

**A Study Concerning Maine's Present and Possible
Future Responses to the *Pro Se* Question**

Stacy O. Stitham*
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Today, the indigent's right to appointed counsel in criminal proceedings is firmly established. Every state has followed the lead of the federal government by incorporating such a right. Moreover, the right to counsel has been expanded in many states to encompass situations in which a party faces other serious deprivations of liberty, such as the termination of paternal rights or civil commitment. Yet there is no absolute right to appointed counsel in most civil disputes. And given the enormous costs of dramatically expanding the right to counsel, as well as some doubt that lawyers are necessary or even useful in all types of proceedings, there is not likely to be a universal right to counsel at any point in the near future. Faced with this reality, in recent years many courts have tried a different approach, attempting to become more "user friendly" to laymen rather than providing greater access to court-appointed attorneys in civil matters.

Perhaps in part because of this attempt, unrepresented indigents have swarmed the courts, particularly the lower-level trial courts. Yet once there, many have little understanding of how to present their claims in a forum which presumes at least a basic understanding of its frequently complex substantive and procedural rules. On an even

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more fundamental level, often *pro ses* are at a disadvantage in knowing how to gather the evidence needed in a logical and thorough manner so as to present what he or she hopes to be a winning case. While these problems are endemic to trial courts around the country, because of the limited scope of this paper, the focus herein shall be on the trial courts in Maine, and in particular, the Maine District Court.

A lawyer or law student who observed daily proceedings in the Maine District Court would find little that reminded him of the idealistic version of the adversary system that lies at the foundation of our nation's courts; a system in which two equally well-matched and well-prepared attorneys spar before a referee judge. Here, *pro se* litigants are the norm rather than the exception, and frustrated trial judges must find a way to guide litigants in the presentation of their cases, or risk becoming inundated with irrelevant evidence; and, more disturbingly, risk that justice will not be done.

Part I of this paper will explore the background and extent of the problem, including the demand for free legal assistance and the relative distribution of *pro se* litigants among and within the Maine trial courts. Part II will describe the steps that Maine has taken in order to address the issue of *pro ses*, and will also address where these steps have fallen short. Part II (a) will focus on Maine's efforts to increase access to counsel among low-income persons without creating a statutory or constitutional right to such counsel. This is done primarily through *pro bono* work coordinated by the Volunteer Lawyers Project ("VLP") and through the efforts of legal aid organizations such as Pine Tree Legal Assistance ("Pine Tree"). Part II (b) will examine Maine's attempts to help *pro ses* function more effectively within the existing system. Such efforts include Pine Tree's acclaimed "HelpMELaw" website, interactive court forms,

and the insertion of case management officers into the divorce proceedings of parties with minor children.

Part III focuses on where Maine must go further. Here, the primary obstacle is a lack of resources. Maine's judicial branch currently has one of the lowest budgets in the nation. Given the limited resources that they possess, Maine's judiciary has been truly innovative in figuring out ways to do more with less. The same may be said for Maine's legal aid organizations, which, faced with funding cuts and restrictions in the mid-1990's, began to create self-help materials largely as a life raft for those they were unable to assist. Currently, Maine lacks the resources needed for any sort of large-scale expansion of either the number of legal aid lawyers or the right to counsel, and is likely operating at near-capacity with regard to existing legal aid workers and *pro bono* efforts. However, since no attempt to make the system more understandable merely through readable websites, simplified descriptions of procedure, and interactive forms will sufficiently assist all those who need help with their cases, Maine must come up with inventive ways to increase the aid that it affords *pro ses* when they arrive at the courthouse.

In Part III, this paper will explore the various options available to increase such help without vastly increasing the resources involved, including: (1) focusing the work of legal aid organizations on those cases in which *pro ses* typically fare much worse than represented parties, and making use of *judicare* in order to supplement these efforts in rural areas where legal aid has less of a presence; (2) expanding the use of volunteers and lay advocates in the courts, in situations where litigants may be able to function effectively without a lawyer if they receive some assistance; (3) developing a program similar to the University of New England's Maine Area Health Education Center

(“AHEC”) plan, requiring third-year law students to do a rotation in one of Maine’s courts in order to provide limited assistance to *pro ses*; (4) consolidating the District and Superior Courts into one trial court, and training all trial judges to take a more active approach to proceedings involving *pro ses*. A conclusion and recommendations for follow-up can be found in Part IV of this paper, as well as in the attached appendices.

I. Background and Extent of the Problem

There are a number of reasons why litigants may attempt to navigate the trial court system without a lawyer. Some no doubt do so out of choice, either because they feel the stakes are small enough such that they need not “waste money” hiring a lawyer, or because they feel that they could do an adequate job themselves.¹ One might speculate that at least a few parties (perhaps including those with mental health issues) appear *pro se* because their claims are largely frivolous, and as a result they were simply unable to find lawyers who would accept their cases.

However, many litigants appear in court without a lawyer simply because they cannot afford to hire anyone to represent them. In Maine, recently ranked 40th in the nation in per capita and median household income, this may be particularly likely to be the case.² In 2000, slightly more than 1 in 10 Mainers lived at or below the federal

¹ See John Sheldon, *The False Idolatry of Rules-Based Law*, 56 ME. L. REV. 299, 303 (2004). Sheldon identifies several reasons behind the decisions of parties to proceed *pro se* in the Maine District Court, including the increase in do-it-yourself law publications and causes of action (primarily Protection from Abuse and Protection from Harassment proceedings), the absence of jury-trial complexity, the high cost of lawyers, and the cultural animus towards them. *Id.*

² Maine State Planning Office: 2002 ANNUAL REPORT CARD ON POVERTY IN MAINE, 1 (Apr. 2003), available at <http://www.state.me.us/spo/economics/economics/pdf/poverty2002.pdf>. Furthermore, while the overall poverty rate in Maine has lagged below the national average for a number of years, *see id.* at 1, 3, recent estimates indicate that it has risen above the national average. See Maine State Planning Office: 2003 ANNUAL REPORT CARD ON POVERTY IN MAINE: SUMMARY, 3, 4 (May 2004), available at <http://mainegov-images.informe.org/spo/economics/economics/pdf/poverty2003.pdf> (estimating Maine’s current poverty rate to be 13.4%, whereas the national average stands at 12.1%).

poverty line, and that figure has been increasing ever since.³ Nor does this statistic capture the extent of the problem, as most people with incomes below 200% of the poverty level have inadequate resources to meet even basic needs.⁴ In Maine, as of 2000 nearly 30% of the population fell within this category.⁵ The problem of affordability is exacerbated by the fact that legal services are increasingly being priced beyond the reach of even the middle class, as cases more and more require additional court appearances and are imbued with added procedural steps, thus becoming more expensive.⁶

The demand for legal services to aid the poor is overwhelming. Neither the Penquis CAP Law Project (a public interest law practice providing legal assistance to low and moderate income residents of Penobscot and Piscataquis Counties), nor the Cumberland Legal Aid Clinic (a legal services provider affiliated with the University of Maine School of Law) does much to advertise their services, yet they have no shortage of

³ See 2002 ANNUAL REPORT CARD ON POVERTY IN MAINE, *supra* note 2, at 1, 3. Note that this percentage varies by county. In the southern, more populated counties, the percentage tends to be lower, and vice versa. For example, in Washington County, at the time of the 2000 Census, the poverty rate was 19%, while in Cumberland County it was 7.9%. *Id.* at 1, 26. See also 2003 ANNUAL REPORT CARD ON POVERTY IN MAINE: SUMMARY, *supra* note 2, at 3, 4 (commenting on the recent increase in residents living below the poverty line).

⁴ See 2002 ANNUAL REPORT CARD ON POVERTY IN MAINE, *supra* note 2, at 4.

⁵ *Id.* Again, recent estimates have pushed this figure higher – it is now suggested that roughly a third of the population of the State falls within 200% of the poverty level. See 2003 ANNUAL REPORT CARD ON POVERTY IN MAINE: SUMMARY, *supra* note 2, at 5.

⁶ The prime example is divorce, as when the proceeding is contested and involves minor children, parties may now be required to attend a conference with a case management officer, mediation, a contested hearing on interim issues, a pretrial conference, and a final hearing as well – whereas before the change in the rules a divorce proceeding usually involved only two trips to court: mediation and trial. See ME. R. FAM. DIV. III.B.–C. One can file a certificate in lieu of a conference, see *id.* at III.A., but the bar has complained that this is not an easy enough opt-out procedure. Consequently, since divorces require more steps than before, and more court-time for attorneys, they are more expensive, and the assistance of lawyer is priced beyond the reach of many parties involved. See John David Kennedy and Wendy F. Rau, *Maine's Family Division – Lighting a Dark Stairway*, in Symposium: Improving Maine's Justice System: A Significant Effort in Progress, 11 ME. POL'Y REV. 1 (Spring 2002) (“When two attorneys are involved, the system has undoubtedly increased the costs of some types of moderately contested proceedings and may occasionally introduce delay in the process”).

calls and referrals.⁷ The home web site of Pine Tree (the primary legal aid provider in Maine) was visited over 585,000 times in 2003.⁸ This figure seems particularly remarkable when compared to the fact that the entire population of Maine, as of April 1, 2000, was only 1,274,923.⁹ In recent years, Pine Tree's annual intake has topped 65,000, yet the staff has been able to respond only to about 20% of those requests for aid.¹⁰ Similarly, the VLP (the organization responsible for coordinating the *pro bono* efforts of the private bar) averages about 10,000 calls per year, but is able to provide representation in only 10% of these cases.¹¹

In sum, the demand for legal aid in Maine far outweighs the legal aid resources available, and indigent Maine citizens frequently must enter the trial courts without benefit of legal assistance. Maine has two statewide trial courts: District and Superior. The Superior Court was created in 1929, in order to ease the burden on the Supreme Judicial Court ("Law Court"), which had functioned as both a high court and a trial court since Maine achieved statehood in 1820.¹² While it originally had the power to consider appeals from the District Court, in 2001 the Maine State Legislature provided for the direct filing of most appeals to the Law Court, largely reducing the intermediate appellate

⁷ Telephone Interview with Tamar Mathieu, Esq., Directing Attorney, Penquis CAP Law Project (Nov. 4, 2004). Telephone Interview with Deirdre Smith, Esq., Project Director, Cumberland Legal Aid Clinic (Nov. 2, 2004).

⁸ Pine Tree: Website Statistics 2003, *available at* <http://lstech.org/ntap/trainings/modules/SWEB116/Maine%20PTLA> (last visited Mar. 22, 2005).

⁹ United States Census Bureau, Census 2000 Data for the State of Maine, *available at* <http://www.census.gov/census2000/states/me.html> (last visited Mar. 22, 2005).

¹⁰ Pine Tree, "About Pine Tree Legal Assistance", *at* <http://www.ptla.org/ptlasite/about/about.htm> (last visited Mar. 22, 2005).

¹¹ MAINE VOLUNTEER LAWYERS PROJECT: CELEBRATING 20 YEARS OF DOING MAINE JUSTICE (2003); Telephone Interview with Mary S. Richardson, Esq., Director, Maine Volunteer Lawyers Project (Oct. 20, 2004). Approximately another 7.5% of callers receive in-depth assistance through the "Helpline", although they still must represent themselves. *See id.* Note that some of these calls logged by the VLP and Pine Tree may be duplicates, since often those rejected by one organization will be transferred to, referred to or will otherwise contact another.

¹² *See* State of Maine Judicial Branch, "Maine Court History", *at* <http://www.courts.state.me.us/mainecourts/history/index.html> (last visited Mar. 22, 2005).

function of the Superior Court.¹³ The Superior Court currently handles all jury and jury-waived trials in civil and criminal cases involving adults. In addition, they hear post-conviction reviews, and cases in which equitable relief is requested.¹⁴

The District Court was created in the early 1960's, as a streamlined replacement for the old municipal court system, which had grown somewhat organically.¹⁵ The court always sits without a jury, and has exclusive jurisdiction over family matters.¹⁶ The District Court also handles small claims matters, money judgment cases, child protection cases, juvenile matters, protection from abuse ("PFA") or harassment ("PFH") motions, forcible entry and detainer ("FED") actions, mental health cases, and contested traffic violations.¹⁷ The caseload of the District Court is heavily skewed towards *pro se* litigants, particularly in comparison to the Superior Court, where parties appear to be more often represented, perhaps because cases in that forum tend to be more complex and involve higher stakes.¹⁸ Indeed, statewide, it has recently been estimated that 40% of

¹³ *See id.* *See also infra* p. 74. The Superior Court now hears only appeals from decisions of state and local administrative agencies. *See* State of Maine Judicial Branch, "Superior Courts", at <http://www.courts.state.me.us/mainecourts/superior/index.html> (last visited Mar. 22, 2005).

¹⁴ Maine Judicial Branch, "Superior Courts", *supra* note 13.

¹⁵ *See* Maine Judicial Branch, "Maine Court History", *supra* note 12.

¹⁶ *Id.* *See also* State of Maine Judicial Branch, "District Courts", at <http://www.courts.state.me.us/mainecourts/district/index.html> (last visited Mar. 22, 2005).

¹⁷ *See* Filings Table 1993–2004: Maine District Court. Compiled by Sherry Wilkins, Court Management Analyst, Administrative Office of the Courts, Maine Judicial Branch. *See also* State of Maine Judicial Branch, "Structure of the Courts", at <http://www.courts.state.me.us/mainecourts/structure/index.html> (last visited Mar. 22, 2005); Maine Judicial Branch, "District Courts", *supra* note 16.

¹⁸ Telephone Interview with the Hon. Thomas Humphrey, Maine Superior Court, Cumberland County (Nov. 12, 2004); Telephone Interview with the Hon. Andrew Mead, Maine Superior Court, Penobscot County (Nov. 2, 2004). Both Chief Justice Humphrey and Justice Mead came to the Superior Court from the District Court, and consider the percentage of *pro se* litigants to be much greater in the District Court. They speculate that the reasons might be the complexity of cases in the Superior Court or the fact that the stakes are often higher. *Id.* *But see* Sheldon, *supra* note 1, at 303 (noting the increased numbers of *pro ses* in the District Court but denying that cases in the District Court are relatively uncomplicated). Note also that a large percentage of the Superior Court's docket consists of criminal matters, which may help to explain the frequent presence of lawyers. *See* 2004 REPORT OF THE MAINE JUDICIAL BRANCH: Caseload Statistics, available at <http://www.courts.state.me.us/annualreport/Annualreport2004/index.html> (last visited Apr. 15, 2005) (indicating that only about one out of every five case filings in Superior Court is a civil matter).

District Court litigants represent themselves.¹⁹ Small claims matters, money judgment cases, PFAs and PFHs, FEDs, and traffic violations are all dominated by *pro se* litigants.²⁰ Furthermore, in an overwhelming 75% of family matters actions at least one party is *pro se*.²¹

Despite, or perhaps because of, the large numbers of *pro se* litigants, the cases filed in District Court tend to be less time-consuming than those filed in Superior Court. In 2004, the 33 judges of the District Court had a caseload encompassing 129,071 matters, whereas the 16 justices of the Superior Court had a total caseload of 15,381 matters.²² There are a number of possibilities as to why matters in District Court are less time-consuming. It may be because the matters themselves are less complicated.

¹⁹ See Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, A REPORT TO THE JOINT CONVENTION OF THE FIRST REGULAR SESSION OF THE 122ND LEGISLATURE (Feb. 1, 2005), available at <http://www.courts.state.me.us/news/> (last visited Mar. 22, 2005).

²⁰ This assertion is largely based on anecdotal evidence drawn from the author's interviews with District Court judges, as no statewide survey has yet been conducted as to the numbers of *pro se* litigants in the different areas falling within the District Court's jurisdiction. E-mail from Sherry Wilkins, Court Management Analyst, Administrative Office of the Courts, Maine Judicial Branch, to the author (Nov. 29, 2004) (on file with author). However, while the sample size is not large enough for any conclusive findings, the Hon. Howard Dana of the Law Court conducted a survey of the dockets in the Portland and Springvale District Courts. His findings preliminarily show that less than 1 in 9 defendants in FED actions are represented by a lawyer, and 4 out of 5 parties in PFH matters are not represented. He also found that defendants were much less likely than plaintiffs to be represented in family, contract, and real estate actions. Memorandum from Justice Dana, to the Law Court, Re: Pro Se Representation in the District Court (July 23, 2004). In addition, the author conducted a survey of 2004 FED matters in the West Bath, Augusta, Waterville, Newport, Bangor, and Dover-Foxcroft District Courts. While again, the sample size may not be large enough for any conclusive findings, tentative results indicate that, if anything, there are even fewer represented defendants in FED actions statewide than is suggested by Justice Dana's findings.

²¹ E-mail from Wendy F. Rau, Esq., Family Division Director, Maine District Court, to the author (Nov. 1, 2004) (on file with author); 2004 REPORT OF THE MAINE JUDICIAL BRANCH: Family Division, *supra* note 18. Family law cases pose even more challenges for District Court judges, as when the custody of a child is in dispute, the court may want to utilize a guardian ad litem to make a recommendation regarding the child's best interests. Yet the court budget does not include funding for the appointment of guardians when the parents are unable to pay (unless the case is a child protection proceeding), and judges across the state report a shortage of guardians willing to serve *pro bono* or at a reduced fee. *Id.*

²² 2004 REPORT OF THE MAINE JUDICIAL BRANCH: Caseload Statistics, *supra* note 18. Nearly half of these District Court filings represent criminal matters. Of the remainder, about 11,000 represent PFAs and PFHs, 4,000 FEDs, 9,000 family matters, 3,600 money judgments, and 9,000 small claims. *Id.* See also Filings Table 1993–2004, *supra* note 17. In 2003, the statistics were similar, with 129,606 filings in District Court and 15,586 filings in Superior Court. 2003 REPORT OF THE MAINE JUDICIAL BRANCH: Caseload Statistics, available at <http://www.courts.state.me.us/annualreport/Annualreport2003/index.html> (last visited Mar. 22, 2005). In 2002, the disparity between the courts was greater, with total statewide case filings in the District

On a somewhat related note, it may be that *pro se* litigants simply don't have much to say (or much to say that is admissible) in the presentation of their claims, and thus matters proceed quickly in such cases. On the other hand, it may be that there are simply so many cases filed in District Court that judges cannot afford to devote as much time to the resolution of them, and so they hurry parties along.

Regardless of the reason, it is certain is that on a daily basis a Maine District Court judge must wade through a heavy docket in which *pro ses* frequently appear. How do *pro ses* fare under such circumstances? The answer is likely to be different depending on whether or not there is an attorney or a *pro se* on the other side of the aisle. If there is an attorney on the other side, even if she makes allowances for the *pro se's* lack of training, she will probably still be making evidentiary objections throughout the *pro se's* presentation. Many judges will attempt to help the *pro se* out somewhat, either by asking the objecting attorney to explain her objections or perhaps by briefly explaining them himself.²³ But there are limits on what the judge can or at least perceives he can do, as he is bound by the principle of judicial impartiality inherent in the traditional model of the adversary system. And attorneys may be upset by any perceived favoritism of the unrepresented side. Overall, the experience is likely to be a frustrating one for the *pro se* litigant, who may try three times to ask a question, each time being told by the judge and the opposing side that such a question will not be allowed because of something called "hearsay". It may be a frustrating one for the judge as well, who will be trying to fulfill

Court reaching 134,221, and total filings in the Superior Court standing at 12,729. 2002 ANNUAL REPORT OF THE MAINE JUDICIAL BRANCH: Maine Courts: Case Filings by County, *available at* <http://www.courts.state.me.us/annualreport/Annualreport2002/report1.html> (last visited Mar. 22, 2005).

²³ The concept that it is sometimes necessary to intervene in order to try to level at least somewhat the procedural playing field when one party is represented and the other is not seems fairly common, and was mentioned as standard practice by the majority of the trial judges that I interviewed.

his role as fact-finder and to determine what precisely the basis of the *pro se*'s claim or defense is, through a barrage of objections. And it is likely to be frustrating for the lawyer, who is "on the clock" and charging her client for every time the judge breaks to explain procedure or the rules of evidence to the *pro se*.

If both parties are *pro se*, the judge may need to intervene even further in the case, unless he is willing to run the risk that the relevant evidence might never be presented. Because the District Court judge sees *pro ses* so often, and may conclude that to leave them foundering on their own will just lead to a victory for whichever party does not have the burden of proof,²⁴ regardless of what the dictates of justice require, he may (but by no means has to) bend the system and its rules. Indeed, the judge may even go so far as to use what is essentially small claims procedure, in order to try to discover what the actual issues are as well as any common ground between the parties. This perhaps is more satisfying for the *pro ses* involved than the previous situation discussed, and gives them a better opportunity to be heard. But it may present a dilemma for the judge, who has been taught that the adversarial system requires judicial neutrality, often equated with judicial passivity. In other words, the judge may be left feeling ethically uneasy, particularly since there is such a disconnect between the idealized version of the adversary system held up to him as a model and its inadequacies in meeting the daily realities of the District Court docket.²⁵

²⁴ Or perhaps whichever party best understands the system and its rules. While it may be thought that the issue of a power imbalance is only relevant when one party is represented and the other is not, such is not always the case. For example, in FED matters, many *pro se* plaintiffs are landlords who are repeat players in the courtroom and understand its rules, thus having a clear advantage over defendants.

²⁵ See American Bar Association, Joint Commission to Evaluate the Model Code of Judicial Conduct, Public Hearing, Atlanta, GA (Aug. 6, 2004) (statement of Hon. Annette Scieszinski, Iowa District Court, Eighth Judicial District) "I stand before you as a judicial officer living the near-daily struggle with *pro se* litigants and the constant worry about assuring those people meaningful access to our courts, while being apprehensive that in doing that I may step over an imaginary line into judicial impropriety." *Id.* See also

Consequently, neither situation is entirely satisfactory to all involved. In order to implement a process that provides for a fair outcome as well as ensures a fair opportunity for both sides to be meaningfully heard, it is necessary either formally to revamp the system to meet the needs of *pro ses*, or to provide *pro ses* with lawyers, so that they might adapt their needs to the confines of the system. Maine has attempted both of these potential resolutions, but due to a lack of resources and other considerations, it has fallen short.

II. The Steps that Maine Has Taken

A. The Right to Counsel, Pro Bono, and Increased Access to Legal Aid Lawyers

Maine, like every other state in the nation, has provided for the right to counsel in criminal proceedings.²⁶ Tracking a trio of cases in the United States Supreme Court,²⁷ this right extends to any felony case or any misdemeanor case in which actual jail time will be imposed on the defendant.²⁸ In addition, parents and custodians have a right to counsel in most child protection proceedings,²⁹ and a person facing civil commitment or involuntary hospitalization for mental illness has the right to appointed counsel.³⁰

American Bar Association, Joint Commission to Evaluate the Model Code of Judicial Conduct, Public Hearing, Washington, D.C. (Dec. 5, 2003) (statement of Richard Zorza) “The core problem, it seems to me, is that judges are torn between, on the one hand, the day-to-day reality of a litigant who doesn’t know what he or she is doing in the courtroom and the sense that terrible injustice, terrible confusion and terrible court delay can result from that, on the one hand, and on the other hand, a generation of viewer judging this [sic] says, you don’t lean over the bench, you don’t stick your hand on the scales of justice and so on... The result has been a – what we might call two phenomena: guilty passivity...or guilty engagement.” *Id.*

²⁶ See ME. CONST. art. 1, § 6; ME. REV. STAT. ANN. tit 15, § 810. See also *Newell v. State*, 277 A.2d 731, 735-36 (Me. 1971), *overruled on other grounds by State v. Cook*, 1998 ME 40, 706 A.2d 603.

²⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and *Scott v. Illinois*, 440 U.S. 367 (1979).

