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**THERE IS NO JUSTICE WHEN LOW AND MODEST-INCOME D.C.  
RESIDENTS ARE FORCED TO REPRESENT THEMSELVES IN CIVIL  
CASES**

**Sheldon Krantz<sup>1</sup>**

**Introduction**

After spending more than twenty years as a white-collar criminal defense lawyer at DLA Piper and prior to that serving as a federal prosecutor, law professor, and law school dean, I had the opportunity to help develop and then share responsibility for directing the non-profit D.C. Affordable Law Firm (“DCALF”).<sup>2</sup>

I learned from this experience that lawyers are rarely available for most of the low- and modest income District of Columbia (“D.C.”) residents who find themselves embroiled in civil matters in D.C. Superior Court on matters greatly impacting their lives. They become, as a result, self-represented litigants (“SRLs”) who must contend with a complicated legal system that was designed on the assumption—now proven to be unfounded—that lawyers would be representing all parties in all proceedings.

I see the value, at least in principle, in having an adversary system grounded on seeking truth through expansive pretrial discovery, restrictions on hearsay, and the right to cross-examine opposing parties and their witnesses. However, it is not a sensible model when lawyers are not available to navigate that process on behalf of both parties or, even worse, only one side has representation.

The system creates an anomalous situation, because lawyers have monopoly control over the representation of parties under D.C.’s rules even though they are available for so few litigants. Equally concerning, there is far too much reliance on overburdened D.C. Superior Court judges

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<sup>1</sup> Sheldon Krantz is a retired DLA Piper litigation partner. He has served on a pro bono basis as the Executive Director of the DC Affordable Law Firm (DCALF), a nonprofit created by the Georgetown University Law Center, DLA Piper and Arent Fox to provide low fee legal services to D.C. residents who do not qualify for free legal aid but cannot afford the normal rates that lawyers charge. Krantz also chaired the DCALF Board of Directors. He currently serves as an Adjunct Professor of Law at Georgetown. Krantz began his career as a federal prosecutor. He also served as the Dean of the University of San Diego Law School, and before that, as a Professor of Law at Boston University. Krantz is the author of numerous books and articles, including *The Legal Profession: What is Wrong and How to Fix It* (2014).

<sup>2</sup> DLA Piper is a global law firm with attorneys located in more than forty countries. The firm has a strong commitment to providing pro bono legal services. DCALF’s mission is to provide civil legal services to D.C. residents who do not qualify for free legal aid and cannot afford the rates lawyers normally charge.

and their staffs to handle matters in traditional adversarial proceedings that can best be handled in less formal ways and in community-based settings.

In this article, I will initially be examining how pervasive the lack of counsel is for low- and modest-income D.C. residents, and nationally, as well as the impact of lack of counsel on those representing themselves. Next, I will assess why it is unlikely that critically needed expanded legal support for this population will be available any time soon. In the article's final sections, I focus on why it is essential to re-envision civil access to justice as a community responsibility; the kinds of initiatives that need to be undertaken; and the changes that need to be made within the court system when parties appear in court unrepresented. The current national debate over whether to re-allocate some of the tasks police departments have for addressing social problems is apt here.

## **I. The lack of counsel for low- and modest income D.C. residents in civil cases**

Based upon 2017 statistics, nearly thirty-percent of D.C. residents—over 193,000—have incomes below 200% of the federal poverty level (“FPL”).<sup>3</sup> Poverty is particularly acute in D.C. Wards 7 and 8, where over ninety-percent of the population is Black and poverty and unemployment rates are high.<sup>4</sup> It is in these wards that the access to justice crisis is most pronounced because poverty increases the likelihood of civil legal problems and the difficulty of overcoming them.<sup>5</sup> While in theory this population qualifies for free legal aid, one study determined that, because of limited resources, only about half of those requesting free legal assistance receive it—and very few even seek it.<sup>6</sup> The areas where most requests for services are made and rejected are in family law, housing, immigration, and consumer debt matters.<sup>7</sup>

In addition, nearly twenty percent of the District's population of over 705,000—or over 122,600—fall between 200-400% of the FPL and, therefore, are generally ineligible for free legal aid.<sup>8</sup> The national average is much higher (thirty percent). And this is true in other countries, too. In Australia, its Productivity Commission estimates that only eight percent of households would likely meet income and asset tests for legal aid leaving most middle-income persons without options for legal assistance.<sup>9</sup>

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<sup>3</sup> DC ACCESS TO JUSTICE COMM'N, *Delivering Justice: Addressing Civil Legal Needs in the District of Columbia*, (2019), [www.dccaccesstojustice.org/assets/pdf/Delivering\\_Justice\\_2019.pdf](http://www.dccaccesstojustice.org/assets/pdf/Delivering_Justice_2019.pdf) (hereinafter *DC Comm'n Report*); see also HENRY J. KAISER FOUND., *State Health Facts, Distribution of Total Population by Federal Poverty Level*, (2018), <https://www.kff.org/other/state-indicator/distribution-by-fpl/?dataView=1&currentTimeframe=1&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (reports 183,200 residents and 27.7% of DC residents in 2018 have incomes below 200% of federal poverty level).

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 5, 27 (citing the *Community Listening Project*, D.C. CONSORTIUM OF LEGAL SERV. PROVIDERS (2016).)

<sup>7</sup> DC Comm'n Report, *supra* note 3, at 31.

<sup>8</sup> HENRY J. KAISER FOUND., *State Health Facts, Distribution by Federal Poverty Level* (2019), <http://kff.org/other/state-indicator/distribution-by-fpl>; see also [www.census.gov/QuickFacts/dc](http://www.census.gov/QuickFacts/dc).

<sup>9</sup> AUSTL. GOV'T PRODUCTIVITY COMM'N, *Access to Justice Arrangements: Productivity Commission Inquiry Report* at 20 (Vol. 1, No. 72 2014), <http://pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>.

The percentages of D.C. residents who currently represent themselves in civil cases are staggering:

- Eighty-three percent of plaintiffs and ninety-three percent of respondents in divorce/custody/miscellaneous in Family Court
- Ninety-seven percent of respondents in paternity and child support cases in Family Court
- Eighty-eight percent of petitioners and ninety-five percent of respondents in the Domestic Violence Division
- An estimated eighty-eight percent of respondents in the Landlord and Tenant Branch of the Civil Division
- Seventy-five percent of plaintiffs in housing conditions cases in the Civil Division
- Ninety-seven percent of plaintiffs in small estate matters in the Probate Division<sup>10</sup>

The percentages are equally high in the D.C. Office of Administrative Hearings which handles public benefits determinations, unemployment compensation benefits disputes, and student discipline appeals.<sup>11</sup> Further, these percentages only tell part of the story and should be considered in the context of the sheer volume of cases filed in D.C. Superior Court civil divisions each year. In 2018, for example, over 10,000 cases were filed in Family Court and over 30,000 in Landlord and Tenant Court.<sup>12</sup> Applying a conservative eighty percent ratio of unrepresented versus represented parties would imply that 24,000 tenants appeared without counsel during 2018. There would also be at least 8,000 SRLs in family court matters, and likely far more, because both petitioners and respondents could be appearing *pro se*.

There is no constitutional right to counsel in civil matters.<sup>13</sup> And government-supported free legal aid is generally available only for those whose income is 200% (or less) of the FPL and, as explained further below, to only a small percent of that population. Incomes at 200% are quite low—\$25,520, or less, annually for an individual, and \$52,400, or less, for a family of four.<sup>14</sup> Those with modest incomes only slightly higher than these figures do not qualify for free legal aid, even if they cannot afford to pay for a lawyer.

Paying for legal services is generally beyond the reach of those with incomes at 200-400% of the FPL. One reason is that D.C. is among the nation's most expensive cities. According to the Economic Policy Institute ("EPI"), it costs a family of four \$10,331 per month (\$123,975 per year) in 2017 dollars to live modestly here, well beyond the annual salary of a family of four within this poverty level range.<sup>15</sup> EPI includes in its calculation of basic costs housing, food, child care, transportation, health care, and taxes. It does not include legal fees. The average billing rate for legal services in D.C. in 2017-2018, according to one survey, was \$572 an hour.<sup>16</sup>

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<sup>10</sup> DC Comm'n Report, *supra* note 3, at 4.

<sup>11</sup> *Id.*

<sup>12</sup> D.C. COURTS, *Statistical Summary* at 4 (2018), [www.dccourts.gov/sites/default/files/2018-Statistical-Summary-June.pdf](http://www.dccourts.gov/sites/default/files/2018-Statistical-Summary-June.pdf).

<sup>13</sup> *Lassiter v. Dep't of Soc. Servs. of Durham*, 452 U.S. 18 (1981).

<sup>14</sup> U.S. DEPT'T OF HEALTH & HUMAN SERV., OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, *HHS Federal Poverty Level Guidelines* (2020).

<sup>15</sup> ECONOMIC POLICY INSTITUTE, *Family budgets in Washington, D.C.*, [www.epi.org/resources/budget/budget-factsheets](http://www.epi.org/resources/budget/budget-factsheets) (last visited Nov. 6, 2020).

<sup>16</sup> Ronald L. Burdge, *United States Consumer Attorney Fee Survey Report 2017-2018* (2018) at 70.

In 2015, Georgetown Law Center, Arent Fox, and DLA Piper created DCALF to serve D.C. residents within 200% to 400% of FPL.<sup>17</sup> DCALF’s mission is to provide high quality, affordable legal services to D.C. residents in areas where the need for assistance was particularly acute, such as in family law, housing, and immigration. DCALF has restricted its fees to \$100 for an initial advice consultation and \$75 an hour thereafter.<sup>18</sup> However, DCALF quickly found that it was difficult for many of its clients to pay even these modest fees. This reality, and the limited availability of legal aid lawyers for those with lower incomes, helps explain why so many D.C. residents appear in court on their own.

