



CHAPMAN LAW REVIEW

Citation: Benjamin C. Carpenter, *A Solution Hidden in Plain Sight: Closing the Justice Gap by Applying to Legal Aid the Market Incentives That Propelled the Pro Bono Revolution*, 25 CHAP. L. REV. 1 (2021).

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A Solution Hidden in Plain Sight: Closing the Justice Gap by Applying to Legal Aid the Market Incentives That Propelled the Pro Bono Revolution

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The legal profession is now thirty years into the pro bono revolution, and the bar is more committed, in both word and action, to access to civil justice than at any other time in its history. Yet for most of the sixty million Americans who cannot afford a lawyer, the bar's commitment provides little solace. Despite all the resources the bar has put into pro bono over the past thirty years, those living at or near poverty still do not receive legal help for almost eighty-six percent of their legal needs. In fact, lawyer participation in pro bono has become stagnant over the past decade, and the World Justice Project just ranked the United States 109th out of 128 countries in access to affordable civil justice. Meanwhile, law firm revenues rocket upward. In 2019, revenue at each of the nine largest law firms was greater than the combined operating budgets of the country's 700 legal aid organizations. Revenue at one firm alone doubled the combined budgets of all legal aid organizations. Yet, as the ABA advocates for additional public funding of legal aid, law firms themselves pitch in less than four one-hundredths of a percent of their revenue. A fair question is what is truly motivating the bar—is it a foundational commitment to closing the justice gap, as it professes, or protecting its own investment in pro bono for the benefit of its members. If the bar is serious about closing the justice gap, it must not simply capture and leverage its

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advances in pro bono, but it must also commit to increasing its support for legal aid—in action, not just words—as it has with pro bono. While history has shown that this shift will not happen simply by encouragement and aspirational appeals, there is a blueprint for accomplishing this: the market incentives that moved big firms to enthusiastically embrace pro bono over the past few decades provide a solution hidden in plain sight. This article explores those incentives, sets out a proposal for how to apply those incentives to increase legal aid funding, and calls on the bar to live up to its public commitment to equal justice.

INTRODUCTION.....	3
I. THE EVER-EXPANDING JUSTICE GAP.....	6
II. THE BAR’S EVOLUTION ON ACCESS TO JUSTICE AS A CORE VALUE	14
A. The Bar’s Grudging Embrace of Legal Aid.....	16
B. The Bar’s Enthusiastic Embrace of Pro Bono.....	26
III. BENEFITS AND LIMITATIONS OF PRO BONO.....	32
A. Pro Bono’s Benefits	32
B. Pro Bono’s Limitations.....	35
IV. OVERVIEW OF LAW FIRM GIVING.....	41
V. INCENTIVIZING LARGE FIRMS TO INCREASE FUNDING TO LEGAL AID.....	45
A. “Self-funding” Legal Aid as a Primary Tool.....	45
B. A Market-Based Proposal to Increase Legal Aid Funding.....	48
C. Benefits of the Proposed Approach.....	51
D. Obstacles to the Proposed Approach	56
E. Illustration of the Proposal.....	63
CONCLUSION.....	65

“[T]he failure to confront pro bono’s limitations risks privileging professional interests over concerns of social justice—promoting the image of equal access without the reality.”

SCOTT L. CUMMINGS, *THE POLITICS OF PRO BONO*¹

“It is not enough for the law to intend justice. It must be so administered that for the great body of citizens justice is actually attained. . . . If those who officially represent the law do not . . . make the administration of justice fair, prompt, and accessible to the humblest citizen, to what group in the body politic may we turn with any hope[?]”

HENRY S. PRITCHETT, *INTRODUCTION TO JUSTICE FOR THE POOR*²

INTRODUCTION

The concept is not novel: while people are inspired by high ideals, self-interest motivates actual action.³ Nor is the cognitive dissonance that follows: most attribute their actions to those ideals and, with enough time, convince themselves of their honorable intentions.⁴ And in this respect, lawyers are no exception. Indeed, given our training in persuasion, we may be particularly adept at (or susceptible to) these cognitive gymnastics. Such self-deception is not always inherently bad,⁵ but it can create a roadblock to real progress and growth.

¹ Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1, 149 (2004).

² REGINALD HEBER SMITH, *JUSTICE AND THE POOR*, at xi, xiv (1919).

³ See 1 ADAM SMITH, *THE WEALTH OF NATIONS* 13 (Ernest Rhys ed., E.P. Dutton & Co. Inc. 1910) (1776).

It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.

Id.; see also Deborah L. Rhode, *Rethinking the Public in Lawyers’ Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 *FORDHAM L. REV.* 1435, 1436–37 (2009) [hereinafter Rhode, *Rethinking the Public*] (citing current studies regarding enlightened self-interest).

⁴ See David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 281–82 (2003).

⁵ See generally William von Hippel & Robert Trivers, *The Evolution and Psychology of Self-Deception*, 34 *BEHAV. & BRAIN SCIS.* 1 (2011) (exploring the theory of self-deception and its various advantages). Volume 34 of this journal also includes numerous responses to the article that explore these concepts further.

This dynamic is exemplified by the bar's approach to the justice gap in America: first in its reluctant embrace of legal aid, then in its enthusiastic commitment to pro bono. History reveals that neither movement was driven by the bar's awakening to a deeply held, institutional commitment to justice, but by self-interest. Nonetheless, lawyers have overwhelmingly attributed these efforts to professional values and intrinsic motivations⁶—then turned around and aggressively marketed their “selfless” deeds. In fact, there is a strong argument that those in the legal profession benefit as much from the current level of pro bono (financially, emotionally, developmentally, and reputationally) as the clients they serve.⁷ Thus, the profession as a whole has little real incentive to fight the justice gap more aggressively. Indeed, this dissonance has caused pro bono growth to plateau over the past decade. As Deborah L. Rhode observed, “The bar's pro bono commitments are, in short, a reflection of both the profession's highest ideals and its most grating hypocrisies.”⁸

This Article lays bare this dynamic, not to be critical of the bar's efforts or motivations, but to strip away the marketing around pro bono and honestly confront what has inspired the bar to action—and in doing so, to unlock further progress in fighting the justice gap. Indeed, enlightened self-interest can provide a win-win, and the pro bono revolution of the last 30 years has undoubtedly brought legal services to millions of individuals who otherwise would have gone unrepresented. The bar is undeniably more committed—in both word and action—to providing access to justice than at any other time in its history.

Yet the justice gap continues to grow. Over 60 million Americans each year remain unable to obtain legal representation for their civil legal needs.⁹ Indeed, despite a thirty-year focus on pro bono, the United States still ranked 109th out of 128 countries in access to civil justice in 2020.¹⁰ Nonetheless, the bar's response remains to double down on pro bono while looking to the public to fund legal aid. If access to justice truly is a foundational value of

⁶ See ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 18–19 (2018) [hereinafter SUPPORTING JUSTICE IV], http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.pdf [<http://perma.cc/F7JQ-476S>]; DEBORAH L. RHODE, ACCESS TO JUSTICE 163–64 (2004).

⁷ See *infra* Section III.A.

⁸ Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 413 (2003) [hereinafter Rhode, *Pro Bono in Principle*].

⁹ See *infra* Part I.

¹⁰ See *infra* note 373 and accompanying text.

this profession—as we profess it to be—is a deeper commitment to pro bono our best solution? Or, as Scott L. Cummings has asked, are we in fact “privileging professional interests over concerns of social justice—promoting the image of equal access without the reality”?¹¹

All the while, as the bar focuses on and celebrates pro bono, there is an army of unsung legal aid lawyers around the country quietly dedicating their lives to representing those in poverty—and many more who would if it were economically viable for them to do so. In most cases, these lawyers provide the most efficient, skilled, and complete representation to those in poverty. Nonetheless, law firms often require legal aid lawyers to support their pro bono efforts, rather than asking how the legal community can better support legal aid attorneys. In fact, pro bono programs often take time and resources *from* those very organizations that otherwise would be spent directly serving those in poverty.

To truly reduce the justice gap, we must flip that dynamic. While the bar should celebrate, maintain, and leverage the significant infrastructure and culture it has built around pro bono, it must make a much bolder commitment to supporting legal aid. To that point, the bar has put its full-throated support behind increased funding for legal aid—provided those increases come from the *public*.¹² For most of the bar, however, supporting legal aid from their own pockets has been a bridge too far. Little has been written about this dynamic; most have simply accepted that meaningful, direct financial support for legal aid is a burden most firms will not bear. At the same time, law firm revenue continues to increase year over year to record levels. In fact, the legal fees generated in 2019 by *each* of the nation’s nine largest law firms exceeded the entire operating budget of the country’s 700 legal aid organizations *combined*.¹³ Further, revenue at Kirkland & Ellis, which serves perhaps a few thousand clients, was twice the budget of all legal aid organizations—which serve over one-fifth of the country’s population.¹⁴ Overall, lawyers and law firms contribute just four one-hundredths of 1% of their overall revenue to legal aid.¹⁵ As we will see though, law firms are often charitable—they just do not consider *legal aid* a priority. Rather, they presently receive more return benefit by giving to other causes.

¹¹ Cummings, *supra* note 1, at 149.

¹² See *infra* notes 318–319 and accompanying text.

¹³ See *infra* note 288 and accompanying text.

¹⁴ See *id.*

¹⁵ See *infra* note 285 and accompanying text.

A shift to making legal aid a priority—not just in word, but in action—can happen, but it will not happen simply through encouragement and aspirational statements. There is, however, a blueprint for accomplishing this: the steps leading to the bar’s embrace of pro bono provides a solution hidden in plain sight. Indeed, if those in a position to influence the conduct of the largest law firms create concrete financial incentives for those firms to act, change will follow. And such incentives do not require legislative action, regulatory changes, or mandatory requirements. Specifically, change will begin if (1) *The American Lawyer* (and others that rank large firms) incorporates direct financial support to legal aid organizations into their ranking methodology; (2) the American Bar Association (ABA) and local bar associations publicly recognize and celebrate those firms that contribute financially to legal aid at a meaningful level; and (3) the legal departments of large corporate clients start to demand the law firms to which they give their business demonstrate their financial support for legal aid. These financial incentives are precisely what led big firms to embrace pro bono and ignited the unlikely pro bono revolution in the 1990s.

Part I of this Article sets the table by discussing the present scope of the justice gap in the United States. Part II then reviews the bar’s evolution regarding its two primary approaches to addressing the justice gap: first its grudging embrace of legal aid as a defensive measure to prevent outside intrusion into the profession, and then its aggressive adoption of pro bono in response to market incentives. Part III follows by acknowledging both the benefits and inherent limitations of pro bono as a tool to reduce the justice gap. Finally, Part IV reviews law firms’ charitable giving priorities, and Part V suggests how to shift these priorities by harnessing the same self-interests that propelled the pro bono revolution to ignite a new legal aid revolution.

I. THE EVER-EXPANDING JUSTICE GAP

The justice gap refers to “the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.”¹⁶ Unlike criminal defendants facing imprisonment, Americans have no constitutional right to legal

¹⁶ LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 9 (2017) [hereinafter *THE JUSTICE GAP*], <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<http://perma.cc/F6JD-B78J>].

representation for civil issues.¹⁷ For those unable to afford representation, though, many civil issues such as an eviction or foreclosure, loss of parental rights, domestic abuse, or loss of benefits may have devastating long-term effects on the individual, their families, and our communities.¹⁸

Defining who falls within the civil justice gap is a blurry proposition. As one judge recently noted, “many lawyers reading this article would likely have to stretch to afford themselves in a legal problem of any substance.”¹⁹ As a starting point, though, references to the justice gap traditionally include only persons with an annual income at or below 125% of the federal poverty level—the threshold for qualifying for legal representation from a legal aid organization that receives funding from the federal government through the Lawyer Services Corporation (LSC).²⁰ For 2021, that correlates to an annual income of just \$33,125 for a family of four.²¹ As of 2019, the year for which the most recent data is available, 46.5 million Americans fell within that category.²² However, 2019 was a year of historic prosperity, as the poverty rate was the lowest it had been since 1959.²³ Indeed,

¹⁷ Compare *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963), with *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 18–19 (1981), and *Turner v. Rogers*, 564 U.S. 431, 448 (2011). In limited cases, individuals have a statutory right to representation in civil matters. See ALAN HOUSEMAN & LINDA E. PERLE, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 53–55 (2018), http://www.clasp.org/sites/default/files/publications/2018/05/2018_securingequaljustice.pdf [<http://perma.cc/5YHD-PVY2>].

¹⁸ See HOUSEMAN & PERLE, *supra* note 17, at 7.

¹⁹ Judge Jay Quam, *Mission Possible: Pro Bono and Its Impact on the Courts and the Community*, HENNEPIN LAW., Sept./Oct. 2018, at 17, 18; see also GILLIAN K. HADFIELD, *RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY* 177–79 (2017) (listing the average legal cost to parties in many common civil disputes).

²⁰ See 45 C.F.R. § 1611.3(c)(1) (2021); see also THE JUSTICE GAP, *supra* note 16, at 10–11. Notably, LSC-funded organizations may provide services to individuals above the 125% threshold if (1) the services are not supported by LSC funding, or (2) the legal assistance is limited to certain narrow categories set out in 45 C.F.R. § 1611.5. See 45 C.F.R. § 1611.3(c)(2) (2021).

²¹ See Annual Update of the HHS Poverty Guidelines, 86 Fed. Reg. 7732, 7733 (Feb. 1, 2021); see also *Poverty Guidelines*, U.S. DEP’T HEALTH & HUM. SERVS. OFF. OF THE ASSISTANT SEC’Y FOR PLAN. AND EVALUATION, <http://aspe.hhs.gov/poverty-guidelines> [<http://perma.cc/G3UF-GKZU>] (last visited May 30, 2021).

²² See JESSICA SEMEGA, ET AL., U.S. CENSUS BUREAU, U.S. DEP’T OF COM., *INCOME AND POVERTY IN THE UNITED STATES: 2019*, at 59 tbl.B-3 (2020), <http://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf> [<http://perma.cc/3CLA-R2FE>].

²³ See *id.* at 12.

in the ten years prior to that, the number of Americans living below 125% of the poverty level averaged over 62 million.²⁴

Moreover, that cut-off greatly understates the number of individuals whose means in fact preclude them from obtaining adequate legal representation. A more accurate measure of the justice gap may include individuals at or below 200% of the poverty level, the threshold used by many legal aid organizations across the country that do not receive LSC funding.²⁵ As of 2019, 85.5 million Americans fell within that group,²⁶ though that number exceeded 100 million for most of the past decade.²⁷ While the effects of the COVID-19 pandemic are still playing out, the number of individuals who cannot afford legal representation is undoubtedly higher today, whichever metric one uses.²⁸ And, unsurprisingly, poverty disproportionately affects women, children, people of color, people with disabilities, and those with less education.²⁹

Those living near poverty have significant civil legal needs. In 2017, LSC reported that 71% of low-income households faced at least one “justiciable civil legal issue[]” each year—one that could be resolved through civil legal action.³⁰ Yet, in almost nine out of ten such cases, the individual received inadequate (and more often no) professional legal help.³¹ Those issues are often critical to one’s very livelihood. The most common legal issues

²⁴ See LEGAL SERVS. CORP., FY2021 BUDGET REQUEST 5 (2021) [hereinafter LSC 2021 BUDGET REQUEST].

²⁵ See 3 EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 878–79 (2014); see also Sherri Knuth & Drew Schaffer, *Where Does Legal Aid Funding Come From?*, 10 BENCH & BAR OF MINN. 16–17 (2019). Similarly, many legal aid organizations that do not receive LSC funding set the income threshold at 185% of the poverty level. See MINN. LEGAL SERVS. COAL., LEGAL AID’S IMPACT 5 (2015); see also *supra* note 20 and accompanying text. LSC-funded organizations may serve those above 125% of the poverty level in limited situations, though the public data available does not clarify which clients from such organizations fall above or below the 125% threshold.

²⁶ SEMEGA ET AL., *supra* note 22, at 59.

²⁷ See, e.g., CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, INCOME AND POVERTY IN THE UNITED STATES: 2014, at 17 tbl.5 (2015). For identical annual reports dating back ten years, see *Income & Poverty Publications*, U.S. CENSUS BUREAU (Nov. 21, 2021), <http://www.census.gov/topics/income-poverty/library/publications.html> [<http://perma.cc/9PYJ-5UZN>].

²⁸ *LSC Survey Finds Major Impact of COVID-19 Pandemic on Legal Aid*, LEGAL SERVS. CORP. (July 24, 2020), <http://www.lsc.gov/press-release/lsc-survey-finds-major-impact-covid-19-pandemic-legal-aid> [<http://perma.cc/P2VE-HUVK>].

²⁹ See SEMEGA ET AL., *supra* note 22, at 13, 15, 17–18; see generally NANETTE GOODMAN ET AL., FINANCIAL INEQUALITY: DISABILITY, RACE AND POVERTY IN AMERICA (2019) (exploring the intersection between race, disability, and poverty).

³⁰ THE JUSTICE GAP, *supra* note 16, at 21 (surveying those at or below 125% of the federal poverty level). Many, of course, face numerous civil legal issues annually. Over one-half of low-income households face two or more justiciable issues in a year, while almost one in four face six or more justiciable civil legal issues in a year. *Id.*

³¹ *Id.* at 30.

faced by low-income individuals relate to health (such as insurance coverage, incorrect billing, and medical debt collection), family issues (such as child custody, child support, and domestic abuse), housing issues (such as eviction, foreclosure, or unsafe living conditions), and income maintenance (such as loss of social security and other benefits).³² Thus, for millions of Americans who risk losing their housing, parental rights, or much needed benefits, or who require a restraining order from a violent partner, they must face these obstacles with no legal help. In addition, individuals in vulnerable populations, such as those with mental disabilities or for whom English is a second language, are particularly disadvantaged.³³

It is not hyperbole that simply having representation may change the course of one's life. In the State of New York in 2015, only 2% of tenants in eviction cases had legal representation.³⁴ Meanwhile, unrepresented tenants were evicted nearly 50% of the time, whereas those who had counsel were evicted in just 10% of the cases.³⁵ A similar study from Philadelphia found that tenants without representation faced "disruptive displacement" in 78% of the cases, while those represented did so only 5% of the time.³⁶ Likewise, in Minneapolis in 2018, only 3% of tenants in eviction cases had legal counsel.³⁷ Those with full representation were able to keep an eviction off their housing record 78% of the time, while those without representation were able to do so only 6% of the time.³⁸ Indeed, a recent metastudy by the National Coalition for a Civil Right to Counsel found that in urban communities where there is no enacted civil right to counsel, 3% of tenants in eviction proceedings are represented, while 82% of landlords are represented.³⁹

³² *Id.* at 22–24.

³³ LSC 2021 BUDGET REQUEST, *supra* note 24, at 10.

³⁴ THE JUSTICE GAP, *supra* note 16, at 9.

³⁵ The Editorial Board, *A Right to a Lawyer to Save Your Home*, N.Y. TIMES (Sept. 23, 2016), <http://www.nytimes.com/2016/09/23/opinion/a-right-to-a-lawyer-to-save-your-home.html> [<http://perma.cc/THS7-XJ8V>].

³⁶ STOUT RISIUS ROSS, ECONOMIC RETURN ON INVESTMENT OF PROVIDING COUNSEL IN PHILADELPHIA EVICTION CASES FOR LOW-INCOME TENANTS 7 (2018).

³⁷ Luke Grundman, Muria Kruger & Tom Tinkham, *In Eviction Proceedings, Lawyers = Better Outcomes*, 76, 2 BENCH & BAR MINN. 19, 19 (2019) (reviewing 5,182 eviction cases filed against tenants in Hennepin County, Minnesota, from July 2017 to June 2018, and finding that only 163 tenants had an attorney of record).

³⁸ *Id.* at 20. Having an eviction on one's housing record can harm their credit and prevent them from qualifying for public housing. See Susan Beck, *The Justice Gap: How Big Law Is Failing Legal Aid*, AM. LAWYER (2015), http://www.courts.ca.gov/documents/BTB_23_PRECON_Poverty_Simulation_2.pdf [<http://perma.cc/4D5T-WYUT>].

³⁹ NAT'L COAL. FOR A CIV. RIGHT TO COUNS., EVICTION REPRESENTATION STATISTICS FOR LANDLORDS AND TENANTS ABSENT SPECIAL INTERVENTION,

The story is the same with debt collection and family issues. A study from Virginia found that 94% of defendants in debt collection cases were unrepresented, though the success rate for defendants increased from 2% when unrepresented, to 23% when represented.⁴⁰ In New York, 95% of parents in child support cases were unrepresented,⁴¹ while the Philadelphia Legal Assistance organization has reported that they must turn away 95% of those who seek assistance for protection orders.⁴² Indeed, in small claims dockets, 76% of *plaintiffs* are represented.⁴³ As noted by Alan Houseman, this “suggests that small claims courts, which were originally developed as a forum for self-represented litigants to obtain access to courts through simplified procedures, have become the forum of choice for attorney-represented plaintiffs in lower-value debt collection cases.”⁴⁴

The costs, of course, are not borne only by the unrepresented litigants. Approximately 18 million families with minor children live below 125% of the federal poverty level.⁴⁵ The ripple effects of a loss of housing, lack of protective orders, and other common civil legal issues can impact those children deeply and perpetuate a cycle of poverty.⁴⁶ Moreover, the greater community suffers real economic costs when families lose their housing and individuals lose employment, income, and benefits. Studies in various states have regularly concluded that for every dollar contributed toward legal aid, the average return on investment to the state is around six dollars.⁴⁷

In addition, the court system itself suffers when individuals are not represented, as *pro se* parties generally require additional time and assistance from court personnel, are less likely to settle their cases, and increase costs to the represented

http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats_NCCRC_pdf#_blank [<http://perma.cc/NG8S-ZAM7>] (last visited Apr. 15, 2022).

