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## Fee Shifting: A Proposal to Solve Maine's Intractable Access to Justice Problem

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# FEE SHIFTING: A PROPOSAL TO SOLVE MAINE'S INTRACTABLE ACCESS TO JUSTICE PROBLEM

*Donald F. Fontaine\**

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## ABSTRACT

The Maine Legislature should enact a new statute to award attorney's fees in civil cases to poor litigants against their opponents. Under the proposed statute the opponent must be a corporation or other legal entity and the poor litigant must be the prevailing party in the case.

The statute proposed is needed because multiple studies show that there has been an unrelenting decline during the last four decades of the poor's access to justice. Their numbers increase and the support of the federal government declines. For those who find themselves in legal positions opposing the poor, there is little deterrent to a decision to violate the legal rights of the poor. While some people who are without attorneys seek the help of the courts pro se, the barriers of pro se procedure are insurmountable. Pro se representation is helpful only to the extent that a person is well educated and can devote significant resources to study, writing, and oral advocacy of legal questions. A state must provide some effective means of assuring equal access to its courts and tribunals.

I. THE STATE OF MAINE CONTINUES TO DENY THE POOR EQUAL ACCESS TO ITS COURTS

It is a strange but common truth that societies believe simultaneously in contradictory myths. Such is the case in America today with regard to civil justice: Americans boast that they stand equal before the law while simultaneously accepting the common quip that "you can get about as much justice as you can afford."

Part I of this article sets forth the history of various official Maine commissions who have studied the lack of access to justice<sup>1</sup> for the poor in Maine. Part II describes in detail the extraordinary degree to which the poor do not participate in Maine's legal system, and Part III describes the barriers that the poor face when they attempt to bring their own cases to court. Part IV illustrates why a "government of laws" does not exist without equal access to courts. Part V describes the lack of success of the various commissions that have been created to study this issue; and shows how their past efforts provided some legal assistance to the poor, but still left them with only a second-class legal system. The section notes particularly the failure of any of these commissions to recommend a well known low-cost solution—"fee shifting"—although its use is widespread in Maine in other areas of the law. Finally, Part VI recommends the solution of fee shifting.<sup>2</sup>

*Commission Studies*

The results of Maine studies for four decades have demonstrated over and over that Maine systematically denies its poor their day in court in civil cases—in spite of the clear aspirations of the Maine Constitution: "Every person, for an injury inflicted . . . shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly, and

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<sup>1</sup> In this paper, "access to justice" means "access to the courts, to administrative agencies and to all other forums in which legal rights are determined." Justice Action Group, *Justice for All: A Report of the Justice Action Group's Access to Justice Planning Initiative*, 23 ME. B. J., Winter 2008, at 14, 15.

<sup>2</sup> See generally Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 723 (2010).

without delay.”<sup>3</sup> The first such study came in 1972.<sup>4</sup> Pine Tree Legal Assistance (“PTLA”) found that the legal problems of a typical poor person required more frequent attention than those of the middle class and that to serve all of the poor it would require more than ten times the assistance than being offered, that is, at least 228 attorneys.<sup>5</sup> At that point, in order to continue to deliver the legal help of the complexity that the poor needed, PTLA ceased handling bankruptcies and plaintiffs’ divorce cases. It was hoped that increasing pro bono work by other lawyers would be a partial solution to the problem. PTLA turned to the Maine Bar for help. It then requested that the bar respond with pro bono assistance and that the bar undertake various other activities.<sup>6</sup>

Seven years later, the problem remained the same in spite of the substantial participation of the private bar. The Maine Commission on Legal Needs was formed, chaired by U.S. Senator Edmund Muskie. It included forty-five Maine leaders, including Maine’s Chief Justice, the Attorney General, and Federal Circuit Judge Frank Coffin.<sup>7</sup> The Commission made a number of factual findings:

- The private bar was doing a commendable job. It led the nation in pro bono work, but this did not begin to meet the need.<sup>8</sup>
- The poor had a more frequent need for attorneys than the affluent.<sup>9</sup>
- If both pro bono attorneys and paid attorneys significantly increased their work, there would still be required 232 additional attorneys to meet the need.<sup>10</sup>
- Only twenty-three percent of the need was at that time being met.<sup>11</sup>

The Muskie Commission then made the following recommendations:

- An appropriation from the State of Maine for more legal aid attorneys.
- Make mandatory *pro bono* work.
- Courts should appoint counsel in landlord-tenant, family, collections, and other civil cases.

In 1993, the Maine Legislature created a new commission that prepared its own

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<sup>3</sup> ME. CONST. art. I, § 19.

<sup>4</sup> See Donald Grey Lowry & Donald F. Fontaine, *How Much Legal Service to the Poor of Maine Need?*, 6 ME. B. BULL., Mar. 1972, at 24, 26.

<sup>5</sup> *Id.* at 25.

<sup>6</sup> *Id.* at 26-27.

<sup>7</sup> ME. COMM’N ON LEGAL NEEDS, REPORT OF THE ME. COMM’N ON LEGAL NEEDS, AN ACTION PLAN FOR THE 1990’S ii (1990).

<sup>8</sup> *Id.* at iii.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 5. Three years later Pine Tree Legal Assistance had to lay off twelve staff due to reduced funding in the federal program.

<sup>11</sup> *Id.* at 4.

report.<sup>12</sup> The 1993 Commission made the following findings:

- The number of funded legal aid lawyers must be increased.<sup>13</sup>
- *Pro bono* attorneys were accepting *pro bono* cases at a rate better than any other state,<sup>14</sup> but making *pro bono* mandatory might cause a reduction.
- The poor had a right to counsel at state expense when basic human needs were at stake. This right must be explored, said the Commissioners.<sup>15</sup>

In 2007, another study commission was formed by the Justice Action Group (“JAG”), a judicially-led taskforce focused on issues of equal justice.<sup>16</sup> The JAG Commission was led by the University of Maine Law School Dean, Colleen A. Khoury, and Judge for the United States First Circuit Court of Appeals Kermit V. Lipez, and included a stellar cast of Maine leaders. It made a number of findings and recommendations:

- Seventy-five percent of people in the civil legal system are not represented by counsel.<sup>17</sup>
- Two hundred and thirty-two *additional* full-time attorneys are needed to represent the poor, even after the then thirty-five attorneys in all the funded legal aid programs and even assuming that *every* private practicing lawyer in Maine accepted three *pro bono* cases per year.<sup>18</sup>
- In one year, all the funded legal aid programs collectively fielded 3606 calls per month, but only fourteen percent received full service. The remainder comprised fifty-one percent who received no assistance and thirty-seven percent who received less than adequate assistance.<sup>19</sup>
- More funding was necessary.
- Despite the recommendation of the Muskie Commission in 1990 “that at least a four-fold increase in the number of legal aid lawyers was necessary to serve all those in need, the overall number of legal aid attorneys has not increased significantly since 1990.”<sup>20</sup>

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<sup>12</sup> COMM’N TO STUDY THE FUTURE OF ME.’S COURTS, NEW DIMENSIONS FOR JUSTICE: REPORT OF THE COMMISSION TO STUDY THE FUTURE OF MAINE’S COURTS (1993). The legislation that created the commission is Maine P.L. 1991, ch. 891.

<sup>13</sup> *Id.* at 33. In 1995, the Congressional appropriation was reduced and Pine Tree Legal terminated twenty-two positions. UNIV. OF ME. SCH. OF LAW, FOUR DECADES OF CIVIL LEGAL AID IN MAINE: PAST ACCOMPLISHMENTS AND PRESENT DAY CHALLENGES, CONFERENCE MATERIALS FROM EXPANDING JUSTICE IN MAINE 3 (2009).

<sup>14</sup> COMM’N TO STUDY THE FUTURE OF ME.’S COURTS, *supra* note 12, at 37.

<sup>15</sup> *Id.* at 35.

<sup>16</sup> *Maine Justice Action Group*, MAINE JUSTICE FOUNDATION, <https://www.justicemaine.org/grants-and-programs/justice-action-group/> [<https://perma.cc/PUL2-QX3N>] (last visited Nov. 18, 2019).

<sup>17</sup> Justice Action Group, *supra* note 1, at 15.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 56.

<sup>20</sup> *Id.* at 16.

- Five of every six requests for legal services are turned away.<sup>21</sup>
- Equal access to justice is possible only when both sides are represented by an attorney.<sup>22</sup>

In May 2009, a study of a two-month period revealed that the programs were able to meet fully only one-fourth of the 6400 requests for legal help. Nearly 5000 applicants for service went away with only limited help or no help at all.<sup>23</sup> Of that study, Nan Heald, Executive Director of Pine Tree Legal Assistance, stated, “[t]wenty-five percent (25%) is a depressingly similar percentage to what was reported back in 1990.”<sup>24</sup>

In 2013, the unmet need still had not declined. The Maine legal aid providers themselves and the Campaign for Justice assisted William S. Harwood in a study that inquired especially about the effect that the 2008 recession had on the poor.<sup>25</sup> It reported that six years into the action plan of the 2007 *Justice for All Report*, “[seventy] percent (70%) of Maine residents with a legal matter before the courts may not be able to afford an attorney.”<sup>26</sup>

In 2014, Diana Scully, Executive Director of the Maine Bar Foundation, found that funding for civil legal aid had been declining on multiple fronts, and simultaneously, the need of the poor for legal help had been increasing.<sup>27</sup> A detailed picture of the present provision of legal services delivered to the poor is discussed below in section II.

## II. THE POOR OF MAINE USE VERY LITTLE OF THE RESOURCES OF MAINE’S COURTS

The previous Part shows that, up until 2014, skilled observers agreed that the poor of Maine were seriously underserved by attorneys. This Part examines the situation more closely by asking the following questions: (1) what are the relevant numbers as of 2017, and (2) what aspects of traditional legal services are wanting?

The answer to the first of these two questions is very clear: the number of times that the poor have a lawyer providing full representation continues to be very small. We can know with some accuracy how many poor clients get *some* attention from an attorney; however, we would like to measure particularly (1) the number who get their cases fully presented to a court or other tribunal, and (2) what kind of cases they are. All of the organizations who provide legal aid in Maine furnish some written information on these questions. Particularly, PTLA provides detailed information in its Annual Case Reports. These reports include numbers about a great variety of

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

<sup>22</sup> *Id.*

<sup>23</sup> See LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 15 (2009)

<sup>24</sup> Trevor Maxwell, *Funding Cuts Leave Legal Aid Clients Behind*, PORTLAND PRESS HERALD, Sept. 26, 2009, at B1.

<sup>25</sup> William Harwood, *Maine Legal Aid: Recession Impacts and Long Term Challenges* (4pp), 28 ME. B.J. 64, 64 (2013).

<sup>26</sup> *Id.*

<sup>27</sup> Diana Scully, *The Maine Bar Foundation: A Snapshot of the Past and a Peek at the Future*, 29 ME. B.J. 7, 7-8 (2014).

cases and the level of services rendered for each. In addition, as will appear below, the courts also report helpful statistics and some judges add reliable anecdotal information. However, these combined sources show the contact that most poor people have limited to advice. It also reveals that when indigent litigants do go to court with a lawyer, it is almost always to answer for something that they have allegedly done wrong. As Earl Johnson Jr., the second Director of the National Legal Services Program, has said, “poor people have access to the American courts in the same sense that the Christians had access to the lions when they were dragged into a Roman arena.”<sup>28</sup>

In order to appreciate better the share of Maine’s judicial resources that the poor consume, we start with two numbers. First, the number of Maine people who are eligible for legal aid. It is about 430,000.<sup>29</sup> Second, the number of impoverished people who actually seek help from legal aid providers in a typical year is 20,526.<sup>30</sup> These people sought help from the seven legal aid providers in Maine and from many other *pro bono* attorneys who volunteered to the providers. This number is an estimate by reading the reports of these legal aid providers. In fiscal year 2018, provider Disability Rights of Maine served 692 poor clients.<sup>31</sup> Twenty-one of those cases were “full representation cases.”<sup>32</sup> The provider Legal Services for the Elderly (LSE) accepted 5121 cases in 2018.<sup>33</sup> Seventy percent were made up of cases involving housing, consumer, or “self-determination.”<sup>34</sup> Housing cases made up twenty-three percent of their total for a year, or 11581 cases.<sup>35</sup> Four hundred and ten of these 5121 cases were full representation cases.<sup>36</sup> More services were rendered to prospective defendants than to plaintiffs, with only 105 cases being plaintiffs’ cases.<sup>37</sup> Immigration and Legal Advocacy Project (“ILAP”) served 2951 clients in

<sup>28</sup> Earl Johnson Jr., *Thrown to the Lions: A Plea for a Constitutional Right to Counsel for Low-Income Civil Litigants*, CLEARINGHOUSE REV. OF POVERTY AND L. (July-Aug. 2006).

<sup>29</sup> JUSTICE ACTION GROUP, JUSTICE FOR ALL: A REPORT OF THE JUSTICE ACTION GROUP 67 (Oct. 10, 2007), [legalaiddresearch.org/pub/4439/justice-for-all](http://legalaiddresearch.org/pub/4439/justice-for-all) (“One-third of Maine’s population has an income at or below the 200% poverty level, generally regarded as the income necessary to meet the basic needs of a family of three.”). Maine’s population is 1,290,000. Particular categories of people in Maine have an even higher percentage of poverty: female heads of household (69.1%); age 65 and over (42%). *Id.* at 55. See also MAINE STATE PLANNING OFFICE, REPORT ON POVERTY 9 (2007).

<sup>30</sup> See generally MAINE CIVIL LEGAL SERVICES FUND COMM’N, REPORT TO JOINT STANDING COMMITTEE OF THE JUDICIARY, 129TH LEGISLATURE (Feb. 1, 2019).

<sup>31</sup> DISABILITY RIGHTS MAINE, ANNUAL REPORT TO MAINE CIVIL LEGAL SERV. FUND COMM’N, *in* MAINE CIVIL LEGAL SERV. FUND COMM’N, REPORT TO JOINT STANDING COMMITTEE OF THE JUDICIARY, 129TH LEGISLATURE 6 (Feb. 1, 2019).

<sup>32</sup> *Id.* “Full representation” includes decisions of tribunals in Maine, settlements negotiated while an action was pending, and cases where extensive service was provided.

<sup>33</sup> LEGAL SERVS. FOR THE ELDERLY, ANNUAL REPORT TO MAINE CIVIL LEGAL SERV. FUND COMM’N, *in* MAINE CIVIL LEGAL SERV. FUND COMM’N, REPORT TO JOINT STANDING COMMITTEE OF THE JUDICIARY, 129TH LEGISLATURE 1 (Feb. 1, 2019).

<sup>34</sup> *Id.* at 2.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.* at 3.

<sup>37</sup> Telephone interview with Jayne L. Martin, Executive Director, Legal Services for the Elderly (May, 2019).