#### **A. The problem in D.C. exists all over the country and elsewhere**

The extent of civil legal problems for those who are economically deprived in D.C. is similar to experiences elsewhere. According to a 2017 national survey by the Legal Services Corporation, one out of four low-income households experienced six or more legal problems; and seven out of ten had at least one legal problem in health care, housing conditions, and domestic violence matters, which greatly impacted their lives.<sup>19</sup>

Consistent with findings in D.C., the survey also found that 1.7 million low-income persons nationally sought help for civil legal problems, and 86% of them received inadequate or no legal help.<sup>20</sup> Equally significant, only about 20% of those with civil legal problems reached out to legal aid providers to request assistance.<sup>21</sup> As noted by Professor Rebecca Sandefur, “Most of the civil justice problems that Americans experience receive no legal attention of any kind, ever.”<sup>22</sup>

It is therefore not surprising that the U.S. fares so poorly in comparison to European democracies on assessments made relating to civil access to justice—and even in comparisons to countries held in relatively low esteem on human rights concerns. Access to civil justice is measured in part by “whether people are aware of availability remedies; can access and afford legal advice and representation; and can access the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic barriers.”<sup>23</sup> Based upon the most recent survey undertaken by the World Justice Project, the United States ranked below virtually all European democracies and even below countries such as United Arab Emirates, Chile, Poland, and Malaysia.<sup>24</sup> This is so when the need for and lack of access to legal services is a serious problem virtually everywhere, including in European democracies.

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<sup>17</sup> Victor Li, *Georgetown Law teams up with 2 firms to create ‘low bono’ firm*, ABA JOURN, (Apr. 16, 2015), <https://www.abajournal.com/lawscribbler/article/georgetown-law-2-firms-team-to-create-low-bono-law-firm>.

<sup>18</sup> DC AFFORDABLE LAW FIRM, *Our Fees*, [www.dcaffordablelaw.org/about-the-firm/our-clients-and-fees](http://www.dcaffordablelaw.org/about-the-firm/our-clients-and-fees) (last visited Nov. 6, 2020).

<sup>19</sup> LEGAL SERVICES CORP., *The Justice Gap Report: Measuring the Unmet Civil Legal Needs of Low-Income Americans* at 6, 21 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.

<sup>20</sup> *Id.* at 30, 39.

<sup>21</sup> *Id.* at 29.

<sup>22</sup> Rebecca L. Sandefur, Daedalus, DAEDALUS, J. OF THE AM. ACAD. OF ARTS & SCI., 49 (Winter 2019).

<sup>23</sup> WORLD JUSTICE PROJ., *WJP Rule of Law Index* 28 (2020),

[https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf).

<sup>24</sup> *Id.* at 14.

The United Nations Office of Drugs and Crime (“UNODC”) determined after a 2015-2016 international study of legal aid that the demand for legal aid in civil cases is largely unmet everywhere.<sup>25</sup> This problem exists even in countries like England and Australia, where there have been long-standing commitments to civil legal aid. Prior to the 2012 Legal Aid, Sentencing and Punishment of Offenders (“LASPO”) Act, England made legal aid available to those with low incomes for almost all aspects of civil law.<sup>26</sup> After the Act, representation was largely eliminated for matters relating to debt, education, housing, employment, immigration, private family law, and benefits. As a result, in the year after the enactment of LASPO, legal assistance was reduced from 925,000 cases to 497,000.<sup>27</sup> In a survey by the Law Council of Australia, it was determined that fifty percent of those surveyed experienced one or more legal problems in the previous twelve months and there is little legal aid available for them in civil matters.<sup>28</sup>

### **B. What is wrong with the current system of civil justice for self-represented litigants (SRLs) in D.C.?**

The current legal system in D.C. imposes unfair burdens on the massive numbers who are forced to represent themselves. As noted below, the law and procedures (like those governing family and landlord-tenant courts) are complex and were designed on the assumption,—now proven to be totally unfounded—that lawyers would be representing all the parties in all aspects of a court’s proceeding.

This was not always so, as noted in the assessment of the early development of the legal profession in America: “[T]he so-called ‘attorneys’ of the early Colonial period were not lawyers at all, but ‘were very largely traders, factors, land speculators, and laymen of clever penmanship and easy volubility, whom parties employed to appear and talk for them in the courts.’”<sup>29</sup> As time passed, lawyers became more organized and assertive and played pivotal and self-interested roles in creating a more formal adversary process that required their involvement.<sup>30</sup>

It is easy to illustrate why the current rules and procedures in D.C. Superior Court logically would require lawyers to administer them. The D.C. Superior Court’s Rules Governing Domestic Relations Proceedings, 190 pages in length, are replete with legal terminology that is indecipherable for those not trained in the law. For example, the General Rules of Pleadings, Rule 8, sets forth defenses that respondents must affirmatively plead in response to a complaint--

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<sup>25</sup> See U.N. OFF. OF DRUGS AND CRIME, *Global Study on Legal Aid Global Report* 3 (2016), [www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid\\_Report01.pdf](http://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf).

<sup>26</sup> See AMNESTY INT’L, *Cuts That Hurt, The Impact of Legal Aid Cuts in England* 8 (2016), <https://www.amnesty.org/download/Documents/EUR4549362016ENGLISH.PDF>.

<sup>27</sup> *Id.* at 8-9.

<sup>28</sup> LAW COUNCIL OF AUSTRALIA, *The Justice Project Final Report: Overarching Themes* 3, 6, 10 (2018) [www.lawcouncil.asn.au/justice-project/final-report](http://www.lawcouncil.asn.au/justice-project/final-report); see also AUSTRALIAN GOVERNMENT PRODUCTIVITY COMMISSION, *1 Access to Justice Arrangements: Productivity Commission Inquiry Report* 72, at 8 (Sept. 5, 2014), <http://pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>.

<sup>29</sup> E.W. Timberlake, *The Origins and Development of Advocacy as a Profession*, 9 VA. L. REV. 25, 35 (Nov. 1922)

<sup>30</sup> See Stephen Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO STATE L.J. 713, 738 (1983).

such as accord and satisfaction, estoppel, laches, res judicata, statute of frauds, and statute of limitations--without even defining their meanings.<sup>31</sup>

Further, there are also over twenty rules governing pretrial discovery, including detailed provisions relating to depositions, interrogatories, document production requests, physical and mental examinations, and requests for admissions.<sup>32</sup> Another rule, over six pages in length, sets forth complicated alternative methods for serving opposing parties and for proving that service has been made.<sup>33</sup> There are similar complexities in the rules governing Landlord and Tenant and other proceedings.<sup>34</sup> I learned from my DCALF experience that these D.C. Superior Court rules and procedures can be daunting, even for an experienced federal court litigator like me.

As noted earlier, the adversary system conceptually has many positive attributes and is consistent with democratic principles. But serious questions have been raised, many of which I share, about whether the adversary system is, in fact, really the best means for seeking truth and arriving at just results. As one thoughtful and experienced litigator observed, the formal adversary system often accomplishes the opposite instead: it distorts the truth and “obfuscates rather than clarifies.”<sup>35</sup>

There are times and situations where an adversarial process might well work in ways for which it was intended. That can certainly be the case for major litigation in which there is a great deal at stake, there is an unwillingness to settle, there is competent counsel on both sides, the parties have the desire and the financial wherewithal to pursue it, and they are willing to allow a judge or jury to decide the matter.

On the other hand, it is clearly not a sensible process to use when lawyers are not able to represent both parties and, even worse, when only one side is represented by a lawyer. Many aspects of law and procedure in D.C. Superior Court are even difficult to master for DCALF lawyers after they graduate from law school, go through an intensive twelve-week training program, and are supervised by mentors.

It must be noted that rules of judicial conduct have been altered to give D.C. Superior Court judges more latitude in assisting SRLs in order to help address these problems. Comments were added to the D.C. Code of Judicial Conduct, for example, which specify that it is “not a violation of the judicial ethics rules for a judge to make reasonable accommodations to ensure litigants who do not have the assistance of counsel the opportunity to have their matters fairly heard.”<sup>36</sup> But Comment 1A of Rule 2.6 amplifies Rule 2.2 [Comment 4] by specifying that a judge should

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<sup>31</sup> D.C. SUPERIOR COURT, Rules Governing Domestic Relations Proceedings, Rule 8, General Rules of Pleading (2018), [www.dccourts.gov/superior-court/rules](http://www.dccourts.gov/superior-court/rules).

<sup>32</sup> *Id.*, Rules 16-37.

<sup>33</sup> *Id.*, Rule 4.

<sup>34</sup> D.C. SUPERIOR COURT, Rules of Procedure for the Landlord and Tenant Branch (2019), [www.dccourts.gov/superior-court/rules](http://www.dccourts.gov/superior-court/rules).

<sup>35</sup> Carrie Menkel-Meadow, *The Trouble with the Adversary system in a Postmodern Multicultural World*, 38 WILLIAM AND MARY L.R. 5, 6 (1996). (Professor Menkel-Meadow has pointed out that the adversary system stimulates incivility among lawyers and closed-minded thinking. *Id.* at 10-11.)

<sup>36</sup> D.C. 2018 EDITION OF THE CODE OF JUDICIAL CONDUCT, Rule 2.2, Comment [4], 12, [https://www.dccourts.gov/sites/default/files/2018%20Edition%20of%20the%20Code%20of%20Judicial%20Conduct%20\(2019%20Supp.\).pdf](https://www.dccourts.gov/sites/default/files/2018%20Edition%20of%20the%20Code%20of%20Judicial%20Conduct%20(2019%20Supp.).pdf).

not “give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person.”<sup>37</sup> It adds that appropriate steps that can be taken include:

(1) providing brief information about the proceeding and evidentiary and procedural requirements, (2) asking neutral questions to elicit or clarify information, (3) modifying the traditional order of taking evidence, (4) refraining from using legal jargon, (5) explaining the basis for a ruling, and (6) making referrals to any resources available to assist the litigant in the preparation of the case.<sup>38</sup>

Giving the judge this added flexibility does tend to move a proceeding away from the adversarial model—where the role of the court is to serve primarily as an impartial referee—and closer to an inquisitorial one where the court is actively involved in proof taking by investigating the facts of the case.<sup>39</sup> My own experience in observing judges in these settings, and discussing their reactions to them, is that it is extraordinarily difficult to know how and where to draw the lines. This is even more pronounced in situations where there are ongoing conflicts or disputes between the parties and personal or relationship issues are at stake.<sup>40</sup>

**C. There is an urgent need for more legal aid, pro bono, and low bono lawyers but it is unlikely that this need will be met any time soon**

**1. The critical need for greatly increased funding for civil legal services**

Because the law and procedure in D.C. Superior Court were designed on the assumption lawyers would be available to navigate the court on behalf of their clients, it is readily apparent that far greater numbers of lawyers are needed to represent the low- and moderate-income populations who do not otherwise have access to them. As noted in the 2019 D.C. Access to Justice Commission Report:

Absent legal representation, litigants are at a serious disadvantage in court and administrative proceedings. Judges report that unrepresented individuals often present pleadings and submissions that are of poor quality and lack the knowledge and skills required to litigate their cases. Both substantive and procedural problems can increase the risk that a judge might miss a meritorious claim if filed by an unrepresented litigant. Studies also show that civil legal aid not only improves outcomes in individual cases but is also a powerful tool in helping low-income individuals create stability in their households and build a better future for themselves and their families.<sup>41</sup>

But the historical record suggests that major expansion of available lawyers is unlikely to happen any time soon. The outlook for greatly increased funding for legal services, for example,

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<sup>37</sup> *Id.* at 15.