⁴⁰ LSC 2021 BUDGET REQUEST, *supra* note 24, at 10.

⁴¹ THE JUSTICE GAP, *supra* note 16, at 9.

⁴² Beck, *supra* note 38.

⁴³ See LSC 2021 BUDGET REQUEST, *supra* note 24, at 9.

⁴⁴ Alan W. Houseman, *Country Report—USA*, in ACCESS TO JUSTICE AND THE CHALLENGE OF COVID-19 293, 293 (International Legal Aid Group (ILAG) Conference, June 2021), http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0018/44424/ILAG-Conference-Booklet-3-National-Reports.pdf [<http://perma.cc/FMU2-CL9D>]. Another study found that plaintiffs are represented in the great majority of debt collection cases, while defendants are represented less than 10% of the time. THE PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 14 (May 2020).

⁴⁵ THE JUSTICE GAP, *supra* note 16, at 51.

⁴⁶ Pamela Cardulla Ortiz, *How a Civil Right to Counsel Can Help Dismantle Concentrated Poverty in America's Inner Cities*, 25 STAN. L. & POL'Y REV. 163, 168 (2014).

⁴⁷ See LISA MOORE & MEGAN PHYPER, RETURN ON INVESTMENT IN CIVIL JUSTICE SERVICES AND PROGRAMS 10–12 (2019) (providing a bibliography and summary of studies of various states); see also LSC 2021 BUDGET REQUEST, *supra* note 24, at 14–16 (listing additional studies).

party due to unnecessary delays and disruptions.⁴⁸ More fundamentally, the lack of meaningful access to representation for a huge portion of the population in this country, one of the richest in the world, affects public confidence in the very legal system itself.⁴⁹ As Deborah Rhode noted, “It is a shameful irony that the country with the world’s most lawyers has one of the least accessible systems of justice. It is more shameful still that the inadequacies attract so little concern.”⁵⁰

Despite this immense need, there are only about 10,500 dedicated legal aid attorneys in America.⁵¹ As of 2019, that equaled one legal aid attorney for every 8,143 individuals in America living below 200% of the poverty level.⁵² By contrast, there was one lawyer for every 181 members of the “paying” population.⁵³

⁴⁸ CONFERENCE OF CHIEF JUSTICES AND CONFERENCE OF STATE COURT ADMINISTRATORS, THE IMPORTANCE OF FUNDING FOR THE LEGAL SERVICES CORPORATION FROM THE PERSPECTIVE OF THE CONFERENCE OF CHIEF JUSTICES AND THE CONFERENCE OF STATE COURT ADMINISTRATORS 2 (2015), available at http://ccj.ncsc.org/_data/assets/pdf_file/0013/23251/lsc_whtpr.pdf [<http://perma.cc/MEP5-CAZY>]; see also LSC 2021 BUDGET REQUEST, *supra* note 24, at 11.

⁴⁹ See 3 JOHNSON JR., *supra* note 25, at 929; see also John M.A. DiPippa, *Peter Singer, Drowning Children, and Pro Bono*, 119 W. VA. L. REV. 113, 125–26 (2016) [hereinafter DiPippa, *Peter Singer*]; DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 27–28 (Stanford Univ. Press 2005) [hereinafter RHODE, IN PRINCIPLE AND IN PRACTICE].

⁵⁰ RHODE, *supra* note 6, at 422.

⁵¹ This number was determined by the National Center for Access to Justice, an independent organization housed at the Fordham University School of Law. *Attorney Access*, NCAJ, <http://www.ncaj.org/state-rankings/2020/attorney-access> [<http://perma.cc/46HS-EDSS>] (last visited May 30, 2021); see also Houseman, *supra* note 44, at 273. *But see* ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2017 79 n.88 (2018) [hereinafter CIVIL LEGAL AID IN THE UNITED STATES], <http://legalaidresearch.org/2020/01/31/civil-legal-aid-in-the-united-states-an-update-for-2017/> [<http://perma.cc/TCE6-AWQT>] (stating that an exact number of both legal aid attorneys and even legal aid organizations is unknown). One recent estimate by the National Legal Aid and Defender Association put the number of full-time equivalent legal aid attorneys at just 6,783. *Id.*; see also 3 JOHNSON JR., *supra* note 25, at 879 (approximating the number at 6,500 in 2014).

⁵² There were 85.5 million individuals below 200 percent of the poverty level in 2019. SEMEGA ET AL., *supra* note 22, at 59 tbl.B-3.

⁵³ See 2019 U.S. Population Estimates Continue to Show the Nation’s Growth is Slowing, U.S. CENSUS BUREAU (Dec. 30, 2019), <http://www.census.gov/newsroom/press-releases/2019/popest-nation.html> [<http://perma.cc/2L99-KKCV>] (citing that as of 2019, the United States Population was approximately 328,239,523); see also ABA National Lawyer Population Survey, AM. BAR ASS’N (2019), http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2019.pdf [<http://perma.cc/8V3H-LCQK>] (stating that in 2019 there were 1,352,027 licensed active lawyers in America). The 181 number was determined by first subtracting the 85.5 million individuals below 200% of the poverty level from the overall population, and then dividing that number by the number of overall lawyers less the 10,500 legal aid lawyers. Notably, this may overstate the availability of counsel for “paying” clients to some degree, because it does not account for lawyers who do not represent clients (e.g., judges, in-house attorneys, and professors).

The above actually overstates the number of legal aid attorneys available for many poor, however. First, as noted above, 2019 reflects a time of historic prosperity. The ratio of legal aid attorneys to those in need would be less favorable in any other year considered, and significantly so in 2021. Second, these attorneys are not distributed evenly. In twenty-seven states, there is less than one legal aid attorney for every 10,000 individuals living below 200% of the poverty level.⁵⁴ Third, not all legal aid attorneys are even theoretically “available” to those living in or near poverty. About 5,629 (full-time equivalent) lawyers work for the 132 legal aid organizations that receive funds from LSC, while 4,850 lawyers work for the 570 or so other legal aid organizations.⁵⁵ However, with limited exceptions, LSC funds may only be used to serve those under 125% of the poverty level.⁵⁶ Thus, those individuals whose family income is above 125% but below 200% of the poverty level in fact have access to only about one-half of the legal aid attorneys in America. At the same time, LSC-funded organizations are prohibited from representing many categories of clients, including most immigrants or housing clients with drug records.⁵⁷ Accordingly, individuals with those (and other) legal issues likewise may seek help only from attorneys at non-LSC-funded organizations.

The work of those 10,500 legal aid lawyers is supplemented by the bar’s significant pro bono contributions. Most states have neither mandatory nor voluntary reporting, so overall pro bono participation is unclear.⁵⁸ A comprehensive study from 2017, though, found that about 52% of lawyers did at least some pro bono service that year, and the average commitment per attorney was 36.9 hours.⁵⁹ If these numbers represent an accurate sample of the nation’s 1.3 million lawyers,⁶⁰ total pro bono hours would be about 48 million hours annually—over three times the hours worked by legal aid attorneys.⁶¹

⁵⁴ *Attorney Access*, *supra* note 51.

⁵⁵ *Id.*

⁵⁶ See sources cited *supra* notes 20 and 25.

⁵⁷ See *infra* Section II.A.

⁵⁸ Nine states require mandatory reporting of pro bono activity (but do not require that attorneys do pro bono), and thirteen states provide for voluntary reporting. See *Pro Bono Reporting*, AM. BAR ASS’N, http://www.americanbar.org/groups/probono_public_service/policy/arguments/ [<http://perma.cc/2WL7-JEXY>] (last updated Mar. 19, 2020) (reporting state bar options).

⁵⁹ See SUPPORTING JUSTICE IV, *supra* note 6, at 1 (polling 47,000 lawyers from twenty-four states).

⁶⁰ See *supra* note 53 and accompanying text.

⁶¹ This assumes that each of the 10,500 legal aid attorneys works thirty hours per week on direct client representation for fifty-two weeks of the year. For example, a 2014 study of Minnesota legal attorneys found that the 227 full-time equivalent legal aid

Notably, pro bono hours are provided disproportionately by the largest firms, which face significant reputational pressure to perform pro bono.⁶² For instance, attorneys at firms with 300 or more attorneys contribute on average almost seventy-three hours of pro bono representation per lawyer annually⁶³ and the participation rate approaches 80%.⁶⁴

However, a focus on hours alone overstates the impact that pro bono has on the justice gap. For one, almost 30% of pro bono hours are not dedicated to serving persons of limited means (or to organizations serving those individuals), but to supporting bar related activities or community-based nonprofits, such as churches, symphonies, or museums.⁶⁵ As recently as 2013, only 46% of pro bono hours went to low-income individuals.⁶⁶ Second, lawyers are less efficient (and likely less effective) at pro bono work than a legal aid attorney with years of experience on the relevant issues.⁶⁷ Indeed, many pro bono attorneys have an incentive *not* to be efficient, as we'll explore later.⁶⁸ Finally, legal aid attorneys must spend a considerable portion of their own time referring clients to, and then supporting, pro bono lawyers—time that would otherwise be spent (efficiently and effectively) serving clients.⁶⁹

Ultimately, despite the combined efforts of legal aid organizations and pro bono programs, the justice gap remains vast and continues to grow.⁷⁰ Low-income Americans seek legal advice for only about 20% of their civil legal problems.⁷¹ Yet, of those 20%, only one in three receive the assistance needed to fully resolve the issue.⁷² While others may receive some limited

attorneys across the state spent 354,120 hours on direct client representation (for an average of 1,560 hours annually). See MINN. LEGAL SERVS. COAL., *supra* note 25, at 5.

⁶² See generally *infra* Section II.B.

⁶³ SUPPORTING JUSTICE IV, *supra* note 6, at 33.

⁶⁴ See PRO BONO INST., 2018 REPORT ON THE LAW FIRM PRO BONO CHALLENGE INITIATIVE 9 (2018) [hereinafter 2018 REPORT ON THE PRO BONO CHALLENGE], <http://www.probonoinst.org/wpps/wp-content/uploads/2019A-Challenge-ReportV8june15-FINAL-1.pdf> [<http://perma.cc/PE85-PNjN>]. In particular, associates at large firms contribute the greatest portion of such hours. *Id.*

⁶⁵ See PRO BONO INST., 2020 REPORT ON THE LAW FIRM PRO BONO CHALLENGE INITIATIVE 8 (2020) [hereinafter 2020 REPORT ON THE PRO BONO CHALLENGE], <http://www.probonoinst.org/2020PBILFChallengeRep> [<http://perma.cc/5D2X-5LCB>]; see also MODEL RULES OF PRO. CONDUCT § 6.1 cmt. 6, 8 (A.B.A. 2020) (recognizing service to community organizations and service to the legal profession generally as pro bono).

⁶⁶ See Beck, *supra* note 38.

⁶⁷ See *id.*

⁶⁸ See *infra* Section III.B.

⁶⁹ See *id.*

⁷⁰ See LSC 2021 BUDGET REQUEST, *supra* note 24, at 8.

⁷¹ THE JUSTICE GAP, *supra* note 16, at 29.

⁷² *Id.* at 13.

representation, four in ten receive no legal help at all.⁷³ Altogether, low-income Americans receive inadequate or no professional legal help for 86% of the civil legal problems they face in a given year.⁷⁴ In approximately 90% of the cases for which the legal aid organization could not adequately represent the client, the cause was simply insufficient resources.⁷⁵ In 2020, the World Justice Project ranked the United States last in access to affordable civil justice among thirty-seven high-income countries—and *109th* out of 128 countries overall.⁷⁶ If ensuring access to justice for all, regardless of one's means, is indeed truly a foundational value of the profession, we are objectively failing to live out that value.

II. THE BAR'S EVOLUTION ON ACCESS TO JUSTICE AS A CORE VALUE

A threshold question is not whether the justice gap exists—it does—but whether the bar has a special responsibility to address it. Many argue the bar does, primarily because it has a monopoly on the provision of legal services (and fights to maintain that monopoly), benefits most directly from that monopoly, and should therefore ensure access to representation for those simply unable to pay.⁷⁷ Others counter that access to legal representation benefits society as a whole, not simply the bar, and the bar therefore should not bear the burden of ensuring such access.⁷⁸ Certainly, there are many individuals within the profession who care deeply about the justice gap and whose actions follow. However, for many lawyers—perhaps most of the bar—ensuring those in poverty receive access to lawyers is a noble ideal, but a practical inconvenience best left to others to address.

Ultimately, then, is the legal profession truly dedicated today to the principle that all members of society should have access to representation, regardless of their means? And, if so, is ensuring such access a responsibility of the bar? My goal with this Article is

⁷³ See *id.*

⁷⁴ See *id.* at 6. Moreover, 62% of low-income individuals have no college education (and 88% have no college degree), making it even more difficult to effectively advocate for oneself in the judicial system. See *id.* at 18.

⁷⁵ See *id.* at 44–45.

⁷⁶ See *WJP Rule of Law Index*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/rule-of-law-index/country/2020/United%20States/Civil%20Justice/> [http://perma.cc/7HCU-TVU8] (last visited June 25, 2021).

⁷⁷ See DiPippa, *Peter Singer*, *supra* note 49, at 121–24; Steven Lubet & Cathryn Stewart, A “Public Assets” Theory of Lawyers’ Pro Bono Obligations, 145 U. PA. L. REV. 1245, 1246 (1997); RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 28–29.

⁷⁸ RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 35–36 (acknowledging but refuting this position).

not to debate that, but simply to take the bar at its word. Today, all levels of the bar vocally and unequivocally profess the profession's commitment to equal access to justice.⁷⁹ Rule 6.1 of the Model Rules of Professional Conduct states that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.”⁸⁰ Former ABA President Patricia Lee Refo recently noted, “The belief that justice should be the same, in substance and availability, regardless of an individual’s economic status . . . is ingrained in the American Bar Association’s DNA.”⁸¹ The ABA has both a Standing Committee on Pro Bono and Public Service⁸² and a Standing Committee on Legal Aid and Indigent Defense,⁸³ and it bestows Pro Bono Publico Awards each year to individuals and institutions who demonstrate outstanding commitment to serving those in poverty. Similarly, almost all state bar associations have Access to Justice Commissions⁸⁴ and publicly celebrate pro bono contributors.⁸⁵ Over 80% of lawyers express strong support for pro bono,⁸⁶ and most major law firms trumpet their commitment to pro bono on their websites, to their clients, and to prospective attorneys. The Conference of Chief Justices and Conference of State Court Administrators have issued resolutions acknowledging the justice gap and setting an “aspirational goal of 100% access to effective assistance for

⁷⁹ See, e.g., MODEL RULES OF PRO. CONDUCT § 6.1 (AM. BAR ASS’N 2020); Patricia Lee Refo, *Justice for All*, AM. BAR ASS’N J. (Feb. 1, 2021, 2:30 AM), <http://www.abajournal.com/magazine/article/Justice-for-All> [<http://perma.cc/A73D-87W7>]; *Standing Committee on Legal Aid and Indigent Defense*, AM. BAR ASS’N [hereinafter *Standing Committee*], http://www.americanbar.org/groups/legal_aid_indigent_defense/ [<http://perma.cc/AF9B-GEK3>] (last visited May 30, 2021).

⁸⁰ MODEL RULES OF PRO. CONDUCT § 6.1 (AM. BAR ASS’N 2020).

⁸¹ Refo, *supra* note 79.

⁸² See *Standing Committee*, *supra* note 79.

⁸³ See *id.*

⁸⁴ See HOUSEMAN & PERLE, *supra* note 17, at 42; see also ABA Resource Center for Access to Justice Initiatives, *Access to Justice Commissions: March/April 2018 Updates*, AM. BAR ASS’N, (2018) http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_sclaid_atj_commission_updates.pdf [<http://perma.cc/LF2T-GPH5>].

⁸⁵ Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2369 (2010); see also *Pro Bono Publico Award*, AM. BAR ASS’N, http://www.americanbar.org/groups/probono_public_service/projects_awards/pro_bono_publico_award/ [<http://perma.cc/X6GP-8PTX>] (last visited May 30, 2021). For an example, the Minnesota state bar publishes each year a list of “North Star” lawyers, those who have contributed fifty or more hours to pro bono service. See *Saluting Our North Star Lawyers*, MINN. BAR ASS’N, <http://www.mnbar.org/resources/publications/bench-bar/columns/2020/06/30/saluting-our-north-star-lawyers> [<http://perma.cc/J548-V89F>] (last visited May 30, 2021).

⁸⁶ SUPPORTING JUSTICE IV, *supra* note 6, at 18.

effective assistance for essential civil legal needs.”⁸⁷ Law schools are now required to offer pro bono opportunities to students to retain accreditation, and many law schools require students to perform some pro bono to graduate.⁸⁸ The current American Association for Law Schools President, Darby Dickerson, defined access to justice as a “cornerstone of legal education and the legal profession.”⁸⁹ While members of the bar may dispute whether the bar has a *duty* to address the justice gap, or what is the best approach to close the gap, few would dispute that ensuring access to justice is “part of the very DNA of our justice system.”⁹⁰

Indeed, newly minted members of the bar would be forgiven for assuming that striving to provide access to justice has long been a foundational aspect of legal tradition. But they would be mistaken. The bar’s commitment to access to justice is a fairly recent development. To understand how the profession got to this point, it is necessary to trace the evolution of the bar’s embrace of and approach to ensuring access to justice, first through the legal aid movement and more recently the pro bono movement.

A. The Bar’s Grudging Embrace of Legal Aid

Despite early pronouncements of a lawyer’s duty, if not privilege, to “cheerfully” represent those unable to pay,⁹¹ such altruism did not extend to *anyone* unable to pay for representation. Rather, for most of the bar throughout the nineteenth century, this duty extended only to neighbors, family, and friends.⁹² While this view may have served the needs of most in rural communities, it left many in the growing cities—many of

⁸⁷ CONFERENCE OF CHIEF JUSTICES AND CONFERENCE OF STATE COURT ADMINISTRATORS, RESOLUTION 5: REAFFIRMING THE COMMITMENT TO MEANINGFUL ACCESS TO JUSTICE FOR ALL (2015), available at <http://ccj.ncsc.org/policy-resolutions> [<http://perma.cc/X2WN-8VST>] (last visited May 30, 2021).

⁸⁸ ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020-2021, Standard 303(b)(2) (2020); see also *Directory of Law School Pro Bono Programs*, AM. BAR ASS’N, http://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/ [<http://perma.cc/YNE3-LS23>] (last updated May 13, 2021).

⁸⁹ *AALS Survey: Law Class of 2019 Contributed More than \$111 Million Worth of Pro Bono Legal Services*, AALS NEWS 9 (Dec. 2019) <http://www.aals.org/aals-newsroom/2019-student-pro-bono-hours-survey/> [<http://perma.cc/6D25-ECCB>].

⁹⁰ *Pro Bono Publico*, FLA. BAR ASS’N (quoting William J. Schifino, Jr., president of the Florida Bar in 2016 and 2017), <http://www.floridabar.org/public/probono/probono002/> [<http://perma.cc/8KPJ-CF3M>] (last updated Dec. 14, 2020); see also Refo, *supra* note 79 (explaining that the current ABA president describes access to justice as “ingrained in the American Bar Association’s DNA”).

⁹¹ SMITH, *supra* note 2, at 232–33 (quoting from the first American code of ethics published by David Hoffman in the early nineteenth century, “I shall never close my ear or heart because my clients’ means are low . . . and they shall receive a due portion of my services, cheerfully given.”).

⁹² See Cummings, *supra* note 1, at 4.

whom were immigrants—without access to lawyers.⁹³ As Reginald Heber Smith bluntly put it: “[I]t is the fact that the bar as a whole has done almost nothing to assist the poor in securing that justice which our institutions profess to guarantee them.”⁹⁴ In fact, the bar’s first formal pronouncement of a lawyer’s duty to provide services to those in poverty, in the ABA’s 1908 Code of Professional Ethics, included a quite tepid, and limited, vision: “The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.”⁹⁵ That was hardly a resounding statement for an ethic of ensuring legal access to all of those in need.

While there were notable voices advocating for the underserved, chiefly that of Justice Louis Brandeis, no chorus could be attributed to the bar at large. Rather, the “majority of . . . judges and lawyers view[ed] this situation with indifference.”⁹⁶ Indeed, when Roscoe Pound, in a 1906 speech to the ABA, addressed the causes of popular dissatisfaction in the administration of civil justice in America, he failed even to acknowledge the lack of access to lawyers that millions of individuals experienced. Moreover, those in attendance were largely “incredulous, and . . . not a few were indignant at the intimation that our justice was not closely akin to perfection itself.”⁹⁷ As Reginald Heber Smith argued forcefully in his seminal 1919 book *Justice for the Poor*, while the “bench and the bar will vehemently deny any suggestion that there is no law for the poor,” that surely did not reflect the reality for those who were, in fact, poor.⁹⁸ And the number of those living in poverty was immense. Smith estimated that in 1918 almost 8 million persons in America were unable to secure legal assistance due to their poverty.⁹⁹

⁹³ See SMITH, *supra* note 2, at 33, 133, 188.

⁹⁴ *Id.* at 233.

⁹⁵ CODE OF PRO. ETHICS r. 12 (AM. BAR ASS’N 1908).