2018.<sup>38</sup> Three hundred and seventy-one of these 2951 cases were full representation cases and they were all in a federal forum.<sup>39</sup> The clients also received the services of 178 pro bono attorneys working 3700 hours.<sup>40</sup> Cumberland County Legal Clinic (“CLAC”) served 465 clients.<sup>41</sup> Nearly sixty-five percent of their cases concerned family law problems or the problems of prisoners.<sup>42</sup> Three hundred and seventy-six of these 453 cases were full representation cases.<sup>43</sup> Most of the full representation cases were in state court, and in those cases CLAC represented the plaintiff.<sup>44</sup> PTLA served 7735 clients in 2017.<sup>45</sup> Sixty-eight percent of these cases were either about housing or family.<sup>46</sup> Full representation was given to 2892 clients.<sup>47</sup> Four hundred and fifty-three of these cases were in a court as opposed to in an administrative tribunal.<sup>48</sup> PTLA represented the plaintiffs in 336 family cases. These include Protection from Abuse cases where family members are involved.<sup>49</sup> Requests for assistance in family cases received full representation in nearly forty percent of the requests, with 472 cases.<sup>50</sup> Housing cases received full representation twenty-three percent of the time, or in 937 cases. Together, family and housing cases totaled sixty-eight percent of PTLA’s total full representation cases for 2017.<sup>51</sup> PTLA saw fifty-three clients who wanted to file bankruptcy, but itself filed no bankruptcy petitions.<sup>52</sup> PTLA refers all bankruptcy, unemployment, and other types of cases to the Volunteer Lawyers Project.

The Volunteer Lawyers Project (“VLP”), whose business is exclusively to find volunteer attorneys, referred 2,837 new cases opened in 2018 to pro bono attorneys, of which 576 were full representation cases.<sup>53</sup> Like PTLA, housing and family cases also made up most of its referral cases—eighty-two percent.<sup>54</sup> Together, PTLA and VLP showed that the focus of their high volume work for clients is strongly in those two areas of the law. VLP appeared to be the only program that assists in more than

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<sup>38</sup> IMMIGRATION AND LEGAL ADVOCACY PROJECT, 2018 ANNUAL REPORT *in* MAINE CIVIL LEGAL SERV. FUND COMM’N, REPORT TO JOINT STANDING COMMITTEE OF THE JUDICIARY, 129TH LEGISLATURE 1 (Feb. 1, 2019).

<sup>39</sup> Email from Julia Brown, Advocacy and Outreach Attorney, Immigration and Legal Advocacy Project, to Donald Fontaine (Mar. 7, 2019) (on file with author).

<sup>40</sup> *Id.*

<sup>41</sup> CUMBERLAND LEGAL AID CLINIC, 2018 ANNUAL REPORT TO MAINE CIVIL LEGAL SERV. FUND COMM’N, *in* MAINE CIVIL LEGAL SERV. FUND COMM’N, REPORT TO JOINT STANDING COMMITTEE OF THE JUDICIARY, 129TH LEGISLATURE 4 (Feb. 1, 2019).

<sup>42</sup> *Id.* at 3.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Pine Tree Legal Assistance, CSR, (Jan. 1, 2017 – Dec. 31, 2017) (on file with author).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> VOLUNTEER LAWYERS PROJECT, REPORT TO MAINE CIVIL LEGAL SERVICES FUND, *in* MAINE CIVIL LEGAL SERVICES FUND COMM’N, REPORT TO JOINT STANDING COMMITTEE OF THE JUDICIARY, 129TH LEGISLATURE 2 (Feb. 1, 2019)

<sup>54</sup> *Id.* at 3.



a handful of unemployment cases.<sup>55</sup>

Maine Equal Justice Partners (“MEJP”) had contact with 619 clients during its calendar year 2018.<sup>56</sup> This program differs from the other six programs in that it seeks to focus on cases or projects that will primarily benefit the poor.<sup>57</sup> Thus, it rendered full representation in only forty-two cases, giving advice, counsel, referral, or limited action to the rest.<sup>58</sup> This past year, it played a significant role in helping to extend Medicare coverage to thousands of people.<sup>59</sup> It handled two cases in state court.<sup>60</sup>

Beyond these hard numbers, the following statements of the providers in their annual reports and certain anecdotal observations by judges shed valuable light on the volume of litigation of these seven providers:

- “Most LSE clients receive help only via telephone. The most intensive level of service, providing a Staff Attorney to represent an elder in a court of administrative proceeding, is offered only where an elder is at risk of losing their home, can’t access essential health or public benefits, or is a victim of abuse of exploitation, and there is no other legal resource available to help the elder.”<sup>61</sup>
- “Any visit to a Maine probate or district court will immediately make clear how large the unmet need to legal assistance is. By estimates of the judges themselves, seven out of every ten cases have at least one side unrepresented.”<sup>62</sup>
- Judge John Romei of the Maine District Court in rural Machias and Calais stated that proper adjudication is a big problem when a litigant is unable to afford counsel.<sup>63</sup>
- Judge Paul A. Cote, Jr., of the District Court in rural South Paris and Rumford stated that tenants in eviction cases appeared with counsel “less than five percent, perhaps less than one percent.”<sup>64</sup>
- Judge David Soucy, who presides in three District Courts in rural Aroostook County, reported that tenants were represented at eviction hearings only five percent of the time.<sup>65</sup>
- Judge Roland Bowdoin of the District Court in Portland, in contrast to

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

<sup>56</sup> MAINE EQUAL JUSTICE, 2018 ANNUAL REPORT TO MAINE CIVIL LEGAL SERVICES FUND, *in* MAINE CIVIL LEGAL SERVICES FUND COMM’N, REPORT TO JOINT STANDING COMMITTEE OF THE JUDICIARY, 129TH LEGISLATURE 2 (Feb. 1, 2019).

<sup>57</sup> *Id.* at 3.

<sup>58</sup> *Id.* at 1.

<sup>59</sup> *Id.* at 5.

<sup>60</sup> Telephone interview with Robyn Merrill, Executive Director, Maine Equal Justice (March 2019).

<sup>61</sup> LEGAL SERVICES FOR THE ELDERLY, *supra* note 33, at 4.

<sup>62</sup> William S. Harwood, *Maine Legal Aid: Recession Impacts and Long-Term Challenges*, 28 ME. B. J. 64, 84 (2013).

<sup>63</sup> J. John Romei, District Court Judge Survey (2013) (unpublished) (on file with author).

<sup>64</sup> J. Paul A. Cote, Jr., District Court Judge Survey (2013) (unpublished) (on file with author).

<sup>65</sup> J. David J. Soucy, District Court Judge Survey (2013) (unpublished) (on file with author).

Judge Cote and Judge Soucy, who preside in rural settings, said that with Pine Tree Legal and pro bono lawyers, fifty percent of eviction hearings had counsel for the tenant present.<sup>66</sup>

- Judge David Kennedy reported that it was rare for him to see a legal aid or pro bono attorney in a small claims court.<sup>67</sup>
- The Law Firm of Drummond Woodsum of Portland accepted many annual referrals for unemployment compensation cases from VLP, either for review or for full hearings.<sup>68</sup>
- Alan Toubman, Chief Unemployment Compensation Hearing Officer, reported that very few claimants are represented at unemployment compensation hearings.<sup>69</sup>
- Commissioner Vincent O'Malley served for eleven years as the Employee Representative on the Unemployment Compensation Commission. He stated that whether, at the first or second level of appeal, very few claimants had counsel.<sup>70</sup>
- Of the 973 consumer cases that PTLA handled, only about five percent went to decision.<sup>71</sup>
- Of the 639 credit card cases that PTLA handled, forty-two went to hearing or decision.<sup>72</sup>
- PTLA reported that it had 439 income maintenance cases in 2017; those cases involved thirty-one hearings.<sup>73</sup>
- “Most qualifying clients who receive an intake would benefit from full representation, but the VLP is able to refer less than 20% for full representation by a pro bono attorney . . . . Limited representation through clinic based services is meaningful for many clients, but more than 80% of these clients would have benefited from full representation. In 2018, almost 500 clients who qualified for our services received only legal information because needed pro bono resources *did not exist in their county* . . . .”<sup>74</sup>
- Some Superior Court judges who responded to a survey by the author in 2013 stated that the number of poor litigants appearing before them with

<sup>66</sup> J. Roland Bowdoin, District Court Judge Survey (2013) (unpublished) (on file with author).

<sup>67</sup> Interview with J. David Kennedy, Me. Dist. Ct. (March, 2019).

<sup>68</sup> Telephone interview with Vincent O'Malley, Comm'r of Me. Unemployment Comp. Comm'n (August 2014).

<sup>69</sup> Training Conference at Pine Tree Legal Assistance, attended by author (2004).

<sup>70</sup> Telephone Interview with Vincent O'Malley, Comm'r, Me. Unemployment Comp. Comm'n (September 2014).

<sup>71</sup> Pine Tree Legal Assistance, *supra* note 45.

<sup>72</sup> *Id.*

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

<sup>74</sup> VOLUNTEER LAWYERS PROJECT, *supra* note 53, at 4.

counsel during a recent year was in the single digits.<sup>75</sup>

The statements above show the paucity of full representation services, and provide some information about legal aid practice in rural versus urban Maine. Some providers express dissatisfaction in being unable to devote more time to cases in court. The extraordinary number of housing cases and protection from abuse cases appears to be why other court work is lacking. PTLA, for example, had only 1257 cases in the categories of education, employment, health, and income maintenance, but PTLA was able to give full representation in only 114 of them (9.1%).<sup>76</sup>

In total, the reports from all of the providers and pro bono lawyers reveal number of clients served for a year is 20,526.<sup>77</sup> However, when measuring how many clients received full representation, the number diminishes steeply from the 20,526 to 3870. This is 18.9% of those who requested help.<sup>78</sup> To what extent did the 3870 full representation cases in one year meet a desirable amount of “access to justice” for Maine’s poor? We ask: how does it compare to the total number of cases of *all* Maine residents in a year?

In fiscal year 2018, the total number of civil cases filed in Maine was 51,560.<sup>79</sup> To calculate the percentage of the total filings that were made by Maine’s poor, we must take care to count only cases filed in state court and not those before federal courts or administrative agencies. The number of all civil state court cases with full representation from the above providers is 3075.<sup>80</sup> We next eliminate from the 3075 cases the clients who were *defendants* in state court so as to arrive at the number of cases that Maine’s poor *filed*—that is, in which they were the parties enforcing their rights. After doing so, we are left with 984 cases filed in the fiscal year of 2018, which represents 1.9% of the 51,560 the total Maine civil filings.<sup>81</sup> Had poor Mainers filed civil actions at the same rate that the entire Maine population did, they would have filed not 984 cases, but 17,217 – thirty-three percent of the total actions filed by the entire Maine population. That is because the poor are thirty-three percent

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<sup>75</sup> See Romei, *supra* note 63; Cote, *supra* note 64; Soucy, *supra* note 65; Bowdoin, *supra* note 66.

<sup>76</sup> Pine Tree Legal Assistance, *supra* note 45.

<sup>77</sup> See generally MAINE CIVIL LEGAL SERVICES FUND COMM’N, *supra* note 30 (total calculated by author).

<sup>78</sup> *Id.*

<sup>79</sup> *Maine State Court Caseload 5 Year Trend, Statistics*, STATE OF MAINE JUDICIAL BRANCH (July 21, 2019), [https://www.courts.maine.gov/news\\_reference/stats/pdf/year-trend/statewide.pdf](https://www.courts.maine.gov/news_reference/stats/pdf/year-trend/statewide.pdf) [<https://perma.cc/6HUX-DB5B>]. For fiscal year 2017, the number includes all civil cases filed in trial courts except Unified Criminal Docket civil violations and traffic infractions.

<sup>80</sup> MAINE CIVIL LEGAL SERVICES FUND COMM’N, *supra* note 30. The number of cases pending in state court is an estimate. It is based upon a reading of the seven annual reports, *supra* notes 30 to 56. Precise numbers are not available because the providers do not all provide figures by tribunal. None distinguish state from federal litigation. PTLA alone distinguishes the number of cases in court from the number in administrative agencies, but only when the tribunal renders a decision. If a litigated case reaches a negotiated settlement, the tribunal is not reported. Estimates were not difficult to determine, however, given the different characteristics of each program’s caseload. ILAP handles immigration cases, mostly federal administrative. LSE handles many categories of federal public benefits cases for the elderly. PTLA handles a great number of state court eviction and family matters cases.

<sup>81</sup> Note that the 1.9% of new filings is higher than the correct figure. The 984 cases counted as *filed* by poor plaintiffs during the year measured also includes cases that they filed in prior years, but were worked on during the period measured by the reports.

of the population. They were thus vastly underrepresented in new filings.<sup>82</sup> This 1.9% figure of cases filed and the underrepresentation figure that it produces is consistent with national figures in an allied measurement, that is, the measurement of legal services lawyers as compared to all lawyers.<sup>83</sup>

The above information leads to several conclusions regarding the experiences of the poor in Maine courts:

- *Representation in court:* Despite the recommended strategies of past commissions, the poor who wish to complain to a court still usually have to go to court alone. Year after year, the number of attorneys available to represent the poor in court has remained too small.
- *The amount of time expended by judges:* The information suggests that Maine's civil courts expend very limited judicial resources on the civil legal problems of the poor. In addition to the numbers reported in the annual reports of the programs, judges have made comments that suggest to a fair observer that their time was focused on some other type of litigation: i.e, it is "rare" to see legal aid in small claims court; debtors are "almost never" represented at disclosure hearings; representation of the poor in evictions in Rumford and the county seat South Paris is as "low as 1% - 5%".<sup>84</sup>
- *The types of cases that do command the attention of judges:* One can conclude that the time of Maine courts is largely taken up with the civil problems of affluent people, institutions, corporations, government agencies, and with criminal cases, many of which are against the poor.
- *There is little deterrence to suing a poor person:* In our somewhat law-intensive society, statutes are written with the expectation that citizens will act proactively to protect their own interests. It is in *filing* cases that the poor could, if they possessed the resources, show that they intend to affirmatively protect their interests. But, the poor are not often plaintiffs. The situation sends a message to parties whose business interest leads them to deal in various ways with poor people: poor people will not sue them.

### III. WHAT ARE THE BARRIERS TO LITIGATION IN MAINE?

It is clear from Part II that the poor participate only to a very limited extent in the courts. Without counsel, the barriers are formidable. The pro se movement

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<sup>82</sup> Note that the number of cases that we assume the poor would file if they were filing at the same rate as the overall population, that is, 17,217, is actually too low. Poor people have, per capita, more need for legal services than the general population. Lowry & Fontaine *supra* note 4, at 25; ME. COMM'N ON LEGAL NEEDS, *supra* note 7.

