

Russell Engler, Opportunities and Challenges: Non-Lawyer Forms of Assistance In Providing Access to Justice for Middle-Income Earners, in MIDDLE INCOME ACCESS TO JUSTICE 145 (Michael J. Trebilcock, Anthony J. Duggan & Lorne Mitchell Sossin eds., 2012).

## **PART 4**

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### **Non-Lawyer Forms of Assistance**



# 4 Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice for Middle- Income Earners

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## I. Introduction

In this paper, I address the issue of non-lawyer forms of assistance and middle-income access to justice as part of a comprehensive strategy to promote meaningful access to justice. I do so by presenting the ideas of 'non-lawyer' and 'middle income' as variables in, or components of, the larger Access to Justice question. As the Background Paper to the Colloquium cautions, we should be 'attentive to the fact that a focus on solving access to justice problems of the middle class may have an impact on low-income individuals and communities.'<sup>1</sup> How can we be sure whether the steps we propose to assist middle-income earners are not achieved at the expense of low-income individuals and communities? How would we measure the trade-offs?

The danger of pitting middle-income earners against low-income ones is only one reason to address the problem as a component of a coherent approach to access to justice. Since the challenges that call for the provision of increased access to justice flow from the shortage of affordable lawyers in relation to the needs of those who cannot afford lawyers, responses involve a range of solutions short of providing lawyers for all low- and middle-income earners for all their legal needs. Viewed one way, this is an inevitable and appropriate response to a

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1 University of Toronto Middle-income Access to Civil Justice (MIACJ) Initiative Steering Committee, *University of Toronto Faculty of Law MIACJ Initiative: Background Paper*, background paper for the MIACJ Colloquium, University of Toronto Faculty of Law, 10 and 11 February 2011) [unpublished] at 5 [MIACJ, *Background Paper*], [http://www.law.utoronto.ca/documents/conferences2/AccessToJustice\\_LiteratureReview.pdf](http://www.law.utoronto.ca/documents/conferences2/AccessToJustice_LiteratureReview.pdf).

shortage of resources. Viewed another way, we are resorting to the provision of legal services on the cheap. How will we know whether our responses are appropriate and effective, as opposed to taking us down the path of second-class justice? To what extent is the access we are providing *mere* access as opposed to *meaningful* access to justice?

Part II provides the backdrop to the conversation, including unmet legal needs, the legal services delivery system, the flood of unrepresented litigants in the courts, the available data on the impact of counsel on case outcomes, and the Access to Justice and Civil Right to Counsel Movements. The balance of Part II discusses self-help and limited assistance programs, including the use of non-lawyers, which occurs against the backdrop of these trends. The varying forms that the programs can take and the limited data available as to the effectiveness of assistance programs have profound implications for an access to justice agenda that seeks to provide meaningful access, rather than second-class justice, to those who cannot afford full representation by counsel.

Part III urges a three-pronged approach to a coordinated, overarching access to justice strategy. It includes the following: (1) revising the roles of the key players in the court system; (2) the increased use of assistance programs short of full representation, but paired with evaluation measures to prioritize the programs that impact case outcomes; and (3) where lesser steps are insufficient and basic human needs are at stake, the provision of counsel. While the three-pronged approach focuses on the court system, its analysis applies not only to administrative agencies as well, but also to front-end initiatives aimed at prevention. Part IV returns to the variables, discussing first the implications that flow from a focus on middle-income, as opposed to low-income, individuals and communities and concluding with the question of where the opportunities for non-lawyer assistance might lie.

## II. The Context of the Conversation

The exploration of the opportunities and challenges in utilizing non-lawyer forms of assistance occurs in the context of trends that shape the larger access to justice challenges. Assistance programs developed against this backdrop vary in structure, goals, and services they offer. Conversations involving programs must distinguish between the forms of assistance under consideration. A brief discussion of issues of ethics and evaluation that arise with assistance programs concludes the background conversation.

### A. Six Key Trends

(1) *Unmet legal needs.* One premise of the colloquium is the vast extent of unmet legal needs for middle-income earners. 'Broadly speaking, our goal is to identify the most acute unmet civil legal needs in the province for middle-income Ontarians across different key areas of law, and to explore a range of existing and possible solutions to these problems.'<sup>2</sup> The Background Paper surveys the literature on 'unmet legal needs,' also discussed as 'Justiciable Problems.'<sup>3</sup> The colloquium's First Plenary Session and the accompanying papers were dedicated to the topic as well.<sup>4</sup> The break-out sessions on Day 2 focused on unmet legal needs in the key areas of consumer, employment, and family law.<sup>5</sup> In the United States, legal needs studies consistently show that 70 to 90 per cent of the legal needs of the poor go unaddressed.<sup>6</sup> Many unmet legal needs involve housing, family, and consumer issues.<sup>7</sup> As Chief Justice Beverley McLachlin noted in her keynote address:

Do we have adequate access to justice? I think the answer is no. Among those hardest hit are the middle class and the poor. We have wonderful justice for the corporations, and for the wealthy.<sup>8</sup>

(2) *The shortage of affordable legal services.* The related premise is the shortage of available and affordable legal services. The funding for legal aid in Canada 'is limited and the income threshold for legal aid certificates

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<sup>2</sup> MIACJ, *Background Paper*, *supra* note 1 at 4.

<sup>3</sup> *Ibid.* at 22–8.

<sup>4</sup> See Pascoe Pleasence and Nigel J. Balmer, *Caught in the Middle: Income, Justiciable Problems, and the Use of Lawyers*, *supra* this volume.

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

<sup>6</sup> Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, 2nd ed. (Washington: Legal Services Corporation, 2007), <http://www.lsc.gov/justicegap.pdf> [LSC, *Documenting the Justice Gap*]. Virtually 'all of the recent state studies found a level of need substantially higher than the level' found in a 1994 American Bar Association study (emphasis in original); *ibid.* at 13.

<sup>7</sup> *Ibid.*

<sup>8</sup> Michael McKiernan, 'Lawyers Integral in Making Justice Accessible: McLachlin,' *Law Times*, 21 February 2011, <http://www.lawtimesnews.com/201102218262/Headline-News/Lawyers-integral-in-making-justice-accessible-McLachlin> [McKiernan, 'Making Justice Accessible'].

or for clinic services is very low.<sup>9</sup> While making too much money to qualify for legal aid, middle-income earners, as Chief Justice McLachlin observed, cannot hope to pay legal fees that average \$338 per hour, leaving them little option but to represent themselves in court or go away empty-handed.<sup>10</sup> Even for low-income Canadians, legal aid does not cover many areas of civil law in which low-income clients need assistance.<sup>11</sup> In the United States, legal services offices represent only a fraction of eligible clients seeking assistance.<sup>12</sup> The worst recession since the Great Depression has dramatically increased the numbers of Americans whose basic human needs are at issue in legal proceedings and who need counsel.<sup>13</sup> Yet the same funding crisis that has expanded the numbers of those needing help has decimated the ability of legal services offices to provide assistance.<sup>14</sup>

(3) *The flood of unrepresented litigants in courts.* In the face of unmet legal needs and the shortage of lawyers, courts are flooded with unrepresented litigants. 'In Ontario, as elsewhere, unrepresented litigants have become a regular feature of the courts.'<sup>15</sup> 'For the most part, the increasing number of unrepresented litigants is a result of rising costs of legal

9 MIACJ, *Background Paper*, *supra* note 1 at 9.

10 McKiernan, 'Making Justice Accessible,' *supra* note 8.

11 *Ibid.*

12 See Alan W. Houseman, 'The Future of Legal Aid: A National Perspective' (2007) 10 U.D.C. L. Rev. 35, 43–46.

13 'The current economic crisis, with its attendant problems of high unemployment, home foreclosures and family stress, has resulted in legal problems relating to consumer credit, housing, employment, bankruptcies, domestic violence and child support, and has pushed many families into poverty for the first time.' LSC, *Documenting the Justice Gap*, *supra* note 6 at 5, [http://www.lsc.gov/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

14 See *ibid.*, at 6. Offices relying on money from Interest on Lawyers Trust Accounts (IOLTA) have faced devastating cutbacks, with plummeting interest rates and the collapse of the real estate market, while offices dependent on aid from state and local governments have faced cutbacks as a result of the fiscal crises facing governments. 'While a long-term trend of increased state funding for civil legal aid has continued, budget crises have put this funding at risk in some states. Revenues from state Interest on Lawyers' Trust Accounts (IOLTA) programs rose in some states with new revenue enhancement techniques, but have recently fallen precipitously in many states as a result of low interest rates and the declining economy, reducing trust account deposits.' In November 2011, Congress approved a spending package for FY2012 that will result in a 14.8 per cent cut to local legal aid programs that receive funding from the Legal Services Corporation. See, Robert Echols, *Access to Justice Headlines*, 1 December 2011, <http://www.ATJsupport.org>.

