

MOVING TOWARD A MORE PERFECT WORLD: ACHIEVING EQUAL ACCESS TO JUSTICE THROUGH A NEW DEFINITION OF JUDICIAL ACTIVISM

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INTRODUCTION

The controversial term *judicial activism*¹ is defined in many varying ways, but is consistently used to refer to a judge's approach when deciding cases. In his comment, Keenan Kmiec surveys the use of the term *judicial activism* from when it first appeared in public print to modern times.² While not advocating a particular definition of the term, Kmiec sets forth five definitions as they have appeared in Supreme Court cases and scholarly literature.³ These

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¹ Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1476 (2004) (referring to Ninth Circuit Judge Diarmuid O'Scannlain's definition of *judicial activism*).

² *Id.* at 1441.

³ *Id.* at 1444.

five definitions of judicial activism, broadly stated, are: striking down of arguably constitutional actions of other branches (striking down clearly unconstitutional actions is merely judicial review);⁴ ignoring controlling-vertical precedent or ignoring controlling-horizontal precedent in certain instances;⁵ judicial legislating;⁶ departing from accepted canons of interpretation when rendering decisions;⁷ and engaging in result-oriented judging, meaning that the judge has an ulterior motive for making the ruling and the decision departs from the baseline of correctness.⁸

The term *judicial activism* once enjoyed a “positive connotation, much more akin to ‘civil rights activist’ than a ‘judge misusing authority.’”⁹ “The label of ‘judicial activist’ . . . reflect[ed] a belief that one ought to aggressively employ judicial review to safeguard the rights upon which democracy is predicated.”¹⁰ Arthur Schlesinger Jr., who introduced the term in early 1947,¹¹ characterized judicial activism as stating firmly that it could not “rely on an increasingly conservative electorate to protect the underdog or to safeguard human rights.”¹² Courts had to intervene.¹³ Over the years, debates on the goods and evils of judicial activism have continued.¹⁴

Notably absent from the debate on judicial activism is discussion of the judge’s role off the bench. Decision-making is the largest part of judges’ contributions to the justice system. However, the judges’ roles also include stewardship over the improvement of laws, the legal system, and the administration of justice.¹⁵ These

⁴ *Id.* at 1463–66.

⁵ *Id.* at 1466–71.

⁶ *Id.* at 1471 (“Judges are labeled judicial activists when they legislate from the bench.”) (quotation omitted); *id.* at 1471–73. Judicial legislation refers to court rulings that go beyond interpreting, declaring, or enforcing the law into the realm of creating or correcting “supposed errors, omissions or defects in legislation.” See N.Y. STAT. § 73 cmt. (2014).

⁷ Kmiec, *supra* note 1, at 1473–75.

⁸ *Id.* at 1475–76.

⁹ *Id.* at 1451.

¹⁰ *Id.*

¹¹ *Id.* at 1446.

¹² Kmiec, *supra* note 1, at 1448–49.

¹³ *Id.* Kmiec, *supra* note 1, at 1449.

¹⁴ Eric J. Segall, *Reconceptualizing Judicial Activism as Judicial Responsibility: A Tale of Two Justice Kennedys*, 41 ARIZ. ST. L.J. 709 (2009) (advocating the position that instead of focusing on the courts’ results by debating the term “judicial activism,” attention should be placed on whether the courts are adhering to “judicial responsibilities”).

¹⁵ See *Code of Conduct for United States Judges*, ADMIN. OFFICE OF U.S. COURTS, <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx> (last visited Feb. 25, 2014) (noting that the Code of Conduct encourages judges to “engage in activities to

aspects of the judicial role have become more important in the current economic climate. The recent economic crisis has flooded state courts with family, consumer, foreclosure, and housing cases.¹⁶ Significantly, more individuals appear in these types of cases without an attorney. Millions of individuals with life-affecting cases handle their cases without any knowledge of substantive or procedural law.¹⁷ The number of self-represented litigants has been described as the biggest challenge facing state court systems.¹⁸ From this challenge, a new form of judicial activism has grown. Judges have stepped forward to ensure that their courts are responsive to unrepresented litigants' needs. This Article discusses the various ways judges have redefined what they can do to improve laws, the legal system, and the administration of justice. This discussion further urges the judiciary to embrace this new definition of judicial activism in order to ensure a more perfect world of equal justice for all.

I. ACCESS TO JUSTICE COMMISSIONS

Twenty-nine states and the District of Columbia have access to

improve the law, the legal system, and the administration of justice"); N.Y. JUD. LAW app. Code of Jud. Conduct pmbl. (2012) (preamble for the *Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts*, providing the purpose of the New York Code of Conduct for judges); *Code of Judicial Conduct*, N.J. JUDICIARY, http://www.judiciary.state.nj.us/rules/appendices/app1_jud.htm (last visited Feb. 25, 2014) (listing the canons of the New Jersey Code of Judicial Conduct).

¹⁶ See MICHAEL D. GREENBERG & GEOFFREY MCGOVERN, AN EARLY ASSESSMENT OF THE CIVIL JUSTICE SYSTEM AFTER THE FINANCIAL CRISIS: SOMETHING WICKED THIS WAY COMES? 13–14 (2012), available at http://www.rand.org/content/dam/rand/pubs/occasional_papers/2012/RAND_OP353.pdf (stating that despite the limits posed on current data, available data suggests “for state civil litigation generally, and for federal bankruptcy and state foreclosure cases in particular, courts across the nation are seeking marked increases in the volume of claims and their workload”).

¹⁷ OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS IN THE NEW YORK CITY FAMILY COURT AND NEW YORK CITY HOUSING COURT 1 (2005), available at www.nycourts.gov/reports/AJJI_SelfRep06.pdf (noting data from informal surveys of court managers revealing that most litigants appear without a lawyer for critical types of cases—as high as 75% and 90% of litigants in family court and housing court, respectively); Memorandum from Madelynn Herman on Self-Representation Pro Se Statistics to the Nat'l Ctr. for State Courts (Sept. 25, 2006), <http://web.archive.org/web/20120504035215/http://www.ncsconline.org/wc/publications/memos/prosestatsmemo.htm> (last modified May 8, 2009) (providing statistics on the number of pro se litigants in various states).

¹⁸ Chief Justice John T. Broderick, Jr., Remarks to the National Association of Court Management: The Changing Face of Justice in a New Century: The Challenges It Poses to State Courts and Court Management 4 (Mar. 10, 2009), available at <http://www.courts.state.nh.us/press/2009/CJ-Brodericks-March-10-2009-speech-to-NACM.pdf> (addressing the challenges that must be faced in order to ensure “accessible, affordable and understandable justice in state courts across the country”).

justice commissions as defined by the American Bar Association (ABA).¹⁹ These commissions have the core responsibility of expanding civil justice to low-income populations.²⁰ Significantly, the body must be charged by or recognized by a state's highest court to be accepted as a commission.²¹ Judges head or co-head sixteen of these commissions.²² The ABA has determined that the most successful commissions have the active participation of the highest court in the state.²³ These commissions have produced reports establishing the need for more civil justice.²⁴ Judges increasingly see serving on these commissions as a new fundamental responsibility of their public office and necessary to ensure justice.²⁵ Commis-

¹⁹ *Resource Center for Access to Justice Initiatives*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html (last visited Feb. 5, 2014) (as of February 2014 the twenty-nine states include, Alabama, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

²⁰ AM. BAR ASS'N, ABA RES. CTR. FOR ACCESS TO JUSTICE INITIATIVES, *DEFINITION OF ACCESS TO JUSTICE COMMISSIONS* (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_of_a_commission.authcheckdam.pdf (noting moderate-income populations can be considered for access to civil justice, but low-income populations must be included in the Commission's mission).

²¹ *Id.*

²² *See* AM. BAR ASS'N, ABA RES. CTR. FOR ACCESS TO JUSTICE INITIATIVES, *STATE ACCESS TO JUSTICE COMMISSIONS: CREATION, COMPOSITION, AND FURTHER DETAILS* (Chart) (last updated Mar. 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_commissions_table.authcheckdam.pdf (listing a table of all state access to justice commissions with data such as when the commissions were created, the number of members in each commission, the names of chairpersons, and how often the commissions release reports).

²³ *DEFINITION OF ACCESS TO JUSTICE COMMISSION*, *supra* note 20.

