

NEW YORK UNIVERSITY LAW REVIEW

VOLUME 88

DECEMBER 2013

NUMBER 6

BRENNAN LECTURE

LIBERTY AND JUSTICE FOR SOME: HOW THE LEGAL SYSTEM FALLS SHORT IN PROTECTING BASIC RIGHTS

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The legal community has long recognized that indigent citizens often lack access to the judicial system. Pro bono programs and legal aid organizations have attempted to address this issue. In the Nineteenth Annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice, Wallace B. Jefferson, former Chief Justice of the Supreme Court of Texas, argues that there are barriers to justice not only for the indigent but also for middle-class Americans. He explores how our most valuable rights are often the least protected. Tenants subject to eviction rarely have counsel, veterans wait years to receive earned benefits, and juveniles cannot invoke the Sixth Amendment to challenge civil fines. Chief Justice Jefferson explores reforms and alternatives that are available when traditional paths to justice are blocked, and he highlights some of the obstacles faced in creating these alternatives.

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* Copyright © 2013 by Wallace B. Jefferson, Chief Justice, Retired, Supreme Court of Texas. A version of this speech was delivered on February 27, 2013, for the annual Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice at New York University School of Law. I want to acknowledge the contributions of my staff attorney, Rachel Ekery, who is, for all practical purposes, co-author of this paper. I would also like to thank David Slayton, director of our Office of Court Administration, and James Hernandez, our intern, for their research assistance.

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INTRODUCTION

When only a third of Americans can name the three branches of government, something is wrong.¹ Fewer than half of our middle schoolers know what the Bill of Rights guarantees.² Two-thirds of us can identify an *American Idol* judge, but only fourteen percent can name the Chief Justice of the United States.³ Within this collective ignorance, the Pledge of Allegiance stands as a notable exception. Written in 1892, the pledge first appeared in a youth magazine that urged students to recite the affirmation.⁴ Fifty years later, Congress passed, and the President signed, a joint resolution codifying the custom of pledging allegiance to the flag.⁵ Today, the Pledge is the most widely recited promise in the nation, required by law in the public schools of most states.⁶ Over time, its text has evolved,⁷ but one

¹ See Howard Blume, *Building the Case for Civics Lessons; Sandra Day O'Connor Promotes an Online Program to Teach How Government Works*, L.A. TIMES, Dec. 27, 2011, at AA1 (explaining Americans' "slim knowledge of civics—and the potential risk it poses to American democracy").

² See Sam Dillon, *Civics Education Called National Crisis*, N.Y. TIMES, May 5, 2011, at A23 (reporting the results of a civics examination taken by eighth graders).

³ Mary Kate Cary, *Civics 101: The Supreme Court vs. American Idol*, U.S. NEWS & WORLD REP. THOMAS JEFFERSON ST. BLOG (Apr. 13, 2010), <http://www.usnews.com/opinion/blogs/mary-kate-cary/2010/04/13/civics-101-the-supreme-court-vs-american-idol>.

⁴ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004).

⁵ Pub. L. No. 77-623, 56 Stat. 377, 380 (1942) (codified as amended at 4 U.S.C. § 4 (2012)).

⁶ Most states have passed laws encouraging, if not requiring, daily recitation of the pledge. See, e.g., CAL. EDUC. CODE § 52720 (West 2006) (requiring "appropriate patriotic exercises" at the beginning of each school day and stating that the pledge "shall satisfy the requirements of this section"); N.Y. EDUC. LAW § 802 (McKinney 2009) (requiring the education commission to prepare a program providing for daily pledge of allegiance); TEX. EDUC. CODE § 25.082(b)(1) (West 2012) (requiring students to recite the pledge each day); see also *State Requirements on Pledge of Allegiance in Schools*, PROCON.ORG, <http://undergod.procon.org/view.resource.php?resourceID=000074> (last visited Oct. 11, 2013) (illustrating the states that require students to recite the pledge and those that allow students the option).

⁷ Before the Pledge was codified, the National Flag Conferences exchanged the phrase "my Flag" for the modern "the flag of the United States of America." *Elk Grove*, 542 U.S. at 6 (internal quotation marks omitted). In 1954, Congress added the words "under God." Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249 (1954) (codified as amended at 4 U.S.C. § 4 (2012)). In 2002, shortly after the Ninth Circuit concluded that a California school district's practice of teacher-led recitation of the Pledge with the words "under God" violated the Establishment Clause, Congress "reaffirmed the exact language that has

phrase has endured: In schools, at naturalization ceremonies,⁸ at public events, and judicial investitures,⁹ we affirm our loyalty to a nation that promises “liberty and justice for all.”

Are we living up to this ideal? Differences in financial status, educational disparities, access to those in positions of power—each of these factors and others influence whether a person whose rights are violated has the ability to forge a remedy in court. The rule of law, practiced by experts in the legal profession, exists to afford a remedy even for the poor, the ignorant, and the powerless. Yet, in the real world, many fundamental rights are illusory. We are not living up to the ideal.

I

BARRIERS TO JUSTICE

For those who can afford it, we have a top-notch legal system. Highly qualified lawyers, who know the art of cross-examination and who compose scholarly briefs, help courts dispense justice fairly and efficiently. But that kind of representation comes at a price. More often, litigants lack wealth, insurance is absent, and public funding is not available. Some of our most essential rights—those involving our families, our homes, and our livelihoods—are the least protected.

Veterans languish an average of eight months before the government processes their claims for disability, pension, and educational benefits.¹⁰ Their poverty rate has increased.¹¹ They face physical and mental trauma, and they comprise twenty percent of the homeless

appeared in the Pledge for decades.” Act of Nov. 13, 2002, Pub. L. No. 107-293, § 2, 116 Stat. 2057, 2060 (2002) (codified at 4 U.S.C. § 4 (2012)); *see also* *Newdow v. U.S. Cong.*, 328 F.3d 466, 489 (9th Cir. 2003) (holding it impermissible for schools to coerce students to recite the Pledge), *rev’d on other grounds sub nom. Elk Grove*, 542 U.S. at 1.

⁸ *See, e.g.*, Jeff Kunerth, *Memorable Fourth of July Celebration: Dozens Pledge Loyalty as U.S. Citizens*, ORLANDO SENTINEL, July 5, 2013, at B1 (describing naturalization ceremony and new citizens’ recitation of the Pledge of Allegiance).

⁹ *See, e.g.*, Ellen Carnes, *Lehrmann Sworn In as Texas Supreme Court Justice*, 74 TEX. BAR J. 198, 198 (2011) (noting that Justice Debra H. Lehrmann’s sons led the Pledge of Allegiance at her investiture ceremony).

¹⁰ *See* James Dao, *Veterans Wait for Benefits as Claims Pile Up*, N.Y. TIMES, Sept. 28, 2012, at A1 (noting the average claims-processing rate in 2012).

¹¹ *See* NAT’L CTR. FOR VETERANS ANALYSIS & STATISTICS, U.S. DEP’T OF VETERANS AFFAIRS, HEALTH INSURANCE COVERAGE, POVERTY, AND INCOME OF VETERANS: 2000 TO 2009, at 9 (2011), *available at* http://www.va.gov/vetdata/docs/SpecialReports/HealthIns_FINAL.pdf (“In 2000, about 5.0 percent of Veterans were living in poverty. By 2009, the poverty rate for Veterans was 6.3 percent.”).

population.¹² They experience significantly higher rates of unemployment than nonveterans.¹³

The financial crisis has created ripple effects throughout society. Lower- and middle-income homeowners and tenants are grappling with legal issues as never before.¹⁴ Facing foreclosure or eviction, they can little afford representation to protect their rights. Over the past several years, high numbers of consumers and small businesses have sought bankruptcy protection.¹⁵

American children are also at risk when interacting with the legal system. A family's lack of resources dramatically affects domestic matters, like custody and child support. Apart from that, families must grapple with issues involving juvenile justice. Texas has one of the largest school systems in the nation, with more than 4.4 million students.¹⁶ Children who misbehave in school are often issued tickets and may be charged with Class C misdemeanors.¹⁷ They must appear in

¹² *United States: Leave No Veteran Behind*, *ECONOMIST*, June 4, 2011, at 38, available at <http://www.economist.com/node/18775315> (noting that “[n]early a fifth of the homeless population in the United States are veterans” and that more face physical and mental challenges).

¹³ Marta Hoes, Comment, *Invisible Wounds: What Texas Should Be Doing for the Mental Health of Its Veterans*, 13 *TEX. TECH ADMIN. L.J.* 369, 373 (2012) (comparing the unemployment rate of veterans with the national average and finding the former to be elevated in comparison to the latter).

¹⁴ See Aleatra P. Williams, *Real Estate Market Meltdown, Foreclosures and Tenants' Rights*, 43 *IND. L. REV.* 1185, 1187 (2010) (“The consequence of the current real estate market collapse and the resulting foreclosures and their effect on the tenant market is unparalleled in history.”); Chris Arnold, *Foreclosures Loom Large for Middle Class*, *NPR* (Aug. 14, 2009, 12:34 PM), <http://www.npr.org/templates/story/story.php?storyId=111890779> (“[A]s the crisis expands, it’s dragging down more middle-class Americans who are making less money because of the battered economy.”).

¹⁵ Although data suggest that consumer and small business bankruptcies may now be declining, their levels remain elevated, with 2010 levels more than three times what they were in 2006. See *Drop in Small Business Bankruptcies Outpaces Decline in Consumer Bankruptcies*, *EQUIFAX*, 1 (2011), <http://www.equifax.com/ecm/pressroom/BankruptcyDataPrimerFinal.pdf> (charting the rate of small business and consumer quarterly petitions for bankruptcy from the first quarter of 2006 through the last quarter of 2010).

¹⁶ See *TEX. APPLESEED, TEXAS'[S] SCHOOL-TO-PRISON PIPELINE: DROPOUT TO INCARCERATION 3* (2007), available at <http://www.texasappleseed.net/pdf/Pipeline%20Report.pdf> (finding that at least 4.4 million students attend public schools in the state’s 1037 school districts).