⁹⁶ SMITH, *supra* note 2, at 9. While Smith’s work was insightful and influential on the topic of access to lawyers, he was less perceptive regarding the role that substantive law and the application thereof played with respect to equal justice, in particular racial and gender inequality under the law. See John M.A. DiPippa, *Justice and the Poor in the 21st Century*, 40 CAMPBELL L. REV. 73, 93 (2018) [hereinafter DiPippa, *Justice and the Poor*]. For instance, Smith noted:

[T]he substantive law, with minor exceptions, is eminently fair and impartial.

In other words, the existing denial of justice to the poor is not attributable to any injustice in the heart of the law itself. The necessary foundation for freedom and equality of justice exists. The immemorial struggle is half won.

SMITH, *supra* note 2, at 15.

⁹⁷ SMITH, *supra* note 2, at 8.

⁹⁸ *Id.* at 11.

⁹⁹ *Id.* at 33.

Due to the efforts of “small and isolated groups of judges, lawyers, and laymen”¹⁰⁰ who first acknowledged, and then were moved to actually confront these issues, legal aid organizations began to spring up in the late 1800s.¹⁰¹ But even those initial organizations were limited to providing services to specific ethnic groups of immigrants, those particularly vulnerable given their limited means and understanding of American systems and language.¹⁰² The first legal aid organization, created specifically to assist German immigrants, was formed in New York City in 1876. The first legal aid organization open to all, regardless of nationality, race, or sex, was organized in Chicago in 1888. By the turn of the century, legal aid organizations existed in three cities, Chicago, New York, and Jersey City.¹⁰³ From there, expansion was steady, if not rapid, and legal aid offices opened in most major American cities.¹⁰⁴ By 1909 there were fourteen legal aid organizations, twenty-eight just four years later, and over forty by 1919.¹⁰⁵ By 1949, there were ninety-two legal aid organizations in the United States,¹⁰⁶ and there are approximately 1,000 today.¹⁰⁷

The first legal aid organization initiated by the bar itself was The Boston Legal Aid Society, organized in 1900.¹⁰⁸ The impetus for the bar’s support, however, was to “relieve private offices of their charity cases.”¹⁰⁹ In other words, the bar’s motivation, at least in significant part, was to shift pressure to do pro bono

¹⁰⁰ *Id.* at 38, 134–36. Smith expressly noted the absence of bar associations and “judges acting as a body” in the formation of legal aid organizations due to either “ignorance of, or indifference to, the disadvantages under which the poor have struggled.” *Id.* at 37.

¹⁰¹ *Id.* at 134–36.

¹⁰² *See id.*

¹⁰³ *See id.* at 139.

¹⁰⁴ *Id.* at 140.

¹⁰⁵ *Id.* at 145, 147. The law school at the University of Denver (now the Sturm School of Law) became the first law school to form a legal aid clinic in 1904, though the clinic in its initial formulation closed in 1910. *See id.* at 143–44.

¹⁰⁶ EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS’ SERVICES FOR PERSONS UNABLE TO PAY FEES* 26 (First Greenwood Reprinting 1971) (1951).

¹⁰⁷ The exact number of legal aid organizations in America is unknown. *See* CIVIL LEGAL AID IN THE UNITED STATES, *supra* note 51. Most, however, “are small entities that provide limited services in specific locales or for particular client groups . . .” *Id.* at 79. Houseman has identified approximately 660 civil legal aid programs, exclusive of law school clinics. *See id.* at 79 n.88. If law school clinics are added, the number increases to about 860. *Id.* However, the National Legal Aid and Defender Association puts the number at 1,147 staff-based programs having an average of six attorneys. *Id.* In addition, one organization may have several offices. For instance, the 132 organizations that receive LSC funding have 855 offices serving every county and territory in the United States. *See* LSC 2021 BUDGET REQUEST, *supra* note 24, at ii.

¹⁰⁸ *See* Mark Spiegel, *The Boston Legal Aid Society: 1900–1925* 20 (B.C. L. Sch. Pub. L. & Legal Theory Rsch. Paper Series, Research Paper No. 20, 2003).

¹⁰⁹ SMITH, *supra* note 2, at 141.

work¹¹⁰ from private attorneys to dedicated legal aid attorneys—in turn, permitting private attorneys to increase their profits.¹¹¹ Reginald Heber Smith observed, “The legal aid societies have recognized their position and have served the bar to the limit of their ability; the lawyers are only dimly aware that they owe a debt to legal aid work, and as yet . . . have not taken the part which may fairly be expected of them.”¹¹² Notably, when the Carnegie Foundation requested the ABA’s mailing list so that it could send a free copy of Smith’s *Justice for the Poor* to all ABA members, the ABA refused the request.¹¹³

In response to Smith’s public rebuke of the bar’s lack of support for legal aid,¹¹⁴ the ABA did establish the Special Committee on Legal Aid Work in 1921. The ABA elevated it to a standing committee the following year, which Smith himself chaired until 1938.¹¹⁵

Though the national bar now at least voiced support for legal aid, local and state groups remained slow to embrace a broader legal aid movement.¹¹⁶ While sections of the bar may have been simply ignorant or apathetic to the issue, others were directly hostile to legal aid. Some feared competition from legal aid organizations for clients. Others felt such organizations would improperly seek systemic change rather than limit their efforts to individual issues. And some may have had a racially motivated desire *not* to build up certain communities.¹¹⁷

Whatever the motivations, however, a commitment to ensuring access to the law for all was not a core value of the profession. Indeed, Emery Brownell concluded in a 1949 follow-up report to Smith’s *Justice and the Poor*:

¹¹⁰ The term “pro bono” was not used at that time; Reginald Heber Smith addressed the concept of pro bono in JUSTICE AND THE POOR as the “volunteer counsel or honorary counsel plan.” SMITH, *supra* note 2, at 220; *see also* DiPippa, *Justice and the Poor*, *supra* note 96, at 89.

¹¹¹ *See* DiPippa, *Justice and the Poor*, *supra* note 96, at 90.

¹¹² SMITH, *supra* note 2, at 226. Among other benefits, Smith noted the reputational benefit to the profession of having legal claims of the poor heard, and the offloading of the ethical responsibility and financial impact of serving the poor from those in private practice. *See id.* at 228–29.

¹¹³ *See* DiPippa, *Justice and the Poor*, *supra* note 96, at 92.

¹¹⁴ *See* Cummings, *supra* note 1, at 12.

¹¹⁵ *See* DiPippa, *Justice and the Poor*, *supra* note 96, at 92; *see also* A Century of SCLAID Timeline, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_aid_indigent_defense/about-us/sclaid-100/a-century-of-sclaid/ [<http://perma.cc/WX9T-B6VB>] (last visited December 31, 2021). That committee remains today as the ABA Standing Committee on Legal Aid & Indigent Defense.

¹¹⁶ *See* DiPippa, *Justice and the Poor*, *supra* note 96, at 94.

¹¹⁷ *See id.* at 93, 96; *see also* Cummings, *supra* note 1, at 15–17.

A major reason [for the lack of legal aid growth] has been the failure of the Bar to recognize the problem and to deal with it realistically. Whether due to the unfounded fear of competition, inherent lethargy, or mere lack of interest, the failure of the local bar associations to give leadership, and in many cases the hostility of lawyers to the idea, have been formidable stumbling blocks in the efforts to establish needed facilities.¹¹⁸

Brownell concluded starkly, “The unhappy truth is that [the legal profession] had made almost no substantial progress up to the close of 1947.”¹¹⁹

Even legal aid advocates debated who should be primarily responsible for funding the work. Smith himself vacillated between assigning responsibility to the bar and to the government. He initially asserted that members of the bar should bear the costs, chiefly because they (apart from the recipients of the services themselves) had the most to gain: legal aid programs permitted private lawyers to increase their own profits by relieving them of the “legal and moral responsibility of the legal profession in general” to provide access to justice.¹²⁰ Yet, Smith also recognized the benefits to the greater society when its members have adequate legal representation, and he saw legal aid work as an “essential public service” that should be funded, when appropriate, by the government.¹²¹ He also advocated a national approach to legal aid to ensure access and permit efficiencies of scale, to be supported both financially and logistically by the ABA, and to be placed under judicial control.¹²² Ultimately, Smith landed on the side of private support, noting in 1949 “the ever-present danger that a grant of governmental money will be followed by governmental control.”¹²³

¹¹⁸ BROWNELL, *supra* note 106, at 29.

¹¹⁹ *Id.* at 33.

¹²⁰ DiPippa, *Justice and the Poor*, *supra* note 96, at 89–90.

¹²¹ *Id.* at 90–91; *see also* SMITH, *supra* note 2, at 182, 244.

¹²² *See* SMITH, *supra* note 2, at 244–47; *see also* 1 EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 34, 35 (2014).

¹²³ Reginald Heber Smith, *Introduction* to EMERY A. BROWNELL, LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS' SERVICES FOR PERSONS UNABLE TO PAY FEES, at xvii (First Greenwood Reprinting 1971) (1951). For purposes of transparency, my own view is that the federal and state governments should bear primary responsibility for increased legal aid funding, given the direct benefit that closing the justice gap would have to society and that many of the factors that have led to the justice gap extend beyond the law. Yet, I strongly believe the bar should accept a much greater role in funding legal aid than it presently accepts given its unique relationship to the issue, including its tight control over who can represent clients its resistance. These considerations will be explored in more detail in a forthcoming piece.

Meanwhile, as both the population and complexities of an expanding industrial nation grew, the justice gap widened.¹²⁴ In 1950, the ABA passed a resolution asserting that it was “the primary responsibility of the legal profession” to establish, maintain, and support legal aid facilities “in all parts of the country”—its first formal call for such engagement.¹²⁵ The catalyst was not the Brownell report, however, but a concerning trend across the ocean. In 1950, England instituted a government-funded legal aid system that compensated private lawyers who handled cases for those unable to afford legal services.¹²⁶ Indeed, “[t]o most leaders of the American Bar, anything patterned on the British system constituted ‘socialism of the legal profession.’”¹²⁷ Robert Storey wrote in the ABA Journal in 1951, one year prior to becoming the ABA president, that a federally financed nationwide plan for legal aid services was the profession’s “greatest threat” (aside from Communist infiltration).¹²⁸ In sum, the ABA’s belated call to its members to support legal aid was not born from the profession’s commitment to justice, but “to forestall the threat to individual freedom implicit in growing efforts to socialize the legal profession.”¹²⁹ The ABA grudgingly embraced legal aid as a way to “avoid change from being ‘thrust from without upon an unwilling bar.’”¹³⁰

This incentive spurred action. In the following decade, the number of legal aid offices in the United States nearly tripled, from ninety-two in 1949 to 236 by 1961. From 1920 to 1950, the number of legal aid offices had increased by just 40% each decade.¹³¹ In the 1950s alone, the number increased by 250%.¹³² The overall financial support for civil legal aid rose from \$909,179 in 1947¹³³ to \$2,084,125 in 1959¹³⁴ to \$3,456,403 in 1962.¹³⁵ While the government provided only 7% of legal aid

¹²⁴ See BROWNELL, *supra* note 106, at 32.

¹²⁵ 1 JOHNSON JR., *supra* note 122, at 37 (quoting an ABA Resolution from September 21, 1950); Reginald Heber Smith, *Introduction* to EMERY A. BROWNELL, LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS’ SERVICES FOR PERSONS UNABLE TO PAY FEES, at xx (First Greenwood Reprinting 1971) (1951).

¹²⁶ See 1 JOHNSON JR., *supra* note 122, at 36.

¹²⁷ *Id.* at 36.

¹²⁸ *Id.* at 36 (citing Robert Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 AM. BAR ASS’N J. 100, 101 (1951)).

¹²⁹ 1 JOHNSON JR., *supra* note 122, at 37 (quoting the ABA’s September 1950 resolution in support of legal aid).

¹³⁰ Cummings, *supra* note 1, at 15 (quoting Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 AM. BAR ASS’N J. 1159, 1161 (1958)).

¹³¹ BROWNELL, *supra* note 106, at 10 (Supp. 1961).

¹³² *Id.* at 10 (Supp. 1961).

¹³³ *Id.* at 233.

¹³⁴ *Id.* at 63 (Supp. 1961).

¹³⁵ 1 JOHNSON JR., *supra* note 122, at 37, 41.

support in 1959,¹³⁶ the majority came from “united funds” and “community chests,” not from the bar itself.¹³⁷

While government funding may have created autonomy concerns, the heavy reliance on community funding presented its own challenges. For instance, to retain funding, many legal aid societies declined to represent individuals in disputes against local businesses or employers.¹³⁸ Indeed, “too often those who supplied the money purchased the kind of legal aid that served their interests rather than the poor.”¹³⁹

Despite this progress, the overall funding of legal aid remained paltry. By 1962, the combined budgets of all legal aid societies was less than 0.1% of the total spent annually on legal services in the United States.¹⁴⁰ Moreover, there was only 400 full-time legal aid attorneys for the over 37 million Americans unable to afford legal services, compared to 250,000 lawyers to serve the remaining 150 million Americans.¹⁴¹ The percentage of financial support for legal aid that came from the bar rose from just 8% to 12%.¹⁴² In short, while the ABA was now formally in support of legal aid, the bar itself was slow to follow.

As a result, the ABA’s fear that the government would step in to fill the legal aid void was realized. Shortly after President Lyndon Johnson declared America’s “war on poverty” in 1964, the newly created Office of Economic Opportunity (OEO) started a legal services program to bring services to low-income neighborhoods throughout the country.¹⁴³ Though the ABA initially resisted the broad government entry into legal aid, its president (and future Supreme Court Justice), Lewis Powell, recognized the reputational risk to the profession if the ABA directly opposed it.¹⁴⁴ Thus, he negotiated a resolution whereby the ABA would formally support OEO’s efforts in return for a say in major policy decisions and a commitment from OEO to support existing bar-sponsored legal aid organizations.¹⁴⁵

¹³⁶ BROWNELL, *supra* note 106, at 63 (Supp. 1961). While the government provided 7% of the overall support for civil legal aid, the government played a much greater role (78%) in supporting public defender programs. *Id.*

¹³⁷ *Id.* at 61 (Supp. 1961).

¹³⁸ 1 JOHNSON JR., *supra* note 122, at 40.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 38.

¹⁴¹ *Id.* Beyond limited access to lawyers, the quality of representation itself was greatly compromised by the meager compensation earned by legal aid lawyers and huge caseloads. *Id.* at 39.

¹⁴² BROWNELL, *supra* note 106, at 61 (Supp. 1961).

¹⁴³ 1 JOHNSON JR., *supra* note 122, at 62–63, 69.

¹⁴⁴ *Id.* at 73–74.

¹⁴⁵ *Id.* at 73–75.

At a meeting in early 1965 to persuade ABA leadership to support OEO, William McCalpin expressly called out the bar's velleity regarding the justice gap:

It is a rather sad and at the same time an exhilarating fact that the past 60 minutes have been the most concentrated . . . and the most constructive consideration of the basic question, "How can the legal profession best serve the public?" in a quarter century. . . . It would be more encouraging if these questions arose in our midst *sui generis*. What we cannot ignore is that this self-examination has been forced upon us by the public whom we are sworn to serve. . . . Two broad paths lie before us. One is the well-trodden road of obstruction, reaction, opposition. . . . The alternative is to meet the challenge head-on, frankly with the penetrating analysis and the restless curiosity of a lawyer addressing himself to a legal problem.¹⁴⁶

The ABA subsequently approved a resolution supporting the OEO plan by unanimous vote,¹⁴⁷ and the bar and the federal government became grudging partners in the delivery of legal services to America's poor.

By 1974, when the program had morphed into the LSC, the bar's embrace of government funding for legal aid was complete. The LSC, an independent non-profit corporation with an eleven-member board appointed by the President, receives appropriations from Congress and distributes funding to qualifying civil legal aid organizations around the country.¹⁴⁸ By 1981, LSC funding from Congress reached its relative peak at \$321,300,000, just shy of \$1 billion in inflation adjusted dollars today—enough to provide a full-time legal aid lawyer for every 5,000 low-income Americans.¹⁴⁹ When President Reagan moved to abolish the LSC after his election, refused to appoint new board members, and submitted a budget with no LSC funding, the ABA, along with lawyers from all over the country and from both political parties, vigorously and publicly opposed the plan.¹⁵⁰

However, with federal funding came the loss of autonomy the bar feared. To receive LSC funding, legal aid organizations were prohibited from representing certain clients or participating in

¹⁴⁶ *Id.* at 74–75 (quoting William McCalpin's remarks at the 1965 ABA mid-year meeting).

¹⁴⁷ 1 JOHNSON JR., *supra* note 122, at 75.

¹⁴⁸ 42 U.S.C.A. §§ 2996b(a), 2996c(a) (West 2018); LEGAL AID FOR THE POOR AND THE LEGAL SERVICES CORPORATION 26 (Carl T. Donovan ed., 2010). Funds are allocated among the states based on the number of low-income individuals per capita, though organizations within each state compete among themselves for a share of that funding. *Id.* at 35.

¹⁴⁹ DiPippa, *Justice and the Poor*, *supra* note 96, at 105; 2 EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 502 (2014).

¹⁵⁰ 2 JOHNSON JR., *supra* note 149, at 512–14.

certain activities. These restrictions were born from a fear by many in Washington that legal aid organizations would push for systemic liberal reform rather than simply provide individual representation for day-to-day disputes.¹⁵¹ Initially, these restrictions prohibited organizations or their lawyers from participating in any political activities, class actions, boycotts, strikes, or demonstrations, and from representing plaintiffs in abortion, school desegregation, criminal, or military draft or desertion cases.¹⁵² Over time, LSC was required to submit to further restrictions in return for continued financial support.¹⁵³ Currently, in addition to the above restrictions, LSC grant recipients may not participate in assisted suicide activities,¹⁵⁴ represent non-citizens in any matter (with limited exceptions for victims of domestic violence or child abuse),¹⁵⁵ represent clients in eviction proceedings if the tenant had been charged with a drug-related crime,¹⁵⁶ or participate in efforts to reform a federal or state welfare system.¹⁵⁷ Notably, LSC grant recipients must agree in writing that any funds they receive from *outside* sources likewise will not be used to support many of the prohibited activities.¹⁵⁸ Finally, with limited exceptions, LSC-funded organizations may only provide assistance to those at or below 125% of the poverty level.¹⁵⁹

The creation of LSC and the support it provides to legal aid organizations has been a great step forward in reducing the justice gap, and it is an essential piece of the puzzle going forward. Yet, it is inherently subject to political winds, and the restrictions on LSC-recipients leave many without representation.

¹⁵¹ HOUSEMAN & PERLE, *supra* note 17, at 37.

¹⁵² Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378, 382–385 (to be codified at 42 U.S.C. § 2996); LEGAL AID FOR THE POOR AND THE LEGAL SERVICES CORPORATION, *supra* note 148, at 16.

¹⁵³ LEGAL AID FOR THE POOR AND THE LEGAL SERVICES CORPORATION, *supra* note 148, at 18–20; HOUSEMAN & PERLE, *supra* note 17, at 29–37.

¹⁵⁴ 45 C.F.R. § 1643.3(c) (2021); 42 U.S.C. § 2996f(b)(11) (providing that funds are not available to a corporation to provide legal assistance if doing so is inconsistent with the Assisted Suicide Funding Restriction Act of 1997).

¹⁵⁵ 45 C.F.R. §§ 1626.1, 1626.4(a) (2021).

¹⁵⁶ *Id.* § 1633.1 (2021).

¹⁵⁷ *Id.* § 1639.1 (2021); *see also* LEGAL AID FOR THE POOR AND THE LEGAL SERVICES CORPORATION, *supra* note 148, at 28. For a complete list of restrictions, *see LSC Restrictions and Other Funding Sources*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/laws-regulations-and-guidance/lsc-restrictions-and-other-funding-sources> [<http://perma.cc/8SSR-ESBU>].

¹⁵⁸ 42 U.S.C. § 2996i(c); *see also* LEGAL AID FOR THE POOR AND THE LEGAL SERVICES CORPORATION, *supra* note 148, at 16.

¹⁵⁹ 45 C.F.R. §§ 1611.3(c)(1), 1611.5 (2021).

1981 may well be considered the highwater mark for the legal aid movement in America. Although the LSC survived numerous defunding threats from the Reagan era to the Trump era, federal financial support has never recovered. In fact, in the forty years since, the average annual Congressional appropriation to LSC has been just \$343,813,000.¹⁶⁰ From a nominal standpoint, this has effectively reflected no real increase from the 1981 appropriation of \$321,300,000.¹⁶¹ When adjusted for inflation, support since 1981 has averaged just over one-half of Congress's 1981 appropriation.¹⁶² Meanwhile, since 1980 the United States population has increased by over 100 million¹⁶³ while the activities LSC-funded organizations may undertake has decreased.¹⁶⁴ As a result, the number of organizations that receive LSC support decreased from 325 in 1996 to 133 in 2018.¹⁶⁵ Nonetheless, the ABA has remained a stout advocate for legal aid since 1981—at least for “a strong, *federally funded*, community controlled program to provide legal aid to the poor.”¹⁶⁶

¹⁶⁰ See *Congressional Appropriations*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/who-we-are/congressional-oversight/congressional-appropriations> [<http://perma.cc/JYU4-DZNU>].

