil legal aid services encompass “the assistance of counsel and legal advocacy for people living at or near poverty in legal matters that fall outside the criminal justice system.”⁶ Unlike in criminal cases, there is no constitutional right to counsel in civil cases.⁷ Because it's not constitutionally protected, the legitimacy and purpose of legal aid have been in flux for decades, beginning as nothing more than an unfunded, theoretical concept based on kindness and charity. Today, the purposes of those services vary across organizations and individuals; for some, legal aid is meant to provide access to the judicial process, but for others there is a broader purpose of achieving social justice, which may involve tasks like law reform and policy engagement.⁸

⁶ *What Is Legal Aid?*, *supra* note 1.

⁷ Earl Johnson Jr., *Justice for America's Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393, 393–94 (2009).

⁸ Mark Spiegel, *Legal Aid 1900 to 1930: What Happened to Law Reform?*, 8 DEPAUL J. FOR SOC. JUST. 199, 201 (2015).

Until 1965, federal and state governments felt no obligation, constitutionally or judicially, to provide counsel to low-income folks who had no means of securing it on their own; instead, private charities and social groups were the sole means to generate funds and labor for indigent clients in civil litigation.⁹ In 1966, the Office of Economic Opportunity (OEO) Legal Services Program was created as a part of the “War on Poverty,” marking the beginning of the national legal aid movement.¹⁰ During this time, the federal government started funding various programs, including the Legal Services Corporation (LSC) in 1974¹¹ and numerous charities that grew into broader legal aid service programs.¹²

Eventually, the LSC’s success allowed it to replace the OEO program, which led to an increase in federal investment for legal aid services to \$321 million.¹³ The 1980s brought an end to this growth when the Reagan administration attempted to completely eliminate federal funding for the LSC; however, the administration was successful in cutting the budget by only one-quarter.¹⁴ Beginning in the 1980s, various state bar associations launched Interest on Lawyer Trust Accounts (IOLTA) programs as another means of funding legal aid services wherein the interest from a lawyer’s trust account is funneled into legal aid budgets.¹⁵ This financial plan also saw shortfalls not long after its advent due to falling interest rates.¹⁶ The LSC and IOLTA funding programs continue to weather new attacks and consistent instability due to changes in administration and fluctuations in the economy.¹⁷

As an independent 501(c)(3) nonprofit corporation, the LSC is currently the largest source of funding for civil legal aid services provided to low-income Americans nationwide.¹⁸ The LSC offers free

⁹ Johnson, *supra* note 7, at 394.

¹⁰ *Id.*

¹¹ *Who We Are*, LEGAL SERVS. CORP., <https://www.lsc.gov/about-lsc/who-we-are> [<https://perma.cc/FTX2-QXCD>].

¹² Steven Eppler-Epstein, *Passion, Caution, and Evolution: The Legal Aid Movement and Empirical Studies of Legal Assistance*, 126 HARV. L. REV. F. 102, 103 (2013).

¹³ Johnson, *supra* note 7, at 394.

¹⁴ Eppler-Epstein, *supra* note 12, at 104.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 2 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/L9UP-BGMC>].

legal services through its partnerships with 133 independent nonprofit legal aid programs across the United States, which accounts for about 93% of the LSC's budget.¹⁹ As previously mentioned, Congress established the LSC as a part of an effort to promote equal access to justice.²⁰ Codified within the statute is the notion that it's vitally important "to provide equal access to the system of justice in our Nation . . . to those who would be otherwise unable to afford adequate legal counsel" and that providing such assistance "will serve best the ends of justice" and reaffirm faith in the government and its laws.²¹

According to U.S. Census Bureau data, about 63 million Americans meet the financial requirements necessary to qualify for an LSC-funded legal aid service; that is roughly one in five people.²² In order to qualify, the financial requirements limit aid to those with a household income below 125% of the federal poverty guidelines.²³ In more tangible terms, the qualification includes someone living alone making roughly \$16,988 per year or a family of four making roughly \$34,688 per year.²⁴ Within this qualified group, studies indicate that clients are typically living with civil justice problems that implicate basic human needs.²⁵ The American Bar Association (ABA) provides the following definition for cases that involve basic human needs:

[M]atters related to shelter (for example eviction proceedings), sustenance (for example, "denials of or termination of government payments or benefits"), safety (for example, "proceedings to obtain or enforce restraining orders"), health (for example, claims to Medicare, Medicaid, or private insurance for "access to appropriate health care for treatment of significant health problems"), and child custody.²⁶

¹⁹ *Id.*

²⁰ *Id.*

²¹ 42 U.S.C. § 2996(1)–(4).

²² AMERICAN BAR ASSOCIATION, *supra* note 2, at 11–12.

²³ *Id.* at 12.

²⁴ 2022 *Poverty Guidelines: 48 Contiguous States (All States Except Alaska and Hawaii)*, OFFICE OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, <https://aspe.hhs.gov/sites/default/files/documents/4b515876c4674466423975826ac57583/Guidelines-2022.pdf> [<https://perma.cc/N6D2-AY4K>]. See *Poverty Guidelines*, OFFICE OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines> [<https://perma.cc/CQK2-4C47>].

