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David W. Lannetti  
*Fourth Judicial Circuit of Virginia*

Jennifer L. Eaton

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SPARKING A MOVEMENT: A COORDINATED, BOTTOM-UP  
APPROACH TO INCREASE VOLUNTARY PRO BONO  
SERVICE AND MEND THE JUSTICE GAP

*David W. Lannetti\* & Jennifer L. Eaton\*\**

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\* Judge, Fourth Judicial Circuit of Virginia, 2014–present, and Adjunct Professor, William & Mary Law School and Regent University Law School. The views advanced in this Article represent commentary “concerning the law, the legal system, [and] the administration of justice” as authorized by the Canons of Judicial Conduct for the Commonwealth of Virginia, Canon 1.L (permitting judges to “write, lecture, speak, teach, and participate in other extrajudicial activities”). These views therefore should not be mistaken for the official views of the Norfolk Circuit Court or this author’s opinion as a circuit court judge in the context of any specific case.

\*\* Civil litigator currently on a temporary leave of absence from private practice to serve as a judicial law clerk to the Hon. Junius P. Fulton III on the newly expanded Court of Appeals of Virginia. J.D., College of William & Mary School of Law; B.S., University of Virginia.

## ABSTRACT

*For decades, the legal profession has tried and tried again to increase pro bono representation and reduce the ill effects of the Justice Gap. A common and increasing theme has been a top-down approach focused on laudable platitudes, jurisdictional reporting policies, and aspirational guidelines to inspire attorneys to voluntarily serve low-income Americans. These efforts have enjoyed very little success, however, and with the Justice Gap only getting worse, a new solution is needed. This Article shifts the focus away from these top-down methods and mandates, which lack accountability and incentives, to a bottom-up approach that offers a more viable solution to the Justice Gap. In a bottom-up approach, attorneys are not only encouraged, but empowered, to provide services in coordination with other stakeholders. The COVID-19 pandemic both aggravated and highlighted the Justice Gap and, as a result, it has the potential to act as the necessary “social change tipping point” to spark a movement. Therefore, the time is ripe for all legal professionals to collectively take steps toward service, however small they may seem, to effectively and sustainably treat the Justice Gap once and for all.*

*“Lawyers have a license to practice law, a monopoly on certain services. But for that privilege and status, lawyers have an obligation to provide legal services to those without the wherewithal to pay, to respond to needs outside themselves, to help repair tears in their communities.”<sup>1</sup>*

## INTRODUCTION

Against the backdrop of American Bar Association (“ABA”) Model Rule of Professional Conduct 6.1, which recommends that all attorneys render at least fifty hours of *pro bono* legal services per year, state bar agencies across the country have tried for decades in various ways to require or encourage their members to provide more *pro bono* service. Many agencies have adopted a version of the ABA’s aspirational goal, some have incorporated a mandatory *reporting* requirement to encourage *pro bono* service, and a few have remained silent on the issue. Despite these efforts and recognizing that some much-needed services have indeed been provided as a result, this top-down approach to encourage *pro bono* service has proved unsuccessful in closing the “Justice Gap,” the difference between the civil legal needs of impoverished Americans and the resources available to meet those needs. Although the quantity of attorney voluntary service hours has increased in recent years, the gap has widened, with legal aid societies turning away almost a million low-income Americans seeking assistance with their civil legal problems each year. The recent pandemic has only exacerbated the situation and

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<sup>1</sup> Ruth Bader Ginsburg, Just., U.S. Sup. Ct., Remarks to Pro Bono Inst. Ann. Conf. (2014), <http://www.probonoinst.org/events/annual-conference/2014-pbi-annual-conference/remarks-from-justice-ginsburg/>.

highlighted, once again, the urgent need for additional *pro bono* service. As the nation recovers from the devastation of COVID-19 and its disparate impact on low-income Americans, the time is ripe—and the necessary tools already exist—for a bottom-up, coordinated approach to activate additional attorney volunteer *pro bono* service.

*Pro bono* reporting requirements and aspirational service goals, like traditional *pro bono* marketing and recruitment, are top-down approaches that focus on leveling the playing field for self-represented litigants (“SRLs”). However, it is clear that reliance on the moral imperative alone is inadequate to fully engage the legal profession. What is required is a paradigmatic shift. Not only is *pro bono* service the *right* thing to do; it is also *necessary* and *prudent* at every level of the administration of justice. To inspire change and spark a movement, legal professionals need to understand that they too have much to gain from *pro bono* representation. Individual attorneys can get immediate client contact, invaluable courtroom experience, and responsibilities they might not otherwise encounter for years to come. Law firms that encourage *pro bono* service can translate positive marketing into new clients and provide attorneys with the fulfillment and experience that will lead to reduced lawyer attrition rates. Bar associations can develop and implement *pro bono* service opportunities consistent with their public service mission. And the administration of justice in the courts undoubtedly will be more efficient and effective when all parties have attorney representation to support the American adversarial system. Broad education, positive marketing, and concrete examples of success are necessary to compel individual attorneys to join the grassroots initiative.

Fortunately, all of the necessary building blocks to sustain increased lawyer contributions are available and, in many cases, have existed for quite some time. What is missing is the spark to ignite collaboration of individual efforts in a post-pandemic world, which has highlighted the access-to-justice crisis. Success will require champions in the form of, among others, local bar associations to assemble member attorneys and carry the torch of hope, law schools to leverage their clinics and other resources, courts to encourage and facilitate *pro bono* service, law firms to reward *pro bono* contributions and inspire a culture of service, individual legal professionals to take small steps in the direction of progress, and legal aid societies to facilitate networking the stakeholders together and marketing the movement. With proper messaging, dedication, and coordination, incremental *pro bono* service opportunities at the grassroots level—and not simply broad-sweeping aspirational goals—can be the catalyst for systemic change.

To understand how SRLs impact the proper administration of justice, Section I of this Article briefly reviews the nature of the adversarial system, including the enhanced role of the parties and their representatives. Section II discusses how the lack of representation can contribute to the breakdown of the justice system when SRLs cannot present their case competently, and why recruitment of *pro bono* attorneys is the only viable way to overcome this impediment. Section III explains the magnitude and trend of the Justice Gap and how jurisdictions have responded to the challenge of closing the gap from the top down. Section IV provides an overview of the benefits of *pro bono* service to public interest stakeholders, including law schools, law firms, bar associations, the courts, and individual legal professionals. Section V then discusses why the pandemic and its aftereffects offer a unique opportunity for change and outlines some recommendations regarding how to create opportunities for and incentives to provide *pro bono* service that exploit the inherent benefits to the non-SRL stakeholders while spearheading a movement.

## I. THE NATURE OF THE ADVERSARIAL SYSTEM

Those who participate in litigation without proper legal training or the assistance of competent legal counsel are at a distinct disadvantage.<sup>2</sup> This is especially true in the American adversarial system, where the parties and their direct representatives are largely responsible for the preparation, pursuit, and defense of claims.<sup>3</sup> Sometimes litigants voluntarily assume this underdog position, consistent with the recognized constitutional right of self-representation.<sup>4</sup> But much more frequently, SRLs simply cannot afford to employ legal counsel, thereby positioning themselves in a dispute resolution system<sup>5</sup> where the odds are decidedly stacked against them.<sup>6</sup>

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<sup>2</sup> See *infra* Section II.

<sup>3</sup> See *infra* Section I.A.

<sup>4</sup> See *Faretta v. California*, 422 U.S. 806, 834 (1975) (holding that “although [a self-represented defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law’” (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring))).

<sup>5</sup> Although the American adversarial system applies to both criminal and civil law, the focus of this Article is on involuntarily self-represented parties engaged in civil litigation. Criminal defendants have a right to be represented even if they cannot afford to hire counsel, see *infra* note 35 and accompanying text, making involuntary self-representation in the criminal context—and the need for *pro bono* attorneys—irrelevant. Hence, unless otherwise indicated, any reference to litigation herein is in the context of resolving civil disputes.

<sup>6</sup> See *infra* Section III.A.

### A. Adversarial vs. Inquisitorial Systems of Justice

The adversarial adjudicatory system was woven into the fabric that formed America's founding and is "deeply [i]ngrained in the American legal psyche."<sup>7</sup> However, it has not been adopted universally around the world.<sup>8</sup> Both adversarial and inquisitorial litigation systems share the parallel goals of attaining the correct outcome, sometimes referred to as "ascertaining the truth,"<sup>9</sup> and providing the parties the sense that they were treated justly.<sup>10</sup> Further, both systems incorporate the same participants: a judge, the parties to the dispute, representative legal counsel if the parties choose, and a decision-maker in the form of the judge or a jury.<sup>11</sup>

In an adversarial system, the judge presiding over the proceeding is a neutral, impartial, and passive arbiter, famously analogized to a baseball umpire whose job is "to call balls and strikes and not to pitch or bat."<sup>12</sup> The parties to the dispute, often with the assistance of legal counsel, are solely

<sup>7</sup> See Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 713 (1983) (noting that an adversarial system has been used in the United States "[s]ince approximately the time of the American Revolution"); Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 301 (1989) (referring to the adversarial system as "[t]he hallmark of American adjudication").

<sup>8</sup> Sward, *supra* note 7 at 301, 312 (noting that "the majority of the world . . . uses some version of the inquisitorial system that evolved primarily in continental Europe and that, according to Professor Sward, inquisitorial adjudication is the "antithesis" of adversarial adjudication).

<sup>9</sup> See, e.g., Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911, 912 (2011/2012). The definition of "truth" arguably is dependent on the adjudicatory system being used. Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 463–64 (2009) ("Truth in the adversarial system was actually a determination of which opposed position was more likely to be correct . . . By contrast, the inquisitorial system demanded that the truth be ascertained by assembling all available evidence." (quoting HERBERT A. JOHNSON & NANCY T. WOLFE, *HISTORY OF CRIMINAL JUSTICE* 71–72 (Elisabeth Roszmann Ebben ed., 3d ed. 2003)).

<sup>10</sup> See Christina Plum & Rachel DuFault, *Perceptions of Justice 2008-2011: Race, Ethnicity, and the Courts*, 50 No. 3 JUDGES' J. 26, 27 (2011) ("It does not matter whether you agree or not, what matters is that a large number of Americans believe the legal system fails them." (quoting Hyman, J.)); Davis G. Yee, *The Professional Responsibility of Fair Play When Dealing With a Pro Se Adversary*, 69 S.C. L. REV. 377, 402–03 (2017) ("From a psychological perspective, the pro se party's perception of the process being fair is important to that party's satisfaction with the outcome").

<sup>11</sup> Finegan, *supra* note 9 at 466–68.

<sup>12</sup> Landsman, *supra* note 7 at 714–15; Finegan, *supra* note 9 at 467 (*Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr., nominee to be Chief Just. of the U.S.). [N]eutrality and passivity are essential not only to ensure an evenhanded consideration of each case, but also to convince society that the judicial system is trustworthy; when a [judge] becomes an active questioner or otherwise participates in a case, society is likely to perceive him as partisan rather than neutral. See also Finegan, *supra* note 9 at 467 ("An adversarial judge will oversee th[e] process and rule on objections and evidentiary issues, but the judge will not determine what facts need to be introduced into evidence to prove a particular argument, nor ask questions to ensure that relevant information is entered in the record for the finder of fact to consider.").

responsible for producing all evidence to be considered in resolving the dispute.<sup>13</sup> This keeps the decision-maker detached, encourages the parties to locate and produce the most persuasive evidence, and focuses the litigation on the issues the parties believe are most important.<sup>14</sup> It also means that the judge's first involvement in the case is often on the day of trial.<sup>15</sup> Because the structure of the adversarial system incentivizes a biased presentation of evidence by each party, highly structured rules of procedure, evidence, and ethics are incorporated to preserve the integrity of the adjudicatory process.<sup>16</sup> The premise of an adversarial system is that a dispute is best resolved by parties presenting their most persuasive evidence to a neutral arbiter within a framework of highly structured rules that ensure fairness.<sup>17</sup> Additionally, by allowing the parties to control the process, an adversarial system safeguards individual autonomy and dignity.<sup>18</sup>

The judge likewise presides over the process in an inquisitorial system, although her role is significantly different.<sup>19</sup> The judge conducts pretrial factual investigations, assembles evidence, calls and questions witnesses, conducts post-trial investigations and calls additional witnesses if necessary, and ultimately renders a decision.<sup>20</sup> Therefore, the inquisitorial judge must be proactive and understand the relevant facts *prior* to trial.<sup>21</sup> Although the parties

<sup>13</sup> Landsman, *supra* note 7 at 715–17 (“[T]he rules of ethics are designed to promote vigorous adversarial contests by requiring that each attorney zealously represent his client’s interests at all times. To ensure zeal, the ethical rules require attorneys to give their clients undivided loyalty.”).

<sup>14</sup> *Id.* at 715.

<sup>15</sup> Sward, *supra* note 7 at 312 (pointing out that “the decisionmaker knows nothing of the litigation until the trial, when the parties present their neatly packaged cases to him”).

<sup>16</sup> *Id.* at 313 (stating that “[the adversarial system] seeks a solution by enabling the litigants to seek their own self-interest without regard for others; indeed, it *expects* them to argue selfishly”); Finegan, *supra* note 9 at 493 (stating that “because of the contest-like atmosphere of an adversarial system, rules must be in place to ensure that the outcome is fair. Thus, the adversarial system relies on strict compliance with procedural rules and zealous advocacy by all representatives to preserve fairness and ensure that justice prevails”); Landsman, *supra* note 7 at 716.

<sup>17</sup> Landsman, *supra* note 5 at 714 (“The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society.”).

<sup>18</sup> Sward, *supra* note 7 at 302, 313, 317–18 (opining that an adversarial system is “highly individualistic,” providing “control and responsibility to the individuals who are most interested in the result and tak[ing] advantage of their self-interest in complete and creative argument” and describing the theory that “the adversary system best preserves the autonomy of the individual by allowing him free rein in making his case to the court” and that “[o]nly by giving the litigants the fullest voice possible can individual dignity be preserved”).

<sup>19</sup> Finegan, *supra* note 9 at 466–467.

<sup>20</sup> *Id.*; Sward, *supra* note 7 at 313–314 (“In practice, an inquisitorial ‘trial’ . . . may continue . . . for several months as the judge considers what further information he might need to resolve the dispute.”).

<sup>21</sup> Finegan, *supra* note 9 at 467. The inquisitorial judge often relies on a “dossier” that outlines all relevant facts of the case.

assist the judge throughout the process, their role is supportive only.<sup>22</sup> Because the judge is primarily responsible for questioning witnesses and eliciting relevant information, there are no strict evidentiary rules, and traditionally unreliable evidence may be considered.<sup>23</sup> Proponents of the inquisitorial system believe that active inquiry by the judge and preclusion of the parties' distorted presentation of evidence has the best chance of revealing the truth and properly resolving the dispute.<sup>24</sup>

In preparing for and executing adversarial adjudications, the parties are required to play an active and essential role.<sup>25</sup> The system, therefore, often does not function as intended without attorney representation.<sup>26</sup> Hence, the odds of an SRL achieving a successful outcome are greatly reduced.<sup>27</sup> One possible response to overcome this shortcoming is to somehow alter the adversarial adjudicatory process. Complete conversion from an adversarial to an inquisitorial system of justice on a national scale is highly unlikely based on the high esteem Americans place on individual autonomy.<sup>28</sup> However, some have argued that the two adjudicatory systems can be viewed as poles on a continuum, with intermediate options available by incorporating aspects

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<sup>22</sup> *Id.* at 466; Sward, *supra* note 7 at 314 (“[T]he parties offer suggestions about further avenues for investigation, witnesses to examine, and so on.”).

<sup>23</sup> Finegan, *supra* note 9 at 468.

<sup>24</sup> *Id.* at 464.