¹⁷ See Wallace B. Jefferson, *Recognizing and Combating the “School-to-Prison” Pipeline in Texas*, *NAT’L CTR. FOR STATE COURTS*, <http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Other-pages/SchoolToPrison-Pipeline-In-Texas.aspx> (last visited Oct. 11, 2013); see also Erik Eckholm, *With Police in Schools, More Children in Court*, *N.Y. TIMES* (Apr. 12, 2013), <http://www.nytimes.com/2013/04/12/education/with-police-in-schools-more-children-in-court.html> (noting that Texas students given criminal citations at schools “may face hundreds of dollars in fines, community service and, in some cases, a lasting record that could affect applications for jobs or the military”).

court to contest the charges but they have no right to counsel.¹⁸ Cash-strapped families forgo representation, often with devastating consequences, such as arrest warrants and criminal records.¹⁹

Thirty years ago, then-president of Harvard University Derek Bok delivered a stinging assessment of our system of justice.²⁰ He observed that our country, which prides itself on efficiency and fairness, “has developed a legal system that is the most expensive in the world, yet cannot manage to protect the rights of most of its citizens.”²¹ He famously observed that “[t]here is far too much law for those who can afford it and far too little for those who cannot.”²²

Is the picture any brighter today? This Lecture’s title—the Justice William J. Brennan, Jr. Lecture on State Courts and Social Justice—is fitting, because it is our state courts that citizens turn to most often, and Justice Brennan, whose judicial roots were planted in the New Jersey state-court system,²³ was probably well aware of that fact. The overwhelming majority of civil cases—more than ninety-five percent—are filed in state courts.²⁴ To ask whether liberty and justice are available to all, we must first diagnose the health of our state courts. If those courts are inaccessible, so is our justice system.

It comes as no surprise that the poor lack access to justice; without the means to hire a lawyer, their legal needs frequently go unmet. But the problem is not exclusively one of indigency. In fact, the poor benefit from an infrastructure geared toward assisting with

¹⁸ See Eckholm, *supra* note 17 (noting that although students may be “sent to court for relatively minor offenses” they “seldom get legal aid”).

¹⁹ See TEX. APPLESEED, TEXAS’S SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST & USE OF FORCE IN SCHOOLS 71 (2010), available at http://www.texasappleseed.net/images/stories/reports/Ticketing_Booklet_web.pdf (noting that juveniles in Texas do not have a right to appointed counsel in Class C misdemeanor cases and observing that young people may plead guilty to such charges simply because they are unaware of viable defenses).

²⁰ See Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).

²¹ *Id.* at 574.

²² *Id.* at 571.

²³ Linda Greenhouse, *William Brennan, 91, Dies; Gave Court Liberal Vision*, N.Y. TIMES, July 25, 1997, at A1 (noting that Justice Brennan “began his judicial career on the state courts of New Jersey”).

²⁴ In 2010, for example, 18,980,531 civil cases (98.5%) were filed in state courts; 282,307 (1.5%) were filed in federal courts. *Civil Caseloads Fell 3 Percent in 2010: Civil Graphics 1*, COURT STATISTICS PROJECT (Sept. 24, 2012), <http://www.courtstatistics.org/Civil/20121Civil.aspx> (follow “Get Data” hyperlink) (state case figure); *Table C: U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2009 and 2010*, U.S. COURTS, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C00Mar10.pdf> (showing 282,307 civil cases filed in U.S. district courts between April 1, 2009 and March 31, 2010).

their critical needs. In 1974, Congress created the Legal Services Corporation, now the “single largest funder of civil legal aid for low-income Americans in the nation.”²⁵ The LSC provides grants to 134 independent nonprofit legal aid programs in more than 800 offices.²⁶ Countless other organizations provide ad hoc pro bono legal services, and private lawyers help bridge the gap by volunteering their services.²⁷ In some cases, states provide constitutional and statutory rights to counsel for the indigent.²⁸ Although the U.S. Supreme Court has held that the Due Process Clause of the Fourteenth Amendment does not always require the appointment of counsel for indigent parents in parental rights termination proceedings,²⁹ most states mandate appointed counsel in such cases.³⁰ In my own court, we have had tremendous success with a pro bono program that matches appellate lawyers with indigent pro se litigants for cases the court would like to study further.³¹ Increasingly across the country, there is talk of, if not funding for, “civil *Gideon*,” providing low-income individuals with lawyers in civil cases when “basic human needs” are at issue.³²

²⁵ LEGAL SERVS. CORP., *Fact Sheet on the Legal Services Corporation*, <http://www.lsc.gov/about/what-is-lsc> (last visited Oct. 11, 2013).

²⁶ *Id.*

²⁷ See, e.g., Wendy L. Watson, *The U.S. Supreme Court's In Forma Pauperis Docket: A Descriptive Analysis*, 27 JUST. SYS. J. 47, 56 (2006) (observing that given the “informal legal advice for prison inmates . . . [and] similar networks of legal support for indigent civil litigants” that exist, “[l]ay-legal-support services may actually be more available to indigent communities, including prison populations, than they are to citizens in somewhat more affluent nonindigent communities,” so that “the collective knowledge and advice of these groups may give indigent pro se petitioners an edge over paying pro se petitioners”).

²⁸ See, e.g., MONT. CODE ANN. § 41-3-425 (2011) (requiring appointment of counsel for indigent parent in termination proceeding); NEB. REV. STAT. § 43-279.01 (2013) (same); N.J. STAT. ANN. § 30:4C-15.4 (2008) (same); see also, e.g., Pasqua v. Council, 892 A.2d 663, 675–76 (N.J. 2006) (recognizing that the state constitution’s due process guarantee requires assignment of counsel for indigents facing civil commitment proceedings).

²⁹ See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27, 31–32 (1981) (rejecting a categorical right to counsel in parental termination cases and holding that trial courts should instead weigh the factors outlined in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to assess the need for counsel on a case-by-case basis).

³⁰ See, e.g., Vivek Sankaran, *A National Survey on a Parent’s Right to Counsel in Termination of Parental Rights and Dependency Cases*, YOUTH, RTS. & JUST., <http://www.youthrightsjustice.org/documents/surveyparentrighttocounsel.pdf> (last visited Oct. 11, 2013) (outlining states in which parents have a statutory or state constitutional right to counsel in termination and dependency cases); see also *Lassiter*, 452 U.S. at 33–34 (noting that “[a] wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution” and observing that thirty-three states have statutes requiring the appointment of counsel in termination cases).

³¹ For a general description of the program, see Michael S. Truesdale, *Why I Support Appellate Pro Bono Services (and Why You Should Too)*, 24 APP. ADVOC. 614, 617–19 (2012).

³² See, e.g., AM. BAR ASS’N, REPORT OF THE TASK FORCE ON ACCESS TO CIVIL JUSTICE ON RESOLUTION 112A 1 (Aug. 7, 2006), available at <http://www.americanbar.org/>

Of course, we have a long way to go before we are meeting the legal needs of the poor. Federal funding cuts and nearly nonexistent interest rates have sharply reduced the availability of legal aid in recent years,³³ even as more Americans are qualifying for legal assistance³⁴ in the wake of an 8.9% drop in real median income in the United States from its 1999 peak.³⁵ Nonetheless, the existing infrastructure provides some assistance for our neediest citizens. This raises another question, however: What about those individuals who do not qualify for legal aid but still cannot afford a lawyer?

The middle class and small businesses find our system unworkable and unaffordable.³⁶ Statutory rights to counsel generally apply

content/dam/aba/administrative/legal_aid_indigent_defendants/lr_sclaid_06A112A.auth checkdam.pdf (urging “federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake” and providing examples such as actions involving “shelter, sustenance, safety, health or child custody”). In *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963), the Supreme Court of the United States held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a criminal case.

³³ Congress has cut Legal Services Corporation’s funding from \$420 million in 2010 to \$404 million in 2011 and \$348 million for 2012. Catherine Ho, *Groups Funded by Legal Services to Cut Jobs in 2012*, WASH. POST, Jan. 30, 2012, at A12. In 2012, “Texas experienced a \$6.2 million loss in federal funds to the three largest legal aid providers in the state due to federal funding cuts to the Legal Services Corporation.” TEX. ACCESS TO JUSTICE COMM’N, A REPORT TO THE SUPREME COURT ADVISORY COMMITTEE FROM THE TEXAS ACCESS TO JUSTICE COMMISSION ON THE COURT’S UNIFORM FORMS TASK FORCE 3 n.13 (2012) [hereinafter REPORT TO THE SUPREME COURT], available at <http://www.texasatj.org/files/file/041012TAJReporttoSCACREVISED.pdf>. Funds from Texas IOLTA accounts dropped from \$20 million in 2007 to just \$4.4 million four years later. *Id.* IOLTA, an acronym that stands for “Interest on Lawyers’ Trust Accounts,” represents interest earned on pooled trust accounts that lawyers hold for their clients and is a major source of legal aid funding. See *Funding a Way to Justice For All*, FORT WORTH STAR-TELEGRAM, Mar. 16, 2011, at A10; see also Texas State Bar Rules, art. XI, § 2 (2008) (asserting that interest income on certain client funds held by attorneys “should be used to provide additional legal services to the indigent in civil matters”).

³⁴ See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1–2 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (noting that the number of unrepresented litigants appearing before certain courts, “especially those courts that deal with issues affecting low-income people,” has increased and that many unrepresented individuals “are low-income people who qualify for legal aid”).

³⁵ CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011, at 5 (2012), <http://www.census.gov/prod/2012pubs/p60-243.pdf>.

