The Lawyer Rent-Seeker Myth and Public Policy

Teresa J Schmid
ABSTRACT

Two enduring fallacies in public policy are that lawyers are rent seekers who impair rather than stimulate the economy, and that there are too many of them. While lawyers may disagree with the first premise, they tacitly accept the second. These two fallacies have led leaders in both the political and professional arenas to adopt policies that impair access to justice. This study documents the negative effects of those policies and recommends courses of action to reverse those effects.
I. INTRODUCTION

Imagine a United States in which there is virtually no medical insurance other than Medicaid; that few who qualify for Medicaid can physically reach healthcare facilities; that, of those who do qualify for Medicaid and present themselves for service, fifty percent are turned away for lack of resources; that the only resource for serving the remaining poor is relying on physicians to provide professional services without compensation; that only people in the highest income brackets can obtain treatment for serious health problems without impoverishing themselves; and that most people at all income levels don’t know where to go for treatment, ignore their health problems altogether, or perform necessary medical procedures on themselves with the assistance of other laypersons. Imagine further that policymakers attribute the decline in the health of Americans to an excess of physicians and adopt strategies to reduce the physician population, or to redirect medical students into other careers deemed to be more economically productive. Happily, that is not the state of the American healthcare system. However, if one substitutes lawyers for physicians and access to justice for healthcare, it fairly describes the state of the American civil justice system.

If the above accurately describes the state of affairs in the American civil legal system, this raises an important policy question: is this a desirable social and economic situation? If rent-seekers are harmful to the economy and if lawyers are rent-seekers, then public policy relating to lawyers is on the right track. Certainly decades of public policy are based on that assumption. But if the assumption is wrong, then the policies upon which it is based are flawed. The present course of American policy toward lawyers and the legal system in general may be undermining not only the country’s
economic recovery, but also its present and future capacity to compete in the global marketplace.

This is not a study in economics, but an historical, longitudinal study of the impact of certain economic theories on policies relating to the delivery of legal services. The study uses publicly available information to provide insight into how deprivation of legal services to the public has accelerated poverty and how policies restoring that access may be the most efficient and cost-effective path to economic recovery and global competitiveness.

II. REVISITING “THE INVISIBLE FOOT”

A. Development of Rent-Seeking Theory

The passage of the Sherman Antitrust Act in 1898\(^1\) was an expression of a national aversion to monopolies and trusts, an aversion that continued with vigor into the twentieth century. This same period saw the organization of professional associations of lawyers, or bar associations, all of which were originally voluntary. From the outset, state supreme courts had implicit plenary authority over regulation of lawyers within their respective jurisdictions. The 1920’s saw the rise of an innovation in lawyer regulation, the “unified” or “integrated” bar association, which the United States Supreme Court has defined as “an association of attorneys in which membership and dues are required as a

\(^1\) The Sherman Antitrust Act, 15 USC § 1, is straightforward in meaning and intent: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony…”
condition of practicing law in a State.”  

2 By 2009, the American Bar Association (ABA) reported that 37 of 59 state bars (including the bars for jurisdictions such as the District of Columbia) were integrated. The trend was especially apparent in the western states; all but two of the states west of Iowa have integrated bar associations. 

3 Integrated bars are typically authorized by court rule, statute, or in the case of California, Article 6, §9 of the state constitution, but the supreme courts of all jurisdictions, unified or otherwise, retain plenary authority over the practice of law within their borders. Because the judicial branch of government is lawyer-dominated, the profession is often described as being “self-regulating.” The United States Supreme Court has recognized integrated bars as being constitutionally valid entities whose role is to make recommendations to the courts or legislature on matters involving the admission or discipline of lawyers and the administration of justice. 

4 The many technical variations of this common structure among integrated bars are beyond the scope of this study. Coupled with the licensing role of state supreme courts in the regulation of lawyers, this structure clothed the lawyer regulation system with the trappings of monopoly in the view of some, perhaps most, economists in the latter part of the twentieth century.

By 1965, Mancur Olson had compared professional associations in general, and integrated state bar associations in particular, to the medieval guild system, observing that they “reached for the forbidden fruit of compulsory membership.” Olson stated that the “self-regulating guild with compulsory membership reached its furthest degree of

2 Keller v. State Bar of California, 496 U.S. 1, 5 (1990)


4 Keller, 496 U.S. at 11.
development in many state bar associations,” and that they are coming to resemble “miniature governments.” On the other hand, Olson identified the justice system, along with military defense and police protection, as being public goods, which are defined as those goods which, if any person in a group consumes them, cannot feasibly be withheld from others in the group. Because the provision of such goods is essential to the public welfare, government cannot rely on voluntary contributions to support them, but must rely on compulsory taxation to ensure that the goods are available to everyone. In his later work, Olson expanded upon his logic of collective action to note that associations can resemble governments in that they produce collective goods which, like public goods, inure to the benefit of all members of the association. When associations are large and provide collective goods to all members, they dilute the incentive for each individual member to voluntarily contribute, as each member receives the benefits of goods regardless of the member’s individual contribution. Therefore the association, like government, depends on coercive taxation of members in order to provide the goods. He also expanded upon the perceived dangers of special interests in action, concluding that special interest organizations and collusions reduce efficiency and aggregate income,

---


making political life more divisive.\(^8\) Olson uncovered, but did not fully explore, the dichotomy arising when access to a public good (the courts) depends on the availability of a private good (legal services) to individuals who are not members of the collective (the organized bar.) Nevertheless, Olson’s logic of collective action demonstrated that government and associations can be subject to similar demands for public and collective goods, and that each may have to rely on taxation models to meet those demands. To that extent, he opened a discussion as to how collective action serves a variety of public interests as well as private interests in the policy arena.

