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## Pro Bono Legal Services: The Silent Majority—A Twenty-Five Year Retrospective

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**PRO BONO LEGAL SERVICES:  
THE SILENT MAJORITY – A TWENTY-FIVE  
YEAR RETROSPECTIVE<sup>†</sup>**

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**INTRODUCTION**

The beginning of this Essay takes an unorthodox course. As a starting point, I jump to the middle of my topic. I do so by telling a story. Through this approach, borrowing a page from the style of children’s stories and biblical text, I seek to simplify my task. The tale I will relate is meant as an expression that sometimes, complex

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<sup>†</sup> This Essay is based on a Social Justice Public Lecture delivered by the author at the Feerick Center for Social Justice, Fordham University School of Law, on June 27, 2013.

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challenges are easier to explain and best understood when clarified with plain illustrations. Graphic contrasts and allegorical aids open lines to purpose and meaning. Casting things in a different light this way can serve not only to gain clearer understanding, but to change hearts and minds, and perhaps even catalyze sooner action in response to a need or a cause.

The story occurred to me recently while reading a statement made by a judge that contains an insightful comparison; one I think sheds light on my thesis. The judge commented on the function of our courts as the place to which people must sometimes resort in coping with the countless acute afflictions of life, many of which involve urgencies they, especially the poor, endure daily as they struggle to satisfy basic human needs. In this connection, the judge said that “[t]he courts are truly the emergency rooms of society.”<sup>1</sup>

That judicial metaphor is generally apt and should work well as applied to most people. But, now vary the analogy. Change the hospital emergency room by adjusting how it functions to reflect the workings of the courthouse, focusing in particular on the realities poor unrepresented parties encounter daily in our courts. What would hospital patients experience if some of the treatment and practices that poor people face in our justice system applied to medical care as well? The new setting, even with its bizarre distortion, is not hard to visualize. And the picture it would paint is not pretty.

In the emergency room as imagined, two groups of patients—one wealthy and one poor—enter presenting similarly serious wounds and acute pains. The rich patients—those able to afford the full expense of medical services—are sent to an intensive care unit for treatment by certified physicians and trained nurses. The poor ones—those possessing no means from any source to pay for doctors—are shunted to a common waiting room. There they sit for hours until their names are called, at which point they are handed a first-aid kit, an abbreviated medical manual, and other self-help guides. The package includes forms describing various common conditions by which the patients might be able to identify what they feel and compare their symptoms to those of known illnesses, and thus self-diagnose what ails them. The kit also provides how-to instructions that the patients can follow in operating the image scanning machines; pads on which to write prescriptions for their own medications; and even simple

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1. Jonathan Lippman, *New York's Template to Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL'Y REV. 13, 14 (2013).

instruments with which to perform surgical procedures on themselves. To handle extreme circumstances in which the poor patients encounter exceptional difficulties employing this handy service, the hospital maintains on standby duty a limited number of medical students and nurse trainees to provide low-income patients some basic guidance on the use of the various medical tools supplied to them. Meanwhile, the hospital's physicians, on the way from their lounge to and from serving the paying patients, regularly pass by the poor people's waiting room.

Would the hospital trustees and administrators maintain a health care system featuring the emergency room service this illustration depicts? In our civilization, indisputably not. Indeed, even in the world's least progressive societies it would be derided as a travesty, a mockery not only of health care standards, but of any measure of human caring as well. Yet any judge would readily recognize a parallel courthouse caricature. To a judge watching litigants represent themselves in a courtroom, the event often seems like the justice system's version of assisted suicide. The scene of self-help in the courthouse is especially poignant at a trial or in complicated proceedings in which the controlling legal issues lodge somewhere within the arcana and long-studied subtleties of the law. The experience could be every bit as disturbing and pitiable as it might be to witness a hospital patient self-administering surgical aid.

If this hypothetical sounds too fanciful or far off the mark, think of real cases taken from the courts' dockets every day. Consider the recent crisis in this country's housing market brought about by mortgage foreclosures. We know now that vast numbers of those proceedings were basically flawed, if not recklessly fraudulent or otherwise unlawful. Yet, in New York, in over 60% of the foreclosure actions filed by the nation's largest banks, homeowners were not represented at a critical stage of the proceedings that the applicable statute requires before a judge can grant relief.<sup>2</sup> By contrast, the banks appeared in court through specialized lawyers. Literally tens of thousands of those individuals lost their homes improperly, and many of them might have avoided that fate had they received adequate legal assistance. How many of those families are now homeless, on the streets, in shelters, or sharing overcrowded quarters with relatives and friends? The same situation continues to play out daily in New York City Housing Court. Every year, in hundreds of thousands of

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2. See ANN PFAU, STATE OF N.Y. UNIFIED COURT SYS., 2010 REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 11-12 (2010), *available at* <http://www.nycourts.gov/publications/pdfs/foreclosurereportnov2010.pdf>.

eviction actions, over 95% of tenants appear in court as defendants without a lawyer. Landlords represented by counsel confront these tenants in almost all cases.<sup>3</sup> Massive numbers of those poor tenants end up homeless and cite eviction as the cause, while eviction ensues in few of the cases in which they are assisted by a lawyer.<sup>4</sup>

Applying my own comparative scoring of the physical and emotional pain levels people experience in a hospital and a courthouse on a scale of one to ten, I would say that in many circumstances the hurt ratings would at minimum coincide. For a resident evicted from a home and thrown out onto the streets, for a parent who loses custody of a child, for an elderly person who forfeits health benefits or financial assistance—in each of these cases by lack of legal aid in court proceedings instituted to curtail rights to basic human needs—the outcome could feel as excruciating, and pierce as deeply into the sinew and bone of daily life, as wounds inflicted by bodily injury. The emotional distress and psychological aches these unassisted parties suffer in the courthouse may be no less acute and traumatic than the pain associated with many physical ailments for which they can secure routine medical treatment in the emergency room.

## I. BACKGROUND

The hospital analogy in my Introduction can be brought closer to home in court, as I will try to do later in my presentation through another fable. For now, let us return to actual developments in the real world of legal services for the poor. Earlier this year a spate of articles appeared in the news media and in academic literature commemorating the fiftieth anniversary of *Gideon v. Wainwright*.<sup>5</sup> Much of the commentary focused on assessing whether the U.S. Supreme Court's ruling in that case has achieved its full promise: the constitutional right of indigents to representation of counsel in criminal proceedings.<sup>6</sup> Over time, the circumstances that compelled

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3. See generally COMM. ON LEGAL ASSISTANCE, ASS'N OF THE BAR OF THE CITY OF N.Y., HOUSING COURT PRO BONO PROJECT: REPORT ON THE PROJECT, PARTS I AND II (1988); THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (2010), available at <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf> (noting that 99% of tenants are unrepresented in eviction cases in New York City).

4. See COMM. ON LEGAL ASSISTANCE, *supra* note 3, at 11–13.

5. 372 U.S. 335 (1963).

6. See, e.g., Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES, Mar. 9, 2013, <http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to->

*Gideon*—the denial of equal access to justice in our courts based on a person’s inability to pay—has prompted examination of the same fundamental issues as they relate to the civil justice system. Perhaps the most prominent question in this debate is whether the time has come for what is referred to as a “civil *Gideon*,” and how the courts and members of the Bar should gear up to address both the overwhelming need and the growing demand for legal services for low-income persons in civil cases in view of the limited available resources.

During the past twenty-five years, as this retrospective will demonstrate, the New York State court system has been recognized as a pioneer in addressing these issues. Working closely with New York’s organized Bar, our State judicial officers and administrators have led the way in calling attention to the legal needs of the poor, in advocating for improvements in programs devoted to meeting those needs, and in highlighting the public benefits and personal value that lawyers, litigants, and the courts derive from pro bono and public interest legal service. This Essay examines what New York has and has not done in this sphere over this time span, the extent to which the State’s efforts have and have not succeeded, and what more may need to be done to realize better results. My thesis stresses a vital point: the severe crisis that large numbers of unrepresented poor people creates for our civil justice system, as well as for our larger society, raises not only grave legal and administrative concerns, but profoundly moral predicaments.