²⁴ *See, e.g.*, THE ALA. ACCESS TO JUSTICE COMM'N, *THE LEGAL NEEDS OF LOW INCOME ALABAMIANS: A NEEDS ASSESSMENT & ANALYSIS* (n.d.), *available at* <http://alabamaatj.org/wp-content/uploads/2013/08/Access-to-Justice-Needs-Final.pdf>; COLO. ACCESS TO JUSTICE COMM'N, *THE JUSTICE CRISIS IN COLORADO: A REPORT ON THE CIVIL LEGAL NEEDS OF THE INDIGENT IN COLORADO* (2008), *available at* <http://www.cobar.org/repository/Access%20to%20Justice/08ATJReport.pdf>; THE D.C. ACCESS TO JUSTICE COMM'N & THE D.C. CONSORTIUM OF LEGAL SERV. PROVIDERS, *RATIONING JUSTICE: THE EFFECT OF THE RECESSION ON ACCESS TO JUSTICE IN THE DISTRICT OF COLUMBIA* (2009), *available at* http://www.dcaccesstojustice.org/files/Rationing_Justice_Report_final_PDF_.pdf; HAW. ACCESS TO JUSTICE COMM'N, *ANNUAL REPORT FOR 2012* (2012), *available at* <http://25shu2g61cw30sjn46t4k87by.wpengine.netdna-cdn.com/wp-content/uploads/2011/05/ATJC-Annual-Report-for-2012-5-8-13.pdf>.

²⁵ *See* Jess Dickinson, Presiding Justice of the Mississippi Supreme Court, Opening Keynote Address at the Arkansas Access to Justice Commission Conference (May 29, 2012), *available at* <http://ualr.edu/socialchange/2012/06/15/supreme-court-of-mississippi-justice-jess-dickinsons-opening-keynote-address-to-the-arkansas-access-to-justice-commission-2/> (highlighting the issue of a lack of equal justice in U.S. courts

sions, some of which are driven by judges, have proposed various reforms to the justice system.²⁶ Many of the commissions' proposals, however, have run counter to the traditions that have been the bedrock of the legal profession.²⁷

For example, a number of commissions have proposed the use of unbundled legal services²⁸ as a means to increase access to justice.²⁹ On the other hand, the New York State Bar Association has resisted the use of unbundled legal services, recommending that lawyers provide clients with full representation.³⁰ Commissions have also urged the use of non-lawyers to bridge the justice gap.³¹

for indigent people and how judges have a lot more work to do in addressing this issue).

²⁶ See TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 8–9 (Nov. 29, 2013) [hereinafter TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES 2013 REPORT], *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceReport_2013.pdf (listing a number of the Task Force's recommendations to help bridge the justice gap in New York including proposing a revision to the Code of Judicial Conduct regarding judges' roles when faced with unrepresented litigants, implementing a process to develop more easily understandable uniform forms for statewide use in various matters—such as in landlord-tenant, consumer debt, foreclosure, and child support cases—and enhancing training for town and village court justices when deciding summary proceedings).

²⁷ For example, even though courts have long recognized the importance of legal assistance, they “have largely failed to extend guarantees of legal assistance to civil contexts, even where crucial interests are at issue.” Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 375 (2004). However, some commissions are considering whether to implement a civil right to counsel at public expense. See, e.g., S.B. 262, 433rd Gen. Assemb. (Md. 2013) (creating a Task Force to study implementing a civil right to counsel in Maryland).

²⁸ *Unbundled legal services* is where a “lawyer and client agree that the lawyer will provide some, but not all, of the work involved in traditional full service representation. Simply put, the lawyers perform only the agreed upon tasks, rather than the whole ‘bundle,’ and the clients perform the remaining tasks on their own.” *Definitions*, N.Y. STATE UNIFIED COURT SYST., <http://www.nycourts.gov/courts/nyc/civil/definitions.shtml#u> (last visited Feb. 12, 2014).

²⁹ See, e.g., MELANIE B. ABBOTT ET AL., REPORT TO THE CONNECTICUT JUDICIAL BRANCH ACCESS TO JUSTICE COMMISSION 11 (2013), *available at* <http://ncforaj.files.wordpress.com/2013/03/report-2-15-13-to-the-access-to-justice-commission-2-15-13.pdf> (reporting the use of limited-scope representation or unbundled legal services to serve unmet civil legal service needs as a method to address the challenges created by the increase in self-represented litigants); HAW. ACCESS TO JUSTICE COMM'N, *supra* note 24, at 8 (recommending unbundled legal services to meet currently unmet legal needs).

³⁰ N.Y. STATE BAR ASS'N, REPORT AND RECOMMENDATIONS ON “UNBUNDLED” LEGAL SERVICES (2002), *available at* <http://www.nysba.org/workarea/DownloadAsset.aspx?id=26674> (recommending that limited representation should not, as a general matter, be permitted).

³¹ See, e.g., HAW. ACCESS TO JUSTICE COMM'N, *supra* note 24, at 5 (describing the goals of the Hawaii Commission's Committee on Initiatives to Enhance Civil Justice to “make recommendations concerning ways in which paralegals and other non-lawyers

In New York State, the Access to Justice Task Force,³² which has judicial members, proposed the use of non-lawyers.³³ The Chief Judge of New York, Jonathan Lippman, formed a committee to study the issue in response to the proposal.³⁴ On February 11, 2014, Judge Lippman announced in his State of the Judiciary address the use of trained non-lawyers—which he called court “Navigators”—to assist unrepresented litigants in court.³⁵ These Navigators are empowered to assist in a number of ways, but their most significant role is to accompany litigants in the courtroom and answer factual questions posed by the judge.³⁶

Judges on commissions have also been influential in addressing social problems facing courts. Judge Jon Levy of the Maine Supreme Court, who co-chaired the Maine commission called the Justice Action Group, was pivotal in addressing the issue of cultural competency in Maine.³⁷ Maine’s expanding new immigrant popu-

may assist in meeting specified unmet civil legal needs”); N.H. ACCESS TO JUSTICE COMM’N, *THE JUSTICE GAP: A STUDY OF THE LEGAL NEEDS OF NEW HAMPSHIRE’S LOW-INCOME RESIDENTS* 40–41 (2013), *available at* http://www.courts.state.nh.us/access/2013_report/LEGAL_NEEDS_STUDY.pdf (finding that educating workers at Community Action Programs on the availability of legal services would “help ease a potential barrier to those with legal needs”); MASS. ACCESS TO JUSTICE COMM’N SPECIAL PLANNING COMMITTEE, *SECOND INTERIM REPORT OF THE SPECIAL PLANNING COMMITTEE* 24 (2011), *available at* <http://www.massaccessjustice.org/reports-of-the-commission.php> (follow hyperlink “The Second Interim Report is the revised version and can be downloaded here”) (recommending development of programs for the utilization of lay advocates).

³² See generally *Task Force to Expand Access to Civil Legal Services in NY*, N.Y. STATE UNIFIED COURT SYST., <http://www.nycourts.gov/ip/access-civil-legal-services/index.shtml> (last visited Feb. 12, 2014) (listing the two main aspects of the Task Force’s mission).

³³ TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, *REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK* 12 (2012), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT_Nov-2012.pdf (recommending the use of non-lawyers to “bridge the access-to-justice gap”).

³⁴ Press Release, N.Y. State Unified Court Sys., Chief Judge Names Members of Committee Charged with Examining How Non-Lawyer Advocates Can Help Narrow New York’s Justice Gap (May 28, 2013), *available at* http://www.nycourts.gov/press/PDFs/PR13_07.pdf (announcing non-lawyer initiative for to meet needs for civil legal services, including training and qualification of non-lawyer advocates).

³⁵ Jonathan Lippman, Chief Judge of the State of New York, *The State of the Judiciary 2014: Vision and Action in Our Modern Courts* 8 (Feb. 11, 2014) [hereinafter Lippman, *The State of Judiciary 2014*], *available at* <http://www.nycourts.gov/whatsnew/pdf/2014-SOJ.pdf> (declaring that the committee examining the use of non-lawyers to bridge the access to justice gap has developed incubator projects by having the trained and supervised non-lawyers provide pro bono assistance in various New York courts to test this approach).

³⁶ *Id.*

³⁷ Telephone Interview with Caroline Wilshusen, Executive Coordinator, Maine Justice Action Group (Feb. 3, 2014) (on file with author).

lation has presented numerous issues in ensuring access to justice in its courts.³⁸ As a result, in 2012, a seminar was devoted to the issue.³⁹

Judicial participation and leadership on access to justice commissions has been an indirect way of asserting judicial activism via influencing action through the collective voice of a body representative of the entire legal community. Access to justice commissions have been influential in recommending and achieving change.⁴⁰ The gravitas of judicial participation has been part of the power in achieving change. Despite the achievements of these commissions and a resolution⁴¹ from the Conference of Chief Justices,⁴²—a body of all the chief judges of state courts—calling for all states to

³⁸ See JUSTICE ACTION GROUP SUBCOMM. ON ACCESS TO THE COURTS, A REPORT TO THE JUSTICE ACTION GROUP ON ACCESS TO MAINE COURTS FOR INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY ii (2005), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/melepfinalreport1_6_05.authcheckdam.pdf (reporting that Maine's immigrant population has presented the court system with issues in language access and due process); see also Rachel Reyes, *The Hard Work of Ensuring Access to Justice for Immigrants*, CTR. FOR MIGRATION STUDIES (Jan. 26, 2012), <http://cmsny.org/the-hard-work-of-ensuring-access-to-justice-for-immigrants/> (reporting that Maine's immigrant population is one of two of Maine's largest growing populations and highlighting the problems with access to legal representation in the U.S. for low-income immigrants given the shortage of affordable civil legal service attorneys).