²⁵ AMERICAN BAR ASSOCIATION, *supra* note 2, at 12.

²⁶ *Id.*

B. Who Qualifies for Legal Aid in Oregon

In Oregon, legal aid applicants also need to meet the federal poverty income guidelines.²⁷ According to a 2018 study, the household income of about one in five Oregonians fell below 125% of the poverty line.²⁸ This study also noted that in addition to facing civil legal issues, low-income residents struggle to maintain basic living expenses like clothing, shelter, and food.²⁹ Additionally, this group is overrepresented by racial and ethnic minorities, people with disabilities, single mothers, and people without a high school diploma.³⁰ Conclusively, not only do many Oregonians qualify, but those who do are more than financially vulnerable—these are members of the community most affected by systemic racism, ableist structures, nuclear family assumptions in our laws, and many more inexplicable obstacles built into a system that renders them simultaneously the most likely to need help and the least likely to receive it.

Within this qualified group, a wide range of claims are brought to legal aid offices across the state. In order from most prevalent to least, the issues concern family/domestic violence, housing, consumer rights, employment, individual rights, income maintenance, and health law.³¹ Although these issues vary, they most often relate to basic human needs, such as finding adequate and safe housing, escaping threat and physical abuse, living free from racism and discrimination, and accessing adequate healthcare services.³²

Oregon has a robust, statewide system of legal aid, comprised of various task forces and dedicated attorneys working tirelessly to address the specific focus areas mentioned above and more.³³ These task forces function under larger organizational umbrellas to provide a coordinated effort for clients who experience a cascade of coinciding issues.³⁴ To illustrate this cascade phenomenon, consider this common

²⁷ *What Is Legal Aid?*, THE LAWS.' CAMPAIGN FOR EQUAL JUST. [hereinafter EQUAL JUSTICE], <https://cej-oregon.org/what-is-legal-aid/> [<https://perma.cc/CKY5-W2EC>].

²⁸ OR. L. FOUND. ET AL., BARRIERS TO JUSTICE 3 (2018) [hereinafter BARRIERS TO JUSTICE], <https://olf.osbar.org/files/2019/02/Barriers-to-Justice-2018-OR-Civil-Legal-Needs-Study.pdf> [<https://perma.cc/KSY2-VJ43>].

²⁹ *Id.*

³⁰ *Id.*

³¹ EQUAL JUSTICE, *supra* note 27.

³² BARRIERS TO JUSTICE, *supra* note 28.

³³ *See Services*, LEGAL AID SERVS. OF OR., <https://lasoregon.org/services/> [<https://perma.cc/86GH-Q8E9>].

³⁴ *Id.*

scenario: a mother fleeing domestic abuse needs assistance from a family attorney to discuss restraining orders, divorce proceedings, and the impending custody battle. Because her living situation is no longer safe, she will also need a housing attorney to offer advice on how to sever her lease or apply for subsidized housing. Because of the history of abuse and current financial crisis, she will need a tax attorney to file an application for innocent spouse relief to untangle her from her ex-spouse's financial missteps. And this life disruption naturally affects her employment situation for which she may need advice from an employment employee. The point of this illustration is that legal aid touches a specific group of extremely vulnerable people who face multiple legal issues all flowing from a single damaging event. Accordingly, the average low-income resident in Oregon may easily experience 5.4 legal problems over a twelve-month span.³⁵

C. An Analysis of the Effects of Legal Aid Efforts in Oregon

During 2017 and 2018, Portland State University Survey Research Lab, in conjunction with various legal aid organizations across Oregon, surveyed over one thousand residents living in high-poverty census blocks.³⁶ The results of that study revealed that around 850,000 low-income and elderly residents qualified to receive legal aid services, provided for by only one hundred legal aid attorneys across the state.³⁷ The result of this disparity was that 84% of people who qualified for legal aid and had a qualifying legal problem did not receive any help at all.³⁸ Providing aid to only 16% of qualifying residents is an indisputable failure. Oregon Supreme Court Chief Justice Martha Walters wrote the following in a letter responding to the results of the study:

Legal problems are widespread, and the impact they have on the lives of low-income individuals can be life altering. . . . This report is both an assessment and a call to action. Despite concerted efforts over the past two decades, our state's civil justice system is not meeting the needs of Oregon's poor. When these needs go unmet, the health, safety, and resiliency of individuals, families, and entire communities are impacted.³⁹

³⁵ BARRIERS TO JUSTICE, *supra* note 28, at 1.

³⁶ *Id.*

³⁷ EQUAL JUSTICE, *supra* note 27.

³⁸ BARRIERS TO JUSTICE, *supra* note 28, at 1.

³⁹ *Id.* at 2.