<sup>25</sup> *Id.* at 467 (“A hallmark of the adversarial system is that the parties control the direction of the trial, with each side determining what facts to enter in evidence, what witnesses to call, what arguments to make, and what objections to raise.”).

<sup>26</sup> Professor Landsman summarized the situation as follows:

Because of the potential complexity of legal questions and the intricacy of the legal mechanism, parties generally cannot manage their own lawsuits. Rather, they, and the adversary system, have come to rely upon a class of skilled professional advocates to assemble and present the testimony upon which decisions will be based. The advocates are expected to provide the legal skills necessary to organize the evidence and formulate the issues.

Landsman, *supra* note 7 at 716.

<sup>27</sup> *See infra* Section II.A.

<sup>28</sup> America's history arguably made an adversarial system inevitable. The element of party control of proceedings apparent in English procedure from the earliest times was also attractive to the intensely individualistic polity of the eighteenth and nineteenth centuries. The English and American judicial process made increasing allowances for each party to run his lawsuit as he saw fit, to voice his claims, and to select his evidence. The judicial decision was directly tied to the presentations of the parties. Clearly, these facts of procedure were particularly suited to an age preoccupied with the establishment of individual political and economic rights. Landsman, *supra* note 7 at 738; Sward, *supra* note 7 at 311 (“[I]t is not surprising that a strongly individualistic society such as ours would have a system of dispute resolution that emphasizes individual control and initiative.”).



of one system into the other.<sup>29</sup> Additionally, special rules theoretically can be incorporated into litigation to help minimize the unfairness SRLs experience by not having the benefit of counsel.<sup>30</sup>

### *B. Possible Responses to Self-Represented Litigants in the Adversarial System*

An adversarial system, much more so than an inquisitorial system, relies on parties who know the law and are able to competently advocate their positions.<sup>31</sup> The U.S. Supreme Court in *Gideon v. Wainwright* recognized a constitutional right of criminal defendants to legal counsel.<sup>32</sup> However, the Court subsequently held that there is no analogous constitutional right to court-appointed counsel in civil cases.<sup>33</sup> Nevertheless, there are still

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<sup>29</sup> Graham C. Polando, *The Indiana Supreme Court's Adversarial Guidance to Inquisitorial Juvenile Courts*, 58 RES GESTAE 23, 23 (2015) (opining that “sophisticated observers do not speak of a particular system as ‘adversarial’ or ‘inquisitorial’ *per se*, but instead place different systems on an adversarial-inquisitorial continuum based on the presence or absence of a number of different factors”); see also Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1187 (2005) (“The models of adversarial and inquisitorial systems of justice are precisely that—models to which no actual legal system precisely corresponds, since all legal systems combine both adversarial and inquisitorial elements”).

<sup>30</sup> See generally Yee, *supra* note 10 at 378–79.

<sup>31</sup> Kessler, *supra* note 29 at 1189 n.38 (opining that “by placing so much power in the hands of the parties (and thus in those of their lawyers), adversarial procedure denies equal access to justice because many cannot afford lawyers”); Martin Marcus, *Above the Fray or into the Breach: The Judge's Role in New York's Adversarial System of Criminal Justice*, 57 BROOK. L. REV. 1193, 1205 (1992) (“The adversarial trial functions as intended when the assumptions of the adversarial model are reflected in the realities of the courtroom: prosecution and defense counsel are effective adversaries, and an even-handed trial judge regulates and clarifies the fact-finding process, but does not advocate, or appear to advocate, the position of either side.”); Justice Scalia Highlights Importance of Legal Aid, LEGAL AID SOC'Y OF CLEVELAND, <https://lasclv.org/09152014-2/> (Sept. 15, 2014) (Justice Antonin Scalia stating that “without access to quality legal representation there is no justice.”).

<sup>32</sup> *Gideon v. Wainwright*, 372 U.S. 335, 342 (1968). Commentators have noted, however, that the right of self-representation is inconsistent with the adversarial system. Finegan, *supra* note 9 at 446 (“In practice, the right of a criminal defendant to represent himself in court in many ways conflicts with the uniquely American focus on procedural fairness and, indeed, the adversarial process generally.”).

<sup>33</sup> *Lassiter v. Dept. of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 31 (1981) (holding that the failure to appoint counsel in a termination of parental rights case did not overcome the “presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty” and therefore did not violate the Due Process Clause). Of note, however, most states provide a statutory right to court-appointed counsel in various civil settings, including certain family law matters, involuntary commitment proceedings, and petitions seeking access to particular medical treatment. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 245, 245 (2006); see also *Civil Right to Counsel*, A.B.A., [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defense/civil\\_right\\_to\\_counsel1/](https://www.americanbar.org/groups/legal_aid_indigent_defense/civil_right_to_counsel1/) (last visited Oct. 12, 2021) (providing a state-by-state breakdown of statutory authority for appointment of counsel for various civil proceedings).

impassioned pleas for a right to government-provided counsel in civil cases<sup>34</sup>—what is often referred to as a “Civil Gideon.”<sup>35</sup> California adopted the first-of-its-kind statute in 2009 that funded several civil legal aid pilot programs within that state.<sup>36</sup> However, fully funding a Civil Gideon program on a national scale is not on the horizon.<sup>37</sup> Further, any expectation of transitioning to an inquisitorial system is simply unrealistic.<sup>38</sup>

There are many proposals to address the injustices and challenges that SRLs face. For example, some advocate for increased judicial involvement, noting that certain proceedings in many jurisdictions already incorporate inquisitorial elements.<sup>39</sup> Pretrial discovery, specialized courts, special masters, court-appointed experts, judicial and non-judicial case managers, and alternative dispute resolution mechanisms arguably are inquisitorial in nature.<sup>40</sup> Also, many juvenile courts already allow certain court-appointed non-parties,

<sup>34</sup> See generally AM. ACAD. OF ARTS & SCI., CIVIL JUSTICE FOR ALL 4–5 (2020) [hereinafter JUSTICE FOR ALL], [https://www.amacad.org/sites/default/files/publication/downloads/2020-Civil-Justice-for-All\\_0.pdf](https://www.amacad.org/sites/default/files/publication/downloads/2020-Civil-Justice-for-All_0.pdf); LEWIS CREEKMORE, ET. AL., LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 13–14 (2017) [hereinafter JUSTICE GAP 2017], <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>; AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES 2–3 (2006), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lsc\\_sclaid\\_06A112A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lsc_sclaid_06A112A.authcheckdam.pdf).

<sup>35</sup> The phrase was coined by U.S. District Judge Robert Sweet in a 1997 lecture, in which he advocated for a constitutional right to counsel in civil matters, similar to the right recognized by *Gideon* in criminal matters. The ABA has more narrowly defined “Civil Gideon” as “the idea that people who are unable to afford lawyers in legal matters involving basic human needs – such as shelter, sustenance, safety, health, and child custody – should have access to a lawyer at no charge.” *Civil Right to Counsel*, *supra* note 33. National Coalition for a Civil Right to Counsel prefers the term “civil right to counsel” to better reflect the narrower scope. See *History of the Civil Right to Counsel*, NAT’L COAL. FOR A CIV. RIGHT TO COUNS., <http://www.civilrighttocounsel.org/about/history> (last visited Oct. 18, 2021).

<sup>36</sup> A.B. 590, 2009 Gen. Assemb., Reg. Sess. (Cal. 2009).

<sup>37</sup> See James L. Baillie & Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1, the Profession and Legal Education*, 13 MINN. J. L. & INEQ. 51, 60 (1994) (“Long, acrimonious, Congressional debates over public funding of . . . programs that provide [indigent civil legal] services have made clear that in the near future adequate funding will not be available”); Clare Pastore, *Gideon Is My Co-Pilot: The Promise of Civil Right to Counsel Pilot Programs*, 17 U. D.C. L. REV. 75, 79 (2014) (noting the “instinctive reaction of many policymakers and members of the public that a civil right to counsel is simply unaffordable”); Even California’s Civil-Gideon law as currently enacted is relatively modest. See *Civil “Gideon” Comes to California*, NEUFELD MARKS, <https://www.neufeldmarks.com/civil-gideon-comes-to-california/> (last visited Oct. 10, 2021) (pointing out that the statute simply requires the establishment of “pilot programs to provide legal counsel to low-income parties in civil cases involving basic human needs” and that increased civil filing fees, and not tax dollars, will fund any new programs).

<sup>38</sup> See Landsman, *supra* note 7 at 713; but see Kessler, *supra* note 29 at 1192 (arguing that “the time has come to begin seriously considering the inquisitorial alternative—namely, a systematic effort to increase the court’s control over litigation as a means of remedying the excesses of adversarial procedure”).

<sup>39</sup> See Sward, *supra* note 7 at 355. The *ABA Model Rules of Judicial Conduct* require that “[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” MODEL CODE OF JUD. CONDUCT r. 2.2 (AM. BAR ASS’N 2020) [hereinafter MODEL JUDICIAL RULES]. The related commentary provides that judges may “make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.” MODEL JUDICIAL RULES r. 2.2 cmt. 4. See generally Tom Lininger, *Judges’ Ethical Duties to Ensure Fair Treatment of Indigent Parties*, 89 FORDHAM L. REV. 1237, 1237–38 (2020).

<sup>40</sup> See generally Sward, *supra* note 7 at 326–54.

such as guardians ad litem and special advocates, to conduct investigations and present evidence in what have been described as “inquisitorial ‘best interest of the child’ determinations.”<sup>41</sup> Further, the rules of evidence may not even apply in many preliminary or miscellaneous proceedings.<sup>42</sup> But there are a host of problems associated with expecting judges to incorporate vaguely defined inquisitorial elements into their adversarial adjudicatory processes, not the least of which is that many of those elements are inconsistent with the fundamental design of the adversarial system.<sup>43</sup>

There are some suggested measures to assist SRLs that are noncontroversial and that arguably should be incorporated universally to the extent possible.<sup>44</sup> These include pretrial conferences to discuss procedure, deadlines, and expectations at trial; detailed court forms that outline the issues to be presented, the party that has the burden of proof, the applicable standard of proof, and the consequences of failing to appear or to satisfy the burden of proof; detailed procedural explanations during the trial as needed; and allowing narrative testimony during trial.<sup>45</sup> At various points in the adjudicatory process, some judges explain to SRLs concepts of evidentiary procedure, including relevancy, forms of evidence, how to obtain evidence, foundation, primary objections to admissibility, and the consequences of failing to produce evidence.<sup>46</sup> And at least one professor has argued persuasively that a “professional responsibility of fair play” be incorporated into attorney rules

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<sup>41</sup> Polando, *supra* note 29 at 26, 28. As one apparently frustrated magistrate put it, “while there are universal calls for juvenile court judges to use ‘evidence-based practices,’ increase cultural ‘competence’ or ‘awareness’ and become more aware of psychological data, it is nearly impossible to present, much less test, those studies in an adversarial setting, and when parties do not present evidence, the most culturally competent, psychologically informed adversarial judge becomes as ignorant as her evidence.”

<sup>42</sup> *See, e.g., id.* at 25 (discussing Rule 101 of Indiana’s Rules of Evidence, which provides that the evidentiary rules do not apply to many proceedings).

<sup>43</sup> *See* Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L., POL’Y & ETHICS J. 659, 672 (2006); Finegan, *supra* note 9 at 473 (“Because of the judge’s role in ensuring a fair trial, the role of neutral arbiter is sometimes abandoned when a defendant decides to represent himself, and the judge begins to look less like the detached overseer of the adversarial system and more like the proactive participant in the inquisitorial process”); Marcus, *supra* note 31 at 1205 (“Whether to intervene, and what form any intervention should take, necessarily varies with the nature and the circumstances of the case, the extent of the problem, and the personalities and abilities of the parties and the court.”); *see also* JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS, AM. JUDICATURE SOC’Y 25, 28 (1998) (“The legal and judicial ethics issues surrounding any form of judicial assistance to a self-represented litigant, or even a represented party, are numerous, intertwined, and implicate competing values”; “Judges must balance their duty of impartiality to all parties with their duty to provide the required ‘meaningful opportunity to be heard’ to which all litigants are constitutionally entitled.”).

<sup>44</sup> Yee, *supra* note 10 at 405–06; *see also* MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR ASS’N 2019); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 103 (AM. L. INST. 2000).

<sup>45</sup> Baldacci, *supra* note 43 at 671.

<sup>46</sup> *Id.* at 671–72.

of professional conduct when dealing with a pro se adversary.<sup>47</sup> Of course, whether these measures ultimately assist SRLs who have no legal training is subject to debate.

Beyond mandated or generally accepted practices, some have argued that, in an adversarial system, judges have an obligation to play an active role in the production of evidence when confronted with an SRL if necessary to prevent a manifest injustice.<sup>48</sup> The supporting rationale is that “it is the ‘chief function of a court of law to find out the truth and not merely to decide which party has adduced better evidence.’”<sup>49</sup> This implicitly recognizes that the adversarial system breaks down when the parties themselves are unable to control the adjudicatory process as intended.<sup>50</sup> Judicial interaction also is fraught with danger: having the judge actively assist an SRL risks taking the judge out of the fair-and-neutral-arbiter role that is essential to adversarial adjudication.<sup>51</sup> For instance, some have advocated that judges ask questions, make objections, and assist an SRL to establish evidentiary foundations and to properly testify regarding the substance of the evidence.<sup>52</sup> Needless to say, the line of demarcation between partiality and ensuring a fair hearing is not well-defined.<sup>53</sup>

None of the above suggestions will adequately overcome the adversity normally faced by an SRL in the American adversarial system. Both sides need legal representation to provide an even playing field in a rules-driven

<sup>47</sup> See generally Yee, *supra* note 10 at 380 (advocating for “a professional responsibility of fair play when dealing with a pro se adversary”).

<sup>48</sup> Polando, *supra* note 29 at 23.

<sup>49</sup> *Id.* at 23 (opining that “sophisticated observers do not speak of a particular system as ‘adversarial’ or ‘inquisitorial’ per se, but instead place different systems on an adversarial-inquisitorial continuum based on the presence or absence of a number of different factors”); see also Kessler, *supra* note 29 at 1187 (“The models of adversarial and inquisitorial systems of justice are precisely that—models to which no actual legal system precisely corresponds, since all legal systems combine both adversarial and inquisitorial elements.”).

<sup>50</sup> As noted in a “guidebook” for judges and court managers, “Many courts have an unstated policy of leniency regarding the construction of pro se pleadings, and failures to adhere to technical rules of procedure are largely ignored to ensure that claims made are given ‘fair and meaningful consideration.’” GOLDSCHMIDT ET AL., *supra* note 43 at 27 (quoting *Metzker v. Herr*, 748 F.2d 1142, 1146 (7th Cir. 1984)).

<sup>51</sup> See Finegan, *supra* note 9 at 473 (“Because of the judge’s role in ensuring a fair trial, the role of neutral arbiter is sometimes abandoned when a defendant decides to represent himself, and the judge begins to look less like the detached overseer of the adversarial system and more like the proactive participant in the inquisitorial process.”).

<sup>52</sup> Baldacci, *supra* note 43 at 672; see also GOLDSCHMIDT ET AL., *supra* note 43 at 28 (“Judges must balance their duty of impartiality to all parties with their duty to provide the required ‘meaningful opportunity to be heard’ to which all litigants are constitutionally entitled.”).

<sup>53</sup> See Marcus, *supra* note 31 at 1205 (“Whether to intervene, and what form any intervention should take, necessarily varies with the nature and the circumstances of the case, the extent of the problem, and the personalities and abilities of the parties and the court.”); GOLDSCHMIDT ET AL., *supra* note 43 at 25 (“The legal and judicial ethics issues surrounding any form of judicial assistance to a self-represented litigant, or even a represented party, are numerous, intertwined, and implicate competing values.”).

adjudicatory process that is controlled by the parties.<sup>54</sup> The only practical solution, at least in the short term, is to understand the severe implications of involuntary self-representation on adversarial adjudication in order to fully appreciate the daunting challenge. Then, the focus needs to be on educating the bar with the goal of identifying the necessary pro bono attorneys to address the problem.

