

# JUDGES AND THE DEREGULATION OF THE LAWYER'S MONOPOLY

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## INTRODUCTION

In a revolutionary moment for the legal profession, the deregulation of legal services is taking hold in many parts of the country. Utah and Arizona, for instance, are experimenting with new regulations that permit nonlawyer advocates to play an active role in assisting people who may not otherwise have access to legal services.<sup>1</sup> In addition, amendments to the rules of professional conduct in both states, as well as those being contemplated in California, now allow nonlawyers to hold a partnership stake in law firms, which may dramatically change the way capital for the delivery of legal services is raised and how technology and artificial intelligence may be leveraged in adjudicating disputes.<sup>2</sup> In the past year alone, at least a dozen states have formed task forces to consider adopting similar provisions.<sup>3</sup> These efforts are looking at ways to crack open the lawyer's monopoly, which has priced legal services out of reach for 85 percent of Americans.<sup>4</sup>

While overt regulatory changes remain enormously controversial, scholars and policymakers have missed a critical part of the landscape: the role state

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1. *See infra* Part I.A.

2. *See infra* Part I.A.

3. Aebra Coe, *Like It or Not, Law May Open Its Doors to Nonlawyers*, LAW360 (Sept. 22, 2019, 8:02 PM), <https://www.law360.com/articles/1201357/like-it-or-not-law-may-open-its-doors-to-nonlawyers> [<https://perma.cc/EGL7-ZPVE>].

4. LEWIS CREEKMAN ET AL., LEGAL SERVS. CORP., JUSTICE GAP REPORT 14 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/D948-NGMH>].

civil trial court judges are playing in the de facto deregulation of the legal profession at the civil trial level. Across the nation, the rise of pro se parties has forced judges to rethink their roles.<sup>5</sup> In the new reality of pro se courts, judges in debt collection, eviction, and family matters—which, together, occupy roughly 90 percent of all civil court dockets<sup>6</sup>—must make critical decisions about how to balance the duty of impartiality with the need to achieve a measure of justice and ensure fair adjudication of disputes.

Drawing on original data from a cross-jurisdictional investigation of the civil justice landscape, this Article shows how some judges—mired in the pro se crisis—are relying on a shadow network of nonlawyer professionals to substitute for the role counsel has traditionally played. Focusing on domestic violence courts as the primary illustration, we find that even in jurisdictions not currently contemplating regulatory reform, judges are relying on organized nonlawyer actors to prepare pleadings, offer substantive and procedural information to litigants, and provide counseling services. These nonlawyer advocates play a significant role in shaping the facts and arguments presented to the judge, which we believe, in turn, influences processes and outcomes.

Notably, in the courts we observed, the collaboration between judges and nonlawyer advocates is hidden behind the scenes. This quiet partnership assists judges in maintaining the perception of impartiality in the courtroom—which is critical to public trust in the courts—while enabling pro se parties to properly raise claims, queue up factual support, clear procedural hurdles, and seek remedies from the justice system. Of note, and discussed further in Part IV, is that nonlawyer advocates assist only petitioners, or alleged victims, in protective order cases, while defendants, or alleged perpetrators, are excluded from their services.

This Article draws on interviews with judges and nonlawyer advocates, as well as hundreds of hours of observation in domestic violence courts to demonstrate that state court judges are leading the charge, out of necessity, toward de facto deregulation of the legal profession, at least in certain pro se courts. Leading academics on the deregulation of the lawyer's monopoly, including Gillian Hadfield, Benjamin Barton, and others, have called attention to de facto deregulation of the legal profession by technology platforms such as LegalZoom.<sup>7</sup> This Article introduces the phenomenon of trial judges as active participants in de facto deregulation and offers a glimpse into *collaboration*—not resistance—by prominent members of the legal profession in deregulating the lawyer's monopoly.

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5. See, e.g., *About, JUST. FOR ALL INITIATIVE*, <https://www.ncsc.org/jfa/about> [<https://perma.cc/D948-NGMH>] (last visited Jan. 27, 2021) (discussing the rise of pro se litigation).

6. See NAT'L CTR. FOR STATE CTS., *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* iii–iv, 3 (2015), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0020/13376/civiljusticereport-2015.pdf](https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf) [<https://perma.cc/KK9B-RKJE>].

7. Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3068 (2014).

In addition to presenting novel research demonstrating this phenomenon, this Article highlights three important implications of the judge's role in diluting the lawyer's monopoly. First, while judges implicitly authorize the role of nonlawyers, their work is primarily performed outside of the courtroom. Nonlawyer advocates often meet with litigants in courthouse hallways or in private court-based interview rooms—underscoring their formalized institutional role—and yet they rarely appear during court proceedings and their role is not publicly acknowledged or delineated by local rule.<sup>8</sup> Often, work that appears like active fact gathering by judges in the courtroom (known as “active judging”) is carefully curated by nonlawyer advocates who have developed factually specific pleadings that guide a judge's questioning of the petitioner.<sup>9</sup> We hypothesize that institutional pressure on judges to prioritize the appearance of neutrality and impartiality creates incentives to keep nonlawyer advocates' critical work concealed from public view.<sup>10</sup>

Second, an opportunity to develop norms around the role of nonlawyers is being squandered. Today, trial judges are quietly experimenting with deregulation of the profession in ways that might assist with innovation in the field. At the same time, formal attempts at deregulation—including court navigators, limited licensing programs, nonlawyer ownership, and the development of regulatory sandboxes—are often greeted with skepticism or outright backlash and opposition from the bar. Trial court judges who have relied heavily on nonlawyers for years could be leaders in developing best practices that ensure the integrity of the legal profession, fill a justice gap for pro se litigants, and help to open up pathways for public and formal recognition of a new class of legal professionals.

And finally, due process demands that the role of nonlawyers be made public. Our research reveals that only one party to a dispute—the petitioner for a protective order—receives nonlawyer assistance, while the defendant in such a dispute typically receives little to no assistance at all. Domestic violence advocates<sup>11</sup> have been effective in organizing wraparound services for survivors, including help with preparing court papers, but those accused of domestic violence and subject to protective order proceedings benefit from no such organizing effort. The interests of survivors are clear; however, it is important to highlight that protective orders may lead to grave consequences for defendants, including the potential loss of physical liberty, residence, or custody of their children. Bringing nonlawyer assistance out of the shadows would make plain that more needs to be done to level the playing field for both parties. Indeed, after the study period concluded, a defendants' advice clinic was added to one study site to address this precise inequity.

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8. *See infra* Part II.

9. *See infra* Part III.

10. Another potential theory, not explored in this Article, is that judges are not concealing the work of advocates, per se, but simply have no outlet or reason to speak publicly about it, leaving the advocates to hide in plain sight—visible to those who work in the trenches of the lower courts but not to entities engaged in regulatory reform.

11. For a discussion on the use of this term, see *infra* Part III.B.

Part I of this Article reviews how the legal profession is regulated and its relationship to the access to justice crisis. Part II canvasses the arguments in favor of deregulation and will highlight select states taking aim at the lawyer's monopoly through new regulatory action. Part III uses original data to present the phenomenon of nonlawyer assistance in state courts and describe its many facets, including the significant contributions to access to justice for recipients of this assistance. Part IV discusses the judicial role in permitting and relying on nonlawyer assistance to preside over pro se cases and the resulting de facto deregulation of the profession. All domestic violence courts in the country are "lawyerless," a term we use to refer to courts in which more than three-quarters of cases involve parties unrepresented by counsel. This creates enormous challenges for judges and is likely a major impetus for their partnership with nonlawyer advocates. Finally, Part V will evaluate the important repercussions of deregulating outside of formal channels, including lost opportunities to rethink the judge's role in lawyerless courts, draw on civil trial judges' expertise in this area to develop best practices for deregulation, and ensure equal access to due process by developing methods to deliver nonlawyer assistance to both parties to a dispute.

## I. HOW THE LEGAL PROFESSION IS REGULATED

### A. *The Lawyer's Monopoly*

The legal profession is unique in that it both regulates itself and holds an absolute monopoly on the provision of legal services. The power to regulate the profession is vested in state supreme courts, which have chosen to delegate a large part of their authority to state bar associations to set rules regarding the practice of law.<sup>12</sup> The monopoly is expansive and prohibits nonlawyers from offering legal services of any kind, including advice, drafting, counseling, or appearances in court.<sup>13</sup> In addition, the lawyer's monopoly is further cemented by preventing nonlawyers from fee sharing or having an ownership stake in a legal services entity.<sup>14</sup>

The basic justification for the monopoly is quality control—that is, only a lawyer is qualified to render counsel and advice to a person with a legal problem. Supporters suggest that the monopoly best protects consumers since nonlawyers are not subject to ethical oversight and discipline by state

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12. Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1204 (2016) (noting that bar associations have largely exercised their power by adopting the Model Rules of Professional Conduct developed by the American Bar Association, either in whole or in large part).

13. Nearly every state has an unauthorized practice of law (UPL) statute barring anyone who has not adhered to the educational requirements of the state bar from providing legal assistance or advice. See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1707 (2008).

14. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2020).

bars.<sup>15</sup> They also argue that inviting nonlawyers to participate in the market for legal services might open the door to fraudulent actors who will offer low-quality services to the public<sup>16</sup> or might result in law firms where lawyers are more beholden to their shareholders than to their clients.<sup>17</sup>

Bar associations, in particular, have been fierce protectors of the monopoly. In California, the private bar referred to the notion of relaxing the monopoly as “[a] catastrophe waiting to happen’ that would ‘completely destroy the practice of law’ and ‘erode the quality of legal services.’”<sup>18</sup> In Virginia, where breaking up the monopoly was considered and rejected, the bar association listed numerous concerns with opening the market for legal services, including

[t]he concept’s success is not yet demonstrable, and the competency of legal paraprofessionals as a general matter is not yet established; there are many underemployed and unemployed lawyers with whom paraprofessionals will compete; and existing court-based resources, pro bono efforts, and law school clinic programs should be expanded instead.<sup>19</sup>

Multinational corporate law firms have staunchly defended the monopoly as well, concerned that the “Big Four” accounting firms would steal much of their business were nonlawyers allowed to provide legal advice.<sup>20</sup> More generally, the bar has raised concerns that deregulation would open the market to “an unsuspecting and ultimately unprotected public [that would then] receiv[e] legal services from unqualified and potentially unscrupulous actors.”<sup>21</sup>

### *B. The Impact of the Monopoly on Access to Justice*

Perhaps the most significant impact of the lawyer’s monopoly is the tremendous negative effect it has on access to civil justice for ordinary Americans. Although the United States has one of the highest concentrations of lawyers in the world, it ranks 109 out of 128 countries in access to justice

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15. Sam Skolnik, *California Bar Trustees Move Toward New Regulatory ‘Sandbox,’* BLOOMBERG L. (May 14, 2020, 5:50 PM), <https://news.bloomberglaw.com/us-law-week/california-bar-trustees-move-toward-new-regulatory-sandbox> [https://perma.cc/8RZP-BZ3L].

16. *Id.*

17. Hadfield & Rhode, *supra* note 12, at 1195.

18. Coe, *supra* note 3.

19. Patrick McGlone, *Can Licensed Legal Paraprofessionals Narrow the Access-to-Justice Gap?*, ABA J. (Sept. 6, 2018, 6:05 AM), [https://www.abajournal.com/news/article/can\\_licensed\\_legal\\_paraprofessionals\\_narrow\\_the\\_access\\_to\\_justice\\_gap](https://www.abajournal.com/news/article/can_licensed_legal_paraprofessionals_narrow_the_access_to_justice_gap) [https://perma.cc/D92S-UJ9N].