As an opening historical backdrop, I quote from statements made by two New York State Chief Judges. In the spring of 1988, then Chief Judge Sol Wachtler noted that “the growing need for providing legal services to the poor has worsened.”<sup>7</sup> He added that “[t]here has been a disproportionate growth in the number of lawyers engaged in the practice of law in relation to the number of people who are denied effective access to the civil justice system in this state because of a lack of means.”<sup>8</sup> In early 2013, Chief Judge Jonathan Lippman made

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counsel-badly-battered-at-50.html?\_r=0; Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After ‘Gideon’*, ATLANTIC (Mar. 13, 2013, 11:09 AM), [http://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/?single\\_page=true](http://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/?single_page=true); Karen Houppert, *Indigent Clients Suffer as Public Defenders Struggle to Keep Up with Caseloads*, WASH. POST, Mar. 15, 2013, [http://www.washingtonpost.com/opinions/legal-aid-for-indigent-clients-needs-help/2013/03/15/65dcbe56-8cc9-11e2-b63f-f53fb9f2fcb4\\_story.html](http://www.washingtonpost.com/opinions/legal-aid-for-indigent-clients-needs-help/2013/03/15/65dcbe56-8cc9-11e2-b63f-f53fb9f2fcb4_story.html).

7. Victor Marrero et al., *Committee to Improve the Availability of Legal Services, Final Report to the Chief Judge of the State of New York*, 19 HOFSTRA L. REV. 755, app. A at 852 (1990).

8. *Id.* at 763 (internal citation omitted).

a similar observation. He wrote that “we are facing a crisis in the delivery of justice in New York State . . . . There is a growing justice gap between the dire need for civil legal services and the dwindling resources available.”<sup>9</sup>

These comments were given twenty-five years apart by two New York State Chief Judges, noting the existence of essentially the same conditions challenging our civil justice system. In light of these comments, when I was considering a subtitle for this Essay the first idea that came to mind was “The More Things Change, The More They Stay The Same.” Instead, I labeled it “The Silent Majority” for reasons that will become clear in a moment. As a starting point, I perceive that during this past quarter of a century, through the efforts undertaken by courts and the organized Bar to expand legal services available for civil litigants unable to afford counsel, some things indeed have changed substantially. But others have remained at a standstill, relatively unaffected despite the considerable public and private energies and resources that have been expended to improve access to the civil justice system.

To preface this part of my remarks, I acknowledge something that has stayed the same over these years. This constant is embodied in the remarkable leadership provided by three successive New York State Chief Judges—Sol Wachtler, Judith Kaye, and Jonathan Lippman—regarding the underlying access to justice issues. Each of them has played an exceptional role in focusing the Bar’s attention on what is referred to as the “justice gap,”<sup>10</sup> a phenomenon also often characterized as a “crisis” in civil justice in New York,<sup>11</sup> and indeed in many other parts of the country.<sup>12</sup> Those terms encompass two interrelated challenges. The first expresses a matter of quantity: the vast number of civil litigants who appear in court proceedings every day without assistance of counsel because they cannot afford to pay for a lawyer. The second conveys a question of quality; there are adverse consequences that unrepresented poor litigants in such magnitude impose on the parties, the courts, the legal profession, and the larger society. Each of these Chief Judges deserves recognition and our gratitude for exercising the great authority and moral

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9. Lippman, *supra* note 1, at 13.

10. *Id.*

11. *See id.*; *see also* THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *supra* note 3, at 1; Marrero et al., *supra* note 7, at 772.

12. *See* LEGAL SERVS. CORP., REPORT OF THE PRO BONO TASK FORCE 1 (2012), *available at* [http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF\\_%20Report\\_FINAL.pdf](http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf).

leadership of their high office to promote the public good, not only by raising awareness of the existence of a large blight on our justice system, but also by initiating creative ways to mitigate its harms. In this ample tribute to judicial action I report the good news. I now turn to chronicle the not so good—the reaction and inaction.

## II. LEGAL AND POLICY ISSUES

Regrettably, despite the commitment and best efforts of our Chief Judges and courts, even combined with strong cooperation and support from major segments of the organized Bar, the justice gap persists in New York, its effects still as pernicious as ever. But while the dimensions of the crisis have remained essentially the same in some respects, in other ways they have gotten worse, significantly altering the tenor and enlarging the implications of the underlying problems for our justice system. A hard look at the twenty-five years of experience examined here confirms this observation. For regardless of the many remedial efforts attempted by judges and the organized Bar, the acute legal crisis engendered in our courts by the overwhelming number of unrepresented poor litigants has festered. As the hardships that low-income people encounter in our courts by denial of effective access to justice have deepened, resulting legal and social issues have assumed a higher grade of urgency.

Fifty-one years ago, President John F. Kennedy spoke to the nation in a speech which still has resonance for the issues I present.<sup>13</sup> He addressed the inequality of treatment in civil rights African Americans experienced under long-standing legal norms and social practices that had developed in this country, conditions that had become entrenched and intractable because they had been actively observed and enforced, or condoned or ignored by many generations of Americans.<sup>14</sup> On this point, he described how on account of the consequential injustices, the problem had intensified so as to decay into what he characterized as a “moral crisis.”<sup>15</sup> Those grave injustices, which for centuries had been encoded or tolerated by much of American society and still engraved in our collective conscience, are now a thing of the past. They fell because our nation could no longer accommodate a moral contradiction. The societal, moral, and legal system that fostered those injustices eventually collapsed for the

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13. *See generally* John F. Kennedy, President of the United States, Radio and Television Report to the American People on Civil Rights (June 11, 1963), *available at* <http://www.presidency.ucsb.edu/ws/?pid=9271>.

14. *See id.*

15. *Id.*



same reason that one hundred years earlier, as Abraham Lincoln had foretold, the United States could not stand as a house divided against itself. At neither of those historical crossroads could America live with the discrepancy between what its people loftily professed on paper and what they actually did on the ground, between the high principles of human equality and equal justice our Constitution proclaims as supreme law of the land, and an oppressive reality: the virulent discrimination and rampant violence that a major part of the American population endured because of the happenstance of race.

In a similar vein, a moral crisis, unsustainable under the weight of equally powerful principles, permeates our civil justice system. The grave imbalance of legal resources the poor contend with in civil actions has deepened into crisis conditions that, in moral terms, we should regard as ugly and unconscionable, and combat as vigorously as those that defined and weakened this country during the centuries-long struggle of African Americans for equal rights. For, at bottom, as was the case of the injustices prevailing in American society generations ago, perhaps the worst outcome that the crisis of inequity of civil justice presents to our generation is its constitutional dimension. As a by-product of the enormous burdens the legal services needs of unrepresented parties impose on our judicial system, courts have become increasingly two-tiered. In essence, the price of services in our judicial system has been marked up, and the caliber of justice it renders has become more and more divided along economic lines: one higher class of justice only accessible to the rich, and a lesser one open to the poor.

To demonstrate the depth of the justice gap and how impervious to improvement it has been over these twenty-five years, this Essay first compares the unmet legal needs of the poor then and now. Next, this Essay considers the prodigious efforts exerted by the Chief Judges, the courts, and the organized Bar to improve the availability of legal services for the poor. And then this Essay weighs that level of commitment against the still modest results that such unwavering and concentrated energies have produced.