³⁹ Judy Harrison, *Cultural Differences as Important as Language When Serving Immigrants in Court, Lawyers Told*, BANGOR DAILY NEWS (Jan. 26, 2012), <http://bangordailynews.com/2012/01/26/news/court/cultural-differences-as-important-as-language-when-serving-immigrants-in-court-lawyers-told/> (discussing the cultural competency difficulties that are faced by immigrants who utilize Maine's court system).

⁴⁰ Karla M. Gray & Robert Echols, *Mobilizing Judges, Lawyers, and Communities: State Access to Justice Commissions*, JUDGES' J., Vol. 47, No. 3, at 33 (2008) (general information on the increasing number of access to justice commissions initiated by the states' highest judiciaries and the positive impacts that result for pro se litigants who seek civil legal services); see also Meredith McBurney, *ATJ Commissions and Resource Development*, in MGMT. INFO. EXCHANGE (2008), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/atjresourcecenter/downloads/resource_development_mie_2008.pdf (describing the work of various Access to Justice Commissions throughout the country in increasing resources for indigent clients with civil legal service matters).

⁴¹ Conference of Chief Justices, Conference of State Court Administrators, Resolution 13: Reaffirming Commitment to Access to Justice Leadership and Expressing Appreciation for Access to Justice Progress and Collaboration (July 31, 2013), available at <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07312013-Reaffirming-Commitment-Justice-Leadership-Expressing-ATJ-Collaboration-CCJ-COSCA> (committing to "tak[ing] steps to ensure that no citizen is denied access to the justice system by reason of lack of resources, or any other such barrier").

⁴² See generally CONFERENCE OF CHIEF JUSTICES, <http://ccj.ncsc.org/> (last visited Feb. 25, 2014) (online hub for states' highest judicial officers to discuss and propose improvements or recommendations for issues relating to state courts and the judicial system).

form an access to justice commission, twenty-one states do not have commissions.⁴³

II. JUDGE-HEADED ACCESS TO JUSTICE PROGRAMS

Both Massachusetts and New York, in addition to commissions, also have judge-led programs that handle access to justice issues.⁴⁴ Judge Dina E. Fein in Massachusetts has recently accomplished the following initiatives: finalized a language access plan; translated small-claims forms into seven languages; produced self-help videos for small claims litigants, dubbed into seven languages; created a new court-system wide website with robust self-help content; piloted two court service centers; and developed court-wide training materials for Limited Assistance Representation (LAR) lawyers.⁴⁵ The New York State Access to Justice Program, which I head, has had many achievements, including: the development of twenty-four Do It Yourself (DIY) interactive computer programs for unrepresented litigants and advocates to use to fill out court forms and obtain legal information; the establishment and supervision of unbundled volunteer attorney programs, programs assisting senior citizens, physically or mentally disabled litigants, and persons at risk of homelessness; and the creation of an extensive community outreach program to underserved communities.⁴⁶ The power of judicial activism is reflected in the initiatives and results that the judge-led programs in Massachusetts and New York have

⁴³ See *Resource Center for Access to Justice Initiatives*, *supra* note 19 (listing existing state access to justice commissions).

⁴⁴ See Press Release, Mass. Court Sys., Special Advisor for Access to Justice Initiatives Appointed (June 8, 2009), <http://www.mass.gov/courts/press/pr060809.html> (stating Judge Dina Fein was appointed as the first Special Advisor for Access to Justice Initiatives by the Chief Judge in 2009); JUANITA BING NEWTON, FIRST ANNUAL REPORT OF THE DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR JUSTICE INITIATIVES (2000), *available at* <http://www.nlada.org/DMS/Documents/1001012090.19/DCAJJ12000Rep.pdf> (findings by the head of the state's new access to justice program, created in 1999); Press Release, N.Y. State Unified Court Syst., Chief Judge Lippman Announces Restructuring of Judicial Administrative Leadership in New York State Courts (Mar. 11, 2009), <http://www.nlada.org/DMS/Documents/1241037636.27/NY%20State%20Court%20Reorganization.pdf> (announcing Judge Fern Fisher's new role as the head of the New York State Access to Justice Program).

⁴⁵ Email from Judge Dina E. Fein, Special Advisor for Access to Justice Initiatives to Judge Fern A. Fisher, Dir. of N.Y. State Access to Justice Program (Jan. 29, 2014, 1:36 CST) (on file with author).

⁴⁶ N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, REPORT TO THE CHIEF JUDGE AND THE CHIEF ADMINISTRATIVE JUDGE OF THE STATE OF NEW YORK 3–5, 19–21, 35–43 (2013), *available at* https://www.nycourts.gov/ip/nya2j/pdfs/NYA2J_2013report.pdf (outlining the Access to Justice Program's various efforts to deliver legal services to unrepresented litigants and communities).

achieved.⁴⁷

III. RALLYING RESOURCES FOR ACCESS TO JUSTICE

Ethical rules permit judges to engage in advocating for resources for civil legal services and recruiting pro bono lawyers.⁴⁸ Judges across the country have defined judicial responsibility as including a commitment to finding ways to close the justice gap.⁴⁹ One of the civil legal services movement's top priorities is to increase funding. In 2012, the Conference of Chief Justices added its weighty voice to the issue by adopting a resolution to restore funding to the Legal Services Corporation.⁵⁰

Chief Judge Jonathan Lippman has set the bar high on judicial activism with his successful advocacy for the inclusion of funding for civil legal services in the New York courts budget. In the year 2011, the New York State Legislature gave \$27.5 million to the New York courts for civil legal services for the first time.⁵¹ Chief

⁴⁷ TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES 2013 REPORT, *supra* note 26, at 6 ("The number of low-income New Yorkers served through the Judiciary Civil Legal Services program across New York State increased from 125,169 in 2011–2012 to 267,965 in 2012–2013."); *see generally* MASS. ACCESS TO JUSTICE COMM'N, REPORT ON 2012: OBJECTIVES AND ACCOMPLISHMENTS 1–2 (2012), *available at* <http://www.massacesstojustice.org/> (follow hyperlink "Report on Activities in 2012") (setting forth several accomplishments of the commission in 2012, including collecting "[m]ore than \$1.1 million in Access to Justice Fees . . . during annual attorney registration and turn[ing it] over to the IOLTA [Interest on Lawyers' Trust Accounts] Committee for support of civil legal services to the poor" and creating "an Access to Justice Fellows program, with senior lawyers providing pro bono services on major projects in collaboration with public interest organizations").

⁴⁸ *See, e.g.*, Md. Judicial Ethics Comm., Published Op. 2010–14 (2010), *available at* <http://www.courts.state.md.us/ethics/pdfs/2010-14.pdf> (noting that "judges are permitted to approach law firms and propose that the firms underwrite the compensation of a full-time pro bono attorney to provide advocacy to victims of domestic violence").

⁴⁹ *See, e.g.*, Annette J. Scieszinski, *A Matter of Trust: A Judge's Fiduciary Responsibility*, JUDGES' J., Vol. 49, No. 4, at 19–20 (2010) ("Access to justice is a judicial responsibility. Reasonable and impartial accommodations in a courtroom, such as language interpretation—while often delegated to the lawyers or court staff to arrange—are ultimately the duty of the judicial officer in charge.").

⁵⁰ Conference of Chief Justices, Conference of State Court Administrators, Resolution 1: In Support of Continued Federal Funding for the Legal Services Corporation (July 25, 2012), *available at* <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07252012-In-Support-of-Continued-Federal-Funding-for-the-Legal-Services-Corporation> (reaffirming the importance of legal services by resolving to restore \$404 million in funding for the Legal Services Corporation in Fiscal Year 2013); *see generally* Fact Sheet on the Legal Services Corporation, LEGAL SERVICES CORP., <http://www.lsc.gov/about/what-is-lsc> (last visited Apr. 26, 2014) (stating the Legal Services Corporation is the "largest funder of civil legal aid for low-income Americans in the nation").