²⁸ *State v. Cook*, 1998 ME 40, ¶ 6, 706 A.2d at 605. *Cook* overruled the holding of *Newell* which had extended the right to counsel to defendants facing criminal charges which might result in the imposition of a penalty of imprisonment for a period of more than six months or a fine in excess of \$500. 277 A.2d at 738. *Newell* had been decided before *Argersinger* and *Scott*.

²⁹ See ME. REV. STAT. ANN. tit. 22, § 4005. See also *Danforth v. State*, 303 A.2d 794 (Me. 1973).

³⁰ See ME. REV. STAT. ANN. tit 34-B, § 3864. Civil commitment is somewhat analogous to incarceration, which intuitively helps to explain the relatively common extension of the right to appointed counsel in this context. See 53 AM. JUR.2D *Mentally Impaired Persons* § 39 (2004)

However, there is no absolute right to counsel in other extremely important contexts, such as eviction proceedings, although counsel may be granted in a case-by-case basis under the due process balancing test enunciated by the Supreme Court in *Mathews v. Eldridge*.³¹ Maine has been relatively conservative in defining the right of an indigent to appointed counsel, either by constitution or by statute. While other states have found such a right in contempt proceedings, Maine has not.³² Maine has also neither found within its constitution nor created by statute a right to counsel in an action to establish paternity.³³ And it has limited its *Danforth* holding, by determining that there is no right to counsel in an action to terminate visitation when the dispute is between parents and the termination order is temporary.³⁴

Consequently, the scope of the right to counsel in Maine is largely limited to the mandates of *Gideon* and progeny, and has not been significantly expanded either by the courts or by the legislature. Therefore, an indigent desiring the aid of a lawyer in a civil proceeding must either try to get a local attorney to take his case *pro bono*, or hope that a legal aid lawyer will take the case. Regardless of which avenue he chooses, resources are scarce. Furthermore, they may be unevenly distributed.

³¹ 424 U.S. 319 (1976). See also *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981). Under this test, the private interest at stake, the government's interest, and the risk of error are weighed against the presumption that an indigent litigant has a right to appointed counsel only when his liberty is at stake. *Id.* at 27. For an argument in favor of a right to counsel in eviction proceedings, see Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988).

³² See *Colson v. State*, 498 A.2d 585 (Me. 1985); *Meyer v. Meyer*, 414 A.2d 236, 238 (Me. 1980). Cf. *Ottom v. Zaborac*, 525 P.2d 537 (Alaska 1974); *People v. Lucero*, 584 P.2d 1208 (Colo. 1978); *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993); *Zetty v. Piatt*, 776 A.2d 631 (Md. 2001); *Mead v. Batchlor*, 460 N.W.2d 493 (Mich. 1990); *Allen v. Sheriff of Lancaster County*, 511 N.W.2d 125 (Neb. 1994); *McBride v. McBride*, 431 S.E.2d 14 (N.C. 1993); *Peters-Riemers v. Riemers*, 674 N.W.2d 287 (N.D. 2004); *Wold Family Farms, Inc. v. Heartland Organic Foods, Inc.*, 661 N.W.2d 719 (S.D. 2003); *Smoot v. Dingess*, 236 S.E.2d 468 (W.Va. 1977); *Ferris v. State*, 249 N.W.2d 789 (Wis. 1977).

³³ See *State v. Tarvers*, 561 A.2d 1029 (Me. 1989). Cf. *Piper v. Popp*, 482 N.W.2d 353, 363 n.12 (Wis. 1992) (citing state statute giving putative father right to appointed counsel in certain paternity proceedings);

³⁴ See *Meyer*, 414 A.2d at 238.

The VLP coordinates the *pro bono* efforts of the private bar statewide. Maine’s lawyers have a long tradition of active *pro bono* work. In 1992, eighty percent of Maine’s active private practitioners were registered volunteers with the VLP, a statistic which earned the bar national recognition.³⁵ Even though that figure has since declined, Maine’s lawyers remain committed to *pro bono* work.³⁶ Besides volunteering with the VLP, practitioners around the State (particularly in rural areas) have reported that they occasionally take on locally-referred cases or matters brought to their attention from other sources for which they charge reduced fees or no fees at all.³⁷

Despite the efforts of the VLP and the private bar, there are several important gaps in the ability of *pro bono* to meet the legal services demands of Maine citizens. First, there are significant limits placed upon the VLP’s ability to take cases by restrictions imposed upon the organization through its funding. Both Pine Tree and the VLP receive the majority of their funding from three sources: the Legal Services Corporation (“LSC”), Interest on Lawyers’ Trust Accounts (“IOLTA”), and the Maine Civil Legal Services Fund.³⁸ Of the three, only the last (a state pool consisting of

³⁵ See CELEBRATING 20 YEARS OF DOING MAINE JUSTICE, *supra* note 11.

³⁶ VLP lawyer participation has declined since the late 1990s (although part of this decline may simply be due to more accurate measurements of the term “participation”). See Hon. Frank M. Coffin, *A History of the Justice Action Group: October 1995 – May 2000*, 15 ME. BAR J. 248, 252–53 (Oct. 2000); E-mail from Mary S. Richardson, Esq., Director, VLP, to the author (Mar. 15, 2005) (on file with author). According to VLP Director Mary Richardson, the decline may be attributed to increased specialization in the practice of law, the shift to a new generation of attorneys, greater economic pressure on law firms, and the decline of rural practitioners. *Id.* Despite the decline, Maine lawyers still play an active role in the state’s effort to deal with indigent litigants. Last year, Maine lawyers donated a total of \$360,000 to legal aid programs, mainly through JAG’s “Campaign for Justice”. See Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, *supra* note 19; Gregory D. Kesich, *Lawyers ante up for the poor*, PORTLAND PRESS HERALD (June 30, 2004). Given the relatively small amount of lawyers in the State, that is one of the highest per-lawyer giving levels for a statewide campaign in the country. Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, *supra* note 19.

³⁷ In addition to voluntary *pro bono*, often a sort of “involuntary” *pro bono* occurs in some smaller practices, where attorneys bend the business practice of obtaining an advance towards fees and costs and instead rely on an informal promise to pay later - a promise which is not always fulfilled.

³⁸ Telephone Interview with Mary S. Richardson, *supra* note 11; Pine Tree, “About Pine Tree’s Funding”, at <http://www.ptla.org/ptlasite/about/funding.htm> (last visited). Pine Tree also receives an annual

surcharges on filing fees and civil fines) has comparatively few substantial restrictions on how the funds are used.³⁹ Roughly 45% of Pine Tree’s total budget each year is made up of LSC funding, 12 ½ % of which is earmarked to spend on private attorney involvement.⁴⁰ That portion goes to the VLP and makes up about a fourth of its total funding.⁴¹ Unfortunately, in general, LSC funds may only be spent on individuals whose annual income level is less than 125% of the federal poverty guideline.⁴² Yet, as pointed out earlier, even those within 200% of the guideline have serious trouble meeting basic needs. Maine’s IOLTA program, under which interest earned on certain trust accounts that lawyers open to deposit client monies is paid to the Maine Bar Foundation (“MBF”), which uses it to fund legal services,⁴³ has similar restrictions. IOLTA funds must usually be used on those with income levels at or under 185% of the federal poverty guideline.⁴⁴

Perhaps the greatest obstacle preventing Maine’s legal aid organizations from meeting the needs of her citizens is that the sheer volume of calls exceeds the resources

appropriation from the State, as well as a grant from United Way for domestic violence work (significantly, this grant does not have income restrictions). *Id.* See also Pine Tree, “Financial Eligibility Criteria”, at <http://www.ptla.org/ptlasite/PDF/eligibility.pdf>.

³⁹ Telephone Interview with Mary S. Richardson, *supra* note 11; ME. REV. STAT. ANN., tit. 4, § 18-A. This source has traditionally accounted for a relatively modest percentage of the total amount of legal services funding, but the Justice Action Group (“JAG”) has recently submitted a bill to the Maine Legislature seeking that the amount of the surcharge be increased (as well as seeking a general appropriation for legal aid services from the State). See An Act to Provide Support for Legal Services for Low-income Mainers, L.D. 715, 122nd Leg., 1st Reg. Sess. (Me. 2005). Note generally that JAG “is an organization that performs leadership and coordination with respect to planning for, and the provision of, legal services to low-income Mainers. Its membership includes individuals from the state and federal judiciary, the Maine Legislature, the Executive Branch, the Maine State Bar Association, the Maine Bar Foundation, the Maine Civil Legal Services Fund Commission, and the boards of legal service providers.” Maine Bar Foundation, “Justice Action Group”, at <http://www.mbf.org/justice.htm> (last visited Mar. 22, 2005).

⁴⁰ LSC Private Attorney Involvement Rule, 45 C.F.R. § 1614.2. See also Pine Tree, “About Pine Tree’s Funding”, *supra* note 38.

⁴¹ Telephone Interview with Mary S. Richardson, *supra* note 11; E-mail from Mary Richardson to the author (Mar. 15, 2005), *supra* note 36.

⁴² LSC Eligibility Rule, 45 C.F.R. § 1611.3. Under some circumstances, people within 150% of the national eligibility level may be provided with legal assistance. See 45 C.F.R § 1611.4.

⁴³ See MBF: “IOLTA – Questions & Answers”, at <http://www.mbf.org/iolta.htm> (last visited). See also ME. BAR R. 3.6.

⁴⁴ Telephone Interview with Mary S. Richardson, *supra* note 11. See also Pine Tree, “Financial Eligibility Criteria”, *supra* note 38.

available in terms of *pro bono* hours. This problem is particularly salient in the northern and rural areas of Maine, where the need is great but attorneys are few. For example, in Piscataquis County, during the years 2000 to 2003, there were only twelve active members of the bar, yet 199 calls for legal services originated from the area.⁴⁵ The VLP referred 24 of these cases out - a ratio of two *pro bono* cases per lawyer. In contrast, during the same time period, Cumberland County had 1726 members of the bar, to whom a total of 503 cases were referred.⁴⁶ This works out to a ratio of 0.29 cases to each lawyer. The fact that Maine's rural attorneys have "accepted the major share of the burdens caused by *pro bono* representation" is noted by the VLP's website as some cause for concern, particularly if the rural legal community does not continue to shoulder such a heavy burden in the future.⁴⁷

Pine Tree, Maine's largest legal aid organization, also has some difficulty in serving the rural communities. Pine Tree currently has six field offices, located in Portland, Lewiston, Augusta, Bangor, Machias and Presque Isle.⁴⁸ During the budget cuts of the mid-1990's, Pine Tree was down to four offices, having closed Machias and Lewiston. However, when Pine Tree began its operations, it had a total of eight offices:

⁴⁵ See CELEBRATING 20 YEARS OF DOING MAINE JUSTICE, *supra* note 11. Note generally that seven out of the sixteen Maine counties have between just four and eight lawyers for every 1000 people below the poverty line. *Id.*

⁴⁶ *Id.*

⁴⁷ See "The VLP: Ten Years After – History of the VLP" (1993), at <http://www.vlp.org/history.htm> (last visited Mar. 22, 2005). See also Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, *supra* note 19 ("In several of our counties, there are simply not enough lawyers to help"); Mary S. Richardson, "Looking Forward", in CELEBRATING 20 YEARS OF DOING MAINE JUSTICE, *supra* note 11 ("We continue to face recurring challenges: ...the geographical mismatch between clients and attorneys in Maine"). It should be noted, however, that though rural attorneys in small firms and solo practices have contributed a large proportion of human resource hours to the cause of *pro bono* activities, Maine's larger urban firms have financially contributed a great deal. In the late 1990's, several of the larger firms joined together under the leadership of JAG to create the Frank M. Coffin Fellowship, which funded three (now two) positions in southern Maine for lawyers to handle cases involving domestic violence or contested paternal rights. *Id.*

⁴⁸ See Pine Tree, "About Pine Tree Legal Assistance", *supra* note 10.

the existing six along with locations in Rockland and Skowhegan (the Rockland office was briefly re-opened after its closure).⁴⁹ According to Pine Tree's Executive Director, each time an office was re-opened, there was an increase in the amount of cases brought to Pine Tree's attention from the area.⁵⁰ It has been suggested that over 15% of Maine's adult population is functioning at the lowest level of literacy;⁵¹ and literacy rates and poverty are often correlated.⁵² Therefore, it is perhaps not surprising that a physical office in the area would receive walk-in traffic from people in need who would otherwise not be able to read an informational pamphlet (assuming that they managed to obtain such a pamphlet in the first place) or perhaps even a phone book in order to learn about and contact a centralized office. Particularly since the very poor may not be likely to have a phone (or easy access to transportation), and thus have even greater obstacles preventing them from reaching the attention of legal aid organizations outside the immediate surrounding area. Indeed, in 1990, the Maine Commission on Legal Needs

⁴⁹ Telephone Interview with Nan Heald, Esq., Executive Director, Pine Tree Legal Assistance (Nov. 23, 2004).

⁵⁰ *Id.* It has been predicted that in the future, legal aid organizations will reestablish legal services as a physical presence in rural areas by reopening more of their branch offices. A branch office does not have to be extensive or expensive – legal aid organizations could operate such an office for just a few hours every week (perhaps in an area church or public library in order to save the cost of renting space), and staff the office with a paralegal and some volunteers. The paralegal would require online access and phone contact with the main office, but little else. See Wayne Moore, *The Future of the Delivery of Legal Services to Low-Income People*, in Bellow-Sacks Access to Civil Legal Services Project Materials, Seminar on Pro Se and Client Self-Help: Challenge and Opportunity for the Courts and the Legal Aid Delivery System (May 10 and 11, 2002) (on file with the author).

⁵¹ Literacy Volunteers of Maine, "Literacy in Maine", at http://www.lvmaine.org/about_lit.php (last visited Mar. 22, 2005). Adults scoring at this level, while not necessarily illiterate, have "difficulty using certain reading, writing, and computational skills considered necessary for functioning in everyday life". National Institute for Literacy, *The State of Literacy in America: Estimates at the Local, State, and National Levels*, available at <http://www.nifl.gov/readers/intro.htm> (last visited Mar. 22, 2005).

⁵² In the 1990's, 43% of people at the lowest level of literacy were estimated to be living in poverty. See National Institute for Literacy, *The State of Literacy in America: Estimates at the Local, State, and National Levels*, *supra* note 51. See also National Literacy Act, Pub. L. No. 102-73, 105 Stat. 333 (1991) ("Literacy problems are...closely associated with poverty"); REPORT OF THE MAINE COMMISSION ON LEGAL NEEDS, Chapter I: Poverty and Legal Problems in Maine, 36 (1990) ("Even more fundamentally, our legal system assumes a high degree of basic literacy skills which enable one to read, write, listen to and understand complex language. Data demonstrating that the educational levels of the poor are low suggest that their ability to function effectively within the legal system is compromised at the level of these fundamental skills).

found that poor people living in an area in which a legal service office is located were *six times* more likely to have obtained free legal services, as well as twice as likely to be aware of the availability of free legal services, than those living outside the area.⁵³

Pine Tree has ameliorated this problem of location through the development of its acclaimed “HelpMELaw” website, which contains a relatively easy-to-use search engine that nevertheless provides valuable tailored results to the user.⁵⁴ HelpMELaw’s search engine is designed to retrieve not only results that Pine Tree has found relevant to the search terms entered, but also contact information for organizations that might be able to provide assistance. For example, a search of “divorce” retrieved not just documents relating to divorce, but, when the “low income household” bubble was checked on the search page (and county information inputted), information regarding the VLP and other legal aid organizations in the area that could possibly help the searcher. While the

⁵³ REPORT OF THE MAINE COMMISSION ON LEGAL NEEDS: AN ACTION PLAN FOR THE 1990’s, Executive Summary, 8-9 (1990). The full report is somewhat unclear as to whether or not it is a lack of information or transportation that is the primary problem preventing people from accessing free legal services outside their immediate geographic area. While the report seems to suggest that it is a deficiency in information and understanding that is the problem, it also quotes testimony from a public hearing indicating that a lack of transportation is also part of the problem. In addition, it suggests that “social service agencies may be able to assist with transportation to a legal services office.” See REPORT OF THE MAINE COMMISSION ON LEGAL NEEDS, *supra* note 52, at 36-38 (1990). Many organizations (particularly community action programs) do provide transportation services for low income citizens. For example, “RTP Rides” assists Medicaid clients in Cumberland County who need to get to a doctor’s appointment and have no other way of doing so. The program is reimbursed by the State for its expenses. See Dep’t of Health & Human Servs., Ch. 101: MAINECARE BENEFITS MANUAL, Chapter II, Section 113: Transportation Services, available at <http://www.maine.gov/sos/cec/rules/10/ch101.htm> (last visited Mar. 22, 2005). See also E-mail from Charles Baker, Director of Services and Operations, RTP Rides, to the author (Mar. 7, 2005) (on file with the author). In addition, it operates as an ADA transit provider for several cities in Cumberland County. See *id.* See also RTP Rides, “Rides for persons with disabilities”, at <http://www.rtprides.org/disabilities.html> (last visited Mar. 22, 2005). More broadly, RTP Rides “provides low-cost transportation to the elderly, social service agency clients, the economically disadvantaged and persons with disabilities throughout Cumberland County”. See RTP Rides, “About RTP”, at <http://www.rtprides.org/about.html> (last visited Mar. 22, 2005). See generally ABILITYMAINE: Maine’s Online News Magazine and Resource Guide for People with Disabilities, “Transportation Guide” at <http://www.abilitymaine.org/guides/transportation.html> (last visited Mar. 22, 2005) (providing a detailed list and description of transportation services by county).

⁵⁴ Telephone Interview with Hugh Calkins, Esq., Research and Development, Pine Tree Legal Assistance (Nov. 8, 2004); Hugh Calkins, *Inside the HelpMeLaw Web site*, “Something about Technology”, ME. BAR J. (Summer 2002); Kathleen Caldwell & Hugh Calkins, Pine Tree, *The Mother of Invention: From Budget Cuts to Web-Based Pro Se Delivery*, MGMT. INFO. EXCH. J., Vol. XV, No. 1, 58 (Summer 2000).

information on “local” legal aid organizations might not be of much practical help to a user without reliable access to transportation who lives in an area miles and miles distant from the nearest such organization, at least the user will be *aware* of what legal services are in fact available. Furthermore, the user will be able to access many of the informational services that the various legal aid organizations offer, without having to travel any further than the local public library.

While the HelpMELaw website (along with other online resources) is a laudable attempt to ease the problem of access to legal services by geographically remote areas, illiteracy remains a significant obstacle to access.⁵⁵ The materials found on the HelpMELaw site, along with pamphlets and handouts designed by the judicial branch which are offered to *pro ses* at the courthouses, are aimed for a fifth or sixth-grade reading level.⁵⁶ However, there are limits to the extent that a complex process (one which in law school is taught to students who have not only graduated from high school but also from college) can be simplified without losing important information. Thus, while aimed for a lower level, the materials may in fact be written at a seventh or even a

⁵⁵ Pine Tree had a three-year grant (which came to an end in 2003) to provide videoconference connections between participating domestic violence shelters and the courts. See Letter from Hon. Joseph Field, Maine District Court, to Hon. Kermit Lipez, United States Court of Appeals, First Circuit, Re: Self-Represented Litigants Task Force (July 13, 2004) (on file with author). Among the goals of this project were attempts to deal with the problems of: (1) fear of encountering the abuser, (2) poor literacy skills for completing the necessary court forms, (3) lack of transportation to the courthouse, and (4) little awareness of other legal assistance available to victims. Pine Tree, TOP FY 2000 Project Narrative, Grant #23-60-00002, Portland, ME, available at <http://ntiaotiant2.ntia.doc.gov/top/docs/nar/pdf/236000002n.pdf>. The potential of a videoconferencing system to provide face-to-face contact between difficult to reach would-be clients and Pine Tree’s offices is promising, and would seem to provide a possible way around the problem of illiteracy. *But see* “The Use and Effectiveness of Videoconferencing Equipment at Pine Tree Legal Assistance”, submitted by Robert Echols, Equal Justice Consulting Services, 14 n.11 (Dec. 2003), available at http://lstech.org/projects/tig_2001_14 (last visited Mar. 22, 2005) (suggesting that other jurisdictions had had questionable success with such projects, particularly when it required clients to travel to distant sites).

⁵⁶ See Caldwell & Calkins, *The Mother of Invention*, *supra* note 54. See also Interview with Kathleen Caldwell, Esq., Pro Se Coordinator, Pine Tree Legal Assistance, in Bangor, Me. (Oct. 27, 2004); Telephone Interview with Wendy F. Rau, Esq., Family Division Director, Maine District Court (Oct. 18, 2004).

ninth-grade reading level.⁵⁷ Furthermore, regardless of how much the information is simplified, it will not make any difference to those who are in fact illiterate or functioning at extremely low levels of literacy unless they have someone else available to explain the pamphlets to them.⁵⁸

Consequently, while straightforward instructions on HelpMELaw, as well as simplified pamphlets available in the courthouse, may ameliorate the problem of distance, the problem of illiteracy will continue to frustrate attempts by those who live in remote areas to obtain access to the assistance offered by Pine Tree. Nor do Maine's other legal services providers have much of a presence in rural communities. The locations of the offices of the Legal Services for the Elderly ("LSE") largely track those of Pine Tree: Augusta, Bangor, Lewiston, and Presque Isle.⁵⁹ While LSE does not have an office in Portland, it does have one in nearby Scarborough.⁶⁰ The Cumberland Legal Aid Clinic is based out of Portland, and the farthest away that the participating student volunteers must travel is to South Paris – a distance of roughly fifty miles.⁶¹ The Maine Equal Justice Partners ("MEJP"), which is responsible for advocating for low-income

⁵⁷ *Id.*

⁵⁸ In 1998, Pine Tree conducted a research study on the effectiveness of its client education materials, in order to determine the level of understanding of its written materials sent to persons calling its hotline. The evaluator interviewed 50 program participants by telephone. All of those receiving the tenants' rights materials found them helpful, but half of those receiving the family law materials reported that they had trouble understanding them. The evaluator did not ask substantive questions to try to determine the client's actual level of understanding, and a number of clients refused to answer any follow up questions, which suggested to the evaluator that they may have been misrepresenting the level of their comprehension. Four out of the fifty people interviewed admitted that they were illiterate, but three stated that they were able to make effective use of the materials by having a literate person assist them. See John M. Greacen, *Self Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know*, Prepared for the Center for Families, Children & the Courts, California Administrative Office of the Courts, available at <http://www.courtinfo.ca.gov/programs/cfcc/pdf/SRLwhatweknow.pdf>.

⁵⁹ Maine's Legal Services for the Elderly, "Offices", at <http://www.mainelse.org/offices.htm> (last visited Mar. 22, 2005). LSE is an organization designed to provide "free, high quality legal assistance to socially and economically needy Maine residents age 60 and over". LSE website at <http://www.mainelse.org> (last visited Mar. 22, 2005).

⁶⁰ LSE, "Offices", *supra* note 59.

⁶¹ Telephone Interview with Deirdre Smith, *supra* note 7.

people in the legislature as well as providing class action and administrative representation, is located only in Augusta.⁶² The same is true of the Disability Rights Center of Maine (“DRC”), Maine’s protection and advocacy agency for people with disabilities.⁶³ And the Immigrant Legal Advocacy Project (“ILAP”), which provides assistance to low-income residents on immigration law and related issues, has only one office as well, located in Portland.⁶⁴

Indeed, out of all the legal services organizations in Maine, only two have office locations outside of the major population centers in Maine: Pine Tree, which has an office in Machias, and Penquis CAP, which, although its Law Project is based out of Bangor, serves residents of both Penobscot and Piscataquis County.⁶⁵ The towns of Dover-Foxcroft and Lincoln, both rural areas roughly an hour’s drive away from Bangor, have their own Penquis CAP offices. Furthermore, the project is attempting to start office hours in the similarly-situated town of Millinocket, as it has found outreach to be relatively ineffective there.⁶⁶

While it certainly seems obvious that the major population centers in Maine should be home to the most legal services workers, it is less intuitive that there should be a number of different offices in the major cities and none in rural areas. By consolidating different offices within the cities (particularly Bangor, Augusta, and Portland), additional

⁶² Maine Equal Justice Partners, “Where We’re Located”, at <http://www.mejp.org/Who.htm> (last visited Mar. 22, 2005).