³⁶ See, e.g., Order in the Matter of the Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005, at 4 (Wash. 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf> (noting that a 2003 study showed that the legal system was unaffordable for moderate-income households—those with incomes between 200% and 400% of the federal poverty level); Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United*

only to the indigent, as do most pro bono efforts.³⁷ Legal aid eligibility is generally capped at 125% of federal poverty guidelines.³⁸ Thus, a family of four with an income of \$30,000 generally will not qualify for services.³⁹ But after that family pays for shelter, sustenance, and the other necessities of daily life, it is unlikely that family will be able to afford a lawyer for even the most basic legal necessities.⁴⁰

With no real alternative, litigants are increasingly representing themselves. Although there are no comprehensive statistics on self-represented litigants in our nation's courts,⁴¹ an American Bar Association (ABA) survey found that 60% of state judges recently noted an increase in the number of litigants representing themselves.⁴² In Texas, the number of petitioners filing family law cases pro se increased from 15.9% in 2011 to 17% in 2012.⁴³ And that number does not account for self-represented *defendants*.⁴⁴ In New York, 2.3 million pro se litigants try to find their way through the civil justice system each year.⁴⁵ In New Hampshire, 70% of divorce cases involve

States, 7 WASH. U. J.L. & POL'Y 1, 2 (2001) ("It remains true, however, that the poor, and even the middle class, encounter financial impediments to a day in court. They do not enjoy the secure access available to those with full purses or political muscle."); Stephen N. Zack, *Justice in Jeopardy*, THE HILL'S CONGRESS BLOG (Mar. 17, 2011, 3:47 PM), <http://thehill.com/blogs/congress-blog/judicial/150531-justice-in-jeopardy> (reporting on an American Bar Association (ABA) survey showing that lawyers and judges believe that "small businesses are increasingly unable to obtain speedy, reasonably affordable justice").

³⁷ See, e.g., TEX. FAM. CODE § 107.013(a)(1) (West Supp. 2012) ("In a suit filed by a governmental entity in which termination of the parent-child relationship is requested, the court shall appoint an attorney ad litem to represent the interests of . . . an indigent parent of the child who responds in opposition to the termination.").

³⁸ Financial Eligibility Policies, 45 C.F.R. § 1611.3(c)(1) (2012).

³⁹ *But see* 45 C.F.R. § 1611.5(a) (2012) (noting that in some instances, eligibility may be capped at 200% of the federal poverty guidelines by household size as determined by the Department of Health and Human Services); *see also* Notice, 78 Fed. Reg. 5182, 5183 (Jan. 24, 2013) (establishing a poverty guideline of \$23,550 for a four-person household). Thus, in some instances, a household of four making less than \$47,100 can qualify.

⁴⁰ See Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719, 721 (2001) ("The fact is that the majority of Americans live on quite modest incomes and lack the discretionary spending power necessary to purchase expensive legal services in today's market.").

⁴¹ See Nathan Koppel, *More Strapped Litigants Skip Lawyers in Court*, WALL ST. J., July 22, 2010, at A4 (noting the lack of such statistics).

⁴² *Id.*

⁴³ OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY, FISCAL YEAR 2012, at 71 (2013), available at <http://www.txcourts.gov/pubs/AR2012/AR12.pdf>; *see also* Avi Salzman, *Going It Alone in Divorce Court*, N.Y. TIMES, Sept. 11, 2005, at CT1 (noting that the percentage of self-represented parties in divorce cases in Connecticut increased nearly five percent from 2004 to 2005).

⁴⁴ See OFFICE OF COURT ADMIN., *supra* note 43 (reporting only on percentage of self-represented petitioners).

⁴⁵ REPORT TO THE SUPREME COURT, *supra* note 33, at 16.

at least one self-represented party.⁴⁶ In Connecticut, 85% of family cases involve at least one such person.⁴⁷ In New Jersey, a stunning 99% of defendants in landlord-tenant disputes last year appeared pro se.⁴⁸

This is not just a problem in trial courts; nearly a third of the U.S. Supreme Court's *in forma pauperis* petitions were filed by self-represented litigants,⁴⁹ and more than a fifth of all petitions for review filed in my court in the first three months of 2012 involved pro se petitioners.⁵⁰ Even without comprehensive statistics, the number of people representing themselves appears significant. Yet, we have more lawyers than at any time in our history. "In 1960, there was one lawyer for every 627 people in the United States";⁵¹ today, there is one for every 252.⁵² Certainly, it can be argued that more lawyers are necessary in an increasingly complex world. Nevertheless, it is ironic that, as litigants are increasingly forced to represent themselves, law school graduates cannot find jobs.⁵³ What accounts for this mismatch,

⁴⁶ John T. Broderick, Jr., *The Changing Face of Justice in a New Century: The Challenges It Poses to State Courts and Court Management*, in *FUTURE TRENDS IN STATE COURTS* 2010, at 60, 62 (Carol R. Flango et al. eds., 2010), available at <http://nscs.contentdm.oclc.org/cdm/singleitem/collection/ctadmin/id/1605/rec/2>.

⁴⁷ Chase T. Rogers, Chief Justice, Connecticut Supreme Court, Keynote Address at the Connecticut Bar Association 1 (June 11, 2012), available at <http://www.nscs.org/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/CBA%20Annual%20Meeting%20Dinner%202012.ashx>.

⁴⁸ John J. Farmer, Jr., Op-Ed., *To Practice Law, Apprentice First*, N.Y. TIMES, Feb. 18, 2013, at A17.

⁴⁹ See Watson, *supra* note 27, at 52 (reviewing the percentage of such petitions for the terms 1976 through 1985).

⁵⁰ See Truesdale, *supra* note 31, at 618.

⁵¹ Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAM L. REV.* 275, 275 (1992).

⁵² Dividing the number of people in the United States by the number of attorneys shows that there is one attorney for every 251.94 people. See PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, *POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010*, at 4 tbl.2 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf> (showing total U.S. population as 308,745,538); James Podgers, *State of the Union: The Nation's Lawyer Population Continues to Grow—Barely*, 97 *A.B.A. J.* 58, 58 (2011) (noting that as of December 31, 2010, there were 1,225,452 "resident and active" attorneys in the United States); see also Bok, *supra* note 20, at 571 (observing that the United States has more lawyers per thousand persons than "any major industrialized nation—three times as many as in Germany, ten times the number in Sweden, and a whopping twenty times the figure in Japan").

⁵³ Catherine Rampell, *The Lawyer Surplus, State by State*, N.Y. TIMES (June 27, 2011, 11:35 AM), <http://economix.blogs.nytimes.com/2011/06/27/the-lawyer-surplus-state-by-state/> (noting that "across the country, there were twice as many people who passed the bar in 2009 . . . as there were [job] openings").

and how can we ensure that our system is accessible to all segments of our society?⁵⁴

The problems we face are not uniquely American. Chief Justice Beverley McLachlin has spoken eloquently about Canada's struggles to make its legal system more accessible to the poor and middle class alike. We should listen closely to what she has to say:

The Canadian legal system is sometimes said to be open to two groups—the wealthy and corporations at one end of the spectrum, and those charged with serious crimes at the other. The first have access to the courts and justice because they have deep pockets and can afford them. The second have access because, by and large, and with some notable deficiencies, legal aid is available to the poor who face serious charges that may lead to imprisonment. To the second group should be added people involved in serious family problems, where the welfare of children is at stake; in such cases the Supreme Court has ruled that legal aid may be a constitutional requirement.

It is obvious that these two groups leave out many Canadians. Hard hit are average middle-class Canadians. They have some income. They may have a few assets, perhaps a modest home. This makes them ineligible for legal aid. But at the same time, they quite reasonably may be unwilling to put a second mortgage on the house or gamble with their child's college education or their retirement savings to pursue justice in the courts. Their options are grim: use up the family assets in litigation; become their own lawyers; or give up.⁵⁵

Her assessment also rings true in America. Is this acceptable? Are we satisfied with a system that serves only the few? If not, how can we fix it?

II

BREAKING DOWN BARRIERS

Increased pro bono work by lawyers is always a good idea, and many lawyers do step in to help those who could not otherwise afford their services. New York now requires bar applicants to complete fifty

⁵⁴ One explanation focuses on financial incentives. See John O. McGinnis & Russell D. Mangas, Op-Ed., *First Thing We Do, Let's Kill All the Law Schools*, WALL ST. J., Jan. 17, 2012, at A15 (observing that the steep cost of legal education results in higher legal fees, making legal services unaffordable to the middle class “at a time when increasing complexity demands more access to these services” and concluding that “the current system leaves citizens underserved and young lawyers indebted”).

⁵⁵ Beverley McLachlin, Chief Justice of Canada, Remarks at the Empire Club of Canada (Mar. 8, 2007) (internal citations omitted), available at <http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2007-03-08-eng.aspx>.

hours of pro bono legal work.⁵⁶ Many law schools mandate pro bono service from their students⁵⁷ and have created legal clinics providing excellent representation for the indigent.⁵⁸

As noted above, my court adopted a pro bono appellate program several years ago.⁵⁹ We noticed that self-represented, indigent parties sometimes presented issues warranting closer study, but we knew that those individuals might not be able to brief and argue the case as well as trained counsel could. We created a pilot program that matched pro bono appellate lawyers with litigants in those cases. If three justices determine that the case presents a compelling legal question and requires extensive briefing, we refer the case to our program. The pro se litigant is offered a volunteer attorney, who is aided by a board-certified appellate attorney, to provide briefs on the merits and, if review is granted, to argue the case in our court.

We have referred dozens of cases to that program. More than three hundred lawyers have signed up to participate. Several of our intermediate appellate courts have adopted similar initiatives, and we are in the process of taking it statewide.

But encouraging or even requiring pro bono representation cannot match the scale of the problem. In 2009, Texas attorneys provided as many as 2.5 million hours of free legal or indirect services to the poor.⁶⁰ While this is impressive, we are still meeting only about twenty to twenty-five percent of the civil legal needs of low-income Texans.⁶¹ Even if we required every Texas lawyer to represent at least one client pro bono, we would serve less than forty percent of indigent

⁵⁶ N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (2013) (imposing the pro bono requirement on graduates who will be admitted to the bar on or after January 1, 2015 and following an examination); see also Joel Stashenko & Christine Simmons, *Lippman Unveils Rule Detailing Bar Admission Pro Bono Mandate*, 248 N.Y. L.J., Sept. 20, 2012, at 1 (reporting on the new requirement).

⁵⁷ See Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1364 (2007) (“While mandatory pro bono remains hotly contested within the organized bar, the majority of American law schools have already implemented some type of pro bono program and many have adopted mandatory requirements.”).

