

March 2016

## Lippman's Law: Debating the Fifty-Hour Pro Bono Requirement for Bar Admission

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### Recommended Citation

Justin Hansford, *Lippman's Law: Debating the Fifty-Hour Pro Bono Requirement for Bar Admission*, 41 Fordham Urb. L.J. 1141 (2014). Available at: <https://ir.lawnet.fordham.edu/ulj/vol41/iss4/2>

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**LIPPMAN’S LAW:  
DEBATING THE FIFTY-HOUR PRO BONO  
REQUIREMENT FOR BAR ADMISSION**

*Justin Hansford\**

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*It is the legal profession’s commitment to equal justice and to the practice of law as a higher calling that has made service to others an intrinsic part of our legal culture.<sup>1</sup>*

### INTRODUCTION

Today in the United States, the richest country in the world, you can lose your home, your financial independence, and even your child as a result of a civil court hearing where your opponent has access to legal counsel and you do not. Astonishingly, it is not hyperbole to say that in New York courts this injustice happens almost every time. A 2010 study confirmed that ninety-nine percent of tenants are unrepresented in eviction cases in New York City, ninety-nine percent of borrowers are unrepresented in consumer credit cases, and ninety-seven percent of parents are unrepresented in child support matters.<sup>2</sup> In contrast, it is estimated that eighty-five percent of the landlords in New York Housing Court are represented by counsel.<sup>3</sup> One might surmise that an even higher percentage of financial institutions have lawyers representing them in consumer credit hearings. And if child welfare seeks to remove a parent’s custody, the government always has representation. In these cases where lawyers litigate against laymen, Judges have reported that they have seen unrepresented litigants lose claims that were meritorious, and they would have won if they had understood the law or knew how to present the evidence correctly.<sup>4</sup>

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1. Jonathan Lippman, Chief Judge, N.Y. Court of Appeals, Address at Law Day 2012 Ceremony at the New York Court of Appeals 1 (May 1, 2012), *available at* <http://www.nycourts.gov/whatsnew/Transcript-of-LawDay-Speech-May1-2012.pdf>.

2. TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2010), *available at* <https://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf>.

3. Harvey Gee, *From Hallway Corridor to Homelessness: Tenants Lack Right to Counsel in New York Housing Court*, 17 GEO. J. ON POVERTY L. & POL’Y 87, 88 (2010); *see also* Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have Rights to Counsel*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 699, 704 (2006) (citing a 1993 study which found that “counsel represented fewer than 12% of the tenants appearing in the Housing Court, while over 97% of the landlords were represented”).

4. TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *supra* note 2, at 1.

In the context of this desperately unjust state of affairs, the Honorable Jonathan Lippman, Chief Judge of the New York Court of Appeals, announced on May 1, 2012 that New York would become the first state to require its bar applicants to complete fifty hours of pro bono service as a condition for bar admission.<sup>5</sup> Judge Lippman explained that this additional requirement would help the New York Bar reach multiple goals, helping the profession grapple with the continuing and growing gap in access to justice, preparing law students to enter the legal workforce with “practice ready” practical skill sets, and most importantly, according to Judge Lippman, instilling in new lawyers a more pro bono and public service oriented sense of professional identity:

If pro bono is a core value of our profession, and it is—and if we aspire for all practicing attorneys to devote a meaningful portion of their time to public service, and they should—these ideals ought to be instilled from the start, when one first aspires to be a member of the profession.<sup>6</sup>

Judge Lippman certainly fits the definition of a “Cause Judge,” his cause being the fight to close the gap in access to justice, and his strategy being the use all of the resources at his disposal to create a more just legal system.<sup>7</sup> With the introduction of Lippman’s law, however, Judge Lippman finds himself in the curious position of advocating for altruism through self-interest—in other words, persuading law students to serve others in part because it will help them gain more “practice ready” skills for their own careers and improve the quality of their own sense of professional identity. This Article explores the problems that this contradiction creates, considering the bona fides of Lippman’s law and the broader questions it raises.

These broader questions include the following: Is service to others actually an intrinsic part of our legal culture? Should it be? Why or why not? If pro bono is a duty, why enforce the duty only on law students and not on the practicing bar? How does Lippman’s law define Pro Bono, and how should it, in order to meet the stated goals of the rule? In terms of reaching those stated goals, will any of this actually work?

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5. Lippman, *supra* note 1 at 4.

6. *Id.* at 4–5.

7. See Justin Hansford, *Cause Judging*, 27 GEO. J. LEGAL ETHICS 1 (2014).

Part I of this Article reviews the longstanding debate as to whether pro bono is a duty or charity. If lawyers do have a duty to engage in public service and bridge the access to justice gap, it seems practical for the profession to go beyond triage and instead to focus on the root causes of the access to justice gap. More could be accomplished by focusing on the crises of economic injustice, racial justice, and democratic participation that brought us here. Part II more specifically articulates why these are the crisis areas, and offers some recommendations for addressing them. Part III explores the question of whether this requirement will meet its stated goals, particularly its most prominent goal of instilling in bar applicants a sense of professionalism that values public service. Ultimately, while a strong argument can be made for a pro bono duty, in practice the rule as currently formulated does not go far enough to achieve its stated goals. Only a more targeted program with more supervision, oversight, and feedback—and ultimately, mandatory pro bono for practicing lawyers—would do that.

### I. DUTY OR CHARITY?

Soon after Lippman's Law Day speech, he appointed an advisory committee that issued a report in September of 2012 further articulating this vision.<sup>8</sup> Later that month, Judge Lippman entered an order to amend the Rules of the Court of Appeals to add, "§ 520.16 Pro Bono Requirement for Bar Admission," and the requirement went into effect on January 1, 2013.<sup>9</sup> As a result, beginning January 1, 2015, no one will be admitted to the New York Bar unless they have completed fifty hours of pro bono service.<sup>10</sup>

This rule has already had an impact extending beyond the nearly 10,000 annual bar applicants in New York. Courts and state bar associations in California, Connecticut, Montana, and New Jersey have already begun formal inquiries into the possibility of adopting the requirement, and it seems inevitable that eventually every state in

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8. ADVISORY COMM. ON N.Y. STATE PRO BONO BAR ADMISSION REQUIREMENTS, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK AND THE PRESIDING JUSTICES OF THE FOUR APPELLATE DIVISION DEPARTMENTS 3 (2012), available at <http://www.nycourts.gov/attorneys/probono/ProBonoBarAdmissionReport.pdf>.

9. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (West, Westlaw through N.Y. State Register, vol. XXXVI, iss. 16, dated Apr. 23, 2014).

10. *New York Bar Admission: Pro Bono Requirement FAQs*, NYCOURTS.GOV (Feb. 10, 2014), <http://www.nycourts.gov/attorneys/probono/FAQsBarAdmission.pdf>.

the country will have to take a position on this issue.<sup>11</sup> It has sparked a national conversation—and a national controversy.

Although the highly passionate nature of the debate would suggest that the idea of pro bono as an enforceable requirement for bar admission is unprecedented and cataclysmic, that is not so. Of the 176 law schools that offer pro bono opportunities, thirty-nine already make pro bono service a requirement for graduation.<sup>12</sup> And graduation remains a requirement for bar admission in most states in the country, meaning for law students at these schools, pro bono is already an admission requirement.

The real clash of worldviews here lies hidden beneath the surface. Literally hidden—the minutes of the meetings that would constitute the legislative history of rule have been sealed from the public, and will remain so for an indefinite time.<sup>13</sup> But we can glean the positions of the stakeholders here from public statements and from the decades of debate that has raged over the related question of whether pro bono should be mandatory for practicing lawyers. Those who oppose the requirement most vociferously believe, either on principled theoretical grounds or on the grounds of tradition, that pro bono is charity—a public service donation that one should choose whether or not to provide based on the ruminations of one’s own conscience.<sup>14</sup> To the contrary, by issuing this mandate Judge Lippman has firmly taken the opposing position that lawyers have a mandatory duty to engage in pro bono, whether they like it or not. Which side is right?

### A. Theoretical Arguments for Pro Bono as Charity

Upon the announcement of the rule, University of Colorado law professor Paul Campos called it “preposterous” and “the platonic

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11. ABA STANDING COMMITTEE ON PRO BONO & PUB. SERV., NEW YORK’S 50-HOUR PREADMISSION PRO BONO RULE: WEIGHING THE POTENTIAL PROS AND CONS 9–11 (2013), available at [http://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/ls\\_pb\\_preadmission\\_pro\\_bono\\_requirement\\_white\\_paper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_preadmission_pro_bono_requirement_white_paper.authcheckdam.pdf).

12. *Chart of Law School Pro Bono Programs*, A.B.A. (Sept. 23, 2013), [http://apps.americanbar.org/legalservices/probono/lawschools/pb\\_programs\\_chart.html](http://apps.americanbar.org/legalservices/probono/lawschools/pb_programs_chart.html).

13. The minutes of these meetings will not be publically released. Email from Justin Hansford to ProBonoRule@nycourts.gov (Mar. 14, 2014) (on file with author).

14. See Debra D. Burke et al., *Mandatory Pro Bono: Cui Bono?*, 25 STETSON L. REV. 983, 999–1006 (1996) (describing First Amendment objections); Debra Burke, Reagan McLaurin & James W. Pearce, *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61, 73–74 (1994).

form of limousine liberal idiocy.”<sup>15</sup> He argued that Judge Lippman was “using professional licensing requirements to enforce [his] political desires,” specifically his desire to force “rich people to transfer wealth to poor people.”<sup>16</sup> Campos wasn’t alone in his passionate critique of the rule. Ronald Rotunda, author of one of the most prominent textbooks on legal ethics, argued that the large gap in access to justice did not justify the creation of this requirement.<sup>17</sup> According to Rotunda, “When the government deems the poor in need of food stamps, it provides food stamps; it doesn’t order the grocer to give them food as a condition of his business license. Why should legal services be different?”<sup>18</sup> Additionally, Susan Cartier Liebel, Founder and CEO of Solo Practice University, argued that Lippman’s law “definitely does not fit the description of pro bono. It is classic indentured servitude.”<sup>19</sup>

These criticisms rest on arguments made by past opponents of mandatory pro bono for practicing lawyers. Campos’ argument echoes the arguments of critics who believe mandatory pro bono coerces lawyers into representing the poor in a project of the political left.<sup>20</sup> If law practice is political speech, so the argument goes, then pro bono legal representation itself is leftist political speech, and it would follow that forcing a lawyer to engage in political speech against their will would violate their First Amendment rights.<sup>21</sup> On the extreme end, some have argued that, because legal work is labor, if pro bono becomes mandatory it would be a violation of individual

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15. Paul Campos, *Clueless Baby Boomer Judge Orders Poor Lawyers to Subsidize Rich Ones*, INSIDE L. SCH. SCAM (May 2, 2012), <http://insidethelawchoolscam.blogspot.com/2012/05/clueless-baby-boomer-judge-orders-poor.html>.

16. *Id.* (the author somewhat contradicts himself by arguing both that law students are too poor to contribute their time, and then arguing that forcing them to contribute is forcing rich people to transfer wealth to poor people).

17. Ronald Rotunda, *The Wrong Legal ‘Help’ for NY’s Poor*, N.Y. POST, June 1, 2012, <http://nypost.com/2012/06/01/the-wrong-legal-help-for-nys-poor>.

18. *Id.*

19. Susan Cartier Liebel, *NY’s New Lawyer Mandatory Pro Bono is Indentured Servitude*, SOLO PRACTICE UNIV. (May 2, 2012), <http://solopracticeuniversity.com/2012/05/02/nys-new-lawYER-mandatory-pro-bono-is-indentured-servitude/#comment-37487>.

20. John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 HOFSTRA L. REV. 1229, 1269 (1991) (criticizing mandatory pro bono on behalf of those “individuals who doubt the claims of the war on poverty”).

21. Kendra Emi Nitti, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909, 920 (1996).

liberty and would constitute involuntary servitude in violation of the Thirteenth Amendment.<sup>22</sup> It would be slavery.

These constitutional arguments are unpersuasive. The Supreme Court has held that legal representation is not speech because attorneys do not affirm the opinions of the clients they represent.<sup>23</sup> Also, an observer is unlikely to interpret pro bono as an endorsement of the political left, especially if it is obligatory.<sup>24</sup> On the slavery argument, courts have found that the Thirteenth Amendment prohibits only physical restraint or a threat of legal confinement.<sup>25</sup> Even if legal representation is labor, sanctions for refusing to engage in this mandatory pro bono requirement at worst would result in failure to obtain a license to practice law in that state, a penalty that pales in comparison to the bodily harm faced by those who could reasonably fear legalized rape, murder, or maiming in retaliation for failure to comply with work demands in the context of enslavement.<sup>26</sup>

These constitutional arguments are further muted by the restriction of Lippman's law to bar applicants. Because the requirement involves only bar applicants and not lawyers, and has educational and evaluative purposes as a primary justification, the service done under Lippman's law is no more forced labor or forced speech than the bar exam requirement or being asked to brief a case in law school. Indeed, just as students pay tuition fees to receive their education and bar application fees to sit for the bar, it would be perfectly legitimate to have students pay a small fee for administrative costs associated with administering the pro bono requirement. In fact, students may find that the professional identity and skills training they receive under Lippman's law may compete in usefulness with law school courses that they paid tens of thousands of dollars for.

