

# The Legal Needs of the Poor as a Starting Point for Systemic Reform

The Honorable Denise R. Johnson<sup>†</sup>

The crisis in the provision of legal services to poor people has a long history. As with many longstanding social ills—urban sprawl, disintegrating public schools, poverty in general—the persistence of the problem tends to reduce it to subliminal status, despite angst-laden bar meetings, scholarly articles espousing new and innovative approaches, and cycles of warnings and complaints from poverty lawyers. What is beyond challenge, however, is that the gap between the needs of poor clients and lawyers to meet these needs is large and growing larger.<sup>1</sup>

The explanation for the most recent stage of the crisis is the virtual demise of federal funding for legal services. For fiscal year 1996, Congress reduced funding for the Legal Services Corporation (LSC) by thirty percent, continuing a series of major reductions and advocacy restrictions that have severely undermined the ability of legal services lawyers to serve their clients.<sup>2</sup> While it is true that legal services programs had been forced to accept restrictions in past years, new controls prohibiting LSC grantees from using non-LSC resources to engage in class action suits, lobbying, and litigation against a federal or state welfare system<sup>3</sup> have decreased advocacy to the poor from a steady stream to a trickle.

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1. See AMERICAN BAR ASSOCIATION, REPORT WITH RECOMMENDATIONS ON NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 79-80 (1995) (“Based upon the findings from numerous legal needs surveys, state bar reports, and the weight of its witnesses’ testimony, the commission finds that when the nation is viewed as a whole, there are currently insufficient sources of affordable legal help for all low- and moderate-income persons, and that the needs of a large number of such persons are currently unmet.”); see also, e.g., STATE BAR OF WISCONSIN, COMMISSION ON THE DELIVERY OF LEGAL SERVICES: FINAL REPORT AND RECOMMENDATIONS 10 (1996) (noting quantifiable unmet need for the delivery of legal services); COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS, JUSTICE IN THE BALANCE 2020, at 64 (1993) (reporting that “only 15.2 percent of the legal needs of the poor were met in 1990”); Victor Marrero, *Committee to Improve the Availability of Legal Services: Final Report to the Chief Judge of the State of New York*, 19 HOFSTRA L. REV. 755 (1991) (reporting that “[t]he scope and dimensions of the crisis of poverty and the gap between legal needs and legal services associated with them are matters of common experience and are confirmed by information, studies, documentation and statistical evidence that put the size and importance of the crisis beyond reasonable doubts”).

2. See Omnibus Consolidated Rescissions and Appropriations Act (OCRAA), Pub. L. No. 104-134, 110 Stat. 1321 (1996).

3. See *Recent Legislation*, 110 HARV. L. REV. 1346, 1346-47 (1997) (citing OCRAA §§

In Vermont, for example, the LSC cuts mean that the number of eligible clients who receive direct representation is so diminished as to be almost nonexistent. Vermont Legal Aid, Inc., a statewide program formerly funded by LSC, no longer takes LSC funding because of the restrictions. It is operating at a greatly reduced level and takes cases only on an emergency basis.<sup>4</sup> A new LSC-funded program, Legal Services Law Line, operates a "hot line" staffed by lawyers who provide advice, referral, and pro se materials to hundreds of callers with the familiar legal problems of the poor: evictions, divorce, custody, guardianship, child support, consumer frauds, and benefits problems. Callers take the advice and materials and represent themselves in court or before administrative agencies.

In addition to the efforts of full-time legal aid attorneys, many private attorneys in Vermont work for the poor in a pro bono capacity. But this resource also cannot meet the need. By LSC directive, Law Line must work in conjunction with a program utilizing the pro bono services of private attorneys.<sup>5</sup> Vermont Volunteer Lawyers Project is a pro bono program that picks up a small percentage of the cases that need counsel, but not nearly enough lawyers participate to make even a small dent in the problem. Vermont is not atypical in this respect.<sup>6</sup>

There is little doubt that the problem of providing legal services to the poor is severe, but there is no agreement on what to do about it. Most proposals look to familiar faces for the answers—the private bar and the courts, or Congress and state governments. While it will always be essential to press the private bar and legislative bodies for more services and funding, that effort will never provide more than a partial answer to a growing problem.