⁵⁸ See, e.g., *Clinical Education at UT Law*, U. TEX. AUSTIN SCH. L., <http://www.utexas.edu/law/clinics/> (last visited Oct. 11, 2013) (describing seventeen clinical programs at the University of Texas School of Law, including a Housing Clinic and a Transnational Worker Rights Clinic).

⁵⁹ For a general description of the program, see Truesdale, *supra* note 31, at 617–19.

⁶⁰ D’Arlene Verduin & Paul Ruggiere, *State Bar of Texas Survey of 2009 Pro Bono*, TEX. ACCESS TO JUST. COMM’N, at i (Mar. 31, 2010), <http://www.texasatj.org/files/file/Pro%20Bono%20Survey%202009.pdf>.

⁶¹ *Facts and Figures*, TEX. ACCESS TO JUST. COMM’N, <http://www.texasatj.org/facts> (last visited Oct. 11, 2013).

individuals in need of legal services,⁶² to say nothing of the millions of middle-class individuals who need representation. In Southwest Texas alone, 2.6 million people qualify for legal aid.⁶³ That means that there are 21,000 potential clients for every lawyer employed by the region's main legal aid office.⁶⁴ This situation is echoed across the country.⁶⁵ Increased funding would help provide more services. But in today's economic climate, even maintaining existing funding has proved challenging.⁶⁶

Still, there have been recent governmental efforts to increase access to legal help. In 2010, the U.S. Department of Justice established the Access to Justice Initiative to address the crisis in our justice system.⁶⁷ Two related goals of the initiative are to “[p]romote less lawyer-intensive and court-intensive solutions to legal problems” and to “[e]xpand research on innovative strategies” to close the justice gap.⁶⁸ The initiative has partnered with a Middle Class Task Force to take steps to bolster foreclosure mediation programs and assist veterans with legal challenges.⁶⁹

⁶² REPORT TO THE SUPREME COURT, *supra* note 33, at 5.

⁶³ *Who We Are*, TEX. RIO GRANDE LEGAL AID, <http://www.trla.org/about/who-we-are> (last visited Oct. 11, 2013).

⁶⁴ *Id.*

⁶⁵ See Gillian Hadfield, *Lawyers, Make Room for Nonlawyers*, CNN (Nov. 25, 2012, 12:25 PM), <http://www.cnn.com/2012/11/23/opinion/hadfield-legal-profession> (arguing that “the demand for ordinary legal help is simply too massive to meet with increased court funding, legal aid or pro bono work”).

⁶⁶ There has been a persistent campaign in Texas for legal aid funding. See Letter from Wallace B. Jefferson, Chief Justice, Supreme Court of Tex., and Nathan L. Hecht, Justice, Supreme Court of Tex., to Royce West, Tex. State Senator 2 (June 1, 2011), *available at* http://www.supreme.courts.state.tx.us/advisories/Letter_West_060111.pdf (seeking funding for basic civil legal services for indigent Texans). In 2011, the Texas legislature authorized gap funding for legal aid. See Press Release, Tex. Access to Just. Comm'n, Texas Access to Justice Commission and Foundation Applaud the Texas Legislature for Providing Funding for the State's Legal Aid System (July 21, 2011), *available at* <http://www.texasatj.org/commissionandfoundationapplaudlegislature> (describing the Texas Legislature's appropriation of \$17.5 million for civil legal aid and \$7.6 million for county indigent defense programs to compensate for a decline in IOLTA funding); see also H. Con. Res. 22, 82d Leg., 1st Called Sess. (Tex. 2011) (commending members of the Texas Supreme Court for advocating for funding “to ensure that all citizens have equal access to the civil justice system”).

⁶⁷ See Eric Holder, U.S. Attorney General, Remarks at the Shriver Center Awards Dinner (Oct. 14, 2010), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-1010141.html> (commenting on the establishment of the Access to Justice Office).

⁶⁸ MELANCA CLARK & DANIEL OLMOS, U.S. DEP'T OF JUSTICE, ACCESS TO JUSTICE INITIATIVE, REPORT FROM THE MARCH 7, 2011, WORKSHOP AT THE U.S. DEPARTMENT OF JUSTICE (2011), *available at* <http://www.justice.gov/atj/foreclosure-mediation.pdf>.

⁶⁹ See Brian Levine, *Helping Middle-Class Families Pursue Justice*, WHITE HOUSE BLOG (Nov. 19, 2010, 4:31 PM), <http://www.whitehouse.gov/blog/2010/11/19/helping-middle-class-families-pursue-justice> (describing remarks by Vice President Biden

But neither money nor additional pro bono work is enough.⁷⁰ And if neither money nor increased pro bono will suffice to meet the challenge, what more can we do?

A. *Increasing Access for Self-Represented Litigants*

Technology has the capability to increase access to justice, particularly for self-represented litigants. Today, courts publish their decisions on their own websites, rather than relying exclusively on commercial electronic databases. Case information, including parties' briefs, is readily available to anyone with a computer. Ten years ago, a person who wanted to see an oral argument in our court had to travel to Austin or purchase a recording (available only on cassette tape). Today, those arguments are webcast live and available to anyone, anywhere in the world, at any time and at no cost.⁷¹

These technological changes may have bolstered an economically motivated increase in the number of self-represented litigants, but self-represented litigants are nothing new. Our country's founders believed self-representation to be a basic right of a free society, and the Supreme Court has held that the Sixth Amendment to the U.S. Constitution guarantees that right in criminal cases.⁷² Today, that right is provided for by statute in civil cases in the federal courts⁷³ and by the provisions of state constitutions, statutes, or procedural rules in the courts of most states.⁷⁴

concerning recent efforts to boost foreclosure mediation programs, help veterans facing legal challenges, and assist workers in finding qualified attorneys).

⁷⁰ Derek Bok, echoing a call for reform that still rings true, has argued:

[M]oney alone will not suffice. In cases involving . . . disputes that touch the lives of ordinary folk, judges will have to develop less costly ways of resolving disputes Likewise, lawyers will need to devise new institutions to supply legal services more cheaply. Such changes, in turn, will undoubtedly force the organized bar to reexamine traditional attitudes toward fee-for-service and the unauthorized practice of law.

Bok, *supra* note 20, at 580.

⁷¹ *Texas Supreme Court Oral Argument Search*, TEX. B. CLE, <http://www.TexasBarCLE.com/CLE/TSCSearch.asp> (last visited Oct. 11, 2013).

⁷² *Faretta v. California*, 422 U.S. 806, 832 (1975) (“The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history.”).

⁷³ 28 U.S.C. § 1654 (2006) (“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.”).

⁷⁴ *See, e.g.*, ALA. CONST. art. I, § 10 (“That no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.”); N.C. GEN. STAT. § 1-11 (2012) (“A party may appear either in person or by attorney in actions or proceedings in which he is interested.”); TEX. R. CIV. P. 7 (“Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.”); JONA GOLDSCHMIDT ET AL., AM. JUDICATURE

Guaranteed or not, however, self-representation presents problems both for litigants and courts. Parties get lost in a maze designed for trained professionals. There is also the perception, perhaps unfounded, that their claims are more likely to be frivolous.⁷⁵ And larger pro se dockets increase systemic costs, as courts devote additional resources to self-represented parties, exacting a toll on court staff and judges. As self-represented parties proliferate, so do problems of access.

Nonetheless, these are cases that go to the core of American families' rights and well-being. Certain types of cases, historically including family law and welfare benefits cases, are more prevalent on the U.S. Supreme Court's *in forma pauperis* docket, which also includes a high proportion of self-represented litigants.⁷⁶ Any solution, then, requires that we confront the persistent reality that people are forced to proceed alone.

How can state courts help ensure that pro se parties get the process they are due? We can find some guidance in *Turner v. Rogers*, a 2011 U.S. Supreme Court decision.⁷⁷ To put that case in context, recall *Gideon v. Wainwright*, decided almost fifty years earlier.⁷⁸ Clarence Gideon had been arrested in Florida and charged with breaking and entering.⁷⁹ Gideon, who could not afford a lawyer, asked the Florida courts to appoint one.⁸⁰ The trial court refused because Florida law guaranteed counsel only in capital cases.⁸¹ Gideon represented himself at trial, and the jury returned a guilty verdict.⁸² While serving his sentence, Gideon, using a pencil and prison stationery, wrote a petition to the U.S. Supreme Court,⁸³ which granted certiorari.⁸⁴ Gideon

SOC'Y, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 23, 130–34 (1998), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/106> (listing the fifteen states that protected the right by constitution or statute in 1998).

⁷⁵ See, e.g., Watson, *supra* note 27, at 52 (noting that the high percentage of self-represented litigants on Supreme Court's *in forma pauperis* docket contributes to "the perception that the [*in forma pauperis*] petitions are more frivolous than the paid petitions; a claim that appears frivolous when expressed by an uneducated layperson may take on a patina of legitimacy when presented by trained legal counsel").

⁷⁶ *Id.* at 51–52.

⁷⁷ 131 S. Ct. 2507 (2011).

⁷⁸ 372 U.S. 335 (1963).

⁷⁹ *Id.* at 336.

⁸⁰ *Id.* at 337.

⁸¹ *Id.*

⁸² *Id.*

⁸³ The petition may be viewed at The U.S. National Archives Photostream. Petition for Writ of Certiorari, *Gideon*, 372 U.S. 335 (No. 890), available at <http://www.flickr.com/photos/usnationalarchives/4127740637/in/photostream/>.

⁸⁴ *Gideon v. Cochran*, 370 U.S. 908 (1962).

argued that the Constitution guaranteed him counsel in criminal proceedings,⁸⁵ a proposition that the Court (of which Justice Brennan was then a member) adopted.⁸⁶ On retrial, Gideon—now represented by counsel—was acquitted.⁸⁷

After *Gideon*, courts and advocacy groups struggled with how the ruling might apply in the civil realm. Eighteen years later, the Supreme Court ruled out a categorical constitutional right to counsel in parental rights termination proceedings⁸⁸ and for some time afterwards, hopes for a “civil *Gideon*” remained dormant.⁸⁹ More recently, however, there has been renewed interest in a civil *Gideon*,⁹⁰ which came to a head in *Turner v. Rogers*.⁹¹

Turner originated in the South Carolina state courts.⁹² A South Carolina family court had ordered Michael Turner to make weekly child support payments to Rebecca Rogers. When Turner failed to pay, the clerk ordered him to appear and explain why he should not be held in contempt. Turner and Rogers, each representing themselves, appeared at the hearing. After questioning Turner, the court held him in contempt, and he was incarcerated.