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22. See Roger Crampton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1132 (1991).

23. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991) (citing *Cohen v. Hurley*, 366 U.S. 117, 126, (1961)).

24. See Mary Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3. B.U. Pub. Int. L.J. 215, 223 n.20 (1993) (citing *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 996–97 (3d Cir. 1993) (rejecting a First Amendment challenge to a high school program requiring sixty hours of community service as a condition of graduation on similar reasoning)).

25. See Deborah Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2422 (1999) (citing *Unites States v. Kozminski*, 487 U.S. 931, 952 (1980)); *Buchanan v. City of Bolivar*, 99 F.3d 1352, 137 (6th Cir. 1996)).

26. *Id.* (citing *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 704–05 (D.C. Cir. 1984)).



A less doctrinal concern is that, once pro bono becomes mandatory, it loses its moral significance and altruistic character. According to Rotunda, “*Mandatory* pro bono, like mandatory charitable donation, is an oxymoron.”<sup>27</sup> Some lawyers and law students take pleasure in pro bono in part because it is an expression of their altruism. For them, a mandatory pro bono requirement might mean that they would lose some of the sense of heightened self-esteem and satisfaction that comes from the knowledge that they have served the public in a way that goes above and beyond the requirements. They would do the work “perhaps without some of the sense of professional fulfillment and pride they might otherwise have had.”<sup>28</sup> We can assuage this concern, however, by remembering that these lawyers who mourn the loss of their altruistic motives can simply do more than the fifty hours, and by going beyond the mandatory minimum they can regain the satisfaction that comes from acting altruistically.

Rotunda’s objection remains: is the crisis in access to justice sufficient grounds for Lippman to assert that a pro bono duty exists?<sup>29</sup> In Lippman’s law day speech, he seems to suggest that the implementation of the fifty-hour rule is appropriate in part because of the huge gap in access to justice that has only broadened in the wake of the financial crisis.<sup>30</sup> According to Rotunda, it does not follow that, simply because a great need for legal services for the poor exists, aspiring lawyers should have to shoulder the burden of closing the gap.<sup>31</sup> Societal need aside, “Owners of grocery stores are not required to provide free food to the poor, landlords are not required to provide free housing, and members of other licensed professions—from plumbers to physicians—are not required to provide free services . . . .”<sup>32</sup> Instead, when needs like this arise, the government taxes the entire population to provide for the needy. When the government implements these taxes, the burden falls on the entire society instead of simply to service providers. In fact, because grocers and landlords are fully compensated for their services, these tax funds

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27. Rotunda, *supra* note 17 (emphasis in original).

28. Barlow F. Christensen, *The Lawyer’s Pro Bono Publico Responsibility*, 6 AM. B. FOUND. RES. J. 1, 12 (1981).

29. Rotunda, *supra* note 17.

30. Lippman, *supra* note 1, at 2.

31. Rotunda, *supra* note 17.

32. Joseph R. Tybor, *Flap Over Working for Free*, NAT’L L. J., June 15, 1981, at 1, 24 (quoting brief prepared by Skadden Arps on behalf of the Legal Services Corporation).

ultimately direct more paid work to them and increase their income stream. Shouldn't the same rules apply for lawyers? And if society decides to continue to lower government expenditures for legal services for the poor, is it the place of the legal community to disagree?<sup>33</sup>

The problem with the analogy of law practice to other forms of trade is that the legal product is created by the state.<sup>34</sup> According to Steven Lubet and Cathryn Stewart's "Public Assets Theory," the government provides the lawyer with the product, the law, as well as exclusive access to a number of publicly created commodities, such as the duty of loyalty and the lawyer-client confidentiality privileges, which lawyers then sell to clients.<sup>35</sup> The lawyer did not create these goods, the government did. Perhaps most significant amongst these government-created goods is the unauthorized practice of law regulations, through which the state has given lawyers monopoly power over law practice.<sup>36</sup> In exchange, the state has the right to "condition its handiwork on the fulfillment of the monopoly's legitimate purpose by its beneficiaries."<sup>37</sup> In other words, because the government has given all of these goods to lawyers, it can demand in return that the practice of law continues to function not simply as a business, but as a form of public service, meaning that the profession can be mobilized to meet the needs of the public in difficult times.

In contrast, if lawyers, like grocers and plumbers and landlords, disbursed their services based on financial considerations alone, justice would be for sale.<sup>38</sup> This model would be "antithetical to the egalitarian values underlying our justice system."<sup>39</sup>

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33. Congressional funding for legal services has dropped from a peak of approximately \$854 million in fiscal year 1979, the year before Reagan took office, to \$348 million in fiscal year 2012, approximately a fourteen percent drop from the \$412 million in fiscal year 2011. See *Funding History*, LEGAL SERVS. CORP., <http://www.lsc.gov/congress/funding/funding-history> (last visited Mar. 5, 2014).

34. David Luban, *Mandatory Pro Bono: A Workable (and Moral) Plan*, 64 MICH. BUS. L.J. 280, 282 (1985).

35. See generally Steven Lubet & Cathryn Stewart, *A Public Assets Theory of Lawyers' Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1249–62 (1997).

36. In the United States, attorneys have much more of a monopoly over legal services than attorneys in other countries. See DEBORAH RHODE ET AL., LEGAL ETHICS 805–06 (6th ed. 2013).

37. Luban, *supra* note 34, at 282.

38. Some argue that in some sense this state of affairs already exists. See, e.g., Michael J. Sandel, *What Isn't for Sale?*, ATLANTIC, (Feb. 27, 2012), <http://www.theatlantic.com/magazine/archive/2012/04/what-isnt-for-sale/308902>.

39. Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 STAN. L. REV. 1695, 1696 (1993).

### B. Traditional Arguments for Pro Bono as Charity

Supporters of Pro Bono as charity also argue for their perspective on the grounds of tradition. As far back as the thirteenth century, Saint Thomas Aquinas reasoned, “He that lacks food is no less in need than he that lacks an advocate. Yet he that is able to give food is not always bound to feed the needy. Therefore neither is an advocate always bound to defend the suits of the poor . . . .”<sup>40</sup> Later, early European lawyers in the fifteenth century took oaths pledging “[n]ot to reject . . . the cause of the weak . . . or the oppressed.”<sup>41</sup> This seems to indicate some progression towards a more duty based approach to pro bono, although even this oath suggests that lawyers should not reject pro bono cases when brought to them, not creating a duty to seek out and procure pro bono work.

As Tigran W. Eldred and Thomas Schoenherr discuss in *The Lawyer’s Duty of Public Service: More than Charity?*, the dominant view in the United States has always “understood pro bono work to be an act of personal charity.”<sup>42</sup> The most prominent legal ethicists of the nineteenth century, David Hoffman and Judge George Sharswood, seemed to share the view that although pro bono service was desirable, “no enforcement mechanisms beyond moral compulsion and the threat of personal dishonor” should be used to encourage it, making it a matter of personal conscience.<sup>43</sup> In 1908, the ABA released its canons of ethics. It did little to advance the notion of an enforceable pro bono obligation, as it did not even mention the possibility of a pro bono requirement.<sup>44</sup>

In the following decades, local bar associations arose that allowed lawyers interested in pro bono to take on cases without a fee.<sup>45</sup> The

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40. Jonathan Macey, *Mandatory Pro Bono: Collective Discharge of Duty or Compelled Free Service?*, 77 CORNELL L. REV. 1115, 1116 (1991)) (citing 2 THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS 274 (Fathers of the English Dominican Province trans., 1918)).

41. Judith L. Maute, *Changing Conceptions of Lawyers’ Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 98 (2002).

42. Tigran W. Eldred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More than Charity?*, 96 W. VA. L. REV. 367, 374 (1994) (citations omitted).

43. Maute, *supra* note 41, at 105 (quoting Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV., 471, 497 (1998)).

44. Eldred & Schoenherr, *supra* note 42, at 379.

45. See Alan Houseman, *Legal Aid History*, in POVERTY LAW MANUAL FOR THE NEW LAWYER 21 (Nat’l Ctr. on Poverty Law ed., 2002), available at <http://web.jhu.edu/prepro/law/Pre-Law.Forms.WordDocs/Public.Interest.Law.1.pdf>.

ABA did not address the issue in depth until the 1950s, when a Joint Conference of the ABA and the AALS issued a report on the state of professional responsibility. The report complained that although the “moral position of the advocate” was at stake on the question of pro bono, at the time “spontaneous generosity” accounted for most of the actual pro bono work done.<sup>46</sup> In 1969, the ABA adopted the Code of Professional Responsibility, and it more affirmatively established pro bono as charity.<sup>47</sup> It placed pro bono in the ethical consideration category, unenforceable as a disciplinary rule.<sup>48</sup> Finally, a disagreement erupted over the specter of mandatory pro bono during the discussions that resulted in the creation of the ABA Model Rules of Professional Conduct. It reached such a fevered pitch that some were willing to abandon the Model Rules project altogether rather than accept a public service obligation.<sup>49</sup> Instead, the supporters for mandatory pro bono caved, and Model Rule 6.1 was adopted, which specifically notes that pro bono public service is not to be enforced through any disciplinary process.<sup>50</sup> The rule is now entitled “*Voluntary Pro Bono Publico Service*.”<sup>51</sup>

Although these arguments concerned mandatory pro bono for the practicing bar, they continue to frame the current debate on whether to implement a mandatory pro bono requirement for bar applicants. Those who oppose Lippman’s law have built upon the considerable history of opposition to the mandatory approach in general. This turbulent history explains why, despite repeated efforts over the years, mandatory pro bono is not a reality today. To the extent that Lippman’s law seeks to instill in bar applicants the notion that the bar considers pro bono to be not optional, but mandatory, there is no alternative to the following somewhat rude but unavoidable question: says who?

### C. Traditional Arguments for Pro Bono as a Duty

Lippman’s response to this verbal challenge would have both theoretical and historical heft to commend it. The same Model Rules that in section 6.1 emphasize a voluntary understanding of pro bono

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46. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958).

47. MODEL CODE OF PROF’L RESPONSIBILITY EC 2-25 (1980).

48. *Id.*

49. Eldred & Schoenherr, *supra* note 42, at 385.

50. MODEL RULES OF PROF’L CONDUCT R. 6.1 (2013).

51. *Id.* (emphasis added).

also begins with a preamble that forcefully endorses a quite mandatory understanding of it. The preamble states that:

A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.<sup>52</sup>

This is not an especially coherent feature of the model rules, but still it is there. In fact the contradictory nature of the bar's tradition has a long history. The language of obligation and responsibility, as opposed to voluntariness, has endured over the years in ethics rules in spite of the language's lack of enforceability. The Code of Professional Responsibility adopted in 1969, Ethical Consideration 2-25, states,

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . . .<sup>53</sup>

The earlier 1908 Canons of Professional Ethics also point in both directions, acknowledging in Canon 12 that “the profession is a branch of the administration of justice and not a mere money-getting trade,”<sup>54</sup> suggesting that some purpose outside of compensated labor exists. These conflicting clauses indicate an unfinished debate.

#### D. Theoretical Arguments for Pro Bono as a Duty

##### 1. *Law as a Higher Calling*

In fact, in a contest of American tradition, the view of pro bono as duty predates the charity view. The mandatory view is based on the concept of law as a “higher calling,” the same concept that Judge Lippman espoused during his Law Day speech when he said: “It is the legal profession's commitment to equal justice and to the practice of

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52. MODEL RULES OF PROF'L CONDUCT pmbl. (2013).

53. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1983).

54. CANONS OF PROF'L ETHICS Canon 12 (1908).

law as a higher calling that has made service to others an intrinsic part of our legal culture.”<sup>55</sup>

During America’s founding, Puritans greatly impacted the country’s intellectual life.<sup>56</sup> The Puritan concept of calling provided that each person was summoned by God to live as called, to serve through a particular vocation or office, and to use one’s work life for the benefit of not just self-interested objectives but all humankind.<sup>57</sup> A calling asked for persons of faith to “become servants to their brothers, for the common good of all.”<sup>58</sup> In their own words, the Puritans strongly believed that these callings should be “for the benefite [sic] and good estate of mankind [sic] . . . for the good of the whole bodie [sic].”<sup>59</sup>

In 1710, Cotton Mather, the influential Harvard-educated Puritan minister of the Massachusetts Bay Colony, delivered what is believed to be the first North American address on lawyers’ professional duties.<sup>60</sup> He urged lawyers to “confute” their bad reputations “by making your Skill in the Law a Blessing to your Neighborhood.”<sup>61</sup> Mather again addressed lawyers in his *Essays to do Good*, by declaring: “What a noble thing would it be for you to find out oppressed widows and orphans; and as such can appear only ‘in forma pauperis,’ and are objects, in whose oppression ‘might overcomes right,’ generously plead their cause!”<sup>62</sup> These early writings suggest that “the early American pro bono tradition was rooted in puritanical thought . . . . Lawyers were called to serve, and to help those who could not afford to pay for needed legal services.”<sup>63</sup>

For the law student who adopts Lippman’s advice and sees law as a higher calling, “everything changes, because [she] now sees herself in a different light. Her work has a different, wider frame of meaning . . . . Her personal religious commitments and values are no longer irrelevant to her work . . . .”<sup>64</sup> For the lawyer who sees her

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55. Lippman, *supra* note 1.