<sup>83</sup> In 2010, civil legal aid attorneys were one-half of one percent all the attorneys in the United States who provided civil services. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resources Landscape for Ordinary Americans*, 37 *FORDHAM URB. L. J.* 129, 140 (2010).

<sup>84</sup> See *supra* notes 63-67.

contends that the solution is to teach non-lawyer litigants to navigate the legal system themselves without counsel and to make changes in the court system that will make that possible.<sup>85</sup> On the contrary, argue attorneys opposing this movement, the legal system is necessarily technical and the state should provide legal counsel for the poor as it does in criminal cases. This is the so-called “civil Gideon” solution.<sup>86</sup> Many opponents of the pro se approach say that litigation is just too complex for non-lawyers and that America’s great promise in its founding documents is equality under the law.<sup>87</sup> They argue that the courts cannot continue to administer two different legal systems—one for the rich and one for the poor. But, civil Gideon remains a long-term goal that depends on the will of Congress. The civil Gideon movement lacks any significant legislative support, just as it has for all of the thirty-eight years since Justice Weinstein proposed it in his article in 1981.<sup>88</sup>

The pro se argument for change in the courts fails for two reasons. First, it fails to appreciate the complexity of civil procedure. Second, it fails to grasp that courts are committed to the present procedures because these procedures are deeply embedded in American jurisprudence.<sup>89</sup> Moreover, can pro se litigants truly be as effective as their own lawyers? Can lay persons untutored in the law comply with court procedures and interpret substantive law well enough? Or, do the common law, statutory law, and administrative law in a country with both federal and state laws present barriers too challenging for non-lawyers?

Before drawing a conclusion about this controversy, it is important to understand what the litigation process *actually* entails. What exactly do pro se litigants face in court? What do lawyers do? A complete understanding of the process is critical to understanding the challenges in adopting a pro se approach.

For litigants to obtain a legal remedy, they must know from the outset if something that happened to them violated a law. The barriers begin. The first barrier

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<sup>85</sup> See Katherine Alteneider, *Literacy and the Courts*, 24 ALASKA JUST. F. (2007); (studying what skills pro se litigants are presently lacking); Benjamin H. Barton, *Against Civil Gideon (And for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010) (arguing that 2010 pro se reform in courts is already starting to happen); Mollie Bryant, *How Americans Navigate a Civil Justice System Made ‘by Lawyers, for Lawyers’*, BIG IF TRUE (March 18, 2019), <https://www.bigiftrue.org/2019/03/18/how-americans-navigate-a-civil-justice-system-made-by-lawyers-for-lawyers/> [https://perma.cc/ER5M-WD9X] (describing in detail what is in fact occurring in multiple courts around the country and the development of self-help centers to guide litigants through common cases); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 61 FORDHAM L. REV. 1987 (1999) (stating that judges, mediators, and clerks must change the degree and manner in which they presently assist pro se litigants); Jacqueline Nolan-Haley, *Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here*, 87 FORDHAM L. REV. 78 (2019) (explaining self-representation in mediation requires reform of the mediation process, which is now coercive); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1997).

<sup>86</sup> Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769 (2006).

<sup>87</sup> Jon D. Levy, *The World is Round: Why We Must Assure Equal Access to Civil Justice*, 62 ME. L. REV. 561, 564 (2010); Jack B. Weinstein, *The Poor’s Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 655 (1981).

<sup>88</sup> Weinstein, *supra* note 87, at 655.

<sup>89</sup> See *McNabb v. United States*, 318 U.S. 332, 347 (1943) (“The history of liberty has largely been the history of the observance of procedural safeguards.”).

to litigants is to “state a cause of action.” For example, many people complain that “my boss fired me for no reason at all,” erroneously thinking that such unfair behavior must be against Maine law. Next, a person must learn which legal body handles the type of claim they are making: a court or an administrative agency? State or federal? If a court, in which branch of the court should papers be filed? In one’s town or city, or in the court where the other party resides? Or, somewhere else? How must the papers be served? Is there a deadline for filing? What if the transaction took place in another state? How much must be said in the complaint? Does the person who is being sued have to admit everything said in the complaint if the statements are probably true? What if he does not? What if one also has a case against the person who sues him? Can he complain in the first case about the illegal action that the other person did? Must he? How is that done? After the suit has begun, what happens next? If the other party possesses some of the important documents in the dispute, how can they be obtained? What if the other party asked for every telephone record for the past two years? Must they be turned over? What about private information?

These questions come up in the beginning of a case. Some of them are basic to many cases. Let us look a little closer. Maine, like all states, has an adversarial system. That means that a judge is not supposed help a litigant prove his case. The Maine Rules of Civil Procedure require lawsuits to begin in a certain way.<sup>90</sup> Civil litigation has its own rules separate from those of criminal trials. These rules govern what can happen in a case at every stage. Litigants must understand and follow all the rules. If they do not, the case may not be successful at trial or it may be dismissed before a trial is ever reached.<sup>91</sup> In the three different civil courts in Maine—Superior, District, and Probate—there are over 130 pages of rules of procedure.<sup>92</sup> There are nearly 100 pages of forms, with some allowed to be used in all three courts, and others in only one court. Failure to take the steps mandated by the rules by a deadline can result in an order by the judge that harms the case, even leading to dismissal.

Each court has a separate “subject matter” jurisdiction, meaning that there are cases that it may decide and cases that it may not. In order to learn what subject matter jurisdiction a court has, other Maine statutes that are not referenced in any of the procedural rules mentioned above must be consulted. The court must also have jurisdiction “over the person,” meaning that the plaintiff must have *legally* served the complaint on the defendant. This choice of what person to serve can require factual and legal research. In the case of an out-of-state occurrence, Maine’s “long arm” statute will have to be used.<sup>93</sup> If one cannot locate the person who is to be sued, one must obtain court permission for a special kind of service or one’s case cannot go forward.

The rules do not permit one to file a suit or make an out-of-court settlement for injury to a child unless the child’s parent or guardian complies with all requirements of Rule 17. All complaints must meet certain requirements. For example, Rule 8

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<sup>90</sup> M.R. Civ. P. 2-5.

<sup>91</sup> M.R. Civ. P. 12(b)(6).

<sup>92</sup> See generally MAINE JUDICIAL BRANCH, MAINE COURT RULES 2014 STATE EDITION (2014).

<sup>93</sup> 14 M.R.S.A. § 704-A (2018). Even if there is jurisdiction over the person according to the language of the statute, it is also necessary to show that the extension of the State’s power in a particular case does not offend the Due Process Clause of the United States Constitution. *Id.*

states that a complaint consists of “a short and plain statement of the claim showing that the pleader is entitled to relief . . . .” This seems simple, but a subsequent Rule, 9(b), provides that a case where one claims a fraud or a mistake must be stated “with particularity.” That means all the particular facts that are part of a “fraud” or a “mistake” case must be pleaded, but Rule 9(b) does not state what those facts are. A “summary sheet” must be filed with the complaint.<sup>94</sup> Failure to conform to any of the above procedures, even failure to include the “summary sheet” with the complaint, will cause the case to be dismissed.<sup>95</sup>

A case may only be filed against the correct legal entity. In a dispute with a landlord, for example, he or she to whom you have always paid the rent may not be the landlord. The legal owner of the property could be a corporation. This may require some legal research at the Registry of Deeds. In some cases, Rule 19 allows the court to direct which parties should be joined in the court action.

There is a time limit for filing a civil case, after which the right to sue expires – a statute of limitations. One must find the correct one.<sup>96</sup> The cause of action may expire automatically or expire only if the defendant brings it up, depending on the wording of the particular statute of limitations. These time deadlines are not stated in the Rules of Procedure. Some statutes of limitation are very short. For example, Rule 80B of the Maine Rules of Civil Procedure requires one who appeals a “final” local government administrative decision to do so within thirty days. Is the decision you disagree with a “final” decision of the government entity?

Sometimes a case will require an expert witness. Doctors are the most common expert witnesses because a patient will not be allowed to give a medical opinion. The court imposes stringent obligations on the side that is going to present an expert witness. That side must provide the other side with the expert medical opinion in writing to be used at the trial.

The defendant will in many cases seek to have the plaintiff’s case dismissed by the court before trial. Defendants will file either a Motion to Dismiss or a Motion for Summary Judgment, or both. A Motion to Dismiss challenges the sufficiency of the complaint. If the complaint does not state a legal claim, the court will dismiss it.<sup>97</sup> In order to prevent the court from dismissing the complaint, the plaintiff must show the court that the complaint pleads all the necessary elements of that type of case and the basic facts that support it. That means that one needs to understand in detail the law of the kind of case that he filed, whether contract, trespass, slander, personal injury, or any other. One must also explain the legal theory in writing. For example, if the case is about a car that one has bought from a car dealership, the Maine Sales Act in Title 11 of the Maine statutes applies. It has ninety sections. A plaintiff must state what section the defendant violated and explain how it was violated.

Trials are often avoided by defendants by use of a Rule 56 Motion for Summary

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<sup>94</sup> M.R. Civ. P. 5(h).

<sup>95</sup> See, e.g., *Strachan v. Kennebunk Bd. of Assessment Review*, No. AP-10-029, 2011 Me. Super. LEXIS 47, at \*6 (Mar. 8, 2011).

<sup>96</sup> There are more than thirty-four such statutes of limitation spread throughout the thirty-nine Titles of the Maine Statutes. See, e.g., 14 M.R.S.A. § 753 (2019) (two years for action for assault and/or battery); 14 M.R.S.A. § 752-A (2019) (four years after alleged malpractice of design professional).

<sup>97</sup> M.R. Civ. P. 12(b)(6).

Judgment.<sup>98</sup> The text of the rule itself, in the hard copy used by Maine lawyers, is two and one-half pages long. The motion itself can be dozens or even hundreds of pages. To oppose such a motion requires meticulous work.<sup>99</sup> When a pro se plaintiff fails to respond in accordance with the Rules, the Law Court has made very clear that it will enforce the rules against pro se parties in the same way as represented parties: “Plaintiff’s plea for judicial leniency by reason of his pro se status falls on deaf ears. The Law Court has reiterated numerous times that pro se litigants are held to the same standards as those litigants who are represented by counsel.”<sup>100</sup>

If one successfully gets past these motions, then he must be ready to answer the defendant’s “discovery.”<sup>101</sup> An attorney knows the power of getting access to all of the evidence. An attorney will also want to know all the facts, not just the ones she learned from her own client. The discovery rules guide this process. The knowledge obtained through discovery can spell the difference between victory and defeat. A litigant has only thirty days to give all of the evidence asked for. Recently, some attorneys have been using Rule 36 (Request for Admissions) against unrepresented parties.<sup>102</sup> Rule 36 permits the opposing party to make a statement about some fact in the case and ask the other party to admit it in writing.<sup>103</sup> If the responding party fails to answer in writing, he will find that at trial he cannot introduce any evidence for or against that fact. If the responding party answers the Request for Admission by denying that the fact is true, he may have to pay attorney’s fees to the other side whether he wins or loses the case if the adversary then proves at trial that the fact that the responding party refused to admit is true. “Discovery” also includes depositions, interrogatories, requests for production of documents, requests to “view” premises involved in the case, and physical and mental examinations—all of which require a litigant’s cooperation.<sup>104</sup>

After the complaint is filed, the defendant must respond in writing to each paragraph, separately. If the defendant fails to deny a fact, the rule says that the facts “are admitted when [they are] not denied in the responsive pleading.”<sup>105</sup> There are some defenses called “affirmative defenses” which are not simply a denial of something the plaintiff said, but which raise new facts or legal concepts thought to benefit the defendant.<sup>106</sup> These “affirmative defenses” must be written in the “Answer.”<sup>107</sup> The defendant must study the list of defenses provided in the Rule,

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<sup>98</sup> M.R. Civ. P. 56.

<sup>99</sup> *See id.* Justice John D. Levy discussed the summary judgment rule in this context as an example of the complexity of civil litigation. It requires an understanding and ability to use contextual terms such as “deny,” “qualify,” “material facts,” “record,” “citations,” and “admissible evidence.” Justice Levy describes particularly Rule 56 and other procedural rules as a “veritable thicket for the uninitiated.” Levy, *supra* note 87, at 64-65.

<sup>100</sup> Dyer Goodall and Federle, LLC v. Proctor, 2007 ME 145, ¶ 18, 935 A.2d 1123.

<sup>101</sup> M.R. Civ. P. 26-37.

<sup>102</sup> M.R. Civ. P. 36.

<sup>103</sup> *Id.*

<sup>104</sup> M.R. Civ. P. 26, 30, 31, 33-35.

<sup>105</sup> M.R. Civ. P. 9(d).

<sup>106</sup> M.R. Civ. P. 8(c).

<sup>107</sup> Most affirmative defenses are technical highly legal concepts. Rule 8(c) lists them: accord and satisfaction, arbitration and award, assumption of risk, comparative fault, discharge in bankruptcy, duress, estoppel, immunity, laches, *res judicata*, payment, release, *et. al.* M.R. Civ. P. 8(c).



learn the meaning of each, decide which may apply, and research it further if it appears to apply. Any affirmative defense that the defendant does not plead in writing in their Answer cannot be raised at trial.

The procedural steps in the Maine Rules of Civil Procedure discussed above provide only a very small taste of the complexities of civil litigation in Maine. There are other equally complex rules. The rules are so technical that a Maine legal scholar has said that they are unnecessarily complicated even for attorneys.<sup>108</sup> There are state statutes that list the specific evidence that is necessary to prove a particular fact. One must find these statutes.<sup>109</sup>

In addition to the Rules of Civil Procedure and the Rules of Evidence there are other sets of rules: Maine Small Claims Procedure, Maine Rules of Appellate Procedure, and Rules of Child Support Guidelines Calculations. Observing litigants trying to conduct their own trials, Professor Alteneder, a scholar of pro se litigation has commented:

[T]he judge is often in the courtroom with two lay people, who likely lack the necessary reading and comprehensive skills. The judge must remain neutral and impartial, while the lay people must, in theory, read and analyze the relevant law, apply their facts to the law, construct a strategy for their case, draft clear, concise and persuasive legal documents, engage with evidentiary and procedural rules to their advantage, follow all pre-trial orders, and finally prepare for the day in court when they finally engage their adversary in a way authorized by rule and law.<sup>110</sup>

One could make the assumption that Maine has provided some streamlined forums that impose less stringent requirements in simple cases. He would be mistaken. There are several so-called streamlined hearings of great importance to poor people: unemployment compensation, general assistance, tax abatements, drivers' licenses, educational rights, and many more. The Hearing Officers in such cases, even though they do not preside in courtrooms, nevertheless do conduct full adversary hearings. And, they are not easy ventures. First, the rules of evidence at administrative hearings are not as relaxed as sometimes stated. Second, many hearing officers are not lawyers. Consequently, they are not highly trained in the rules of evidence. Some hearing officers are overly strict because of their lack of knowledge. Third, the appeal of their decisions is limited. A Superior Court judge reviewing an administrative case on appeal will closely examine the Hearing Officer's *legal* conclusions, but not their *factual* findings. This is the "substantial

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<sup>108</sup> John C. Sheldon, *Thinking Outside of the Box About Pro Se Litigation*, 23 ME. B.J. 90, 96 n.47 (2008).

