

## ARTICLES

### **The Civil Self-Representation Crisis: The Need for More Data and Less Complacency**

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*This Article analyzes self-represented litigants (SRLs) in the civil justice system. The increased number of filings by SRLs is often referred to as a crisis. There are several challenges that SRLs pose in individual courtrooms and to our civil justice system as a whole. Even with the recent trend of standardized self-help forms, SRLs have difficulty with procedural matters, articulating their cases sufficiently, and other formalities of the legal process. This in turn affects the overall efficiency of the system and deprives SRLs of their right to equal access to justice. The legal profession has not caught up with the rising numbers of SRLs, and very few procedures for uniform reporting exist in order to study and monitor the effect of SRLs nationwide. The civil justice system is especially lacking a national reporting mechanism to study the increase of SRLs; however, many continue to refer to this significant increase as a crisis while not having concrete numbers to understand the complexity of issues. This Article advocates for a systems approach to study the SRL crisis with all stakeholders at the table in order to effectuate much needed change.*

*To properly understand whether we should refer to the increased SRL numbers as a crisis, this Article first explores the term “crisis” and crisis management principles to better understand a more formal process to properly label a current moment as a true crisis. Many times, the term “crisis” is used loosely to reference an emergency with the need for an urgent response. However, without a systems approach to analyze whether an event truly qualifies as a crisis, any urgent response might be ineffective, and a crisis may continue to grow until it reaches the point of a full-fledged disaster.*

*This Article makes a simple gesture to expose the deficit in data and reporting structures and suggests a call for urgency to organize the collection of data to study outcomes through a systems approach at a national level.*

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## I. INTRODUCTION

A woman enters a courthouse visibly stressed and seeking help. She is pushing a stroller with three young children all under the age of three. The courthouse is not designed to entertain a child’s attention, but she has no other options. She is in crisis. Her husband just left to move in with his mistress and she is completely reliant upon him for financial support. She is unsure where to turn as her money dwindles with only enough to feed her and the three children for the next week. She knows enough about the law to know her husband is obligated to provide support for the children, but she doesn't know how to navigate through legal processes or procedures to secure a much-needed judgment. On this day, at this moment, she is empowered enough to pack up the children and seek help at the only place she deems logical—the courthouse.

Luckily, this courthouse has a self-help desk with legal aid attorneys and volunteers who offer a triage type of legal service.<sup>1</sup> Similar to a patient in medical trauma who travels straight to the nearest emergency room, the mother is in legal trauma and turns to the nearest courthouse to seek help. The volunteer lawyers listen to her story while she calms the children and tries to keep them quiet. The attorneys offer her a form which is over six pages long in order to request emergency child support.<sup>2</sup> She stares at the form and more stress sweeps over her expression. She pulls one child from the stroller to bounce on her knee while her other hand navigates the fill-in form. She cannot afford an attorney and her attention is compromised by stress, the demands of motherhood, and survival.<sup>3</sup>

Unlike medicine, our profession essentially asks a person in survival mode to walk into the emergency room, and then we hand them an instruction booklet to operate on themselves. If the person is lucky, a legal aid office might be able to assist and perform some triage services or take the case entirely if the client qualifies under a specific grant. Otherwise, the person weaves and bops through the civil system on their own because paying for an attorney is beyond reach. Other patrons of the courthouse might be able to afford an attorney but decide that the value of professional legal help is outweighed by a previous unfavorable experience. Instead, they decide to pursue the matter themselves and hopefully receive a favorable outcome. Other people may hire an attorney with the full intention to have counsel throughout the entirety of their case but run out of finances to pay their attorney. Worse yet are cases where the client pays an attorney, but the attorney does not achieve results, or resolve the case.

In each of these scenarios, little data is collected or reported nationally to understand the experiences, trends, and repercussions upon the profession. All of these scenarios, however, affect the public's trust in attorneys and the judicial process within the civil system. Because we have failed to truly measure, we have been unable to understand whether the SRL crisis is truly that—a crisis.

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The increasing number of SRLs indicates an impending, current, or rising crisis.<sup>4</sup> Yet, we have not collected data in a systematic manner that would enable

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1. See LEGAL SERV. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* (2017) (highlighting the triage approach now taken by many legal aid offices).

2. Many legal aid offices are unable to assist all who walk in the door either because of income restrictions, grant limitations, or insufficient attorneys to handle the case. Many legal aid lawyers assist through self-help forms or unbundled services with limited appearances.

3. See IAALS Legal Institute, *Christine E. Cerniglia: Serving the Community and Students through Courthouse Self-Help Desks*, YOUTUBE (Dec. 14, 2017),

<https://www.youtube.com/watch?v=yZoLBnvxulk>. This story is roughly drawn from an experience at a self-help desk where the author volunteered every week in order to fully appreciate what she was hearing, that people were waiting in lines to speak with an attorney and obtain self-help forms after the self-help desk opened. Many people who visit a courthouse self-help desk are in distress or crisis seeking immediate legal help, but others are simply trying to seek guidance as they navigate through the civil legal system on their own. The author spoke about this experience at the 2017 Educating Tomorrow's Lawyers conference.

4. Madelynn Herman, *Pro Se Statistics*, NAT'L CTR. FOR STATE COURTS (June 21, 2006), <https://www.srln.org/system/files/attachments/NCSC%202006%20SRL%20stats%20summary.pdf>; see

us to appreciate whether this is a new trend or a real crisis. This Article advocates for a more focused systems approach wherein all stakeholders are engaged and converge to invest time and energy to build solutions. This type of approach first requires collection and analysis of data before launching into a series of solutions. Stakeholders learn from each other while studying the data to craft collaborative solutions that are born from many perspectives and discuss how to best configure state data collection to share and analyze. Only then will more momentum build in a consensus manner to fully address the many issues.

This Article first delves into understanding the term crisis and analysis of the term “crisis” to provide context and explain the need for a more urgent response. Examples from other industries that employ a fast response through crisis management principles or a systems approach showcase how the legal profession suffers from a lack of crisis management principles.<sup>5</sup> The first step is to determine what qualifies as a crisis and specific markers that indicate the burden upon the system as beyond a normal trend. The comparison with other industries provides insight into how a rapid and systematic response minimizes the negative impact of a crisis.

The Article analyzes whether “crisis” is a proper label for the rising trend of SRLs by analyzing the literature over the past several decades that describes the demands upon our civil court system. Usually in a crisis there is a critical point or a specific moment traceable to increased numbers or data projection. The lack of data in the context of SRL filings makes it difficult to identify the turning moment or crisis point. Some literature on specific areas of law or data reported by some courts provide insight into this rising crisis point. Courthouse self-help desks are also critically important to fully understand the impact. However, few studies provide a voice directly from SRLs.

This deficit in data exists because there is a lack of uniformity or required reporting on the national level. This leaves us without a mechanism to cohesively report data at the national level, which makes it difficult to study and understand certain trends related to SRLs. In turn, we are not able to grasp the disparate impact upon SRLs based on gender, ethnicity, and socioeconomic status. Uniform and consistent reporting is needed at the state level which would allow stakeholders to study trends and compare jurisdictions in a systematic way leading to creative solutions. This requires more funding and incentives at the state and federal level.

SRLs have created instability and overloaded the court system. This Article analyzes various studies describing the detailed impact from potential stakeholders who hold an interest in creative solutions, such as court administrators, judges, and clerks. Anytime there is an impact upon a system, the disruption should be analyzed under the lens of crisis management principles. Specifically, this

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also Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 441–44 (2009); *Pro Se Statistics*, TEX. ACCESS TO JUSTICE COMM’N, <https://www.texasatj.org/sites/default/files/3ProSeStatisticsSummary.pdf> (last visited Apr. 30, 2020); Lauren Sudeall Lucas & Darcy Meals, *Every Year, Millions Try to Navigate US Courts Without a Lawyer*, THE CONVERSATION (Sept. 21, 2017), <http://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159>. Rebecca Sandefur, Presentation at the Association of American Law Schools, Professional Responsibility Section, Annual Meeting (Jan. 4, 2020). (commenting on the rising numbers of SRLs and referencing the term crisis when analyzing statistics).

5. See Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057 (2015).

disruption should be analyzed in order to determine whether the disruption occurs in a relatively short period of time and to also better understand stress upon the system. Sadly, the literature reflects that the disruption is well over a decade and the gap continues to widen for those in need of legal services.

Overall, this Article suggests a systems approach similar to movements in the criminal justice system; it requires various stakeholders to come together and build a collective response.<sup>6</sup> The first step is a systems approach to data collection. The mechanisms to collect data are likely already in place at each state trial level, however, courts do not report in a uniform manner to the National Center for State Courts, which hinders the ability to research and report on trends.<sup>7</sup>

To address the many legal issues related to SRLs is impossible in one article. This Article provides an overview of scholarship related to SRLs. The scholarship includes analysis of certain geographic areas, the impact upon the court, and analysis of the growing trend and discussions on whether counsel should be appointed in the civil system. Other literature addresses ongoing access to justice issues and the many who cannot afford legal representation. The most recent literature suggests possible solutions including technology, unbundled services, self-help forms, and modernization of process, procedures, or ethical rules. The literature is widespread and overwhelmingly rich with suggestions for reform. This Article humbly suggests we still lack a starting point to collect uniform data on SRLs at the state level.

Once we have proper data, the next generation of literature may include questions suggested in this Article to study rising numbers of SRLs in the civil system. Future studies may include relevant outcomes related to public trust, the outcomes in certain areas of law or whether a triage approach, such as unbundled services, self-help forms or piecemeal technology provides positive case outcomes. Regardless, the first step is to create a national reporting system with incentives or penalties for not reporting.

#### *A. A Summary of Scholarship on SRLs as a History of the Crisis*

Over the past two decades scholars have suggested SRL numbers are at a crisis level directly impacting the civil justice system.<sup>8</sup> One of the most prolific writers on the topic, Rebecca Sandefur, analyzes the crisis from the lens of sociology and empirical research; Sandefur calls for more data collection and united stakeholders to “understand and assess the challenge of providing services for low-income Americans.”<sup>9</sup> Without Sandefur’s relentless research holding a mirror to the legal

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6. *Id.*

7. Richard Schauffler & Shauna Strickland, *The Case for Counting Cases*, 51 CT. REV. 52, 52 (2015).

8. Notably, the term “crisis” is often used in either the title or introduction. See Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123 (1993); Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and Its Solutions*, 45 FAM. L. Q. 45 (2011); see also Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373 (2005); Kerry Fitzgerald, *Serving Pro Se Patrons: An Obligation and an Opportunity*, 22 L. REF. SERV. Q. 41 (2003); Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 741 (2015) (“A crisis in civil justice has seized the lowest rungs of state court where the great majority of American justice is meted out.”).

9. Rebecca Sandefur, *Access to Justice*, AM. BAR FOUND.,

profession and asking for change, we would have little empirical data documenting the crisis.

Many authors, such as Drew Swank, provide insight into the crisis, but few studies showcase the staggering numbers of pro se litigants with analysis of the impact in certain areas of law or upon courthouses.<sup>10</sup> One of the most data intensive pieces is the detailed study of SRLs in the New York City Family and Housing Court, which revealed that 83% of those surveyed were either African-American, Asian, or Hispanic and “had less education and lower income than New York City residents as a whole.”<sup>11</sup> Such studies showcase the profiles of self-represented litigants and also reflect a possible correlation in disparate case outcomes. Sadly, both articles were published over fifteen years ago, and even then, they reflected a trend of pro se representation that Swank described as “growing at an exponential rate” with possibly the highest numbers in U.S. history.<sup>12</sup> Complacency continues to create sluggish results to revise a system to accurately report data at a national level.

