

# Fordham Urban Law Journal

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Volume 41  
Number 4 *Until Civil Gideon: Expanding Access  
to Justice*

Article 7

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March 2016

## Access To Justice: A Roadmap For Reform

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### Recommended Citation

Deborah L. Rhode, *Access To Justice: A Roadmap For Reform*, 41 Fordham Urb. L.J. 1227 (2014).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol41/iss4/7>

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# ACCESS TO JUSTICE: A ROADMAP FOR REFORM

*Deborah L. Rhode\**

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## INTRODUCTION

It is a shameful irony that the nation with one of the world’s highest concentrations of lawyers does so little to make legal services accessible.<sup>1</sup> According to the World Justice Project, the United States is tied with Uganda for sixty-seventh out of ninety-seven countries in access to the justice system and affordability of legal services.<sup>2</sup> “Equal justice under law” is one of America’s most proudly

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1. For research suggesting that the United States ranks first or second among countries with advanced economies, see Charles Keckler, *Lawyered Up: A Book Review Essay*, 27 T.M. COOLEY L. REV. 57, 73 tbl.1 (2010); *America Lawyers: Guilty as Charged*, ECONOMIST (Feb. 2, 2013).

2. WORLD JUSTICE PROJECT, THE WORLD JUSTICE PROJECT RULE OF LAW INDEX 2012–2013, at 175 (2013).

proclaimed and routinely violated legal principles. It embellishes courthouse doors, but in no way describes what goes on behind them. Millions of Americans lack any access to justice, let alone equal access. Over four-fifths of the poor's legal needs and two- to three-fifths of the legal needs of middle-income Americans remain unmet.<sup>3</sup>

This Article analyzes the causes of the justice gap and identifies the most promising responses. Part I explores barriers in the justice system, including financial, structural, doctrinal and political obstacles to greater access to legal services. Part II looks at strategies for reform, such as self-help and non-lawyer service providers, broader rights to counsel in civil cases, more pro bono assistance, unbundled services and innovative delivery structures, additional research concerning access to justice, and more attention to these issues in law schools.

## I. BARRIERS IN THE CIVIL JUSTICE SYSTEM

In principle, America is deeply committed to individual rights. In practice, few Americans can afford to enforce them.<sup>4</sup> The barriers have financial, structural, doctrinal and political dimensions, each of which are discussed in turn.

### A. Financial

Money may not be the root of all evil, but it is surely responsible for much of what ails the current legal aid system. Americans do not believe that justice should be for sale, but nor do they want to pay for the alternative. Even before recent budgetary cutbacks, there was only one legal aid lawyer per 6415 low-income individuals in the United States.<sup>5</sup> In some jurisdictions, poor people must wait two years before seeing a lawyer for matters not considered an emergency, and other jurisdictions exclude such cases altogether.<sup>6</sup> The United States federal government spends slightly more than one

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3. For a discussion of legal needs among low-income individuals, see LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW INCOME AMERICANS 1-13 (2009), available at [http://www.lsc.gov/pdfs/dcocumenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/dcocumenting_the_justice_gap_in_america_2009.pdf). Surveys find that between two-fifths and three-quarters of the needs of middle-income individuals are unaddressed, with most finding at least half. See DEBORAH L. RHODE, ACCESS TO JUSTICE 3, 79 (2004); Luz E. Herrera, *Rethinking Private Attorney Involvement in the Delivery of Civil Legal Services for Low and Moderate Income Clients*, 42 LOY. L. REV. 1, 5 (2009).

4. See *supra* notes 2-3 and accompanying text.

5. LEGAL SERVS. CORP., *supra* note 3, at 21 (as of 2009).

6. RHODE, *supra* note 3, at 13.

dollar per person for legal aid.<sup>7</sup> At this funding level, not much due process is available. Compared to other advanced economies, America spends less per legal aid case and has fewer institutions such as advice and ombudsperson agencies to assist with routine needs.<sup>8</sup> As a consequence, more individuals are priced out of the legal system than in other comparable countries. For example, one survey reported that in the United States, thirty-eight percent of poor individuals and twenty-six percent of middle-income individuals took no action in response to a legal problem, compared with five percent in England and ten percent in the Netherlands.<sup>9</sup> Moreover, the recent economic downturn has made a bad situation worse. High rates of unemployment, bankruptcies, foreclosures, and reductions in social services created more demands for legal representation at the same time that many of its providers have faced cutbacks in their own budgets.<sup>10</sup> The federal budget for legal aid has been cut by almost a fifth since 2010.<sup>11</sup> In effect, understaffed and overextended legal

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7. The United States population in 2013 was slightly more than 316 million and the 2013 federal allocation for legal aid was \$340.8 million. *LSC Funding*, LEGAL SERVS. CORP., <http://www.lsc.gov/congress/lsc-funding> (last visited Mar. 15, 2014); *United States World and Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock> (last visited Mar. 15, 2014).

8. For expenditures, see Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L. J. 129, 148 (2010); Earl Johnson, Jr., *Justice For America's Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393, 397-98 (2009); Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World?*, 15 TEMPLE PL. & CIV. RTS. L. REV. 769, 779 (2006). For a comparison of intermediary institutions, see Rebecca Sandefur, *The Fulcrum Point of Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 958, 965 (2009).

9. Hadfield, *supra* note 8, at 139.

10. See Emily Saver, *Expand Legal Services Now*, NAT'L L. J., June 28, 2010 (reporting increases in demand and seventy-five percent drop in IOLTA funds between 2007 and 2009); *Need a Lawyer? Good Luck*, N.Y. TIMES, Oct. 14, 2010, at A32; Karen Sloan, *Perfect Storm Hits Legal Aid*, NAT'L L. J., Jan. 3, 2011, at 4 (noting decline in funds from government IOLTA (Interest on Lawyers Trust Fund Accounts), and tight private fundraising climate, together with increased demand for services); Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid Groups*, N.Y. TIMES, Jan. 19, 2009, at A12 (reporting a thirty percent increase in requests for legal aid); see also RICHARD ZORZA, ACCESS TO JUSTICE: ECONOMIC CRISIS CHALLENGES, IMPACTS, AND RESPONSES 9 (2009), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/185> (finding that a majority of judges reported increase in pro se caseloads, but that thirty-nine percent also reported cuts in self- help services budget).

11. The budget declined from \$420 in 2010 to \$340.8 in 2013. Ian Millhiser, *Budget Cuts Hobble Legal Services for the Poor*, THINK PROGRESS (Aug. 20, 2012), <http://thinkprogress.org/justice/2012/08/20/714521/budget-cuts-hobble-legal-services-for-the-poor>.

assistance programs are often asked to do more with less. As a result, millions of Americans find that legal protections available in principle are inaccessible in practice.

### B. Structural

A more structural set of problems involves the absence of any coherent system for allocating assistance and matching clients with the most cost-effective service provider. Researchers at the American Bar Foundation (ABF) recently undertook the first ever state-by-state portrait of funding available for civil legal services.<sup>12</sup> They found considerable inequality within and across states. “[G]eography is destiny: the services available to people from eligible populations who face civil justice problems are determined not by what their problems are or the kinds of services they may need, but rather by where they happen to live.”<sup>13</sup> Georgia offers a representative case of the mismatch between supply and demand that often underlies the inequality. Some seventy percent of the state’s lawyers are in the Atlanta area, while seventy percent of the poor live outside it.<sup>14</sup> Six counties have no lawyer and dozens have only two or three.<sup>15</sup> Moreover, as ABF researchers found, “[l]ittle coordination exists for civil legal assistance, and existing mechanisms of coordination often have powers only of exhortation and consultation.”<sup>16</sup> Local legal services programs typically set the priorities for who will get services and what kinds of services they receive.<sup>17</sup> The result is not only resource disparities across jurisdictions, but also resource inadequacies in scaling up promising programs.<sup>18</sup> A related problem is that we lack reliable “empirical evidence that would support confident advice to claimants about what [form of] assistance would best meet their needs, and . . . the coordination and planning that would assure that the right assistance is readily available to those who need it.”<sup>19</sup>

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12. See REBECCA SANDEFUR & AARON C. SMYTH, AM. BAR FOUND. ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT (2011).

13. *Id.* at v.

14. Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES, Mar. 15, 2013, at A1, A6.

15. *Id.* at A6.

16. SANDEFUR & SMYTH, *supra* note 12, at v.

17. *Id.*

18. Jeanne Charn, *Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Justice*, 122 YALE L.J. 2206, 2216–17 (2013)

19. *Id.* at 2223.

The system is also unduly lawyer-centric. Bar organizations, which have been the most powerful voices in the debate over access to justice, have seen the solution as more lawyers. In 2006, the American Bar Association (ABA) unanimously adopted a resolution urging the provision of “legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake.”<sup>20</sup> Many state and local bar associations passed similar resolutions.<sup>21</sup> These organizations have not been similarly enthusiastic about court simplification and pro se assistance, and have actively fought self-help publications and non-lawyer providers.<sup>22</sup> From the profession’s perspective, the focus on guaranteeing more lawyers makes obvious sense. But from the standpoint of the public, the objective is more access to justice, not necessarily to lawyers.