<sup>38</sup> *Id.*

<sup>39</sup> See USLegal, Legal Definitions, <https://definitions.uslegal.com/i/inquisitorial-system/> (last visited Nov. 22, 2020). (“An inquisitorial system is a legal system where the court is actively involved in proof taking by investigating the facts of the case. It is opposed to an adversarial system where the role of the court is primarily that of an impartial referee between the prosecution and the defense.”)

<sup>40</sup> Menkel-Meadow, *supra* note 35 at 26-27.

<sup>41</sup> DC Comm’n Report, *supra* note 3 at 14.

is not promising. Federal support for legal services programs has been stagnant over the past ten years and is twelve percent lower than the funds that were appropriated in 2010—when adjusted for inflation.<sup>42</sup> Twelve members of the U.S. House of Representatives, led by Joe Kennedy (D-MA), submitted a proposed Resolution in May 2020 calling for the federal government to share the financial burden with state and local governments to implement the right to counsel in civil cases.<sup>43</sup> As discussed in the following section, there is no indication, however, that this type of federal support or an emergence of a constitutional right to counsel in civil cases will be forthcoming.

The prospects for increased funding at state and local levels are no more encouraging. The pattern has instead been a decrease in funding. The National Association of IOLTA Programs (“NAIP”), which administers Interest on Lawyers Trust Accounts (“IOLTA”), state court filing fees, and legislative appropriations for fifty state and local organizations across the U.S., projected a reduction of over \$157 million in 2020 for civil legal aid programs.<sup>44</sup> D.C. government is a leader in support for civil access to justice and appropriated over \$11 million for the fiscal year 2020.<sup>45</sup> But that still does not come anywhere close to meeting the need.

## **2. The constitutional right to counsel available in criminal cases has yet to be applied for civil matters**

Arguments have been made that the failure to provide adequate funding dictates that the right to counsel in civil cases should be constitutionally mandated to parallel that existing in criminal cases stemming from the 1963 U.S. Supreme Court decision in *Gideon v. Wainwright*.<sup>46</sup> The Supreme Court, however, has to date refused to adopt this view in the two cases where it had the opportunity to do so.<sup>47</sup>

No state has imposed a broadly-based civil right to counsel right on state constitution grounds either, although some have selectively created such a right in more narrowly defined areas such as in abuse and neglect and mental health cases.<sup>48</sup> In 2010, the American Bar Association urged state legislatures to require counsel as a matter of right in adversarial

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<sup>42</sup> See testimony of Judy Perry Martinez, President of the American Bar Association in support of the Legal Services Corporation before the U.S. House Appropriations Subcommittee on Commerce, Justice, Science (Mar. 13, 2020) at [www.americanbar.org/content/aba/administrative/government\\_affairs\\_office/lsc-aba-house-testimony.pdf](http://www.americanbar.org/content/aba/administrative/government_affairs_office/lsc-aba-house-testimony.pdf).

<sup>43</sup> See Joe Kennedy III, <https://kennedy.house.gov/newsroom/press-releases/kennedy-introduces-civil-gideon> (last visited Nov. 6, 2020).

<sup>44</sup> See NAIP Press Release, *\$157.4 Million Projected Loss in Critical Sources of State Funding for Civil Legal Aid*, [www.iolta.org/images/NAIP-Press-Release-5-29-20.pdf](http://www.iolta.org/images/NAIP-Press-Release-5-29-20.pdf) (last visited Nov. 6, 2020).

<sup>45</sup> D. C. Access to Justice Commission, The Access to Justice Initiative, [www.dccaccesstojustice.org/access-public-funding](http://www.dccaccesstojustice.org/access-public-funding) (last visited Nov. 7, 2020).

<sup>46</sup> See, e.g., Kathryn Joyce, *No Money, No Lawyer, No Justice: The vast hidden inequities of the civil legal system*, NEW REPUBLIC (June 22, 2020), <https://newrepublic.com/article/158095/civil-legal-system-no-money-no-lawyer-no-justice>. See also *Gideon v. Wainwright*, 372 U.S. 335 (1963)

<sup>47</sup> See, *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (holding that due process does not require appointed counsel in cases that could lead to a loss of parental rights); see also *Turner v. Rogers*, 564 U.S. 431 (2011) (holding that there is no right to counsel for an indigent facing incarceration for civil contempt for failing to make child support payments if the custodial parent is unrepresented and the state has fair procedures for dealing with the incarceration-related question).

<sup>48</sup> See, John Pollock, *The Cases Against Case-By-Case: Courts Identifying Rights to Counsel in Basic Human Needs*, 61 Drake L. R. 763 (2013).

proceedings where “basic human needs are at stake, such as those involving sustenance, safety, health, or child custody,” and created a Model Act for them to consider.<sup>49</sup> There has been modest movement in this regard, as reflected in a summary of legislative developments prepared by the National Coalition for a Civil Right to Counsel.<sup>50</sup>

Several cities, including New York City, San Francisco, Newark, and Cleveland, have more recently enacted legislation relating to the right to counsel in eviction cases.<sup>51</sup> D.C. formalized its own right to counsel initiative in housing cases in 2017 when the D.C. City Council appropriated \$4.5 million, since annually renewed, to expand support for representation of tenants in eviction matters.<sup>52</sup> An important component of D.C.’s program is that twenty law firms and federal government lawyers agreed to provide pro bono support to complement the representation provided by legal aid providers.<sup>53</sup>

The lack of counsel for tenants in D.C. is particularly disturbing since ninety-five percent of landlords have attorneys in eviction cases.<sup>54</sup> Far too often, unrepresented tenants fail to assert legitimate defenses and instead enter one-sided, often unfavorable consent judgments, which waive important rights and place tenants at undue risk of eviction.<sup>55</sup> If counsel were available, they could make arrangements to negotiate rent abatements, arrange for necessary repairs, and win or negotiate dismissal of lease violation claims, significantly increasing tenants’ chances of avoiding displacement.<sup>56</sup>

Each of the cities mentioned, including D.C., is limiting the initial scope of its programs. The limitations include imposing restrictions on eligibility for counsel based upon level of income and type of eviction case and appropriating insufficient funding or mandating required pro bono support in lieu of government funding for required counsel programs. As a result, there is no indication yet that the “right to counsel” mandated requirements will come anywhere close to meeting the need in these jurisdictions.

In sum, given the history of inadequate funding for legal aid at all levels of government or constitutional mandate to require it, there is little doubt that there will continue to be a massive shortfall in financial support for legal services.

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<sup>49</sup> See AM. BAR ASS’N, Basic Principles for Right to Counsel in Civil Legal Proceedings 1 (2010), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_105\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf).

<sup>50</sup> See NAT’L COALITION FOR A CIVIL RIGHT TO COUNSEL, <http://civilrighttocounsel.org/> (last visited Nov. 7, 2020).

<sup>51</sup> See Ericka Peterson, *Building a House for Gideon: The Right to Counsel in Evictions*, 63 STANFORD J. OF CIV. RTS. AND CIV. LIBERTIES 64, 91 (2020).

<sup>52</sup> See COUNCIL OF D.C., Expanding Access to Justice Amendment Act of 2017, D.C. Act No. 22-130, Section 3051 (last visited July 31, 2017).

<sup>53</sup> DC Comm’n Report, *supra* note 3, at 52.

<sup>54</sup> Beth Harrison, *District of Columbia Joins Right to Counsel Movement with New Eviction Defense Funding*, MGMT. INFO. EXCH. J. at 41-42 (Fall 2017), <https://mielegalaid.org/system/files/dl/DCRighttoCounselHarrison.pdf>.

<sup>55</sup> *Id.* at 42.

<sup>56</sup> *Id.*

### 3. The support of pro bono lawyers can help fill the need, but it, too, seems to offer limited promise

There has long been a view that substantial increases in pro bono support from America's lawyers can fill at least some of the gap. There are, after all, over 1.35 million lawyers in the United States.<sup>57</sup> But there are no mandatory pro bono requirements in this country with one minor exception—New York State requires applicants for the New York Bar to have performed fifty pro bono hours before applying for admission to the Bar.<sup>58</sup> Most, but not all, jurisdictions have adopted the aspirational language in Rule 6.1 of the Model Rules of Professional Conduct which sets only a target, stating:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of *pro bono publico* legal services per year. In fulfilling this responsibility, the model rule states that lawyers should:

- (a) Provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
  - (1) Persons of limited means or
  - (2) Charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means.<sup>59</sup>

If all 1.35 million lawyers in this country complied with this aspirational goal, it would add over 67 million pro bono hours every year. That could make a big difference. However, the 2020 Pro Bono Institute's survey on law firms that provide the major bulk of pro bono services tells a different story and bring us back to reality. Lawyers in these firms performed around 5 million hours of pro bono service in 2019 of which 3.3 million were provided to persons of limited means.<sup>60</sup>

It is revealing that the total hours have not increased beyond those reported ten years earlier. The 2019 ABA survey found that nearly half of the responding lawyers did not perform any pro bono work, and only twenty percent indicated that they met the ABA's aspirational goal of fifty pro bono hours.<sup>61</sup> These surveys provide little support for the notion that members of the legal profession will stand up and become a major source of pro bono support well beyond what they have historically been providing.