56. WINTHROP S. HUDSON, *RELIGION IN AMERICA* 17 (2d ed. 1965).

57. Maute, *supra* note 41, at 99.

58. *Id.* at 100.

59. *Id.* at 100 n.38.

60. *Id.* at 100.

61. *Id.*

62. COTTON MATHER, *ESSAYS TO DO GOOD* 186 (Glasgow, Chalmers & Collins 1825).

63. Maute, *supra* note 41, at 101.

64. JOSEPH ALLEGRETTI, *THE LAWYER’S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 33 (1996).

work as a vocation, “[o]ur self-worth is not bound to the size of our paycheck or our office. A lawyer has one foot in the marketplace, but if she takes her calling seriously, she also has a commitment to service that transcends the marketplace. She is governed by a higher vision.”<sup>65</sup> The view of one’s work in the law as a vocation can imbue it with a newfound sense of meaning. It can invite law students to “take a second look at what they do, to see the ways in which their work contributes to the good of individuals and society.”<sup>66</sup> Bound up with this view of one’s legal practice as a higher calling, however, is the understanding that the higher calling is not optional to a righteous lawyer. Mather admonished that it was not lawful to live outside of one’s calling, “for men will fall into horrible snares and infinite sins.”<sup>67</sup>

A calling “requires that we serve God and neighbor in all that we do. In order to view the practice of law as a calling . . . [it] should equip us to better serve God and neighbor.”<sup>68</sup> Does a life in the law equip people to make society better? In the view of Judge Lippman and many others, it does. A lawyer who has been instilled with public service values will seek out and perform meaningful work that will contribute to the public good.

## 2. *The Idea of a Higher Calling and the Lawyer-Statesman*

In *The Lost Lawyer*, former Dean of Yale Law School Anthony Kronman argues that the legal profession has suffered a deep crisis in morale in part because it is suffering from an identity crisis caused by losing its moral foundation.<sup>69</sup> This moral foundation finds its best expression in the “lawyer-statesman” ideal, according to Kronman.<sup>70</sup> Young aspiring lawyers once sought to manifest this “embodiment of professional excellence” because the ideal was inspirational to them.<sup>71</sup> It did more than simply challenge them to accumulate a storehouse of knowledge or attain a high level of technical skill. The lawyer-statesman ideal made a moral statement. It challenged the lawyer to become a certain type of person—a good and morally upright person—whose virtues included the attainment of highly-admired

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65. *Id.* at 34.

66. *Id.* at 35.

67. COTTON MATHER, A CHRISTIAN AT HIS CALLING 41 (1701).

68. Timothy Floyd, *The Practice of Law as a Vocation or Calling*, 66 FORDHAM L. REV. 1405, 1415 (1998).

69. ANTHONY KRONMAN, THE LOST LAWYER 1–3 (1993).

70. *Id.* at 11–16.

71. *Id.* at 12.

characteristics. The virtues of the lawyer statesman included practical wisdom or prudence, integrity, deliberative skill, and a deep commitment promoting the public good.<sup>72</sup>

The commitment to the public good demonstrated by Kronman's lawyer-statesman was a core characteristic that dovetailed with the concept of a calling. The lawyer-statesman felt he was called to be who he was. (I use the masculine here because, at the time, this ideal was highly, and problematically gender biased.) For Kronman, the lost lawyer ideal was informed by the "idea of a calling, of salvation through work," and in particular, the notion that legal work could confer "meaning on the whole of a person's life."<sup>73</sup>

Kronman's lawyer statesman "cares about the public good and is prepared to sacrifice his own well-being for it, unlike those who use the law merely to advance their private ends."<sup>74</sup> This separates the lawyer-statesman from the "purely self-interested practitioner of law."<sup>75</sup> If lawyers acquire these character traits through their legal education and practice, it makes sense that they can in turn use their integrity, prudence, skill in deliberation, and public service orientation to make their families and communities better on a daily basis. And a lawyer who has attained these qualities in their full measure will find a way to influence his clients and his colleagues positively so they in turn can use their own influence to construct a better world, creating a virtuous cycle.

For this reason, Kronman believed that "[a] legal education must do more than impart information and technical skills. It must also inculcate the character virtues of prudence and public-spiritedness."<sup>76</sup> Kronman goes into great detail about how legal education has done this in the past and, although law today has "become a business like any other," at one time there existed "the older professional culture that encouraged lawyers to believe they might find part of the answer to life's riddle in their work."<sup>77</sup>

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72. *Id.* at 14–15.

73. *Id.* at 370–71.

74. *Id.* at 14.

75. *Id.*

76. *Id.* at 154.

77. *Id.* at 370. For a more in depth treatment of the *Lost Lawyer*, see Anthony Alfieri, *Denaturalizing the Lawyer Statesman*, 93 MICH. L. REV. 1304 (1994); James Altman, *Modern Litigators and Lawyer-Statesman*, 103 YALE L.J. 1031 (1994); David Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARVARD L. REV. 458 (1994).



Other contemporary analysts of legal education have echoed Kronman's call for more teaching of public service values, as opposed to analytical legal skills alone. The 1992 study referred to in shorthand as the "MacCrate Report" called for the teaching of four "fundamental values of the profession," including "striving to promote justice, fairness, and morality."<sup>78</sup> In 1996, a report from the ABA echoed this concern, arguing that "lawyer professionalism has declined in recent years and increasing the level of professionalism will require significant changes in the way professionalism ideals are taught."<sup>79</sup> And in 2007 the "Carnegie Report" again reaffirmed that "legal education needs to attend very seriously to its apprenticeship of professional identity," while emphasizing "the potential of pro bono work" because "free legal work for clients who cannot afford legal services is a vivid enactment of law's professional identity."<sup>80</sup>

Lippman's law cannot be properly understood outside the context of this discourse, both in legal education and in professional legal culture. Lippman's description of law as a "higher calling" and confidence that "serving the public is an essential component of our professional identity as lawyers" resonate with well-established theoretical traditions in the bar.<sup>81</sup>

### 3. *Equal Justice Under Law*

Is it wrong to promote a Christian Protestant ideal of law as a higher calling in today's pluralistic legal community, with lawyers from many different faiths and value systems?<sup>82</sup> Maybe, but if so, Judge Lippman is saved because he did not base his argument on calling alone. In his speech, he explained Lippman's law as an embodiment of "the legal profession's commitment to equal justice."<sup>83</sup>

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78. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUC. & PROF'L DEV., AN EDUCATION CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 140-41 (1992).

79. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, TEACHING & LEARNING PROFESSIONALISM, REPORT OF THE PROFESSIONALISM COMMITTEE 5 (1996).

80. WILLIAM M. SULLIVAN, ET AL. THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 128, 138 (2007).

81. Lippman, *supra* note 1.

82. *See generally*, Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113 (2000). The question of the extent to which the notion of "calling" has a presence in other faith traditions besides the Christian one is worthy of further study, however it is beyond the scope of this Article.

83. Lippman, *supra* note 1.

Lippman wants to challenge every law student to look into the mirror and ask, “Will you use your legal acumen to foster equal justice in our state? Do you recognize that being a lawyer requires an understanding that access to justice must be available to all New Yorkers regardless of their station in life?”<sup>84</sup>

That understanding bears a heavy weight when only 20% of the legal needs of poor people are being met, at a time when 15% of the people in the state of New York find themselves living at or below the poverty level.<sup>85</sup> In a state with a population of nearly twenty million, over 600,000 people in poverty find themselves with civil legal problems that go unmet because they cannot afford a lawyer. The majority will have to represent themselves, many in a courtroom, against trained legal counsel. As recently as last year it was reported that since the economic downturn began in 2008, the New York Legal Aid Society has turned away eight out of every nine people seeking help with civil legal services.<sup>86</sup> Furthermore, while requests for help with health care issues have jumped 40%, requests for help with unemployment issues have jumped 54%, and requests for help with foreclosures have jumped an amazing 800%.<sup>87</sup>

What does this equal access to justice gap say about the state of justice under law? The phrase can evoke many different meanings, but at minimum it means that under the purview of the legal system we all play by the same set of rules. In the same way that no ruler stands above the law and the President cannot commit a crime with impunity, no citizen should find himself below the law, and no one can violate the rights of a defenseless person, because that person can always take his grievance to the courts.

As a nation, we claim to hold this idea of equal justice under law in such a high level of esteem that we have emblazoned it above the entrance of the United States Supreme Court.<sup>88</sup> The reality, however, is that a person who cannot afford legal counsel does not have access to equal justice under law. It is very difficult to navigate the complexity of the legal system without a lawyer. The United States

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84. *Id.*

85. *Id.*

86. Anne Barnard, *Top Judge Makes Free Legal Work Mandatory for Joining State Bar*, N.Y. TIMES, May 1, 2012, [http://www.nytimes.com/2012/05/02/nyregion/new-lawYERS-IN-NEW-YORK-TO-BE-REQUIRED-TO-DO-SOME-WORK-FREE.html?\\_r=0](http://www.nytimes.com/2012/05/02/nyregion/new-lawYERS-IN-NEW-YORK-TO-BE-REQUIRED-TO-DO-SOME-WORK-FREE.html?_r=0)

87. *Id.*

88. *The Court and Constitutional Interpretation*, SUPREME COURT U.S., <http://www.supremecourt.gov/about/constitutional.aspx> (last visited Mar. 17, 2014).

Supreme Court acknowledged this in the aftermath of the 1930s Scottsboro Boys' case in Alabama.<sup>89</sup> In that case, nine indigent African-American boys were accused of raping two white women, and the state of Alabama failed to provide them with adequate legal assistance before they were found guilty.<sup>90</sup> Eight were sentenced to death.<sup>91</sup> The court later overturned some of the convictions after one of the supposed victims acknowledged that they had made the entire incident up.<sup>92</sup> In that opinion, the court acknowledged that the "right to be heard would in many cases be of little avail if it did not comprehend the right to be heard by counsel."<sup>93</sup> The remaining accused had to wait for justice, and only in November 2013 were the last of the Scottsboro Boys posthumously pardoned.<sup>94</sup> A few decades after the Scottsboro Boys' incident, in the landmark case *Gideon v. Wainwright* in 1963, the Supreme Court held that all indigent defendants in a felony proceeding, in state or federal trial court, were entitled to an attorney.<sup>95</sup> The Court had finally acknowledged the "obvious truth" that the ideal of insuring that "every defendant stands equal before the law . . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."<sup>96</sup>

In contrast to this long but ultimately just arc towards *Gideon*, to date our courts have yet to extend the right to legal counsel to civil trials.<sup>97</sup> Even if a person learns and understands the law and has a knack for thinking like a lawyer, that person would still almost certainly fail in court without a basic understanding of the legal precedent, civil procedure, jurisdiction, or trial technique.<sup>98</sup> Although both parties may have equal access to the law in a de jure sense, it is not the case in a de facto sense.

The lack of de facto equal access to justice in civil trials raises not just issues of fairness, but also issues of legitimation. Political theory suggests that equal justice under law is one of the "legitimation

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89. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

90. *See id.* at 45; DAN CARTER, *THE SCOTTSBORO BOYS: A TRAGEDY OF THE AMERICAN SOUTH* 3–50 (La. State Univ. Press rev. ed. 2007).

91. *Powell*, 287 U.S. at 50; CARTER, *supra* note 90, at 48.

92. *Powell*, 287 U.S. 45; *see generally* CARTER, *supra* note 90, at 231–462.

93. *Powell*, 287 U.S. at 68–69.

94. *Alabama Posthumously Pardons Three Scottsboro Boys*, BBC (Nov. 21, 2013), <http://www.bbc.co.uk/news/world-us-canada-25046096>.

95. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

96. *Id.*

97. *See generally* *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

98. *See* DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 245 (1988).

principles” which justifies the existence of our system of government.<sup>99</sup> In the same way a legislative candidate who receives fewer votes than her opponent does not have the right to take office because our system says that political power depends on the consent of the governed, similarly, a court does not justifiably have the right to issue binding orders without the consent of the populace. Who would consent to a judicial system such as ours with foreknowledge of its inequities?

Ultimately, a country without access to justice for large swaths of its populace exists only on very shaky moral ground. To see efforts to rectify this situation as optional rather than mandatory belies a faulty understanding of political theory and ethics.

The bar recognizes this to a certain degree. The current rules state,

A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice . . . .<sup>100</sup>

To believers in equal justice under law, equal access is not simply a matter of charity, but a matter of political legitimacy.

### **E. Lawyers as Upholders of Human Dignity**

All of the aforementioned visions of what a lawyer is share a central value—the human dignity of the client and citizen. Valuing the humanity of our neighbors makes protection of their interests a noble calling, and respect for our neighbors as equally worthwhile human agents mandates that we accord them equal rights under law.

According to Luban in *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, the moral foundation of the lawyer's profession lies in the “defense of human dignity—and the chief moral danger facing the profession arises when lawyers assault human dignity rather than defend it.”<sup>101</sup> This approach to understanding the moral content of the lawyer's role doesn't depend on the belief in the divine in the same way that the idea of law as a “higher calling” does. It does not necessarily even depend on the concept of equal justice under law as a political legitimation principle.