While serving his sentence, Turner—now represented by pro bono counsel—appealed.⁹³ He argued that the trial court’s refusal to appoint counsel violated his constitutional right to counsel. The South Carolina Supreme Court rejected his argument,⁹⁴ and Turner petitioned the Supreme Court of the United States for certiorari, which the Court granted.⁹⁵

Dealing an apparent blow to civil *Gideon* advocates nationwide, the Court held that the Constitution’s Due Process Clause does not

⁸⁵ *Gideon*, 372 U.S. at 337.

⁸⁶ *Id.* at 345.

⁸⁷ Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181, 185 (2003).

⁸⁸ See *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 31 (1981).

⁸⁹ Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 980 (2012) (“Following *Lassiter*, civil *Gideon* hopes lay fallow for many years.”).

⁹⁰ See *id.* (noting that the renewal was perhaps fueled in part by the call to action in a 1997 speech by U.S. District Judge Robert Sweet at the Yale Law School).

⁹¹ 131 S. Ct. 2507 (2011).

⁹² See *id.* at 2513. The Brennan Center for Justice at New York University School of Law submitted an amicus brief in support of the petitioner. Brief for Nat’l Ass’n of Criminal Def. Lawyers, Brennan Ctr. for Justice, Nat’l Legal Aid and Defender Ass’n, S. Ctr. for Human Rights & Am. Civil Liberties Union as Amici Curiae Supporting Petitioner, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10), 2011 U.S. S. Ct. Briefs LEXIS 33.

⁹³ 131 S. Ct. at 2514.

⁹⁴ *Price v. Turner*, 691 S.E.2d 470, 472 (S.C. 2010).

⁹⁵ *Turner v. Rogers*, 131 S. Ct. 504 (2010).

automatically require appointed counsel for an indigent parent facing jail time for civil contempt.⁹⁶ But there is much more to the opinion than that. The Supreme Court explored how lower courts *can* provide adequate process to self-represented litigants in such cases.

The defendant's ability to pay is a critical question in civil contempt proceedings based on the failure to pay child support. The Court, picking up on a point made in an amicus brief submitted by the Solicitor General of the United States,⁹⁷ explained that certain kinds of court-provided procedural safeguards could substitute for the lack of appointed counsel:

Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status[] (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.⁹⁸

The Court observed that these protections "can significantly reduce the risk of an erroneous deprivation of liberty."⁹⁹ The Court also explained how, in certain situations, appointed counsel could make the proceeding "*less* fair overall."¹⁰⁰ It emphasized that, unlike in a criminal case, the person opposing the defendant at a civil contempt hearing is not the government, represented by counsel, but the custodial parent, who may also be unrepresented.¹⁰¹ In such a case, state-appointed counsel for one parent may put the self-represented other parent at an unfair disadvantage and introduce unwarranted "formality or delay."¹⁰² The Court concluded that the Due Process Clause did not require the provision of counsel when the opposing party is unrepresented *and* the State provides "alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings)."¹⁰³ Because neither a lawyer nor those safeguards were provided, however, the Court vacated the South Carolina judgment and remanded the case for further proceedings.¹⁰⁴

⁹⁶ *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011).

⁹⁷ *Id.* at 2519.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 2520.

¹⁰⁴ *Id.*

We have much to learn from this decision and developments since it was issued. First, despite this ruling, civil *Gideon* is not dead; several states have recently taken steps to expand the right to counsel for civil litigants.¹⁰⁵ We may find, as in the parental rights termination context, that the Supreme Court's rejection of a categorical federal constitutional right to counsel leads to state recognition of the right, either by statute or under state constitutions.¹⁰⁶ As Justice Brennan himself urged, state constitutions can be a "font of individual liberties" and may secure rights greater than those guaranteed by the U.S. Constitution.¹⁰⁷ Many states already recognize a right to counsel in civil contempt proceedings that may lead to incarceration,¹⁰⁸ although, to the extent that recognition of the right is based on the U.S. Constitution, *Turner's* full impact remains to be seen.¹⁰⁹

¹⁰⁵ See, e.g., Lawrence J. Siskind, *Civil Gideon: An Idea Whose Time Should Not Come*, AM. THINKER (Aug. 6, 2011), http://www.americanthinker.com/2011/08/civil_gideon_an_idea_whose_time_should_not_come.html (noting that the Alaska Bar Association Board of Governors and the Conference of Delegates of California Bar Associations, now known as the Conference of California Bar Associations, have passed resolutions endorsing civil *Gideon*, that other state bar associations have established committees to examine the issue, and that "[t]he California legislature has enacted a pilot program, funded by increased court cost fees, that is expected to funnel about \$11 million to legal aid societies that provide counsel to civil litigants").

¹⁰⁶ See Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, J. POVERTY L. & POL'Y, July–Aug. 2006, at 186, 191–92 (describing how several states have held that state constitutions provide a categorical right to counsel in parental rights termination cases, despite the lesser standard imposed under the *Lassiter* Court's interpretation of the U.S. Constitution).

¹⁰⁷ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions['] . . . protections often extend[] beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not . . . inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."); see also Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310, 1344 (2003) (noting that remedies clauses, which "guarantee . . . a right of access to the courts to obtain a remedy for injury" and are found in the constitutions of forty states, "may impose some level of responsibility on courts to see that all citizens secure the promise of equal justice under the law").

¹⁰⁸ See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 138–39 (2008) (noting that approximately half of all states recognize a right to counsel in civil contempt proceedings); see also, e.g., TEX. FAM. CODE § 157.163 (West 2008) (providing a right to counsel for indigent respondents facing possible incarceration).

¹⁰⁹ See Patterson, *supra* note 108, at 139 n.244 (observing that "[m]any courts have relied on the Supreme Court's statement in [*Lassiter*] that the indigent individual's interest in personal freedom is the trigger for the right to appointed counsel" (citation omitted)); see also, e.g., *Black v. Div. of Child Support Enforcement*, 686 A.2d 164, 167 (Del. 1996) ("The right to counsel in a civil contempt proceeding is derived from the Due Process Clause of the Fourteenth Amendment to the United States Constitution . . .").

Second, there is little doubt that *Turner* heralds a new era for self-represented litigants. The Court had previously stressed the importance of counsel,¹¹⁰ including in cases like *Powell v. Alabama*:¹¹¹

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.¹¹²

But *Turner* recognized the critical role *courts* must play in providing due process to self-represented litigants. As commentators have noted, “[i]n rejecting a broad new constitutional right, the Court steered toward more sustainable reform for pro se litigants.”¹¹³ For example, Benjamin Barton and Stephanos Bibas in the *University of Pennsylvania Law Review* assert that “[p]roperly understood, *Turner* recognizes and protects pro se litigants. . . . Not every court dispute requires a lawyer’s involvement, and neither litigants nor society can afford lawyers for each dispute. Rather than looking backward to *Gideon*, *Turner* invites forward-looking, flexible pro se alternatives.”¹¹⁴

¹¹⁰ See Barton & Bibas, *supra* note 89, at 986 (“The Court’s Sixth Amendment cases have regularly praised counsel as indispensable for procedural fairness.”).

¹¹¹ 287 U.S. 45 (1932).

¹¹² *Id.* at 69.

¹¹³ Barton & Bibas, *supra* note 89, at 970.

¹¹⁴ *Id.* at 988–89; see also Daniel Curry, *The March Toward Justice: Assessing the Impact of Turner v. Rogers on Civil Access-to-Justice Reforms*, 25 GEO. J. LEGAL ETHICS 487, 498 (2012) (noting that *Turner* “requires judges to actively elicit relevant information from [litigants] to ensure fundamental fairness” and “should galvanize current *pro se* court reforms, which attempt to make courts simpler and fairer for self-represented litigants”).

1. *Forms*

One of the safeguards the *Turner* Court mentioned was court-provided forms to elicit critical information from a self-represented party. The New York state courts have been leaders in this area, with free, do-it-yourself forms that can be completed online and submitted electronically.¹¹⁵ Corresponding YouTube videos guide people through the entire process and provide simple and clear instructions.¹¹⁶

My court recently adopted forms for simple divorce cases (those involving no real property and no children), and I would like to talk a bit about that experience. In 2010, the Texas Access to Justice Commission held a two-day statewide forum on self-represented litigants.¹¹⁷ Attendees discussed “the impact pro se litigants have on the court system and evaluated tools to enable the courts to help pro se litigants navigate the legal system and to improve court efficiencies.”¹¹⁸ It became clear that statewide standardized forms for pleadings frequently used by self-represented litigants would aid those efforts.¹¹⁹

As a result of that discussion, the Supreme Court of Texas appointed a Uniform Forms Task Force to develop standardized forms.¹²⁰ Although we recognized that “[t]he legal system functions most effectively when each litigant is represented by an attorney,” we knew that parties increasingly appeared in courts pro se because they could not afford an attorney and had been unable to obtain representation from legal aid.¹²¹ Task Force members included judges, private lawyers, legal services attorneys, court clerks and administrators, and law librarians.¹²² We agreed that developing court-approved pleading

¹¹⁵ See N.Y. CT. HELP, www.nycourthelp.gov (last visited Oct. 11, 2013) (offering forms for family law, landlord-tenant, probate, and other matters).

¹¹⁶ See, e.g., N.Y. State Courts Access to Justice Program, *New York State Court's* [sic] *Support Modification DIY Forms*, YOUTUBE, http://www.youtube.com/watch?v=_34J99kKwDY (last visited Oct. 11, 2013) (explaining how to seek modifications of child support orders). In Arizona, the Maricopa County Superior Court offers similar guidance. See *Superior Court Maricopa County Videos*, YOUTUBE, <http://www.youtube.com/user/SuperiorCourtAZ/videos> (last visited Oct. 11, 2013) (providing video explanations of how to apply for guardianships, complete court forms, and request a court interpreter, among other things).

