Fordham Urban Law Journal

Volume 31 | Number 4 Article 4

2004

Normalcy After 9/11: Public Service as the Crisis Fades

Russell Engler

Normalcy After 9/11: Public Service as the Crisis Fades

Cover Page Footnote
Professor of Law and Director of Clinical Programs, New England School of Law. I am grateful for the helpful feedback I received from Tracy Miller, Mary Helen McNeal, and Bruce Green. This work was supported by a Stipend from the Board of Trustees of New England School of Law.

NORMALCY AFTER 9/11: PUBLIC SERVICE AS THE CRISIS FADES

*Russell Engler**

INTRODUCTION

There is much to celebrate regarding the legal community's response to the legal needs arising out of the September 11, 2001 attacks.[1] Chief Judge Kaye rightly delights in the picture of "the Bar at its finest, its shining hour; thousands of lawyers, paralegals and staff, hundreds of thousands of hours enthusiastically volunteered for the public good."[2] As the Report's introduction summarizes, and the body of the Report details, the response of the legal community was "fast, thoughtful, comprehensive and creative."[3] The raw numbers are impressive. Volunteer lawyers represented more than 4,000 individuals and families who were affected by the disaster.[4] Approximately 3,000 lawyers received September 11th training through the City Bar and in-house law firm programs.[5]

* Professor of Law and Director of Clinical Programs, New England School of Law. I am grateful for the helpful feedback I received from Tracy Miller, Mary Helen McNeal, and Bruce Green. This work was supported by a Stipend from the Board of Trustees of New England School of Law.

1. *See* ASS'N OF THE BAR OF THE CITY OF NEW YORK FUND, INC., ET AL., PUBLIC SERVICE IN A TIME OF CRISIS: A REPORT AND RETROSPECTIVE ON THE LEGAL COMMUNITY'S RESPONSE TO THE EVENTS OF SEPTEMBER 11, 2001, (2004), *reprinted in* 31 FORDHAM URB. L.J. 831, 833 (2004) (hereinafter ABCNY FUND, ET AL.]; Serge Schmemann, *U.S. Attacked; President Vows to Exact Punishment for 'Evil'*, N.Y. TIMES, Sept. 12, 2001, at A1.

2. Hon. Judith S. Kaye, *Foreword* to ASS'N OF THE BAR OF THE CITY OF NEW YORK FUND, INC., ET AL., PUBLIC SERVICE IN A TIME OF CRISIS: A REPORT AND RETROSPECTIVE ON THE LEGAL COMMUNITY'S RESPONSE TO THE EVENTS OF SEPTEMBER 11, 2001, at 5 (2004), *reprinted in* 31 FORDHAM URB. L.J. 831, 833 (2004) [hereinafter Kaye, *Foreword*].

3. ABCNY FUND, ET AL., *supra* note 1, at 840.

4. *Id.*

5. *Id.*; *see also* Michael A. Cardozo, *Legal Heroes of September 11th*, Speech to the Am. Corporate Counsel Ass'n at the Fed. Reserve Bank (June 13, 2002) (describing the response of the legal community to Bar Association training sessions and related calls for volunteers in the wake of September 11th), *available at* http://www.nyc.gov/html/la w/pressreleases/sp061302.pdf; *NY Lawyers Answer 9/11 Call with Surge of Pro Bono Work*, N.Y. L., July 23, 2002 (providing that the City Bar Fund database of lawyers available for on-call assignments to pro-bono cases increased by more than 3,000 names after September 11th) [hereinafter *NY Lawyers Answer 9/11 Call*], *available at* http://www.nyl awyer.com/news/02/07/072302e.html.

Over 2,800 lawyers registered on the ProBono.net, a 9/11 website, to gain information and resources.[6]

The raw numbers are only the beginning of the story of the legal community's response. "[T]he institutions that make up the New York area legal community collaborated in ways never previously imagined. Where turf battles once existed, cooperation prevailed."[7] Chief Judge Kaye observes in the Report's *Foreword* that the Report itself is an "extraordinary primer"—"a comprehensive textbook on how best to deliver pro bono services!"[8] Each chapter is filled with information crucial to those who might attempt to glean lessons from the 9/11 experience and translate them to other endeavors. The Report sets forth the "Foundations of the Legal Community's Response"[9] and describes the rich variety of "Specific Projects Designed to Aid Victims."[10] The Report turns to "Ongoing Efforts and Unmet Needs"[11] before describing "Survey Results" of the volunteer lawyers and organizations that responded to the crisis.[12]

The final part of the Report offers eighteen lessons learned, in the "hope that the 9/11 legal response will be an instructive example for future legal relief efforts."[13] The lessons are divided into three categories: "Responding as a Community";[14] "Responding to

6. ABCNY FUND, ET AL., *supra* note 1, at 840; *NY Lawyers Answer 9/11 Call*, *supra* note 5.

7. ABCNY FUND, ET AL., *supra* note 1, at 840.

8. Kaye, *Foreword*, *supra* note 2, at 833.

9. ABCNY FUND, ET AL., *supra* note 1, at 843-868 (finding, in Part I of the Report, that the legal community's response was coordinated among the courts, bar associations, legal service organizations, the private bar, insurance counsel, government attorneys and law schools).

10. *Id.* at 868-906. Such projects, discussed in Part II of the Report, included Volunteer Notary Assistance, the Expedited Death Certificate Assistance Project, the Legal Aid and Legal Services Help Desk, Uniformed Officer and Family Assistance, Family Service Guides, the Immigrant Affairs Help Desk, the Trusts and Estates Help Desk, Outreach to Disadvantaged Communities, Aid for Detainees and Victims of Discrimination, the Small Business Legal Relief Initiative, the In-House Counsel and the Angels Project, the Law Student and Law School Response, the Victim Compensation Fund, and New Jersey Victim Assistance. *Id.*

11. *Id.* at 906-07 (noting, in Part III of the Report, that despite the sustained involvement of many attorneys from 2001 forward, there are still many individuals whose 9/11-related legal needs remain unaddressed).

12. *Id.* at 908-28.

13. *Id.* at 928-930.

14. *Id.* at 930-33 (describing, in Lessons 1-7, what it means to respond to crisis as a community and explaining that "[e]very element of the national legal community had a role to play in responding to 9/11").

a Disaster";[15] and "Improvements for the Future."[16] Chief Judge Kaye's only disagreement with the "Lessons Learned" is that she sees not only eighteen lessons, but "hundreds of lessons . . . for organizing, delivering, and overseeing pro bono services."[17]

As we celebrate the unprecedented achievement of the legal community in the aftermath of the September 11th attack, we should examine the achievements with a critical eye. The evaluation should not be limited to the year following September 11th. Rather, as the crisis "fades" and the profession, along with the rest of the world, settles into "normalcy" post-9/11, the questions become more difficult:

> Despite the extensive response of the legal community, to what extent did the response prove inadequate?[18]
>
> To what extent does the unique nature and magnitude of the September 11th disaster render the impressive response something we cannot replicate, even to a lesser degree?[19]
>
> Even to the extent the response was successful, to what extent did the response constitute a diversion of existing resources from other endeavors, rather than an overall increase in pro bono and public services efforts?[20]
>
> If the Report is to serve as a primer for legal communities, what lessons from the response to September 11th can be applied to other settings, and how can we apply them?[21]

Although it seems unpatriotic to raise questions as to the ultimate success of the endeavor, I do so despite my complete admiration and respect for the efforts of those inside and outside the legal community who responded immediately, creatively, and tirelessly to the horrific events of September 11th and its aftermath. I do so

---

15. *Id.* at 933-37 (explaining, in Lessons 8-16, the importance of such things as "[s]wift action . . . maximizing volunteerism and cooperation").

16. *Id.* at 938 (explaining, in Lessons 17-18, that the legal community should strive to make improvements for the future, such as fostering "collaborat[ion] and build[ing] relationships with social services agencies").

17. Kaye, *Foreword*, *supra* note 2, at 833.

18. *See, e.g.*, ABCNY FUND, ET AL., *supra* note 1, at 907 (noting shortcomings of the post 9/11 legal relief efforts and commenting that "although many needs continue to exist, the rush of legal volunteers has diminished").

19. *See, e.g.*, *infra* notes 39-41 (discussing difficulties in sustaining the response of the volunteer legal community to the crisis of homelessness); *see also infra* notes 133, 185-187 and accompanying text (discussing the shortage of volunteers for pro bono initiatives and efforts to foster an increase in such volunteer involvement).

20. *See* ABCNY FUND, ET AL., *supra* note 1, at 845; *infra* notes 69, 89 and accompanying text.

21. *See* ABCNY FUND, ET AL., *supra* note 1, at 930-38 (expressing the "hope that the 9/11 legal response will be an instructive example for future legal relief efforts").

in the spirit of the implicit challenge of Chief Judge Kaye's *Foreword* to the Report, where she notes: "the fact is that for families facing homelessness, or eviction, or deportation, or foster care, or innumerable other life challenges, every day is also a time of crisis."[22] The success of the legal community's efforts must therefore be measured not only by analysis of the response to the 9/11 crisis itself, but also by consideration of whether the lessons learned pave the way for an improved response by the legal community to the legal crises facing countless families every day.