In 1988, the New York State Bar Association undertook a survey to measure the unmet needs for legal services experienced by poor people in New York State.<sup>16</sup> The study, first released in 1990, documented the deeply troubling social and economic conditions under which low-income New Yorkers lived, and how the dire effects

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16. *See* N.Y. STATE BAR ASS'N COMM. ON LEGAL AID, THE NEW YORK LEGAL NEEDS STUDY (1993).

of those circumstances came to bear on our courts. Among its most important contributions, the study documented the extensive incidence of poverty in New York and its pronounced manifestation in the justice system.<sup>17</sup>

Specifically, according to the study, approximately three million people, or nearly 15% of the State's 1987 population, lived on incomes at or below the national poverty level (based on an index that then stood at \$11,700 per year for a family of four).<sup>18</sup> The study also found that households representing the State's poor population reported an average of 2.37 distinct civil legal problems—involving basic human needs such as housing, employment, health, and parental rights—for which the individuals had obtained no legal assistance during the survey year.<sup>19</sup> At the same time, federal, State, and local funding available for civil legal services for the poor had experienced sharp reductions. With all available public and private resources combined, only about 14% of the overall legal needs of the poor were being met.<sup>20</sup>

Skip forward twenty-five years to the most recent examinations of the same conditions. A new legal needs survey was performed in 2010 by the Task Force to Expand Access to Civil Legal Services in New York State,<sup>21</sup> a group of prominent leaders of the New York State Bar appointed by Chief Judge Lippman. The Task Force was directed to measure the extent of the unmet civil legal services needs of the poor, to propose statewide priorities, programs, strategies, and best practices to improve the delivery of legal services in civil proceedings, and to advocate for greater public funding to finance legal services for the poor. In its needs analysis, the Task Force found that among the working poor, defined as persons reporting incomes at or below 200% of the federal poverty index (then approximately \$22,100 for a family of four), almost three million people had faced a civil legal problem also involving fundamental human needs during the study year.<sup>22</sup> The Task Force's report concluded that at most, 20% of the needs of the State's working poor for civil legal services were being addressed.<sup>23</sup> In concrete terms, these figures indicated that

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17. *See generally id.*

18. *Id.* at 10.

19. *Id.* at 1.

20. *Id.* at 159–60.

21. *See THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y.*, *supra* note 3.

22. *Id.* at 4, 11.

23. *Id.* at 4.

every year more than 2.3 million low-income New Yorkers proceed through the State's civil justice system without legal assistance.<sup>24</sup> Legal services providers confirm these figures. The Legal Aid Society, for example, reported that in 2012 its offices turned away nearly 90% of people who sought legal assistance.<sup>25</sup>

Thus, in nearly twenty-five years little changed in any of the major social and court system indicators that measure the justice gap. The number of people in the state classified as poor, the number of civil legal problems low-income households encountered, and the number of persons involved in court proceedings who experienced a need for legal services but were unable to obtain assistance of counsel, remained substantially unchanged. One telling statistic relevant to this overview, however, did register a dramatic rise: in 1987, approximately 110,000 attorneys were registered in New York State.<sup>26</sup> The number in 2012 was approximately 280,000.<sup>27</sup>

Against these realities, no serious dispute could arise regarding three issues. First, the vast unmet needs of poor people in New York for legal services pertaining to basic human needs still persist in crisis proportions. Second, the primary obligation to resolve the justice gap and its impact on the legal system belongs to government at all levels. And third, to fulfill this purpose, public financing of legal services providers to employ trained, full-time lawyers is the most effective solution, and should be the first-line strategy for both government and the organized Bar to pursue. I will not dwell further on these points except to note that the mere existence of the justice gap, with its long duration and overwhelming proportions, constitutes ample evidence of the continuing inadequacy of the governmental response, and of the dim prospects that change will emerge from that front anytime soon.

What does constitute the subject of great debate within the legal community regarding the scope of justice gap presents a different question. Assuming both the persistence of the enormous unmet need for legal services for the poor, the considered ongoing shortage of governmental resources, and the unpromising future for

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24. *See id.*

25. John Caher, *Hearing Begins Evaluation of Need for More Civil Legal Services*, N.Y. L.J., Sept. 18, 2013, [www.legal-aid.org/en/mediaandpublicinformation/inthenews/newyorklawjournalreportsonchiefjudgelippmanshearings.aspx](http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/newyorklawjournalreportsonchiefjudgelippmanshearings.aspx).

26. N.Y. STATE UNIFIED COURT SYS., 10TH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR 102 (1988).

27. E-mail from Sam Younger, Deputy Dir., N.Y. Office of Court Admin., to Hon. Victor Marrero, Senior Judge, S.D.N.Y. (June 25, 2013) (on file with author) (citing numbers from an internal report not published).

improvement on this score, what are individual members of the Bar now doing or not doing about these worsening conditions and their impacts on the justice system? Should lawyers bear an obligation to do more?

### III. THE FIRE NEXT DOOR: FROM LEGAL CRISIS TO MORAL CRISIS

As a point of departure for a review of what exists and what remains to be done about the justice gap, recall the lofty exhortation enshrined in the New York Lawyer's Code of Professional Responsibility.<sup>28</sup> Preceding the text of Ethical Canon 2-34 is a statement that "a lawyer has a professional obligation to render public interest and pro bono legal service."<sup>29</sup> The pro bono contributions contemplated by this provision are defined broadly to include legal services at no fee and without expectation of a fee to: (1) persons of limited financial means; (2) not-for-profit, governmental or public services organizations, where the legal services are designed primarily to address the legal and other basic needs of persons of limited financial means; or (3) organizations specifically designed to increase the availability of legal services to persons of limited means.<sup>30</sup> As a numerical goal, the number of hours of pro bono and public interest legal service that each lawyer should aspire to provide was recently raised from twenty to fifty.<sup>31</sup> To assess how well members of the Bar have fared over the past twenty-five years in achieving these ethical standards, I return to some important developments set in motion in 1988.

#### A. The Picture Then

In 1988, then-New York State Chief Judge Sol Wachtler observed that the problems associated with the unmet needs of the State's poor population for legal services had worsened. In response, he noted that public attention had increasingly focused on the obligation of the private Bar to provide legal representation on behalf of people who

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28. N.Y. STATE BAR ASS'N, NEW YORK LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY (2007), available at <http://www.nysba.org/workarea/downloadasset.aspx?id=26638>.

29. *Id.* at 23.

30. *Id.*

31. Joel Stashenko & Christine Simmons, *Court System Enacts Disclosure Mandate for Pro Bono Service*, N.Y. L.J., May 1, 2013, at 1, <http://www.newyorklawjournal.com/id=1202598312375>.

needed such services but were unable to afford them.<sup>32</sup> To examine the issues he appointed the Committee to Improve the Availability of Legal Services (the CIALS). The CIALS, which I had the honor and privilege to chair, was composed of leaders of the Bar drawn from every part of New York State. As the Chief Judge spelled out, the CIALS's mission was to develop a plan of action comprising programs and methods necessary to provide increased legal services to the poor by attorneys in New York through their involvement "in the discharge of their fundamental and ethical responsibilities as members of the Bar."<sup>33</sup> In particular, Chief Judge Wachtler's charge provided, "Deliberations of the committee may also include consideration of the propriety and feasibility of imposing a mandatory pro bono obligation on all members of the bar . . . ."<sup>34</sup>

The CIALS's work spanned more than two years. Its methods included consultations with legal services providers, bar associations, and law schools, as well as public hearings throughout the State designed to elicit views from members of the organized Bar and community leaders. The CIALS then presented its Final Report to the Chief Judge in April 1990.<sup>35</sup> In it, the CIALS made the following findings and recommendations: (1) the unmet need for civil legal services for the poor in New York constituted a critical problem having a devastating impact on the lives of large numbers of poor people who needed legal assistance and could not afford to pay for a lawyer; (2) the problem posed severe implications for the legitimacy of the State's legal profession and justice system; (3) the problem had to be addressed promptly through the efforts of society in general and members of the legal profession; (4) whether or not society responded, lawyers have a separate professional responsibility to contribute meaningfully to remedy the problem; and (5) the scope of the need was so extensive that volunteer efforts alone could not provide an adequate response.<sup>36</sup> The CIALS proposed a plan calling for obligatory pro bono legal services that it considered essentially sound and more responsive to the crisis than either the volunteerism alternative boosted by opponents, or inaction.<sup>37</sup>

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32. See Marrero et al., *supra* note 7, app. A at 852.