It is my belief that the situation will not be remedied unless it is attacked as part of a broader problem of access to the justice system. It is not just the poor who cannot afford justice in today's society. Courts across the country have experienced an explosion in pro se litigation,<sup>7</sup>

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504(d)(1), 504(a)(16)).

4. One of the current features of legal services funding is that it is easier to find funding for specific groups, such as the elderly and disabled, or victims of domestic violence, producing a kind of "boutique" legal services. Funding is less available for general service work, which may be what low-income clients need most.

5. See 45 C.F.R. § 1614.1a (1998) (requiring that an LSC grantee devote 12.5% of funds to involving private attorneys in a pro bono capacity).

6. See Marrero, *supra* note 1, at 824 (noting that, despite efforts of bar associations, only about 10% of attorneys in New York engage in pro bono work for the poor); Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 58 (1990) (noting that voluntary programs in Maryland are not meeting needs of the poor).

7. Pro se litigants are appearing with increasing frequency, not just in courts of limited jurisdiction but also in courts of general jurisdiction. See AMERICAN JUDICATURE SOCIETY, MEETING THE CHALLENGE OF PRO SE LITIGATION 8 (1998). There has been a particularly dramatic increase

and many people representing themselves are of moderate income levels and would not be eligible for publicly funded legal services or pro bono services even under the most generous standards that have been employed. Our long-term strategy must move beyond throwing more lawyers at the problem. Instead, we must develop a new approach to doing the traditional business of the courts that will meet the needs of diverse economic groups. Such an approach should not only utilize scarce resources more efficiently, but it also should serve a substantially greater population, and thus be more likely to enjoy broad and continuing political support.

### I. WHY THE OLD SOLUTIONS WILL NOT WORK

Relying on pro bono services of attorneys and federally funded legal services programs will not enable us to provide meaningful access to an overloaded justice system. The seemingly endless debate within the bar about the nature of the lawyer's professional obligation to provide pro bono services has succeeded only in delaying real resolution of the issue. In the meantime, the answer to the question, "Why should attorneys do pro bono?" has become increasingly irrelevant. Focusing only on ways to revive and reorganize legal services programs is also a strategic error in that it treats access to justice as a discrete problem of the poor, rather than of society in general.

Historically, the dominant view has been that the pro bono services of a lawyer are an act of charity, compelled by the lawyer's individual conscience,<sup>8</sup> or, more recently, by codes of professional conduct. The organized bar has not been able to agree on any form of compulsion to increase the level of pro bono activity. Rule 6.1 of the ABA's Model Rules of Professional Conduct sets forth only an aspirational goal: at least 50 hours of pro bono legal services a year, with a substantial majority of the legal services to be rendered to people of limited means or other groups without resources for legal fees. Some states now require mandatory reporting of pro bono activities,<sup>9</sup> but the obligation to serve remains voluntary in every state.

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in domestic relations courts. *See id.* Lower-income people are more likely to represent themselves, *see id.* at 11-12, but data from studies in various jurisdictions indicates that there is no typical profile of a pro se litigant, *see id.* at 13. Some jurisdictions have witnessed marked increases in self-representation by middle income persons. *See id.* at 12.

8. *See* Tigran W. Eldred, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 374 & n. 26 (1994).

9. *See, e.g.*, RULES OF PROFESSIONAL CONDUCT, R. 4-6.1(d) (Florida Bar Association 1998) (requiring members of the Florida bar to annually report whether the member has satisfied the member's professional responsibility to provide pro bono legal services to the poor).