⁶³ See Disability Rights Center of Maine website at <http://www.drcme.org/> (last visited Mar. 22, 2005).

⁶⁴ Immigrant Legal Advocacy Project website at <http://www.immigrantlegaladvocacy.org/> (last visited Mar. 22, 2005). In addition, the Maine Civil Liberties Union (“MCLU”), which represents violations of civil liberties by the government, just has a Portland office. Yet the MCLU will not take clients either on a walk-in basis or over the phone, instead requiring someone seeking legal assistance to write a letter requesting services. See MCLU, “Need Legal Help?”, at <http://www.mclu.org/Programs/Legal/NeedLegalAssistance.htm> (last visited Mar. 22, 2005). This presents obvious problems for those functioning with low levels of literacy.

⁶⁵ Arguably, Presque Isle is not a major population center either, in which case LSE falls in this category as well.

⁶⁶ Telephone Interview with Tamar Mathieu, *supra* note 7.

resources would be available to allow at least part-time services in more rural areas.⁶⁷

For example, instead of having separate offices for Pine Tree, LSE, and ILAP in the Portland area, one could consolidate the offices, eliminate duplicative administrative staff, and use the funds to hire more legal aid attorneys (one could also re-assign some of the existing attorneys to other locations).⁶⁸ The difficulties here would involve the fact that each organization currently has its own sources of funding and separate priorities. However, consolidation could probably be done with appropriate firewalls and perhaps some reshuffling of priorities. Indeed, currently the VLP and Pine Tree share a Portland office, despite the fact that they have different priorities.⁶⁹

⁶⁷ Another way to free up more resources is by making more use of a sliding-scale fee structure. Currently, the Penquis CAP Law Project and ILAP ask clients to pay small fees if they can afford it. *See* Penquis CAP: Law Project, at <http://www.penquiscap.org/penquis.nsf/webpages/Law+Project> (last visited Mar. 22, 2005); ILAP website, *supra* note 64. Similarly, the Cumberland Legal Aid Clinic asks clients to pay a \$10 administrative fee, and may ask clients to cover court costs. Cumberland Legal Aid Clinic website at <http://mainelaw.maine.edu/clac/> (last visited Mar. 22, 2005). According to Tamar Mathieu, the Directing Attorney of the Penquis CAP Law Project, most contributions are made post-case, when clients are in better financial situations. She speculates that the reason is that many clients want to give back something to the organization which helped them - to allow someone else with a similar problem the opportunity to be helped. Telephone Interview with Tamar Mathieu, *supra* note 7. More cynically, one could argue (as some have) that charging even small fees during the progression of a case may help the client realize the value of the lawyer's time, and may lead to a more efficient working relationship between lawyer and client by eliminating unrealistic demands placed on the lawyer by the client. Although client co-payments may lead to more efficient management of existing cases and infuse more funds into the organization, Pine Tree, the major legal aid organization in Maine, is principally funded through LSC, which traditionally has not charged clients. Telephone Interview with Nan Heald, *supra* note 49. Following LSC, there is understandable resistance among higher-ups at Pine Tree to charging low-income clients who have trouble making ends meet at all, even if the fees are very small or are voluntary. *Id.*

⁶⁸ Since answering phones is unrelated to an office's physical location, in addition to consolidating neighboring offices, the various legal aid organizations around the State should consider moving towards one statewide intake system. Such an intake system would eliminate the need for frustrated, would-be clients to make repeat calls or be continually referred to different organizations, in order to find one that might take his or her case. It would also make it easier to document the extent of the need for legal services (since calls would not be duplicates), and to determine precisely how many people are not being helped. *See supra* note 11. Intake workers could answer calls, document the type of problems, screen for financial or other disqualifications, categorize the cases, and then post them online for the different legal aid organizations to pick up. At the very least, Pine Tree should consider the merits of implementing one intake system, rather than decentralizing intake to the neighborhood offices. *See* Pine Tree, "Contact Us", at <http://www.ptla.org/ptlasite/cliented/contact.htm> (last visited Mar. 22, 2005).

⁶⁹ Telephone Interview with Mary Richardson, *supra* note 11. The relationship between Pine Tree and the VLP is unusually close, however, as the VLP is a joint project of the MBF and Pine Tree. E-mail from Mary Richardson to the author (Mar. 15, 2005), *supra* note 36. Pine Tree houses and administers the VLP,

But it should be noted that it is not clear that rural areas are getting a disproportionate share of legal services. Indeed there is evidence suggesting that at least some urban areas (particularly in the southern part of the State) are more underserved. In 2003, Pine Tree provided extended representation in 1251 cases across the State. Of those, 39 were located in Oxford County and 17 in Piscataquis County (both rural counties without legal aid offices).⁷⁰ As of the same time, the population of Maine was estimated to be 1,305,728, with 56,151 of those residents living in Oxford and 17,394 living in Piscataquis.⁷¹ Consequently, in 2003 Oxford County contained roughly 4% of the population, and received roughly 3% of Pine Tree's services. Similarly, Piscataquis County contained roughly 1% of the population, and received roughly 1% of Pine Tree's services. In contrast, Cumberland County (including the city of Portland), contained about 21% of the total population of Maine but received only 18% of Pine Tree's services.⁷² Thus, the numbers reported by Pine Tree may suggest that the existing placement of offices (at least for Pine Tree) is relatively appropriate, and that any increase in resources obtained by consolidating the existing offices should not go to more

provides the VLP with LSC funds, and also provides staffing. See CELEBRATING 20 YEARS OF DOING MAINE JUSTICE, *supra* note 11; Pine Tree, "About Pine Tree Legal Assistance", *supra* note 10.

⁷⁰ Pine Tree, "LSC Closed Cases by County, PTLA & VLP", attachment to e-mail from Nan Heald, Esq., Executive Director, Pine Tree, to the author (Nov. 23, 2004) (on file with author). It should be noted that some of Pine Tree's funding (especially that intended to serve domestic violence victims) prioritizes extended representation work. This can skew the local counts in those communities where Pine Tree has that funding. *Id.*

⁷¹ See Census 2000 Data for the State of Maine, "State by County", *supra* note 9.

⁷² Pine Tree provided extended representation to 221 cases in Cumberland County in 2003, and the population of the area at the time was estimated at 270,923. *Id.*; Pine Tree, "LSC Closed Cases by County, PTLA & VLP". Similarly, York County contained 15% of the population of Maine in 2003, yet received only 9% of Pine Tree's services.

On the other hand, the data for Kennebec County (including the city of Augusta) suggests a more favorable distribution (9% of the population; 11% of Pine Tree's services). And though Penobscot County (including the city of Bangor) contained only 11% of the population, it received a whopping 18% of Pine Tree's services in 2003. *But see supra* note 70 as a possible explanation for Penobscot County's unusual data.

attorney placement in rural areas, but rather to hire more attorneys to work in some of the population centers.

In order to be sure that this is the case, however, one would have to more accurately calculate the demand for services in different counties. Currently, the extent of the demand in rural areas may be relatively unknown because of the fact that many residents (particularly the illiterate or very poor) are unaware of legal aid organizations which are often located more than an hour away, and thus cannot bring their needs to the attention of such organizations.⁷³ In other words, while Oxford County may have only 4% of the population, a much greater percentage of the 56,151 residents who live there may require legal aid services than their counterparts in Cumberland County, yet such residents may be unaware of the legal services provided and therefore are not properly counted. Indeed, there is some suggestion that a greater percentage of the population in rural areas require legal aid services, as rural counties in Maine tend to have higher poverty rates (as well as fewer lawyers) than urban ones.⁷⁴

Although it appears that the legal aid organizations in Maine could perhaps benefit from consolidating their offices and applying the resources in needed areas

⁷³ See *supra* note 53 and accompanying text.

⁷⁴ See *supra* note 3. To stick with the example discussed above, as of 2000, Piscataquis County had a poverty rate of 14.8% of the population, and Oxford 11.8%. In contrast, Cumberland County had a poverty rate of only 7.9%. 2002 ANNUAL REPORT CARD ON POVERTY IN MAINE, *supra* note 2, at 26. In the Chief Justice's recent address to the Legislature on the State of the Judiciary, it was estimated that 58% of low-income households may have unmet legal needs. Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, *supra* note 19. See also 2004 REPORT OF THE MAINE JUDICIAL BRANCH: Access to Justice, *supra* note 18 (noting that "there is a vast unmet need for legal representation for low-income Mainers"). Such needs could include help in getting sub-standard housing brought up to code, help in securing Social Security, welfare benefits or child support, etc. REPORT OF THE MAINE COMMISSION ON LEGAL NEEDS, *supra* note 52, at 27.

Note that some explanation for Penobscot County's seemingly disproportionate amount of Pine Tree's services can perhaps be found in its relatively high poverty rate – 13.7%. 2002 ANNUAL REPORT CARD ON POVERTY IN MAINE, *supra* note 2, at 26. It should be noted; however, that Penobscot County may not be properly classified as "urban", as though it contains the city of Bangor and relatively dense surrounding areas, the remainder of the county, particularly in the north, is quite rural.

(whether urban or rural), this will have only a limited effect on the much larger problem of demand. There seems to be very little else that the existing legal aid organizations can do to meet this demand without a substantial influx of resources. To a large extent, these organizations are coordinating their efforts in order to maximize the services available to low-income residents. For example, each year, Pine Tree holds an annual retreat which MEJP, and occasionally LSE or various judges attend.⁷⁵ There are periodic conferences of intake workers to summarize what they do, what the various priorities of each organization are, and what constitutes a good referral.⁷⁶ Referrals are common, and there are hyperlinks to other legal aid services on the different organizations' websites. Furthermore, each organization is able to access Pine Tree's informational (although obviously not client) files online.⁷⁷

Nor does it seem that the existing priorities of each legal aid organization are unnecessarily duplicative. The VLP and Pine Tree carefully organized their protocols so as to avoid duplication in the cases that they undertake. The VLP focuses primarily on family law (49% of the referrals made in 2002) and consumer law (27%).⁷⁸ In contrast,

⁷⁵ E-mail from Kathleen Caldwell, Esq., Pro Se Coordinator, Pine Tree, to the author (Mar. 14, 2005) (on file with author).

⁷⁶ Interview with Kathleen Caldwell, *supra* note 56. Invitees include not only all legal services programs in Maine but also court personnel, community mediation programs, community action programs, and State agencies such as the Attorney General's Consumer Mediation Services, the Public Utilities Commission's Consumer Assistance Division, and the Department of Health & Human Services. E-mail from Kathleen Caldwell to the author (Mar. 14, 2005), *supra* note 75.

As an additional example of the Maine legal aid community's relatively close working relationship, it should be noted that when ILAP was transitioning from a volunteer project to a staffed legal services agency, it received a great deal of help from MEJP. *See* ILAP, "About ILAP" at <http://www.immigrantlegaladvocacy.org/about.html> (last visited Mar. 22, 2005).

⁷⁷ Interview with Kathleen Caldwell, *supra* note 56. Pine Tree is in the process of developing a password-protected database library of staff resources that may be accessed by the VLP, MEJP, LSE, and possibly DRC. E-mail from Kathleen Caldwell to the author (Mar. 14, 2005), *supra* note 75.

⁷⁸ CELEBRATING 20 YEARS OF DOING MAINE JUSTICE, *supra* note 11. In 2003, those figures were 50% and 30%, respectively. *See* MAINE VOLUNTEER LAWYERS PROJECT: 2004 PRO BONO YEAR IN REVIEW.

Pine Tree's top priorities include cases involving housing and benefits issues.⁷⁹

According to Kenneth Lehman, Esq., a member of the VLP Advisory Committee, the decision to split the work this way was determined in part by the belief that the private bar would be more knowledgeable in family matters work, since those were the types of cases in which they frequently were involved.⁸⁰

MEJP is a splinter organization from Pine Tree, which was forced by LSC restrictions to withdraw from class action litigation and advocacy before the legislature and administrative agencies.⁸¹ Formed to fill this gap, MEJP relies on non-LSC funds. Consequently, there is essentially no overlap between the cases that Pine Tree and the VLP are involved with and those advocated by MEJP. Similarly, there is little overlap with cases taken on by ILAP and by the MCLU – both organizations with narrowly tailored priorities which do not receive any federal grant money for the work they do.⁸²

Some overlap with Pine Tree and the VLP is perhaps presented in the caseload of the Penquis CAP Law Project (focusing on domestic violence work) and that of DRC, but both projects are less constrained by income level restrictions due to the nature of their organization and funding.⁸³ Consequently, they are more easily able to help those who

⁷⁹ See Pine Tree, "About Pine Tree Legal Assistance", *supra* note 10. See also Pine Tree, "Statement of Priorities" (approved Mar. 21, 2001), at <http://www.ptla.org/ptlasite/about/priority.htm> (last visited Mar. 22, 2005) (listing the various priorities of Pine Tree and the VLP).

⁸⁰ Telephone Interview with Kenneth Lehman, Esq., Partner, Bernstein, Shur, Sawyer & Nelson (Dec. 16, 2004).

⁸¹ See MAINE EQUAL JUSTICE: BALANCING THE SCALES OF JUSTICE. See also Omnibus Consolidated Rescissions and Appropriations Act, § 504, Pub. L. 104-134, 110 Stat. 1321 (1996); LSC Restrictions on Lobbying Rule, 45 C.F.R. § 1612.1; LSC Class Actions Rule, 45 C.F.R. § 1617.1. To some extent, the Cumberland Legal Aid Clinic has also tried to fill in where Pine Tree is unable to because of grant restrictions. This includes some prisoners' assistance work. Telephone Interview with Deirdre Smith, *supra* note 7; University of Maine School of Law, "Clinics and Practice Training", at <http://mainelaw.maine.edu/acad-clinic.htm> (last visited Mar. 22, 2005). See also LSC Representation of Prisoners Rule, 45 C.F.R. § 1637.1.

⁸² See ILAP, "About ILAP", *supra* note 76; MCLU, "Need Legal Help?", *supra* note 64.

⁸³ Telephone Interview with Tamar Mathieu, *supra* note 7; DRC, "Eligibility for Services", at <http://www.drcme.org/eligible.html> (last visited Mar. 22, 2005). For example, the Penquis CAP Law

are unable to hire a lawyer but fail to fall within the federal poverty guidelines. The same is true of LSE, which recognizes that “lack of money may not be the only barrier preventing an elderly person from getting the legal services he or she needs...Legal Services for the Elderly serves Maine’s socially, as well as economically needy”.⁸⁴

In sum, Maine’s legal aid societies and *pro bono* efforts have been carefully coordinated in order to provide largely non-overlapping services. Although it might be more efficient to consolidate some of the legal aid offices despite differences in funding and priorities, and to move to a statewide intake system, Maine’s low-income legal service community is largely doing the best they can with the resources that they have. There are still problems, however, particularly in rural areas. The problem of literacy and lack of access on the part of the rural poor may mean that many of those who have unmet legal needs are not being brought to the attention of legal aid societies. There are heavy burdens on the relatively scarce rural bar to take a higher proportion of *pro bono* cases. Funding restrictions on many of the major organizations severely limit their ability to take on cases. And finally, the bottom line is that there are simply not enough available lawyer hours to meet the existing demand. Because of these shortcomings, it has been necessary for Maine to turn to other avenues of help for those unable to afford a lawyer.

B. Reducing the Need for Lawyers and De-Mystifying the System

There are a number of ways to give assistance to poor residents confronted with a legal quandary without providing them with the traditional advocate to shepherd them through the entire process. Perhaps the most orthodox way is to help these residents

Project is primarily funded through a grant pursuant to the 1994 Violence Against Women Act (“VAWA”), which does not have income restrictions. Telephone Interview with Tamar Mathieu, *supra* note 7.

⁸⁴ LSE, “LSE’s Eligibility Guidelines”, at <http://www.mainelse.org/eligible.htm> (last visited Mar. 22, 2005).

obtain limited legal assistance – such as an initial consultation with a lawyer, or assistance only with a particularly troublesome aspect of a case. Other possible ways include: online research information, explanatory pamphlets, interactive forms, *pro se* clinics, help at the courthouse or from various organizations in filling out forms, simplified court procedure, and opportunities for more informal case management and mediation. To some extent, Maine has tried all of these possibilities.

If the individual seeking legal help is unsuccessful in obtaining free legal assistance (perhaps because he or she has too high an income to meet the strict poverty guidelines), but does have some money available, he or she could try to make do with some limited legal assistance. One way of doing this is to take advantage of the Maine State Bar Association’s (“MSBA”) Lawyer Referral and Information Service – which allows the caller a half-hour consultation with a lawyer for only twenty dollars.⁸⁵ However, this would appear to have limits as a way to obtain inexpensive legal advice, particularly in a more complex case, as it is unlikely that lawyers would want to commit themselves to providing advice in a matter they know so little about.

Another way to obtain limited assistance is provided by the State’s recent adoption of “unbundling”. In 2001, the Maine Rules of Civil Procedure and the Maine Bar Rules were amended in order to allow a potential litigant with only limited resources to allocate those resources in a targeted way.⁸⁶ In other words, instead of the “soup to

⁸⁵ See Maine State Bar Association, “Lawyer Referral and Information Service”, at http://www.mainebar.org/public_lris.asp (last visited Mar. 22, 2005). Technically, it is the MSBA rather than the lawyer which charges the \$20 fee. *Id.*

⁸⁶ See Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L. J. 1145, 1191-92 (2002). Specifically, the following rules were amended: ME. R. CIV. P. 5 (service and filing of pleadings and other papers), 11 (signing of pleadings and motions; sanctions), 89 (withdrawal of attorneys; visiting lawyers; temporary practice with legal services organizations); ME. BAR R. 3.4 (identifying commencement, continuation, and termination of representation), 3.5 (withdrawal from employment), 3.6 (conduct during representation). See State of Maine: Supreme Judicial Court, AMENDMENTS TO THE MAINE BAR RULES

nuts” approach which is “pricing the Bar out of the market for many in need of their services”, the litigant can allocate his scarce funds towards hiring a lawyer only for those elements of a case with which he really needs a lawyer’s assistance.⁸⁷ The ability of the litigant and attorney to enter into such an agreement does have certain restrictions and exceptions, and is subject to some oversight by the court.⁸⁸ While this seems like a positive approach to the problem, one good for both lawyers (who have the chance to pick up some extra fees) and would-be part-time clients,⁸⁹ the verdict is still out as to whether or not unbundling has been a success.⁹⁰

If the individual in search of legal services has been turned down by a legal aid organization for representation, he may still be provided with some assistance by said organization. Several of the legal aid organizations in Maine provide aid to *pro ses* in the form of a helpline, clinic, or other assistance project in order to help them complete court forms and to answer their questions. Often, however, such help is limited. The Penquis CAP Law Project offers such clinics only on an “as-needed basis”, and charges an administrative fee of five dollars.⁹¹ Pine Tree holds office hours just in Augusta and

(eff. July 1, 2001), available at <http://www.cleaves.org/pdf/barrules.pdf>; State of Maine: Supreme Judicial Court, AMENDMENTS TO THE MAINE RULES OF CIVIL PROCEDURE (eff. July 1, 2001), available at <http://www.cleaves.org/pdf/civilunb.pdf>.

⁸⁷ Letter, Hon. Joseph Field, Maine District Court, to Hon. Frank M. Coffin, United States Court of Appeals, First Circuit, Re: Self-Represented Litigants (Mar. 14, 2000) (on file with the author). See also *supra* note 6.

⁸⁸ See Goldschmidt, *supra* note 86, at 1191. For example, Maine requires that the court be informed of the scope of the limited representation agreement, and that the client provide informed consent. *Id.*

⁸⁹ See Elizabeth Scheffee, “Legalizing” *Unbundled Practice: The Maine Experience*, American Bar Association (“ABA”), *DIALOGUE*, Vol. 7, No. 3 (Summer 2003), available at http://www.abanet.org/legalservices/dialogue/03summer/dial_03summerIris.html (last visited Mar. 22, 2005).

⁹⁰ See Letter from Hon. Joseph Field to Hon. Kermit Lipez, *supra* note 55. Judge Field chairs the Self-Represented Litigants Task Force (“Task Force”), a working group under the auspices of JAG. The Task Force is comprised of Nan Heald, Esq., from Pine Tree, Elizabeth Scheffee, Esq., from the MSBA, Peggy McGehee, Esq., Wendy Rau, Esq., from the Administrative Office of the Courts, and M. Calien Lewis, Esq., the Executive Director of the MBF. Until autumn of 2003, the group was co-chaired by the Hon. Howard Dana of the Law Court. *Id.*

⁹¹ See Penquis CAP: Law Project, *supra* note 67.

Lewiston, and only for two hours every week or other week.⁹² Still, the concept of offering assistance to those needing legal services *via* filling out forms, answering questions, and providing other instruction raises significant possibilities for expansion – as such assistance can be provided not only by lawyers, but also by paralegals or trained volunteers.⁹³ There has been some experimentation with removing lawyers from the process. For example, in the Bangor District Court, the National Association of Legal Secretaries (“NALS”) has sponsored a courthouse assistance project in small claims and family law - without income limits.⁹⁴ Similarly, the Kennebec-Somerset Legal Secretaries Association Family Law Project (“KSLSA”) offers occasional help to those at the Waterville District Court.⁹⁵ These projects are limited to a few hours, a few courthouses, and a few areas of expertise. It seems, however, that such efforts could be dramatically increased, at comparatively little cost relative to the benefit obtained. This topic will be further explored in Part III of this paper.

There are a number of ways through which the Maine Judicial Branch and Maine legal services organizations have dealt with the problem of demand for legal aid services by providing *pro ses* with self-help assistance – in order to lessen the need for lawyers in the first place (or at least lessen the harm that the lack of a lawyer might lead to). The home websites of Pine Tree and the VLP offer online research links. In addition, as was mentioned earlier, Pine Tree launched the “HelpMELaw” website in the late 1990’s.

HelpMELaw, which has proved enormously popular (and which has the added benefit of

⁹² See Pine Tree, “Courthouse Assistance and HelpLine”, at <http://www.ptla.org/ptlasite/cliented/family/assist.htm> (last visited Mar. 22, 2005).

⁹³ See Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step towards a Meaningful Right to Be Heard*, 96 YALE L. J. 1641 (1987) (advocating for a solution to the problem of meaningful access to the courts by *pro ses* through making increased use of clinics taught by lawyers or paralegals).

⁹⁴ See Pine Tree, “Courthouse Assistance and HelpLine”, *supra* note 92.