<sup>109</sup> 26 M.R.S. § 1043(11)(E) (2018) ("Services performed by an individual for remuneration are considered to be employment subject to this Chapter unless it is shown to the satisfaction of the Bureau that the individual is free from the essential direction and control of the employing unit, both under the individual's contract of service and in fact, and the employing unit proves that the individual meets all of the criteria in subparagraph (1) and criteria of at least three (3) divisions of subparagraph (2)."). The statute then proceeds to list the multiple factors in each of three divisions to consider. To interpret it and apply them is not a simple matter.

<sup>110</sup> Alteneder, *supra* note 85, at 5. Another skilled observer of pro se litigants who are trying to conduct a trial in Maine spells out how defense counsel should counter cases presented by pro se litigants. In the course of the description, he paints a realistic picture similar to what professor Alteneder describes. Brian L. Champion, *Defending Against a Pro Se Plaintiff: When the Plaintiff is David and You're Goliath*, 20 ME. B. J. 236, 238-39 (2005).

evidence” rule.<sup>111</sup> A careful litigant will not be satisfied to have offered just enough evidence at the administrative hearing to prove his case by a mere preponderance of the evidence. He must strive for an air-tight factual picture in order to win at the administrative level—the only fact-finding level available to him—or make a record so favorable that a reviewing judge may be able to see an obvious miscarriage of justice. It is a tough standard to meet. The sample of rules discussed above shows that undertaking litigation in Maine is a formidable task. All litigation must overcome many rules that function as barriers. Note that it is feasible that a particular non-lawyer who has studied and been involved in multiple cases could apply some of these rules, but this article does not look at the difficulty these barriers pose from the perspective of a sophisticated pro se litigant. Rather, I consider the question of the effect of these barriers upon *most* pro se litigants who will confront a barrier for the first time, and *particularly on their effect upon impoverished pro se litigants*.

#### IV. MAINE CANNOT CLAIM TO BE A GOVERNMENT OF LAWS WHILE DENYING TO THE POOR EQUAL ACCESS TO ITS CIVIL COURTS

Maine cannot claim to be a “government of laws” while denying to the poor equal access to its courts. The notion is widespread in America that we are fortunate to live in a country with a government of laws. “Equal Justice Under Law” is chiseled on the portico of the United States Supreme Court. The editors of the *Portland Press Herald* recently wrote: “The United States’ system of government has been a model for many new democracies. We have exported our Constitution and our Bill of Rights. We have helped design governments with separate powers strong enough to check each other; and independent courts to enforce the rule of law.”<sup>112</sup>

The U.S. sends legal scholars to help new nations set up legal systems. On Law Day and other public holidays the legal community celebrates the rule of law. In the State of the Judiciary Report in 1990, Maine’s Chief Justice stated:

The State of the Judiciary is sound. We are fulfilling our role as the backbone of a democratic society by ensuring the rule of law. In the most elementary terms, an effective judiciary ensures that those who do violence against society can be prosecuted and punished; *that a forum is available to resolve disputes among private citizens so that resort to lawlessness is avoided*; and that elected and appointed boards and officials, whether state regulatory agencies, local zoning boards, police officers, or others, are held to the rule of law by judicial review of their actions.<sup>113</sup>

Maine court opinions constantly repeat that ours is “a government of laws and

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<sup>111</sup> See generally 5 M.R.S.A. § 11007(4)(c)(5) (2018); *Gulick v. Bd. of Env'tl. Prot.*, 452 A.2d 1262, 1263 (Me. 1987); *Seven Islands Land Co. v. Maine Land Use Regulation Comm'n.*, 450 A.2d 475, 479 (Me.1982) (“The fact that the record contains inconsistent evidence or that inconsistent conclusions could be drawn from the record does not prevent the agency’s findings from being sustained if there is substantial evidence to support them.”); M.R. Civ. P. 80B, 80C.

<sup>112</sup> Editorial, *Compact Wrong Way to Fix Electoral College*, PORTLAND PRESS HERALD, March 7, 2019, at A-6.

<sup>113</sup> LEG. REC. OF THE 114TH LEG. OF THE ST. OF ME., vol. IV, 2d Reg. Sess., at 251 (1990) (statement of the Chief Justice of the Supreme Judicial Court Vincent L. McKusick) (emphasis added).

not of men.”<sup>114</sup> And yet the forums that the Chief Justice describes above, as having the task of assuring the rule of law are not available to the poor. Indeed, for much of our history there has been a consensus that it is everyone’s responsibility to hire a lawyer if they want one. The United States Supreme Court reflected that consensus when it said, “[w]e live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise.”<sup>115</sup> However, the Court knew well years before that statement, in *Powell v. Alabama*, that a pro se litigant was not capable of acting effectively in his own defense at a trial:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>116</sup>

The above description of the difficulty that a layperson has in comprehending court procedure involves a core function of government. That fact alone removes it from the sphere of private enterprise. Courts are not commercial enterprises. We must find a better sphere of thought in which to discuss the problem of the collision between poverty and the constitutional duty “to establish justice.” Our United States Constitution forbids us to treat our day in court like a commercial commodity, or like a shopping trip to Macy’s.

The marketplace analogy above quoted from *Fuller v. Oregon* lost its luster in the latter part of the twentieth century. *Gideon v. Wainwright* was decided in 1963.<sup>117</sup> By 1971, Maine had joined other states in extending the right to counsel in criminal cases to misdemeanor cases.<sup>118</sup> It has come time to examine the absence of counsel in civil courts in relation to our nation’s ability to function as a government of laws. The poor are unable to present their legal issues to those parts of the government created to establish justice. “Establishing and maintaining justice was at the heart of the rationale for forming our nation,” wrote Judge Jon D. Levy in 2010.<sup>119</sup> Looking back to colonial times and the opinions of Chief Justice John Marshall, Justice Levy views the present problem in relationship to the declared obligations of government. The courts dispense justice and must do so to all, he writes, because equal access to justice is a foundation of democracy.<sup>120</sup> Federal Justice Jack B. Weinstein holds a

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<sup>114</sup> *State v. Sklar*, 317 A.2d 160, 171 (Me. 1974); *State v. Small*, 219 A.2d 263, 267 (Me. 1966); *Lewis v. Webb*, 3 Me. 326, 336 (1825).

<sup>115</sup> *Fuller v. Oregon*, 417 U.S. 40, 53 (1974).

<sup>116</sup> *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

<sup>117</sup> *See generally* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>118</sup> *See* *Newell v. State*, 277 A.2d 731 (Me. 1971).

<sup>119</sup> *Levy, supra* note 87, at 563.

<sup>120</sup> *Id.* at 562.

similar view:

Equal access to the judicial process is the *sine qua non* of a just society. While we have made enormous strides towards that goal, it is still a glaring truth that equality of access is in the real world little more than a figment of the jurisprudential imagination. Achieving full and precise equality, even in the courts, is incredibly difficult in a society where social and economic inequality is so highly prized.<sup>121</sup>

Professor Deborah Rhode, a prolific American scholar on access to courts, also finds that the rule of law is what needs to be examined to understand the implications of the exclusion of the poor from the nation's courts. She writes:

As the Supreme Court has recognized in other contexts, the “right to sue and defend” is a right “conservative of all other rights, and lies at the foundation of an orderly government.” Providing the services necessary to make those rights meaningful fosters values central to the rule of law and social justice.<sup>122</sup>

In *Justice for All* a Maine commission recognized in 2007 that the poor's lack of access to courts imperils our democracy. The report states that the absence of equal access to courts “also distorts the basic principle of our democracy.”<sup>123</sup> Not only do many leaders in Maine agree with that contention, but a broader revolution of thought is underway world-wide.<sup>124</sup> The sad fact is that when we look closely, we see that the United States can no longer tout the quality of its legal system, especially since its own government agency, the Legal Services Corporation, estimates that over eighty percent of the poor cannot even access the civil court system.<sup>125</sup> It is undoubtedly for this reason that the American Bar Association concludes that state governments have “put the rule of law at risk.”<sup>126</sup>

The right of access that belongs to all Americans does not derive *solely* from the American Constitution. It also derives from the duty of the United States as a member nation of the United Nations and a pledge of the United States Attorney General to it. The General Assembly resolved:

We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote

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<sup>121</sup> Weinstein, *supra* note 87, at 655.

<sup>122</sup> Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 375 (2004).

<sup>123</sup> JUSTICE ACTION GROUP, *supra* note 29, at 41.

<sup>124</sup> See Forrest Dill, *Law Reform and Social Inequality: Twentieth-Century Revolution in Civil Justice?*, 10 CONTEMP. SOC. 745 (1981); Lidman, *supra* note 86; World Justice Project, *World Justice Project Rule of Law Index 2015* (2015),

[https://worldjusticeproject.org/sites/default/files/documents/roli\\_2015\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/roli_2015_0.pdf) [<https://perma.cc/PE99-DQ46>] (ranking the United States as nineteenth on access to justice).

<sup>125</sup> Legal Servs. Corp., *Documenting The Justice Gap In America: The Current Unmet Civil Legal Needs Of Low-Income Americans*, 28 (2009),

[https://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](https://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf) [<https://perma.cc/FGX2-PS54>].

<sup>126</sup> AM. BAR ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 36 (2016).

access to justice for all including legal aid.<sup>127</sup>

The then-Attorney General of the United States, Eric Holder, spoke to the General Assembly in favor of the resolution pledging “to improve access to justice for those who cannot afford representation.”<sup>128</sup>

European and American legal aid comparisons were the study of Justice Earl Johnson, who was the second national director of the Federal Office of Economic Opportunity Legal Services Program. For twenty-seven years he has been studying the legal aid programs of Europe and America. His seminal article was published in 2000.<sup>129</sup> The study focuses on money. Justice Johnson found that the United States and its separate American states spent dramatically less on civil legal aid than every European industrial country. It did not matter whether he used the percentage of gross national product or the percentage of court budgets. English solicitors received twelve percent of their fees for performing civil legal aid. U.S. expenditures were found to be “absurdly low.” In the provision of legal aid, he found that we were truly an “underdeveloped country.”<sup>130</sup> Professor Rhode, referred to above, also studies this problem comparatively. In 2004, according to research available at the time, the United States collectively allocated only about one-sixteenth of what Great Britain did in its budgets for civil legal assistance. We provided only a sixth of what New Zealand provided, and a third of what some Canadian provinces guaranteed.<sup>131</sup> It should by now be apparent to policymakers that they must find a solution to federal and state governments’ exclusion of the poor from their courts if the United States wants to continue to present itself internationally as a country governed by the rule of law.

#### V .SOLUTIONS ATTEMPTED IN THE PAST HAVE NOT BEEN SUCCESSFUL AND WILL NOT SUCCEED IN THE FUTURE

In Part III, I described some of the barriers that exist to litigating in Maine’s courts. In Part IV, I set forth the constitutional imperative Maine faces. The past solutions that were recommended by Maine commissions overcame these barriers to an extent. For example, pro bono attorneys increased their service. Pro se litigants were provided unbundled services. I now ask: are those solutions and others that have been recommended likely to provide equal access for Maine’s poor? I examine them all below: pro se, mediation, simplified procedures, unbundled legal services, civil *Gideon*, funding increases, and pro bono representation.

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<sup>127</sup> G.A. Res. 67/1 (I), at 3 (Nov. 30, 2012).

<sup>128</sup> Dept. of Justice, *Attorney General Eric Holder Speaks at the United Nations General Assembly’s High-Level Event on the Rule of Law* (Sep. 24, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-united-nations-general-assemblys-high-level-event> [<https://perma.cc/XQS3-NSME>].

<sup>129</sup> See generally Earl Johnson, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *FORDHAM INT’L. L.J.* 83 (2000).

<sup>130</sup> *Id.* at 98.

<sup>131</sup> Rhode, *supra* note 122, at 374 n.7.

*A. Pro se: basic skills.*

Unrepresented litigants are flooding the courts.<sup>132</sup> In addition to the pro se litigants that represent themselves because they cannot afford to pay a lawyer, some pro se litigants simply prefer to proceed on their own.<sup>133</sup> This paper does not concern them. Rather, it concerns those who cannot afford to pay a lawyer.<sup>134</sup>

A litigant must have the skill to communicate clearly both orally and in writing. There are multiple steps in litigation that require these skills. The need begins with the Complaint. Great care is required. It is the first paper that a judge will see. It tells the judge what legal wrong of which the plaintiff complains and determines the scope of the evidence that may be offered to support the claim. A scholar in the study of pro se litigation observes:

[W]riting ability is one of the most critical skills in the bundle of literacy skills required when participating in the court system. Judges are often called upon to muddle through a garbled text in an effort to understand what a litigant is requesting and to parse the relevant legal information from the emotional.<sup>135</sup>

A garbled Complaint loses the judge from the beginning. In a recent pro se case, a Maine judge made the following analysis of a Complaint. It shows the damage that a lack of clarity will cause. The court said the plaintiff's Complaint consists of a hodge-podge of unnumbered averments complaining of defendant's wrongdoings, sledging, inter alia, unhealthy indoor air quality, failure to maintain a residential property, negligence and poor management practices . . . . The Complaint filed by the plaintiff contains ten pages of rambling allegations not made in numbered paragraphs as required by Rule 8(a).<sup>136</sup>

The court dismissed the case. Another Maine judge commented that a majority of pro se foreclosure cases, eviction appeals, and small claims appeals before him were "frivolous if frivolous is defined to mean that the appeal was 'devoid of merit.'"<sup>137</sup> A federal judge with extensive experience on state and federal benches

<sup>132</sup> See, e.g., Russel Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, And Clerks*, 67 *FORDHAM L. REV.* 1987 (1999).

<sup>133</sup> See Champion, *supra* note 108, at 236 (An ABA study concluded that "the primary reason self-help litigants gave for going forward without a lawyer was the belief that they could navigate the system and obtain their desired outcome on their own."); Soucy, *supra* note 65.

<sup>134</sup> Consequently, this article does not address the problem caused by the flood of pro se litigants to the courts to the extent that affluent litigants are involved.

<sup>135</sup> Alteneder, *supra* note 85, at 8.