During the same period, Gordon Tullock developed a similar theme which became the precursor to rent-seeking theory. Prior to 1967, Tullock and other economists measured the social costs of monopoly and special privilege chiefly through the welfare (or dead weight) triangle.\(^9\) This calculation demonstrates that, beyond the competitive equilibrium point, increase in supply decreases social surplus as the demand curve falls below the supply curve. This loss of social surplus, known as “deadweight loss” or “welfare cost,” results from deviations in efficiency, and it remains an important measure in welfare economics.\(^10\) But Tullock questioned whether the triangle measured the actual social costs of monopolies, observing that the costs of these and similar activities significantly undermined the economy to a much greater extent than was previously


estimated. By mid-century, Tullock noted that scholars such as Arnold Harberger estimated the costs of monopoly as measured by the welfare triangle to have been less than a tenth of one percent of the gross national product in the 1920’s.\textsuperscript{11} By that measure, the costs of monopolies would be negligible. In challenging those assumptions, Tullock laid the foundation for modern rent-seeking theory.

Tullock reasoned that there must, in fact, be a considerable dissipation of wealth in monopoly-building activity itself, especially when the governmental grantor is a relatively weak democracy unable to impose its will on the bidders. He introduced his theory in a 1967 article, “The Welfare Costs of Tariffs, Monopolies, and Theft.”\textsuperscript{12} When his theory did not find immediate traction in mainstream economics, he returned to the theme some years later, focusing on the costs of transfers, again challenging the then-common wisdom that transfers that increase utility and income are virtually cost-free.\textsuperscript{13} Ann Krueger later introduced the term “rent-seeking” to describe competitive behavior for licenses and other government-provided benefits in India and Turkey. Like Tullock, Krueger argued that considerable resources are expended in competitive behavior, and that those rents can be quantitatively important to an economy.\textsuperscript{14} In his

\begin{itemize}
\end{itemize}
retrospective on the development of rent-seeking theory, Tullock defined rent-seeking as “the outlay of resources by individuals and organizations in the pursuit of rents created by government.” It was perhaps inevitable that, as bar associations were identified with monopolies and monopolies, in turn, were identified with rent-seeking, that economists would connect the dots and characterize lawyers themselves as a class of rent-seekers.

B. The “Invisible Foot”

Criticism of lawyers has historically been so much a part of Anglo-American culture that its periodic expression in the public discourse is to be expected. However, in the late 1970’s it took on new political significance. In 1978 President Jimmy Carter addressed the Los Angeles County Bar Association on the occasion of its 100th anniversary luncheon and laid the enumerated failings of the civil justice system squarely at the door of the organized bar. The President’s rhetoric suggested that hostility toward lawyers had already become deeply embedded in the administration’s approach to policymaking: “[I]n short, when the profession has accommodated the interests of the public, it’s done so only when forced to.” In 1984 the lawyer/rent-seeker construct came full circle. The book, Black Hole Tariffs and Endogenous Policy Theory.

---


included a chapter entitled “The Invisible Foot and the Waste of Nations: Lawyers as Negative Externalities.” The allusion to Adam Smith was both catchy and influential. Both Bush administrations embraced the “invisible foot” concept and integrated it into their respective economic policies, beginning with the Council on Competitiveness, chaired by Vice President Dan Quayle, and its Agenda for Civil Justice Reform.\textsuperscript{18}

Economist Stephen P. Magee quickly emerged as an authority on the issue, and again the rhetoric was noteworthy: “By definition, rent seeking is just a legalized, white-collar version of ordinary criminal activity.”\textsuperscript{19} Magee’s findings included the following:

- The United States’ legal system adds $1.8 trillion to the economy (one-third of the United States gross domestic product), but takes away $600 billion (just over 10%).
- Lawyer participation in U.S. politics advances their interests at the expense of the U.S. economy.
- In 1983, the world optimum number of lawyers was 23 for every 1000 white collar workers. The U.S. has 38 per 1000; therefore 60% of total U.S. legal activity adds to our economy while 40% detracts from it.


The 40% excess lawyers in the U.S. equates to about 300,000. Collectively they reduce the GDP by $300,000 billion every year, in that that each excess lawyer reduces the GDP by $1 million.

The average lawyer in Congress reduces U.S. GDP by at least $1 billion a year (1990 dollars).

As will be demonstrated in the short history of the Legal Services Corporation below, Magee’s “invisible foot” construct resonated with policymakers over several presidential administrations, and perhaps still does. However, there is a considerable body of literature which is inconsistent with its major premises.

First, there has been an ongoing debate over the validity of Magee’s data and conclusions. Critics have observed, *inter alia*, that:

- The definition of “lawyer” varies across countries, so that data based on a population of lawyers are necessarily a “very crude calculation,” and the difference between “lawyers” and “law graduates” is a problem of definition.\(^{20}\)
- The implied assumption is that occupational alternatives such as engineering or banking are wholly productive. Such a sharp occupational dichotomy between unproductive and wealth-creating activities is unlikely. Determining whether lawyering is really wealth-dampening will require comparison with other occupations. In light of Enron, the accountancy profession could prove to be more growth-reversing.\(^{21}\)


Empirical data that purports to establish that the lawyer population is too large must control not only for the extent that there is certainty about legal standards, but must also account for the fact that the costs of informal dispute resolution may differ widely among countries.\textsuperscript{22}

Exclusive concentration on costs associated with lawyers and legal proceedings fails to account for the value of benefits derived from enforcing economic transfers, inducing investment in safety, and deterring undesirable behavior.\textsuperscript{23}

Second, there remains a robust body of literature in law and economics that contradicts Tullock’s theory that transfer costs associated with have being grossly underestimated, at least insofar as they are attributed to lawyers and the legal system. Legal economists such as R.H. Coase and Richard Posner have long argued that, not only are transaction costs associated with the enforcement of rights inevitable, they can also be efficiently applied so that their utility offsets their costs.\textsuperscript{24}

Third, economists appear to be in general agreement that the court system itself, lawyers notwithstanding, is a public good. What determines whether a good (or service) is a public good depends on whether has the characteristics of nonrivalry and nonexclusivity of consumption. Nonrivalry means that the good can be consumed by an individual without reducing its availability or benefits to others; nonexclusivity means


that individuals cannot be excluded from its benefits.\textsuperscript{25} Indeed, there is virtually no disagreement that a well functioning court system is essential to a healthy economy.\textsuperscript{26} Tullock has even characterized decisions of judges as public goods.\textsuperscript{27} If, therefore, lawyers are distributive rent-seekers engaged in unproductive behavior, it follows that the courts as a public good, and the public as their beneficiary, would operate more efficiently without lawyers. On the other hand, if lawyers facilitate rather than impair public access to the benefits of the courts, then public policy calculated to reduce their number or contract their role in the legal system harms the economy.