In courts that handle housing, bankruptcy, small claims, and family matters, parties without attorneys are often less the exception than the rule.<sup>23</sup> Yet they must cope with procedures designed by and for lawyers. Although courts have made increasing attempts to accommodate these unrepresented litigants, one national survey found only eleven states with comprehensive programs to help pro se parties.<sup>24</sup> Many of the services available, such as self-help computer kiosks, are unusable by those who need help most: low-income litigants with limited technological competence and English language skills.<sup>25</sup> All too often, parties confront procedures of excessive and

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20. ABA, REPORT TO THE HOUSE OF DELEGATES (105-REVISED) 1 (2010), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_105\\_revised\\_final\\_aug\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf) (quoting ABA RECOMMENDATION 112A (2006)).

21. *Bar Efforts*, COALITION FOR CIV. RIGHT TO COUNS., [http://www.civilrightocounsel.org/advances/bar\\_efforts](http://www.civilrightocounsel.org/advances/bar_efforts) (last visited Mar. 15, 2014).

22. For historical examples of opposition, see Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 705 (1996). For the bar’s current enforcement efforts, see Deborah L. Rhode & Lucy Ricca, *Unauthorized Practice Enforcement: Protection of the Public or the Profession*, FORDHAM L. REV. (forthcoming 2014).

23. See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 41–43 (2010) (summarizing reports on representation rates in housing, small claims, and family law cases).

24. ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2007, at 20–21 (2007), available at [http://www.clasp.org/publications/civil\\_legal\\_aid\\_2007.pdf](http://www.clasp.org/publications/civil_legal_aid_2007.pdf).

25. For the kind of services available, see Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?* 82 JUDICATURE 13, 20–22 (1998); *infra* text accompanying note 108.

bewildering complexity, and forms with archaic jargon. The United States lags behind other nations in providing access to justice through less expensive approaches than representation by lawyers.<sup>26</sup> For example, in the United Kingdom, millions of individuals are assisted by Citizens' Advice Bureaus, which are staffed by trained non-lawyer volunteers.<sup>27</sup>

In this country, the result is that only about half of Americans have reported satisfaction with the resolution of their own legal problems.<sup>28</sup> The experience of one lawyer-less litigant was all too common. When told by a trial court that he lacked a draft order that would authorize a referral to counseling, the man began asking questions about how to prepare the order. The judge responded, "I'm not your secretary," and shoed the man out of the courtroom.<sup>29</sup>

Moreover, for some cases, such as uncontested divorces, lawyers may be contributing more to the problem than the solution. In one survey of parents of young children represented by counsel in divorce proceedings, seventy-one percent felt that the legal process exacerbated hostility.<sup>30</sup> Parents also felt that the role of the attorney contributed to conflict by pitting them against each other and "replacing direct communication with discussion filtered only through attorneys."<sup>31</sup> Other research finds that divorcing couples prefer simpler, less adversarial procedures, and that many pro se litigants do not hire lawyers for fear of intensifying conflict.<sup>32</sup>

### C. Doctrinal

At the doctrinal level, problems also arise from courts' expansive definitions of unauthorized practice of law (UPL) by non-lawyers and the restrictive standards for determining when court-appointed counsel is available. The result has been to foreclose access to

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26. Charn, *supra* note 18, at 2226.

27. See *History of the Citizens Advice Service*, CITIZENS ADVICE BUREAUS, <http://www.citizensadvice.org.uk/index/aboutus/ourhistory.htm> (last visited Mar. 25, 2014).

28. ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS; MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 7-19 (1994).

29. Amanda Ripley, *Who Needs Lawyers*, TIME, June 12, 2000, at 62.

30. Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283, 298 (1999).

31. *Id.*

32. Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106, 2117-18 (2013).

qualified non-lawyers, and to place on unrepresented litigants an unrealistic burden of showing that the absence of a lawyer makes a legal proceeding fundamentally unfair.

A common feature of statutory and common-law prohibitions on unauthorized practice is their broad and ambiguous scope. A number of jurisdictions simply prohibit, without defining, the practice of law by non-lawyers.<sup>33</sup> Others take a circular approach and define the practice of law as what lawyers do.<sup>34</sup> Some jurisdictions list conduct that is illustrative, such as providing legal advice, legal representation, and preparation of legal instruments, and then conclude with some amorphous catchall provision, such as “any action taken for others in any matter connected with the law.”<sup>35</sup> On their face, these prohibitions encompass a wide range of common commercial activity. Many individuals, including accountants, financial advisors, real estate brokers, insurance agents, and even newspaper advice columnists could not give intelligent advice without reference to legal concerns. Moreover, the ban on personalized assistance stands as a powerful barrier to competent low-cost providers. Form-processing services, for example, may provide clerical help, but are prohibited from correcting obvious errors or answering simple questions about where and when papers must be filed.<sup>36</sup> A few decisions have even held that computerized document assistance programs such as LegalZoom constitutes the unauthorized practice of law because the on-line programs go beyond clerical support.<sup>37</sup> Court clerks are also

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33. See Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 722 (2007); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 45 (1981); see also Hoppock, *supra*, at 722 n.35 (listing cases illustrating state courts’ reluctance to offer a definition).

34. Rhode, *supra* note 33, at 45 n.136.

35. *Id.* at 46 nn.140–42; see also GA. CODE ANN. § 9-401 (Supp. 1981).

36. See Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978); Fifteenth Judicial Dist. Unified Bar Ass’n v. Glasgow, No. M1996-00020-COA-R3-CV, 1999 WL 1128847, at \*3–6 (Tenn. Ct. App. Dec. 10, 1999).

37. See, e.g., *In re Reynoso*, 477 F.3d 1117, 1126 (9th Cir. 2007); *Unauthorized Practice of Law Comm. v. Parsons Tech. (Unauthorized Practice of Law)*, 179 F. 3d 956 (5th Cir. 1999); *Janson v. Legal Zoom.com (Janson)*, 802 F. Supp. 2d 1053, 1069–70 (W.D. Mo. 2011). However, *Unauthorized Practice of Law* was overturned by a legislative exemption, and *Janson* was subsequently settled without banning the services altogether. For further discussion, see Tom McNichol, *Is LegalZoom’s Gain Your Loss?*, CAL. LAW., Sept. 2010, at 20, available at <http://www.callawyer.com/clstory.cfm?eid=911404&ref=updates>.

banned from giving advice to unrepresented parties.<sup>38</sup> Some courthouses even have signs stating that clerks “can’t answer questions of a legal nature.”<sup>39</sup> Yet as one California judge noted, those are the only questions that clerks generally encounter, other than “where is the restroom.”<sup>40</sup>

Such expansive prohibitions ill serve the public interest. Although courts repeatedly insist that broad prohibitions on unauthorized practice serve to protect the public,<sup>41</sup> support for that claim is often lacking. In my recent review of ten years of reported UPL cases, less than a quarter mentioned specific evidence of public injury.<sup>42</sup> In my survey of officials involved in UPL enforcement, two thirds could not recall a specific case of injury in the past year.<sup>43</sup> Other research similarly casts doubt on the frequency of client injury. The vast majority of UPL lawsuits filed against cyber lawyer products are brought by lawyers or unauthorized practice committees and generally settle without examples of harm.<sup>44</sup>

Other nations permit non-lawyers to provide legal advice and assist with routine documents, and the evidence available does not suggest that their performance has been inadequate.<sup>45</sup> In a study comparing outcomes for low-income clients in the United Kingdom on matters such as welfare benefits, housing, and employment, non-lawyers generally outperformed lawyers in terms of concrete results and client satisfaction.<sup>46</sup> After reviewing their own and other empirical studies, the authors of that study concluded, “it is specialization, not

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38. John M. Greacen, *Clerk’s Office Staff Cannot Give Legal Advice?: What Does That Mean?*, JUDGES J., Winter 1995, at 10, 10.

39. RHODE, *supra* note 3, at 83.

40. *Id.*

41. Ky. Bar Ass’n v. Tarpinian, 337 S.W.3d 627, 628–31 (Ky. 2011) (adopting and relying on Special Commissioner’s report); La. State Bar Ass’n v. Carr & Assocs., 15 So. 3d 158, 165–67 (La. Ct. App. 2009).

42. Rhode & Ricca, *supra* note 22, at 15–16.

43. *Id.* at 12.

44. Mathew Rotenberg, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 722 (2012).

45. RHODE, *supra* note 3, at 89; Herbert Kritzer, *Rethinking Barriers to Legal Practice*, 81 JUDICATURE 100, 100–01 (1997) (discussing English Citizen’s Advice Bureaus with trained non lawyer volunteers); Julian Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT’L L.J. 1629, 1636 (2010) (discussing Swedish legal advice providers).

46. Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC’Y REV. 765, 785–86 (2003). For discussion, see Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883, 888–90 (2004).

professional status, which appears to be the best predictor of quality.”<sup>47</sup> Ontario allows licensed paralegals to represent individuals in minor court cases and administrative tribunal proceedings, and a five-year review reported “solid levels of [public] satisfaction with the services received.”<sup>48</sup>

In the United States, research on non-lawyer specialists who provide legal representation in bankruptcy and administrative agency hearings finds that they generally perform as well or better than attorneys.<sup>49</sup> Extensive formal training is less critical than daily experience for effective advocacy.<sup>50</sup> Yet existing unauthorized practice doctrine focuses only on whether the non-lawyer is providing legal assistance, not the quality of that assistance or the public injury that results.

Further doctrinal problems arise from the restrictive standards that courts have established to determine rights to counsel in civil proceedings.<sup>51</sup> The most recent authoritative case is the Supreme Court’s decision in *Turner v. Rogers*.<sup>52</sup> Michael Turner had been jailed repeatedly for civil contempt for failure to make child support payments to Rebecca Rodgers, the mother of his child.<sup>53</sup> Turner was unrepresented at his civil contempt hearings, and while serving a one-year sentence, found a pro bono attorney to challenge the failure of the South Carolina state court to appoint counsel for him.<sup>54</sup> In a unanimous decision, the South Carolina Supreme Court held that the Due Process Clause did not entitle Turner to counsel.<sup>55</sup> On certiorari, the United States Supreme Court applied a balancing test articulated in *Mathews v. Eldridge*, which requires consideration of “(1) the nature of the ‘private interest that will be affected,’ (2) the comparative ‘risk’ of an ‘erroneous deprivation’ of that interest with and without ‘additional or substitute procedural safeguards,’ and (3) the nature and the magnitude of any countervailing interest in not

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47. Moorhead et al., *supra* note 46, at 795.

48. DAVID B. MORRIS, ONTARIO MINISTRY OF THE ATTORNEY GEN., REPORT OF APPOINTEE’S FIVE-YEAR REVIEW OF PARALEGAL REGULATION IN ONTARIO 12 (2012)

49. HERBERT KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 148, 201 (1998).

50. *Id.* at 76, 108, 148, 190, 201.

51. *See* *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

52. *Id.*

53. *Id.* at 2513.

54. *Id.* at 2514.

55. *Id.*

providing ‘additional or substitute requirement[s].’<sup>56</sup> After balancing these considerations, the majority concluded that despite the defendant’s strong liberty interest, the facts tipped against appointment of counsel.<sup>57</sup> In so holding, the court stressed that the critical issue of the defendant’s ability to pay support was “sufficiently straightforward” and uncomplicated to be resolved without counsel; moreover, because Rogers was not represented, appointing counsel only for Turner could create an asymmetry that might unduly slow payment and make the proceedings “less fair overall.”<sup>58</sup> The majority also believed that there was an alternative set of safeguards that could “significantly reduce the risk of an erroneous deprivation of liberty” without appointing counsel.<sup>59</sup> These included giving notice that ability to pay child support is a key issue; asking defendants to fill out financial disclosure forms; allowing defendants to respond to questions about their finances; and making express findings regarding ability to pay. Because Turner had been denied such protections, his conviction could not stand.

The decision is problematic for several reasons. One is that the court provided no empirical evidence to support assertions about the complexity of procedures and fairness of alternatives. Some commentators suggest that the Court’s analysis reveals a “breathtaking disconnect from the real world.”<sup>60</sup> As Peter Edelman noted, “I don’t think the Court understands what it’s like to go into court without a lawyer. It would be good for the whole lot of them to go and spend the day in landlord-tenant court and see if they have the same view.”<sup>61</sup> How would an unrepresented litigant be able to establish that alternative procedures would lack fundamental fairness

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56. *Id.* at 2517–18 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

57. *Id.* at 2519–20 (“We consequently hold that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order.”).

58. *Id.* at 2519.

59. *Id.*

60. Norman Reimer, *Turner v. Rogers: The Right to Counsel Haunted by the Ghost of Gagnon*, CONCURRING OPINIONS (June 27, 2011, 4:51 PM), <http://www.concurringopinions.com/archives/2011/06/turner-v-rogers-the-right-to-counsel-haunted-by-the-ghost-of-gagnon.html>; see also Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. LAW & POL’Y REV. 31, 41 (2013); Peter B. Edelman, *Does the Supreme Court Get It in Turner?*, CONCURRING OPINIONS (June 27, 2011), <http://www.concurringopinions.com/archives/2011/06/does-the-supreme-court-get-it-in-turner.html>.

61. Mark Walsh, *A Sour Note from Gideon’s Trumpet: Playing the Blues for the Right of Counsel in Civil Cases*, A.B.A. J. (Sept. 1, 2011), [http://www.abajournal.com/magazine/article/a\\_sour\\_note\\_from\\_gideons\\_trumpet](http://www.abajournal.com/magazine/article/a_sour_note_from_gideons_trumpet).

or present an unacceptable risk of error?<sup>62</sup> How much risk would be too much?<sup>63</sup> Critics also noted that Turner faced more jail time for civil contempt than he would have served for criminal contempt, which would have required appointment of counsel.<sup>64</sup>

Judith Resnik found still more fundamental problems with the *Mathews* balancing test that *Turner* applied; it serves

to mask the lack of genuine empiricism. Neither judges nor litigants can identify with any rigor the actual costs of various procedures, let alone model (or know) the impact in terms of false positives and negatives produced by the same, more or different processes . . . . While one can state the equation, one cannot do the math because the data are missing.<sup>65</sup>

A further problem is that unrepresented litigants cannot ensure that the requisite procedural alternatives are installed.<sup>66</sup> As Resnik notes, the trial judge in *Turner* “spent less than five minutes . . . made no findings on the record . . . and sent Turner to jail for twelve months,” which suggests the “inadequacies of the decider of fact” who would be responsible for procedural fairness.<sup>67</sup> Absent some “public accounting and lawyer involvement, few mechanisms exist to police the fairness that *Turner* calls for.”<sup>68</sup>

Moreover, the *Mathews* balancing test endorsed by *Turner* is not only flawed in theory; it has proven unworkable in practice. Vulnerable litigants in need of a lawyer’s assistance almost never succeed in persuading federal courts to provide it.<sup>69</sup> Courts and legislatures have mandated counsel in civil cases only in extremely limited categories of matters, typically involving family, medical, and civil commitment issues.<sup>70</sup> Judging from the caseloads of civil legal

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62. Engler, *supra* note 60, at 54–56.

63. *Id.* at 56.

64. Walsh, *supra* note 61.

65. Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 158 (2012)

66. *See id.*

67. *Id.* at 160.

68. *Id.* at 161.

69. *See* Houseman, *supra* note 24, at 16. The litigation history of Civil *Gideon* is collected on the website of the coalition for a civil right to counsel. *See* *Litigation*, NAT’L COALITION FOR CIVIL RIGHT COUNCIL, <http://www.civilrighttocounsel.org/advances/litigation> (last visited Mar. 15, 2014).

70. *See* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245, 245 (2006); Clare Pastore, *Life After Lassiter: An Over View of State-Court Right to Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 189–91 (2006).

aid programs, no right to counsel is available for about ninety-eight percent of cases that directly involve low-income parties.<sup>71</sup> The process for selecting cases in which to guarantee counsel also seems idiosyncratic. Why should individuals challenging voluntary vaccination orders or school attendance get a lawyer, but not individuals dealing with survival needs such as food, housing, medical benefits or protection from domestic violence?<sup>72</sup> Even where lawyers are available, requirements of adequate experience, training and compensation are “more often than not . . . neither imposed nor satisfied.”<sup>73</sup>

The denial of assistance to undocumented aliens imposes particular hardship. Their frequent lack of language skills and understanding of American legal processes makes it difficult to proceed without legal assistance. Yet only about a third of aliens, and ten percent of those in detention, have legal representation in immigration proceedings.<sup>74</sup> Programs funded by the federal Legal Services Corporation are prohibited from representing undocumented aliens.<sup>75</sup> Although leading federal decisions authorize the appointment of counsel to prevent erroneous judgments, surveys cannot find a single immigration case in three decades where a noncitizen has been granted a lawyer.<sup>76</sup>

#### D. Political

A final set of barriers in the justice system is political. The public is uninformed and unorganized on issues concerning access to justice and prefers options that bar organizations have been effective in opposing.<sup>77</sup> Although the vast majority of Americans support provision of legal services to those who cannot afford it, four-fifths also incorrectly believe that the poor are entitled to counsel in civil

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71. See Houseman, *supra* note 24, at 16.

72. See Abel & Rettig, *supra* note 70, at 246–48.

73. *Id.* at 248.