Before responding to this call to action, it's critical to understand where the current funding for Oregon's legal aid comes from in order to determine where both the inadequacies are and any potential opportunities for improvement.

III

CURRENT FUNDING STRUCTURES AND THE NEED FOR MORE

A. A Breakdown in Percentages of Current Funding

In 1996, the Oregon Legislature created the Legal Services Program (LSP) and tasked it with monitoring state funding, implementing standards and guidelines, and creating the LSP Committee.⁴⁰ In 1998, the Oregon State Bar Board of Governors passed the first draft of the Oregon LSP Standards and Guidelines, making it one of the first states to create an integrated statewide network of legal aid services.⁴¹ Today, Oregon's legal aid system operates under the Oregon State Bar LSP, which funds and coordinates a comprehensive, statewide system of civil legal aid organizations. Together, these offices occupy seventeen different communities over all thirty-six Oregon counties.⁴²

In Oregon, the various legal aid programs across the state receive funding from the coordinated efforts of over eighty different state, federal, and private sources.⁴³ This funding amounted to about \$17 million in 2018.⁴⁴ Generally, around 40% of the budget comes from the Oregon State Bar through state statutory funds.⁴⁵ These funds are derived predominantly from court filing fees, a uniquely Oregon solution created in 1977.⁴⁶ About 29% of the budget is federal funding from the LSC.⁴⁷ About 16% is deemed "Other Funding" and comes from an assortment of sources, such as government grants.⁴⁸ Around 7% comes from other federal funding, 4% from donors through the

⁴⁰ *Legal Services Program*, OR. STATE BAR, <https://www.osbar.org/lsp/> [<https://perma.cc/H727-62AQ>].

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Our Funding*, OR. L. CTR., <https://oregonlawcenter.org/about-olc/our-funding/> [<https://perma.cc/6MZB-EQKC>].

⁴⁴ *Id.*

⁴⁵ *See id.*; EQUAL JUSTICE, *supra* note 27.

⁴⁶ *Legal Services Program*, *supra* note 40.

⁴⁷ EQUAL JUSTICE, *supra* note 27.

⁴⁸ *Id.*

Campaign for Equal Justice, and 4% from IOLTA funds.⁴⁹ Because of the fluctuating national economy, varying interest rates, and the voluntary nature of donations, these numbers change every year.

B. What Do Attorneys and Communities Say We Need More Of?

When asked what needs to change, attorneys and community members actively engaged in this work agree that they simply need more funding.⁵⁰ According to the ABA, the “minimally adequate” amount of staffing for legal aid is two attorneys for every 10,000 qualifying residents.⁵¹ As of 2018, there are two attorneys for every 14,000 qualifying residents in Oregon.⁵² Analysts project that an additional \$425,000 increase in the budget each year is required simply to keep up with inflation.⁵³

Although Oregon needs more legal aid lawyers, the solution is a matter of funding for jobs, not actually more lawyers. Law schools are admitting unprecedented numbers of students. With more law school graduates than ever before, the shortage is not due to a lack of attorneys but rather a lack of funding to pay for the attorneys and resources legal aid offices need to meet the demand of qualifying Oregonians. When law students graduate, they are saddled with insurmountable debt (more than \$140,000 on average) and therefore need to be extremely selective in which positions they accept.⁵⁴ Such debt limits the applicant pool that has the option of going into lower-paying nonprofit work. Therefore, efforts focused on attracting more attorneys to work for legal aid are misplaced and fruitless. Far more effective are measures that focus on ascertaining and allocating larger funds because they would create more positions for attorneys to work in legal aid. They will also have the dual effect of attracting X [where X is lawyers or law school graduates] to these positions. Better pay attracts not only more applicants but better applicants, ensuring a higher quality of

⁴⁹ *Id.*

⁵⁰ See BARRIERS TO JUSTICE, *supra* note 28, at 13–14.

⁵¹ *Id.* at 13.

⁵² *Id.*

⁵³ Cliff Collins, *Hard Times for Access to Justice: Economic Downturn Is Beginning to Take Its Toll in Oregon*, 69 OR. STATE BAR BULL. Dec. 2008, at 19, 23.

⁵⁴ OR. STATE BAR FUTURES TASK FORCE, FUTURE: THE FUTURE OF LEGAL SERVICES IN OREGON EXECUTIVE SUMMARY 4 (2017) [hereinafter FUTURES TASK FORCE], http://www.osbar.org/_docs/resources/taskforces/futures/futurestf_summary.pdf [<https://perma.cc/9B8F-8NMT>].

advocate required to handle the immense and taxing workload that a legal aid lawyer faces.