I. ONGOING EFFORTS AND UNMET NEEDS

A primary reason to identify lessons learned from the legal community's response to the 9/11 crisis is to create the possibility that the achievements of the 9/11 effort can serve as a model to solve legal problems arising from other crises.[23] It is sobering to recognize that, despite the impressive successes achieved by the legal community's responses to 9/11, the efforts have fallen short.[24] The shortest portion of the Report is Part III, titled "Ongoing Efforts and Unmet Needs."[25] In contrast to Parts I and II, covering over twenty and thirty pages respectively, Part III consists of one-and-a-half pages. Some of this is inevitable, as the Report focuses "on the period of time from September 11, 2001 through approximately the end of 2002."[26] As a result, the brevity of the reporting reflects in part the dearth of information regarding the efforts after 2002, which are beyond the scope of the Report. The Report notes the continuing work of many of the pro bono and legal services organizations that were involved from the outset of the crisis.[27]

The brevity of Part III, however, also reflects difficulties in sustaining the response and continuing to address unmet legal needs.[28]

22. Kaye, *Foreword*, *supra* note 2, at 833.

23. ABCNY FUND, ET AL., *supra* note 1, at 928-30.

24. *Id.* at 907 (noting that although many needs continue to exist, the rush of legal volunteers has diminished, resulting in difficulty in the staffing of certain relief efforts).

25. *Id.*

26. *Id.*

27. *Id.* These organizations include the City Bar Fund, Legal Aid Society of New York and Legal Services for New York ("LSNY"), among others. *Id.* Lawyers "continue to work on applications to the Victim Compensation fund, ongoing estate proceedings, workers' compensation issues, housing issues and dealing with continued unemployment." *Id.* Legal services organizations "continue to actively reach out to low income New Yorkers suffering adverse economic effects resulting from the downturn sparked by 9/11." *Id.*

28. *See, e.g.*, *infra* notes 39-41 (discussing difficulties in sustaining the response of the volunteer legal community to the crisis of homelessness).

The Report describes three categories of legal needs that remain unaddressed:

> [T]hose who suffered economic harm from the fallout of 9/11 but lacked a sufficient nexus to the actual events of 9/11 to qualify for economic assistance programs;
> immigrants who suffered directly from the events of 9/11 (and would qualify for such assistance) but who were afraid, because of their immigration status, to come forward and take advantage of the resources that were available to them; and
> immigrants who were detained either immediately after 9/11 or as a result of the special registration program implemented by the government in response to 9/11.[29]

Legal needs also remain unmet because they arose, or were discovered, later than the needs that were immediately evident in the wake of the attack:

> Later, organizations became more proactive, seeking to identify needs that might not be fully recognized or appreciated and seeking to reach out to those communities who had suffered but not come forward on their own. Some needs arose only later, either because of the extended economic downturn in new York City that followed 9/11 or simply owing to the fact that many needs only become evident after the passage of many months.[30]

The more disturbing reason for the fact that legal needs remain unmet is the shortage of volunteers.[31] In stark contrast, the surge in volunteers in the immediate aftermath of the attacks was overwhelming.[32] For example, on September 25, 2001, Mayor Guiliani announced that volunteer lawyers would be needed to help survivors apply for death certificates.[33] More than 800 lawyers attempted to attend a training session at the City Bar Association scheduled within a day of the mayor's announcement.[34] Since the City Bar Association's largest conference room held 500 people, roughly 300 volunteers were turned away from the initial training session.[35]

29. ABCNY FUND, ET AL., *supra* note 1, at 907; *see also A Better Deal for Victims*, N.Y. TIMES, Mar. 6, 2002, at A20 (explaining that as of March 6th, 2002, the Justice Department had yet to agree to shield from prosecution the families and employers of illegal aliens killed on September 11th).

30. ABCNY FUND, ET AL., *supra* note 1, at 907.

31. *Id.*

32. *Id.* at 840, 873.

33. *Id.* at 873.

34. *Id.*

35. *Id.*

As the crisis fades from public view, "the rush of legal volunteers has diminished."[36] Applications to the Victim Compensation Fund were due in December 2003, "yet a shortage of volunteer lawyers was reported as the application deadline approached."[37] According to the City Bar, "where once lawyers competed for volunteer opportunities, more recently it has been difficult to staff some opportunities."[38]

The difficulty of sustaining a response to a crisis is not unique to the response to the September 11th crisis. For example, Maria Foscarinis offers a moving account of efforts to combat homelessness.[39] She describes how, in response to the growing crisis of homelessness, advocates embarked on a campaign to achieve an emergency federal legislative response to homelessness, which at first achieved "immediate, positive results," but that "stasis . . . followed the initial success."[40]

> During the 1980's, there was an enormous outpouring of public concern for the homeless. Newspaper articles carried frequent features depicting the plight of particular individuals or families. Concerned persons of all sorts volunteered to help. Lawyers became involved, first in the courts, then in Congress.
> But as homelessness persists, and continues to grow, there is a tendency towards acceptance: What was originally perceived as an intolerable crisis may be evolving into an accepted social condition.[41]

Without belaboring differences between the crisis of homelessness and the crisis created by the September 11th attacks,[42] the pat-

---

36. *Id.* at 907.

37. *Id.*

38. *Id.* Opportunities have been particularly difficult to staff where they involved "a loss of income" or "requir[ed] special expertise . . . such as workers' compensation and landlord/tenant matters." *Id.*

39. Maria Foscarinis, *Beyond Homelessness: Ethics, Advocacy, and Strategy*, 12 ST. LOUIS U. PUB. L. REV. 37, 38 (1993).

40. *Id.* at 39.

41. *Id.* at 41-42.

42. For example, nothing in the legal community's response to the 9/11 crisis suggests that community leaders employed a constrained definition of "crisis" in developing responses. In the context of the homelessness crisis, Susan Bennett illustrates how policy-makers utilized strained definitions of the word "crisis" in crafting policies relating not only to the crisis of homelessness, but to the connected problems related to our welfare system and housing policies. Susan Bennett, *Heartbreak Hotel: The Disharmonious Convergence of Welfare, Housing and Homelessness*, 1 MD. J. CONTEMP. LEGAL ISSUES 27, 30 (1990). Foscarinis identifies the "institutionalization" and "legitimization" of homelessness as part of the explanation of "stasis." Foscarinis, *supra* note 39, at 39. Bennett adds that the policymakers avoided developing genuine solutions to the deep-seated problems by resorting to tortured definitions of the language

tern of a burst of organized activity involving all sorts of volunteers, including lawyers, yielding initial positive results, but giving way to stasis, is a pattern recognizable in the pages of the September 11th Report.[43] In one respect, the continuation of unmet legal needs presents a challenge for the legal community. To the extent the legal community can achieve successes in meeting the unmet needs away from the spotlight, after the crisis has faded and after stasis has set in, the lessons may prove to be the most useful primer of all.[44] At the same time, however, the continuation of unmet legal needs after 9/11 is a sobering reality.[45] If the overwhelming response to the 9/11 crisis fell short of meeting the needs, then even greater hurdles will face efforts to address crises that cannot be solved with an immediate burst of concentrated effort or are perceived as crises of a lesser magnitude.

II. CRISIS OR DISASTER?

One of the Report's lessons is that "[p]eople responded when they were asked to help."[46] Yet, any effort to translate lessons learned from the 9/11 response to other settings carries with it the obvious limitation that the 9/11 crisis simply was unlike any other.[47] In this respect, the unprecedented response by the legal community described in the Report was paralleled by the response of others across the country responding to the horrors of the attacks

---

of emergency and crisis. Bennett, *supra* note 42, at 30-33. The availability of "emergency shelter" impedes the solution of crafting permanent housing solutions, despite the fact the precipitating factor of the homelessness is loss of income or family crisis, rather than an event such as a tornado or flood, and the "the 'emergency' state of homelessness may last not for days, but months." *Id.* at 33-34. "The continuing fantasy of treating dire need for housing as an 'emergency' has exposed the most vulnerable of all applicants to the full force of all the inequities arising from the states' inconsistent interpretations" of benefits and housing programs. *Id.* at 34.

43. ABCNY FUND, ET AL., *supra* note 1, at 907.

44. *See id.* (explaining that many lawyers who got involved in the legal relief effort early on do continue to work on applications to the Victim Compensation Fund, ongoing estate proceedings, workers' compensation issues, housing issues and efforts to cope with continued unemployment).

45. *See id.* (noting that a shortage of volunteer lawyers was reported as the application deadline for the Victim Compensation Fund approached and that "the rush of legal volunteers has diminished").

46. *Id.* at 930, 937 (setting this principle out a lesson to be taken from the 9/11 relief effort).