⁹⁵ *Id.*

costing relatively little),⁹⁶ was designed with the *pro se* litigant in mind. Consequently, the search engine retrieves results for the search term entered (e.g. “divorce”) as well as results concerning related topics that a layman user might not consider (e.g. guardians ad litem, protection from abuse orders, etc.). Pine Tree determines what material to put on the website based on what they feel clients most need, and monitors the searches fairly closely to be sure those needs are being met.⁹⁷ In addition, Pine Tree has itself authored a number of the “self-help” documents that have been placed on HelpMELaw, targeted for a fifth-grade reading level.⁹⁸

HelpMELaw is not perfect, however. Although Pine Tree is “picky about what... [it] will include in the library, especially in terms of readability and usability, there are often gaps in the available information”.⁹⁹ And materials targeted to a fifth-grade reading level do little to help those with literacy skills below that level, as explored previously. Moreover, these materials do little good in the case of a *pro se* who does not even begin to think about his case until he shows up at the courthouse (a not at all uncommon situation). While the MBF funded a pilot project to place computer terminals in twelve courthouses in order for people to access HelpMELaw, the program was not much of success and was discontinued.¹⁰⁰

⁹⁶ Telephone Interview with Hugh Calkins, *supra* note 54; Hugh Calkins, *Inside the HelpMeLaw Web site*, *supra* note 54; Caldwell & Calkins, *The Mother of Invention*, *supra* note 54; Interview with Kathleen Caldwell, *supra* note 56.

⁹⁷ Telephone Interview with Hugh Calkins, *supra* note 54.

⁹⁸ *Id.* See also Interview with Kathleen Caldwell, *supra* note 56.

⁹⁹ Hugh Calkins, *Inside the HelpMeLaw Web site*, *supra* note 54.

¹⁰⁰ Telephone Interview with Hugh Calkins, *supra* note 54. See also Letter from Hon. Joseph Field to Hon. Kermit Lipez, *supra* note 55. Judge Field includes a number of reasons for the experiment’s failure, including: inability to get volunteers, inability to advertise widely, inability of clerks’ office to support the program because of excessive pre-existing demands, and courts’ inability to continue operational support of the computers due to funding cutbacks. *Id.* The exception was the District Court in Fort Kent, where the experiment was considered a success. This may be because the Fort Kent courthouse has less traffic than others, and thus its clerks have more time to monitor and assist with use of the system. In 2004, the Fort Kent District Court had a caseload of 600 matters – the lowest of any District Court in the state. See 2004

Furthermore, the HelpMELaw site is for English speakers only, despite a growing demand in Maine (particularly the southern part of the State) for information in other languages.¹⁰¹ The need for more translation services is a problem recognized not only by Pine Tree, but also by court personnel who have worked on designing readable material for *pro ses*. While Pine Tree has translated or obtained some self-help materials in other languages, and has made use of “Language Line Services” for non-English speaking callers, this process has been expensive and incomplete.¹⁰² Yet Pine Tree has progressed further than the courts in this area – the simplified pamphlets provided by the Maine Judicial Branch are available only in English.¹⁰³

To the English-speaking, literate *pro se* of average intelligence, the Internet, courthouses, and legal aid offices have a wealth of information available. HelpMELaw, and the websites of the Maine Judicial Branch, the VLP, and Pine Tree, all provide research links and procedural information. The District courthouses have various pamphlets and handouts available explaining the different types of actions, and many if not most clerks will point out the various legal aid options to *pro ses* coming to them for

REPORT OF THE MAINE JUDICIAL BRANCH: Caseload Statistics, *supra* note 18. Or it may be that they had more reliable volunteers who could assist people with the website. Indeed, according to the resident clerk, the local battered women’s shelter would sometimes help people use the system.

¹⁰¹ Telephone Interview with Hugh Calkins, *supra* note 54. According to Calkins, Tennessee is developing a mirror site in Spanish, which HelpMELaw plans to link to upon completion. *Id.*

¹⁰² Interview with Kathleen Caldwell, *supra* note 56. *See also* Pine Tree: Website Statistics 2003, *supra* note 8; Pine Tree, “PTLA Client Education Materials Other Languages / August 2004” (on file with the author). Languages include: Spanish, French, Vietnamese, Arabic, Somali, Chinese, and Russian. *Id.* *See also* Pine Tree, “What’s New at Our Website”, at <http://www.ptla.org/ptlasite/news/whatsnew.htm> (last visited Mar. 22, 2005). Note also that Pine Tree is not the only legal aid organization to provide materials in other languages; for example, LSE’s website allows the user to download an informational brochure in twelve different languages. LSE website, *supra* note 59.

¹⁰³ Telephone Interview with Wendy Rau, *supra* note 56. The Judicial Branch has recognized the need for more language assistance in court proceedings, and has begun to make strides towards that goal. *See* Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, *supra* note 19. *See also* A REPORT TO THE JUSTICE ACTION GROUP ON ACCESS TO MAINE COURTS FOR INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY (Jan. 2005), available at <http://www.mbf.org/justice.htm> (last visited Mar. 22, 2005).

assistance. Pine Tree offers interactive forms on its website, some with help notes, which litigants can prepare online.¹⁰⁴ The website for the Maine Judicial Branch offers downloadable forms,¹⁰⁵ and in several places contains a hyperlink to Pine Tree.¹⁰⁶

But this information is not particularly useful for non-English speaking *pro se* litigants, or those with low levels of literacy. In order to help the first group, it is necessary to expand the amount of information provided in translation. To help the second group, the State may want to consider *mandating* that *pro se* litigants coming to court watch basic instructional videos about what to expect in the courtroom concerning their claim.¹⁰⁷ Maine has already taken steps towards the use of videos as a source of *pro se* help. Indeed, the Task Force and Pine Tree are currently working on a video project concerning the PFA process.¹⁰⁸ Furthermore, there are some videos available at certain court locations regarding various aspects of family law.¹⁰⁹ Such videos may be a welcome relief for the private bar and the bench as well, since most judges already make short announcements before cases involving *pro ses*, describing briefly the rules of procedure and evidence – announcements which are repetitive for the judge, and time-consuming for the attorney on the clock. Although some would point out that a *pro se* is

¹⁰⁴ Pine Tree, “Court Forms” at http://www.ptla.org/forms/index_html (last visited Mar. 22, 2005). See also Caldwell & Calkins, *The Mother of Invention*, *supra* note 54; Hugh Calkins, *Getting interactive court forms off the Internet is becoming easier*, “Something about Technology”, ME. BAR J. (Spring 2002).

¹⁰⁵ State of Maine Judicial Branch, “Publication & Forms”, at http://www.courts.state.me.us/rules_forms_fees/pub_forms.html (last visited Mar. 22, 2005).

¹⁰⁶ See, e.g., State of Maine Judicial Branch, “Family Division”, at <http://www.courts.state.me.us/mainecourts/familydiv/index.html> (last visited Mar. 22, 2005). The MBF also offers links to the different legal services providers. MBF, “Legal Service Providers and Support Agencies”, at <http://www.mbf.org/provider.htm> (last visited Mar. 22, 2005).

¹⁰⁷ The problem with this approach is that for a *pro se* who has not gathered any evidence in support of his claim, watching an instructional video on how to present this (non-existent) evidence *just before* going into court will not be at all helpful. For matters that require preparation in advance, rather than just procedural and decorum issues, a different solution is probably needed.

¹⁰⁸ Letter from Hon. Joseph Field to Hon. Kermit Lipez, *supra* note 55; E-mail from Hugh Calkins, Esq., Research and Development, Pine Tree, to the author (Mar. 16, 2005) (on file with author).

¹⁰⁹ See Maine Judicial Branch, “Family Division”, *supra* note 106.

far more likely to pay attention to a speech from the judge than to a video, instructional videos are becoming increasingly popular throughout the country.¹¹⁰ Moreover, while a judge's instructions may have the advantage of being narrowly tailored to the particular circumstances, they are also likely to be relatively brief. Videos could go into considerably more detail.

As an alternative to providing *pro ses* with explanatory assistance on how to proceed without a lawyer in the legal system, in types of cases where laymen are the norm Maine has adjusted the system itself in order to better meet the needs of these lay litigants. As a result, several areas of the court's jurisdiction are "*pro se* friendly". First, as is typical around the country,¹¹¹ there is no strict application of the rules of evidence in small claims matters – evidence which is considered by the judge to be relevant and to have probative value may be admitted.¹¹² Consequently, each side has the opportunity to present his story to the judge in a more direct manner, without the imposition of significant technical encumbrances (although the problem remains of parties who do not prepare, and do not have any witnesses or evidence available at all). Second, beginning

¹¹⁰ See PRO SE LITIGANTS: THE CHALLENGE OF THE FUTURE, Commonwealth of Massachusetts, Trial Court, Probate and Family Court Department, *Pro Se* Committee Report, 63, available at <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/prosefinalreport.pdf>. "The Committee recommends the use of videotapes to educate/inform *pro se* litigants about various aspects of the court-related process in which they are involved". *Id.* See, e.g., California Courts: Self-Help Center, "Links & Resources", at <http://www.courtinfo.ca.gov/selfhelp/additionalinfo/links.htm> (last visited Mar. 22, 2005); Idaho Supreme Court, "Court Assistance Offices Project", at <http://www2.state.id.us/cao/overview.asp> (last visited Mar. 22, 2005); REPORT OF NEBRASKA SUPREME COURT COMMITTEE ON PRO SE LITIGATION, 19 (Nov. 22, 2002), available at http://court.nol.org/community/pro_se_report.pdf.

¹¹¹ See, e.g., Wyoming Judicial Branch, RULES AND FORMS GOVERNING SMALL CLAIMS CASES 6, available at <http://courts.state.wy.us/RULES/Rules%20and%20Forms%20Governing.html> (last updated June 1, 2001) ("Strict rules of evidence shall not apply in trials of small claims actions"); Vermont Judiciary, RULES OF SMALL CLAIMS PROCEDURE 6(b), available at <http://www.vermontjudiciary.org/courts/superior/smclaimsrules.htm> (last visited Mar. 22, 2005) ("The Vermont Rules of Evidence are inapplicable except for the rules respecting privilege").

¹¹² See ME. R. S. C. P. 6(b) ("The rules of evidence, other than those with respect to privileges, shall not apply"). See also State of Maine Judicial Branch, "Small Claims Court", at <http://www.courts.state.me.us/mainecourts/smallclaims/index.html> (last visited Mar. 22, 2005).

in the early 1980's with the adoption of the Uniform Probate Code, probate proceedings became relatively simplified and streamlined.¹¹³

More recently, Maine created eight case management officer ("CMO") positions, with authority in all divorce cases involving minor children to conduct case management conferences, issue case management and pretrial orders, issue interim orders, issue final orders regarding child support, and issue orders in child support enforcement actions.¹¹⁴ The institution of CMOs has been fairly controversial.¹¹⁵ On the one hand, CMOs are thought to be useful in cases involving *pro ses*, as unlike that of judges their role comfortably allows them to explain the process to the parties.¹¹⁶ However, there have been complaints that CMOs increase costs when both sides are represented by lawyers, that they have too little authority,¹¹⁷ and that there are too few of them relative to the work that needs to be done (particularly in southern Maine).¹¹⁸ Furthermore, there has

¹¹³ See ME. REV. STAT. ANN., tit. 18-A, § 1-102 (b) "The underlying purposes and policies of this Code are (1) to simplify and clarify the law... (3) to promote a speedy and efficient system for liquidating the estate of the decedent"). See also ME. R. PROB. P. 1 ("The rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding").

¹¹⁴ See ME. REV. STAT. ANN., tit. 4, § 183; ME. R. FAM. DIV., *supra* note 6, at I.C. Also, in an uncontested proceeding or with the consent of the parties, CMOs may hear and decide other matters and may issue divorce judgments, paternity judgments, judicial separation decrees, and interim and final orders establishing parental rights and responsibilities. *Id.*

¹¹⁵ See *supra* note 6.

¹¹⁶ See 2004 REPORT OF THE MAINE JUDICIAL BRANCH: Family Division, *supra* note 18 ("The initial conference is...an opportunity for self-represented litigants to learn more about the court process and the steps through which their case will proceed...although CMOs do not provide legal advice, the information they provide about family law and case processing is invaluable to the large number of parents who appear in court without an attorney.").

¹¹⁷ The CMO program is largely funded by Title IV-D of the Social Security Act, and due to funding restrictions, CMOs are required to have certain limits in their authority. In particular, they cannot be actual judges. See Kennedy & Rau, *supra* note 6.

¹¹⁸ See *id.* See also 2004 REPORT OF THE MAINE JUDICIAL BRANCH: Family Division, *supra* note 18 ("The heavy volume of court filings and the limited number of CMOs make it nearly impossible for the court to timely address each family's case"). There is currently a proposal to add two new CMO positions. Telephone Interview with Wendy Rau, *supra* note 56. See also Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, A SPOKEN REPORT TO THE JOINT CONVENTION OF THE FIRST REGULAR SESSION OF THE 122ND LEGISLATURE (Feb. 1, 2005), available at <http://www.courts.state.me.us/news/> (last visited Mar. 22, 2005).

been some suggestion that the work of CMOs should be better coordinated with that of related proceedings in which the family may be involved, such as juvenile actions.¹¹⁹

Somewhat similar to the conferences required with CMOs is the growth in Maine of mediation and alternative dispute resolution (“ADR”). There is a presumption of ADR in civil, commercial cases in the Superior Court,¹²⁰ and mediation is mandatory in the District Court for small claims and contested domestic relations matters.¹²¹ There is a widely-held view that mediation is fairly effective,¹²² although mediators (much like judges) still struggle when *pro ses* are involved in order to avoid the potentially unfair results which may occur if a power imbalance is left unchecked, and to provide an explanation of the rules without crossing the line into giving legal advice.¹²³

While mediation may be an admirable step towards the goal of making the system more usable for *pro se* litigants, the possibility of a power imbalance remains problematic. Even though it is highly likely that *both* parties to a family matter proceeding or a small claims action are *pro se*, it is also not unlikely that one party will have a particular advantage over the other – for example, an abusive husband in a divorce action against his battered wife, or a creditor in a small claims action against a debtor.

¹¹⁹ Telephone Interview with Wendy Rau, *supra* note 56.

¹²⁰ See ME. R. CIV. P. 16B; State of Maine Judicial Branch, “Frequently Asked Questions – Superior Court Alternative Dispute Resolution”, at <http://www.courts.state.me.us/faq/adr.html> (last visited Mar. 22, 2005).

¹²¹ See State of Maine Judicial Branch, “In What Types of Cases Is ADR Available?”, at <http://www.courts.state.me.us/courtservices/adr/adrcases.html> (last visited Mar. 22, 2005). See also State of Maine Judicial Branch, Court Alternative Dispute Resolution Service (CADRES), “Small Claims Mediation” (Jun. 2000), available at <http://www.courts.state.me.us/courtservices/adr/pdf/smallclaims.pdf>; State of Maine Judicial Branch, CADRES, “Mediation of Family Matters at Court” (Oct. 1999), available at http://www.courts.state.me.us/courtservices/adr/pdf/familymatters_med.pdf; Administrative Order – Uniform Domestic Relations Mediation Order (eff. Jan. 1, 2001), available at http://www.courts.state.me.us/rules_forms_fees/rules/MRFamDiv%208-04.htm (last visited Mar. 22, 2005).

¹²² Reaching an agreement at an early stage in the proceedings will save parties both time and money. Those parties with lawyers will save the cost of further attorneys’ fees, while those without will save the cost of missing work in order to be present at additional court proceedings. This is no doubt a strong incentive to settle.

¹²³ Telephone Interview with Diane Kenty, Esq., Head of CADRES (Nov. 2, 2004).

While mediation may be useful in protecting the rights of *pro ses* when the alternative is negotiating directly with an attorney, or even with a more powerful opposing party,¹²⁴ nevertheless in such cases, the insertion of a neutral arbitrator may not be enough to shield the weaker party from the stronger. The same argument may be made concerning case management conferences, or even judicial hearings when the judge applies simplified procedural rules but otherwise remains passive. When there is a power imbalance in such proceedings, either an advocate may be needed, or the judge may need to intervene vigorously in order to level the playing field – for example, by taking control of the proceedings and inquiring of both parties to the extent necessary to reach a fair resolution of the case.

III. Where to Go Further

Essentially, then, the demand for legal representation outlined in Part I largely overshadows our existing legal aid resources and *pro bono* efforts, particularly in rural areas. Efforts to provide *pro ses* with other forms of legal assistance run into the problem that many *pro ses* cannot utilize the help offered because they have low literacy skills, do not speak English, or are simply not of sufficient intelligence. Finally, attempts to simplify the system or insert a neutral party do not entirely solve the problem of *pro ses* in situations of a power imbalance (moreover these solutions are rarely tried except in subject matter areas where laymen, not lawyers, are the norm). The question thus becomes: what can Maine do to further the assistance that it gives indigent residents with legal problems, keeping in mind the State's lack of resources?

¹²⁴ See Craig A. McEwen et al., *Bringing in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1391 (1995). See also Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiation with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 130 (1997).

A. Initial Screening

The first step is to identify the precise type of assistance that a given *pro se* may need. In order to do this, it is crucial that the State have in place an effective intake process which can both identify the needs of various *pro ses* and channel them into a particular assistance option depending on the type and severity of those needs. In all probability, such screening would need to be done at the courthouse, as we have already seen that self-identification of legal aid needs, particularly in areas without legal aid offices, is likely to be incomplete.¹²⁵ Screening should identify, at minimum: (1) the *pro se*'s financial resources; (2) type of matter (i.e. is it the kind of case in which parties typically fare much worse without legal assistance); (3) whether the other side is represented; and (what is more difficult to determine) (4) some indication of the abilities of the particular *pro se* to adequately present his or her own case.

At the outset it is necessary to determine who would be best suited to perform the screening. One possible answer is the court's clerks, as they deal with *pro ses* on a regular basis and would probably require little additional training to properly assess their needs. Furthermore, they are employees of the judicial branch, and so involving them would give the judicial branch a stake in the process. However, upon further examination this seems unlikely to be a good solution. First, there are troubling issues about getting

¹²⁵ Providing screening and assistance at the courthouse has a number of advantages. First of all, relying on indigents requiring legal assistance to self-identify themselves to legal aid organizations and *pro bono* attorneys would likely only capture a fraction of those who need such assistance. *See supra* note 73 and accompanying text. Second, it is more efficient to help people at one easy-to-locate place rather than at various offices scattered around the State – and it is more likely that these people would receive consistent information. Finally, resources would be saved if the court could identify a litigant's needs and provide advice or otherwise channel them into an assistance option during that litigant's very first visit to court, rather than having to delay the litigant's hearing because they are not prepared, or have not yet tried to secure legal representation. Not only would resources be saved, but litigants would be less likely to have to make multiple trips to the courthouse (saving them the costs of securing child care, or of taking time off from work, etc.).

the clerks involved in a matter that ultimately ends up before the judge. Since the clerks are court personnel, any mistakes on their part puts the judge in an awkward position and reflects badly on the judicial branch in general. On a more practical note, given the current levels of resources invested in the clerks' offices, it would simply be impossible for them to devote the kind of time necessary for effective screening. Without an infusion of funds towards the hiring of more court personnel, clerks cannot meet the demands of this task. And an infusion of resources is unlikely to come soon – due to cuts in personnel funding the judicial branch has been forced to operate with more than twenty vacant positions.¹²⁶

An alternative solution would be to look to highly-trained volunteers to perform the screening. There are several advantages to this solution. It would cost significantly less, although there would be costs involved in recruiting and training volunteers (and probably in creating a paid supervisory position). Furthermore, using volunteers would allow clerks to continue in their current role and preserve at least the fiction of distance from the judicial branch. Yet this solution is also not without possible problems, particularly the difficulties involved in finding enough suitable volunteers. Recall that one of the reasons cited by Judge Field for the failure of the project to put HelpMELaw

¹²⁶ See Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, *supra* note 19. See also 2004 REPORT OF THE MAINE JUDICIAL BRANCH: Message From the Chief Justice, *supra* note 18 (“We have had an average of 25 positions vacant over the past 2 years”); 2003 REPORT OF THE MAINE JUDICIAL BRANCH: Plan for the Future, *supra* note 22 (“Faced with significant budget cuts in FY’03, Maine’s courts struggled to adequately serve the citizens of Maine. Cuts in the personal services budget led to reduction in staffing at many courthouses and offices. Already minimally staffed, the courts were stretched to keep up with growing expectations and decreasing resources. With the intent of maintaining the current number of staffing positions, the Judicial Branch opted to maintain the equivalent of 20 vacancies, rather than permanently eliminating the number of legislatively approved staff positions. With only 465 positions available to staff the entire court system throughout the state, this has been a tremendous hardship on courts and offices where vacancies were maintained...More than half of the state courts have five or fewer staff in clerk’s offices, and a single vacancy can seriously hamper their ability to process cases”).

terminals in the courthouse was an inability to get volunteers.¹²⁷

B. Assistance from an Attorney

After having conducted a screening, volunteers should have a number of options to choose from in determining what assistance to provide *pro ses*. Since legal aid is scarce, help from a lawyer would probably not be feasible in all cases. However, in some instances, a lawyer might be necessary in order to ensure that the litigant's claim had been fairly presented. These might include cases where parties without lawyers are statistically much more likely to do quite worse than they would with lawyers – i.e. types of cases with very precise and technical legal rules, or cases in which the relevant background rule is non-intuitive. For example, the “best interests of the child” standard, which governs custody determinations,¹²⁸ would appear to be a standard that is both intuitive to and manageable by many laymen (although more research would need to be done as to whether or not this is in fact true). In contrast, the requirement that a landlord hold a security deposit in a separate bank account seems relatively non-intuitive.¹²⁹ Indeed, there are a number of affirmative defenses by tenants in the FED context that are unlikely to be raised without the assistance of a lawyer trained in housing law.¹³⁰ This would suggest that Pine Tree's current emphasis on housing law is a suitable, if not

¹²⁷ See *supra* note 100.

¹²⁸ See ME. REV. STAT. ANN., tit. 19-A, § 1653.

¹²⁹ See ME. REV. STAT. ANN., tit. 14, § 6038.

¹³⁰ This has been suggested in other states as well. See D. Michael Dale, *The State of Access to Justice in Oregon, Part I: Assessment of Legal Needs*, Sponsored by the Oregon Bar, the Oregon Judicial Department, and the Office of the Governor, 9-10 (Mar. 31, 2000), available at http://www.osbar.org/_docs/resources/LegalNeedsreport.pdf (“Generally, judges thought that tenants in most cases can represent themselves reasonably well in court, but often need advice about possible defenses to eviction”). Note that Pine Tree has provided *pro se* tenants with some general information about their rights. See Pine Tree, “Rights of Tenants in Maine: Introduction”, available at <http://www.ptla.org/ptlasite/cliented/tenants/tenants.htm> (last visited Mar. 22, 2005). Still, the handbook offers a caveat: “this online handbook gives you a quick look at Maine's landlord-tenant laws as of May 2004. The law is always changing. Also, you may need more information. If you have a problem with your landlord, ask for legal help”. *Id.*

optimal, use of its resources.¹³¹

It is less obvious that the VLP's focus on family law is ideal, given the limited *pro bono* hours with which they are working. Contested divorces might be brutal, but the parties might be able to do an acceptable job on their own in this area of law, where many of the "rules" are actually intuitive (and often equitable) standards. The introduction of advocates into *pro se* family law cases might be helpful to both the court and the parties if it brought in some cooler heads and provided a buffer layer between the often emotionally-charged parties. However, in the current adversarial nature of the legal profession, many lawyers do nothing to make the process easier for the parties or more efficient for the court, and indeed may exacerbate tensions and make use of delay tactics.¹³² Lawyers might be particularly necessary, though, in cases of domestic abuse,

¹³¹ Unfortunately, there do not seem to be nearly enough Pine Tree lawyers to handle the amounts of FED cases that are filed in the District Courts. For example, in the Bangor District Court, out of a total of 105 cases sampled, only 6 defendants were represented, whereas 89 plaintiffs were. In Augusta, out of 102 cases, only 4 defendants were represented, as opposed to 60 plaintiffs. The results of cases sampled in these and other District Courts in which defendants did have legal representation suggest a somewhat more optimal outcome (judgment for the defendant, dismissal of the action, or at least an extended time before plaintiff takes possession), but there are not nearly enough such cases to determine with any accuracy whether in fact better outcomes correlate with legal representation in this context.