⁵¹ *See* Jonathan Lippman, *Accessing Justice in a Time of Reduced Court Resources*, in

Judge Jonathan Lippman's one-man campaign for the increase in funding emanated from his view that there is a moral imperative for society to ensure equal access to justice.⁵²

In Massachusetts, Chief Justice Roderick L. Ireland of the Supreme Judicial Court joined "hundreds of private attorneys from more than 50 law firms at the Massachusetts State House on Jan[uary] 30[, 2014] . . . [to] ask for increased state funding for programs that provide civil legal aid to low-income Massachusetts residents."⁵³ In 2009, Chief Justice Wallace B. Jefferson of the Supreme Court of Texas lobbied for and secured \$20 million for IOLTA funding.⁵⁴ In 2011, the Chief Justice reported in an interview that the "[Texas] Legislature appropriated almost \$18 million for basic civil legal services in the last legislative session."⁵⁵

The second most coveted resource by the civil legal services community is more pro bono lawyers. Many state court systems encourage judges to recruit pro bono attorneys through literature or rules.⁵⁶ Federal courts have similarly made efforts to increase the

ARTHUR LIMAN PROGRAM: 15TH ANNIVERSARY ISSUE 8 (2012), available at http://www.law.yale.edu/documents/pdf/Liman/Liman_NL_2012_final.pdf (explaining that the approved funding was "just the tip of the iceberg given the need, but yet the most state funding for civil legal services in the country"). The \$27.5 million consisted of \$12.5 million for civil legal services and \$15 million for the Interest on Lawyer Trust Account (IOLTA). *Id.* The IOLTA account is a "mainstay in funding civil legal services for the poor." Terry Carter, *No Longer Flush: IOLTA Programs Find New Funding to Support Legal Services*, A.B.A. J., March 2013, at 61 (explaining that when the Federal Reserve lowered the interest rate to "virtually zero," this major source of legal services funding was lost).

⁵² Jonathan Lippman, Symposium, *New York's Template to Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL'Y REV. 13, 19 (2013) ("Access to justice is not a luxury, affordable only in good times. To the contrary, it is a bedrock value of a society based on the rule of law. For the judiciary and for the legal profession, equal justice for all is our very reason for being.").

⁵³ Press Release, Chief Justice Ireland, Bar Association Leaders to Speak at 15th Annual Walk to the Hill (Jan. 22, 2014), available at <http://www.prweb.com/releases/2014/01/prweb11508611.htm>.

⁵⁴ Carter, *supra* note 51 at 61.

⁵⁵ *Texas Judiciary Meets Dynamic State Challenges*, METROP. CORP. COUNSEL (Sept. 1, 2011), available at <http://www.metrocorp.counsel.com/articles/15323/texas-judiciary-meets-dynamic-state-challenges> (interview with the chief justice where he recounts efforts for "emergency relief to provide funding for legal aid").

⁵⁶ See *Recruiting Volunteer Attorneys*, MO. JUDICIARY, <http://www.courts.mo.gov/page.jsp?id=40234> (last visited Feb. 19, 2014) (providing examples as to how Missouri judges can recruit pro bono attorneys); COMM. ON THE ROLE OF JUDGES IN PRO BONO ACTIVITY, REPORT OF THE COMMITTEE ON THE ROLE OF JUDGES IN PRO BONO ACTIVITY (1994), available at <http://www2.mnbar.org/committees/lad/role-judges.pdf> (recommending each judicial district "adopt a comprehensive policy that encourages judges to be involved in recruiting and training pro bono attorneys, and educating attorneys and the public regarding the need for pro bono services"); MD. JUDICIAL COMM'N ON PRO BONO, THE MARYLAND JUDICIAL COMMISSION ON PRO BONO REPORT AND RECOM-

number of pro bono attorneys.⁵⁷ Frontline judges have passionately engaged in recruiting pro bono lawyers. United States District Judge Jay C. Zainey from New Orleans “has spent his professional and personal life aspiring to the ideal ‘We are responsible to each other,’”⁵⁸ and in 2004 founded the H.E.L.P. Program (Homeless

MENDATIONS 27–28 (2000), available at <http://www.courts.state.md.us/probono/pdfs/probono.pdf> (reporting that the Maryland Judicial Ethics Committee not only found it ethical to solicit attorneys for “pro bono assistance to indigent parties in child custody cases,” but also further opined that circuit court judges may advertise in local bar newspapers and appear at group meetings of the bar to solicit pro bono volunteer lawyers); *A Few Key Things that Judicial Officers Can Do to Encourage Attorneys to Provide Pro Bono Services*, JUDICIAL BRANCH OF CAL., <http://www.courts.ca.gov/partners/56.htm#california> (follow hyperlink “A Few Key Things Judges Can Do to Encourage Pro Bono” under the “Pro Bono Toolkit” tab) (providing tips to judicial officers on ways to encourage attorneys to engage in pro bono work); Ind. Pro Bono Comm’n, *Judicial Appointee Resource Guide*, Exhibit A, available at <http://www.nlada.org/DMS/Documents/1316110339.0/judicial%20appointee%20resource%20guide.docx> (stating the purpose of Rule 6.6 of the Rules of Professional Conduct, which is to “promote equal access to justice for all Indiana residents, regardless of economic status, by creating and promoting opportunities for attorneys to provide pro bono civil legal services to persons of limited means”); *Pro Bono/Legal Assistance*, ELEVENTH JUDICIAL CIRCUIT OF FLA., <http://www.jud11.flcourts.org/SCSingle.aspx?pid=212> (last visited Mar. 12, 2014) (stating that the Put Something Back Pro Bono Project has recruited over 7,000 attorneys to provide free legal assistance and is also the “largest and most comprehensive pro bono project in Florida”).

⁵⁷ See Memorandum from David L. Neal, Chief Immigration Judge, to All Immigration Judges et al. 2 (Mar. 10, 2008), available at <http://www.justice.gov/eoir/efoia/ocij/oppm08/08-01.pdf> (demonstrating that immigration courts encourage the recruitment of pro bono attorneys); *Federal Pro Bono Project*, U.S. DIST. COURT N. DIST. OF CAL., <http://www.cand.uscourts.gov/probono> (last visited Feb. 26, 2014) (stating that the Northern District of California U.S. District Court will reimburse costs of participating attorneys in the Federal Pro Bono Project for up to \$15,000 and “[p]ro bono counsel may recover attorney’s fees awarded to the plaintiff as the prevailing party or as part of a negotiated settlement of the case”). In some states, hours spent representing indigent clients in federal court counts toward state incentive programs. See, e.g., *Pro Bono Service Opportunities*, U.S. DIST. COURT DIST. OF OR., <http://www.ord.uscourts.gov/index.php/attorneys/pro-bono-panel> (last visited Feb. 26, 2014) (“Hours spent representing individuals in Federal Court in Oregon now count toward Pro Bono Challenge, Honor Roll, and other [Oregon State Bar (OSB)] OSB-sponsored programs.”); *Pro Bono CLE*, U.S. DIST. COURT S. DIST. OF N.Y., http://www.nysd.uscourts.gov/pro_bono_cle.php (last visited Feb. 26, 2014) (attorneys may receive Continuing Legal Education (CLE) credit from the New York State CLE Board for hours spent providing pro bono services); see also *U.S. District Judge Jay C. Zainey*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/publications/young_lawyer/jayzainey.authcheckdam.pdf (last visited Apr. 2, 2014) (stating Judge Zainey is the co-founder of SOLACE, a Louisiana State Bar Association Program, which has about 7,500 volunteer attorneys who participate in the program to provide services to the bar association and the entire legal community).