IV

CURRENT DEVELOPMENTS AIMED AT SOLVING THIS PROBLEM AND THE RESPECTIVE SHORTCOMINGS

A. Donors and Charity

Currently, many efforts to increase funding for legal aid rely on charitable donations of time and money. Although this style of funding is important to maintain for reasons such as community building and legal ethical obligations, charitable donations should be considered an additional, auxiliary source of funding—not a continuously relied-upon segment of the budget. The danger in relying upon this funding lies in its inconsistency. The voluntary nature of charitable donations means that they can stop whenever the donor wants or needs. The unpredictability of charitable donations, combined with low interest rates and declining federal funding, has resulted in a budget adequate to meet merely 15% of civil legal needs and consistent staff reductions.⁵⁵

Another problematic aspect of relying on charitable donations is that donating property or money creates financial incentives for the donor, whereas donating services does not.⁵⁶ Per section 170 of the Internal Revenue Code, a taxpayer generally may deduct only property or money donated to a qualifying charitable organization.⁵⁷ There is no allowed deduction for the value of donated services.⁵⁸ Therefore, while a well-off attorney may derive minimal benefit from donating cash to a legal aid organization in Oregon, he or she would receive no benefit other than a philanthropic buzz for donating his or her legal time, thus limiting the derived benefit from potential donations.

Another source of funding that legal aid detrimentally relies upon is IOLTA. As previously explained, IOLTA is a method of raising money

⁵⁵ See CAMPAIGN FOR EQUAL JUST. TASK FORCE, 2014 TASK FORCE ON LEGAL AID FUNDING: FINAL REPORT 1–2 (2014), <https://cej-oregon.org/wp-content/uploads/Task-Force-on-Legal-Aid-Funding-FINAL-REPORT-adopted-6-3-14.pdf> [<https://perma.cc/9TSL-33XF>].

⁵⁶ INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. NO. 526, CHARITABLE CONTRIBUTIONS 3 (2021), <https://www.irs.gov/pub/irs-pdf/p526.pdf> [<https://perma.cc/JE8E-FS6R>].

⁵⁷ See I.R.C. § 170(b)(1)(A), (c)(2).

⁵⁸ INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, *supra* note 56.

for legal aid by allowing or compelling attorneys to place short-term client funds in a single, communal, interest-bearing trust account that accrues interest that banks pass on to fund charities.⁵⁹ While this is a noble effort, the problems of inadequacy and inconsistency persist here too.⁶⁰ Revenue from IOLTA is subject to fluctuating interest rates, leading to a massive decline in IOLTA-fund revenues.⁶¹ Thus, IOLTA programs face challenges across the country whenever the Federal Reserve holds interest rates near zero, making this source of funding very unpredictable.⁶²

Lastly, donations are problematic due to a phenomenon called “crowding out,” theorized as the Achilles’ heel of any funding plan that relies on charitable donations. Crowding out can happen for a number of reasons.⁶³ One reason is the “declining marginal value” to both the donee and donor because each dollar given to a particular nonprofit makes less and less of an impact as time goes on beyond the initial start-up costs.⁶⁴ As donations continue, so do growth and demand; therefore, donations make less and less of an impact.⁶⁵

Although relying on charitable donations is too unstable and inadequate to meet the demands of low-income Oregonians, fundraising efforts should not be eliminated and could possibly be improved. Donations are still an incredibly important source of funding for legal aid, not just because of the dollars they bring every year but also because they promote a public policy of shared duties and norms that communities should support one another.

One way to improve the current structure of funding through charitable donations is reflected in the recent changes to the Coronavirus Aid, Relief, and Economic Security (CARES) Act.⁶⁶ The CARES Act amendments allow donors to take deductions of up to \$300 in contributions, regardless of whether they elect for a standard or

⁵⁹ *IOLTA Overview*, A.B.A., https://www.americanbar.org/groups/interest_lawyers_trust_accounts/overview/ [https://perma.cc/Z97G-74UE].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Eppler-Epstein, *supra* note 12, at 104–05.

⁶³ Dru Stevenson, *A Million Little Takings*, 14 U. PA. J.L. & SOC. CHANGE 1, 39–42 (2011).

⁶⁴ *Id.* at 39.

⁶⁵ *Id.*

⁶⁶ Stephen Kump, *Thinking of Donating at Year-End? What You Need to Know.*, CHARITYVEST (Nov. 5, 2020), <https://www.charityvest.org/blog/thinking-of-donating-at-year-end> [https://perma.cc/7XUA-XJXW].

itemized deduction.⁶⁷ They also allow itemized taxpayers to elect a deduction on cash donations that is limited to 100% of their adjusted gross income.⁶⁸ In simpler terms, the benefits of deductions are better and more attainable, incentivizing taxpayers to donate more because they can deduct more. Oregon's legislature should implement a similar incentive boost on deductions to increase donations. Additionally, amending the code to allow for a deduction on the value of donated legal services would strongly incentivize attorneys to donate their time. While this specific idea has already been proposed and neglected, it may be worth exploring given the fact that legal aid is in dire need of assistance, and it is evident that a stronger incentive is needed beyond just encouraging pro bono hours.