99. *Id.* at 252–53.

100. MODEL RULES OF PROF'L CONDUCT pmbl. (2013).

101. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 815.

It does, however, give more substance to the notion of the lawyer as a defender of justice and provider of a fundamental good that all humanity needs—human dignity.

Theorists who believe dignity is subjectivity explain this function by viewing the lawyer as a translator of the client's story into legal terminology.<sup>102</sup> The good lawyer enhances the client's subjectivity and ability to express his own narrative. Those who believe dignity is autonomy emphasize the lawyer's role in enhancing the client's ability to make informed choices as key to upholding the client's dignity.<sup>103</sup> Others have argued that the lawyer upholds dignity by defending clients against abuses of the state, especially in criminal prosecutions that confer status and reputational harm upon criminal conviction.<sup>104</sup>

In contrast, Luban explains that we can best understand the relationship of the law to human dignity through an understanding of dignity's opposite: humiliation.<sup>105</sup> "Lawyers honor the human dignity of clients by protecting them against humiliations, and lawyers defile that dignity by subjecting them to humiliations."<sup>106</sup> In the criminal justice system, "human dignity requires litigants to be heard, and . . . without a lawyer, they cannot be heard."<sup>107</sup> A criminal conviction carries with it the moral condemnation of the community and an attendant loss of respect, so human decency requires that before people face such condemnation, they should get to tell their side of the story. For the vast majority of cases, however, the mystification of the legal system restricts those without a lawyer from doing this effectively. This is one of the reasons we celebrate *Gideon v. Wainwright* and the right to counsel in a criminal trial. *Gideon* greatly enhanced the potential for justice and dignity in the American justice system.<sup>108</sup>

Luban asserts that this reasoning only applies to criminal law; that although "losing a lawsuit can still carry moral stigma—think of

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102. Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS ETHICS* 130 (David Luban ed., 1984).

103. See generally Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976).

104. Luban, *supra* note 101, at 823–24.

105. *Id.* at 821.

106. *Id.* at 815.

107. *Id.* at 819.

108. *Gideon v. Wainwright*, 372 U.S. 335 (1963). But see Ethan Bronner, *Right to Lawyer Can be an Empty Promise for the Poor*, *N.Y. TIMES*, Mar. 15, 2013, 2013, [http://www.nytimes.com/2013/03/16/us/16gideon.html?\\_r=0](http://www.nytimes.com/2013/03/16/us/16gideon.html?_r=0).

losing a sexual harassment lawsuit, for example—but it is not quite the communal condemnation of criminal conviction.”<sup>109</sup> To the contrary, I believe that civil lawsuits where people of limited means face deprivations of their essential needs raise the same questions of social stigma that criminal convictions raise. The litigants in a landlord-tenant suit face high stakes where a low-income tenant may end up homeless if they lose, or a health care client may face financial ruin because of a chronic disease unless they gain access to health insurance. Many civil lawsuits involving the poor have high stakes. In New York Housing Court, where ninety-nine percent of the tenants who appear are unrepresented by counsel, thousands of people face the humiliation of possible homelessness.<sup>110</sup>

Professor Steven Lubet offers an illuminating example from his days as a Chicago legal services lawyer that contradicts Luban’s assertion that civil legal services do not involve questions of human dignity.<sup>111</sup> The local landlord-tenant and collection courts that Lubet operated in offered very little by way of equal access to justice:

The all but inevitable outcome of every case was either an eviction or a wage garnishment . . . . The defendants were almost always unrepresented. If they had defenses, they had no way of recognizing or raising them . . . . The judges were nasty and preemptory. They rushed through the cases without allowing the defendants to talk, and they ridiculed defendants who attempted to say a few words in their own behalves. The clerks and bailiffs were worse, refusing to answer questions or to give explanations.<sup>112</sup>

Things changed when, one day, a name partner in one of Chicago’s leading law firms, a former Republican Counsel to the Senate Watergate Committee, walked through the door.<sup>113</sup> “Clerks began answering inquiries from unrepresented defendants. The judge actually asked questions about the facts and the law. It was as though we were now in a real courtroom where justice, and people, mattered.”<sup>114</sup>

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109. Luban, *supra* note 101, at 824.

110. JONATHAN LIPPMAN ET AL., NEW YORK STATE COURTS ACCESS TO JUSTICE PROGRAM, 2 (2010), *available* at [www.nycourts.gov/ip/nya2j/pdfs/NYA2J\\_2010report.pdf](http://www.nycourts.gov/ip/nya2j/pdfs/NYA2J_2010report.pdf)

111. Steven Lubet, *Professionalism Revisited*, 42 EMORY L.J. 197, 204–06 (1993).

112. *Id.* at 205.

113. *Id.* at 206.

114. *Id.* at 206.

During the pro bono requirement service, aspiring members of the bar will have a chance to make abstract notions like dignity a reality for low-income members of the community whose low status in the eyes of court officials puts their dignity at risk when they become entangled with the justice system.

This ongoing debate—duty or charity—has endured for decades and even centuries, making it difficult to declare victory today for either side after a short review of the arguments. But ultimately, despite the prevalent view of pro bono as charity, the legal profession in perhaps its most official statement of norms, the preamble of the Model Rules of Professional Conduct, affirms the principle of pro bono as duty. It begins with the statement that “a lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”<sup>115</sup>

It makes sense to think of the public citizen, who in paragraph 8 of the preamble is shown to be supremely interested in the public good, as a lawyer statesman who meets the obligations of his or her “professional calling.”<sup>116</sup> As an officer of the legal system, it makes sense for the lawyer to be interested in supporting the administration of justice by protecting the legitimacy of the courts, which a lawyer does by helping to promote access to justice and equal justice under law. And as a person who has a special responsibility for the quality of justice, it makes sense for the lawyer to seek to uphold the human dignity of those who do not deserve to be humiliated.

## II. WHAT SHOULD COUNT?

Part I demonstrated that Judge Lippman is neither being unreasonable nor taking an unprecedented position when he declares that he believes that lawyers should be committed to equal justice under law and a higher calling. In fact, in large part I share his views. However, moving from a normative to a pragmatic mode of analysis reveals that the fine points of this particular draft of the rule run the danger of not meeting its stated goals, and this section explains why and suggests corrections.

The ABA Standing Committee on Pro Bono and Public Service issued a report in October 2013 weighing the potential pros and cons

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115. MODEL RULES OF PROF'L CONDUCT pmb. (2013).

116. *Id.*

of Lippman's law.<sup>117</sup> It found that Lippman's law allowed an extraordinarily broad swath of work to count as "pro bono" for purposes of fulfilling this requirement.<sup>118</sup> The Advisory Committee appointed by Judge Lippman to help him draft the rule recommended that he include "law-related work (i) in the traditional pro bono areas of legal services for the poor and unrepresented, (ii) in the traditional areas of public service throughout the levels of federal, state and local government and the judiciary, and (iii) in the service of not-for-profit institutions."<sup>119</sup> When the rule took effect, Judge Lippman apparently took their advice.

The ABA dislikes this. The rule allows work that would not qualify under ABA Model Rule 6.1 or under Rule 6.1 of the New York Rules of Professional Conduct.<sup>120</sup> The report explains that other prevailing definitions of "pro bono" used by major pro bono institutions also contemplate a narrower scope of activities.<sup>121</sup> For example, Lippman law qualifying work includes "externship or internship placements with a judge or a court system" or a "federal, state, or local government agency or legislative body."<sup>122</sup> It points out that the

broad 'pro bono' definition could have the unintended effect of lessening the importance of traditional pro bono work, i.e., direct, uncompensated service to poor people and their communities . . . [I]t may be performed, for instance, in an adequately funded government agency that plays little or no role in serving low-income populations.<sup>123</sup>

For example, under the way the law is currently drafted, a student could serve as a legal intern for the Department of Motor Vehicles, issuing tickets and fines to poor people as opposed to providing them with services, and still satisfy the pro bono requirement.

117. ABA STANDING COMMITTEE ON PRO BONO & PUB. SERV., *supra* note 11, at 5–8.

118. *Id.* at 4–5.

119. ADVISORY COMM. ON N.Y. STATE PRO BONO BAR ADMISSION REQUIREMENTS, *supra* note 8, at 5.

120. ABA STANDING COMMITTEE ON PRO BONO & PUB. SERV., *supra* note 11, at 7.

121. For example, The Pro Bono Institute, the nation's major pro bono organization, has a narrower definition. See LAW FIRM PRO BONO PROJECT, PRO BONO INST., WHAT COUNTS? A COMPILATION OF QUERIES AND ANSWERS 6–15 (2008), available at <http://www.probonoinst.org/wpps/wp-content/uploads/what-counts-2008.pdf>.

122. *New York Bar Admission: Pro Bono Requirement FAQs*, *supra* note 10, at 9–10.

123. ABA STANDING COMMITTEE ON PRO BONO & PUB. SERV., *supra* note 11, at 7.



Lippman's law as currently drafted also allows the requirement to be fulfilled simply through any work that "involves the use of legal skills for an organization that qualifies as tax-exempt under Internal Revenue Code § 501(c)(3)."<sup>124</sup> A law student could satisfy this requirement through service at a number of nonprofit organizations that may make life more difficult for poor people, for example, as a law clerk the New York State Collectors Association, as association for debt collection companies.<sup>125</sup>

It is possible that the advisory committee feared that the state's legal services and pro bono infrastructure could not handle the task of supervising the influx of the estimated yearly 10,000 bar applicants, adding another 500,000 hours of pro bono work that would need supervision every year. Instead, however, this broad definition disburses the work too broadly, including government services that serve the poor and those that do not, and nonprofit organizations that serve the poor and those that do not. This flexibility pragmatically spreads the burden to a large number of actors who can more ably provide supervision. The problem, however, is that it allows for the possibility of incorporating work that does not directly seek to instill the spirit of public service or even bridge the access to justice gap. The most recent version of the informational website that describes the rule has provided more effective prodding towards public service by including a link directly to service opportunities offered by pro bono net.<sup>126</sup> Still, it seems that the law has been drafted too broadly, tempering its core of public service and zeal to close the access to justice gap, and leaving the important but non-altruistic motive of skills training as the new animating force of the rule.

This section suggests replenishing what was drained, narrowing the law to focus on economic justice, racial justice, and voting rights as the categories of work that could satisfy the requirement. This focus would lessen ambiguity as students seek to determine what counts. Also, all three of these types of pro bono opportunities are relevant to the core public service ideals and access to justice concerns that Lippman raised in his law day speech in 2012.<sup>127</sup> By including "low

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124. *New York Bar Admission: Pro Bono Requirement FAQs*, *supra* note 10, at 9 – 10.

125. See N.Y. STATE COLLECTORS ASS'N, <http://www.nyscollect.org> (last visited Mar. 6, 2014).

126. See *Pro Bono Bar Admission Requirements*, NYCOURTS.GOV, <http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml#Information> (last visited May 6, 2014).

127. Lippman, *supra* note 1.

bono” representation within the ambit of economic justice work, immigration representation and prisoner’s rights litigation to the ambit of racial justice work, and election protection in the voting rights arena, the services that the students engage in will be well-tailored to instilling the spirit of public service, addressing the root causes of the access to justice problem, and promoting equal justice under law and providing practical skills training.

### A. Economic Justice

*Overcoming poverty is not a gesture of charity; it is an act of Justice.* —Nelson Mandela<sup>128</sup>

Two years after the Occupy Wall Street protests at Zuccotti Park turned the nation’s attention to the issue of economic injustice for the first time in years, poverty and economic inequality in the United States has continued to grow, reaching staggering proportions.<sup>129</sup> This is nothing new. Over the past three decades, the overall pre-tax incomes of the top 1% of households rose 19.6% compared to a 1% increase for the rest of Americans.<sup>130</sup> The top 1% of Americans control 40% of the nation’s wealth.<sup>131</sup> The 400 richest people in the United States have more wealth than the bottom 150 million put together.<sup>132</sup> Just this past year, the top 1% of American income earners collected 19.3% of household income, breaking a record previously set in 1927.<sup>133</sup>

Outside of direct representation of poor people, this issue has the most direct impact on the access to justice gap. The primary reason why tenants, consumer credit defendants, and other civil litigants do not have lawyers is because they cannot afford them. A lawyer who

128. *Nelson Mandela on G8 Summit: “Overcoming Poverty is Not a Gesture of Charity, it Is an Act of Justice”*, DEMOCRACY NOW! (July 5, 2005), [http://www.democracynow.org/2005/7/5/nelson\\_mandela\\_on\\_g8\\_summit\\_overcoming](http://www.democracynow.org/2005/7/5/nelson_mandela_on_g8_summit_overcoming).

129. Justin Wedes, *Occupy Wall Street: Two Years on, We’re Still the 99% R. 16.3*, GUARDIAN, Sept. 17, 2013, <http://www.theguardian.com/commentisfree/2013/sep/17/occupy-wall-street-99-percent>.

130. *US Income Inequality at Record High*, BBC NEWS (Sept. 10, 2013), <http://www.bbc.co.uk/news/world-us-canada-24039202>.