## II. THE IMPACT OF SELF-REPRESENTED LITIGANTS ON THE ADVERSARIAL SYSTEM

Studies have consistently shown that the absence of legal counsel has an appreciably negative effect on the twin goals of the litigation system.<sup>55</sup> SRLs are less likely to prevail in court and, arguably more concerning, more likely to believe that they were not treated fairly.<sup>56</sup> The only way to provide an even playing field in a rules-driven adjudicatory process that is controlled by the parties is to ensure both sides have legal representation.

### A. *How Legal Representation Affects Arriving at the Correct Outcome*

Recruiting additional *pro bono* attorneys to fill the void in the adversarial system created by SRLs almost certainly will be easier if the potential recruits are assured that their participation really will make a difference.<sup>57</sup> Conducting litigation without legal counsel clearly is inconsistent with the design of the modern adversary process.<sup>58</sup> Still, the question is whether the insertion of representation will actually improve the otherwise self-represented party's

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<sup>54</sup> See Landsman, *supra* note 7 at 716 (“Because of the potential complexity of legal questions and the intricacy of the legal mechanism, parties generally cannot manage their own lawsuits. Rather, they, and the adversary system, have come to rely upon a class of skilled professional advocates to assemble and present the testimony upon which decisions will be based. The advocates are expected to provide the legal skills necessary to organize the evidence and formulate the issues.”).

<sup>55</sup> See Finegan, *supra* note 9 at 464 (“Truth in the adversarial system was actually a determination of which opposed position was more likely to be correct . . . By contrast, the inquisitorial system demanded that the truth be ascertained by assembling all available evidence.”); Yee, *supra* note 10 at 402–03 (“From a psychological perspective, the pro se party’s perception of the process being fair is important to that party’s satisfaction with the outcome.”).

<sup>56</sup> See Matthew Chaney, *Study: Unrepresented Civil Litigants Lose More Often*, VA. LAW. WKLY. (Apr. 27, 2018), <https://valawyersweekly.com/2018/04/27/study-unrepresented-civil-litigants-lose-more-often/>.

<sup>57</sup> See Margaret Meriwether Cordray, *Expanding Pro Bono’s Role in Legal Education*, 48 IDAHO L. REV. 29, 38 (2011) (“Research on volunteerism suggests that individuals are more likely to contribute if they feel that they have the time and competence to help, their efforts will be effective, and they have personal involvement with the people whom they are assisting.”).

<sup>58</sup> See Landsman, *supra* note 7 at 716 (“Because of the potential complexity of legal questions and the intricacy of the legal mechanism, parties generally cannot manage their own lawsuits. Rather, they, and the adversary system, have come to rely upon a class of skilled professional advocates to assemble and present the testimony upon which decisions will be based. The advocates are expected to provide the legal skills necessary to organize the evidence and formulate the issues.”).

outcome in the proceedings. The short answer is that, based on numerous studies, it absolutely will.

Recognizing that legislators would need to be convinced that the benefit to indigent civil litigants would outweigh the cost of any government-provided attorneys, multiple studies have been conducted to examine the benefits of legal counsel to otherwise unrepresented litigants.<sup>59</sup> Although the expense associated with lawyers can be eliminated by using *pro bono* attorneys, the benefits measured by these studies are still valid. These positive results are also a measure of the current negative impact of SRLs on the court with respect to arriving at the “correct” adjudicatory outcome.

Several studies have been conducted in the area of housing, where, as Professor Pastore put it, “the imbalance of representation between indigent [tenant] defendants and landlord plaintiffs is overwhelming.”<sup>60</sup> In one Massachusetts study, which compared full legal representation to a three-hour self-help clinic for tenants subject to potential eviction, two-thirds of represented tenants were able to stay in their homes compared to one-third of SRLs.<sup>61</sup> The most extensive studies, conducted in California, found that representation resulted in the eviction default rate going from 40% to effectively zero, and that two-thirds of cases with full representation settled compared with one-third of SRL cases.<sup>62</sup>

The California studies also evaluated child custody cases.<sup>63</sup> They found that 54% of represented cases were fully resolved during a settlement conference compared to 30% of SRL cases, and that 60% of represented cases resolved without a hearing versus 37% of SRL cases.<sup>64</sup> Also of significance, the parties in only one in ten represented cases returned to court within two years after adjudication to modify the court’s custody order compared to one

<sup>59</sup> Pastore, *supra* note 37 at 77.

<sup>60</sup> *Id.* at 80; see also JUSTICE FOR ALL, *supra* note 34 at 7 (noting that in New York in 2017, “about 90 percent of landlords in eviction proceedings had lawyers, compared to only about 1 percent of tenants.”); JUD. COUNCIL OF CAL., SARGENT SHRIVER CIVIL COUNSEL ACT EVALUATION 1, 47 (2020), [https://www.courts.ca.gov/documents/Shriver-Legislative-Report\\_June-30-2020.pdf](https://www.courts.ca.gov/documents/Shriver-Legislative-Report_June-30-2020.pdf) (pointing out that in California “[i]t is very common for unlawful detainer cases to involve landlords with legal representation and tenants without the resources to retain counsel.”); *Backdrop: The Access to Justice Crisis* NAT’L COAL. FOR A CIV. RT. TO COUNS., <http://civilrighttocounsel.org/about/history> (last visited June 15, 2021). The National Coalition for the Civil Right to Counsel claims that “eviction cases involve one of the most imbalanced scenarios for civil cases” and that one of its recent studies shows that, on average, only 3% of tenants are represented in eviction cases whereas 81% of landlords are represented.

<sup>61</sup> Pastore, *supra* note 37 at 77. Of note, the self-help clinic alone represented a huge benefit, as it increased the statewide possession rate of 2% to more than 30%.

<sup>62</sup> JUD. COUNCIL OF CAL., *supra* note 60 at 15–16. California studies were pilot projects pursuant to the 2009 Sargent Shriver Civil Counsel Act. JUSTICE FOR ALL, *supra* note 34 at 1. The program consisted of ten pilot projects conducted between 2015 and 2019, six focused on housing cases, three on child custody cases, and one on guardianship and conservatorship cases.

<sup>63</sup> JUD. COUNCIL OF CAL., *supra* note 60 at 53.

<sup>64</sup> *Id.* at 84.

in three SRL cases, indicating that the attorney-assisted resolution was more permanent.<sup>65</sup> These studies can also act as a proxy to demonstrate the more generalized impact of access to justice initiatives on indigent individuals because the studies spanned an eight-year period and involved 43,266 low-income litigants.<sup>66</sup> Across the six housing pilot studies, 67% of represented cases, compared to 34% of SRL cases, were settled; 3% of represented cases, versus 14% of SRL cases, were resolved via trial; and 8% of represented cases, compared to 26% of SRL cases, ended via default judgment.<sup>67</sup>

Another way of measuring the impact of legal representation is to look at the financial implications to the low-income Americans served. In 2017, the state of New York helped indigent residents obtain \$1.08 billion in federal benefits and \$58.6 million in civil damages.<sup>68</sup> The California bar reported that during that same year, legal efforts supporting low-income residents recovered \$134 million, prevented the loss of an additional \$43 million in benefits, and helped keep 4,895 families in their homes, which avoided \$19.6 million in costs for the residents.<sup>69</sup> Vermont estimated an economic return on its 2017 investment in legal services for indigent residents of \$66.4 million.<sup>70</sup>

In sum, it is undeniable that the involvement of legal counsel results in significant positive results for those who would otherwise be unrepresented. Based on our adversarial system, indigent Americans *with* lawyers are much more likely to prevail in litigation in terms of, *inter alia*, keeping their homes, being granted custody of their children, receiving protective orders, gaining guardianship and conservatorship of those who need assistance, and receiving federal benefits.<sup>71</sup> Providing low-income people access to legal representation also means that cases are decided on the merits and not as a result of only one side having access to an attorney. Simply put, legal representation matters.

### *B. How Self-Represented Litigants Perceive Being Treated Justly*

Equally important as reaching the correct outcome in an adjudicatory system, if not more important, is the parties' perception that they were treated

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<sup>65</sup> *Id.* at 85.

<sup>66</sup> *Id.* at 4. Approximately 39,000 of the roughly 43,000 litigants served were involved in unlawful detainer cases. About 3,000 were involved in child custody cases, and approximately 1,000 were involved in guardianship or conservatorship cases.

<sup>67</sup> *Id.* at 23. A study in Virginia similarly documented the detriment of litigating without legal representation. See Chaney, *supra* note 56.

<sup>68</sup> JUSTICE FOR ALL, *supra* note 34 at 6.

<sup>69</sup> *Id.* at 8.

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., *id.* at 6.

fairly during the process.<sup>72</sup> An individual's perception of justice forms the basis for his respect for the rule of law.<sup>73</sup> Individuals resort to judicial remedies or are drafted into the realm of litigation, sometimes involuntarily, because their rights are at stake or they are trying to settle a dispute that they have been unable to resolve otherwise.<sup>74</sup> They then can find themselves in a strange and unfamiliar world.<sup>75</sup>

Attorneys often act as surrogates and interpreters for their clients during litigation by filing documents and explaining the nuances of a relatively complex system of justice.<sup>76</sup> Self-represented litigants without legal training often are confused by the adjudicatory process and therefore exit the courthouse believing that the system is flawed, illogical, and unfair.<sup>77</sup> They may even feel like they were not provided an opportunity to be heard and were not informed of why the judge ruled the way she did.<sup>78</sup> Parties without counsel are frequently on the losing end of a default judgment because they did not file a required pleading or did not understand what evidence to present or how to present it.<sup>79</sup> They may be precluded from presenting relevant evidence during a court proceeding because they are unaware that they had to respond to

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<sup>72</sup> See Yee, *supra* note 10 at 402–03 (“From a psychological perspective, the pro se party’s perception of the process being fair is important to that party’s satisfaction with the outcome.”).

<sup>73</sup> See Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 3 (2011) (noting that “perceptions of procedural justice have important effects on how people think about, and behave with respect to, the outcomes they receive in legal disputes” and further “predict future adherence to outcomes and agreements”).

<sup>74</sup> ALAN HOUSEMAN & LINDA E. PERLE, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 7 (2018) (noting that “[c]ivil legal assistance helps low-income people navigate various civil matters like housing evictions, home foreclosures, predatory lending, child support, and domestic violence” and “also helps people access government benefits like Social Security, Veteran’s Benefits, disability, unemployment insurance, food stamps, cash assistance, and health insurance”).

<sup>75</sup> See Baldacci, *supra* note 43 at 661 (asserting that “a pro se litigant is thrust into the role of litigator within an adversarial system which she does not understand, either procedurally or substantively, and which effectively silences her”).

<sup>76</sup> HOUSEMAN & PERLE, *supra* note 74 at 7 (“Without the services of a lawyer, low-income people with civil-legal problems may have no way of protecting their legal rights and advancing their interests.”).

<sup>77</sup> See Hollander-Blumoff & Tyler, *supra* note 73 at 4 (“Even when people lose, they feel better about that loss when they experience procedural fairness; conversely, when they win, they do not feel as good about that outcome absent procedural fairness.”).

<sup>78</sup> See *id.* at 5 (“[I]ndividuals care whether . . . they have had an opportunity to present their own story, a factor that the literature commonly refers to as voice.”); Sward, *supra* note 7 at 310 (asserting that a “reason for giving each party a voice is that it enhances the individual dignity of the participants in the adjudicatory process” and that “in a society that values autonomy of the individual, such a voice is essential”).

<sup>79</sup> JUD. COUNCIL OF CAL., *supra* note 60 at 3 (noting that landlords received default judgements against unrepresented tenants in 40% of California eviction cases between 2016 and 2019).



discovery or did not make required pretrial disclosures.<sup>80</sup> In short, SRLs often come away from the litigation process believing that they were not treated justly.<sup>81</sup>

But the perception of unfairness stemming from a litigation experience, even if the perception is unwarranted, can have a much greater consequence.<sup>82</sup> It likely will negatively contribute to that individual's perception of the justice system as a whole, an issue that is becoming more and more concerning.<sup>83</sup> Respect for the rule of law is premised on the perception that the administration of justice treats everyone equally and fairly.<sup>84</sup> If substantial numbers of citizens lose confidence in our justice system, there can be significant adverse societal costs, up to and including violence.<sup>85</sup> It, therefore, is critical that litigants perceive that they are being treated justly.

### III. THE JUSTICE GAP AND TOP-DOWN RESPONSES THERETO

Studies have shown that more than 70% of low-income American households experience at least one civil legal dispute in a given year, including problems with housing conditions, evictions, foreclosures, debt collection, disability access, health care, veterans' benefits, and domestic violence.<sup>86</sup> Although legal aid societies in many areas of the country are tasked with resolving these issues for low-income people, usually with the assistance of the judicial system, they simply are unable to do so on the scale needed given

<sup>80</sup> FED. BAR ASS'N, REPRESENTING YOURSELF IN FEDERAL DISTRICT COURT: A HANDBOOK FOR PRO SE LITIGANTS 3 (2019) (pointing out to SRLs that “[i]t is more important to file/submit required documents and responses on time, than to do everything “perfectly” and that “[y]ou can lose your case if you miss deadlines.”).

<sup>81</sup> As Chicago judge Michael B. Hyman, then chair of the ABA Judicial Division Lawyers Conference, put it in 2008, “Fairness underlies both the legitimacy and effectiveness of a judicial system.” AM. BAR ASS'N JUD. DIV. LAW. CONF., PERCEPTIONS OF JUSTICE: A DIALOGUE ON RACE, ETHNICITY, AND THE COURTS 4 (2008-2011), [https://www.americanbar.org/content/dam/aba/administrative/lawyers\\_conference/2011\\_poj\\_writtenreport.pdf](https://www.americanbar.org/content/dam/aba/administrative/lawyers_conference/2011_poj_writtenreport.pdf). (quoting Judge Hyman).

<sup>82</sup> Keith Roberts, *Perceptions of Justice: Time to Act*, THE JUDGES' J. (Nov. 1, 2015), [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/2015/fall/perceptions\\_of\\_justice\\_time\\_to\\_act/](https://www.americanbar.org/groups/judicial/publications/judges_journal/2015/fall/perceptions_of_justice_time_to_act/) (noting that “even mistaken perceptions lead to serious problems.”).

<sup>83</sup> Sherrilyn Ifill, then President of the NAACP Legal Defense and Educational Fund, stated the following in 2015: “We are losing a whole generation, maybe more than one, who are losing their confidence in our justice system. Increasingly they believe that the rule of law is selective, unfair, and inequitably applied.” *Id.*

<sup>84</sup> Hollander-Blumoff & Tyler, *supra* note 73 at 6 (“[P]eople are more likely to defer to the decisions and judgments of an authority, and comply with those judgments in the long term, when they perceive that the authority has made those decisions according to a fair process.”).

<sup>85</sup> Roberts, *supra* note 82 (concluding that “minority perceptions of the justice system are often negative and sometimes inaccurate,” which can lead to “frustration and rage; feelings of exclusion and isolation from society that cause people to eschew civic activity (including, for example, failing to vote); and even, in some instances, people taking ‘justice’ into their own hands.”).