33. *Id.* at 852.

34. *Id.* at 853.

35. *Id.* at 756.

36. *Id.* at 768.

37. *See id.*

1. *A Plan of Action . . .*

The CIALS's far-reaching pro bono services proposal recommended that the State court system adopt a rule that would obligate all practicing attorneys in New York, as a condition of remaining in good standing as members of the State's bar, to perform a minimum of twenty hours every year of qualifying legal services.<sup>38</sup> As defined by the CIALS plan, qualifying services would include three primary categories: (1) professional services in civil matters rendered directly to persons who cannot afford to compensate counsel; (2) activities designed to improve the administration of justice and access to justice for poor persons; and (3) professional services to charitable, religious, civic, or educational organizations in matters related primarily to addressing the needs of poor persons.<sup>39</sup>

A word about nomenclature. This proposal is of course known in the vernacular as "mandatory pro bono," a somewhat unfortunate misnomer. Combined, the terms border on the linguistic absurd somewhere along the lines of oxymoron, epithet, and call to arms. As such, the phrase must have been the branding brainchild of someone challenged in communications and marketing skills, or a stroke of genius of a rabid opponent of the idea. Better articulated, what the concept really embodies is a fulfillment of pro bono legal service, a public interest requirement that attorneys must satisfy annually as a condition of remaining as members of the New York Bar in good standing, and thus fulfilling the duties and enjoying the rewards of the profession.

2. *. . . And Reaction*

Response to the CIALS's pro bono obligation proposal was mixed. It was supported by the Association of the Bar of the City of New York, the largest organized Bar group in the State, as well as by some of the leading legal services providers and advocates, among them the Legal Aid Society, Community Action for Legal Services, Volunteers for Legal Services, New York Lawyers for the Public Interest, and the Council of Law Associates. The concept also received substantial editorial endorsement, including from *The New York Times*.<sup>40</sup> It was

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38. *See id.* (stating the proposed requirement as forty hours of qualifying pro bono legal services every two years).

39. *Id.* at 768–69.

40. *See* Kevin Sack, *Chief Judge Presses Lawyers on Legal Work for the Poor*, N.Y. TIMES, May 2, 1990, <http://www.nytimes.com/1990/05/02/nyregion/chief-judge-presses-lawyers-on-legal-work-for-the-poor.html>.

opposed by the New York State Bar Association and several county bar associations.

Among the critics' most frequent objections, one merits mention here because it directly squares with the legal and moral issues which remain at the heart of the legal community's continuing debate about the subject. Opponents pointed out that the problems created by the unmet needs of the poor for legal services involved issues for which society as a whole bore the responsibility and which could be solved properly only through allocation of adequate public resources.<sup>41</sup> Accordingly, they further argued that it was unfair to single out lawyers to bear an obligation not imposed on any other licensed professions and that legal services contributions made by volunteers should not be compelled.<sup>42</sup>

To these arguments, the response that CIALS members found most persuasive relied on constitutional and ethical concepts. The right to assistance of counsel and the fair and effective administration of justice regardless of a person's financial means are bedrock principles enshrined in our constitutional government, and, at least in spirit, are also reflected in the Lawyer's Code of Professional Responsibility. As officers of the court, attorneys solemnly take a professional oath to honor and support those basic tenets. The ethical canon which provides for the lawyer's professional obligation to render public interest and pro bono legal service does not refer to mere *charity* applicable to all persons in general, but to a form of *duty* particular to attorneys that stems from and is integral to their special public role in our society.

Because of the solid constitutional and public interest underpinnings upon which legal services in our courts are grounded, the lawyer's function is unique among licensed professions. The success or failure of our justice system thus depends vitally on the effective performance of attorneys' duties and on the level of their contributions to strengthen the administration of justice. The Constitution does not confer that lofty societal status on any other profession. It makes no reference to the services of doctors, teachers, or plumbers, for example. Accordingly, legal services stand quite apart from those provided by many other professional endeavors, and rest on a higher public plane. From this perspective, to equate an attorney's obligation to provide pro bono assistance to the poor in furtherance of the fair and effective administration of justice with

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41. See Steven Wechsler, *Attorneys' Attitudes Toward Mandatory Pro Bono*, 41 SYRACUSE L. REV. 909, 926 (1990).

42. See *id.*

work performed by other professionals is to devalue the meaning of the lawyer's public interest function in our society.

Chief Judge Wachtler, acknowledging the divisions within the Bar, accepted the CIALS Final Report but deferred consideration of the pro bono service proposal.<sup>43</sup> Noting that the State Bar Association had committed to redouble its efforts to significantly increase the legal services available to the poor by means of a comprehensive program of voluntary actions, Chief Judge Wachtler agreed to allow the Bar leaders two years to demonstrate the results of those initiatives.<sup>44</sup> But, he cautioned that if those efforts were not successful after the two-year period, he would seek implementation of the pro bono service condition recommended by the CIALS.<sup>45</sup>

The State Bar Association then launched an ambitious statewide campaign to mobilize attorneys to increase the level of volunteer legal services provided to the poor, using the CIALS definition as a benchmark. Its ambitious twenty-point program touched every corner of the legal community and included initiatives of education, exhortation, advertising, recognition, encouragement, training, and coordination of pro bono activities. The Association published its report of these efforts in February 1994.<sup>46</sup>

Meanwhile, to monitor the results of the State Bar Association's program, Chief Judge Wachtler appointed a Pro Bono Review Committee and named Justin Vigdor (a past President of the New York State Bar Association) and myself to serve as co-chairs. That committee conducted three annual surveys and presented its Final Report to Chief Judge Wachtler's successor, Judith Kaye, in April 1994.<sup>47</sup>

### 3. *Inaction: The Silent Majority*

The Pro Bono Review Committee's findings were not encouraging. Over the three-year survey period, nearly half of the members of the New York Bar indicated that they did not engage in any activity

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43. Sol Wachtler, *Symposium on Mandatory Pro Bono, Introduction*, 19 HOFSTRA L. REV. 739, 743 (1991).

44. *Id.* at 742-43.

45. *Id.* at 743.

46. THE PRESIDENT'S COMM. ON ACCESS TO JUSTICE & THE DEP'T OF PRO BONO AFFAIRS, N.Y. STATE BAR ASS'N, NEW YORK EFFORTS TO ADDRESS THE UNMET NEEDS OF THE STATE'S POOR, SEPTEMBER, 1991 TO DECEMBER, 1993 (1994).

47. VICTOR MARRERO ET AL., FINAL REPORT OF THE PRO BONO REVIEW COMMITTEE (1994).



providing pro bono legal services of any kind.<sup>48</sup> The percentage of attorneys providing *any* amount of qualifying pro bono services to poor persons actually declined slightly over three years—from 39.8% of those surveyed in 1990 to 37.7% in 1992.<sup>49</sup> Of respondents who did participate in such services, only 21% met the twenty-hour annual standard proposed by the CIALS.<sup>50</sup> But the total number of hours of qualifying services provided individually by attorneys who did contribute increased on average from 36.5 hours in 1990 to 44.0 hours in 1992.<sup>51</sup> Considering the State Bar Association's ambitious commitment to raise volunteerism, the results were less than promising. Only 10% of respondents reported participating in qualifying service for the first time in 1992, and only 3.6% indicated that their initial response followed the pro bono volunteer activities promoted by the organized Bar.<sup>52</sup> Ninety percent of contributors reported that they had provided pro bono legal services in the past.<sup>53</sup>

From these results, several reasonable inferences and implications follow. First, assuming these statistics continue to hold today, the analysis suggests that approximately 75% to 80% of the members of the Bar fail to meet the goal of twenty hours of pro bono services relating to the unmet legal needs of the poor. Second, essentially the same overall percentage of lawyers—the same minority of the whole Bar—has traditionally volunteered in response to the dire need of the poor for legal services and the related crisis in the justice system. And third, significantly, the contributions by those attorneys who do participate in pro bono and public interest service have not been static. Apparently, those lawyers have increased their professional commitment, providing more pro bono assistance at the same time as the unmet needs of the poor for legal services grew and as the Chief Judges and Bar leaders sounded the clarion call seeking more volunteers to help.