⁵⁸ See States News Service, *American Bar Association Honors Jay Zainey with 2011 Pro Bono Publico Award for Outstanding Service* (June 27, 2011), available at http://go.galegroup.com/ps/i.do?id=GALE%7CA259996197&v=2.1&u=cuny_lawschool&it=r&p=AONE&sw=w&asid=51fc99010f60ae45c21b5229e6aa5a1f; see also Jamie Hochman-Herz, *2011 ABA Pro Bono Publico Award Recipients*, DIALOGUE, Vol. 15, No. 2 (2011),

Experience Legal Protection Program).⁵⁹ Through “a local shelter, H.E.L.P. establishes a regularly scheduled clinic to offer free legal services to homeless individuals, provided by volunteer attorneys from [around New Orleans].”⁶⁰ With Judge Zainey’s personal involvement and literal footwork—traveling to other cities to promote the program and recruiting volunteers—H.E.L.P. has expanded to nineteen additional cities, and “over 450 attorneys” have participated in the program across the country.⁶¹ Judge Robert Katzman, the Chief Judge of the U.S. Court of Appeals for the Second Circuit, took the initiative to address another area of great need—“the shortage of competent legal representation for immigrants, particularly those of modest means facing deportation.”⁶² “[D]eeply concerned about the quality and availability of representation for immigrants, he sounded a clarion call and started a study group . . . [which found that m]ost detained immigrants in the New York region did not have counsel at the time that their cases were completed.”⁶³ Chief Judge Katzman’s efforts “spawned an initiative, the New York Immigrant Family Unity Project, which seeks to provide legal representation for every poor immigrant facing deportation.”⁶⁴ Determined to make greater strides and reach more numbers of immigrants, Chief Judge Katzman continued his advocacy and stayed the challenging course for many years, inspiring the founding of another group, the Immigrant Justice Corps (IJC).⁶⁵

First of its kind, the IJC “recruits [as fellows] talented lawyers and college graduates . . . and partners them with New York City’s

available at http://www.americanbar.org/content/newsletter/publications/dialogue_home/dialogue_archive/ls_dial_fa11_probono3.html (highlighting how each of the 2011 ABA Pro Bono Publico Award recipients became involved in pro bono work and the contributions each recipient made to serve low-income populations throughout his or her career).

⁵⁹ See generally *Home*, PROJECT H.E.L.P., <http://homelesslegalprotection.com/> (last visited Apr. 2, 2014) (program composed of local attorneys, law students, and law firm secretaries and paralegal in a number of cities providing pro bono legal assistance to homeless individuals at local shelters and other social service organizations).

⁶⁰ Hochman-Herz, *supra* note 58.

⁶¹ *Id.*

⁶² Kirk Semple, *Seeking Better Legal Help for Immigrants*, N.Y. TIMES (Jan. 28, 2014), http://www.nytimes.com/2014/01/29/nyregion/service-program-will-recruit-law-school-graduates-to-help-represent-immigrants.html?_r=0 (discussing the new program designed to address the shortage of competent legal representation for immigrants by recruiting twenty-five recent law graduates each year to work in various community-based organizations).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *id.*

leading non-profit legal service providers and community-based organizations to offer a broad range of immigration assistance.”⁶⁶ In 2014, the IJC plans to award forty fellowships to high achievers, who will assist immigrants and their families with “a broad range of immigration assistance including naturalization [and] deportation defense.”⁶⁷ The fellows will also help with “affirmative applications for asylum seekers, juveniles, and victims of crime, domestic violence or human trafficking.”⁶⁸

Judge Ann Lazurus of the Superior Court of Pennsylvania has also been publicly active in endorsing volunteer programs for lawyers to help communities in need and has advocated for more judge involvement. Judge Lazurus recognizes that it is “incumbent upon the judiciary to continually strive . . . towards achieving the promise of ‘equal justice under the law.’”⁶⁹ She urges courts to, among other things, encourage judges to recruit attorneys to perform pro bono services, increase resources for self-represented litigants, and loosen restrictions on attorneys to allow for unbundled legal services.⁷⁰

Over the past five years in New York State, my staff and I have recruited 3,000 volunteer lawyers to serve in court-based volunteer lawyers.⁷¹

IV. DELIVERING LEGAL SERVICES

The concept of a court providing legal services to court users is novel. Despite the imprimatur of the Conference of Chief Justices, few judges have involved themselves directly with the delivery of legal services. New York State has operated court-based and court-operated volunteer attorney programs since 1997 and has the most robust involvement in delivering legal services to court users in the country. I started the first program when I was unable to get any bar association in New York City to start a pro bono program in housing court. Without any other alternative to address the needs

⁶⁶ See *id.*; see also *Our Story*, IMMIGRANT JUSTICE CORPS, <http://justicecorps.org/our-story/> (last visited Apr. 15, 2014).

⁶⁷ See IMMIGRANT JUSTICE CORPS, *supra* note 66.

⁶⁸ *Id.*

⁶⁹ Ann Lazarus, *Pro Bono: A Case for Judicial Intervention, Or How the Judiciary Can Bridge the Justice Gap in America*, 80 PENN. B. ASS’N. Q. 47, 58 (2009), http://apps.americanbar.org/legalservices/probono/judicial/downloads/probono_a_case.pdf (arguing for an increased judicial role in the recruitment of pro bono attorneys).

⁷⁰ *Id.* at 50–51, 54–56.

⁷¹ New York State Courts Access to Justice Program statistics from 2009 to 2014 (on file with the author). It should be noted that the volunteer programs commenced in 1997. Many more were trained from 1997 to 2009.

of the flood of unrepresented litigants in the courthouse, the New York court system filled the void by developing volunteer programs. All of the programs are unbundled programs and provide either divorce form preparation, advice in the Help Centers, or limited-scope representation in courtrooms.⁷² The court recruits, trains, and supervises volunteer attorneys.⁷³ From 2009 to the present, the New York State Access to Justice Program has trained 3,000 attorneys⁷⁴ and thousands of litigants have received assistance.⁷⁵ In 2005, the court launched the Consumer Debt Volunteer Lawyer for the Day Program,⁷⁶ which provides limited-scope representation in settlements of consumer debt cases. As of 2012, the program had represented over 10,000 defendants in consumer debt cases.⁷⁷

One of the key attributes of the New York State volunteer programs is that the lawyers who volunteer receive indemnification defense should there be a claim of malpractice by a litigant.⁷⁸ New York State Attorney General Opinion, No. 2000-F1, dated February 3, 2000, clarified that the indemnification defense under the New York Public Officer's Law § 17 is available for any volunteer whom the court trains and supervises.⁷⁹ Generally, participants in state-sponsored volunteer programs are considered "state employees" where the state provides them training and supervision during their volunteer service.⁸⁰

The advice-only programs⁸¹ and the Uncontested Divorce Pro-

⁷² N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, *supra* note 46, at 3.

⁷³ *Id.* at 1.

⁷⁴ *See supra* note 71.

⁷⁵ N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, *supra* note 46, at 4–5, 10, 12, 16, 24, 49.

⁷⁶ *Id.* at 10 ("Begun as a pilot program in 2009, the [Volunteer Lawyer for the Day] VLFD – Consumer Debt Program has expanded to include almost all daily programs in New York, Kings, Queens and Bronx counties that help thousands of . . . New York City residents who have been sued in debt collection cases . . . and face major substantive and procedural obstacles to the fair adjudication of their cases.").

⁷⁷ *Id.* at 11.

⁷⁸ *Id.* at 3.

⁷⁹ Eligibility of Volunteer Lawyers to Receive Defense and Indemnification by the State, Op. Att'y Gen. No. 2000-F1 (2000), *available at* <http://www.ag.ny.gov/sites/default/files/opinion/2000-F1%20pw.pdf>.

⁸⁰ *Id.*

⁸¹ N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, *supra* note 46, at 4–5 ("The Access to Justice Program oversees several unbundled volunteer lawyer programs that provide legal assistance to unrepresented litigants in the New York City Civil, Family and Housing Courts. The access to Justice Program recruits, trains and placed admitted attorneys, law graduates, and law student volunteers in Court Help Centers where they assist unrepresented litigants with pending court cases.").

gram⁸² provide services to any unrepresented person who needs assistance.⁸³ The issue of an attorney's conflict of interest with a client while volunteering in limited pro bono legal services programs is addressed by Rule 6.5 of the New York State Rules of Professional Conduct.⁸⁴ When a litigant goes into a courtroom unrepresented, a judge will often need to be more engaged than he or she would typically be if both parties were represented by counsel; for example, by asking additional questions or more fully explaining the law, thereby creating the appearance that the court is not neutral.⁸⁵ Even though this perception is flawed,⁸⁶ the courtroom representation model nevertheless addresses these concerns by taking the pressure off of the court to be more engaged with unrepresented litigants.⁸⁷ The Volunteer Lawyer for the Day Program⁸⁸ operates in consumer debt and housing cases only.⁸⁹ In

⁸² *Id.* at 12 (“The Access to Justice Program’s Uncontested Divorce Program helps unrepresented litigants with the preparation of uncontested divorce forms at clinics in the Supreme Courts of New York, Queens, Kings, Bronx and Westchester Counties. . . . The Program helps ensure that the divorce process is simply explained and the documents that litigants submit are complete and accurately prepared. The Program recruits, trains and supervises volunteer attorneys to assist unrepresented litigants.”).

⁸³ *Id.* at 3–5, 12–13 (Access to Justice volunteer-based programs, such as the advice-only programs and the Uncontested Divorce Program, do not income screen; the only requirement is that the unrepresented litigant has a case in the New York State Courts.).