<sup>86</sup> JUSTICE GAP 2017, *supra* note 34 at 20–27.

current configurations and funding constraints.<sup>87</sup> Therefore, bridging the Justice Gap<sup>88</sup> by providing necessary legal representation, requires additional assistance from the legal profession itself.<sup>89</sup>

### A. *The Magnitude and Trend of the Justice Gap*

The sheer magnitude of the current Justice Gap is daunting. Low-income individuals seek professional legal assistance for only 20% of their civil legal problems.<sup>90</sup> And according to the National Center for State Courts, more than 75% of all civil cases involve at least one self-represented party.<sup>91</sup> The Legal Services Corporation (“LSC”) reported that in 2016, 71% of low-income households experienced at least one civil legal problem, and 86% of the reported problems received inadequate or no legal assistance.<sup>92</sup> It also predicted that in 2017, between 62% and 72% of an estimated 1.7 million legal problems presented to the LSC would receive only limited or no help.<sup>93</sup> Further, based on all legal aid programs in the country, there is approximately one legal-aid lawyer for every 6,415 low-income people compared with approximately one lawyer providing personal legal services for every 525 people in the general population.<sup>94</sup>

Perhaps of more concern, the Justice Gap continues to widen despite the longstanding recognition of the crisis, recurring calls from the top down for

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<sup>87</sup> *Id.* (noting that the Legal Services Corporation (LSC), which is “the single largest funder of civil legal aid for low-income Americans,” is only able to address about half of the civil needs of low-income Americans brought each year. The LSC “is an independent nonprofit established by Congress in 1974 to provide financial support for civil legal aid to low-income Americans.”)

<sup>88</sup> The term “Justice Gap” was coined in 2004 by the LSC. LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 5, 9 (2009). It is defined as “the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.”

<sup>89</sup> *A Guide and Explanation to Pro Bono Service*, AM. BAR ASS’N (May 13, 2021), [https://www.americanbar.org/groups/legal\\_education/resources/pro\\_bono/](https://www.americanbar.org/groups/legal_education/resources/pro_bono/) (stating that ABA Model Rule 6.1—regarding “Voluntary Pro Bono Publico Service”—“recognizes that only lawyers have the special skills and knowledge needed to secure access to justice for low-income people, whose enormous unmet legal needs are well documented.”).

<sup>90</sup> JUSTICE GAP 2017, *supra* note 34 at 13.

<sup>91</sup> NAT’L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0020/13376/civiljusticereport-2015.pdf](https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf).

<sup>92</sup> JUSTICE GAP 2017, *supra* note 34 at 13. As The Lawyerist website first noted in 2016—and continues to point out today—“This isn’t a [justice] gap. It’s a chasm.” *Access to Justice*, LAWYERIST, <https://lawyerist.com/strategy/access-justice/> (last visited Oct. 14, 2021).

<sup>93</sup> LEGAL SERV. CORP., *supra* note 88 at 13–14.

<sup>94</sup> *Id.* at 20–21 (2009). Of note, the LSC in recent years has not published an updated figure, perhaps because, as of 2014, LSC grantees must spend at least 12.5% of their grant funds on private attorney involvement. *Rulemaking - LSC's Private Attorney Involvement (PAI) Regulation*, LEGAL SERV. CORP., <https://www.lsc.gov/rulemaking-lscs-private-attorney-involvement-pai-regulation> (last visited Oct. 16, 2021).

more *pro bono* services, and some strengthening of ethical rules.<sup>95</sup> The LSC reports that, due to inadequate resources, each year it provides only limited or no legal help to almost a million impoverished people seeking assistance with civil legal problems.<sup>96</sup> The recent COVID-19 pandemic resulted in tens of millions more Americans being eligible for free legal services.<sup>97</sup> At the same time, there was a significant decrease in Interest on Lawyer Trust Account (“IOLTA”) funding due to economic conditions.<sup>98</sup> In addition to attorney *pro bono* hours not keeping pace with the growth of the civil legal needs of low-income Americans, funding for LSC entities—traditionally through federal grants and income from the IOLTA program—has dwindled over the past twenty years.<sup>99</sup> Despite very significant efforts expended and the progress that has been made over the past couple of decades, much more is needed.<sup>100</sup>

### *B. The Call for Pro Bono Service*

Historically, the primary role of attorneys was to serve the public, with remuneration for a portion of their services merely a secondary function to

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<sup>95</sup> See Robert H. Frank, *How Rising Inequality Has Widened the Justice Gap*, N.Y. TIMES (Aug. 31, 2018), <https://www.nytimes.com/2018/08/31/business/rising-inequality-widened-justice-gap.html> (noting that “in the ensuing decades [since the LSC was formed], rising income inequality has contributed both to a reduction in the supply of legal assistance to low-income families and an increase in the need for it”).

<sup>96</sup> JUSTICE GAP 2017, *supra* note 34 at 13.

<sup>97</sup> See JUSTICE FOR ALL, *supra* note 34 at 3–4 (asserting that the pandemic made it difficult for poor and low-income individuals in particular to obtain the rights and benefits to which they are entitled by law, exacerbating inequalities in the justice system that are already decades old); see also Erica Melko, *Understanding How COVID-19 Widens the Justice Gap*, WEBJUNCTION (Sept. 12, 2020), <https://www.webjunction.org/news/webjunction/understanding-how-COVID-19-widens-the-justice-gap.html> (“The COVID-19 pandemic has exacerbated [the justice] gap and created a surge in civil legal issues for many people with rising unemployment, housing insecurity, medical debt, concerns of safety and domestic violence, and more.”).

<sup>98</sup> Olivia Bane, *IOLTA Inadequacies and Proposed Reforms*, 21 WAKE FOREST J. BUS. INTELL. PROP. L. 84, 86–87, 89–90 (2020). State-run IOLTA programs, second only to LSC in funding legal aid entities, receive short-term interest payments from pooled interest-bearing trust accounts maintained in banks by attorneys. The IOLTA funding in 2020 was approximately \$123 million less than in 2019, a 46% decrease.

<sup>99</sup> John G. Levi, *The Widening “Justice Gap” and Why We Must Close It*, THE HILL (Apr. 20, 2012), <https://thehill.com/blogs/congress-blog/civil-rights/222803-the-widening-qjustice-gapq-and-why-we-must-close-it> (pointing out that “as demand [for civil legal assistance] has been rising, the combined funding for LSC programs from federal, IOLTA, state, local and all other sources has dropped”).

<sup>100</sup> Deborah L. Rhode, *The Pro Bono Responsibilities of Lawyers and Law Students*, 27 WM. MITCHELL L. REV. 1201, 1202 (2000) (“The bar’s failure to secure broader participation in pro bono work is all the more disappointing when measured against the extraordinary successes that such work has yielded.”).

allow accomplishment of their principal mission.<sup>101</sup> Once it appeared clear in the modern era that the efforts of individual attorneys were insufficient, the ABA included in its 1969 *Model Code of Professional Conduct* aspirational “Ethical Considerations,” one of which asserted that “[t]he rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer.”<sup>102</sup> An ABA Commission subsequently recommended both a forty-hour-per-year mandatory *pro bono* service provision and a mandatory *pro bono* reporting requirement.<sup>103</sup> After intense criticism of the recommendations, Rule 6.1 of the Model Rules of Professional Conduct, as finally adopted in 1983, simply stated that “[a] lawyer should render public interest legal service,” without any mandatory—or even aspirational—*pro bono* service or reporting requirement.<sup>104</sup>

A decade later, the ABA opted to strengthen Rule 6.1 by adding a specific time commitment, albeit an aspirational one: “A lawyer should aspire to render at least (50) hours of pro bono publico services per year.”<sup>105</sup> This change, as well as the unadopted recommendation for a mandatory *pro bono* reporting requirement, was directly influenced by acknowledgment of the Justice Gap.<sup>106</sup> In an apparent attempt to bolster its aspirational requirement for *pro bono* service, the ABA later modified Rule 6.1 to add a prefatory sentence, indicating that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.”<sup>107</sup>

Of note, the call for mandatory *pro bono* service addresses both the

<sup>101</sup> *Id.* (“The bar’s failure to secure broader participation in pro bono work is all the more disappointing when measured against the extraordinary successes that such work has yielded.”); Baillie & Bernstein-Baker, *supra* note 37 at 52 (noting that law—like medicine and the clergy— “began as a profession which provided service to the public; making an income sufficient to support continued public service was secondary to the service. This professional ethos implied that service was not contingent upon pecuniary compensation.”).

<sup>102</sup> *Preamble to the ANN. CODE OF PRO. RESP. EC 2-25* (Am. Bar Found. 1979). The Code at the time consisted of aspirational “Canons” and “Ethical Considerations,” as well as mandatory “Disciplinary Rules.” *See ANN. CODE OF PRO. RESP.* (Am. Bar Found. 1979).

<sup>103</sup> Baillie & Bernstein-Baker, *supra* note 37 at 56.

<sup>104</sup> *See id.* at 57 (quoting MODEL RULES OF PRO. CONDUCT r. 6.1 (Am. Bar Ass’n 1984)).

<sup>105</sup> *Id.* at 58–59 (1995) (quoting MODEL RULES OF PRO. CONDUCT r. 6.1 (Am. Bar Ass’n 1993)). Like all ABA Model Rules, Model Rule 6.1 was “intended to become part of the ethical rules of each state.” Pro bono publico service is for the public good, which the Model Rules define as providing legal services at no fee or at a substantially reduced fee to, or for the benefit of, those “with limited means.” Baillie & Bernstein-Baker, *supra* note 37 at 59.

<sup>106</sup> *Id.* at 60, 62 “The passage of the [modified Model Rule 6.1 signalled a reinvigorated effort by the organized bar to enlarge public access to justice.” In 2015, the Conference of Chief Justices and the Conference of State Court Administrators adopted a resolution firmly supporting access to justice. *See Conf. of Chief Just., Res. 5, Reaffirming the Commitment to Meaningful Access to Justice for All* (2015).

<sup>107</sup> MODEL RULES OF PRO. CONDUCT r. 6.1 (Am. Bar Ass’n 2019). Additionally, comment 9 to the current rule emphasizes that pro bono service is a “professional responsibility” and an “individual ethical commitment” of all lawyers. MODEL RULES OF PRO. CONDUCT r. 6.1 cmt. 9 (Am. Bar Ass’n 2019).

precepts of professionalism and the “crisis of unmet legal need.”<sup>108</sup> It would force individual attorneys to respond to their obligation to serve the underprivileged while closing the Justice Gap simultaneously.<sup>109</sup> Moreover, the current predicament was created by the failure of the legal profession to properly respond to its collective calling.<sup>110</sup> One practitioner aptly summed up the problem more than twenty-five years ago: “[T]he crisis in unmet legal needs comes in part from lack of recognition by today’s lawyers of the roots of the profession and the profession’s evolution into a trade, with lawyers primarily dedicated to the increase in their incomes.”<sup>111</sup> Unfortunately, the problem has only gotten worse over the past quarter-century.<sup>112</sup> A universal Civil *Gideon*, even if it were to come to fruition, might be successful in closing the Justice Gap if it were expansive enough, but it would also represent the abandonment of the social responsibility on which the legal profession was founded.<sup>113</sup>

### C. Top-Down Responses to the Justice Gap

Largely in response to ABA Model Rule 6.1 and the widening Justice Gap, state bar agencies across the country have focused on increasing *pro bono* participation.<sup>114</sup> No state currently mandates *pro bono* service for its members.<sup>115</sup> Instead, the two primary methods to call attorneys to action are *pro bono* reporting—either mandatory or voluntary—and aspirational service

<sup>108</sup> Baillie & Bernstein-Baker, *supra* note 37 at 57; cf. Rhode, *supra* note 100 at 1203 (describing two premises supporting *pro bono* contributions: “access to legal services is a fundamental need” and “lawyers have some responsibility to help make those services available.”).

<sup>109</sup> Rhode, *supra* note 100 at 1205 (“[P]ro bono work is not simply a philanthropic exercise; it is also a professional responsibility”).

<sup>110</sup> Lawyers, like other professionals, have an inherent responsibility to hold their clients’ needs above their own by virtue of what has been described as a “calling in the spirit of public service.” Baillie & Bernstein-Baker, *supra* note 37 at 51; see also *id.* at 75 (referring to “the special tradition of *pro bono* service as a defining characteristic of the [legal] profession”).

<sup>111</sup> Baillie & Bernstein-Baker, *supra* note 37 at 57.

<sup>112</sup> See Rhode, *supra* note 100 at 1201 (“Recent estimates [as of the year 2000] suggest that most attorneys do not perform significant *pro bono* work, and that only between ten and twenty percent of those who do are assisting low-income clients. The average for the profession as a whole is less than a half an hour per week”). A major contributor to the problem has been the dwindling inflation-adjusted federal funding to the LSC. If the 1980 funding level were merely adjusted for inflation, the current annual funding would be over \$1 billion. HOUSEMAN & PERLE, *supra* note 74 at 38. Instead, the 2020 funding was only \$440 million. *Budget Request Tables*, LEGAL SERVS. CORP., <https://www.lsc.gov/spotlight-blog/budget-request-tables> (last visited June 15, 2021).

<sup>113</sup> Baillie & Bernstein-Baker, *supra* note 37 at 52 (noting that law—like medicine and the clergy—“began as a profession which provided service to the public; making an income sufficient to support continued public service was secondary to the service”). “This professional ethos implied that service was not contingent upon pecuniary compensation.”

<sup>114</sup> *Preamble to the ANN. CODE OF PRO. RESP.*, *supra* note 102. The Code at the time consisted of aspirational “Canons” and “Ethical Considerations,” as well as mandatory “Disciplinary Rules.” See ANN. CODE OF PRO. RESP. (1979); Baillie & Bernstein-Baker, *supra* note 37 at 52, 56.

<sup>115</sup> See *Pro Bono Reporting*, AM. BAR ASS’N, [https://www.americanbar.org/groups/probono\\_public\\_service/policy/arguments/](https://www.americanbar.org/groups/probono_public_service/policy/arguments/) (last updated Mar. 19, 2020).

goals.<sup>116</sup> However, both approaches yielded limited success, demonstrating that these top-down methods have not mobilized attorneys to action fast enough to address the ever-expanding Justice Gap.

*i. Mandatory Pro Bono Reporting*

Mandatory *pro bono* reporting requires that licensed attorneys report their *pro bono* service hours annually.<sup>117</sup> It is generally regarded as a way to appeal to the morality of attorneys or, as one state puts it, to serve “as an annual reminder to the lawyers . . . that *pro bono* service is an integral part of a lawyer’s professionalism.”<sup>118</sup>

In the early 1990s, Florida became the first state to adopt mandatory *pro bono* reporting, suggesting 20 hours of service or a \$350 legal aid contribution annually.<sup>119</sup> Since then, eight other states have followed suit: Hawaii, Illinois, Indiana, Maryland, Mississippi, Nevada, New Mexico, and New York.<sup>120</sup> Each requires disclosure of total *pro bono* service hours rendered, and most provide a monetary contribution alternative.<sup>121</sup> The suggested amounts vary by jurisdiction and range between 20–50 hours and \$200–\$500.<sup>122</sup> Some states impose sanctions for not reporting, including prohibiting nonresponsive attorneys from practicing law until the required report is submitted.<sup>123</sup>

In addition to its mandatory reporting requirement for attorneys, New York in 2012 implemented a pre-admission *pro bono* service requirement, calling for fifty hours of *pro bono* service as a prerequisite to bar admission.<sup>124</sup> The scope of qualifying service includes areas other than traditional *pro bono* services for low-income individuals, including law-related work

<sup>116</sup> *See id.*

<sup>117</sup> *Id.* (identifying states with mandatory reporting requirements).

<sup>118</sup> Ill. S. Ct. R. 756(f), cmt. (recognizing “the vast unmet and burgeoning legal needs of persons of limited means in Illinois, and the unique role that lawyers play in providing greater access to these critical legal services”).

<sup>119</sup> *Pro Bono Publico (For the Good of the Public)*, FLA. B.: PRO BONO PUBLICO HISTORY, <https://www.floridabar.org/public/probono/probono002> (last visited June 15, 2021).

<sup>120</sup> *Pro Bono Reporting*, *supra* note 115.

<sup>121</sup> *Id.* (summarizing the *pro bono* reporting requirements of the nine states).