Proponents of mandatory pro bono argue that a legal and enforceable duty may be found in the ethical norms governing the legal profession, especially in light of the present crisis. They buttress their argument for obligatory pro bono with various theories grounded in the notions that lawyers have a monopoly on the justice system and that “meaningful access to the legal system requires the assistance of a lawyer.”<sup>10</sup> Accordingly, asking lawyers to spend a certain percentage of their time on pro bono work is a “fair surcharge for the windfall that accrues from a legal monopoly.”<sup>11</sup> In a variation on the monopoly theme, some have argued that mandatory pro bono is similar to an in-kind user fee, which should be paid by lawyers for the exclusive right to use certain public assets, such as evidentiary privileges, conflict of interest rules, and the work product doctrine.<sup>12</sup> On the other side of the argument, a number of commentators refute the monopoly theory and oppose mandatory pro bono on the ground that the burden of distributing legal services to the poor should be borne by society as a whole, not by individual lawyers.<sup>13</sup>

It is not surprising that these theories have not yielded measurable changes in attitudes or in hours of pro bono services. Ethical norms do not vary in response to ebbs and flows in demand for legal services. Professional standards may change gradually over time, but they are essentially independent of transient factors like shifts in the economy and in political fortunes. Even if new theories were taken seriously, it would be unrealistic to expect an enforceable legal duty to provide pro bono services to match cyclical changes in need.

Pursuant to their regulatory control of lawyers, the courts could, of course, give more teeth to Rule 6.1 by making it mandatory. But I suspect most state courts will not want to assume of the role of “pro bono cop.” Judges are far more willing to encourage lawyers, through voluntary programs, to assist the courts by providing more service to poor clients. More importantly, even if the courts were willing to resolve the moral-obligation-versus-professional-duty debate in favor of mandatory pro bono, the present aspirational goal of 50 hours per year would fall far short of solving the needs of the poor given the current crisis.

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10. See Eldred, *supra* note 8, at 395.

11. *Id.* at 398.

12. See Steven Lubert & Cathryn Stewart, *A “Public Assets” Theory of Lawyers’ Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1262-85 (1997).

13. See Eldred, *supra* note 8, at 397-98 (citing DAVID LUBAN, *LAWYERING AND JUSTICE: AN ETHICAL STUDY* 246 (1988) (“[I]t is unfortunate that poor people cannot obtain lawyers, but that is not the fault of the legal system.”); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1079-80 (1976) (“If the obligation [to serve the poor] is one of justice, then it is an obligation of society as a whole. It is cheap and hypocritical for society to be unwilling to pay the necessary lawyers from the tax revenues of all, and then to claim that individual lawyers are morally at fault for not choosing to work for free.”)).

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Even voluntary pro bono is a hard sell in this economic climate. Increased competition among law firms and the demand for billable hours has reduced opportunities for lawyers to engage in “pro bono service, civic involvement, and experiences that build professional judgment and sustain a professional culture.”<sup>14</sup> Under these conditions, debating “oughts” that are neither enforceable institutionally nor accountable to the marketplace is at best ineffectual and at worst counterproductive. Engaging in this conversation may create the illusion that salvation will follow soon after logic prevails and truth-based advocacy triumphs.

The old solutions also will not work because they assume that the entire subject is best left to the legal profession and the courts. The creation of the Legal Services Corporation may have been a high point in public attention to the legal service needs of the poor; it now appears to have been an exception to the prevailing rule. As important as the program was, it relied heavily on the assumption that the legal profession would remain the core service provider and that the courts would remain the central forum for resolution of disputes. In the days when LSC grantees were allowed to engage in lobbying, legislative initiatives successfully secured broad-scale relief for low-income clients through policy changes in welfare and other programs affecting them. But it is fair to say that the main focus was, and still is, on providing adequate services within the existing judicial system rather than on changing that system. In the absence of systemic changes that would lessen dependency on funded legal services, the Legal Services Corporation was politically at risk from the moment of its creation. The lesson is that stable and comprehensive solutions should not center on any one politically sensitive program, however enlightened in concept and effective in practice it is while it operates.

Realistically, Congress is not likely to reverse the anti-legal services trend begun in the Reagan years. Nor are states prepared to make up the difference. The parallel federal and state focus on welfare reform, though distinct from the pro bono debate, creates an atmosphere in which restoration of former levels of funding, either from Congress or state legislatures, is extremely unlikely.