¹¹⁷ Order Creating Uniform Forms Task Force, Misc. Docket No. 11-9046, at 1 (Tex. 2011), available at <http://www.supreme.courts.state.tx.us/miscdocket/11/11904600.pdf>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2.

¹²¹ *Id.* at 1.

¹²² *Id.* at 2.

and order forms “would increase access to justice and reduce the strain on courts posed by pro se litigants.”¹²³

The Task Force concluded that family law generally, and divorce in particular, presented the most pressing need.¹²⁴ It developed “a set of instructions and forms for an uncontested divorce [for a couple] with no children and no real property.”¹²⁵ At the time, forty-eight states had court-approved family law forms, and thirty-seven had divorce forms.¹²⁶ In those states utilizing them, standardized forms have increased “judicial efficiency and economy.”¹²⁷ We in Texas were in the distinct minority.¹²⁸

We encountered staunch opposition to the forms project, with the most strident objections coming from the bar.¹²⁹ Our state bar’s family law section and other family lawyer groups opposed the forms, arguing that the court’s “foray into uniform forms raise[d] questions about the proper exercise of its powers.”¹³⁰ They complained that we failed to limit use of the forms to the indigent, asserting that “[t]he Court’s stated purpose is to increase access to justice by use of the forms,” which is a “goal [that] will not be advanced by assisting those who already have access to justice, i.e., those who *can* afford an attorney.”¹³¹ Finally, the associations argued that the development of uniform forms was “beyond the institutional capacity of the Texas Supreme Court and should be abandoned”¹³² We were also privy to nefarious emails circulated among divorce lawyers urging their colleagues to refrain from donating to the Texas Access to Justice Foundation¹³³ and the state bar president asked us to suspend work

¹²³ *Id.* at 1.

¹²⁴ REPORT TO THE SUPREME COURT, *supra* note 33, at 3.

¹²⁵ *Id.*

¹²⁶ *Id.* at 7.

¹²⁷ *Id.*

¹²⁸ *See id.* at 8 (noting that the forms available in Texas were “often inadequate for use by pro se litigants”).

¹²⁹ *See* FAMILY LAW SECTION OF THE STATE BAR OF TEX. ET AL., RESPONSE TO THE REPORT OF THE UNIFORM FORMS TASK FORCE SUBMITTED TO THE TEXAS SUPREME COURT AS OF JANUARY 11, 2012, at 3 (2012), available at <http://www.texasatj.org/files/file/FLGResponsetoForms041012.pdf> (“Texas’ low-income litigants need legal advice, not another set of inadequate forms that will harm their most important interests.”).

¹³⁰ *Id.* at 5.

¹³¹ *Id.* at 21.

¹³² *Id.* at 22; *see also* Letter from State Bar of Tex., Family Law Section, to the Supreme Court of Tex. (May 2, 2012), available at <http://www.texasatj.org/files/file/FLGSCOTLtrRevised050512.pdf> (“We have documented the fact that . . . deviations from our system of law are clearly present in the forms presented to the Court, even after nine months of work by the Task Force.”).

¹³³ *See* Patricia Kilday Hart, *DIY Divorce Forms Divide Two Groups of Texas Lawyers*, HOUS. CHRON., Feb. 3, 2012, at B1 (“In this battle royale, some attorneys actually wanted

on the forms.¹³⁴ We declined to do so, noting that we had a duty to establish “a judicial climate in which people who lack money to hire a lawyer have a reasonable chance to vindicate their rights.”¹³⁵ We considered the specific objections to the forms, revised them, and simplified them. In spite of the opposition, we approved the forms on November 13, 2012.¹³⁶

2. *Self-Help Centers*

Forms are not the only way courts can assist the self-represented. Many courts have created specialized centers to assist pro se litigants. The Fourth Judicial District Court of Minnesota offers a robust self-help center that provides assistance in family law, small claims matters, landlord-tenant disputes, and domestic violence situations.¹³⁷ The center offers forms, a lawyer referral service, and free legal clinics staffed by volunteer attorneys.¹³⁸ In San Antonio, a Pro Se Assistance Program utilizes a staff attorney “to review orders and organize the pro se docket,” enabling judges to review an average of 3000 to 3500 cases per year, approximately double the statewide average of 1600.¹³⁹ The staff attorney answers self-represented litigants’ questions, tracks and coordinates inmate litigation, acts as ombudsman for the San Antonio Pro Bono Project, coordinates mediation, and generally assists with the pro se docket.¹⁴⁰ California’s Administrative Office of the Courts has created a self-help website that includes a 900-page self-help guide for pro se litigants.¹⁴¹ It receives more than 100,000

to boycott Legal Aid fundraisers in retribution for the group allegedly consorting with the enemy.”).

¹³⁴ Letter from Bob Black, Pres., State Bar of Tex., to author (Jan. 5, 2012), *available at* <http://www.texasatj.org/files/file/14BarPresLettertoSupremeCourtJan52012.pdf>.

¹³⁵ Nathan Koppel, *Self-Filed Divorces Rile Texas Attorneys*, WALL ST. J. ONLINE (Feb. 24, 2012), <http://online.wsj.com/article/SB10001424052970204778604577239480550755v826.html>.

¹³⁶ See Order Approving Uniform Forms—Divorce Set One, Misc. Docket No. 12-9192, at 1 (Tex. 2012), *available at* <http://www.supreme.courts.state.tx.us/miscdocket/12/12919200.pdf> (noting approval date). For the forms themselves, see Uniform Forms—Divorce Set 1, No Minor Children, No Real Property (Tex. 2012), *available at* <http://www.supreme.courts.state.tx.us/miscDocket/12/Divorcesetorder.pdf>.

¹³⁷ See *Self-Help Centers (4th District)*, MINN. JUD. BRANCH, <http://www.mncourts.gov/district/4/selfhelp> (last visited Oct. 11, 2013).

¹³⁸ *Id.*

¹³⁹ Anita Davis, *A Pro Se Program That Is Also “Pro” Judges, Lawyers, and the Public*, 63 TEX. B.J. 896, 896 (2000).

¹⁴⁰ *Id.*

¹⁴¹ Ronald M. George, *Preface* to RICHARD ZORZA, NAT’L CTR. FOR STATE COURTS, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 8 (2002), *available at* http://www.zorza.net/Res_ProSe_SelfHelpCtPub.pdf.

visitors each month.¹⁴² These are just a few examples of the innovative approaches courts are using to increase access for self-represented litigants.

B. Expedited Actions

We can also make it cheaper and easier to try simple cases. In Texas, we recently adopted rules to simplify proceedings in cases involving claims for monetary relief of less than \$100,000.¹⁴³ This is similar to the “fast track,” or summary, jury trial offered in New York, South Carolina, and California, with one notable difference: We are the first state to make the procedure mandatory in most cases.¹⁴⁴ Discovery will be limited,¹⁴⁵ and the cases will be expedited so that smaller cases can be disposed of more efficiently. Each side will be given eight hours to present its case, and the trial court can order the parties to alternative dispute resolution only when it will be comparably fast.¹⁴⁶

The rule is not without controversy. Three sections of our state bar have objected to various provisions.¹⁴⁷ The Litigation Section would prefer that the rule be voluntary, the Alternative Dispute Resolution Section objects to the limitation on referral to alternative dispute resolution, and the Family Law Section has objected to certain

¹⁴² *Id.*

¹⁴³ See TEX. GOV'T CODE ANN. § 22.004(h) (West Supp. 2012) (requiring the Supreme Court of Texas to “adopt rules to promote the prompt, efficient, and cost-effective resolution of civil actions” involving less than \$100,000); see also Adoption of Rules for Dismissals and Expedited Actions, Misc. Docket No. 12-9191, at 3 (Tex. 2012) [hereinafter Adoption of Rules], available at <http://www.supreme.courts.state.tx.us/miscdocket/12/12919100.pdf> (noting that “[s]mall measures cannot achieve that directive”).

¹⁴⁴ See PAULA L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS 30, available at <http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/Civil%20cover%20sheets/ShortSummaryExpedited-online%20rev.ashx> (detailing the voluntary Summary Jury Trial program in Chautauqua County, New York, which began in 1998 and “offered a nonbinding option to resolve legal disputes”); Jeremy P. Ehrlich, *The Expedited Jury Trials Act: Enhancing Access, Reducing Costs, and Increasing Efficiency*, 42 McGEORGE L. REV. 515, 518–22 (noting that “South Carolina’s model is completely voluntary” and also describing California’s voluntary system).

¹⁴⁵ See Adoption of Rules, *supra* note 143, at 12–13 (limiting the time allowed for interrogatories, depositions, and requests for admissions, disclosures, and productions). Each party may spend a total of six hours examining and cross-examining witnesses in depositions. *Id.* at 12. In addition to time limitations, parties may serve on any other party no more than fifteen interrogatories, fifteen requests for production, and fifteen requests for admission. *Id.*

¹⁴⁶ *Id.* at 8–9 (noting that the trial court may refer the parties to alternative dispute resolution, provided the cost is no more than twice the civil filing fees, and the process does not exceed a half-day in duration).

¹⁴⁷ Angela Morris, *Expedited-Actions Rule Faces Opposition from Bar Sections*, TEX. LAWYER, Feb. 4, 2013, <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202586573987>.

requirements involving discovery, among other things.¹⁴⁸ But, after carefully considering those comments and hundreds of others, we revised the rules and adopted them on February 12, 2012.¹⁴⁹

C. *Unbundling and Ghostwriting*

Lawyers can help improve access to justice by offering narrower, targeted services that are cheaper yet still effective. Unbundling, also known as “discrete task representation,” or “limited scope representation,” permits a lawyer to provide only a portion of the services required to resolve a problem, with the client completing the remainder.¹⁵⁰ The ABA’s support for unbundling is reflected in Rule 1.2(c) of its Model Rules of Professional Conduct, which allows a lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”¹⁵¹ Although the provision has been in place since 2002, and states have widely adopted similar rules, “public opinion research demonstrates that a substantial portion of the public is unaware of the option to limit the scope of representation.”¹⁵² The ABA recently passed a resolution further supporting unbundled legal services and urging practitioners and courts alike to educate the public about limited scope representation as a means of increasing access to justice.¹⁵³

Unbundling is less controversial than “ghostwriting,” in which an attorney drafts, but does not sign, pleadings or other legal documents

¹⁴⁸ *Id.*

¹⁴⁹ See Final Approval of Rules for Dismissals and Expedited Actions, Misc. Docket No. 13-9022 (Tex. 2012), available at <http://www.supreme.courts.state.tx.us/miscdocket/13/13902200.pdf>.