One of the most relevant and insightful studies into the crisis is the 2014 “Self-Help Census,” a publication from the Standing Committee on the Delivery of Legal Services of the American Bar Association which studied self-help centers throughout the country.<sup>13</sup> The study gives voice to SRLs. Many people were interviewed, and trends and sentiments from those using self-help services were directly documented. The study documents the rising trend, reporting that “nearly 3.7 million people are served by self-help centers annually.”<sup>14</sup> The growing trend of self-help desks in courthouses is addressing a very relevant need in our country.

The Institute for the Advancement of American Legal Systems (IAALS) published a report entitled “Cases without Counsel” in May 2016 which collected data and gave voice to SRL concerns. The study called on an effort to address the crisis with more “shared responsibility and coordinated response,” highlighting specific recommendations after hearing from litigants themselves.<sup>15</sup> The call for reform in the IAALS report suggests a more stakeholder driven approach to address the crisis.<sup>16</sup> The recommendation in this study mirrors a systems approach.

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<http://www.americanbarfoundation.org/research/project/106> (last visited Apr. 30, 2020) (describing civil justice problems as widespread involving over 100 million people with most never reaching out to an attorney). See also John Mark Hanson & Rebecca L. Sandefur, *Data Collection and Legal Services for Low-income Americans*, AM. ACAD. OF ARTS & SCI., <https://www.amacad.org/project/data-collection-and-legal-services-low-income-americans> (last visited May 19, 2020) (a call to convene stakeholders mostly aimed at the low-income analysis of legal services recognizing the lack of data in the civil context).

10. See Swank, *supra* note 8.

11. OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES 3 (2005), [http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/AJJI\\_SelfRep06.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/AJJI_SelfRep06.pdf).

12. Swank, *supra* note 8, at 376.

13. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERV., THE SELF-HELP CENSUS: A NATIONAL SURVEY 1 (2014), <https://www.srln.org/system/files/attachments/ABA%20Self-Help%20Center%20Census%20%282014%29.pdf>.

14. *Id.* at v.

15. NATALIE ANNE KNOWLTON, CASES WITHOUT COUNSEL: OUR RECOMMENDATIONS AFTER LISTENING TO THE LITIGANTS 5 (2016), [https://iaals.du.edu/sites/default/files/documents/publications/cases\\_without\\_counsel\\_recommendations\\_report.pdf](https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_recommendations_report.pdf).

16. *Id.* at 3.

Under the new leadership of executive director and former Arizona Supreme Court Justice Scott Bales, more momentum and funding to support IAALS' important work is integral to solving the civil SRL crisis.<sup>17</sup>

Other articles analyze why litigants choose the non-lawyer route versus deciding to invest in legal representation.<sup>18</sup> Drew Swank provides insight into why many choose to self-represent with such reasons as "increased literacy rates," "increased sense of consumerism," "individualism," or "anti-lawyer sentiment and mistrust in the legal system."<sup>19</sup> Another reason why people may not seek legal help is that they may not perceive their problem as legal.<sup>20</sup> This lack of knowledge reflects another issue: more outreach is necessary to educate people about their legal rights. While we know people are deciding not to seek legal advice or hire an attorney in record numbers, tragically, we do not have accurate numbers on the rate of increased filings of SRLs.

Russel Engler's article *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, showcases specific areas of law and the growing trend of SRLs.<sup>21</sup> Many studies focus on specific outcomes in areas of law<sup>22</sup> and possible negative consequences of choosing the unrepresented route.<sup>23</sup> Literature from the bench also reflects a disruption in process and procedures due to the rising trend of SRLs.<sup>24</sup> Rabeea Assy's article, *Revisiting the Right to Self-Representation*, analyzes the adversarial system and the historical right to self-representation.<sup>25</sup> Assy notes "self-representation in the criminal context must not be allowed to shape our attitude towards it in the civil

17. See Zachary Willis, *IAALS Announces Leadership Transition*, IAALS (Mar. 7, 2019), <https://iaals.du.edu/blog/iaals-announces-leadership-transition>.

18. David Luban, *Self-Representation, Access to Justice, and the Quality of Counsel: A Comment on Rabeea Assy's Injustice in Person: The Right of Self-Representation*, 17 JERUSALEM REV. L. STUD. 46, 47 (2018) (summarizing three reasons for the rise of self-represented litigants: 1) people believe they can "do a good job as a lawyer"; 2) they are unable to access a lawyer; and 3) they have a disagreement with a current lawyer on how to present their case); see also Rabeea Assy, *Revisiting the Right to Self-Representation* 17–20 (Oxford Student Legal Research Paper Series, Working Paper No. 02/2012, 2012), <http://ssrn.com/abstract=2010509> (stating there is not empirical data to claim SRLs decide to represent themselves due to financial reasons); HAZEL GLENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* (1999).

19. Swank, *supra* note 8, at 378–79.

20. See LEGAL SERV. CORP., *supra* note 1, at 7.

21. Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010) (one of the most important articles analyzing housing, family and small claims cases as well as administrative proceedings such as social security disability, unemployment, and immigration with specific observations and questions necessary to understand data outcomes).

22. See, e.g., KNOWLTON, *supra* note 15; see generally CRISTINA LLOP, *ADDRESSING THE NEEDS OF SELF-REPRESENTED LITIGANTS IN ALABAMA STATE COURTS* (2009), <https://alabamataj.org/wp-content/uploads/2013/08/Alabama-Final-Report-SRL-Services.pdf>; see generally E. Lea Johnston, *Communication and Competence for Self-Representation*, 84 FORDHAM L. REV. 2121 (2016).

23. See, e.g., Carla L. Reyes, *Access to Counsel in Removal Proceedings: A Case Study for Exploring the Legal and Societal Imperative to Expand the Civil Right to Counsel*, 17 UDC/DCSL L. REV. 131 (2014).

24. See, e.g., JONA GOLDSCHMIDT ET AL., *MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS* 10 (1998) (providing reasons why the pro se trend might be on the rise).

25. See generally Assy, *supra* note 18.

context.<sup>26</sup> Instead, Assy urges a more principled attitude to self-representation to ultimately question whether we should continue to allow people to self-represent despite knowing the impact upon systems of justice.<sup>27</sup> Sadly, much of this literature should have served as an alarm to the profession, but now we are well past a decade into the crisis and systemic change is not any closer.

There is plenty of literature advocating for a civil Gideon standard.<sup>28</sup> This Article does not delve into analyzing the scholarship in this area or advancing the right to an attorney in the civil system. Stakeholders should however aim for such a principled solution. Equally important to analyze once a systems approach is in place, is the pushback as presented by Benjamin Barton recognizing that *Gideon* “has largely proven a disappointment.”<sup>29</sup> While civil Gideon is the aspirational goal, more study is needed to fully understand how to achieve a standard in the civil system by learning lessons from the criminal system.

Possible solutions about how to solve the problem include understanding modern approaches. The most recent Legal Services Corporation (LSC) report on *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*, published in June 2017, reports that, “86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help.”<sup>30</sup> Many approaches are underway to address the gap, such as unbundled legal services,<sup>31</sup> the limited legal technician, and the use of technology. Most reform movements seem to endorse a triage approach to assist with the rising number of SRLs with varied responses depending upon the resources. Before we travel further down the path to various solutions, we need systems in place to collect data on such approaches and the impact upon SRLs.

## II. UNDERSTANDING THE SPECIFIC CONTEXT OF THE TERM “CRISIS” TO BUILD BETTER RESPONSE SYSTEMS FOR SELF-REPRESENTED LITIGANTS

The term “crisis” is found throughout legal literature and is used both as a reference to a legal issue and to describe events that impact legal systems.<sup>32</sup> Many times, lawyers or the court system are impacted in a time of crisis; such as, the

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26. *Id.* at 13.

27. *Id.*

28. See, e.g., Engler, *supra* note 21; CRISTINA LLOP, *supra* note 22. But see Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010) (The concept of right to counsel in civil cases is often referred to as “Civil Gideon,” a play on the name of the 1963 Supreme Court case, *Gideon v. Wainwright*, which held that low-income criminal defendants are entitled to free legal representation. *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

29. See Barton, *supra* note 28, at 1228 (critiquing *Gideon v. Wainwright*, 372 U.S. 335 (1963)); see also Ted Frank, *The Trouble with the Civil Gideon Movement*, AM. ENTERPRISE INST. (Aug. 7, 2008), <https://www.aei.org/research-products/report/the-trouble-with-the-civil-gideon-movement> (arguing a flood of costly civil appeals is likely if we compare to what occurs in the criminal system).

30. LEGAL SERV. CORP., *supra* note 1, at 6.

31. See Cassandra Wolos Pattanayak et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013).

32. Sanford Levinson & Jack M. Balkin, *Constitutional Crisis*, 157 U. PA. L. REV. 707, 710, 714 (2009) (for example the term “constitutional crisis” is “promiscuous[ly]” used to describe conflict and explaining that the American Constitution was created in conflict and able to respond in times of tension between branches).



subprime mortgage foreclosure crisis, a localized housing crisis, the child welfare crisis, or the current opioid crisis.<sup>33</sup> Lawyers in these roles traditionally act as advisors on legal issues and are called to respond and provide advice to clients embroiled in crisis.

Notably, a “crisis” is not synonymous with an emergency but instead describes “a potentially decisive turning point . . . a moment at which the order threatens to break down, just as the body does in a medical crisis.”<sup>34</sup> While lawyers may be directly involved in times of crisis, there is no protocol within the profession to identify a moment of internal crisis for the profession.

The current state of political affairs offers scholarly debate on the term “constitutional crisis,” often describing it as some type of disruption; however, even in that context, the term is not used with precision.<sup>35</sup> In the corporate context, in-house counsel may have a more sophisticated response in crisis management and may recognize how to respond when their company is impacted by a crisis. Such crises may include lawsuits, sexual harassment claims, regulatory investigations, criminal investigations, or other events that may immediately impact the company.<sup>36</sup>

Overall, the term “crisis” is used by lawyers and legal scholars but does not parallel in precise vocabulary as in other industries. For example, in reference to the rising SRLs in the civil system, the term “crisis” is used often, but we are without a measuring tool to determine when the numbers truly equate to a crisis.<sup>37</sup>

#### A. The Term “Crisis” and Shared Definitions

The term “crisis” is used as a term of art and many times is not clearly defined depending upon the field or industry.<sup>38</sup> The term in Latin is “crisi,” meaning a critical culmination point.<sup>39</sup> Other etymology points to the Greek term “krino,”

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33. Erin Pritchard, *How the Economy is Affecting the Legal Landscape: A Profession Under Fire*, CBA REC., May 2009, at 36, 41; John Powell & Jason Reece, *The Future of Fair Housing and Fair Credit: From Crisis to Opportunity*, 57 CLEV. ST. L.REV. 209, 212 (2009) (describing many aspects of crises in the housing context); Nicolas Terry, *From Health Policy to Stigma and Back Again: The Feedback Loop Perpetuating the Opioids Crisis*, 2019 UTAH L. REV. 785, 801 (providing specific examples of the complexity of the opioid crisis as a multifaceted policy issue).

34. Levinson & Balkin, *supra* note 32, at 715.

35. *Id.* at 710, 715 (describing the term “constitutional crisis” as one “promiscuous[ly]” used too often to describe conflict. Also referencing the origins of the term “crisis” as representing “a breakdown in a previous balance or equilibrium, a disturbance to important values and to the existing order that will ultimately resolve in one direction or another.”); see also Jack M. Balkin, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*, 94 IND. L.J. 253 (2019) (recognizing a shift in principles is potentially thought of as a true crisis but the usage of “crisis” is many times a reference to politics).