On the other hand, it should be noted that Pine Tree might not have to defend all or even a substantial number of existing landlord-tenant cases in order to discourage unscrupulous landlords from exploiting tenants. If Pine Tree took on a certain percentage of all exploitative landlord-tenant cases, and in those cases had a high enough success rate to make the landlord's practices unprofitable, other landlords in the area would perhaps think twice before taking advantage of their tenants. Yet it should be realized that the advantages of selective prosecution do not carry over to all areas of law, particularly to situations where the parties are not likely to be rational actors or repeat players (i.e. family law), and that the shortage of legal aid lawyers is by no means confined to the context of FED cases. Indeed, JAG has reported that statewide, there is one legal service attorney per 6,400 low-income Mainers – compared to one per 532 of the general population. JAG, *Maine's Need for Increased Resources for Legal Aid*, Prepared by Sally Sutton, Executive Coordinator (Dec. 29, 2004), available at <http://www.mbf.org/JAGneedlegalaid.htm> (last visited Mar. 22, 2005).

¹³² This is by no means universal. Indeed, there is a growing movement in this country towards a "collaborative law" approach, in which lawyers and parties agree to share information and to reach written agreement on issues outside of contested court proceedings. See The Collaborative Law Institute of Minnesota, "About Collaborative Law", at <http://www.collaborativelaw.org/index.cfm/hurl/obj=aboutCollaborativeLaw/aboutCollaborativeLaw.cfm> (last visited Mar. 22, 2005). Note that the MSBA contains a link to the Massachusetts Collaborative Law Council on its website. See MSBA, "Public Resources: Useful Links", at http://www.mainebar.org/public_links.asp (last visited Mar. 22, 2005).

where a severe power imbalance could result without the victim having an advocate for her (or him) self in the courthouse. This would suggest that the focus of the Penquis CAP Law Project is a needed one. For a similar reason, lawyers might be necessary when the other side has hired an advocate. And, since in determining whether or not take a family law matter, the VLP currently looks for cases where the potential client has obtained a PFA against his or her spouse or cases in which the opposing party has an attorney,¹³³ it would seem that the VLP as well is largely focusing its efforts on cases in which lawyers are most needed.

A volunteer screening *pro se* at the courthouse should have the discretion to refer cases which match up to the above-mentioned priorities to the various legal aid organizations for representation. Ideally, each legal aid organization would have a representative at the courthouse, who would be able to meet with the *pro se* party in order to determine right away whether or not his or her case has merit and whether the organization can handle the additional burden. However, this is unlikely to be the case, particularly in the smaller, rural courthouses, where it is not likely that a representative from even one of the legal aid organizations would be present. Even if a representative is present, it is by no means certain that he or she would be willing to assess whether or not the organization could take the case on before consulting with others within the organization to determine their caseloads and thoughts. Alternatively, the volunteer screeners could be provided with a direct phone line to the legal aid organizations, or an internet connection through which they could e-mail the relevant information (as long as

¹³³ See “VLP Referral Priorities”, current as of July 2004, *available at* http://www.ptla.org/ptlasite/staff/Resources/vlp_priorities (last visited Mar. 22, 2005).

the organizations had rapid electronic intake systems).¹³⁴

If the legal aid organizations were not able to make immediate determinations (either personally, over the phone, or electronically) as to whether or not they could take on additional cases, it would be necessary to provide a mechanism for an automatic deferral of the cases recommended to legal aid. Even if an immediate determination would be possible in a given case, under most circumstances a legal aid organization should still be allowed to request a deferral in order to have time to become acquainted with the case and to prepare for a hearing. Unfortunately, such deferrals would be unlikely to be looked on with favor by the opposing side and their lawyers, who will have “wasted” a trip to court. Another problem arises when we consider that these referrals by volunteers would be made to organizations that appear to be using their time and resources wisely yet are already maxed out on their caseloads. There are several options which would free up more resources, however. First, there could be increased consolidation and use of client co-payments, as discussed in Part II. While this is unlikely to dramatically expand the amount of resources available, every little bit should help. Second, while obviously not ideal, volunteers could only refer cases to legal aid organizations that meet the above-listed criteria (e.g. the other side is represented, the party meets the financial criteria, the relevant law is non-intuitive or there is a severe power imbalance) *and* the party does not seem at all able to speak for him or herself. In other words, if necessary, volunteers should perhaps weed out cases where parties seem better able to present their own interests.¹³⁵

¹³⁴ Note that a statewide intake system would make this process easier, as it would allow a volunteer to make a single phone call to an intake worker, rather than perhaps having to speak to several different organizations. Indeed, it might be the case that the volunteer could cut out the middleman, and simply post the case online for the various legal aid organizations to review.

But even reserving legal aid lawyers and *pro bono* hours only for the cases that truly require lawyers, and making maximum use of these legal aid resources, it still does not seem as though we would have nearly enough resources to go around.¹³⁶ To some degree then, it is necessary either that more funds be procured in order to hire more legal aid lawyers, or that greater use is made of the private bar. There are a few ways to accomplish the latter.¹³⁷ Lawyers who do not regularly appear in court are not likely to be taking *pro bono* cases that require court-time. This is potentially an untapped well for *pro bono* activity. If the bar required *pro bono* as the price of membership, rather than making it discretionary,¹³⁸ there would be an increase in the amount of *pro bono* hours available. This approach is somewhat problematic, however. First, *pro bono* would not necessarily just include cases involving indigent litigants in civil cases, the subject of this paper. As specifically contemplated by the rule, the term is also broad enough to include “service in activities for improving the law, the legal system, or the legal profession”.¹³⁹ Second, making *pro bono* service mandatory might raise objections from some members of the private bar, who might find it to be an intrusive and possibly unconstitutional

¹³⁵ If a case truly seems spurious, a volunteer could also decide not to make a referral on those grounds. By and large though, the determination of whether or not a case has merit should probably be made by the legal aid attorneys considering whether to accept it.

¹³⁶ See *supra* note 131.

¹³⁷ One promising possibility, recently adopted by the Maine Judicial Branch, is to provide a licensing status to allow attorneys who retire from the active practice of law to offer *pro bono* legal services through recognized legal services organization. See MSBA, *Supreme Judicial Court announces emeritus attorney status*, THE SUPPLEMENT, Vol. VII, No. 1 (Feb. 2005). See also State of Maine: Supreme Judicial Court, AMENDMENTS TO THE MAINE BAR RULES (eff. Feb. 1, 2005), available at http://www.courts.state.me.us/rules_forms_fees/rules/MBarR6-10-12amend.pdf%20.pdf. Similarly, the State has relaxed the rules of civil procedure in order to allow attorneys from other states who become employed by Maine legal services organizations to practice before Maine courts on a temporary basis, without becoming members of the bar. See ME. R. CIV. P. 89; State of Maine: Supreme Judicial Court, AMENDMENTS TO THE MAINE RULES OF CIVIL PROCEDURE (eff. Apr. 1, 2005), available at [http://www.courts.state.me.us/rules_forms_fees/rules/MRCivP89\(c\)amend4-1-05.htm](http://www.courts.state.me.us/rules_forms_fees/rules/MRCivP89(c)amend4-1-05.htm) (last visited Apr. 5, 2005).

¹³⁸ See ME. BAR R. 3.10 (“A lawyer engaged in active practice in the State of Maine *should* render unpaid public interest legal service”) (emphasis added).

¹³⁹ *Id.*

conscripted of their livelihood.¹⁴⁰ There might be administrative problems with this program as well, as it would presumably be difficult to monitor and enforce such an obligation. And finally, there is a practical question as to how useful lawyers will be to their *pro bono* clients when they do not regularly appear in court and have no experience with such matters. Even if they are better able to represent indigent parties than volunteers, having been trained in the law, it seems that they would have to be granted protection from malpractice in order to gain their acceptance of this proposal.

Without making *pro bono* mandatory, it appears that there may be no way around a decision that the State must provide more funds to the private bar as an incentive to take these cases. Judicare is one possible way of doing so, a program under which the government would pay the private bar on a per case basis to provide services to low-income citizens.¹⁴¹ This solution would have a particular advantage in rural areas where legal aid's presence is thin. There is a question as to whether or not the private bar in rural areas could shoulder this burden. As we have seen, they are already handling more

¹⁴⁰ See Wendy F. Rau, *The Unmet Legal Needs of the Poor in Maine: Is Mandatory Pro Bono the Answer?* 43 ME. L. REV. 235, 254 (1991) (outlining the constitutional and policy objections to mandatory *pro bono*, and ultimately concluding that mandatory *pro bono* should be considered in Maine only if a voluntary solution to the problem of an indigent's need for legal services is not forthcoming). See also Pro Bono Institute at Georgetown University Law Center, *The Case Against: 'Just Say No...To Mandatory Pro Bono'*, from the Pro Bono Guide issues of THE AMERICAN LAWYER (1996), available at <http://www.probonoinst.org/pdfs/justsayno.pdf>.

¹⁴¹ While popular in Britain and other countries, judicare has had a relatively unimpressive history in the United States. See David Goldstein et al., *Improving Access to Justice: Legal Services Funding and Private Bar Involvement in Public Interest Lawyering Around the World*, Public Interest Law Initiative, Columbia University, Budapest Law Center (Spring 2000), available at http://www.pili.org/resources/access/improving_access_to_justice.htm (last visited Mar. 22, 2005). There have been some experiments, however. Judicare has been utilized in a number of northern counties in Wisconsin since the 1960's. See Wisconsin Judicare, Inc. website at <http://www.judicare.org/program.html> (last visited Mar. 22, 2005). Attorneys are free to determine whether or not they will take a case, but once they take it they are not allowed to charge clients the difference between their usual fee and what judicare pays. *Id.* In Georgia, the State's Pro Bono Project supervises and monitors payments to private attorneys on a reduced fee basis for the representation of indigents unable to afford legal counsel in civil matters. State Bar of Georgia, "About the Pro Bono Project", at http://www.gabar.org/related_organizations/pro_bono_project/about_the_pro_bono_project/ (last visited Mar. 22, 2005).

than their fair share of *pro bono* cases. Furthermore, since Maine does not have a public defender's office,¹⁴² these practitioners are also paid by the State on a reduced basis to provide indigents charged with crimes with their constitutionally required legal services. Nevertheless, judicare would be a better option than *pro bono* for the private bar, as they at least would be paid something for their work. Consequently, asking them to bear the burden of some judicare cases would appear to be less onerous than asking them to bear the burden of additional *pro bono*. While under judicare rates even lower-paid lawyers would probably make much less than they could under their normal hourly rate, they are unlikely to be charging that rate for every client anyway, considering that they often, voluntarily or not, perform legal services for reduced rates.

Indeed, lawyers in smaller, struggling firms might be in favor of judicare in that it gives them a steady source of fees.¹⁴³ Attempts to make the system more understandable to *pro ses* encourages some people to do it on their own who would otherwise hire a lawyer – essentially undercutting the livelihood of some members of the private bar.¹⁴⁴ Judicare is a way of providing assistance to indigents in a way that benefits the bar. A more serious problem is whether or not Maine could afford judicare. Care would have to be taken to ensure that the costs of the program do not spiral out of control; indeed, England's legal services program has traditionally been one of the most expensive in

¹⁴² See National Center for State Courts, "Indigent Defense in State and Federal Courts", at http://www.ncsconline.org/WC/Publications/KIS_IndDefStatesPub.pdf. See also National Legal Aid & Defender Association, "Defender Resources", at http://www.nlada.org/Defender/Defender_Kit/facts (last visited Mar. 22, 2005); Ronald W. Schneider, Jr., *A Measure of Our Justice System: A Look at Maine's Indigent Criminal Defense Delivery System*, 48 ME. L. REV. 335, 374 (1996).

¹⁴³ In part because of this, it would be necessary to ensure that any judicare program implemented is not structured so that it gives lawyers incentives to settle early in order to collect the largest fee for the least amount of effort, or otherwise jeopardizes the quality of representation.

¹⁴⁴ Many lawyers have taken up this challenge to their profession by publicizing the reasons why, even in a simplified system, a lawyer's help is still useful. See, e.g., Brown & Pols, P.A., "The Family Case Management System (and why you still need a lawyer)", at <http://www.edwardabrown.com/fammed.html> (last visited Mar. 22, 2005).

Europe.¹⁴⁵ Limiting judicare to particular locales and particular types of cases might be one way of ensuring that costs remain manageable. Another way to keep costs down for the State would be to seek outside funding. For example, Wisconsin's judicare program is primarily funded by LSC.¹⁴⁶

In the volunteer's determination whether or not to recommend a case for extended representation, means testing will be crucial. Not only are most legal aid organizations hamstrung by financial restraints; but Maine's Judicial Branch has a budget that is among the lowest in the nation.¹⁴⁷ They are required to set aside roughly 20% of this budget for court-appointed attorneys in criminal matters. Before the judicial branch devoted any more of this limited budget in order to provide legal assistance to *pro ses* in civil matters, it would almost certainly require a determination that those appearing at the courthouse and requesting *pro se* assistance truly could not afford a lawyer.¹⁴⁸ However, while means testing seems a sensible way to cut down on costs, there are problems with administrability – since *pro ses* often do not even bring documents regarding their claim to court with them on their court date, it might not be very plausible to believe that they would bring documents showing proof of financial ineligibility. In regard to counsel in

¹⁴⁵ See Goldstein et al., *Improving Access to Justice: Legal Services Funding and Private Bar Involvement in Public Interest Lawyering Around the World*, *supra* note 141.

¹⁴⁶ See Wisconsin Judicare, Inc., "History & Organization of Wisconsin Judicare", at <http://www.judicare.org/history.htm> (last visited Mar. 22, 2005).

¹⁴⁷ The Judicial Branch's budget for fiscal year '04 was around \$51.5 million – less than 2% of the State's General Fund. Of this amount, about \$11.5 million was set aside to be spent on constitutionally required attorneys. See 2004 SUMMARY ANNUAL REPORT OF THE MAINE JUDICIAL BRANCH: Maine's Court System, available at <http://www.courts.state.me.us/annualreport/Annualreport2004/annualrptsumm04.pdf>. When it is considered that the Judicial Branch returned over \$31 million to the General Fund last year, this amount seems relatively modest. See 2004 REPORT OF THE MAINE JUDICIAL BRANCH: Fiscal Information, *supra* note 18. See also Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, *supra* note 19.

¹⁴⁸ Means testing has the added bonus of making it more likely that the private bar would support such a program, as the more help provided to *pro ses*, the more attractive the do-it-yourself option is likely to seem to those weighing whether or not it would be worth it to hire a lawyer to pursue their claim. If we limit assistance to those who cannot afford lawyers anyway, we are less likely to be seen as taking away the livelihood of lawyers – this is business they would not have gotten regardless.

criminal matters, the State has adopted a sensible approach in order to address the administrability problem. While anyone appearing before the court on a criminal charge, regardless of finances, may speak to the “lawyer for the day” at his arraignment,¹⁴⁹ in order to obtain a court-appointed lawyer it is necessary to fill out an indigency affidavit.¹⁵⁰ Similarly, in civil cases, the State might allow anyone arriving at the courthouse without a lawyer to speak to the volunteers present, but in order to be recommended for an option involving extended representation, proof of indigency would have to be shown.

C. Law Students and Lay Advocates

Since the extended representation option would realistically only be available to a fraction of those *pro ses* appearing at the courthouse, even under this model, there remains the problem of what to do with those turned down for extended representation, or not recommended for representation by the screeners in the first place - because the law is less complex or more intuitive, because the *pro se* seems relatively articulate, or because the other side is not represented. In such cases, one potential option would be to make expanded use of the volunteers already present in the courthouse to conduct screening. Volunteers could assist the *pro ses* in filling out forms, give them advice before their hearings, and if need be, articulate their interests in court.

¹⁴⁹ See *A New Model for Scheduling Courts and Allocating Judicial Resources*, REPORT OF THE JUDICIAL RESOURCE TEAM TO THE MAINE SUPREME JUDICIAL COURT (Sept. 19, 2003), available at http://www.courts.state.me.us/rules_forms_fees/JRT%20Final%20Report.htm (last visited Mar. 22, 2005). See also District Attorney’s Office, Cumberland County, Maine, “Frequently Asked Questions”, at <http://www.cumberlandcounty.org/da/docs/Dafaqs.html> (last visited Apr. 20, 2005) (informing viewers that the “Lawyer for the Day” program in Portland...“ensures that a private defense attorney is available on your arraignment date to discuss your case with you and provide you with free legal counsel. You must remember that this lawyer does NOT become your attorney through the remainder of your case, unless you make arrangements to retain him or her as counsel. He or she is in court for arraignments to ensure that all defendants may receive sufficient legal advice regarding their plea on that day.”).

¹⁵⁰ State of Maine, Indigency Affidavit, CR-032, available at <http://www.ptla.org/forms/allforms.htm> (last visited Mar. 22, 2005).

Yet the more that we increase the role given to volunteers and non-lawyers, the more effective training, regulation, and supervision become crucial. To avoid the difficulties posed by these considerations, it perhaps might be possible to place attorneys in the courthouse to give limited legal assistance, much as attorneys currently do in the criminal context through the “lawyer for the day” program.¹⁵¹ Lawyers are already subject to regulation through the Maine Bar Rules (and indeed, the recent amendments to the bar rules to allow for unbundling expressly contemplate limited assistance by lawyers), and would not require supervision. Plus there is the obvious benefit that *pro* *ses* would be receiving advice from actual lawyers.

There are a few difficulties with this approach, however. First, it further increases the burden on the private bar, which is already being asked to take *pro bono* cases, court-appointed criminal work, and (under this model) *judicare* civil cases.¹⁵² Second, there are ethical issues to be considered when attorneys provide legal advice in a setting such as this. Under the Maine Bar Rules, an attorney in a “Court-Annexed Limited Legal Service Program” or one practicing under the auspices of a non-profit organization is subject to the conflict rules for any limited representation work only if he *knows* that the representation involves a conflict of interest.¹⁵³ Still, lawyers in smaller firms and rural areas are likely to know who their clients are and when a conflict exists, and thus would

¹⁵¹ For another example, one could look to California, where each county has a “family law facilitator” - a lawyer with experience in family law who is appointed by the court. The facilitator provides educational materials, help in filling out court forms, assistance in figuring out support amounts, and referrals to community agencies. See California Courts: Self-Help Center, “Questions & Answers About Family Law Facilitators”, at <http://www.courtinfo.ca.gov/selfhelp/lowcost/qa-flf.htm> (last visited Mar. 22, 2005). See also CAL. FAM. CODE § 10002 *et seq.* The program is funded through Title IV-D of the Social Security Act. See CAL. FAM. CODE § 10011.

¹⁵² In 1993, the VLP was concerned that there might be a decline in “the ability and willingness of these dedicated... [rural] attorneys to maintain the level of participation in the VLP that they have demonstrated over the last decade”. “The VLP: Ten Years After – History of the VLP”, *supra* note 47. Similarly, it is a matter of some concern that if the private bar is asked to shoulder a greater *pro bono* caseload than it can bear (or is not adequately compensated for this work), then they might refuse to take such cases altogether.

¹⁵³ ME. BAR R. 3.4 (j).

be prohibited from many cases. Furthermore, many lawyers would be understandably wary of determining where to draw the line. Often the rules of ethics are seen as a floor rather than a ceiling – and many attorneys would be hesitant to provide legal advice to someone who might be pursuing interests adverse to an existing client.

Since volunteer lawyer time is a resource which would seem to be best used elsewhere, it is probably necessary to rely on non-lawyer volunteers for limited assistance. One potential relatively untapped resource is third-year law students. The advantage of using law students is manifold. First, they already possess some legal knowledge and training, and would probably pick up additional training rather easily. Second, they are not members of the bar, and therefore are not subject to the conflict provisions and other ethical rules embodied in the Maine Bar Rules. Yet they do wish to become members of the bar in the near future, and because of that, would likely be easy to regulate by the court. Third, a placement in a rural area might encourage a law student who would not otherwise consider working in such an area to seek a job there, thereby alleviating the rural shortage of attorneys. Furthermore, providing law students with exposure to actual cases and the daily workings of the District Court would be practical and useful from an educational perspective.¹⁵⁴ Finally, it might instill these lawyers-in-training with a respect for *pro bono* or at least an understanding of the extent of *pro se* in the lower-level trial courts. If so, even if after graduation a law student went on to work in a large firm doing little or no work in such courts, he or she could still be an advocate for more *pro se* assistance activities within the bar.

¹⁵⁴ Along related lines, others have suggested that law students be utilized to teach *pro se* clinics in order to improve their ability to explain the law to laymen and speak in public – both valuable skills needed by effective advocates. See Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 *FORDHAM L. REV.* 1879, 1918-19 (1999).

Despite the advantages of using law students, there are significant practical problems in translating it from theory to practice. Maine has only one law school – the University of Maine School of Law (“Maine Law”), located in Portland. The class size at Maine Law is roughly 85 students.¹⁵⁵ Consequently, there are over eighty third-year law students which could be made available as a volunteer resource if a mandatory field component was introduced into Maine Law’s educational requirements. The question is where to place these students, so as to maximize their usefulness while effectively monitoring them. There is a secondary question as well; namely, how to get the bar, the courts, Maine Law, and the students to agree to mandatory placements for *pro se* assistance. Both of these questions will be dealt with in turn.

There are several possibilities for placement. One option would be for students to be placed with practitioners around the State. Each student could be assigned to a lawyer or a law firm, to work on *pro se* assistance. To establish such assignments, it is first necessary to determine what geographical areas most require volunteers. After so determining, lawyers from these areas could be recruited to monitor the students. Any work done by the student would need to be supervised by his or her responsible attorney, and he or she would ultimately be responsible for the student’s activities.

Critics of this proposed approach will no doubt point out that in many if not most areas of Maine (particularly the underserved rural areas), there are few large or even medium-sized firms, and small firms and solo practitioners are the norm. Yet it is unlikely that a solo practitioner would feel as though she had the time or inclination to take charge of a law student – to supervise his work, to answer his questions, and to take

¹⁵⁵University of Maine School of Law, “2004 Entering Class Profile”, at <http://mainelaw.maine.edu/admis-profile.htm> (last visited Mar. 22, 2005).

him along to court. This is particularly likely to be the case if the student's time is devoted to helping *pro ses*, rather than paying clients. However, it is possible that some sort of trade-off could be arranged. The student could give a partnership or solo practitioner research assistance, and in return the firm might have additional time to take on more *pro bono* cases or to help more *pro ses*.

Unfortunately, this is a risky strategy and could easily lead to suboptimal results. There is no guarantee that a small firm or solo practitioner would have enough legal work for the law student to do, and if not, either the law student becomes a burden to the firm or he might be used for more secretarial tasks – hardly a boon from an educational perspective. Furthermore, a law firm would certainly not want to get a reputation as taking on a lot of cases for free (particularly since the extra help would only be available for part of the year). And there is the opposite problem (from the *pro se's* perspective) that the word might *not* get out about this source of assistance. Finally, there are probably limits as to how many additional indigent litigants could be helped through this method. A lawyer might feel that his obligation would be satisfied by picking up one or two more *pro bono* cases or helping several *pro ses* – whereas a law student with no other commitments could assist a much greater number of people.

