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## Access and Justice: The Transformative Potential of Pro Bono Work

### Cover Page Footnote

Associate Professor, Northeastern University School of Law. I would like to thank Amy Marinacci for excellent research assistance and Sue Zago and the staff of the Northeastern Law School library for bibliographic assistance. I received helpful suggestions from Bill Mayer, Lucy Williams, Fred Davis, Harry Hope, and George Kocur.

# ACCESS AND JUSTICE: THE TRANSFORMATIVE POTENTIAL OF PROBONO WORK

Martha F. Davis\*

## INTRODUCTION

In the early 1990s, I briefly taught a social welfare policy class for graduate social work students in New York City. One of the class assignments was to draft a welfare law. I gave the students the relevant parameters for the assignment and emphasized that they should think about how their law might be enforced. I expected to get back drafts that spelled out a series of procedural protections such as rights to counsel, private rights of action, appeal rights, hearing procedures, and so on. But instead, the social work students almost always took a different approach. My students drafted laws creating special client-centered services and funding new programs providing everything from food to mental health counseling. These laws showed little regard for procedure. In fact, my efforts to direct our post-assignment discussions to procedural issues were usually met with active resistance.

In the ensuing decade, I have often reflected on the lessons that I learned from this foray into social work. Among other things, it taught me the importance of policing the gap that too often develops between procedure and substance.<sup>1</sup> Effective laws and programs need

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1. *Goldberg v. Kelly* and the subsequent enactment of the 1996 welfare reform law are a good illustration of this problem. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). As Lucie White has asserted, “[w]elfare hearings . . . offered no ‘panacea to the problems inherent in our ossified and bureaucratic system of public assistance administration.’” Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 *Brook. L. Rev.* 861, 866-67 (1990) (citations omitted). Further, in 1996, Congress purported to repeal the entitlement that *Goldberg* sought to protect through fair hearing rights. 42 U.S.C. § 601(b) (2000). The procedural rights established by *Goldberg* did little to hinder Congress, though some state courts have subsequently ruled that due process rights continue to attach to welfare benefits despite Congress’s efforts. See, e.g., *Weston v. Cassata*, 37 P.3d 469 (Colo. Ct. App. 2001).

both: substantive provisions to address real needs and procedural mechanisms to ensure proper, fair implementation and access.

The social work students' reluctance to focus on procedure (and my own preoccupation with it) also underscores the role that personal experiences and professional training play in shaping one's preference for policy approaches. Lawyers learn in law school that procedural justice is important, and that lawyers have a unique role as procedural gatekeepers and technicians.<sup>2</sup> As Professors Austin Sarat and Stuart Scheingold have observed, "the dominant understanding of lawyering [is that it is] properly wedded to moral neutrality and technical competence."<sup>3</sup> Social workers, operating on a different, yet parallel plane where moral stances are acceptable, are less likely to see procedure as central to their clients' well-being. Indeed, social workers' concept of justice may be more muscular than the legal profession's. The National Association of Social Work's Code of Ethics states squarely that "[s]ocial workers promote social justice and social change with and on behalf of clients."<sup>4</sup>

Deborah Rhode's book, *Access to Justice*, takes a lawyerly tack, focusing on the more procedural, "access" part of the "access to justice" equation. Certainly, creating equal access to the legal system is challenge enough for one book and one author, even a scholar as insightful and prolific as Professor Rhode. Both her diagnoses and prescriptions are illuminating, particularly her suggestions regarding provision of legal services by nonlawyers.<sup>5</sup> If implemented, these reforms alone could dramatically change the face of the justice system in America.

In this Essay, however, I want to focus on pro bono lawyers while, at the same time, expanding the frame—as Professor Rhode herself has done in other work—by looking more closely at the impact that her agenda for the profession might have on pro bono lawyers' substantive concepts of "justice."<sup>6</sup> That is, the very act of providing

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2. See David W. Neubauer, *Judicial Process: Law, Courts, and Politics in the United States* 125 (2d ed. 1997) (stating that "lawyers are the gatekeepers of the judicial process"). This preoccupation with process can relegate lawyers to a conservative role even when they are active within progressive social movements. See, e.g., Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*, at 49, 72-73 (1993).

3. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *Cause Lawyering: Political Commitments and Professional Responsibilities* 3, 3 (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter *Cause Lawyering: Political Commitments and Professional Responsibilities*].

4. Nat'l Ass'n of Social Workers, *Code of Ethics: Preamble* (1999), available at <http://www.socialworkers.org/pubs/code/code.asp>.

5. Deborah L. Rhode, *Access to Justice* 90-91 (2004).

6. See, e.g., Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *Fordham L. Rev.* 2415 (1999); Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 *J. Legal Educ.* 413 (2003) [hereinafter Rhode, *Pro Bono in Principle and in Practice*]. In *Access to Justice*, Professor Rhode devotes an entire

access might change pro bono lawyers' own personal understandings of justice; the experience of representing a homeless client or a death penalty client or some other pro bono client might actually influence a lawyer's views of the solutions to homelessness or the propriety of the death penalty.

If pro bono lawyering changed lawyers, then providing access would be the beginning, not the end, of pro bono work, which would also engage the pro bono volunteer in seeking substantive justice. As former City Year participant Drake Bennett wrote in *The American Prospect*

[M]uch of what's done by volunteers has a tacit politics that volunteerism may inadvertently conceal. If you volunteer in a soup kitchen or help the homeless, you should also be working to eliminate the causes of homelessness. That enterprise, of course, logically leads to social change and to politics as the necessary instrument of change.<sup>7</sup>

In the pro bono arena, a lawyer or law student who has not been exposed previously to low-income clients or social justice issues may take on one or two public interest cases to fulfill a law firm expectation, to meet a bar association guideline, or to gain experience.<sup>8</sup> Perhaps under these circumstances, where prior political views may not be particularly rigid, the initial impulse to volunteer can, if properly channeled, nurtured, and supported, lead the volunteer to adopt a concept of justice that encompasses political activism.

Because *Access to Justice* focuses primarily on the mechanics of access, Professor Rhode takes justice at face value through much of the book.<sup>9</sup> In particular, she does not suggest that pro bono lawyers have an ethical obligation to change the law, but that the profession must simply ensure access to the accepted legal institutions set up to secure fair outcomes.<sup>10</sup> For example, a pro bono lawyer representing a capital defendant must defend her client in available venues to the

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chapter to an analysis of, and recommendations concerning, pro bono legal work. See Rhode, *supra* note 5, at 145-84.

7. Drake Bennett, *Doing Disservice: The Benefits and Limits of Volunteerism*, Am. Prospect, Oct. 23, 2003, at A20. City Year is a Boston-based community service organization that served as the inspiration for the federal Americorps program. See City Year, at <http://www.cityyear.org> (last visited Oct. 14, 2004).

8. Rhode, *supra* note 5, at 147.

9. In *Access to Justice*, Professor Rhode notes that "justice" is an elusive concept, and discusses briefly the distinction between procedural and substantive, or distributive, justice before moving on to other topics. *Id.* at 5-7. Given the book's implicit emphasis on procedural justice, i.e., access to lawyers, it is worth noting that some experimental data has suggested that procedural justice is more important to people as an indication of fairness than distributive justice. See Kees van den Bos et al., *Procedural and Distributive Justice: What Is Fair Depends More on What Comes First than on What Comes Next*, 72 J. Personality & Soc. Psychol. 95, 95-96 (1997).

10. See, e.g., Rhode, *supra* note 5, at 6, 185, 189.

best of her ability—and may even argue the law's unconstitutionality—but she is under no obligation to personally oppose the state's death penalty law. Instead, while the pro bono lawyer's individual social justice concerns may indeed have motivated her to take on death penalty litigation, these concerns are in a separate sphere from her professional obligations.<sup>11</sup>

This view of lawyers' obligations is consistent with traditional professional constraints but its capacity to expand or re-conceptualize the norms of justice is necessarily very limited.<sup>12</sup> Under this view, a death row client may be "lucky" enough to get excellent legal representation, yet still be justly executed. The lawyer has done her job. If the execution was consistent with existing law and obtained through fair processes, justice has been done.