36. See, e.g., David Norton, *Crisis Management for Small Air Carriers, Aircraft Parts Manufacturers or Maintainers, and Other Aviation Industry Participants*, 66 J. AIR L. & COM. 505, 510 (2001).

37. See *Our Civil Justice System Fails Ordinary Americans*, ALL RISE FOR CIVIL JUSTICE, <https://allriseforciviljustice.org/crisis> (last visited Apr. 30, 2020) (describing the civil justice system as broken and in crisis).

38. Katherine Eastham, Donald Coates & Federico Allodi, *The Concept of Crisis*, 15 CAN. PSYCHIATRIC ASS’N J. 463, 463 (1970) (describing the term “crisis” as one which “lacks precision and specificity”).

39. Maciej Czarniecki & Anna Starosta, *Two Faces of Anti-Crisis Management: From Definitions to Concepts*, 18 DE. GRUYTER: MGMT. 169, 169–83 (2014) (studying the concepts and definitions of “crisis” throughout various fields and historical definitions).

meaning “the ultimate resolution.”<sup>40</sup> The definitions indicate “crisis” refers to a moment in time of change or a critical point.<sup>41</sup> While the term “crisis” is often imprecise, there is often reference to a point of stress or disorder which calls for an urgent response.<sup>42</sup> Overwhelmingly, “crisis” is associated with descriptions that are negative and reference an instability usually associated with deterioration in the status quo or condition.<sup>43</sup> Translations consistently mention that a crisis exists over a relatively short period of time and induces stress due to some event or disruption to normal operations.<sup>44</sup> This relatively short time frame associated with crisis causes difficulty and usually requires a problem-solving approach that taxes available resources.<sup>45</sup>

The term is “generally associated with a system, organization and group of people or individuals . . . [and] features of a crisis are uniqueness, danger, being in trouble or causing damage, being unexpected, and usually emotional.”<sup>46</sup> The term includes a sudden, unexpected triggering moment resulting in a need for rapid response through policy because of the disruption to a system.<sup>47</sup> Notably, there is some recognition that such a negative impact may actually lead to positive effects or developments.<sup>48</sup> The Chinese translation incorporates both danger and opportunity.<sup>49</sup> Sometimes such disruption will create an opportunity for a stagnant system to change and evolve prompted by unorthodox thinking to restructure, thus creating a more efficient operation.<sup>50</sup>

While the term “crisis” is often associated with an emergency or disaster, important differences help to define each context. In a study of forty-one definitions of “crisis,” “emergency,” and “disaster,” common features emerged as

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40. *Id.* at 169–70.

41. *Id.* at 170.

42. *Id.*

43. *Id.*

44. GOLDSCHMIDT ET AL., *supra* note 24 (investigating the term “crisis” for intervention work in public health and psychology and describing five essential features of a crisis and the relationship between crisis and stress).

45. See Hajer Al-Dahash, Menaha Thayaparan & Udayangani Kulatunga, *Understanding the Terminologies: Disaster, Crisis and Emergency*, 2 ASS’N RESEARCHERS CONSTR. MGMT. 1191, 1193 (2016) (describing “crisis” as “a time of intense difficulty, trouble, or danger and can be personal, or confined to a small population, like a family, or a company dealing with a very serious problem”).

46. Al-Dahash et al., *supra* note 45, at 1195–97 (diagramming each word and concepts associated with each term, to understand distinctions and commonality).

47. *Id.* at 1193 (defining “crisis” as “a disruption that physically affects a system as a whole and threatens its basic assumptions, its subjective sense of self, and its existential core . . .” or “an abnormal situation which presents a high risk to business and may trigger rapid public policy changes, since it draws public and media attention and threatens public trust . . .” and “a situation faced by an individual, group or organization which they are unable to cope with the use of normal routine procedures and in which stress is created by sudden change”).

48. Czarnecki & Starosta, *supra* note 39, at 173 (describing the phenomenon of crisis as one which provides a “platform for revolutionary organizational changes which could not occur otherwise”).

49. Tomi White Bryan, *Systems Thinking Applied to Crisis Management: The Eleven Allegories as an Analysis Tool* (Feb. 2005) (Ph.D. dissertation, Walden University) (on file with ProQuest Information and Learning Company).

50. Maria Langan-Riekhof, Arex B. Avanni & Adrienne Janetti, *Sometimes the World Needs a Crisis: Turning Challenges Into Opportunities*, BROOKINGS INST. (Apr. 10, 2017), <https://www.brookings.edu/research/sometimes-the-world-needs-a-crisis-turning-challenges-into-opportunities>.

well as important distinctions.<sup>51</sup> An emergency may cause an impact but not a significant disruption from normal process or procedures.<sup>52</sup> A lack of response to a crisis may actually lead to a disaster, if not properly addressed in time.<sup>53</sup> This escalation showcases how conditions worsen from an emergency to a crisis, and eventually a disaster, if left unaddressed. Consistently, a “crisis” is defined as a short-term period of time that requires proper management principles and policy decisions to problem-solve and resolve any damage or disruption.<sup>54</sup>

*B. Crisis Management Principles Employ a Quick Response  
and Minimize Negative Impact*

The study of crisis management is a multidisciplinary field which focuses on the study of comprehensive processes or a systematic method used to minimize the impact across industries.<sup>55</sup> Overall, this field of study focuses on various phases of a crisis as well as plans to manage the events during the impact.<sup>56</sup> The academic literature continues to transform into specific categories of study<sup>57</sup> with varying agreement on the chronology of a crisis and how to identify each stage or implement recovery strategies.<sup>58</sup> Stages of a crisis are described as first beginning with a “warning signal or acute stage”<sup>59</sup> and then continuing to a stage of “chronic crisis.”<sup>60</sup> Academics disagree on the number of stages or the chronology of a crisis; however, the need for an urgent response appears as a unifying principle.<sup>61</sup>

Post-crisis management may include appointing a team or commission to analyze the source of the negative exposure, collect and analyze the data, and create contingency plans to limit the impact.<sup>62</sup> Notably, “a crisis in one area often leads to a ‘vicious circle’ of crises in other areas.”<sup>63</sup> A systematic response helps industries prepare and implement a method to collect data, analyze options, and problem-solve as opposed to reacting post-crisis in an ineffective manner. A post-

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51. Al-Dahash et al., *supra* note 45, at 1195–97 (diagramming each word and concepts associated with each term to understand distinctions and commonality).

52. Bryan, *supra* note 49, at 17.

53. Al-Dahash et al., *supra* note 45, at 1198 (describing how a “crisis might develop into a disaster if neglected or mismanaged”).

54. *Id.*

55. The field emerged in the late 1970’s and has progressed into a true interdisciplinary study of crisis response. See Bryan, *supra* note 49, at 30 (reviewing literature from the field of crisis management with cites to experts Mitroff (1988), Barton (2001) and NyBloom (2003) to describe the interconnected study from multiple disciplines); see also *id.* at 17 (defining “crisis management” as a “systematic attempt by organizational members with external stakeholders to avert crisis or to effectively manage those that do occur”).

56. *Id.* at 13.

57. *Id.* at 33 (describing the field as one emerging and sorted into three categories of research: definitions, case studies, and typology studies).

58. *Id.* at 36.

59. *Id.* at 36 (stating that “the objective at this stage is to catch the crisis before it occurs or escalates”).

60. *Id.* (describing this stage as one of recovery where an organization may delve into self-analysis or experience disruption).

61. *Id.* (summarizing research from S. Fink’s article *Crisis Management: Planning for the Inevitable*, and Miterooff (1996) and Augustine (2000) research of the stages of crisis).

62. Norton, *supra* note 36, at 511–12, 535.

63. *Id.* at 510.

crisis response requires study to learn how to build a better framework for a response in order to lessen the large-scale negative impact. To address the SRL crisis, this type of systemic response is needed to collect data and mitigate the negative impact.

The financial crisis in the early period of 2008<sup>64</sup> is a good example of how crisis management principles were employed to collect data to understand the impact of foreclosures.<sup>65</sup> Researchers were able to acquire funding relatively quickly in order to conduct a detailed analysis of the zip codes of those homes impacted by foreclosure and find disproportionate shares of subprime borrowers which then identified the potential consequences.<sup>66</sup> This crisis was studied by researchers to understand the cause and the possible impact across the world. Funding was provided both in grant money and in federal funds to understand the issues and minimize the impact. Some may argue that crisis management principles efficiently and effectively responded to the market drop. The economic recession could have been much worse. In 2008, many systems were in place to collect data and there was a willingness to fund research to better understand the factors leading up to the crisis.<sup>67</sup> The Economic Advisory Committee of the Financial Industry Regulatory Authority (FINRA) provided research and analysis of the cause, effect, and consequences of subprime mortgages.<sup>68</sup> Researchers were also able to analyze how many people were underwater in their mortgage and the social norms relevant to their decision to stay put in their house.<sup>69</sup>

The legal field was directly impacted by the financial crisis in 2008 which caused disruption in courthouses throughout the nation.<sup>70</sup> Minimal research exists, however, to determine whether the rise in SRLs is directly related to the financial crisis. Also unknown is whether case outcomes are different for those who decide to self-represent. Little research exists to understand the point where the increase in SRL filings is directly related to an economic crisis. To illustrate, now that the economy is better, we should see a decrease in SRLs, which might indicate a correlation between the economy and the ability to afford a lawyer.

Understanding the definition and usage of the term “crisis” helps to analyze whether there is a distinct period of time of disruption to the operations of the court

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64. Pritchard, *supra* note 33, at 6.

65. Atif R. Mian & Amir Sufi, *The Consequences of Mortgage Credit Expansion: Evidence from the U.S. Mortgage Default Crisis*, 124 THE QUARTERLY J. OF ECON. 1, 1–7 (2008) (noting the need for detailed “micro-level data to test the competing hypotheses”).

66. *Id.* at 1–2.

67. To analyze another crisis, see the medical malpractice claims of the late 1980s and how the department of insurance was able to provide data to better understand medical malpractice litigation. Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 209 (2005).

68. Richard C. Whalen, *The Subprime Crisis: Cause, Effect and Consequences*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 219, 219–20 (2008).

69. Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 971–73 (2010).

70. For an example of how the courts handled the mortgage foreclosure crisis, see *Resolution 22: State Judicial Branch Budgets in Times of Fiscal Crisis*, CONFERENCE OF CHIEF JUSTICES (Jan. 21, 2004), <https://ccj.nsc.org/~media/Microsites/Files/CCJ/Resolutions/01212004-State-Judicial-Branch-Budgets-in-Times-of-Fiscal-Crisis.ashx>.

or legal offices and whether SRLs are putting negative stress upon the system and ultimately taxing resources.

### III. IS CRISIS A PROPER LABEL FOR THE RISE IN SELF-REPRESENTED LITIGANTS?

A crisis suggests a largely negative impact, causing disruption and deteriorating systems.<sup>71</sup> A crisis period is relatively short and usually causes induced stress, disruption to normal operations, and a toll upon resources.<sup>72</sup> Is the rise in filings of SRLs a growing trend with a largely negative impact upon the court system and possibly on the litigants? Does literature from the bench document the type of disruption and how the process deteriorates? Have more resources been allocated within the court system to address this need and legal aid offices have restructured assistance to provide a triage-style approach? Well over a decade has passed since the rise in SRLs began and only some of these questions have been answered.