Perhaps then, a more direct and efficient solution would be to put the students directly in the courthouse, where they could reach *pro ses* more effectively. There are currently 31 District courthouses in Maine (not all are full-time).¹⁵⁶ Larger, full-time courts such as Portland and Bangor could have several law students permanently assigned there. More rural courts with lighter caseloads could be assigned one or two law students on days when court is in session and there is a civil docket. Again, however, the key to

¹⁵⁶ Maine Judicial Branch, "District Courts", *supra* note 16. There are 33 District Court judges. *Id.*

effective distribution is assessing relative need. A comprehensive survey of the Maine District Courts would have to be undertaken, to determine not just which courts have the heaviest dockets, but which courts have the largest numbers of *pro ses* and the greatest percentage of cases in which *pro ses* tend to fare much worse than represented parties.¹⁵⁷

Assigning students to a courthouse is less of a problem than determining what to do with them once they are there. If we as a society were willing to loosen our traditional understanding of the adversary system and each actor's role within that system, it might be possible to have the judge monitor the law students. For example, if each of the 33 District Court judges were assigned at least two law students (the extra students could be assigned either to courts with heavier numbers of *pro ses* or to Superior Courts with substantial numbers of *pro ses*), the students could assist the judge by helping the *pro ses* present their information to the court. Essentially, in a case involving a *pro se*, the judge would allow the unrepresented party the opportunity to speak with one of the students. In a case involving two *pro ses*, both students would be involved – one for each litigant. The students could try to help the parties reach an agreement (subject to approval by the court), or if that did not work, they could speak for “their” parties in court, which would perhaps allow for a more efficient and complete presentation of information.

While this may be a useful idea in theory, the bar would be likely to balk at the idea of judges supervising law student advocates for *pro ses* in cases where the other side is represented. Though any lawyer is likely to be more knowledgeable than a law student, there would seem to be reason to be concerned about real or perceived bias on

¹⁵⁷ The Administrative Office of the Courts already keeps track of the number and types of cases filed in each court, so it would be relatively easy to determine which courthouses need the most help once it is determined what types of cases generally draw large numbers of *pro ses* and most require a lawyer's assistance.

the part of a judge toward his law student “protégée”. Even if we were to assume a lack of actual bias, this arrangement would still seem to send a disturbing message to people coming to court; namely, that you don’t need to spend money on a lawyer, as you can get assigned to a semi-lawyer who is close to the judge for free. This potential encouragement of *pro ses* could be stemmed by means-testing – to ensure that only people who truly could not afford a lawyer were able to take advantage of this option. However the problems of means-testing people showing up at court for the very first time have already been discussed. Finally, the bar might just object in general to the introduction of a law student (or indeed any volunteer or lay advocate) into the process. In cases where there hasn’t been a mediator or CMO involved, and the *pro se* has been intractable or unreasonable, the insertion of a reasonable person into the process might offer an opportunity for settlement. But in a case that has dragged on without settlement despite opportunities for doing so, the lawyer involved might just feel frustrated and want to get the trial over with without wasting more of his time and his client’s money – both of which would be required to get the law student up to speed or otherwise introduce more steps in the process of resolution.

At least a few of these problems could be ameliorated by having law students monitored in other ways. It might be possible for the State or Maine Law to hire only a few full-time supervisors, who could perhaps be assisted by legal volunteers in a centralized office. If the law students received extensive training, had protocol/interview guidelines to follow, and could confer with a supervisor regarding any issues that arose, such long-distance supervision, while not ideal, at least would have the potential to be successful. Furthermore, if the law student volunteers had access to computers in the

courthouse, they could fill out court forms with the *pro se* online and then e-mail them to the central office for review. There would have to be a fast turn around on any such review, as well as a general procedure whereby a supervisor was always quickly available to answer the student's questions *via* phone or e-mail. The effectiveness of this long-distance supervision could be increased if it was supplemented by monitoring from legal aid lawyers in the larger courthouses, where they have a regular presence (although this might be relatively unrealistic given the demand for these lawyers' time as previously noted). And in more rural areas, perhaps judges could keep an eye out for any problems with the students' assistance or any oversights, as a sort of safety net.¹⁵⁸

Assuming that the problems regarding the use of law students in this capacity could be ironed out, there still remains the issue of getting support for such a program. In particular, there is left the question of why Maine Law and its students would agree to implement such a radical view of legal education as is posed by statewide mandatory clinical placements. There are in fact, however, several potential models for such placements. Although none of these models are precisely on point, all could serve as the basis for a pilot program.

First, optional, local clinicals have become standard fare for law schools. Indeed, Maine Law already offers such a program in the form of the Cumberland Legal Aid Clinic. The clinic has two different components, a General Practice Clinic (doing mostly family law work), and a Prisoner Assistance Clinic. According to the Project Director, Deirdre Smith, up to twenty students (out of the roughly 85 enrolled as third-year students at Maine Law) participate in these clinics, and the courses usually must be

¹⁵⁸ I am grateful to Jeanne Charn for the exploration of the possibilities of long-distance supervision in this context.

lotteried.¹⁵⁹ Thus there is reason to suppose that a high proportion of students are willing to participate in some sort of clinical work; a proportion which might increase with more diverse offerings. However, the existing clinic does not require students to disrupt their lives by traveling elsewhere in the State for weeks or even months at a time, as a mandatory, statewide clinic would do. Such a program would probably be far less attractive to students.

In order to find a closer analogy, it is necessary to turn to the medical profession. Just as Maine has one law school, it also has only one medical school, also located in southern Maine. Like most American medical schools, the University of New England (“UNE”) is much more focused on practical education than its counterparts in the legal world.¹⁶⁰ In addition to a number of other placements, UNE requires its students to participate in Area Health Education Center (“AHEC”) clinical clerkships. A national, federally-funded program, AHEC was designed in part to “support the community-based training of primary care health professions students and residents in health professional shortage areas and medically underserved areas”.¹⁶¹ To meet the purposes of AHEC, UNE requires that each fourth-year medical student spend four weeks with a rural provider (usually in a family practice).¹⁶²

¹⁵⁹ See Telephone Interview with Deirdre Smith, *supra* note 7.

¹⁶⁰ Clark D. Cunningham, *Rethinking the Licensing of New Attorneys – An Exploration of Alternatives to the Bar Exam: Introduction*, 20 GA. ST. U. L. REV. vii, xxii (Summer 2004) (“The training and licensing of physicians, in its extensive integration of academic and practical education, offers a model towards which the legal profession could well aspire...Although the traditional model for medical school education was the ‘2+2’ curriculum – two years of basic science followed by two years of clinical education – most schools now introduce students to actual patient care beginning in the first year”).

¹⁶¹ National AHEC Organization, “Area Health Education Center (AHEC) Program: The AHEC Mission”, at <http://nationalahec.org/main/ahec.asp> (last visited Mar. 22, 2005). See also University of New England, “AHEC: From Pipeline to Practice”, at <http://www.une.edu/com/ahec/flow.html> (last visited Mar. 22, 2005).

¹⁶² Telephone Interview with Paul Weston, Executive Director, Acadia Health Education Coalition (Nov. 13, 2004). See also University of New England, “Maine Area Health Education (AHEC) Network”, at <http://www.une.edu/com/ahec/index.html> (last visited Mar. 22, 2005).

There are a number of useful lessons that the AHEC program followed by UNE could offer to a proposal to put law students in areas that are underserved from a legal aid perspective. First, the medical students often assume quite a lot of responsibility while assisting in the rural practice, without serious incident. Second, while there is a lot of turnover in finding supervisory practitioners (known as preceptors); there has never been a shortage.¹⁶³ Third, costs are relatively low – students are housed with families in the local area, and again, this has been largely successful.¹⁶⁴ Finally, though students do complain about paying tuition while they are not actually in school, they tend to give positive feedback about the program, particularly regarding the fact that they get to try their hand at a variety of work.¹⁶⁵

The AHEC program was designed as a way of encouraging medical students to practice in underserved areas, particularly rural areas.¹⁶⁶ But the model it offers could also work quite well in this context (although it suggests that students should be placed with attorneys rather than in the courthouse). Since the costs would largely be limited to hiring a staff to find housing and supervisors as well as a director to deal with complaints, it would likely be an attractive proposal from the judicial branch’s perspective,

¹⁶³ Telephone Interview with Paul Weston, *supra* note 162. Weston believes that this is because most professionals feel obligated to help educate the next generation. *Id.* If such does not hold true for the legal profession (or lawyers are less willing to give up their time than AHEC preceptors because the law students would be assisting non-paying rather than paying clients and thus not “earning their keep”), I would also suggest that an additional inducement could be offered to professionals who are willing to supervise; namely, continuing legal education credit.

¹⁶⁴ *Id.* See also University of New England, “Maine Area Health Education (AHEC) Network”, *supra* note 162.

¹⁶⁵ Telephone Interview with Paul Weston, *supra* note 162. See also University of New England, “AHEC: Program Feedback”, at <http://www.une.edu/com/ahec/feedback.html> (last visited Mar. 22, 2005).

¹⁶⁶ See University of New England, “AHEC: Healthcare Workforce Shortage Problem”, at <http://www.une.edu/com/ahec/shortage.html> (last visited Mar. 22, 2005). Note that many of the same rural areas which are medically underserved also have few lawyers, and therefore this purpose might carry over to the legal context, adding a secondary goal to the program proposed here.

particularly if those costs were covered by Maine Law.¹⁶⁷ Since the program would be limited to four weeks, during which time students would be paying tuition, Maine Law might also find the program to be advantageous. It is less clear that law students would. While medical students only grumble about the program, they are at least used to being shipped elsewhere to gain practical experience. Law school students, not used to such a practice, might be much more vociferous at being uprooted (although the temporary nature of the program should help silence opposition). At the very least, Maine Law would probably have to start an AHEC-modeled program for its incoming classes rather than for its existing students, and, if such a program did not prove popular among the students after a few years, the school would have to discontinue the program or face a huge admissions hit.

One other model is worth discussing, namely, the recent debate among scholars and practitioners concerning the merits of bar alternative proposals. Under the generic form of this proposal, for a period of time immediately following law school graduation, graduates provide reduced-fee legal services to persons of modest means, in exchange for admission to the bar. There have been two such proposals advanced in the United States.¹⁶⁸ In New York, the proposal has been dubbed the Public Service Alternative Bar

¹⁶⁷ Although the State legislature might be somewhat ambivalent as to whether the program were financed by Maine Law or the judicial branch – since both institutions rely on State funds. Nevertheless, the legislature would seem to be likely to prefer Maine Law as well. Maine Law is an administrative unit of the University of Southern Maine, a member of the University of Maine System. State appropriations constitute only about a third of the University of Maine System’s total operating budget. See University of Maine System, “Gift Giving to the University of Maine System”, at <http://www.maine.edu/oft/gifts.htm> (last visited Mar. 22, 2005).

¹⁶⁸ Note also that South Africa has implemented a program of licensure by which the usual two years of apprenticeship required of attorneys may be reduced to one year if the person performs twelve months of community service with a public interest legal organization. See Cunningham, *Rethinking the Licensing of New Attorneys*, *supra* note 160, at xviii-xix.

Examination (“PSABE”).¹⁶⁹ The PSABE requires selected graduates to work for a three-month period in a placement within the court system under the supervision of court personnel.¹⁷⁰ Applicants will “draft opinions, conference cases, assist unrepresented litigants and serve as mediators”.¹⁷¹ After their admission to the Bar, applicants will also be required to provide 150 hours of *pro bono* work over the following three years.¹⁷²

From an educational perspective, the PSABE has been touted as a way to make up for the “general dissatisfaction with the job currently done by legal education in training its graduates for actual practice”¹⁷³ Since law schools must, out of necessity, teach to the bar, changing the bar might provide incentives to law schools to offer more skills-based or clinical experiences.¹⁷⁴ Another possible advantage of the PSABE is that it could help to bridge the “disconnect between legal education and the courts”.¹⁷⁵

¹⁶⁹ See The Committee on Legal Education and Admission to the Bar of the Association of the Bar of the City of New York and the Committee on Legal Education and Admission to the Bar of the New York State Bar Association, JOINT COMMITTEE REPORT: PUBLIC SERVICE ALTERNATIVE BAR EXAMINATION (June 14, 2002), available at <http://nysba.org/Content/ContentGroups/News1/Reports3/jointRPT614.pdf>.

¹⁷⁰ *Id.* at 6.

¹⁷¹ *Id.*

¹⁷² *Id.* at 7.

¹⁷³ Kristin Booth Glen, *In Defense of the PSABE, and Other “Alternative” Thoughts*, 20 GA. ST. U. L. REV. 1029, 1035 (Summer 2004). The proposal is based in part on the 1992 report of the ABA’s Taskforce on Law Schools and the Profession (more commonly known as the MacCrate Report), which comprehensively examined both legal practice and legal education and presented ten fundamental lawyering skills considered necessary for competent practice. See Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1698-99 (2002). It is these skills which the PSABE is designed to test. See Glen, *In Defense of the PSABE*, 20 GA. ST. U. L. REV. at 1031.

¹⁷⁴ See Glen, *In Defense of the PSABE*, *supra* note 173, at 1036; Glen, *When and Where We Enter*, *supra* note 173, at 1735.

¹⁷⁵ Kristin Booth Glen, *Thinking out of the Bar Exam Box: A Proposal to ‘MacCrate’ Entry to the Profession*, 23 PACE L. REV. 343, 488 (Spring 2003) (“Bringing clinicians and other legal educators into the courts to plan and execute a pilot program and to work collegially with judges and other court personnel would expose a new and important group of stakeholders to the courts’ many problems--and many possibilities. Once the connection was made, participants from legal education might well remain engaged in issues of court reform and the courts’ justice initiatives. They might also take back to their classrooms and their colleagues a more realistic and nuanced picture of the court system than can be gleaned from casebooks and most law review articles.”).

Note that in a state such as Maine, this “disconnect” is likely to be less of a problem. Maine Law is the only law school in the state, and a high proportion of its graduates go on to become members of the Maine bar. For example, the State’s current Attorney General and two of the seven Supreme Court Justices are Maine Law graduates. Indeed, the ties between the law school and the state are emphasized on the

Despite the strong advocacy of its primary proponent, Kristin Booth Glen, Dean and Professor of Law, City University of New York School of Law, and others, there has been little official response to the joint proposal made nearly three years ago by the Association of the Bar of the City of New York and by the New York State Bar Association that a pilot program be implemented.¹⁷⁶ Supporters of an alternative bar exam have had somewhat more success in Arizona, where a similar proposal for a pilot project has recently been accepted, and will be implemented pending funding. The public service alternative to the traditional bar examination in Arizona is known as the Community Legal Access BarAlt (“CLABA”). The program is a one-year, post-degree “apprenticeship” which is designed to serve not only as an alternative method of first-time attorney licensure but also as a means of providing “reduced-fee legal counsel and representation to lower middle-income populations”.¹⁷⁷

As formulated, the Arizona program is being marketed as a broader solution to the problem of “unmet legal needs within both the community and the profession”,¹⁷⁸ as

school’s website. “Maine’s legal, governmental, and business community is similarly small. During your time in Law School, you will likely have an opportunity to meet the Chief Justice, the Governor, members of the Congressional delegation, along with leaders of the bar and various civic and business organizations. Each year, the finalists in our School’s Moot Court competition argue their cases before all of the justices of the State’s highest court. This is just one example of the special benefits you will garner from studying law in Maine.” University of Maine School of Law, “About Maine Law”, at <http://mainelaw.maine.edu/about.htm> (last visited Mar. 22, 2005).

¹⁷⁶ See Cunningham, *Rethinking the Licensing of New Attorneys*, *supra* note 160, at xii. See also Lawrence M. Grosberg, *Standardized Clients: A Possible Improvement for the Bar Exam*, 20 GA. ST. U. L. REV. 841, 845 n.15 (Summer 2004). Major concerns include how to finance the program, and how to administer the PSABE in a fair and valid manner. *Id.* at 849.

¹⁷⁷ Sally Simpson & Dean Toni M. Massaro, *Students with “CLAS”: An Alternative to Traditional Bar Examinations*, 20 GA. ST. U. L. REV. 813, 817 (Summer 2004). See also The Community Legal Access BarAlt Proposal: Proposal Summary (Jan. 15, 2004), available at <http://clubs.asua.arizona.edu/~clas/CLABA.html> (last visited Apr. 20, 2005).

¹⁷⁸ Simpson & Massaro, *Students with “CLAS”*, *supra* note 177, at 817. The article spends a great deal of time laying out the problem of unmet legal needs at the poorest levels of society. “Working-poor and moderate-means households are effectively locked out of the system. There is little chance that these individuals’ unmet legal needs will compel the system to fund an organized initiative for change. Although the need is evident, adequate services are inadequate and likely will remain so for those whose income falls within 125% and 500% of federal poverty guidelines.” *Id.* at 820-21.

opposed to its New York counterpart, which has largely been viewed as a way of responding to inadequacies in the current bar exam and in the existing state of legal education.¹⁷⁹ The pilot program envisions a 501(c)(3) Institute, run by an Executive Director, in which groups of three apprentices rotate through six different practice areas, each headed by a full-time lawyer-mentor who must conduct competency-based performance evaluations and otherwise oversee the students' work.¹⁸⁰

While approved by the Board of Governors of the Arizona Bar, and while there has been promising support among law students,¹⁸¹ the pilot program is contingent upon obtaining preliminary funding commitments.¹⁸² And indeed, the program is likely to impose significant costs. It will be necessary to cover administrative costs, costs of developing the Institute, and salaries for the lawyer-mentors and for an Executive Director (whom Simpson suggests should be “relatively highly compensated”).¹⁸³ Furthermore, the apprentices themselves must be paid for the work that they do, since most would not be able to afford to do a year's worth of work completely *pro bono*.¹⁸⁴ Indeed, such a program would likely be out of reach for a state such as Maine, barring substantial outside funding. A short-term program is probably far more manageable for Maine, as it would not require the payment of participants. Indeed, if the student participates while still in law school (as in the AHEC model), the State may even be able

¹⁷⁹ See generally Glen, *When and Where We Enter*, *supra* note 173.

¹⁸⁰ See Simpson & Massaro, *Students with “CLAS”*, *supra* note 177, at 817-18, 828-29. The six practice areas are: government regulation, business finance and planning, family law, personal finance and planning, personal and economic injury, and criminal defense. *Id.* at 832-33.

¹⁸¹ The sample size was very limited, but a survey of graduating students done at the University of Arizona James E. Rogers College of Law during April of 2002 indicated enthusiasm for the proposal. See “Student Survey Results”, available at <http://clubs.asua.arizona.edu/~clas/CLABA.html> (last visited Mar. 22, 2005).

¹⁸² See Cunningham, *Rethinking the Licensing of New Attorney*, *supra* note 160, at xii.

¹⁸³ See Simpson & Massaro, *Students with “CLAS”*, *supra* note 177, at 828.

¹⁸⁴ Simpson estimates a salary of between \$19,000 and \$24,000 for the year – certainly a modest amount, but not a negligible cost. See *id.* at 818 n.6.

to get the student to pay to participate.¹⁸⁵

To sum, there are a number of models for expanding the use of law students as a source of help to *pro ses* in the courthouses; models which could act as the basis for a pilot program.¹⁸⁶ With sufficient support from among the bar, Maine Law, the courts, law students, and the community, Maine could greatly increase the help that it gives to *pro ses* at relatively reasonable additional cost. Nevertheless, even under the best of circumstances, the third-year law students would only be a part-time solution. Other lay advocates and volunteers would be needed to fill the demand for *pro se* assistance during the remainder of the year, or the role of the clerks would need to be expanded to allow them to provide such assistance (with a concomitant increase in resources enabling them to do so). However, allowing lay volunteers would present even more of a “quality control” and regulatory problem, especially if such people were allowed to give legal

¹⁸⁵ Cf. Glen, *Thinking out of the Bar Exam Box*, *supra* note 175, which discusses ways by which recent graduates may be induced to work for free at least for a short-term period. “Saving the cost of a bar preparation course also makes it more likely that applicants of limited financial means could afford to devote ten weeks to unpaid work.” *Id.* at 425.

¹⁸⁶ One additional model, not discussed here, is the (largely unsuccessful) attempt by a few law schools to create a post-graduate program. In 1998, the faculty at Rutgers Law School in Newark approved the “Rutgers Law Fellowship Program”, a three-year pilot project designed to mimic internship and residency requirements for doctors, under which recent graduates would work with a managing director for two years, providing legal services to clients referred to the program from the general public. The program was intended to become self-funded, with monies generated from the legal services provided. Referred clients would be approved on the basis of the educational value of the services they requested, as well as financial need. However, referred clients would generally be charged a modest rate for services (half of what was charged by similarly experienced practitioners in the private sector). See Tim O’Brien, *Rutgers-Newark Weighs Plan for Post-Grad Clinic*, 154 N.J. L.J. 169 (1998); Andrew J. Rothman, *Preparing Law School Graduates for Practices: A Blueprint for Professional Education Following the Medical Profession Example*, 51 RUTGERS L. REV. 875 (1999). Unfortunately, the program has failed to get off the ground, due to an inability to secure funding (as well as some concern that the program as designed inappropriately competed with the work of local community lawyers). Instead, Rutgers has channeled its efforts into the Community Law Clinic, an in-school program which does corporate and transactional work for organizations serving the low-income community. Telephone Interview with Andrew J. Rothman, Esq., Assistant Dean for Academic Administration and Associate Director, Community Law Clinic, Rutgers School of Law: Newark (Mar. 2, 2005). See also Rutgers School of Law Newark, “Clinics: Community Law Clinic”, at http://law.newark.rutgers.edu/clinics_community.html (last visited Mar. 22, 2005). Note that Chicago-Kent College of Law at the Illinois Institute of Technology also attempted a similar project, without success. See O’Brien, *Rutgers-Newark Weighs Plan for Post-Grad Clinic*, 154 N.J. L.J. at 169.

advice.¹⁸⁷ This problem is not insurmountable, however. Hiring a supervisory attorney would go a long way towards correcting any oversights or missteps by volunteers, and the court itself could act as a final check to stem the consequences of mistakes.¹⁸⁸

Furthermore, volunteers could be useful even if relegated to a limited role, as in many cases the prospects of *pro ses* might improve if they simply had some (not necessarily legal) support.¹⁸⁹

D. Judges and the Maine Court System

Third-year law students and lay volunteers, thoroughly trained and adequately

¹⁸⁷ This might require an amendment of the current rule, which provides that no person may practice law in Maine unless admitted to the bar of the State. ME. REV. STAT. ANN., tit. 4, § 807. Some way around this rule for at least limited information about what to expect in the courtroom would probably be necessary for any large-scale use of volunteers. This is not a particularly difficult obstacle to overcome, as many states have adopted or discussed clearer definitions designed to draw distinctions between information and advice and to lay out ways that non-lawyers, particularly clerks, can provide assistance. *See, e.g., May I help you? Legal Advice vs. Legal Information: A Resource Guide for Court Clerks*, Judicial Council of California, Administrative Office of the Courts, Access and Fairness Advisory Committee (2003), available at <http://www.courtinfo.ca.gov/programs/access/documents/mayihelptyou.pdf>. Similarly, clarification of what types of information court staff and volunteers may impart to *pro ses* was one of the measures recommended by the Task Force. *See* Letter from Hon. Joseph Field to Hon. Kermit Lipez, *supra* note 55. It should be noted that despite the fact that District Court clerks are at the current time officially prohibited from giving advice, *see, e.g.,* ME. REV. STAT. ANN., tit. 5, § 4653; ME. REV. STAT. ANN., tit. 19-A, § 4005, it is likely that they occasionally cross the line into doing so when they are besieged by requests for assistance from *pro ses*. If so, this would suggest that a clearer definition of which types of informational help are prohibited and which are not would be extremely helpful to clerks and perhaps more effective than an absolute bar.

Note also that the unauthorized practice of law prohibition is less of a problem for law students, as ME. R. CIV. P. 90 provides that eligible students may appear in court in civil actions (subject to certain restrictions). *See also* ME. REV. STAT. ANN., tit. 4, § 807 (providing an exception for senior law students appearing in court under the supervision of legal services organizations).