C. Case in Point: Public Policy and Legal Aid

The development of rent-seeking theory as applied to lawyers might have been of only academic interest had it not found expression in federal policymaking. Marc Galanter documented the high-level impact of the lawyer rent-seeker construct following Magee’s introduction of it in 1989.\textsuperscript{28} Its influence was particularly in evidence with


regard to the Legal Services Corporation (LSC). A short history of the legal aid
movement and the LSC is instructive.

Credit for the modern legal aid movement in America is generally attributed to
Reginald Heber Smith, a member of the Boston Bar who conducted a definitive survey of
the of legal services to the poor in the early twentieth century. Smith anticipated the
work of Amartya Sen in making the connection between access to justice, reduction of
poverty, and deterrence of anti-social behavior. He estimated that 35 million Americans
were unable to afford any legal services and recognized that the needs of so many could
not be met on a case-by-case basis but required recourse to the “common law,” or what is
more recently termed “impact litigation,” (including class actions, which were unknown
in 1919). His concept was to resolve issues common to large groups of indigent people
by litigating a single representative case.

Two world wars and the Great Depression passed before the link between legal
services to the poor and economic development resurfaced in the national discourse.
Great Britain established public funding for legal services to the indigent on July 30,
1949, when the Legal Aid and Advice Act received Royal Assent. However, it was not
until President Lyndon Johnson created the Office of Economic Opportunity (OEO) in
1964 as part of his War on Poverty that legal services were recognized as a tool for
economic recovery. The President appointed Peace Corps director Sargent Shriver to

29 Smith, Reginald Heber. *Justice and the Poor: A Study of the Present Denial of Justice to the
Poor and of the Agencies Making More Equal Their Position Before the Law with Particular
Carnegie Foundation, 1919.
head the OEO, and in 1965 a national network of legal aid services emerged in the form of OEO Legal Services Program. Earl Johnson, Jr., a former director of the Program, authored a richly detailed history of its development.\(^{30}\) Between 1959 and 1971, the total number of lawyers in the United States exclusively employed in serving the poor grew from 292 to 2,534, and the government’s total investment in legal services grew from $2,084,125 to $77,272,710. Even at 1919 poverty levels, however, that represented a distribution of 13,812 poor people per legal aid lawyer\(^{31}\) and a per capita investment of only $2.21, the gap presumably to be filled by private donations and pro bono services to be provided by 355,242 practicing lawyers nation-wide. The scope of this assumption is mind-boggling: in addition to maintaining a practice sufficient for his or her own support, under this model every attorney in the United States would be expected to volunteer enough hours to meet the legal needs of approximately 100 poor people.

Faced with the task of meeting a vast legal need with very limited resources, the Legal Services Program arrived at the same conclusion as had Smith 50 years earlier: it adopted a policy of advancing impact litigation, especially cases that protected entitlements to the new programs created as part of the War On Poverty. Every community legal aid program seeking an OEO grant was required to demonstrate how it would advance legal reform, which could include litigating test cases and lobbying. The Legal Services Program achieved considerable success in its impact litigation. This activity resulted in decisions such as *Shapiro v. Thompson*, 394 U.S. 638 (1969).


\(^{31}\) Id. At 292.
[prohibiting arbitrary denial of welfare benefits to legitimate recipients]; *Goldberg v. Kelley*, 397 U.S. 254 (1970) [requiring government to provide due process before denying benefits]; and *Edwards v. Habib*, 397 F. 2d (D.C. Cir. 1968) [prohibiting retaliatory eviction from residential housing.] This period was also notable for changes in distribution of income in the United States: the number of Americans with incomes in the bottom 30% of the range dropped from 10% of the population in 1955 to 2% in 1970.32

Alan Houseman and Linda Perle of the Center for Law and Social Policy wrote a comprehensive history of the Legal Services Corporation, which succeeded the OEO Legal Services Program as the primary vehicle for federal funding of legal aid.33 Congress created the Legal Services Corporation (LSC) in 1974 as a private, federally funded, non-profit corporation34 to replace the OEO Legal Services Program. After considerable debate, the Legal Services Corporation Act of 1974 was enacted with relatively few restrictions on the activities in which recipient legal aid organizations could engage. By 1981 LSC had achieved funding of $321.3 million, theoretically sufficient to provide “minimum access” to justice, defined as sufficient funding for two lawyers for every 10,000 poor persons.35 In 1982 the LSC appropriation was reduced to

32 Id. At 286.


34 P.L. 93-355

$241 million. Although Congress funded LSC to a peak amount of $400 million in 1995, it dramatically reduced the appropriation again to $278 million the following year. LSC funding would never again approach an amount sufficient to provide “minimum access.”