Finally, focusing on reviving legal services is problematic because it treats the poor as isolated constituents with unique difficulties, thereby masking the connection between their problems and those of other litigants, and obscuring the ways in which the access problem stems from failures in the system's design.

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14. Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 299-300 (1998).

## II. A NEW DIRECTION

The difficulty poor clients experience in their efforts to access justice should be seen as the canary in the coal mine for the justice system as a whole—the poor are affected first because they are more vulnerable, but their difficulties are symptomatic of larger problems that ultimately will affect everyone. Although people of limited means may suffer most acutely from lack of representation, their experience is not an anomaly in an otherwise optimal relationship between society and the legal profession. As I have noted, people of moderate means lack representation for the same reasons as do the poor: because they cannot afford the legal fees.<sup>15</sup> An effective long-term strategy cannot rely solely on reviving legal services for the poor, but must develop approaches that will enhance access to justice for a wider public. There are achievable structural changes that will make the legal system more efficient for its users. Additionally, in the current political climate, legislators and policy makers will be more receptive to funding structural reforms that benefit all users rather than a single sector.

There is no shortage of ideas for ways to reform the legal system.<sup>16</sup> The critical question is which ideas hold the most promise for a large number of litigants and for the institutions of justice, and thus are more likely to be accepted and actually implemented. From the standpoint of solving the access problems of indigent clients, some solutions worth considering include altering the lawyer's monopoly on the justice system and demystifying the law so that lay people can understand it. It is also appropriate to question whether court adjudication, with its attendant emphasis on legal formality, is always the most appropriate method of dispute resolution, either procedurally or substantively.<sup>17</sup>

Critical to any scheme for improving access to justice is a recognition that the monopoly lawyers hold on the justice system has become an unacceptable barrier to change. The increasing use of paralegals has proven that many legal matters, especially those that rely on forms, may be handled quite competently by non-lawyers, with little or no actual supervi-

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15. See Roger C. Cramton, *Delivery of Legal Service to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, n. 28 ("cost is the second most-frequent reason given for not consulting a lawyer") (citing Barbara A. Curran, *Report on the 1989 Survey of the Public's Use of Legal Services, in TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENT OF THE POOR & PUBLIC GENERALLY 55* (ABA Consortium on Legal Services for the Public, 1989)).

16. See Cramton, *supra* note 15, at 532 (reciting long history of commentators expressing widely held views that legal system is grossly inefficient and suggesting various avenues of reform).

17. See, e.g., Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996) (arguing that many conflicts cannot be reduced to binary solutions because of fundamental indeterminacy of facts, irreconcilability of legal entitlements, or equal validity of competing emotional claims in certain cases).

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sion by a person admitted to the bar.<sup>18</sup> Lawyers in candid moments will admit this, but the organized bar has kept a firm grip on rules relating to paralegals and the unauthorized practice of law.<sup>19</sup> The consistent rationale is that consumers need protection against their own ignorance, and that only by regulating lawyers will the public be protected from the unscrupulous.<sup>20</sup> But lawyers have made themselves a scarce resource, and it is difficult to sustain the argument that the poor are being protected by not receiving any legal advice at all.<sup>21</sup> For clients who are poor, uneducated and powerless, and who may have language and cultural barriers that distance them even farther from access to justice, an adviser with a limited range of skills or knowledge is preferable to no adviser at all. Thus, it is possible to agree with the premise that consumers need protection without concluding that giving lawyers an exclusive right to provide service is a necessary safeguard.<sup>22</sup>

I am not suggesting that poor people do not deserve competent representation, but rather that not every case that comes to court requires an adviser with the full range of skills possessed by an attorney. A far more useful approach is to think about ways to expand the universe of potential counselors to the poor by reducing or eliminating the lawyer's monopoly in some areas, without compromising important legal rights.