It is reasonable to infer that most lawyers would agree with this concept of justice—that is, most lawyers believe that adherence to the rule of law is the minimum standard of justice. Whether lawyers should also oppose the death penalty because it is inherently unjust is, however, more contested. This question moves the focus from procedure to substance, from the question of mere "access" to the issue of what is "justice." Under this second inquiry, providing access to legal mechanisms alone may be no assurance of justice.<sup>13</sup>

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11. In essence, this attempt to preserve moral neutrality in legal representation marks the boundary between a pro bono lawyer and a "cause lawyer." See, e.g., Sarat & Scheingold, *supra* note 3. Cause lawyers embrace the connections between their personal politics and their clients' goals. Indeed, those connections between the personal and the professional are the reason for the cause lawyer's involvement in the first place.

12. The formal professional rules that govern lawyers' obligations to clients may reflect a set of concerns that are inappropriate to a public interest context. Jennifer Gordon has noted that "[m]any of the ethical rules that govern the conduct of attorneys have been developed in the context of private lawyering and, thus, conflict with lawyering in the context of a larger mobilizing effort." Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 Harv. C.R.-C.L. L. Rev. 407, 440-41 n.97 (1995) (citing, for example, Canon 5 of the Lawyer's Code of Professional Responsibility).

13. International human rights law reflects a parallel dichotomy between procedural justice and substantive justice. The International Covenant on Civil and Political Rights stresses issues such as access to lawyers, consistent procedures, and procedural fairness. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. The International Covenant on Economic, Social and Cultural Rights focuses on a set of rights that are more substantive in nature: food, water, and shelter, for example. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 933 U.N.T.S. 3; see also Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 Brook. J. Int'l L. 689, 696-97 (1998). International institutions and jurists have repeatedly noted, however, that the divisions between procedural rights and substantive rights are artificial, and that there is no dividing line or hierarchy between those rights that put food directly on the table and those that do so by improving political participation. See *Vienna Declaration and Programme of Action*, U.N. GAOR ¶ 5, U.N. Doc. A/CONF.157/23 (1993) ("All human rights are universal, indivisible and interdependent and interrelated."). There is a similar (though often

Given the disagreements surrounding more substantive definitions of justice—and the ample justifications for pro bono work based on procedural fairness alone—Professor Rhode’s decision to focus in *Access to Justice* on clients’ access to lawyers is understandable. Yet she also acknowledges that providing access to justice is more than a simple mechanical process—and that the lawyers providing the access may have an emotional stake of some kind in both the process and the outcome. For example, in making her case supporting the importance of pro bono work for the legal profession, Professor Rhode draws a connection between providing access and lawyers’ emotional well-being: She describes the many positive personal impacts that pro bono participation may have on lawyers, including alleviating depression and reviving sagging professional morale.<sup>14</sup>

Certainly there is much anecdotal evidence of the enthusiasm that lawyers bring to their pro bono work, even in dire circumstances. After the September 11, 2001 attacks, the New York City Bar’s outpouring of volunteerism was cathartic for many who wanted to make a meaningful contribution to the relief effort. As one attorney who provided assistance to victims in New Jersey stated, “[volunteering] was really a privilege. It was not a sacrifice. I was extremely lucky to be in the right place at the right time in my practice and in my life.”<sup>15</sup> Volunteering in less trying times, one in-house counsel who provided pro bono intellectual property assistance through an organization called the Pro Bono Partnership observed that “[t]o be able to give a little time and effort to the legal problems of those who otherwise might not have access to the legal advice they deserve, is not only ‘the right thing to do,’ but it is also personally gratifying.”<sup>16</sup> Law students completing public interest placements have described similar feelings. A sampling of student responses from a Stanford Law School survey included: “I loved where I worked.” “There was never a dull moment. Very interesting, very good experience . . . I truly loved my experience there.” “Very rewarding, interesting and informative.” “I found it extremely interesting and helpful in providing a terrific learning experience.” “I loved the work

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unacknowledged) continuity in domestic law, and procedural victories often have significant substantive impacts.