74. See Robert A. Katzman, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 7–8 (2008).

75. See 45 C.F.R. § 1626.3 (2013).

76. See, e.g., *Aguilera-Enriquez v. Immigration & Naturalization Serv.*, 516 F.2d 565, 568–69 (6th Cir. 1975); THOMAS ALEXANDER ALIENIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP* 645 (5th ed. 2003).

77. For lawyers' advantages over consumers in lobbying over matters such as anticompetitive licensing restrictions, see Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MISSOURI L. REV. 299, 314 (2004).

cases.<sup>78</sup> Only a third think that low-income individuals would have difficulty finding legal assistance, a perception wildly out of touch with reality.<sup>79</sup> On the rare occasions when its opinion has been solicited, four-fifths of the public also agreed that “many things that lawyers handle . . . can be done as well and less expensively by non-lawyers.”<sup>80</sup> Yet ordinary citizens lack adequate incentives to mobilize for reforms permitting access to such service providers. Unlike health care, which is a crucial and continuing need, most Americans’ demands for legal assistance are much more episodic and more readily met, however imperfectly, by self-help.

The obstacles to reform are especially formidable given the bar associations’ incentives and capacity for resistance. No other occupation enjoys such prominence in all three branches of government. As a result, the bar has traditionally been well-positioned to block changes that might benefit the public at the profession’s expense. The bar has repeatedly fought publication of self-help materials and opposed access to non-lawyer assistance.<sup>81</sup> The ABA is on record as supporting efforts to strengthen UPL prohibitions and over four-fifths of surveyed lawyers favor prosecution of independent paralegals for unauthorized practice.<sup>82</sup> The bar has also been concerned that “pro se court reform will spread upwards from the poor to the middle class and beyond.”<sup>83</sup> And the courts, which enforce those prohibitions and control procedural

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78. In a survey commissioned by the American Bar Association, fifty-five percent of respondents strongly agreed that it was essential that legal services be available; thirty-three percent somewhat agreed. ABA, Survey Summary: Economic Downturn and Access to Legal Resources (Apr. 20, 2009) (on file with author). For the public’s belief about the right to counsel, see Johnson, *supra* note 8, at 393; see also ABA, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 63 (1999), available at [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/perceptions\\_of\\_justice\\_system\\_1999\\_2nd\\_half.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/perceptions_of_justice_system_1999_2nd_half.authcheckdam.pdf).

79. See ABA, *supra* note 78, at 63.

80. BARBARA CURRAN & F. SPAULDING, THE LEGAL NEEDS OF THE PUBLIC 231 (1977). The bar has not recently asked that question.

81. See Rhode, *supra* note 22, at 705. For the Texas bar’s effort to ban a self-help computer software program, a decision that was overturned by the Texas legislature, see Unauthorized Practice of Law Comm. v. Parsons Tech., No. Civ.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1990), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999). For bar suits against Legal Zoom despite high rates of customer satisfaction, see generally Rhode & Ricca, *supra* note 22.

82. RHODE, *supra* note 3, at 88 (2004); see also James Podgers, *Crumbling Fortress: Legal Profession Faces Rising Tide of Nonlawyer Practice*, A.B.A. J., Dec. 1993, at 51, 56 (1993).

83. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed Counsel, Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 994 (2012).

simplification and pro se assistance programs, have been unduly deferential to the bar on matters that affect its livelihood.<sup>84</sup>

Political opposition from attorneys has also sabotaged efforts to mandate pro bono service. Although bar leaders and ethical codes have long maintained that all lawyers share a professional responsibility to provide legal assistance to those who cannot afford it, proposals to put teeth into that obligation have been unceremoniously buried.<sup>85</sup> Only one state, New York, requires service, and that requirement applies only to applicants to the bar.<sup>86</sup> In the absence of requirements, only thirty-six percent of American lawyers meet the aspirational standard of fifty hours of service annually that is codified in the ABA Model Rules of Professional Conduct.<sup>87</sup> In the nation's largest firms, less than half of the lawyers contribute even twenty hours a year.<sup>88</sup> Given these participation levels, it is perhaps unsurprising that most attorneys resist campaigns to make service mandatory. Only eight states even require lawyers to report their pro bono hours.<sup>89</sup>

The inadequacy of bar involvement reflects a missed opportunity for the profession as well as the public. Lawyers themselves benefit, both individually and collectively, from participation in public service. It can enhance their skills, contacts, reputation, and psychological well-being, as well as the professions' public image.<sup>90</sup>

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84. See BENJAMIN BARTON, THE LAWYER JUDGE BIAS IN THE AMERICAN LEGAL PROFESSION 83 (2011); Benjamin Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?* (Univ. of Tenn. Coll. of Law Legal Studies Research Paper Series No. 1, Oct. 2007), available at <http://ssrn.com/abstract=976478>.

85. For the bar's current recognition of lawyers' pro bono responsibility, see MODEL RULES OF PROF'L CONDUCT R. 6.1 (Discussion Draft 1983). Bar ethical codes and efforts to require pro bono service are chronicled in Deborah L. Rhode, *Pro Bono in Principle and in Practice* 15–17 (Stanford Law Sch. Pub. Law & Legal Theory Working Paper Series No. 66, June 2003).

86. The New York rule requires fifty hours of unpaid work as a condition of admission. See Mosi Secret, *Judge Details a Rule Requiring Pro Bono Work by Aspiring Lawyers*, N.Y. TIMES, Sept. 19, 2012, at A25.

87. See MODEL RULES OF PROF'L CONDUCT R. 6.1 (Discussion Draft 1983); ABA STANDING COMM. ON PRO BONO AND PUBLIC SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 5 (2013).

88. Only forty-four percent performed at least twenty hours of service. See *Where the Recession Lingers*, AM. LAW., June 2013, at 47.

89. *State by State Pro Bono Service Rules*, A.B.A., [http://www.americanbar.org/proups/probono\\_public\\_service/policy/state-ethic-rules.html](http://www.americanbar.org/proups/probono_public_service/policy/state-ethic-rules.html) (last visited Mar. 15, 2014).

90. See Rhode, *supra* note 85, at 16.

## II. REFORM STRATEGIES

Despite these political obstacles, there is reason to hope that some progress is possible on access to justice. First, the increasing public interest in do-it-yourself publications and services and the increasing volume of pro se litigants has created corresponding pressure for reform.<sup>91</sup> As Russell Engler notes, attitudes toward the role of judges and court clerks concerning unrepresented parties have “undergone a sea change over the past fifteen years.”<sup>92</sup> About half the states have access to justice commissions, and a consortium of law professors recently formed to support research and teaching initiatives on access issues.<sup>93</sup> The State of Washington has enacted a licensing system for trained paralegals who can offer limited services, and New York and California are considering proposals for similar systems.<sup>94</sup> Bar efforts to crack down on self-help software have triggered legislative reversal.<sup>95</sup> The ABA has abandoned its attempt to promulgate a restrictive definition of unauthorized practice of law after protest by the Justice Department, the Federal Trade Commission, and its own antitrust division concerning the anticompetitive consequences of such changes.<sup>96</sup> California and Massachusetts have launched pilot projects to evaluate the cost-effectiveness of guaranteeing the right to counsel in specified circumstances.<sup>97</sup> An ABA Task Force on Legal Education has recommended a licensing system for paralegals to provide routine legal services.<sup>98</sup> Never has there been a more receptive climate for access to justice issues.

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91. For example, LegalZoom has served over two million customers since its founding and has shown annual revenue of \$156 million. Anthony Ha, *Legal Zoom Files for \$120 M IPO: Saw \$156M in Revenues Last Year*, TECH CRUNCH (May 11, 2012), <http://techcrunch.com/2012/05/11/legalzoom.ipo>.

92. Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. LAW & POL'Y REV. 31, 45 (2013).

93. For access to justice commissions, see Richard Zorza, Turner v. Rodgers: *The Implications for Access to Justice Strategies*, 95 JUDICATURE 255, 264 (2012). For the consortium, see Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 532 (2013).

94. See Don J. DeBenedictis, *State Bar to Weigh Licensing Nonlawyers*, S.F. DAILY J., Apr. 11, 2013, at 1.

95. See Rhode, *supra* note 93, at 543.

96. See *id.*

97. See JUDICIAL COUNSEL OF CAL., SARGENT SHRIVER CIVIL COUNSEL ACT (A.B. 590) (2012) (describing California pilot); Engler, *supra* note 92, at 49 (describing Massachusetts proposals).

98. ABA TASK FORCE ON THE FUTURE OF LEGAL EDUC., DRAFT REPORT AND RECOMMENDATIONS 12–13, 27 (2013), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/taskforcecomments/task\\_force\\_on\\_legal\\_education\\_draft\\_report\\_september2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/task_force_on_legal_education_draft_report_september2013.authcheckdam.pdf).