⁸⁴ N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 Rule 6.5 (2013) (attorney representing a client pro bono shall comply with conflict of interest rules if the attorney actually knows of a conflict at the commencement of representation).

⁸⁵ See Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. L. LEGAL ETHICS 423, 427–28 (2004) (The public perception of a judge is “characterized by a responsive and reactive attitude, in which the judge does no more or less than acts as an umpire, responding only when asked to do so by counsel.” (footnote omitted)).

⁸⁶ *Id.* at 428–29 (a judge can be neutral and engaged simultaneously).

⁸⁷ See N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, *supra* note 46, at 8 (A volunteer lawyer’s presence in the courtroom contributes to fairer outcomes for litigants by “breaking down the legalese,” “addressing language difficulties” and “alleviat[ing] the litigant’s nervousness” and by “deftly arguing points of law and fact before the judge,” while also freeing up the courtroom employees’ time by answering litigants’ questions or explaining procedure.).

⁸⁸ *Id.* at 7–8 (“The Access to Justice Program offers unbundled representation in the courtroom through its Volunteer Lawyer for the Day (VLFD) Program. . . . The VLFD Program recruits, trains, and supervises volunteer lawyers in the New York City Housing and Civil Courts. Unlike the advice only programs, the volunteer attorneys, law graduates, and law students who participate in the VLFD programs meet their clients for the first time on the morning of the court appearance. The representation begins and ends the same day. If a particular case is not resolved in a single appearance, the Program provides representation on adjourned dates by the same volunteer or by a different volunteer depending on availability.”).

consumer debt cases, the plaintiff-corporation must always be represented by an attorney and only defendants require assistance.⁹⁰ Therefore, the court is not faced with one side receiving assistance, and not the other. In fact, the court fosters neutrality by ensuring that both sides have attorneys. In the housing program, it is very challenging for the court to maintain fairness to both sides. In housing cases, 99% of tenants do not have attorneys and 85% of homeowners have representation.⁹¹ In cases where the homeowner is not represented, the court's program does not provide assistance to the tenant. The court then refers the tenant to other programs.

After observing problems that unrepresented litigants were having in their courtrooms, frontline judges took action and developed programs to address the issues they saw. In Oregon, Judge Maureen McKnight of the Multnomah County Family Court saw individuals who would have fared better in her courtroom if a lawyer had represented them.⁹² Judge McKnight helped to develop a clinic using volunteer lawyers.⁹³ Similarly, Judge Stephanie Joanides of Anchorage, Alaska, developed a program in family court with the Family Law Self-Help Center⁹⁴ and the Alaskan Pro Bono Program called the Early Resolution Project (ERP).⁹⁵ The Alaska Legal Services Corporation (ALSC)⁹⁶ succeeded the Alaskan Pro Bono Program and began working with the Alaskan Court System on the ERP.⁹⁷ The ALSC handles the volunteer attorney coordina-

⁸⁹ See *id.* at 7–11.

⁹⁰ N.Y. C.P.L.R. § 321(a) (McKinney 2014) (stating “a corporation . . . shall appear by attorney”).

⁹¹ N.Y. STATE COURTS ACCESS TO JUSTICE PROGRAM, *supra* note 46, at 32.

⁹² Janine Robben, *Here Come the Judges: Concern for Unrepresented Litigants Lures Judges to Pro Bono*, OR. ST. B. BULL. (Dec. 2006), available at <http://www.osbar.org/publications/bulletin/06dec/judges.html#top> (last visited Mar. 28 2014) (providing a description of Judge Maureen McKnight's and other Oregon judges' efforts to create programs that offer pro bono legal services to unrepresented litigants who cannot afford representation).

⁹³ *Id.*

⁹⁴ See generally *About the Family Law Self-Help Center*, ALASKA COURT SYST., <http://courts.alaska.gov/selfhelp.htm> (last updated Jan. 6, 2014) (stating general information about The Family Law Self-Help Center and how trained neutral people provide legal information and educational materials to litigants in family court in Alaska).

⁹⁵ Chief Justice Walter L. Carpeneti, State of the Judiciary: 2012 (Feb. 29, 2012), <http://courts.alaska.gov/state12.htm> (providing a brief description of the Early Resolution Project); Chief Justice Dana Fabe, State of the Judiciary: 2013 (Feb. 13, 2013), <http://courts.alaska.gov/state13.htm>.

⁹⁶ *Alaska Legal Services Corporation (ALSC)*, ALASKA LEGAL SERVICES CORP., <http://new.aklawselfhelp.org/background-and-history/> (last visited Mar. 12, 2014) (providing general information on the history and services offered by the Alaska Legal Services Corporation).

⁹⁷ Chief Justice Dana Fabe, *supra* note 95.

tion and recruitment and co-trains new volunteers with the Family Law Self-Help Center.⁹⁸ Volunteer attorneys receive the ALSC's malpractice insurance when they are volunteering.⁹⁹

Additionally, President Judge Darnell Jones and Judge Annette Rizzo of the Philadelphia Court of Common Pleas saw the rise in foreclosure cases first hand.¹⁰⁰ In response, the judges set up the Residential Mortgage Foreclosure Diversion Pilot Program in 2008.¹⁰¹ The program is overseen by Judge Rizzo.¹⁰² All foreclosures are diverted into a settlement program,¹⁰³ and participation is required of both sides.¹⁰⁴ The volunteer attorneys represent homeowners in negotiations with banks to resolve the foreclosure.¹⁰⁵

V. JUDICIAL ACTIVISTS SHAKING UP THE SYSTEM

Judges are perceived as the architects and defenders of the justice system,¹⁰⁶ and the crisis in civil justice has led some judges to believe the justice system needs an overhaul.¹⁰⁷ These activist

⁹⁸ Richard Zorza, *Alaska Early Resolution Project Using Pro Bono*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (Mar. 9, 2013), <http://accesstojustice.net/2013/03/09/alaska-early-resolution-project-using-pro-bono/> (providing a description of the Early Resolution Project).

⁹⁹ *Pro Bono Legal Service Providers*, ALASKA BAR ASS'N, https://www.alaskabar.org/servlet/content/pro_bono_resources.html (last visited Mar. 19, 2014).

¹⁰⁰ UNEMPLOYMENT INFO. CTR., PHILADELPHIA RESIDENTIAL MORTGAGE FORECLOSURE DIVERSION PILOT PROGRAM: SURVEY OF OUTCOMES FOR HOMEOWNERS FACING FORECLOSURE WHO ENTERED THE DIVERSION PROGRAM BETWEEN JUNE 2008 AND FEBRUARY 2009 (2009), *available at* <http://www.philaup.org/pdf/PhiladelphiaRMFDPP.pdf> (reporting that the Mortgage Foreclosure Diversion Prevention Program has a positive impact on helping homeowners remain in their homes).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*; *see also* Peter S. Goodman, *Philadelphia Gives Homeowners a Way to Stay Put*, N.Y. TIMES (Nov. 17, 2009), http://www.nytimes.com/2009/11/18/business/18philly.html?pagewanted=all&_r=1& (reporting that Philadelphia's volunteer lawyer program helps homeowners in foreclosure proceedings to stay in their homes).

¹⁰⁶ *See* Kim Lane Scheppele, *Judges as Architects*, 24 YALE J.L. & HUMAN. 345, 347–49 (2013) (highlighting the similarities between the roles of judges and architects).

¹⁰⁷ *See, e.g.,* Rebecca Love Kourlis, *5 Steps for Fixing the Civil Justice System*, THE ATLANTIC (June 11, 2012, 11:50 AM), <http://www.theatlantic.com/national/archive/2012/06/5-steps-for-fixing-the-civil-justice-system/258295/> (discussing how the legal system has become too expensive and inefficient for ordinary citizens to resolve personal conflicts). Kourlis is a former judge of the Colorado Supreme Court. *Rebecca Love Kourlis*, ATLANTIC, <http://www.theatlantic.com/rebecca-love-kourlis/> (last visited Apr. 19, 2014); Margaret H. Marshall, Chief Justice of the Supreme Judicial Court Mass., Remarks on the Access to Justice Commission (Apr. 4, 2007), *available at* http://www.nlada.org/DMS/Index/000000/000053/00005313/document_browse#topics (follow hyperlink "Speech by Chief Justice Marshall") (quoting Reginald Herber

judges came from a variety of backgrounds before they ascended to the bench. Some had Legal Aid backgrounds and were already familiar with the problems confronting unrepresented litigants.¹⁰⁸ Other judges became exposed to access to justice issues facing unrepresented litigants after they became judges. For example, Judge Annette Rizzo worked at the Philadelphia City Solicitor's Office,¹⁰⁹ and then with a law firm, which does civil litigation defense.¹¹⁰ Just prior to ascending to bench, Judge Rizzo served as Senior Counsel at CIGNA Companies, a global health insurance company.¹¹¹ Judge Stephanie Joannides, who recently retired from the bench, was a prosecutor and government attorney before her election to the bench.¹¹² Judge Mark Juhas was also not exposed to unrepresented litigants prior to becoming a Los Angeles Superior Court Judge¹¹³—he handled personal injury, insurance defense, and product liability cases.¹¹⁴ Judge Juhas' introduction to the civil justice crisis started when he ascended to the bench, where he now handles family court cases.¹¹⁵ His observations in his courtroom led

Smith and continuing to address that there is much that remains to be done to reach the goal of equal justice).