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<sup>57</sup> See AM. BAR ASS'N, *ABA National Population Survey 2020*, [www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf](http://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf).

<sup>58</sup> See 22 CRR-NY § 520.16, [www.nycourts.gov/ctapps/520rules10.htm#B16](http://www.nycourts.gov/ctapps/520rules10.htm#B16).

<sup>59</sup> AM. BAR ASS'N, *Model Code of Professional Responsibility*, Rule 6.1 (2010).

<sup>60</sup> PRO BONO INST., *2020 Report on the Law Firm Pro Bono Challenge Initiative*, <http://www.probonoinitiative.org/2020PBILFChallengeRep>.

<sup>61</sup> See AM. BAR ASS'N, *ABA Profile of the Legal Profession 2020* at 139, [www.americanbar.org/content/dam/aba/administrative/news/20230/07/potlp2020.pdf](http://www.americanbar.org/content/dam/aba/administrative/news/20230/07/potlp2020.pdf) (last visited 2020).

D.C.'s bar dedicates hundreds of thousands of hours each year to pro bono service, but many of the hours are devoted to national and global issues.<sup>62</sup> As is apparent, the commitment to meet the needs of thousands of unrepresented D.C. residents falls woefully short of what is needed.<sup>63</sup>

Additionally, only about thirty non-profit law firms nationally, like the DCALF, were created to offer reduced legal rates for individuals with lower incomes ineligible for free legal aid.<sup>64</sup> Significantly, though, even many of these firms have been struggling to survive.<sup>65</sup> The DCALF model may be among the more promising approaches because it supplements client revenues with the ongoing support of its law school and law firm sponsoring partners, public and private grant support, and charitable contributions.

There have been other efforts to serve the “low bono” population.<sup>66</sup> Some nonprofit organizations and bar associations have created low bono panel referral services to connect potential modest-means clients with lawyers willing to take matters on a reduced fee basis. D.C. Refers, created by the Washington Council of Lawyers in D.C., is such a program.<sup>67</sup> Also, some legal aid programs, most typically immigration legal services programs, such as Central American Resource Center (“CARECEN”) D.C., have expanded the populations they serve and charge limited fees to those with incomes above the 200% FPL.<sup>68</sup> In addition, law schools have taken the lead in creating incubator programs in which recent graduates agree to serve moderate-income clients at an affordable hourly rate or fixed fee basis in return for free or low-cost office space, skills training, and mentoring support. There are now over sixty such programs.<sup>69</sup>

As encouraging as some of these initiatives may be, they have, up to this point, served only a miniscule percentage of the millions who do not have access to legal help when they need it. There is little evidence that this is likely to change in D.C. any time soon. This requires the legal profession to quickly formulate comprehensive strategies to tackle the civil access to justice crisis that now exists. So, what comprehensive strategies might be pursued? My suggestions for consideration follow.

## **II. We need to re-envision civil access to justice as a community responsibility**

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<sup>62</sup> See DC Comm'n Report, *supra* note 3, at 71,74.

<sup>63</sup> *Id.* at 74.

<sup>64</sup> See AM. BAR ASS'N, Standing Committee on the Delivery of Legal Services, *Affordable Legal Services*, [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources/programs\\_to\\_help\\_those\\_with\\_moderate\\_income/](http://www.americanbar.org/groups/delivery_legal_services/resources/programs_to_help_those_with_moderate_income/) (last visited Nov. 5, 2020).

<sup>65</sup> Lyle Moran, *Hope for nonprofit model remains despite closing of Open Legal Services*, (May 12, 2020), [www.abajournal.com/web/article/hope-for-nonprofit-law-firm-model-remains-despite-open-legal-closing](http://www.abajournal.com/web/article/hope-for-nonprofit-law-firm-model-remains-despite-open-legal-closing).

<sup>66</sup> Low bono has been defined as charging rates that those with low- and modest incomes can afford. See William Vogeler, *You Know About Pro Bono, What About Low Bono*, FINDLAW (June 07, 2019, 6:00 AM), [www.blogs.findlaw.com/strategist/2019/06/you-know-about-probono-what-about-low-bono.html](http://www.blogs.findlaw.com/strategist/2019/06/you-know-about-probono-what-about-low-bono.html).

<sup>67</sup> See DC REFERS, *Mission & Board of Directors*, <https://dcrefers.org/pages/mission> (last visited Nov. 5, 2020).

<sup>68</sup> See CENTRAL AMERICAN RESOURCE CENTER, [www.carecencdc.org/direct-services/immigration-legal-services](http://www.carecencdc.org/direct-services/immigration-legal-services) (last visited Nov. 5, 2020).

<sup>69</sup> See AM. BAR ASS'N, Standing Committee on the Delivery of Legal Services, *Legal Incubators*, [https://www.americanbar.org/groups/delivery\\_legal\\_services/initiatives\\_awards/program\\_main/](https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/) (last visited Nov. 5, 2020).

Civil access to justice needs to be redefined as a community responsibility and not one simply delegated to our courts to resolve. We need to figure out how to avoid, whenever possible, assigning responsibility to courts and the formal adversarial process to resolve matters—such as family, landlord-tenant, and debt-related disputes—that judges and that process are frankly not particularly well-suited to handle. Conditions will be even worse in the years ahead due to the court’s closure and scaled back operations as a result of the pandemic.

Furthermore, the current debate over whether to re-allocate some of the responsibilities of police departments for addressing social problems is apt here. As Professor David Cole noted in the national conversation about ‘defunding’ of police, we must focus our attention on “which of their tasks could be better handled by others....”<sup>70</sup> This also has budgetary implications. The Washington Post pointed out in its July 17, 2020 lead editorial, that budgets should reflect community priorities and if non-policing solutions are underfunded, “an obvious move is to provide them with more resources.”<sup>71</sup>

In the same way, as Professor Sandefur properly notes, limiting the discussion about the access to justice crisis as one of too few lawyers, is far too narrow:

Resolving justice problems lawfully does not always require lawyers’ assistance. Evidence shows that only some of the justice problems experienced by the public benefit from lawyers’ services or other legal interventions, while others do not. That is because such intervention is excessive or because it may be the wrong treatment for the problem.<sup>72</sup>

Professor Sandefur added that resolving our current crisis requires that lawyers and courts “shift their understanding of the access problem and share the quest for solutions with others—other disciplines; other problem-solvers; and other members of the American public, whom the justice system is meant to serve.”<sup>73</sup>

As Esther Lardent, the late beloved former president of the Pro Bono Institute, reflected:

The current system of justice, for many, is randomized, cumbersome, too slow, unfair, expensive, unpredictable, incomprehensible, mysterious, and frightening. . . Do we really think the best method for those seeking to divorce and settle family-related issues is to do so in a public courtroom in front of a judge, well-versed in the law but not necessarily in human psychology? <sup>74</sup>

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<sup>70</sup> See David Cole, *Less Punishment, More Justice*, The New York Review of Books, July 23, 2020, at 13.

<sup>71</sup> See Washington Post Editorial Board, *Beyond the ‘defund’ slogan: How to reimagine public safety in America?*, WASHINGTON POST (July 17, 2020, 6:29 PM), [https://www.washingtonpost.com/opinions/defund-the-police-is-as-much-about-reimagining-public-safety-as-it-is-about-money/2020/07/16/577603cc-c6dc-11ea-8ffe-372be8d82298\\_story.html](https://www.washingtonpost.com/opinions/defund-the-police-is-as-much-about-reimagining-public-safety-as-it-is-about-money/2020/07/16/577603cc-c6dc-11ea-8ffe-372be8d82298_story.html).

<sup>72</sup> Rebecca L. Sandefur, *Access to What?*, DAEDALUS, J. OF THE AM. ACAD. OF ARTS & SCI., 49,54 (Winter 2019).

<sup>73</sup> *Id.* at 54.

<sup>74</sup> Esther P. Lardent, *For most Americans, Our System Is a Failure*, Cal. B. J. (Jan. 2000), <http://archive.calbar.ca.gov/calbar/2cbj/00jan/page8-1.htm>.

In fact, while not well-known, most civil justice problems, both within and outside the U.S., are handled outside of the formal legal system.<sup>75</sup> Surveys outside of the U.S. indicate that courts or tribunals resolved only about five percent or fewer of civil legal problems.<sup>76</sup> In Pleasence’s and Balmer’s view, this is as it should be because of the need for “a rich diversity of forums and channels of services to match the diverse legal needs and legal capabilities of the public.”<sup>77</sup>

Redefining civil access to justice as a community responsibility—and not just as one for lawyers and courts to address—can have several aspects. As will be discussed below, broader community responsibility and making more sensible use of courts and lawyers should include:

- Emphasizing community-based information, advice, and advocacy services and mediation programs;
- Utilizing more informal tribunals;
- Making more effective use of the limited legal resources that are available; and
- Involving nonlawyers in services that we don’t need lawyers to handle or that lawyers don’t have the best skills to undertake.

#### **A. Developing community-based information and advice services for those who need them**

As pointed out in the Consortium of Legal Aid Providers *Community Listening Project*, low-income D.C. residents constantly face serious problems related to issues such as housing, employment, neighborhood concerns, immigration, and debt. Yet the vast majority did not seek legal services for help solving these problems despite being eligible for such services.<sup>78</sup> The discussion that follows provides a review of other models that have been used to address these types of problems and how these models could be adapted in D.C.

Those struggling with personal and financial problems or having difficulties in their interactions with the government often need easily understandable and accurate information about their rights and advocates who can act on their behalf. There are countries outside the U.S. that have long addressed these needs in ways that would be beneficial for the District to emulate.

Perhaps the best example is the British Citizens Advice program, which has been in existence for over eighty years and renders its services face-to-face, online, by phone, and even, in some cases, through direct services in peoples’ homes. When Citizens Advice services were first established in the mid-1930s, they initially focused on the public’s need for information about the government’s social welfare programs and civilian needs during the Second World War. Through both government and private support, the program has evolved to where it now delivers advice services from over 3,400 community locations in England and Wales.<sup>79</sup>

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<sup>75</sup> See Pascoe Pleasence & Nigel J. Balmer, *Justice & the Capacity to Function in Society*, DAEDALUS, J. OF THE AM. ACAD. OF ARTS & SCI., 140,141 (Winter 2019).