<sup>122</sup> *See, e.g.*, MISS. RULES PRO. CONDUCT R. 6.1(b) (2005) (suggesting 20 hours of *pro bono* services and/or \$200 in contributions); RULES GOVERNING N.M. BAR R. 24-108 (2008) (suggesting 50 hours of *pro bono* services and/or \$500 in contributions).

<sup>123</sup> STANDING COMM. ON PRO BONO & PUB. SERV., AM. BAR ASS’N, SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS, 30–31 (2009), [https://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/as/report2.pdf](https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/as/report2.pdf). Maryland is one such state; MD. RULES ATTORNEYS r. 19-503 (2019).

<sup>124</sup> This was after much research and discussion among the bar, legal services organizations, and law schools. *See* ADVISORY COMM. ON N.Y. STATE PRO BONO BAR ADMISSION REQUIREMENTS, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK AND THE PRESIDING JUSTICES OF THE FOUR APPELLATE DIVISION DEPARTMENTS 9–10 (2012), <http://www.nycourts.gov/attorneys/probono/ProBonoBarAdmissionReport.pdf>.

performed for governmental, judicial, and not-for-profit organizations.<sup>125</sup> Additionally, applicants must submit a certified affidavit for each *pro bono* project being used to satisfy the requirement.<sup>126</sup> California affirmatively rejected an analogous pre-admission *pro bono* requirement while New Jersey and Connecticut initiated preliminary investigations but took no further action.<sup>127</sup>

The criticisms of mandatory reporting are many.<sup>128</sup> Some claim that it is a shame tactic and an inappropriate way to inspire service, asserting that it may actually reduce the quality of service provided because it is not motivated by a desire to do a “good deed.”<sup>129</sup> Others assert that legal aid lawyers are in the best position to provide public interest services.<sup>130</sup> From a philosophical perspective, some express concern that the mandatory nature fosters inaccurate reporting or allows reporting services that are not truly *pro bono* services for low-income individuals as defined by Rule 6.1, thereby diluting what “*pro bono*” truly means.<sup>131</sup> For instance, Indiana’s requirement broadly defines *pro bono* services to include discounted services offered at less than 50% of the individual attorney’s rate.<sup>132</sup> The most staunch critics claim mandatory *pro bono* service constitutes involuntary servitude that is violative of the U.S. Constitution.<sup>133</sup>

Most jurisdictions do not report data gathered from mandatory reporting.<sup>134</sup> Further, there appears to be even less analytical analysis to determine

<sup>125</sup> *Id.*

<sup>126</sup> *Application for Admission to Practice as an Attorney and Counselor-at-Law in the State of New York*, N.Y. ST. SUP. CT. APP. DIVISION (Jan. 2020), [http://ww2.nycourts.gov/sites/default/files/document/files/2021-01/F-Bar\\_Admissions-Pro%20Bono%20Requirements.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2021-01/F-Bar_Admissions-Pro%20Bono%20Requirements.pdf).

<sup>127</sup> *Bar Pre-Admission Pro Bono*, AM. BAR ASS’N, [https://www.americanbar.org/groups/probono\\_public\\_service/policy/bar\\_pre\\_admission\\_pro\\_bono/](https://www.americanbar.org/groups/probono_public_service/policy/bar_pre_admission_pro_bono/) (last visited June 15, 2021).

<sup>128</sup> See generally Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question: Against*, 49 MD. L. REV. 78 (1990).

<sup>129</sup> Tricia DeFilipps, *Attorneys’ Ethical Responsibility to Provide Pro Bono Legal Services to Those in Need*, 33 BUFF. PUB. INT. L.J. 1, 18 (2014).

<sup>130</sup> Rima Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, 78 LA. L. REV. 547, 575 (2017).

<sup>131</sup> AM. BAR ASS’N, STANDING COMM. ON PRO BONO AND PUB. SERV., NEW YORK’S 50-HOUR PREADMISSION PRO BONO RULE: WEIGHING THE POTENTIAL PROS AND CONS, 2–3 (Oct. 2013), [https://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/lp\\_pb\\_preadmission\\_pro\\_bono\\_requirement\\_white\\_paper.pdf](https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lp_pb_preadmission_pro_bono_requirement_white_paper.pdf).

<sup>132</sup> Emily Kile-Maxwell & Kristina Coleman, *Pro Bono Matters: Indiana’s Pro Bono Reporting System Reflects Growing Participation*, IND. LAW. (Aug. 19, 2020), <https://www.theindianalawyer.com/articles/pro-bono-matters-indianas-pro-bono-reporting-system-reflects-growing-participation>.

<sup>133</sup> See generally John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 HOFSTRA L. REV. 1229 (1991).

<sup>134</sup> See, e.g., PRESIDENT’S COMM. ON ACCESS TO JUST. & THE COMM. ON LEGAL AID, INFORMATIONAL REPORT ON MANDATORY REPORTING OF PRO BONO WORK AND OF CONTRIBUTIONS TO LEGAL SERVICES ORGANIZATIONS 6 (2014), <http://nylawyer.nylj.com/adgifs/decisions14/062014report.pdf>.

whether these requirements actually produce additional *pro bono* service.<sup>135</sup> It, therefore, is difficult to weigh the pros of mandatory reporting, assess needs going forward, and optimize *pro bono* participation. The lack of a consistent definition of “*pro bono*” also leads to an inability to make apples-to-apples comparisons of programs.<sup>136</sup> But, based on what information is available, it is clear that mandatory reporting requirements are not a viable solution to the Justice Gap.<sup>137</sup> Even Florida, the longest available case study, reports that although the number of attorneys volunteering grew after mandatory reporting was adopted, “*pro bono* hours have not increased at the same rate.”<sup>138</sup>

*ii. Optional Pro Bono Reporting*

Optional *pro bono* reporting is what it sounds like: the jurisdiction allows for, but does not require, *pro bono* service hour reporting.<sup>139</sup> Thirteen states employ annual voluntary reporting: Arizona, Connecticut, Georgia, Kentucky, Louisiana, Montana, North Carolina, Ohio, Oregon, Tennessee, Texas, Virginia, and Washington.<sup>140</sup> Eleven states have implemented voluntary *pro bono* reporting requirements since 2000, potentially indicating a positive trend.<sup>141</sup> The two most recent states to implement the policy—Virginia and North Carolina—did so in 2017.<sup>142</sup> In Virginia, the implementation of voluntary reporting came only after Virginia attorneys reacted negatively to a mandatory reporting proposal.<sup>143</sup> After the backlash, the Supreme Court of Virginia ultimately elected to adopt optional reporting.<sup>144</sup>

In general, responses to voluntary reporting have been more favorable than those associated with mandatory reporting. On the whole, attorneys seem to

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<sup>135</sup> *Id.* at 10 (“Almost all states that have mandatory reporting and all states that have voluntary reporting do not disclose information reported by individual attorneys.”).

<sup>136</sup> Sirota, *supra* note 130 at 570.

<sup>137</sup> As one scholar put it, “No reliable basis of comparison to states without such a requirement exists, however, and studies conducted thus far have yet to establish a positive effect from mandatory reporting.” *Id.* at 571–72.

<sup>138</sup> Notably, however, even though Florida’s *pro bono* hours have not steadily increased, the amount of monetary donations has increased, with the highest reported amount occurring in the past year. *Pro Bono Publico*, *supra* note 119.

<sup>139</sup> See *Pro Bono Reporting*, *supra* note 115 (describing voluntary *pro bono* reporting as “rules suggesting that attorneys volunteer such information”).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Peter Vieth, *Bar Won’t Back Pro Bono Reporting*, VA. LAW.’S WKLY. (Oct. 10, 2016), <https://valawyersweekly.com/welcome-ad/?retUrl=/2016/10/17/bar-wont-back-pro-bono-reporting-2/> (noting that the vote against mandatory *pro bono* reporting “was a blow to a proposal that came from a Supreme Court-appointed commission and ha[d] the backing of legal aid groups and many large law firms, as well as [statewide bar associations]”).

<sup>144</sup> See *Voluntary Pro Bono Reporting FAQs*, VA. STATE BAR, [https://www.vsb.org/site/members/voluntary\\_pro\\_bono\\_reporting\\_faqs](https://www.vsb.org/site/members/voluntary_pro_bono_reporting_faqs) (last updated Aug. 17, 2020).



prefer voluntary reporting because its optional nature permits opting out while theoretically allowing for the simultaneous recognition of attorneys who are generous with their service.<sup>145</sup> However, critics argue that it historically has a low response rate and that it otherwise is not effective at encouraging *pro bono* service because of its voluntary nature.<sup>146</sup>

As with mandatory reporting, not much information is publicly shared regarding the impact of voluntary reporting. In general, the traditionally low reporting rates suggest that it is not successful at creating real, lasting change in service to low-income people.<sup>147</sup> Maryland, which does provide *pro bono* data, noted that it saw a 2% increase in total *pro bono* hours reported between 2002 and 2014.<sup>148</sup> Although *any* increase would seem on its face to be positive, the same period saw a 29% increase in the number of attorneys; the average number of hours per attorney actually decreased from 33.16 to 29.46.<sup>149</sup> And between 2014 and 2019, Maryland reported an overall *decline* in the percentage of attorneys participating in *pro bono* work, from 42.4% to 39.7%.<sup>150</sup> Although voluntary reporting may motivate some attorneys to perform additional *pro bono* work, it is clear—as is the case with mandatory *pro bono* reporting—that it does not inspire enough service to meaningfully narrow the Justice Gap.

### *iii. Aspirational Pro Bono Service Recommendations*

The vast majority of remaining jurisdictions, i.e., those with no *pro bono* reporting requirement, either simply recite Rule 6.1 in their rules of professional conduct or include a slightly modified rule.<sup>151</sup> Without any hard data, tracking the *pro bono* participation in these jurisdictions is incredibly challenging. However, the 2020 National Center for Access to Justice “Justice Index” lists the top six jurisdictions with the “best practices for ensuring access to justice” as Washington, D.C., Maryland, Massachusetts, Connecticut, California, and Hawaii, and identifies South Dakota, Alabama, Nevada, New

<sup>145</sup> *Pro Bono Reporting*, *supra* note 115.

<sup>146</sup> *Id.*

<sup>147</sup> *See id.*

<sup>148</sup> *Pro Bono Reporting—The Experience in Two States: Florida (First to Adopt) and Maryland (A Neighboring Bar)*, VA. STATE BAR, <https://www.vsb.org/docs/access-reporting-2016/pro-bono-reporting-FL-MD.pdf> (last visited June 15, 2021).

<sup>149</sup> *Id.*

<sup>150</sup> ADMIN. OFF. OF THE CTS., CURRENT STATUS OF PRO BONO SERVICE AMONG MARYLAND LAWYERS 9 (2020), <https://www.courts.state.md.us/sites/default/files/import/probono/pdfs/probonorepor t20182019.pdf>.

<sup>151</sup> Sirota, *supra* note 130 at 568. Most states follow the ABA’s lead, with no state requiring any *pro bono* hours from its attorneys. About half of the states have adopted the ABA goal of 50 voluntary hours per year, with the remainder setting a lesser goal—generally, 20 to 30 hours per year—or making no specific recommendation regarding the number of hours. Moreover, all states with a *pro bono* rule follow the ABA’s broad latitude in encouraging direct services for indigent clients but allowing service through many other avenues as well.

Hampshire, North Dakota, and Texas as the worst.<sup>152</sup> Although certainly not definitive, mandatory reporting of pro bono service arguably played at least some role in Maryland, Connecticut, and Hawaii appearing on the “best” list, whereas jurisdictions with only aspirational recommendations largely fell on the “worst” list.

*D. Moving Beyond a Top-Down Approach to Pro Bono Service*

Even if responsible for some progress, reporting requirements and aspirational goals have not inspired the necessary voluntary service required to bridge the Justice Gap.<sup>153</sup> Of course, the current access-to-justice crisis is a multi-faceted issue with a complicated history and various foundational issues.<sup>154</sup> Increased pro bono service will address only the effects of an inequitable justice system and will not cure the root causes of the Justice Gap, but it can nevertheless narrow the divide. And the time for change has never been more apt. In order to accomplish the needed mobilization, the authors propose changing the narrative from a top-down approach focused on laudable platitudes, jurisdictional reporting policies, and aspirational guidelines to a bottom-up approach where legal professionals are not only encouraged, but empowered, to offer services—in coordination with other stakeholders—from every corner of the legal profession.

The key is to identify the catalyst that will lead individuals to act collectively and rise in solidarity with a shared purpose of addressing injustice and inequality.<sup>155</sup> Bystanders must be converted into what some scholars call “up-standers,” individuals who will “contribute to a solution through action.”<sup>156</sup> The fundamental question presented is how to motivate lawyers to rise up and collectively act to provide pro bono service to low-income Americans.<sup>157</sup> Like other social justice movements, this is an issue of timing—identifying an event or moment in time that will motivate and activate individual attorneys.<sup>158</sup> The legal profession has successfully come together in the past to respond to short-term tragedies, demonstrating the enormous potential of grassroots legal collaboration.<sup>159</sup> There also have been limited efforts to

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<sup>152</sup> *Justice Index*, NAT’L CTR. FOR ACCESS TO JUST., <https://ncj.org/state-rankings/2021/justice-index> (last visited June 15, 2021).

<sup>153</sup> See *supra* sections III.C.1., III.C.2.

<sup>154</sup> See *supra* section III.A.

<sup>155</sup> Gia Nardini, et al., *Together We Rise: How Social Movements Succeed*, 31 J. CONSUMER PSYCH. 112, 114 (2021).

<sup>156</sup> *Id.* at 113.

<sup>157</sup> *Id.*

<sup>158</sup> For an explanation of the events that combined to enable the Black Lives Matter movement, see *id.* at 125–30.

<sup>159</sup> Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 145–46 (2004) (describing post-9/11 attorney collaboration in New York City).

collaboratively address the Justice Gap, some of which have revealed that care must be taken to ensure that stakeholder interests are aligned and focused on service to low-income people.<sup>160</sup>

The necessary spark for a sustained movement very well may be the COVID-19 contagion. This monumental event created a confluence of events that negatively impacted the Justice Gap: a substantially greater need for indigent civil legal services, a significant reduction in IOLTA funding, and a marked decrease in personal interactions.<sup>161</sup> The coronavirus both aggravated and highlighted the inequity, and as a result, it has the potential to act as the necessary “social change tipping point.”<sup>162</sup> Scholars have described the signs of the inflection point as follows:

People need to feel *able to contribute* because they have access, time, knowledge, allies, power, and a voice or platform; people need to *want to contribute* because they feel an inner motivation fueled by their convictions or passions to become involved; and people need to feel they *have to contribute* because they feel a compulsion to do so, whether based on their own moral compass, the fear of missing the moment, or simply because it feels like the right thing to do.<sup>163</sup>

The aftereffects of the pandemic will significantly impact low-income Americans for the foreseeable future.<sup>164</sup> As the country begins to rebound, focusing on bottom-up collaboration between *pro bono* stakeholders may be the elusive key to initiate a grassroots movement and finally begin to mend the Justice Gap.<sup>165</sup> Old conventions have already been discarded, and the new environment presents an ideal opportunity to revisit *pro bono* service differently within the legal profession. To ignite this change, legal professionals

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<sup>160</sup> See Malka Herman, Note, *Creating a “Great Pro Bono Practice,”* 109 CAL. L. REV. 701, 716–18 (2021) (pointing out that “the interests of big law attorneys are not always aligned with the interests of the [public interest law organizations] they work with”); see also *id.* at 148 (“It is important that the advantages of pro bono—its decentralized structure, collaborative relationships, pragmatic alliances, and flexible approaches—receive full attention. Yet these advantages must be carefully weighed against the systemic challenges that pro bono poses: its refusal to take on corporate practice and its dilettantish approach to advancing the interests of marginalized groups”).

<sup>161</sup> See JUSTICE FOR ALL, *supra* note 34 at 4 (“[R]ecent events have only amplified the urgency of a crisis a half-century or more in the making”). See generally Baillie & Bernstein-Baker, *supra* note 37 at 60 (explaining the history of the Justice Gap and related issues).