¹⁸⁸ For a discussion of the possibilities of supervision and regulation of non-lawyer legal assistance, *see* Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2274-75 (1999). *See also* Russell Engler, *And Justice for All -- Including the Unrepresented Poor: Revisiting The Roles of The Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1991, 2041 (1999) (suggesting that the judiciary, particularly if it was unwilling to revise the role of clerks, could tackle the problem of *pro se* litigants by nurturing and overseeing the increased use of skilled lay advocates, and noting that “the danger that lay advocates will give poor legal advice should be addressed by training and oversight, not a prohibition against giving the advice”).

¹⁸⁹ For example, in many cases involving domestic abuse, domestic violence advocates from local non-profit organizations (such as WomenCare and Spruce Run in central Maine) go to court with battered women to provide moral support when they must face their batterers. Telephone Interview with Tamar Mathieu, *supra* note 7. *See also* Spruce Run, “Services for People Affected by Domestic Abuse”, at <http://www.sprucerun.net/services.html> (last visited Mar. 22, 2005); Pine Tree, TOP FY 2000 Project Narrative, Grant #23-60-00002, *supra* note 55 (“Local domestic violence advocates usually travel with victims to offer support and a sense of safety as they seek court orders”).

supervised, could perform a number of useful functions to assist *pro ses*. By screening all *pro ses* entering the courthouse, they could better assess the various needs and requirements of each. Those *pro ses* needing a great deal of assistance, or who are involved in relatively complicated matters, could be referred to a legal aid representative (so long as they met the financial requirements), or barring availability, to a local practitioner taking *judicare* cases. Those *pro ses* better able to speak for themselves and handle their own interests could be given limited assistance from these law students and lay advocates, such as help in filling out forms, information and support, and, if necessary, aid in articulating their interests in court.

But Maine could provide further assistance to those *pro ses* not able to secure legal representation, at least in cases without a lawyer on the other side, at little or no additional cost – by just changing the procedure. Simply put, when there are two *pro ses* in a case, a judge should be able to take a more active approach to the proceedings.¹⁹⁰ Such an approach has recently been advocated by Russell Engler and Richard Zorza, among others.¹⁹¹ Under such an “active” or “judge-led” approach, the judge would be

¹⁹⁰ Requiring judges to use this procedural approach would arguably not even mandate a change in the ethical rules, although an explicit statement in the comments endorsing this practice might be necessary in order to convince hesitant judges (particularly since even the appearance of impartiality is frowned upon in the American legal system, *see* MODEL CODE OF JUDICIAL CONDUCT, Canon 3(b)(5), cmt.). *See* Testimony of Richard Zorza before the Joint Commission to Evaluate the Model Code of Judicial Conduct, *supra* note 25. “My own view...is that there is, in fact, nothing in the code that prohibits appropriate judicial engagement... Your task is to find the right words to convey to judges that, provided they do it in an appropriate way, they can do whatever they feel is necessary in order to make sure that all sides of the story are told”. *Id.* Maine could go a long way towards convincing hesitant judges to take a more active approach in the case of *pro se* litigants by drafting a “proposed protocol” for such hearings, as has already been done by states such as Minnesota and Idaho. *See* Rebecca A. Albrecht et al., Judicial Techniques for Cases Involving Self-Represented Litigants, ABA, THE JUDGES JOURNAL, Vol. 42, No. 1, 18 (2003).

¹⁹¹ *See* Engler, *And Justice for All -- Including the Unrepresented Poor*, *supra* note 188, at 2028 (“Because the buck stops with the judge, she must be as active as necessary to ensure that the legal system’s promise of fairness and substantial justice is not frustrated by the litigant’s appearance without a lawyer. Far from offending notions of impartiality, the call for judges to provide vigorous assistance to unrepresented litigants is consistent with the need for impartiality. The judge’s role at trials involving unrepresented litigants should be modeled on precedent from the small claims courts and administrative agencies.”). *See also* Testimony of Richard Zorza before the Joint Commission to Evaluate the Model Code of Judicial

expected to ask questions of parties if to do so would be necessary to ensure that enough of the relevant facts needed for him to make his decision were set forth, rather than being allowed to sit back and rely on the parties alone to determine the scope of the record within the confines of the applicable procedural and evidentiary rules.¹⁹²

One step towards such an approach, which would allow the judge to take a greater role as well as prevent legal technicalities from frustrating the proceedings, would be to adopt a procedure similar to that used in small claims cases for all *pro se* non-jury trials. It is difficult to see of what benefit the formal rules of evidence are in a proceeding in which neither party knows of them.¹⁹³ At best, they are frustrating; at worst, they operate to keep a *pro se* party from presenting his case. The understandable concern of the courts is in keeping out useless, irrelevant, or otherwise terrible evidence. But a trial judge is aware of what types of evidence are less valuable than others (for example, hearing a description second-hand is obviously less reliable than personally viewing an incident),

Conduct, *supra* note 25 (“I think the problem is that we’ve tended to equate neutrality and passivity, and to equate engagement and nonneutrality. And my urging is that we need to think about them as on two dimensions. You can have an engaged judge who is neutral; and you can have a passive judge who is neutral. You can have a passive judge who is nonneutral and you can have an engaged judge who is nonneutral. Ironically...passivity makes it harder to observe and judge whether or not the judge is actually neutral”).

¹⁹² While I propose this approach primarily for cases in which both parties are *pro se*, in some areas of law, where *pro ses* are the norm, we might want to consider allowing judges to take an active approach even when one side has a lawyer. While it might be more difficult in such instances for judges to determine precisely how much they should become involved in the proceedings so as to maintain impartiality yet avoid bias and avoid unduly impinging on the role of counsel, it also might be more necessary for judges to take an active approach. Because in such cases the likelihood of a power imbalance is particularly great, allowing judges to examine both sides and take a firmer control over the proceedings would overcome at least some of the consequences of such an imbalance. Such a proposal would be likely to meet with stiff resistance from the bar, however.

¹⁹³ For a discussion of the abolition of the rules of evidence in Maine’s civil non-jury trials, see Peter L. Murray and John C. Sheldon, *Should the Rules of Evidence Be Modified for Civil Non-Jury Trials?*, 17 ME. BAR J. 30 (Winter 2002). Murray and Sheldon identify three reasons for modifying the majority of the rules of admissibility for non-jury trials, one of which is “the often unfair burden that such rules impose on *pro se* litigants”. *Id.* at 31. “Many *pro se* litigants do not suspect the existence of the rules of evidence, and practically all do not understand them”. *Id.* at 32. Proposals regarding the simplification of the rules of evidence were also made by the Task Force, but rejected by the Maine District Court in conference. See Letter from Hon. Joseph Field to Hon. Kermit Lipez, *supra* note 55.

and to the extent that the judge recognizes that the evidence being offered is less valuable, he will discount its weight when considering what outcome he should reach.¹⁹⁴

The benefits of a more active approach are manifold. If trial judges are already acting in such a way when there are two *pro ses* in a case, this change would provide official sanction to that approach. In other words, there would no longer be any disconnect between what the judge is actually doing in order to keep his courtroom functioning, and what he “should” be doing under the model of the American trial system. To the extent that trial judges are disengaged in cases involving two *pro ses*, switching to a judge-led model would have even more radical effects. A trial judge who takes the time to ask the relevant questions and to draw out the necessary information from the parties, coupled with a volunteer to assist a nervous or confused *pro se* (or perhaps one frightened of a more powerful opposing party), would go a long way towards ensuring that the *pro se* has a fair opportunity to be heard, as well as redressing the problem of a power imbalance.

Some judges might resist such a change in the system. After all, to make this change would further erode the venerable and time-honored adversarial model under which American lawyers have always been trained.¹⁹⁵ Furthermore, such a change would primarily apply to District Court judges, rather than to Superior Court justices (since Superior Court justices see *pro ses* much more infrequently). Some District Court judges might be somewhat sensitive towards any notion that they were being “degraded” into a

¹⁹⁴ See Murray & Sheldon, *Should the Rules of Evidence Be Modified?*, *supra* note 193, at 36 n.60.

¹⁹⁵ It is important to note that because of our cultural commitment and stake in the adversary system, it is doubtful that the American legal system will be scrapped and reformed in the European continental or inquisitorial model at any point in the near future. Nor is this paper advocating such a strong position – rather, it is merely advocating a more flexible and more active role for judges within the existing adversarial system, and only when *pro ses* are involved in the proceedings.

“lower” court.¹⁹⁶ If in a large portion of their cases they would be required to act in a way that did not meet their understanding of the judge’s role, while the Superior Court justices were generally allowed to continue under the traditional model, resistance might occur. There are several possibilities for dealing with this anticipated resistance. First, adequate training for judges would eliminate many of the questions or concerns regarding this approach. Second, it might be advantageous to unify the District and Superior Courts into one trial court, which would perhaps ameliorate any perception that the District Court is a “lower court”.

Unification has been a relatively controversial proposition in Maine, and the subject of recent study. While proponents (which include a large number of District Court judges, perhaps smarting over the caseload statistics discussed in Part I of this paper),¹⁹⁷ argue that unification would be an advantageous way to provide a more efficient distribution of existing resources, opponents (which include a large number of Superior Court justices) counter that the current dual system allows for specialization and that any revamping of the court system might require us to scrap our existing infrastructure and rebuild – an expensive proposition.

There are several ways by which unification could be implemented in Maine. One would be to simply merge the two courts into a single unified trial court system, with

¹⁹⁶ Even now some perceive the District Court as an inferior court. *See Sheldon, supra* note 1, at 306-8. *See also* FINAL REPORT OF THE STATE OF MAINE COURT UNIFICATION TASK FORCE TO MAKE RECOMMENDATIONS TO UNIFY THE SUPERIOR AND DISTRICT COURTS, Transmitted to the Hon. Daniel E. Wathen, Chief Justice, Maine Supreme Judicial Court, 14, 36 (Dec. 8, 1999) (describing the perception among some practitioners that District Court judges are more parochial and not as skilled as Superior Court justices, and recommending that measures be implemented to dispel this impression). Note that a large number of District Court judges go on to serve on the Superior Court, suggesting that most if not all are skilled enough to handle the work of either court. *See* Court Unification Task Force, *What to Expect in Court Unification*, 16 ME. BAR J. 180, 184 (2001) (reporting that as of the date of press, ten out of the sixteen Superior Court justices had previously served on the District Court).

¹⁹⁷ *See supra* note 22 and accompanying text

the resulting possibility that resources could be reassigned and positions (or locations) consolidated. Advocates of a single trial system argue that a dual system is wasteful and duplicative. If the courts were unified it might be possible to use existing resources more efficiently – by reassigning judges, making use of economies of scale, or otherwise freeing up time and money. In other words, with unification comes the possibility of consolidation. This is not a new idea. Indeed, the District Court system itself was devised as a consolidation of the old municipal court system which had preceded it. In 1962, the statewide District Court was created to replace 115 local municipal court judges and trial justices.¹⁹⁸ Many of the same concerns which have surfaced recently during the consideration of whether or not to unify the District and Superior Courts were also raised during a 1961 study of whether to reorganize the municipal court system. It was successfully argued then, however, that reorganization and consolidation would effect a monetary saving, even though new facilities and higher salaries would have to be implemented to accommodate the new District Court judges.¹⁹⁹

If unification did lead to consolidation, it might still be possible for judges to specialize, which would address one of the primary concerns opponents have regarding the efficacy of unification. Indeed, clustering several judges together in one location would make it possible for *increased* specialization. For example, if Bangor had six full-time trial judges, instead of between two to three District Court judges and two Superior Court justices, each could specialize in a particular area of expertise – e.g., family

¹⁹⁸ FINAL REPORT OF THE STATE OF MAINE COURT UNIFICATION TASK FORCE TO MAKE RECOMMENDATIONS TO UNIFY THE SUPERIOR AND DISTRICT COURTS, *supra* note 196, at 5

¹⁹⁹ See *A District Court for Maine: REPORT TO THE LEGISLATIVE RESEARCH COMMITTEE OF MAINE ON THE DESIRABILITY OF INTEGRATING ACTIVITIES OF MUNICIPAL COURTS AND TRIAL JUSTICES*, Prepared by the Institute of Judicial Administration, New York, N.Y., 4, 15-16, 29-30 (Jan. 1961). Under the new system, it was possible to have fourteen full-time judges do the work previously being done by about one hundred of their predecessors. *Id.* at 20.

matters, FED work, child protection cases, jury trials, etc.²⁰⁰ While some opponents might argue that consolidation would require the construction of entirely new courthouses in order to house such a collective pool of judicial resources, this would be a relatively short-term cost. Many courthouses around the State are in need of upgrades anyway.²⁰¹ There are also several sources of funds available from consolidation which might offset this cost. First, funds could potentially be derived from the sale of smaller, local courthouses which would no longer be needed.²⁰² Second, economies of scale might make it possible to cut a judicial position or two altogether. Another advantage of consolidated, central courthouses is that it would make it easier to implement the volunteer programs suggested in this paper, and to supervise the volunteers. Since the volunteers would be clustered in fewer locations, instead of spread out across the State, it

²⁰⁰ Under this relatively simple hypothetical, the extra judges would be drawn from the Newport, Lincoln, Millinocket, and Dover-Foxcroft District Courts, which would all be closed (these courts currently comprise Region VII of the Maine court system). There is no need to assume, however, that a consolidated Bangor District Court would be most efficient if it simply absorbed the other judges in its scheduling region - further study would have to be done as to the most appropriate placement of judicial resources.

While the idea of consolidating and shutting down regional courts remains purely hypothetical at present, as of the date of writing, a new Penobscot County Courthouse has been proposed for the City of Bangor which would house both the District and Superior Courts. According to State Court Administrator James Glessner, “the state would like to consolidate the two court operations into a single facility so that the state could realize some efficiencies in areas such as security, technology and staffing”. Consequently, there is reason to believe that, as existing courthouses become overcrowded, unsafe or inefficient, Maine may respond favorably to the idea of building new, consolidated facilities. Nevertheless, the Bangor project is contingent on obtaining legislative funding, and its efficiency is open to question, because the county has expressed its intent to maintain the existing Superior Court building for the next century, despite the fact that there are no concrete plans for its reuse. *See Site for New Courthouse Selected*, BANGOR DAILY NEWS (Apr. 16, 2005),

²⁰¹ *See id.* *See also* 2002 ANNUAL REPORT OF THE MAINE JUDICIAL BRANCH: Review of the Year, Maine’s Courthouses: Building for the Future, *supra* note 22 (discussing the recent renovations of the Lewiston and Springvale District Courts, and mentioning possible future renovations of the courthouses at Augusta, Bangor, Dover-Foxcroft, and Machias); Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, *supra* note 19 (“In some areas we need extensive renovations or a new facility”). Upgrades were also needed forty years ago. “A program for upgrading the facilities of the local courts is clearly in order. However, such a program obviously would present far greater difficulty if the present structure... were to be continued than if the number of places for holding court were to be reduced”. REPORT TO THE LEGISLATIVE RESEARCH COMMITTEE OF MAINE ON THE DESIRABILITY OF INTEGRATING ACTIVITIES OF MUNICIPAL COURTS AND TRIAL JUSTICES, *supra* note 199, at 15-16.

²⁰² Alternatively, these courthouses could be reused by the State for other operations, thus perhaps avoiding the need to construct new facilities for the same.

might be economically feasible to hire supervisors to be physically present in the courthouses.

While consolidation might seem like a beneficial idea which would ensure efficient resource allocation, there remains one significant problem, discussed in Part II of this paper; namely, that consolidation might pose difficulties for the rural poor. Since the very poor likely do not have easy access to transportation,²⁰³ perhaps the same justification for increasing the legal aid presence in rural communities applies to the debate about whether to reduce the number of courthouses. In other words, it might be better to have a number of rural courthouses, and require the area judges to travel to each on a regular basis, than to create one central courthouse in which the judges remain stationary but to which the lawyers, and more problematically, the *pro ses*, must travel.²⁰⁴

²⁰³ See *supra* note 53 and accompanying text. As was mentioned earlier, the findings of the Maine Commission on Legal Needs were somewhat unclear as to whether or not the rural poor do indeed have significant problems regarding access to transportation. In a state such as Maine, where public transportation is very minimal, it would seem that reliable access to private transportation is a necessity. And indeed, while Maine's population has remained fairly constant, vehicle registrations have increased since 1990 and are at high levels relative to population. See Maine Department of Transportation, "Maine Transportation Facts", 23 (2002), available at <http://mainegov-images.informe.org/mdot/planning-documents/pdf/fact2002.pdf>. Still, the number of community organizations providing rides to disabled, elderly, and other needy Maine residents suggests that transportation is still a problem for some (and note that the clientele of LSE and DRC likely overlaps with those of these community organizations). Furthermore, national studies on the extent of access to transportation among rural Americans suggest that many have difficulty traveling. See George Rucker, Community Transportation Association of America, STATUS REPORT ON PUBLIC TRANSPORTATION IN RURAL AMERICA, Prepared for the Rural Transit Assistance Program (1994), available at <http://www.fta.dot.gov/library/program/rurlstat/rurlstat.html> (last visited Mar. 22, 2005). Rucker's study reports that while the majority of the 10.6 million carless households reported in the 1990 census are situated in urban areas (where public transportation is more common), one out of every 13 rural households is dependent on others for mobility. *Id.*

It should perhaps be noted at this juncture that even if the very poor do have reliable use of transportation, consolidated courthouses might still pose psychological barriers to access. Undereducated, indigent litigants might feel comfortable traveling to smaller local courthouses, but be intimidated by larger, central consolidated courts which are unfamiliar, imposing, and distant. While comfort level is not a large concern in and of itself, it might be worth examining if it suggests that the very poor would not travel to central courthouses at all, or would be even more unlikely to be able to present their cases upon arrival.

²⁰⁴ It is unclear whether consolidation would be more or less advantageous to the bar in general. Currently, lawyers may have cases pending in several courts at once, which may mean that they spend large portions of their weeks traveling around. If instead the courts were consolidated, those same lawyers would be able to dispose of their caseloads in the same courthouse, without the need for travel. On the other hand, there

It might be argued that consulting with legal aid is discretionary, while appearances in court are mandatory. Consequently, even though an indigent *pro se* may find it too difficult to travel to a distant legal aid office, he or she will make the effort to go to court. A caveat should be attached to this distinction, however, as the large number of default judgments in many areas of law may suggest that a large portion of indigent *pro ses* still find themselves unable to travel even to mandatory court appearances.²⁰⁵

Transportation of *pro ses* presents a difficult argument against consolidation. One of the arguments in favor of consolidation in the 1960's was that "the present-day ease of travel and communication" no longer made it necessary to provide courthouses in every town.²⁰⁶ And indeed, long-distance travel is even easier today than it was in the 1960's. Many Maine residents, despite initial grumbling about the inconvenience, would probably adjust fairly easily. After all, many residents of rural Maine travel to relatively distant populated areas such as Portland or Bangor on a regular basis – to go to the movies, to shop, or just generally to make a night of it.²⁰⁷ And unlike trips to Bangor for

are several local practitioners who primarily practice in nearby rural courthouses. If those were eliminated, they would find the amount of travel that they do significantly increased.

²⁰⁵ For example, in most District Courts sampled by the author, rates of default in FED matters ranged from a third to a half of the total. Furthermore, while there is no evidence to back this up, one could speculate that in at least some cases defendants might have settled with the plaintiff simply in order to avoid going to court. This does not necessarily mean that these defendants were unable to transport themselves to court. It may instead mean that they could not afford to take the time off from work to go. Even if that is the case, however, consolidation might only exacerbate the problem, as traveling to courts that are farther away would require even more time off from work. Nevertheless, this assumes that the rural poor have jobs near their residence rather than near the major population centers. If, on the other hand, they have jobs near the major population centers, not only have they obviously solved the transportation problem, but consolidated courthouses would actually be more conveniently located to their place of work.

²⁰⁶ REPORT TO THE LEGISLATIVE RESEARCH COMMITTEE OF MAINE ON THE DESIRABILITY OF INTEGRATING ACTIVITIES OF MUNICIPAL COURTS AND TRIAL JUSTICES, *supra* note 199, at 5.

²⁰⁷ Indeed, the growth of malls and other commercial development in Bangor and Portland and the consequent decline of local stores in less populated areas of the State suggests that many rural residents have "voted with their feet", at least in regard to shopping. See Greg McManus, *The Two Maines: Separate but not Equal, Part Five: On the Fault Line*, A Special Report from the BANGOR DAILY NEWS (Sept. 1998), available at <http://www.bangornews.com/editorialnews/specialreports/twomaines/> (last visited Apr. 11, 2005) ("Bangor's success may correspond to retail trade declines in Piscataquis, Aroostook and Washington counties").

shopping, trips to the courthouse are likely to be infrequent or even one-time occurrences. Consequently, it would seem that the 1961 study on the possibility of consolidation of the municipal courts was correct when it noted that Joe Citizen was likely to conclude that “if a more distant court is likely to dispose of his case in a manner more satisfactory or more helpful than could a nearer and less highly organized court, the additional distance traveled is surely worth while”.²⁰⁸

But this conclusion does not necessarily apply to those for whom long-distance travel is not just inconvenient but impossible. The 1961 study alluded to this group, but dismissed their concerns, asking: “but how serious is the burden of increased travel for a relatively small number of people when weighed against the advantages of a better system of courts? In all public facilities, accessibility is of course to be desired. However, sometimes it can be secured only at the expense of other values – as strikingly illustrated in the case of schools and hospitals”.²⁰⁹ At first glance, the analogy to schools and hospitals is apt. In both cases, economies of scales have made it necessary to consolidate, which has led to the closings of many former local schools and hospitals.²¹⁰

²⁰⁸ REPORT TO THE LEGISLATIVE RESEARCH COMMITTEE OF MAINE ON THE DESIRABILITY OF INTEGRATING ACTIVITIES OF MUNICIPAL COURTS AND TRIAL JUSTICES, *supra* note 199, at 25.

²⁰⁹ *Id.*

²¹⁰ Indeed, the debate over the merits of consolidation of both schools and hospitals has been revisited recently by the Baldacci administration. See COMMISSION TO STUDY MAINE’S HOSPITALS: REPORT TO THE LEGISLATURE, 5 (Feb. 2005), *available at* <http://www.dirigohealth.maine.gov/Feb%202005%20CSMH%20Report.pdf> (declining to recommend specific hospital closings or mergers but urging “every hospital board to evaluate possible opportunities to minimize duplication and maximize collaboration”). See also Meg Haskell, *Health care leaders weigh consolidation*, BANGOR DAILY NEWS (July 7, 2004); Chris Churchill, *Panel: Hospitals must cooperate, not close*, KENNEBEC JOURNAL (Feb. 3, 2005). In the context of schools, see TASK FORCE ON INCREASING EFFICIENCY AND EQUITY IN THE USE OF K-12 EDUCATION RESOURCES: FINAL REPORT, Submitted to the Hon. John E. Baldacci, Governor, State of Maine, 5 (Jan. 20, 2004), *available at* <http://www.usm.maine.edu/cepare/pdf/ts/Final%20Report%201-20-04.pdf> (“We believe several strategies are needed to address our challenges. At the core of these strategies are ones designed to encourage regionalization of educational services, and the consolidation of school districts”). See also Barbara Merrill, *Consolidation plan will wipe out small, rural schools*, MAINETODAY (Feb. 22, 2004), *available at* <http://news.mainetoday.com/indepth/taxreform/040222localschools.shtml> (last visited Mar. 22, 2005); Lee Burnett, *The push for school consolidation gets a push back*, THE PORTLAND PHOENIX (May 2-8, 2003).