¹⁰⁸ I am a former Legal Services attorney. Judge Dina E. Fein, a housing court judge in Massachusetts, is a former Legal Aid attorney. E-mail from Judge Dina E. Fein, Special Advisor for Access to Justice Initiatives, to Judge Fern A. Fisher, Dir. of N.Y. State Access to Justice Program (Mar. 31, 2014, 6:59 PM CST) (on file with author). Judge Maureen McKnight, a Multnomah County, Oregon Circuit Court Judge, was a Legal Aid attorney and involved in family law issues prior to being appointed to the bench. *Biography*, OR. JUDICIAL DEP'T, available at http://courts.oregon.gov/Multnomah/General_Info/Judges/McKnight/pages/Judge_McKnight_Biography.aspx (last visited Apr. 9, 2014).

¹⁰⁹ "The City Solicitor is a member of the Mayor's Cabinet, and manages the [Philadelphia] Law Department." *Welcome to the Law Department*, CITY OF PHILA. LAW DEP'T, <http://www.phila.gov/law/index.html> (last visited Apr. 19, 2014).

¹¹⁰ *Honorable Annette M. Rizzo*, FEARLESSWOMENNETWORK.ORG, <http://www.fearlesswomennetwork.org/Bios/Rizzo.php> (last visited Apr. 15, 2014); *Success Endures*, RAWLE & HENDERSON, <http://www.rawle.com/> (last visited Apr. 19, 2014).

¹¹¹ FEARLESSWOMENNETWORK.ORG, *supra* note 110.

¹¹² Rhonda McBride, *Judge Stephanie Joannides Steps Down from Superior Court Bench*, KTUU-TV (Jan. 31, 2011), http://articles.ktuu.com/2011-01-31/superior-court-bench_27095172; *District Court Judge: Stephanie E. Joannides, Third Judicial District*, ALASKA DIV. OF ELECTIONS, <http://www.elections.alaska.gov/doc/oep/1996/joannide.htm> (last visited Apr. 4, 2014).

¹¹³ Telephone interview with Judge Mark Juhas (Mar. 13, 2014) (on file with author).

¹¹⁴ See Robert Greene, *Governor Davis Names Four to Los Angeles Superior Court*, METRO. NEWS-ENTER. (Aug. 26, 2002), <http://www.metnews.com/articles/appt082602.htm> ("Judge Juhas' practice has been exclusively in civil litigation" with some Superior Court experience as a judge *pro tempore* presiding over traffic and small claims cases); telephone interview with Judge Mark Juhas, *supra* note 113.

¹¹⁵ Telephone interview with Judge Mark Juhas, *supra* note 113.

him to become a judicial activist.¹¹⁶ Judge Juhas advocates non-adversarial solutions to family court cases.¹¹⁷ He believes “the default process for resolving family law matters must be changed from litigation to consensual dispute resolution.”¹¹⁸ My years of sitting on the bench handling housing and matrimonial cases has led me to share the same beliefs as Judge Juhas on the U.S. justice system. We must re-think our adversarial system. I challenge lawyers and judges to consider that an adversarial system is inherently unfair to unrepresented litigants.¹¹⁹

New York is fortunate to have a chief judge who is a leader in access to justice issues. The title of Chief Judge Jonathan Lippman’s recent speech at New York University School of Law on March 11, 2014, “The Judiciary as the Leader of the Access to Justice Revolution,” says it all—in New York State, judicial activism goes to the top.¹²⁰ In his speech, Judge Lippman stated:

With all of these changes that I’ve talked about tonight, we are shifting the landscape for access to justice in New York and around the country. The cumulative effect truly amounts to a revolution, and the Judiciary is and should be at its vanguard—as we incrementally move closer to a civil *Gideon*, where we as a society demand that people be represented when the basic necessities of life are at stake. This is what we’re supposed to be doing, making equal justice a reality for every single individual, regardless of his or her status in life. We are experiencing that revolution in the way we think about the need for legal services,

¹¹⁶ See Jessica Logan, *New Program to Help Lighten Legal Paperwork*, FREEREPUBLIC.COM (Oct. 2, 2004, 6:10 PM), <http://www.freerepublic.com/focus/f-chat/1233596/posts> (reporting various efforts made by Judge Mark Juhas and Commissioner Michael Convey to make the court “very user-friendly” in order to help self-represented litigants); see also Press Release, Cal. Ass’n of Legal Document Assistants, LA Superior Court Judge Mark Juhas as the Keynote Speaker at the California Association of Legal Document Assistants’ 24th Annual Conference (Sept. 19, 2011), <http://www.pr.com/press-release/354351> (announcing the topics of discussion Judge Mark Juhas will address in his speech at the conference, including the importance of having a continuum of access to legal services for self-represented litigants and access to justice).

¹¹⁷ Mark Baer, *Is the Adversary Model Appropriate or Suitable for Family Law Matters?*, HUFFINGTON POST (June 9, 2013, 3:35 PM), http://www.huffingtonpost.com/mark-baer/is-the-adversary-model-ap_b_3412351.html (noting the significant negative impact divorces can have on children and the problems that arise through family law).

¹¹⁸ *Id.*

¹¹⁹ Fern Fisher, Deputy Chief Admin. Judge of N.Y.C. Courts, Dir. of N.Y. State Access to Justice Program, Commencement Speech at California Western Law School (Dec. 16, 2013) (speech on file with author).

¹²⁰ See Jonathan Lippman, Address at the Twentieth Annual Justice William J. Brennan Lecture on State Courts and Social Justice: The Judiciary as the Leader of the Access to Justice Revolution (Mar. 11, 2014), *available at* <http://ncforaj.org/wp-content/uploads/2014/03/CJ-Lippman-Brennan-3-11-14.pdf>.

about society's obligation to the poor, and the ways in which we can fulfill that obligation. State judiciaries are uniquely positioned by our constitutional and societal role to advocate for access to justice and to meet the challenges ahead. We cannot be limited or narrow in defining our role, nor underestimate the impact we can have. By using the Judiciary's authority to regulate the courts and the profession and shape legal education, by developing a record, adopting rules, and focusing on the noble values of our profession, as we promote innovation and change, we can have a dramatic impact on the equal justice paradigm. We, in the Judiciary, are duty bound to change the public dialogue as it relates to legal services for the most needy among us, so that access to justice will no longer be an afterthought, but rather recognized throughout the country as the fundamental right of every individual in a civilized society.¹²¹

Judge Lippman's 2012 Law Day announcement of a fifty-hour pro bono requirement of law graduates seeking admission to the bar shook up the bar and law schools.¹²² The proposed rule was met with some skepticism.¹²³ However, the civil legal services community was generally warm to this ground-breaking requirement.¹²⁴ New York's pro bono requirement was the first of its kind in the country,¹²⁵ and the chief architect of the rule is a member of the judiciary. Three other states—California, Connecticut, and New Jersey—are considering a similar fifty-hour pro bono rule, although the catalyst for the movement is not from the judiciary in Connecticut and California.¹²⁶

¹²¹ *Id.* at 19–20.

¹²² Chief Judge Jonathan Lippman, Remarks on Law Day 2012 4 (2012), *available at* <http://www.nycourts.gov/whatsnew/Transcript-of-LawDay-Speech-May1-2012.pdf>; N.Y. Ct. Rules § 520.16 (2013).

¹²³ See Joel Stashenko, *While Pro Bono Goal Applauded, Questions About Details Abound*, 247 N.Y. L.J. 87 (highlighting both the unmet legal need to be served by the pro bono requirement and the concerns about the pro bono requirement's implementation and impact on existing law student pro-bono efforts); Ben Trachtenberg, Op-Ed., *Rethinking Pro Bono*, N.Y. TIMES (May 13, 2012), <http://www.nytimes.com/2012/05/14/opinion/a-better-pro-bono-plan.html> (explaining why Chief Judge Lippman's proposal, mandating law students perform fifty pro bono hours to join the state bar, is an ineffective approach for addressing the needs of pro bono legal services and suggesting other alternatives).