47. *Id.* at 840 ("The attacks on September 11, 2001 were unprecedented in scope, and the legal needs that grew out of the attacks were . . . far-reaching."); Schmemann, *supra* note 1, at A1 (noting that "in the immediate aftermath [of September 11th,] the calamity was already being ranked the worst and most audacious terror attack in American history").

on the Twin Towers.[48] Countless reports documented the extent to which doctors, nurses, firefighters, policemen, and legions of others were catalyzed into action in the wake of the attacks, volunteering their time, effort and skills.[49] In terms of financial donations, "September 11th evoked an avalanche of philanthropic feelings and charitable giving."[50]

Eighty-five percent of the individual lawyers who volunteered indicated that they did so because "they wanted to help."[51] Related reasons included the fact that it felt like "the right thing to do" and it felt like the best way to "help victims."[52] In the moving words of one volunteer, "[l]ike many people, I just felt the need to help in any way possible."[53] Pro bono work seemed to be the most effective outlet for many volunteers, although one noted that "[i]n

48. "[I]n the United States, in the after-math of the 9/11 terrorist attacks, victims and their families received an outpouring of legal and other assistance, fueled partly by a desire to demonstrate national strength and solidarity." Deborah L. Rhode, *Pro Bono in Principle and Practice*, 53 J. LEGAL EDUC. 413, 418-19 (2003).

49. *See, e.g.*, Sally Jenkins, *New York's Men of Steel: Hard Hats, Soft Hearts*, WASH. POST, Sept. 15, 2001, at C01 ("They tramp into the smoke and dust, a legion of volunteer laborers wearing hard hats and tool belts and thick-soled boots."); Mirta Ojito, *After the Attacks: The Volunteers; Lending Everything From Ears to Elbow Grease*, N.Y. TIMES, Sept. 13, 2001, at A11 (explaining that after the September 11th attacks "volunteers came [to New York] by the hundreds. . . . [and] lined up for hours at Red Cross headquarters on the West Side, at the Jacob K. Javits Convention Center, at hospitals, blood banks, and police command posts, offering themselves for whatever was needed"); Edward Walsh, *National Response to Terror: FEMA Leads Effort; Borders Tightened*, WASH. POST, Sept. 12, 2001, at A23 (reporting that the Department of Health and Human Services "authorized an emergency shipment of medical supplies to New York and, for the first time since it was created, activated a national medical emergency system that would make about 7,000 volunteer doctors, nurses, pharmacists, and other medical personnel available in the attack areas"); Edward Walsh, *Volunteers Find It Hard to Join Rescue Efforts; New York Turns Away Help, Food Offers*, WASH. POST, Sept. 16, 2001, at A50 ("Since terror and disaster struck the World Trade Center[,] . . . hundreds if not thousands of people . . . have poured into this city desperately wanting to help. They joined thousands of New Yorkers who had the same thing in mind. The outpouring of volunteers has been astounding. . .").

50. Catalogue for Philanthropy, *Generosity in 2001*, *at* http://www.catalogueforphilanthropy.org/cfp/generosity_index/ (last visited Apr. 28, 2004) [hereinafter Catalogue for Philanthropy, *Generosity in 2001*]; *see also* Catalogue for Philanthropy, *The Generosity Index: 2003 (2001 US State Data)*, *at* http://www.catalogueforphilanthropy.org/cfp/db/generosity.php?year=2003 (last visited Apr. 28, 2004); *see also* Rob Varnon, *Businesses Offering Charity on 9-11; Firms Mark Tragic Day with Giving; Helping Others is Theme of Practical Donations*, CONN. POST (Bridgeport), Sept. 10, 2003, § M (discussing diverse initiatives on the part of the business community to commemorate the anniversary of the September 11th attacks with charitable efforts and donations).

51. ABCNY FUND, ET AL., *supra* note 1, at 908.

52. *Id.* at 912 (fifty-seven percent and fifty-nine percent listed these reasons, respectively).

53. *Id.*

the days right after the tragedy, I would have traded in my law degree for experience in rescue operations in a heartbeat."[54]

The Report underscores the uniqueness of the 9/11 attack, with the Executive Summary opening with the observation that the "attacks on September 11, 2001 were unprecedented in scope."[55] That the unprecedented attack yielded an unprecedented response by the legal community is in retrospect not surprising. It also suggests that a problem perceived as a lesser crisis can be expected to provoke a lesser response.

Even a subtle shift in semantics as the Report unfolds underscores the uniqueness of the situation.[56] The Report is titled "Public Service in a Time of Crisis", and Chief Judge Kaye builds on the word "crisis" to refer to the daily crises, facing countless families, that also cry out for assistance from the legal community.[57] By the "Lessons Learned" section of the Report, however, the word "crisis" has been replaced by "disaster."[58] Lessons eight through sixteen, therefore, are organized under the category of "Responding to a Disaster."[59]

While the shift in language may be more semantic than substantive, the fact of a single, visible, triggering event sets this crisis apart from others. The nature and extent of the response clearly was affected by the fact that the disaster was triggered by a horrific, one-time event, occurring on a single day, and reported through the mass media as the disaster unfolded.[60] This reality will affect the applicability of lessons learned to other crises. The less dramatic and visible a particular crisis, and the less it is triggered by a single event, the less there will be an outpouring of response.[61] A

54. *Id.* at 846. The survey response continues: "[w]hen the opportunity came to help the families of the victims, and to help them in a legal role, I jumped at it." *Id.*

55. *Id.* at 840.

56. *See infra* notes 57-66 and accompanying text.

57. Kaye, *Foreword*, *supra* note 2, at 833 ("[T]he fact is that for families facing homelessness, or eviction, or deportation, or foster care, or innumerable other life challenges, every day is also a time of crisis.").

58. ABCNY FUND, ET AL., *supra* note 1, at 927-38.

59. *Id.* at 927.

60. *E.g.*, *supra* notes 1, 49 (listing various newspaper accounts of the September 11th attack and the ensuing volunteer efforts).

61. *See, e.g.*, Foscarinis, *supra* note 39, at 39 (discussing difficulties in sustaining the response of the volunteer legal community to the crisis of homelessness); *see also infra* notes 133, 185-187 and accompanying text (discussing the shortage of volunteers for pro bono initiatives and efforts to foster an increase in such volunteer involvement).

smaller response to a different crisis in turn means that fewer resources are available for handling that crisis.[62]

The trigger of a single event was crucial to the swiftness of the response.[63] The first lesson listed in the section under Responding to a Disaster is: "Swift action following 9/11 was vital to maximizing volunteerism and cooperation."[64] Quick action was crucial because in "the immediate aftermath of the tragic events of 9/11, levels of volunteerism and cooperation within the legal community soared," and, by acting quickly, the New York "legal community effectively harnessed these forces to the tremendous benefit of those affected by 9/11.[65] Absent a visible, triggering event, there will not be so obvious a moment at which levels of volunteerism and cooperation will be at their highest. With lower levels of volunteerism and cooperation in response to crises that fall far short of the 9/11 disaster, the mobilization challenge facing the public service community will be formidable.[66]

III. THE DANGER OF DIVERSION

A third question regarding the successes of the legal community's response to the September 11th attacks is whether the human and financial resources mobilized in response to the attacks were new resources or resources diverted from other endeavors.[67] In the area of charitable giving, for example, it is undisputed that there was a surge in giving in response to the attacks.[68] By some accounts, however, Americans gave generously to attack relief

62. *See generally* ABCNY FUND, ET AL., *supra* note 1, at 936 (discussing the importance of timely and adequate funding to community relief efforts); Curtis Krieger, *Donations to Local Charities Slow in Months After Attacks*, ST. PETERSBURG TIMES, Sept. 4, 2002 (discussing the adverse effect of September 11th generosity on funds available for donation to non-9/11 charitable organizations), *available at* http://www.sptimes.com/2002/09/04/91 1/Donations_to_local_ch.shtml.

63. *See* ABCNY FUND, ET AL., *supra* note 1, at 933.

64. *Id.*

65. *Id.*

66. *See infra* notes 133, 185-187 and accompanying text (discussing the shortage of volunteers for pro bono initiatives and efforts to foster an increase in such volunteer involvement).

67. *See* ABCNY FUND, ET AL., *supra* note 1, at 847.

68. *See, e.g.*, Stephanie Strom, *Ground Zero: Charity; A Flood of Money, Then a Deluge of Scrutiny for Those Handing it Out*, N.Y. TIMES, Sept. 11, 2002, at B5 ("Never has so much money been raised with so little effort."); Varnon, *supra* note 50 (discussing business community efforts to commemorate the anniversary of the September 11th attacks with charitable efforts and donations); Catalogue for Philanthropy, *Generosity in 2001*, *supra* note 50 (noting that "the catastrophe of September 11th evoked strong philanthropic response").

funds in lieu of their traditional donations to other organizations.[69] Other accounts indicate that the decline in giving occurred later and was due instead to a downturn in the economy.[70]

The question of whether legal resources in response to 9/11 were diverted from other endeavors is a delicate one. To the extent resources were diverted, the individual and organizational decisions leading to those diversions were wholly justifiable and predictable given the nature of the disaster. Indeed, it would have been surprising and disturbing if large sectors of the legal community continued as if nothing had happened in the aftermath of the attacks. Despite the delicate nature of the inquiry, it is important to understand which resources marshaled in response to the 9/11 disaster were diverted from other endeavors and which were new resources. The answer to that question requires an exploration of which endeavors may have suffered while resources were mobilized after the attacks.