15 MIACJ, *Background Paper*, *supra* note 1 at 9.

services.<sup>16</sup> While studies of unrepresented litigants in Ontario have not been published by the court system, available evidence indicates that unrepresented litigants are a regular feature in many courts, and are particularly prevalent in family courts.<sup>17</sup> Some statistics from across Canada indicate that the number of unrepresented litigants has been rising in the past fifteen years.<sup>18</sup> In the United States, most family law cases involve at least one party without counsel, and often two.<sup>19</sup> Most tenants, many landlords, and most debtors appear in court without counsel.<sup>20</sup> Unrepresented litigants disproportionately are minorities and typically are poor.<sup>21</sup> They often identify an inability to pay for a lawyer as the primary reason for appearing without counsel.<sup>22</sup>

<sup>16</sup> *Ibid.*

<sup>17</sup> See, for example, Anne-Marie Langan, 'Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Court of Ontario' (2004-5) 30 *Queens L.J.* 825 [Langan, 'Scales of Justice'].

<sup>18</sup> Alberta Rules of Court Project, *Self-Represented Litigants: Consultation Memorandum 12.18* (2005).

<sup>19</sup> Russell Engler, 'And Justice for All – Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks' (1999) 67 *Fordham Law Review* 1987 at 2047-52 [Engler, 'And Justice for All']. John M. Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know* (2002) at 3-6 (2002, <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/SRLwhatwknow.pdf>, accessed 14 July 2010). For an edited version of the article, see John M. Greacen, 'An Administrator's Perspective: The Impact of Self-Represented Litigants on Trial Courts – Testing Stereotypes against Real Data' (2002) 41 *Judges Journal* 32 [Greacen, 'An Administrator's Perspective.']. Surveys of litigants in New York City found that 75 per cent of the litigants in the New York City Family Court and 90 per cent of the tenants in Housing Court appeared without counsel: New York, Office of the Deputy Chief Administrative Judge for Justice Initiatives, *Self-Represented Litigants: Characteristics, Needs, Services: The Results of Two Surveys*, Office of the Deputy Chief Administrative Judge for Justice Initiatives (November 2005) [Justice Initiatives, *Two Surveys*].

<sup>20</sup> See, for example, Russell Engler, 'Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed' (2010) 37 *Fordham Urb. L.J.* 37 [Engler, 'Connecting Self-Representation to Civil Gideon'].

<sup>21</sup> See, for example, Engler, 'And Justice for All,' *supra* note 19; Greacen, 'An Administrator's Perspective,' *supra* note 19. Surveys from 2005 in New York City found that 79 per cent of the self-represented litigants in Family and Housing Court were African-American or Hispanic. Justice Initiatives, *Two Surveys*, *supra* note 19 at 3. Regarding income, 21 per cent had incomes below \$10,000, an additional 36 per cent had incomes between \$10,000 and \$20,000, and another 26 per cent had incomes between \$21,000 and \$30,000; thus 83 per cent of the self-represented litigants had incomes below \$30,000. *Id.* at 4. Spanish-speaking litigants had less formal education than English-speaking litigants: *ibid.*

<sup>22</sup> 'According to most studies, litigants are usually unrepresented because they are unable to afford a lawyer or have been turned away from legal aid': MIACJ, *Background*

(4) *The impact of the absence of counsel.* The consequences of appearing without counsel are devastating, since unrepresented litigants often fare poorly in the courts.

[I]n housing courts, representation has a large impact on tenants' outcomes, but typically little impact on landlord outcomes. Similar conclusions apply in family law cases (with some caveats), debt cases, and the administrative context, including social security disability appeals and unemployment and immigration cases. Further, representation of only one party may impede the settlement process, for example, by reducing the likelihood of productive negotiations.<sup>23</sup>

Studies from Canada found that (1) representation positively influences outcomes in contested hearings before the Ontario Rental Housing Tribunal;<sup>24</sup> (2) a lack of representation in the Tax Court of Canada may prevent the litigants from obtaining fair outcomes;<sup>25</sup> and (3) 87.5 per cent of judges in a Nova Scotia study thought that unrepresented litigants were generally disadvantaged by a lack of representation.<sup>26</sup> '[U]nrepresented litigants struggle with the process and tend to raise concerns in the courtroom that are irrelevant to the legal issues in question thereby causing frustration for judges.'<sup>27</sup>

(5) *The access to justice movement.* Concern about the fate awaiting unrepresented litigants in the courts gave rise to a renewed commitment

*Paper, supra* note 1 at 15. See also Engler, 'Connecting Self-Representation to Civil Gideon,' *supra* note 20 at 41.

23 MIACJ, *Background Paper, supra* note 1 at 21 (citations omitted), relying on my metastudy from the United States, Engler, 'Connecting Self-Representation to Civil Gideon,' *supra* note 20 (discussing and analysing many of the studies showing the impact of counsel on case outcomes). But see D. James Greiner and Cassandra Wolos Pattanayak, 'Randomized Evaluation of Legal Assistance Programs: What Difference Does Representation (Offer and Actual Use) Make?' (2012) 112 Yale L.J. [forthcoming] (finding no statistical difference between outcomes between the control and study group for offers of representation by a law school clinic in unemployment appeals).

24 Tenant Duty Counsel Program, *Toronto East Representation Pilot Project Report* (Ontario: Advocacy Centre for Tenants, 2006) [Tenant Duty Counsel Program, *Toronto East Pilot Project Report*].

25 Andre Galant, 'The Tax Court's Informal Procedure and Self-Represented Litigants: Problems and Solutions' (2005) 53 Canadian Tax J. 333.

26 Nova Scotia Department of Justice, *Self-Represented Litigants in Nova Scotia: Needs Assessment Study* (2004).

27 Langan, 'Scales of Justice', *supra* note 17 at 839–41.

to access to justice. This colloquium uses the ongoing initiatives in Canada and abroad, largely involving access to justice for the poor and working poor, and seeks to focus the conversation on middle-income earners.<sup>28</sup> In the United States, Conferences of Judges and State Court Administrators have adopted resolutions calling for the courts to provide meaningful access to justice.<sup>29</sup> Over the past fifteen years, access to justice initiatives intensified across the United States, spurred by conferences dedicated to the topic.<sup>30</sup> The number of State Access to Justice Commissions increased rapidly; sixteen states created commissions between 2003 and 2008.<sup>31</sup> The commissions, created by order of state supreme courts, are comprised of members from an array of stakeholders in the legal system.<sup>32</sup> The Commissions have a broad charge to

28 See Michael Trebilcock, Anthony Duggan, and Lorne Sossin, 'Introduction,' *supra* this volume.

29 In 2000 the National Conference of State Court Administrators called on the courts to provide access to justice for those without counsel: *Position Paper on Self-Represented Litigation* (Arlington: Government Relations Office, 2000), <http://costa.ncsc.dni.us/WhitePapers/selfrepresentation.pdf>.

The following year, the Conference of Chief Justices promulgated Resolution 23, titled 'Leadership to Promote Equal Justice,' resolving in part to '[r]emove impediments to access to the justice system, including physical, economic, psychological and language barriers': Resolution 23 (adopted 25 January 2001), <http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol23Leadership.html>. In 2002 the two conferences jointly issued Resolution 31, resolving that 'courts have an affirmative obligation to ensure that all litigants have meaningful access to the courts, regardless of representation status.' See, for example, Resolution 31 (adopted 1 August 2002), National Center for State Courts, [http://www.ncsconline.org/WC/Publications/Res\\_ProSe\\_CCCJOSCAResolution31Pub.pdf](http://www.ncsconline.org/WC/Publications/Res_ProSe_CCCJOSCAResolution31Pub.pdf).