<sup>136</sup> *Davison v. Princeton Props.*, CUMBSC-CV-2011-0182 (Me. Super. Ct., York Cty., Jan. 20, 2012). Neither is the Law Court reluctant to point out the errors of pro se litigants. It wrote:

We find utterly groundless every attack made by appellant on the actions taken by the trial courts. For example, his only comprehensible claims of error supposedly committed in the jury trial challenged the Superior Court's quashing of his witness subpoenas and its refusal to give 19 instructions requested by him. He, however, had not tendered the required attendance and travel fees to any of the subpoenaed witnesses, *see* M.R.Civ.P. 45(c), and every one of his requested instructions either was irrelevant to any issue at trial before the jury, or was not generated by any evidence before the jury, or was simply wrong in its statement of the law. He has shown no plausible ground in law for dissolving the trustee process on the joint bank account, and any discussion of his contentions on the dismissed 'counterclaims' would dignify them beyond their worth.

*State of Maine v. Simanonok*, 539 A.2d 211, 212 (Me. 1988) (citations omitted).

<sup>137</sup> J. Thomas D. Warren, District Court Judge Survey (2013) (unpublished) (on file with author).

in Maine commented that the challenges of complying with the writing requirements of the summary judgment rule, Rule 56, are substantial for even a trained lawyer and that the requirements present a “veritable thicket for the uninitiated.”<sup>138</sup>

A second skill that a pro se litigant must have is the ability to do legal research. Legal research requires highly skillful reading. For example, in some consumer purchase cases, the litigant must be familiar with several parts of Title 10 of the Maine statutes. Title 10 includes detailed provisions about credit and debit cards (ch. 202-B); Commercial Loan Agreements (ch. 202-C); The Fair Trade Act (ch. 203); Warranty’s On Motor Vehicles (ch. 803-A); Unfair Sales Act (ch. 205); Required Disclosures To Consumers (ch. 205-A); The Unfair Deceptive Trade Practices Act (ch. 206); Fair Credit Reporting Act (ch. 209-B and ch. 210); Consumer Arbitration Agreements (ch. 212-B); Used Car Information (ch. 217), and many other protective statutes in the commercial field. In a case in which a pro se consumer is sued, he must research all the possible relevant statutes in Title 10. In a case involving employment she must find the applicable definition of “employee.” It could be found in a statute, or a regulation, or in a decision. Differing definitions are found in different places.<sup>139</sup> The search may be done for a defense as well as for the possibility of a counterclaim, or both. The regulations of Maine’s administrative agencies in statutory cases also must be found, read, and applied to the case. For many statutes, there is an administrative agency that further interprets the governing statute and issues regulations that have the force of law. There are sixty-five independent agencies.<sup>140</sup> The attorney must determine if any regulations exist affecting the case at hand.

In cases controlled not by statute but by common law, a different kind of research is required. In such cases, access to decisions of the Law Court is necessary. They are available for free on the Maine Court’s website,<sup>141</sup> but some research skills are required. However, past decisions of the District and Superior Courts—even decisions of the very judge that the case is pending before—are not easily available without a subscription to Westlaw or LEXIS.

The research skills above described require superior reading skills and constitute the bare minimum for research duties.

### *B. Pro se: litigation results.*

Studies show that litigants represented by counsel achieve better outcomes than those achieved by pro se litigants. The saying that “a lawyer who represents himself has a fool for a client” is sometimes borne out in practice. From 1967 to 2017 there were fifteen pro se appeals of unemployment compensation decisions from the Maine Unemployment Compensation Commission to the Superior Court. All fifteen

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<sup>138</sup> Levy, *supra* note 87, at 564-65.

<sup>139</sup> Compare 26 M.R.S. § 1043(11)(E) (2019) with Murray’s Case, 130 Me. 181, 186, 154 A. 352, 354 (1931).

<sup>140</sup> See State of Maine, *Rule Chapters for Independent Agencies*, <https://www.maine.gov/sos/cec/rules/90/chaps90-.htm> [<https://perma.cc/KY6K-JNWH>] (last visited Jan. 13, 2020).

<sup>141</sup> See State of Maine Judicial Branch, *Published Opinions of the Law Court*, [https://www.courts.maine.gov/opinions\\_orders/supreme/publishedopinions.shtml](https://www.courts.maine.gov/opinions_orders/supreme/publishedopinions.shtml) [<https://perma.cc/TWW7-AJ53>] (last visited Jan. 13, 2020).

pro se litigants lost.<sup>142</sup> A study in 2013 showed that twenty years of Superior and Law Court pro se proceedings in eviction cases produced seventeen loses for pro se litigants and one victory.<sup>143</sup> In the subject of landlord-tenant litigation, a scholar performed a randomized study, with a control group, of the results of Massachusetts District Court decisions when tenants were represented by counsel versus when the members of a control group were pro se tenants.<sup>144</sup> In eviction cases, two-thirds of tenants in the former category retained possession of the premises versus one-third of the pro se litigants.<sup>145</sup> In the area of rent waivers, those represented by counsel achieved an average of 9.4 months of rent per case versus 1.9 months of rent per case for the *pro se* control group.<sup>146</sup>

In Maine housing cases a study of residential forcible and detainer (i.e. evictions) actions in the Superior Court and the Law Court showed that from 1993 to 2013 every pro se tenant, except one, lost their case.<sup>147</sup> A study by the then Justice Howard H. Dana, Jr., showed that in eviction cases at the District Court level in Maine, tenants who proceeded without counsel achieved a generally favorable outcome fifty-eight percent of the time, while those who had the benefit of counsel achieved a generally favorable result eighty-five percent of the time.<sup>148</sup> The above studies are part of a plethora of studies demonstrating that a poor person appearing in court without counsel is less likely to produce a favorable result than a poor person attending court with an attorney.<sup>149</sup> Indeed, the high default rate in Maine amongst *pro se* litigants assures their defeat in many cases. Consumer cases are usually followed by a disclosure proceeding in Maine where default rates are also high.<sup>150</sup> In an experimental project at the District Court in Washington County with separate targeted funding, PTLA attended disclosure hearings with one-hundred percent of the poor people there summonsed.<sup>151</sup> It made a huge difference; assets and income that are exempt by statute from attachment were asserted by the debtors' counsel.<sup>152</sup>

<sup>142</sup> The unemployment study was accomplished through a non-exhaustive LEXIS search of Maine cases performed by the author in 2017 and updated with a Westlaw search in February 2019. Results are on file with the author.

<sup>143</sup> The eviction study was accomplished through a non-exhaustive LEXIS search of Maine cases performed by the author in 2013 (on file with author).

<sup>144</sup> D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 903 (2013).

<sup>145</sup> *Id.* at 908.

<sup>146</sup> *Id.* at 903.

<sup>147</sup> LEXIS search conducted by Oct. 6, 2013 (10 pages) by Author.

<sup>148</sup> Levy, *supra* note 87, at 576.

<sup>149</sup> Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80(5) AM. SOC. REV. 909, 924 (2015) ("The findings of the meta-analysis are striking in three respects. First, they reveal a potentially very large impact of lawyer representation on case outcomes. Under three different assumptions about how cases are matched with representation, a synthesis of available evidence reveals that expanding access to attorneys could radically change the outcomes of adjudicated civil cases. This potential impact is notable when the lawyers' work is compared to that of nonlawyer advocates (Table 4), and *spectacular* when compared to lay people's attempts at self-representation (Table 3.)") (emphasis added).

<sup>150</sup> In District Courts in Maine in a typical year, judges report a total of approximately 2640 defaults per year in eviction, small claims, and disclosure proceedings. See Romei, *supra* note 63; Cote, *supra* note 64; Soucy, *supra* note 65; Bowdoin, *supra* note 66.

<sup>151</sup> Interview with Nan Heald, Ex. Dir., Pine Tree Legal Assistance, (Feb. 24, 2019).

<sup>152</sup> *Id.*



The result was that payment plans were often reduced so that the debtors achieved a lower repayment.<sup>153</sup>

The reason for the disparity in the results was that in the past where debtors appeared without counsel, busy dockets often made it difficult for the presiding judge to inquire about the basis for settlements proposed by the parties. This could have easily resulted in exempt income and assets being erroneously attached.<sup>154</sup> The one-year experiment, prior to the grant running out, proved, beyond any question, that the key to debtors receiving their statutory exemptions from attachment is the presence of counsel. In its 2016 Report on the Future of Legal Services in the United States, the American Bar Association commented on the value of counsel being present in courts conducting high volume transactions such as evictions and consumer collections.<sup>155</sup> It wrote: “A 2015 meta-analysis of extant research on lawyers’ impact on case outcomes found that lawyers make the biggest difference in high-volume settings in which cases are typically ‘treated perfunctorily or in an ad hoc fashion by judges, hearing officers and clerks.’”<sup>156</sup>

### C. Simple Cases in Streamlined Courts?

A notion exists that many legal disputes of the poor are not as complicated as those of the affluent. Therefore, the notion is that streamlined procedures will suffice with “unbundled” services from pro bono attorneys. The poor will have their cases heard but will not necessarily have all the refinements that full due process uses. These tribunals are, in a sense, simplified administrative tribunals, as they are supposed to function without technical rules of evidence. Volunteer pro bono attorneys supposedly are able to guide the way and assist pro se litigants in using necessary forms.

The reality is different. Studies of Maine’s poor have concluded that the legal problems of the poor mostly affect the basic needs of life.<sup>157</sup> They are not less important than the cases of affluent people. To subject such cases to lesser procedural protection would be foolhardy. Furthermore, the fact that many disputes of the poor are with various levels of the government makes them more complex. Cases involving towns, cities, states, and the federal government all involve legal action by the state where the state faces questions of due process and equal protection of the law that do not apply to private parties.<sup>158</sup> Additionally, the cases of poor people confront the same procedural barriers to successful litigation as those of affluent people. Court requirements are construed and applied with the same degree of severity as they are with those who have counsel.<sup>159</sup> It is true that some cases in which the poor are frequently involved do not use all the complicated procedural

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> ABA Commission on the Future of Legal Services, *Report on the Future of Legal Services in the United States*, 1 (2016), <https://abafutures.com/2016-fls-report-web-pdf> [<https://perma.cc/7K2P-S8LX>].

<sup>156</sup> *Id.* at 34 n.280.

<sup>157</sup> JUSTICE ACTION GROUP, *supra* note 29, at 2.

<sup>158</sup> 42 U.S.C. § 1983 (2018).

<sup>159</sup> *See, e.g.*, *Haskell v. Me. Unemployment Ins. Comm’n*, KENNSC-CV-012-34 (Me. Super. Ct., Kenn. Cty., July 29, 2013); *Desta v. Me. Unemployment Ins. Comm’n*, YORKSC-CV-2014-0182 (Me. Super. Ct., York Cty., Jan. 20, 2012).

rules of the court, especially pre-trial discovery and strict hearsay evidence rules. Small claims courts, forcible entry and detainer, and administrative hearings fit some of these characteristics. However, as any fair observer will conclude, all of these so called “simplified” tribunals conduct trials. They present their own formidable tasks: preparing witnesses for direct and cross examination, finding and admitting into evidence the most relevant documents, conducting legal research, and in some cases conducting a narrow scope of review of the decisions on review.<sup>160</sup>

Small claims courts are one such streamlined tribunal. It was once touted as just the place for ordinary people to present their own disputes in an easy way, without attorneys. However, the jurisdiction of the small claims court is limited to a “debt or contract,”<sup>161</sup> a narrow aspect of life, considering it does not cover car accidents, injuries on a landlord’s property, any other kind of accident, theft of property, assault and battery, slander, defective repairs, firings, or nearly any action against a town or city. The limitation of the court’s jurisdiction to a debt or contract is probably no accident. The reality of small claims court is that it is more a tribunal for corporations.<sup>162</sup> They send their lawyers there to collect overdue bills. The poor are frequent defendants. The small claims court was conceived as a place where one did not need an attorney. However, they have become swamped with credit card debt cases and other actions by creditors all represented by counsel.<sup>163</sup> Both credit card cases and other commercial sales cases are far from routine. There are dozens of liability statutes in commercial law and dozens of possible defenses in a very detailed statute.<sup>164</sup> These statutes require careful reading to understand their many technical legal terms.

Mediation, a usual procedural step, can cause great stress for nonlawyers. When one gets to court on the day noticed for hearing, the judge more than likely will direct the litigant to try mediation before a hearing. A hearing is delayed while one waits in the hall for mediation. When mediation does not work, the litigant will have to come back another day, miss another day of work, and arrange childcare again. Even if a litigant wins a trial the process will not result in payment. When the payment does not follow, the litigant has to begin a second procedure known as “disclosure.” If the defendant appears at the disclosure, the court will direct mediation. One is likely to return on another day for the hearing in order to question the debtor. Another day of missed work and/or childcare expenses occurs. One may certainly agree that given the volume of cases, this process may be unavoidable. Yet, this process is far from simple. Court procedures are more challenging to non-lawyers because of their unfamiliarity and the mere presence of an opposing attorney. Nor,

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<sup>160</sup> For the problems these barriers present see *supra* Part III.

<sup>161</sup> 14 M.R.S. § 7482 (1987). The statute is perhaps capable of a broader meaning than “debt or contract,” but research reveals no attempts to seek a broader interpretation.

<sup>162</sup> See, e.g., Larry R. Spain, *Alternate Dispute Resolution for the Poor: Is It an Alternative?*, 70 N.D. L. REV. 269, 272 (1994) (observing that “small claims courts merely provide an inexpensive collection method for businesses” rather than an accessible dispute resolution forum for the poor).

<sup>163</sup> Pine Tree Legal Assistance, *supra* note 45; see also Jennifer Smith, *Credit Cards, Attorney’s Fees, and the Putative Debtor: A Pyrrhic Victory? Putative Debtors May Win The Battle But Nevertheless Lose The War*, 61 ME. L. REV. 171 (2009).

<sup>164</sup> See *supra* pp. 31 (listing state consumer statutes).

do they seem a solution for the problem of unequal access to justice.<sup>165</sup>

#### *D. Unemployment Compensation—Not Simple*

Unemployment compensation cases are neither simple nor streamlined. The governing law is both state and federal. The substantive law is refined. Words like “voluntary quit” and “misconduct” have very specific meanings controlled by regulations and judicial glosses. A typical case with actual names changed follows. Mary Jones worked at the Bolton Linens. On a Tuesday at work she got into an argument with another employee, and said something very sarcastic: “You sure are pulling out all the stops today,” as the other employee was gazing around while Mary was stacking clothing for return. The supervisor told Mary to go home, cool off, and take a few days off. It did not help that the other worker was the nephew of the store manager.

The next Monday when Mary had not heard from the store, she called. The office clerk told her that her file was marked “abandoned her position.” The supervisor repeated the same to Mary and said that when she did not call in, she was deemed to have quit. But, when she applied for unemployment compensation, she got it. The deputy did not think she had intended to quit. It saved her life, as she saw it, because without an income while she looked for another job at twelve dollars per hour, she surely would have lost her apartment and been on the street with her five year old son. Or, she would have had to apply for welfare for her rent and food.