Significant progress will require strategies on four levels. First, we need to maximize opportunities for self-help and assistance from service providers less expensive than lawyers. A second strategy should focus on ways to match cases with the most cost-effective providers, and to ensure access to lawyers in cases involving fundamental interests that cannot be effectively addressed in other ways. A third strategy should involve research to assess different methods of assistance and to gain a better understanding of what works best for whom in what circumstances.<sup>99</sup> A final strategy should ensure more education of the public and the profession about the need for reform.

### A. Self-Help and Non-lawyer Service Providers

The first strategy is already well underway. Courts around the country are implementing reform efforts to accommodate pro se litigants.<sup>100</sup> These litigants are often particularly vulnerable; they are disproportionately poor, and unfamiliar with legal proceedings, and many face barriers of language literacy, and education.<sup>101</sup> They need what Richard Zorza has termed “The Self-Help Friendly Court.”<sup>102</sup> This court would seek to reduce complexity, utilize technology, and train judges and staff in assisting litigants.<sup>103</sup> Models for this kind of court are increasingly available. The American Judicature Society and the National Center for State Courts have published guides to make legal proceedings more fair and accessible to parties without lawyers.<sup>104</sup> The Self-Represented Litigation Network has also published materials compiling best practices and innovative approaches.<sup>105</sup> Some court systems have established special magistrate courts for pro se cases, or employed staff attorneys to assist pro se litigants.<sup>106</sup> Others have hot lines, pro se clerks’ offices,

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99. Charn, *supra* note 18, at 2232.

100. See Barton & Bibas, *supra* note 83, at 987–90.

101. See Engler, *supra* note 23, at 79.

102. RICHARD ZORZA, THE NAT’L CTR. FOR STATE COURTS, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (2002).

103. Engler, *supra* note 60, at 57–58.

104. CYNTHIA GRAY, AM. JUDICATURE SOC’Y & STATE JUSTICE INST., REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS 51–57 (2005).

105. THE SELF-REPRESENTED LITIG. NETWORK, CORE MATERIALS ON SELF-REPRESENTED LITIGATION INNOVATION (2006).

106. For the New York magistrate court, see Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 493–97 (2002). For the San Antonio staff attorney

“lawyer-of-the-day’-programs,” and self-help centers.<sup>107</sup> However, all of these strategies assume a commitment to making courts more accessible—a commitment that has sometimes been lagging.<sup>108</sup> And in many jurisdictions, severe financial constraints and recent budgetary cutbacks have compounded the challenge of funding adequate pro se services.<sup>109</sup> Surmounting those obstacles will require more evaluation and exposure of inaccessible systems, more resources for innovation, and more ways to hold the courts accountable.<sup>110</sup>

Americans would also benefit from more effective channels of informal dispute resolution, not only in courthouses, but also in neighborhood, workplace and commercial settings. Considerable evidence suggests that well-designed employee and consumer grievance procedures benefit both business and individual participants, and that most people prefer to resolve disputes through informal, out-of court processes.<sup>111</sup> Businesses over a certain size could be given incentives to institutionalize such dispute resolution processes, and reforms could be mandated for arbitration and mediation procedures that are now skewed against weaker parties.<sup>112</sup>

The United States also needs changes in unauthorized practice doctrine and enforcement, as well as licensing systems for paralegals that would increase access to low-cost services. Charges of

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program, see Anita Davis, *A Pro Se Program that Is Also “Pro” Judges, Lawyers, and the Public*, 63 TEX. B.J. 896 (2000).

107. See Engler, *supra* note 23 at 42.

108. Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 40 (2002). For negative perceptions about pro se litigants and the burdens they create, see Stephen Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 449 (2009); Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 381 (2002).

109. See Julia Cheever, *Deep Cuts to Court Funding Make CA Chief Justice “Afraid to See the Future,”* S.F. APPEAL (Aug. 9, 2013), <http://sfappeal.com/2013/08/deep-cuts-to-court-funding-make-ca-chief-justice-afraid-to-see-the-future>; *Mounting Budget Troubles Crimp Delivery of Justice*, U.S.A. TODAY, Dec. 6, 2011, at 10A.

110. Determining what strategies will increase accountability should be part of the research agenda described *infra* Part II.E.

111. CHRISTINE PARKER, *JUST LAWYERS* 184–89 (1990). For individuals’ preferences, see HAZEL G. GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 217–26 (1999); MICHAEL ZANDER, *THE STATE OF JUSTICE* 29–32 (2000).

112. See Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2355–60 (2012); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1015–17 (1999).

unauthorized practice should only be brought in cases of demonstrated consumer injury. Judges should follow the lead of courts that have weighed the public interest in determining whether to ban unauthorized practice. For example, the Colorado Supreme Court upheld a system enabling non-lawyers to represent claimants in unemployment proceedings; the Court reasoned that lay representation has been accepted by the public for fifty years and “poses no threat to the People of the State of Colorado. Nor is it interfering with the proper administration of justice. No evidence was presented to the contrary.”<sup>113</sup> Similarly, the Washington State Supreme Court, after considering factors such as cost, availability of services, and consumer convenience, concluded that it was in the public’s interest for licensed real estate brokers to fill in standard form agreements.<sup>114</sup> Such a consumer-oriented approach would allow for a more socially defensible regulatory structure than conventional bans on non-lawyer practice irrespective of its quality and cost-effectiveness.

Licensing systems could also be developed to allow qualified non-lawyers to offer personalized assistance on routine matters. Consumer protections could be required concerning qualifications, disclaimers, ethical standards, malpractice insurance, and discipline.<sup>115</sup> Many administrative agencies already have the power to regulate non-lawyers appearing before them, and no evidence suggests that these frameworks have been inadequate or that agencies have more disciplinary problems with non-lawyers than lawyers.<sup>116</sup> Under their inherent powers, courts could oversee the development of such licensing systems or approve legislatively authorized structures as consistent with the public interest. A number of jurisdictions, including New York and California, are considering licensing frameworks, and Washington has implemented one for certain specialties.<sup>117</sup> If the goal is to protect clients from incompetence,

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113. *Unauthorized Practice of Law Comm. of Supreme Court of Colo. v. Emp’rs Unity, Inc.*, 716 P.2d 460, 463 (Colo. 1986)

114. *Cultum v. Heritage House Realtors, Inc.*, 694 P.2d 630, 633–35 (Wash. 1985).

115. See Stephen Gillers, Note, *How to Make Rules for Lawyers*, 40 PEPP. L. REV. 365, 417 (2013).

116. See Kritzer, *supra* note 45, at 101; Emily A. Unger, *Solving Immigration Consultant Fraud Through Expanded Federal Accreditation*, 29 LAW & INEQUALITY 425, 448 (2011); see also Zachery C. Zurek, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 242, 265 (discussing requirements for nonlawyer patent specialists).

117. Joyce E. Cutler, *California State Bar Group Approves Report to Spur Support for Nonlawyer Practitioners*, 29 LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 416 (July 3, 2013); Don J. DeBenedictis, *State Bar to Weigh Licensing*

rather than lawyers from competition, then regulation—not prohibition—of lay specialists makes sense.

Such a regulatory system would be particularly beneficial in the immigration area, a field characterized by both pervasive fraud and pervasive unmet needs.<sup>118</sup> Individuals holding themselves out as notaries and immigration consultants have preyed on the ignorance of undocumented consumers who cannot afford attorneys and are reluctant to approach authorities to complain about fraudulent services. Many of these consultants capitalize on the status of *notario publicos* in some Latin American countries, where these legal professionals enjoy formal legal training and authority to provide legal assistance.<sup>119</sup> The situation would benefit from a licensing structure similar to those in Australia, Canada, and the United Kingdom, which allow licensed non-lawyer experts to provide immigration-related assistance.<sup>120</sup> Although the United States allows accredited non-lawyers to represent individuals in immigration appeals, it permits only representatives who work for nonprofit organizations and who accept only nominal fees for their efforts.<sup>121</sup> An expanded licensing system that would allow qualified lay experts to charge reasonable fees could expand access to justice for a population in great need of assistance.<sup>122</sup>

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*Nonlawyers*, S.F. DAILY J., Apr. 11, 2013, at 1; Christine Simmons, *City Bar Eyes Nonlawyer “Aides,” “Technicians” to Help the Poor*, N.Y. L.J., June 26, 2013, at 1.

118. See Unger, *supra* note 116; see also Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 589 (2009); Jessica Weisberg & Bridget O’Shea, *Fake Lawyers and Notaries Prey on Immigrants*, N.Y. TIMES, Oct. 23, 2011, at A25B. For unmet need, see Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrants*, 115 W. VA. L. REV. 643, 654–55 (2012).

119. Anne E. Langford, *What’s in a Name?: Notarios in the United States and the Exploitation of a Vulnerable Latino Immigrant Population*, 7 HARV. LATINO L. REV. 115, 119–20 (2004).