B. Pro Bono Hour Requirements and Incentives for Attorneys

One way the Oregon State Bar has attempted to create more resources for legal aid is through encouraging attorneys to perform pro bono hours.⁶⁹ Oftentimes, this results in efforts by private attorneys, or sometimes law firms, to support legal aid networks. In this effort, Oregon, and all other state bar associations, are guided by the ABA's Rules of Professional Conduct. Unfortunately, there has been an ongoing and fruitless debate around mandating pro bono hours since 1983, and throughout the various revisions to the ABA's Model Rules of Professional Conduct, some version of a mandatory hour requirement—or even a mandated annual report—was consistently voted down.⁷⁰ In 2001, some mild changes were adopted in the form of an additional sentence emphasizing every lawyer's duty to those unable to pay and another sentence noting that “law firms should act reasonably” to enable their attorneys to rise to this duty.⁷¹ The ABA also recommends that firms *should* adopt written policies that support and reward pro bono work across local communities.⁷² Some suggestions included counting pro bono hours as billable hours, considering pro bono work when offering advances, setting annual

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *Pro Bono*, OR. STATE BAR, <https://www.osbar.org/probono/> [<https://perma.cc/CH7K-UGD8>].

⁷⁰ FRANCINE J. LIPMAN, PRO BONO IS EVERY LAWYER'S PROFESSIONAL RESPONSIBILITY (2012), Westlaw 1392255 (included as part of the ABA Section of Taxation's 2012 midyear meeting).

⁷¹ *Id.*

⁷² *Id.*

goals, and establishing a system to maintain and manage pro bono services.⁷³

Although the legal community possesses a vital responsibility to fix this issue, a pro bono incentive program will not and does not adequately address the current funding needs of legal aid services. To begin, there is no legal enforcement mechanism, which leads to very little accountability and follow-through. Because of this, there are no comprehensive national data accounting for pro bono contributions;⁷⁴ however, those contributions are assumed to be low for the following reasons. Many states have loose definitions of “pro bono,” which allows the meaning of pro bono to stretch to include assistance with the legal issues of friends and family.⁷⁵ Additionally, some studies show that fewer than ten percent of lawyers accept referrals from legal aid offices.⁷⁶ Lastly, only ten states even mandate reporting of pro bono hours, of which Oregon is not one.⁷⁷

According to an Oregon State Bar report, “U.S. lawyers would have to increase their pro bono efforts . . . to over nine hundred hours each to provide some measure of assistance to all [low-income] households with legal needs.”⁷⁸ Something that studies of this nature consistently fail to acknowledge is that these types of plans are both impractical and ineffective. Relying on the voluntary efforts of lawyers, who already work an average of over forty-nine hours a week,⁷⁹ is a superficial Band-Aid that capitalizes on depleted people helping depleted people—it is not a solution, and it treats low-income folks like they are deserving of substandard quality legal counsel. For centuries, the rhetoric of the profession has emphasized promoting justice rather than earning fees; however, the feeble efforts toward voluntary pro bono work speak for themselves.⁸⁰ Therefore, any expectation that voluntary pro bono hours will provide enough assistance to sustain legal aid services is sorely misinformed.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Pro Bono Reporting*, A.B.A., https://www.americanbar.org/groups/probono_public_service/policy/arguments/ [<https://perma.cc/2NUQ-S64S>].

⁷⁸ FUTURES TASK FORCE, *supra* note 54.

⁷⁹ Sharon Miki, *Understanding the Reality of Long Lawyer Working Hours*, CLIO (July 10, 2021), <https://www.clio.com/blog/lawyer-working-hours/> [<https://perma.cc/ES5L-DTEV>].

⁸⁰ Giovanni Anzalone, *AIDS and Mandatory Pro Bono: A Step Toward the Equal Administration of Justice*, 8 GEO. J. LEGAL ETHICS 691, 702–03 (1995).

C. Loan Forgiveness

Loan forgiveness is another attempt to create more resources for legal aid by attracting and retaining public service attorneys. In 2007, the Oregon State Bar created the Loan Repayment Assistance Program (LRAP) in recognition that “educational debt can create a financial barrier which prevents lawyers from pursuing or continuing careers in public service law.”⁸¹ The program works by partially forgiving students’ federal loans after a set number of qualified payments working under a qualified employer in the nonprofit or government sector.⁸² Although well-intentioned and an important step toward reducing economic barriers to higher education, LRAP has failed to assist legal aid in any tangible way for a number of reasons. Primarily, its elongated structure and marginal benefit leave very little incentive for graduates to accept the minimal pay and high workload of a legal aid attorney. This has resulted in very few graduates taking advantage of this benefit. In 2017, only fifty attorneys received forgiveness, and even for those fifty graduates, the “forgiveness” is not a complete erasure of debt.⁸³ In Oregon, the program places two limits on the maximum amount of benefit to be derived.⁸⁴ The maximum annual amount is \$5,000 per year, and the maximum time one may apply is three years, capping total support at \$15,000.⁸⁵ Thus, even for that respectively small pool of recipients, the aid is minor.⁸⁶

Secondly, this aid program merely creates more applicants. In its idealized form, LRAP makes it manageable for more graduates to join the legal aid job force; however, that still fails to correct the main issue—lack of money. Although it attempts to free up more funds for attorneys, it does not do an adequate job of generating enough funds to support those programs. Thus, this program alone is not an adequate

⁸¹ *Loan Repayment Assistance Program*, OR. STATE BAR, <https://www.osbar.org/lrap> [<https://perma.cc/3WLM-JS3X>].