30 For example, Eastern Regional Conference on Access to Justice for the Self-Represented Litigant (White Plains, 2006); the New York State Unified Court System Access to Justice Conference (Albany, 2001).

31 Karla M. Gray and Robert Echols, 'Mobilizing Lawyers, Judges, and Communities: State Access to Justice Commissions' (2008) 17 *Judges Journal* 33 at 35–36. Although only five states had Access to Justice Commissions in 1999, the number had increased to twenty-three by June 2006. More than a dozen additional states had an active committee of the state bar or bar association charged with the broad access to justice function. See Access to Justice Support Project, *Access to Justice Partnerships, State by State* (2005) at 1, [http://www.nlada.org/Civil/Civil\\_SPAN/SPAN\\_Report](http://www.nlada.org/Civil/Civil_SPAN/SPAN_Report), accessed 29 June 2010. Kentucky, by order of its Supreme Court in October 2010, became the most recent state to create an Access to Justice Commission: Robert Echols, *Access to Justice Headlines*, 2 February 2011, on file with author; see also Resource Center for Access to Justice Initiatives, <http://www.ATJsupport.org>.

32 Robert Echols, 'The Rapid Expansion of State Access to Justice Commissions' (2005) *Management Information Exchange Journal* 41. The stakeholders typically include the courts, organized bar, civil legal aid providers, and law schools: *ibid*.

engage in an ongoing assessment of the civil legal needs of the poor and to develop initiatives to respond to those needs.<sup>33</sup>

(6) *The revitalized civil right to counsel movement.* In the United States the years after 2003, the fortieth anniversary of *Gideon v. Wainwright*,<sup>34</sup> saw a sharp increase in activity supporting a civil right to counsel. Articles,<sup>35</sup> conferences,<sup>36</sup> and speeches<sup>37</sup> addressed the issue, while membership surged in the newly formed National Coalition for a Civil Right to Counsel.<sup>38</sup> Some advocates pursued test case strategies attempting to establish the right to counsel by court decision,<sup>39</sup> while others pursued a legislative strategy.<sup>40</sup> In 2006, the American Bar

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33 *Ibid.*

34 372 U.S. 335 (1963).

35 See, for example, 'Special Issue: A Right to a Lawyer? Momentum Grows' (2006) 40 *Clearinghouse Review* 163–293 ['Momentum Grows']; '2006 Edward V. Sparer Symposium, Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context' (2006) 15 *Temple Political & Civ. Rights L. Rev.* 697–800.

36 Conferences across the country included panels on Civil Gideon as part of the broader discussion of access to justice in civil cases. For example, the symposium 'Legal Representation and Access to Justice: Breaking Point or Opportunity to Change,' jointly sponsored by the Korematsu Center for Justice and the Seattle University School of Law, was held on 19 February 2010. The Sparer Symposium, held on 28 March 2006 and titled 'Civil Gideon: Making the Case,' was co-sponsored by Rutgers, Penn, Villanova, and Widener Law Schools: <http://www.law.upenn.edu/pic/students/Sparer06Program.pdf>. Washington State's Access to Justice Conference in 2002 included a panel dedicated to the topic. See Paul Marvy, 'To Promote Jurisprudential Understanding of the Law: The Civil Right to Counsel in Washington State' (2006) 40 *Clearinghouse Review* 180.

37 Justice Johnson's speech, delivered at the Pathways to Justice Conference in Los Angeles, 7 June 2008, was published in *Clearinghouse Review: Three Phases of Justice for the Poor: From Charity to Discretion to Right* (2009) 43 *Clearinghouse Review* 486. See also Robert J. Derocher, 'Access to Justice: Is Civil Gideon a Piece of the Puzzle?' (2008) *ABA Bar Leader* 11 at 11.

38 See, for example, Paul Marvy and Debra Gardner, 'A Civil Right to Counsel for the Poor' (2005) 32 *Human Rights* 8 at 9.

39 See, for example, *Frase v. Barnhart*, 840 2d 144, 379 Md. 100 (2003); *Kelly v. Warpinski*, No. 04-2999-0A (Wisc. Sup. Ct., filed 17 November 2004); *King v. King*, 162 Wash. 2d 378, 174 P. 3d 659 (2007).

40 See, for example, Texas H.B. No. 2124, relating to appointment of counsel in appeals of certain eviction suits. A model statute from California became the basis for a more recent *Model Access Act* adopted by the American Bar Association. See Clare Pastore, 'The California Model Statute Task Force' (2006) 40 *Clearinghouse Review* 176 [Pastore, 'California Model Statute Task Force']; the ABA Model Act, and accompanying Basic Principles, are available at <http://www.abanet.org/legalservices/sclaidd/downloads>. Advocates in New York expanded the reach of the statutory right to counsel in di-

Association unanimously adopted Resolution 112A, urging the provision of

legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.<sup>41</sup>

The adoption of ABA Resolution 112A spurred a flurry of activity often coordinated with, and bolstered by, the work of state Access to Justice Commissions. In Massachusetts, the Boston Bar Association (BBA) created its Task Force on Expanding the Civil Right to Counsel, which included members from key statewide stakeholders; the task force identified nine pilot projects in four substantive areas in an effort to explore starting points for expansion of the right to counsel.<sup>42</sup> In California, advocates drafted two model statutes providing for an expanded civil right to counsel,<sup>43</sup> before the state enacted, in the fall of 2009, legislation to provide funding for civil right to counsel pilot projects.<sup>44</sup> In

voice cases to the Supreme Court and drafted and arranged for the filing of legislation initiatives covering the elderly in eviction and foreclosure cases. See N.Y. Judiciary Law, Section 35 (8) (amended September 2006); Manny Fernandez, 'Free Legal Aid Sought for Elderly Tenants,' *New York Times*, 16 November 2007, [http://www.nytimes.com/2007/11/16/nyregion/16housing.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/11/16/nyregion/16housing.html?_r=1&oref=slogin), accessed 14 July 2010.

41 The ABA House of Delegates adopted the resolution on 7 August 2006 at its Annual Meeting. For the resolution and the report of the ABA Task Force on Access to Civil Justice, see *Report to the House of Delegates* (7 August 2006), <http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/downloads/06A112A.auth-checkdam.pdf>.

42 *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*, Report of the Boston Bar Association Task Force on Expanding the Civil Right to Counsel in Massachusetts (September 2008), <http://www.bostonbar.org/prs/reports/GideonsNewTrumpet.pdf>, [*Gideon's New Trumpet*]. The Boston Bar Association (BBA) and Massachusetts Bar Association held a joint conference to begin implementing the resolution. For a description of the Joint MBA/BBA Civil Gideon Symposium, held in October 2007, see Kelsey Sadoff, 'Civil Gideon Symposium Mobilizes Legal Community Behind Equal Justice in Law,' <http://www.massbar.org/for-attorneys/publications/lawyers-journal/2007/november/civil-gideon-symposium-mobilizes-legal-community-behind-equal-justice-in-law>.

43 See Pastore, 'California Model Statute Task Force,' *supra* note 40.

44 See Carol J. Williams, 'California Gives the Poor a New Legal Right,' *Los Angeles Times*, 17 October 2009, <http://www.latimes.com/news/local/la-me-civil-gideon17-2009oct17,0,7682738.story>, accessed 14 July 2010. Assembly Bill 590, creating the pilot projects, was signed into law by Governor Schwarzenegger on 11 October 2009: [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_0551-0600/ab\\_590\\_](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_)

New York, Chief Judge Lippmann called for implementation of a civil right to counsel and appointed a Task Force to Expand Access to Legal Services.<sup>45</sup> In 2011, the Maryland Access to Justice Commission released its report, 'Implementing a Civil Right to Counsel in Maryland.'<sup>46</sup> In Canada, the Supreme Court has thus far declined to recognize a broad right to counsel in civil settings.<sup>47</sup> Nor has the Court recognized access to justice as a constitutional basis for requiring state-funded civil legal services.<sup>48</sup>

bill\_20091011\_chaptered.pdf, accessed 14 July 2010. See also 'Note: California Establishes Pilot Program to Expand Access to Counsel for Low-Income Parties' (2010) 123 Harv. L. Rev. 1532.