Lawyers are, of course, essential in fully contested trials. In such cases, legal skills are needed to protect clients, and nonprofessional representation would likely result in negative externalities such as efficiency costs to the tribunal itself or to other litigants.<sup>23</sup> Such litigation, however, represents a relatively small fraction of the legal matters involving the poor. Many cases are quite routine, and may actually be made more complex by the overlay of judicial procedures.

There is significant potential for training nonlawyers to manage and conduct small residential closings, handle uncontested divorces, draw up

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18. Accountants, realtors, paralegals, unions and experienced legal secretaries have proven reliable dispensers of particular kinds of legal advice. See Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 222-28 (1990). But see Florida Bar v. Furman, 451 So. 2d 808, 815 (Fla. 1984) (finding contempt for violation of court order barring a former legal secretary from providing oral advice about divorce forms to persons seeking uncontested divorce). Even assistance in court may be effectively carried out by non-lawyers; for instance, in Vermont, victims' advocates provide emotional support and explain court proceedings in domestic violence cases.

19. All states prohibit the unauthorized practice of law by persons not admitted to the bar. See Cramton, *supra* note 15, at 543.

20. See *id.* at 545.

21. Some argue that the traditional ethical notions that underlie this kind of protectionist argument are based on a profession that no longer exists, i.e., the profession no longer comprises the "19th century tradition of the all-competent generalist lawyer whose clients were almost entirely private individuals." *Id.* at 538.

22. See *id.*

23. See *id.* at 570-71

simple wills, probate small estates, negotiate routine personal injury claims, or collect or defend simple debts.<sup>24</sup> To the extent that these matters require court hearings, they are the sort of cases that could be shifted from courts of general jurisdiction to court-supervised alternative dispute resolution (ADR) mechanisms.<sup>25</sup> A non-exclusive alternative might be a procedurally simplified fast-track within the court system for cases within given subject matter and complexity boundaries.

The opportunities for reducing the formality of the forum and the level of expertise required to operate in it would be even greater if the substantive law could likewise be simplified. The law is often complex because it needs to be. Housing, family and consumer laws—the areas in which legal assistance so often is needed—are not inherently less complex than other laws because they affect poor people. But even when the complexities of substantive laws cannot be eliminated, the text of legislation and regulations may be amenable to simplification and demystification. Modern insurance policies written for home and auto owners are successful examples of moderately complex legal obligations that have been translated into terms people understand. Similarly, if written decisions are required as a result of alternative dispute mechanisms, opinions should be designed for lay comprehension.

A break-up of the lawyer monopoly would require corresponding structural reforms in the judicial system. Innovative court-sponsored ADR programs may have the most potential for simplifying procedures and utilizing non-lawyer counselors to provide service to poor people (and other types of litigants) in appropriate cases. ADR programs already in existence are gaining increasing acceptance by courts and legislatures. Many programs are designed with other goals in mind, such as improving court efficiency in docket management,<sup>26</sup> but they can also be designed to reduce the overall demand for legal proceedings, and, therefore, for lawyers. Counselors will still have to be paid, but presumably not at the rate it takes to support the modern law practice. Even if lawyer representation is retained in some non-court proceedings, ADR proce-

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24. See JEROME E. CARLIN, *LAWYERS ON THEIR OWN: THE SOLO PRACTITIONER IN AN URBAN SETTING*, 206-09 (1994).

25. See Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 580 & n. 3 (1997) (explaining that ADR is an umbrella term used to describe a number of different mechanisms of dispute resolution, such as arbitration, early neutral evaluation, fact-finding, mediation, mediation/arbitration, mini-trials, negotiation, ombudsman, and summary jury trials).

26. See NATIONAL CENTER FOR STATE COURTS NORTHEASTERN REGIONAL OFFICE, *MIDDLESEX MULTI-DOOR COURTHOUSE EVALUATION PROJECT: FINAL REPORT* (1992) (reporting findings from court-annexed program designed to screen cases and refer them to the most appropriate dispute resolution process: case evaluation, mediation, standard arbitration, and complex case management).



dures may be more streamlined than court litigation and cost less as a result.