⁸² Melanie Lockert, *Your Guide to Student Loan Forgiveness for Lawyers*, STUDENT LOAN HERO (Apr. 8, 2020), <https://studentloanhero.com/featured/student-loan-forgiveness-for-lawyers-guide/#public> [<https://perma.cc/F3HJ-BLBP>].

⁸³ STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, A.B.A., *LOAN REPAYMENT ASSISTANCE PROGRAMS* (July 2018) [hereinafter LRAP], https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_lrap_state_chart_summary.pdf [<https://perma.cc/JU5C-ZN5U>].

⁸⁴ UNIV. OF OR. SCH. OF L., *LOAN REPAYMENT ASSISTANCE PROGRAM POLICIES AND PROCESS*, https://law.uoregon.edu/sites/law2.uoregon.edu/files/lrap_loan_repayment_policy_and_process2022.pdf [<https://perma.cc/S4WT-XUE2>].

⁸⁵ *Id.*

⁸⁶ LRAP, *supra* note 83.

solution for supplementing legal aid resources to a level that would meet the community's needs.

D. Increased Self-Help Infrastructure

Another incredibly important measure being taken is expanding platforms and technologies that allow clients to help themselves navigate their legal issues. Self-help infrastructure has applications to many different areas of law, particularly those dealing with basic human rights. These efforts are not intended to eventually serve as a complete substitute and cannot alone replace legal aid; however, increased infrastructure would massively relieve the strain on legal aid resources by decreasing demand and therefore should be continuously considered as a coinciding effort along with raising monetary funds. A brief description of self-help infrastructure will better illustrate what efforts are currently being implemented and what a continuation of this progress will look like.

In a recent report, the ABA Commission on the Future of Legal Services recommended that “[s]tates should explore how legal services are delivered by entities that employ new technologies and internet-based platforms and then assess the benefits and risks to the public associated with those services.”⁸⁷ Libraries are prime candidates for these efforts. Increasing platforms for Oregonians to equip themselves with legal tools to handle their cases could look like designated physical spaces, such as a room in the library with handouts and information organized by issue. These platforms could also extend to library computers or internet-based websites providing virtual assistance similar to the accessible user portals on the Internal Revenue Service (IRS) website with clear instructions on who to call and what to do depending on what notice was sent out.

Specifically referring to court proceedings, the commission recommended that “[m]ultilingual written materials should be adopted by courts, and the availability of qualified translators and interpreters should be expanded.”⁸⁸ The commission also suggested providing “[c]ourt-annexed online dispute resolution systems” and “streamlining litigation processes through uniform, plain-language forms” for ease of Oregonians.⁸⁹

⁸⁷ AMERICAN BAR ASSOCIATION, *supra* note 2, at 6.

⁸⁸ *Id.*

⁸⁹ *Id.*

A final example comes from efforts to increase access to the Earned Income Taxpayer Credit, the largest U.S. welfare program in history.⁹⁰ In a few states, organizations successfully adopted “limited assistance programs” focused on connecting low-income folks with this tax benefit.⁹¹ These programs provide all the necessary information and resources to pro se litigants so that they may effectively resolve their legal disputes.⁹² For example, these programs suggest “offering simplified forms, providing pamphlets in a wide range of languages, establishing hotlines with legal information, or even selling unbundled legal services.”⁹³

COVID-19 offered few silver linings; however, one important lesson was that there is a lot of flexibility within our current system to update with new technology and information. Continued efforts that reduce the burden on low-income folks’ limited time and resources are a crucial part of helping the community and eliminating the strain on current legal aid resources.

V

SUGGESTIONS TO DEVELOP A SPECIAL TAX PLAN AND THE IMPLICATIONS BEHIND IT

A. Reframing the Issue as a Socially Productive Fiscal Policy

The legal community is perfectly positioned to improve the financial status of legal aid because it has resources, it is duty bound, and it consists of lawmakers. As mentioned, there are plenty of resources within the legal community; the issue is one of allocation. Secondly, the legal community has vowed to uphold justice and, more importantly, access to justice for all Oregonians, not solely those who can afford counsel. Lastly, lawyers are in a rare, privileged position to help, being that they virtually regulate their own market, through both the independent creation of rules and sometimes statutes devised by lawyers holding public office.⁹⁴ Lawmakers need to recognize that providing legal assistance for vulnerable community members fighting

⁹⁰ See Adam S. Chilton et al., *The Earned Income Tax Credit, Low-Income Workers, and the Legal Aid Community*, 3 COLUM. J. TAX L. 176, 180 (2012).