#### 4. *Keeping the Light Flickering*

To round out this historical sketch, a few more key events merit reference. Viewed as a whole, these developments underscore the

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48. *Id.* at 23; see also JUDITH S. KAYE & JONATHAN LIPPMAN, N.Y. STATE UNIFIED COURT SYS., *THE FUTURE OF PRO BONO IN NEW YORK, VOL. TWO: REPORT AND RECOMMENDATIONS FROM THE PRO BONO CONVOCATIONS* 5 (2004).

49. MARRERO ET AL., *supra* note 47, at 15.

50. *Id.*

51. *Id.*

52. *Id.* at 47.

53. *Id.* at 14, 15, 20, 24, 47.

same three points: that the State court system has been constantly mindful of the justice gap; that its high-level efforts to address the crisis have been continuous; and that the level of lawyers' volunteer contributions of legal services has remained relatively unchanged, and has fallen far short of the amount necessary to narrow the justice gap in any meaningful way.

In 1997, Chief Judge Kaye and the Administrative Board of the New York State Courts, responding to a proposal from the New York City Bar Association, adopted a Pro Bono Resolution urging attorneys to provide twenty hours of qualifying pro bono service annually as defined by the CIALS proposal and to contribute financial support for the work of organizations devoted to rendering legal services for the poor.<sup>54</sup> Starting then, a copy of the Pro Bono Resolution was included with the registration forms that the state court system biennially sends to all attorneys admitted to practice in New York.

In 2002, responding to an initiative of Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman, the State's Unified Court System conducted another survey of the amount of pro bono legal services members of the State Bar performed related to the legal needs of the poor. The study, which used the twenty-hour-per-year goal the Administrative Board recommended in the 1997 Pro Bono Resolution, indicated that 46% of practicing attorneys provided some qualifying pro bono service while a majority—54%—made no pro bono contribution of any kind.<sup>55</sup> Moreover, of the attorneys who contributed pro bono services, only about 27% performed more than the recommended twenty hours per year.<sup>56</sup> In fact, the levels of participation by New York lawyers in pro bono activities had not changed dramatically from those recorded by the Pro Bono Review Committee ten years earlier, with one exception that reaffirmed the findings of the earlier survey: the portion of volunteer attorneys who did perform pro bono legal services and who satisfied the twenty-hour per year CIALS standard, roughly the same 20% to 25% of the Bar, continued to do so in approximately the same amounts of about forty-one hours per year.<sup>57</sup>

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54. See N.Y. STATE UNIFIED COURT SYS., PRO BONO RESOLUTION OF THE ADMINISTRATIVE BOARD OF THE COURTS (1997), available at <http://www.courts.state.ny.us/attorneys/probono/resolution.shtml>.

55. KAYE & LIPPMAN, *supra* note 48, at 2.

56. *Id.*

57. *Id.* at 26 n. 54.

Two years later, New York's Unified Court System organized four Pro Bono Convocations throughout the State. This initiative reflected a continuation of Chief Judge Kaye's efforts to promote greater awareness of the unmet needs of poor people for legal services. The report and recommendations of the Convocations was published in January 2004.<sup>58</sup> In brief, the Convocations, citing the unmet legal needs study of the New York State Bar Association as revised in 1993,<sup>59</sup> made several general findings: (1) a need existed to increase pro bono services in New York State; (2) formal statewide programs to promote pro bono were necessary and desirable; (3) all stakeholders should be involved in such activities; (4) the judiciary should have a significant role, but local leadership, design, implementation, and control of the tasks were essential to achieve a comprehensive and workable program; and (5) pro bono services should be voluntary.<sup>60</sup>

### B. The Picture Now

The preceding overview brings us to the present and leaves an open question to guide the inquiry as it proceeds. Where does the level of pro bono legal services provided by attorneys in New York stand today in terms of both the overall level of lawyer participation and the average number of hours contributed by each member of the Bar? The short answer to this question is that at this time, no hard measures exist more recently than in the twenty-year-old Pro Bono Review Committee surveys and the 2002 update prepared by the Unified Court System in connection with the 2004 Pro Bono Convocations.

Several initiatives recently instituted by Chief Judge Lippman, however, may soon provide a means to obtain a fresh indicator of the New York Bar's current pro bono participation.<sup>61</sup> Those efforts were

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58. *See id.*

59. *See generally* N.Y. STATE BAR ASS'N COMM. ON LEGAL AID, THE LEGAL NEEDS STUDY (1993).

60. *See* KAYE & LIPPMAN, *supra* note 48, at 15.

61. Chief Judge Lippman, consistent with a recommendation by the Task Force 2010 Report, obtained approval to increase from \$12.5 million to \$25 million the State judiciary's funding for civil legal services for poor persons. *See* N.Y. STATE UNIFIED COURT SYS., BUDGET: GENERAL STATE CHARGES: FISCAL YEAR APRIL 1, 2012–MARCH 31, 2013, at 132 (2011), *available at* [http://www.nycourts.gov/admin/financialops/BGT12-13/Final-GSC-Budget\\_2012-13.pdf](http://www.nycourts.gov/admin/financialops/BGT12-13/Final-GSC-Budget_2012-13.pdf). Other activities that the Chief Judge and the State court system carried out for these purposes included: the Attorney Emeritus Program, which seeks to encourage retired attorneys in good standing to provide, through qualified legal services organizations, at least thirty hours of services as pro bono counsel to low-income clients, *see* Jonathan Lippman,

designed to narrow the justice gap by raising both public funding to legal services organizations and the level of volunteer pro bono contributions by members of the Bar. Among them, two are most significant for the purposes of this subject. One is the adoption of a rule requiring law school graduates to complete fifty hours of participation in qualifying law-related pro bono work as a condition of admission to law practice in New York.<sup>62</sup> The second entails a mandatory reporting requirement by which attorneys will indicate on their biennial registration forms the number of hours of pro bono legal services they provided during the preceding two years related to the legal services needs of the poor.<sup>63</sup>

### 1. *A New Benchmark*

The pro bono reporting rule went into effect in May 2013 and has particular relevance to this discussion.<sup>64</sup> The results from the first evaluation of the reporting requirement could make available useful updated information about how many, and in what amount, New York attorneys are honoring their ethical obligation to provide pro bono and public interest legal service. The shame or guilt, and perhaps even a do-good inducement, associated with this requirement could also potentially create a new incentive for lawyers who are not making any pro bono contributions to do so for mandatory reporting purposes. I anticipate that when the numbers are disclosed, an important public debate will ensue about their meaning and implications. In that respect, essential questions and concerns, as well as pitfalls, will arise that any new review should address. Here I suggest some of the major issues that those discussions should consider, and a framework for analysis of the underlying issues.

I pause at this point to express a disclaimer followed by a word of caution. I do not wish to prejudge the outcomes that the pro bono reporting requirement may produce, nor do I want to appear unduly

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*New Attorney Emeritus Program is Announced*, N.Y. L.J., Jan. 25, 2010, <http://www.newyorklawjournal.com/id=1202439358963/-New-Attorney-Emeritus-Program-Is-Announced>; the appointment of a committee to study the feasibility of permitting non-lawyers to provide assistance to the poor in simple civil matters, see Joel Stashenko, *Non-Lawyers May Get Role in Closing New York's "Justice Gap,"* N.Y. L.J., May 30, 2013, <http://www.newyorklawjournal.com/id=1202601857889>; and an increase from twenty to fifty hours in the annual pro bono legal services goal applicable to all Bar members, see Stashenko & Simmons, *supra* note 31.