131. Joseph E. Stiglitz, *Of the 1%, by the 1%, for the 1%*, VANITY FAIR (May 2011), <http://www.vanityfair.com/society/features/2011/05/top-one-percent-201105?currentPage=all>.

132. Steve Hargreaves, *How Income Inequality Hurts America*, CNN MONEY (Sept. 25, 2013), <http://money.cnn.com/2013/09/25/news/economy/income-inequality>.

133. *US Income Inequality at Record High*, *supra* note 130.

embraces the practice of law as a calling, thereby acknowledging the idea of a higher power who has issued that call, will readily understand that providing aid to the poor answers the call to service. Many faith traditions demand service to the poor not as charity, but as fairness. In the Protestant Christian tradition, many Bible verses insist on good treatment of the poor.<sup>134</sup> The Catholic Church is the progenitor of liberation theology, which interprets the Christian faith in relation to unjust economic and social conditions.<sup>135</sup> Pope Francis has recently become an outspoken critic of economic injustice and inequality.<sup>136</sup> The teachings of Islam and Judaism also include similar injunctions.<sup>137</sup>

Economic injustice is an assault on equal justice under law. In the absence of a right to an attorney in civil trials, millions of low- and middle-income people have had to forgo representation when important legal circumstances have arisen in their lives.<sup>138</sup> According to law professor Deborah Rhode, nationally “about four-fifths of the civil legal needs of the poor, and two to three fifths of the needs of middle-income individuals, remain unmet.”<sup>139</sup>

According to the Task Force to Expand Access to Civil Legal Services in New York, between 2010 and 2012 in the State of New

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134. See *Deuteronomy* 15:11 (“Therefore I command you, You shall open wide your hand to your brother, to the needy and to the poor, in your land.”); *Luke* 3:11 (“And he answered them, Whoever has two tunics is to share with him who has none, and whoever has food is to do likewise . . . .”); *Matthew* 5:42 (“Give to the one who begs from you, and do not refuse the one who would borrow from you.”).

135. See generally GUTIERREZ GUSTAVO, *A THEOLOGY OF LIBERATION* (Sister Caridad Inda & John Eagleson trans., ed. 1973).

136. Zachary A. Goldfarb & Michelle Boorstein, *Pope Francis Denounces ‘Trickle-Down’ Economic Theories in Critique of Inequality*, WASH. POST (Nov. 26, 2013), [http://www.washingtonpost.com/business/economy/pope-francis-denounces-trickle-down-economic-theories-in-critique-of-inequality/2013/11/26/e17ffe4e-56b6-11e3-8304-caf30787c0a9\\_story.html](http://www.washingtonpost.com/business/economy/pope-francis-denounces-trickle-down-economic-theories-in-critique-of-inequality/2013/11/26/e17ffe4e-56b6-11e3-8304-caf30787c0a9_story.html).

137. See *Leviticus* 25:39 (“If your kinsman under you continues in straits and must give himself over to you, do not subject him to the treatment of a slave.”); Abu Amina Elias, *Islam Is Good Neighborliness to All, Believers and Unbelievers*, FAITH IN ALLAH (May 9, 2013), <http://www.faihinallah.org/islam-is-good-neighborliness-to-all-believers-and-unbelievers> (“He is not a believer whose stomach is filled while the neighbor to his side goes hungry.”) (citation omitted).

138. *Sunday Dialogue: Public Service for Lawyers*, N.Y. TIMES, June 2, 2012, [http://www.nytimes.com/2012/06/03/opinion/sunday/sunday-dialogue-public-service-for-lawyers.html?pagewanted=1&\\_r=0](http://www.nytimes.com/2012/06/03/opinion/sunday/sunday-dialogue-public-service-for-lawyers.html?pagewanted=1&_r=0) (“[E]ach year, more than 2.3 million New Yorkers must defend their homes, livelihoods and families without legal representation.”).

139. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 47–48 (2004).

York alone, “1.2 million low-income New Yorkers living at or below 200 percent of the federal poverty level (\$47,100 in annual income for a family of four in 2013) had multiple civil legal problems involving essential needs [(food, housing, etc.)] and were forced to navigate the legal system without a lawyer.”<sup>140</sup> With 46% of New Yorkers living below 150% of the poverty level in 2011, the continued presence of need is apparent.<sup>141</sup>

Ten thousand law students working fifty hours each cannot bridge this justice gap through individual representation. Any attempt to bridge the gap must include an expanded effort to raise more New Yorkers out of poverty, addressing the root of the problem. Gary Bellow, leading light of the legal services movement, expressed this sentiment as early as 1968, when he cautioned that the then newly created legal services programs would not create a lasting solution “if they are not accompanied by some real changes in the political and economic position of the poor as well.”<sup>142</sup>

The lawyer’s role as a promoter of justice justifies efforts to create a more egalitarian society if high levels of economic inequality and poverty prevent equal access to justice. As simply charity work, pro bono does not need to concern itself with the question of ultimately solving the access to justice problem because altruism exists in the act of helping itself. But if altruism is enough, does Lippman’s law as currently structured communicate to students that their pro bono efforts have entered the realm of charity and moved away from the spheres of duty and justice?

### B. Who Deserves to Be Poor?

How can we say that poverty is a problem of justice and not charity? When people consider the idea of justice, they often ask whether the parties involved got what they deserved. Does the 1%

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140. THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1–2 (Nov. 2013), available at [http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceReport\\_2013.pdf](http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceReport_2013.pdf).

141. Sam Roberts, *City Report Shows More Near Poverty in 2011*, N.Y. TIMES, Apr. 21, 2013, <http://www.nytimes.com/2013/04/22/nyregion/city-report-shows-a-growing-number-are-near-poverty.html>.

142. Gary Bellow, *The Extension of Legal Services to the Poor: New Approaches to the Bar’s Responsibility*, in THE PATH OF THE LAW FROM 1967, at 115, 121 (Arthur E. Sutherland ed., 1968) (the author was a trailblazer in the field of public services lawyers and a leader in the creation of clinical education.).

deserve to own nearly half of the world's wealth?<sup>143</sup> Do 46% of New Yorkers deserve to live at near poverty levels?<sup>144</sup> What determines whether a person deserves the amount of income that they receive or wealth that they have? Consider these wage differentials:

The average schoolteacher in the United States is paid about \$43,000 per year for working to educate our children and shape young lives.<sup>145</sup> Kim Kardashian earned \$10 million last year for her work.<sup>146</sup>

John Roberts, Chief Justice of the U.S. Supreme Court, is paid \$217,400 a year.<sup>147</sup> Judge Judy, who has a reality television show, makes \$25 million a year.<sup>148</sup>

Barack Obama, President of the United States, is paid \$400,000.<sup>149</sup> Simon Cowell, Judge on the X-Factor and former Judge of American Idol, earned \$95 million last year.<sup>150</sup>

A reasonable observer could conclude that Judge Judy is not one hundred times more deserving of financial reward than Chief Justice Roberts. She is not one hundred times more intelligent or hardworking, and her contributions to the public good, although significant as entertainment, are not one hundred times more valuable to society than the work of a Justice on the United States Supreme Court. Judge Judy is lucky to live in a society that lavishes huge sums on television stars.<sup>151</sup> If she happened to live in another, perhaps more reasonable society, as an entertainer she would make less than a United States Supreme Court Justice who has as much power as anyone in our society. No ethical or moral or legal mandate exists that suggests that it is somehow just or fair or inevitable for people to live in a society with this particular set of values—the fact that Judge Judy lives in a society of this nature is morally arbitrary.<sup>152</sup>

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143. Kim Hjelmgaard, *The Richest 1% own 46% of Global Wealth*, USA TODAY, Jan. 20, 2014, <http://www.usatoday.com/story/news/world/2014/01/20/davos-2014-oxfam-85-richest-people-half-world/4655337/>.

144. Roberts, *supra* note 141.

145. MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* 162 (2009).

146. *Kim Kardashian*, FORBES (June 2013), <http://www.forbes.com/profile/kim-kardashian>.

147. SANDEL, *supra* note 145, at 162.

148. *Id.* at 162.

149. Peter Baker & Michael D. Shear, *In a Budget Gesture, Obama Will Return 5% of His Salary*, N.Y. TIMES, Apr. 3, 2013, <http://www.nytimes.com/2013/04/04/us/politics/to-highlight-pain-of-budget-cuts-obama-to-return-of-part-of-pay.html>.

150. *Simon Cowell*, FORBES (June 2013), <http://www.forbes.com/profile/simon-cowell>.

151. SANDEL, *supra* note 145, at 162–63.

152. *Id.* at 163.

Similarly, the fact that our society rewards humor and entertainment more than constitutional adjudication is not Judge Judy's doing, so she cannot argue that she is completely responsible for her wealth.

This principle applies to all of us. We all could just as easily have lived in a society a few centuries ago where the ability to take the LSAT and engage in logical reasoning and make persuasive arguments would not guarantee you a comfortable life. The most skillful athletes who could defend themselves in battle, for example, may have received all of the rewards during humankind's prehistoric period. We have no influence over what society rewards at any given time, and we have no impact on the time period in which we are born.

Of particular interest are the people in the bottom end of the ninety-nine percent, or the 6.3 million New Yorkers mentioned above. Many of these people are the working poor who, in spite of solid work ethic, honorable character, and clean living, still have not found an opportunity to excel economically. If because of their financial situation they lack the ability to obtain counsel in a landlord-tenant case, or another important civil proceeding, one cannot say that they deserve their plight.

Because the poor do not necessarily deserve their plight and they suffer greatly, charity is not the most accurate term to describe providing aid to them. It instead becomes an act of justice towards one's neighbor that would comport with notions of public service and vocation that might arise from the Biblical injunction to love one's neighbor as oneself, or the Islamic injunction of Zakah, or giving to the poor.<sup>153</sup> Lawyers who believe their work is a calling will want to use their skills to make their neighbors' lives better.

Even if the poor did deserve their plight, as officers of the court, lawyers should seek to provide them counsel so that the court can justify its legitimacy by providing as many citizens as possible equal access to the adjudicative process. As stated in the preamble to the Model Rules of Professional Conduct, a lawyer committed to the promotion of equal justice under law and aware of a special responsibility for the quality of justice should avidly seek to promote equal access to justice for those who cannot afford representation.<sup>154</sup>

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153. *See Mark* 12:31 ("The second is this: 'Love your neighbor as yourself.' There is no commandment greater than these."); *THE QURAN* 2:110 ("And establish prayer and give zakah, and whatever of good you put forward for yourselves—you will find it with Allah. Indeed, Allah of what you do, is Seeing.").

154. *MODEL RULES OF PROF'L CONDUCT* pmbl. (2013).

Poverty and economic inequality also assault a person's sense of dignity. This goes beyond the humiliation that the litigant will face in court when they cannot understand what is taking place while they are having their rights denied to them. The litigant in question may be facing the loss of an essential need, like housing rights, and any indignity felt in the courtroom will only be the coup de grace in comparison to the indignity of homelessness. Also, desperation for economic access is often cited as a motivating factor for involvement in crime, drug trafficking, human trafficking, and other high-risk occupations that facilitate the degradation of participants.<sup>155</sup> Thus, where economic injustice contributes to assaults on human dignity, the lawyer's role as upholder of human dignity justifies an intervention. Thorough explanation of these principles to bar applicants can help them to understand that economic justice work is an opportunity to express the core values of the public spirited lawyer.

### C. Recommendation: Low Bono

"Low Bono" is the term used to describe discounted-rate arrangements between attorneys and clients that consider the financial constraints of both sides.<sup>156</sup> This might apply, for example, to "working age families with children who have incomes between 100 and 250 percent of the federal poverty level . . . or between roughly \$15,000 and \$60,000" per year, depending on the amount of children they have.<sup>157</sup> Though not officially poor enough to qualify for legal services, these families often experience limited economic security, and one major setback, such as a bankruptcy, an eviction, or the loss of food stamps or an illness uncovered by Medicaid benefits—could "thrust them into economic chaos."<sup>158</sup> Nearly ten million families in the United States fit in this category.<sup>159</sup>

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155. LENORE KUO, PROSTITUTION POLICY: REVOLUTIONIZING PRACTICE THROUGH A GENDERED PERSPECTIVE 69 (2002) (citing a study where "90 percent of the women interviewed said money was their primary reason for prostitution").

156. Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1, 39 (2010).

157. MELISSA KEARNEY ET AL., THE HAMILTON PROJECT, A DOZEN FACTS ABOUT AMERICA'S STRUGGLING LOWER-MIDDLE CLASS 1 (2013), available at [http://www.hamiltonproject.org/files/downloads\\_and\\_links/THP\\_12LowIncomeFacts\\_Final.pdf](http://www.hamiltonproject.org/files/downloads_and_links/THP_12LowIncomeFacts_Final.pdf).