¹⁶¹ *Id.* Notably, LSC funding has increased modestly each year since 2013, and Congress's \$465,000,000 appropriation in 2021 was the highest nominal amount in LSC's history. *Id.*; see David Reich, *Additional Funding Needed for Legal Service Corporation*, CTR. ON BUDGET & POLY PRIORITIES (Feb. 1, 2021, 2:15 PM), <http://www.cbpp.org/blog/additional-funding-needed-for-legal-service-corporation> [<http://perma.cc/VSC7-MRZ8>]. In addition, the Biden Administration requested, and the House Committee on Appropriations approved, a \$600,000,000 appropriation to LSC for 2022. *House Appropriations Committee Approves Bill Providing \$600 Million for the Legal Services Corporation*, LEGAL SERVS. CORP. (July 6, 2021), <http://www.lsc.gov/press-release/house-appropriations-committee-approves-bill-providing-600-million-legal-services-corporation> [<http://perma.cc/7D36-96CU>]. While this recent trend is encouraging, similar trends over the past forty years have been followed by significant reductions. *Congressional Appropriations*, *supra* note 160. It remains to be seen whether the trend continues over the course of several elections.

¹⁶² More specifically, 54.5%. Calculations for each year were determined from January of each year to January 2021 using the inflation calculator available at *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm [<http://perma.cc/T9E2-G2AA>] (on file with author).

¹⁶³ The population in 1980 was about 231,000,000. U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1981 at 8 (102d ed. 1981).

¹⁶⁴ Cummings, *supra* note 1, at 22–23.

¹⁶⁵ HOUSEMAN & PERLE, *supra* note 17, at 40.

¹⁶⁶ *Legal Services Corporation: Latest Developments*, AM. BAR ASS'N (Apr. 2020) (emphasis added), http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/access_to_legal_services/legal_services_corporation/ [<http://perma.cc/TQW7-2B5P>] (“ABA Policy” near the bottom of webpage).

Overall legal aid funding since 2003 is available through the ABA Resource Center for Access to Justice Initiatives.¹⁶⁷ From 2003 to 2013, overall legal aid funding remained largely flat, increasing from \$1.31 billion to \$1.47 billion.¹⁶⁸ Since 2013, funding has steadily increased and reached \$2.16 billion in 2019.¹⁶⁹ Over those seventeen years, 58% of legal aid support came from federal and state governments, 9% from community foundations and corporate grants, and just 6% from the legal community.¹⁷⁰ The remaining funding came from Interest on Lawyer Trust Account (IOLTA) programs (9%), court fines and fees (8%), cy pres awards (2%), and “other” strategies (8%).¹⁷¹ Reginald Heber Smith’s observation 100 years ago remains true today: “The growth of legal aid work has been made possible by laymen and not lawyers.”¹⁷²

While 1981 may mark the peak of the legal aid movement, it also marks the beginning of the profession’s shift to pro bono as the primary vehicle to address the justice gap. But, as with legal aid, interest from the bar itself lagged behind the ABA’s appeals—until it became economically beneficial for large firms to embrace pro bono.¹⁷³ The impetus behind support for pro bono was less defensive than with legal aid. Rather, as we’ll see next, firms went on the offensive, driven primarily by reputational competition among firms.

B. The Bar’s Enthusiastic Embrace of Pro Bono

In 1969, the ABA replaced its 1908 Canons of Professional Ethics with a new Model Code of Professional Responsibility.¹⁷⁴ Whereas the Canons called on lawyers to give “special and kindly considerations” to the “reasonable requests of brother lawyers” and

¹⁶⁷ *U.S. Funding for Legal Aid*, ABARRAY (Jan. 7, 2022) <http://public.tableau.com/app/profile/abarray/viz/ABArrayNationalData/NationalLegalAidFunding> [<http://perma.cc/EKM9-NHDY>]. For a breakdown of funding sources specific to LSC recipients, see LEGAL SERVS. CORP., 2018 BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS 13–14 (2018).

¹⁶⁸ *U.S. Funding for Legal Aid*, *supra* note 167.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* Government funding included state appropriations (10%), LSC appropriations (24%), and other public funds (24%). *Id.* Gifts from community foundations exclude gifts from law firm foundations, which are reflected in the “Legal Community” category. *Id.*

¹⁷¹ *Id.* The “other” category includes fellowships, United Way donations, individual (non-lawyer) donations, and attorney’s fees. *Id.*

¹⁷² SMITH, *supra* note 2, at 238.

¹⁷³ See Cummings, *supra* note 1, at 24.

¹⁷⁴ See *Model Rules of Professional Conduct*, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rule_s_of_professional_conduct/ [<http://perma.cc/AF2N-RHCM>] (last visited Mar. 18, 2022).

their widows and orphans,¹⁷⁵ the Model Code provided a broader vision: “[P]ersons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.”¹⁷⁶ The Model Code added that “[t]he rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer,” and “[e]very lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.”¹⁷⁷

This was the first time the ABA formally referred to pro bono work as a professional duty or obligation of lawyers. In a footnote to this rule, the ABA reinforced the importance of organized legal aid as a tool to address the justice gap, presciently noting:

[A] system of justice that attempts, in mid-twentieth century America, to meet the needs of the financially incapacitated accused through primary or exclusive reliance on the uncompensated services of counsel will prove unsuccessful and inadequate. . . . A system of adequate representation, therefore, should be structured and financed in a manner reflecting its public importance.¹⁷⁸

The aspirational approach, however, had little effect on actual pro bono contributions by individual lawyers.¹⁷⁹ In the 1970s, only a small number of private attorneys did pro bono work; one study found “the most generous firms provided only about five hours a year” per lawyer.¹⁸⁰ And, similar to the early view of pro bono, “[m]ost uncompensated assistance went to friends, relatives and employees of lawyers and their clients, or to bar associations and middle- and upper-middle-class organizations such as Jaycees, Little League, and symphonies.”¹⁸¹ Another study from that period concluded that only 5% of lawyer volunteer work went to indigent individuals.¹⁸² In sum, it would be hard to cite much evidence that, to the vast majority of the

¹⁷⁵ AM. BAR ASS’N, FINAL REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS 578 (1908).

¹⁷⁶ AM. BAR ASS’N, CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS 6 (1969) [hereinafter 1969 MODEL CODE] (footnote omitted).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 12 n.56 (alteration in original) (quoting FRANCIS A. ALLEN, REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 42 (1963)).

¹⁷⁹ See Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 L. & SOC’Y REV. 79, 90–91 (2007).

¹⁸⁰ Rhode, *Pro Bono in Principle*, *supra* note 8, at 425 n.25 (citing JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 282 (1976)).

¹⁸¹ *Id.* at 425.

¹⁸² *Id.* at 425 n.25 (citing Joel F. Handler et al., *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A. J. 1388, 1389, 1391 (1975)).

bar, pro bono service was a fundamental value. Rather, most members of the bar were using pro bono to support their own community activities and standing, while relying on legal aid lawyers to satisfy any obligation to serve those unable to afford civil legal services.

The first significant shift toward pro bono—and toward a focus on indigent *individuals*—may be attributed not to the ABA’s aspirational call but to a financial incentive.¹⁸³ In response to the threats to LSC, the ABA in 1980 urged Congress to mandate that LSC recipients incorporate substantial participation by private attorneys in the representation of legal aid clients.¹⁸⁴ This was done, in part, to assuage conservative critics who felt staffed legal aid clinics were too focused on social change, whereas private lawyers would be more focused on individual client concerns.¹⁸⁵ Before Congress acted, the LSC itself in 1981 directed its grantees to use at least 10% of their LSC funds to support such efforts, which it increased to 12.5% in 1984.¹⁸⁶ This requirement became known as the private attorney involvement, or “PAI.”¹⁸⁷

Thereafter, to receive funding, LSC recipients had to fund efforts to incorporate pro bono services of private attorneys.¹⁸⁸ Most of these funds went toward the development and support of pro bono programs,¹⁸⁹ with legal aid organizations and local bar associations partnering to develop new volunteer recruitment and referral programs.¹⁹⁰ With legal aid funding now directly tied to pro bono participation, the ABA put its support behind pro bono, and as a result, pro bono programs around the country increased from eighty-three in 1980 to over 500 by 1985.¹⁹¹

The fuse was lit, but what truly detonated the pro bono movement was a convergence of additional economic factors in

¹⁸³ See Cummings, *supra* note 1, at 24.

¹⁸⁴ See HOUSEMAN & PERLE, *supra* note 17, at 26–27.

¹⁸⁵ Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL’Y REV. 83, 89 n.27 (2013).

¹⁸⁶ HOUSEMAN & PERLE, *supra* note 17, at 27; see also Cummings, *supra* note 1, at 24–25. The amount remains at 12.5% today. 45 C.F.R. § 1614.2 (2021).

¹⁸⁷ 45 C.F.R. § 1614.2 (2021).

¹⁸⁸ See Cummings, *supra* note 1, at 24.

¹⁸⁹ See HOUSEMAN & PERLE, *supra* note 17, at 27.

¹⁹⁰ Angela McCaffrey, *Pro Bono in Minnesota: A History of Volunteerism in the Delivery of Civil Legal Services to Low Income Clients*, 13 L. & INEQ. 77, 87 (1994).

¹⁹¹ See Cummings, *supra* note 1, at 25; AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 30 (2009) [hereinafter SUPPORTING JUSTICE II]. By 2009, there were over 1,000 pro bono programs. SUPPORTING JUSTICE II, *supra*, at 30.

the 1990s. Scholars have identified four primary drivers for pro bono's sudden growth: (1) the reduction of federal aid in the 1980s noted above, (2) the growth of large law firms, (3) the role of professional incentives, and (4) a focus on rankings and reputation.¹⁹² The first concrete step came in 1993 when the ABA replaced its general aspirational statement in its Model Code of Professional Responsibility that a lawyer “should render public interest legal service” with a specific goal of 50 hours of pro bono service per lawyer annually.¹⁹³ That same year, the ABA instituted the Law Firm Pro Bono Challenge—which challenged firms with fifty or more lawyers to contribute 3% to 5% of their billable hours to pro bono work—and then it publicized which firms met the challenge.¹⁹⁴

Similarly, in the early 1990s *The American Lawyer* magazine began to report pro bono data from the top law firms, and, a decade later, began incorporating pro bono activity into its rankings of the top twenty law firms (known as the “A-list”).¹⁹⁵ That incentive alone—until recently, pro bono accounted for one-third of a firm’s ranking¹⁹⁶—“dramatically altered firm behavior.”¹⁹⁷ Indeed, representatives from many

¹⁹² See Cummings & Rhode, *supra* note 85, at 2365–72. Regarding the growth of law firms, the average size of the top 100 American law firms grew from 375 in 1990, to 621 in 2001, to 820 in 2008, while profits tripled during that time. *Id.* at 2366.

¹⁹³ See CENTER FOR PRO. RESP. AM. BAR. ASS'N, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 706–08. (Art Garwin ed., 2013). In its 1993 amendments, the ABA also somewhat limited the activities for which lawyers could claim pro bono credit to focus the work on indigent *individuals* or agencies that support such individuals. See *id.* at 706–10; see also Cummings, *supra* note 1, at 32.

¹⁹⁴ Cummings, *supra* note 1, at 34, 40.

¹⁹⁵ See Cummings & Rhode, *supra* note 85, at 2371. The annual Pro Bono Scorecard ranks the 200 largest firms by revenue (the AmLaw 200). *The 2020 Pro Bono Scorecard: The National Rankings*, THE AM. LAW. (Jul. 6, 2020, 5:00 AM), <http://www.law.com/americanlawyer/2020/07/06/the-2020-pro-bono-scorecard-the-national-rankings/?slreturn=20211017200607> [http://perma.cc/Y5PL-DCS2]. One half of the score reflects the average number of pro bono hours per lawyer; the other half reflects the percentage of lawyers who performed more than 20 hours of pro bono work. *Id.* The “A-list” rankings measure revenue per lawyer, pro bono commitment, associate satisfaction, diversity, and female representation among equity partners, with revenue per lawyer and pro bono commitment weighted double. See Gina Passarella, *Introducing the New and Improved A-List*, THE AM. LAW. (July 27, 2017, 2:42 PM), <http://www.law.com/americanlawyer/2017/07/27/introducing-the-new-and-improved-a-list/> [http://perma.cc/PVE3-88JM].

¹⁹⁶ Prior to 2017, four categories (revenue per lawyer, pro bono commitment, associate satisfaction, and diversity) were each scored on a 200-point scale, with revenue per lawyer and pro bono commitment then given double weight. Passarella, *supra* note 195. In 2017, *The American Lawyer* added a fifth category, female equity partner representation, while continuing to give double weight to pro bono representation and revenue per lawyer. *Id.* Thus, pro bono commitment presently accounts for 28.6% of a firm’s score.

¹⁹⁷ Cummings & Rhode, *supra* note 85, at 2371.

large firms specifically cited pressure from *The American Lawyer* rankings as the primary influence behind their newfound commitment to pro bono.¹⁹⁸ Likewise, in 2006 the National Association for Law Placement began publishing information for prospective associates about law firm commitment to pro bono,¹⁹⁹ and the influential Vault.com also published a list of the best firms for pro bono.²⁰⁰ Finally, when choosing which law firms to hire, corporate clients began to require that firms demonstrate their commitment to pro bono.²⁰¹

Together, those reputational incentives for the largest firms spurred action.²⁰² In 1995, for instance, the 135 firms that signed on to the Law Firm Pro Bono Challenge contributed 1.6 million pro bono hours.²⁰³ By 2004, the number of hours increased to 2.2 million and then more than doubled over the next five years to 4.9 million hours.²⁰⁴ Since 2009, however, the hours have remained relatively flat, totaling 5 million hours in 2019.²⁰⁵ Notably, these numbers represent those firms who have voluntarily signed onto the Pro Bono Challenge and, presumably, reflect the segment of the bar most committed to pro bono.²⁰⁶ Similarly, firms began to add dedicated pro bono managers, often full-time attorneys, to manage their pro bono programs.²⁰⁷ In 2000, only a dozen of the 200 largest American law firms (the AmLaw 200) had a pro bono coordinator; by 2008, nearly 100 of those firms did.²⁰⁸ Today, state bar associations in almost all fifty states have pro bono committees,²⁰⁹ there are over 900 formal pro

¹⁹⁸ See, e.g., Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, in 12 ACCESS TO JUST. (SOCIO. CRIME, L. & DEVIANCE) 145, 156 (Rebecca L. Sandefur ed., 2009); Cummings & Rhode, *supra* note 85, at 2374 (alteration in original) (quoting a partner at a large firm, “We had a whole [partnership] meeting on pro bono because the firm wanted to get on the ridiculous A-list . . . We made it [the next year] and since [then], there has been no utterance of the words ‘pro bono’ [at the partnership meetings].”).

¹⁹⁹ See Cummings & Rhode, *supra* note 85, at 2372.

²⁰⁰ See *Best Law Firms to Work For*, FIRSTHAND, <http://firsthand.co/best-companies-to-work-for/law/best-law-firms-to-work-for/pro-bono> [<http://perma.cc/T74L-HMS5>].

²⁰¹ See Steven A. Boutcher, *Rethinking Culture: Organized Pro Bono and the External Sources of Law Firm Culture*, 8 U. ST. THOMAS L.J. 108, 124–25 (2011); Cummings, *supra* note 1, at 108–10.

²⁰² See Cummings & Sandefur, *supra* note 185, at 97; Boutcher, *supra* note 201, at 122–27.

²⁰³ 2020 REPORT ON THE PRO BONO CHALLENGE, *supra* note 65, at 11.

²⁰⁴ See *id.* at 4.

²⁰⁵ See *id.*

²⁰⁶ See *id.* at 11 (explaining that participants are “challenge signatories”).

²⁰⁷ See Cummings & Rhode, *supra* note 85, at 2372–74.

²⁰⁸ See *id.* at 2372–73.

²⁰⁹ HOUSEMAN & PERLE, *supra* note 17, at 28.

bono programs around the country,²¹⁰ and essentially every large law firm has a portion of their website dedicated to promoting their pro bono work.²¹¹

The growth of pro bono has been an undeniable benefit to many indigent individuals and a point of pride to the legal community, as it should be. The truth, though, is that the growth was not due primarily to a commitment to our foundational values and professional duties as lawyers; rather, the “signal finding of extant research is that the organizational and economic contexts of lawyers’ work are the central, if not the determinative, factors shaping their pro bono behavior.”²¹² Likewise, Scott Cummings and Deborah Rhode noted that “[a]mong the most powerful influences on pro bono priorities are ranking systems, particularly those in *The American Lawyer*.”²¹³ That is fine, for as Cummings has pointed out, “the association of professional altruism with private gain is unremarkable.”²¹⁴ Yet, he recognized that “there is something new in the sense of openness with which large firms and the organized bar have turned to the project of connecting professional ideals with commercial gain.”²¹⁵

Enlightened self-interest may be perfectly fine, provided the result truly benefits those we profess to serve.²¹⁶ However, we must guard against a scale that tips too far toward self-interest and the cognitive dissonance that prevents honest assessment of that. For instance, one study of law firm pro bono directors found that most attribute their firm’s pro bono programs to a

²¹⁰ CIVIL LEGAL AID IN THE UNITED STATES, *supra* note 51, at 79. The American Bar Association’s Standing Committee on Pro Bono and Public Service estimated the number of pro bono programs at around 1,000 in 2009. See SUPPORTING JUSTICE II, *supra* note 191, at 30.

²¹¹ John Bliss & Steven A. Boucher, *Rationalizing Pro Bono: Corporate Social Responsibility and the Reinvention of Legal Professionalism in Elite American Law Firms*, in GLOBAL PRO BONO: CAUSES, CONSEQUENCES, AND CONTESTATION 101 (Scott L. Cummings et al. eds., forthcoming 2022) (noting that the websites of 98 of the 100 largest law firms include a pro bono page). For examples of law firms with a pro bono page, see *Pro Bono|Industries & Practices*, DORSEY & WHITNEY, <http://www.dorsey.com/services/pro-bono> [<http://perma.cc/4BAY-CNHL>] and *Pro Bono*, KING & SPALDING, <http://www.kslaw.com/pages/pro-bono> [<http://perma.cc/EW4K-CYVR>].

²¹² Cummings & Sandefur, *supra* note 185, at 95; see also Sandefur, *supra* note 179, at 102 (“As suggested by market-oriented theories of lawyer professionalism, lawyers’ participation in [pro bono work] appears highly sensitive to the dynamics of legal services markets.”).

²¹³ Cummings & Rhode, *supra* note 85, at 2340.

²¹⁴ Cummings, *supra* note 1, at 106.

²¹⁵ *Id.* at 107.

²¹⁶ But see Rhode, *Rethinking the Public*, *supra* note 3, at 1436 (arguing that “view[ing] public service solely in terms of professional interests is troubling on both moral and pragmatic grounds”).

longstanding culture established by their founders, that pro bono reflects a “historic, core value of the firm.”²¹⁷ Yet, few of those firms exhibited any meaningful pro bono efforts prior to the turn of this century.²¹⁸ The same could be said for the profession at large. As Leonore Carpenter has noted, “It appears that the large firms may not be grasping the shaded, complex message that materialistic concerns should be viewed as a beneficial by-product, but not a driver, of pro bono programs. Instead, they appear to have seized bottom-line motivations for pro bono with both hands.”²¹⁹

Accordingly, if the profession truly is committed to reducing the justice gap, as it professes to be, and not primarily to serving its own interests, it must acknowledge both its motivations for embracing pro bono as its primary approach and pro bono’s limitations.

III. BENEFITS AND LIMITATIONS OF PRO BONO

Pro bono provides several benefits for reducing the justice gap that legal aid alone cannot. At its best, it supplements and provides leverage for the work of legal aid attorneys. However, too often aspects of pro bono actually conflict with and dilute the work of legal aid organizations. Moreover, many of pro bono’s benefits run primarily to the lawyer providing the service or the law firm supporting that lawyer, rather than to the clients themselves. The following sections discuss these benefits and limitations.

A. Pro Bono’s Benefits

Pro bono provides many benefits to clients that legal aid cannot. For example, pro bono programs permit lawyers to represent clients that LSC-funded organizations are prohibited from representing. In that way, pro bono work may fill in the gaps and represent a broader group of interests than many legal aid organizations can represent.²²⁰ For instance, while LSC-funded legal aid organizations are precluded from representing immigrants in most actions or tenants with a drug record, pro bono attorneys are free to do so (at least those not partnering with an LSC-funded legal aid organization through the PAI program)²²¹. Moreover, large firms have the resources to take on complex, discovery-intensive lawsuits that may swamp a legal aid

²¹⁷ Boutcher, *supra* note 201, at 120–21.

²¹⁸ *Id.*

²¹⁹ Leonore F. Carpenter, “We’re Not Running a Charity Here”: *Rethinking Public Interest Lawyers’ Relationships with Bottom-Line Driven Pro Bono Programs*, 29 *BUFF. PUB. INT. L.J.* 37, 54 (2011).

²²⁰ Cummings, *supra* note 1, at 103.

²²¹ *See id.*

office.²²² Similarly, law firms often have expertise that can be leveraged in particular cases to further a legal-aid office's objectives.²²³ For instance, a legal aid office may lean on a seasoned appellate lawyer for oral argument in an important case, or on an associate with experience in bankruptcy law for a client facing bankruptcy.²²⁴

Pro bono also benefits the individual lawyer. Most notably, pro bono work can provide a sense of meaning and challenge to an individual who may have a calling to help the less fortunate but, for various reasons, chose to work at a firm. As Scott Cummings has noted, pro bono work may permit "lawyers to engage in socially significant work while enjoying the prestige and economic rewards of private practice."²²⁵ At a time when lawyer anxiety and dissatisfaction is so high, particularly among those early in their career,²²⁶ this benefit should not be discounted. Pro bono can also provide an opportunity for attorneys to gain skills and experience, both technical and interpersonal, in a way their present job may not permit.²²⁷ This is particularly true for associates at large firms, who may not get much, if any, direct client contact or courtroom opportunities in their first few years. Finally, pro bono can introduce and connect individual attorneys to aspects of society they otherwise would not experience. The personal experience may deepen an individual's commitment to addressing the justice gap in a way that only direct service can do. As Deborah Rhode noted, "Face-to-face experience with poverty-related problems is generally more effective than abstract appeals in inspiring service."²²⁸

Moreover, firms that support pro bono programs benefit from a reputational and marketing standpoint. With corporate clients demanding to see that firms are doing pro bono work, this has become a necessary aspect of marketing in today's landscape.²²⁹ Additionally, pro bono can provide relationship building opportunities with clients, as law firms and their corporate clients often partner on pro bono activities as a way to deepen their own relationship.²³⁰ In fact, while pro bono has become a necessary cost

²²² See *id.* at 105.