62. See N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (2013).

63. See N.Y. COMP. CODES R. & REGS. tit. 22, § 118(e)(14) (2013).

64. See *Pro Bono Reporting Requirements—Attorney Registration*, N.Y. COURTS, <https://www.nycourts.gov/attorneys/probono/reportingreqs-intro.shtml> (last visited Mar. 15, 2014).

skeptical of what the numbers will reveal about New York lawyers' responses to any new pro bono services survey based on that mandate. But, there are indicators that could offer predictions of what the results might show. In some of the states in which the court system imposed such a reporting requirement, lawyers' declarations indicated an increase in the total amount of pro bono activities. In Illinois, for example, as Chief Judge Lippman's Task Force 2010 Report points out,<sup>65</sup> the pro bono hours lawyers reported rose by about 10% after the rule went into effect. Nonetheless, before Bar and court officials draw any hard conclusion from the reports or formulate an official policy response, they should carefully analyze and consider the reports' statistical significance.

## 2. *Amber Light*

At the risk of sounding too much like a spoilsport—the Grinch who stole New York lawyers' pro bono reporting celebration before it happened—I will play a dual role at this juncture: as devil's advocate and as prophet. For the purposes of the first part, I will assume that the most encouraging results emerge from a new survey of voluntary pro bono contribution by New York lawyers, that the reporting requirement will demonstrate a rise in participation of say 10% or even 20%. As heartening as such numbers might appear at first glance, the outcome would still raise issues that merit closer scrutiny and counsel amber light precaution. In this regard, the weightiest risk we must guard against is the rush to judgment, the temptation to celebrate statistics prematurely and, regarding ongoing pro bono efforts, deciding that even a modest improvement is good enough.

Here I will switch professional garb from devil's advocate and don the robe of fortuneteller. I would venture a prediction that in the debate about what the reporting requirement results indicate there will be a contingent, possibly comprising a substantial proportion of the members of the Bar, who, if the results show some increase in pro bono activities, will reject the cautionary approach I propose. Instead, buoyed and relieved by the numbers, their likely impulse will be euphoria—grounds to advocate for an immediate official pronouncement that the outcome is acceptable, so as to enable the New York Bar to declare victory and go home. But, however exhilarated lawyers may feel by any such exciting early returns, another side in that debate should be heard, and forthrightly weighed.

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65. *See generally* THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *supra* note 3.

I would again advise against hasty retreat from a future course aimed at expanding contributions of pro bono legal services universally and apportioning more equitably the Bar members' unique responsibility in efforts aimed at closing the justice gap and relieving the crisis in our courts. Before jumping to conclusions regarding the meaning of lawyers' reports about their pro bono contributions, the legal community should ensure that we possess a sufficiently reliable analytic framework to support any policy response. What the circumstances may demand and justify as a proper next step for the court system to follow should be both principled and based on defensible data.

In line with my continuing role here as constructive critic, I suggest several fundamental issues that a thorough examination of the reporting requirement results should consider. At the outset, it is important to bear in mind that the reporting system incorporates several built-in limitations that could produce substantial overstatement of pro bono legal services. It employs self-reports. For that reason alone, such representations should be accorded heightened scrutiny.<sup>66</sup> Indeed, judges regularly admonish juries

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66. The use of self-reports as sources of data for empirical research and administrative purposes suffers from obvious shortcomings. In scientific studies that rely heavily on investigation based on self-report questionnaires, researchers customarily acknowledge the obvious limitations of results produced by the method. *See generally* Rob Hoskin, *The Dangers of Self-Report*, SCI. FOR ALL BRAINWAVES (Mar. 3, 2012), <http://www.sciencebrainwaves.com/uncategorized/the-dangers-of-self-report>. The tendency of respondents to exaggerate or minimize answers because of personal biases, fear of public embarrassment or incrimination, and/or the influence of other self-interests, works to diminish the accuracy and reliability of information gathered by self-reports.

The federal income tax system provides an instructive example of the substantial rate of error self-reporting procedures generate, even in connection with a mandatory public obligation subject to enforcement through severe penalties. For 2006, the most recent year for which public records are available, the Internal Revenue Service reported a gross tax gap (the difference between taxes owed and taxes paid on time) of \$450 billion, of which approximately 84% represented under-reported tax liability. *See* James M. Bickley, CONG. RESEARCH SERV., R42739, TAX GAP, TAX COMPLIANCE, AND PROPOSED LEGISLATION IN THE 112TH CONGRESS 1–2 (2012). Of the portion of income under-reported, 56% was attributable to taxpayers who directly reported in their tax returns various sources of income not subject to withholding, in contrast to only 1% in relation to income reported by employers to the IRS from which taxes were withheld. In 2012, the random audits of individual returns that the IRS performed resulted in no change in tax liability in 10% of examinations conducted in person and no change in 15% of those done by mail. Presumably, therefore, the IRS found under-reporting and imposed additional tax liability on a significant number of audited returns. *See* I.R.S. PUB. NO. 55B, DATA BOOK 2012, at 23 (2012). Finally, in the criminal investigations the IRS conducted for tax reporting violations, the resulting rate of conviction was 93%. *See* IRS OVERSIGHT BOARD, ANNUAL REPORT TO CONGRESS 2012, at 36, 40 (2013).

weighing potentially self-serving testimony of interested witnesses. Caution is indicated here for numerous other reasons. The responses are not confidential and would be measured against a defined goal of voluntary activities. No audits or sanctions follow up on the reports, and no consequences flow from failure to satisfy the new fifty-hour aspirational standard. Thus, no means exist to check the filing of false or exaggerated information. Because the identity of the reporting attorneys would be shown in the registration forms, and potentially subject to public disclosure, lawyers' awareness that a name is linked to the disclosure, combined with the other considerations described above, could induce substantially enhanced reports.

On the other hand, if any new survey of pro bono activities bears relation to reality and reflects previous patterns, another outcome, one consistent with a vital component of the level of pro bono legal services measured in the prior surveys, is likely to recur. Any real bump recorded in the total amount of pro bono contributions attorneys report is likely to derive disproportionately from the same minority of New York Bar members who traditionally have participated in pro bono activities. In view of these shortcomings, assessment of the reporting requirement should factor in a reliable margin of error. This measure would recognize that under these circumstances the amount of pro bono services lawyers report represents not hard truth, but an approximation, and thus that proper adjustment should be made in the analysis so that the recognized results project not a flawed representation, but the closest possible embodiment of reality.

A second line for further examination in this endeavor should consider both the starting point for measurement and the prevailing conditions against which progress should be evaluated. Stated another way, any appraisal of impacts and effectiveness of the levels of individual and total pro bono activities that lawyers report should be examined in relation to the scope of current total legal services needs and the remedial impacts all existing resources are now making. To aid this review, several questions merit consideration. Assuming the reports indicate some rise in the amount of pro bono services attorneys are contributing, what is the proper baseline? How many and which lawyers are doing how much? What does any incremental rise in the level of pro bono participation actually mean to the unmet needs of the poor and to the courts? In other words, does any higher amount of reported pro bono services translate into material improvement of conditions on the ground, in the courts, and in the overall dimensions of the justice gap? Or, given the magnitude and

gravity of prevailing conditions, would any such increase still make only a nominal difference in the grand scheme of things?