Ironically, as the planes were crashing into the two towers, a collaborative effort was unfolding in the form of New York's first ever Access to Justice Conference, scheduled to be held in Albany, New York on September 11 and 12, 2001.[71] As the Report reflects, the situation at the Conference changed radically when the conference planners learned of the terrorist attacks.[72] Judge Juanita Bing Newton, Deputy Chief Administrative Judge for Justice Initiatives, under whose leadership the conference was organized, decided to go ahead with the Conference despite the attacks and approximately two thirds of the scheduled participants remained in Albany at the Conference.[73] Representatives of various New York City bar associations and legal services organizations met during a

69. *See* ABCNY FUND, ET AL., *supra* note 1, at 847; Krieger, *supra* note 62 (noting that charitable donations to 9/11 relief efforts came at the expense of donations to organizations whose charitable focus was elsewhere, such as with domestic violence prevention).

70. *See, e.g.*, Sheryl Homan, *Charitable Giving was Good Despite Sept. 11* (Aug. 1, 2002), *at* http://www.businessnorth.com/viewarticle.asp?articleid=523 (last visited May 14, 2004).

> Many nonprofit organizations believe money contributed at a local level last year was down due to the events of 9-11. Believe it or not, charitable giving actually increased in 2001, according to the annual 'Giving USA' report released recently by the American Association of Fundraising Council. Granted, the increases weren't at the levels of prior years, but giving was well within the norm for a recession.

Id.

71. ABCNY FUND, ET AL., *supra* note 1, at 843.

72. *Id.*

73. *Id.*

break in the conference and "turned their attention to helping those impacted by the attacks."[74] The Conference therefore provided an immediate opportunity for members of the legal community to begin the collaboration that yielded the impressive response to the attacks.[75]

The Conference had its own agenda, however, which was imposing enough absent the September 11th attacks. The Conference was designed to bring to reality the concept of Access to Justice in the New York Court system.[76] In the words of Wilhelm Joseph, one of the speakers in the opening plenary, the New York courts and courts throughout the country are struggling with a "serious crisis in justice."[77] Mr. Joseph discussed the need to create "a sense of urgency that action must to be taken to achieve our constitutional mandate to establish justice."[78] In her comments prepared for the Conference, Chief Judge Kaye observed: "It is appalling for me as chief judge to see how small a percentage of the civil legal needs of the poor in this country are being met, a statistic that may decline even further with the economy."[79]

The Conference agenda included a variety of panels addressing aspects of the Access to Justice challenge.[80] Some focused on the players in the system, discussing challenges facing civil legal services, the law schools, the Judiciary and pro bono organizations.[81]

---

74. *Id.*

75. *See id.*

76. *Id.*

77. Margaret Martin Barry, *Access to Justice: On Dialogues with the Judiciary*, 29 FORDHAM URB. L.J. 1089, 1089 (2002) (quoting Wilhelm Joseph, Executive Director, Legal Aid Bureau of Md., Inc, Remarks at New York State Unified Court System Access to Justice Conference (Sept. 11, 2001)).

78. *Id.*

79. Hon. Judith S. Kaye, Chief Judge, New York State Court of Appeals, Remarks Prepared for New York State Unified Court System Access to Justice Conference (Sept. 11, 2001), *in* 29 FORDHAM URB. L.J. 1081, 1081 (2002) [hereinafter Kaye, Remarks]. In a small, but appropriate example of diversion, Chief Judge Kaye did not actually deliver her prepared remarks at the Conference, opting instead to deliver a moving address expressing her sadness and horror after the terrorist attacks.

80. Agenda, New York State Unified Court System Access to Justice Conference (Sept. 11-12, 2001) (on file with author). The articles written for the Access to Justice Conference were compiled by this law journal and appear in a previous issue. Conference, *New York State Unified Court System Access to Justice*, *in* 29 FORDHAM URB. L. J. 1081, 1081-1348 (2002).

81. Agenda, *supra* note 80; *see also* Barry, *supra* note 77, at 1089-90; Robert M. Elardo, *Equal Protection Denied in New York to Some Family Law Litigants in Supreme Court: An Assigned Counsel Dilemma for the Courts*, 29 FORDHAM URB. L.J. 1125, 1125-31 (2002); Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1213-17 (2002); Deborah Howard, *The Law School Consortium Project: Law Schools Support-*

Others focused on innovations, including access through technology,[82] new court initiatives,[83] and unbundled legal services.[84] Some targeted specific settings, such as Family Court[85] or legal services in Rural Communities,[86] while others tackled systemic issues, as reflected in the titles of "Communicating: Making Access Possible by Overcoming Cultural, Language and Literacy Barriers," and "Self-Represented Litigants are Here to Stay."[87]

Almost three years after the twin events of the terrorist attacks and the Access to Justice Conference, none of the panels would be superfluous were a similar conference held today. The problems that led to the Conference in 2001 persist, and likely were exacerbated by a downturn in the economy that increased the legal needs of the poor and contributed to a shrinking availability of legal services.[88] Whether the problems were pushed to the back-burner as the legal community responded to the attacks cannot be discerned from the Report. In the short run, it is fair to assume that tasks undertaken with existing resources diverted resources from other endeavors.[89] For example, Lesson 5 of the Report is that the public interest legal services was a vital contributor to the 9/11 legal relief effort.[90] The details of the "Specific Projects Designed to Aid Vic-

ing Graduates to Increase Access to Justice for Low and Moderate-Income Individuals and Communities, 29 FORDHAM URB. L.J. 1245, 1245-47 (2002).

82. Agenda, *supra* note 80; *see also* Frances H. Thompson, *Access to Justice in Idaho*, 29 FORDHAM URB. L.J. 1313, 1314-15 (2002).

83. Agenda, *supra* note 80; *see also* Margot Lindsay & Mary K. Shilton, *The Public is Willing*, 29 FORDHAM URB. L.J. 1267, 1267-71 (2002); Tina L. Rasnow, *Traveling Justice: Providing Court Based Pro Se Assistance to Limited Access Communities*, 29 FORDHAM URB. 1281, 1281-82 (2002).

84. Agenda, *supra* note 80; *see also* Hon. Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1107-11 (2002); Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1145 (2002) [hereinafter Goldschmidt, *Ghostwriting*].

85. Agenda, *supra* note 80; *see also* Elardo, *supra* note 81, at 1125-31.

86. Agenda, *supra* note 80; *see also* Rasnow, *supra* note 83, at 1281-82; Thompson, *supra* note 82, at 1313-15.

87. Agenda, *supra* note 80.

88. *See, e.g.*, David W. Chen, *Boom Times in the City's Housing Courts*, N.Y. TIMES, May 27, 2003, at B1 (explaining that New York City's Housing Court, which generally serves some of the city's poorest tenants has seen a rapid rise in middle-class litigants and noting that "the changing face of housing court . . . is but one more graphic, often terribly sad reflection of the city's stumbling economy"). The article also notes that Legal Aid and Legal Services, which should be available to help those with inadequate resources, are both pressed for funds. *Id.*

89. ABCNY FUND, ET AL., *supra* note 1, at 847 ("Projects to assist those affected by 9/11 . . . occupied staff and depleted other resources from the organizing agencies.").

90. *Id.* at 927, 932.

tims" are replete with examples in which legal services organizations played a direct role in the delivery of legal services, or dedicated resources to the training of volunteers.[91] With legal services organizations facing cuts nationally and locally, absent evidence that these activities were funded by new monies, resources likely were diverted from other endeavors.[92]

Similarly, the volunteer efforts from the private bar represented a mix of new and existing resources.[93] "People who were new to pro bono work volunteered in large numbers."[94] Twenty-two percent of the volunteers had not volunteered previously and thirty percent had spent no more than twenty-five hours in the past on pro bono matters,[95] suggesting that a significant portion of the pro bono resources leveraged were new resources. Other volunteers, however, had a pattern of performing pro bono work,[96] and their pro bono efforts likely occurred in lieu of other pro bono work they would have performed. The training resources committed by the private bar also came, in part, at the expense of training dedicated to other pro bono endeavors.[97]

Since it was inevitable and appropriate that human and financial resources would be diverted in response to the 9/11 disaster, the more important assessment becomes the extent to which existing resources were diverted and the extent to which new resources were leveraged. Where the legal community succeeded in leveraging new resources, it is important to understand the process so that the lessons of this experience can lead to the leveraging of new resources to address future crises.[98] It is also important to insure that pro bono and financial resources made available for the first

91. *See, e.g., id.* at 868, 875-76 (discussing Legal Aid and the Legal Services Help Desk). "Nonprofit and legal service organizations participated in every aspect of the legal relief effort. Lawyers . . . helped thousands of clients devastated by 9/11 and trained and advised volunteer lawyers from the private sector . . . ." *Id.* at 845.

92. *See id.* at 847. Some of the activities were in fact funded by the philanthropic community, and legal aid organizations were among the recipients of the financial assistance. *Id.* Indeed, as Lesson 13 reflects, funding was essential. *Id.* at 936. Nonetheless, projects organized by the legal organizations "occupied staff and depleted other resources from the organizing agencies. This depletion coincided with reductions in their own incomes from contributions due to the economic fallout of 9/11." *Id.* at 847.