The term “crisis” is often used in the context of self-help or pro se representation.<sup>73</sup> Many scholars for the past two decades have been the proverbial “canaries in the coal mine” voicing concerns about the civil justice system.<sup>74</sup> Their time dedicated to studying issues at a microscopic level has shed light on some of the trends; but, much of the literature, including studies from over a decade ago, suggest unprecedented numbers of SRLs causing disruption within the civil system.<sup>75</sup> From a national standpoint, many trends are still unknown and questions remain regarding whether a specific response is effectively minimizing the impact or simply addressing the need.<sup>76</sup> The data reported and studied is usually a small

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71. Czarnecki & Starosta *supra* note 39, at 170.

72. Eastham et al., *supra* note 38, at 465–66.

73. See text accompanying note 4 giving examples of literature discussing self-represented litigants, all describing this trend as a crisis.

74. See Sandefur, *supra* note 9; Hanson & Sandefur, *supra* note 9; Bonnie Hough, *Self-Represented Litigants in Family Law: The Response of California’s Courts*, 1 CALIF. L. REV. CIR. 15, 20 (2010) (reporting the increased number of SRL filings in California in 2010 and describing the need for assistance as “tremendous”); Engler, *supra* note 21, at 77 (describing the increase of SRLs and the struggle with courts to balance all interests); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. L. REV. 1537, 1579–80 (2005).

75. See Hough, *supra* note 74 (reporting the increased number of SRL filings in California in 2010 and describing the need for assistance as “tremendous”); Bonnie Rose Hough, *Evaluation of Innovations Designed to Increase Access to Justice for Self-Represented Litigants*, SUMMIT ON THE FUTURE OF SELF-REPRESENTED LITIGATION (Mar. 25, 2005), <https://www.srln.org/system/files/attachments/Evaluation%20of%20Innovations%20Designed%20to%20Increase%20Access%20to%20Justice.pdf>.

76. Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 533 (2013) (describing the unknown problems or clarity to determine the precise problem in analyzing access to justice and the lack of “evidence-based practice” in the U.S. justice system compared to other industries); see Hough, *supra* note 75, at 6–9 (outlining the complexity issues for further study such as areas of substantive law, procedural reform or outcome analysis, outcomes of individual judges, and overall court operations).

sample from a few courthouses willing to report or self-help desks who partner with researchers willing to analyze and publish.<sup>77</sup>

From a crisis standpoint, the rise in SRL filings and the demands upon civil systems is well beyond a short period of time. To analyze whether SRL-increased filings may be classified as a crisis, it is important to study the factors giving rise to a crisis and determine whether data exists to showcase when disruption first began. Some questions connecting crisis analysis and the SRL context include:

1. Is there a specific moment in time that indicates change or a critical point to analyze the increase of SRLs?
2. Is the increase in filings causing instability or overload to the system with deterioration in the status quo or normal condition?
3. Is the impact causing disruption to procedures or process over a relatively short period of time which has induced stress upon normal operations?
4. Could the impact negatively affect the credibility of the court or reputation of the profession?
5. Has the increase caused a vicious circle of crises in other areas?
6. Is the impact taxing resources?<sup>78</sup>

The first step is to collect and share data about national trends in order to properly make data-informed decisions. Research does show the increase in numbers, the impact upon courthouse process, procedures, and staff, the impact in certain areas of law, the financial costs, and whether any triage solutions are effectively addressing the issue as discussed below. Equally important to recognize, but not addressed in-depth in this Article, is the historical balance and nature of the right to self-represent in courts.<sup>79</sup> Balancing all interests ensures access *and* ensures equality in that access. To simply say access is provided through pro se representation is not enough. Rather, the important task is to understand whether equality in outcomes is maintained. The only way to analyze is to collect and trace data trends.<sup>80</sup> This Article does not question or argue against the right to self-represent but instead advocates for more analysis and data collection around both the procedural and substantive issues.

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77. *Id.* at 2 (summarizing the research about court innovations and outreach efforts for self-represented litigants from five pilot self-help desks and also research from the Trial Court Research Improvement Consortium from participating court programs).

78. Czarnecki & Starosta, *supra* note 39, at 169–83.

79. Swank, *supra* note 8, at 374–76 (tracing the development and historical right to self-representation in the United States and describing the historical roots of self-representation and the American ideal that both the poor and wealthy have access to the courts with equal treatment).

80. Jonathan D. Rosenbloom, *Exploring Methods to Improve Management in Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 *FORDHAM URB. L.J.* 305, 310 (recognizing that most of the research on the impact of pro se representation is anecdotal).

*A. Is there a specific moment in time that indicates change or a critical point to analyze the increase of SRLs?*

To track the number of SRLs in the civil system requires study at the state and local level, but each court system operates separately based on state funding and without a requirement to report numbers at the national level.<sup>81</sup> Despite multiple attempts by the National Center for State Courts (NCSC) to encourage states to report, the effort to report is dismal.<sup>82</sup> One challenge for a cohesive reporting mechanism is the difference in courthouse filing systems, computer systems, and questions on the civil intake sheet. This inconsistency makes it difficult to uniformly track SRL numbers nationally and study trends. Another challenge is the changing status of litigants. Even if courthouses are able to track numbers at the time of filing, many litigants may change to self-represent at a later stage in the process, and such reporting requires another level of monitoring to collect information.

While significant steps have been made to formalize definitions to assist with case counting, the data collection process is still in infancy.<sup>83</sup> The most recent literature on SRLs by the NCSC acknowledged that “. . . reliable, consistent statistics on the number of cases with self-represented litigants do not exist.”<sup>84</sup> The visualization tool now available on NCSC’s website allows for shared data.<sup>85</sup> In 2017, the most recent publishable data revealed that only five states report enough data to the NCSC to truly understand the context.

2017 Civil Caseloads - Trial Courts				
2017 Civil Cases with Self-Represented Litigants				
State	Tier	Number of Civil Cases with SRLs	Total Civil Dispositions	Percent
Indiana	General	75,724	312,709	24.2%
Kansas	Limited	NJ	NJ	-
Minnesota*	Single	126,999	167,580	75.8%
Missouri*	Single	14,627	253,216	5.8%
New Jersey	Limited	NJ	NJ	-
North Dakota	Limited	NJ	NJ	-
Oklahoma	Limited	NJ	NJ	-
Texas	General	7,159	219,757	3.3%
Texas	Limited	11,991	1,085,394	1.1%
Wisconsin	Limited	NJ	NJ	-

81. BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 18 (Samuel Estreicher & Joy Radice eds., Cambridge Univ. Press 2016) (chapter by Ian Weinstein describing the limitations of the national data showing “particular local needs”).

82. *Cases with Self-Represented Litigants (SRL)*, COURT STATISTICS PROJECT, [http://www.courtstatistics.org/Other-Pages/SRL\\_Main.aspx](http://www.courtstatistics.org/Other-Pages/SRL_Main.aspx) (last visited May 15, 2020); see also *Resolution 1: In Support of State Counts of Cases with Interpreters*, CONFERENCE OF STATE COURT ADMINISTRATORS (Dec. 7, 2013) 1 (approving position paper on SRLs Resolution 31 which recommends that “states should support methods to better identify, collect and analyze self-represented litigant data”).

83. See *id.* (The Conference of State Court Administrators was established to provide definitions and counting rules for reporting SRL cases).

84. Schauffler & Strickland, *supra* note 7 (noting the term “knowledge gap” as an indicator for more data needed).

85. *Cases with Self-Represented Litigants (SRL)*, *supra* note 82.

FIGURE 1: CIVIL CASES WITH SELF-REPRESENTED LITIGANTS IN 2017<sup>86</sup>

In 2016, only seven states reported data to NCSC, but only three states (Minnesota, Missouri and Texas) provided subsequent data in order to study year-to-year trends. Notably, SRL cases decreased in Minnesota and Missouri, which may give other courts an opportunity to learn from specific initiatives in each jurisdiction.

2016 Civil Caseloads - Trial Courts				
2016 Civil Cases with Self-Represented Litigants				
State	Tier	Number of Civil Cases with SRLs	Total Civil Dispositions	Percent
Arizona	General	11,797	47,898	24.6%
Indiana	General	60,194	330,058	18.2%
Indiana	Limited	26,129	45,642	57.2%
Kansas	Limited	NJ	NJ	-
Minnesota*	Single	124,344	152,463	81.6%
Missouri*	Single	14,663	247,014	5.9%
New Jersey	Limited	NJ	NJ	-
North Dakota	Limited	NJ	NJ	-
Oklahoma	Limited	NJ	NJ	-
Texas	General	6,099	213,739	2.9%
Texas	Limited	10,306	1,089,570	0.9%
Wisconsin	Limited	NJ	NJ	-

FIGURE 2: CIVIL CASES WITH SELF-REPRESENTED LITIGANTS IN 2016<sup>87</sup>

Missouri and Texas are the only states that consistently report data for both civil and domestic relations cases.<sup>88</sup> For domestic relations cases which are generally known to have more SRLs, only four states reported data to NCSC in 2017.<sup>89</sup> This data deficiency has been properly labeled as a “knowledge gap.”<sup>90</sup> The ability to analyze SRL trends nationally is almost impossible because data at the national level is “scant.”<sup>91</sup>

The known data and research is from researchers and publications produced at the state level or by NCSC. In 2006, the NCSC compiled fragmented statistics from selected states and republished studies on SRLs.<sup>92</sup> Statistics at the state level prior to the economic recession in 2008 showed increasing trends of SRLs. For example, in New Hampshire, 85% of all civil cases at the district court level

86. *CSP DataViewer*, COURT STATISTICS PROJECT, [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx) (last visited Apr. 30, 2020) (select “Civil” tab, followed by data year of “2017,” and then “Civil Cases with Self-Represented Litigants”).

87. *Id.* (select “Civil” tab, followed by data year of “2016,” and then “Civil Cases with Self-Represented Litigants”).

88. This information can be found in the National Center for State Courts data visualization tool, which compiles state court caseloads. *CSP DataViewer*, COURT STATISTICS PROJECT, [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx) (last visited Apr. 10, 2020).

89. *Id.* (only four states reporting percentages of SRLs in domestic relations cases: Indiana 36.80%, Minnesota 85.70%, Missouri 30.80%, Texas 43.20%).

90. Schaffer & Strickland, *supra* note 84.

91. Jona Goldschmidt & Don Stemen, *Patterns and Trends in Federal Pro Se Defense, 1996-2011: An Exploratory Study*, 8 FED. CTS. L. REV. 3, 84 (2015). (“Anyone working in the area of research into pro se litigation knows that court data regarding the phenomenon is scant.”)

92. Herman, *supra* note 4.



involved at least one pro se and 48% at the superior court level.<sup>93</sup> In California, “over 4.3 million court users are self-represented . . .”<sup>94</sup> In Florida, an increased trend in SRLs was noted from 1999–2001 in the 9th Judicial Circuit tracking the family court in one county.<sup>95</sup>

This widespread increase in pro se representation in the civil system has also led to calls for reform.<sup>96</sup> The increase continues to suggest a crisis point labeling an unprecedented number of litigants<sup>97</sup> and a notable rise in family law cases.<sup>98</sup> In approximately seventy-six of the civil cases, “at least one party was self-represented, usually the defendant.”<sup>99</sup>

Few studies have analyzed the impact of the 2008 economic downturn as directly related to the abrupt rise in SRL filings.<sup>100</sup> As such, the question remains whether the improved economy correlates to a downturn in SRL filings post the 2008 economic crisis. Whether an economic downturn is directly related to an increase in SRL filing is still relatively unstudied in a nationally consistent manner. Some data suggests a continued upward trend despite economic changes.<sup>101</sup>

Another way to track the numbers of SRLs is to measure data collected through courthouse self-help centers. The expansion of court-based self-help centers possibly correlates to the rise in SRLs. In 2014, the American Bar Association published “The Self-Help Center Census,” which studied a sampling of self-help centers throughout the country through a snowball sampling to document the rising trend.<sup>102</sup> The survey provided some insight into the approximately 500 self-help centers across the country. Conclusions from that survey pointedly state that courthouse self-help resources are “a vibrant and effective resource addressing the

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93. *Id.* (citing N.H. SUPREME COURT TASK FORCE ON SELF-REPRESENTATION, CHALLENGE TO JUSTICE: A REPORT ON SELF-REPRESENTED LITIGANTS IN NEW HAMPSHIRE COURTS (2005), <http://www.nh.gov/judiciary/supreme/prosereport.pdf>).