²²³ See *id.* at 104.

²²⁴ *Id.* at 105–06.

²²⁵ *Id.* at 102; see Rhode, *Pro Bono in Principle*, *supra* note 8, at 449.

²²⁶ See Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, *J. ADDICTION MED.* 46, 51 (2016).

²²⁷ See Cummings, *supra* note 1, at 111.

²²⁸ Rhode, *Pro Bono in Principle*, *supra* note 8, at 420.

²²⁹ See Cummings, *supra* note 1, at 108–10.

²³⁰ See Daniels & Martin, *supra* note 198, at 156.

of doing business for large firms, the “cost” is more of an investment with real returns.²³¹ Studies have shown that, for many large firms, pro bono work is “revenue neutral” at worst.²³²

Pro bono has become essential not only for marketing to clients, but to potential associates.²³³ Many pro bono “early adopters” were Northeastern firms competing against legal aid organizations to recruit prized graduates.²³⁴ They created pro bono opportunities to attract students with public interest leanings, then marketed these programs to the law schools and their students.²³⁵ Similarly, providing associates the opportunity to allocate some portion of their time to personally meaningful work helps to retain associates.²³⁶ Further, pro bono helps firms not only to recruit and retain top students, but also to train them. The training opportunities noted above are not only valuable to the associate herself, but to the firm. With many corporations now refusing to pay for first year associate work, pro bono can provide large firms a “low risk” and cost-neutral vehicle to train and evaluate their newer attorneys.²³⁷ To that point, many firms acknowledge that they select pro bono projects as much for the training opportunities they can provide their lawyers as for the benefits to the clients.²³⁸

Finally, pro bono provides a valuable counterpoint to negative stereotypes about greedy lawyers and a legal system stacked against the poor.²³⁹ To the extent that helps to instill public trust in and respect for the legal process, that is an undeniable benefit. Yet, this dynamic often steers firms towards projects that maximize publicity over impact,²⁴⁰ a result Atinuke

²³¹ See *id.* at 157.

²³² See Reena N. Glazer, *Revisiting the Business Case for Law Firm Pro Bono*, 51 S. TEX. L. REV. 563, 571 (2010); see also Jack W. Londen, *The Impact of Pro Bono Work on Law Firm Economics*, 9 GEO. J. LEGAL ETHICS 925, 925–26 (1996); Marc Galanter & Thomas Palay, *Public Service Implications of Evolving Law Firm Size and Structure*, in THE LAW FIRM AND THE PUBLIC GOOD 19, 41–46 (Robert A. Katzmann ed., 1995); Esther F. Lardent, PRO BONO INST., MAKING THE BUSINESS CASE FOR PRO BONO 3 (2000).

²³³ See Cummings, *supra* note 1, at 110–11.

²³⁴ See Cummings & Rhode, *supra* note 85, at 2370–71.

²³⁵ Boutcher, *supra* note 201, at 122–24; see Cummings & Rhode, *supra* note 85, at 2370–71.

²³⁶ See Cummings, *supra* note 1, at 113–14.

²³⁷ See Daniels & Martin, *supra* note 198, at 154–55; see also Cummings, *supra* note 1, at 112–13.

²³⁸ See Cummings & Rhode, *supra* note 85, at 2426–28.

²³⁹ See Rhode, *Rethinking the Public*, *supra* note 3, at 1441 (citing PETER D. HART & ASSOCS., A SURVEY OF ATTITUDES NATIONWIDE TOWARD LAWYERS AND THE LEGAL SYSTEM 18 (1993)).

²⁴⁰ See DiPippa, *Peter Singer*, *supra* note 49, at 131.

Adrediran has termed the “pro bono mismatch.”²⁴¹ For instance, one study of pro bono by Maryland lawyers found that while low-income individuals with family law issues had the greatest need for representation, such cases ranked seventh or eighth among pro bono causes.²⁴² One large firm pro bono coordinator left little doubt about this dynamic. When asked whether her firm would be interested in assisting same-sex couples with adoptions, she responded, “Our associates would find those sorts of cases boring. What we’re looking for are cases that we can put in our newsletter, like Guantanamo cases, or death penalty cases. Or asylum. Do you have any asylum cases?”²⁴³ Indeed, in 2014, more than twenty of the eighty firms that participated in the Pro Bono Challenge cited a death penalty case as their biggest pro bono project, and less than half reported projects that focused on “everyday” matters.²⁴⁴

To be clear, I do not argue the above are inappropriate motivations or considerations. To one facing the death penalty, representation may be life-saving. But, when considering the impact of pro bono as a tool for narrowing the justice gap—as the practicing bar’s *primary* tool—we must honestly weigh the benefits of pro bono (and *who* in fact benefits) against pro bono’s inherent limitations.

B. Pro Bono’s Limitations

One notable, but largely unappreciated, drawback of pro bono programs is the drain they can create on the already stretched resources of legal aid organizations. As noted above, LSC-funded legal aid organizations are required to involve private attorneys in the delivery of legal assistance to their clients.²⁴⁵ Similarly, many of the non-LSC funded legal aid organizations serve as referral organizations to feed private firms’ pro bono programs.²⁴⁶ The administrative aspects of doing this—and of keeping firms happy—are not insignificant. Moreover, managing the relationships with various law firms and the needs of their often inexperienced attorneys take time away from the legal aid organization that could otherwise be dedicated to direct legal representation.²⁴⁷

²⁴¹ See generally Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1035, 1037–38 (2020).

²⁴² See Rhode, *Rethinking the Public*, *supra* note 3, at 1445–46.

²⁴³ Carpenter, *supra* note 219, at 61 (internal quotation marks omitted).

²⁴⁴ Beck, *supra* note 38, at 9.

²⁴⁵ See *supra* Section II.B.

²⁴⁶ See Cummings, *supra* note 1, at 142–43.

²⁴⁷ See *id.*

In effect, large firms often become more of a customer of, rather than partner with, legal aid organizations. Legal aid organizations may not simply pass along cases to a firm but are commonly expected to provide ongoing support to the pro bono attorney as well. A lawyer at a large Chicago firm noted:

[S]ome legal service providers are . . . better at accommodating the needs and preferences of law firm pro bono programs than others. What we want from a legal services provider is a regular stream of opportunities We want institutional back-up, because if they're doing work in an area and we don't have anybody in our firm who knows that subject area, we need co-counsel. . . . Every pro bono matter that comes from one of these organizations should have one person from the organization assigned to it and one person from the law firm. . . . The most frustrating organizations to deal with are those that just hand you a file and say, go do it.²⁴⁸

It does not require much imagination to appreciate the frustration many legal aid attorneys feel when working with such firms. Some legal aid attorneys in fact spend more of their time assisting pro bono volunteers than directly representing clients.²⁴⁹

Handholding aside, pro bono creates additional drains on legal aid. Legal aid organizations are often required to pass along “interesting” or otherwise rewarding cases to private attorneys, or to take on the monotonous aspects of a case and delegate to law firms the more exciting parts, such as an oral argument or deposition.²⁵⁰ Similarly, legal aid organizations may feel pressure to “protect” the private attorneys from difficult or “undeserving” clients, and to provide firms with a fresh stream of “easily packaged, time-limited, and emotionally warm cases.”²⁵¹ As a result, the highly trained and experienced legal aid attorney often ends up dealing primarily with the monotonous cases or particularly difficult clients. While this dynamic may help law firms train and retain their attorneys, it can lead to burnout and turnover among legal aid attorneys.²⁵² This dynamic can also

²⁴⁸ Daniels & Martin, *supra* note 198, at 158.

²⁴⁹ See Cummings, *supra* note 1, at 143.

²⁵⁰ See Rhode, *Rethinking the Public*, *supra* note 3, at 1445; see also Cummings, *supra* note 1, at 143–44.

²⁵¹ Cummings, *supra* note 1, at 141; see also Rhode, *Rethinking the Public*, *supra* note 3, at 1445.

²⁵² See Cummings, *supra* note 1, at 143–44; see also CHI. BAR FOUND. & ILL. COAL. FOR EQUAL JUST., *Investing in Justice: A Framework for Effective Recruitment and Retention of Illinois Legal Aid Attorneys* 8, 29–30 (2006), <http://chicagobarfoundation.org/wpcontent/uploads/2014/01/recruitment-retention-study.pdf> [<http://perma.cc/4J3A-CAE3>].

lead to a misperception among private lawyers regarding the true nature of the work that legal aid attorneys do.²⁵³

Moreover, referrals from legal aid organizations to pro bono attorneys too often result in a transfer of expertise. While some private attorneys can provide immediate expertise in a pro bono matter—perhaps expertise not available at the referring organization—that is the exception.²⁵⁴ Indeed, many attorneys seek pro bono work specifically to experience a new aspect of the law, to obtain a break from their own practice. Though some legal issues referred by legal aid organizations may not be particularly complex, they nonetheless require the lawyer to get up-to-speed on a new area of the law, and one the attorney may never use again. In such cases, which are common, it would undoubtedly be both more efficient and effective for a legal aid attorney, fully experienced in the specific area of the law, to undertake the representation. Perhaps even more important, though, the legal aid attorney would also have the experience that comes from counseling many clients on similar issues to identify not just the legal, but the social and practical aspects, that are often critical to effective client representation. One law firm pro bono coordinator noted that “there is a crushing lack of efficiency and strategic design in what we and other law firms are doing around pro bono.”²⁵⁵

This lack of experience and the attendant inefficiencies can lead to a bloated number of hours reported for pro bono work. Particularly if the attorney receives billable-hour credit from her firm for the time she commits to pro bono work, there is little incentive to do the work efficiently. Quite the opposite: since nobody is paying for the work, yet the associate may count the time toward her billable hours, there is a not-so-subtle incentive to be inefficient. At the same time, the law firm itself may have little incentive to get on top of this, as it helps the firm’s pro bono reporting as well.²⁵⁶ Indeed, firms may leverage pro bono to keep associates busy at times where billable hours are not otherwise available.²⁵⁷ As Scott Cummings and Deborah Rhode have noted,

²⁵³ See Cummings, *supra* note 1, at 141–42.

²⁵⁴ See Cummings & Rhode, *supra* note 85, at 2433 (“Law firm lawyers, however committed, generally lack the time, expertise, resources, and freedom from conflicts of interest necessary to ensure adequate access to justice.”).

²⁵⁵ Cummings & Rhode, *supra* note 85, at 2430; see also Rhode, *Rethinking the Public*, *supra* note 3, at 1446–47.

²⁵⁶ See Rhode, *Rethinking the Public*, *supra* note 3, at 1444.

²⁵⁷ See Cummings & Sandefur, *supra* note 185, at 96 (referring to “organizational slack”).

The American Lawyer and similar rankings reward “quantity, not quality or cost-effectiveness.”²⁵⁸

Importantly, pro bono representation often suffers from quality issues as well. Almost 60% of legal aid organizations express concern about the quality of the representation their clients receive from their pro bono partners.²⁵⁹ This is hardly surprising when a large portion of pro bono work is being done by busy associates at large firms who take on matters outside of their expertise with little supervision.²⁶⁰ Moreover, most firms frankly appear largely disinterested in investing additional time into monitoring the quality of their pro bono work.²⁶¹ Most do little, if any, by way of client follow-up to ensure their pro bono clients feel well represented.²⁶² Rather, firms tend to rely primarily on informal feedback from the lawyer himself or the referring organizations, which themselves may feel pressure to keep the firms happy and be hesitant to provide candid feedback.²⁶³ Others openly scoff at the idea that indigent clients could accurately assess the lawyer’s performance.²⁶⁴ Tellingly, more firms poll their own attorneys to determine whether *they* were satisfied with their pro bono experience than poll the clients themselves.²⁶⁵ This is not to suggest that firms do not *want* their attorneys to provide solid legal representation for all clients, paying or not. But, for many, *ensuring* quality is a secondary consideration.

Each of the above limitations played out in my own experience with pro bono as an associate. After representing wealthy clients in trusts and estate law at a large firm for six years, I felt a need to “do good” and wanted to experience a new area of the law. Moreover, this was during the economic and legal downturn in 2009, when substantial billable hours from paying clients were at times hard to come by. The firm’s pro bono coordinator connected me and two other associates with a young man seeking asylum. None of us had asylum or trial experience, yet we confidently believed we could represent this man well. We each spent twenty or so hours simply reading up on the basics of immigration law and the immigration court’s local rules. We made numerous calls to the legal aid organization who referred the case with fairly basic questions. When we met with our client, we had a passable understanding of

²⁵⁸ Cummings & Rhode, *supra* note 85, at 2430.

²⁵⁹ *Id.* at 2378 (citing a 2008 study by Deborah Rhode).

²⁶⁰ See Rhode, *Rethinking the Public*, *supra* note 3, at 1445.

²⁶¹ See Cummings & Sandefur, *supra* note 185, at 102–03.

²⁶² See Cummings & Rhode, *supra* note 85, at 2402–03.

²⁶³ See *id.*

²⁶⁴ See *id.* at 2404–05.

²⁶⁵ See Cummings & Sandefur, *supra* note 185, at 109.

the asylum process, though we had no ability to respond meaningfully to unanticipated questions or to advise on the more practical aspects of his situation. On the eve of our client's asylum hearing, we failed to follow a local rule unique to that immigration court and our brief was rejected by the clerk. To our relief, the judge rescheduled the hearing for eighteen months later.

Eventually, our client, with no money and frustrated by the long delay, left the country to seek relief elsewhere. My two colleagues and I spent hundreds of hours collectively on this case and, at the end of the day, provided very little quality representation to the client. That said, we received billable credit for our work, received our annual bonuses, and were never asked by a firm partner about the experience. Rather, in my annual review later that year, a partner advised me not to do any more pro bono work until after my partnership vote and to focus over the next year instead on "real" billable hours. There is no question that a single experienced attorney from the referring agency would have provided significantly better representation than the three of us "prestigious" lawyers were able to, and at a fraction of the time.²⁶⁶

Ultimately, the greatest drawback of looking to pro bono primarily to close the justice gap may be that the profession appears to have hit its ceiling. Understandably, pro bono representation tends to decrease when the economy is down (though that is when the needs of the poor increase).²⁶⁷ However, despite both one of the greatest economic cycles in American history and the bar's efforts to increase pro bono, pro bono hours decreased over the past decade. For instance, among attorneys at those firms who have signed onto the Pro Bono Challenge—presumably those firms most committed to pro bono—hours decreased from 70.0 hours per attorney in 2009 to 64.3 in 2018.²⁶⁸ While overall pro bono hours reported by those

²⁶⁶ Notably, I also assisted a client pro bono on a probate matter directly within my practice area, yet still made a significant error. I failed to clarify with my client her relationship to extended family members she raised and referred to as her children, and I thus misrepresented those relationships to the court. Indeed, good client representation requires more than just a familiarity with the law, and even those providing pro bono service within their subject matter expertise may experience challenges when first working with new client populations—challenges most legal aid attorneys would effortlessly avoid.

²⁶⁷ For instance, from 2008 to 2011, pro bono hours at the 100 largest firms decreased by over 12%. Cummings & Sandefur, *supra* note 185, at 109–10. Professors Cummings and Sandefur rightly asked, "When times are toughest for poor Americans, why does our legal services system hinge on a resource, pro bono, that contracts with the economy?" *Id.* at 110.

²⁶⁸ 2018 REPORT ON THE PRO BONO CHALLENGE, *supra* note 64, at 5.

firms increased a modest 2%,²⁶⁹ that simply reflects the growth of those firms during this relative boom. The number one reason cited by attorneys for not participating in pro bono, or not increasing their participation, is that they do not have enough time to do so.²⁷⁰ Indeed, when the climate is tough for attorneys, they will prioritize paying work over pro bono; yet, when demand from paying clients is high, that makes it harder for attorneys to “find the time” for pro bono.²⁷¹

Despite these drawbacks, the bar’s increased commitment to pro bono over the past thirty years has been a great accomplishment and should be celebrated. Yet, the fact remains that despite all the efforts, only 52% of attorneys do pro bono in a given year, only 20% meet the ABA’s aspirational standards, and 20% have never done pro bono work.²⁷² Indeed, though there is room for further pro bono growth in theory, it is hard to see what would move the needle further at this point.²⁷³ At the same time, the pro bono system involves layers of inefficiencies that both inflate the effective value of hours committed to pro bono work by private attorneys and decrease the hours of direct representation by legal aid attorneys.²⁷⁴ In fact, at many firms, pro bono is not an economic sacrifice at all; instead, it is an investment that returns in full.²⁷⁵

To be sure, the profession must capture and retain the great progress made with pro bono over the past few decades. But if the primary goal truly is to decrease the justice gap, not to serve our own interests, it is time for a substantial shift in strategy—namely, to increase legal aid funding from within the bar. Before considering the proposal to accomplish this, though, let us first consider whether firms have to capacity to do so, and to whom law firms presently contribute money.

²⁶⁹ See *id.* at 3 (showing an increase from 4.9 million hours in 2009 to 5.0 million hours in 2018).

²⁷⁰ SUPPORTING JUSTICE IV, *supra* note 6, at 20.

²⁷¹ See Rhode, *Pro Bono in Principle*, *supra* note 8, at 430 (noting that at the turn of the century, when average firm revenues at the 100 largest firms grew by 50%, pro bono participation declined by a third).

²⁷² See SUPPORTING JUSTICE IV, *supra* note 6, at 7.

²⁷³ In one creative approach to reversing this trend, John M.A. DiPippa has suggested the ABA reduce its aspirational target of fifty hours of pro bono service each year to thirty hours (along with mandatory reporting), in an effort to increase *overall* participation. DiPippa, *Peter Singer*, *supra* note 49, at 136–38. Such an approach, however, likely overestimates the role that noneconomic external motivations play in shaping lawyer conduct. If the aspirational guidelines are, in fact, a primary motivator for many lawyers, a just-as-likely result would be that lawyers who do pro bono would reduce their hours from fifty to thirty, while those presently disinclined to do meaningful pro bono would still not do so.

²⁷⁴ See Rhode, *Rethinking the Public*, *supra* note 3, at 1437.

²⁷⁵ See *id.* at 1437–38.

IV. OVERVIEW OF LAW FIRM GIVING

Large law firms are, in fact, often quite charitable. However, the great majority of this giving is directed toward community projects unrelated to legal aid. For instance, in 2013 the Kirkland & Ellis Foundation donated \$8.2 million to charities; of that, only \$1.7 million (21%) went to legal aid organizations.²⁷⁶ Likewise, the Jones Day Foundation donated \$3.5 million, though only \$270,000 (7.7%) went to legal aid organizations.²⁷⁷ Wachtell, Lipton, Rosen & Katz had the highest profits per partner of any American firm, yet its foundation made *no* contributions to legal aid.²⁷⁸ That is, of course, the prerogative of the partners. I certainly do not suggest that firms are obligated to give only to, or even primarily to, legal aid organizations. But, if ensuring access to justice is a core value, as many firms profess, and when over 85% of low-income Americans cannot get representation for critical civil issues, it would certainly seem that legal aid would fall a bit higher on most firms' charitable priority list.

Those priorities become clear, however, by looking at the organizations to whom they do donate. James Sandman, former managing partner at Arnold & Porter and president of LSC from 2011 to 2020, noted that many firm donations go to their clients' favored causes and "are more in the nature of marketing or client relationships."²⁷⁹ For instance, one of the largest gifts from the Kirkland & Ellis Foundation in 2013 went to Bain Capital Children's Charity, run by one of its largest clients, Bain Capital.²⁸⁰ Others give to law schools with close relationships to the firm. Kirkland & Ellis Foundation's largest gift in 2013 went to Northwestern University, where the firm's chairmen went to law school.²⁸¹ Likewise, Wachtell, Lipton, Rosen & Katz Foundation's largest gift in 2013 went to New York University, where one of the firm's founders was chairman of its board of trustees at the time. To that point, Kirkland & Ellis Foundation's website proudly notes that other schools receiving the Foundation's "most significant gifts include the University of

²⁷⁶ Beck, *supra* note 38. The Kirkland & Ellis Foundation donated over \$14.1 million to charitable organizations in 2020. *Charitable Giving*, KIRKLAND & ELLIS, <http://www.kirkland.com/social-commitment/charitable-giving> [<http://perma.cc/VTN3-VTJE>].

²⁷⁷ Beck, *supra* note 38.

²⁷⁸ *Id.* A Wachtell firm leader noted that the firm did donate to legal aid outside of its foundation, though he declined to say how much. *Id.*

²⁷⁹ *Id.*; see also *LSC President to Step Down*, LEGAL SERVS. CORP. (Jan. 21, 2020), <http://www.lsc.gov/media-center/press-releases/2020/lsc-president-james-j-sandman-step-down> [<http://perma.cc/D4FJ-QRDE>].

²⁸⁰ Beck, *supra* note 38, at 6.