She started getting weekly checks. Weeks passed. Then her employer appealed. She was told that there would be a hearing. When it eventually occurred, Mary got a big surprise. The employer said that they had expected her to call back the next day and that she had used rude language twice before. This was not true, or at least, it had not been pointed out to her before. Bolton said that a supervisor who was no longer with the company had noted the prior incidents in Mary’s personnel file – Mary had never seen these. This was a pattern of misconduct, said the employer. She was done anyway, they said, because she had quit by not showing up for work on Thursday.

The hearing officer ruled that she had not quit, but had been fired. However, she was guilty of “misconduct,” meaning that she would not get any more unemployment compensation and would have to pay back the \$3780.00 she had already received. Mary had not had a lawyer up to this point. She now tried to get one. The prospective lawyer told her that she could appeal to the three commissioners and then to the Superior Court. But as she had already had her hearing on the facts, it would be very hard to win now. She gave up. Research in this area of law shows that there are many court decisions concerning voluntary resignations and discharges for misconduct. These decisions involve counsel on both sides, where courts are challenged to make careful analyses because many misconduct and

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<sup>165</sup> Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS 128, 131 (2019).

voluntary resignation cases are ultimately decided by the Maine Law Court.<sup>166</sup>

Public assistance litigation is also complex. For example, General Assistance has a state statute, a Department of Health and Human Services regulation, and some local law either in the form of a municipal ordinance or regulation. Temporary Assistance for Needy Families (“TANF”) benefits and public housing are interrelated in the two different statutes that collectively guide the program.<sup>167</sup> A reading of a recent case involving financial eligibility for public housing shows that such cases are complex and require representation of counsel.<sup>168</sup> None of these types of hearings, with supposedly simple streamlined procedures, are within the ability of many pro se litigants. For most poor pro se litigants they are completely unrealistic.

#### *E. Unbundled Services.*

The provision of unbundled services to a pro se litigant does not fill in the gap between *pro se* litigation and representation by an attorney. “Unbundling” is an effort of the Maine Bar that makes it ethical, and therefore possible to give legal assistance to a pro se litigant on part of the case.<sup>169</sup> The 2007 Justice for All Report conceived and defined the idea: “‘Unbundled’ legal services can also be described as a ‘discrete task representation.’ An attorney providing unbundled services provides a specific service to a client, who is otherwise representing herself, as opposed to providing full legal representation to the client on the entire range of possible so-called ‘bundled’ services.”<sup>170</sup> This allows compensated and pro bono attorneys to accept a referral without committing to full representation. It has made the task of finding a pro bono referral easier to accomplish. Lawyers can now alert litigants to court forms and instruct them how to use these forms. They can help with other short cuts to assist litigation.

“Lawyers of the Day” efforts can provide attorneys to interview pro se litigants. In high volume areas such as small claim collection cases, disclosures, and evictions, a *pro se* litigant’s tactics and confidence can be improved by unbundled services. Attorneys from their offices also can help by preparing pleadings, either in person, by telephone, or electronically. Most of the programs are active, electronically providing legal information.<sup>171</sup> PTLA is considered a national leader in web sites

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<sup>166</sup> See *Chapman v. Me. Unemployment Ins. Com’n*, No. AP-17-31, 2018 WL 2291085, at \*3-4 (Me. Super. Ct. Apr. 19, 2018); *Pankey v. Me. Unemployment Ins. Com’n*, No. AP-12-51, 2013 WL 7919966, at \*1-2 (Me. Super. Oct. 8, 2013).

<sup>167</sup> See 22 M.R.S.A. § 4322 (2018); *City of Portland v. Me. Dep’t of Human Servs.*, No. CV-AP-15-20, 2016 WL 4618836 (Me. Super. Ct. Aug. 3, 2016).

<sup>168</sup> *Brown v. Bangor Hous. Auth.*, No. AP 05-06, 2006 WL 521729, at \*1-2 (Me. Super. Pen. Cty., January 17, 2016).

<sup>169</sup> See M.R. Prof. Conduct 1.2(c).

A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client provides informed consent after consultation. If, after consultation, the client consents, an attorney may enter a limited appearance on behalf of an otherwise unrepresented party involved in a court proceeding. A lawyer who signs a complaint, counterclaim, cross-claim or any amendment thereto that is filed with the court, may not thereafter limit representation as provided in this rule, without leave of court.

See also, M. R. Civ. P. 11(b) (requiring an attorney to state precisely the scope of the representation).

<sup>170</sup> JUSTICE ACTION GROUP, *supra* note 29, at n.49

<sup>171</sup> See Harwood, *supra* note 62, at 64, 67 (detailing pro se activities in Maine as of the Spring 2013).

that assist litigants in self-representation.<sup>172</sup> Additionally, the VLP has provided half-hour walk-in-clinics, family law clinics in Augusta, Bangor, Biddeford, Lewiston, Portland, Ellsworth, Wells, Bath, and Wiscasset. They are open with pro bono lawyers from three to four hours per month. However, they do not exist north of Bangor. VLP also established a Maine page of an American Bar Association electronic website called “Free Legal Answers,” solely for poor clients.

The efforts described above are helpful to many pro se litigants and in future years will prove more helpful as courts develop electronic services.<sup>173</sup> However, none of the providers regard the information given as full and complete legal advice. A number of defects in this kind of delivery of unbundled services are apparent. First, the information and advice is episodic: it does not continue during the litigation. Second, advice at the courthouse is too late for help with discovery, counterclaims, and motions to dismiss or for summary judgment. It occurs in a rushed atmosphere. Therefore, courthouse advice can only be regarded as limited in value. Third, electronic information may reach many litigants before trial day, but it is doubtful that it will reach many of the poor. One-third of poor people do not own a smartphone.<sup>174</sup> Nearly half of low-income households reach their data caps on a monthly basis or are forced to cancel their services because they cannot pay for them.<sup>175</sup> Half of the people with household incomes less than \$30,000 do not have broadband access at home.<sup>176</sup> Fourth, even when the unbundled services benefit the litigant, they likely will not be as prepared as the adversary. When their day in court arrives, they will face a formidable adversary – a lawyer. A scholar of pro se litigation describes it:

Finally, legal representation provides a source of power. Skilled lawyers utilize the substantive law, navigate the procedures, and tailor their cases to the particular judges. They avoid certain judges, maneuver there cases to others, and understand the dynamics of a particular forum. Lawyers may be superfluous where certain landlords, employers, and business interests already benefit from the operation of housing courts, agencies hearing unemployment cases, and small claims court. Yet, a skilled lawyer can neutralize the power that the unrepresented litigant typically encounters, providing vulnerable, one-shot litigant with the benefits of the repeat-player status.<sup>177</sup>

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<sup>172</sup> *Id.*; see also Pine Tree Legal Assistance: *RePresent: A game to help self-represented Parties get Ready for Court*, <https://ptla.org/represent-renter-game#> [<https://perma.cc/MA93-953E>] (last visited Jan. 13, 2020).

<sup>173</sup> See, e.g., Amy J. Schmitz, *Expanding Access to Remedies through E-Court Initiatives*, 67 BUFF. L. REV. 89, 94-98 (2019).

<sup>174</sup> Monica Anderson & Madhumitha Kumar, *Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption*, PEW RESEARCH CENTER (Mar. 22, 2017), <http://www.pewresearch.org/fact-tank/2017/03/22/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/> [<https://perma.cc/V7HG-V2UF>].

<sup>175</sup> Tanina Rostain, *Techno-Optimism and Access to the Legal System* 148 DAEDALUS 93, 94 (2019); Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CENTER (Apr. 1, 2015), <https://www.pewresearch.org/internet/2015/04/01/us-smartphone-use-in-2015/> [<https://perma.cc/UBV3-FEP5>].

<sup>176</sup> Smith, *supra* note 175.

<sup>177</sup> Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L. J. 37, 79 (2010).

The unrepresented litigant may appear obviously poor, unfamiliar with the court setting, and bewildered by the elevated judge. A practical-minded Maine lawyer, John C. Sheldon, writes:

One recent attempt at reform illustrates the point: the “unbundling” of legal services. Now litigants can hire lawyers to prepare and file pleadings, without having to pay the lawyers to appear in court. But can anyone maintain that this makes much difference? Handing a layman a sheaf of artful pleadings and motions and aiming him toward the courthouse is like handing him a compass and sending him in to a briar patch.<sup>178</sup>

Aside from the difficulty of *pro se* litigation, there are negative consequences in addition to the failure of justice in individual cases. For instance, because poor people occupy a unique position, that position removes the deterrence function of our legal system. Simply being permanently without access to attorneys sends a message to their potential adversaries: that they lack the power to enforce their rights.

#### F. Literacy Skills Required in Litigation

When the poor are faced with the prospect of *pro se* litigation they are more severely challenged than are more affluent *pro se* litigants. Like all *pro se* litigants the poor are faced with the same barriers as other litigants described above in Part III. However, the poor face an even greater challenge because of lower rates of education achievement and fewer literacy skills. The absence of these experiences and skills prevents many indigent litigants from conducting even the basic procedural steps involved in litigation. According to the *National Assessment of Adult Literacy* only fifteen percent of U.S.-born adults are proficient at completing complex and challenging literacy tasks.<sup>179</sup> That literacy study characterizes court activities, such as completing forms, collecting financial information or evidence as “complex and challenging literacy tasks.”<sup>180</sup> These proficiencies seem to be lacking in the U.S. to a greater extent than they are lacking in other countries, to wit:

In 2013, the US Department of Education’s National Center for Education Statistics released the results from the Program for The International Assessment Of Adult Competencies (PIAAC). The PIAAC provided an overview of proficiency in adult literacy, numeracy and problem-solving. In literacy, people born after 1980 in the US scored lower than 15 of the 22 participating countries. Overall, US adults between ages fifteen-sixty-five (15-65) scored below the international average in all three categories – ranking them near the very bottom in numeracy.<sup>181</sup>

Almost half of Americans cannot read well enough to understand health information.<sup>182</sup> Many employees, clients, and customers fail in everyday settings to

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<sup>178</sup> Sheldon, *supra* note 108, at 98 (citation omitted). Another Maine practicing attorney with substantial litigation experience *against* *pro se* plaintiffs observes that “[they] have little or no understanding of time lines, due dates, discovery requests, or rules of evidence and civil procedure.” Champion, *supra* note 108, at 236.

<sup>179</sup> Alteneider, *supra* note 85, at 3.

<sup>180</sup> *Id.*

<sup>181</sup> *Crisis Point: The State of Literacy in America*, ROOM 241 (Mar. 5, 2018), <https://education.cu-portland.edu/blog/education-news-roundup/illiteracy-in-america/> [<https://perma.cc/WM5H-K754>].

<sup>182</sup> *Id.* at 2.

complete forms accurately. The National Assessment of Adult Literacy (“NAAL”) explains the tell-tale signs of literacy: many people do not provide information in a timely manner, do not follow instructions, or do not demonstrate knowledge of information that has been provided.<sup>183</sup> NAAL states that the average American simply cannot process the information that is provided to them.<sup>184</sup> This poor literate behavior has been studied in relation to pro se litigants in the state courts of Alaska.<sup>185</sup> The study used a nationwide sample of over 19,000 individuals aged sixteen and older from in the nation’s state and federal prisons. She used a NAAL description of three tasks that relate to literacy levels: (1) to read a one-page flyer on SSI eligibility and find specific information;<sup>186</sup> (2) to enter three pieces of information on a maintenance log on the correct line;<sup>187</sup> and (3) to use the one-page SSI flyer from the first question to calculate the annual benefit for a couple.<sup>188</sup> The NAAL testing is skilled-based and not related to formal education grade levels. It tests prose literacy, document literacy, and quantitative literacy.<sup>189</sup> NAAL’s study, the one reference in the paragraph above, surveyed the skills of 19,000 people in households and prisons.<sup>190</sup> The study concluded that high percentages could not perform work typically associated with court proceedings.<sup>191</sup>

The impact of these literacy limitations particularly affects the poor. Among adults with the lowest literacy skills, forty-three percent live in poverty.<sup>192</sup> There are specific subgroups that have an even higher illiteracy rate. For example, around fifty percent of the immigrants that come to the United States each year lack high school education and proficiency in English.<sup>193</sup> Additionally, forty-one percent of adult immigrants score at or below the lowest level of English literacy.<sup>194</sup> As of 2007, there were 58,000 immigrants in Maine.<sup>195</sup> The number has likely increased by June 2019. The results of the most recent examination of fifteen-year-olds in the Program for International Student Assessment in 2018 make similar findings in regard to those on the lower end of literacy skills.<sup>196</sup>

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<sup>183</sup> Alteneder, *supra* note 85, at 1.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 4.

<sup>186</sup> After completing the reading of the flyer those surveyed were asked to write an answer to the following question: “If you are working, you may be able to get SSI as an individual if you earn less than what amount?” Fifty-eight percent could not answer correctly.

<sup>187</sup> Only forty-two percent could do it.

<sup>188</sup> Only thirty-eight percent could do it

<sup>189</sup> Alteneder, *supra* note 85, at 5 (“Literacy is often assessed by evaluators as grade-level reading skills, but this can provide a rather flat perspective without insights into an individual’s ability to function in the world. Grade-level analysis can, however, be a useful tool for writers and editors as they draft forms and publications for public consumption.”).

<sup>190</sup> *Id.* at 2.

<sup>191</sup> *Id.*

<sup>192</sup> *Adult Literacy Facts*, PROLITERACY.ORG, <https://proliteracy.org/Adult-Literacy-Facts> [<https://perma.cc/FFP5-B7R5>] (last visited Oct. 4, 2019).

<sup>193</sup> *Id.*

<sup>194</sup> Jason Richwine, *Immigrant Literacy*, CENTER FOR IMMIGRATION STUDIES (June 21, 2017), <https://cis.org/Immigrant-Literacy-Self-Assessment-vs-Reality> [<https://perma.cc/9XAR-3UYL>].

<sup>195</sup> JUSTICE ACTION GROUP, *supra* note 29, at 54 (statement of former Attorney General Tierney).

<sup>196</sup> Nineteen percent of American students were low performers in reading literacy, scoring at proficiency levels *below* proficiency level two out of six levels. *PISA 2018 Reading Literacy Results*, NATIONAL CENTER FOR EDUCATION STATISTIC,

It is clear then that combined with the other barriers that make it difficult for nonlawyers to adapt effectively to the procedures of the court, the poor suffer the additional barrier of insufficient literacy skills. Because unbundled services depend upon literacy skills, they appear to be of limited benefit to the poor. The picture of a single mother holding a child in one hand and a forcible entry and detainer brief in the other, ready to face a lawyer who is regularly in court is not a picture of equal access to justice. *Pro se* is not for poor people. They wisely avoid it and let their defaults be entered.<sup>197</sup>

### G. Mediation

Does mediation provide an easier forum for the poor? The frightened client arrives at the court on the day when she expects to see a judge who will resolve her dispute. She is directed to mediation. In Maine, mediation is established by statute and regulated by court rules.<sup>198</sup> In some cases not governed by statute, the court has discretion to refer the parties to the Court Alternative Dispute Resolution Service (“CADRES”).<sup>199</sup> In family matters, mediation is mandatory and in small claims cases the court may require mediation.<sup>200</sup> In Maine, seventy-five percent of family matter litigants appear without counsel.<sup>201</sup> Because mediation has now lost its key strength of being a voluntary choice of both litigants, and as it has become a rushed process precisely because so many litigants *must* participate in it, its value is questionable.<sup>202</sup> Yet, the task of a mediator is a challenge: in the limited time available the mediator must produce a written agreement between the parties and present it to the court.