94. *Id.* (citing CAL. JUDICIAL COUNCIL TASK FORCE ON SELF-REPRESENTED LITIGANTS, CALIFORNIA STATEWIDE ACTION PLAN FOR SELF-REPRESENTED LITIGANTS (2004), <https://www.courts.ca.gov/documents/selfreplitsrept.pdf>).

95. *Id.* (citing Florida Judge Roger McDonald, showing an increase from 66% in 1999 to 73% in 2001).

96. Murphy, *supra* note 8, at 131 (calling for a review of the unlicensed practice of law rules and more funding sources to address the need).

97. Swank, *supra* note 8, at 376 (reporting that 80 or 90% of family law cases now involve at least one pro se litigant).

98. CAL. JUDICIAL COUNCIL TASK FORCE ON SELF REPRESENTED LITIGANTS, *supra* note 94, at 87 (finding that 82% of all family law cases involved one SRL); Herman, *supra* note 4 (stating that in Colorado in the late 90s equally showed 55% of domestic cases involved a SRL and in Arizona in the early 90s 88% of divorces cases in Phoenix involved an SRL).

99. PAULA HANNAFORD-AGOR ET AL., NAT’L CTR. STATE COURTS, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

100. LINDA KLEIN, ABA COALITION FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS 4 (2010), <https://legalaidresearchnlada.files.wordpress.com/2020/02/aba-coalition-justice-survey-judges-2010.pdf> (citing 62% of the judges surveyed indicated the negative impact upon the party’s case); *see also* Rhode, *supra* note 76, at 531 (describing a new urgency due to the economic recession).

101. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERV., *supra* note 13.

102. *Id.* at 1.

needs of court-users throughout the country.”<sup>103</sup> However, even that study lacks full participation by all states. The Self-Help Census only included twenty-eight jurisdictions<sup>104</sup> with some states more actively participating than others.<sup>105</sup> Less than half of the 500 centers identified responded.<sup>106</sup>

Even with a 50% response rate, this census overwhelmingly supports the conclusion that we have reached a self-help crisis as “nearly 3.7 million people are served by self-help centers annually.”<sup>107</sup> Tragically, many of the centers had to turn away people because they were unable to provide services,<sup>108</sup> the matter was “too complicated,” or “the volume of customers exceeded the center’s capacity.”<sup>109</sup>

The study also addressed the need for limited or full representation with eighty-six of the centers responding that their patrons would benefit from limited representation services, but many also believe that only a small percentage could afford the going legal rate in the area.<sup>110</sup> 60% of the centers indicated their customers would benefit from full representation.<sup>111</sup> Again, sparse data is available to track those who are turned away from self-help centers and whether those who need full representation do eventually find an attorney or decide to self-represent. This lack of data inevitably leaves the profession without a true understanding of current trends or the full appreciation whether a crisis exists. The Self-Help Census generated the first list of centers and is a survey instrument that could be used for future data collection.

Another important aspect ripe to study is the identity of SRLs and whether there is a disparate impact based on gender, ethnicity, and poverty rates of SRLs. Women and minority groups might be more likely to self-represent than others.<sup>112</sup>

In the LSC 2017 study, the “gap” in legal service needs is described as a “gulf.”<sup>113</sup> The gap is “the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.”<sup>114</sup> The study reflects that 86% of the civil legal problems of low-income Americans receive “inadequate or no legal help.”<sup>115</sup> This is not a new trend but one where national data collected and tracked could help analyze how self-representation is directly related to access to justice for low-income individuals or inequality in outcomes based on other factors.

Uniform and consistent reporting by each state would allow for each stakeholder, agency, and researcher to better understand how one geographic area

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103. *Id.*

104. *Id.* at 3.

105. *Id.* at 4 (California provided 80 completed surveys, Illinois provided 44 surveys and Maryland provided 17, while the majority of states either did not complete the survey or only one survey was completed.).

106. *Id.* at 2 (At a 47% response rate, 222 self-help centers responded out of 500 with some states providing higher response rates, such as California and Illinois.).

107. *Id.* at 16.

108. *Id.* at 17 (Sadly, 57% of the self-help centers responded that they had to turn away people).

109. *Id.* at 18.

110. *Id.* at 19–20.

111. *Id.* at 24.

112. Engler, *supra* note 21, at 47 (discussing that self-represented tenants are disproportionately women and racial and ethnic minorities).

113. LEGAL SERVS. CORP., *supra* note 1, at 9.

114. *Id.*

115. *Id.* at 36.

may have a better response versus another. This may allow studies from a data perspective rather than a proprietary response. Shared data allows for more ideas to address systemic issues. The question remains whether a mandate or funding at the federal level is necessary to require state courts to report data to the National Center for State Courts.

*B. Is the increase in filings causing instability or overload to the system with deterioration in the status quo or normal condition?*

SRLs disrupt judicial efficiency and court resources across the country.<sup>116</sup> Undoubtedly, courts have recognized a growing pattern of SRLs. One of the most insightful surveys conducted in 2010 included the perspective of nearly 1200 state trial court judges.<sup>117</sup> The judges identified an increase in pro se litigants within the court system,<sup>118</sup> and the report exposed a trend that “self[-] representation has been growing in most courts over the past decade.”<sup>119</sup> 60% of the judges acknowledged that fewer parties were represented by attorneys and 62% of judges acknowledged that not having an attorney has a negative impact upon the litigant.<sup>120</sup> The survey of 1200 state trial court judges was still limited in data,<sup>121</sup> as only thirty-seven states were included in the survey and from that sample, 293 of the 1175 respondents refrained from identifying their state<sup>122</sup> and only nine states participated in a significant way.<sup>123</sup>

Courtroom confusion is detailed in literature revealing how judges try to balance the delicate nature of remaining neutral while also trying to proceed with the case when a pro se litigant is involved.<sup>124</sup> The negative impact includes problems with failure to present evidence, procedural errors, ineffective witness examination, and improper objections and arguments.<sup>125</sup> Overwhelmingly, 90% of the judges categorized slower procedures as the negative impact upon the court system.<sup>126</sup> Also noted as a challenge is the excess time required by court staff to assist pro se litigants.<sup>127</sup> Notably, 78% of the judges said the court is negatively

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116. Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES J. 16 (2003) (describing in great detail the crisis within the court in how to handle the overload of SRLs and balance judicial ethical rules or SRLs failing to follow rules of procedure, evidence or establishing jurisdiction).

117. KLEIN, *supra* note 100, at 5.

118. *Id.* at 2.

119. *Id.* at 10.

120. *Id.* at 3.

121. *Id.* at 5.

122. *Id.* at 7.

123. *Id.* (a recorded response rate of “Georgia (124), Florida (108), Texas (91), Louisiana (83), New York (74), Minnesota (59), Washington (48), and Tennessee (37)”).

124. *See id.* at 12 (naming instances when the litigant fails to establish evidence or jurisdiction).

125. *Id.* at 4; *see also* Judge Denise S. Owens, *The Reality of Pro Se Representation*, 82 MISS. L.J.: SUPRA 147, 159 (2013) (noting the barriers to SRLs and the lack of the “basic understanding of the court system”).

126. KLEIN, *supra* note 101, at 4.

127. *Id.*; *see also* LLOP, *supra* note 22, at 10 (noting the challenge of SRLs in the court system as requiring “heavy time and emotional demands on clerks and others who deal with the public.”).

impacted.<sup>128</sup> Less than half of the judges admitted that “impartiality of the court may be compromised to avoid injustice in the cases.”<sup>129</sup> Notably, 26% of the judges described the injustice that occurs when one party is not represented as “troubling.”<sup>130</sup> The increase of SRLs was analyzed in response to the 2008 economic downturn. Many thought the 2008 downturn was the reason for a growing trend of SRLs, but research shows more is at play, such as “the chronic underfunding of legal services” and a “growing trend toward self-representation of the middle class.”<sup>131</sup> The call for assistance to address the crisis is not new:

. . . self-represented litigants can be a drain on court resources, judicial efficiency and effectiveness, and pose serious problems to the court’s obligation to maintain neutrality and impartiality. However, to ignore the problem hoping it will go away, or that eventually everyone will hire an attorney, has already proven to be a failing proposition. Not only have self-represented litigants not gone away, they have been increasingly accessing our courts and requesting the access to justice to which they are entitled.<sup>132</sup>

The National Center for State Courts provides several reports with reference to increased filings with suggested procedures for a triage approach.<sup>133</sup> Several reports comment upon the overwhelming stress upon the civil system and the lack of resources to address the issue.<sup>134</sup>

Similarly, the federal system also shows disruption in the context of pro se representation albeit in the criminal system. A 2011 survey of clerks and chief judges on assistance to pro se litigants at U.S. district courts for prisoner and non-prisoner populations revealed concern about the impact of pro se litigation on court staff.<sup>135</sup> The chief judges outlined five major issues present in most pro se cases:

- 1) pleadings or submissions that are unnecessary, illegible, or cannot be understood; 2) problems with pro se litigants’ responses to motions to dismiss or for summary judgment; 3) pro se litigants’ lack of knowledge about the legal decisions

128. KLEIN, *supra* note 100, at 12.

129. *Id.* at 4.

130. *Id.* at 13.

131. *Id.* at 14.

132. *See* LLOP, *supra* note 22, at 12.

133. *Self-Representation Research Guide*, NAT’L CTR. FOR STATE COURTS, <https://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/Resource-Guide.aspx> (last visited Apr. 30, 2020; *see generally* TOM CLARK, RICHARD ZORZA & KATHERINE ALTENER, TRIAGE PROTOCOLS FOR LITIGANT PORTALS: A COORDINATED STRATEGY BETWEEN COURTS AND SERVICE PROVIDERS, <https://www.srln.org/node/184/article-triage-protocols-litigant-portals-coordinated-strategy-between-courts-and-service> (December 2013)).

134. KNOWLTON, *supra* note 15, at 3 (describing the self-representation crisis as having a negative impact on an already overburdened and underfunded court system); ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERV., *supra* note 13, at 18, 26 (explaining that 47% of self-help centers surveyed have had to turn people away because the volume exceeded the center’s capacity to help. Additionally, most self-help centers are staffed by five or fewer workers, many of whom are volunteers).

135. DONA STIENSTRA, JARED BATAILLON & JASON A. CANTONE, ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES vi (Federal Judicial Center 2011), <https://www.fjc.gov/sites/default/files/2012/ProSeUSDC.pdf>.

or other information that would help their cases; 4) pro se litigants' failure to object to testimony or evidence; and 5) pro se litigants' failure to understand the legal consequences of their actions or inactions (e.g. failure to plead statute of limitation, failure to respond to requests for admissions).<sup>136</sup>

The lack of response could escalate problems across wide spectrums of courthouse procedures, outcomes, and substantive areas of law. More national data is necessary to study this disruption and trends for judicial efficiency, expanded court resources, and court statistics regarding process and procedures.