20. Sam Skolnik, *Give Non-lawyers a Bigger Legal Role, Utah Report Proposes (1)*, BLOOMBERG L. (Aug. 27, 2019, 5:54 PM), <https://news.bloombergtax.com/bankruptcy-law/non-lawyers-should-have-bigger-legal-role-utah-report-proposes?context=article-related> [https://perma.cc/B2SG-Y48G].

21. Chris Albin-Lackey, *California Should Embrace Nonlawyer Providers*, LAW360 (Oct. 20, 2019, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1211183/california-should-embrace-nonlawyer-providers> [https://perma.cc/V4N4-RWUM].

and affordability of legal services, below Malawi and Afghanistan.<sup>22</sup> The civil access to justice crisis cannot be overemphasized and cuts across almost every dimension of the population, including low-income families,<sup>23</sup> middle-income individuals,<sup>24</sup> and small businesses.<sup>25</sup>

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22. WORLD JUST. PROJECT, RULE OF LAW INDEX 154 (2020) (offering a country-by-country analysis of Factor 7.1, accessibility and affordability of civil justice), [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf) [<https://perma.cc/BAQ2-T2AP>]; *WJP Rule of Law Index Country Insights: United States*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/country/2020/United%20States/Civil%20Justice> [<https://perma.cc/G4FN-NUZ3>] (last visited Jan. 27, 2021) (select “Civil Justice” from the left-hand menu and scroll to Factor 7.1).

23. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 30 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/6YDL-UMQC>]. Low-income Americans comprise a vulnerable group that is unable to afford any private market legal assistance and has no entitlement to government-funded counsel. See Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon* 17 (2020) (unpublished manuscript) (on file with authors). The Legal Services Corporation (LSC), the federal agency in charge of disbursing funds for civil legal aid, has faced a declining budget for decades. See Deborah L. Rhode, *Legal Services Corporation: One of the Worst Cuts in Trump’s Budget*, STANFORD L. SCH. (May 31, 2017), <https://law.stanford.edu/2017/05/31/six-of-the-worst-cuts-in-trumps-budget> [<https://perma.cc/DMC4-ZCQC>]. Civil legal aid organizations report that they must turn away half of the people who seek assistance, typically in basic human needs cases pertaining to physical safety, shelter, economic security, or access to health care. In 2017, low-income Americans approached LSC-funded legal aid organizations for support with an estimated 1.7 million problems. LEGAL SERVS. CORP., *supra*, at 13. They received only limited or no legal help for more than half of these problems due to a lack of resources. *Id.*

24. BENJAMIN H. BARTON, GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION 196 (2015) (“When it comes to legal work for the middle class, bar associations, law schools, and others have no suggestions. Law students are trained to offer individual services by the hour, and cheaper, non-lawyer options are repressed or prosecuted as the unauthorized practice of law (UPL).”); George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession’s Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 776 (2001) (providing examples of unaffordable legal services the middle class needs but cannot access in areas such as real estate transactions, divorce and child custody disputes, financial and estate planning, employment contracts and disputes, and small business contracts and disputes); Andrew M. Perlman, *The Public’s Unmet Need for Legal Services & What Law Schools Can Do About It*, DÆDALUS, Winter 2019, at 75, 75 (“[A] majority of middle-income Americans receive no meaningful assistance when facing important civil legal issues, such as child custody, debt collection, eviction, and foreclosure.”).

25. Small business owners often encounter legal issues, but 60 percent of small business owners report that they cannot afford a lawyer to assist them. JASON SOLOMON ET AL., STANFORD CTR. ON THE LEGAL PRO., HOW REFORMING RULE 5.4 WOULD BENEFIT LAWYERS AND CONSUMERS, PROMOTE INNOVATION, AND INCREASE ACCESS TO JUSTICE 1 (2020), [https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/Rule\\_5.4\\_Whitepaper\\_-\\_Final.pdf](https://www-cdn.law.stanford.edu/wp-content/uploads/2020/04/Rule_5.4_Whitepaper_-_Final.pdf) [<https://perma.cc/2BYW-88WW>]. They consider these legal issues as one of the “greatest threats to their business.” *Id.* (quoting LEGAL SHIELD & DECISION ANALYST, THE LEGAL NEEDS OF SMALL BUSINESS 4 (2013), <https://www.business.com/images/content/58a/da0bd2f87b1207f721220/0-0-/> [<https://perma.cc/Q8UP-A9XN>]); see also Alice Armitage et al., *Startups and Unmet Legal Needs*, 2016 UTAH L. REV. 575, 582–92 (citing high cost and an insufficient number of lawyers available to help startups with contract formation, incorporation, and defending against lawsuits).

The regulatory structure of the profession exacts a significant human toll and plays a role in perpetuating economic hardship and racial injustice.<sup>26</sup> Legal services are primarily performed on behalf of large multinational corporations and exclude regular people who live in a “law thick” world.<sup>27</sup> Three-quarters of all state cases in our civil justice system now involve parties who do not have counsel,<sup>28</sup> a figure that has grown dramatically in recent decades.<sup>29</sup> In these lawyerless courts, up to fifteen million individuals face encounters with the civil justice system each year, in areas such as eviction, debt collection, and child custody, and must navigate an intricate legal system alone. The reality of the monopoly is that it contributes to a mismatch between people’s legal needs and their ability to access services.

Furthermore, many additional Americans have opted out of the courts to solve their problems, despite experiencing civil legal issues that might greatly benefit from intervention and attorney assistance. In a random sample of over 650 adults of all income levels, Rebecca Sandefur demonstrated that two-thirds of Americans experience an average of 2.1 civil justice problems a year—primarily concerning employment, debt, government benefits, insurance claims, and rental housing—but very few attempt to contact a lawyer.<sup>30</sup> The price of an attorney was one consideration, but Sandefur also discovered that many individuals opted out of the courts because of an information deficit: they did not understand their issue as legal in nature.<sup>31</sup> Building on Sandefur’s insight, the Legal Services Corporation (responsible for administering federal funds to legal aid offices) conducted a survey of 2000 adults living below 125 percent of the federal poverty line and reported that 71 percent of poor Americans had experienced at least one civil justice problem in the past year.<sup>32</sup> Of this group—primarily presenting with legal issues related to housing conditions, disability benefits, and veteran’s benefits—only 14 percent received adequate legal assistance.<sup>33</sup> This wider lens demonstrates that the access to justice crisis is even larger than what can be understood by capturing pro se data from the courts. We

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26. See Kathryn A. Sabbeth, *The Prioritization of Criminal over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 909–10 (2015); see also Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55, 60, 83 (2018); Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1591–96 (2018).

27. Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: Legal Resources for Ordinary Americans*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 21–52 (Samuel Estreicher & Joy Radice eds., 2016).

28. See NAT’L CTR. FOR STATE CTS., *supra* note 6, at 35.

29. See *id.* at 31.

30. REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 3, 12 (2014), [https://www.srln.org/system/files/attachments/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_usa\\_aug\\_2014.pdf](https://www.srln.org/system/files/attachments/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf) [<https://perma.cc/72J3-NB2S>] (reporting on interviews with 668 subjects in a medium-sized American city).

31. *Id.* at 3.

32. LEGAL SERVS. CORP., *supra* note 23, at 11, 21.

33. See *id.* at 6, 31–32.

must look to the civil legal needs of the public at large when considering the critical need to increase access to quality and affordable legal assistance.<sup>34</sup>

## II. DEREGULATION OF THE LAWYER'S MONOPOLY—ARGUMENTS AND ACTION

### A. Arguments for Deregulation

For decades, a small band of scholars has argued for deregulation of the legal profession. Gillian Hadfield and Deborah Rhode, prominent voices in regulatory reform, argue that “our existing approaches to regulating the American legal profession increase costs, decrease access, stifle innovation, and do little to protect the interests of those who need or use legal services.”<sup>35</sup> This occurs, they suggest, because our existing model relies solely on one-on-one lawyering and forgoes the cost efficiencies that would result if nonlawyers could partner with lawyers to scale, brand, and market legal services, as well as advance technological capacities.<sup>36</sup> Hadfield and Rhode consider the American legal market “among the most, if not the most, intrusively regulated [markets] in the modern economy.”<sup>37</sup> The result is a monopoly that drives up prices, reduces competition, and creates a one-size-fits-all approach to serving the public’s legal needs.

Proponents of deregulation also argue that the lawyer’s monopoly represents “sheer protectionism,” with lawyers unwilling to give up a share of the legal market and invite competition.<sup>38</sup> Regarding the role of bar associations in opposing deregulation, Sandefur argues:

Their narrow focus on legal services reflects their experience: lawyers’ daily practice shows them many instances when legal services they provide shape people’s lives, sometimes for the better. Their narrowness also reflects any profession’s interest in maintaining jurisdiction over some body of the problems that people experience. Such jurisdiction is the bread and butter of professions and their reason for existing. Lawyers’ fundamental interest is in maintaining their rights to define and diagnose people’s problems as legal, and to provide the services that treat them.

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34. See generally Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443 (2016). Sandefur has often referred to the pro se crisis in the civil courts as capturing only the tip of the iceberg when it comes to assessing the full nature of the civil legal needs of the public. See Rebecca L. Sandefur, *Access to What?*, DÆDALUS, Winter 2019, at 49, 50–51.

35. Hadfield & Rhode, *supra* note 12, at 1192; see also BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 172–73 (2017); Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. PRO. LAW. 79, 79 (arguing that “stratification of the legal profession[] has not been adequately explored as a way to increase access to legal services” and defining “stratification” as the “training, education and licensure of professionals—other than lawyers—to provide some legal services”).

36. Hadfield & Rhode, *supra* note 12, at 1193–94.

37. *Id.* at 1194.

38. *Id.*



*The bar's account dominates the discussion because it is simple and sounds reasonable, not because it is accurate.*<sup>39</sup>

Deregulation proponents have pushed to lift restrictions on the unauthorized practice of law so that a tiered system of legal professionals might emerge—much the way the medical field is comprised of doctors, nurses, and technicians, each of whom perform a distinct and important role in the delivery of health services.<sup>40</sup> In addition, reformers have argued for the repeal of Rule 5.4, as adopted in various jurisdictions based on the Model Rules of Professional Conduct, which prohibits nonlawyers from having an ownership stake in a legal services entity.<sup>41</sup> The U.S. Supreme Court has recognized that when a profession regulates itself, it can be difficult to disentangle anticompetitive motives from concern for the public interest, but the Court has stopped short of applying this analysis to lawyers.<sup>42</sup> Therefore, rule change from within the legal profession is currently the only path toward loosening market restrictions on who can provide legal advice and counsel.

Although most bar associations have actively opposed opening up the market for legal services,<sup>43</sup> little evidence exists to support their claim that only a lawyer can provide quality assistance.<sup>44</sup> In fact, Sandefur has amassed

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39. Sandefur, *supra* note 34, at 49 (emphasis added) (footnote omitted).

40. BARTON & BIBAS, *supra* note 35, at 174–77; Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law*, 38 INT'L REV. L. & ECON. (SPECIAL ISSUE) 43, 60–61 (2014) (arguing that in-store health clinics “are routinely staffed by nurse practitioners rather than MDs” and that “[n]one of these incursions on the corporate practice of medicine doctrine resulted in a diminution of the professional responsibility of care that physicians hold toward their patients”); see also Hadfield & Rhode, *supra* note 12, at 1214 n.82 (detailing heavy reliance by the medical profession on a system of tiered professionals, such as nurse practitioners, certified nurse anesthetists, pharmacists, and physical therapists “to appropriately allocate expensive MD services where they are needed and reduce the cost of routine care”).

41. Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 11 (2012).

42. In *North Carolina State Board of Dental Examiners v. FTC*, a case involving the dental profession, the Court concluded that market participants cannot regulate their own markets without antitrust accountability. *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 505–06 (2015). Elizabeth Chambliss offers an insightful analysis of *Dental Examiners* as ushering in an era of evidence-based regulation by requiring bar associations to show “active supervision” by state supreme courts in order to invoke immunity from antitrust liability. Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U. L. REV. 297, 301–303 (2019).

43. The New York City Bar Association is an exception to local bar opposition and was ahead of its time in issuing a 1995 report that recommended a pilot program to “permit appropriately trained nonlawyer advocates to provide out-of-court assistance in a discrete substantive area.” N.Y.C. BAR ASS'N, *NARROWING THE “JUSTICE GAP”: ROLES FOR NONLAWYER PRACTITIONERS 1* (2013), <https://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf> [<https://perma.cc/9TK4-ZH4X>] (quoting THE TASK FORCE TO EXPAND CIV. LEGAL SERVS. IN N.Y., *REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 39* (2012), [http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT\\_Nov-2012.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT_Nov-2012.pdf) [<https://perma.cc/62HK-K8FJ>]).

44. DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* 49–50 (2015); Chambliss, *supra* note 42, at 299 (showing that courts have required very little evidence to dispose of the need for anticompetitive regulation and support the lawyer's monopoly). Deborah Rhode points to

studies in a wide range of contexts demonstrating that lay advocates can perform successfully as legal professionals.<sup>45</sup> Furthermore, as scholars have pointed out, lawyers are not currently providing services to most of the American population.<sup>46</sup> Therefore, the salient question is not whether an alternative provider of legal services is as good as a lawyer but rather, whether that alternative provider is better than nothing.

### B. Action Toward Deregulation

In a paradigm shift for the lawyer's monopoly, select states are now taking action to deregulate the legal profession.<sup>47</sup> Utah has emerged as the national leader in regulatory reform and has taken groundbreaking steps to loosen restrictions on who can have an equity stake in a legal services entity.<sup>48</sup> A standing order of the Utah Supreme Court has created a "regulatory sandbox"—a pilot program through which nontraditional entities, co-owned by lawyers and nonlawyers, can apply to deliver legal services subject to evaluation and oversight.<sup>49</sup> Sandbox entities are expected to offer innovative

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the example of Colorado, where the state supreme court upheld the ability of nonlawyers to represent claimants in unemployment proceedings in *Unauthorized Practice of Law Committee v. Employers Unity, Inc.*, 716 P.2d 460, 463 (Colo. 1986), reasoning that certain forms of lay representation had existed for fifty years. RHODE, *supra*, at 49–50. The court concluded that the lay representation system at issue "poses no threat to the People of the State of Colorado [and n]or is it interfering with the proper administration of justice." *Unauthorized Prac. of L. Comm.*, 716 P.2d at 463. The court also noted that "[n]o evidence was presented to the contrary." *Id.* Similarly, the Washington State Supreme Court concluded that it was in the public interest to allow licensed real estate brokers to fill in standard form agreements, finding that no harm would accrue to consumers. *See id.*

45. Sandefur, *supra* note 34, at 52. As one example among many, Rebecca Sandefur and Thomas Clarke's study of "court navigators"—individuals trained to provide legal assistance to pro se parties in rental housing cases in two New York City courts—found that navigators competently performed their roles. The study's findings included that navigators were far more likely to help pro se parties tell their stories, ensure their defenses were recognized by the court, and achieve desired outcomes, such as court orders requiring landlords to abate housing code violations. At one of the navigator study sites, *none* of the assisted tenants were forcibly evicted from their homes, compared to an approximately 11 percent eviction rate in the years prior to the launch of the navigator program. REBECCA L. SANDEFUR, AM. BAR. FOUND. & THOMAS M. CLARKE, NAT'L CTR. FOR STATE CTS., ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS 4–6 (2016), [http://www.americanbarfoundation.org/uploads/cms/documents/new\\_york\\_city\\_court\\_navigators\\_report\\_final\\_with\\_final\\_links\\_december\\_2016.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/new_york_city_court_navigators_report_final_with_final_links_december_2016.pdf) [<https://perma.cc/6VN6-L5XN>].

46. Emily A. Spieler, *The Paradox of Access to Civil Justice: The "Glut" of New Lawyers and the Persistence of Unmet Need*, 44 U. TOL. L. REV. 365, 367 (2013) (illuminating the irony that a "glut" of new lawyers entered the profession after the 2008 recession and could not find employment while, simultaneously, the vast majority of Americans' legal needs went unmet).

47. *See* Ben Lehnardt & Anna E. Carpenter, *Re-regulating Legal Services*, A.B.A. L. PRAC. MAG., July/Aug. 2020, at 54, 54. *See generally* David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISCOURSE 246 (2020).

48. In addition, New Mexico and Illinois have formed task forces to study the issue. Coe, *supra* note 3.

49. *Supreme Court Regulatory Reform Proposal—Comment Period Closes July 23, 2020*, UTAH CTS. (Apr. 24, 2020), <http://www.utcourts.gov/utc/rules-comment/2020/04/24/supreme-court-regulatory-reform-proposal-comment-period-closes-july-23-2020> [<https://perma.cc/A74F-6KVS>]. A regulatory sandbox is a "well-established policy tool

ways of delivering legal services. One example of such an entity is an eviction defense firm owned by a lawyer and two social workers, who offer services on a sliding scale and share profits. Another example is a multiprofession firm in which a lawyer partners with a technologist to create online legal tools for estate planning.<sup>50</sup> Elizabeth Chambliss has championed the sandbox concept for creating an evidence-based model of deregulation in which alternative entities are monitored and overseen.<sup>51</sup> California's State Bar Board of Trustees voted in May 2020 to explore similar regulatory reforms as a way of expanding access to affordable legal assistance,<sup>52</sup> and both New Mexico and Illinois have formed task forces in the past year to study the sandbox model.<sup>53</sup>

In addition, several states are enacting plans to create new forms of licensure for legal professionals who have not attended law school or passed the bar exam. In 2019, Utah's supreme court authorized a Licensed Paralegal Practitioner (LPP) program<sup>54</sup> that aims to develop a new type of legal professional able to assist clients in family law, eviction, and debt collection matters—the three largest categories of civil justice issues and the ones in which the most vulnerable party is least likely to have a lawyer.<sup>55</sup> LPPs must have a paralegal certificate or degree, complete 1500 hours of apprenticeship training in the substantive area where they intend to practice, and pass an

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through which regulators permit new models and services in a market under careful oversight to test the interest, viability, and consumer impact and inform policy development.” *Utah Legal Regulatory Reform: Basic Facts*, UTAH CTS., [https://uploads-ssl.webflow.com/5d03efebc4cbd6d7c884b485/5eb4ce987b732d0b802f9190\\_UTAH%20Fact%20Sheet%20FINAL.pdf](https://uploads-ssl.webflow.com/5d03efebc4cbd6d7c884b485/5eb4ce987b732d0b802f9190_UTAH%20Fact%20Sheet%20FINAL.pdf) [<https://perma.cc/4VFQ-NN5R>] (last visited Jan. 27, 2021). Utah is developing a new regulatory body to oversee the sandbox and to ensure regulated entities both provide value with their services and do no harm to consumers. *See Supreme Court Regulatory Reform Proposal—Comment Period Closes July 23, 2020*, *supra*. Currently, the sandbox is experimental and involves an iterative evaluation process between regulator and entity, but these models could well become permanent if they succeed.

50. The technology component of the sandbox is particularly important. In most states, artificial intelligence platforms that conduct legal analysis can only be sold to law firms at fixed prices; the technologists cannot claim an ownership stake in the business, which limits their drive to innovate.

51. Chambliss, *supra* note 42, at 337–38.

52. Skolnik, *supra* note 15; *see also* ROCÍO AVALOS ET AL., STATE BAR OF CAL., 2019 CALIFORNIA JUSTICE GAP STUDY EXECUTIVE REPORT 4, 26 (2019), <https://www.calbar.ca.gov/Portals/0/documents/accessJustice/Justice-Gap-Study-Executive-Summary.pdf> [<https://perma.cc/VKR3-NGRC>] (noting that regulatory reform is responsive to the access to justice crisis in California and citing a 2019 study finding that “[m]any Californians, regardless of income, are navigating critical civil legal issues without legal representation or meaningful legal assistance”); SOLOMON ET AL., *supra* note 25, at 1.

53. Coe, *supra* note 3; *see also* AD HOC LICENSED LEGAL TECHNICIANS WORKGROUP, INNOVATION TO ADDRESS THE ACCESS TO JUSTICE GAP: REPORT TO THE NEW MEXICO SUPREME COURT 22–25 (2019), <https://cms.nmcourts.gov/uploads/files/News/Report%20to%20Supreme%20Court-Ad%20Hoc%20Licensed%20Legal%20Technicians%20Workgroup.pdf> [<https://perma.cc/PV44-UMTT>]; ILL. ATT'Y REGISTRATION & DISCIPLINARY COMM'N, INTERMEDIARY CONNECTING SERVICES PROPOSAL: EXECUTIVE SUMMARY AND CALL FOR COMMENTS 5 (2020), [https://www.iardc.org/icsproposal/resources/Proposal\\_-\\_Standalone\\_Draft\\_for\\_Publication.pdf](https://www.iardc.org/icsproposal/resources/Proposal_-_Standalone_Draft_for_Publication.pdf) [<https://perma.cc/2367-H4DB>].

54. UTAH SUP. CT. PRO. PRAC. R. 14-802.

55. Steinberg, *supra* note 26, at 1591–97.

exam.<sup>56</sup> With those credentials, LPPs are then permitted to provide an array of legal services, including advice, negotiation, and document preparation.<sup>57</sup> In 2020, Arizona followed suit with the creation of a Licensed Legal Advocate (LLA) program that credentials trained individuals to provide limited scope legal advice to domestic violence survivors in the nonprofit sector, 86 percent of whom currently do not receive any legal assistance.<sup>58</sup> Both Minnesota and Colorado are also developing pilot projects to allow paraprofessionals to deliver legal advice,<sup>59</sup> and Arizona will soon launch an expanded Legal Paraprofessional Program.<sup>60</sup>

These states follow in the footsteps of Washington State, which authorized the first paraprofessional licensure program in 2012 but later shuttered the program due to low enrollment.<sup>61</sup> Benjamin Barton has argued that Washington's doomed efforts were preordained to fail, largely because the bar demanded high access barriers for interested applicants, including educational and financial requirements that made the model unattractive as a professional choice.<sup>62</sup>

States' efforts to deregulate make clear that the market for legal services is undergoing its most dramatic reexamination in decades.<sup>63</sup> In this

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56. *See supra* note 54.

57. UTAH SUP. CT. PRO. PRAC. R. 14-802.

58. *New "Licensed Legal Advocates" Program Aims to Close Justice Gap for Domestic Violence Survivors, Provide New Path for Legal Support*, UNIV. OF ARIZ. (Feb. 3, 2020) [hereinafter *New "Licensed Legal Advocates" Program*], <https://law.arizona.edu/news/2020/02/new-licensed-legal-advocates-pilot-program> [<https://perma.cc/8Y79-UF9Z>]. Under an Arizona Supreme Court administrative order, LLAs will be permitted to provide legal advice to domestic violence survivors with respect to a wide range of issues, including protective orders, divorce, custody, consumer protection, and housing. LLAs are social workers who already work with trauma victims and must complete a modular training series in order to add legal advice to their tool kits, including advice on how to complete a petition, prepare for court, and negotiate a consent order. Administrative Order No. 2020-84 (Ariz. June 3, 2020).