93. *See infra* notes 94-96 and accompanying text.

94. ABCNY FUND, ET AL., *supra* note 1, at 908.

95. *Id.*

96. *Id.*

97. *See id.* at 845, 850-51.

98. *See id.* at 927, 36 (discussing, in Lesson 13, how fundamental timely funding is to disaster relief efforts).

time will continue to be utilized to address the plethora of unmet legal needs as the 9/11 crisis fades.[99] Finally, it is important to understand and replicate the innovations developed, and the patterns of collaboration that emerged, in the response to the 9/11 attacks.[100] Where the innovations and collaborations produced a more efficient or effective delivery of legal services, those successes should be viewed as off-setting resources that were diverted. The analysis of resources leveraged and utilized therefore becomes most important as part of the inquiry into the larger question of whether the lessons learned from the aftermath of September 11th can be applied to other crises.

IV. APPLYING THE LESSONS LEARNED: ONE CRISIS

If the Report is to serve as a primer for a legal community, we should apply the lessons of the response to September 11th to other settings. We should do so while recognizing the difficulties identified in the preceding sections: that even the massive 9/11 response proved inadequate in some respects and that significant hurdles impede efforts to apply the lessons of September 11th to problems perceived as lesser crises.[101] Since it was the topic of Access to Justice in the New York Court System that was symbolically pushed aside in the wake of the attacks,[102] we should begin applying the lessons learned from the 9/11 response to that setting.

Within the topic of Access to Justice, one of the most difficult problems is the routine forfeiture of important legal rights by the unrepresented poor in civil proceedings.[103] It is widely documented that unrepresented litigants are flooding the courts.[104] Un-

99. *See id.* at 907.

100. *See id.* at 927-38 (enumerating the lessons learned from an analysis of the legal community's response to September 11th, in the hopes that they might provide guidance for future relief efforts).

101. *See id.* at 907; *supra* note 61 and accompanying text.

102. ABCNY FUND, ET AL., *supra* note 1, at 845; *supra* notes 71-87 and accompanying text.

103. For a more detailed exploration of the issues raised in the next two paragraphs, see Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987-90 (1999) [hereinafter Engler, *And Justice for All*].

104. *Id.* at 1987; *e.g.*, Goldschmidt, *Ghostwriting*, *supra* note 84, at 1145 ("The increased presence of pro se litigants in the court . . . . can be attributed to the high cost of litigation, anti-lawyer sentiment, and the advent of do-it-yourself law kits, books, and web sites."); Thompson, *supra* note 82, at 1315 (noting the abundance of pro se litigants and attributing this phenomenon to, *inter alia*, the fact that "the demand for attorneys exceed[s] the supply" and the fact that "many attorneys do not practice the kinds of law that are useful to the self-represented").

represented litigants raise significant issues for judges, mediators, clerks, represented parties, and opposing counsel alike.[105] Yet, in the context of an Access to Justice analysis, the difficulties facing those players in the court system pale in comparison to the difficulties facing many unrepresented litigants.[106] On a daily basis, all around the country, unrepresented litigants forfeit important rights not because of the applicable law or facts of their cases, but due to the absence of counsel.[107]

A hallmark of our adversary system is the promise of neutrality and impartiality.[108] Yet, the roles of the players in the adversary system are defined by rules that assume that parties to litigation are represented by counsel.[109] Where cases involve only unrepresented litigants, they challenge the adversary system.[110] Where cases pit unrepresented litigants against represented ones, the adversary system breaks down.[111] All too often in these settings, the mere presence of counsel for one side, and not the governing law as applied to the facts, controls the outcome.[112]

A system in which an unrepresented litigant may forfeit important rights due to the absence of counsel fails to uphold the promise of neutrality, fairness, and justice.[113] Wilhelm Joseph, speaking at the opening plenary of the Access to Justice Conference, referred to this reality in asserting that the New York courts and courts throughout the country are struggling with a "serious crisis in justice."[114] Building on Mr. Joseph's comments, Professor Margaret Martin Barry wrote in the Symposium Issue for the Access to Justice Conference:

> At a time when our country is experiencing a renewed sense of patriotism and is speaking with conviction about precepts that distinguish the Nation, [Mr. Joseph's] reference to this essential mandate is all the more poignant. Central to our democracy is a belief that our legal system is just. This faith has been sorely tested by the experiences of many who seek judicial relief. Peo-

105. *See* Engler, *And Justice for All*, *supra* note 103, at 1987-90.
106. *See id.* at 1988-89.
107. *Id.* at 1989.
108. *See id.* at 2022-24.
109. *Id.* at 2022.
110. *Id.*
111. *Id.*
112. *Id.* at 2023.
113. *See id.*; *see also* Barry, *supra* note 77, at 1089.
114. Barry, *supra* note 77, at 1089 (quoting Wilhelm Joseph, Executive Director, Legal Aid Bureau of Md., Inc, Remarks at New York State Unified Court System Access to Justice Conference (Sept. 11, 2001)).

> ple enter a system dependent on lawyers whom they often do not trust and more often cannot afford. The legal system has not been structured to accommodate those without professional help. After years of managing unrepresented litigants who do not get justice, there is a growing concern that the movement has subsumed the central mission of the courts. Many of those involved are becoming disillusioned.[115]

Justice Earl Johnson, Jr., one of the Keynote Speakers at the Access to Justice Conference, spoke of the need for adoption of a "Civil Gideon" to address the problem of the unrepresented litigants in the courts.[116] Chief Judge Kaye highlighted the issue of unmet legal needs in civil cases by placing the topic at the beginning of her remarks both for the Access to Justice Conference and the 9/11 Report:

> It is appalling for me as chief judge to see how small a percentage of the civil legal needs of the poor in this country are being met . . . .[117]
>
> But the fact is that for families facing homelessness, or eviction, or deportation, or foster care, or innumerable other life challenges, every day is also a time of crisis.[118]

On the one hand, there already is widespread recognition of the crisis regarding the unrepresented poor.[119] On the other hand, as Wilhelm Joseph points out, we still must "creat[e] a sense of urgency . . . to achieve our constitutional mandate to establish justice."[120] No terrorist attack triggered this crisis. The unrepresented poor have faced insurmountable barriers in the legal system from its inception.[121] Viewed from one perspective, the

---

115. *Id.*

116. Agenda, *supra* note 80. A "Civil Gideon" refers to the appointment of counsel in civil cases, paralleling the right to counsel in criminal cases established in *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963). For a more detailed description of Justice Johnson's views, see Justice Earl Johnson, Jr., *Will Gideon's Trumpet Sound a New Meldoy? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE U.J. SOC. JUST. 201 (2003) [hereinafter Johnson, Jr., *Will Gideon's Trumpet Sound?*; Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. 83, 83-88 (2000) [hereinafter Johnson, Jr., *Equal Access to Justice*] (reproduced in the materials circulated at the Access to Justice Conference).

117. Kaye, Remarks, *supra* note 79, at 1081.

118. Kaye, *Foreword*, *supra* note 2, at 833.

119. *See* Barry, *supra* note 77, at 1089; Johnson, *Equal Access to Justice*, *supra* note 116, at 83-88; Kaye, Remarks, *supra* note 79, at 1081.

120. *See* Barry, *supra* note 77, at 1089.

121. *See id.*; Engler, *And Justice for All*, *supra* note 103, at 2022-24.

problem is exacerbated as the number of unrepresented poor surges and overwhelms the legal system.[122] Viewed from another, it is only the acknowledgment and perception of the problem that are new.[123] Unlike the crisis in homelessness, it does not seem as if a concentrated campaign yielding initial results has given way to stasis.[124] More accurately, the problem has been institutionalized and legitimized in the United States from the outset.[125] We remain a century behind our counterparts in Western Europe in our approach to civil needs of the unrepresented poor.[126]

If the legal community treats the topics of access to justice and the unrepresented poor as a problem short of a crisis, the "Report of the Legal Community's Response to the Events of September 11, 2001" will provide little guidance. As more players in the system recognize or are persuaded that the crisis is real, then the pages of the Report are rich with lessons that can be learned and applied. The solutions demand that those in the legal system respond as a community.[127] Collaboration among a plethora of institutions is fundamental; central coordination, coupled with wide collaboration and participation, will magnify the effectiveness of the community's response.[128] Individual projects can be operated and controlled by their own sponsoring organizations, while at the same time coordinated centrally.[129] The public interest legal ser-

122. *Cf.* Goldschmidt, *Ghostwriting*, *supra* note 84, at 1145 (noting that the demand for legal assistance is unmet in the face of an "increased presence of pro se litigants in the court . . . . [which] can be attributed to the high cost of litigation, anti-lawyer sentiment, and the advent of do-it-yourself law kits, books, and web sites.").

123. *See* Johnson, *Equal Access to Justice*, *supra* note 116, at 85-86, 99 (commenting on the extent to which the number of unrepresented litigants in the United States overwhelms the resources allocated for their assistance and noting that this problem has persisted for decades). "To borrow a health services analogy, the United States is in a 'triage' situation—indeed one of 'extreme triage'—trying to pick the relative few poor people to which its limited legal service resource will be able to offer a free lawyer." *Id.* at 99.