Returning to my Cassandra role, I now elaborate on, and warn against, what I perceive as a prospect very likely to flow from the initial results of the pro bono reporting requirement, and why cautious examination of them matters so much. This forecast is based on responses to reports of prior efforts to measure lawyers' pro bono participation levels, specifically the pro bono activities reported in the surveys conducted by the Pro Bono Review Committee from 1990 to 1992 and by the Unified Court System in 2002. Recall the most salient findings suggested by those studies. To the extent members of the New York Bar provided pro bono or public interest legal services, their overall response derived from less than 50% of the lawyers, and not more than about 25% of them satisfied the annual twenty-hour minimum suggested by the CIALS in 1990 and the 1997 Pro Bono Resolution.<sup>67</sup> The balance, over 50% of Bar members, performed either less than the aspirational goal or no pro bono or public interest legal services at all. In essence, for many of the non-participating attorneys, the moral obligation for which the language of the Lawyer's Code of Professional Responsibility's EC 2-34 strives may as well be, to use common legal jargon, supernumerary surplusage signifying nothing about which Bar members should be seriously concerned.

Yet, in response to reports of the results of the previous pro bono surveys it is not uncommon to find members of the organized Bar focusing their attention on the rise in the total amount of legal services provided collectively by all attorneys and touting the higher average number of hours per year individual attorneys contributed. That response ignores two important points: that on closer analysis, as a percentage of the whole the number of attorneys contributing pro bono did not change, and that the increase in the number of hours reported was largely attributable to the same participating minority.

### 3. *Sooner Action and Why It Matters*

In response to the challenge and the course my admonitions suggest, some representatives of the silent majority probably would react aggressively. They might declare: so what? And they would remind us that nothing in the law says that they are under any binding obligation to do anything about the justice gap. True enough. So why should their absence from the pro bono honor rolls matter? To

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67. See generally N.Y. STATE UNIFIED COURT SYS., *supra* note 54.



whom should it make a difference that a substantial majority of the members of the Bar remains on the sidelines while a legal crisis continues to diminish our justice system and while the entire weight of efforts to relieve the shortfall continues to land on essentially the same relatively small proportion of New York lawyers?

I would go further and pose perhaps the most provocative question this line of inquiry suggests. Assume that the larger society, expressing itself through official budgetary and political policies, chooses to disregard the justice system's pleas for adequate resources and also ignores warnings of the consequences, and continues to shortchange legal services, producing an ever wider and deeper justice gap. When that event comes to pass—as in fact it has in New York, as reflected by the unmet legal services needs of the poor in our courts during at least the past twenty-five years—why should a larger share of responsibility and a greater contribution for remedying the accompanying problems not be demanded of all lawyers admitted to practice in New York? Why should a more rigorous obligation for safeguarding the fundamental ethical and legal values of fairness and equal access to justice not be imposed on all members of the Bar by the authorized court administrators?

A comparable line of inquiry would apply, and indeed its moral crossroad has been encountered, in other contexts. Suppose jury service, or paying taxes, or military service in time of war, were voluntary and, even as vital public functions and societal structures began to break down, not more than 25% of the citizenry, drawn disproportionately from the same social or economic ranks, chose to honor their moral obligation and participate fully in official calls for contributions? Would a rule requiring universal participation not be justified?

Admittedly, under the existing law, there is no legal answer to these questions. In *Turner v. Rogers*,<sup>68</sup> the Supreme Court recently declined to rule that a constitutional right exists under the Due Process Clause to compel court appointment of counsel in civil cases for litigants who cannot afford a lawyer, even in a contempt proceeding in which the offender faces a penalty of imprisonment. And, of course, the provisions of the Lawyer's Code of Professional Responsibility EC 2-34 represent merely aspirational goals. At this time, the Bar's efforts to generate a more effective answer to the questions raised here must depend largely on two recourses. One is to wait for a major change in existing law, potentially adopted by

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68. 131 S. Ct. 2507, 2512 (2011).

decision of the United States Supreme Court or the New York Court of Appeals, or by State statute or amendment of the canons of ethics, to make the pro bono service standard prescribed by EC 2-34 obligatory at least in some circumstances. A second approach is for the courts and the organized Bar to continue on the present course. To that end they would continue to press for the miracle of a stronger voluntary pro bono response by lawyers, self-motivated and emanating from *moral grounds*, unsatisfactory as the Bar's pro bono performance record has been to date in relying primarily on the force generated by this domain.

Despite the broad reach of the challenge I pose, I consider myself a realist. I recognize that, regrettably, at this time efforts to produce a more effective answer by the legislature, the courts, and the Bar to the questions I raise are likely to be long term. That prospect creates a period of continuing uncertainty, one of those long pauses that induce doubt. Like a moment evoking a sense of waiting for Godot, it asks: what happens in the meantime?

#### 4. *Fighting the Fire*

What I see likely to happen next is that, absent a more effective and more immediate response from the court system, the justice gap and its attendant moral crisis will continue getting worse. To demonstrate my prediction, I turn again to the instructive aid of another allegorical tale — as promised, one closer to the home front.

The courthouse is on fire, presenting a major crisis for the judges, the lawyers, the litigants, and the administration of justice in the State. The magnitude of the problem is staggering. The building is far too big, the fire too extensive, and the potential loss of lives and property too great for the firefighters available. The existing force can provide only a fraction of the vast resources needed to handle the emergency effectively. To save the historic structure, the fire commissioner asks the court system for help in mobilizing volunteers. The Chief Judge declares an emergency and puts out a call urging all lawyers to lend a hand. A substantial number, say nearly 50%, promptly respond with contributions in varying amounts varyingly helpful to the rescue efforts. Some assist the firefighters in pulling the hoses. Some join in relay teams passing buckets of water. Some send money to aid the victims and help pay for restoration of the building.

As the threat intensifies, the Chief Judge seeks to fill the dire shortage of resources by drafting law students and enlisting voluntary support from retired lawyers and members of the general public. These recruits are asked to perform non-hazardous but nonetheless

important remedial tasks. Meanwhile, a substantial majority of the members of the Bar, though sworn as officers of the court and by virtue of the profession's ethical canons morally bound to help, ignore the crisis and pay no heed to the Chief Judge's entreaties. In fact they do nothing. Even as the flames spread and engulf the courthouse and imperil the integrity of the profession, they watch in silence, hands in their pockets, pails of water idle at their feet. When they do open their mouths to speak, it is merely to remind the Chief Judge that, unfortunate as the reality may seem, extinguishing the fire and repairing the courthouse are not the problems of lawyers alone, but rather public responsibilities the government should impose on the whole society. The Chief Judge, as guardian of cherished values the justice system proclaims and as keeper of the ethical standards governing the Bar, possesses authority to act decisively in this emergency. How should the Chief Judge respond?

This vignette represents an expression of how I, and possibly other members of the CIALS, perceived the legal and moral crises confronting New York's justice system and the members of the Bar twenty-five years ago when Chief Judge Wachtler charged our committee to examine the problem. As it relates to legal services for the poor, the ethical dilemma the tale poses should not be hard to recognize. In any candid picture of our justice system, the story captures substantially how the threat occasioned by the justice gap and the corresponding challenge appeared then, and how the same conditions still appear today.

The hypothetical also reveals a paradox. The moral crisis created by the unmet legal services needs of the poor intensifies in direct relation to introduction of less desirable remedies while more effective means to address the demand are available but withheld or exempt from deployment. The ethical complications become more profound as long as a substantial portion of the Bar disregards or tolerates urgent conditions in the justice system, leaving harms unremedied while the severity of the underlying emergency continues to worsen.<sup>69</sup>

Specifically, in evaluating the moral implications associated with the unmet legal services needs, several considerations bear decisive weight. First, the same relatively small percentage of volunteer attorneys, a minority of all the members of the Bar, not only continues to shoulder the entire burden of the private Bar's response, but is constantly called upon to contribute even more. Second, the

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69. See discussion *infra* Part III.B.5.

court system's efforts to address the problem forces it to resort, as it has in New York and elsewhere, to the aid of clearly valuable but not optimal alternative resources, such as retired lawyers, students, and general public volunteers.