59. MARY E. MCCLYMONT, JUST. LAB AT GEORGETOWN L. CTR., *NONLAWYER NAVIGATORS IN STATE COURTS: AN EMERGING CONSENSUS* 10 (2019), <https://www.srln.org/system/files/attachments/Final%20Navigator%20report%20in%20word-6.11.hyperlinks.pdf> [<https://perma.cc/9PVN-NRKS>].

60. Administrative Order No. 2020-84.

61. Order No. 25700-A-1005 (Wash. June 14, 2012); Lyle Moran, *How the Washington Supreme Court's LLLT Program Met Its Demise*, ABA J. (July 9, 2020), <https://www.abajournal.com/web/article/how-washingtons-limited-license-legal-technician-program-met-its-demise> [<https://perma.cc/9AV5-VR75>].

62. BARTON & BIBAS, *supra* note 35, at 173–74; *see also* Albin-Lackey, *supra* note 21 (discussing Washington's Limited License Legal Technician program, noting that seven years into the program “only around 40 nonlawyers have actually become licensed as providers under the new . . . regime” and suggesting that the “significant educational requirements and 3,000 hours of work under an attorney’s supervision”—which are required as part of the Limited License Legal Technician licensure process—created barriers to entry that could not be justified by many aspiring technicians given the limited scope of practice they would be able to engage in and the considerable uncertainty around whether the state bar would “ultimately allow them to flourish”).

63. BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 237–38 (2015) (arguing that “regulatory sluggishness” has allowed “computers, outsourcing, and non-lawyers” to swarm the market, making it even more critical that the profession respond to the changing times).

watershed moment, models, best practices, and institutional expertise will be needed to build alternative systems for the delivery of legal services that meet the public's demand for assistance.<sup>64</sup> In particular, Washington's unsuccessful attempt at creating a robust paraprofessional class is a cautionary tale that admonishes states to develop their programs carefully, attract quality applicants, and ensure that licensed individuals can count on a viable business model for launching their practices once they complete programmatic requirements.

To date, states have largely formed their deregulation task forces with state supreme court justices, members of the practicing bar, academics, and lawyers in the civil legal aid community.<sup>65</sup> While these important stakeholders are critical to crafting intelligent regulatory structures that break up the lawyer's monopoly and invite new actors into the profession, our research demonstrates that two important sources of information have not been tapped: (1) civil trial judges who preside over lawyerless courts and (2) the nonlawyer advocates that have been working with judges behind the scenes for years outside of any formal regulatory structures. As the next part will detail, these judges have extensive experience and wisdom to offer, as do the nonlawyer advocates who perform legal services for pro se parties.<sup>66</sup> Indeed, in the parts that follow, we argue that the partnership between trial judges and nonlawyer advocates has contributed to de facto deregulation of the legal profession in certain lawyerless courts—even without authorizing guidance. These long-existing partnerships, which result in the successful delivery of legal services to underserved populations, should be carefully studied for practices, resources, and models, as formal efforts toward deregulation are contemplated by state supreme courts and adjacent task forces across the nation.

### III. JUDGES AND NONLAWYER ADVOCATES

#### A. *Our Study on the Role of the Judge in Pro Se Courts*

Over a span of two years, we examined the role of the judge in state civil justice, with a particular focus on the relationship between trial judges and pro se parties.<sup>67</sup> At each of three research sites in different states, we studied civil domestic violence cases in which petitioners (the alleged victims) seek protective orders against people who they claim have harassed, threatened, stalked, or assaulted them. Our study sites varied considerably in terms of the culture and demographics of the courts, the size and density of the cities

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64. Rebecca Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J.C.R. & C.L. 283, 289–97 (2020) (providing empirical evidence that consumers want advice from nonlawyer legal professionals and already use them when permitted by law).

65. *See, e.g.*, Administrative Order No. 2018-111 app. (Ariz. Nov. 21, 2018).

66. *See infra* Part III.

67. For further explication of our methodology, see Anna E. Carpenter et al., *Judges in Lawyerless Courts* (2021) (unpublished manuscript) (on file with authors).

in which the courts were located, and the political affiliations of the judges.<sup>68</sup> Protective order cases are ideal for cross-jurisdictional analysis even within the highly decentralized and uncoordinated U.S. state civil justice system. Unlike many other legal areas, substantive and procedural domestic violence law tends to be fairly static across states and is almost a controlled variable against which the actions of judges can be evaluated.

All domestic violence courts are lawyerless, meaning more than 75 percent of cases involve an unrepresented party.<sup>69</sup> Lawyerless courts pose significant challenges for judges who are bound by ethical rules that define their role based on the principle of impartiality.<sup>70</sup> They also pose extraordinary barriers for parties, who often struggle to provide relevant and factually specific testimony, produce reliable evidence, and comply with required procedures.<sup>71</sup>

For the purposes of this Article, we draw on observations of roughly 275 court hearings at two of our study sites in different states, which we call “Centerville” and “Plainville,” as well as semistructured, long-form interviews with judges, protective order attorneys, and nonlawyer advocates who work with petitioners in protective order matters.<sup>72</sup> What we find upends our assumptions about the judicial role in state civil justice. Our field observations of judges in action reveal a picture of an “active judge,” one who sheds the traditional cloak of neutrality in favor of eliciting information from petitioners to establish the right to a protective order.<sup>73</sup> That itself is a striking finding, at odds with traditional conceptions of the judicial role, and is explored elsewhere in our work.<sup>74</sup>

However, our interviews with judges and the court-adjacent personnel who serve pro se parties uncover further nuance and surprise in understanding the judicial role. Judges are quietly collaborating with a network of nonlawyer advocates who carefully curate protective order petitions, develop facts and evidence, counsel pro se petitioners, and influence the judge’s performance in court and, presumably, the outcome of cases. We suggest that judges rely

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68. *Id.*

69. Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 347 (2011) (“Almost all petitioners enter the [protective order] system *pro se*, and only a fortunate few are able to obtain counsel after filing their cases.”); *see also, e.g.*, D.C. ACCESS TO JUST. COMM’N, DELIVERING JUSTICE: ADDRESSING CIVIL LEGAL NEEDS IN THE DISTRICT OF COLUMBIA 115 (2019), [https://dcaccesstojustice.org/assets/pdf/Delivering\\_Justice\\_2019.pdf](https://dcaccesstojustice.org/assets/pdf/Delivering_Justice_2019.pdf) [<https://perma.cc/A954-4YJ6>]; (noting that 88 percent of petitioners and 95 percent of defendants are pro se); Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 170 (2003) (noting a pro se rate of 83.4 percent); *New “Licensed Legal Advocates” Program*, *supra* note 58 (noting that 86 percent of petitioners are pro se).

70. MODEL CODE OF JUD. CONDUCT Canons 1.2, 2.2 (AM. BAR. ASS’N 2010).

71. Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 754–58 (2015).

72. For the third study site, we have robust observational data of court proceedings, but judges and nonlawyer advocates declined to be interviewed about their roles.

73. Carpenter et al., *supra* note 67.

74. *Id.*

on nonlawyer advocates for two reasons. First, they are under enormous pressure to process cases quickly and nonlawyer preparation of cases behind the scenes is enormously beneficial to docket control.<sup>75</sup> Second, without nonlawyer-crafted petitions, judges would face great difficulty honing in on the legal bases for the protective order claims, which would either result in dismissals of meritorious cases or compel judges to step further outside of acknowledged ethical boundaries to assist pro se parties in developing their claims.<sup>76</sup>

It is important to note that our study sites are not unique in uncovering nonlawyer advocate programs. In a national study of the availability of nonlawyer advocates in civil justice courts, Mary McClymont conducted interviews with sixty “informants” who describe twenty-three “trailblazer” nonlawyer advocate programs operating in jurisdictions across the country.<sup>77</sup> McClymont refers to these advocates as “navigators”—reflecting that no clear branding has emerged for this role.<sup>78</sup> However, the programs we highlight below are very similar to most McClymont describes, including features such as judicial cooperation with or oversight of the nonlawyer programs, the delivery of an array of legal services for pro se parties, no authorization by formal court rule, and a certain invisibility to the role of nonlawyers in the public courtroom.<sup>79</sup>

Of particular significance to this Article is McClymont’s finding that nonlawyer advocacy programs are most common in the protective order context and, in fact, are “widespread across the country.”<sup>80</sup> The National Network to End Domestic Violence reported that 53 percent of the 1873 domestic violence programs in the country provide “court advocacy/legal accompaniment” services.<sup>81</sup> This suggests that our findings may have relevance to a range of similar domestic violence programs offering protective order services by nonlawyers.<sup>82</sup>

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75. Interview with Judge Two, in Centerville (on file with authors) (“We are under a lot of pressure to get cases resolved.”); Interview with Judge One, in Plainville (on file with authors) (“[Y]ou have to be efficient.”).

76. Scholars have written about the difficulty of adjudicating claims in lawyerless courts in several other areas, particularly in courts without formal procedural rules or in courts where those rules are disregarded. See Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303, 1323–30 (2019); Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 22 GEO. J. ON POVERTY L. & POL’Y 473, 475 (2015).

77. McClymont, *supra* note 59, at 6, 13–14.

78. *Id.* at 11–12, 17.

79. *Id.* at 14–16.

80. *Id.* at 15.

81. NAT’L NETWORK TO END DOMESTIC VIOLENCE, 12TH ANNUAL DOMESTIC VIOLENCE COUNTS REPORT 1 (2017), [https://nnedv.org/wp-content/uploads/2019/07/Library\\_Census\\_2017\\_Report\\_High\\_Resolution.pdf](https://nnedv.org/wp-content/uploads/2019/07/Library_Census_2017_Report_High_Resolution.pdf) [<https://perma.cc/SGC3-FR24>].

82. Nonlawyer advocacy programs are also common in the United Kingdom, where the provision of legal advice is not a regulated area in the practice of law. *Reserved Legal Activities*, LEGAL SERVS. BD., <https://www.legalservicesboard.org.uk/enquiries/frequently-asked-questions/reserved-legal-activities> [<https://perma.cc/4HBS-E2K9>] (last visited Jan. 27, 2021). In the United Kingdom, nonlawyers are known as McKenzie Friends and provide a range of services much like those described in this paper. Sandefur, *supra* note 64, at 283, 294–95.

Within this context, the next two sections will utilize original qualitative data to illustrate the many facets of the nonlawyer role at our study sites, a position not officially authorized by regulatory structures in the states we studied.

### B. Key Features of the Advocates' Role

There are three key features of the advocates' role: its breadth, the location where services are rendered, and the invisibility of the advocates' work.

In protective order courts, the nonlawyers who assist petitioners are known as domestic violence advocates. They work for nonprofits funded, in part, by the Violence Against Women Act of 1994<sup>83</sup> but perform their work in the courts.<sup>84</sup> A critical aspect of the advocates' role is the breadth of their work with domestic violence petitioners. In Centerville, nonlawyer advocates report writing 2682 petitions per year,<sup>85</sup> more than half of the 5578 protective order petitions filed in court.<sup>86</sup> Advocates in Centerville work for an agency that runs a twenty-four-hour hotline serving 11,000 people per year and work closely with police to provide safety planning and crisis intervention to any victim of domestic violence.<sup>87</sup> The figures are similar in Plainville.<sup>88</sup>

A second important component of the advocates' role is the location of their work. In Centerville, the advocates have a permanent office next to the filing clerk, and in Plainville, the advocates work out of the basement of a government building next to the courthouse. At both study sites, court clerks review filings, identify petitioners with a claim of intimate partner violence, and automatically direct those petitioners to advocates for a range of services, including help completing their court paperwork.