Mediation requires that a *pro se* litigant possesses several skills. They are similar to the skills needed at trial, but with less formality. Mediation differs from trial in that the party to be persuaded at trial is the fact finder, but in mediation is the adversary. Negotiation is not like negotiation to buy a car. To be successful, a litigant must convince the adverse party that (1) she has the necessary evidence for her case; (2) she is prepared to go to trial; and (3) she will waive trial only if the adverse party agrees to a resolution that is fair and based upon the strength of the evidence. She must do this without emotional display. To communicate without anger is more difficult when one is the party directly affected. For example, mediation is mandatory in “family” domestic violence cases. But for a woman to

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<https://nces.ed.gov/surveys/pisa/pisa2018/#/reading/intlcompare> [https://perma.cc/BGT2-M7YY] (last visited Jan. 19, 2020).

<sup>197</sup> In Maine’s District Courts, four judges reported a total of approximately 2,340 defaults per year in eviction, small claims, and disclosure proceedings. *See* Romei, *supra* note 63 (fifty per month); Cote, *supra* note 64 (forty per month in Lewiston; five per month in So.Paris); Soucy, *supra* note 65 (sixty per month); Beaudoin, *supra* note 66 (twenty-five to fifty per month in disclosures and forcible entry and detainer and one to five per month in other civil).

<sup>198</sup> 19-A M.R.S.A. § 251 (2018) (domestic relations); M.R. Civ. P. 16B (civil cases generally); M.R. Civ. P. 92 (family matters, small claims, et al).

<sup>199</sup> M.R. Civ. P. 80D(e)(2) (evictions); M.R. Civ. P. 92(c)(1) (small claims).

<sup>200</sup> M.R. Civ. P. 92(b), (c)(1).

<sup>201</sup> JUSTICE ACTION GROUP, *supra* note 1, at 12.

<sup>202</sup> *See generally* Jacqueline Nolan-Haley, *Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here*, 87 FORDHAM L. REV. 78, 82 (2018); Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89 (2005).



face a man who has assaulted her is terrifying. Fortunately, if the victim can learn how to draft a motion and an affidavit, she can get temporary relief from the court for good cause and dispense with mediation.<sup>203</sup> But counsel is needed to accomplish this.

If the pro se litigant is the defendant from whom money is sought she should not make the first offer. She should, however, respond promptly, offering somewhat less than what the opposing party has demanded and also less than what she would ultimately settle for. The pro se litigant should offer to sign an agreement to pay on a fixed schedule. She should point out that the opposing party's victory at a trial would only result in getting a paper called a "judgment," but that the pro se litigant is now willing to commit herself to pay on a fixed schedule, a promise which the judge will approve and make into an order. Whichever side the pro se litigant is on, it is crucial that she concretely explain as many details as possible about the evidence, the witnesses, and the laws that favor her. The rule of experienced lawyers is: "if you want to settle, be ready for trial."

In sum, the skills that are needed to succeed at mediation are similar to those needed at trial—the ability to express ideas, analyze, argue, interpret, and compute in both written and oral forms<sup>204</sup>—and, in addition, advanced negotiating skills.

#### *H. Civil Gideon*

Another solution that has been recommended is civil Gideon, but it can provide no immediate solution. There is little likelihood of the Maine Legislature adopting it in the near future. It would impose an annual budget of a very large multiple of the judiciary's present budget, when at present the judiciary struggles each year to gain even a modest increase from the legislature. However, the necessity of an increase remains. For nearly forty years legal scholars have written that the United States Constitution demands it.<sup>205</sup> In 2006, the American Bar Association's House of Delegates unanimously approved a resolution requiring government to supply counsel to the poor in all "categories of adversarial proceedings where basic human needs are at stake."<sup>206</sup> The three commissions discussed above in Part I containing many of Maine's professional leaders have all stated that equal justice under law requires such a program. It is clear that the lack of a substantial legislative response to past efforts is itself a response: it is too expensive. The likelihood of changing the legislature's response in the near future is small. An idea of the cost of funding all the legal aid needed for Maine people can be appreciated by viewing the costs nationally: to pay for one extra hour per dispute-related problem per household of the poor would be on the order of \$20 billion annually at a market rate of \$200 per hour.<sup>207</sup> Equal access to justice for the poor cannot wait upon the hope for funding of this magnitude.

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<sup>203</sup> 19-A M.R.S.A. § 251(2) (2018); Sara Glidden, *One Size Does Not Fit All* (2015) at 13-17 (on file with author).

<sup>204</sup> See Altener, *supra* note 84, at 5.

<sup>205</sup> See generally Weinstein, *supra* note 87; Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L. REV. 545 (1967).

<sup>206</sup> ABA House of Delegates, Resolution 112A, 13 (August 7, 2006).

<sup>207</sup> Hadfield, *supra* note 83, at 152.

*I. Pro Bono*

In spite of the enormous efforts of Maine pro bono attorneys, their efforts will solve only a small part of the access to justice problem. For generations, attorneys in Maine have volunteered their time to the poor. VLP is an organization devoted solely to promoting volunteer attorneys. It devotes its full time to match up the cases of poor people with attorneys willing to accept them. VLP speaks to so many prospective clients that it has been able to refer less than twenty percent of the eligible clients for full-time representation. The rest receive only legal information on the telephone or conversations with attorneys in “unbundled” sessions. But still the unmet need of the poor has not been relieved. The efforts of the private bar “cannot do the job,” says Senator Muskie. Even if each private attorney accepted pro bono referrals of three extended representations or litigations per year, and if the Cumberland Legal Aid Clinic were to double its case load, 232 additional lawyers would still be needed.<sup>208</sup> According to the American Bar Association, the data shows that annually, “U.S. lawyers would have to increase their pro bono efforts . . . to over nine hundred hours each year to provide some measure of assistance to all the households with legal needs.”<sup>209</sup>

## VI. FEE SHIFTING SOLUTION

This Part proposes a statute that provides a way to pay for litigation for the poor when they are in court against an adversary. The proposed statute requires the courts to award attorney’s fees to poor litigants against their opponents, but only when a poor litigant prevails against corporations or other legal entities. The law would apply to all civil cases.

The importance that the Maine Legislature assigns to access to the courts by the poor is well-documented. It reached the status of a “high priority” twenty-six years ago in the judgment of the Maine Legislature.<sup>210</sup> But the problem remains: how will this enormous expense be paid for?<sup>211</sup> The statute discussed below in large part removes from the state the cost of implementing it. And, it benefits the courts, the state, and the poor in several ways.

The first benefit is that it extends to the poor a proven and realistic way to meet the expenses of defending their rights. Both the State of Maine and the United States have for many years “shifted” the liability for attorney’s fees from one civil litigant to another. Just as Maine law now provides for the payment when its indigent residents incur certain fees for litigation (filing fees, jury fees, mediation fees),<sup>212</sup> so too should it now provide for the payment of legal fees.<sup>213</sup> This is a type of fee that

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<sup>208</sup> ME. COMM’N ON LEGAL NEEDS, *supra* note 7, at 5.

<sup>209</sup> *Id.* at 51.

<sup>210</sup> See *supra* notes 4-10; see also COMM’N TO STUDY THE FUTURE OF ME.’S COURTS, *supra* note 12, at 33 (showing the various legislative responses to the findings of the various Commissions, especially, the 1993 Maine legislative commission report, “New Dimensions for Justice”: “High priority should be placed on funding for legal services so that the poor have equal access to the court system”).

<sup>211</sup> The estimated cost according to the Muskie report is the cost of offices to support an additional 282 full-time attorneys annually. See ME. COMM’N ON LEGAL NEEDS, *supra* note 7, at 4.

<sup>212</sup> M.R. Civ. P. 91(c).

<sup>213</sup> See M.R. Civ. P. 91 (Proceedings for Waiver of Payment of Fees or Costs).

the legislature accustomed to enacting. It has often “shifted” the liability for fees from the party who incurred the fees to the party who caused them to have been incurred, that is from the injured to the wrongdoer. The legislation that this article recommends will shift the legal fees only when the wrongdoer is a legal entity, not when it is a natural person. The “shifting” accomplishes two wise results: (1) it places the cost for the attorney’s services on the party who caused them to be necessary, and (2) it places the cost for the attorney’s services on the party who caused them to be necessary.<sup>214</sup>

There is a clear need for the policy suggested because it makes possible the participation of the poor in Maine’s legal system. Some examples of fee shifting statutes currently in force in Maine are: violation of the Human Trafficking Law which provides that a “prevailing” plaintiff is entitled to attorney’s fees and costs;<sup>215</sup> violation of the Maine Civil Rights Act that provides protection from violence or force that interferes with constitutional rights;<sup>216</sup> a statute penalizing insurance carriers who fail to make timely payments of benefits due; and violation of the disability, employment, housing, and public accommodations, or extension of credit provisions of the Maine Human Rights Act.<sup>217</sup> There are many other Maine statutes with similar fee shifting provisions in various areas of law.<sup>218</sup> Many of these existing fee shifting statutes aid the affluent rather than the poor. They have a purpose, though, in common with the purpose of the statute proposed here: to put the expense of litigation upon the party that is in the wrong.

A similar process created each of the preceding statutes. First, the legislature recognizes a substantive problem, like human trafficking, and then enacts a law to prevent it. Having established the public policy, the legislature is concerned with who will bear the associated cost to enforce the new policy. Therefore, choosing not to place that cost on the party that it sought to protect, the person who was trafficked against her will, the legislature places the cost on the wrongdoer, but only where the one trafficked is the prevailing party in the case.

The United States Legislature has been even more aggressive than Maine in pursuing the policy of shifting liability for legal fees onto the wrongdoer. More than 320 federal statutes in the areas of tax, price fixing, discrimination, wages, and other

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<sup>214</sup> The practice now widespread of requiring the losing party to pay the prevailing party’s attorney’s fees is sometimes described as an exception to the “American rule.” The American Rule originally called for each party pay their own attorney, win or lose. *Soley v. Karll*, 2004 ME 89, ¶ 15, 853 A.2d 755. But since the middle of the twentieth century there has occurred so many exceptions—statutes and judicial decisions—that the continued vitality of the American rule is in question. See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984); John Leubsdorf, *Does the American Rule Promote Access to Justice? Was That Why It Was Adopted?*, 67 DUKE L. J. 257 (2019).

<sup>215</sup> 5 M.R.S.A. § 4701(2) (2018).

<sup>216</sup> § 4683.

<sup>217</sup> § 4614.

<sup>218</sup> See, e.g., 9-A M.R.S.A. § 5-201(9) (2018) (garnishing wages); 10 M.R.S.A. § 1176 (2018) (car dealer repair rights); 14 M.R.S.A. § 218 (health insurance); 14 M.R.S.A. § 556 (2018) (“anti-slapp” law); 15 M.R.S.A. § 711 (2018) (intercepting wire or oral communications); 22 M.R.S.A. § 1711-E(2) (2018) (privacy of medication); 22 M.R.S.A. § 3281 (2018) (state violations of federal blind, disabled, elderly law); 24-A M.R.S.A. § 2436 (2018) (late insurance payments); 24-A M.R.S.A. § 2436-B(2) (2018) (failure of insurance company to defend); 26 M.R.S.A. § 689(1) (2018) (substance abuse tests).

areas of the law award the prevailing party attorney's fees.<sup>219</sup>

### A. Benefits to the Rural Poor

The second wise benefit is to the rural residents of Maine. They will benefit from fee shifting because it will extend legal services where they are now in short supply.<sup>220</sup> The statute would create a new opportunity to engage attorneys for the low-income population who live in small towns. Under the proposed statute, any attorney in Maine would be able to accept a case for a poor person with the understanding that the opposing party, if it is a legal entity, will be liable to pay the legal fees, if the poor person prevails in the case. The expansion of the number of attorneys who could then represent poor Mainers is especially important for the eleven out of sixteen Maine counties that together have only fourteen percent of the lawyers in the state.<sup>221</sup> Currently, attorneys in these counties are called upon to volunteer their time that is already in very short supply given the demands of their paying clients. The situation of lawyers in small towns becomes clear when one compares the lawyer-to-resident ratio of three urban counties to that of three rural counties.<sup>222</sup> The disparity of available legal services is drastic. It is understandable that volunteer help in those rural areas is limited. The financial incentive offered by fee shifting could draw more lawyers to practice in smaller towns.<sup>223</sup> The statute

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<sup>219</sup> Henry Cohen, CONG. RESEARCH SERV., Order Code 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES (2008).

<sup>220</sup> See generally Maybell Romero, *Viewing Access to Justice for Rural Mainers of Color Through a Prosecution Lens*, 71 ME. L. REV. 228 (2019).

<sup>221</sup> Those eleven counties are: Aroostook, Franklin, Hancock, Knox, Lincoln, Oxford, Piscataquis, Sagadahoc, Somerset, Waldo, and Washington. County Demographics supplied to the author by Susan Adams of the Office of the Maine Overseers of the Bar (May, 2019). The rural counties consume an even smaller portion of legal aid services, especially "full representation" services, than their numbers justify because of the lack of offices in most rural areas of the state. Their annual reports show this. PTLA is somewhat of an exception in this regard with its offices in two of the eleven rural counties, and VLP has a courthouse advice project in family law, but none are conducted in courts north, east, or west of Bangor. E-mail from Lucia Chomeau-Hunt, Supervisor, Pine Tree Legal Assistance Family Law Unit, to Donald Fontaine (May 31, 2019, 9:54 AM EST) (on file with author). The University of Maine School of Law recognizes the shortage of lawyers in rural Maine. *Maine Law Symposium Will Look at Maine Rural Lawyer Shortage*, MAINEBIZ (Oct. 15, 2019), <https://www.mainebiz.biz/article/maine-law-symposium-will-look-at-maine-rural-lawyer-shortage> [<https://perma.cc/2KA2-5C7V>]. And, in 1993 a Maine legislative commission recommended to the Legislature that "[t]he number of locations where legal services are available to the poor must be increased." COMM'N TO STUDY THE FUTURE OF ME.'S COURTS, *supra* note 12, at 33.