124. *Compare id.* at 85-86, 99 (explaining that the American justice system has been underestimating its failure to provide its poor with truly "equal access to justice" for decades), *with* Foscarinis, *supra* note 39, at 39 (explaining that after generating some interest in the legal community in abating the crisis of homelessness, those campaigning for the cause found it difficult to sustain effective levels of volunteerism and concern).

125. *See* Johnson, *Equal Access to Justice*, *supra* note 116, at 85-86.

126. *See id.* at 89 ("Most other Western European countries, like the United Kingdom, enacted a statutory right to counsel in civil cases over a century, or at least decades, ago.").

127. ABCNY FUND, ET AL., *supra* note 1, at 927-32.

128. *See id.* at 927-30.

129. *Id.* (noting that this structure "contributed to the effectiveness of the [9/11] relief effort").

vices community is a vital and central contributor, and significant contributions will come from non-lawyers in the legal community.[130] Pro bono lawyers must play a major role; they will need to be mobilized, trained, and supported by technological innovations.[131] Law students and law schools eagerly participated in the 9/11 relief efforts;[132] they must be involved in Access to Justice efforts to provide assistance in the short run and to foster public service in future lawyers.[133] Every element of the legal community has a role to play.[134]

Alan Houseman, who moderated a panel on civil legal services at the New York Access to Justice Conference, calls for "A Comprehensive Integrated System" to ensure "equal justice under the law for low-income persons."[135] The elements of the comprehensive integrated system are consistent with the lessons learned from the legal community's response to the 9/11 crisis.[136] According to Houseman, the comprehensive system must: 1) provide access to civil legal assistance; 2) provide a full range of services; 3) use a full

130. *Id.* at 932 (noting that "[s]everal of the 9/11 relief projects made effective use of nonlawyers from within the legal community").

131. *Id.* (explaining that "[f]ully utilizing technology and online pro bono communities made volunteering easier and brought in many volunteers with little prior pro bono experience").

132. *Id.* at 898-99. "Each law school found a unique way for its students and professors to contribute to the [9/11] legal relief effort." *Id.*

133. For example, Professor Margaret Martin Barry and Deborah Howard were among the speakers at the New York Access to Justice Conference on the panel titled "Law Schools: Fostering Public Service in Future Lawyers." Agenda, *supra* note 80. Professor Barry's published comments in the Symposium Issue following the Conference examine "what insight [law school] clinical programs can offer to the judiciary on making the courts more accessible to the public" in an effort "to encourage more dialogue between the judiciary and law school faculty involved with the courts." Barry, *supra* note 77, at 1090. Deborah Howard's article for the Symposium Issue discusses the Law School Consortium Project, as a mechanism for law schools to increase access to justice for law and moderate income communities. Howard, *supra* note 81, at 1245-47. Professor Deborah L. Rhode has recently published the results of a comprehensive, national survey of the factors influencing pro bono work, which "suggest changes in workplace and law school cultures that can more effectively translate public service principles into professional practices." Rhode, *supra* note 48, at 414. The article includes a specific section dedicated to an empirical analysis of law school pro bono programs, and the agenda for reform involves specific practices that could be developed for law schools. Rhode, *supra* note 48, at 454-62.

134. ABCNY FUND, ET AL., *supra* note 1, at 932.

135. Houseman, *supra* note 81, at 1233.

136. *Compare id.* at 1233-42 (providing a series of suggestions aimed at achieving "[f]undamental change in civil legal assistance delivery"), *with* ABCNY FUND, ET AL., *supra* note 1, at 927 (enumerating eighteen lessons learned from "the 9/11 legal response" in hopes that they "will be an instructive example for future legal relief efforts").

range of providers; 4) involve collaboration with human services providers; 5) ensure statewide coordination of and support for providers of civil legal assistance; and 6) involve national coordination and support for civil legal assistance providers.[137]

The coordinated response must include the reshaping of attitudes in understanding the problem in the first place.[138] The entire legal community must rededicate itself to the notion that the goal of the legal system is to provide fairness and justice, not simply in process but in outcomes as well.[139] We must accept the reality that many unrepresented litigants do not "choose" to appear without counsel, but are forced to do so due to a shortage of available and affordable legal services.[140] We must recognize that the existing roles of the players in the legal system were developed in a world that assumed that parties would be represented by counsel.[141] Where the traditional roles impede, rather than further the goal of justice, we must alter the roles rather than abandon the goal.[142] We must revisit the roles of judges, court-connected mediators, clerks and other court personnel not only to permit, but to require them to carry out their duties in a manner that protects litigants from the forfeiture of important legal rights due to the absence of counsel.[143] The legal community must understand and accept that the concept of impartiality is not equated with passivity.[144] Impartiality requires the active participation of neutral players to avoid the forfeiture of rights.[145]

I have set forth elsewhere a more detailed exploration of these principles and the implications for the particular roles of judges,

137. Houseman, *supra* note 81, at 1233-42. The first element, providing access to civil legal assistance, involves: a) coordinated service delivery connecting all providers; b) coordinated advice and brief services; c) accessible intake systems; and d) a gateway to state civil legal assistance systems. *Id.* at 1234-36.

138. *See, e.g.*, Engler, *And Justice for All*, *supra* note 103, at 1988 (advocating "a fundamental re-examination by the judiciary of the roles of judges, mediators, and clerks in cases involving unrepresented litigants").

139. *See id.* at 1990 ("A system in which represented parties routinely prevail over unrepresented parties—without regard to the merits of the case—cannot be viewed as fair or impartial.")

140. *Id.* at 1988, 2027.

141. *Id.* at 2022.

142. *Id.* at 2022-23.

143. *Id.* at 1990, 2042.

144. *See id.* at 2023 ("The notion that a court cannot provide extensive assistance to one party without compromising its impartiality must be rejected. To the contrary, a court may need to provide more help to one side than to the other to maintain the impartiality of the proceeding.").

145. *See id.* at 2023-24.

court-connected mediators and clerks.[146] Professor Jona Goldschmidt, in his subsequently published comments at the Access to Justice Conference, underscores the need for a shift in attitude and approach by those inside the court system.[147] According to Professor Goldschmidt, "judges should not be rigidly passive; rather, they should provide pro se litigants . . . 'reasonable judicial assistance' as an entitlement of living in a democracy and as a matter of constitutional right."[148]

As with the coordinated, collaborative response to 9/11, judges from the New York State court system, led by the Chief Judge, will play crucial roles in responding to New York's crisis of the unrepresented poor, spearheading initiatives to motivate those outside the court system and playing a central role in formulating specific plans within the court system.[149] The courts must lead the efforts to reshape the roles of the players inside the court system as well as the attitudes of those in the larger legal community, by building on

146. *Id.* at 2021-47 (examining, in Part II of the article, "the roles of the judges, court personnel, and other players to demonstrate how they can and should provide the necessary assistance" to unrepresented litigants).

147. 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, 45-46 (2002) [hereinafter Goldschmidt, *Pro Se Litigant's Struggle*].

148. *Id.* at 43. Prof. Goldschmidt articulates five proposals for reform:

1. The Court Should Train Court Staff to Provide Basic Legal Information to the Public[;]

. . . .

2. Pretrial Conferences Should Be Conducted by Court Staff or Judicial Personnel to Prepare the Litigants for Trial[;]

. . . .

3. Judges Should Be Authorized to Provide Reasonable Assistance to Pro Se Litigants and Facilitate the Introduction of Their Evidence[;]

. . . .

4. Judges Should Be Permitted to Ask Questions, Call Witnesses, and Conduct Limited Independent Investigations[;]

. . . .

5. The Rules of Procedure and Evidence Should Be Relaxed in Cases Involving Pro Se Litigants[.]

Id. at 46-53. Professor Goldschmidt advocates that the basic information to be provided by court staff involve "elements of common causes of action, defenses, statutes of limitations, and such procedural requirements as those for service of process and execution of judgment." *Id.* at 46.

149. *See, e.g.*, ABCNY FUND, ET AL., *supra* note 1, at 843 ("[E]ven before the events of September 11, 2001, the courts were advancing a collaborative effort by the legal community to respond to the tremendous need for legal services by the poor and disadvantaged."); Kaye, *Foreword*, *supra* note 2, at 833 (reminding attorneys that while 9/11 was certainly a "disaster, ... for families facing homelessness, or eviction, or deportation, or foster care, or innumerable other life challenges, every day is also a time of crisis").

the ideas from the Access to Justice Conference and working through the Office of the Deputy Chief Administrative Judge for Justice Initiatives.[150] Similar to the 9/11 response, changes must involve court procedures[151] and ethical rules.[152] Ethical rules involving lay advocacy, ghostwriting, limited assistance programs and unbundled legal services remain as impediments to many access to justice initiatives.[153] Each tool at the disposal of the courts must be

150. *See* ABCNY FUND, ET AL., *supra* note 1, at 843.