In addition, in both Centerville and Plainville, the advocates are stationed inside the courtroom during protective order proceedings, but their presence is unobtrusive, lacking any obvious indicator of the significance or official nature of their role. To communicate with pro se parties, Centerville and Plainville advocates must whisper to petitioners seated in the gallery before the judge takes the bench to remind them of the advocacy plan devised

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83. Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of the U.S.C.).

84. The Violence Against Women Act funds nonlawyer advocates in domestic violence proceedings in other areas of the country as well. MCCLYMONT, *supra* note 59, at 31.

85. The only reason the number of completed petitions is not higher is that domestic violence advocates only serve people alleging intimate partner violence, while the protective order statutes are typically much broader and include disputes between people with other types of relationships. Interview with Domestic Violence Advocate One, in Centerville (on file with authors).

86. This data was obtained from the Centerville courts and a copy remains on file with the authors.

87. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85.

88. In Plainville, 4762 protective orders were filed with the court in 2019, for example, and figures are similar for other years. This data was obtained from the Plainville courts and a copy remains on file with the authors.



together with the advocates prior to the court proceeding.<sup>89</sup> Occasionally, when a petitioner appears particularly confused, Centerville judges may interrupt a proceeding to ask if an advocate is in the courtroom and can assist the pro se party in the hallway—indeed, this occasional judicial reference to the advocates is how we detected their presence at all.<sup>90</sup> In Plainville, courtroom advocates provide substantial services after a ruling has been reached or the case dismissed, in addition to their prehearing work with petitioners.<sup>91</sup> Plainville judges direct petitioners to exit the courtroom through a backdoor that leads to judicial chambers.<sup>92</sup> In chambers, advocates explain what happened in court, which might include explanation of orders or how to effectuate service so a hearing can take place.<sup>93</sup>

Finally, we draw attention to the invisibility of advocates' work. There is a paradox at play here. On the one hand, advocates are intimately embedded in the courts, serve a majority of petitioners who file protective orders, and are relied on by judges to off-load the burdens of serving pro se parties. They are quite visible to judges, court staff, and pro se parties—and, ultimately, were visible to us as observers of these courts. On the other hand, the advocates' activities—while known to actors within the court ecosystem—are hidden from public view or, at the very least, hiding in plain sight.<sup>94</sup> Their role is not formally acknowledged or regulated by the bar or state supreme court. Furthermore, little transparency exists as to how advocates serve petitioners and even whether petitioners are required to avail themselves of the advocates' services or merely have the option to do so. One advocate voiced a common source of confusion, which is that pro se parties do not understand who an advocate is, who they work for, and what they do. She states that “a lot of people think I’m court staff. I kinda just explain that I’m an . . . advocate and that I’m there to help them.”<sup>95</sup>

### C. Range of Advocates' Legal Work

We find ample evidence that advocates provide the full range of services one might expect from a lawyer, short of appearing in court. Advocates identify protective orders as an option, among many, that domestic violence

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89. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85 (describing this activity in Centerville). The Plainville activity was documented through personal observations by a researcher on this project.

90. *See* Interview with Judge Two, in Centerville, *supra* note 75 (“Is there an advocate in the room?”).

91. Interview with Domestic Violence Advocate Two, in Plainville (on file with authors).

92. *Id.*; Interview with Judge One, in Plainville, *supra* note 75.

93. Interview with Domestic Violence Advocate Two, in Plainville, *supra* note 91.

94. Richard Zorza and David Udell make the important point that the invisibility of nonlawyers protects their role since legal stakeholders are more likely to accept their scope of practice as long as their activities do not extend to the trial courtroom. Richard Zorza & David Udell, *New Roles for Non-lawyers to Increase Access to Justice*, 41 *FORDHAM URB. L.J.* 1259, 1273 (2016). Exploration of nonlawyers' incentives to keep their role informal and unregulated is outside the scope of this Article but would be a fruitful avenue of further inquiry.

95. Interview with Domestic Violence Advocate One, in Plainville (on file with authors).

survivors might pursue. They elicit factual information from petitioners in service of preparing protective order pleadings. They assist in the development of evidence. They offer explanations about what the court process entails. And finally, they counsel petitioners on whether to pursue legal recourse, how to select remedies, and how to clear procedural hurdles, such as service of process.

### 1. Identifying Protective Orders as an Option

Advocates have multiple access points at which they meet domestic violence survivors. They run a twenty-four-hour hotline, participate in police ride-alongs, and partner with shelters and child and family services.<sup>96</sup> While much initial advocate-to-survivor communication centers around safety planning and crisis intervention, advocates report that they also “introduce protective orders and talk about that as an option.”<sup>97</sup> The discussion around protective orders is informed by the survivor’s goals, as evaluated by advocates. A protective order docket attorney explains that, in her office, advocates “sit with [survivors], talk about what’s going on, what their goal is and assess the situation. Based on that, they’ll either do a protective order, or if it’s a real safety concern where maybe the protective order’s not a good idea, we’ll safety plan around that.”<sup>98</sup>

The community outreach conducted by advocates is comprehensive. They encourage survivors to assert their legal rights and prepare them to engage in the court process. As one advocate reports: “It’s fairly rare that people are coming to court without any previous contact with us in some way. Most [survivors] already have a little bit of an idea of what the [protective order] process is and who we are.”<sup>99</sup>

### 2. Eliciting Facts and Preparing Pleadings

Perhaps advocates’ most important contribution to petitioners is the expert manner in which they help craft pleadings. One advocate describes the process as such:

We frame the issue around timing—we start with the most recent incident and work backwards. So if a client says, “My child’s father called me a bitch, I’m sick of this bullshit, he’s always trashed.” I would say, “Can you tell me more? Did he put his hands on you? Did you fear for your safety? Did you fear for your child’s safety?” . . . We also push people to talk about instances of [domestic violence] that aren’t right at the surface. So we might ask, “Have his actions increased? Do you feel it’s increased over the past 6 months? How?” Or we might ask, “Has he threatened to hurt himself if you leave?” That’s a part of [domestic violence] but people don’t

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96. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85.

97. *Id.*

98. Interview with Protective Order Docket Attorney, in Plainville (on file with authors).

99. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85.

always recognize it that way. We try to get the conversation to move in a certain way . . . . “Were the threats specific? General?”<sup>100</sup>

At another study site, the petition-writing process conducted by advocates is described in a strikingly similar way: the advocates start with a bare-bones pleading that petitioners complete by checking various boxes, such as “I was threatened” or “I was stalked.” They then work with petitioners to develop the pleading factually:

[O]ur advocates will explain, “this is what the judge is looking for,” but it will still be [written] in [the petitioner’s] own words . . . . [They will] say, “Hey, you said that he threatened you. Did you write what threats they were?” Just to kind of backtrack and remind them “Hey, you said that this was happening. Did you actually go into detail about it?” . . . . I do think it helps to have advocates that are close to the court system and at least know the judge is looking for these things . . . . [For example] we have to be a lot more clear with sexual assault cases as to if there was penetration or not because the judge just wasn’t taking “well, he sexually assaulted me” as enough. It needed more.<sup>101</sup>

Just as a lawyer typically does, advocates urge survivors to provide more than conclusory allegations, employing several strategies to do so. They ensure pleadings contain sufficient detail on each count, help petitioners to order events chronologically so they are easier to follow, ask petitioners to think beyond the scope of recent incidents to prior threats and actions that might constitute a pattern of domestic violence, and elicit information needed to satisfy particular legal criteria, such as whether a petitioner experienced fear.

An attorney who represents clients exclusively on the protective order docket at one study site believes that advocates influence outcomes by helping survivors shape a narrative:

I do see a significant difference in those that don’t get help with an advocate and those that do in just not only the structural details, but in their narrative. We’ll see one where it might just say, “she yelled at me and took the kid.” I mean that’s not really a whole thought. With an advocate it might have been “she told me she was going to burn my house down, punch me in the face and then she drove off with the children. I have full custody.”<sup>102</sup>

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100. *Id.* The advocate goes on to explain the crucial nature of the petition-writing process: People’s handwriting isn’t great. People’s command of the English language isn’t great. If a clerk or a judge can’t read your petition or understand it, that can severely impact the process . . . . It can be difficult for people to coherently articulate what’s happened when they’re the victim of trauma. A third party helps with sussing out what happened and processing the information. We pull all the pieces together because events are mashed together in people’s heads and it’s very difficult for clients to be able to parse them . . . . Someone might say “oh this happened, but wait then that . . . .” Without [our help] it just becomes a mishmash of everything that’s happened over the years.

*Id.*

101. Interview with Protective Order Docket Attorney, in Plainville, *supra* note 98.

102. *Id.*

### 3. Developing Evidence

While not a core component of the advocates' role at both study sites, the Plainville advocates, who operate out of the basement of a court-adjacent building, collaborate with law enforcement to document injuries, including having photos taken if a bruise is visible or having an on-site nurse conduct an evaluation and produce a report.<sup>103</sup> This physical evidence may later prove extraordinarily helpful to a petitioner who otherwise might not have a way to prove her injuries. Plainville advocates are quite specific about instructing petitioners on evidentiary requirements, such as advising that documents and photos must be removed from a phone and presented as physical records.<sup>104</sup>

### 4. Offering Explanations

Advocates offer both substantive and procedural explanations to pro se petitioners. This involves listing the elements of the legal standard.<sup>105</sup> It also includes explaining to a petitioner that she can seek to have her case reinstated if she arrives late to the hearing and it has been dismissed.<sup>106</sup> And it consists of reading a protective order with the petitioner once it has been issued to "show them the date and when it expires" and how to address violations of the order, since "it's a lot to take in" during the open court session.<sup>107</sup>

Additionally, advocates provide information about the range of remedies available to petitioners.<sup>108</sup> One advocate describes her role as empowering the petitioner to make her own choice from the slate of options for relief. As illustrated below, the advocate also explains that relief can be broad or narrow in scope and that relief is not permanent; it can be modified at the petitioner's request:

We're saying, "it can be whatever you want it to be. If you don't want [the] kids to see him at all, we can do that. We can ask for that. If you want custody but he has visitation, we can do that too." You can get a stay away component—and it can be as large or small as they need it to be depending on their circumstances. And it's not static, either. We explain that too. Just because you ask for something today doesn't mean it can't be changed. Just because they're doing this [protective order] doesn't mean it is written in stone . . . . We're saying, "You're in control . . . ."<sup>109</sup>

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103. *Id.*

104. This information is based on the personal observations of a researcher on this project.

105. Interview Domestic Violence Advocate One, in Centerville, *supra* note 85.

106. *Id.*

107. Interview with Domestic Violence Advocate One, in Plainville, *supra* note 95.

108. Both courts in our study have created a pro se form for a protective order that lists the available remedies. However, advocates review the remedies with petitioners to determine which of the remedies might be advantageous given the circumstances of each particular case.

109. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85.