¹²⁴ See AM. BAR ASS'N STANDING COMM. ON PRO BONO AND PUB. SERV., NEW YORK'S 50-HOUR PREADMISSION PRO BONO RULE: WEIGHING THE PROS AND CONS (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_preadmission_pro_bono_requirement_white_paper.authcheckdam.pdf (commenting on Chief Judge Jonathan Lippman's fifty-hour pro bono requirement for New York's bar applicants and analyzing the potential benefits and drawbacks of the new rule).

¹²⁵ *Id.* at 1.

¹²⁶ N.J. COURTS, REPORT OF THE WORKING GROUP ON THE PROPOSED PREADMISSION

Judge Lippmann again shook the legal community when he announced the Pro Bono Scholars Program¹²⁷ during his 2014 State of the Judiciary address.¹²⁸ The program will allow law students in their last year of law school to provide 500 hours of pro bono services in lieu of traditional classes.¹²⁹ Additionally, these students will be able to take the bar before they graduate and have their admission paperwork expedited as soon as their service is completed.¹³⁰ Judge Lippman stated “this new option of coupling early bar admission, practical experience, and service to the poor [is] part of what must be a partnership of the academy, the Judiciary, and the profession to help close the justice gap and ensure the nobility and relevance of the legal profession in the challenging years ahead.”¹³¹

In Washington State, the Supreme Court adopted APR 28, which allows for non-lawyers to practice law.¹³² In adopting APR 28, the Limited Practice Rule for Limited License Legal Technicians,¹³³ a six-justice majority of the Supreme Court of Washington

PRO BONO REQUIREMENT (2013), *available at* <http://ncforaj.files.wordpress.com/2013/05/nj-report-on-50-hr-rule.pdf> (reporting on the Working Group’s evaluation, pursuant to the Chief Justice of the New Jersey Supreme Court’s request, of whether New Jersey should establish a preadmission pro bono requirement, and the extent of such program for New Jersey bar applicants); Joyce E. Cutler, *California Proposal Would Mandate Pro Bono, Practical Skills Requirements for Admission*, BLOOMBERG BUREAU OF NAT’L AFFAIRS (Feb. 27, 2013), <http://www.bna.com/california-proposal-mandate-n17179872597/> (discussing the California State Bar’s investigation on whether the bar should develop a requirement to perform fifty hours of voluntary legal service for California bar applicants); MELANIE B. ABBOTT ET AL., *supra* note 29, at 19–20 (recommending that the Connecticut judiciary implement a fifty-hour pro bono requirement).

¹²⁷ See Steve Grumm, *New York’s New “Pro Bono Scholars Program”: What We Know, What We Don’t*, AM. BAR ASS’N ACCESS TO JUSTICE BLOG (Feb. 12, 2014), <http://abaatj.wordpress.com/2014/02/12/new-yorks-new-pro-bono-scholars-program-what-we-know-what-we-dont/> (outlining the Scholars Program and raising practical questions about how it will work).

¹²⁸ See Lippman, *The State of Judiciary 2014*, *supra* note 35, at 3–6.

¹²⁹ *Id.* at 4.

¹³⁰ *Id.*

¹³¹ *Id.* at 6.

¹³² Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 Miss. L.J. 75, 77 (2013), *available at* http://mississippilawjournal.org/wp-content/uploads/2013/02/3_Holland_Final.pdf (discussing the innovative move of utilizing trained non-lawyers to engage in the limited practice of law).

¹³³ See *In the Matter of the Adoption of New APR 28—Limited Practice Rules for Limited License Legal Technicians*, No. 25700-A-1005, slip op. at 2 (Wash. June 15, 2012), *available at* <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>. The rule allows Limited License Legal Technicians, individuals who are not lawyers, to engage in very discrete, limited-scope and limited-function activities. Many individuals will need far more help than the limited-scope of

sought to protect unrepresented litigants from an unregulated marketplace of legal and law-related services.¹³⁴ Recognizing that a “range of strategies” have been implemented to help assist unrepresented litigants, the majority detailed “significant limitations in [the resulting] services and large gaps in the type of services for pro se litigants.”¹³⁵ According to the majority, these shortcomings force many unrepresented litigants to seek help from non-attorney “practitioners.”¹³⁶ The majority concluded that the courts “have a duty to ensure that the public can access affordable legal and law related services [in a regulated marketplace], and that they are not left to fall prey to the perils of the unregulated market place.”¹³⁷ The three dissenting judges’ only objection to the rule was the source of funding to implement the rule.¹³⁸

Judges are calling for change of the role of judges in the courtroom.¹³⁹ Justice Laurie Zelon of the California Court of Appeals, for example, advocates for judges to be neutral and engaged with self-represented litigants and recently offered a webinar on the subject with Judge Karen Adam of the Arizona Superior Court in Pima County.¹⁴⁰

law related activities that a limited license legal technician will be able to offer. These people must still seek help from an attorney. But there are people who need only limited levels of assistance that can be provided by non-lawyers trained and overseen within the framework of the regulatory system developed by the Practice of Law Board.

¹³⁴ *Id.*

¹³⁵ *Id.* at 4–5.

¹³⁶ *Id.* at 5.

¹³⁷ *Id.* at 5–6.

¹³⁸ See *In the Matter of the Adoption of New APR 28—Limited Practice Rules for Limited License Legal Technicians*, Dissent to Order, No. 25700-A-1005 (Wash. June 14, 2012) (Owens, J., dissenting), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf>.

¹³⁹ See Rebecca A. Albrect et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, JUDGES’ J., VOL. 42, No. 1, at 16, 43 (2003) (reviewing recent case law and finding a large number of instances in which appellate courts reversed trial courts that did not “lean over backward . . . to identify meritorious issues hidden in the presentations of an unrepresented litigant”); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 373 (2008) (describing the “growing consensus that is essential for courts to provide meaningful access [to the courts] to unrepresented litigants”).

¹⁴⁰ Karen Adam & Laurie Zelon, *Self-Represented Litigation Curriculum* (Jan. 16, 2014, 2:00 PM), <http://www.ncsc.org/microsites/access-to-justice/home/Webinars.aspx> (follow hyperlink “Self-Represented Litigation Curriculum, January 16, 2014 at 2:00 PM EST”) (explaining how judges can utilize their role in dealing with self-represented litigants, and explaining various modules to assist judges on how to make their courtroom and the legal process more accessible for self-represented litigants).

CONCLUSION

The public is losing confidence in the civil justice system.¹⁴¹ Confidence in the system will continue to erode as more individuals are faced with life-affecting civil cases and are forced to do so without an attorney in an adversarial judicial system that is lawyer-centric. The real debate on judicial activism is not the lofty sparring on how to interpret the U.S. Constitution, but is actually what judges can and should do to ensure access to justice. Individuals who are faced with the loss of their homes, income, benefits, and children are foremost concerned with how the civil justice system will respond to them. Judges are recruiting pro bono lawyers, insisting on the provision of more funds for civil legal services, developing and operating delivery systems for such services, and challenging the judicial system to change to be more inclusive of the needs of the public, especially those without lawyers. Judicial activists throughout the country have shown that judges can change the conversation about judicial activism from the narrow focus on interpreting the Constitution to every day legal problems faced by millions in the country. Former Chief Judge John T. Broderick, Jr. of New Hampshire stated the charge perfectly:

I believe that courts need to speak with a louder voice and that judges, in particular, need to be heard. If those who preside in our courtrooms do not take a laboring oar on the issue of meaningful access to justice, then we cannot complain when others don't. If as judges we do not press the bar to step up, the courts to change, and the legislative and executive leaders in this country to join us, we will surely fail. Silence is not our friend, nor is it mandated by any ethical code that governs our conduct. We are all free to speak and write on issues affecting the administration of justice and more importantly, it is, in my judgment, our fiduciary obligation to do so. It goes to the very essence of what drew us to public service in the first place.¹⁴²

Judges must be activists and lead the way to a more perfect world where there is equal access to justice for all.

¹⁴¹ Ron Faucheux, *By the Numbers: Americans Lack Confidence in the Legal System*, ATLANTIC (July 6, 2012, 7:24 AM), <http://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458/> (discussing the statistics of a recent poll that highlight Americans' lack of trust in the American legal system).

¹⁴² John T. Broderick, Jr., Chief Justice of the New Hampshire Supreme Court, Remarks at the National Access to Justice Conference: A Roadmap Toward Justice (May 9, 2008), *reprinted in* DIALOGUE 30 (Summer 2008), *available at* <http://www.nlada.org/DMS/Documents/1219779973.18/Broderick%20speech%206-08%20Dialogue.pdf>.