*C. Is the impact causing disruption to procedures or process over during a relatively short period of time which has induced stress upon normal operations?*

On June 20, 2011, the United States Supreme Court's decision in *Turner v. Rogers* reemphasized the need for the judiciary and court systems to address the challenges presented by self-represented litigants.<sup>137</sup> The case considered due process implications of SRLs in the criminal context. However, the decision caused widespread potential deprivation of constitutionally protected rights by courts whenever SRLs appear.<sup>138</sup> The impact of the decision was far-reaching in the civil context prompting court administrators to study the issues of "sufficient fairness and accuracy" when due process is involved and engage in more innovation and training to ensure neutral questioning when a SRL appears in court or to provide more resources.<sup>139</sup> Court management post-*Turner* began to implement initiatives for approved self-help forms, neutral self-help desks, more courtroom services, and discrete representation through unbundled services or more engagement with legal pro bono.<sup>140</sup> A call for a widespread study to collect and analyze this rising trend is still not funded and while civil legal services, court-house administrators, pro bono attorneys, and other stakeholders continue to innovate to provide triage services in order to address the need, a cohesive method to collect and compile data in order to study the impact of such services does not exist.

Another manner to measure the crisis is to analyze specific areas of law and determine whether there is disruption to procedures or processes in that area. There are studies showcasing the surge of SRL cases in family law, domestic violence, child support, guardianship, landlord/tenant, and consumer protection.<sup>141</sup> At a

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136. *Id.* at vii (findings include both civil and criminal cases).

137. *Turner v. Rogers*, 564 U.S. 431 (2011).

138. *Id.* at 441.

139. Richard Zorza, *Turner v. Rogers: Improving Due Process for the Self-Represented*, NCSC, <https://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Courts-and-the-Community/3-9-Turner-v-Rogers.aspx> (last visited Apr. 30, 2020); see also *Module A: Judges, Ethics and the Self-Represented Litigant—The Law Today*, NCSC (Aug. 8, 2013) <https://www.ncsc.org/~media/Microsites/Files/access/Module%20A%20Guide%20Draft%208-13.ashx>.

140. Zorza, *supra* note 139.

141. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERV., *supra* note 13, at 16; see also Swank, *supra* note 8, at 376.

more granular level, more research is needed to analyze the disruption in specific areas of law.

In a revealing article by Russel Engler, he describes in detail the substantive impact in specific areas of law.<sup>142</sup> He reveals that unrepresented litigants suffer unfavorable outcomes even when the law is on their side.<sup>143</sup> His research describes a “stunning regularity with which unrepresented tenants lose in housing courts.”<sup>144</sup> This disparity is also shown in social security, unemployment, and immigration appeal cases.<sup>145</sup> Notably, this article was published in 2010 and we still lack specific data at the national level to answer some of the questions posed in his analysis.<sup>146</sup>

The stigma of appearing as a pro se litigant may have a negative effect with significant outcomes in those cases.<sup>147</sup> Each area of law may provide an opportunity for research to understand how to provide better access or representation. For example, when people are sued by creditors, this may indicate a moment in their life when they assume the additional cost of an attorney is inconceivable and therefore decide to proceed in court on their own. Some scholars have suggested a research technique using a clinical approach to offer legal representation in such debt collection cases.<sup>148</sup>

Another impact to analyze is the emotional or financial toll upon SRLs themselves. In Canada, Dr. Julie Macfarlane conducted a national study of SRLs with replicable tools to collect and measure correlations related to self-representation.<sup>149</sup> Dr. Macfarlane’s study analyzes the personal and social impacts upon SRLs and documents qualitative data describing the stressful impact of appearing in court or the financial consequences of taking off of work to navigate court systems to attend a hearing.<sup>150</sup>

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142. Engler, *supra* note 22, at 74 (reviewing substantive areas of law from housing to small claims to immigration showcasing success rates in each area. Stating “. . . reports are replete with examples of the interplay between the substantive rights and outcomes.”).

143. *Id.* at 75.

144. *Id.*

145. *Id.* at 74.

146. *Id.* at 83 (analyzing beyond case outcomes to rights at stake and risk of errors).

147. Swank, *supra* note 8, at 384 (noting the many perceptions by the bench in “clogging the system” creating an expressed negative bias. Also noting New York’s housing court and systemic issues related to negative perceptions.).

148. See generally Dalié Jiménez, D. James Greiner, and Lois R. Lupica, & Rebecca L. Sandefur, *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. ON POVERTY L. & POL’Y 449 (2013).

149. JULIE MACFARLANE, THE NATIONAL SELF-REPRESENTED LITIGANTS PROJECT: IDENTIFYING AND MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS FINAL REPORT (2013), <https://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> (recognizing the increase in SRL filings and the need for more empirical research with her study selecting three field sites to collect data across demographics directly from SRLs).

150. *Id.* at 17 (describing the stress of court appearances similar to symptoms of post-traumatic stress disorder).

*D. Is the impact negatively affecting the credibility of the court or reputation of the profession?*

Public trust toward the legal profession, the bench, the judicial process as a whole, and any correlation between public trust and SRLs are equally important and relatively unknown topics to explore.<sup>151</sup> Every twenty years, the American Bar Association (ABA) conducts a “Perception of the U.S. Justice System” study with a specific objective to measure the public’s current attitudes and understand what drives their perception about the justice system.<sup>152</sup> In the 1999 study, 80% of the respondents agreed the American justice system is still the best in the world.<sup>153</sup> However, only 14% of the respondents indicated strong confidence in lawyers.<sup>154</sup> The level of knowledge or experience with the judicial system directly influenced people’s confidence.<sup>155</sup> When compared to the previous 1978 study, the confidence level as a whole reflects an increase over the twenty-year time span.<sup>156</sup>

In contrast, however, a study conducted by Harris Poll Research on occupational prestige reflects that the prestige of lawyers fell dramatically over a 30-year period, with the percentage of people who thought they had very great prestige falling from 36% in 1977 to 26% in 2009.<sup>157</sup> No other profession experienced as dramatic a drop in prestige during the period surveyed by Harris.<sup>158</sup> A startling aspect of the 1999 ABA study was the strong disagreement with the statement that “courts try to treat poor people and wealthy people alike” by over half of the respondents.<sup>159</sup> Data is necessary to study court outcomes and SRL outcomes based on income levels to determine if courts treat people differently based on wealth.

More research is needed to provide insight into any correlation between SRLs and an impact upon public trust. Macfarlane’s Canadian study provides a qualitative tool with specific insight that could be replicated in other jurisdictions. In her study, many SRLs described a deep sense of skepticism about the justice system.<sup>160</sup> This consistent sentiment is described as a “failing faith in the justice

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151. LLOP, *supra* note 22, at 13 (noting the “erosion of public trust and confidence in the courts” and how such impact “affects the legitimacy” and impacts our democracy).

152. AM. BAR ASS’N, PERCEPTIONS OF THE U.S. JUSTICE SYS. (1999), [https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/perceptions\\_of\\_justice\\_system\\_1999\\_1st\\_half.pdf](https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/perceptions_of_justice_system_1999_1st_half.pdf).

153. *Id.* at 6. (The 1999 study was the most recent data published at the time of writing.).

154. *Id.* at 7.

155. *Id.* (stating “those having knowledge and experience with the court voice the greatest dissatisfaction and criticism”).

156. *Id.*

157. See *Firefighters, Scientists & Teachers Top List As “Most Prestigious Occupations,” According To Latest Harris Poll: Bankers, Actors & Real Estate Agents Are At The Bottom Of The List*, HARRIS INTERACTIVE (Aug. 1, 2007), <https://theharrispoll.com/wp-content/uploads/2017/12/Harris-Interactive-Poll-Research-Pres-Occupations-2007-08.pdf>.

158. *Id.*

159. See AM. BAR ASS’N, *supra* note 152, at 44, 58.

160. MACFARLANE, *supra* note 149, at 110 (describing SRLs reaching a conclusion that “the justice system is ‘broken’”). Notably, the Canadian civil system is similar to the United States civil court system and therefore relevant to understand growing trends related to SRLs in the U.S.

system” with a widespread belief that lawyers and judges are “not accountable for their behaviors.”<sup>161</sup>

With increased numbers of SRLs, the assumption is that more people have knowledge and experience with the court system. As such, we must question whether our next American study will reflect a similar sentiment of deep skepticism and failing faith.

*E. Is the increase causing a vicious circle of crises  
in other areas and taxing resources?*

The financial cost of rising SRL filings is a concern for all stakeholders: the litigants, legal aid offices, court administration, judges, and state legislatures.<sup>162</sup> The financial impact directly upon SRLs is relatively unknown other than anecdotal accounts documenting how litigants are required to take off of work to attend court or navigate the court system or the countless hours they spend trying to understand their case. Again, Macfarlane’s study sheds some insight on how SRLs may have exhausted their savings on previous legal counsel or the long hours required to work on their case which impacts their full-time employment.<sup>163</sup> The financial toll SRLs experience is relatively unexamined. Another aspect to study is whether there is a less desirable financial outcome when an SRL is involved. The financial toll upon courthouses is seen as court administrations configure employee workflow to address the rising need to provide services. The “threshold” service model is “less than optimal but more than minimal” in providing court-based services to pro se litigants.<sup>164</sup> More self-help centers are in courthouses to provide direct outreach. Court-based self-help centers are predominantly funded through the court’s budget.<sup>165</sup> Only two percent of the funding comes from the federal level for self-help centers,<sup>166</sup> and federal funding for legal service programs have has experienced a cut by of close to one-third over the past decade.<sup>167</sup> The cost necessary to secure funding for representation even at a minimal level is likely over four billion dollars.<sup>168</sup>

At first glance this may seem exorbitant, but the overall cost of SRLs both for the court system and the profession as a whole is largely unknown. Regardless, financial resources to fix an already broken system are lacking. The solution will require funding at multiple levels and incentives or requirements for attorneys to

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161. *Id.* at 111.

162. *See generally* MARY LAVERY FLYNN, ACCESS TO JUSTICE COMMISSIONS: INCREASING EFFECTIVENESS THROUGH ADEQUATE STAFFING AND FUNDING (2018), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_at\\_j\\_commission\\_report.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_at_j_commission_report.pdf).

163. MACFARLANE, *supra* note 149, at 109–10.

164. *See* SUP. CT. OF FLA. COMM’N ON TRIAL COURT PERFORMANCE AND ACCOUNTABILITY, ENSURING ACCESS TO JUSTICE: SERVING FLORIDA’S SELF-REPRESENTED LITIGANTS 18 (2008), <https://www.flcourts.org/content/download/218243/1975404/SelfHelpFinalReport0408.pdf> (describing specific steps courthouses may take to provide assistance to address the need).

165. *Id.* at 9–11.

166. *Id.* at 10.

167. *Id.* at 10; Swank, *supra* note 7, at 381.

168. Swank, *supra* note 7, at 381.



engage in pro bono work to address the need.<sup>169</sup> Knowing what to properly fund requires reliance on data and measuring successful methods.

#### IV. THE KNOWLEDGE GAP

More than a decade into a rising SRL crisis, the actual number of case filings nationally is relatively unknown. Also unknown is how SRL status may shift over the continuation of a case. To close the access to justice gap requires addressing the gap in data. The term “knowledge gap” is referenced by Richard Schauffler and Shauna Strickland in their 2015 article entitled *The Case for Counting Cases*, where they candidly state, “[r]eliable, consistent statistics on the number of cases with self-represented litigants do not exist.”<sup>170</sup> The call for more data is still a relevant and much needed request, but more funding is necessary to collect, analyze, and publish articles to bring attention to the issues.<sup>171</sup> However, complacency seems to best describe the lack of change in the civil system.