158. *Id.*

159. S.E. Smith, *The Economic Gap Just Keeps Growing, and Growing, and Growing*, THIS AIN'T LIVIN' (Apr. 9, 2013), [http://meloukhia.net/2013/04/the\\_](http://meloukhia.net/2013/04/the_)

Recent research indicates that these families have little access to legal services. A 1994 ABA survey found that 52% of moderate-income households faced at least one legal need, but only around 33% of those households turned to the legal system for a solution, and of that group, 42% handled the legal matter on their own without the aid of a lawyer.<sup>160</sup> A survey in by the Oregon State Bar in 2000 found that only 20% turned to lawyers for aid in their legal needs,<sup>161</sup> and a 1996 survey in Maryland found that only 28% turned to lawyers there.<sup>162</sup>

As currently written, it isn't clear that Lippman's law covers representation of these families who need "low bono" representation. Lippman's law allows externships or internship placement with a law firm that might engage in "low bono" to count for the requirement "only if the work is performed for a pro bono matter handled by that firm and the pro bono client is not paying a fee."<sup>163</sup> Outside of that, Lippman's law is limited to either government services or non-profit work. There may be non-profit work that addresses the needs of people of "limited means," but because these organizations are non-profit they are unlikely to engage in the provision of legal services for a lower fee in a way that would fit the description of "low bono." This is in contrast, for example, with California's approach. In June 2013, the California State Bar's Task Force on Admissions Regulation Reform released a "Phase One Final Report," which "recommends requiring 50 hours of legal services in the pro bono or modest means areas."<sup>164</sup>

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economic\_gap\_just\_keeps\_growing\_and\_growing\_and\_growing ("Over 10 million families in the United States are classified as working poor, and the income distribution between working families in general is growing more and more unequal.").

160. *Legal Needs and Civil Justice: A Survey of Americans*, A.B.A. CONSORTIUM ON LEGAL SERVS. & PUB. (1994), <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf>.

161. See N.Y. CITY BAR ASS'N TASK FORCE ON NEW LAWYERS IN A CHANGING PROFESSION, DEVELOPING LEGAL CAREERS AND DELIVERING JUSTICE IN THE 21ST CENTURY 90 (2013), available at <http://www2.nycbar.org/pdf/developing-legal-careers-and-delivering-justice-in-the-21st-century.pdf> (citing D. MICHAEL DALE, OREGON STATE BAR, THE STATE OF ACCESS TO JUSTICE IN OREGON, PART I: ASSESSMENT OF LEGAL NEEDS 29 (2000)).

162. See *id.* at 90 (citing Janet Stidman Eveleth, *Is Middle Class America Denied Access to Justice?*, 29 MD. B.J. 44, 45 (1996)).

163. *New York Bar Admission: Pro Bono Requirement FAQs*, *supra* note 10, at 9.

164. JON B. STREETER, STATE BAR OF CAL., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT 8 (2013), available at



There are many possibilities here. To begin with, the City University of New York (CUNY) School of Law houses the Community Legal Resource Network, perhaps the most active and largest incubator for self-employed graduates in the country.<sup>165</sup> This program can serve as a model for other law schools in New York to follow. Secondly, in September 2013, the U.S. Department of Labor sent a letter to the ABA acknowledging that law students can be hired as unpaid interns for for-profit law firms.<sup>166</sup> This provides a way for students to engage in internships at smaller law firms that provide either pro bono or low bono opportunities, enlarging the scope of work beyond the legal service and 501(c)(3) universe. Perhaps most significantly, the New York City Bar Association Task Force on New Lawyers in a Changing Profession announced in the fall of 2013 that it will develop a pilot program “to design and test a mission-driven, commercial business model to deliver a defined set of legal services to people who can afford to pay something, but who do not have practical access at the present time to such services at an affordable rate.”<sup>167</sup> This could potentially create a sizable legal resource for the community with the aid of bar applicant volunteers.

While legal services for the unemployed or severely impoverished remain pro bono’s touchstone, it is important for law students to grapple with the reality that teachers, firemen, social workers, and government employees also cannot afford to hire an attorney to protect their basic essential rights.<sup>168</sup> These cases often include foreclosures, bankruptcies, eviction, medical coverage issues, and questions that threaten the economic health of families where people have stable jobs, but simply do not have the financial resources to hire an attorney.<sup>169</sup> From these experiences students will see how the access to justice crisis afflicts people with backgrounds similar to their own, hopefully further inculcating the spirit of service in those who

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[http://www.calbar.ca.gov/Portals/0/documents/publicComment/2013/2013\\_StateBarTaskForceBios\\_FINAL6-11-13.pdf](http://www.calbar.ca.gov/Portals/0/documents/publicComment/2013/2013_StateBarTaskForceBios_FINAL6-11-13.pdf).

165. Luz E. Herrera, *Training Lawyer-Entrepreneurs*, 89 DENV. U. L. REV. 887, 923 (2012).

166. Letter from M. Patricia Smith, Solicitor of Labor, to Laurel G. Bellows, Immediate Past President, ABA (Sept. 12, 2013), *available at* [http://www.americanbar.org/content/dam/aba/images/news/PDF/MPS\\_Letter\\_reFLS\\_A\\_091213.pdf](http://www.americanbar.org/content/dam/aba/images/news/PDF/MPS_Letter_reFLS_A_091213.pdf).

167. *See* N.Y. CITY BAR ASS’N TASK FORCE ON NEW LAWYERS IN A CHANGING PROFESSION, *supra* note 161, at 98.

168. *See* Herrera, *supra* note 156, at 6.

169. *See id.* at 2–3.

cannot easily bridge the barrier of difference when extending their empathy to others.

In terms of career preparation, low bono may actually do more to deliver “practice ready” skills training, because it will expose students to the realities involved in hanging up their own shingle and starting their own law practices. ABA market research has indicated that, as of 2012, nearly 75% of all attorneys work in private practice, and of those attorneys, nearly 50% work in solo practice and another 14% work in small law offices with five or less lawyers.<sup>170</sup> In today’s economy, training in solo law practice might be the best way to make law students “practice ready.”

As law students bemoan the lack of job opportunities and “oversupply” of lawyers, it will be immensely educational for them to realize the vast number of everyday citizens who desperately need lawyers and cannot obtain them. To the extent that law schools share some of the blame by instilling in law students a distorted focus on “BigLaw” as the only viable career option, low bono might expose students to real avenues through which they can pursue law as a vocation, while furthering the cause of equal justice under law.<sup>171</sup>

#### D. Racial Justice

In the summer of 2013, racial justice advocates throughout the country recoiled in horror as a number of cases seemed to directly threaten the opportunity for people of color to walk freely in public without having their dignity assaulted through racial profiling, or having their freedom to participate in democracy threatened. In the Supreme Court decision *Shelby County v. Holder*, Chief Justice Roberts wrote an opinion that invalidated a key section of the Voting Rights Act of 1964, perhaps the signature piece of legislation to emerge from the civil rights movement. It was designed to allow people of color to have equal access to the vote and full participation in American Democracy.<sup>172</sup> Additionally, New York City’s stop and frisk policy brought the issue of racial profiling into full view.<sup>173</sup> A national conversation began on whether targeted policing was either

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170. Herrera, *supra* note 165, at 889.

171. See N.Y. CITY BAR ASS’N TASK FORCE ON NEW LAWYERS IN A CHANGING PROFESSION, *supra* note 161, at 98.

172. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

173. See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), *appeal dismissed*, (Sept. 25, 2013).

morally justifiable or constitutionally permissible.<sup>174</sup> Could the city purport to provide equal justice under law as it pursues a policy of targeted enforcement? Finally, the Trayvon Martin case provided a stark reminder that stereotypes, both conscious and unconscious, inevitably come to have an impact on the application of the law, particularly when young African American males are involved.<sup>175</sup> Even the President of the United States was moved to wonder aloud: if the counterfactual had taken place, and George Zimmerman had been the victim and Trayvon had been the shooter, would the investigation and trial have proceeded in the same manner?<sup>176</sup>

A lawyer who embraces the ideal of the practice of law as a higher calling would acknowledge that most faith traditions take a strong stand against ethnic and racial bigotry. The Bible states, “There is neither Jew nor Greek . . . for you are all one in Christ Jesus.”<sup>177</sup> In Islam, the Hadith asserts, “There is no superiority of an Arab over a non-Arab.”<sup>178</sup> Members of the Jewish community have a long and abiding commitment to promoting civil rights in the United States, and throughout the twentieth century often worked in tandem with the African American community to promote racial justice.<sup>179</sup> Part of that impetus may result from the Jewish community’s own experiences fighting against anti-Semitism, and most horrifically the holocaust. In many faith traditions, a valid way to pursue a calling would be to engage in the fight against racial and ethnic bigotry.

But is this truly a question of equal justice under law? Hasn’t American law eradicated Jim Crow and other unequal laws that have discriminated on the basis of race? In reality, even after the election of an African-American president, economic inequality has continued

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174. See, e.g., Joseph Goldstein & Benjamin Weiser, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES, Jan. 30, 2004, <http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html>.

175. See Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not-Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

176. See Barack Obama, President of the United States, Remarks on Trayvon Martin (July 19, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/07/19/remarks-president-trayvon-martin>.

177. *Galatians* 3:28.

178. Bassam Zawadi & Mansur Ahmed, *Rebuttal to Answering Islam’s Article “MOHAMMED CLAIMED TO BE A WARNER ONLY FOR ARABIA”*, CALL TO MONOTHEISM, [http://www.call-to-monotheism.com/rebuttal\\_to\\_answering\\_islam\\_s\\_article\\_mohammed\\_claimed\\_to\\_be\\_a\\_warner\\_only\\_for\\_arabia\\_](http://www.call-to-monotheism.com/rebuttal_to_answering_islam_s_article_mohammed_claimed_to_be_a_warner_only_for_arabia_) (last visited Mar. 19, 2014).

179. AFRICAN AMERICANS AND JEWS IN THE TWENTIETH CENTURY: STUDIES IN CONVERGENCE AND CONFLICT (V.P. Franklin, et al. eds., 1998).

to have racial dimensions, continuing to feed stereotypes. The median wealth of white households nationwide is twenty times that of black households and eighteen times that of Hispanic households.<sup>180</sup> While the median net worth of white households in 2009 was \$113,149, for Hispanic households it was \$6325, and for Black households it was \$5677.<sup>181</sup> The African American poverty rate is 27.2%, nearly three times higher than the 9.7% for whites, while the Latino poverty rate stands at 25.6% and the Asian rate at 11.7%.<sup>182</sup> Too often children of color start life at a disadvantage: in 2011, 37.4% of African-American and 34.1% of Latino children live in poverty, as opposed to 12.5% of white children.<sup>183</sup>

In New York specifically, the statistics are no better. While 14% of White New Yorkers live in poverty, 33% of African Americans and 37% of Latinos do.<sup>184</sup> If, as noted above, poverty directly affects one's access to legal representation and access to justice, it seems clear that the access to justice gap has a racial dimension that calls for engagement.

Why do these disparities persist in the absence of any laws that intentionally promote racial discrimination? Understanding the enduring impact of Jim Crow laws can help explain this continued disparity. For example, as scholars Francisca Fajana and Camille Holmes have pointed out, "Between 1930 and 1960, of mortgages insured by the Federal Housing Administration, which spurred homeownership and massive transfers of wealth, 99 percent went to whites."<sup>185</sup> This inequitable mortgage approval outcome resulted from deliberate government policy during a time when segregation

180. See Rakesh Kochhar, Richard Fry & Paul Taylor, *Wealth Gaps Rise Between Whites, Blacks, and Hispanics*, PEW RES. CENTER (2011), available at <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics>.

181. *Id.*

182. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES 1, 13 (2013), available at <http://www.census.gov/prod/2013pubs/p60-245.pdf>.

183. Assistant Secretary for Planning and Evaluation Human Services Policy Staff, *ASPE Issue Brief: Information on Poverty and Income Statistics: A Summary of 2012 Current Population Survey Data*, U.S. DEP'T HEALTH & HUM. SERVICES 1 (Sept. 12, 2012), <http://aspe.hhs.gov/hsp/12/povertyandincomeest/ib.pdf>.

184. State Health Facts, *Poverty Rate by Race/Ethnicity (2012)*, HENRY J. KAISER FAM. FOUND., <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity> (last visited May 6, 2014).

185. Francisca Fajana & Camille Holmes, *Advancing Racial Equity-A Legal Services Imperative*, 47 CLEARINGHOUSE REV. 139, 142 (2013).

was the rule of the day.<sup>186</sup> Throughout the twentieth century, homeownership was the primary means of intergenerational wealth accumulation and social mobility for the middle class, and unsurprisingly economic prosperity followed the dictates of segregation policy.<sup>187</sup> Even though Jim Crow laws were abandoned, no effort was made to engage in substantial corrective justice for the wrongs committed. For example, racist housing policy helped set in motion persistent inequitable wealth disparities, and those disparities were never addressed.<sup>188</sup>

Hesitancy to craft targeted solutions to the problem of persistent racial inequity has allowed the effects of Jim Crow laws to remain in place, creating society's current predicament. As John A. Powell has stated, "Fairness is not advanced by treating those who are situated differently as if they were the same . . . . For example, it would make little sense to provide the same protections against hurricanes to mid-western communities as to coastal communities."<sup>189</sup> Similarly, hesitancy to address issues of racial inequality with "race-conscious" solutions allows the problem to continue. The hesitancy emerges partly out of the false understanding of racism as limited to a "belief structure" where certain people take actions against others on the grounds of racial animus.<sup>190</sup>

As opposed to looking for racist intent to explain the poverty and wealth statistics mentioned above, and assuming that because we do not see recently articulated racist intent, then racism played no role in the inequitable outcome, there are better options available for

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186. MEIZHU LEUI ET AL., *THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE* 92 (2006).