## 5. Counseling

Perhaps most significant to the topic of deregulation, advocates offer extensive counseling to petitioners about many aspects of their protective order cases. We are careful here not to term this “advice,” as all advocates firmly stated that they understood legal advice was prohibited and that “ultimately it’s the client’s choice what to say and whether to file.”<sup>110</sup> One advocate was blunt that she doesn’t “give any opinion whatsoever on anything.”<sup>111</sup>

However, there is often a barely perceptible distinction between “advice”—which is understood by advocates to mean directing clients to take a particular course of action—and “counseling,” which they understand as taking steps to ensure petitioners understand and have explored all options within the context of their particular circumstances. Because advice is a loaded word that raises the specter of unauthorized practice of law,<sup>112</sup> we describe the advocates’ activities as counseling instead. In our estimation, it would be difficult to suggest that advocates do anything “unauthorized,” as their activities are known to judges, sanctioned by the courts, and heavily relied on in the adjudication of protective order cases.

In discussing how she counsels survivors whether to pursue a protective order, one advocate explains that she first determines the survivor’s goals. She discovers that some petitioners

want the [defendant] held accountable for what they did. They want to get up in court and have people hear it . . . . We have to explain that they’re not necessarily going to get that kind of accountability. It might end up as a consent without admissions [i.e., a settlement agreement], the [defendant] won’t necessarily get up and admit that he assaulted you. It’s hard to explain to people that they may not get that kind of release.<sup>113</sup>

In a second example of this type of goal-oriented counseling, an advocate explains that, to help a petitioner select among the various check-the-box remedies listed on the protective order pleading, it might be necessary to probe into the petitioner’s hesitation around particular forms of relief. Perhaps the most consequential relief that can attach to a protective order is temporary custody of one’s children for up to a year. Advocates are careful to say “[i]t’s not up to me, it’s not my life. I can’t tell you what you want to do with your kids.”<sup>114</sup> However, they then proceed to explore any reluctance to check particular boxes, as follows:

I might ask, “Why are you on the fence about this? Are you concerned because of the way he acts with you but not the kids? Are you afraid he’ll do something if you file a [protective] order? What do you think is going to happen? What are you afraid of?” The client might say, “I’m not trying

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110. *Id.*

111. Interview with Domestic Violence Advocate Two, in Plainville, *supra* note 91.

112. *See generally infra* note 120.

113. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85.

114. *Id.*

to take my kids away from their father, I don't want to do that." And we'll tell them, "This is about boundaries. This is about setting boundaries in your relationship. It's about creating a safe structure. It's not about taking the kids away."<sup>115</sup>

The advocates' counseling activities align with the concept of "strategic expertise," developed by Colleen Shanahan, Anna Carpenter, and Alyx Mark as an essential part of the lawyer's role.<sup>116</sup> The theory of strategic expertise suggests that legal analysis and acumen may contribute less to the efficacy of attorney representation than do a combination of relational expertise<sup>117</sup> and familiarity with the norms of the actors in the civil justice system.<sup>118</sup> Much in this vein, nonlawyers do not produce written briefs or focus on analysis of case law but use their expertise about the "law of the courtroom" to provide enormous added value to petitioners in protective order cases.<sup>119</sup>

Advocates' counseling activities—especially when viewed as strategic expertise—raise important questions about the unauthorized practice of law and whether the advice/information distinction should be discarded.<sup>120</sup> The confusion around what, precisely, constitutes advice is almost impossible to unpack and creates a chilling effect among paraprofessionals providing legal services to the clients who need them most and cannot access them elsewhere.

#### IV. THE JUDICIAL ROLE IN DE FACTO DEREGULATION OF THE LAWYER'S MONOPOLY

Drawing on the rich description of the work of nonlawyer advocates in Part III, we illustrate in this part how judges rely on, sanction, and facilitate the role of nonlawyer advocates—even in the absence of a regulatory structure explicitly authorizing such a role. Judges collaborate with advocates both as partners in the adjudication of individual domestic violence cases and also—at least in one jurisdiction—on systemic court reform. There is no uniform consensus among judges as to whether it is appropriate or beneficial for advocates to play an influential role in shaping court procedures and, as a byproduct, judicial behaviors. However, it is clear that

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115. *Id.*

116. Colleen Shanahan et al., *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469, 491 (2016).

117. Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOC. REV. 909, 915–16 (2015).

118. Shanahan et al., *supra* note 116, at 510.

119. Gary Blasi discusses the "law of the courtroom" as sometimes in conflict with written law. See THE EMPIRICAL RSCH. GRP., UCLA SCH. OF L., EVALUATION OF THE VAN NUYS LEGAL SELF-HELP CENTER: FINAL REPORT 15 (2001), <https://www.srln.org/system/files/attachments/Evaluation%20of%20the%20Van%20Nuys%20Legal%20Self%20Help%20Center%20Final%20Report%20%28California%202001%29.pdf> [<https://perma.cc/L8MM-FL93>].

120. UPL statutes uniformly prohibit the provision of legal advice by anyone who has not attended a three-year law school and passed the bar. See, e.g., Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581 (1999).

judges are intimately familiar with the work of advocates and lean on them to do their jobs. While state supreme courts and bar associations debate the theoretical wisdom of creating paraprofessional roles, the data below demonstrate that any implementation of regulatory reform would benefit greatly from the lived experiences of civil trial judges.

#### A. *Judges and Advocates—Collaboration on Individual Cases*

Judges rely on advocates in multiple ways to do their jobs. They are dependent on advocates to manage their dockets, discern the issues in a case, produce evidence, overcome procedural obstacles, and counsel litigants. In some jurisdictions, judges handle up to twenty-five protective order cases a day.<sup>121</sup> The vast majority of these are handled during a three-hour morning session, with leftover court business rolled over to the afternoon.<sup>122</sup> (In Centerville, the afternoon is reserved for full evidentiary trials, often in cases where the parties are represented by counsel.) That leaves approximately seven minutes for each case, although most hearings are much shorter. Judges meet case processing expectations by outsourcing part of their role to advocates who are available to elicit, explain, and assist. Advocates are an essential part of the court infrastructure. Their pretrial work with petitioners develops the case so that judges appear “active” during proceedings and can fulfill their ethical duties to provide pro se parties with a meaningful opportunity to be heard.

##### 1. Docket Control

Judges are under immense pressure to manage their dockets and process cases quickly.<sup>123</sup> While much of the advocates’ work could, theoretically, be performed by judges—and pro se guidance suggests that some of it should be—the demands of efficient docket control are at odds with the need to provide slow, careful, and compassionate assistance to pro se parties. One advocate underscores the importance of her role in this regard:

If the judge is feeling overwhelmed and feels like, “I have to keep the docket moving,” I’m not sure how much time they’d want to dedicate to holding people’s hands . . . . Could they explain the difference between the criminal process and the civil? . . . Yes, and they don’t . . . . I think it would be very hard for a judge to stop what they’re doing and help the person in front of them.<sup>124</sup>

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121. This information is based on the authors’ court observations.

122. This information is based on the authors’ court observations.

123. Interview with Judge Two, in Centerville, *supra* note 75 (“We are under a lot of pressure to get cases resolved.”); *see also* Interview with Judge One, in Centerville (on file with authors) (“There’s pressure from the—we call them the suits—to move the cases . . . . we get these statistics about who’s moving cases, how we’re moving cases. We see stats every month, how many trials we’ve done. And it’s particular to judges, so you know how you’re doing. We’d always have these meetings about moving cases, and we’d be at 99%, and I’d say that’s not really helping us improve. If the metric we’re using gets us to 99%, then it’s not the right metric. We should be at 70%, 80% so we can figure out how to improve.”).

124. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85.

Judges confirm that they would find it difficult to fulfill their functions on the docket without the assistance of advocates. A Centerville judge explained, “I don’t think it’s all done by the judges. The negotiators . . . they take the weight off of us. We are trying to move cases along so it is wonderful to know that [the negotiators] have spoken to [the parties] before they see us.”<sup>125</sup>

## 2. Discerning Issues in a Case

One Plainville judge shared that he uses the advocate-crafted petitions to direct his questioning of the parties, rather than providing an opportunity for the petitioner to share a narrative.<sup>126</sup> Pro se guidance suggests a narrative as the superior method, but that may leave a petitioner confused or apt to share a story that does not contain sufficient detail. In the words of the Plainville judge, “I read the petition, and then I ask ‘em questions. I don’t just say, ‘[t]ell me your story.’”<sup>127</sup> An attorney in the same court corroborates the judges’ approach, describing that a judge will typically read the petition and then ask clarifying—and even leading—questions, such as, “‘Okay, well is it true that the [defendant] punched you in the face?’”<sup>128</sup> If the [petitioner] says yes, he’ll ask, ‘Well, how did he punch you? With his fist closed, with his fist open?’”<sup>129</sup>

At our second study site, Centerville, a protective order judge admitted that, prior to joining the bench, he did not appreciate that the judge plays just “one role” among many played by stakeholders serving pro se parties.<sup>130</sup> This judge identified the advocates as important partners in working with “quote-unquote victims,” and specifically noted as “helpful” the advocates’ work in “com[ing] up with the facts by working with people” in advance of their court dates.<sup>131</sup>

## 3. Producing Evidence

An advocate in Plainville described for us how judges sometimes rely on them to identify evidence that may help resolve a contested factual issue. For example, one Plainville petitioner described an instance in which “she was stabbed in her private part.”<sup>132</sup> The judge—in an effort to determine the veracity of this claim—asked an advocate “to go into the hallway and [have the petitioner] show it to [the advocate].” Despite discomfort with the request, the advocate did as she was asked, “because it’s so hard to say no to

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125. Interview with Judge Two, in Centerville, *supra* note 75.

126. See, e.g., JUD. COUNCIL OF CAL., HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A BENCHGUIDE FOR JUDICIAL OFFICERS 2–3 (2019), [https://www.courts.ca.gov/documents/benchguide\\_self\\_rep\\_litigants.pdf](https://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf) [<https://perma.cc/36FW-UF2J>].

127. Interview with Judge Two, in Plainville (on file with authors).

128. Interview with Protective Order Docket Attorney, in Plainville, *supra* note 98.

129. *Id.*

130. Interview with Judge One, in Centerville, *supra* note 123.

131. *Id.*

132. Interview with Domestic Violence Advocate One, in Plainville, *supra* note 95.



a judge.”<sup>133</sup> Although we did not find this type of investigatory conduct common among the judges we observed, it offers another illustration of the desperation judges face in resolving factual disputes with no physical evidence, which, in this particular case, resulted in questionable judgment and an invasion of privacy.

#### 4. Overcoming Procedural Obstacles

Judges also rely on advocates to help petitioners with confounding procedural issues that arise during live court proceedings. One advocate explained that judges might interrupt a formal court hearing to “ask us . . . to call the [pro se] person and maybe have them come in and amend something.”<sup>134</sup> Another explained that advocates carry purple clipboards so that judges can identify them in court. A judge might say, while court is in session, “Is there an advocate in the courtroom? Can you help this person with service?”<sup>135</sup>

#### 5. Counseling Pro Se Petitioners

The following interaction between a judge and a petitioner illustrates a judge’s reliance on nonlawyer advocates to counsel pro se parties on important decision-making that arises during proceedings. In this case, a petitioner sought to vacate a protective order, explaining to the judge that alcohol was involved in the incident, pushing and shoving occurred on both sides, and she had sought court involvement largely in response to pressure from her parents, which she now felt was a mistake.<sup>136</sup> The judge insisted she meet with an advocate to evaluate the voluntariness of her decision to vacate the order:

JUDGE: In summary, you’re a different person, the event was a mutual combat situation. I would like it if you would visit with the [domestic violence] advocates?

PETITIONER: No. [Adamant].

JUDGE: Would you be willing?

PETITIONER: No.

JUDGE: I’d be more comfortable . . .