But the focus of the attack on LSC was, at its core, neither financial nor political; it was philosophical. In addition to reducing LSC’s appropriation in 1982, Congress imposed restrictions on how the funding could be used. Federal funds could no longer be used for lobbying and rulemaking, or for the representation of certain categories of undocumented aliens. The funding cuts of 1996 were accompanied by the restrictions on LSC activities, the bulk of which are still in force today:36 Section 504(a) prohibits the use of LSC funds for 19 specific activities, many of which had previously been central to the legal aid mission. These restrictions included prohibitions on lobbying; participating in class actions; representing any aliens not lawfully present in the United States (later overruled by the Supreme Court so as to permit representation of victims of domestic violence); defending a person subject to an eviction proceeding from public housing if the person has been charged (not convicted) of drug activity; participating in any litigation with respect to abortion; participating in any litigation on behalf of a person incarcerated in a federal, state or local prison (whether or not convicted of a crime); and claiming attorneys’ fees from litigation, even if such fees are permitted or even required to be paid under federal or state law. In sum, federal funding for legal aid was effectively limited to serving individual clients on a case-by-case basis rather than pursuing systemic legal reform. As a result, enforcement of consumer protection laws and public safety

regulations through private litigation has become increasingly important as a vehicle for compensating consumers injured by major corporations.37

D. Convergence: Rent-Seeking Theory and Policy: 1980-Present

While the focus of this study is the impact that the lawyer rent-seeker construct has had on legal aid and access to justice, the construct is central to the development of other policies impacting legal services, such as tort reform.38 As the lawyer rent-seeker construct and political trends became mutually reinforcing, they led to some curious conclusions in economic scholarship. For example, Rubin and Shepherd theorize that, while tort reform might increase accidental deaths as tortfeasors internalize fewer costs of the harm they cause, it is more likely that tort reform reduces accidental deaths, because lower expected liability costs lowers prices, thereby enabling consumers to buy more risk-reducing products such as medicines, safety equipment, and medical services.39 But recent medical research on treatment-related injuries suggests that consumer investment in risk-reducing goods may not address the core issue of increasing medical costs. In 1999 the Institute of Medicine reported that 44,000 - 98,000 die in hospitals each year as a result of medical error and estimated $17 billion to $29 billion in annual costs to due medical error, $1.47 in costs due to surgical error. Costs include lost income,


disability, and health care costs.\textsuperscript{40} Recently, the Agency for Healthcare Research and Policy (a division of the U.S. Department of Health and Human Services) reported that, while there appear to be improvements in some areas of patient safety, reporting and measurement remain inadequate to monitor the incidents. Meanwhile, in 2005 and 2006, one in seven adult hospitalized Medicare patients experienced adverse events, which are tracked by the Medicare Patient Safety Monitoring System.\textsuperscript{41} Perhaps even more telling is policy surrounding regulation of legal services to veterans. From the end of the Civil War until 1988, lawyers were permitted by law to charge only a nominal fee to assist veterans in preparing and filing claims for Veteran Administration benefits, such fee not to exceed ten dollars. In 1988, even the nominal fee was repealed, and it became a criminal offense for lawyers to collect any fee whatsoever to assist veterans with the preparation and filing of original claims, although they could charge for assisting veterans with pre-filing advice and post-decision appeals.\textsuperscript{42} Congress partially repealed the restriction in the Veterans’ Choice of Representation and Benefits Act of 2006, also known as “Attorneys for Veterans.”\textsuperscript{43} As of June 20, 2007, veterans may engage a lawyer earlier in the claims process after a Notice of Disagreement is filed. However, lawyers still may not charge a fee to assist veterans in preparation of an initial claim.

\textsuperscript{40} Committee on Quality of Health Care in America. To Err is Human: Building a Safer Health System. Institute of Medicine, Washington, D.C.: National Academy Press, 1999.


\textsuperscript{43} 38 U.S.C.S. §5904
although they may provide such services pro bono. Legal aid remains the primary resource for veterans seeking advice on filing original claims.

III. METHOD AND DATA: ACCESS TO JUSTICE IN OREGON

A simple graph illustrates the path of congressional action relating to public funding of civil legal services for the poor. Figure 1 shows the actual history of LSC funding from 1980 through 1988, demonstrating the change in policy toward legal services during the most active period of the lawyer rent-seeker literature.

Figure 1: Federal appropriation for the Legal Services Corporation, 1980-1998. 44

The history of LSC funding demonstrates a material change in public investment in legal services over time. However, it does not explain any potential relationship between access to legal services, access to justice, and economics. A trio of prior studies, both

qualitative and quantitative, helped to frame the analytical model used for this investigation.

By 1919 Reginald Heber Smith had already identified the deprivation of legal services as a denial of economic equality, noting that no matter how fair laws may be on their face, economic equality requires substantive protection of rights and property. To fail to carry out the intent of laws by reason of “inadequate machinery” is to undermine fundamental rights. “To deny law or justice to any person is, in actual effect, to outlaw them by stripping them of their only protection.”

Smith devoted a chapter of his book to domestic relations courts, noting that this represented one of the most pressing areas of legal need by the poor. Smith focused on the interest of government in preserving the family as a social unit. However, the family is also an economic unit, and its orderly dissolution soon became as important as its preservation as an issue of access to justice.

A second important influence on development of the model was a study published by economists Amy Farmer and Jill Tiefenthaler in 2003, which examined the causes for a 21% decline in domestic violence reported by the Department of Justice for the period 1993-1998. Using the Area-Identified National Crime Victimization Survey (NCVS), the authors found that, while shelters, hotlines, and counseling programs showed no

---


46 Id. At 73-82.

significant impact on the likelihood of domestic abuse, the availability of legal services in the county of residence had a significant negative impact. They noted that this reinforced prior studies demonstrating that incidents of intimate partner domestic violence decrease where women have greater economic power and therefore more options.\textsuperscript{48}

The third influence on the model was a study conducted in Oregon in 2000. As the state felt the combined effects of the reduced federal funding for legal aid and the restrictions placed on its use in 1996, the Oregon State Bar, the Oregon Judicial Department, and the Office of Governor John Kitzhaber collaborated in a joint study of the state of access to justice in Oregon.\textsuperscript{49} Assisted by Portland State University, the advisory committee conducted a legal needs survey of 1,011 low and moderate income Oregonians, and elicited additional information from judges, lawyers, social service workers, community leaders, and legal service providers. The conclusions were sobering and included the following.\textsuperscript{50}

- The greatest need for legal services arises in housing, public services, family, employment, and consumer cases.
- Lower income Oregonians obtain legal assistance for problems less than 20\% of the time.

\textsuperscript{48} Id. at 159.


\textsuperscript{50} Id. at ii-iii.
Lack of information, ignorance of resources, unavailability of services, and fear of retaliation are the most common reasons why lower income Oregonians do not seek representation when they have a legal problem.