<sup>76</sup> *Id.* at 141.

<sup>77</sup> *Id.* at 146.

<sup>78</sup> See DC Comm’n Report, *supra* note 3, at 27.

<sup>79</sup> See CITIZENS ADVICE, *History of the Citizen Advice Service*, <https://www.citizensadvice.org/about-us/how-citizens-advice-works/who-we-are-and-what-we-do/history-of-the-citizens-advice-service>.

Working with a network of over 22,000 trained volunteers, Citizens Advice helps people resolve their legal, money, and other problems by providing free advice and information, and by serving as its advocates in interactions with governmental agencies.<sup>80</sup> Citizens Advice services include for example, providing information, advice, and advocacy services relating to debt and money;<sup>81</sup> ending a relationship;<sup>82</sup> housing;<sup>83</sup> and benefits.<sup>84</sup> As an illustration, in the area of benefits, there are links for information and advice about coronavirus-related benefits; an overview of all government benefits and tax credits, including sick or disabled benefits; and available help for those on low incomes.<sup>85</sup>

Another illustration of the range of United Kingdom advice services is that offered by the Paddock Wood Community Advice Centre, a charitable independent advice center.<sup>86</sup> Along with providing free debt advice, the Centre also serves as an advocate before agencies like the Department of Work and Pensions, from the initial interview stage to challenging awards and, often, seeking to overturn government decisions. The guidance includes “filling in forms, making telephone calls, and [assisting in] online applications.”

South Africa also has a long history of providing advice and information services to people who are marginalized through poverty, social circumstances, and geographical locations dating back to the apartheid era.<sup>87</sup> Staffed by paralegals, over 300 Community Advice Offices (“CAOs”) educate communities on rights-based information such as matters relating to benefits, water sanitation, housing, and how and where to access governmental services. Funding is provided entirely from donor grants.<sup>88</sup>

I was involved in an initiative in Namibia that demonstrates how paralegals and community volunteers can be trained to provide these kinds of information and advice services. There are few lawyers in Namibia, especially in rural areas of the country. Nine out of ten Namibians cannot afford legal services, in any event.<sup>89</sup> To overcome this problem, the Legal Assistance Centre, one of the very few legal aid organizations in Namibia, trained community volunteers, including social workers, teachers, and police officers, to serve as paralegals. The volunteer paralegals created the Namibia Paralegal Association and then provided information and advice at the grassroots level. DLA Piper, its New Perimeter nonprofit affiliate—for which I was then serving as Executive Director—and the University of Maryland Law School, working with the Legal Assistance Centre, then prepared a detailed Access to Justice Paralegal Manual for the

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<sup>80</sup> *Id.*

<sup>81</sup> See CITIZENS ADVICE, *Debt and Money*, <https://www.citizensadvice.org.uk/debt-and-money/>.

<sup>82</sup> See CITIZENS ADVICE, *Ending a Relationship*, <https://www.citizensadvice.org.uk/family/ending-a-relationship/>.

<sup>83</sup> See CITIZENS ADVICE, *Housing*, <https://www.citizensadvice.org.uk/housing/>.

<sup>84</sup> See CITIZENS ADVICE, *Benefits*, <https://www.citizensadvice.org.uk/benefits/>.

<sup>85</sup> *Id.*

<sup>86</sup> See PADDOCK WOOD COMMUNITY ADVICE CENTRE, [www.pwadvice.org/4582440095](http://www.pwadvice.org/4582440095).

<sup>87</sup> See National Alliance for the Development of Community Advice Offices (CAOs), [www.ngopulse.org/organization/national-alliance-development-community-advice-offices](http://www.ngopulse.org/organization/national-alliance-development-community-advice-offices) (last visited Nov. 5, 2020).

<sup>88</sup> *Id.*

<sup>89</sup> *Justice Outreach*, NAMIBIA PARALEGAL ASSOC. (NPA), <http://namibiaparalegals.org/justiceoutreach.html>.

paralegals to use setting forth basic information in the areas where they would be providing information and assistance such as what victims of domestic violence can do.<sup>90</sup>

While information, advice, and advocacy services such as these would have to be adapted to fit D.C. residents' specific needs, there is great value in including a community-based information, advice, and advocacy program as a key aspect in the re-envisioning civil access to justice as a community responsibility. The legal profession, including law schools, would play important roles in such initiatives. Lawyers, for example, should be involved in providing oversight and guidance on both the legal information and advice given and the advocacy that is provided.

There are also some valuable information sources available in the U.S. that can serve as models. Pine Tree Legal Services in Maine, for example, provides online guidance on matters similar to those provided by Citizen Advice offices in the U.K.<sup>91</sup> Law Help also has state-specific websites, including one for D.C., that provides litigation-related forms, contact information about legal aid organizations, and basic information about federal and state law in areas like those covered by Pine Tree, but the primary focus is on court-related issues.<sup>92</sup> It is uncertain, though, whether the D.C. site is as well-known as it should be. Any community-based information, advice, and advocacy programs developed will need to be broadly known and easily accessible and should include outreach components.

In addition, both D.C. and federal government agencies need to be encouraged to ensure that they:

- Provide simplified, clearly stated, and supportive information about their services and how to dispute them;
- Have it more readily available on their websites and through social media and in printed materials; and
- Expand outreach through easily reachable customer service representatives, community presentations, and interactive chat links.

This is currently often not the case. One exception is the Federal Trade Commission (“FTC”) which, through its website, provides guidance on managing money, dealing with credit, loan and debt issues, and scams and identity theft.<sup>93</sup>

Law schools in D.C. should also be playing more active roles in educating the public on legal rights and ways to enforce them. There are proven models in the medical field that law schools

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<sup>90</sup> Manual and background on the Namibia Paralegal Association are available at [www.namibiaparalegals.org](http://www.namibiaparalegals.org); see also Peter Chapman and Chelsea Payne, *The Contributions of Community-Based Paralegals in Delivering Access to Justice in Postwar Liberia*, (2018), <https://www.cambridge.org/core/books/community-paralegals-and-the-pursuit-of-justice/contributions-of-community-based-paralegals-in-delivering-acc> (other examples of utilizing paralegals as alternatives when lawyers are not available); see also NAMATI, Innovations in Legal Empowerment [www.namati.org](http://www.namati.org) (a broader look at the community paralegal movement outside of the U.S.).

<sup>91</sup> See PINE TREE LEGAL SERVICES, [www.ptlaw.org](http://www.ptlaw.org).

<sup>92</sup> See LAW HELP, [www.lawhelp.org](http://www.lawhelp.org).

<sup>93</sup> See FEDERAL TRADE COMMISSION, [www.consumer.gov](http://www.consumer.gov) (last visited Nov. 5, 2020); For an often-praised state government website, see OHIO DEPARTMENT OF HEALTH, *Benefits*, <https://benefits.ohio.gov/> (last visited Nov. 5, 2020).

should emulate. For example, Johns Hopkins and the Mayo Clinic provide extensive information on their websites about conditions and diseases, symptoms, treatments, wellness, and prevention.<sup>94</sup> Involving law students in developing and maintaining such sites should also underscore for them, as part of their legal education, the importance of community education on legal rights matters. We need to do more to introduce law students to “the extraordinary access-to-justice problems in the country and the legal profession’s role in addressing them.”<sup>95</sup>

The private sector also has a role to play here. Online legal services technology companies now provide legal documents preparation services for the corporate sector and the middle class.<sup>96</sup> They have not historically, however, offered low bono or pro bono services to those who have little or no means to pay. The online legal services technology companies should be serving this population.

Under new Utah Supreme Court Rules, approved in August 2020, nonlawyer organizations, like Legal Zoom and Rocket Lawyer, have been encouraged to submit proposals to offer innovative access to justice services.<sup>97</sup> Some technology companies have already responded to the invitation. LawPal, for example, is planning to offer a “TurboTax-like” platform for divorce and eviction disputes and 1LAW plans to help clients complete court documents and offer legal information utilizing “chatbots.”<sup>98</sup> Utah’s Implementation Task Force made it clear that innovations such as these are vital and that lawyers alone will not resolve the access to justice crisis.<sup>99</sup> It then provided the following rationale:

- The need for legal help is great: Each year thousands of Utahns face problems like employment disputes, divorce or custody proceedings, small business matters, wage theft, eviction, or consumer debt without any help at all. In Utah’s largest district, in ninety-three percent of all family and civil law disputes, one party did not have a lawyer.<sup>100</sup>
- Legal aid and pro bono legal help will never be able to meet the need. We need to change the rules controlling who can offer legal help and how law is practiced and so that people are able to get help in more ways when they need it.
- Fewer people are using lawyers’ services already—lawyers are too expensive and cannot meet people where and when they need help. We need new models for

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<sup>94</sup> See JOHN HOPKINS MEDICINE, *Wellness and Prevention*, [www.hopkins/medicine.org/health/wellness-and-prevention](http://www.hopkins/medicine.org/health/wellness-and-prevention) (last visited Nov. 5, 2020) and MAYO CLINIC, [www.mayoclinic.org](http://www.mayoclinic.org) (last visited Nov. 5, 2020).

<sup>95</sup> Sheldon Krantz & Michael Millemann, *Legal Education in Transition: Trends and Their Implication*, 94 Neb. L. Rev. 1, 2 (2015).

<sup>96</sup> See LEGAL ZOOM, [www.legalzoom.com](http://www.legalzoom.com) (last visited Nov. 5, 2020); See also ROCKET LAWYER, [www.rocketlawyer.com](http://www.rocketlawyer.com) (last visited Nov. 5, 2020).

<sup>97</sup> *Utah Legal Regulatory Reform: Basic Facts*, Utah State Bar, <https://www.utahbar.org/wp-content/uploads/2020/05/UTAH-Communications-Fact-Sheet-FINAL.pdf>.

<sup>98</sup> Justin Wise, Orgs Enter Utah ‘Sandbox’ Trying To Reshape Legal Industry, (January 22, 2021), [https://www.law360.com/access-to-justice/articles/1344420/orgs-enter-utah-sandbox-trying-to-reshape-legal-industry?nl\\_pk=a725a5e1-1f0b-4a0f-ba4](https://www.law360.com/access-to-justice/articles/1344420/orgs-enter-utah-sandbox-trying-to-reshape-legal-industry?nl_pk=a725a5e1-1f0b-4a0f-ba4).