- 45 Chief Judge Lippmann issued one call for an expanded civil right to counsel in a speech to the Central Synagogue of New York on 5 February 2010, titled "'Justice, Justice Shall You Pursue'": The Chief Judge's Perspective on Justice and Jewish Values' (speech on file with author). 'The time has come for New York State to make good on its promise of Gideon and ensure that there is a right to counsel at public expense in at least those cases where basic human needs are at stake, like shelter, sustenance, safety, health and children': *ibid.* at 13–14. Regarding the creation of the task force, see Daniel Wise, 'Lippman Names 28 to Task Force to Expand Access to Legal Services,' *New York Law Journal* (10 June 2010), [http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202462459386&Lippman\\_Names\\_to\\_Task\\_Force\\_to\\_Expand\\_Access\\_to\\_Legal\\_Services&slreturn=1&hbxlogin=1](http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202462459386&Lippman_Names_to_Task_Force_to_Expand_Access_to_Legal_Services&slreturn=1&hbxlogin=1), accessed 22 June 2010. New York advocates also convened a day-long symposium in March 2008, designed to create a blueprint for a Civil Right to Counsel in their state. The proceedings, and related articles, are published in the symposium volume 'An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State' (2009) 25 *Touro L. Rev.* 1–539.
- 46 The report is available at <http://www.mdcourts.gov/mdatjc/pdfs/ImplementingCivilRighttoCounselinMD2011.pdf>. Advocates in Maryland held a conference dedicated to the topic in 2007. See Stephen H. Sachs, 'Keynote Address: Seeking a Right to Counsel in Appointed Civil Cases in Maryland' (2007) 37 *U. Balt. L. Rev.* 5.
- 47 While a general right to counsel in criminal justice contexts is set out in s.10(b) of the Canadian *Charter of Rights and Freedoms*, the right to counsel in civil contexts is assessed on a case-by-case basis. As the Court stated in a *per curiam* judgment in *British Columbia (A.G.) v. Christie* 2007 SCC 21 at para. 25: 'Section 7 of the *Charter*, for example, has been held to imply a right to counsel as an aspect of procedural fairness where life, liberty, and security of the person are affected: see *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46. But this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. Thus in *New Brunswick*, the Court was at pains to state that the right to counsel outside of the s. 10(b) context is a case-specific multi-factored enquiry (see para. 86).'
- 48 The Court affirmed in *Christie, ibid.*, that, 'the text of the Constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possi-

### B. *The Evolution of Self-Help Programs and Assistance Programs*

While many of the trends discussed in the previous section have accelerated in recent years, the problems of unmet legal needs and the shortage of affordable counsel are not new. The past ten to fifteen years have seen an explosion of forms of assistance short of full representation by counsel, as various players have struggled to assist bewildered and often desperate low-, moderate-, and middle-income families. The programs include hotlines, technological assistance, clinics, *pro se* clerks' offices, Lawyer-of-the-Day programs, and self-help centres, developed to provide assistance to litigants who otherwise would receive no help at all.<sup>49</sup> Programs that comprise the 'legal services spectrum' short of full representation and holistic services include the following: self-help services; public legal education and information; advice from non-lawyers and non-paralegals; paralegals; summary advice; brief services; and referrals and duty counsel.<sup>50</sup>

In a world of scarce resources, it will be an essential component of an effective access to justice strategy to understand which types of assistance programs are most effective in dealing with which types of legal problems and clients. We must target scarce resources to scenarios in which they will truly assist, and avoid squandering resources where they are likely to be ineffective. The next sections use familiar variables to understand the range of possible programs; flag ethical concerns that might limit the applicability of some programs in some scenarios; and explore what we know from efforts at evaluating the programs.

#### 1. THE VARIETY OF POTENTIAL ASSISTANCE PROGRAMS

As extensive as the list of forms of assistance program may be, it takes little imagination to realize that programs will continue to emerge, each a bit different from programs known in other contexts. Thus, the familiar categories of Who, What, When, Where, Why, and How, although in a different order, illustrate the potential for creativity in the construction of assistance programs in a given context.

bility that a right to counsel may be recognized in specific and varied situations. But at the same time, they do not support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations' (at para. 23).

49 Houseman, *supra* note 12, at 40–3; Engler, 'And Justice for All,' *supra* note 19 at 2003–6.

50 MIACJ, *Background Paper*, *supra* note 1 at 30–49.

*What* may involve the type of program employed. The range suggested by the legal services spectrum, such as hotlines, self-help centres, and duty lawyers, illustrate the types of programs available. 'What' may refer as well to the services provided. Does the program provide only information or advice as well? Do those utilizing the service receive assistance in filling out court documents? Or does the program provide general information with referral numbers?

*Who* can involve lawyers and non-lawyers, alone or in combination. Where lawyers are involved, are they publicly funded or private? Do the lawyers volunteer, or are they compensated for their work? Are court personnel involved, and if so, are they clerks, court-connected mediators, judges, or someone else? Where lay advocates are involved, they may be court personnel, paralegals, volunteers, law students, social services agencies, members of government offices, or law and public librarians, among the many possibilities.

The categories of *how*, *where*, and *when* can overlap, depending on the type of program. Is the assistance being provided in person, over the phone, via e-mail, or through a website? Is the office providing assistance inside or outside the courthouse? In terms of timing, is the assistance provided in advance of court or an administrative hearing, during the day of the hearing, after the hearing has been completed, or as some form of front-end prevention designed to avert the court date or hearing in the first place?

Ultimately, the category of *why* may be the most salient question, since forms of assistance should be designed to address certain identified needs. 'Why' should then be thought of in terms of goals: What is the program attempting to accomplish, and why is a particular format, using certain personnel, the best design for addressing the goals?

## 2. ETHICAL ISSUES FLOWING FROM VARYING STRUCTURES

The realization that there are innumerable formulations for potential assistance programs makes the development and prioritization of goals a key component of program design and analysis. Some structures may be more likely to achieve articulated goals in a particular setting. Ethical issues surrounding the development and operation of assistance programs may also impact the choices. Although a detailed exploration of ethical issues is beyond the scope of this paper,<sup>51</sup> the

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51 For an analysis in the context of the United States, see Russell Engler, 'Approaching Ethical Issues Involving Unrepresented Litigants' (2009) 43 *Clearinghouse Review* 377 [Engler, 'Approaching Ethical Issues'].

variables identified in the preceding section suggest related ethical issues.

Where responses to access to justice issues involve the roles of judges, court-connected mediators, clerks, and other personnel, the issues surrounding the provision of assistance while remaining impartial and without providing legal advice are the subject of much analysis.<sup>52</sup> Where lawyers provide assistance short of full representation, the ethical issues involving unbundled legal services and ghostwriting have captured the lion's share of the attention.<sup>53</sup> A closer analysis reveals that those issues entail the application, to unfamiliar scenarios, of the familiar ethical issues, including the scope of representation, the measure of competent representation, the establishment of the lawyer-client relationship, the application of the conflict of interest rules, and the duty of candor.<sup>54</sup> Where the programs utilize non-lawyers, including law students, the issues relate to the unauthorized practice of law, most notably the challenges of parsing the distinction between the giving of legal advice and the provision of legal information.<sup>55</sup>

### 3. WHAT WE KNOW AND WHAT THE KNOWLEDGE IMPLIES

While the assessment of goals and analysis of ethical issues should be key components in designing assistance programs that provide meaningful access to justice, the effectiveness of particular programs in certain settings should be key as well. Yet '[w]ith programs facilitating self-representation, litigants and court personnel report high levels of satisfaction with the programs; the programs' impact on case outcomes is less clear.'<sup>56</sup> The importance of including the study of case outcomes in evaluating assistance programs is illustrated by a 2003 evaluation of a self-help centre in California: in rent disputes, Center-assisted litigants consistently agreed to pay landlords *higher* amounts of back rent than unassisted litigants.<sup>57</sup> Whatever the challenges of measuring improved

52 See, for example, Russell Engler, 'Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role' (2008) 22 *Notre Dame J.L. Eth. & Pub. Pol'y* 67 [Engler, 'Ethics in Transition']; Engler, 'And Justice for All,' *supra* note 19.