120. For the role of registered migration agents in Australia, see AUSTRALIAN GOV’T OFFICE MIGRATION AGENTS REGISTRATION AUTHORITY, <https://www.mara.gov.au> (last visited Mar. 15, 2014). For the role of authorized immigration consultants in Canada, see *Use an Authorized Immigration Representative*, CITIZENSHIP & IMMIGR. CANADA, <http://www.cic.gc.ca/english/information/representative/rep-who.asp> (last visited Mar. 15, 2014). For the role of regulated immigration advisors in the United Kingdom, see OFFICE OF THE IMMIGRATION SERVS. COMM’R, THE CODE OF STANDARDS: THE COMMISSIONER’S RULES (2007), available at <http://oisc.homeoffice.gov.uk/servefile.aspx?docid=6>.

121. See 8 C.F.R. § 1292.1 (2014); Shannon, note 118, at 602–03.

122. See Unger, *supra* note 116, at 443–49; see also Careen Shannon, *To License or Not to License? A Look at Differing Approaches to Policing the Activities of Nonlawyer Immigration Service Providers*, 33 CARDOZO L. REV. 437, 485–86 (2011).

In short, the current structure is both under-enforced and over-inclusive. Bar prohibitions encompass a sweeping array of competent, low-cost services. Yet strong consumer demand for such assistance makes these prohibitions difficult to enforce. As a result, most lay practice goes unregulated, and when abuses occur, as in the immigration context, the public has inadequate remedies. A preferable regulatory structure would provide both less and more protection—less for attorneys and more for consumers.

### B. Right to Counsel in Civil Cases

Not only do we need to increase less expensive options than attorneys, we also need systems to match clients with appropriate service providers and to ensure provision of lawyers where other options are inadequate.<sup>123</sup> The right to counsel (a Civil *Gideon*) should depend on whether fundamental interests are at issue and whether a lawyer's assistance is critical to ensure fundamental fairness.<sup>124</sup> In identifying fundamental interests, a starting point for analysis is the American Bar Association's resolution in favor of appointing counsel in areas of "basic human need," defined as shelter, sustenance, safety, health and child custody.<sup>125</sup> In determining fundamental fairness, courts and legislatures should consider the complexity of the procedures and the power relations between the parties.

The right to counsel is compelling in principle, but challenging in practice. Over eighty years ago, the U.S. Supreme Court recognized that an individual's "right to be heard [in legal proceedings] would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."<sup>126</sup> Access to an attorney is often critical to the rule of law and social justice. In contexts involving fundamental needs, the stakes for parties will often be more substantial than the possibility of brief imprisonment for a misdemeanor, where counsel is already mandated.<sup>127</sup> The United States lags behind the forty-nine countries in the Council of Europe, as well as other nations such as

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123. For the need for such a matching system, see Johnson, *supra* note 8, at 420–21; Charn, *supra* note 18.

124. For alternative doctrinal standards, see Engler, *supra* note 23, at 81, 85.

125. ABA, *supra* note 20, at 1.

126. *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

127. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). For arguments supporting a right to counsel, see *A Right to a Lawyer? Momentum Grows*, 40 CLEARINGHOUSE REV. 63 (2006); Symposium, *Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMPLE POL. & CIV. RTS. L. REV. 697 (2006).

Canada, Japan, India and Australia that have recognized a right to counsel in at least some civil cases.<sup>128</sup>

What stands in the way is money. America's experience in attempting to fund a right to counsel in criminal cases is not encouraging. In many jurisdictions, staggering caseloads and shockingly inadequate fees have made effective representation impossible.<sup>129</sup> Given the current constraints on state and local budgets, funding for a civil right to counsel may fare no better. In jurisdictions that now appoint lawyers for defendants in child support cases, inadequate time and resources often prevent effective assistance.<sup>130</sup> A related concern is that extending the civil right to counsel "will compete with other rights to counsel, spreading funding ever thinner."<sup>131</sup>

Addressing these problems will require government funding adequate to meet the demands of those who need legal assistance, but cannot realistically afford it. What constitutes "need" and "affordability" is of course open to dispute, but by almost any standard our current system falls far short.<sup>132</sup> Most European nations guarantee legal assistance for a much broader category of individuals than those entitled to legal aid in the American system. American individuals that are entitled to legal aid are those below or just above the official poverty line.<sup>133</sup> Examples of the eligibility criterion in other countries include:

- Does the claim have a reasonable chance of success?
- What would be the benefits of legal assistance or the harms if it is unavailable?

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128. See Reven Lidman, Note, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 771 (2006).

129. See ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA L. REV. 967, 972-77 (2012).

130. See REBECCA MAY & MARGUERITE ROULET, *A LOOK AT ARRESTS OF LOW-INCOME FATHERS FOR CHILD SUPPORT NONPAYMENT: ENFORCEMENT, COURT AND PROGRAM PRACTICES*, CENTER FOR FAMILY POLICY AND PRACTICE 45 (2005), available at <http://www.cffpp.org/publications/LookAtArrests.pdf>.

131. Barton & Bibas, *supra* note 83, at 993-94.

132. See *supra* text accompanying notes 16-29.

133. For the financial eligibility requirements of legal aid programs that receive federal funds from the Legal Services Corporation, see 45 C.F.R § 1611.3 (2013).

- Would a reasonable lawyer, advising a reasonable client, suggest that the client use his or her own money to pursue the issue?<sup>134</sup>

These nations' eligibility structures remedy a major limitation of the United States model, which excludes many individuals with urgent problems and no realistic means of addressing them.<sup>135</sup> Although such a structure would require more funding, it would also have more political appeal than current programs because it would benefit more than just low-income communities.

Subsidies for an expanded system could also come from various financial sources likely to command greater political support than general tax revenues. Examples include a small progressive tax on law-related revenues, a surcharge on court filing fees based on the amount in controversy, and more contexts permitting fee awards to prevailing parties.<sup>136</sup> In a nation that spends over \$90 billion annually on private legal fees, a modest one percent tax would raise \$900 million, which would almost triple the current federal budget for legal aid.<sup>137</sup>

An equitable and cost-effective legal aid system would also operate without the restrictions on activities that now accompany government subsidies. Legal services programs that receive federal funds may not use that money, and in some instances may not use any other revenue for a broad range of matters including school desegregation, abortion, political redistricting, welfare reform, and clients who are undocumented aliens or prison inmates.<sup>138</sup> Nor may these programs

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134. See e.g., *Quail v. Mun. Court*, 217 Cal. Rptr. 361, 373 n.13 (Ct. App. 1985); Jeremy Cooper, *English Legal Services: A Tale of Diminishing Returns*, 5 MD. J. CONTEMP. LEGAL ISSUES 247, 253 (2004); Sarah Conn Martin, *Appointed Counsel in Civil Cases: How California's Pilot Project Compares to Access to Counsel in Other Developed Countries*, 37 J. LEGAL PROF. 281, 290 (2013); Mark Richardson & Steven Reynolds, *The Shrinking Public Purse: Civil Legal Aid in New South Wales, Australia*, 5 MD. J. CONTEMP. LEGAL ISSUES 349, 360 (2004).

135. See *supra* text accompanying notes 6–9.

136. California's pilot Civil Gideon program is funded through fees associated with non-essential court services. *Recent Legislation—Access to Justice—Civil Right to Counsel—California Establishes Pilot Program to Expand Access to Counsel for Low-Income Parties—Act of Oct. 11, 2009, Ch. 457 (Codified in Scattered Sections of Cal. Gov't Code)*, 123 HARV. L. REV. 1532, 1534 (2010).

137. See EARL JOHNSON, *TOWARD EQUAL JUSTICE* 215 (1975); William Carlson, *San Francisco Lawyers Propose Tax on Lawyers*, S. F. CHRON., Feb. 7, 1989, at A7; see also LEGAL SERVS. CORP., *BUDGET REQUEST FISCAL YEAR 2014* (2013), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC\\_FY2014\\_Budget%20Request\\_FINrev\\_6.5.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC_FY2014_Budget%20Request_FINrev_6.5.pdf).

138. See ALAN HOUSEMAN & LINDA E. PERLE, *CTR. FOR LAW & SOC. POLICY, WHAT CAN AND CANNOT BE DONE: REPRESENTATION OF CLIENTS BY LSC-FUNDED PROGRAMS* 6 (2001).

engage in activities such as lobbying, community organizing, class actions, or representation in legislative and administrative rulemaking proceedings.<sup>139</sup> Since these are the very strategies that may be most likely to address the causes of legal problems and to deter future abuses, legal aid programs have faced an unpalatable choice. They can do without federal funds and help far fewer individual clients, but in a more effective fashion. Conversely, they can handle more cases, but only for politically acceptable clients, and in ways less likely to promote real change.<sup>140</sup> This is a choice we should not require. Legislators who have demanded such restrictions are attempting to accomplish indirectly what they have unable to do directly: curtail rights and social services benefiting the least popular of the poor. These actions are unworthy of a nation committed to equal justice under law.