⁹¹ *Id.* at 204.

⁹² *Id.*

⁹³ *Id.* (quoting John M. Greason, *Framing the Issue for the Summit on the Future of Self-Represented Litigation*, in SUMMIT ON THE FUTURE OF SELF-LITIGATION 21 (2005)).

⁹⁴ Neil M. Gorsuch, *Access to Affordable Justice: A Challenge to the Bench, Bar, and Academy*, JUDICATURE, Autumn 2016, at 46, 48.

to address basic human needs must remain a high budgetary priority—even during times of fiscal austerity.⁹⁵

Not only is access to inexpensive legal services an integral piece of a society dependent on the rule of law, but it is also a critical component of a functioning economy.⁹⁶ Funding for legal aid can no longer be thought of as an optional, charitable gesture. To survive, funding streams need to be reconceptualized as a prioritized fiscal policy. Framing this issue as a socially productive fiscal policy is beneficial because it expands the appeal of legal aid by illustrating that all Oregonians have an interest in the results of these services, and it allows for the introduction of objectivity when evaluating policy options without clouding the conversation with politics and misconceptions.⁹⁷

B. How the Tax Code Generates Revenue

To meet the needs of low-income Oregonians, civil legal aid funding needs to be restructured in a way that offers more money, not merely more attorneys. Existing funding structures operate off two types of monetary streams: donations and government funding. As discussed above, donations are unstable and inadequate. Therefore, structural intervention in existing government revenue streams is a more effective solution.

Approaching the issue through tax reform would create government revenue, address the need for monetary resources, and is much more stable than reliance on charitable donations. However, the question remains of who or what to tax. I propose a plan that manipulates the tax code in a way that focuses on taxing within the legal industry as a means of redistributing the wealth from the highest-resourced areas to the lowest: civil legal aid services.

To structure this discussion, a brief explanation of the tax code is warranted. Annually, companies and individuals pay taxes according to the rules Congress promulgated in the Internal Revenue Code.⁹⁸ The main purposes of the provisions found within the Internal Revenue

⁹⁵ Chilton et al., *supra* note 90, at 210.

⁹⁶ Ben Notterman, *Leveraging Civil Legal Services: Using Economic Research and Social Impact Bonds to Close the Justice Gap*, 40 *THE HARBINGER* 1, 2 (2015).

⁹⁷ *Id.*

⁹⁸ Jeff Hoopes, *What Is the Purpose of the Internal Revenue Code?*, UNC TAX CTR. (Oct. 8, 2021), <https://tax.unc.edu/index.php/news-media/what-is-the-purpose-of-the-internal-revenue-code/> [<https://perma.cc/RE3U-5ULT>].

Code are to raise revenue, redistribute money, and elicit changes in taxpayer behavior.⁹⁹ Manipulation of the tax code has historically been used to fund all government programs, redistribute wealth across social groups, and motivate taxpayers into socially productive conduct. These uses render the manipulation of the tax code into an invaluable tool for improving legal aid resource issues.

C. Finding Stable Solutions Through Oregon's Tax Code

One potential way to generate revenue is to implement an additional excise tax on high-grossing law firms that would be paid annually and allocated into the existing government funding for legal aid services. Excise taxes are taxes imposed on various goods, activities, or services, such as a tax on transportation, alcohol, or fuel.¹⁰⁰ In the issue at hand, the legislature could implement either a tax on the firm itself or the sale of legal services.

Regarding taxing the actual law firm, there is a parallel example in the way we structure funding for schools. Although it's not ideal for creating equal, well-funded schools,¹⁰¹ the system of funding public schools through property taxes creates a useful model for funding legal aid through taxes on firms. The rationale behind using property tax revenue to pay for schools pulls from the idea that there is a mutual benefit to homeowners in having good schools nearby because it increases their home value and it's fairer because the tax is proportionally based on how much wealth homeowners have.¹⁰² In other words, if you have a lot of property, you contribute more because you can.

Similar logic can be applied to a tax on law firms. Firms derive a mutual benefit from well-funded legal aid because legal services provide for low-income folks, which helps local economies by reducing strain on public services. Simply explained, alleviating financial and emotional strain caused by simple housing, medical, or family-related legal issues allows low-income folks to dedicate time

⁹⁹ *Id.*

¹⁰⁰ *Excise Tax*, INTERNAL REVENUE SERV. (Oct. 13, 2022), <https://www.irs.gov/businesses/small-businesses-self-employed/excise-tax> [<https://perma.cc/2QXY-BQ6F>].

¹⁰¹ Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1838–40 (2007).