53 See, for example, Engler, 'Approaching Ethical Issues,' *supra* note 51 at 378-81. Plenary Session 4 of the Colloquium, dedicated to Access to Lawyers, included a paper presentation and discussion of the issues surrounding unbundling: Samreen Beg and Lorne Sossin, 'Should Legal Services Be Unbundled?', *infra* this volume.

54 See, for example, Engler, 'Approaching Ethical Issue,' *supra* note 519 at 381-2.

55 See, for example, *ibid.* at 382.

56 Engler, 'Connecting Self-Representation to Civil Gideon,' *supra* note 20 at 3.

57 *Ibid.* at 88-9, discussing the Empirical Research Group, UCLA Law School, 'Evaluation of the Van Nuys Legal Self-Help Center, Final Report' (2003) at 1, 11. Professor

access to justice, an assistance program that leaves less money in the pockets of those who seek assistance than they would have had they bypassed the assistance cautions against the breezy assumption that any help will always make things better, not worse.

If the evaluations of assistance programs provide little guidance for measuring case outcomes, the reports of the impact of full representation indicate the types of data points that could be studied. For example, eviction cases from the United States have used possession, rent abatements, repairs, and time between the court date and an eventual move-out as data points for evaluation.<sup>58</sup> Studies of family law issues have assessed the awards of custody, alimony, and child support and restraining orders;<sup>59</sup> while debt collection cases explore the default rate, who wins the judgment, and the amount of any judgment awarded against a defendant.<sup>60</sup> The outcomes of administrative hearings involving government benefits typically involve fewer variables, focusing on the award or denial of benefits.<sup>61</sup>

The dearth of reliable studies of assistance programs and case outcomes suggests the need for further research; nonetheless, the reports provide important clues for our responses to the problems of unmet legal needs and the shortage of affordable lawyers. The data from the reports that attempt to measure the impact of counsel show that the greater the imbalance of power between the parties, the more likely it will be that extensive assistance will be necessary to impact the case outcome. The power or powerlessness can derive from the substantive or procedural law, the judge, and the operation of the forum; those features in turn may be considered other variables, beyond representation, that impact case outcomes. Disparities in economic resources, barriers (such as those due to race, ethnicity, disability, language, and education), and the presence of counsel for only one side can affect the calculus as well. The greater the imbalance of power, the greater is the need for a skilled advocate with expertise in the forum to provide the needed help.<sup>62</sup>

Gary Blasi, involved in the first Van Nuys evaluation, theorizes that the centre acted as a 'dispenser of norms,' raising expectations by explaining how the legal system should work, as opposed to how it likely would work: *ibid.* at 88.

58 See Engler, 'Connecting Self-Representation to Civil Gideon,' *supra* note 20 at 46–51.

59 *Ibid.* at 51–5.

60 *Ibid.* at 55–8.

61 *Ibid.* at 58–66.

62 For a more detailed exploration of these issues, see *ibid.* at 73–85.

### III. An Overarching Access to Justice Strategy

The preceding sections underscore the need for an overarching, coordinated access to justice strategy. The extent of unmet legal needs and the devastating consequences of the lack of appropriate assistance require that we identify ways to provide meaningful access. Not only must every tool in the legal services delivery spectrum play a role in the strategy, but the strategy must look beyond the delivery system for approaches to removing barriers and increasing access. At the same time, however, the danger that solutions to one part of the access to justice problem might exacerbate problems elsewhere serves as a reminder that the strategies must not only be coordinated and comprehensive, but also include evaluation components to ensure that the responses we craft are truly solutions. This section outlines a broad strategy, initially focused on the court system, before expanding the vision beyond the courts.

#### A. A Framework for Decision Making

I articulate elsewhere an overarching, coordinated access to justice strategy that includes three prongs:

1. the expansion of the roles of the court system's key players, such as judges, court-connected mediators, and clerks, to require them to assist unrepresented litigants as necessary to prevent a forfeiture of important rights;
2. the use of assistance programs, rigorously evaluated to identify which most effectively protect litigants from the forfeiture of rights; and
3. the adoption of a civil right to counsel where the expansion of the roles of the key players and the assistance programs do not provide the necessary help to vulnerable litigants.<sup>63</sup>

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63 See, for example, Russell Engler, 'Towards a Context-Based Civil Gideon through Access to Justice Initiatives' (2006) 40 *Clearinghouse Review* 196. For a discussion of the importance of understanding the civil Gideon initiative as an exercise in effectuating social change rather than framing legal claims, see Engler, 'Shaping a Context-Based Civil Gideon from the Dynamics of Social Change' (2006) 15 *Temple Political and Civ. Rights Law Rev.* 697.

With Prong 1, the need and justification for a revision of the roles of the key players flows from fundamental principles of justice that are the hallmark of our adversarial system. The rules that implicate the analysis are general, and the standard application of the rules governing judges, mediators, and clerks to fact patterns that confront court personnel daily depends on the customs established in courts, not the text of the rules.<sup>64</sup> While judges and clerks historically viewed their roles towards unrepresented litigants passively, the past decade has seen a shift in attitudes.<sup>65</sup>

The need to revise the roles of key players flows from needs of the litigants—the courts' 'consumers'—who are appearing without counsel in vast numbers.<sup>66</sup> The underlying goal of our justice system is to be fair and just. The ethical rules shaping the roles of the players in the adversary system imply that unrepresented litigants are the exception. Given the realities of many of our courts, our traditional understanding of the roles frustrates rather than furthers the goal of fairness and justice. As between abandoning the goal and changing the roles, we should change the roles.

The focus on fairness and justice, in substance and not simply appearance, requires shifting the approach to cases involving unrepresented litigants. We must revise our understanding of what it means to be impartial, rejecting the idea that impartiality equals passivity.<sup>67</sup> A system favouring those with lawyers, without regard to the law and facts, is a partial, not impartial, system. Judges, court-connected mediators, and clerks must play an active role to maintain the system's impartiality and ensure that unrepresented litigants do not forfeit rights due to the absence of counsel.<sup>68</sup>

Prong 2 covers assistance programs beyond the work of court personnel and short of full representation by counsel. Part II above explores the range of programs and suggests the innumerable possible formulations of such programs.<sup>69</sup> Innovative programs are an important component in the strategy to increase access to justice. Yet a comprehensive access

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64 See, for example, Engler, 'And Justice for All,' *supra* note 19.

65 See Engler, 'Ethics in Transition,' *supra* note 52.

66 See Part II.A.iii, *supra*.

67 See, for example, Engler, 'And Justice for All,' *supra* note 19 at 2023–4; Jona Goldschmidt, 'The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance' (2002) 40 *Family Court Review* 36.

68 Engler, 'And Justice for All,' *supra* note 19 at 1992–8, 2007–40.

69 See Part II.B.1, *supra*.

to justice strategy requires that we evaluate the programs carefully. Evaluation tools must identify which programs help stem the forfeiture of rights and which only help the courts run more smoothly, without affecting case outcomes.<sup>70</sup> Programs not affecting case outcomes may be worthwhile, but are not a solution to the problem of the forfeiture of rights due to the absence of counsel.