187. CTR. FOR RESPONSIBLE LENDING, *DREAMS DEFERRED: IMPACTS AND CHARACTERISTICS OF THE CALIFORNIA FORECLOSURE CRISIS* 4 (2010), available at <http://www.responsiblelending.org/california/ca-mortgage/research-analysis/dreams-deferred-CA-foreclosure-report-August-2010.pdf> ("Homeownership is also the primary means by which wealth is transferred to future generations."); see also, Suzanne Davies Withers & Carolina Katz Reid, *Racial Differences in Intergenerational Wealth Transfers and Access to Homeownership*, PRINCETON UNIV. (2005), <http://paa2005.princeton.edu/papers/51443>.

188. Jonathan Kaplan & Andrew Valls, *Housing Discrimination as a Basis for Black Reparations*, 21 PUB. AFF. Q. 255, 256 (2007), available at <http://people.oregonstate.edu/~kaplanj/Reparations.pdf> ("Through all of the changes in policy that took place, African Americans continued to be disadvantaged, and the accumulated effects of this disadvantage have never been directly addressed.").

189. JOHN A. POWELL, *RACING TO JUSTICE, TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY* 27, 79, 230 (2012).

190. John A. Powell, *Understanding Structural Racialization*, 47 CLEARINGHOUSE REV. 146, 148 (2013).

achieving racial justice. For example, we could acknowledge that because of the reality of the statistics above, people of all backgrounds, black and white, are likely to become unconsciously biased against people of color, and assume negative characteristics about them. The unequal statistics may exist because of the unequal structures created by Jim Crow policies. But because of those statistics, and the assumptions they create within us subconsciously, we become infected with an unconscious racism that causes us as a broader community to engage in a myriad of micro-aggressions that make the inequality even worse.<sup>191</sup> Indeed, “Racist intent, in terms of psychological manifestations of race-specific negative attitudes, can be seen as an outcome of structures that produce a racially organized society, rather than the sole cause of that racial organization.”<sup>192</sup>

The most prevalent racism today is the “unconscious racism” of stereotyping that allows people to degrade and discriminate against people of color while remaining unaware of what they are doing.<sup>193</sup> Hence, New York City Police who engage in stop-and-frisk tactics that overwhelmingly target communities of color could honestly say that they have no racist intent.<sup>194</sup> In their own eyes, the police officers may not see the parallels between their method of racial profiling and the perhaps more crude style of profiling that George Zimmerman seems to have engaged in. As a result of their blindness to their own unconscious racism, when racial disparities in arrests ensue, police conclude that the stereotype of black criminality is accurate, ignoring the possibility that their own unconscious biases may have influenced the outcome. Because they feel their own stereotypes are justified, they engage in more targeted policing, increasing police presence in the areas where the most arrests occur, and the vicious cycle continues. For example, a recent study revealed that blacks are 3.7 times more likely to be arrested for marijuana possession than whites,

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191. Derald Wing Sue & David Rivera, *Microaggressions in Everyday Life: A New View on Racism, Sexism, and Heterosexism*, PSYCHOL. TODAY (Oct. 5, 2010), <http://www.psychologytoday.com/blog/microaggressions-in-everyday-life/201010/racial-microaggressions-in-everyday-life>.

192. *Id.*

193. See generally Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (noting that because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings).

194. See *id.* at 322; Jesse Alejandro Cottrell, ‘Stop and Frisk’ May be Working—But Is It Racist?, ATLANTIC, (Jan. 23, 2013), <http://www.theatlantic.com/national/archive/2013/01/stop-and-frisk-may-be-working-but-is-it-racist/267417>.

although the two groups use the substance in virtually identical percentages.<sup>195</sup>

Cognitive scientists who study how bias is formed in the brain have demonstrated that “the implicit bias of ‘in-group’ preference is often the cause of disparate racial outcomes and that it can exist without the intentional animus the law requires.”<sup>196</sup> Although unconscious racial animus may not have the same moral blameworthiness as twentieth-century style blatant racism, it can lead to similar outcomes in all aspects of the law, including policing, witness identification, and jury deliberation.<sup>197</sup> A valid way to instill in new lawyers the public service values of equal justice under law and respect for the human dignity of their neighbors of all ethnic backgrounds would include exposing them to pro bono work that breaks down stereotyping and promotes racial harmony.

#### **E. Recommendation: Immigration Law, Prisoner’s Rights and Re-entry, and Racial Impact Statements**

Opportunities abound for students interested in focusing on racial justice work. According to Brendan Roediger, a faculty member at the Saint Louis University Law Clinic, many federal courts have a backlog of prisoners’ rights cases.<sup>198</sup> Because the criminal justice system is so racialized,<sup>199</sup> students who volunteer will have an opportunity to interact with minority clients and identify the societal structures that may have led to their conviction. Some may be inspired by the work and further pursue criminal law, or even take on the heroic role of becoming a public defender.<sup>200</sup> Also, many newly-released ex-offenders face job discrimination when applying for work,

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195. ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 17 (2013), available at <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf>.

196. William Kennedy et al., *Putting Race Back on the Table: Racial Impact Statements*, 47 CLEARINGHOUSE REV. 154, 156 (2013).

197. See *Generally* Cynthia Lee, Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society, 91 N.C. L. Rev. 1555 (2013).

198. Interview with Brendan Roediger, Assistant Professor, St. Louis Univ. Law Clinic, in St. Louis, Mo. (Dec. 5, 2013) (on file with author)

199. See *generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

200. See, e.g. *GIDEON’S ARMY* (HBO Documentary Films 2013).

and students who work on re-entry cases will receive exposure to both economic justice and racial justice issues.<sup>201</sup>

Students can also engage in the production of racial impact statements.<sup>202</sup> Racial impact statements are litigation supportive documents that “systematically analyze how racial and ethnic groups are affected by an existing or proposed action, policy, or practice.”<sup>203</sup> These documents are similar to environmental impact statements in the environmental law context.<sup>204</sup> State and local governments in Virginia, Washington State, and Minnesota have made use of these types of statements to engage in policy making.<sup>205</sup> Particularly in New York City, with the election of Mayor DeBlasio, it would make sense to produce reports of this type, as the Mayor may take these racial impact statements into consideration when creating local policy that affects the lives of people of color.

Any effort to eradicate cognitive bias against people of color should involve direct contact with clients of color, accompanied by training, reflection, and supervision with feedback to ensure that law students can identify the historical and ongoing racialized structures contributing to the client’s predicament.<sup>206</sup> This combination of reflection, training, and supervision with feedback is important. Without these teaching measures the students might simply continue to engage in the same unconscious practices that they have in the past without recognizing either the need for or the possibility of change. En masse training on these issues is entirely feasible, as training can take place in large groups with programs administered over the Internet.<sup>207</sup> Personal reflection is a key mechanism for the development of professional identity. And supervision with feedback is important because without the threat of negative feedback that will be shown on the permanent record of their bar application, some students might not put forth sufficient effort.

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201. Kai Wright, *The Illegal Background-Check Boom*, COLORLINES: NEWS FOR ACTION (Nov. 7, 2013), [http://colorlines.com/archives/2013/11/background\\_checks\\_and\\_unemployment.html](http://colorlines.com/archives/2013/11/background_checks_and_unemployment.html).

202. Kennedy et al., *supra* note 196, at 157.

203. *Id.*

204. *Id.*

205. *Id.*

206. Interview with William Kennedy, Managing Attorney, Legal Servs. of N. Cal., Sacramento, Cal. (Nov. 19, 2013).

207. *Racial Justice Training Institute*, SARGENT SHRIVER NAT’L CENTER ON POVERTY L., <http://povertylaw.org/training/racial-justice-institute> (last visited Mar. 6, 2014).



Racial Justice issues also arise in the immigration context. Although rarely framed as such, immigration issues are indeed ripe for inclusion in the struggle against race oppression and difference. The lines between the two often blur, and it is often difficult to determine which type of discrimination is active at any particular point in time: race, ethnicity, or national origin.<sup>208</sup> In immigration law, a student is exposed to the litigation process through the lens of human rights and fairness. As a law student, I myself worked in the Center for Applied Legal Studies, an asylum clinic at Georgetown University Law Center. During that time I had one of my formative experiences representing a client from the Democratic Republic of Congo, himself a human rights lawyer, who had been tortured and who had members of his family killed in front of him in the midst of ethnic strife growing out of the Rwandan Genocide of the late 90s. I gained experience developing supporting documentation for his case, interviewing witnesses, writing legal memoranda, and preparing my client to testify. The experience expanded my moral universe and further inspired in me an interest in the struggles of people in developing countries that continues to flourish unto this day.

The philosopher John Rawls argued in *Justice as Fairness* that one of the worst effects of inequality is that it encourages those on the bottom of the hierarchy to be seen as inferior both by themselves and by others.<sup>209</sup> This is particularly odious when low status is reified by accidents of birth like gender or race. Pro bono opportunities such as those mentioned in this section can provide an opportunity to bridge the gap between communities and genuinely promote a sense of dignity in the clients who might otherwise have been denied it.

I can speak from experience and say that any sense of distance I felt from my client because of his status as a refugee from a developing country evaporated over the days and weeks as we tried to win his asylum case. Winning asylum for him gave me one of the greatest memories of my young legal career. This type of experience can instill an attitude of not simply tolerance, but empathy and a desire to bring about justice for people of different backgrounds that approaches what Martin Luther King Jr. described as “the beloved community” in a spiritual sense, and what Kwame Appiah described

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208. See generally Cecilia Chen & Robin Goldfaden, *Closing the Gap in Understanding Immigrant Rights as Civil Rights*, 47 CLEARINGHOUSE REV. 169 (2013).

209. See generally JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 131 (Erin Kelly ed., 2001).

has described as “cosmopolitanism” in a philosophical sense.<sup>210</sup> According to Appiah, cosmopolitanism consists of two ideas: one, that we have obligations to others beyond those of our own “kith and kind,” and even beyond the borders of our own nation state, and two, not only is all human life valuable, but particular human lives are worth taking an interest in.<sup>211</sup>

## F. The Lawyer’s Role in Democracy

### 1. *Democracy and the Lawyer-Statesman*

Alexis de Tocqueville prophetically argued almost two centuries ago that lawyers would play an important role in the democratic project.<sup>212</sup> He argued that lawyers and the judiciary could provide a necessary counterforce to temper the despotic tendencies of the tyranny of the majority that could emerge from unchecked democracy.<sup>213</sup> This countermajoritarian role of the legal profession has largely been abdicated in recent years with the rise of the “hired gun” mentality of legal practice.<sup>214</sup> The hired gun mentality emphasizes the lawyer’s role as zealous advocate for clients to such a degree that it delegitimizes any imposition of ethical deliberation on the client as a lessening of the client’s autonomy.<sup>215</sup> This has led the lawyer’s role in recent years to become about doing the client’s bidding, and not necessarily helping to ensure that our democracy embraces fairness. It was hired gun lawyers that helped to shield bad corporate actors in the wake of the corporate frauds that greatly harmed the economy, including the Enron scandal and the predatory loan crisis of 2008.<sup>216</sup> Not only that, but hired guns also have

210. *See generally* KWAME APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS*, at xv (2006); ROBERT K. VISCHER, *MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE: LESSONS IN LOVE AND JUSTICE* 245 (2013).

211. APPIAH, *supra* note 210, at xv.

212. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 277–284 (Henry Reeve, trans., Colonial Press ed. 1900) (1835).

213. *See id.*

214. *See* DEBORAH RHODE ET AL., *LEGAL ETHICS* 137–48 (6th ed. 2013) (noting that the hired gun, or neutral partisan, conception of the lawyer’s role has enjoyed so much dominance that some authors have called it the “standard conception” of the lawyer’s role.).

215. *See, e.g.*, Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 A.B.A. RES. J. 613 (arguing that the zealous lawyer increases autonomy).

216. *See* Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9 (2002); Sarah Kellogg, *Financial Crisis: Where Were the Lawyers?*,

contributed to a hypercompetitive approach to promoting American interests on the world stage that has similarly led to widespread global inequality.<sup>217</sup> Lawyers who serve as hired guns for their clients in opposition to any notion of justice or the public good contribute to the current state of economic inequality, and in turn have made our democracy weaker.<sup>218</sup> This is in contrast to what lawyer statesmen would do—seek to strengthen our nation’s democracy through wise statesmanship and a desire to promote the public good.

In contrast, the counter-tradition of legal practice that Judge Lippman has advocated,<sup>219</sup> a vision tied up with notions of public service, would encourage lawyers to intervene to help make the promises embedded in the Constitution a reality.

Today we need lawyers to serve as not only as a check on unfettered democracy and majoritarianism, but also as a check on unfettered capitalism. Doing so would help to abate the inequality that systematically excludes many from having access to either the justice system or the democratic process.