The Oregon study noted that legal representation was especially important in family law cases where the opposing party is represented, or there is an imbalance of power. 51

The observations concerning the economic implications of family law and domestic violence are particularly significant, as legal needs in these areas cross all social and economic levels. In all such cases, court intervention is required not only to reconstruct familial relationships but also to redistribute family assets. When the legal issues include dependent children and spouses with unequal incomes, the results of the litigation can have an impact on future assets of the parties as well. As the Oregon study noted, unequal access to legal representation creates an imbalance of power in family law. This, in turn, impacts results in such critical issues as the custody of children and the fair distribution of the marital estate. Effective advocacy in family court can literally determine whether a dissolution of marriage results in two economically viable households, or one with a disproportionate share of wealth and the other in poverty.

However, there is an even worse case scenario, which is when neither party in a family law matter is represented. In such a case, because of the legal and procedural complexities of litigation, the judge cannot be certain that the parties have provided all information necessary for the court to achieve a fair and correct result. Unfortunately, unrepresented litigants from all levels of the economic spectrum have reached epidemic

51 Id. at i.
proportions. In 2008 the National Center for State Courts reported that between 40 and 90 percent of litigants across the country are representing themselves in critical civil matters such as eviction defense, divorce, and creditor claims. The report also cited studies from California and New York showing that, in large cities, between 70 and 90 percent of all litigants facing abuse or loss of their homes appear in court without counsel.52

The above insights suggest potential links between family law, domestic violence, poverty, and the availability of lawyers. The object of this study is a four-county area in rural southern Oregon during 2000-2007, the years following the Oregon legal needs study and the changes in federal policy relating to the LSC. The analytical model measures trends in both the general population and the active lawyer population, compared to family law filings, including both dissolution of marriage and also protective orders under Oregon’s Family Abuse Protection Act (FAPA). Finally, the data will demonstrate a relationship between the above trends, investments in legal services to the poor, and changes in poverty rates in the target region. The resulting data indicates that specific changes in public policy could reverse these negative effects at relatively little cost.

A. The First Dimension: Population Growth and Family Law Trends in Oregon

The analysis begins with a chart illustrating the general population growth in Oregon during the target period, 2000-2007. The state’s population grew by 9.5% during

that period, a rate slightly greater than that of the United States as a whole, which was 7.2%.\textsuperscript{53} (Oregon Housing and Community Services 2008).

**Figure 2: Total Population Growth in Oregon, 2000-2007\textsuperscript{54}**

In the four-county region of southern Oregon under discussion (Douglas, Jackson, Josephine, and Klamath Counties), the rate was varied, as shown below:


The rate for the region during the same period was slightly less than that of the state overall, at 8.1%. The baseline population data is unremarkable: the state’s population growth is greater than the national growth, but not explosive; the regional population growth in southern Oregon is slightly less than the state as a whole but slightly greater than the national rate. At the same time, there is enough variation in population growth within the region to make yield other comparative data. The specific growth rates in each county were: Douglas County 4.3%, Jackson County 11.6%, Josephine County 8.7%, and Klamath County 3.2%.

When the United States and the Oregon divorce and annulment rates are compared, however, there is a pronounced anomaly. The National Center for Health Statistics measures trends in divorces and annulments as the rate occurring per 1,000 of total population. Although the national rate and the Oregon rate both dropped during

---

2000-2007, the contrast between their respective rates of decline is significant: 10% nationally versus 40% in Oregon. Figure 4 illustrates the trend:

**Figure 4: Comparative Divorce/Annulment Rates 2000-2007, United States Compared to Oregon**

The Oregon decline in divorce rates compared to the national decline is interesting not only cumulatively but as a trend, i.e. there is a symmetrical inverted curve that makes a dramatic appearance in 2003. The Oregon Circuit Court statistics on case closures during this period provide additional insights to the phenomenon. Figure 5 illustrates the statewide trend specifically for dissolution of marriage.

---

Again, the inverted curve is evident, with a decrease of 11% in dissolution of marriage while the state population experiences an increase of 9.5% during the same period.

A look at the rural southern region of Oregon is instructive. While the region as a whole had a decrease in completed dissolution cases of 12%, comparable to the state trend of 11%, there was considerable differentiation among the four individual counties. There was a decrease in dissolution completions in all four, but significant disparities in the rates.

---

The actual decline in dissolutions in each of the southern counties during 2000-2007 was as follows: Douglas County -17%, Jackson County -6%, Josephine County -20%, and Klamath County -12%.

There is another closely related area of family law activity that sheds additional light on the phenomenon. Like most states, Oregon provides a statutory remedy for members of a household who are victims of domestic violence. Under FAPA, victims may petition the court for an order of protection from the abuser. Such orders are limited in scope and duration, and they do not distribute either income or assets of any party. However, a protective order can provide a victim with temporary relief in two important areas: exclusive use of the domicile and custody of children. As a result, a married victim without the time or resources to litigate a dissolution of marriage can at least secure control of the family’s primary asset and key relationships. Therefore, it would be...

---

58 Id.
reasonable that a downturn in dissolution actions might have a mirror effect in increased filings under FAPA, or at least a slower rate of decline. On the state level, that is essentially the observed effect. There is a decline in FAPA case completions, but it is smoother than that of dissolutions. The cumulative decline for 2000-2007 is 17%, but the main body of the decline does not occur until 2006.

Figure 7: Oregon FAPA Cases Terminated Trend Data, 2000-2007

In contrast to the dissolution statistics, the difference between the state and regional statistics on FAPA filings is striking. While the cumulative decline in FAPA cases on the state level is 17%, on the southern regional level the decline is a mere 4%. A comparison among the individual counties is even more dramatic. Figure 8 illustrates the trends.

---

59 Id.
The swings in the cumulative FAPA statistics among the counties fluctuate even more wildly than the dissolution statistics, showing increases as well as decreases: Douglas County -22%, Jackson County +16%, Josephine County -5%, Klamath County +5%. However, the trend pattern is remarkably similar. This suggests that the counties may have started the period with different family law profiles, but collectively the family law activity in the rural southern region of Oregon responded to the same stimuli over time. The question is, what were those stimuli?