PETITIONER: I don’t really see a need.

JUDGE: I’d like for you to do that before I decide on the motion. I’d appreciate their perspective . . . .

PETITIONER: I understand. So I come back [after I meet with them]?

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133. *Id.*

134. Interview with Domestic Violence Advocate Two, in Plainville, *supra* note 91.

135. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85.

136. Observation Transcript of Court Hearing Eighty-One in Front of Judge One, in Plainville (on file with authors).

JUDGE: Yes, we will call you.<sup>137</sup>

Although the judge could have performed a voluntariness colloquy in court, he relied on the advocate to take on this counseling role—perhaps to free up time on the docket or perhaps because advocates are trained in trauma and the judge views them as better equipped to perform this function. Either way, an unanswered question about the advocates' role concerns whether pro se parties should be required or pressured to consult with them on case strategy and decision-making.

*B. Judges and Advocates—Collaboration on Systemic Court Operations*

In both Centerville and Plainville, judges also endorse the advocates' role at an even deeper level than individual assistance, often including them in conversations about systems-based design. Advocates are at the table during judge-led stakeholder meetings that involve clerks, lawyers, and other service providers involved in protective order proceedings.<sup>138</sup> Advocates provide feedback about how to improve court operations or how a judge might approach pro se parties differently, and they report that judges are receptive to this constructive advice.<sup>139</sup> The court understands the mutually beneficial relationship; without advocates, the court clerk would have to absorb thousands of pleas for help from petitioners who would otherwise have nowhere else to turn.<sup>140</sup>

In addition, advocates and the organizations that employ them are long-term institutional actors in protective order courts and play a role in acculturating new judges to the role they are about to assume. In Centerville, when new judges rotate onto the protective order calendar, advocates train them on “what to expect in the courtrooms.”<sup>141</sup> It is important to note that not all judges are comfortable with the influential role of advocates, and the organizations that employ them, in shaping judicial norms and court processes. One judge in Plainville, who was new to protective order cases, reported: “I’m telling you they are enmeshed in my courtroom . . . . I didn’t get to do what I wanted to do with my docket.”<sup>142</sup> In particular, this judge wanted petitioners to testify orally at ex parte emergency hearings but did not feel free to require petitioners to do so because the nonprofit domestic violence organization employing the nonlawyer advocates took a stand against it.<sup>143</sup> The organization’s leaders believed it was “re-traumatizing” to have survivors testify when the events were already recorded in paper pleadings.<sup>144</sup> The judge ultimately conceded to these demands, recognizing

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137. *Id.*

138. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85.

139. *Id.*

140. *Id.*

141. Interview with Judge One, in Plainville, *supra* note 75.

142. *Id.*

143. *Id.*

144. *Id.*

“subtle” forces at play that made domestic violence agencies, and their advocates, powerful actors within the court.<sup>145</sup>

#### V. IMPLICATIONS OF DEREGULATING THE LAWYER’S MONOPOLY IN THE SHADOWS

Thus far, this Article has sought to describe, with rich qualitative data, the novel phenomenon of nonlawyer advocates operating as institutional partners in trial courts where no formal regulatory structure authorizes the advocates’ role. This phenomenon can be viewed as *de facto* deregulation of the lawyer’s monopoly, as advocates are performing a wide range of legal work that the court both sanctions and relies on. Indeed, the judges may be leading the charge toward recognition of a class of legal professionals that is not licensed, regulated, or even openly acknowledged. Drowning in the *pro se* crisis that confronts them, judges simply do not have the training or resources to adequately assist the parties before them. We stress that judges are embracing deregulation out of necessity, in an effort to support a healthy justice system in lawyerless courts. We also stress that the advocate model appears to be working as intended—at least for petitioners and the courts. Although the model is not without its flaws, our basic contention is that, based on the findings from our study, nonlawyer advocate programs should be encouraged to thrive, and any resulting disparities for parties who do not receive such assistance should be corrected with an increase in nonlawyer advocates, not elimination of such programs.

That said, allowing deregulation to flourish in the shadows of the law—particularly with the judicial imprimatur—raises three important implications that must be addressed. First, we should grant judges the freedom to speak candidly about how they perform their roles in lawyerless courts. The ethical constraint of judicial “neutrality” must be redefined to capture the critical function of nonlawyers so that state civil courts can be more transparent about how they operate. Second, an opportunity to develop norms and best practices around a paraprofessional role is being squandered. This is particularly unfortunate as states are now formally grappling with experimentation around exactly this type of deregulation. Third, the invisibility of the advocates’ role during public court proceedings conceals a massive due process rift between survivors and alleged abusers. Petitioners have access to experienced advocates who assist with almost every aspect of protective order proceedings, while defendants typically have no assistance at all. At stake for defendants are their freedom of movement, custody of their children, and eviction from their residences. Bringing the advocates’ role into public view would make clear that state supreme courts and bar associations need to take steps to level the playing field.

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145. *Id.*

*A. Judges' Ethical Trap*

As the previous parts have shown, the work of advocates is sanctioned by judges but primarily performed outside the public courtroom. In Centerville, advocates describe a flurry of activity that occurs before the judge takes the bench.<sup>146</sup> In consultation with the court clerk, advocates attempt to locate the petitioners they have previously assisted with pleadings and then work quickly to whisper advice to their clients—such as “bring your text messages with you”—as dozens of pro se parties wait in the gallery for the proceedings to begin.<sup>147</sup> In Plainville, advocates try to walk with their clients to court to offer support “because they’re a wreck” and also so they can answer last-minute questions.<sup>148</sup> Advocates also sometimes sit behind their clients and quietly offer information or explanation while the judge handles other matters.<sup>149</sup> At both study sites, contact with clients in advance of court is necessary, since the advocates are not a public part of the proceedings. Even when judges call on advocates in open court to provide assistance, an observer to the court would not be able to determine the nature or scope of their role.

The hidden nature of the advocates’ role is not an accident. A Plainville advocate explained that their role has become more concealed over time. In the past, advocates were permitted to make a speech prior to the commencement of the protective order docket, identifying themselves and the services they provided.<sup>150</sup> However, judges grew uncomfortable with the advocates’ public appearances, since it gave the impression that the court favored petitioners over defendants.<sup>151</sup> Notably, advocates’ firm institutional status in the Plainville courts did not shrink after the prefatory speech was abolished. Advocates in Plainville continue to perform their role in the same way—they occupy permanent space within the courts to meet with survivors and accompany every petitioner to the judge’s chambers after a hearing concludes. It was only the public-facing part of their role that disappeared.

We hypothesize that institutional pressure on judges to maintain an appearance of neutrality creates an incentive to keep quiet the critical work of nonlawyer advocates. Judges receive competing directions from ethical canons that, first and foremost, prize impartiality and neutrality but also indicate that certain active judging practices may be appropriate in lawyerless courts.<sup>152</sup> Our findings suggest that judges struggle to balance these competing demands and are hesitant to bring to the forefront the human infrastructure—such as the advocates—that supports the judges’ function in these cases.<sup>153</sup> In addition, our findings reveal that much of what appears to

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146. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85.

147. *Id.*

148. Interview with Domestic Violence Advocate One, in Plainville, *supra* note 95.

149. *Id.*

150. Interview with Domestic Violence Advocate Two, in Plainville, *supra* note 91.

151. *Id.*; Interview with Judge One, in Plainville, *supra* note 75.

152. See MODEL RULES OF JUD. CONDUCT r. 2.2 cmt. 4 (AM. BAR. ASS’N 2010).

153. As we have argued in other works, ethical guidance for judges in lawyerless courts has not evolved sufficiently to create clear norms around the adjudication of an enormous

be “active judging” in protective order cases may in fact be the product of the advocates’ behind-the-scenes work. In the nearly 275 cases we observed across both study sites, judges elicited factual information from petitioners in the vast majority of merits hearings. Judicial questions often appear, in open court, to be unprompted. However, our field interviews suggest that many of these questions are not judge led but derived from carefully curated pleadings that expert advocates have developed to advance the interests of petitioners.

Although only a hypothesis, it is reasonable to assume that judges feel caught in an “ethical trap” that favors sublimating the role of nonlawyer advocates. It is also quite likely that judges fear reprisal from local bar associations who have long opposed any type of deregulation when it is made formal. This undermines transparency, subverts public understanding of lawyerless courts, and exacerbates petitioner-defendant inequality. For reform to take hold, it is essential that judges be granted the freedom to speak with candor about how they perform their duties and how cases are triaged and adjudicated within the court’s ecosystem. A model to follow might be the LLA program in Arizona, which is formally recognized and regulated, operates transparently, is subject to evaluation, and is a public part of court proceedings.<sup>154</sup>

#### *B. An Existing Model for Nonlawyer Advocates*

The failure to acknowledge the imprint of nonlawyer advocates on court operations has a second implication: it inhibits regulatory reform efforts around the country. As states consider how to expand the legal profession to advance access to justice, they do not have the benefit of the accumulated wisdom of trial judges who collaborate daily with advocates to run their dockets. Civil judges in lawyerless courts are relying on their inherent authority to quietly experiment with deregulation in ways that could assist with innovation, peer learning, and the development of best practices in the field—and yet this wealth of experience has not been tapped by the state supreme courts and bar association task forces taking up this issue.

As an example, a thorny issue confounding some deregulation efforts is how to train and license alternative legal professionals. In 2012, Washington became the first state in the nation to create a formal program for Limited License Legal Technicians (LLLT) who would be authorized to practice in specific areas, such as immigration or family law.<sup>155</sup> Although this step toward expanding access to legal assistance appeared promising at first, eight years into the program only forty nonlawyers had become LLLTs, and the

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volume of cases involving people who are in clear distress but cannot, on their own, shape their stories into a language the court can understand and act on. *See generally* Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 6647, 6666 (2018); Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 BYU L. REV. 899.

154. *New “Licensed Legal Advocates” Program*, *supra* note 58.

155. WASH. STATE CT. ADMISSION & PRAC. R. 28.

program shuttered in 2020.<sup>156</sup> Ultimately, the barriers to entry were too high, requiring strict educational requirements and 3000 hours of work under an attorney's supervision.<sup>157</sup> And even once licensed, the allowable scope of practice was narrow, with LLLTs able to complete forms and advise on process but unable to represent clients in court or in settlement talks.<sup>158</sup> It is possible LLLT enrollment was so low because the prospective LLLTs themselves were concerned they may not be able to earn sufficient income to justify the investment in their training and education.

Our research reveals an entirely different model of training that could inform the debate around training and licensing requirements for legal paraprofessionals. In Centerville, domestic violence advocates receive forty hours of training in confidentiality, fifteen to twenty hours of training in trauma-informed care, and then complete eighty hours of observations in which they watch experienced advocates do their work.<sup>159</sup> Finally, new advocates are shadowed for forty to forty-five hours to ensure the integrity and quality of their services.<sup>160</sup> In total, the apprenticeship-like program involves thirty to forty-five days of training.<sup>161</sup> In Plainville, training requirements are similar. Advocates spend two to three weeks shadowing professionals who work in the various departments of the umbrella domestic violence agency, including observations of advocates involved in crisis management, safety planning, and petition writing.<sup>162</sup> In addition, advocates undergo forty hours of online training related to domestic violence and are certified to conduct a lethality assessment with clients.<sup>163</sup> Finally, advocates are themselves shadowed for approximately half a day to ensure they are completing paperwork correctly.<sup>164</sup> The entire process in Plainville takes one month.