Third, meanwhile, a vast multitude of lawyers who possess the requisite training, experience, and resources—and whose contributions would enable the court system to make a truly substantial difference in alleviating the crisis—remain unresponsive on the sidelines, protesting stronger calls for their assistance, and disclaiming responsibility for contributing anything to help. Fourth, these holdouts, by virtue of the license the State grants them to practice law, are empowered to serve as officers of the court, and also are enabled to earn a decent living and enjoy high social standing in their communities. These lawyers would do well to recognize that a scorched courthouse represents a moral failure that ultimately leaves them a lesser place in which to ply their trade, and that their inaction contributes to generating a justice system whose legitimacy is threatened and a profession whose stature is correspondingly diminished.

#### *5. The Most Fundamental Issue*

As I perceive it, the moral crisis I describe has worsened because something else—a weight that tipped the balance—decidedly changed. At some grade of severity, the combination of these increasingly urgent and unremedied circumstances sets in motion on a larger scale a variable that underpins the most vital of moral questions: fundamental fairness. In the existing state of play, the unchanging or rising magnitude of the unmet needs of the poor for legal assistance in proceedings involving basic human needs creates fundamental unfairness of different kinds in several spheres, especially when combined with the heavily disproportionate contributions to remedial efforts by members of the Bar. There is unfairness to poor people. This effect is palpably destructive of individual lives and of the court system, grounded as it is on the unrelieved hardships and injustices poor people suffer daily during imbalanced adversarial judicial proceedings that essentially pit them against opponents commanding grossly unmatched legal resources.

Fundamental unfairness also implicates the members of the Bar. It is manifested by the uneven performance of lawyers in fulfilling their ethical obligation to provide pro bono and public interest legal service. Those who contribute nothing, the silent majority missing in action, create an unfairly heavier burden of participation which the

rest are called upon to bear. This inequality takes on larger dimension because it could reach a point at which the disproportion yields deep, counterproductive resentment among those who are left to carry the brunt of the weight indefinitely. That circumstance could arise, for instance, in the case of the pro bono contribution required of law students to fulfill the highest ideals of the profession as a condition for admission to the Bar. When they become practitioners, could these young lawyers help but observe that no such obligation applies to all members of the Bar, and that in fact the silent majority of lawyers continues to contribute nothing to help narrow the justice gap? The inherent unfairness some of those newly admitted attorneys may perceive in that inequality could engender cynicism that in turn may impede their further contribution of pro bono and public interest legal service.

Finally, fairness issues stemming from the unmet legal services needs of the poor permeate throughout other interests encompassed by the justice system—the parties in court proceedings, the lawyers, the courts, and the larger society. Judicial proceedings involving unrepresented litigants impose heavier burdens on all participants. Those parties face inherently more demanding challenges. They tend to be disproportionately less educated, less informed, and often less able to speak or understand English well enough to present a sufficient case. For these reasons, lawyers appearing against unrepresented litigants in some cases could easily take advantage of their ignorance of the law to induce them into an unfavorable disposition. Cases involving unrepresented parties are not only more difficult to adjudicate on the merits, but also to settle, thus prolonging uncertainty and enlarging costs for other litigants. Largely by reason of their lack of familiarity with the law, some unrepresented litigants tend to adopt hard, unrealistic positions that advice of counsel can usually soften. The judges' role as impartial arbiters is often strained in these actions. In efforts to maintain a modicum of balance and fairness in what are innately lopsided proceedings, the judges are called upon to grapple with unique challenges. They have to walk the fine line between preventing injustice to unrepresented parties by explaining legal principles and offering subtle guidance to them, while also preserving a proper level of neutrality.

### 6. *Synthesis*

How do the multiple issues and considerations I have outlined tie together, and what logical, legal, and moral implications emerge from them? Twenty-five years ago, when the CIALS reached such a point

of synthesis, it reached the conclusion I described above. It noted that an official response to the legal services crisis based primarily on voluntary efforts generated by the organized Bar would be far too limited, unreliable, short-term, and unfair—and thus morally unacceptable—to respond adequately to the unmet legal services needs of the poor, particularly in court proceedings involving basic human needs. The CIALS therefore recommended that the state court system impose a pro bono legal service obligation as a condition for lawyers to remain in good standing as members of the Bar.<sup>70</sup>

In those days, when I reached this point in talking to some gatherings of lawyers, I would sense the energy fields in the auditorium begin to crackle and spark, and the room temperature to rise. These atmospheric disturbances usually served as the cues for some in the audience, at least in a figurative sense, to take to the streets, to uproot the cobblestones and brandish pitchforks, to erect barriers, shout catcalls, and throw tomatoes. Because in my assessment of prevailing circumstances I have detected little change in some of the most vital forces that shape this debate, I hope that at least in this audience the passage of time has mellowed those passions. I hope also that another look at the conditions unrepresented poor people experience in our courts today will enable the Bar as a whole to view the facts on the ground with an open mind, due composure, and greater balance.

### CONCLUSION

However the concept is labeled, the pro bono legal service condition that the CIALS developed twenty-five years ago still exists out there in suspense, and every bit as pertinent and valid today as it was then. It remains a weighty option with immense potential to make a significant difference in narrowing the justice gap. Yet, like the elephant hiding in the living room, it represents a large presence many lawyers do not wish to confront or even contemplate. Nonetheless, my crystal ball tells me that a time could come when circumstances will render it inevitable for the court system to adopt, as the CIALS proposed, a pro bono legal service condition applicable to all attorneys registered in the State. That move might be impelled by a potential combination of several circumstances on a larger scale to establish the necessary foundation for a bold response by the court system. Those conditions include: the continued widening of the justice gap; the resulting imbalances and greater unfairness that

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70. See Marrero et al., *supra* note 7, at 768.

characterize lawyers' disproportionate voluntary contributions; and the worsening moral crisis these conditions present as they further weaken our justice system and the legal profession.

The moment I forecast could arise, for example, should the United States Supreme Court, or the New York Court of Appeals, discarding the rule of *Turner*, recognize the existence of a right to representation of counsel, a civil *Gideon*, in cases involving basic human needs, such as court proceedings threatening a party with loss of liberty, home, food benefits, or parental rights. This prospect is not a pipe dream. Two observations also recently noted by New York Chief Judge Lippman<sup>71</sup> support its plausibility.

First, only twenty-one years separated *Gideon* and the decision it overruled, *Betts v. Brady*.<sup>72</sup> During that interval, the legal community's efforts, public and private, mobilized support at the State and local levels, to provide counsel to indigent defendants, and to prepare the groundwork for the law to evolve empirically and conceptually enough to compel the rule of *Gideon*. Second, through current legal scholarship,<sup>73</sup> as well as through litigation and policy advocacy, comparable access to justice initiatives are already building momentum in some states toward recognition of a civil *Gideon*.<sup>74</sup> In a resolution adopted in 2006, the American Bar Association called for governments to provide resources to support recognition of a right to assistance of counsel in civil proceedings involving basic human needs.<sup>75</sup> Similarly, the Conference of State Chief Justices and the Conference of State Court Administrators urged their members in 2008 to exert leadership to prevent denials of access to justice.<sup>76</sup>

But until these efforts eventually produce the outcome wished for, the immense and long-standing unmet demand for civil legal services for the poor will continue to impair the fair and effective administration of justice in our courts. In the interim, to mitigate the crisis, adoption of a pro bono legal service condition for admission to practice law in New York will become all the more compelling. Gatherings of interested and concerned audiences, pressing for more

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71. See Lippman, *supra* note 1, at 28.

72. 316 U.S. 455 (1942).

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

74. See Lippman, *supra* note 1, at 28. See generally Engler, *supra* note 73.

75. See generally AM. BAR ASS'N, RECOMMENDATION 112A (2006).

76. See generally *Resolution 2: In Support of Efforts to Increase Access to Justice*, CONF. CHIEF JUSTICES (July 30, 2008), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07302008-In-Support-of-Efforts-to-Increase-Access-to-Justice.ashx>.

immediate change, can help ensure that the concept of a pro bono service condition, such as the one the CIALS proposed twenty-five years ago, stays relevant in the debate as an available option.