¹⁵⁰ Richard Zorza, *Self-Represented Litigants and the Access to Justice Revolution in the State Courts: Cross-Pollinating Perspectives Toward a Dialogue for Innovation in the Courts and the Administrative System*, 29 J. NAT’L ASS’N OF ADMIN. L. JUD. 63, 74 & n.29 (2009).

¹⁵¹ MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2012).

¹⁵² AM. BAR ASS’N, REPORT OF THE STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES (Feb. 2013), http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_resolution_and_report_108.authcheckdam.pdf.

¹⁵³ See AM. BAR ASS’N, *Resolution 108* (Feb. 11, 2013), http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2013/05/nat_1_mtg_of_accessjusticecmnchairs/ls_sclaid_atj_adopted_unbundling_resolution_108.authcheckdam.pdf (“[T]he American Bar Association encourages practitioners . . . to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services [T]he American Bar Association encourages . . . increas[ing] public awareness of the availability of limited scope representation”); see also Debra Cassens Weiss, *Unbundle Legal Services, ABA House Resolution Urges*, A.B.A. J. (Feb. 11, 2013, 4:30 PM), http://www.abajournal.com/news/article/unbundle_legal_services_aba_house_resolution_urges/ (noting that Resolution 108 was approved by the ABA House of Delegates).

for a litigant who then appears in court pro se.¹⁵⁴ Although the ABA has endorsed the practice,¹⁵⁵ opponents argue that it may provide self-represented litigants with an unfair advantage, as courts often construe pleadings filed by a pro se party more leniently than those signed by a lawyer.¹⁵⁶ Proponents argue that ghostwriting provides a more affordable solution to a litigant who is otherwise unable to retain counsel to appear in court.¹⁵⁷

A new study in the *Harvard Law Review* suggests that neither unbundling nor court-provided access-to-justice measures result in outcomes as favorable as those obtained with full attorney representation.¹⁵⁸ That may be the case. But where full representation is neither affordable nor feasible, these options may provide some assistance and access to those who need it.

D. Nonlawyer Solutions

Any remedial approach must also examine structural reforms. We should seriously consider allowing trained nonlawyers to play a greater role. We see this being played out across the country as well. For example, over consistent opposition from its bar association, and in an effort to assist the thousands of unrepresented litigants appearing in Washington courts, the Washington Supreme Court recently adopted a rule authorizing limited-license legal technicians.¹⁵⁹

¹⁵⁴ See John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 *FORDHAM L. REV.* 2687, 2692 (1999) (describing the ghostwriting process, several contexts in which ghostwriting might occur, and the fact that ghostwriting may implicate ethical considerations).

¹⁵⁵ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446, at 2-3 (2007) (concluding that ghostwriting is frequently acceptable because whether a pro se litigant has received undisclosed legal assistance is often "not material to the merits of the litigation").

¹⁵⁶ See, e.g., *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (noting that pro se pleadings are held "to less stringent standards than formal pleadings drafted by lawyers"); see also Rothermich, *supra* note 154, at 2697 (noting that "if courts mistakenly believe that the ghostwritten pleading was drafted without legal assistance, they might apply an unwarranted degree of leniency to a pleading that was actually drafted with the assistance of counsel").

¹⁵⁷ Rothermich, *supra* note 154, at 2689 ("[Ghostwriting] would allow legal services offices to provide legal assistance to more individuals, potentially increasing access to justice for low-income clients.").

¹⁵⁸ D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *HARV. L. REV.* 901, 908-09 (2013) (finding that outcomes were significantly better for clients with full representation than with unbundled legal services).

¹⁵⁹ See Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES, Feb. 11, 2013, at A11 (noting that Washington's limited license legal technician program—the first of its kind in the nation—will provide access to those who cannot afford lawyers and will regulate the unauthorized practice of law); Press Release, Wash. Courts, Supreme Court Adopts Rule Authorizing Non-Lawyers to Assist in Certain Civil Legal

These technicians will have greater training and responsibility than paralegals but will not appear in court or negotiate with opposing parties on their clients' behalf.¹⁶⁰ Technicians may assist with court forms, inform clients of procedures and timelines, review and explain pleadings, and identify documents that may be needed in court.¹⁶¹ Noting the objection that the rule posed a threat to the family law bar, the court explained that the basis of any regulatory scheme, including the court's authority to regulate the practice of law, must be the public interest, and "[p]rotecting the monopoly status of attorneys in any practice area is not a legitimate objective."¹⁶²

Washington is the first state to adopt such a rule,¹⁶³ but it is not alone in this effort. California and New York are now following Washington's lead and pursuing their own initiatives on nonlawyer assistance to increase access to justice.¹⁶⁴ Other countries, most notably England, have for years successfully relied on nonlawyers to provide legal assistance.¹⁶⁵

These solutions are not perfect and may open the door to abuses. For example, federal law has for decades authorized nonlawyer "bankruptcy petition preparers" to assist parties seeking bankruptcy

Matters (June 15, 2012), available at <http://www.courts.wa.gov/newsinfo/?fa=newsinfo.internetdetail&newsid=2136> (describing the adoption process and substance of the Washington Supreme Court's "Limited Practice Rule for Limited License Technicians"); *Supreme Court Adopts Limited License Legal Technician Rule*, WASH. STATE BAR ASS'N, <http://www.wsba.org/News-and-Events/News/Supreme-Court-Adopts-Limited-License-Legal-Technician-Rule> [hereinafter *Supreme Court Adopts*] (explaining the Limited License Legal Technician Rule and the legal profession's role in its implementation).

¹⁶⁰ See Press Release, Wash. Courts, *supra* note 159 (noting some of the abilities of technicians).

¹⁶¹ *Id.*

¹⁶² In the Matter of the Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, Order No. 25700-A-1005, at 7 (Wash. 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>.

¹⁶³ *Supreme Court Adopts*, *supra* note 159.

¹⁶⁴ See Laura Ernde, *State Bar to Look at Limited-Practice Licensing Program*, CAL. ST. B.J. (Feb. 2013), <http://www.calbarjournal.com/February2013/TopHeadlines/TH1.aspx> (explaining that the State Bar Board of Trustees is exploring ways to increase public access to legal services and provide practice opportunities for unlicensed law school students and legal technicians, while also regulating the unauthorized practice of law); Jonathan Lippman, *The State of the Judiciary 2013: "Let Justice Be Done,"* N.Y. STATE UNIFIED COURT SYS., 13–14 (2013), <http://www.nycourts.gov/ctapps/news/SOJ-2013.pdf> (describing task force "to examine the role that appropriately trained and regulated nonlawyer advocates can play in providing out-of-court assistance in discrete areas such as housing, consumer credit and foreclosures").

¹⁶⁵ See Hadfield, *supra* note 65 ("The United Kingdom has a long history of allowing a wide variety of differently trained individuals and organizations [to] provide legal assistance, and studies show that the practice works very well.").

protection.¹⁶⁶ Although the preparers cannot provide legal advice or services, they can complete a bankruptcy petition on behalf of a debtor.¹⁶⁷ But with recent changes in both the bankruptcy laws and the economy, federal bankruptcy courts have confronted allegations of preparers' unscrupulous practices and dishonesty.¹⁶⁸ We have also seen nonlawyer notary publics capitalizing on the use of the term "notario," which in some countries signifies an individual who can perform official acts,¹⁶⁹ as well as nonlawyer "immigration consultant[s]," who do more harm than good.¹⁷⁰ Yet despite these problems, we must consider whether nonlawyer assistants provide a more attractive option than the status quo.

Allowing nonlawyers to take on a greater role would require states to relax the prohibitions on the unauthorized practice of law, a change that has been on the horizon for some time. Fourteen years ago, when Quicken introduced its Family Lawyer software, a program that provided different legal forms and instructions on how to complete them, Texas's Unauthorized Practice of Law Committee sought to enjoin sales of the product in Texas.¹⁷¹ A federal district court granted the injunction,¹⁷² and if not for the Legislature's quick action

¹⁶⁶ See 11 U.S.C. § 110 (2012) (delineating permissible and impermissible activities of bankruptcy petition preparers and providing penalties and remedies for violations of these limits).

¹⁶⁷ See *id.* (describing the limits, duties, and consequences of noncompliance for bankruptcy petition preparers); see also *Bankruptcy Petition Preparers*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/ust/r05/docs/general/guidelines/bank_pet_prep.pdf (last visited Oct. 11, 2013) (explaining to debtors the role and limits of bankruptcy petition preparers).

¹⁶⁸ See Eileen Ambrose, *DIY, BPP are Potential Pitfalls in Bankruptcy*, BALTIMORE SUN, June 24, 2012, at C1 (explaining difficulties encountered by bankruptcy petition preparer clients in Maryland); *Increased Use of Bankruptcy Petition Preparers Raises Concerns*, THIRD BRANCH NEWS (June 18, 2012), <http://news.uscourts.gov/increased-use-bankruptcy-petition-preparers-raises-concerns> (describing an increase in abuses, including unauthorized practice of law and collecting higher preparation fees than that permitted by bankruptcy courts).

¹⁶⁹ See Ernde, *supra* note 164 (explaining that there has been confusion between professionals in other countries called "notarios" and notary publics in the United States, who are more limited in their ability to provide legal assistance).

¹⁷⁰ See, e.g., *Consumer Protection Legislation: The "White Paper,"* NEV. LAWYER, Mar. 1999, at 9, 9 (describing Amigo Services, an immigration consulting firm that filed "frivolous, fraudulent and meritless immigration documents," in one instance, "fail[ing] to include the entire family in an Application for Political Asylum, thus precluding the possibility of other family members being able to legalize their status in the United States and precluding the actual applicant from being able to legalize his status in the United States").