To properly understand and label the increased filings of SRLs in the system as a true crisis, the first challenge is to collect information at the state trial court level. The difficulty is the varying court-management systems and the ability to track the changing status of SRLs.<sup>172</sup> Initially, a litigant may file the case as a represented party with counsel fully retained, but as the case progresses, the client may decide to release their attorney, the attorney may withdraw, or the attorney may have only contracted for a portion of the representation. The changing scope of representation is still relatively unstudied<sup>173</sup> and to track this changing status would allow stakeholders to study trends in representation as they relate to SRLs.<sup>174</sup>

The challenge in collecting data is multifaceted: states need to adopt standard vocabulary, intake questions, and uniform data collection practices. The NCSC established definitions and counting rules to specifically analyze cases with SRLs.<sup>175</sup> In 2013, the Conference of State Court Administrators adopted a

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169. See Swank, *supra* note 8, at 382 (describing the widespread lack of funding by legal aid societies, courts, and incentives for the private bar).

170. Schauffler & Strickland, *supra* note 84, at 52.

171. See, e.g., Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485, 486 (2017).

172. Schauffler & Strickland, *supra* note 84, at 52 (recognizing challenges to include the varying ability of court-management systems to track the status of SRLs and also to have a consistent reporting framework.).

173. KNOWLTON, *supra* note 15 (providing a unique insight into the voice of SRLs). See also SHAUNA STRICKLAND ET AL., NAT’L CTR. FOR STATE COURTS, VIRGINIA SELF-REPRESENTED LITIGANT STUDY: DESCRIPTIVE ANALYSIS OF CIVIL DATA IN CIRCUIT COURT (2017), <https://nsc.contentdm.oclc.org/digital/collection/accessfair/id/812> (the most recent in-depth study by Shauna Strickland, Scott Graves, and Richard Schauffler).

174. See Schauffler & Strickland, *supra* note 84, at 52 (allowing “judges and court administrators to see patterns of representation and evaluate whether parties are seeking representation at the most appropriate points”).

175. HANNAFORD-AGOR ET AL., *supra* note 99, at 8–9.

resolution to seek uniform national data reports and partnerships with stakeholders, such as the Court Statistics Committee and the NCSC.<sup>176</sup>

The next challenge is to overcome the voluntary nature of how and when states report data; many may collect data on SRLs, but there is not a requirement to report the data to NCSC every year. A mandate to report would allow more stakeholders to study trends and possible solutions. This type of mandate at the federal level however would require additional funding at the state level.

To better explain the lack of data, the 2013 NCSC “The Landscape” study “developed recommendations based on evidence-based practices to improve civil case processing in state courts.”<sup>177</sup> The data collected was from 152 courts analyzing 925,344 cases, which represents only 5% of state civil caseloads nationally.<sup>178</sup> A national mandate to report to the NCSC would allow for all stakeholders to study trends and to suggest or implement various solutions.

The courthouse self-help desk is one solution to provide direct access to SRLs. In 2008, the Administrative Office of Courts in California issued guidelines for the operation of self-help centers in the courts.<sup>179</sup> These guidelines provide a model for many self-help centers across the country to operate and balance ethical, professional, and practical issues when providing help to pro se litigants. However, whether courthouses are implementing such standards remains to be seen.

Other solutions include technology and innovative solutions to address self-help through the use of artificial intelligence and guided self-help forms; or the triage approach of unbundled services. While this goodwill serves a direct need, many questions remain regarding how the profession, courthouses, and clients are best served in the long term. Ultimately, more data is needed to understand the impact of such solutions upon the rising SRL trend. Without consistent data, specific solutions to minimize the impact should be analyzed with heightened speculation.

We need to study whether the SRL crisis has now transformed into something larger. Maybe into a true disaster within the profession eroding people’s trust in the judicial system?<sup>180</sup> Or, whether SRLs suffer disproportionately negative outcomes in an area of law or outcome of a case.

Comparatively, if such a large increase caused disruption in a corporate setting, crisis management protocols would have been readily enacted in order to minimize the impact. We are over a decade past the 2008 financial crisis and still

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176. FAIRNESS & PUBLIC TRUST COMM., *supra* note 83; *see also* Schaffler & Strickland, *supra* note 84 (describing the Court Statistics Project as an endeavor to create a reporting framework “to ensure states count cases similarly and eliminate apparent differences. . .”).

177. HANNAFORD-AGOR ET AL., *supra* note 99, at i.

178. *Id.* at iii.

179. *See generally* ADMIN. OFFICE OF THE COURTS, GUIDELINES FOR THE OPERATION OF SELF-HELP CENTERS IN CALIFORNIA TRIAL COURTS (reaffirmed 2011), [https://www.courts.ca.gov/documents/self\\_help\\_center\\_guidelines.pdf](https://www.courts.ca.gov/documents/self_help_center_guidelines.pdf).

180. Victor Li, *True Innovation in the Legal Industry Requires Outside Views and Thinking*, *Summit Speakers Say*, ABA L. J. (May 4, 2015), [http://www.abajournal.com/lawscribbler/article/true\\_innovation\\_in\\_the\\_legal\\_industry\\_requires\\_outside\\_views\\_and\\_thinking/](http://www.abajournal.com/lawscribbler/article/true_innovation_in_the_legal_industry_requires_outside_views_and_thinking/) (quoting Sherrilyn Ifill, President & Director, NAACP Legal Defense and Educational Fund, Remarks at the National Summit on Innovation in Legal Services) (“There’s an entire generation now that believes that law is unfair and inequitably applied . . . Public confidence in rule of law is essential. As the public loses confidence in the rule of law, the less they believe me when I tell them to trust in the law. If they don’t believe me, then what recourse will they have?”).

do not fully understand the depth of the civil self-help crisis. The current research is not comprehensive or collected in a manner that allows a deeper dive into the complexity of issues. The truth is that the profession does not know the reason why people are choosing the non-lawyer route and how this choice may have a larger impact upon the profession. Trust is a marker of performance in many industries and is analyzed as an important function in some industries.<sup>181</sup>

To analyze the many issues presented by SRL filings is overwhelming to think about as one sweeping reform effort. Instead, a systematic method to analyze and gather stakeholders to find common solutions is the best method and desperately needed.

## V. THE FIRST STEP TO A SOLUTION IS THROUGH A SYSTEMS APPROACH

### *A. Understanding the foundation to a “systems approach”*

A systems approach at the most simplistic level is an interdisciplinary study of how various systems operate or interact to form a process.<sup>182</sup> This approach requires data collection and study from various perspectives.

A successful “systems approach” tends to:

1. “Identify and gather data about risks, errors and outcomes, including data about near-misses or consequence-free errors;
2. Adopt educational approaches to risk and error so that participants view errors as learning opportunities, rather than professional failures;
3. Value system reform and improvement over operator discipline and disgrace;
4. Implement a strong, and constantly evolving data-driven feedback loop, through which the organization assesses data, experiments with improvement strategies, and evaluates the resultant outcomes, and implements those strategies that demonstrably improve outcomes;
5. Engage front-end actors at the “sharp end” of practice with those at the “blunt end” of the practice, in order to enhance the systemic approach to outcome improvement; and
6. Address risks, errors and negative outcomes in a manner that participants receive as “just.”<sup>183</sup>

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181. See D. Harrison McKnight & Norman L. Chervany, *What Trust Means in E-Commerce Customer Relationships: An Interdisciplinary Conceptual Typology*, 6 INT’L J. ELEC. COM. 35 (2001); see also Gerardo Guerra, Michael Bacharach & Daniel Zizzo, *Is Trust Self-Fulfilling? An Experimental Study* (U. of Oxford, Economics, Discussion Paper No. 76, 2001), <https://ssrn.com/abstract=333481>.

182. Bryan, *supra* note 49, at 20–21 (describing the larger goal of systems thinking to create a learning organization).

183. Metzger & Ferguson, *supra* note 5, at 1088. (The six factors are articulated by Metzger and Ferguson.) (internal citations omitted).

A more complex understanding of a systems approach is to build a learning community with influence from various disciplines with the ultimate goal of empowering an organization, system, or company.<sup>184</sup> This interdisciplinary process builds synergy toward a common vision and reform. Many times, change is unable to find a catalyst because too many are operating based on old assumptions or a proprietary reaction. The human impulse to instinctively guard against change or promote a particular method based on assumptions is natural; however, many industries have minimized human factors to ensure less risk and higher levels of trust.<sup>185</sup> The notion that an organization may easily create a common vision and synergy undervalues the lessons learned from systems thinking; the study of each barrier and required leadership training helps overcome each barrier.<sup>186</sup> In a 2014 article written by Pamela Metzger and Andrew Guthrie Ferguson, the authors describe how other industries transformed based on a systems approach to minimize events that would cause high risk and thus avoid crisis.<sup>187</sup> The article describes how many industries have minimized human factors to ensure less risk and higher levels of trust.<sup>188</sup> Such industries implemented a “systems approach” which is “counterintuitive to professionals who work in high-risk fields.”<sup>189</sup>

The Metzger-Ferguson article first outlines the challenges to developing a systems approach due to the absence of structural incentives, common vocabulary, or technology to support the collection of data.<sup>190</sup> Most importantly, a culture resistant to a “systems approach” or data gathering might emphasize a “human approach” as a better method. Data can be gathered regarding a “human approach” to track the error or failure to a human reason why such error occurred. A systems approach allows for analysis of data trends from a larger comprehensive level. In a culture resistant to a “systems approach” many may articulate that the problems are too “complex or complicated.”<sup>191</sup> Such a response still allows for analysis. A “complicated” problem is one that “consists of multiple problems and challenges” whereas a “complex” problem is one that defies “a ready solution.”<sup>192</sup> High risk professions have implemented a systems approach and as such have better outcomes than before. The aviation and healthcare industries have transformed through this approach, and society is now safer in flight, travel, and medical

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184. Bryan, *supra* note 49, at 21 (outlining the five disciplines in learning organizations as: “(a) systems thinking (b) personal mastery (c) mental models, (d) building shared vision, and (e) team learning”).

185. See Metzger & Ferguson, *supra* note 5, at 1082 (describing “high-profile catastrophes in aviation, chemical and petrochemical production, nuclear power production, space travel, and urban transportation”).

186. Bryan, *supra* note 49, at 21, 22–28 (describing barriers to include eleven allegories to describe the challenges with errors and solutions listed for each challenge).

187. Metzger & Ferguson, *supra* note 5, at 1057, 1082.

188. *Id.* at 1082.

189. *Id.* at 1084 (describing how a “person,” “human,” or “individual” approach assumes it is better to locate the person who is linked to the error).

190. *Id.* at 1062.

191. Metzger & Ferguson, *supra* note 5 at

192. *Id.* at 1089–90 (citing ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT 48–49 (2009)).

procedures because the systems, vocabulary, and principles now in place to collect data analyze and minimize risk.<sup>193</sup>

Comparatively, Metzger and Ferguson suggest a systems approach as necessary in the criminal justice system describing specific steps. The first step is to “identify and gather data about risks, errors and outcomes, including data about ‘near misses’ and consequence free errors.”<sup>194</sup> The next step is described as a reform movement to instill the values of reform and improvement rather than discipline and disgrace.<sup>195</sup>

A strong system of data collection is necessary; this data collection should evolve as organizations assess for improvement.<sup>196</sup> During the next process of a systems approach, evaluation of outcomes with strategies linked to improved outcomes is essential.<sup>197</sup> The need to engage people in the front-end of the process toward reform is important as stakeholders address risks and errors, and consider possible negative outcomes.<sup>198</sup> The participants must be part of the solution even if negative outcomes are inevitable, as they must perceive the outcome as “just.”<sup>199</sup> It is during this critical time when stakeholders begin to adopt approaches toward reform because they believe any errors in the system are learning opportunities and not personal failures.<sup>200</sup> This shift toward a learning culture is an important part of a systems approach.