When revising the roles of judges, mediators, and clerks and using assistance programs short of full representation are insufficient, we can no longer accept the denial of access and routine forfeiture of rights as acceptable outcomes. In those instances, we must recognize and establish a right to counsel in civil cases. The 2006 ABA Resolution,<sup>71</sup> with its focus on basic human needs, is an important starting point. However difficult it may be to envision starting points for an expanded civil right to counsel, particularly in the face of legal aid cutbacks, the desperate times compel us to press ahead.<sup>72</sup>

### *B. The Pieces Are Already in Place*

If the challenges facing the implementation of an overarching strategy seem overwhelming, the reality that steady progress has been achieved on each prong should provide some measure of solace. Regarding Prong 1, the attitudes towards the roles of judges, court-connected mediators, and clerks have undergone a sea change over the past fifteen years.<sup>73</sup> Conferences, trainings, Access to Justice Resolutions, and the work of state Access to Justice Commissions have accelerated the trends.<sup>74</sup> Regarding Prong 2, the ongoing development of assistance programs ensures that energetic and innovative advocates will continue to try to identify ways to provide assistance, despite the shortage of resources.<sup>75</sup>

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70 See Part II.B.3, *supra*.

71 See Part II.A.6, *supra*.

72 For an exploration of these ideas, and a proposed seven-step approach for identifying starting points for a civil right to counsel, see Russell Engler, 'Pursuing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis' (2010) 15 Roger Williams Law Rev. 472.

73 See, for example, Engler, 'Ethics in Transition,' *supra* note 52. The recent Supreme Court decision in *Turner v. Rogers*, No. 10-10, 564 U.S. (20 June 2011). For a discussion of *Turner*, see Richard Zorza, 'A New Day for Judges and the Self-Represented: The Implications of *Turner v. Rogers* (2011) 50 Judges' Journal 16.

74 *Ibid.*

75 See Part II.B., *supra*.

The careful articulation of goals, the commitment to match needs with structures of assistance programs likely to effectuate the goals, and the use of evaluative tools to ensure that the programs are delivering as anticipated are essential tools for the Prong 2 strategy. While sceptics might question the extent of progress achieved by the civil right to counsel movement, the strategies employed over the past decade suggest that the issue will not go away and that the ultimate success of the initiatives might be as components of, rather than substitutes for, larger access to justice strategies.<sup>76</sup>

### *C. Beyond the Court-Based Focus on the Key Prongs*

That the three-pronged strategy is focused on the courts derives from the reality that unrepresented litigants are flooding the courts in unprecedented numbers, causing challenges for the courts and opposing counsel, while resulting in the forfeiture of important rights by the unrepresented litigants due to the absence of counsel. While the courts may present the most immediate challenges, the effectiveness of the overarching strategy requires broadening its reach in two respects. First, the scope of Prong 1 should expand beyond the courts to administrative agencies and tribunals. Issues important to many lower and middle-income earners are resolved in the administrative agencies, rather than the courts. The lack of representation affects court and *tribunal* processes and fairness of outcomes, as the example of the Ontario Rental Housing Tribunal illustrates.<sup>77</sup> Studies from the United States regarding the impact of representation reveal problems facing unrepresented claimants in administrative agency proceedings.<sup>78</sup>

Second, to the extent that the focus on courts and tribunals involves back-end solutions, access to justice strategies must include front-end solutions as well. In one sense, the focus on administrative tribunals is both a back-end issue and a front-end approach, at least where judicial review follows the tribunal decision. Improvements to the tribunal and agency processes might result both in an increase in meaningful access and in a decrease in the resulting court challenges. Yet the front-end

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76 See Part II.A.6, *supra*. For one recent articulation of an ‘emerging consensus’ that includes the pieces in the Access to Justice strategy proposed here, see Richard Zorza, ‘Access to Justice: The Emerging Consensus and Some Questions and Implications’ (2011) 94 *Judicature* 156.

77 Tenant Duty Counsel Program, *Toronto East Pilot Project Report*, *supra* note 24, discussed in *Background Paper*, *supra* note 1 at 21 (emphasis in original).

78 See Engler, ‘Connecting Self-Representation to Civil Gideon,’ *supra* note 20 at 58–66.

strategies are far broader than efforts to improve the operations of tribunals and agencies. Plenary 2 of the colloquium focused on 'Front-End' Proactive Solutions, with the accompanying paper by Professors Duggan and Ramsay using the context of consumer cases to illustrate the range of tools that comprise the arsenal for front-end solutions.<sup>79</sup> Education programs, licensing and certification regimes, and regulatory frameworks are 'a very small sample of the myriad opportunities we have to develop programs, resources, and systems that will minimize or eliminate the need to resort to the legal system in order to resolve some disputes for specific individuals.'<sup>80</sup>

#### *D. Illustrating the Point*

Key to the overall strategy not only is the utilization of all three prongs with the front-end strategies, but also the coordination of the various strategies. Even assuming that an expanded right to counsel will be a key component of an overall strategy, how can we understand the scope of the right, and where might lesser steps suffice? The scope of the right to counsel is directly dependent on the effectiveness of the first two prongs in the access to justice strategy. Where steps short of full representation succeed in protecting litigants from the devastating outcomes that might occur where their basic human needs are at stake, appointment of counsel might not be needed. As a result, the more that judges, mediators, clerks, and assistance programs are effective in stemming the forfeiture of rights due to the absence of counsel, the smaller will be the pool of cases in which counsel is needed. Where nothing short of full representation can provide the needed assessment, the right to counsel must attach.

An example from the efforts to assist tenants in Massachusetts illustrates the importance of utilizing a comprehensive strategy. In Massachusetts, as elsewhere in the United States, eviction cases typically proceed in court, with virtually all tenants appearing without counsel, while in many settings landlords are represented by counsel; available reports indicate that tenants are steamrolled by the process, losing swiftly and dramatically in comparison to represented tenants.<sup>81</sup>

A 2008 study of evictions in the District Court in Cambridge, Mas-

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79 See Anthony Duggan and Iain Ramsay, 'Front-End Strategies for Improving Consumer Access to Justice,' *supra* this volume.

80 *Background Paper*, *supra* note 1 at 30.

81 For a more detailed discussion of the reports of the impact of counsel in housing cases, see Engler, 'Connecting Self-Representation to Civil Gideon,' *supra* note 20 at 46-51.

sachusetts, revealed that a high percentage of evictions are brought by the Cambridge Housing Authority, often for non-payment of rent of amounts totalling less than \$1,000.<sup>82</sup> One response to this problem is to provide counsel for all tenants. A solution focused entirely on a civil right to counsel would need to calculate the number of cases per year, estimate the number of hours per case, settle on an hourly rate for the work, and propose the resulting, presumably large, price tag as the cost needed to respond to the problem. Alternatively, courts could modify their procedures, or a program might be designed to provide some assistance to tenants.

The comprehensive strategy suggests use of a fuller range of responses in coordination. At Prong 1, the roles of the judges, court-connected mediators, clerks, and other court personnel should be re-examined to ensure that the players are part of the solution, rather than the problem. Each aspect of the court's process is ripe for reform to ensure that procedures, forms, and materials enhance rather than frustrate meaningful access. The tools available as part of front-end strategies will be particularly valuable with the realization that the Housing Authority is an independent government agency; its practices could be modified to place the emphasis on keeping tenants in their homes and reducing the use of eviction proceedings. Where the authorities receive federal funding, oversight and regulation from the federal government can impact the calculus; the role of state governments is similarly implicated for state-funded authorities.

At Prong 2, the full menu of assistance programs may be utilized, but paired with evaluation, to identify which programs actually impact case outcomes.<sup>83</sup> Prong 2 also envisions non-legal forms of assistance. In Massachusetts, for example, the Tenancy Preservation Program connects vulnerable tenants to social services agencies, as an attempt to address underlying issues in households that may be the deeper causes of the problems that manifest themselves in court as non-payment of rent issues.<sup>84</sup> Finally, the use of counsel at Prong 3 remains an essential

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82 Jennifer Greenwood *et al.*, *Tenancy at Risk: Leveling the Playing Field*, Northeastern University School of Law Legal Skills in Social Context Community Lawyering Program (May 2008) (unpublished report on file with author).

83 The lessons of the Massachusetts legal services *pro se* clinics suggest that the minimal assistance alone might be ineffective, but the effect increases when used in conjunction with greater levels of assistance. See Engler, 'Connecting Self-Representation to Civil Gideon,' *supra* note 20 at 67–8.