<sup>222</sup> In Cumberland County the ratio of lawyers to population is 1:150; in Kennebec County 1:262; in Androscoggin 1:520. Contrast these three urban counties with the following rural counties: Piscataquis 1:2826; Somerset 1:1545; Washington 1:1272; Oxford 1:1331. Email from Susan Adams, Senior Assistant to Bar Counsel, to Donald F. Fontaine (May 2, 2019) (on file with author); Maine Counties by Population, [http://www.maine-demographics.com/counties\\_by\\_population](http://www.maine-demographics.com/counties_by_population) [<https://perma.cc/8RC9-7AQ4>].

<sup>223</sup> The concept that fee shifting may draw lawyers to create a new law office is much more than a theoretical hope. It is in practice. A published article offers case studies of two private law firms that use fee shifting statutes to fund their law practice on behalf of low- and moderate-income clients. It offers insights into their business models, goals, and operations in an effort to encourage replication in other parts of the country. The firms are not unique. According to the authors, firms other than their firm are following the same strategy in a wide variety of substantive areas. Gerry Singens, *et al.*, *Dollars and Sense: Fee Shifting*, 39 W. NEW ENG. L. REV. 283, 285 (2017).

advocated for here will create a market demand for lawyers to serve new clients who the lawyers regard as having meritorious cases. “Full representation” service will replace unbundled services and pro se litigation in the private sector when the number of attorneys willing to accept cases of poor people expands. While in the past very busy rural attorneys have been able to accept pro bono advice-only cases and unbundled parts of cases, they will now have the opportunity to process full representation cases. In doing so they will help to solve a major defect of the legal aid programs – the inability to handle very many full representation cases. We have seen above in Part II that the number of cases filed in state court for low income people in a recent year was 984 cases, or far less than expected, given their relative percentage of the population.<sup>224</sup> This study also reveals that the shortfall in full representation is one of the biggest losses that poor people experience in Maine’s legal system. The proposed statute can reduce the disparity between Maine residents who have enough resources to defend their rights and those without such resources.

The third benefit to the poor is the creation of a deterrent to their adversaries. The opportunity to be represented by counsel clothes people with the possibility of protecting their rights. It allows the poor substantially greater participation in civil society and in the legal system. The noted jurist Richard A. Posner argues: “The likelier a suit is, the greater is the effect...and hence the less likely are potential defendants to engage in the forbidden conduct that would create the right to sue.”<sup>225</sup> Conversely, when a business expects that a person will not have access to legal advice, the business may behave much differently. This concept is not merely theoretical: “Studies confirm that lower income groups are specifically targeted by a host of shady businesses for various other types of economic exploitation, presumably because perpetrators perceive these groups as financially unsophisticated and therefore less likely to seek legal or other assistance to combat abusive tactics.”<sup>226</sup>

A fourth benefit to a fee shifting law is that it will correct a defect in the contingent fee arrangement in common use in Maine. The contingent fee arrangement has shortcomings, especially in the case of poor people, when damages may be so small that a contingent fee arrangement will not produce enough income to pay the lawyer. Lawyers decline such cases. As a consequence, the injury is left without a remedy.

A fifth benefit to the poor under the proposed statute concerns disputes that do not involve money, so-called litigation for relief that is not “monetizable.” These are court victories without monetary value that deserve a hearing. Assume that a poor person is the *defendant* in a case where a bank sues for a large credit card bill and fails to prove a case against the defendant. Although the defendant won the case, her victory does not result in any payment of money, but merely in the fact that she does not have to pay money that was unjustly claimed against her. There is no *corpus* out of which to pay attorney’s fees. The proposed statute would provide money from the plaintiff bank that was in error in filing the suit with which to pay her attorney’s

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<sup>224</sup> See generally MAINE CIVIL LEGAL SERVICES FUND COMM’N, *supra* note 30.

<sup>225</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 585 (6<sup>th</sup> Ed. 2003).

<sup>226</sup> Myriam Giles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1543 (2016).

fees. Thus, the in-advance possibility of this post-judgment order for legal fees would have made it possible for her to find an attorney at the beginning of the case. A variety of civil claims are “non-monetizable,” such as those for trespass, negligible damage to property, and auto accidents where the prevailing party is a low-income defendant. Other “non-monetizable” claims are those in which an indigent *plaintiff* does not seek money in the case, but seeks a different kind of relief such as a declaratory judgment or an injunction. A recently decided case provides an example. In *Smith v. Aroostook County*, a prisoner awaiting trial in jail was refused a medicine she urgently needed, buprenorphine, during her stay there.<sup>227</sup> She obtained a court order against the county, but no monetary damages. Nevertheless, her attorney’s fee would be paid under the proposed fee shifting law.

Small claims court litigation also cannot be monetized. The poor are frequently pro se defendants. Under the proposed statute, upon being sued they could seek out an attorney to determine if they have a defense that can prevail. If in the opinion of an attorney who is willing to risk his time the poor person will prevail, the defendant could be represented in small claims court. It is not material that small claims court was *supposed* to function without attorneys. It does not now. Institutional plaintiffs now chose to come to small claims court with an attorney but without a viable case. Under the proposed statute the unsuccessful plaintiff would cover the fees of the prevailing low-income defendant.<sup>228</sup>

### B. How Fee Shifting Works

A valuable benefit to the court system would be administrative ease. Fee shifting for the poor under the statute would apply to all civil cases. It would resemble the present *in forma pauperis* waiver of costs rule.<sup>229</sup> Only a person with a net income of less than three-hundred percent of the federal poverty rate would be an eligible claimant for fee-shifting. The opponent would be vulnerable to fee shifting only if it was an institutional entity (corporation, financial institution, insurance, or a public entity). Such entities usually command more financial resources than an individual person. Most engage regularly in litigation and are able to make economic decisions regarding the wisdom of proceeding. They are better able to anticipate, prevent, and spread the cost of litigation, indeed, in some cases to insure against that risk. The state’s strong constitutional interest in promoting access to justice justifies imposing a different fee liability standard on affluent corporate litigants when they have caused the opposing party to incur legal fees.

As shown above, the legislature in the past has provided fee shifting in favor of prevailing litigants without regard to their ability to pay an attorney from their own resources. In contrast, the instant proposal authorizes fee shifting only when the prevailing party is unable to pay an attorney from his own resources and the losing party is a corporation or other legal entity. For the small “ma and pa” business that is incorporated, the statute could provide an escape option for such an entity, who

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<sup>227</sup> *Smith v. Aroostook County*, 922 F.2d 41, 41 (1st Cir. 2019).

<sup>228</sup> The need for new legislatively authorized fee shifting in this setting is described in detail in Jennifer Smith, *Credit Cards, Attorney's Fees, and the Putative Debtor: A Pyrrhic Victory? Putative Debtors May Win the Battle but Nevertheless Lose the War*, 61 ME. L. REV. 171, 172 (2009).

<sup>229</sup> M.R. Civ. P. 91.

could dispute the “entity” standard. The statute would permit an entity and its owners to submit tax records for the three years before the suit was filed. These documents would be filed with its first pleading. If the average net worth of the entity was less than \$500,000, the entity could be treated as an individual, and thus not be liable for fee-shifting.<sup>230</sup> However, an entity who itself files a claim under the entity’s name could not later dispute its entity status.

This is a one-way fee shifting statute for the prevailing party. Such statutes have almost invariably been one sided.<sup>231</sup> As in other statutes, “prevailing” is established if the party has succeeded in obtaining the relief she sought in the case, or part of it, whether or not any decree is entered by the court.<sup>232</sup> She prevails if the parties reach a settlement or if the suit leads the adversary to voluntarily make the change that was sought.<sup>233</sup> It is said that the touchstone of prevailing is whether there has been a “material alteration” in the opponent’s position.<sup>234</sup> The Maine Legislature uses the “prevail” standard in existing statutes.<sup>235</sup>

The determination of the amount of fees will follow the present practice in Maine.<sup>236</sup> The fees must be in proportion to the time and difficulty of the case.<sup>237</sup> The amount of fees in any case must be at the hourly rate of the particular attorney who succeeded in the litigation.<sup>238</sup> A market-based rate is necessary for the fee to attract high-quality lawyers for complex cases. The fee must provide the necessary incentive to engage in litigation on a no-win, no-fee basis.<sup>239</sup> A prospective fee must also incentivize lawyers to thoroughly investigate a case before filing it in court. The coverage of this work will accomplish the goal of having them function as effective gatekeepers.<sup>240</sup> It will also deter the filing of weak cases because the attorneys will be incentivized not to do work unless they expect to be compensated.<sup>241</sup> In Maine, customary hourly rates have long been applied by courts, that is, market-based rates. In this regard, the Law Court has followed the leading federal case, *Johnson v. Georgia Highway Express Inc.*<sup>242</sup> *Johnson* lists the twelve factors to be considered in arriving at a reasonable fee.<sup>243</sup>

<sup>230</sup> Rosen-Zvi, *supra* note 2, at 746.

<sup>231</sup> *Id.* at 732, 739, 743; *see also, e.g.*, 5 M.R.S.A. § 4701 (2018); 24-A M.R.S.A. § 2436 (2018).

<sup>232</sup> Rosen-Zvi, *supra* note 2, at 744-45.

<sup>233</sup> *Id.*

<sup>234</sup> *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989).

<sup>235</sup> *See, e.g.*, 5 M.R.S.A. § 4683 (2018); 24-A M.R.S.A. § 2436-B(2) (2018); 38 M.R.S.A. § 1310-B(1) (2018).

<sup>236</sup> *Poussard v. Commercial Credit Plan, Inc.*, 479 A.2d 881, 884 (Me. 1984).

<sup>237</sup> *Id.*

<sup>238</sup> Rosen-Zvi, *supra* note 2, at 750.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 759.

<sup>242</sup> *Poussard*, 479 A.2d at 884 (“[T]he court correctly relied on the factors listed in *Johnson v. Georgia Highway Express, Inc.*”).

<sup>243</sup> *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-20 (5th Cir. 1974) ((1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) the skill required to perform the legal services; (4) the preclusion of other employment by the attorneys due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by client or circumstances; (8) the amount involved and the results obtained; (9) the

Finally, an additional benefit to the civil court system of attracting attorneys for cases goes to its core function: deciding cases correctly. An adversarial system of law depends on both sides being knowledgeable of the issues—factual and legal—and on counsel having prepared properly and being capable of making an adequate presentation to the court. As Justice Brandeis said, “[a] judge rarely performs his functions adequately unless the case before him is adequately presented.” The weakness of one side in an adversarial hearing can lead to erroneous and unjust results. Moreover, the chronic absence of counsel for one party, the poor, increases the likelihood of cases being filed simply because there is little incentive for the much stronger plaintiff to attempt resolution before filing suit. And, the likelihood of a default judgment can make filing a case even more attractive to a plaintiff. In contrast, the presence of counsel on both sides will result in more settlements and fewer trials. Fewer disclosure requests will be filed. When both sides are represented by counsel in civil cases, ninety-five percent of the cases are settled before trial. Justice Howard Dana’s study of Maine eviction cases where both sides were represented shows that the presence of lawyers on both sides substantially increased the percentage of mutually acceptable agreements.<sup>244</sup> Counsel for the low-income person will be less likely to present a weak appeal.

The determination of whether the parties to a particular case are covered by fee shifting would be a non-judicial administrative function. Individuals seeking or opposing coverage would file with their first pleading their most recent tax return and/or evidence of any public assistance. The current receipt of public assistance would by itself establish eligibility. The status of an institutional entity would almost always be a matter of public record. Filing of a pleading by the institution would be an admission of that status. A dispute about a party’s status could in almost all cases be based upon documents. Maine courts already use non-judicial screenings. In fact, non-judicial screening for *in forma pauperis* proceedings was recommended by a Maine commission to study Maine courts.<sup>245</sup> The commission’s 1993 report recommended financial eligibility screening as follows: “Indigency screening should be an administrative function independent of the judicial branch.”<sup>246</sup>

### C. Administrative Agencies

Poor families lack representation at hearings conducted by various government administrative agencies. At these hearings the agencies grant, deny, suspend, and terminate benefits of the most essential kind: driver’s licenses, general assistance, unemployment compensation, education, housing, TANF, and other benefits that are basic necessities of life.<sup>247</sup> It is therefore an essential part of a fee shifting statute that the agency award legal fees when these litigants prevail at an administrative hearing. There is a need to attract counsel to these hearings because of the inability

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experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases).

<sup>244</sup> Levy, *supra* note 87, at 576.

<sup>245</sup> COMM’N TO STUDY THE FUTURE OF ME.’S COURTS, *supra* note 12, at 35.

<sup>246</sup> *Id.*

<sup>247</sup> See, e.g., 22 M.R.S.A. § 4323(4) (2018) (general assistance); 26 M.R.S.A. § 1194(3) (2018) (unemployment compensation); 29-A M.R.S.A. § 2458(1) (2018) (driver’s licenses).



of the providers to render full-service representation outside of the fields of housing and family law. To assure that the poor have access to attorneys at these hearings the term “prevailing parties” must include those who prevail at administrative hearings.

The federal law is clear that the prevailing party is to be awarded fees in administrative proceedings. The statute proposed here should have similar language. Common federal language is that the court must award attorney’s fees to the prevailing party “in any action or *proceeding*,” where “proceeding” has been uniformly interpreted in all federal statutes to encompass administrative hearings.<sup>248</sup> Similarly, the proposed Maine statute would provide that attorney’s fees are to be awarded “in any civil action or proceeding” to any person eligible for fee shifting who prevails in the action or proceeding against an opposing litigant who is an “entity” as those two terms are defined by the statute. In the event that a low-income litigant does not prevail at the administrative hearing, but then appeals to a court, and prevails, the attorney’s fees award must include the compensation for the hours spent at the administrative proceeding.

In summary, the benefits produced by the fee shifting law described above are substantial, both for the litigants and for the State of Maine. The cost of the attorney’s fees for a poor litigant will not require an appropriation for any litigation against an “entity” in the private sector. Rather, the cost will fall on the wrongdoer. The administration of the proposed statute is simple. It reaches state-wide into underserved rural communities. It incentivizes would-be attorneys for the poor as gatekeepers to avoid weak court filings. It deters institutional plaintiffs from filing non-meritorious cases against weaker opponents. It covers smaller cases not suitable for contingent fee representation. It provides indigent people with lawyers who will know how to position cases for a fair settlement. It covers declaratory judgment cases that involve no money damages.

It is wise legislation. “From a law and sociology perspective, one way of evaluating whether a law is just or right is to assess the degree to which it signals to groups that they are included within the polity.”<sup>249</sup> The proposed statute helps the state to send a positive signal. It extends true adversarial hearings to the poor and so carries out the responsibility that all democracies have: to provide equal access to justice. In short, it makes it possible for the poor to participate in Maine’s legal system as equal citizens.

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<sup>248</sup> See generally *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980).

<sup>249</sup> Monica C. Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1 20, 22 (2018).