Part of the explanation is one of budgetary constraints on the Oregon courts. The Oregon legislature meets bi-annually and approves the state budget for two-year periods. If state revenues do not meet the budgeted projections, all state-funded programs can find themselves in an economic crisis. That is precisely what happened to the Oregon Judicial Department in the 2001-2003 biennium. From March through June of 2003, Oregon courts were closed for one day every week, until the new biennial budget went into effect.

---

60 Id.
July 1, 2003. For that period, the courts were simply unavailable to any civil litigants for 20% of the time.\textsuperscript{61} That provides some insight into why family law case terminations fell in 2003. It does not, however, fully explain why the case closures did not begin to recover until 2007.

B. The Second Dimension: Domestic Violence

The Oregon case closure data documents only those matters resulting in formal court proceedings. The increase in population in both the state and the southern region in Oregon suggest that dissolution cases and FAPA cases should have increased. However, that did not occur until 2006 or later. The forced contraction of the court’s activity in 2003 suggests that reduced access to the court was one reason for the decline in case closures, but it was for only four months during the 2000-2007 period. Absent some positive social phenomenon resulting in an extended period of domestic stability in Oregon, there should be a “bulge” somewhere in the data showing how Oregonians were resolving domestic tensions without accessing the courts. The next level of inquiry was to determine whether trends in domestic violence could account for the “bulge.”

Domestic violence is one of the most elusive of social phenomena to accurately measure. As a criminal incident, domestic violence is one of the most underreported.\textsuperscript{62} Therefore, reporting, arrest and conviction statistics do not provide much insight on how


often it really occurs. Data on utilization of social services provides more information. The Oregon Department of Human Services\(^{63}\) provides some data for the period in question as the number of shelter nights provided to adult and child victims of domestic violence. On the state-wide level, the rate of increase was marked: 15.4% increase in adult shelter nights and 30.3% in child shelter nights provided. As significant as this increase appears, it still may tell the entire story. Shelter for victims is limited by the capacity of the facilities, so that data on shelter nights actually provided may not describe the full scope of the demand for services. The DHS provided another relevant piece of data that helps to bridge the gap: the number of shelter requests that could not be met. During 2005-2008, not only did the number of shelter nights provided to victims increase significantly, but also the number of unmet shelter requests rose by 200.8%. Taken together, these data demonstrate how Oregonians used social services in lieu of formal court proceedings to cope with domestic violence. Graphically, the data appear as follows:

The DHS reports shelter nights on a regional basis as well, including the southern region of Oregon. While the agency does not capture the “unable to shelter” category on a regional basis, it does provide cumulative data on adult and child shelter nights, and it yields a different trend than the state data. In contrast to the growth in adult shelter nights statewide, the increase in the southern region during 2005-2008 was only 3.6%, and the shelter nights for children actually declined by 1.7%. Figure 10 illustrates the southern regional trend.

---

64 Id.
There are many possible explanations for the contrast to the state data, but the sharp increase in 2006 followed by a sharp decline in 2007 is an anomaly, compared to the more steady upward trend experienced by the state as a whole.

C. The Third Dimension: Poverty

In 2007, 12.9% of Oregon residents lived on incomes below the federal poverty guidelines, comparably to the national poverty rate of 13% in the same year. In the 2000-2007 period, the percentage of Oregonians living in poverty fluctuated between 11% and 13% on the state level, as shown in Figure 11.

\[\text{Id.}\]
The actual number of Oregonians living in poverty increased by 7.2% during the 2000-2007 period. But in the southern counties, the pattern was different. Between 2000 and 2007, only Jackson County experienced comparable growth in its poverty population, at 7.8%. Poverty growth in the other three southern counties was considerably less: Douglas County 3.5%, Josephine County 5.8%, and Klamath County 2.7%. Figure 12 illustrates the variances among the southern counties.

---

As noted above in Figure 3, the southern counties’ population increased as follows: Douglas County 4.3%, Jackson County 11.6%, Josephine County 8.7%, and Klamath County 3.2%. Therefore, while both the general population and poverty population increased in the 2000-2007 period, the decline in dissolution cases noted in Figure 6 (Douglas County -17%, Jackson County -6%, Josephine County -20%, and Klamath County -12%) and the fluctuating pattern of FAPA cases noted in Figure 8 (Douglas County -22%, Jackson County +16%, Josephine County -5%, Klamath County +5%) are counter-intuitive: if a population becomes larger and poorer over time, it is reasonable to expect that its social relationships should become increasingly unstable.

On the state level, an increase in demand for shelter by victims of domestic violence provided an outlet as social services became an informal alternative to court proceedings for many Oregonians caught in bad domestic situations. But in the southern region, which experienced the same period of partial court closures in 2003, there was a

---

67 Id.
pronounced decline in demand for shelter in 2007, and a fluctuating pattern of FAPA cases among the counties (Figure 8). This suggests there was another factor at work in the southern region that reduced incidents of domestic violence and increased access to the courts for formal restraining orders during the targeted period. If Farmer and Tiefenthaler\textsuperscript{68} are correct, that factor is the availability of lawyers within the county.

D. The Fourth Dimension: The Lawyer Population

The Oregon State Bar is a unified bar; lawyers must be actively licensed as members of the Bar in order to lawfully practice within the state. Therefore, if access to lawyers is a material factor in the reduction of domestic violence, then the number of actively licensed lawyers within the southern Oregon counties may explain the reduction in demand for domestic violence shelter and the variance among the counties in processing of FAPA cases.

Between 2000 and 2007, the number of active lawyers in Oregon increased by 18.1\%, an increase nearly double that of the general population, which was 9.5\% (Figure 2). Figure 13 illustrates the trend.

But the number of lawyers was not evenly distributed among the counties. In the southern region, the variation was especially evident. Figure 14 demonstrates the growth rate of the active lawyer population in these counties.