84 For a description and account of the effectiveness of the program, see Massachu-

component of the response. Its use as part of a larger strategy, however, suggests the potential for a far smaller price tag, in keeping with the idea that counsel is needed where something important is at stake (the roof over a family's head must be at or near the top of any such list) and nothing short of full representation will suffice to provide meaningful access to justice.

#### IV. The Variables of Middle-Income and 'Non-Lawyers'

Using the three-pronged access to justice strategy as a framework, it becomes easier to focus on the variables of middle-income and non-lawyers. The framework not only suggests opportunities but also provides cautionary concerns to help assess where the responses are likely to be part of the solution as opposed to part of the problem. As the next section reveals, not only will virtually every tool in the access to justice arsenal apply with full force to the problems of middle-income earners, but the tools short of full representation might actually be more effective for middle-income earners than low-income earners. The framework also suggests the range of opportunities for non-lawyer forms of assistance, as the final section explores.

##### A. *The Question of Middle-Income versus Low-Income Earners*

Using the three prongs as a starting point, each initiative involving access to justice with low-income earners should apply with full force to middle-income earners for the simple reason that the initiatives are not means-tested in their application. Regarding the players in the court system at Prong 1, to the extent we revise the roles of judges, court-connected mediators, and clerks, every unrepresented court user would benefit, whether low or middle income. The Background Paper ends by discussing Adjudicative Processes and Alternatives; the ideas include Informal Complaint Systems, Mediation, and – under the category of Court Reform – Proportionality, Diversion and Streaming, Simplifica-

setts Housing Finance Agency Press Release, 'UMass Study Finds Mass Housing Tenancy Preservation Program Highly Effective in Preventing Homelessness among Tenants with Disabilities' (25 March 2010), [https://www.masshousing.com/portal/server.pt/gateway/PTARGS\\_0\\_2\\_8580\\_0\\_0\\_18/2010-03-25-TPP.pdf](https://www.masshousing.com/portal/server.pt/gateway/PTARGS_0_2_8580_0_0_18/2010-03-25-TPP.pdf). The full report is available at [https://www.masshousing.com/portal/server.pt/gateway/PTARGS\\_0\\_2\\_8582\\_0\\_0\\_18/TPP\\_Presentation\\_Final.pdf](https://www.masshousing.com/portal/server.pt/gateway/PTARGS_0_2_8582_0_0_18/TPP_Presentation_Final.pdf).

tion, and Case Management and Technology.<sup>85</sup> Each of these structural changes applies to all court users, including middle-income earners.

Proposals from Massachusetts illustrate the point. The Massachusetts Supreme Judicial Court responded to the flood of unrepresented litigants in the courts by creating a Steering Committee on Self-Represented Litigants. The Steering Committee's work, which relates directly to the Prong 1 analysis, included a focus on judicial guidelines and training, guidelines and training for court staff, and user-friendly courts among its six major areas of inquiry.<sup>86</sup> The Steering Committee's final recommendations included the following:

- (2) further guidance to judges on ethical conduct and useful courtroom techniques in cases involving self-represented litigants;
- (3) additional simplified forms and self-help materials for self-represented litigants;
- (4) educational programs for court staff;
- (5) expanded use of technology;
- (6) experimentation with court service centers in courthouses, particularly in those that have multiple court departments; ... and
- (8) establishment of a senior-level position with the Administrative Office of the Trial Court to direct court-based policy and programs relating to Access to Justice or, alternatively, an appointment of a judge in each Trial Court Department to serve as the coordinator of services for self-represented litigants.<sup>87</sup>

Each of the recommendations attacks the problem of the lack of access for both low and middle-income earners.

At Prong 2, there is no inherent reason why the assistance programs

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<sup>85</sup> *Background Paper*, *supra* note 1 at 79–121.

<sup>86</sup> Massachusetts Supreme Judicial Court Press Release, 'Supreme Judicial Court Steering Committee on Self-Represented Litigants Presents Final Report and Recommendations to Justices' (21 January 2009), <http://www.bostonbar.org/pub/bw/0809/011209/sjc1.pdf>. The other three major areas were expanding access to legal representation through limited assistance representation (sometimes referred to as 'unbundling' of legal services); a resource and referral guide for self-represented litigants; and technology initiatives: *ibid*. The full report of the Massachusetts Supreme Judicial Court's Steering Committee on Self-Represented Litigants, titled 'Addressing the Needs of Self-Represented Litigants in Our Courts: Final Report and Recommendations' (21 November 2008) ['Addressing the Needs'] is available at <http://www.mass.gov/courts/sjc/docs/self-rep-final-report.pdf>.

<sup>87</sup> *Ibid*.

would be inapplicable to middle-income users. Hotlines, self-help centres, technology-based initiatives, *pro se* clinics – each of these could serve middle-income earners or low-income earners, with the restrictions flowing only from means-testing imposed by funders, as opposed to the particular features of one of the tools. The legal needs studies typically show ‘that unrepresented litigants tend to have low-to-middle incomes.’<sup>88</sup> The evaluation of the B.C. Supreme Court Self-Help Information Centre found that, of the clients for whom data were available, ‘30 percent reported incomes less than \$12,000, 60 percent reported incomes less than \$24,000, and 80 percent reported incomes less than \$36,000.’<sup>89</sup> As long as middle-income users are priced out of the market for hiring lawyers for full representation, they will be frequent users of the remaining forms of assistance at their disposal.

While Prong 3, involving representation by counsel, is largely beyond the scope of an article focused on non-lawyer forms of assistance, the question of middle versus low-income provides for interesting analysis. On the one hand, since an expanded civil right to counsel would likely target indigent litigants, the prong might seem less useful in a discussion of access to justice for middle-income earners. On the other hand, the remaining tools for expanding the availability of counsel might prove more useful to middle-income earners than low-income ones. Plenary Session 4 at the colloquium covered unbundled legal services.<sup>90</sup> If the logic behind unbundled legal services includes the idea that some clients might be able to afford some aspects of a lawyer’s assistance, but not the price tag for full representation, then the greater the income of the client, the greater the chances that she or he will be able to afford even unbundled services. With fee-shifting statutes, both low and middle-income litigants might benefit from modifications in practice and procedure. In the United States, greater use of fee-shifting statutes would allow private lawyers to represent clients regardless of their ability to pay. At least with respect to small claims court in Canada, Deputy Judge Shelley McGill’s reforms proposed at Plenary Session 5 include protection from extensive ‘loser pays’ rules with the goal of increasing access to middle-income litigants.<sup>91</sup>

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88 *Background Paper*, *supra* note 1 at 17.

89 *Ibid.*

90 Samreen Beg and Lorne Sossin, ‘Should Legal Services Be Unbundled?’, *infra* this volume.

91 Shelley McGill, ‘Challenges in Small Claims Court System Design: Does One Size Fit

While the tools at each prong available for middle-income earners might be substantially the same as those available for earners, the data and evaluation suggest that many of those tools might be more effective for middle-income earners than for many earners. The Background Paper cautions that we ‘remain attentive to differences of education, literacy, language, geography, culture, mental health and other systemic barriers that affect the availability of legal resources for middle-income individuals, as well as the range of appropriate responses to the problem.’<sup>92</sup> While focused on distinctions among middle-income earners, the idea applies across the spectrum of low and middle-income earners. The studies of Law Help Ontario’s project and the B.C. Self-Help Centre found that users were likely to be among the more educated in their income level,<sup>93</sup> the acknowledgment that ‘there is a self-selection bias in their clientele’ illustrates the point.<sup>94</sup> A study of the effectiveness of hotlines in the United States found that clients who rated their outcomes most favourably ‘were significantly more likely to be white, English-speaking, [and] educated at least to the eighth grade.’<sup>95</sup>

These findings fit neatly into the analysis in Part II, suggesting that the greater the extent of power imbalances, the greater the need for more extensive intervention if assistance is to be effective.<sup>96</sup> Where middle-income earners face fewer barriers in terms of language, education, employment, and the absence of disabilities, they stand a better chance of utilizing more effectively the forms of limited assistance. As the barriers increase, with litigants increasingly without power and without options, forms of self-help are likely to be less and less effective. The findings likely will hold true whether we are exploring back-end or front-end solutions. While not all middle-income earners are free of barriers, and not all earners are unable to overcome barriers, as a general proposition, the distinction posed by the variable of income is less the menu of options available, but rather the likelihood of their effectiveness.