<sup>99</sup> *Narrowing the Access-to-Justice Gap by Reimagining Regulation*, UTAH GROUP ON REG. REFORM 7 (August 2019), <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>.

<sup>100</sup> *Id.*

legal services, including technology, to increase consumer engagement and demand.<sup>101</sup>

Additionally, accounting firms and software companies with expertise in artificial intelligence are looking for ways to expand into the legal marketplace.<sup>102</sup> Approaches should be made to these companies to begin helping those who cannot afford their services with assistance in areas of importance to them, such as assistance in resolving disputes, drafting wills, reviewing leases, completing government forms, and securing benefits.

## **B. Investing in community mediation and other dispute resolution programs**

When disputes arise, community alternatives need to exist for preventing them from blossoming into contentious litigation. There have been positive experiences using community mediation for such purposes which should be actively pursued in D.C. The purpose of community mediation is to use trained volunteers to provide free or low-cost mediation services to resolve disputes within families, among neighbors, and between merchants and customers, among others. There are now an estimated 400 community mediation centers in the U.S.<sup>103</sup> These programs need to be expanded to reduce reliance on courts to resolve community-based disputes.

Maryland and Massachusetts, in particular, have been leaders in actively supporting community mediation initiatives. The impetus in Maryland has come from the nonprofit Community Mediation Maryland (“MACRO”). With grant support from the Corporation for National and Community Service, MACRO has supported the creation of centers in locations such as Baltimore City and Baltimore County. It recruits, trains, places, and supervises AmeriCorps members for the Centers.<sup>104</sup> In addition, MACRO’s training department provides free training for all community mediation volunteers and has a program to apprentice new trainers and mentor new mediators.<sup>105</sup>

MACRO is guided by a ten-point Community Mediation Model, which strives to:

1. Train community members who reflect the community’s diversity with-regard-to age, race, gender, ethnicity, income, and education to serve as volunteer mediators;
2. Provide mediation services at no cost or on a sliding scale;
3. Hold mediation in neighborhoods where disputes occur;
4. Schedule mediations at a time and place convenient to the participants;

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<sup>101</sup> See [www.sandboxutcourts.gov](http://www.sandboxutcourts.gov) Utah Implementation Task Force on Regulatory Reform, Frequently Asked Questions. See also Victoria Hudgins, *Utah Broke the Lawyer Fee-Sharing Mold. Now Other States Watch With Interest*, Law.com (August 25, 2020), <https://www.law.com/americanlawyer/2020/08/25/utah-broke-the-lawyer-fee-sharing-mold-now-other-states-watch-with-interest>.

<sup>102</sup> See Jonathan Hurtarter, *Big Four May Gain Legal Market Foothold With State Rule Change*, BLOOMBERG LAW (Apr. 11, 2019), [www.news.bloomberg.law.com/us-law-week/big-four-may-gain-legal-market-foothold-with-state-rule-change](http://www.news.bloomberg.law.com/us-law-week/big-four-may-gain-legal-market-foothold-with-state-rule-change); see also Rob Toews, *AI Will Transform the Field of Law*, Forbes (Dec. 19, 2019), [www.forbes.com/sites/robtoews/2019/12/19/ai-will-transform-the-field-of-law/#233884147f01](http://www.forbes.com/sites/robtoews/2019/12/19/ai-will-transform-the-field-of-law/#233884147f01).

<sup>103</sup> See RESOL. SYS. INST., [www.aboutrsi.org](http://www.aboutrsi.org).

<sup>104</sup> See About Us, CMTY. MEDITATION MD., [www.mdmeditation.org/about-us/](http://www.mdmeditation.org/about-us/).

<sup>105</sup> *Id.*

5. Encourage early use of mediation to prevent violence or to reduce the need for court intervention, as well as provide mediation at any stage in a dispute;
6. Mediate community-based disputes that come from referral sources, including self-referrals, police, courts, community organizations, civic groups, religious institutions, government;
7. Educate community members about conflict resolution and mediation;
8. Maintain high-quality mediators by providing intensive, skills-based training, apprenticeships, continuing education, and ongoing evaluation of volunteer mediators;
9. Work with the community in governing community mediation programs in a manner that is based on collaborative problem solving among staff, volunteers, and community members; and
10. Provide mediation, education, and potentially other conflict resolution processes to community members who reflect the community's diversity regarding age, race, gender, ethnicity, income, education, and geographic location<sup>106</sup>

MACRO has supported evaluation studies on the impact of community mediation. One study determined that people who use community mediation are more likely to stop using police or court resources following mediation than those in conflict who did not use mediation.<sup>107</sup>

The Massachusetts program is administered and partially funded with Commonwealth appropriations, now in excess of \$1 million, through the State Office of Public Collaboration.<sup>108</sup> Like the Maryland program, MOPC provides grant support to community-based mediation centers—now twelve in total.<sup>109</sup> According to a fiscal 2019 annual report, MOPC centers mediated 4,000 cases that year and had an over 72% rate in resolving the disputes.<sup>110</sup>

D.C. currently has one community mediation center—Community Mediation D.C. (“CMDC”).<sup>111</sup> CMDC is relatively new, beginning operations in 2018.<sup>112</sup> According to Caroline Cragin, Executive Director, CMDC. has adopted the ten-point Community Mediation Model utilized by Community Mediation Maryland and was created with the Maryland mediation centers model in mind.<sup>113</sup> CMDC. currently has a modest budget and a small staff and corps of volunteer mediators. It handles roughly fifty mediations annually with a primary emphasis on prisoner reentry and landlord-tenant mediations.<sup>114</sup> Ms. Cragin strongly favors developing a

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<sup>106</sup> *Id.*

<sup>107</sup> See Lorig Charkoudian, *Giving Police and Courts a Break: The Effect of Community Mediation on Decreasing the Use of Police and Court Resources*, 28 CONFLICT RESOL. Q., 114,153 (Winter 2010).

<sup>108</sup> See *Fiscal Year 2019 Report & Evaluation*, MASS. CMTY. MEDIATION CTR. GRANT PROG., 1, 2 (2019), [https://www.umb.edu/editor\\_uploads/images/mopc/Executive\\_Summary\\_FY19\\_CMC-GP\\_Evaluation\\_Report\\_final\\_1.19.20.pdf](https://www.umb.edu/editor_uploads/images/mopc/Executive_Summary_FY19_CMC-GP_Evaluation_Report_final_1.19.20.pdf) (hereinafter Mass. Comm. Mediation Center 2019 Report).

<sup>109</sup> *Id.*

<sup>110</sup> MASS. COMM. MEDIATION CTR. GRANT PROG., FY 2019 Report & Eval., [https://umb.edu/editor\\_uploads/images/MOPC/FY\\_19\\_CMC\\_gp\\_evaluation\\_report\\_Jan\\_2020\\_\(2\)\\_1-4.pdf](https://umb.edu/editor_uploads/images/MOPC/FY_19_CMC_gp_evaluation_report_Jan_2020_(2)_1-4.pdf). See also, NAT'L ASS'N FOR COMTY MEDIATION (NAFCM), [www.nacfm.org/page/Purpose](http://www.nacfm.org/page/Purpose) (more about national developments in community mediation).

<sup>111</sup> See About Us, CMTY. MEDIATION DC, <https://communitymediationdc.org/about/more/>.

<sup>112</sup> *Id.*

<sup>113</sup> Conversation with Caroline Cragin, Founding Dir., CMTY. MEDIATION DC (July 14, 2020).

<sup>114</sup> *Id.*

mediation program detached from D.C. Superior Court’s Multi-Door Mediation Program, which will be described more fully below.<sup>115</sup>

Other dispute resolution models—such as those utilizing elders and faith leaders—may be equally effective and worth consideration. There is a long-standing tradition of using elders to resolve disputes that predates the colonial period, and which continues today.<sup>116</sup> The use of and respect for elders is deeply entrenched in African and tribal culture and may not be transportable to this country. There is, however, greater experience in the U.S. in involving faith leaders in mediating disputes that may be worthy of careful assessment.<sup>117</sup>

In sum, D.C. should emphasize these types of community-based services for resolving the kinds of disputes just described because courts should be “doing less of what they are not well suited to do.”<sup>118</sup>

### **C. What changes should be made within the court system when SRLs still appear there?**

While a primary goal of re-envisioning civil access to justice as a community responsibility is to reduce reliance on judges and lawyers, disputes involving one or both self-represented parties will inevitably end up in courts that cannot refuse to take them. To avoid having the parties mired down in the full-fledged adversarial system when parties are representing themselves, D.C. Superior Court should adopt more informal problem-solving approaches for the branches that handle family law and landlord/tenant matters.

Less formal options will need to include the kind of “virtual” flexibility of not appearing in court that will be a legacy of (and remaining long after) the COVID-19 pandemic. This flexibility, however, must factor in the reality that SRLs will often not have access to the technology that others may have:

Nancy Drane, Executive Director of the D.C. Access to Justice Commission recognizes that the benefits and prospective improvements of shifting court processes online must be balanced against the challenges, which are serious and real. “We know that for low-income litigants, and particularly those who are unrepresented, there is this digital divide that often leads to lack of access to internet technology, even to smart phones,” Drane says. “We are trying to think creatively about how we foster the type of access to make remote participation possible for those types of litigants.”<sup>119</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> See Francis Kariuki, *Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities* (2015), [www.semanticscholar.org/paper/Conflict-Resolution-by-Elders-in-Africa-%3A-Successes-Kariuki/13e98c834f154a3b5c753f00054](http://www.semanticscholar.org/paper/Conflict-Resolution-by-Elders-in-Africa-%3A-Successes-Kariuki/13e98c834f154a3b5c753f00054) (Paper delivered at the Chartered Institute of Arbitrators Centenary Conference ‘Learning from Africa’ on July 15, 2015 at the Victoria Falls Convention Centre, Livingston, Zambia).

<sup>117</sup> See R. Seth Shippee, “*Blessed are the Peacemakers*”: *Faith-Based Approaches to Dispute Resolution*, 9 ISLA J. INT’L COMPAR. L. (2002).