**Figure 14: Change in Active Lawyer Population for Southern Region, 2000-2007**

*Source: Oregon State Bar*
When this data is compiled with the trends in poverty, dissolution cases, and FAPA cases over the same period, the relationship among these factors becomes clearer, as shown in Figure 15.

**Figure 15: Comparative Data on Poverty, Divorce, FAPA and Lawyer Population, 2000-2007.**

Several inferences can be drawn from the data. First, poverty increased in all four southern counties, but at very different rates, ranging from a high of 7.8% in Jackson County to a low of 2.7% in Klamath County. Klamath County is also the only one of the four counties that experienced growth in all areas, so that growth in the other three areas may have had a moderating influence on poverty.

Second, the data on domestic violence demonstrated that a decrease in dissolution of marriage and FAPA actions is a negative rather than a positive social indicator. The fact that demand for temporary shelter from domestic violence victims increased as closure of family law cases declined suggests that access to the courts was impaired, and with it the only resource for equitable distribution of family assets. Increased activity in
temporary restraining orders under FAPA may stabilize social relationships and possession of domiciles in dissolving family units for limited periods, but it would only delay, not resolve, division of assets and assignment of financial responsibilities. The result would be economic instability and, inevitably, an increase in poverty among marginal populations, such as low-income, single-parent households. This is apparent in the Jackson County data: in spite of a 15% increase in FAPA activity, the decline in completion of divorce cases was associated with the highest increase in poverty among the four counties, at 7.8%. Jackson County explains another phenomenon: an increase in the number of lawyers in a county may support increased FAPA filings, but unless it also results in dissolution proceedings, poverty will continue to grow. In fact, the data suggests that poverty may be exacerbated by the forced social and economic uncertainty within domestic units resulting from temporary restraining orders.

Third, flat or negative growth in lawyer population will result in declines in both FAPA and dissolution actions, so that the courts can neither temporarily stabilize domestic units nor effect a formal distribution of assets and legal obligations effectively. Unless an increase in lawyer population accompanies an increase in formal dissolution of marriage proceedings, poverty with prove intractable, as demonstrated in all southern counties except Klamath. Only there is there sufficient growth in the lawyer population to ensure court intervention to formally stabilize domestic units on both a temporary and permanent basis. It is therefore significant that a new legal aid office opened in Klamath County in May 2007, a previous office having been closed in 1996 due to cuts in federal
funding of the Legal Services Corporation\textsuperscript{69} As a result, the restoration of legal services in Klamath County can be traced directly to an increase in access to justice and a corresponding decrease in poverty in that county.

E. The Fifth Dimension: Interest on Lawyers’ Trust Accounts

In addition to the direct impact of federal policy as to LSC, here is another area of impact of national economic policy that has a secondary, but critical, impact on funding of legal aid. Lawyers who serve private clients often handle small sums of money on clients’ behalf for settlements, court costs, etc. Lawyers typically hold such funds in a client trust account and are strictly accountable to both clients and disciplinary agencies for how those funds are used. Until the early 1980’s, client trust accounts did not carry interest (except for special accounts created to handle substantial sums for individual clients), since the amounts were small and the time held was very limited. However, as reduced funding for the LSC had its effect on legal aid agencies throughout the United States, the organized bar introduced programs known as Interest on Lawyers’ Client Trust Accounts (IOLTA) to support general funding for legal services. Under these programs, which were adopted on a state-by-state basis, banks provide interest-bearing accounts for lawyers to use for client trust funds. The interest generated by these accounts supports legal aid services in the respective states.\textsuperscript{70} In 2003, the U.S. Supreme


Court found IOLTA programs to be constitutional, ruling that, although such use of interest may constitute a technical “taking,” it was a valid use of such funds, and that no compensation was warranted. See Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003.) As of 2009, all U. S. jurisdictions (including the District of Columbia and the Virgin Islands) have IOLTA programs, 39 of which are mandatory, 11 are imposed unless lawyers “opt-out,” and 2 are voluntary.71

When LSC programs were introduced in the early 1980s, they provided an important new resource for funding legal services to the poor. IOLTA came at a critical time because of the cutbacks in LSC funding, and because interest rates were high, driven by the rising federal funds effective rates. However, as lowering of interest rates became the strategy of choice used by the Federal Reserve to alternatively stimulate or reduce economic growth, interest rates paid on IOLTA accounts followed suit. By January 2009 falling interest rates had reduced the flow of IOLTA revenue to historical lows. That effect, combined with minimal recovery in LSC funding, has brought funding of legal services back down to critical levels. Increasingly, access to legal services was denied to many, even as foreclosures, job losses, and consumer debt escalated.72

There are undoubtedly many reasons why the lowering of interest rates by the Federal Reserve might increase poverty rates over time, even though the action is meant to stimulate the economy in general. Adverse impacts on savings accounts, pension


plans, and other sources of fixed incomes are a few of the side effects that may lead to increases in poverty among Americans on the economic fringes. It is therefore instructive to compare the impact of falling interest rates to the increase of poverty in Oregon. While the Federal Funds effective rate can be tracked through 2008, the models used to estimate poverty project only through 2007, so that the relationship between the two for cannot be accurately represented through 2008. Nevertheless, it is immediately apparent that decreases in the Federal Funds effective rate have an inverse relationship to the poverty growth in Oregon. Figures 16 and 17 illustrate this relationship.

Figure 16: Federal Funds Effective Rate, 2000-2007

In light of the results yielded by this study on how increased access to legal services is associated with declines in both domestic violence and poverty, it is likely that the precipitous drop in IOLTA revenues resulting from the drop in the Federal Funds rate provides a partial explanation. A significant decrease in the availability of legal services would deprive low-income Oregonians of legal protections for jobs, consumer protection, even entitlements such as welfare and Medicare benefits. Predictably, that would magnify the effects of an economic recession, making poverty more intractable and recovery more elusive.