### C. Pro Bono Service

Another obvious way to increase access to legal counsel is to require pro bono contributions from lawyers. It is a professional disgrace that most American lawyers cannot manage even an hour a week on pro bono service.<sup>141</sup> We can and must do better. Fifty hours a year, the current aspirational standard, should be mandatory, with a financial buyout option for those who lack the time or inclination for service. Buyout contributions could go to support designated legal aid providers. Such a requirement, calling for less than one hour a week of service or the financial equivalent, hardly justifies the overblown descriptions advanced by critics of mandatory service: “latent fascism,” “economic slavery,” and “involuntary servitude.”<sup>142</sup>

The rationale for a pro bono requirement is straightforward. Because access to law so often requires access to lawyers, they bear a particular responsibility to help make legal services available. As courts and bar ethical codes have long noted, the state grants lawyers

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139. See e.g., Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996); 45 C.F.R. §§ 1610–42 (2013); see also Houseman & Perle, *supra* note 138, at 5.

140. See generally David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia and Oregon Describe the Costs*, 17 YALE L. & POL’Y REV. 337 (1998). For critiques of these restrictions see David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CALIF. L. REV. 209, 225–26 (2003).

141. See *supra* text accompanying notes 87–89.

142. E.g., Tigran W. Elred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 391 n.97 (1993); Michael J. Mazzone, *Mandatory Pro Bono: Slavery in Disguise*, TEX. LAW. 22 (1990).

special privileges that impose special obligations.<sup>143</sup> As officers of the court, lawyers bear some responsibility for ensuring fundamental fairness in its processes.<sup>144</sup> As long as lawyers occupy such a central role in our justice system, there is particular value in exposing them to how that system functions, or fails to function, for the have-nots. Additionally,

Pro bono work offers many attorneys their only direct contact with what passes for justice among the poor. Giving broad segments of the bar some experience with poverty-related problems and public interest causes can lay crucial foundations for change. [For example,] pro bono programs have often launched social reform initiatives and strengthened support for government subsidies of legal aid.<sup>145</sup>

Mandating pro bono service would benefit the profession as well as the public. Volunteer service offers ways to gain additional skills, trial experience, and community contacts. Such career development opportunities, in the service of causes to which attorneys are committed, are often their most rewarding professional experiences.<sup>146</sup> Many lawyers report that they would like to do more pro bono work but are in institutions that do not support it.<sup>147</sup> ABA surveys find that young lawyers' greatest source of dissatisfaction in practice is its lack of connection to the public good.<sup>148</sup> Pro bono service can supply that connection.

In the absence of a requirement for pro bono service, more efforts could be made to encourage voluntary contributions. More courts and bar associations should require lawyers to report their pro bono assistance, and more clients should consider lawyers' pro bono involvement when selecting counsel. For example, California legislation requires pro bono contributions as a condition of any state contract for legal services exceeding \$50,000.<sup>149</sup> Organizations such as the ABA Standing Committee on Pro Bono and Public Service could publish directories with information concerning employers' pro bono policies and contributions. They could also develop best the practices

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143. See Rhode, *supra* note 85, at 41.

144. See MODEL RULES OF PROF'L CONDUCT pmb. (Discussion Draft 1983).

145. Rhode, *supra* note 85, at 42.

146. See *id.* at 69.

147. See *id.* at 77–94.

148. See ABA YOUNG LAWYERS DIVISION, CAREER SATISFACTION SURVEY 19–20 (2000).

149. CAL. BUS. & PROF. CODE § 6072 (2013).

and publicize lists of employers who certify that they are in compliance. These practices could include:

- adoption of a formal pro bono policy that gives credit for pro bono work toward billable hour requirements;
- a visible commitment by the organization's leadership;
- consideration of pro bono service as a favorable factor in performance evaluations and in promotion and compensation decisions;
- requirements of compliance with the ABA Model Rules standard of fifty hours of service per year or the financial equivalent;
- adequate opportunities for service, and adequate supervision and training;
- recognition and showcasing of service.<sup>150</sup>

Greater efforts could also be made to target particular groups of lawyers whose services have been underutilized, such as retired lawyers and legal academics.<sup>151</sup> And bar associations could offer back-up assistance, free malpractice insurance, and continuing education credit for pro bono training. Whatever the strategy, the objective should be to insure a closer match between the profession's rhetorical and actual commitment to public service.

#### **D. Unbundled Services and Innovative Delivery Structures**

Another way of expanding access to counsel is through unbundled legal services. Under this approach, lawyers provide assistance on discrete legal tasks, such as advice, negotiation, ghostwriting, document preparation, or court appearances, rather than full representation.<sup>152</sup> In one ABA poll, two-thirds of potential clients would like to have a conversation about unbundling, and two-thirds said lawyers' willingness to provide unbundled services would be important to their decision about who to engage.<sup>153</sup> Courts can encourage this trend by allowing lawyers to submit ghostwritten pleadings and to limit their liability for specified tasks as long as the

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150. RHODE, *supra* note 3, at 180–81.

151. See Deborah L. Rhode, *Senior Lawyers Serving Public Interests, Pro Bono and Second Stage Careers*, 21 PROF. LAW. 1 (2011).

152. See e.g., Forrest S. Mosten, *Unbundled Legal Services Today and Predictions for the Future*, 35 FAM. ADVOC. 14 (2012); Forrest S. Mosten, *Unbundling Legal Services: Servicing Clients Within Their Ability to Pay*, 40 JUDGES J. 15, 16 (2001); ABA, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 4 (2003), available at <https://apps.americanbar.org/litigation/taskforces/modest/report.pdf>.

153. Will Hornsby, *Unbundling and the Lawyer's Duty of Care*, 35 FAM. ADVOC. 27 (2012).

limitation is reasonable and clients give informed consent.<sup>154</sup> To make such representation more accessible, lawyers could follow the lead of initiatives such as the coffee chain, Legal Grind, which dispenses brief advice along with cappuccino and self-help materials.<sup>155</sup> To increase demand for such services, more state bars could also establish unbundled or “low bono” referral programs that match clients of limited means to lawyers willing to provide reduced-fee assistance.<sup>156</sup>

### E. Research

A major obstacle to increasing access to justice is the lack of research on key issues. For example, methodologically sound studies on the contributions of lawyers in routine cases are scarce and conflicting.<sup>157</sup> Researchers using randomized control groups have come to different conclusions as to whether lawyers improve outcomes.<sup>158</sup> Moreover, short-term outcomes are not the only, or

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154. See MODEL RULES OF PROF'L CONDUCT R. 1.2 (Discussion Draft 1983) (providing for limited representation); see also Mosten, *Unbundling Legal Services: Servicing Clients Within Their Ability to Pay*, *supra* note 152, at 18 (proposing civil immunity for lawyers); Margaret Graham Tebo, *Loosening Ties: Unbundling of Legal Services Can Open Door to New Clients*, 89 A.B.A. J. 35, 35 (2003) (noting state rules).

155. See e.g., Carol J. Williams, *Another Sign of Tough Times: Legal Aid for the Middle Class*, L.A. TIMES, Mar. 10, 2009, at 6.

156. Kathryn Alfisi, *Low Bono Widens Path to Access to Justice*, WASH. LAW., Sept. 2013, at 24; Deborah L. Rhode, *Whatever Happened to Access to Justice*, 42 LOY. L. A. L. REV. 869, 898–99 (2009).

157. See Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295, (2010) (describing conflicting outcomes); Barton & Bibas, *supra* note 83, at 991 (noting scarcity of credible data and conflicting findings); Charn, *supra* note 18, at 2222 (noting that we lack “empirical evidence that would support confident advice to claimants about what assistance would best meet their needs”); Engler, *supra* note 23, at 69–73 (noting lack of evaluation of pro se assistance on case outcomes and problems in using satisfaction as a measure of success for hotlines and self help programs); Engler, *supra* note 92, at 52–53 (noting the “shortage of solid, reliable data concerning which types of legal assistance various types of litigants need to obtain meaningful access” (internal quotation marks omitted)); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make*, 121 YALE L.J. 2118 (2012) (discussing methodological weaknesses of many studies and conflicting results); Resnik, *supra* note 65, at 158 (noting that neither judges nor litigants have the basis for knowing “whether adding lawyers would enhance accuracy”); Rhode, *supra* note 93 at 538–39 (2013) (discussing scarcity of data and conflicting results); Hadfield, *supra* note 8, at 129 (noting “slim empirical basis” for evaluating a lawyer’s performance).