<sup>162</sup> Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

<sup>163</sup> Nardini et al., *supra* note 155 at 130.

<sup>164</sup> There is growing concern that although the economy has begun to rebound, some negative effects of the pandemic—especially on low-income Americans—may be long-lasting. See, e.g., Nelson D. Schwartz, *New York Faces Lasting Economic Toll Even as Pandemic Passes*, N.Y. TIMES (June 20, 2021), <https://www.nytimes.com/2021/06/20/business/economy/new-york-city-economy-coronavirus.html>.

<sup>165</sup> See, e.g., Karen Natzel, *So How Do We Work Together Now? Reimagine Workplace Collaboration*, VA. LAWS. WKLY. (June 7, 2021), <https://valawyersweekly.com/2021/06/07/so-how-do-we-work-together-now-reimagine-workplace-collaboration/> (opining that “the pandemic is a pivotal moment in time for how we choose to show up in our lives and shape our work worlds”).

must first appreciate the scope of the benefits that emanate from *pro bono* work, and then they must collectively take small steps toward furthering *pro bono* efforts.

#### IV. THE BENEFITS OF *PRO BONO* SERVICE: BEYOND THE MORAL IMPERATIVE

The moral case for *pro bono* service speaks for itself, but the personal, business, and professional cases for such service demand further investigation. It is these additional benefits—which inure to the individuals, firms, and organizations partaking in *pro bono* work—that have been underestimated and could hold the key to mobilizing action at the grassroots level.

##### *A. Pro Bono Service Enhances Attorney Well-Being*

Many pitch *pro bono* work to attorneys as “the right thing to do.”<sup>166</sup> It is, of course, but this obligation should not be viewed in a vacuum. *Pro bono* service does not provide assistance to the recipients alone; it also benefits the individual providing the service.<sup>167</sup> When used as the sole focus of a top-down message to increase *pro bono* work, the right-thing-to-do narrative can actually be counterproductive. Although *pro bono* service is unobjectionable morally, that limited focus may make *pro bono* work seem inaccessible or unappealing in a profession where many suffer from anxiety, depression, and substance abuse.<sup>168</sup> Those struggling with work overload or burnout might view volunteerism as just another item on the never-ending to-do list. But *pro bono* representations can provide a sense of order and control to an otherwise chaotic profession because attorneys can usually control the process and, at times, the outcome. And when done within a supportive work environment, attorneys can feel—and be—more productive and valued, thereby increasing workplace satisfaction.<sup>169</sup>

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<sup>166</sup> See e.g., John M. Burman, *Wyoming Attorneys’ Pro Bono Obligation*, 5 WYO. L. REV. 421, 428 (2005) (“In the absence of an ethical or a legal duty to furnish *pro bono* legal services, the question for each lawyer becomes, ‘Why should I? Spending time providing *pro bono* services will reduce the time I spend representing clients who can pay, take time from my family, or both.’ The simple answer is because it’s the right thing to do, i.e., it’s morally correct”); Rhode, *supra* note 100 at 1211 (arguing that a *pro bono* requirement “would make failure to contribute service morally illegitimate” and “reinforce the message that such contributions are not only a philanthropic opportunity, but also a professional obligation”).

<sup>167</sup> See *infra* Section IV.A.

<sup>168</sup> See Patrick R. Krill, Ryan Johnson, & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICT MED. 46, 46 (2016); Peggy A. Thoits & Lyndi N. Hewitt, *Volunteer Work and Well-Being*, 42 J. HEALTH & SOC. BEHAV. 115, 126–27 (2001); Patrick Krill, *ALM Survey on Mental Health and Substance Abuse: Big Law’s Pervasive Problem*, LAW.COM (Sept. 14, 2018), <https://www.law.com/2018/09/14/alm-survey-on-mentalhealth-and-substance-abuse-big-laws-pervasive-problem/>.

<sup>169</sup> See Thoits & Hewitt, *supra* note 168 at 126.

*Pro bono* service can benefit attorneys on an individual level. Lawyers deal with occupational stress and often an effort-reward imbalance—where effort outweighs reward—that can lead to dissatisfaction or other undesirable outcomes.<sup>170</sup> Unsurprisingly, stress theory suggests that the presentation of high demands with little individual control creates negative physical and mental consequences.<sup>171</sup> At the same time, volunteer work can benefit the provider’s physical and mental well-being.<sup>172</sup> Witnessing volunteer legal representation change the life of a client is rewarding.<sup>173</sup> It also is refreshing and can both renew faith in the profession and improve personal well-being.<sup>174</sup> At least one study demonstrated that attorneys who perform *pro bono* work reported feeling a resultant “sense of purpose.”<sup>175</sup> This can help counterbalance the inevitable negative aspects of the profession and can ultimately reduce stress.<sup>176</sup> Such statistics should serve as a focal point to market and ultimately increase participation in *pro bono* service, which is critical in a world where the moral imperative has been inadequate on its own to mobilize a sufficient number of attorneys into action.<sup>177</sup>

### B. *Pro Bono Service Pays Dividends to Law Firms*

It has long been touted that *pro bono* service can provide attorneys direct client contact, new subject-matter expertise, improved oral and written advocacy skills, case management opportunities, courtroom experience, and goodwill with peers, all of which can benefit firms indirectly.<sup>178</sup> With hourly billable rates in some jurisdictions reaching the quadruple digits, there can be no doubt that the legal profession is a business.<sup>179</sup> On paper, *pro bono* work may appear to cost firms money via lost time and opportunity costs. Although arguably true on a micro-level, such a view is shortsighted; there is a

<sup>170</sup> Johannes Siegrist, *Effort-Reward Imbalance at Work – Theory, Measurement and Evidence*, DEPT. OF MED. SOCIO. 2 (2012), [https://www.uniklinik-duesseldorf.de/fileadmin/Fuer-Patienten-und-Besucher/Kliniken-Zentren-Institute/Institute/Institut\\_fuer\\_Medizinische\\_Soziologie/Dateien/ERI/ERI-Website.pdf](https://www.uniklinik-duesseldorf.de/fileadmin/Fuer-Patienten-und-Besucher/Kliniken-Zentren-Institute/Institute/Institut_fuer_Medizinische_Soziologie/Dateien/ERI/ERI-Website.pdf).

<sup>171</sup> See Jan de Jonge et al., *The Demand-Control Model: Specific Demands, Specific Control, and Well-Defined Groups*, 7 INT’L J. OF STRESS MGMT. 269, 279 (2000).

<sup>172</sup> See Thoits & Hewitt, *supra* note 168.

<sup>173</sup> See *id.* at 128.

<sup>174</sup> See *id.*

<sup>175</sup> Pamela Bucy Pierson et al., *Stress Hardiness and Lawyers*, 42 J. LEGAL PRO. 1, 46–50 (2017).

<sup>176</sup> Having a life purpose facilitates dealing with negative stimuli. Stacey M. Schaefer et al., *Purpose in Life Predicts Better Emotional Recovery from Negative Stimuli*, 8 PLOS ONE 11 (Nov. 13, 2013), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0080329>.

<sup>177</sup> See *infra* Section III.B.

<sup>178</sup> SANDRA PHILLIPS ET AL., 3 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 38A:10 (2021) [hereinafter SUCCESSFUL PARTNERING].

<sup>179</sup> See, e.g., Samantha Stokes, *Will Billing Rates for Elite Firms Rise More in 2020?*, AM. LAW. (July 30, 2020), <https://www.law.com/americanlawyer/2020/07/30/will-billing-rates-for-elite-firms-rise-more-in-2020/>.

corresponding long-term value proposition that many overlook.<sup>180</sup> Besides skills development, *pro bono* projects provide attorneys opportunities for teamwork, fulfillment, and pride, which are essential to attorney retention.<sup>181</sup> Associate attrition is on the rise, and firms need to find new ways—beyond money—to retain talent in the long term.<sup>182</sup>

Savvy firms can implement policies and practices that elevate *pro bono* service to an important part of firm and attorney identity. Thus, they can use their abundant resources and the benefits of service to both positively impact the Justice Gap and address firm issues. When considering summer offers and ultimate placements, such changes will also appeal to law students who are looking for a firm with a strong *pro bono* commitment.<sup>183</sup>

More and more potential clients are looking for firms that prioritize community outreach and social justice initiatives.<sup>184</sup> If done earnestly, *pro bono* service can be a valuable marketing tool and perhaps also provide opportunities for firms to partner with clients' in-house counsel to engage in joint *pro bono* work.<sup>185</sup> Firms that incorporate *pro bono* work into their business plans can stand out in an ever-competitive marketplace while serving low-income individuals in society.

### C. Pro Bono Service Benefits Bar Associations

Voluntary bar organizations are constantly competing with one another for members and appeal.<sup>186</sup> But like other volunteer organizations, they must

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<sup>180</sup> See generally, ALAN GUTTERMAN, HILDENBRANDT HANDBOOK OF LAW FIRM MANAGEMENT § 12:18 (2020) [hereinafter MANAGEMENT HANDBOOK].

<sup>181</sup> *Id.*

<sup>182</sup> Kerrie Spencer, *Law Firm Attrition May Be Due to Corporate Culture Not Lack of Perks*, BIGGER L. FIRM (July 24, 2020), <https://www.biggerlawfirm.com/law-firm-attrition-may-be-due-to-corporate-culture-not-lack-of-perks/> (reporting that “despite an increase in perks and benefits, an average salary jump of nine percent, and an average bonus increase of 30 percent, associate turnover still leapt sharply in 2017, with an increase of 28 percent over 2016,” supporting “the theory that firm culture plays a large role in whether younger attorneys choose to stay or leave”).

<sup>183</sup> MANAGEMENT HANDBOOK, *supra* note 180 at § 12:18 (noting that “a law firm’s *pro bono* reputation and programming has become an increasingly important factor for recent law graduates choosing an employer”). For law students with an interest in *pro bono* work, the ABA offers a list of sample interview questions for students to ask law firms in order to gauge a firm’s level of commitment to *pro bono* service. AM. BAR ASS’N, STANDING COMM. ON PRO BONO AND PUB. SERV., THE PATH TO PRO BONO: AN INTERVIEWING TOOL FOR LAW STUDENTS 4 (2008), [https://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/as/path.pdf](https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/as/path.pdf).

<sup>184</sup> MANAGEMENT HANDBOOK, *supra* note 180 at § 12:18.

<sup>185</sup> MANAGEMENT HANDBOOK, *supra* note 180 at § 12:18; see also Esther J. Lardent, *Making the Business Case for Pro Bono*, LAW FIRM PRO BONO PROJECT (2000), [https://www2.nycbar.org/mp3/DoingWellByDoingGood/pbi\\_businesscase.pdf](https://www2.nycbar.org/mp3/DoingWellByDoingGood/pbi_businesscase.pdf).

<sup>186</sup> Robert J. Derocher, *What Have You Done for Me Lately? Bars Focus on Membership*, AM. BAR. ASS’N. (July - Aug. 2004), [https://www.americanbar.org/groups/bar\\_services/publications/bar\\_leader/2003\\_04/2806/membership/](https://www.americanbar.org/groups/bar_services/publications/bar_leader/2003_04/2806/membership/).

demonstrate value to attract and retain members.<sup>187</sup> *Pro bono* service can provide opportunities for fellowship, networking, and teamwork that involve lawyers, judges, and law students.<sup>188</sup> The mission statement of most bar associations focuses in part on service to the public.<sup>189</sup> Thus, because their memberships normally represent a cross-section of legal organizations, they are an ideal platform to bring disparate organizations together to achieve common goals.<sup>190</sup>

#### *D. Pro Bono Service Fosters the Proper Administration of Justice*

As discussed above, the proper administration of justice in our adversarial system requires a great number of additional *pro bono* attorneys.<sup>191</sup> The lack of legal representation more often results in low-income litigants not prevailing in court—even when they should—and perceiving that they were not treated justly.<sup>192</sup> Additionally, SRLs can complicate and prolong the litigation process and drain already limited judicial resources.<sup>193</sup> Prior to the COVID-19 pandemic, public interest organizations were already facing enormous challenges assisting low-income Americans with their civil legal needs.<sup>194</sup> COVID-19 and the concomitant court closures and prolonged unavailability of jury trials exacerbated delays in obtaining access to justice.<sup>195</sup> In a post-COVID-19 world, courts in many areas will face a substantial backlog of criminal cases—which are subject to statutory and constitutional speedy trial requirements—that will necessarily take priority over civil cases.<sup>196</sup> Hence, there is a clear and tangible benefit to encouraging *pro bono* representation because it fosters the efficient administration of justice.

#### *E. Pro Bono Service Creates Service-Minded Future Lawyers*

As the gateway to the legal profession, law schools present the ideal

<sup>187</sup> *Id.*

<sup>188</sup> *See id.*

<sup>189</sup> For example, the ABA's mission is "to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession." *About the ABA*, AM. BAR ASS'N, [https://www.americanbar.org/about\\_the\\_aba/](https://www.americanbar.org/about_the_aba/) (last visited June 15, 2021).

Many bar associations have committees dedicated to *pro bono* service. *See e.g. Standing Committee on Pro Bono and Public Service*, AM. BAR. ASS'N, [https://www.americanbar.org/groups/probono\\_public\\_service/](https://www.americanbar.org/groups/probono_public_service/) (last visited June 15, 2021).

<sup>191</sup> Rhode, *supra* note 100 at 1202.

<sup>192</sup> *See Yee, supra* note 10 at 402–03; Chaney, *supra* note 56.

<sup>193</sup> Ronald W. Staudt & Paula L. Hannaford, *Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers*, 52 SYRACUSE L. REV. 1017, 1018 (2002) ("Self-represented litigants tend to place heavier demands on court resources, especially staff time, compared to litigants represented by counsel.").

<sup>194</sup> JUSTICE FOR ALL, *supra* note 34 at 7.

<sup>195</sup> *New Data Shed Light on Pandemic-Related Backlogs*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/newsroom/at-the-center/2020/new-data-shed-light-on-pandemic-related-backlogs> (last visited Oct. 2021).

<sup>196</sup> *See id.*

opportunity to prepare future lawyers to practice law within a culture of professionalism.<sup>197</sup> They have a captive audience of young, impressionable minds, and they are constantly looking for ways to stand out and compete with other law schools to attract the best talent.<sup>198</sup> *Pro bono* opportunities provide law students with the experience they crave and demonstrate to law firms that these students have both practical skills and certain intangible skills, including experience with client relations and dispute resolution.<sup>199</sup> The number of *pro bono* matters, as well as the complexity and depth of the service, are key ways law schools can market themselves to attract new students, appeal to potential employers, and raise funds to benefit their institutions.<sup>200</sup>

#### V. SPARKING A MOVEMENT: CLOSING THE JUSTICE GAP FROM THE BOTTOM UP

The Justice Gap is solvable with sufficient attorney participation. There are at least 1.3 million attorneys in the United States.<sup>201</sup> But with such an immense and longstanding problem, the key to unlocking broad sweeping change seems elusive. Top-down approaches remove a sense of responsibility from those on the ground who can actually mobilize a grassroots solution.<sup>202</sup> Recognizing the obstacles and challenges limiting the success of broad aspirations and mandatory reporting, these authors offer practical and simple steps that individual stakeholders can take—both individually and collectively—to mend the Justice Gap from the bottom up in a post-pandemic environment. Although this may sound like an impossible Utopian ideal, a

<sup>197</sup> Christina M. Rosas, Note, *Mandatory Pro Bono Publico for Law Students: The Right Place to Start*, 30 HOFSTRA L. REV. 1069, 1078 (2002) (noting that students who provide pro bono service in law school “are more likely to continue to perform such work as attorneys, perhaps effecting a ‘trickle-up’ phenomenon among their senior colleagues who have previously failed to satisfy their pro bono obligation”).