151. For example, one part of the coordinated response to the problems of small businesses harmed by 9/11 and facing commercial lease issues was the creation of a separate docket and recruiting of volunteers by the Administrative Judge of the Civil Court, the Hon. Fern Fisher. *Id.* at 895. Professor Goldschmidt's article illustrates a number of procedural changes that could be implemented. Goldschmidt, *Pro Se Litigant's Struggle*, *supra* note 147, at 46-53. In a similar vein, Professor Barry proposes that the following components be included in plans of courts addressing access to justice: "[1)] Clear Guidelines for Handling Pro Se Cases[;] . . . . [2)] Clear Guidelines for Clerks on How to Assist Litigants[;] . . . . [3)] Consider the Role Lay Advocates Can Play in Assisting Pro Se Litigants[;] . . . . [4)] Help Pro Bono Triage Efforts by Acknowledging Pro Bono Attorneys' Time Constraints[;] and . . . . [5)] Seek Input from the Public." Barry, *supra* note 77, at 1102-05. Recent articles have also explored procedural changes in the federal courts, in the Eastern and Southern Districts of New York, in an effort to increase access to justice for unrepresented litigants. Hon. Lois Bloom & Helen Hirshkoff, *Federal Courts, Magistrate Judges, and the Pro Se, Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 494-99 (2002) (explaining procedural changes made in the Eastern District of New York); 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, 328-35 (2002) (explaining procedural changes made in the Southern District of New York).

152. *See* ABCNY FUND, ET AL., *supra* note 1, at 927.

153. The Report itself specifically urges adoption of *ABA Model Rules of Prof'l Conduct R.* 6.5 (2001), involving limited assistance programs, "to remove unnecessary disciplinary impediments" to the efforts to provide pro bono assistance. *Id.* at 60. The Access to Justice Symposium Issue includes articles focusing on ghostwriting and unbundled legal services. Fisher-Brandveen & Klempner, *supra* note 84, at 1107-11; Goldschmidt, *Ghostwriting*, *supra* note 84, at 1145-46. For the recommendations and report on the topic of limited assistance, developed at the 1998 Conference held at Fordham University School of Law, see *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751, 1774-78 (1999) [hereinafter *Recommendations of the Conference*]; *see also Report of the Working Group*, 67 FORDHAM L. REV. 1819, 1824-25 (1999). For a further discussion of ghostwriting issues, see John C. Rottermich, Note, *Ethical and Procedural Implications of 'Ghostwriting' for Pro Se Litigants: Toward Increased Access to Justice*, 67 FORDHAM L. REV. 2687, 2690-92 (1999). Regarding the arguments on both sides of the unbundled legal services debate, compare Mary Helen McNeal, *Responses to the Conference: Having One Oar or Being Without a Boat*, 67 FORDHAM L. REV. 2617, 2617-19, 2641-48 (tentatively accepting the viability of unbundled legal services as a mode of assistance for low-income litigants, but recognizing weaknesses in this approach and uncertainty in its effectiveness and advocating further study of the conference proposals) (1999), and Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295,

revisited and reshaped to conform to a revised understanding of the role of the judiciary in solving the problems of the unmet civil legal needs of the poor.

While the judiciary must lead, the solutions necessarily involve the entire legal community.[154] Around the country, an array of limited assistance programs have sprung up as a partial response to the surge of unrepresented litigants.[155] The legal profession must continue to develop, with flexibility and innovation,[156] programs short of full representation that can assist litigants in certain contexts.[157] Technology and web-based resources play an important role, but their effectiveness is limited unless supported by appropriate personnel.[158] A facilitator model might be important where litigants face a multiplicity of problems[159] and collaboration with social services agencies is essential.[160] Ethical rules must be revised or reinterpreted where they prohibit nonlawyers from participating

318-39 (1997) (discussing professional and ethical concerns raised by the provision of unbundled legal services and concluding that further study is necessary before it becomes a truly viable option), with Forrest S. Mosten, *Unbundled Legal Services and Unrepresented Litigants: Current Developments and Future Trends*, 40 FAM. CT. REV. 15, 15-18 (2002) (advocating unbundling as a way to allow people to "buy[ ] the limited help of a lawyer rather than . . . navigate the legal system on their own"), and Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 421-26, 447-49 (1994) (advocating unbundling and explaining that "with successful pro se unbundling experience, clients are gaining confidence in taking responsibility to determine the scope of legal work to meet identified legal needs"). For information regarding unbundling initiatives in the various states, see A Look at What is Happening Around the Country, *at* http://www.unbundled law.org/States/states.htm (last visited Apr. 29, 2004). For further information on unbundling, see Bibliography, *at* http://www.unbundledlaw.org/related/biblio.htm (last visited Apr. 29, 2004).

154. *See, e.g.*, *Recommendations of the Conference*, *supra* note 153, at 1751-74 (advocating broad reform allowing for effective integration of lawyers and non-lawyers to assist otherwise unrepresented low-income litigants).

155. *E.g.*, Engler, *And Justice for All*, *supra* note 103, at 2003-06 (summarizing various legal assistance initiatives); Rasnow, *supra* note 83, at 1281-92 (discussing initiatives to provide access to justice for rural residents of Ventura County, California).

156. *See* ABCNY FUND, ET AL., *supra* note 1, at 927.

157. *E.g.*, Engler, *And Justice for All*, *supra* note 103, at 2003-06 (summarizing the types of limited assistance programs that have been developed around the country); *see also* Fisher-Brandveen & Klempner, *supra* note 84, at 1107-11 (acknowledging the growing number of low-income civil litigants and exploring the option of 'unbundled' legal services as a means to meet their needs); Rasnow, *supra* note 83, at, at 1281-92 (discussing limited assistance initiatives in a rural setting).

158. *See* ABCNY FUND, ET AL., *supra* note 1, at 927.

159. *Id.*

160. *Id.*

in the programs,[161] prohibit lawyers from helping on a limited basis or prohibit court personnel from performing their revised roles.[162]

Perhaps most importantly, we must "step back periodically to evaluate"[163] the various innovations and limited assistance programs. Programs that succeed in halting the forfeiture of rights should be continued.[164] Programs that make the docket run more smoothly, but do not protect the rights of the unrepresented litigants, must be examined to insure that the programs are the wisest allocation of scarce resources. Programs that serve simply to make the work of the judges, clerks, and lawyers easier, but do not help the unrepresented litigants, are not solutions to the problem.[165]

Inevitably, the evaluation will show that, despite the revised roles of the players and the presence of limited assistance programs, there remain categories of cases in which unrepresented litigants continue to forfeit important rights due to the absence of counsel.[166] A stark choice faces us: we can acknowledge that the promise of justice is illusory, or we can provide counsel in these settings.[167] In the words of the Honorable Robert W. Sweet:

---

161. *Id.* at 937 (advocating the adoption of *ABA Model Rules of Prof'l Conduct R. 6.5* (2001) in order to facilitate lawyer participation in pro bono initiatives).

162. *Id.*; *see also Recommendations of the Conference*, *supra* note 153, at 1751-74 (advocating for ethical and practical reforms in order to allow more lawyers and nonlawyers to assist otherwise unrepresented low-income litigants).

163. ABCNY FUND, ET AL., *supra* note 1, at 927.

164. *See, e.g.*, Engler, *And Justice for All*, *supra* note 103, at 2003-06 (summarizing various legal assistance initiatives).

165. For an exploration of the issues involved in evaluating pro se initiatives, see Richard Zorza, *Evaluation of Pro Se Innovation* (Sept. 24, 2002), *at* http://www.zorza.net/evalofpr ose/Mass-Pro-Se-Eval-9-02_files/v3_document.htm (providing an interactive slide show raising issues and concerns relevant to the evaluation of pro se initiatives).

166. *See* Engler, *And Justice for All*, *supra* note 103, at 1989, 2020-21 (discussing the pressures placed on unrepresented litigants to forfeit rights and accept settlements which are not in their best interests by opposing counsel and judges eager to clear their dockets of such cases); Hon. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 505 (1998).

167. *See* John McKay, *Federally Funded Legal Services: A New Vision of Equal Justice Under Law*, 68 TENN. L. REV. 101, 105 (2000).

> Courts and the legal community have expressly recognized the connection between one's right to counsel and due process. The criminal justice system has long provided that a person who cannot afford a lawyer should be appointed one, regardless of the costs; a defendant without representation has little chance of receiving a fair trial. . . . In the absence of adequate federal, state, and private investment in civil legal services, the courts could well entertain a Civil Gideon constitutional challenge and mandate representation by an attorney when individual health, safety, or welfare is found at issue.

Id.