158. See D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 928 (2013) (finding tenants with access to lawyer fared better than those who were randomly assigned to information and self help). *Compare*

necessarily the most important, measures of impact. We know almost nothing about the long-term consequences of appointing counsel. For example, how much does winning a landlord-tenant case help in terms of stabilizing a party's living situation or producing improvements in building conditions?<sup>159</sup> Are there better uses of lawyers' time? Could they do more to prevent homelessness by focusing more on policy and organizing efforts and less on individual representation? We also know almost nothing about the value of unbundled legal services.<sup>160</sup> And we lack adequate data about various self-help strategies such as hotlines and pro se clinics. Assessing long-term impacts is critical in evaluating the relative cost- effectiveness of particular forms of assistance.

We also need more evaluation of the quality and social impact of pro bono representation. All too often, lawyers assume that any work done pro bono *is* pro bono; "representation is taken as a good in and of itself, regardless of cost effectiveness."<sup>161</sup> In the only recent survey of law firms' pro bono programs, no firms made any formal efforts to assess the social impact of their work or the satisfaction of clients and non-profit partners that referred cases.<sup>162</sup> Many firms operate with a "spray and pray" approach: they spread services widely and hope that something good will come of them.<sup>163</sup> Although something good usually does result, this is not necessarily the best use of resources.

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Greiner & Pattanayak, *supra* note 157 (finding that access to representation did not correlate with favorable outcomes), with Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001) (tenants with lawyer assistance did better than those without).

159. See Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUST. 139, 148-50 (2010) (describing studies attempting to quantify long-term consequences); Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 920-23, 936-39 (2009) (discussing a case in which a slum landlord declined to make necessary improvements despite a series of litigation losses); Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 871 (2004).

160. Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825, 827-28 (2012). For the only randomized study on point, see Greiner et al., *supra* note 158.

161. See Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1452 (2008).

162. For a fuller elaboration of this problem, see Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2401-03 (2010).

163. Rhode, *supra* note 161, at 1446.

Nor do good intentions necessarily ensure good results. On one of the rare occasions when someone asked about the quality of pro bono work, almost half of public interest legal organizations reported problems with the assistance that they obtained from outside firms.<sup>164</sup>

Ensuring that pro bono resources are used most effectively will require research within and across institutions. Firms should collect standardized data on the amount and types of services provided, the outcomes obtained, and the satisfaction of clients and public interest partners.<sup>165</sup> Such data should be publicly available to hold providers accountable for their performance and also to monitor the adequacy of the system as a whole. Only through systematic research can we identify the legal needs that fall through the cracks and the quality concerns that should be addressed.

### F. Legal Education

Legal education should do more to promote access to justice both by supporting research and by integrating those issues into the curriculum and programmatic activities. Currently, the topic is missing or marginal in the traditional core curriculum.<sup>166</sup> Even professional responsibility courses, which are logical forums for these issues, typically focus on the law of lawyering and omit broader questions about the distribution of legal services.<sup>167</sup> In one national survey, only one percent of law school graduates recalled coverage of pro bono obligations in their professional responsibility class or orientation program.<sup>168</sup> Although many legal clinics offer some firsthand exposure to what passes for justice among low-income communities, not all students take these courses. And given the need to provide both skills training and knowledge of relevant substantive and procedural law, not all clinics will have adequate time to devote

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164. Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2071 (2008).

165. Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 105 (2013).

166. For the marginalization of these issues generally, see WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 141, 187 (2007).

167. For discussion of “legal ethics without the ethics,” see RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 117, 200 (2003); SULLIVAN ET AL., *supra* note 166 at 149.

168. Rhode, *supra* note 85, at 162.

to structural problems and reforms in the delivery of legal services.<sup>169</sup> To address these gaps, schools should offer at least one specialized course on access to justice and should encourage integration of the topic into the core curriculum.

Given the profession's aspiration that all lawyers should provide pro bono services, all law schools should lay the foundation for that commitment. A decade ago, a commission of the Association of American Law Schools recommended that every institution "make available for every student at least one well-supervised pro bono opportunity and either require participation or find ways to attract the great majority of students to volunteer."<sup>170</sup> We remain a considerable distance from that goal. Only a small minority of schools require pro bono work, fewer still impose specific obligations on faculty, and in many institutions, the amounts required are minimal.<sup>171</sup> Although other schools have voluntary programs, their scope and supervision are sometimes open to question, and many students still graduate without pro bono work as part of the educational experience.<sup>172</sup> Legal education could do better, and models are available that could be widely replicated. An example is the Roger Williams Law School Pro Bono Collaborative, where faculty members oversee some thirty initiatives involving students, non-profit organizations, and pro bono attorneys who assist low-income individuals.<sup>173</sup>

The American Bar Association's Council on Legal Education and Admission to the Bar should also do more to support such initiatives. Its standards for accreditation call on law schools to encourage students to participate in pro bono activities and provide

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169. After many conversations with clinicians on this point over the years, I have yet to meet anyone who felt that he or she had adequate time to cover these issues.

170. ASS'N OF AM. LAW SCHS., COMMISSION ON PRO BONO & PUB. SERV. OPPORTUNITIES IN LAW SCHS., LEARNING TO SERVE: A SUMMARY OF THE FINDINGS AND RECOMMENDATIONS OF THE AALS COMMISSION ON PRO BONO AND PUBLIC SERVICE IN LAW SCHOOLS 2 (1999), available at <http://www.aals.org/probono/report.html#foreword>.

171. Thirty-nine schools require students to provide service as a condition of graduation. See *Chart of Law School Pro Bono Programs*, A.B.A., [http://apps.americanbar.org/legalservices/probono/lawschools/pb\\_programs\\_chart.html](http://apps.americanbar.org/legalservices/probono/lawschools/pb_programs_chart.html) (last updated Sept. 23, 2013). In many of these schools, the number of hours is under ten a year. ABA STANDING COMMITTEE STANDING COMMITTEE ON PROFESSIONALISM, REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS 46-47 (2006).

172. See LAW SCH. SURVEY OF STUDENT ENGAGEMENT, <http://lssse.iub.edu> (last visited Mar. 15, 2014).

173. Laurie Barron et al., *Don't Do It Alone: A Community-Based Collaborative Approach to Pro Bono*, 23 GEO. J. LEGAL ETHICS 323 (2010).

opportunities for them to do so.<sup>174</sup> But enforcement of these standards has had little teeth.<sup>175</sup> The ABA should require schools to require pro bono service and to include access to justice issues in the core curriculum.<sup>176</sup>

Legal education should also do more to educate the public about these issues. As noted earlier, much of the problem concerning access to justice stems from the lack of public recognition that there *is* a significant problem.<sup>177</sup> Not only do most Americans believe incorrectly that the poor already have a right to appointed counsel, they also believe the nation has too much litigation.<sup>178</sup> Such perceptions make increased budgets for legal services a low priority. Academics need to do more writing for non-academic audiences and to put a human face on legal needs.

### CONCLUSION

The ideal of equal justice is deeply embedded in American legal traditions and routinely violated in daily legal practices. Our nation prides itself on its commitment to the rule of law, but prices it out of reach for millions of its citizens. Primary control over the legal process rests with the profession that has the least stake in reducing its expense.

Over three decades ago, then-President Jimmy Carter noted that the United States had “the heaviest concentration of lawyers on earth . . . but no resource of talent and training . . . is more wastefully or unfairly distributed than legal skills. Ninety percent of our lawyers serve ten percent of our people. We are overlawyered and

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174. ABA, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2013–2014, at 21–22 (2013).

175. Schools are not required to disclose their efforts to encourage pro bono assistance, the number of students who participate in pro bono activities, or the extent of their involvement.

176. The ABA already requires that schools provide instruction in the “rules and responsibilities of the legal profession and its members.” *See generally* ABA, *supra* note 174. Rule 6.1 of the ABA Model Rules of Professional Conduct recognizes enhancing access to justice as such a responsibility. MODEL RULES OF PROF’L CONDUCT R. 6.1 (“Every lawyer has a professional responsibility to provide legal services to those unable to pay.”).

177. *See supra* notes 20–22.

178. For public misperceptions about the right to counsel, see David G. Savage, *The Race to the White House: A Trial Lawyer on Ticket Has Corporate U.S. Seeing Red*, L.A. TIMES, Sept. 13, 2004, at 1 (noting that eighty percent of Americans believe that there is too much litigation); *supra* note 56 and accompanying text.

underrepresented.”<sup>179</sup> The situation has not improved. And at least part of the problem is of the profession’s own making. Our nation does not lack for lawyers.<sup>180</sup> Nor does it lack for ideas of how to make legal services more accessible. The challenge remaining is to learn more about what strategies work best, and to make them a public and a professional priority. If our nation is truly committed to equal justice under law, we must do more to translate that rhetorical aspiration into daily reality.

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179. Jimmy Carter, President of the United States, Remarks at the 100th Anniversary Luncheon of the Los Angeles County Bar Association, 64 A.B.A. J. 840, 842 (1978).

180. Over the past four decades, the number of lawyers has approximately quadrupled. THOMAS MORGAN, *THE VANISHING AMERICAN LAWYER* 81 (2010).