¹⁰² Hunkar Ozyasar, *Advantages & Disadvantages of Property Taxes Used to Fund Education*, SAPLING, <https://www.sapling.com/12053235/advantages-disadvantages-property-taxes-used-fund-education> (last visited Oct. 31, 2022).

and energy to working, providing for themselves and their community, and thriving as active members in our economy. Firms also derive benefit because they are fulfilling their responsibility to the community for providing legal services to indigent clients. If lawyers take their vow seriously, to “devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel,” then it is within their best interest to provide resources and funding to the only program that ensures “equal access to our system of justice”: civil legal aid services.¹⁰³ Further, the tax is fair because it would be based proportionally off the respective wealth that firms generate annually. Within the legal community, firms have the largest resources, justifying the intervention into this area.

Another way to create revenue by taxing the legal community is through an excise tax placed on the sale of civil legal services. We already have tax provisions that create an additional tax dependent on specific goods purchased. Oregon could create a tax provision that taxes the purchase of legal services on a public policy basis, accompanied by a revenue provision that funnels the additional income from the tax on legal services into the existing government budget for civil legal aid. This public policy would not only promote community-wide assistance, but it could also have the dual effect of punishing massive, needless, or frivolous lawsuits. Excise taxes are often used to keep unwanted behavior in check, and placing additional taxes on massive lawsuits may increase judicial efficiency.

Another, and perhaps more lofty, aspirational idea is for Oregon's legislature to pass an act similar to the Restructuring and Reform Act that Congress passed in 1998, which provided more than \$6 million in matching grants to low-income taxpayer clinics, a form of civil legal aid specific to tax controversy.¹⁰⁴ That law was an effort to restructure and improve the IRS.¹⁰⁵ The U.S. House Committee on Ways and Means worked with the commission by holding hearings to listen to its recommendations.¹⁰⁶ The Senate also engaged in the hearings, which

¹⁰³ MODEL RULES OF PRO. CONDUCT: PREAMBLE & SCOPE § 6 (A.B.A. 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ [https://perma.cc/8WET-8MS5].

¹⁰⁴ Keith Fogg, *Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics*, 67 *TAX LAW.* 3, 22–23 (2013).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

focused on the strong need for change within the tax system.¹⁰⁷ The product of this collaboration was the Restructuring and Reform Act of 1998, which, among other things, created a program that authorized matching funds to create grants specifically for nonprofits offering legal aid with tax law.¹⁰⁸ These collaborative efforts could be replicated between the Oregon State Legislature and the Oregon Department of Revenue to create a matching fund program; however, instead of just offering those grants to low-income taxpayer clinics (as there are only two in the state, there should be room for other organizations), these funds could be funneled through the state bar to the various legal aid services across the state.

CONCLUSION

It is hard to ignore the blatant evidence of systemic racism when looking at the failure to provide legal services. Oregon's low-income ethnic and racial minorities experience legal problems at a very disparate rate from nonminorities.¹⁰⁹ Black Oregonians experience higher rates of civil legal issues and report stronger negative effects from civil legal problems stemming from rental housing, policing, discrimination, education, and abuse.¹¹⁰ In fact, homeownership was the sole issue in which Black Oregonians experienced legal problems at a rate lower than the general population, which can likely be explained by Oregon's history of preventing people of color from homeownership and the systemic racism that has since persisted.¹¹¹ Native Americans also experience a high rate of civil legal aid problems accompanied by stronger negative effects from issues related to housing, aging, disability, health care, and family abuse.¹¹² Low-income Latinx and Asian Americans reported similar experiences, along with an additional language barrier hurdle; in both groups, only 59% of participants reported English as their primary language.¹¹³

It is no coincidence that racial and ethnic minorities are most in need of legal aid services. They live within a system maintained by coordinated efforts to keep these groups marginalized. These same

¹⁰⁷ *Id.* at 23.

¹⁰⁸ *Id.*

¹⁰⁹ BARRIERS TO JUSTICE, *supra* note 28, at 9.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 9–10.

¹¹³ *Id.* at 10.

groups are more likely to have poor access to education, are more likely to struggle to find work, are more likely to be trapped in the carceral system, and, naturally, are far more likely to need legal services from a system that has failed them and robbed them of their faith. When asked why low-income Oregonians don't seek out legal aid, the most common reason given was the belief that nothing could be done about their legal problems.¹¹⁴

I have proposed a few solutions and highlighted where improvements should be made; however, there are many more examples and ideas all around the world that demonstrate effective means for providing adequate civil legal aid services to qualifying communities.¹¹⁵ The apathy that plagues this crisis is the only reason it has not been solved. It is not for lack of ideas or options. It is not for lack of money or resources. It's a complete disinterest in reworking and challenging the current systems in a way that produces better results for those who are often forgotten. As ABA President Paulette stated: "Lawyers must use the incredible power given them by their law license to effectuate positive change. . . . We must be social engineers and change the perception of our justice system."¹¹⁶ The justice system is ripe for fresh solutions, and it's on the legal community to play a leading role in rectifying miscarriages of justice when they exist.

¹¹⁴ FUTURES TASK FORCE, *supra* note 54, at 5.

¹¹⁵ See Johnson, *supra* note 7, at 424.

¹¹⁶ AMERICAN BAR ASSOCIATION, *supra* note 2, at 10.