²⁸¹ *Id.*

Chicago Law School, Columbia Law School, Harvard Law School, University of Michigan Law School, Northwestern University Pritzker School of Law and Stanford Law.”²⁸² Such giving suggests more self-interest than enlightenment. To that point, John Bliss and Stephen Boutcher have argued powerfully that law firms’ charitable priorities presently are driven more by general concepts of corporate social responsibility (CSR)—and, often, the CSR priorities of their biggest clients—than by the ethics of traditional legal professionalism.²⁸³

To be clear, the legal community does contribute *somewhat* to legal aid. The ABA has estimated that, from 2003 to 2019, donations to legal aid from the legal community averaged \$82.2 million per year (\$95.6 million when adjusted for inflation)—about 6% of overall funding for legal aid.²⁸⁴ While that raw number may seem impressive upon first glance, it represented less than *four one-hundredths of a percent* (0.04%) of overall lawyer revenue in the United States.²⁸⁵ For example, in 2017, even if the entire amount of giving from the legal community came from only the 100 largest law firms (which it did not), the total amount donated would have represented just over one-tenth of 1% of those firms’ revenue.²⁸⁶ Moreover, only about two-thirds of that giving reflected voluntary donations; the balance came from lawyer registration fees, bar dues, and general bar funds.²⁸⁷

To truly put the gulf between law firm revenue and legal aid support into perspective, consider that legal fees generated in 2019 by *each* of the nation’s nine largest law firms exceeded the entire operating budget of the country’s 700 legal aid

²⁸² *Charitable Giving*, KIRKLAND & ELLIS LLP, <http://www.kirkland.com/social-commitment/charitable-giving> [<http://perma.cc/697H-HGUM>] (last visited May 30, 2021).

²⁸³ Bliss & Boutcher, *supra* note 211, at 101.

²⁸⁴ ABA RESOURCE CENTER, *supra* note 167. Inflation calculations were determined from January of each year to January 2021 using the inflation calculator available at *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm [on file with author].

²⁸⁵ Determined by comparing overall law firm revenue to giving for the years 2012 to 2019. For revenue information, see *Legal Services Industry*, STATISTA, <http://www.statista.com/forecasts/311177/legal-services-revenue-in-the-us#statisticContainer> [<http://perma.cc/4QQN-XZUA>] (last updated Sept. 2020) (last visited June 25, 2021). For giving information, see ABA RESOURCE CENTER, *supra* note 167.

²⁸⁶ In 2017, the overall amount of giving from the legal community was \$98.2 million. See ABA RESOURCE CENTER, *supra* note 167. In comparison, the total revenue for the AmLaw 100 firms was \$91.4 billion. See Robert Ambrogio, *Annual Am Law 100 Published Today Shows Boom Year for Biglaw*, LAWSITES (Apr. 24, 2018), <http://www.lawsitesblog.com/2018/04/annual-am-law-100-published-today-shows-boom-year-for-biglaw.html> [<http://perma.cc/EA3H-9J63>].

²⁸⁷ *Resources for Legal Aid, 2016*, AM. BAR ASS’N (2018), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendan ts/ATJReports/l_s_sclaid_atj_resources_civil_legal_2016.pdf [<http://perma.cc/B44G-Q58Y>].

organizations *combined*.²⁸⁸ As noted above, revenue at Kirkland & Ellis, which serves perhaps a few thousand clients, alone was *twice* the budget of all legal aid organizations—which serve over one-fifth of the country’s population.²⁸⁹ Notably, while legal community giving increased an average of 6.2% from 2004 to 2017,²⁹⁰ giving did double from 2017 (\$98.2 million) to 2019 (\$207.5 million).²⁹¹

Consistent with those findings, studies of various states from 1993 to 2000 showed that average individual contributions by lawyers to legal aid ranged from thirty-two to eighty-two dollars.²⁹² In Florida, one of the few states with mandatory reporting of financial contributions, the average contribution per lawyer was fifty-nine dollars in 2019.²⁹³ Assuming an average billing rate of just \$250 per hour, this equals an annual financial commitment equal to about fifteen minutes of a lawyer’s billable time. Likewise, about fifty New York firms participate in a pledge program of \$600 per lawyer to The Legal Aid Society of New York²⁹⁴—equivalent to the revenue from roughly one billable hour for many New York large-firm lawyers. That amount has not increased in over twenty-five years, yet those who run the challenge note they are reluctant to raise the amount and alienate the firms.²⁹⁵

Firms often respond that the above numbers understate their actual giving, because individual gifts by their attorneys

²⁸⁸ Compare ABA RESOURCE CENTER, *supra* note 167 (showing total legal aid funding in 2019 was approximately \$2.16 billion) with ALM Staff, *The 2020 Am Law 100: Ranked by Gross Revenue*, THE AM. LAW. (Apr. 21, 2020, 9:22 AM), <http://www.law.com/americanlawyer/2020/04/21/the-2020-am-law-100-ranked-by-gross-revenue/?tokenvalue=6EFA0A05-E55B-4C29-8DB2-049A4C5D3DE0>. See generally 1 JOHNSON JR., *supra* note 122 (making this comparison as of 2014).

²⁸⁹ See ABA RESOURCE CENTER, *supra* note 167 (using 2017 as a benchmark for this discussion when the combined funds donated through IOLTA and LSC were approximately \$403.3 million); compare with Claire Bushey, *Kirkland & Ellis Reaches the Top as It Focuses on Corporate Work*, CRAIN’S CHI. BUS. (May 21, 2018) <http://www.kirkland.com/-/media/news/press-mention/2018/10/crains-chicago-business-corporate-practice-may-201.pdf> [<http://perma.cc/AV9E-RUED>] (Kirkland’s revenue totaled \$3.17 billion).

²⁹⁰ ABA RESOURCE CENTER, *supra* note 167.

²⁹¹ *Id.*

²⁹² Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1810 (2001) [hereinafter Rhode, *Access to Justice*].

²⁹³ See *Lawyer Discipline Statistics*, FLA. BAR, <http://www.floridabar.org/public/acap/lawyer-discipline-statistics/> [<http://perma.cc/6KXW-9RGR>] (last visited May 30, 2021) (noting that 108,615 lawyers were licensed in Florida during 2019); *Pro Bono Publico*, *supra* note 90, at 8 (noting that pro bono contributions totaled \$6,369,364 in 2019).

²⁹⁴ Beck, *supra* note 38, at 7.

²⁹⁵ *Id.*

cannot easily be tracked.²⁹⁶ For a profession that specializes in solving complex problems—and that enthusiastically tracks and markets its lawyers' pro bono efforts²⁹⁷—that excuse is disingenuous. Here is one idea: a simple email to lawyers requesting that they share their total individual contributions to legal aid with the pro bono coordinator so the firm can accurately capture its commitment to legal aid. If confidentiality or anonymity is a concern, a poll or similar feature on the firm's internal website would permit anonymous reporting by individual lawyers. Or, even better, establish a matching program within the firm (or its foundation, which most large firms now have) for gifts to legal aid by individual lawyers. Not only would that likely increase giving, it would also permit easy tracking. Indeed, such information certainly could be easily gathered by a law firm, if there was a desire to do so. And it would certainly be celebrated, if there was reason to celebrate it.

Notably, state bars also provide funding through IOLTA interest, court fees, bar foundation grants, and cy pres awards. Together, these sources have constituted approximately 20% of overall legal aid funding since 2003.²⁹⁸ While these reflect contributions from the profession, they can hardly be attributed to the altruism of law firms. IOLTA interest, for example, simply reflects interest on assets firms hold on behalf of their clients and is, in effect, another form of public support. Moreover, relying on IOLTA is a particularly unreliable funding source since it is so dependent on interest rates. For instance, in 2008, IOLTA accounts contributed \$240 million to legal aid; by 2013, as interest rates dropped with the recession, IOLTA accounts contributed only \$74.5 million to legal aid.²⁹⁹ IOLTA funding increased after 2013, but again plummeted in 2020.³⁰⁰ In both instances, just as the need for legal aid spiked, funding for legal aid through IOLTA dropped. In sum, voluntary contributions from law firms and individual lawyers constitute only about 4% of all legal aid funding.³⁰¹

²⁹⁶ *Id.* at 5. Notably, among those approximately 130 firms who have signed the Pro Bono Challenge, about fifty do voluntarily report their direct financial contributions to legal aid. 2020 REPORT ON THE PRO BONO CHALLENGE, *supra* note 65, at 10.

²⁹⁷ In my experience, I have noted that firms also closely track their lawyers' United Way contributions.

²⁹⁸ ABA RESOURCE CENTER, *supra* note 167.

²⁹⁹ Beck, *supra* note 38, at 6.

³⁰⁰ See Press Release, Nat'l Ass'n IOLTA Programs, \$157.4 Million Projected Loss In Critical Sources of State Funding for Civ. Legal Aid (May 29, 2020), <http://www.iola.org/all-documents/160-naip-press-release-5-29-20/file> [<http://perma.cc/BE5U-ACLS>].

³⁰¹ *Resources for Civil Legal Aid, 2016*, AM. BAR. ASS'N, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendan

V. INCENTIVIZING LARGE FIRMS TO INCREASE FUNDING TO LEGAL AID

Utah Supreme Court Justice Dino Himonas recently recognized that “[w]e cannot volunteer ourselves across the access-to-justice gap. We have spent billions of dollars trying this approach. It has not worked. And hammering away at the problem with the same tools is Einstein’s very definition of insanity. What is needed is a market-based approach”³⁰² The following section first addresses why increased “self-funding” of legal aid should be the profession’s next major step for reducing the justice gap, sets out a market-based proposal for accomplishing this step, discusses the benefits of the proposal and some obstacles to implementing it, then concludes with an illustration applying the proposal.

A. “Self-funding” Legal Aid as a Primary Tool

States are experimenting with additional options to increase access to justice for low-income individuals that do not rely on pro bono, including self-help centers, hotlines and on-line legal forums, document assembly and other technological approaches to enable self-help, and efforts to allow lay advocates to assist in certain simple cases.³⁰³ For instance, in August 2020, the Utah Supreme Court established a groundbreaking two-year program creating a “legal regulatory sandbox.”³⁰⁴ This program relaxes existing rules regulating the practice of law and permits both lawyers and nonlawyers to offer innovative approaches to reducing the justice gap and to act under the purview of the court.³⁰⁵ Similarly, one month later, the Minnesota Supreme Court approved a two-year Legal Paraprofessional Pilot Project to permit paralegals, with attorney supervision, to represent indigent clients in court in certain housing and family law disputes.³⁰⁶ Scholars have called

ts/ATJReports/ls_sclaid_atj_resources_civil_legal_2016.pdf [http://perma.cc/B44G-Q58Y] (last visited Sept. 24, 2021).

³⁰² *To Tackle the Unmet Legal Needs Crisis*, UTAH CTS. RECENT PRESS NOTIFICATIONS (Aug. 13, 2020), <http://www.utcourts.gov/utc/news/2020/08/13/to-tackle-the-unmet-legal-needs-crisis-utah-supreme-court-unanimously-endorses-a-pilot-program-to-assess-changes-to-the-governance-of-the-practice-of-law/> [http://perma.cc/7HJW-NRUV].

³⁰³ See, e.g., 3 JOHNSON JR., *supra* note 13, at 898–906; HOUSEMAN & PERLE, *supra* note 17, at 53–55; see also Jason Tashea, *Outside the Box*, 106 A.B.A. J. 52, 52–54 (2020).

³⁰⁴ UTAH SUP. CT., STANDING ORD. NO. 15, at 3–4 (Aug. 14, 2020), <http://www.utcourts.gov/utc/rules-approved/wp-content/uploads/sites/4/2020/08/FINAL-Utah-Supreme-Court-Standing-Order-No.-15.pdf> [http://perma.cc/5QBJ-T2TQ].

³⁰⁵ *Id.* at 3–4, 10.

³⁰⁶ MINN. SUP. CT., ORD. IMPLEMENTING LEGAL PARAPROFESSIONAL PILOT PROJECT (Sept. 29, 2020) <http://www.mncourts.gov/mncourtsgov/mediaAppellate/Supreme%20Court/RecentRulesOrders/Administrative-Order-Implementing-Legal-Paraprofessional-Pilot-Project.pdf> [http://perma.cc/HS56-ML6A].

for many of these same approaches, along with mandatory pro bono requirements, decreased restrictions on LSC recipients, deregulation to permit a more “corporate” practice of law,³⁰⁷ increased availability to attorneys’ fees in civil rights cases, increased access to aggregate remedies for common claims, and taxation of legal services to fund legal aid.³⁰⁸

Each of these ideas should be applauded and, many, pursued. Though each may chip away at the problem, the single greatest step to reducing the justice gap would be to increase funding for legal aid. While most, if not all, scholars agree legal aid attorneys provide the most efficient and effective delivery of legal services,³⁰⁹ they likewise seem resigned to the fact that increased funding for legal aid is simply off the table, a non-starter.³¹⁰ This may be best exemplified by Deborah Rhode: “To be sure, subsidizing additional poverty law specialists would be a more efficient way of expanding services than relying on reluctant dilettantes. But an adequate increase in government support does not seem plausible in this political climate. Nor does a major increase in voluntary contributions from the bar.”³¹¹

I agree that meaningful, sustained increases in federal funding for legal aid is unlikely. The bar has labored over the decades not only to increase congressional funding of legal aid, but to save LSC itself from numerous efforts—as recently as 2020—to disband it.³¹² While the bar has succeeded in keeping LSC alive, LSC funding has effectively been cut in half over the past forty years.³¹³ Indeed, funding fell even during Bill Clinton’s

³⁰⁷ See, e.g., Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT’L REV. L. & ECON. 43, 45–46 (2014).

³⁰⁸ See e.g., 1 JOHNSON, JR., *supra* note 122, at 4; Jeffrey Kosbie, *Donor Preferences and the Crisis in Public Interest Law*, 57 SANTA CLARA L. REV. 43, 67 (2017); DiPippa, *Peter Singer, supra* note 49, at 128, 141; Rob Atkinson, *A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 AM. U.J. GENDER SOC. POLY & LAW 129, 170 (2001) (proposing a tax on legal services to fund legal aid).

³⁰⁹ See Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2425 (1999); DiPippa, *Justice and the Poor, supra* note 96, at 107; Beck, *supra* note 38 (quoting Judge David Tatel of the United States Court of Appeals for the District of Columbia); Atkinson, *supra* note 308, at 142–43; see also Cummings & Sandefur, *supra* note 185, at 91 (noting the need for further research on this issue).

³¹⁰ *But see* DiPippa, *supra* note 49, at 138–40 (developing an argument that the bar itself should contribute more financially to legal aid).

³¹¹ Rhode, *Pro Bono in Principle, supra* note 8, at 435.

³¹² *LSC Submits 2021 Budget as White House Again Calls for Defunding*, LEGAL SERVS. CORP. (Feb. 10, 2020), <http://www.lsc.gov/media-center/press-releases/2020/lsc-submits-2021-budget-white-house-again-calls-defunding> [<http://perma.cc/YCR4-8BWN>].

³¹³ See *supra* Section II.A.

presidency,³¹⁴ despite that Hillary Clinton had previously been the chair of LSC's board.³¹⁵ And while LSC appropriations have increased annually since 2013, similar stretches over the past forty years have been followed by significant reductions—the classic one step forward, two steps back scenario.³¹⁶ The ABA has fought hard for these gains and must continue its outstanding advocacy on behalf of LSC, which is a critical source of legal aid funding. Given this forty-year track record, though, the expanding national deficit, and the ever-increasing polarization in Washington on seemingly all issues, one certainly cannot rely on long-term consensus support for increased federal funding of any social program.

Likewise, significant additional funding from the bar is unlikely if left simply to aspirational appeals or efforts to shame. As Rebecca Sandefur has recognized, “Attempts to activate latent values or commitments to public service may play important symbolic roles in internal debates within the bar . . . but the state-level, cross-sectional evidence does not support them as effective strategies for encouraging lawyers’ service.”³¹⁷ In short, the majority of the practicing bar simply does not view funding legal aid as its responsibility. Rather, the ABA formally supports a “strong, *federally funded* . . . program to provide legal aid,”³¹⁸ and the Pro Bono Institute, reflecting the present view of the profession, asserts that the bar should not be asked to “do more before other funding streams, particularly public ones, are tapped.”³¹⁹

However, our approach to additional legal aid funding cannot simply be one of resignation. Indeed, few in 1990 would have foreseen the success and extent of the “institutionalization” of pro bono.³²⁰ If the primary incentive for that growth was merely the ABA’s aspirational goal of fifty pro bono hours a year,

³¹⁴ *Congressional Appropriations*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/who-we-are/congressional-oversight/congressional-appropriations> [<http://perma.cc/8J64-5GVT>] (last visited May 30, 2021).

³¹⁵ 2 JOHNSON JR., *supra* note 149, at 482.

³¹⁶ See *supra* note 161 and accompanying text.

³¹⁷ Sandefur, *supra* note 179, at 102. Similarly, Judge David Tatel of the United States Court of Appeals for the District of Columbia gave an impassioned plea to increase donations to D.C. legal aid groups in 2013. When asked two years later about the response, he said simply: “I have not heard any response.” Beck, *supra* note 38.

³¹⁸ *Legal Services Corporation*, AM. BAR ASS’N, (emphasis added), http://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/access_to_legal_services/legal_services_corporation/ [<http://perma.cc/DQ4M-Y9PD>] (last visited May 30, 2021).

³¹⁹ 2018 REPORT ON THE PRO BONO CHALLENGE, *supra* note 64, at 12.

³²⁰ Cummings, *supra* note 1, at 6.

the pro bono revolution would not have happened. But the ABA backed that up with the Pro Bono Challenge, which permitted firms to publicly measure and then market themselves against others. At the same time, *The American Lawyer* stepped in and added pro bono to its ranking methodology. Suddenly, the largest American law firms took notice, as they now had a direct financial interest in pro bono. Their reputations—and the reputations of their peers—were thereafter to be measured in significant part by their pro bono commitment. Likewise, clients started looking at these rankings and asking the same questions when hiring law firms. These economic incentives changed the conduct among those firms at the top, which eventually changed the profession's pro bono culture altogether.³²¹

Today, the legal profession stands with respect to legal aid funding where it stood with respect to pro bono in 1993: while the Model Rules encourage lawyers to support legal aid financially, it is little more than a suggestion. Moreover, the Model Rules themselves present financial support for legal aid as a secondary option to providing pro bono service, with pro bono as the gold standard. There is no direct benefit to the firms for contributing to legal aid or repercussions for failing to do so. But, just as occurred with pro bono, the following proposal would change that.

B. A Market-Based Proposal to Increase Legal Aid Funding

While the following approach would require coordination from a few sources, it would not require any change in formal bar policy, any legislation, or any mandatory obligations. Rather than *requiring* a firm or lawyer to do anything, it would instead provide them the *opportunity* to distinguish themselves from their peers from a business standpoint. But it would also create a potential economic consequence if they chose not to do so.

First, *The American Lawyer*, the *Vault*, and similar organizations that compare and rank large firms must begin to incorporate into their ranking methodology a law firm's direct financial commitment to legal aid.³²² When measuring a firm's commitment to ensuring access to justice, focusing on pro bono alone is no longer an accurate indicator, given the limitations of pro bono as previously discussed. Rather, a methodology that

³²¹ Boutcher, *supra* note 201, at 120–22; Cummings & Rhode, *supra* note 85, at 2372; 2018 REPORT ON THE PRO BONO CHALLENGE, *supra* note 64, at 13 (noting that “[m]etrics create incentives and shape behaviors”).

³²² While this paper is focused on civil legal aid, financial contributions from law firms could include those to public defender programs, as well, just as pro bono hours are counted whether the services were for civil or criminal matters.

considers both pro bono participation and financial support for legal aid (including both direct firm contributions and those of a firm's individual lawyers) would more accurately represent a firm's actual commitment to reducing the justice gap.

Though the measurement could be tied to any number of metrics, it should not be based on nominal contributions, but on a percent of the firm's economic performance, such as annual revenue, profits per partner, or profits per lawyer. This would be consistent with the pro bono metrics, which measure participation as a percent of the firm's hours rather than raw hours. In this way, firms do not get the benefit of simply being larger than others; they must contribute proportionately to be ranked accordingly. Notably, including direct financial support would also make it harder for a firm to manipulate its ranking, as firms can sometimes do with pro bono.³²³ Whatever the metric, the point is to create a standard by which to measure firms and, importantly, by which firms (and firm clients) can compare themselves against other firms. Perhaps most importantly, these organizations would also provide a vehicle to broadly publish the results and create accountability.

Second, as John DiPippa has suggested, the ABA should institute a "legal aid challenge" similar to the Pro Bono Challenge.³²⁴ Not only would this powerfully signal the ABA's commitment to addressing the justice gap, but it would also provide law firms another concrete marketing opportunity around their giving (and one that would permit them to be measured favorably against their peer institutions). While this could be a separate challenge altogether, many firms could choose to participate only in the Pro Bono Challenge and use that to market themselves still as an access to justice leader. A more effective approach would be to eliminate the Pro Bono Challenge as it presently exists and replace it with a more comprehensive "Justice Gap Challenge" that measures both a firm's pro bono participation and direct legal aid financial contributions.

³²³ Because one-half of *The American Lawyer* metric for pro bono measures the percentage of a firm's attorneys who contribute at least twenty hours of pro bono in a given year, firms sometimes focus on getting the maximum number of lawyers to commit the minimum number of hours necessary. See Cummings & Rhode, *supra* note 85, at 2407–08. Firms have also been known to cycle associates through a pro bono project to maximize that number.