<sup>118</sup> Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can’t Solve Inequality*, DAEDALUS, J. OF THE AM. ACAD. OF ARTS & SCI., 128,134 (Winter 2019).

<sup>119</sup> William Roberts, *How the Pandemic Has Transformed the Courts*, Washington Lawyer at 27- 28 (September/October 2020).

D.C. Superior Court now has “problem-solving” community courts for certain minor crime and drug offenses and offenders with mental health problems. The D.C. Superior Court’s rationale in creating these informal problem-solving criminal courts has been that:

Problem-solving courts bring together criminal justice and community partners and corresponding resources to respond to crime and safety issues....In problem-solving courts, everyone has a role to play in helping solve problems—not just the judge, prosecutor, and defense attorney, but also social service and government agencies, community organizations, businesses, faith community, individual residents and the defendant/offender. Through these partnerships, problem-solving courts respond more effectively to crime and develop solutions that improve outcomes to the community, victims, and the defendants/offenders themselves.<sup>120</sup>

The D.C. Superior Court lists its goals for criminal problem-solving courts as: addressing offender needs by linking them to treatment and social services, streamlining case processing, and forging partnerships to solve neighborhood problems.<sup>121</sup> These are laudable objectives that should apply equally in addressing problems such as family and landlord-tenant disputes. As noted by George Washington Clinical Law Professor Jessica Steinberg, taking this approach could empower judges to coordinate factfinding with interdisciplinary partners and use their authority to monitor landlords and debt collectors who might otherwise manipulate the process in more traditional court settings.<sup>122</sup>

But as Professors Shanahan and Carpenter point out in their article, *Simplified Courts Can’t Solve Inequality*,<sup>123</sup> it will be necessary to change the equation of how simplified civil courts would likely work:

[M]any of the problems that civil courts handle are symptoms of inequality. The design of civil courts constrains the substantive law and procedural tools at their disposal to address these symptoms. By the time the tenant comes to a state civil court, she has already lost her job and failed to pay her rent, which the law says she can be evicted for. Court simplification might make the legal process of eviction easier to navigate for the tenant, and perhaps allow her to identify a defense that delays her eviction or reduces the amount of money she owes the landlord. . . but it cannot help her with the other challenges related to her conviction, such as finding affordable child care, health care, or employment that leads to savings to protect against future eviction. . . . The socioeconomic needs cannot be simplified away within the judicial branch.<sup>124</sup>

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<sup>120</sup> D.C. Superior Court, *Community Courts and Problem Solving Courts*, <https://dccourts.gov/services/criminal-matters/community-court-and-problem-solving-courts>.

<sup>121</sup> *Id.*

<sup>122</sup> Jessica Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1580, 1632 (2018).

<sup>123</sup> *Shanahan & Carpenter*, *supra* note 118, at 131.

<sup>124</sup> *Id.*

Nor can a family court easily address situations when a husband or wife in a custody battle does not have access to mental health care, affordable child-care or flexible employment hours, affordable housing, or adequate educational opportunities.<sup>125</sup>

While there will be limitations on how judges will be permitted to address these underlying concerns in a problem-solving court setting, they should at least have the discretion and authority to utilize governmental and other appropriate experts to participate in the creative problem-solving that will be required. At least one study indicates that a community-based landlord-tenant court can, if it has greater flexibility, be a much fairer forum for tenants.<sup>126</sup>

Given the potential limitations that will inevitably be imposed on future problem-solving courts, these courts should work in tandem with and regularly make referrals to both court-based and community-based mediation programs that will have more flexibility in deciding how best to resolve intractable disputes.

D.C. Superior Court currently has a Multi-Door Mediation Program. Established in 1985, the Division now provides mediation services for several court divisions, including family, landlord and tenant, small claims, and probate. Based upon D.C. Superior Court 2018 statistics, it appears, however, that the Multi-Door Program is somewhat modest in scope. It provided mediation in only 1,314 domestic relations and 986 landlord-tenant matters, with widely varied success (39% in domestic relations cases; sixty-for percent, in landlord-tenant cases).<sup>127</sup> Greatly expanding court-based mediation services and community-based mediation programs as they are developed would need to be a key element of any civil problem-solving court program.

#### **D. Existing lawyer resources need to be used more sensibly**

This article's primary focus has been on alternative means to help SRLs in civil matters when lawyers are not available. But it is important to restate that there is an urgent need to greatly increase federal, state, and local support for civil justice legal services programs so that a far higher percentage of D.C. residents can be represented by counsel. Relating to this is how legal aid organizations can make the best use of the lawyer resources they now have and how they can best fit within a broader community-based access to civil justice program. With such limited legal assistance available, legal aid organizations must ask these kinds of questions at the intake stage:

- Can the dispute be resolved outside of a courtroom setting by referral to one of the community-based programs described above or to a less formal problem-solving court, and is either approach a preferable way to handle the matter?
- Is it the kind of problem that can be resolved by having a lawyer provide brief legal advice?

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<sup>125</sup> *Id.* at 130.

<sup>126</sup> See Rashida Abuwala and Donald J. Farole, *The Perceptions of Self-Represented Tenants in a Community-Based Housing Court*, 44 COURT REVIEW 56 (positively describing tenant perceptions of the Harlem Community Justice Center).

<sup>127</sup> See D.C. SUPER. CT., Program Summary Multi-Door Dispute Resolution Division 18 (2019), <https://www.dccourts.gov/sites/default/files/MultiDoor-PDFs/MultiDoor-2019-Program-Summary.pdf>.

- Or will it be necessary to have a lawyer play a more extended but still narrower role, such as appearing on behalf of a SRL at a status hearing?
- And what matters require that the legal aid organization involved commit to providing full representation in a traditional adversarial setting?

There is now a growing literature on using cost-benefit analysis in assessing legal aid programs that could assist in answering these questions. Much of it relates to ways to demonstrate the economic benefits associated with the provision of civil legal aid.<sup>128</sup> Some studies, though, are focused more specifically on what factors legal aid organizations should assess in deciding how they should allocate their resources. The Australia Productivity Commission, for example, has pointed out that it is not enough to identify a problem to be addressed (that is, an unmet legal need). It is also necessary to assess the extent to which providing such assistance would make a difference and what kinds of services to provide.<sup>129</sup> In making this assessment, the Productivity Commission identified the following questions that needed to be analyzed in deciding not to take a matter, undertaking only limited services, or undertaking full representation services:

- What would happen to an individual if assistance is not provided?
- How much does receiving the assistance affect the legal outcome of a case?
- Does obtaining a favorable legal outcome avoid adverse outcomes in the client’s life “outside the court room?”
- What are the costs of these adverse outcomes that are avoided?

I would further add the following question: Are there alternative ways to assist—such as community-based mediation or alternative social services—that would be more or equally responsive to the problem?

Legal aid organizations provide a wide range of services in Australia. They include: (1) education and information services (92,945 matters, including free telephone information, community information seminars, self-help guides); (2) short-term legal advice (18,864 matters); (3) dispute resolution services (995 matters); (4) limited scope services (4,889 matters); and (5) full representation (4,579 matters).<sup>130</sup>

John Greacen, former Court Administrator for the U.S. Court of Appeals for the Fourth Circuit and a longtime expert on court administration, who has played a central role in defining ways to assist SRLs, also conducted a study about the economic benefits of providing differing forms of legal services.<sup>131</sup> The study, conducted in six California courts, assessed the potential value and cost savings of helping SRLs in three different ways: through information workshops,

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<sup>128</sup> See, e.g., WORLD BANK, *A Tool for Justice: The Cost Benefit Analysis of Legal Aid* (2019), <http://documents1.worldbank.org/curated/en/592901569218028553/pdf/A-Tool-for-Justice-The-Cost-Benefit-Analysis-of-Legal-Aid.pdf>.

<sup>129</sup> See AUSTL. GOV’T PRODUCTIVITY COMM’N., *supra* note 9, at 5.

<sup>130</sup> See *Economic Value of Legal Aid: Analysis in relation to Commonwealth funded matters with a focus on family law*, PwC (2009), [https://www.legalaidact.org.au/sites/default/files/files/publications/economic\\_value\\_of\\_legalaid.pdf](https://www.legalaidact.org.au/sites/default/files/files/publications/economic_value_of_legalaid.pdf).

<sup>131</sup> See John Greacen, *The Benefits and Costs of Programs to Assist Self-Represented Litigants: Results from Limited Data Gathering Conducted by Six Trial Courts in San Joaquin Valley* (2009), [https://www.courts.ca.gov/partners/documents/Greacen\\_benefit\\_cost\\_final\\_report.pdf](https://www.courts.ca.gov/partners/documents/Greacen_benefit_cost_final_report.pdf).

one-on-one advice services, and appearances in a first hearing to seek to resolve the dispute.<sup>132</sup> He determined that all three forms of services were beneficial because they reduced the cost to the court, the litigants—and, undoubtedly, to the legal aid programs—of ongoing court hearings.

Legal aid agencies in D.C. need to undertake this kind of analysis so that they can better assess how to make the most beneficial use of the resources they have. There are already some important developments in D.C. that emphasize the benefits to SRLs if legal aid programs expand the range of their services beyond the more traditional one of full representation.

Perhaps most significant, the DCALF, the D.C. Bar Pro Bono Center, and D.C. Legal Aid created the Family Law Assistance Network (“FLAN”) to provide both in-court advice and limited scope legal services to SRLs.<sup>133</sup> With support from the D.C. Bar Foundation, the program began in March 2020, just when Superior Court closed the courthouse because of COVID-19. Even so, FLAN is already providing substantial limited scope services to SRLs on a virtual basis. Legal aid providers render advice to SRLs on child support, consumer law, domestic violence, landlord-tenant, and small claims matters at the court through resource centers and through monthly community-based advice clinics.<sup>134</sup> The D.C. Superior Court is also taking several steps to assist SRLs, including posting more easily understood forms and interactive questionnaires online, particularly in the family law area, and establishing the Family Court Self Help Center, which helps litigants complete on-the online forms.<sup>135</sup>

### **E. Lawyers need help that nonlawyers can provide**

As noted throughout this article, there will never be enough lawyers to fill the needs existing in our courts. The legal profession does not have the means or the will to resolve the civil access to justice crisis on its own.<sup>136</sup> That is why it must be recognized that there are many services lawyers provide that we do not need them to handle and others that they do not have the exclusive competence to undertake. The D.C. metropolitan area is rich in community resources that should be available, with proper training, to supplement services lawyers alone are now expected to provide.