As described, the domestic violence advocates in our study face much less stringent training requirements than do any of those in the paraprofessional programs currently being launched in states such as Utah and California. We cannot take a definitive position on whether the advocates are sufficiently well trained to perform high quality work for pro se parties, other than to say that, based on our interviews with them, they appear to have deep knowledge of both the legal aspects of protective order proceedings and the unique needs of domestic violence survivors who may be experiencing tremendous trauma. The far more important point, however, is that judges who rely on the work of advocates have substantial on-the-ground experience with the sufficiency of their training and the quality of their work. Considering the uptake challenges that the state of Washington faced in enrolling LLLTs and the

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156. Albin-Lackey, *supra* note 21.

157. *Id.*

158. *Id.*

159. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85.

160. *Id.*

161. *Id.*

162. Interview with Protective Order Docket Attorney, in Plainville, *supra* note 98.

163. *Id.*

164. *Id.*

significant educational burdens that states continue to place on newly launched programs for licensed legal paraprofessionals, it is imperative that civil trial judges are invited to break their silence and contribute their knowledge to this aspect of regulatory reform.

Training is just one area where civil trial judges could assist in the development of best practices and peer learning among jurisdictions. Scope of practice is another area where states contemplating deregulation struggle to ensure that licensed legal professionals can offer affordable and useful services, while also taking pains not to infringe on lawyers' business. As illustrated in Part III, the advocates in our study provide a robust range of legal services—short of trial representation—that could serve as a model for jurisdictions considering deregulation. As Mary McClymont highlighted in her study, services provided by nonlawyers do not steal clients from lawyers but instead permit lawyers to operate at the “top of their licenses.”<sup>165</sup> In both Centerville and Plainville, lawyers take over representation in protective order cases that proceed to trial *when* such lawyers are available, which admittedly is not often. This model creates a vertical services structure where advocates work with clients to prepare cases up until the point where formal legal training, command of the rules of evidence and procedure, and trial advocacy skills become necessary—at which point, a lawyer is brought in.

An even more significant component of the advocates' work involves the wraparound services they provide to domestic violence clients, which includes locating safe shelters, operating a twenty-four-hour hotline for emergencies, driving or walking survivors to appointments, and assisting with child and family welfare services.<sup>166</sup> The holistic aspect of the advocates' role is critical to highlight, since lawyers typically do not offer these services, and yet they are invaluable to survivors who face a host of issues, many of them not specifically legal in nature. States considering regulatory reform might benefit from consideration of a hybrid model for nonlawyer advocates, in which social work and legal advice could both be deployed to benefit clients. This model involves “upskilling” or providing legal training to professionals who are already trained in another discipline, such as social work. The LLA program in Arizona is currently piloting such an approach and should serve as an exemplar.<sup>167</sup>

In short, trial judges, advocates, and the communities they serve could be leaders in the regulatory reform sphere, leveraging their experiences in working with advocates to formulate new categories of legal professionals that balance multiple goals: advancing access to justice, identifying the proper scope of services, protecting consumers, avoiding the fate of the Washington LLLT program, and addressing the fears of lawyers who are concerned that deregulation will infringe on their ability to attract clients. The bottom-up approach we suggest—in which the judges on the ground

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165. McClymont, *supra* note 59, at 5.

166. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85; Interview with Domestic Violence Advocate One, in Plainville, *supra* note 95.

167. *New “Licensed Legal Advocates” Program*, *supra* note 58.

“manage up” the process of deregulation—is aligned with Michael Dorf and Charles Sabel’s democratic experimentalism, in which a feedback loop is created between experimental practices, regulatory structures, and evaluation.<sup>168</sup>

### C. *Due Process Deficiencies*

Finally, judges’ quiet partnerships with advocates have an unintended consequence that must be corrected: they compromise due process for defendants. Our research shows that nearly all pro se parties assisted by advocates are female petitioners.<sup>169</sup> In a small number of cases, where the advocates determine the defendant is actually the “true” victim (typically when the defendant is female), services will be offered to the defendant.<sup>170</sup> These few cases notwithstanding, the nonlawyer advocacy model we observed creates enormous equity concerns for most defendants, who often have many more rights at stake in protective order proceedings than might be readily apparent.

Protective orders are commonly associated with stay-away provisions, in which the defendant is prohibited from contacting the petitioner. On the surface, it may appear sensible to prioritize petitioners for legal assistance, since they potentially face grave safety risks; the infringement on defendants’ rights appears insignificant in comparison. However, three important findings from our research change this calculus. First, in our court observations, not all of the alleged conduct in protective order proceedings involved violence. Second, the relief that petitioners request—and courts commonly grant—is quite expansive and goes far beyond the typical stay-away order. A protective order might require the defendant to vacate his home immediately and retrieve his belongings with a police escort. It may also require the defendant to attend substance abuse counseling or enroll in parenting classes and to pay for such programming out of his own pocket. In addition, the protective order becomes a permanent part of the defendant’s record and can be used to deny employment and housing. And most importantly, in Centerville, protective orders can award temporary custody of minor children to the petitioner for up to one year. Defendants may have no rights to see their children or may only be able to see them through supervised visitation at the court.<sup>171</sup> Any violations of the orders are subject to criminal prosecution.

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168. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

169. One judge reports that about “90% of the people who get the advocates are women.” Interview with Judge Two, in Centerville, *supra* note 75. Advocates do not dispute this: “We work mostly with alleged victims.” Interview with Domestic Violence Advocate One, in Plainville, *supra* note 95.

170. Interview with Protective Order Docket Attorney, in Plainville, *supra* note 98 (noting that it is justifiable for defendants to be denied services because “they are in the wrong”).

171. See generally LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018); Laurie Kohn,



While the safety risks to petitioners are real and must be addressed, it is important to bring the advocates' role out of the shadows and to make known that defendants' rights are not well articulated or preserved. If the work of advocates were made publicly visible, it would become abundantly clear that defendants have no meaningful opportunity to contest petitioners' claims and, in many cases, are steamrolled by the process. Advocates in both Centerville and Plainville describe their goal as advancing the rights of petitioners to the maximum extent permitted by law. One advocate explained that, when it would benefit a petitioner, she might suggest requesting relief not expressly authorized by statute, such as GPS monitoring of the defendant.<sup>172</sup> An advocate in Plainville indicates that about 10 percent of their work is performed on behalf of defendants, but rather than assisting with a legal defense, they typically "provide resources for batterer's intervention or something like that."<sup>173</sup> In other words, even defendant-focused assistance is primarily intended to serve the needs of survivors.

To be clear, there is absolutely nothing untoward about the advocates' conduct: they are operating, as attorneys do, with a duty of loyalty toward their clients. However, precisely because the advocates are so competent in assisting petitioners, defendants require a corollary system of protection. We observed dozens of hearings in which defendants denied assaulting, stalking, or threatening the petitioner but offered insufficient testimony, no witnesses, or no documentary evidence to support their claims. We also observed hearings in which defendants openly stated that they did not understand the nature of the proceedings or the procedures they were required to follow. Finally, we observed hearings in which defendants offered seemingly reliable testimony that could have been corroborated if an advocate or attorney were available to gather the evidence, but with no such services offered, the judge ruled against the defendant.<sup>174</sup> Underscoring the ethical trap engulfing judges, we observed very few instances—if any—in which a judge provided needed assistance to defendants. Without nonlawyer advocates to rely on, judges generally refused defendants' requests for help, explaining, "I cannot serve as your advocate." A common response, instead, was to continue the case so that the defendant could hire a lawyer—a fictional scenario that judges well know will not materialize, since the vast majority of defendants

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*Engaging Men as Fathers: The Courts, the Law and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511 (2013).

172. Interview with Domestic Violence Advocate One, in Centerville, *supra* note 85.

173. Interview with Domestic Violence Advocate Two, in Plainville, *supra* note 91.

174. *See, e.g.*, Observation Transcript of Court Hearing Eighty-One in Front of Judge One, in Plainville, *supra* note 136. This example related to a contested case, in which the defendant testified that a family law judge had modified the original protective order to allow him to pick up his kids from their mother's house. If true, this would have obliterated the petitioner's claim that he had violated the protective order by driving to her home. However, rather than checking the family court's records, the judge extended the protective order by three months with agreement to vacate it if the defendant committed no further "violations." When the defendant asked the judge how to enforce his visitation rights under these constraints, the judge declined to offer a suggestion, saying: "No I can't speak to that. I am just speaking to this [protective order]." *Id.*

cannot afford private counsel and almost all civil legal services providers limit their practices to serving protective order petitioners.

Judges are aware that the playing field is not balanced. Discussing the disadvantage to defendants, a judge in Centerville said: “I early on figured out that domestic violence victims were able to get volunteers. So they’d come up against the perpetrator or whatever, and they could clobber them because they had the resources to put on a better show.”<sup>175</sup> A judge in Plainville said that, if she could wave a magic wand, she would produce “a bulleted list for defendants of the potential harms of that protective order. Just maybe a bulleted list to try and tell them to prepare for court.”<sup>176</sup> At one study site—after the period of our field research concluded—a project was in the works to provide limited advice to defendants, although it came nowhere close to the type of comprehensive, compassionate, and thorough assistance provided to petitioners by the advocates.

Civil trial judges should be encouraged by higher authorities within the state court systems to make transparent the work of advocates so that states undergoing regulatory reform think to authorize programs that serve pro se defendants as well. For example, in Arizona’s new LLA program, licensed professionals will be able to serve survivors in protective order cases but not alleged perpetrators.<sup>177</sup> Civil judges have legitimate reasons to remain silent on the known hazards of this approach; therefore, we suggest action by state supreme courts to bring de facto deregulation out of the shadows to inform the development of a more balanced model, in which all pro se parties receive similar levels of assistance.

#### CONCLUSION

After decades of ignoring the crisis in civil access to justice and maintaining the lawyer’s monopoly at the expense of access to affordable legal services, the profession is undergoing a reexamination of its reflexive opposition to deregulation. In particular, a number of states have enacted rule changes that authorize the licensing of paraprofessionals to provide legal advice in select areas of practice, particularly where overwhelming legal need exists and is not met by the private bar.<sup>178</sup> In addition, states are exploring experimental programs that would relax Rule 5.4 prohibitions and allow alternative business structures, co-owned by lawyers and nonlawyers, to provide legal services, subject to evaluation and oversight by new regulatory bodies.<sup>179</sup> At least a dozen states have formed task forces within the past two years to study these issues carefully and consider adoption of similar rules.<sup>180</sup>

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175. Interview with Judge One, in Centerville, *supra* note 123.

176. Interview with Judge One, in Plainville, *supra* note 75.

177. *New “Licensed Legal Advocates” Program*, *supra* note 58.

178. *See supra* Part II.

179. *See supra* Part I.A.

180. *See supra* Part I.A.

As the data in this Article demonstrate, civil trial judges and nonlawyer advocates should be tapped for membership in these task forces to offer an account of their extensive experiences with the provision of legal services by paraprofessionals and to play an influential role in the public policy debate around deregulation of the lawyer's monopoly. Furthermore, the interactions and relationships that exist between trial judges, nonlawyer advocates, and lay litigants, as illuminated by our two-year study of protective order dockets, should form a baseline analysis for how paraprofessionals might be brought out of the shadows, fully integrated into open courts, and authorized to offer services currently considered sacrosanct by the practicing bar—including providing legal advice and speaking on behalf of clients in live proceedings. It is critically important to this endeavor that existing nonlawyer advocates be protected, not ousted, by new regulatory efforts and that elected trial judges are politically insulated by increased support from the legislature, the public, and collectives of higher-ranking judges, such as the Conference of Chief Judges.