³²⁴ DiPippa, *Peter Singer*, *supra* note 49, at 139–40 (referring to it as a "Pro Bono Dollar Donation Challenge").

Third, state bar associations should begin to require that firms disclose their overall direct financial contributions to legal aid each year. For this purpose, a firm could include in its totals those contributions made directly by the firm itself, from a firm foundation, and collectively by its individual lawyers. Just as with those states that require pro bono reporting, the purpose would not be to discipline lawyers or firms who do not participate (while reporting would be mandatory, giving would not be). Rather, the purpose would be to enable each state (and, ultimately, the profession overall) to measure more accurately its support for legal aid and to track progress. Indeed, any claim that ensuring access to justice is foundational to our profession rings hollow if the bar has little interest in actually measuring the extent of our commitment and, over time, progress in this regard.

This step would permit state and local bars to publish a list of firms making substantial contributions to legal aid each year and the size of such contributions. To address potential privacy concerns, the bar need not publish giving information for individual lawyers or from firms under a certain size. At a minimum, each respective bar could publish an annual report that sets out average giving by its members, average giving by firm size, the names of firms that give at a leadership level, trends in giving, and other relevant measures. This would also provide firms with comparative data points by which to market themselves, should they choose to do so. As a profession, this information could also provide another valuable response to negative stereotypes about lawyers—unless, of course, giving is so stingy as to be embarrassing.

There is some precedent for formal reporting programs relating to legal aid, and the precedent suggests mandatory reporting alone increases participation. For instance, in 1992, Florida began requiring all attorneys to certify on their annual bar membership dues statements the number of hours they contributed to pro bono and the amount of financial contributions to legal organizations.³²⁵ From 1992 to 2020, while the number of pro bono hours reported increased by 60%, financial contributions increased by 319%.³²⁶ Likewise, in the District of Columbia, after a program for reporting financial contributions from lawyers to legal aid was instituted, contributions increased by 66% in the first year alone.³²⁷

³²⁵ See *Pro Bono Publico*, *supra* note 90, at 1, 3, 6; see also Cummings & Rhode, *supra* note 85, at 2370.

³²⁶ See *Pro Bono Publico*, *supra* note 90, at 11–13.

³²⁷ Beck, *supra* note 38.

Finally, corporate clients must start requiring that the large law firms with whom they do business demonstrate their financial commitment to legal aid, just as many now demand firms demonstrate their commitment to pro bono. Indeed, the above three steps may be for naught if firms perceive that their largest clients frankly do not care.³²⁸ The first three steps are essential for raising awareness, setting expectations, and providing specific information by which to measure and compare firms. The final step, however, is what will actually motivate action. Once large corporate clients begin to demand this information, large firm culture around legal aid support will shift accordingly. And, as large firm culture shifts, so too will the culture throughout the bar. No firm could complain that this is being foisted on them or violating their autonomy. It would simply be the market talking, and firms can embrace or ignore it as they please.

C. Benefits of the Proposed Approach

Increased legal aid funding by law firms and individual lawyers would provide numerous benefits—beyond simply rankings and other reputational aspects—that other approaches aimed at reducing the justice gap cannot. First, direct financial contributions to legal aid organizations would permit a firm's partners to receive a charitable deduction for income tax purposes.³²⁹ Considering only the federal income tax, this would generate a 37% tax savings.³³⁰ In effect, a gift of \$1 million by a firm would “cost” the equity partners a net of \$630,000. And this tax benefit is already in the law; it requires no legislative action

³²⁸ An apt analogy is to law firm diversity and inclusion efforts, where corporate client demands have helped drive law firm movement. As a comprehensive 2011 study found, law firm diversity efforts reflected a lot of talk, but little action, when large corporate clients did not hold firms accountable for their diversity efforts. INST. FOR INCLUSION IN THE LEGAL PROF., *THE BUSINESS CASE FOR DIVERSITY: REALITY OR WISHFUL THINKING?* 7–9 (2011), http://theiilp.wildapricot.org/Resources/Documents/BusCaseDivReport_11_Final.pdf [<http://perma.cc/7UE2-RBJD>]. However, when corporate clients in fact *required* law firms to meet diversity standards to win or retain their business, action followed. Colleen Cochran, *Demographics as Destiny: Making the Case for Law Firm Diversity and Inclusion*, AM. BAR ASS'N (June 22, 2021), <http://www.americanbar.org/groups/journal/articles/2021/demographics-as-destiny-making-the-case-for-law-firm-diversity/> [<http://perma.cc/XZ3M-M8WS>] (citing examples from Facebook, Hewlett-Packard, and Microsoft).

³²⁹ 26 U.S.C. § 170 (2018).

³³⁰ Rev. Proc. 2020-45 § 3.01. This assumes they are in the highest individual tax bracket, which would undoubtedly be true for most equity partners at large firms, at least. *See infra* note 363 and accompanying text. For simplicity, this Article refers only to federal income taxes, but the tax savings may be significantly greater when other taxes, such as employment taxes and state income taxes, are also accounted for.

at all.³³¹ On the other hand, firms cannot take any deduction for the “economic value” of pro bono hours.³³² Not only is a direct contribution more efficient for the legal aid organization than coordinating pro bono volunteers, it also would be more tax-efficient to the firm.

Second, the proposed approach would provide law firms direct control over which legal aid organizations they support. Alternatively, a tax on legal services to support legal aid, as some have proposed, would be collected by the taxing authority and allocated among organizations through a political process. Likewise, with legal aid funding through IOLTA interest, court fees, or bar fees, firms have no direct control over which organizations receive funding. On the other hand, firms have complete control over which organizations they choose to support with direct donations. They may supplement LSC funding for organizations, fund those organizations not eligible for LSC funding, or both. They may fund legal aid organizations their clients prefer or for whom their lawyers serve as board members. The business factors behind these decisions would be largely irrelevant; the ultimate beneficiary of the gifts will be indigent individuals with legal needs.

Notably, this freedom of choice may raise concerns regarding positional conflicts associated with pro bono.³³³ For instance, firms that represent large corporate landlords may be unwilling to represent tenants, even absent an actual conflict, due to concern that such representation could create precedent detrimental to their paying client. In this context, however, the risk of upsetting a good client, or jeopardizing their interests, is significantly decreased. For one, although some legal aid organizations focus on a particular subject area, many represent clients in a variety of areas. For instance, Southern Minnesota Regional Legal Services employs over sixty staff attorneys serving clients with a wide-variety of legal issues, including those relating to custody, divorce, domestic violence, government benefits, expungements, evictions, tenant rights, consumer rights, debt collection, estate planning, immigration, education,

³³¹ Cf. Jason M. Thiemann, *The Past, The Present, and the Future of Pro Bono: Pro Bono as a Tax Incentive for Lawyers, Not a Tax on the Practice of Law*, 26 *HAMLIN J. PUB. L. & POL'Y* 331, 377 (2005) (proposing a new tax credit for pro bono work, which would require legislative action).

³³² The economic value of contributing time or services does not qualify for the charitable deduction. See I.R.S. Publ'n. 526, 7 (Mar. 3, 2021).

³³³ See generally Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 *FORDHAM L. REV.* 2279 (1999).

elder abuse, employment issues, and tax issues.³³⁴ A contribution to such an organization could be used in any number of areas; unrestricted funding would not be used to support any particular matter that could be “traced” to the law firm. Similarly, unlike pro bono, the firm is not actually representing a client, so that firm’s name will never appear on the docket of a case that could negatively affect a client. While positional conflicts could still emerge in limited situations, the benefits of an overall funding increase for legal aid would be additive, not a reallocation of existing funding, and would greatly outweigh such concerns.

Third, the proposed approach would require almost no time commitment from the firm or its individual lawyers. The number one reason lawyers cite for not doing more pro bono is a lack of time, followed by family commitments, lack of skills, unrealistic client expectations, and scheduling conflicts.³³⁵ None of these limitations apply to direct donations. Apart from a committee meeting or two to decide which organization or organizations to fund, this requires no additional lawyer time. In addition, unlike increased pro bono, it would require very little additional administrative or organizational support from the firm.

Fourth, unlike much of the pro bono that is done, direct contributions would not divert resources *from* legal aid organizations. Rather, the additional funding could be used to permit legal aid attorneys to do what inspires them and they do best: to work directly with those in need. Unlike LSC grants, which require the organization to dedicate a percentage to pro bono partnerships, such private grants would allow legal aid organizations more autonomy. In addition, they could use the funds in a way they deem best, whether that is hiring additional attorneys, increasing salaries to permit them to better recruit and retain attorneys, adding new services to expand their reach, improving their technology to provide more efficient services, or other ways to increase and improve their services. To be sure, legal aid organizations would still be accountable for how they steward these funds, as future donations may depend on their ability to show the firms’ contributions are put to good use.³³⁶

³³⁴ See *Legal Services*, SMRLS <http://www.smrls.org/get-help/legal-services/> [<http://perma.cc/N5AV-YCF6>] (last visited Sept. 24, 2021).

³³⁵ SUPPORTING JUSTICE IV, *supra* note 6, at 20.

³³⁶ Notably, one potential concern about this may be the creation of a competitive market among legal aid organizations for law firm gifts, which could create additional time to be dedicated to grant proposals and shape the behavior of legal aid organizations. Jeffrey Kosbie, *Donor Preferences and the Crisis in Public Interest Law*, 57 SANTA CLARA L. REV. 43, 46 (2017). However, these concerns represent a reality of most philanthropy these days, and it also creates accountability for the efficient and effective use of the

Fifth, by increasing funding for legal aid, the profession would also support its own by creating more employment opportunities for law school graduates. For the class of 2019, 6.5% of graduates (approximately 2,150) were unemployed and looking for work ten months after graduation.³³⁷ As discussed in the next section, many law school graduates would like to work for legal aid organizations, though it simply is not an economically viable option (particularly with student debt among law school graduates at record levels). While not all of those looking for work would choose legal aid, many would if increased funding allowed for the creation of more jobs, higher paying positions, or both.

In this regard, many law schools are stepping in to support both recent graduates and legal aid through legal aid fellowships. Over 10% of public interest jobs taken by 2019 law school graduates were fellowships funded, in part, by law schools.³³⁸ This should not be a burden born by law schools, however, and such fellowships are limited in duration. Further legal aid funding would permit those organizations to provide long-term employment for such lawyers.

To be fair, many law firms also sponsor legal aid fellowship programs.³³⁹ For some, these programs provide no direct benefit to the firm (apart from, appropriately, a valuable marketing opportunity). Most notably, Skadden Arps has funded over 900 two-year fellowships since 1988, and over 90% of those fellows continue in full-time public service work upon completion of their fellowship.³⁴⁰ For many firms, though, these serve not to provide an entry for lawyers into a potential long-term career in legal aid, but as a vehicle to increase the firm's pro bono numbers or to house promising attorneys for whom they do not currently have

funding. *See id.* Moreover, this would *increase* the funding available to organizations, not simply reallocate the limited existing funding among them. As such, an organization may choose not to compete for the additional funding if it concluded that such concerns outweighed the benefits.

³³⁷ *See* NAT'L ASS'N FOR L. PLACEMENT, JOBS & JDS: EMPLOYMENT FOR THE CLASS OF 2019—SELECTED FINDINGS 4 (2020). Though this is the lowest percent since 2007, it reflects, in part, years of smaller law school classes rather than more job openings. *See id.* Further, the authors note that the unemployment rate for graduates will most likely increase in the coming years. *See id.*

³³⁸ *See id.* at 7. For example, the University of St. Thomas School of Law partners with legal aid organizations in Minnesota through its Archbishop Ireland Justice Fellows Program. *See* Patricia Peterson, *What Happens to Those Who Can't Afford an Attorney?*, 13 ST. THOMAS LAW. 5, 20–23 (2020). Many of these do turn into full-time positions at the end of the fellowship. *See id.* at 22–23.

³³⁹ Cummings, *supra* note 1, at 80–82.

³⁴⁰ *Skadden Fellows Share the Impact of the Program After Thirty Years*, SKADDEN FELLOWSHIP FOUND., <http://www.skaddenfellowships.org/> [<http://perma.cc/AUA3-D9XX>].

the work to support.³⁴¹ As with pro bono, although the benefits of these arrangements still outweigh the costs, such programs can create a drain on the organization the firm purports to support. Indeed, “[s]ome public interest leaders cannot help but feel that if firms were motivated primarily by a desire to advance the public good, they would be helping to subsidize the nonprofit lawyers . . . not pushing to place [with them] their own untrained associates.”³⁴²

Sixth, funding from law firms would provide organizations a more predictable and stable source of income than many other sources. For instance, congressional appropriations for LSC fluctuate significantly from year to year based on many factors, both political and practical.³⁴³ Likewise, funding from IOLTA programs, which is directly tied to interest rates, consistently decreases during economic downturns.³⁴⁴ On the other hand, while the legal profession is by no means immune from economic cycles, it tends to weather them better than the overall economy due to its diversity of practice areas, which often are countercyclical.³⁴⁵ For instance, over the past three recessions (1991, 2001, 2009), revenue among the 100 largest law firms dropped only in 2009 (and, even then, less than the overall economy).³⁴⁶ In fact, despite the COVID-19 driven economic collapse, law firm revenue soared to record highs in 2020.³⁴⁷

Notably, several cities and one state (Washington) have passed statutes ensuring a right to counsel in certain civil cases, and other states are considering the same.³⁴⁸ While this represents an important step forward in theory, it will require an even greater need for lawyers’ time in practice. Such movements could put even more pressure on legal aid organizations, though

³⁴¹ See Cummings, *supra* note 1, at 80–82; see also Cummings & Rhode, *supra* note 85, at 2410–13.

³⁴² Cummings & Rhode, *supra* note 85, at 2413.

³⁴³ See *Congressional Appropriations*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/who-we-are/congressional-oversight/congressional-appropriations> [<http://perma.cc/87AU-HS8K>].

³⁴⁴ See *supra* notes 296–299 and accompanying text.

³⁴⁵ See Todd Babbitz & Albert Bollard, *COVID-19: Implications for Law Firms*, MCKINSEY & CO. (May 4, 2020), <http://www.mckinsey.com/industries/financial-services/our-insights/covid-19-implications-for-law-firms#> [<http://perma.cc/K472-X365>].

³⁴⁶ See *id.* at 2.

³⁴⁷ See Dan Packer, *Against All Odds, the Am Law 100 Were Stunningly Successful in 2020*, THE AM. LAW. 2–3 (Apr. 20, 2021), <http://www.law.com/americanlawyer/2021/04/20/against-all-odds-the-am-law-100-were-stunningly-successful-in-2020/> [<http://perma.cc/P877-NRR4>].

³⁴⁸ See Tonya L. Brito, *The Right to Civil Counsel*, 148 DAEDALUS J. AM. ACAD. ARTS & SCI. 56, 57 (2019); see also Houseman, *supra* note 44, at 274–75.

they do not have the resources to meet the need as it is.³⁴⁹ Simply put, looking to legal aid to support mandatory access programs is not a realistic option, absent increased funding. The other option to support these approaches, then, is for more pro bono. But if that requires courts to appoint attorneys, it would effectively create a sort of mandatory pro bono requirement that many within the bar have fought hard against. Rather, the above proposal would help to avoid that result by increasing the pool of available and dedicated legal aid attorneys.

The greatest benefit of this proposal, however, is its simplicity. This requires almost no structural changes at all: no legislative changes to the tax code,³⁵⁰ no mandatory obligations on lawyers, no update to the Model Rules of Professional Conduct (or state versions), no changes to the regulation of legal practice, and no disciplinary action for failure to participate. This would be purely voluntary. Firms need not make any contribution, just as they need not provide any pro bono. But if they do, they can aggressively market their philanthropy. They can show their clients, prospective clients, and prospective associates their commitment to the local legal aid community. And if their business depends on this, they will do so.

D. Obstacles to the Proposed Approach

While there are some obstacles to the approach, demand is not one of them. As discussed above, the demand for civil legal aid is both enormous and growing, and the profession will not be able to “pro bono itself” out of the justice gap. For instance, consider just those 18 million families with minor children who

³⁴⁹ See Diana Calais, *Ethical Violations Resulting from Excessive Workloads in Legal Aid Offices: Who Should Bear the Responsibility for Preventing Them?*, 16 LOY. UNIV. CHI. L.J. 589, 591–96 (1985).

³⁵⁰ Notably, a tax on legal services that went to support legal aid could, in theory, accomplish the same result. However, the complexities of such a tax would be substantial. For one, it would almost certainly have to be a state tax, not a federal tax, which would require fifty different governments to pass such legislation. Certainly, many states simply would not, and there would be considerable variance among those that did. Additionally, in those states that adopt it, firms would likely pass that tax along to their clients directly on the bill or through an attendant increase in their billable rates, effectively transferring any responsibility for legal aid funding back to the public. (Perhaps this is defensible, like a gas tax that goes toward infrastructure and is targeted to those who consume gas, but that potential result may make such a tax even less likely to be adopted). Moreover, lawyers would have a significantly different engagement with legal aid when *required* to contribute a portion of their income versus being incentivized to support the cause. That dynamic has been exhibited well by the bar’s embrace of voluntary pro bono, and the fervent objection of many within the bar to any form of mandatory pro bono. See RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 15–17.

live below 125% of the poverty level.³⁵¹ If 70% of those families had a “justiciable legal issue,” as LSC has determined, and each such family had on average two such issues,³⁵² that subset of the population alone would present almost 25 million legal issues each year. Further, if each issue took on average seven hours of a lawyer’s time,³⁵³ each of the 1.3 million attorneys in the United States would have to contribute 135 hours of pro bono a year—over three times the current average commitment—to meet just that demand. Alternatively, that same demand could be met by 16,150 legal aid attorneys working 1,560 hours per year, or just 5,650 more legal aid attorneys than there are in America today.

Likewise, a (potential) supply of willing lawyers is not an obstacle. Roughly one-third of law students cite the desire to engage in social justice or prepare for public service as their primary reason for going to law school, and many note their work in a clinic as their best law school experience.³⁵⁴ At the same time, legal aid attorneys generally report the highest job satisfaction and lowest turnover rates out of all categories of lawyers.³⁵⁵ Yet only one out of 140 lawyers makes legal aid their career.³⁵⁶

³⁵¹ See THE JUSTICE GAP, *supra* note 16, at 16, 19 and accompanying text (data is as of 2017).

³⁵² See *id.* at 21.

³⁵³ I have been unable to find information stating the average hours required by legal aid attorneys to resolve an issue. For this, I am using numbers from a 2014 study of Minnesota pro bono and Judicare attorneys working on cases referred by Minnesota legal aid organizations. Those attorneys closed 16,060 such cases while reporting 108,500 volunteer hours (a 6.75 hour average per case). See MINN. LEGAL SERVS. COALITION, *supra* note 25, at 6. This may overstate the time needed per case, as legal aid attorneys are likely more efficient than pro bono attorneys. On the other hand, many cases those organizations refer to their pro bono partners may be less complex or challenging than the cases they retain. See Cummings, *supra* note 1, at 141; see also Rhode, *Rethinking the Public*, *supra* note 3, at 1445. That study also noted that the 227 legal aid attorneys served 48,344 individuals and families through 354,120 hours (a 7.33 hour per client average). See MINN. LEGAL SERVS. COALITION, *supra* note 25, at 5.

³⁵⁴ See RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 155–56. The cited study focused on lawyers who demonstrated a commitment to pro bono work, which may skew the result somewhat. See Rhode, *Access to Justice*, *supra* note 292, at 162–64 (describing the same study). Nonetheless, this cohort provides perhaps an even more telling data point because it represents a group who had an affinity toward public service, maintained that affinity, yet chose not to become legal aid lawyers.

³⁵⁵ Mike Stetz, *Where the Happiest Lawyers Work*, NAT’L JURIST, Fall 2018, at 21; GABRIELE PLICKERT ET AL., AFTER THE JD III: THIRD RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 14, 52, 53, 58, 59 (Am. Bar Found. & NALP Found. L. Career Rsch. & Educ. eds., 2014); Jerome M. Organ, *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 UNIV. ST. THOMAS L.J. 225, 265 (2011). Other studies, however, note higher levels of dissatisfaction and turnover among legal aid attorneys. See ROCÍO AVALES, ET AL., 2019 CALIFORNIA JUSTICE GAP STUDY 17 (State Bar Cal. ed., 2019); CHI. BAR FOUND. & ILL. COAL. FOR EQUAL JUST., INVESTING IN JUSTICE: A FRAMEWORK FOR EFFECTIVE RECRUITMENT AND RETENTION

While law students of course have various reasons for choosing careers other than legal aid—including, at many schools, a law school culture apathetic to public interest law³⁵⁷—the primary reason is undoubtedly economic.³⁵⁸ In 2018, the median starting salary for first-year legal aid attorneys was \$48,000.³⁵⁹ At the same time, the majority of legal aid positions are in urban settings, where the cost of living is relatively high. In contrast, the average starting salary for first-year associates at private firms with less than fifty attorneys was \$98,750 in 2019.³⁶⁰ And, for those graduates with the opportunity to go to large firms, first-year-associate salaries at many firms have ballooned to \$190,000 (even in smaller markets).³⁶¹ Many lawyers have noted that while “they would have preferred full-time public interest work, a well-paying private-sector job offering pro bono opportunities was the next-best alternative.”³⁶² Over one-third of recent law school graduates acknowledged they chose a job with a higher salary over a job they really wanted.³⁶³ In a 2006 study of legal aid attorneys, most responded that a salary increase of just \$10,000 would permit them to stay in their position rather than finding a higher paying job.³⁶⁴ Indeed, an increase in

OF ILLINOIS LEGAL AID ATTORNEYS 26–27 (Chi. Bar Found. & Ill. Coal. for Equal Just. eds., 2006) [hereinafter INVESTING IN JUSTICE].