<sup>198</sup> See Baillie & Bernstein-Baker, *supra* note 37 at 66–67 (suggesting that law school admissions policies could include “criteria that examine candidates’ commitment to professional idealism, enlarging clinical opportunities for students, creating extracurricular and cocurricular pro bono programs, and offering courses in poverty law”).

<sup>199</sup> See Ann Marie Cavazos, *Demands of the Marketplace Require Practical Skills: A Necessity for Emerging Practitioners, and Its Clinical Impact on Society - A Paradigm for Change*, 37 NOTRE DAME J. OF LEGIS. 1, 16–17 (2011) (identifying ten key reasons why law clinics provide value to participants).

<sup>200</sup> See Baillie & Bernstein-Baker, *supra* note 37 at 66–68. For example, Yale Law School touts its nearly 30 clinics as “one of the most robust clinical programs in the country” where, “[u]nlike most other schools, students can begin taking clinics—and appearing in court—during the spring of their first year.” *Clinical and Experiential Learning*, YALE L. SCH., <https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning> (last visited June 15, 2021).

<sup>201</sup> *New ABA Data Reveals Rise in Number of U.S. Lawyers, 15 Percent Increase Since 2008*, AM. BAR ASS’N. (May 11, 2018), [https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new\\_aba\\_data\\_reveals/](https://www.americanbar.org/news/abanews/aba-news-archives/2018/05/new_aba_data_reveals/).

<sup>202</sup> Nardini, et al., *supra* note 155 at 134 (“Resolving systemic forces that perpetuate inequality and injustice depends on bottom-up grassroots organizing by social movements.”).



bottom-up approach is actually easy to implement because it relies on micro-actions and not broad-sweeping change. The ideas shared here are not exclusive or revolutionary. Most of them are easy to implement and require little effort to accomplish. Meaningful change does not have to be arduous but requires deliberate collective efforts. With enough support from individual legal professionals, collective action has the potential to create what the fight against the Justice Gap has lacked: a broad movement.

#### A. What Law Schools Can Do.

Law schools already have the foundation in place to make systematic *pro bono* change. The *Standards and Rules for Approval of Law Schools* require law schools to provide “substantial opportunities” for “student participation in pro bono legal services.”<sup>203</sup> Further, a professional responsibility course that includes instruction on, *inter alia*, “the values and responsibilities of the legal profession” is a mandatory part of the curriculum.<sup>204</sup> Some law schools also offer poverty law and public interest courses.<sup>205</sup> Most law schools have formal *pro bono* programs with legal clinics where law students, supervised by licensed attorneys, interact directly with and provide free legal assistance to low-income people.<sup>206</sup> At least thirty-nine law schools—including some of the country’s most prestigious institutions—have mandatory *pro bono* or public service graduation requirements.<sup>207</sup> After three years immersed in a “culture of service,” the hope is that law schools will have inculcated in future lawyers an attitude of professionalism and an understanding of their obligation to, among other things, serve the low-income communities.<sup>208</sup>

The number and variety of legal clinics at law schools have grown

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<sup>203</sup> STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 303(b), 303-3 (2020-21). The related commentary provides that “law schools are encouraged to promote opportunities for law student pro bono service that incorporate the priorities established in Model Rule 6.1” and “to promote opportunities for law students to provide over their law school career at least 50 hours of pro bono service.”

<sup>204</sup> *Id.* at § 303(a)(1).

<sup>205</sup> Larry R. Spain, *The Unfinished Agenda for Law Schools in Nurturing a Commitment to Pro Bono Legal Services by Law Students*, 72 UMKC L. REV. 477, 488 (2003).

<sup>206</sup> See *Description of Program*, AM. BAR ASS’N., [https://www.americanbar.org/groups/center-pro-bono/resources/directory\\_of\\_law\\_school\\_public\\_interest\\_pro\\_bono\\_programs/definitions/pb\\_description/](https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pb_description/) (last visited June 15, 2021).

<sup>207</sup> *Id.* (listing Harvard Law School and University of Pennsylvania Law School as having mandatory programs); *Pro Bono*, AM. BAR. ASS’N. (May 13, 2021), [https://www.americanbar.org/groups/legal\\_education/resources/pro\\_bono/](https://www.americanbar.org/groups/legal_education/resources/pro_bono/) (last visited June 15, 2021) (“These schools may require a specific number of hours of pro bono legal service as a condition of graduation (e.g. 20-75 hours) or they may require a combination of pro bono legal service, clinical work and community-based volunteer work.”).

<sup>208</sup> Baillie & Bernstein-Baker, *supra* note 37 at 67–68, 75 (opining that “law schools have a special responsibility to acquaint students with the public service calling of our profession in general, and to equip students to deal with the problem of the poor in particular”); Cordray, *supra* note 57 at 29–30 (noting that educators seek “to help students maintain the sense of purpose and social commitment that originally inspired them to go to law school, so that it continues to motivate them as students and becomes integrated into their professional identities as lawyers”).

significantly over the past several decades, with almost all law schools now having at least one clinic.<sup>209</sup> Because the clinical model limits the number of student participants per clinic, increased service to low-income people relies on continued enlargement of clinical opportunities, either through additional clinics or external partnerships.<sup>210</sup> Law schools can partner with public interest attorneys, bar association leaders, and local law firms to identify additional attorney supervisors.<sup>211</sup>

Relatedly, law schools that have not done so already might consider incorporating a mandatory *pro bono* service requirement to both increase *pro bono* hours and ingrain in students an attitude of service.<sup>212</sup> Mandatory faculty service could also be considered.<sup>213</sup> Service opportunities can be created beyond the law school perimeter by establishing partnerships with local legal aid entities, bar associations, and law firms.<sup>214</sup> This can include both ongoing service and periodic *pro bono* “service days” for the local community, either as law school standalone events or with partners.<sup>215</sup> Mandatory service may require broadening the defined requirement to include volunteer non-legal community service for the underprivileged, as some law schools may not be located in a geographic area with the legal need or resources to accommodate all students.<sup>216</sup>

Law schools can also incorporate recognition programs for *pro bono* service, as many already do.<sup>217</sup> This might include annual recognition for volunteer service, outstanding student service awards, and recognition at

<sup>209</sup> See *Definitions, Public Interest Clinics*, AM. BAR ASS’N., [https://www.americanbar.org/groups/center-pro-bono/resources/directory\\_of\\_law\\_school\\_public\\_interest\\_pro\\_bono\\_programs/definitions/pi\\_pi\\_clinics/](https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_pi_clinics/) (Aug 19, 2021), for a comprehensive list of law school clinical programs.

<sup>210</sup> Baillie & Bernstein-Baker, *supra* note 37 at 69; see also Cordray, *supra* note 57 at 37 (noting that “opportunities remain limited at many schools, and the quality of placements, projects, and on-site supervision is often mixed”); Spain, *supra* note 205 at 486 (advocating for mandatory law school clinical experience).

<sup>211</sup> Baillie & Bernstein-Baker, *supra* note 37 at 70.

<sup>212</sup> See generally Rosas, *supra* note 197 at 1075–78.

<sup>213</sup> Spain, *supra* note 205 at 490–91.

<sup>214</sup> Baillie & Bernstein-Baker, *supra* note 37 at 70–71.

<sup>215</sup> Spain, *supra* note 205 at 485–86, 491.

<sup>216</sup> However, whenever possible, a “substantial majority” of the student placement opportunities should be focused on service to the poor. James L. Baillie & Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1, the Profession and Legal Education*, 13 MINN. J. OF L. & INEQ. 51, 69 (1995).

<sup>217</sup> For example, the University of Virginia Law School has an excellent recognition program. The Pro Bono Challenge encourages every law student to volunteer at least 25 hours annually. Students who complete their required hours receive a certificate of recognition at the end of their first and second years. Graduating students who have logged at least 75 pro bono hours are recognized in the commencement brochure and receive a certificate of completion signed by the Dean. The graduate(s) who best demonstrates an “extraordinary commitment to pro bono service” is honored with the annual Pro Bono Award. *Definitions, Description of Program*, AM. BAR ASS’N., [https://www.americanbar.org/groups/center-pro-bono/resources/directory\\_of\\_law\\_school\\_public\\_interest\\_pro\\_bono\\_programs/definitions/pb\\_description/](https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pb_description/).

graduation.<sup>218</sup> The overall goal of *pro bono* service in law school is two-fold: to increase service to low-income Americans while developing legal professionals who are prepared and expecting to continue serving low-income individuals as practicing attorneys.<sup>219</sup>

### B. What Law Firms Can Do

Law firms, especially larger ones, have the resources and talent to take a more active role in supporting pro bono service. Partner profits at the country's largest firms continue to rise, even during the pandemic-ridden 2020.<sup>220</sup> Supporting pro bono work cannot just be for show; it needs to emanate from a cultural level.<sup>221</sup> As pointed out above, law schools are getting better at developing lawyers who anticipate that they will continue to provide pro bono service as attorneys.<sup>222</sup> Associates, like other apprentices, learn from the example of their superiors. If senior attorneys are not engaging in pro bono work, then associates will conclude that such service is not valued or expected. A culture of service is not created overnight, but cultural shifts can occur in micromovements.<sup>223</sup> Further, firms can use their hierarchical structure to rapidly expand the sphere of influence within the firm: one partner can affect many associates. Enacting a pro bono policy, leading by example, and carrying on a tradition of service can enable firms to develop a strong pro bono culture.<sup>224</sup>

Big Law is notorious for its high billable hour requirements—2,000 hours or more per year—which often leave little or no spare time for volunteer work.<sup>225</sup> Having pro bono hours count as billable hours would demonstrate that the firm values pro bono efforts and can, in turn, translate into goodwill with associates accustomed to or interested in public service.<sup>226</sup> Firms can also incorporate pro bono service into their reward structure, providing, for

<sup>218</sup> *Id.*

<sup>219</sup> Cordray, *supra* note 57 at 38 (noting “Research on volunteerism suggests that individuals are more likely to contribute if they feel that they have the time and the competence to help, their efforts will be effective, and they have personal involvement with the people whom they are assisting.”).

<sup>220</sup> Brenda S. Jeffreys, *Profits Surged at Am Law 100 Firms in 2020. Can They Keep It Up In 2021?*, AM. LAW. (Apr. 20, 2021), <https://www.law.com/americanlawyer/2021/04/20/profits-surged-at-am-law-100-firms-in-2020-can-they-keep-it-up-in-2021/?sreturn=20210422135840>.

<sup>221</sup> MANAGEMENT HANDBOOK, *supra* note 180 at § 12:18.

<sup>222</sup> See *infra* Section IV.E.

<sup>223</sup> MANAGEMENT HANDBOOK, *supra* note 180 at § 12:7 (noting that “creation of an infrastructure alone will not enable firms to maintain a successful pro bono program over time”).

<sup>224</sup> ALAN GUTTERMAN, BUSINESS TRANSACTIONS SOLUTIONS § 55:151 (2021) (providing an example of a “model” law firm *pro bono* policy).

<sup>225</sup> Roy Strom, *Can Law Firms Measure Ambition Without Billable Hours?*, BLOOMBERG L. (Nov. 4, 2021), <https://news.bloomberglaw.com/business-and-practice/can-law-firms-measure-ambition-without-billable-hours>.

<sup>226</sup> MANAGEMENT HANDBOOK, *supra* note 180 at § 12:10 (noting that many large law firms provide billable hour targets).

example, a nominal bonus or charity donation for completion of a certain number of volunteer hours.<sup>227</sup> Frequent but small rewards can intrinsically motivate people, and public recognition can positively affect both the one being recognized and those witnessing the recognition.<sup>228</sup>

Some firms might even consider mandatory pro bono service to demonstrate their commitment to public service.<sup>229</sup> Of course, if it is merely a mandate without strong firm support, complimentary cultural ideals, and incentives, then it will fail.<sup>230</sup> But if implemented properly, a mandatory pro bono requirement can be transformative for both the firm and its attorneys.

Hiring a dedicated firm pro bono attorney, or at least designating a pro bono coordinator, can be beneficial when paired with other firm efforts. However, doing so simply as a way to delegate and deflect pro bono responsibility can be counterproductive because it displaces the responsibility of many onto a single person and does not perpetuate the level of contribution needed to appreciably affect the Justice Gap.<sup>231</sup> On the other hand, assigning a pro bono coordinator who supports firm attorneys—who also perform pro bono work and/or identify pro bono cases in the community—is an excellent way to organize and encourage pro bono work within the firm, provide support for such services, and engage as many attorneys as possible in the process.<sup>232</sup>

IOLTA accounts are widely used and directly fund access to justice.<sup>233</sup> Firms in those states that do not have mandatory IOLTA participation should

<sup>227</sup> See, e.g., *Pro Bono*, FOX ROTHSCHILD LLP, <https://www.foxrothschild.com/careers-for-students/pro-bono> (last visited Oct. 14, 2021) (noting some firms consider pro bono hours when deciding salary adjustments and yearly bonus awards).

<sup>228</sup> Kaitlin Woolley & Ayelet Fishbach, *It's About Time: Earlier Rewards Increase Intrinsic Motivation*, 114 J. PERSONALITY & SOC. PSYCH. 877, 884–85 (2018).

<sup>229</sup> See MANAGEMENT HANDBOOK, *supra* note 180 at § 12:18.

<sup>230</sup> See *id.* at § 12:7 (noting that “creation of an infrastructure alone will not enable firms to maintain a successful pro bono program over time”).

<sup>231</sup> Rhode, *supra* note 100 at 1202 (noting “the bar’s failure to secure broader participation in pro bono work is all the more disappointing when measured against the extraordinary successes that such work has yielded.”).

<sup>232</sup> *Pro Bono Fellowships and Awards*, HUNTON ANDREWS KURTH LLP, <https://www.huntonak.com/en/about/pro-bono/fellowships-and-awards.html> (last visited Oct. 14, 2021) (noting one national firm hires pro bono “fellows” whose practice is solely “committed to pro bono work”).

<sup>233</sup> Carole J. Buckner, *IOLTAs and Client Trust Accounts*, AM. BAR ASS’N (July 31, 2011), [https://www.americanbar.org/groups/gpsolo/publications/gp\\_solo/2011/july\\_august/ioltas\\_client\\_trust\\_accounts/](https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2011/july_august/ioltas_client_trust_accounts/).

All states have IOLTA programs. IOLTA accounts are mandatory in some states and voluntary in others. Whether mandatory or voluntary, the IOLTA mechanism pools funds that could not otherwise earn interest for individual clients, and the interest on the pooled funds is payable to a state-sponsored IOLTA program. IOLTA programs in turn use the funds to finance charitable and educational endeavors, improvements to the administration of justice, and to provide indigent and low-income persons with legal services.

not opt out of a voluntary IOLTA program.<sup>234</sup> Finally, firms can partner with other firms, area law schools, and local bar associations to expand their reach and benefit from the synergy.<sup>235</sup>

Large law firms have demonstrated the potential of institutional commitment, teamwork, and shared resources to positively impact access to justice.<sup>236</sup> For example, the Pro Bono Institute was formed in 1996, and there are currently 140 member firms that have accepted the challenge to contribute three to five percent of their total billable hours to pro bono service.<sup>237</sup> The Institute provides, among other things, written resources, webinars, pro bono summits, consulting services, and pre-packaged pro bono programs to its members.<sup>238</sup>

### C. What Local Bar Associations Can Do

Much like law firms, bar associations have a unique network of legal talent, but unlike law firms, their goals are generally limited to efforts to promote the profession and educate the public.<sup>239</sup> This different focus allows bar associations the opportunity to creatively drive how *pro bono* work can be done in the local community. Some attorneys who are willing and able to take on *pro bono* representations do not know where to start or are unwilling to spend the time to figure it out. Bar associations can fill that need by working in conjunction with legal aid societies to identify service opportunities, create continuing legal education trainings, and establish a referral network for interested legal professionals.<sup>240</sup>

Forming a *pro bono* committee is a simple step for bar associations to

<sup>234</sup> Olivia Bane, *IOLTA Inadequacies and Proposed Reforms*, 21 WAKE FOREST J. BUS. & INTELL. PROP. L. 83, 85 (2020).