These resources include a potentially large pool of law students; other students at both undergraduate and graduate levels; professionals in fields such as social work and psychology; debt counseling; and faith and other community leaders, among others, who might be willing to provide pro bono services to help SRLs prepare for or resolve in-court disputes. Law students, for example, can be trained to help SRLs to complete and file court forms, gather documents and information they may need to have in the litigation, and potentially be available to accompany SRLs to court hearings and assist them in responding to questions about information on forms they helped to complete. As Mary McClymont wrote in her June 2019 report, *Nonlawyer*

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<sup>132</sup> *Id.*

<sup>133</sup> Family Law Assistance Network, D.C. BAR: PRO BONO CTR., <https://www.dcbbar.org/pro-bono/what-we-do/family-law-assistance-network>.

<sup>134</sup> *See, e.g., Help for Individuals*, D.C. BAR: PRO BONO CTR., <https://www.dcbbar.org/pro-bono/free-legal-help/help-for-individuals>.

<sup>135</sup> *See, e.g., D.C. SUPER. CT., Handbook for People who Represent themselves in Divorce, Custody, and Child Support Cases* (2014).

<sup>136</sup> SHELDON KRANTZ, *THE LEGAL PROFESSION: WHAT IS WRONG AND HOW TO FIX IT* 86 (2013).

*Navigators in State Courts: An Emerging Consensus*, programs all over the country have demonstrated that students can effectively serve as navigators.<sup>137</sup>

I can attest to that from personal experience. Lisa Dewey, the pro bono partner at DLA Piper, and I recently taught a Practicum at Georgetown Law Center in which our students successfully helped *pro se* litigants prepare pleadings at the D.C. Superior Court Family Law Self Help Center. The students loved the work. The Court also recently created its own navigator program for the landlord-tenant and small claims divisions.<sup>138</sup>

There are also endless possibilities for experts who have competencies that lawyers typically do not possess. Debt counselors, for example, could assist tenants in reaching favorable settlements and in figuring out longer term solutions for avoiding evictions for failure to pay rent or dealing with debt collection or other credit issues. Tenant advocates or others with expertise in deplorable housing conditions could assist tenants both outside and inside of courts in crafting strategies for negotiating settlements with landlords on necessary repairs. Psychologists or social workers could help negotiate acceptable terms and serve as parenting coordinators when parents are at loggerheads over custody or visitation arrangements.

In this regard, D.C. should follow the lead of the Arizona Supreme Court which, in August 2020, adopted new rules authorizing nonlawyer experts to assist unrepresented litigants on a pro bono basis in certain situations.<sup>139</sup> More specifically, under Arizona Supreme Court Rule 31.3, a party may be represented by an individual with special knowledge and training with respect to the problems of children with disabilities in administrative hearings as long as it is without charge.<sup>140</sup> And mediators can prepare and file settlements in court if they do so on a cost-free basis and are involved in a nonprofit mediation or community-based program.<sup>141</sup> In sum, there could be enormous benefits in developing an “SRL Resource Bank” to provide services that will allow lawyers to devote their time to matters that only they have the skills to handle.

Expanding the use of nonlawyers to assist in expanding access to civil justice resources is not a new concept. Nonlawyers are now permitted to represent parties before administrative agencies such as the Internal Revenue Service and the Social Security Administration.<sup>142</sup> There are also developments occurring elsewhere it is time for the District to begin exploring. As previously noted, the Utah Supreme Court, for example, has adopted a Standing Order in 2020 that creates an Office of Innovation to approve and oversee innovative pilot projects such as those involving nonlawyers in providing limited legal advice to address gaps in civil access to justice and having

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<sup>137</sup> See Mary McClymont, *Nonlawyer Navigators in State Courts: An Emerging Consensus*, JUST. LAB GEO. L. (2019), <https://www.srln.org/system/files/attachments/Final%20Navigator%20report%20in%20word-6.11.hyperlinks.pdf>.

<sup>138</sup> See D.C. Ct., Court Navigator, <http://www.dccourts.gov/services/civil-matters/requesting-10k-or-less> (small claims matters); see also D.C. Ct., Court Navigator <http://www.dccourts.gov/services/civil-matters/landlord-tenant> (landlord and tenant matters).

<sup>139</sup> See Order Amending the Arizona Rules of the Supreme Court and the Arizona Rules of Evidence, August 27, 2020, [www.azcourts.gov/Portals/215/Documents/082720FOrderR-20-0034/LPABS.pdf?ver=2020-08-27-153342-037](http://www.azcourts.gov/Portals/215/Documents/082720FOrderR-20-0034/LPABS.pdf?ver=2020-08-27-153342-037).

<sup>140</sup> *Id.* Rule 31.3(d)(15).

<sup>141</sup> *Id.* Rule 31.3(d)(25).

<sup>142</sup> Comm’n on NonLawyer Practice, *NonLawyer Activity in Law-Related Situations*, ABA (1995), [https://www.paralegals.org/files/ABA\\_Commission\\_on\\_Non-Lawyer\\_Practice.pdf](https://www.paralegals.org/files/ABA_Commission_on_Non-Lawyer_Practice.pdf).

nontraditional legal services providers adapt their interactive forms and contracts for use by pro se litigants.<sup>143</sup>

If history is a guide, there will be strong pushback by elements within the legal profession who will argue that (1) lawyers alone have the necessary skills and services to perform these services; and (2) these activities, if performed by nonlawyers, would create potential serious risks of harm to the public.<sup>144</sup> In effect, these are the standard arguments in favor of lawyers retaining a monopoly over all aspects of the “practice of law” and participation in the adversary system. Unauthorized practice of law restrictions in all states are broadly defined. In D.C., for example, with the narrow exception of routine agreements incidental to a regular course of business, it is currently unlawful for anyone other than a D.C.-licensed lawyer to:

- Prepare any legal document;
- Prepare any claims, demands or pleadings of any kind; and
- Provide advice or counsel on any of these activities<sup>145</sup>

It is specified in the Comment to the Rule that the purpose of the restricted provisions is “to protect members of the public from persons who are not qualified by competence or fitness to provide professional advice or service.”<sup>146</sup>

Given the lack of available lawyers, it is time to recognize that adjustments need to be made in the legal profession’s monopoly over the provision of legal services. It can no longer be justified. Adjustments can be tailored to address protecting public concerns.

Other professions with severe shortages have recognized the need for change. For example, the severe shortage of physicians in rural areas has led many states to permit nurse practitioners to prescribe medication. According to the National Council of State Boards of Nursing, twenty-two states and D.C. permit independent prescribing for certified nurse practitioners.<sup>147</sup>

If the legal profession does not provide expanded opportunities for nonlawyers to meet the gap in civil access to justice, the FTC and the Antitrust Division in the U.S. Department of Justice should intervene because unduly restrictive unauthorized practice of law restrictions are anti-competitive. They have precedent to apply here in *North Carolina Board of Dental Examiners v. Federal Trade Commission*,<sup>148</sup> which precluded the Dental Board from restricting non-dentists from providing teeth whitening services. The FTC and the Department of Justice have already expressed the possibility of the rationale in that case applying to restrictions

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<sup>143</sup> Utah S. Ct. Standing Order No. 15 (Aug. 14, 2020), <https://utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf>.

<sup>144</sup> See, e.g., William T. Robinson, III, *Legal Help for the Poor: A View from the A.B.A.*, N.Y. TIMES (Aug. 31, 2011), <http://www.nytimes.com/2011/08/31/opinion/legal-help-for-the-poor-the-view-from-the-aba.html>.

<sup>145</sup> See D.C. Ct. APP. R. 49, [www.dccourts.gov/sites/default/files/2017-07/DCCA%20Rule%2049%20Unauthorized%20Practice%20of%20Law.pdf](http://www.dccourts.gov/sites/default/files/2017-07/DCCA%20Rule%2049%20Unauthorized%20Practice%20of%20Law.pdf).

<sup>146</sup> *Id.*

<sup>147</sup> See *Nat’l Council State Bds. Nursing*, State Practice Environment Map, <https://www.aanp.org/advocacy/state/state-practice-environment> State Practice Environment Map, NAT’L COUNCIL STATE BD. NURSING, <https://www.aanp.org/advocacy/state/state-practice-environment>.

<sup>148</sup> *N.C. Bd. Dental Exam’rs v. Fed. Trade Comm’n*, 574 U.S. 494 (2015).

imposed by the legal profession.<sup>149</sup> In the letter, Division and FTC staff asserted that the ‘practice of law’ should be limited to:

[A]ctivities for which specialized legal knowledge and training is demonstrably necessary to protect consumers and an attorney-client relationship is present. Overbroad scope-of-practice and unauthorized-practice-of-law policies can restrict competition between licensed attorneys and non-lawyer providers of legal services.<sup>150</sup>

### III. **Conclusion: The time for reform is now**

Are these essential reforms possible? Absolutely! How can we make them happen? It will undoubtedly take the combined involvement of the D.C. Bar, working closely with the D.C. Access to Justice Commission, the D.C. Bar Foundation, D.C. Superior Court, the D.C. Consortium of Legal Services Providers, the Mayor’s Office, and the D.C. City Council. And it will be essential to involve nonlawyers in the conversation, particularly community representatives from Wards 5, 7, and 8, where so many SRLs reside. It is time to acknowledge that self-represented litigants deserve priority attention and to carefully assess possible solutions—including those set out above—to a problem that in good conscience D.C., and other jurisdictions, can no longer ignore.

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<sup>149</sup> See Letter from the FTC to the Honorable Bill Cook (Jun. 10, 2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill-436/160610commentncbill.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill-436/160610commentncbill.pdf) (assessing the benefits of proposed legislation with respect to interactive software for consumer, signed by Marina Lao, Director, Office of Policy Planning, Federal Trade Commission and Robert Potter, Chief, Legal Policy Section, Antitrust Division, U.S. Department of Justice).

<sup>150</sup> *Id.*