From an empirical perspective, sociological research has shown that economic inequality substantially reduces the capacity for democratic political engagement for those excluded from social structures of accumulation.<sup>220</sup> This research comports with what political philosophers have suggested for years.<sup>221</sup> Most notably, John Rawls argued that high concentrations of wealth in a society allow elites to use their wealth to manipulate the system in a way that will

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DC B. (Jan. 2010), <http://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/january-2010-financial-crisis.cfm>.

217. See THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 14 (2008) (“Skillful defense of our acquiescence in world poverty typically also draws on the common belief that people may give priority to their compatriots, especially in the context of a system of competing states . . . it is permissible for us and our political representatives vigorously to pursue our interests within an adversary system in which others and their representatives can vigorously pursue their interests.”).

218. Ann E. Cudd, *Economic Inequality and Global Justice*, in *ECONOMIC JUSTICE, PHILOSOPHICAL AND LEGAL PERSPECTIVES* 159 (2013) (“I argue that economic inequality is not unjust in itself, but that if it allows the rich to dominate politically and create unfair economic conditions, then it is unjust.”).

219. Lippman, *supra* note 1.

220. See Frederick Solt, *Economic Does Economic Inequality Depress Electoral Participation? Testing the Schattschneider Hypothesis*, 32 *POL. BEHAV. J.* 285 (2010).

221. See generally Jan Narveson, *Poverty, Markets, Justice: Why the Market Is the Only Cure for Poverty*, in *ECONOMIC JUSTICE: PHILOSOPHICAL AND LEGAL PERSPECTIVES* 93 (2013).

calcify economic stratification.<sup>222</sup> This is in addition to what common sense already tells us about poverty—it serves as a barrier to democratic participation by, for example, making it difficult to obtain voter ID or making the commute to the polling place difficult because of the cost of travel or a lost workday. Recent jurisprudence has doubled down on these effects, making it even more likely that democratic participation could be suppressed in economically challenged communities.<sup>223</sup>

## 2. *Democratic Participation and Equal Justice Under Law*

Like equal justice under law, the consent of the governed is another legitimization principle of the U.S. government.<sup>224</sup> In his seminal book on the subject, *Active Liberty*, Justice Stephen Breyer outlines his interpretation of the Constitution itself as a document that protects more than just freedom from government intrusion.<sup>225</sup> It also protects what he describes as “an active liberty,” the sharing of sovereign authority, including “the citizen’s right to deliberate in the public place.”<sup>226</sup> Breyer argues that this theme of participative democracy “resonates throughout the constitution,” and is thus a valid factor to consider when judging constitutional questions.<sup>227</sup>

As bar applicants prepare to enter the profession, why not seek to instill in them an appreciation of the constitution that puts a spotlight on the role of democracy? A bar applicant who plans to work his or her entire career to uphold the Constitution should enthusiastically engage in pro bono work that promotes the same idea of democracy that emerges from the Constitution. Breyer argues that participation in democracy should be cultivated in its most direct form, and people “should possess the tools, such as information and education, necessary to participate and to govern effectively.”<sup>228</sup> A lawyer who spends his pro bono requirement engaged in legal work that serves

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222. RAWLS, *supra* note 209, at 139–40 (explaining that greater concentrations of wealth leave the underclass outside of the political culture); *see also* Cudd, *supra* note 212, at 159.

223. *See* *Shelby Cnty. v. Holder*, 557 U.S. 193 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010).

224. LUBAN, *supra* note 98, at 251 (1988) (“Now we may believe that the only legitimization principle that holds water is the *consent of the governed*.”).

225. STEPHEN BREYER, *ACTIVE LIBERTY* 3 (2007).

226. *Id.* at 6 (internal quotation marks omitted).

227. *Id.* at 16.

228. BREYER, *supra* note 225 at 16.

these purposes would gain these tools straightaway, and could help to inform citizens of their voting rights for years to come.

An aspiring lawyer is well positioned to help facilitate participative democracy. Applicants to the bar have learned about fair procedural techniques, and can help explain the importance of voting procedures to citizens. Carrie Menkel-Meadow mentioned this in *The Lawyer's Role(s) in Deliberative Democracy*.<sup>229</sup> She recognized that “as process experts, lawyers may be particularly well suited” to facilitate democratic deliberation.<sup>230</sup> Skills in mediation, consensus building, counseling, and other process-focused competencies serve lawyers well when the goal is not necessarily advocacy but instead the creation of an environment where participative democratic deliberation can take place freely.

### G. Recommendation: Early Voting and Election Protection

Legal aid programs are not traditionally involved in voting issues for fear of political bias.<sup>231</sup> Lippman's law similarly is wary of engaging in political pro bono activity that could draw the ire of politicians.<sup>232</sup> Even so, public service-oriented lawyers should want to work to ensure democratic participation. Projects that seek to expand access to the vote generally—projects like working on policy that would provide for the expansion of early voting locations or the provision of voting rights to former felons—should not necessarily implicate bias against a political party. Election protection efforts also provide a way for law students to help promote electoral participation using their legal skills. Projects that promote political engagement are sound projects for students, and as long as they involve some type of law-related activity, they should be included in the mandatory pro bono requirement.

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229. Carrie Menkel Meadow, *The Lawyer's Role in Deliberative Democracy*, 5 NEV. L.J. 347, 359 (2004).

230. *See id.*

231. LUBAN, *supra* note 98, at 300 (“The legislative compromise under which LSC continues its existence . . . has forbidden lawyers in recipient programs from participating in certain politically controversial activities: taking cases involving abortion rights . . . [and] engaging in lobbying, voter registration, or political organizing activities . . .”).

232. *See* ADVISORY COMM. ON N.Y. STATE PRO BONO BAR ADMISSION REQUIREMENTS, *supra* note 8, at 6 (“We are, however, of the view that partisan political work should not qualify.”).

### III WILL IT WORK?

The final question, and in many senses the most fundamental, remains. Will this work? Will enforcing a mandatory pro bono requirement instill new values in students, or will they simply respond with hostility, resentment, and schemes of avoidance? Will the change in their attitude endure, or will the cynicism endemic in the legal community prove too much to overcome? Will this address the access to justice gap and help students accumulate new practical skills? What will happen?

Reasons for skepticism abound. Historically, members of the bar have had less esteem for legal work that assists those in need, which suggests that if students receive that hierarchical indoctrination before commencing their mandatory pro bono service, they will look askance at the work.<sup>233</sup> Studies have found that “the more a legal specialty encountered personal suffering, the less prestigious and desirable it was . . . Prestige appeared directly proportional to the degree with which the legal specialty facilitated corporate work.”<sup>234</sup> The problem with forcing applicants to do pro bono is that it can hurt legal professionalism in the long run and stoke cynicism by creating a situation where students feel compelled by status pressures to demonstrate their aptitude to evade, dissemble, and search for loopholes to do as little mandatory pro bono possible.<sup>235</sup>

One answer is that lawyers should represent their clients the best they can anyway—part of professionalism is putting one’s attitude towards a client to the side and doing one’s job with warm zeal. Another approach is to ask the question, how can we make students want to do public service from the start? I believe that the answer is to educate them thoroughly on the theories that undergird the public service approach, mimicking, for example, the process I used in Parts I and II.<sup>236</sup> It is a mistake to simply mention public service values

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233. Edward O. Laumann & John P. Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 2 AM. B. FOUND. RES. J. 155, 204, 206 (1977).

234. Chaifetz, *supra* note 39, at 1697.

235. It may be worth noting, however, that the few students who would act in this manner have already had these values inculcated in them before the mandatory pro bono service has begun—the pro bono requirement would not create in them the tendency to engage in this behavior independent of prior socialization. And this may be overstating the point a bit—many law students are altruistic minded and would jump at the opportunity to engage in the pro bono work. I have taught many such students myself in recent years.

236. *See supra* Parts I and II.

occasionally on the assumption that they will resonate with law students. For many, if they ever came across these noble perspectives on the profession during law school, it happened intermittently; meanwhile their student debt loomed large, and the career service office stood ready to usher the students with the best GPAs towards corporate law jobs. The hope of Lippman's law, and ultimately of the profession, should be to change this culture. Not only is it impractical on a pragmatic level in light of the changing legal market, but on a moral level the old status quo does not provide a vision of the practice of law as a morally significant enterprise.

The new requirement's success also depends on the commitment towards using it to create ongoing relationships with pro bono work generally, and specifically with the organizations volunteered for.<sup>237</sup> The experience of actually having contact with disempowered communities can be transformative for the students. If the pro bono experiences create a sustained engagement with this type of practice, it can have a major impact on an aspiring lawyer's professional life, helping her become more sensitive to law's "forgotten stories."<sup>238</sup> Of course, we will not know whether this impact has happened unless the program measures not just the increased amounts of pro bono hours logged by students, but also the change in professional ideals that emanate from the new requirement. This may depend on future empirical study.

The most complete and most recent empirical review of mandatory pro bono programs for law students is sociologist Robert Granfield's *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*.<sup>239</sup> Granfield conducted a survey in 2004 of three law schools with pro bono requirements, ultimately sending surveys to approximately 2000 former students asking them a series of open-ended questions about the impact that the mandatory pro bono programs had on their professional lives.<sup>240</sup> Granfield found that "nearly seventy percent of these attorneys endorse the view that their law school pro bono experiences taught them something about

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237. Interview with William Kennedy, Managing Attorney, Legal Servs. of N. Cal., Sacramento, Cal. (Nov. 19, 2013).

238. Alec Karakatsanis, *The Human Lawyer*, 34 N.Y.U. REV. L. & SOC. CHANGE 563, 569 (2010).

239. Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355 (2007).

240. *Id.* at 1375-77.

people who were different from themselves,”<sup>241</sup> however, he also found “there are no significant differences in the number of hours devoted to pro bono work between attorneys who were required to do pro bono in law school and those who were not.”<sup>242</sup> On the question of whether the attorneys who went through the mandatory program believe pro bono to be charity or duty, Granfield found that

graduates of mandatory pro bono programs rank the motivating factor of professional obligation somewhat lower than do lawyers who were not required to participate in pro bono in law school . . . . [L]awyers who were not required to perform pro bono in law school report a slightly higher sense of professional obligation to do pro bono.<sup>243</sup>

In contrast to these sobering results that suggest that the mandatory pro bono had little positive long-term effect, and possibly even negative effect, Granfield also found that

[a] large percentage of attorneys, sixty-four percent, report that their mandatory pro bono was helpful in gaining a practical understanding of how the legal system works . . . . Overall, lawyers believe that they benefited directly from the opportunity to further develop their legal skills through mandatory pro bono.<sup>244</sup>

Why did the mandatory pro bono have a mixed effect on the question of values and so positive an effect on the question of skill? The author suggests that because these particular mandatory pro bono programs were instituted in the aftermath of the 1992 MacCrate Report, which focused on need for more experiential based skills learning to take place in law schools, the law schools marketed the mandatory pro bono on those grounds, and that’s what students took away from their experiences.<sup>245</sup> Also, I would surmise that because these activities took place within the law school setting, the students had the supervision necessary to gain the feedback so vital to enhancing understanding.

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241. *Id.* at 1378.

242. *Id.* at 1378, 1387.

243. *Id.* at 1399.

244. *Id.* at 1378.

245. *Id.* at 1403–04.



**CONCLUSION: “THE MINDFUL ASSASSIN?”**

In Buddhist meditative practice, mindfulness is highly valued.<sup>246</sup> One immersed in mindfulness practice can be completely calm and composed, yet lucid and focused.<sup>247</sup> An assassin, planning to hunt the victim, would love to be taught how to be mindful, so as to become a better assassin. As one engages in the mindfulness of the Buddha, however, another desire may arise in the heart of the assassin while practicing mindfulness—the sincere desire to reduce suffering.<sup>248</sup> Once one engages in mindfulness practice, “When we become aware that what we are doing is creating suffering for ourselves and others, we desist. When we become aware that [what we are doing] is reducing suffering for ourselves and others, we continue.”<sup>249</sup> A good Buddhist teaches mindfulness to the assassin in the hopes of transforming his heart, eventually resulting in the assassin no longer having the desire to assassinate.

Judge Lippman and others may hope, like the Buddhist teacher of the mindful assassin, that exposing students to mandatory pro bono would be enough to allow the ideals of the practice of law as a higher calling and the commitment to equal justice under law to enter the hearts and minds of bar applicants. There is little evidence to support this hope, just as there is little evidence to support the hope that bar applicant pro bono will significantly close the gap in access to justice, or that non-supervised pro bono by students, with no mandatory feedback mechanisms for supervisors, will result in effective practical skills training.

Judge Lippman’s cause is a worthy one. His leadership on issues of access to justice may eventually become one of the most significant and inspiring developments in the law that we have seen in many decades. However, with Lippman’s law, change will only happen through rigorous exploration of professional ideals, targeted, focused experiences in law practice directly related to public service values like economic justice, racial justice, and voting rights, and thorough data gathering, supervision, and training. If these suggestions are heeded, Lippman’s law may have a great effect.

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246. See Mitchell Ratner, *The Mindfulness of Mindfulness Practice*, STILLWATERMPC (Sept. 9, 2010), <http://www.stillwatermpc.org/dharma/dh20100902.htm>.

247. See *id.*

248. See *id.*

249. See *id.*