---

IV. REVERSING THE EFFECTS OF THE LAWYER RENT-SEEKER MYTH: POLICY SOLUTIONS

If policymakers and their economic advisors can escape the ideological constraints of the lawyer rent-seeker myth, the impact of lawyers on the economy may be reframed. Recent surveys demonstrate that less than 20% of the legal needs of low-income citizens are being met, not only in Oregon, but nationally. In Oregon, there are approximately 100 legal aid lawyers, or about one for every 7,000 low-income residents. If this is indeed an economic issue, as the data in this study indicates, then policies improving the delivery of legal services may also advance economic recovery.

A. Increasing Funding, Reducing Restrictions on the Legal Services Corporation

The data indicate that public investment in legal services for the poor may decrease both domestic violence and poverty rates. Conversely, restrictions placed on LSC-funded agencies inhibits legal solutions to systemic legal problems, such as product liability and access to public entitlements, and prevents legal aid agencies from supplementing their funding by recovering statutory legal fees available to other litigants. On March 26, 2009, Senator Tom Harkin (D-IA) introduced the Civil Access to Justice Act, which would increase LSC funding to $750 million annually and eliminate many of


the restrictions on the use of federal funds by legal aid agencies. In Oregon, scarcity of legal aid representation limits service availability for high-priority needs, such as food, shelter, medical care, income maintenance, and safety; approximately 40% of legal aid cases involve family law, most of which involve domestic violence. Senator Harkins’ proposed funding would double the current funding levels, bringing the federal investment in legal services back to the 1981 level, adjusted for inflation.

B. Maximizing Interest on Lawyers’ Trust Accounts

IOLTA programs are an important private source of revenue to legal aid agencies. As noted above, however, the flow of IOLTA revenue is highly sensitive to interest rate changes made by the Federal Reserve to stabilize the economy. This sensitivity will continue so long as interest rates are low. However, other strategies on the federal level can mitigate the decline. Under IOLTA programs, client trust accounts are interest-bearing. However, banks do not uniformly pay interest rates that are comparable with rates they pay on other accounts. As a result, interest paid on IOLTA accounts can be as little as a fraction of a percent. Some states, such as California and Arizona, require banks to pay comparable rates on IOLTA accounts; in most states, however, banks can choose to pay de minimis interest rates, so that IOLTA revenues are not optimum.

The Federal Reserve has an opportunity to reverse this effect by providing a positive incentive to banks to voluntarily pay comparable interest on IOLTA accounts. In 1977, Congress enacted the Community Reinvestment Act, which imposed an obligation on federally insured depository institutions to take action to meet credit needs

---

of communities in which they are chartered. Under the CRA, banks must annually report what action they have taken to meet this obligation. Many banks have claimed and received CRA credits for paying comparable interest rates on IOLTA accounts. If the Federal Reserve were to expressly promote the payment of comparable interest on IOLTA accounts as qualifying for CRA credit, banks would have a regulatory incentive to make that investment.

C. Prepaid Legal Services: Legal Resources for Middle-Income Americans

A 1978 study documented significant unmet legal needs among the general population, not just Americans with lower incomes. The study noted the potential of a new insurance product, prepaid legal services, as a resource for providing critical legal services to workers through their employers. Until 1992, prepaid legal services carried a preferred tax status, making it an inexpensive and attractive employee benefit. However, in that year the preferred tax status expired, decreasing the value of the benefit and making it taxable as income to employees. Since that time, the American Bar Association has unsuccessfully included restoration of the preferred tax status for prepaid legal services in its legislative agenda. The issue gained greater immediacy as the foreclosure crisis, consumer credit, and other economic issues presented an increasing demand for preventative legal services. On March 10, 2009, Representatives Pete Stark (D-CA) and Paul Ryan (R-WI) introduced the Legal Services Benefit Act of 2009,

---

proposing restoration of preferred tax status for prepaid legal services as an employee benefit. ⁸₀

V. EPILOGUE: THE FUTURE IN REAL TIME

Is the number of lawyers in the economy the right question? Or is it the actual availability of legal services, however they are delivered? Recent events suggest that other countries consider access to legal services to be an economic driver rather than an inhibitor. If so, then such foreign economic policy is in sharp contrast to that of the U.S. The proof will play out in economic growth and global competitiveness. Examples of heightened interest in legal services are:

- U.K.: In October 2007, the U.K Parliament passed the Legal Services Act. The express purpose of the Act is to expand the availability of legal services, and the U.K.’s global competitiveness by de-regulating the legal industry. By 2011, barristers and solicitors were authorized to provide legal services under a wide variety of business forms, including public offerings. Lyceum Capital, a private equity firm is already targeting the U.K. legal market for investment when the Act is fully in effect. ⁸₁

- Japan: Over-regulation and governmental inefficiency has impaired the ability of both public and private institutions to respond to the demands of globalization. A

---


key problem is training an adequate number of lawyers to carry on the process of reform.\textsuperscript{82} In April 2004, 68 public and privates universities across Japan opened new law schools modeled after those in the U.S. Keio University President Yuichiro Anzai stated, “Frankly speaking, this is a war to get as many talented students as we can…It’s important not to make a school that just provides students with skills to obtain legal qualifications,” he said. We also hope our graduates play leading roles in the international community.”\textsuperscript{83} However, succeeding studies suggest that Japan’s legal institutions will be slow to change.\textsuperscript{84}

VI. CONCLUSION

This study identifies a correlation between population growth, access to justice, and poverty in Oregon. The data demonstrate that the rate of poverty in Oregon is rising faster than that of the general population, and that there is an inverse relationship between poverty growth and access to justice in Oregon. The data indicate that both are also influenced by the amount of public investment in the delivery of legal services to the poor, both via direct national investment through LSC and indirect investment through state IOLTA legislation.


\textsuperscript{83} Nakamura, Akemi. "Colleges hope new law schools will boost student numbers." \textit{The Japan Times}, March 31, 2004.

The data also suggest a third relationship between public investment in legal services and the economy: that the accepted strategy for stimulating a faltering national economy, i.e. lowering interest rates, is associated with an increase in poverty.\textsuperscript{85}