All?, *infra* this volume. (‘The small claims court was never contemplated as a high stakes game where litigants are punished for having their day in court. A loss should mean the loser must pay what is owed, not with an added penalty for trying to defend’: *ibid.*)

92 *Background Paper*, *supra* note 1 at 6.

93 *Ibid.* at 17–18.

94 *Ibid.* at 18.

95 Engler, ‘Connecting Self-Representation to Civil Gideon,’ *supra* note 20 at 71.

96 See II.B.3, *supra*.

*B. The Use of Non-Lawyers*

The three-pronged strategy provides the framework for analysis of the final variable: the use of non-lawyers as opposed to lawyers. Virtually every initiative at Prongs 1 and 2 creates the opportunity for utilization of non-lawyers. The call for evaluation serves as a constant reminder that the question of where they may be used is only part of the calculation; where non-lawyers may most effectively be used will depend on how successfully we frame and measure that inquiry. The inclusion of Prong 3 suggests that non-lawyers may be utilized alone, or in conjunction with lawyers. Even where lawyers are necessary under the rules of court and ethics, their work can be enhanced by their association with trained and effective non-lawyers.

At Prong 1, the opportunities for non-lawyers flow from the recitation of initiatives. Non-lawyers can play key roles in clerks' offices, self-help centres, and court information centres. Some court-connected mediators will be lawyers, but some will not. While the work of non-lawyers will be limited by work that does not constitute legal advice and the practice of law, our evolving understanding of those concepts results in the recognition that more of the help that litigants need, particularly when offered under the auspices of programs authorized by the court, is unlikely to run afoul of rules prohibiting the unauthorized practice of law.<sup>97</sup> The increased use of technology provides twin opportunities for the use of non-lawyers. Those with the technological skills to design, implement, and maintain the systems may or may not be lawyers. At the same time, as technology lowers the barriers to access, the level of accompanying assistance that is still needed might require less legal training than would be needed in the absence of the technology. With a

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<sup>97</sup> Responding to a complaint filed against a Family Court Manager in the Vermont Courts based on the claim that her work constituted the unauthorized practice of law, the Attorney General's Office dismissed the complaint with the following explanation: 'It is my opinion ... that the activities of a case manager in conformance with the job description does not constitute the practice of law. Even if they did, since the activities are authorized by the Court and performed on its behalf, the Attorney General would be hard pressed to argue that they are unauthorized (albeit unlicensed) ... There may be a policy argument against allowing court personnel to help litigants complete forms and understand their right [*sic*] and the legal process, but I do not know what that argument might be': Engler, 'And Justice for All,' *supra* note 19 at 2041, n241, *quoting* Letter from William Griffin, Chief Assistant Attorney General, State of Vermont Office of the Attorney General, to Jan Rickless Paul, Esq., Paul & Paul (8 August 1994) at 2.

vision of Prong 1 expanded to include agencies and tribunals, as well as front-end work, the information and assistance provided at every turn may be provided by non-lawyers. Support, oversight, and training are key ingredients to ensure that the assistance is competent and effective.

A similar analysis applies at Prong 2. Each stage in the delivery spectrum provides opportunities for the use of non-lawyers, subject to the twin restrictions of ethics and effectiveness. The analysis in Part II above, designed to expand our ideas of potential assistance programs with shifting combinations of the variables of who, what, when, where, how, and why, reveals similar opportunities with each formulation. Hotlines, *pro se* clinics, form preparation, websites – each of these vehicles may be staffed either entirely by non-lawyers, or by non-lawyers under the supervision of lawyers where the assistance falls clearly within the ambit of legal advice.

Since Prong 3 typically focuses on representation by counsel, the opportunities for non-lawyers might seem limited. However, many if not most lawyers and legal aid offices utilize non-lawyers, including paralegals, as part of the delivery model. Moreover, not all scenarios limit representation to lawyers. Ontario began regulating paralegals following the enactment of the *Access to Justice Act, 2006*.<sup>98</sup> Under this regime, licensed paralegals can provide advice, draft documents, conduct negotiations and represent clients in small claims court, before administrative tribunals, and before the Ontario Court of Justice for summary conviction offences, hybrid offences where the Crown elects to proceed summarily, and matters falling under the *Provincial Offences Act*.<sup>99</sup> Deputy Judge McGill discussed the use of paralegals in Small Claims Court.<sup>100</sup> In March 2009, the Law Society of Upper Canada stated that today's licensed and insured paralegals are 'providing consumers throughout the province with more choice, protection and improved access to justice.'<sup>101</sup> Lay advocates may represent claimants before most adminis-

98 S.O. 2006, c.21. See *Background Paper*, *supra* note 1.

99 *Ibid.*

100 McGill, 'Challenges in Small Claims Court System Design,' *infra* this volume. ('Externally, the regulation of paralegals, although part of a wider access to justice and quality control measure, directly impacts the small claims courts. There are now over 2700 paralegals in Ontario offering litigants a wide choice of representation, at least theoretically, at different price points' (citations omitted).)

101 Law Society of Upper Canada, Media release, 'Paralegal Regulation Sets Precedent for Consumer Protection,' 30 March 2009, <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=8872>.

trative agencies in the United States, and some studies from the United States and the United Kingdom suggest that lay advocates can be as effective, and at times more effective, than lawyers in certain settings.<sup>102</sup>

As the three-pronged analysis reveals, the opportunities abound for non-lawyers to play crucial roles in providing access to justice for middle-income earners. That reality returns the analysis to the question of 'who' and the concerns of effectiveness and evaluation. The rubric of non-lawyers includes court personnel, paralegals, volunteers (such as senior citizens and university students), law students, staff of social service agencies, government officials, and public and law librarians. Many of those people would embrace the role of comprising a portion of the access to justice delivery system. Others might recoil, believing that their jobs necessitate their interaction with members of the public, but not in the sense of providing legal assistance. For those committed to tackling the problem of providing increased access, the mindset of the particular non-lawyers should be considered and understood, but their ability to provide meaningful assistance and support to those they encounter should be nurtured and supported regardless of their understanding of their roles.

As long as the problem of unmet legal needs remains a problem to be solved by those with legal training, we lose the opportunity to increase dramatically the resources potentially at our disposal. We need to analyse carefully how people with legal needs or justiciable problems respond to those scenarios, and design our responses in ways that reach those who need help, respond appropriately to their needs, and ensure that the responses are effective in resolving the problems. A full array of non-lawyers is essential to that challenge, and careful and continuous evaluation will help match the available non-lawyers with the scenarios in which they are most effective.

## V. Conclusion

As this paper demonstrates, a range of options exists for using non-

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102 See, for example, Engler, 'Connecting Self-Representation to Civil Gideon,' *supra* note 20 at 82 ('With lay advocates, [Herbert] Kritzer's data indicates that the success rate of skilled lay advocates can rival that of skilled attorneys in certain settings ... Authors of one study from England conclude that "specialization, rather than professional status, seems to be the best guarantee of such protection,"' citing Richard Moorhead, Avrom Sherr, and Alan Paterson, 'Contesting Professionalism: Legal Aid and Non-Lawyers in England and Wales' (2003) 37 *Law and Soc. Rev.* 765.

lawyers in an effort to increase access to justice for middle-income earners. The solutions we identify, however, will inevitably be shaped by the questions we ask and the ways in which we define the problems we are trying to solve. With access to justice, the flood of unrepresented litigants and the prevalence of unmet legal needs cause problems for all involved, including judges, court personnel, and opposing counsel. Yet the most important problem to solve is the reality that on a daily basis, in Canada, the United States, and elsewhere, vulnerable litigants – and those who never reach the formal legal system – forfeit important rights and jeopardize basic human needs not because the law and facts are against them, but because they lack legal representation. Our solutions must be driven by the determination to make a reality of the image of the balanced scales of justice, and stem the routine forfeiture of rights by those without the power to protect their rights or to hire lawyers to do so for them. Anything less suggests that by access to justice, we mean mere access, rather than meaningful access.