Yet schools and hospitals have buses and ambulances to pick up those who are unable to transport themselves. No such transportation system yet exists to bring the very poor to court,²¹¹ and Maine lacks a general system of public transportation in rural areas.

The ability of the rural poor to access consolidated courthouses may in fact be the only argument against consolidation that withstands scrutiny or at least has long-term effects. It seems to be somewhat of a given that if the State of Maine were designing a court system from scratch today, it would not create two separate trial courts. The continuing push to preserve the existing two-track system as is largely seems to rely on politics (because it is often unpopular to close a courthouse) and inertia. A single trial court system would allow for increased specialization, more efficiency, and an improved use of resources. Such a system would be better able to serve (and likely at lower cost) all those who came before it seeking justice – including *pro ses*. However, if because of consolidation the rural poor are unable to arrive at the courthouse at all, then consolidation might not be the answer, and it might be better to unify the courts without combining them or otherwise changing the existing infrastructure.²¹²

²¹¹ Although such a transportation system might be desirable, particularly if it would allow us to consolidate courthouses without hindering their ability to serve the rural poor. In other words, operating a “court bus” from rural towns to central courthouses would likely be cheaper than keeping inefficient courthouses open in such rural areas. Perhaps the existing transportational services provided by the local community action programs and other community organizations could be adapted and expanded for this purpose.

²¹² Even if widespread consolidation is to be avoided, there may be some places where it would be advantageous, and would reduce costs with relatively limited consequences. For example, both the towns of Fort Kent and Madawaska, just twenty miles apart in northern Aroostook County, have District Courts that averaged between six and seven hundred filings during 2004. In contrast, all but two other District Courts in the State handled over 1,000 cases, with several handling many times that number. *See* 2004 REPORT OF THE MAINE JUDICIAL BRANCH: Caseload Statistics, *supra* note 18. Interestingly, in the 1961 study, there was no proposal of a Madawaska District Court, only one in Fort Kent. REPORT TO THE LEGISLATIVE RESEARCH COMMITTEE OF MAINE ON THE DESIRABILITY OF INTEGRATING ACTIVITIES OF MUNICIPAL COURTS AND TRIAL JUSTICES, *supra* note 199, at 2. However, it is not certain whether closing the Madawaska District Court would create that much of a cost savings, particularly since both courts share a clerk.

Maine has already taken several steps towards unification while resisting efforts towards consolidation. District Court judges and Superior Court justices are paid equally.²¹³ Both trial court systems are under the administration of the Administrative Office of the Courts.²¹⁴ There are Unified Rules of Civil and Criminal Procedure and of Evidence, a single judicial discipline system, a unified financial system, and a single personnel system for the two courts.²¹⁵ And the list goes on. Nevertheless, there remain two trial courts in Maine. In the late 1990's, the Court Unification Task Force ("CUTAF") was established pursuant to a Legislative Resolve, and was directed to make recommendations to the Chief Justice of the Supreme Judicial Court as to how best to unify the District and Superior Courts.²¹⁶ CUTAF made eight recommendations at the end of its study, including measures to reshuffle the caseload of each court (for example, CUTAF recommended that divorce become the exclusive jurisdiction of the District Court and that appellate review by the Superior Court of District Court judgments be substantially eliminated).²¹⁷ However, CUTAF stopped short of recommending immediate full-scale integration, concluding that "the unification of the Superior and District courts must not be viewed as an end in itself. An effort simply to create a single trial court with a single class of judges solely for the sake of 'unification' would not necessarily improve the efficiency or effectiveness of the judicial system for the people

²¹³ See FINAL REPORT OF THE STATE OF MAINE COURT UNIFICATION TASK FORCE TO MAKE RECOMMENDATIONS TO UNIFY THE SUPERIOR AND DISTRICT COURTS *supra* note 196, at 7-9.

²¹⁴ See *id.* See also State of Maine Judicial Branch, "Administrative Office of the Courts", at http://www.courts.state.me.us/mainecourts/admin_office/index.html (last visited Mar. 22, 2005).

²¹⁵ See FINAL REPORT OF THE STATE OF MAINE COURT UNIFICATION TASK FORCE TO MAKE RECOMMENDATIONS TO UNIFY THE SUPERIOR AND DISTRICT COURTS *supra* note 196, at 7-9.

²¹⁶ See *id.* at 2, app. A. See also Resolve, Directing the Judicial Department to Develop Recommendations to Implement Court Unification, ch. 107, H.P. 992 - L.D. 1372, 118th Leg., 2d Reg. Sess. (Me. 1998); ME. REV. STAT. ANN., tit. 4, § 41.

²¹⁷ See FINAL REPORT OF THE STATE OF MAINE COURT UNIFICATION TASK FORCE TO MAKE RECOMMENDATIONS TO UNIFY THE SUPERIOR AND DISTRICT COURTS, *supra* note 196, at 1-2.

of Maine”.²¹⁸

One relatively painless way to unify the District and Superior Courts would be to simply eliminate the formal distinctions between the two trial court systems, to unify judicial and clerical functions to the extent possible, and to more closely coordinate scheduling.²¹⁹ This would not require a large-scale change in infrastructure, but might allow for a more efficient use of resources. In 2003, the Judicial Resource Team (“JRT”), created by the Law Court to address the issues of judicial workload, resources and scheduling, issued its final report which recommended, among other things, “the establishment of a regional structure to coordinate the scheduling of Superior and District Court dockets”.²²⁰ The JRT divided the State into eight regions, each primarily responsible for coordination.²²¹ Consequently, the extent of coordination may vary by region,²²² and it is unclear whether all regions have been equally successful at the task. For example, truly effective coordination might require “back-up” cases to be scheduled in Superior Court, when it is likely that the Superior Court justice will settle his caseload and be willing to fill the extra time by helping out the local District Court judges. There are limits to the extent that effective coordination can occur through scheduling, however.

²¹⁸ *Id.* at 2-3. CUTAF’s report was sharply criticized by John Sheldon in *The False Idolatry of Rules-Based Law*, in which he argued that the report further entrenched Maine’s trial courts into a “caste system”. Sheldon, *supra* note 1, at 300.

²¹⁹ CUTAF strongly recommended a unified case scheduling and management system statewide, along with increased combination of clerks’ offices in the Superior and District Courts and cross-assignment of personnel. See FINAL REPORT OF THE STATE OF MAINE COURT UNIFICATION TASK FORCE TO MAKE RECOMMENDATIONS TO UNIFY THE SUPERIOR AND DISTRICT COURTS *supra* note 196, at 16-17, 33, 35-36.

²²⁰ REPORT OF THE JUDICIAL RESOURCE TEAM TO THE MAINE SUPREME JUDICIAL COURT, *supra* note 149. Besides the regional structure, other guidelines for the new model scheduling include: consolidating resources and avoiding duplication between the trial courts, working towards a goal of ensuring that events occur as scheduled, and managing schedules based on established time measures and priorities set by the Law Court. See 2004 REPORT OF THE MAINE JUDICIAL BRANCH: Regional Scheduling, *supra* note 18.

²²¹ REPORT OF THE JUDICIAL RESOURCE TEAM TO THE MAINE SUPREME JUDICIAL COURT, *supra* note 149.

²²² See Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, *supra* note 19 (“Because available resources, geography, and case mixes vary throughout the state, the regions are experimenting with different methods”).

Obviously the ability of any judge or justice to assist an overburdened courthouse or colleague depends on the availability of an empty courtroom in the region. If a judge or justice is willing to help out more distant colleagues, but an extra courtroom cannot be found, little will come of his good intentions.²²³

Regardless of the form that it takes, unification has several possible advantages for *pro ses*, and consequently merits further study. First, it might eliminate the resistance of District Court judges towards taking a step that they perceive consigns them to an inferior role; a step that they may feel asks them to act more like an arbitrator than an adversarial judge. Second, it might lead to a better use of resources, which might in turn free up more time for a judge to conduct proceedings using a more active approach.²²⁴ In short, when combined with the other approaches addressed in this paper, unification could make the difference between a court system that has the time, training and

²²³ As described above, unification of scheduling and consolidation of judicial functions is seen as an alternative to the centralization and closing of courthouses if such centralization would have negative effects on the ability of the rural poor to reach court. Alternatively, one could view such streamlining of scheduling and personnel as the first step in a two-step process of unification. Since the closing of courthouses will meet with stiff political resistance, the unification of judicial functions is a necessary preliminary step. As resources are saved from this re-allocation of functions, it may be possible to garner political support and pave the way for the next step – consolidation.

²²⁴ There is another possible way to free up more time; namely, by removing some segments of the docket from the courthouse altogether and providing a better means of resolution. *See* Gregory D. Kesich, *Emotions on Trial*, PORTLAND PRESS HERALD (Feb. 9, 2003) (expressing the view that many domestic relations problems are a mixture of economic and emotional issues that are frustrating to District Court judges because they don't necessarily "have a legal solution"). For example, there seems to be a prevalent opinion among District Court judges that many PFH's could be better resolved either by the police or through mediation. Indeed, the Maine Legislature has expressly recognized the ability of law enforcement officers to forbid harassing conduct. *See* ME. REV. STAT. ANN., tit. 17-A, § 506-A. Largely removing PFH's from the District Court's jurisdiction would not be an insignificant step - there were over 4500 PFH's filed in District Court in 2004. *See* Filings Table 1993–2004, *supra* note 17.

It should be noted that while unification of the District and Superior Courts (or removal of some segments of the docket) might lead to a more efficient distribution of resources, such an approach would be unlikely to provide a complete solution to the problem of scarce judicial time. A study by the National Center for State Courts estimates that Maine is short by 20% of the necessary number of trial judges. *See* Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, *supra* note 118. If Maine is in fact operating under such a severe deficit, mere reallocation of resources cannot provide a satisfactory fix to the problem – more judges are needed. However, before the State hires more judges, it should be certain that it is using the ones that it has in the most efficient way possible.

resources to ensure that justice is adequately done in the case of a *pro se* litigant, and one that does not.

IV. Conclusion and Follow-up

This paper has attempted to outline the current state of affairs regarding *pro se* assistance in the State of Maine, as well as tried to offer an exploration of the possibilities for providing further assistance without significant increases in cost. The efforts of Maine's legal community – its judiciary, legal aid organizations, and private bar - to work together to help *pro ses* in the face of daunting financial obstacles should be commended. However, such efforts are not enough to stem the tide of unprepared *pro se* litigants in the courts. It is strongly recommended that Maine develop an adequate *pro se* assistance system at the courthouse, by: (1) vastly increasing the presence and role of volunteers; (2) working with Maine Law to secure the help of third-year law students; (3) supplementing the efforts of legal aid lawyers by paying the private bar on a per case basis to take meritorious civil cases from those in need; and (4) unifying the trial courts and training all trial judges to take an active approach in *pro se* cases. In addition, long-term efforts should be made towards improving literacy, and otherwise addressing the educational obstacles preventing poorer residents from obtaining the help that they need. In the short term, the State should consider expanding the role of explanatory videos in courthouse proceedings as well as increasing the amount of foreign language services available. Finally, legal aid organizations might want to study whether consolidation and increased use of client co-payments are feasible means of freeing up more resources, and whether a statewide intake system would be a more efficient and practical means of helping clients and measuring demand.

Before any of the proposals outlined in this paper can be implemented; however, a comprehensive survey of the extent of the demand for *pro se* assistance must be undertaken. In particular, it will be necessary to determine precisely which types of cases most require a lawyer's assistance and which are adequately managed through other forms of legal aid services. It will also be necessary to determine which locations are most underserved from a *pro se* assistance perspective (and to what extent), as well as various ways in which those locations could be more effectively reached. After those determinations have been completed, consideration should be given to an appropriately-placed pilot project to test the effectiveness of the suggestions laid out herein in meeting the continual problem posed by unprepared *pro se* litigants in the courthouse.

There is yet another preliminary step; however, that of examining seriously to what extent we as a society are committed to ensuring adequate justice for all, regardless of cost. We at least pay lip service to the idea that *everyone* in need of health care should have the aid of a medical professional. Yet in the courthouse, we are much more willing to allow many of those seeking justice to flounder on their own, without aid. It may not require the assistance of a lawyer in every case to ensure that justice is done. But it may require that Maine, along with the rest of the nation, recognize that we must invest more resources into helping those unable to afford legal help with their claim or defense. This may not only be a moral or ethical "good" for society; it may also be an economic one. Imagine that a *pro se* parent in a divorce is ignored by the system and ends up with an unjust property disposition or child support award. It is not implausible to think that a child of that marriage, feeling frustrated or deprived, goes on to commit juvenile crimes, and later adult crimes, that cost society not only in terms of harm to victims but also in

regard to expenses related to incarceration.²²⁵ To take another example, a wrongful eviction of a *pro se* tenant which leaves him or her homeless, or a wrongful denial of public benefits to which a *pro se* may be entitled, is not unlikely to have long-term negative effects on the health of that *pro se*, and, ultimately, the public fisc.²²⁶

This year, in the annual State of the Judiciary speech, Chief Justice Saufley implored the Legislature to help keep the promise of justice alive in Maine; and in particular to “remember that Access to Justice does not come easily to low-income Mainers”.²²⁷ The suggestions made in this paper aim to increase such access to justice without greatly increasing costs. However, it may be that society simply cannot afford to keep down the costs of assisting indigent litigants. It may be that in the long run, any costs saved by funding cuts will be outweighed by the costs of a widespread negative perception regarding the fairness of the American legal system, as well as by costs that those frustrated with such a system may impose, intentionally or unintentionally, on a society that they believe does not care about their needs.

²²⁵ A nod should be made here to Pine Tree’s “KIDS Legal Aid of Maine” Project, which maintains a holistic focus on the needs of children, giving them a voice and helping them to access educational services, health care, mental health and social services, and affordable housing. See Judy Harrison, *Pine Tree Legal launches child aid program*, BANGOR DAILY NEWS (Oct. 3, 2003). The program is intended to “improv[e] outcomes for the entire family” and to prevent expense and suffering in the long run. *Id.* See also David Hench, *Children’s Advocate Stresses Importance of Lawyers’ Help*, PORTLAND PRESS HERALD (Oct. 3, 2003); KIDS Legal Aid of Maine website at <http://www.kidslegalaid.org> (last visited Mar. 22, 2005).

²²⁶ See also JAG, *Maine’s Need for Increased Resources for Legal Aid*, *supra* note 131 (“If...[Maine people living in poverty] had legal help at a critical moment when they needed to challenge a poor housing situation, deal with a credit problem, or even remove themselves from an abusive situation, not only could the quality of their lives be improved, but their dependence on government assistance might also be reduced ultimately costing the state less money”)

²²⁷ See Chief Justice Leigh I. Saufley, *Maine Judicial Branch: The State of the Judiciary*, *supra* note 19.

Appendix

(1) Initial Recommended Follow-up Studies

Study:
Determine the feasibility of combining legal aid offices in geographical areas where more than one office is located. If consolidation is determined to be both beneficial and practical, figure out the best use for the additional resources released by this change.
Study should be done concerning to the best way to create a statewide intake system for all of Maine's legal aid organizations. As part of this, it may be necessary to consider a means of: (1) ensuring that people are consistently able to get through to a volunteer or operator; (2) documenting all calls and requests, including those who are unable to be helped, in order to measure the extent of demand; (3) setting up a mechanism to ensure that each legal aid organization has access to the calls which are taken by the intake workers (perhaps by requiring the intake worker to categorize cases and post them online).
Determine which jurisdictions in Maine are most underserved from a legal aid perspective.
Determine which types of matters most require a lawyer's assistance, and which have the same or similar success rates when other types of aid are utilized, such as informational self-help, volunteers or law students.
Consider whether <i>judicare</i> or mandatory <i>pro bono</i> are feasible options for the State.
Consult with Maine Law, the students, the bar, and the courts as to the feasibility of placing students in the courthouse to assist volunteers. If such an option garners enough support, determine which jurisdictions in Maine most require student assistance and what the most effective way to monitor these students would be.
Study whether it is primarily a lack of information or a lack of transportation which keeps the poor from reaching legal aid organizations and the courthouse.
<ul style="list-style-type: none">● If the former, it is necessary to determine a means of overcoming the informational barrier (perhaps through literacy or other educational efforts). Since lack of transportation is not the primary problem, however, a cost-benefit analysis regarding unification of the trial courts as well as a determination of the best way to advance that position politically should be completed. Advocating for consolidation will also require an examination of where central courthouses should be located, how many judges each should have, and what their functions should be.
<ul style="list-style-type: none">● If instead it is a lack of transportation that is the problem, determine whether unification is still beneficial to the rural poor, and whether the obstacles posed by this issue can be overcome (perhaps through the use of a court-affiliated transportation system).
Particularly for PFH actions, an examination should be made as to whether or not the District Court is an effective forum to deal with such problems, at least as an initial matter rather than as a last resort. If it is not, consideration should be given to a more appropriate means of resolution, such as mediation.

(2) Summary of Recommendations (Implementation May Hinge on Outcome of Studies)

<u>Proposal:</u>	<u>Follow-up and Suggestions:</u>
Consolidation of existing legal aid offices	See Appendix 1
Creation of a statewide intake system for legal aid	See Appendix 1
Increased use of sliding-scale fee structures in legal aid organizations	To the extent permitted by funding restrictions, legal aid organizations should consider policies advocating client co-payments and voluntary contributions.
Expanding the amount of material available in translation, and increasing interpretive services at the courthouse	Maine has already taken several steps down this path, but in order to continue to make progress, it should take seriously the suggestions made in the recent REPORT TO THE JUSTICE ACTION GROUP ON ACCESS TO MAINE COURTS FOR INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY.
Mandating that <i>pro ses</i> view explanatory videos about courtroom procedure and decorum before their courtroom appearances	This is a relatively low-cost measure, which requires the State to (1) review examples from other states; (2) expand upon the video library currently available; (3) distribute the videos to the various courthouses; and (4) instruct clerks as to the change in procedure.
Vastly increasing the presence and role of volunteers in the courthouse (or, similarly, expanding both the number and duties of clerks)	Volunteers must be highly trained, and should have two functions: (1) screening <i>pro ses</i> and channeling them into various assistance options; (2) providing support and information to those <i>pro ses</i> who are not able to secure help from other sources. If, as is likely, it is determined that to be effective volunteers must be permitted to assist <i>pro ses</i> in the courtroom and to provide them with advice, the existing law will have to be amended and/or clarified.
Expanding the use of the private bar	Maine should study the feasibility of using <i>judicare</i> to compensate private attorneys who take civil cases from low-income citizens in order to supplement legal aid efforts. While the Law Court's recent adoption of <i>emeritus</i> status for retired attorneys is helpful in meeting the demand for legal services, mandatory <i>pro bono</i> should be considered by the State as well.
Securing the assistance of legal aid	Legal aid organizations should establish close working relationships with any volunteers placed at the courthouse, promptly reviewing cases referred to them by said volunteers and determining whether or not they can take such cases on for extended representation.
Making use of third-year law students as volunteers	Maine Law and the judicial branch should strongly consider adapting the AHEC model used in medical schools in order to place law students in courthouses according to demand for at least a few weeks each year.

Implementing adequate means testing at the courthouse	In order to ensure that the private bar supports the above-mentioned proposals, effective means testing is crucial in order to ensure that only those who truly cannot afford a lawyer take advantage of these help options.
Requiring and training trial judges to adopt an active approach in cases involving <i>pro se</i> litigants	The first step towards this approach is to eliminate the rules of evidence in civil, non-jury trials involving <i>pro ses</i> . In general, the approach may be modeled on small claims procedure, and should at the very least be available in cases in which there are two <i>pro ses</i> . It is also noteworthy; however, that such an approach may be useful in remedying power imbalances in any case involving a <i>pro se</i> .
Unification of the trial courts	While further study should be made as to the impact of consolidation on the ability of the poor to reach the courthouse, if such an option does not have a significant negative impact on the rural poor, or can be overcome by other means, unification and consolidation should be reviewed yet again by the Maine Legislature. Regardless of whether consolidation is ultimately desired or is a political possibility, further steps should be taken towards increased coordination between the two trial courts.
Consider the possibility of removing some segments of the docket from the courthouse	See Appendix 1
Improving literacy and educational opportunities	While not directly discussed in this paper, illiteracy and under-education are enormous obstacles preventing attempts to assist <i>pro ses</i> from being effective. Even more fundamentally, they are often obstacles in the efforts of indigents to escape from poverty. The Literacy Volunteers of Maine, as well as other adult learning programs in the State, may be important allies in this effort.
As a final resort, add more judges	Only after it is certain that our existing judicial resources are being used as efficiently as possible, yet judges are still overwhelmed and lack the time to adequately deal with <i>pro ses</i> , should Maine increase the number of judges.

(3) Maine Legal Aid Organizations and Other Sources of Help

<u>Organization:</u>	<u>Description:</u>	<u>Contact Information:</u>
Pine Tree Legal Assistance	Maine's primary legal aid organization, providing free civil legal services to Maine's low-income community.	207-774-8211 (Portland); 207-764-4349 (Presque Isle); 207-942-8241 (Bangor); 207-622-4731 (Augusta); 207-255-8656 (Machias); 207-784-1558 (Lewiston); http://www.ptla.org
Volunteer Lawyers' Project	Maine's statewide <i>pro bono</i> project, coordinating the volunteer efforts of the private bar.	207-774-4348 (4 intake lines); 1-800-442-4293 (2 intake lines); http://www.vlp.org/
Legal Services for the Elderly	Dedicated to providing legal assistance to socially and economically needy residents age 60 and over	1-800-750-5353; http://www.mainelse.org/
Maine Equal Justice Project	Works in the legislature, before administrative agencies and in the courts to provide legal and policy analysis and to give low-income Maine people an effective voice.	1-866-626-7059; http://www.mejp.org/
Maine Civil Liberties Union	Advances and preserves the civil liberties of Maine people through litigation, advocacy, public education and lobbying.	207-774-5444; http://www.mclu.org/ ; 401 Cumberland Avenue, Suite 105, Portland, ME 04101
Disability Rights Center of Maine	Maine's protection and advocacy agency for people with disabilities.	1-800-452-1948; http://www.drcme.org
Cumberland Legal Aid Clinic	Legal services provider associated with the University of Maine School of Law	1-877-780-2522; http://mainelaw.maine.edu/clac
Immigrant Legal Advocacy Project	Dedicated to providing information and legal assistance to low-income residents of Maine who need help with immigration law and related issues	207-780-1593; http://www.immigrantlegaladvocacy.org/
Penquis CAP Law Project	Public interest law practice which seeks to create access to civil legal services for low- and moderate-income residents of Penobscot and Piscataquis counties.	973-3671; http://www.penquiscap.org/penquis.nsf/webpages/Law+Project
HelpMELaw	Provides easy-to-use self-help legal information as well as information about low-income legal service providers in Maine.	http://www.helpmelaw.com

Maine State Bar Association Lawyer Referral and Information Service	For a \$20 fee, connects callers with local attorneys who will provide an initial free half-hour consultation.	1-800-860-1460; http://www.mainebar.org/public_lris.asp
Maine State Judicial Branch	The website of the Maine court system, with links to legal service providers and informational documents.	http://www.courts.state.me.us/
Cleaves Law Library	Online library of Maine legal links and information.	http://www.cleaves.org
Maine Bar Foundation	Engaged in activities intended to enhance the legal profession's ability to serve the public, including promoting the provision of legal services to the poor and supporting legal and law-related education. Contains a number of legal aid links and information regarding legal service initiatives.	http://www.mbf.org
Literacy Volunteers of Maine	Delivers literacy and English as a Second language instruction through a network of local affiliates statewide.	1-800-322-5455; http://www.lvmaine.org