> What needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society under a rule of law?. . . . [W]e need a civil *Gideon*, that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all are essential to the functioning of an effective justice system.[168]

It is neither feasible nor advisable to adopt a Civil Gideon that mandates appointment of counsel for all litigants in all civil proceedings.[169] The adoption of a Civil Gideon will necessarily involve hard choices regarding which cases, which litigants and which settings.[170] We should not categorically reject the Small Claims model.[171] To the contrary, the model of an impartial judge charged with the obligation to develop the record and achieve justice regardless of the skills of parties, might be an important one to replicate in other settings.[172] In some cases in which both parties are without counsel, adjustments to the roles of the players may be sufficient to achieve justice.[173] In other instances, the revised roles combined with innovative assistance programs may be sufficient, although that can only be assessed through ongoing and accurate evaluation. In still other instances, the deprivation of rights may simply not rise to a level at which we can conclude there was a miscarriage of justice.[174]

Counsel must be provided where important rights are at stake and likely to be forfeited due to the absence of counsel.[175] It is

168. Sweet, *supra* note 166, at 503 (citation omitted).

169. *See* Fisher-Brandveen & Klempner, *supra* note 84, at 1107-11 ("[L]egal services budgets continue to be cut and thousands of potential clients are turned away each year"; acknowledging the shortage of attorneys to assist the growing number of low-income litigants and suggesting 'unbundled' legal services as part of a solution).

170. *But see* Sweet, *supra* note 166, at 506 ("To seek to limit this proposed right to counsel [in civil cases] would simply serve to defeat the right.").

171. Engler, *And Justice for All*, *supra* note 103, at 2016-17.

172. *Id.* At 2016-18 ("The precedents from small claims courts and administrative agencies serve as an important reminder that impartiality does not require judges to be passive.").

173. *See id.* at 1990-91.

174. *Cf.* Sweet, *supra* note 166, at 505-06 (advocating that a Civil Gideon right to representation by counsel "should arise whenever access to the justice system is warranted").

175. I read Justice Johnson's recent article on Civil Gideon as providing support for this approach:

> In one sense, the possibility of satisfying this constitutional imperative, short of declaring an absolute right to counsel in civil cases, could make it easier for an appellate court to recognize such a right. After all, in doing so, the courts would not be mandating government pay for a lawyer in each and every civil dispute involving an indigent on one side or the other. Instead, they would be limiting the mandate to cases and forums where disputants

beyond the scope of this essay to set forth the full list of rights we should consider important. A good place to start is Chief Justice Kaye's list, which includes the crises of families facing homelessness, eviction, deportation, and foster care.[176] The risk of erroneous forfeiture is heightened where unrepresented litigants are pitted against represented ones in cases involving such important rights.[177] Advocates in Maryland recently tried to achieve a Civil Gideon in a family law context.[178] Advocates in Washington State are pursuing similar litigation involving the eviction of an elderly tenant and the isolation and deportation of a fourteen-year-old.[179] The failure of the courts to recognize a right to counsel in such cases continues an American trend that remains in stark contrast to decisions abroad.[180]

> cannot obtain a fair hearing unless assisted by a lawyer. . ..Thus, if they are to guarantee truly effective access to low income civil litigants, appellate courts would not only have to recognize a right to equal justice, but also over time establish definitive standards.

Johnson, *Will Gideon's Trumpet Sound?*, *supra* note 116, at 218-19.

176. Kaye, *Foreword*, *supra* note 2, at 833.

177. *See* Engler, *And Justice for All*, *supra* note 103, at 1988-89 (discussing the risk to unrepresented litigants of forfeiting important rights due to a combination of their lack of familiarity with adversarial proceedings and pressure to accept ill-advised settlements from opposing counsel and "judges . . . driven by docket control"). "When both sides appear without counsel, the traditional configuration of the adversarial system has been altered; when one side is represented while the other is not, it has broken down." *Id.* at 2022.

178. *See* Frase v. Barnhart, 840 A.2d 114, 115, 123 (Md. 2003). The Maryland Court of Appeals held, by a 4-3 vote, that a lower court had wrongly imposed conditions on Deborah Frase's custody of her son. *See id.* at 125-29. The majority also ruled, however, that it was inappropriate to rule on Ms. Frase's claim of a right to counsel citing, among other reasons, that the litigation was over. *Id.* at 115 (stating that it was "both unnecessary and inappropriate . . . to address the right-to-appointed-counsel issue"). The three concurring judges were prepared to recognize the right to counsel in cases involving the fundamental right of parents to parent their children. *Id.* at 131-42 (Bell, J., concurring). "I would reach the [ ] issue. . . . [and] would resolve it by holding that in cases involving the fundamental right of parents to parent their children, especially when the parent is a defendant . . ., counsel should be provided for those parents who lack independent means to retain private counsel." *Id.* at 141 (Bell, J., concurring).

179. The eviction case is *City of Moses Lake v. Smith*, No. 01-2-007668 (Wash. Sup. Ct. Grant Cty. July 8, 2001) (pleadings on file with author). The Immigration case is *Machado v. Ashcroft*, No. CS-02-0066-FVS (E.D. Wash. Mar. 20, 2002) (pleadings on file with author).

180. Efforts by advocates in New York City in the 1980's to establish a right to counsel in eviction cases to prevent homelessness became mired in a procedural morass. *See* Donaldson v. State, 548 N.Y.S.2d 676, 676-78 (App. Div. 1989) (finding a lack of subject matter jurisdiction and transferring the case to the Supreme Court, Bronx County for a determination in the first instance as to whether there is a "right to assigned counsel for indigent defendants facing summary eviction proceedings in Housing Court"). For an exploration of the efforts in New York City, see Russell

Such an initiative will not occur without a struggle. A "thoughtful, comprehensive and creative" response from an organized legal community is required.[181]People will respond if they are asked to help;[182] however, the asking will be easier and the response will be greater if there is consensus around the need to solve the crisis and the best way to utilize each element of the legal community.[183] Through this route, volunteers—whether lawyers or lay advocates—can most efficiently be trained and channeled into opportunities that are easy to identify and rewarding to perform.[184]

Inevitably, even heroic efforts from volunteers will not resolve the crisis. The disaster of 9/11 exposed the limits of the capacity of the private bar to mobilize volunteers.[185] Significant numbers of lawyers reported that they might be "too busy" to perform future pro bono work, and a disturbing twenty percent of the litigators reported that pro bono work is "not valued by [their] law firm or company."[186] The Report confirms Professor Deborah Rhode's findings, particularly regarding the extent that workplace practices limit pro bono participation.[187]

Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 104-15 (1997). The analysis supporting the claims is set forth in Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 562-87 (1987). For a description of successful decisions abroad in courts in Switzerland, Germany, and Canada, as well as the European Court of Human Rights, see Johnson, *Equal Access to Justice*, *supra* note 116, at 89-91, 104-110.

181. *See* ABCNY FUND, ET AL., *supra* note 1, at 840.

182. *Id.* at 937-38 (explaining that when needs are clearly identified, people will specifically attempt to fulfill them).

183. *E.g.*, *id.* at 932 (explaining that "every element of the national legal community[,]" including the "public interest services community" and "nonlawyers from within the legal community" had roles to play and made significant contributions to the 9/11 legal relief efforts).

184. *See id.* at 932 (noting that "[t]raining was crucial—in part because with training, all lawyers are capable of providing pro bono services" and that "[s]everal of the 9/11 legal relief projects made effective use of nonlawyers from within the legal community").

185. *See id.* at 907.

186. *Id.* at 925. Sixty-six percent of law firm lawyers, and forty-four percent of sole practitioners identified being "too busy" as the factor most likely to prevent them from performing future pro bono work. *Id.*

187. Rhode, *supra* note 48, at 447-54. The deficiencies in workplace policies includes the poor structure of formal policies, workplace policies concerning resources, rewards, and recognition, and the effect of pro bono work on promotion and bonus decisions. *Id.* For example, "[o]ver a third of surveyed lawyers said that their organization's informal reward structures were at odds with formal policies supporting pro bono work." *Id.* at 451.

The public interest legal community will remain a vital contributor to the response.[188] Yet, "[m]ore financial resources are needed to achieve full access to civil legal assistance."[189] Absent additional funds, the public interest community will be unable to do more than scratch the surface of the problem.[190] As with the 9/11 crisis, funding will be essential.[191] The more coordinated the efforts of the legal community are, the greater the likelihood that we can reach consensus on how to shift existing financial and human resources and identify and leverage new ones. Only then will the legal community be at the forefront of efforts to move the country beyond the sad feature of our legal system, captured by the words of Justice Johnson, a keynote speaker at the New York Access to Justice Conference:

> It is the tragedy of the present we remain insular and smug about our nation's superiority in all things related to 'justice,' while millions of poor U.S. citizens are denied this precious right. It is the hope of the future the United States will finally open its eyes and embrace the 'practical and effective' right to equal justice most Western democracies now guarantee. When that day comes—and it may come soon—millions of U.S. citizens will, for the first time, truly have their day in court.[192]

CONCLUSION

As we rightfully celebrate the successes documented in the Report, we should also envision the legal community's future public service efforts. The legal community must meet the unmet, post-9/11 needs, insure that other "crises" in the legal system are addressed, and apply to other crises the lessons learned from the response to the September 11th crisis. By achieving these ambitious goals, we will truly honor the victims of September 11th and their families and friends.

188. ABCNY FUND, ET AL., *supra* note 1, at 932-33 (explaining that the public interest community can be especially helpful due to their "unparalleled experience ministering to the needs of the poor and working with those in distress").

189. Houseman, *supra* note 81, at 1233.

190. *See id.*

191. *See* ABCNY FUND, ET AL., *supra* note 1, at 927.

192. Johnson, *Equal Access to Justice*, *supra* note 116, at 110.