The challenge is to find a qualitative approach to classifying cases in the justice system that would incorporate, as an operating principle, the notion that trial judges and trial lawyers are scarce resources, and that only those cases requiring their full expertise should be heard in court.<sup>27</sup> There is no reason that every cause of action filed in court should be treated in the same manner. Not all cases merit setting a discovery schedule, holding status conferences, and pushing counsel toward a trial date in the hope that the case will actually settle. In other words, court systems need to spend time figuring out how to handle voluminous non-complex litigation. Filtering out those cases that could be heard by a different kind of tribunal may be more rewarding than simply pressuring parties to settle in an ad hoc fashion.

In family law, the area with the most dramatic demand for services, there is a powerful argument for a substantive change. In Vermont the family court is overwhelmed with the volume of cases filed, with the number of pre- and post-judgment proceedings, and with the emotional crises that plague families in the context of separation and divorce. Lack of representation for a substantial number of cases exacerbates the problem beyond resolution within the traditional forum. Family court judges and staff are barreling toward burn-out because of the frustration of being unable to solve the myriad problems. A change that would benefit litigants across the board would be a move toward a multi-disciplinary approach that would remove certain aspects of family cases from the adversarial process.<sup>28</sup> By multi-disciplinary, I mean using other professionals—social workers, mediators, psychologists—to handle the difficult family problems that are not primarily legal and that are not amenable to

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27. *See id.*, passim. The Middlesex Multi-Door Courthouse project, which focused on optimizing the use of attorneys, judges, and court room time, was evaluated for the efficiency of its screening procedures, cost of procedures, and satisfaction of participants. The evaluation was made relative to a control group whose cases were processed through the traditional court system. Because cases processed through the project required fewer attorney hours and less judicial action, costs were lower, and participants in the project reported a high degree of satisfaction.

28. It is apparent that there are gross inefficiencies in the way the system currently makes use of precious judge-time. Full-blown trials are held in some divorce cases simply because the litigants have the means to pay the legal fees required. It is essential to allocate public resources upon criteria that go beyond the desire of litigants.

a merely legal solution.<sup>29</sup> Absent protection and power imbalance concerns, counseling, mediation and administrative hearings may be more suitable methods of resolving family disputes.

### III. CONCLUSION

The provision of adequate legal services to those in need is essential to the legitimacy of the civil justice system. If the problem of serving the indigent is not solved, the civil justice system will be seen increasingly as a publicly funded dispute resolution mechanism for the rich. Traditional solutions—namely, federally funded legal services programs and pro bono contributions of lawyers—while important, cannot meet the dramatic rise in demand for service.

In my view, the way out of this morass is to recognize that the lack of legal services for the poor is symptomatic of a deeper problem with our nation's court system. Our society has outgrown its judicial system. Nothing short of systemic reform can address these deficiencies. Specific options include reconfiguring the monopoly lawyers have on the justice system by reducing the complexity and formality of proceedings where appropriate. Because the poor are not the only people who are denied access through lack of representation, the most effective and politically viable strategy is to combine forces with other groups calling for broad-based reforms. Much as the health care delivery system has undergone a sea-change in the past decade, moving away from providing service on demand and excessive reliance on the most intensively trained service providers, the crisis of access in the judicial system will force us to recognize the need for systemic reform. The collision of limited resources and increasing demand compels the invention of a new paradigm for thinking about both resources and needs. The judicial system must reassess its purposes with all users in mind and reallocate limited resources according to priorities that do not shut out the economically disadvantaged.

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29. See Patricia G. Barnes, *It May Take a Village . . . or a Specialized Court To Address Family Problems*, 82 A.B.A. J. 22 (Dec. 1996) (observing that domestic relations cases are the fastest growing segment of state court civil caseloads; accordingly, some states have adopted a unified court approach in which a judge works on legal issues while social services concerns are handled by those with expertise in that area); Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996) (arguing that traditional legalistic approach to domestic violence is ineffective and insensitive to the complex circumstances that give rise to violence in intimate relationships).