¹⁷¹ *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *1, *3 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999) (per curiam) (vacating judgment in light of statutory changes).

¹⁷² *Id.* at *10.

in amending the statutory definition of the “practice of law,”¹⁷³ sales might be illegal today.

Historically, our profession has resisted such change. The ABA’s Model Rules of Professional Conduct, adopted in 1983, prohibit non-lawyer participation in legal services. These types of restrictions have been in place since at least 1928, when the ABA first adopted Canons 33, 34, and 35, limiting partnerships, fee splitting, and employment relationships between lawyers and nonlawyers.¹⁷⁴ The stated rationale is that these restrictions “protect the lawyer’s professional independence of judgment.”¹⁷⁵ In the 1990s, the ABA appointed a Commission to once again consider the wisdom of this prohibition. The Commission was instructed to focus on serving the public interest rather than the economic interests of attorneys.¹⁷⁶ After study, the Commission recommended that lawyers and nonlawyers be permitted to form partnerships and to share fees, provided certain ethical considerations were satisfied.¹⁷⁷ After just an hour of debate, the ABA House of Delegates rejected the recommendation and instead reaffirmed the existing restrictions, emphasizing that the rules governing attorney conduct are intended to safeguard the public interest.¹⁷⁸

Time and again, the profession has rejected reform efforts in the name of protecting core values. But as commentators have asked: “[W]hat good are the profession’s core values to those who do not make it through the lawyer’s office door?”¹⁷⁹ Many of these reforms echo those experienced by the medical profession.¹⁸⁰ Just as that model has moved away from services provided by physicians and toward those given by physician’s assistants and nurse practitioners,

¹⁷³ See TEX. GOV’T CODE ANN. § 81.101 (West 2013) (defining the term to exclude “the design, creation, publication, distribution, display, or sale, including . . . by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney”).

¹⁷⁴ George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession’s Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 779 (2001) (describing ABA Canons 33, 34, and 35, which codified ABA ethics committee opinions).

¹⁷⁵ *Id.* at 784 (quoting AM. BAR ASS’N CTR. FOR PROF’L RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 164 (1987)).

¹⁷⁶ *Id.* at 785.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 786–87.

¹⁷⁹ *Id.* at 807.

¹⁸⁰ See *id.* at 777 (noting that “the medical profession has faced, and continues to struggle with, similar tensions between affordability and professionalism,” precipitating its move “from a traditional model of fee-for-service by independent doctors to the currently predominant model of managed care by corporate medical service providers”).

we could similarly rely more on trained nonlawyers to provide many of the services for which a lawyer is now required. Perhaps, “[a]s the medical profession has learned, it may be necessary to live with the ethical tension of encroachments on professional autonomy in order to make professional services accessible to a wider class of society.”¹⁸¹

E. Legal Education

We should also consider reforming our system of educating lawyers. Law school applications have dropped,¹⁸² recent graduates cannot find jobs, and law students face enormous debt loads that prevent them from charging rates that would make their services affordable for middle- and lower-income clients.¹⁸³

There have been unheeded calls to reduce law school from three years to two. Some, such as Jim Chen, former dean of the University of Louisville Brandeis School of Law, suggest that tenured professors may be partially to blame.¹⁸⁴ Chen asserts that professors would block such change because it may harm their economic self-interest, and that the push for change must therefore come from state supreme courts.¹⁸⁵

But this is not always the case, as Professor Samuel Estreicher’s example proves. He argues convincingly that law students should be eligible to take the bar exam after two years, rather than three.¹⁸⁶ He notes that, in the 1970s, there was a push toward a two-year professional law degree. Although the idea had the support of Chief Justice Warren E. Burger and ABA president Justin Stanley, the movement

¹⁸¹ *Id.* at 845.

¹⁸² Ethan Bronner, *Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 31, 2013, at A1 (describing a two-year thirty-eight percent decrease in law school applications and noting that “the decline is creating what many see as a cultural shift”).

¹⁸³ *See id.* (observing that debt load for private law school graduates was \$125,000 in 2011, up from \$70,000 in 2001, and describing how technological advances have eliminated some lawyer jobs); *see also* Kendall Coffey, *Underserved Middle Class Could Sustain Underemployed Law Graduates*, NAT’L L.J. ONLINE (Aug. 15, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202567602357&Underserved_middle_class_could_sustain_underemployed_law_graduates (“Ironically, while thousands of new law graduates fret about the chronic joblessness that awaits them, tens of millions of Americans need attorneys but cannot afford them.”).

¹⁸⁴ Bronner, *supra* note 159.

¹⁸⁵ *Id.*

¹⁸⁶ Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 599, 606–10 (2012); *see also* Daniel B. Rodriguez & Samuel Estreicher, Op-Ed., *Make Law Schools Earn a Third Year*, N.Y. TIMES, Jan. 18, 2013, at A27 (“[A] two-year option would allow many newly minted lawyers to pursue careers in the public interest or to work at smaller firms that serve lower- or average-income Americans, thereby fulfilling a largely unmet need”).

ended after some of the nation's most prestigious law schools opposed it.¹⁸⁷ As one professor noted, the idea “was killed for very bad reasons that have more to do with institutional tranquility than the public welfare.”¹⁸⁸ Professor Estreicher rightly questions whether the interest in “institutional tranquility” is enough to justify a legal mandate of an additional year of law school, with its accompanying debt and impact on the profession and the legal services provided to consumers.¹⁸⁹

Law schools are increasingly revamping their third year curriculum, as New York University recently did, to include “a focus on foreign study and specialized concentrations.”¹⁹⁰ Other schools have dropped the standard third-year course load in exchange for a combination of clinics and outside internships.¹⁹¹ One dean has called for a two-year “residency” program for new graduates, much like those undertaken by recent medical school graduates.¹⁹² Programs like these promise to make legal education more affordable and lawyers' services more accessible. Other reforms are likely forthcoming.

CONCLUSION

The phrase “access to justice” is often thought of in terms of providing legal services to the poor. It is that, to be sure, but an accessible justice system requires that all segments of our society be able to utilize it. Viewed this way, our remedies must be more expansive as well.¹⁹³ Just as no single issue created the barriers, there is no unitary solution.

On February 24, 1836, Texas forces were under siege from the Mexican army at the battle of the Alamo. William Barret Travis, the commander of the Texian soldiers, wrote a desperate plea for help. Addressed to “the People of Texas and All Americans in the World,” he asked “in the name of Liberty, of patriotism & everything dear to the American character, to come to our aid, with all dispatch.” He vowed never to surrender or retreat, promising “victory or [d]eath.”¹⁹⁴

¹⁸⁷ Estreicher, *supra* note 186, at 604–05.

¹⁸⁸ *Id.* at 604 n.25 (quoting Preble Stolz, *The Two-Year Law School: The Day the Music Died*, 25 J. LEGAL EDUC. 37, 40 (1973)).

¹⁸⁹ *See id.* at 609.

¹⁹⁰ Peter Lattman, *N.Y.U. Law Plans Overhaul of Students' Third Year*, N.Y. TIMES, Oct. 17, 2012, at B1.

¹⁹¹ *See id.* (describing program at Washington and Lee University School of Law).

¹⁹² Farmer, *supra* note 48.

¹⁹³ *See* Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 3, 15 (2010) (noting that “access to justice is a complex issue” and that “[a] solution to the ‘problem’ depends on how the problem is defined and what policy goals one wishes to reach”).

¹⁹⁴ *Travis Pens His Famous Letter From the Alamo*, TEX. ST. HISTORICAL ASS'N, <http://www.tshaonline.org/day-by-day/31352> (last visited Oct. 11, 2013).

While not as dire as the situation faced by Commander Travis, we too are at a crossroads. Fixing any of our justice system's problems necessitates a fundamental shift in our thinking. "[I]n the name of Liberty, of patriotism & everything dear to the American character," the legal profession must adapt to evolving procedures and times and must embrace change, even if that change sometimes comes at our own expense. Too often, when faced with issues that might adversely affect the bottom line, our profession acts less like a profession and more like a trade.¹⁹⁵

Courts must step in because those who lack access to justice are a constituency without a voice.¹⁹⁶ Am I suggesting that lawyers are the root of our system's ills? Not at all. But when vast segments of our society are unable to utilize the legal system, we must examine whether we should change the way legal services are delivered and how courts can create more accessible systems. If resistance to such change stems from inertia, "institutional tranquility," or economic self-interest, we are not fulfilling our pledge. A two-tiered justice system denies "liberty and justice for all." We can do much better.

Let's marshal our forces. Or, as we say in Texas: Remember the Alamo!

¹⁹⁵ See, e.g., Harris & Foran, *supra* note 174, at 804 ("[M]any lawyers traditionally serving middle-class consumers perceive the Internet, with its proliferation of legal self-help resources, as well as self-help computer software, as the enemy.").

¹⁹⁶ See BARBARA RODRIGUEZ MUNDELL & WALLACE B. JEFFERSON, EXECUTIVE SESSION FOR STATE COURT LEADERS IN THE 21ST CENTURY, HERDING LIONS: SHARED LEADERSHIP OF STATE TRIAL COURTS 1 (2008), available at <http://www.ncsc.org/services-and-experts/court-leadership/~media/files/pdf/services%20and%20experts/areas%20of%20expertise/jefferson-mundell-herding-lions-shared-leadership-of-state-trial-courts.ashx> ("[A] state supreme court must ensure access to, and the availability of, essential court services."); see also Hadfield, *supra* note 65 ("Solving the problem requires lawyers—especially those on the bench who bear the ultimate responsibility for regulating the profession—to share the field with other, less-expensive, non-JD professionals and nonlawyer dominated organizations who can provide perfectly adequate legal help in many cases."); Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 *FORDHAM L. REV.* 2193, 2243 (2010) (noting that the bar's failure "to appropriately and credibly consider the public interest" could invite "a legislative response that not only implements rules with which the profession itself is not satisfied, but us[es] that to justify further encroachments on lawyer self-regulation").