³⁵⁶ As of 2019, there were about 10,479 legal aid lawyers out of 1,328,692 lawyers overall in America. See *Attorney Access—2020*, *supra* note 51, at 2; AM. BAR ASS’N, PROFILE OF THE LEGAL PROFESSION 30 (2020) [hereinafter PROFILE 2020]. Notably, while this Article is focused on legal aid, other public-interest minded students do go into similar arenas, such as public defenders or government attorneys. See Catherine Albiston et al., *Making Public Interest Lawyers in a Time of Crisis: An Evidence-Based Approach*, 34 GEO. J. LEGAL ETHICS 223, 257 (2021).

³⁵⁷ RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 158; Albiston et al., *supra* note 356, at 235–36, 266–67.

³⁵⁸ RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 158; see also AVALES ET AL., *supra* note 355, at 22; PROFILE 2020, *supra* note 356, at 24, 28 (noting the average debt for law students upon graduation in 2020 was \$120,406, and that 37% passed on the job they wanted to work at one with a higher salary); *but see* Albiston et al., *supra* note 356, at 235, 250 (noting that some research has discounted the impact of debt and attributed more weight to law school culture).

³⁵⁹ *Findings from the NALP/PSJD 2018 Public Service Attorney Salary Survey*, NALP (June 2018), <http://www.nalp.org/0618research?s=legal%20percent20aid%20percent20salaries> [<http://perma.cc/CN7V-4ACK>]. Notably, this is \$10,000 less than the median starting salary for public defenders. *Id.* Moreover, that salary would have fallen under 200% of the poverty level for a family of four in 2018 (\$50,200). See Annual Update of the HHS Poverty Guidelines, 83 Fed. Reg. 2643 (Jan. 18, 2018).

³⁶⁰ Jason Tashea, *What Lawyers Earn in 2019*, ABA J. (Sept. 1, 2019, 3:40 AM), <http://www.abajournal.com/magazine/article/what-lawyers-earn> [<http://perma.cc/22MG-KJ92>].

³⁶¹ Andrew Maloney, *As Associate Pay Scale Gets Set Across US, Market Will Feel Ripple Effects*, THE AM. LAW. (May 11, 2021, 03:50 PM), <http://www.law.com/americanlawyer/2021/05/11/as-associate-pay-scale-gets-set-across-us-market-will-feel-ripple-effects/>.

³⁶² Rhode, *Pro Bono in Principle*, *supra* note 8, at 449.

³⁶³ PROFILE 2020, *supra* note 356, at 24.

³⁶⁴ INVESTING IN JUSTICE, *supra* note 355, at 29.

legal aid funding would not simply permit organizations to support more attorney positions, it would enable them to pay their attorneys higher salaries—and thus recruit (and retain) lawyers for whom the current salary structure simply precludes a career in legal aid.³⁶⁵

Moreover, despite the claims of some, a lack of resources is not an obstacle. Total revenue for all legal services in the United States is estimated to be \$330 billion.³⁶⁶ Among the United States' 100 largest law firms alone, revenue reached \$111 billion in 2020, an increase of 6.6% from the prior year.³⁶⁷ Revenue per lawyer at those firms was \$1.05 million, while profits per equity partner increased to \$2.23 million, with over 21,000 equity partners.³⁶⁸ Yet, those at large firms often talk about giving from a position of “scarcity.”³⁶⁹ As one partner from an AmLaw 100 firm argued, presumably with a straight face: “You can’t expect a lot more than what we are already doing You can’t expect giving to be unduly high.”³⁷⁰

One real obstacle, however, may simply be a lack of general awareness of the justice gap. Recent polls have showed that almost 80% of Americans believe there is a constitutional right to counsel for civil issues, while only one in three believe low-income individuals have difficulty finding legal representation.³⁷¹ Without a greater awareness of the justice gap by the public, law firms will face little outside pressure to address it. Rather, firms can continue to trumpet their pro bono efforts and wash their hands of the remaining problem. Indeed, the profession’s aggressive

³⁶⁵ A recent New York Times article noted that about one-third of legal aid attorneys in New York work second jobs in order to make ends meet. Sonia Weiser, *Lawyers by Day, Uber Drivers and Bartenders by Night*, N.Y. TIMES (June 3, 2019), <http://www.nytimes.com/2019/06/03/nyregion/legal-aid-lawyers-salary-ny.html> [<http://perma.cc/JV3R-9KWH>]. Another approach to address the economic barriers of a legal aid career would be through loan forgiveness programs. That would require governmental action, however, and many candidates may be skeptical of such a program based on the track record of the federal Public Service Loan Forgiveness program. See Adam S. Minsky, *New Federal Report: Student Loan Servicers Often Harm Borrowers Seeking Public Service Loan Forgiveness*, FORBES (June 29, 2021, 02:57 PM), <http://www.forbes.com/sites/adamminsky/2021/06/29/report-student-loan-servicers-frequently-harm-borrowers-seeking-public-service-loan-forgiveness/?sh=5c4507c5757b> [<http://perma.cc/3LZ5-YR3H>]. Moreover, unlike increased funding, increasing the pool of potential legal aid attorneys by debt relief (or other measures) does not address the limited number of positions available. See Albiston et al., *supra* note 356, at 284.

³⁶⁶ CLAIRE O’CONNOR, DUE PROCESS: RISING BUSINESS ACTIVITY AND DISPOSABLE INCOME WILL BOLSTER INDUSTRY GROWTH 5 (IBISWorld ed., 2019).

³⁶⁷ Packel, *supra* note 347.

³⁶⁸ *Id.*

³⁶⁹ Beck, *supra* note 38.

³⁷⁰ *Id.*

³⁷¹ 3 JOHNSON JR., *supra* note 25, at 929; RHODE, *supra* note 6, at 4.

marketing and public celebration of its pro bono efforts has likely contributed to the misperception that those with limited means largely receive the representation they need.³⁷²

While most lawyers (presumably) understand the Constitution does not protect those with civil needs, many undoubtedly do not appreciate the extent of the justice gap. Looking back on my own experiences over a decade at two AmLaw 100 firms, very little thought was given to the work of legal aid organizations—apart from what cases they could refer to the firm. Indeed, even while researching this article I was startled to learn the World Justice Project ranked the United States last in 2020 among thirty-seven high-income countries for access to affordable civil justice, and *109th* out of 128 countries overall.³⁷³

Earl Johnson Jr. noted that the United States' placement on the list was a "shock" to most lawyers when the rankings first appeared in 2011.³⁷⁴ While that is likely true, I suspect most lawyers simply never heard of the ranking at all. Perhaps little in this regard has changed since Reginald Heber Smith's observed 100 years ago that most of the bar was not hostile to legal aid, but wholly ignorant of the need for it.³⁷⁵

The proposed approach does not require a reeducation of the entire population, though. Rather, the message must get to those who drive policy and priorities at large law firms' most important clients: large corporations. A good place to start would be with those in general counsels' offices, who presumably would grasp the issue, have the ear of other executives, and have a say in the firms those corporations hire. If they become more aware of the scope and depth of the justice gap, and then begin to make large firms answer for their financial efforts to address it, that may provide the necessary spark.

Notably, the National Legal Aid and Defense Association has had a Corporate Advisory Committee since 1992, which "[t]hrough the leadership of its [member corporate counsel], . . . engages the corporate community to expand the availability of quality representation to those who cannot otherwise afford counsel."³⁷⁶ One of their main initiatives is to help legal aid organizations

³⁷² 3 JOHNSON JR., *supra* note 25, at 928.

³⁷³ See *WJP Rule of Law Index*, *supra* note 76 (Factor 7.1: "people can access and afford civil justice").

³⁷⁴ 3 JOHNSON JR., *supra* note 25, at 927.

³⁷⁵ See *supra* notes 97, 98, 112, and accompanying text.

³⁷⁶ *Bringing Justice from the Boardroom to our Communities*, NAT'L LEGAL AID & DEF. ASS'N, <http://www.nlada.org/issues-and-initiatives/corporate-engagement> [<http://perma.cc/NEL7-8EHM>].

obtain federal grants outside of LSC and to advocate for additional government funding for non-LSC funded legal services.³⁷⁷ In addition, general counsel from over 250 of the country's largest companies joined in letters to Congress in 2018 and 2020 to express their support for LSC funding and note the importance of civil legal aid to the community and, by extension, their own businesses.³⁷⁸ Perhaps, then, what corporate counsel need is not so much a better appreciation for the issue, but a broader vision for legal aid (apart from adopting the ABA's policy prioritizing government funding) and recognition of the role they may play in shaping law firm behavior.³⁷⁹

A second significant obstacle is simply that large firms have so embraced pro bono. They have invested significant resources to developing, staffing, and marketing their pro bono programs. And, ultimately, those pro bono programs benefit the firms directly in many ways, most of which direct financial contributions would not. As noted above, studies have found that many firms' pro bono programs are ultimately cost neutral.

At the same time, large firm partners tend to dominate leadership positions within the bar. For instance, eleven of the twelve members of the Pro Bono Institute's Law Firm Pro Bono Project Advisory Committee are partners at AmLaw 100 firms.³⁸⁰ This is not intended to be a critical statement; however, it may help explain the Institute's dubious conclusion that the amount firms give to legal aid "expose[s] as myth any perception that large law firms are not adequately supporting legal aid programs."³⁸¹ Simply put, large firms often drive bar policy and conduct, and

³⁷⁷ *Civil Legal Aid Initiative: Non-LSC Federal Resources*, NAT'L LEGAL AID & DEF. ASS'N, <http://www.nlada.org/tools-technical-assistance/civil-resources/civil-legal-aid-funding/civil-legal-aid-initiative-non> [http://perma.cc/J56J-VFER].

³⁷⁸ See LSC 2021 BUDGET REQUEST, *supra* note 24, at 3; LEGAL SERVS. CORP., 2018 ANNUAL REPORT 21 (2018).

³⁷⁹ The inside cover of a recent issue of *Bench and Bar of Minnesota* (May/June 2021) listed the names of eighty-seven in-house counsel who contributed to the Fund for Legal Aid at Mid-Minnesota Legal Aid as part of a campaign to increase giving by in-house counsel. Such campaigns are commendable, both for the individual gifts they bring in and the awareness they can bring, and they indicate an awareness of and interest in the needs of legal aid by corporations. See generally Minn. State Bar Ass'n, 78 BENCH & BAR OF MINN., May/June 2021, at 1. Real leverage would occur, though, if those same in-house counsel not only contributed themselves, but were able to require the law firms their companies hire to contribute meaningfully as well.

³⁸⁰ Compare *Law Firm Pro Bono Project Advisory Committee*, PRO BONO INST., <http://www.probonoinst.org/about-us/governance/law-firm-pro-bono-project-advisory-committee/> [http://perma.cc/EU2M-PL4B], with *The 2020 Am Law 100 Report*, THE AM. LAW. (Apr. 21, 2020, 09:22 AM), <http://www.law.com/americanlawyer/rankings/the-2020-am-law-100/> [http://perma.cc/D374-5BS2].

³⁸¹ 2020 REPORT ON THE PRO BONO CHALLENGE, *supra* note 65, at 12.

large firms have a significant self-interest in pro bono at this time; they do not presently have a similar interest in legal aid.

Ultimately, this proposal would not require firms to undo any of their pro bono investments. Rather, the goal would be to leverage the infrastructure firms have built around pro bono while supplementing that with direct contributions to legal aid. Currently, however, an increase in giving would be against their own economic interests in a way that pro bono is not. That is what must change: those who have the ability to influence large firm behavior must make it economically beneficial for firms to contribute directly to legal aid. As Adam Smith observed almost 250 years ago, to do so we must “address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.”³⁸²

A third obstacle may be resistance from *The American Lawyer* (and similar publications) to reconsider how they measure a firm’s access to justice impact, or from the ABA to adopt a broader Access to Justice Challenge—in each case, to shift from an approach based purely on pro bono hours³⁸³ to actual impact. But why would those organizations, as guardians, watchdogs, and champions of the profession, *resist* such steps? Indeed, the focus on measuring pro bono as a proxy for reducing the justice gap, while once innovative and still important, patently fails to fully capture what it really intends to measure. Apart from simple inertia—the Pro Bono Challenge is nearing its thirtieth anniversary and the Pro Bono Scorecard its twentieth—how can such organizations *not* include legal aid funding as a component when (1) the profession professes that access to justice is a core, foundational value, part of its very DNA, (2) despite laudable progress, the profession continues to fall so far short in its efforts to provide meaningful access to justice, (3) legal aid attorneys provide the most efficient and effective service for most aspects of poverty law, and yet, (4) law firm and lawyer contributions constitute less than 6% of overall legal aid funding.

Modifying *The American Lawyer* ranking criteria, or adopting an Access to Justice Challenge, would require some work and, likely, generate some resistance. But it would also generate exactly the type of attention to and discussion around the urgently needed role that legal aid can play in closing the justice gap. It would force the issue upon firms in a way that an aspirational statement or an article that a firm leader could read

³⁸² 1 SMITH, *supra* note 3, at 17.

³⁸³ See Cummings & Rhode, *supra* note 85, at 2407, 2430.

with interest, then put out of mind, cannot. It would require firm leaders to in fact reconsider their firms' position and interests regarding true access to justice—and to choose action or inaction.

E. Illustration of the Proposal

Before concluding, consider a couple examples of the impact this approach could have. In 2020, there were 21,258 equity partners at AmLaw 100 firms, and the average profits per equity partner at those firms was \$2.23 million.³⁸⁴ If those firms alone committed to donating 1% of profits per equity partner (\$22,300 each) to legal aid organizations, that would add \$474 million to legal aid budgets, more than LSC typically provides.³⁸⁵ Even if legal aid organizations increased their starting salaries from an average of \$48,000 to \$60,000, and if benefits cost organizations an additional \$15,000 per new lawyer, this would enable those organizations to hire 6,300 additional legal aid attorneys (including, in theory at least, all unemployed recent law school graduates³⁸⁶).

As previously noted, it would take approximately 16,150 legal aid attorneys to meet the needs of all 18 million families with minor children who live below 125% of the poverty level.³⁸⁷ That additional staffing, along with the 10,500 current legal aid attorneys, would permit legal aid organizations to fully serve the civil legal needs of every such family, with capacity to spare.³⁸⁸ In many cases, this would mean secure housing, maintenance of benefits, protection from domestic violence, retention of parental rights—ultimately, the elimination of many of the factors that lead to the cycle of poverty. While this alone would not

³⁸⁴ See Packel, *supra* note 347.

³⁸⁵ See *id.* As noted in Part IV, firms have contributed on average \$95.6 million (when adjusted for inflation) to legal aid annually over the past seventeen years. However, the data does not reflect what portion of that has come from the AmLaw 100 firms versus the rest of the bar. Accordingly, for purposes of this illustration, I have not reduced the \$474 million to account for existing giving. Nonetheless, even if *all* existing giving came from AmLaw 100 firms, which is not the case, the net increase would still be close to \$400 million.

³⁸⁶ See NAT'L ASS'N FOR L. PLACEMENT, JOBS & JDS: EMPLOYMENT FOR THE CLASS OF 2019—SELECTED FINDINGS, *supra* note 337 and accompanying text.

³⁸⁷ See *supra* Section IV.D.

³⁸⁸ I recognize a few obvious flaws in this example. For one, an organization could not simply increase starting attorney salaries without increasing those with some seniority, as well. Second, not all legal aid attorneys would be available to serve such families, as many legal aid organizations primarily (or exclusively) serve other populations, such as immigrants. But while any hypothetical can be critiqued as too simplistic, the larger point remains: increased funding for legal aid would provide the most immediate, efficient, and effective tool for serving those in need and reducing the justice gap. And such funding would provide the agencies who *do* this work the flexibility to increase salaries to retain staff, hire new attorneys, expand their services offered, or take other steps to most directly increase their impact.

completely close the justice gap,³⁸⁹ it would for millions of additional American families.

Again, the actual cost to firms would be significantly less. After federal income tax savings alone are considered,³⁹⁰ the average net cost in this example per equity partner would be around just \$14,000,³⁹¹ leaving profits per equity partner still north of \$2.22 million. Even the best of lawyers could not sell the argument that this would reflect giving from a position of scarcity. And this example considers the impact if only the equity partners at the 100 largest firms participated.

Alternatively, consider the potential impact of a “Justice Gap Challenge,” whereby firms are called to contribute 2% of billable hours toward pro bono and replace that third percent (under the current Pro Bono Challenge of 3–5% of a firm’s billable hours) with a contribution of 1% of revenue to legal aid. Under this approach, if firms reallocated that third 1% of their hours from pro bono work to paying client work and donated the proceeds, they would be *no worse off* economically, but it would enable *significantly* more actual legal services through legal aid.

For instance, if all AmLaw100 firms participated in such a challenge, the direct annual benefit to legal aid would exceed \$1.11 billion.³⁹² If we assume a (very) conservative average billable hourly billable rate of \$300 per hour for AmLaw 100 lawyers, that would reflect 3.7 million pro bono hours reallocated to billable work (and the related proceeds then contributed to legal aid). At the current \$48,000 average starting salary for legal aid attorneys, plus \$15,000 for benefits, this would permit legal aid organizations to hire over 17,600 additional attorneys. If each such attorney worked 1,500 hours a year on direct client representation, that would generate 26.4 million (efficient and skilled) hours. After accounting for the loss of the 3.7 million (less efficient and often less skilled) pro bono hours, this would still create a net gain of 22.7 million hours toward reducing the justice gap. At the same time, firms could retain the many benefits of their existing pro bono programs, both for themselves (such as associate training

³⁸⁹ In 1996 and 1999, scholars estimated that it would require approximately four billion dollars of funding for legal aid to fully meet the civil needs of those living in or near poverty. See Deborah Rhode, *Equal Justice Under Law*, MARKKULA CTR. FOR APPLIED ETHICS SANTA CLARA UNIV. (Jan. 1, 2020), <http://www.scu.edu/ethics/focus-areas/more-focus-areas/resources/equal-justice-under-law/> [<http://perma.cc/UJ3B-DG5S>].

³⁹⁰ See *supra* Section IV.C.

³⁹¹ Determined by taking 1% of profits per equity partner, or \$23,000, multiplied by 37%, the highest federal income tax rate.

³⁹² See *supra* text accompanying note 367.

and marketing) and for those areas where legal aid alone is less effective than pro bono (such as class actions).

Whatever the incentive, it is true that not every one of those firms would fully participate. But many would. And the ultimate goal is not necessarily full participation, but a shift in culture within the profession regarding support for legal aid. If the conduct by many of the largest firms changes, the culture among the profession itself would start to change, just as it did around pro bono. Smaller firms would incorporate this ethos, and the impact would multiply. That would start to truly reduce the justice gap in a way that pro bono, self-help, or the other approaches simply cannot.

CONCLUSION

One hundred years ago, Reginald Heber Smith shined a bright light on the justice gap and urged the bar to fully support legal aid as the profession's most effective, and efficient, tool to address it. This led to greater awareness, but little commitment. Forty-five years later William McCalpin directly challenged the ABA: "Two broad paths lie before us. One is the well-trodden road of obstruction, reaction, opposition. . . . The alternative is to meet the challenge head-on, frankly with the penetrating analysis and the restless curiosity of a lawyer addressing himself to a legal problem."³⁹³

Indeed, two broad paths lie before us again. We can double down on pro bono as our best answer to reducing the justice gap—not because it is, in fact, the best answer, but because it gives so much back to us in return. We can justify, rationalize, and defend this path, and perhaps even convince ourselves that we are not at some level "privileging professional interests over concerns of social justice—promoting the image of equal access without the reality."³⁹⁴

Or, we can live up to our creed that ensuring access to justice for all individuals, not just those who can pay us, is a foundational value of the profession, a part of its very DNA. We can capture the great progress with pro bono, but also meaningfully increase our support for legal aid. We can acknowledge that while we urge the public to increase funding for legal aid, we ourselves give less than four one-hundredths of 1% of our revenue, and less than one-tenth of 1% of our income,

³⁹³ 1 JOHNSON JR., *supra* note 122, at 74–75 (quoting William McCalpin's remarks at the 1965 ABA mid-year meeting).

³⁹⁴ Cummings, *supra* note 1, at 149.

to legal aid. We can admit that a contribution of 100 pro bono hours does not, in reality, reflect an opportunity cost of \$20,000, but is instead an investment that often returns in full. We can recognize that we often do little to support the 10,500 or so legal aid lawyers who have dedicated their professional lives to fighting the justice gap, but that we instead ask them to support our own pro bono efforts. We can accept that, though poverty is not of our creation, we stand in a unique position within the population regarding legal representation for those who are in poverty. In short, we can stop “celebrat[ing] lawyers’ ‘selfless’ pro bono contributions [while] oppos[ing] reforms that would serve the same objectives on an even broader scale.”³⁹⁵

However, this will not happen through aspirational appeals. It will happen only if those with the ability to influence the bar—primarily *The American Lawyer*, the ABA, and corporate clients—create concrete, economic incentives for large firms to more meaningfully support legal aid. Only then will conduct, and ultimately culture, change. This can be done. It has been done before, and the pro bono revolution provides the blueprint for it. Indeed, the solution is hidden in plain sight. We know right where to look—if we truly want to find it.

³⁹⁵ RHODE, IN PRINCIPLE AND IN PRACTICE, *supra* note 49, at 177.