Movements within the criminal justice system have gathered stakeholders who are present in dialogue and are part of a brainstorming session with the collective goal toward reform.<sup>201</sup> In a recent trend for more data-driven approaches to address the underfunding of public defender offices and improve outcomes relevant to criminal defense, a data driven systems approach allows researchers to analyze outcomes similar to other industries.<sup>202</sup>

### *B. Identifying stakeholders*

At the beginning of a systems approach, identifying stakeholders is critical. Stakeholders are those who are interacting with SRLs and may understand the impact of the crisis and want change within the system and who are willing to share a common dialogue. Each stakeholder may have a different perspective for use for data collection. In the civil context, specifically in regards to the SRL crisis and as identified in the IAALS study, “Cases Without Counsel,” the identified stakeholders include, “academics, social scientists, judges, psychologists, court

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193. *Id.* at 1087–88.

194. *Id.* at 1088.

195. *Id.*

196. Metzger & Ferguson, *supra* note 6, at 1088.

197. *Id.*

198. *See id.*

199. *Id.*

200. *Id.*

201. *See, e.g.,* Ellen S. Podgor, *The 2018 Florida Bar Criminal Justice Summit: A First Step in Improving Florida’s Criminal Justice System*, 93 FL. BAR. J. 8 (2019).

202. *See id.* at 1089; *see also* Pamela R. Metzger, *Me and Mr. Jones: A Systems-Based Analysis of a Catastrophic Defense Outcome*, 78 ALB. L. REV. 1261 (2014) (describing the widespread latent errors found in those being detained).

administrators, private practitioners, and self-represented litigants.”<sup>203</sup> Each stakeholder provides a unique perspective to truly understand the issues and create a culture of learning. Most importantly, the stakeholders have access to common data gathering and can analyze the data with a specific objective toward reform. Currently, some of the named stakeholders may gather, but the data remains fragmented and they are unable to study in a comprehensive manner. A mandated comprehensive collection of data allows for a large-scale analysis and hypotheses, solutions, or isolation of variables in order to construct a systems approach.

*C. The need for legislation, funding and incentives.*

To create systems of state trial court data collection requires legislation, funding, or a federal mandate. While the SRL crisis continues to worsen, federal funding for legal aid has decreased.<sup>204</sup> Funding sources may include nonprofits or soft bodies who are more agile to respond rather than to wait for legislatures. State or federal legislatures could also incentivize states to report by offering money to courthouses willing to share data consistently.

Imagine if there was a reporting system in place twenty years ago. By now, our civil cover sheets would have common vocabulary to easily identify SRL cases or technology to track when litigants decide to represent themselves. The same technology would track updates when SRLs decide to hire an attorney. Or through questionnaires and technology would track court appearance or if the case resolves to provide feedback throughout the process. This would allow both qualitative and quantitative data about when and why someone decides to represent themselves.

If the legal field applied crisis management principles two decades ago and implemented a systems approach, we would have already collected this micro-data to analyze specific trends. We would be able to specifically understand what types of cases or geographic areas have increased numbers of SRLs and by what percentage. We would have analyzed that data against already existing measurable outcomes published by the National Center for State Courts or bar associations to isolate hypotheses, such as an increase or decrease of public trust toward the court system or the profession. Sadly, we are well within two decades of noticing an increased trend and still remain complacent. We accept the term “crisis” but fail to take steps to limit the damage.

*D. Possible questions to study the SRL crisis in a systematic manner*

To study the SRL crisis and implement data collection, a systems approach includes the chronology of steps as outlined above. Metzger and Ferguson outline successful approaches used in other high-risk fields. One goal is to “[i]dentify and gather data about risks, errors and outcomes including data about near misses and consequence-free errors.”<sup>205</sup> In the SRL context, some risks and errors could be cured by using a common vocabulary which would help when reporting data. A

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203. KNOWLTON, *supra* note 15, at 5.

204. Rhode, *supra* note 80, at 533.

205. Metzger & Ferguson, *supra* note 5, at 1088 (citing Paul Barach & Stephen Small, *Reporting and Preventing Medical Mishaps: Lessons from Non-Medical Near Miss Reporting Systems*, 320 BRIT. MED. J. 759, 759 (2000)).

uniform civil cover sheet or commonly used questionnaires would help to collect similar responses which may provide insight. Such collection of data may help answer questions such as:

1. The time or efficiency of initial filing to final dissolution on SRL cases to analyze whether there is a difference in efficiency or process when an SRL is involved. While some literature suggests an overall slower court docket more data is needed to prove SRLs have caused this impact.
2. Data on specific areas law when an SRL is involved and whether the outcome for that case is in the SRLs favor or if there is a trend that SRLs may have a negative impact on the outcome of the case.
3. Data to analyze the margin for errors on SRL cases, specifically whether such errors have a direct negative impact in cases involving SRLs.
4. Data to compare historic analysis of the areas of law and how legal issues may have evolved through an appeal process or rehearing requests to help shape the legal issue and whether the SRL crisis has disrupted the evolution of legal issues in such areas of law.
5. Data analyzing trends in public trust toward the courthouse and the profession as a whole and whether there is any correlation to the increase trend in of SRLs.
6. Data directly collected from SRLs themselves identifying both qualitative and quantitative issues related to the civil system and their decision to pursue self-representation.
7. Whether the economy has a direct impact on the rise of SRL filings.

To implement a systems approach, another important step includes an educational mission to assess the risks and errors in a manner where participants view them as opportunities to learn rather than professional failures.<sup>206</sup> Imagine a common educational symposia where all stakeholders surrounding the SRL crisis are able to exchange ideas based on national reported data. Currently, most conferences are organized around specific areas or siloed with only one group of stakeholders who exchange ideas within their own purview. For example, court administrator conferences, judicial conferences, or academic conferences rarely have time for a collaborative think-tank session with all parties at the table. A well-designed conference specifically dedicated to civil-SRL issues with invited stakeholders to discuss would allow for a more interdisciplinary exchange.

One main goal of a systems approach is to define what would constitute success among all stakeholders. Each stakeholder may have their own idea of success, therefore, finding commonality as a successful outcome allows for the group to work together toward a common vision. Is there a particular vision for shared success in the SRL context? Would the right to counsel in a civil system be part of that vision?

Another goal of a systems approach includes minimizing fear or resistance. Many may argue that the SRL crisis is too complicated or complex to fully understand why people are deciding to go the non-lawyer route. Such an articulation may showcase a cultural resistance and a barrier to implement change. Other industries have faced

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206. *Id.* at 1088.

similar resistance but through a systems approach everyone is able to analyze from a scientific standpoint rather than an emotional response.

States may not want to report data out of fear of what it may reveal. A true impact upon the court system could expose larger issues related to disparate outcomes, overall injustice delivered from the bench or implicit bias against SRLs. The data may also showcase a class of justice or injustice and the disproportionate impact between the rich and poor. The judiciary and court administrators may fear that data would expose negative outcomes or showcase an implicit bias that might influence judicial decision-making when interacting with SRLs. Other stakeholders may fear more competition for funding sources based on grant numbers or funding goals. The overall goal of a systems approach is to minimize such fears and to work toward the common success measure.

Another goal includes implementing a “value system for reform and improvement over operator discipline and disgrace.”<sup>207</sup> This step requires more funding to provide incentives for reform efforts that track improvement toward the articulated outcomes. This also requires a culture shift to have all stakeholders focus on improvement rather than feeling vulnerable about what the data might expose.

One success measure for a systems approach is to “implement a strong, and constantly evolving data-driven feedback loop, through which the organization assesses data, experiments with improvement strategies, and evaluates the resultant outcomes, and implements those strategies that demonstrably improve outcomes.”<sup>208</sup> Achieving this step requires annual reporting to one central shared database. An open source database that provides access to all stakeholders to analyze the data is essential. Similar to reporting crime on campus or health issues reported to the Center for Disease Control, SRL data should require reports from all states. Shared data would allow for courts, legal aid offices, judges, and academics to understand how an idea worked in one jurisdiction and analyze how other jurisdictions might implement. Naturally, stakeholders are more apt to adopt ideas when they hear about success from another jurisdiction.

In a systems approach, another measure of success is to “engage front-end actors at the ‘sharp end’ of practice with those at the ‘blunt end’ of the practice, in order to enhance the systemic approach to outcome improvement.”<sup>209</sup> Essentially, those in the trench who provide services to SRLs are able to report back; and those who analyze the trends or implement administrative procedures have direct data from the field. In the self-help context, bar associations, the bench, court administrators, and clerk offices must hear from legal aid offices or judges who directly serve SRLs. A court administrator cannot implement new procedures without the input from the judiciary and legal aid offices reporting back how the

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207. *Id.* (citing Eileen Munro, *Improving Safety in Medicine: A Systems Approach*, 185 BRIT. J. PSYCH. 2, 3 (2004)).

208. *Id.* (citing Paul Barach & Stephen Small, *Reporting and Preventing Medical Mishaps: Lessons from Non-Medical Near Miss Reporting Systems*, 320 BRIT. MED. J. 759, 759 (2000)); see generally GAIN WORKING GROUP E, FLIGHT OPS/ATC OPS SAFETY INFORMATION SHARING, A ROADMAP TO JUST CULTURE: ENHANCING THE SAFETY ENVIRONMENT (2004).

209. Metzger & Ferguson, *supra* note 5, at 1088 (describing how in medicine the “blunt end” is the process which is separate and away from the patient) (internal citation omitted).



process might impact SRLs. All stakeholders would process the data together and engage in study to discover solutions.

Lastly, a successful systems approach requires stakeholders to “address risks, errors, and negative outcomes in a manner that participants perceive as ‘just.’”<sup>210</sup> It is important that each stakeholder understand the benefit of analyzing trends that are less favorable in a respectful manner in order to correct and improve all systems. Healthy conversations around how to improve the system requires some vulnerability to admit the data is not positive. Then, the ability to share and brainstorm without judgment in a protected manner builds more momentum for stakeholders to willingly participate because they understand reform requires vulnerability and movement toward a just outcome.

## VI. CONCLUSION

Imagine that the mother of three young children visiting the courthouse in her time of personal emergency instead finds a fully functioning self-help office with a staff of attorneys or law students able to assist and take her case. She no longer needs to bounce one child on her knee and fill out a self-help form, but instead answers questions by law students trained to understand the legal issues, who then work with an attorney to file the appropriate pleadings to secure relief for her. She walks out of the courthouse with less stress and a more positive perception of the civil justice system. She now views the profession as one working toward public good with a duty similar to the Hippocratic Oath in medicine—to help those in need.

To achieve progress toward this vision requires the profession to focus on the voice of the SRL foremost and then create a shared space with all stakeholders to work collaboratively toward a common vision. The first step is less complacency. More movement is necessary to require states to report data and then to convene those interested and willing to work toward change. Change does not dictate a particular order but instead a common interest and commitment to the end goal. The complacency for the past two decades is not sustainable for our profession or the surmounting need which is upon us.

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210. *Id.*