<sup>235</sup> Shanti Ariker, *STARTING A PRO BONO LEGAL PROGRAM IS EASIER THAN YOU THINK* 32 (2020).

<sup>236</sup> DENNIS F. KERRIGAN, 3 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 37A:5 (2021) (discussing the benefits of an institutional commitment).

<sup>237</sup> *About Us*, PRO BONO INST., <http://www.probonoinst.org/about-us/> (last visited Oct. 17, 2021); *Law Firm Pro Bono Challenge Signatories List*, PRO BONO INST., <http://www.probonoinst.org/projects/law-firm-pro-bono/law-firm-pro-bono-challenge-signatory-law-firms/law-firm-pro-bono-challenge-signatories-list/> (last visited Oct. 17, 2021). There is also a challenge for corporate in-house counsel. *Corporate Pro Bono*, PRO BONO INST., <http://www.probonoinst.org/projects/corporate-pro-bono/> (last visited Oct. 17, 2021).

<sup>238</sup> *Resources*, PRO BONO INST., <http://www.probonoinst.org/resources/> (last visited Oct. 17, 2021).

<sup>239</sup> See, e.g., *About the Virginia Bar Association*, VA. BAR ASSOC., [https://www.vba.org/page/about\\_us](https://www.vba.org/page/about_us) (last visited Oct. 17, 2021). The difference between bar associations and law firms is apparent in the nonprofit status held by many bar associations. Gene Takagi, *Bar Associations and Advocacy*, NEO L. GRP. (Aug. 4, 2017), <https://nonprofitlawblog.com/bar-associations-advocacy/>.

<sup>240</sup> See e.g., *What We Do*, LEGAL SERVS. OF N. VA., <https://www.lsnv.org/what-we-do/> (pointing out that Legal Services of Northern Virginia “partner[s] closely with other legal aid organizations, state and local bar associations, as well as the courts to serve the region’s low-income and neediest populations”) (last visited Oct. 17, 2021); see also ABA STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID 80 (2006) (discussing a legal aid provider’s relationship with local and state bar associations).

support *pro bono* activities.<sup>241</sup> A committee allows for brainstorming and discussion to create new and creative ways to serve the current needs of the community.<sup>242</sup> A committee structure also facilitates collaboration between attorneys who practice in different areas to tackle the complex and unique problems facing the in-need individuals of a particular community.<sup>243</sup> A Garnishment Clinic or other group initiative is a great means to bring together attorneys into a collective in order to provide unbundled services.<sup>244</sup> Partnering with a local law school clinic is another avenue to increase resources to support these coordinated efforts.<sup>245</sup>

Recognition of individual attorneys and firms can celebrate, publicize, and incentivize good works. Many bar associations have annual banquets that include awards ceremonies.<sup>246</sup> As part of these ceremonies, bar associations can incorporate recognition for *pro bono* service. These small gestures put *pro bono* at the forefront.

#### D. What Courts Can Do

Courts have a unique opportunity to observe the impact of SRLs in real time. Judges see litigants in their courtrooms daily and can both observe trends and identify specific local needs. Based on this knowledge, as well as their stature in their communities, their actions can directly produce additional *pro bono* service.<sup>247</sup>

Courts can work with local bar associations to create an SRL self-help desk, a courthouse walk-up clinic, or a “courthouse lawyer” program to assist

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<sup>241</sup> See e.g., *Pro Bono Committee*, ALBANY BAR ASS’N, <https://www.albanycountybar.org/page/ProBonoAdvisory> (noting that the Albany Bar Association’s “Pro Bono Committee works to identify, communicate and educate bar members about opportunities that can offer meaningful assistance to the community and strengthen their professional skills development”).

<sup>242</sup> See *id.*

<sup>243</sup> See *id.*

<sup>244</sup> See e.g., *Pro Bono Program*, PEOPLE’S L. LIBRARY OF MD. (2021), <https://www.peoples-law.org/pro-bono-program> (noting garnishment clinic as a list of *pro bono* services in Maryland).

<sup>245</sup> See e.g., *Clinics*, WM. & MARY L. SCH., <https://law.wm.edu/academics/programs/jd/electives/clinics/index.php> (last visited Oct. 17, 2021) (stating that the William & Mary Law School’s “Family Law Clinic students work in the Williamsburg office of the Legal Aid Society of Eastern Virginia, providing legal services to low-income clients that address divorce, custody, support, and equitable distribution matters”).

<sup>246</sup> For instance, the Chicago Bar Foundation hosts an annual Pro Bono & Public Service Award Luncheon. *CBA & CBF Pro Bono & Public Service Awards Luncheon*, CHI. BAR FOUND., <https://chicago-barfoundation.org/awards-celebration/> (last visited Oct. 17, 2021).

<sup>247</sup> As the ABA notes on its website, “Judicial support of *pro bono* can increase lawyer’s acceptance of *pro bono* responsibility and increase the acceptance of *pro bono* as a necessary component of the delivery of access to justice.” *Judicial Promotion of Pro Bono*, ABA, [https://www.americanbar.org/groups/probono\\_public\\_service/policy/judicialparticipation/](https://www.americanbar.org/groups/probono_public_service/policy/judicialparticipation/) (last visited Oct. 16, 2021).

unrepresented litigants.<sup>248</sup> For high-volume courts, a volunteer or legal aid lawyer who is familiar with common issues, such as landlord-tenant matters, could appear in court as part of a legal assistance program to assist indigent parties while streamlining the court's docket.<sup>249</sup> For malpractice coverage reasons, legal aid societies may be able to partner with local attorneys so that the legal aid society's malpractice insurance covers any issues arising from these limited representations.<sup>250</sup>

The Model Code of Judicial Conduct permits a judge to encourage lawyers to provide pro bono services as long as there is no coercion.<sup>251</sup> This includes contacting law firms to see whether they are willing to accept pro bono cases from the court.<sup>252</sup> Additionally, some jurisdictions expressly allow judges to appoint counsel in civil matters.<sup>253</sup> Judges should explore all available options to provide counsel when needed, including instituting incentives like handling pro bono cases first on the docket—which also provides the opportunity for public recognition—and permitting unbundled services representation in pro bono cases.<sup>254</sup> Courts can also implement a pro bono court-appointed list so judges have easy access to attorneys willing to offer their services.<sup>255</sup>

Judges can liaise with legal aid organizations, bar associations, and law firms by, for example, joining local pro bono committees, serving on legal aid boards, and providing pro bono promotional materials.<sup>256</sup> They can also work with their respective clerk's offices to ensure indigent individuals have ready access to information and free legal aid resources. On a more personal

<sup>248</sup> Catherine Peck McEwen, *Pro Bono Isn't Just for Attorneys: How to Organize a Judicial Pro Bono Summit—and Some Ideas on What Judges Can Do Themselves*, BUS. L. TODAY (June 5, 2017), <https://businesslawtoday.org/2017/06/pro-bono-isnt-just-for-attorneys-how-to-organize-a-judicial-pro-bono-summit-and-some-ideas-on-what-judges-can-do-themselves/>.

<sup>249</sup> See *id.*

<sup>250</sup> See *Pro Bono Resource Center*, VA. BAR ASS'N, [https://www.vba.org/page/pro\\_bono\\_resources](https://www.vba.org/page/pro_bono_resources) (last visited Oct. 16, 2021).

<sup>251</sup> MODEL RULES OF JUDICIAL CONDUCT r. 3.7 cmt. 5 (ABA 2020). “Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.” This list is illustrative and not exhaustive. ABA Standing Comm. of Jud. Conduct, Formal Op. 470 (2015) (clarifying that judges may send letters to state bar associations encouraging lawyers to perform *pro bono* work).

<sup>252</sup> Elizabeth Goff Gonzalez, *How Can Judges Perform Pro Bono Activities and Assist in Recruitment of Attorneys to Provide Pro Bono Services?*, 15 NEV. LAW. 22, 23 (2007).

<sup>253</sup> See ABA STANDING COMM. ON PRO BONO AND PUBLIC SERVICE, SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 31 (2009) (noting that the Nevada commentary provides that judges “can request that attorneys accept pro bono representation of cases before them”); see also *Court Programs*, ABA, [https://www.americanbar.org/groups/probono\\_public\\_service/policy/judicial-participation/court-programs/](https://www.americanbar.org/groups/probono_public_service/policy/judicial-participation/court-programs/) (last visited Oct. 17, 2021) (listing jurisdictions where courts appoint attorneys for certain civil *pro bono* matters).

<sup>254</sup> Elizabeth Goff Gonzalez, *How Can Judges Perform Pro Bono Activities and Assist in Recruitment of Attorneys to Provide Pro Bono Services?*, 15 NEV. LAW. 22, 23 (2007).

<sup>255</sup> See McEwen, *supra* note 248.

<sup>256</sup> See *id.*

level, they can encourage pro bono service through speaking engagements, writing articles, attending fundraising events, and serving as faculty for training events—perhaps provided for free in exchange for attendees agreeing to take a pro bono case.<sup>257</sup> Judges can also nominate pro bono lawyers and voluntary bar associations for awards and attend related award ceremonies.<sup>258</sup> And, like attorneys, judges can, of course, make financial contributions to local legal aid societies.<sup>259</sup>

#### *E. What Every Legal Professional Can Do*

Individual lawyers, in conjunction with public interest stakeholders, have increased their *pro bono* service to low-income Americans over the past couple of decades.<sup>260</sup> However, the additional total volunteer hours have not kept pace with the ever-growing need.<sup>261</sup> What the stakeholders have lacked—and what needs to be exploited—is the collaboration necessary to facilitate a self-sustaining movement. With the common goal of meeting the civil legal needs of low-income people, the synergy of grassroots collective action has the greatest potential to begin to close the Justice Gap.<sup>262</sup>

Consumer psychologists have recognized that social change requires a bottom-up approach and have identified the necessary steps to transform an idea of protest into a widespread movement: building grassroots momentum, creating networks, coalescing around multiple leaders, assembling coalitions to expand the effort, and uniting the movement.<sup>263</sup> The access-to-justice initiative already has most of these building blocks in place, and has for quite some time. Existing networks include the LSC and its public interest partners, the ABA, the Conference of Chief Justices, statewide and local bar associations, the courts, the legal academy, and the Pro Bono Initiative.<sup>264</sup> These networks are poised to combine into coalitions with the assistance of established leaders.<sup>265</sup> The missing element is the grassroots momentum of

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<sup>257</sup> *See id.*

<sup>258</sup> *See id.*

<sup>259</sup> *See id.*

<sup>260</sup> JUSTICE GAP 2017, *supra* note 34 at 9; *see also* HOUSEMAN & PERLE, *supra* note 74 at 56. (“Within the last 20 years, a broad access to justice movement has emerged at the state level, including through state supreme courts, access to justice commissions, state IOLTA and other funders, law schools, civil legal aid programs, bar associations, self-help centers, technology initiatives, and researchers on delivery of legal services.”).

<sup>261</sup> Baillie & Bernstein-Baker, *supra* note 37 at 75.

<sup>262</sup> *See* HOUSEMAN & PERLE, *supra* note 74 at 42 (noting that “[a] comprehensive ‘access-to-justice system’ includes a coordinated and integrated civil legal aid system”).

<sup>263</sup> *See generally* Nardini et al., *supra* note 155 at 114–15.

<sup>264</sup> *Id.* at 113–17.

<sup>265</sup> *See id.* at 120–21 (stating that successful social movements “bring together diverse—and sometimes adversarial—organizations and groups operating in the same movement space to form a coalition of allies working together toward a common purpose with a shared agenda” and embrace a “hybrid form of leadership” via collective decision making).



individuals to kickstart the transformation process, which has the potential to close the Justice Gap. However, with collective, bottom-up action in response to the inequity highlighted by the pandemic and its lingering aftereffects, a self-sustaining movement is possible.<sup>266</sup>

Creating the necessary momentum requires individual stakeholder actions to hopefully convert attorney bystanders into upstanders. Small individual acts within each of the stakeholder groups can make all the difference. Law school administrators can expand their school's reach by using law firm attorneys as clinical supervisors and partnering with bar associations to host *pro bono* events.<sup>267</sup> Law firm *pro bono* coordinators can work with other stakeholders to identify service opportunities and provide unbundled services to legal aid societies.<sup>268</sup> Bar association leaders can collaborate with individual attorney members and law firms to sponsor service days and provide referrals.<sup>269</sup> Court personnel can facilitate individual volunteer attorneys in the courthouse, and individual judges can tout the benefits of professionalism and of serving the underprivileged.<sup>270</sup> And legal aid attorneys can act as a resource for training and expertise while simultaneously bringing various stakeholders together with appropriate networking and marketing.<sup>271</sup> Mutual trust and a focus on collaboration can provide the needed momentum and hopefully be the impetus needed for a sustained movement.<sup>272</sup>

Simply put, a bottom-up approach to tackling the Justice Gap requires the buy-in of many. Legal professionals can take small steps to promote *pro bono* efforts, whether by volunteering to serve, raising awareness of the crisis, bringing together local interested stakeholders to identify problems and brainstorm solutions, or some other action. For those who may be overwhelmed with options, perhaps the easiest path is to start a dialogue about *pro bono* service whenever possible. Conversing with peers, mentors, and community members about their respective *pro bono* journeys can broaden the initiative. Learning from what others' experiences and identifying community needs can motivate others to act.

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<sup>266</sup> *See id.* at 113–31 (2021) (“Simply put, when people rise together as upstanders on an issue, particularly one involving injustice or inequality, they forge social movements with the momentum needed to drive social change.”). The exact “moment” that solidifies the momentum is a direct result of “long-term, sustained, often slow community organizing.”

<sup>267</sup> Baillie & Berinstein-Baker, *supra* note 37 at 70.

<sup>268</sup> Rhode, *supra* note 100 at 1210.

<sup>269</sup> *What We Do*, L. SERVS. OF N. VA., <https://www.lsnv.org/what-we-do/> (last visited Oct. 15, 2021).

<sup>270</sup> McEwen, *supra* note 248.

<sup>271</sup> AM. BAR ASS'N, STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID (2006).

<sup>272</sup> Nardini et al., *supra* note 155 at 130.

Legal professionals can no longer wait for the Justice Gap to close itself because it will not.<sup>273</sup> They cannot idly sit by and rely on the status quo because the gap continues to expand.<sup>274</sup> Lawyers should act not only out of a sense of morality but because they too benefit from serving others. Every legal professional can take some step toward service, however small it may seem. Collective individual contributions with a common goal can create a movement. Make small differences and know that they will add up to big change, not just to close the Justice Gap, but to enhance the profession.

#### CONCLUSION

The Justice Gap is a symptom of a larger problem within the field of law, where not enough attorneys appreciate the benefits of *pro bono* service to the legal profession itself, and too few lawyers understand the potential value of their contributions. If legal professionals focus on taking a collaborative approach that starts from the bottom up, instead of focusing on mandates and aspirational goals that lack accountability and incentives, they can start to mend the Justice Gap from the bottom up. In so doing, they have the potential to blaze a trail ahead where lawyers are empowered to provide *pro bono* services and where law schools, firms, bar associations, and the courts support them. The potential to close the Justice Gap is here. With many more low-income Americans having unmet civil needs, the post-pandemic landscape presents a unique opportunity to illuminate the Justice Gap and serve as the tipping point to address this longstanding crisis. True access to justice can be realized if a sufficient number of legal professionals are willing to seize the moment and do something to advance the *pro bono* cause, regardless of how small that something may seem. Together we can spark a movement.

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<sup>273</sup> LEGAL SERVS. CORP., *supra* note 88 at 1.

<sup>274</sup> *Id.* at 28.