14. Rhode, *supra* note 5, at 146-47; see also Rhode, *Pro Bono in Principle and in Practice*, *supra* note 6, at 416-17 (describing health benefits of volunteerism); John Wilson & Marc Musick, *The Effects of Volunteering on the Volunteer*, 62 *Law & Contemp. Probs.* 141, 150-62 (1999).

15. Ass’n of the Bar of the City of N.Y. Fund, Inc. et al., *Public Service in a Time of Crisis: A Report and Retrospective on the Legal Community’s Response to the Events of September 11, 2001*, at 41 (2004) (quoting Nancy Erika Smith).

16. Rich Stewart, *Champion International, Statement at Volunteer Testimonials of Pro Bono Partnership Volunteer Attorneys*, at [http://www.probonopartner.org/volunteer\\_comments.htm](http://www.probonopartner.org/volunteer_comments.htm) (last visited Oct. 20, 2004).

I did this semester.” “It was fantastic! I was able to combine many interests from my undergraduate [experience] with the project.”<sup>17</sup>

The effect of pro bono work on lawyers is even more complex, however. Not only do lawyers reap emotional benefits from their pro bono practices, but the experiences associated with doing pro bono work can re-shape their political attitudes. Theories of political psychology suggest that there is a relationship between access and justice—that is, an individual lawyer’s participation in providing legal access to marginalized clients will influence that lawyer’s view of underlying substantive concepts of justice, and may in turn influence political participation by the lawyer to attain a substantive law reform goal.<sup>18</sup> Of course, as successive social movements have found, simply having access to lawyers (and therefore, access to power) may change the political dynamics surrounding a marginalized group in profound ways.<sup>19</sup> But lawyers can change too. Both intuition and the limited empirical data available suggest the political views of the pro bono lawyers may be altered as they confront the bias and hardships directed at their clients.<sup>20</sup> Professor Rhode herself has acknowledged this possibility, observing that “[g]iving broad segments of the bar some experience with poverty-related problems and public interest causes can lay crucial foundations for change.”<sup>21</sup>

It may be particularly important to take this dynamic relationship between access and justice into account in shaping the legal profession’s pro bono policies—for example, what does this relationship tell us about the impacts of mandatory pro bono requirements on the profession, or about the potential power of law school public interest mandates?<sup>22</sup> What lessons does it have for professional standards of client representation? At this stage of the

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17. Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 *Stan. L. Rev.* 1695, 1707-08 n.60 (1993). While such positive feelings are in the majority, they are not universal. In *Pro Bono in Principle and in Practice*, Professor Rhode reports on negative comments from some law school graduates who were required to participate in pro bono work as a prerequisite to graduation. Rhode, *Pro Bono in Principle and in Practice*, *supra* note 6, at 436-43; *see also* Rhode, *supra* note 5, at 175-78.

18. *See infra* Part I.A.

19. Access to lawyers can give shape and weight to clients’ own more expansive views of justice, an effect that may also contribute to client subordination if lawyers are not sufficiently sensitive to this power imbalance. *See, e.g.*, White, *supra* note 1.

20. *See infra* Part I.B.

21. Rhode, *supra* note 5, at 148; *see also id.* at 147 (“Involvement in community groups, charitable organizations, high visibility litigation, and other public interest activities is a way for attorneys to expand their perspectives . . .”); Deborah L. Rhode, Foreword, in *Ass’n of Am. Law Schs., Learning to Serve: The Findings and Proposals of the AALS Commission on Pro Bono and Public Service Opportunities* (1999), available at <http://www.aals.org/probono/report.html>.

22. Some of these questions are also examined in Reed Elizabeth Loder, *Tending the Generous Heart: Mandatory Pro Bono and Moral Development*, 14 *Geo. J. Legal Ethics* 459 (2001).



research in this area, the evidence is still too sparse to draw firm conclusions.<sup>23</sup> In this Essay, I survey the existing data, identify its practical implications for the legal profession and client representation, and outline future research that would bring the relationship of access and justice, for lawyers themselves, into clearer focus.

### I. DOES PRO BONO WORK INFLUENCE LAWYERS' CONCEPTS OF JUSTICE?

Studies of volunteers have tried to identify the collection of factors that might initially lead to volunteerism. As Professor Rhode has catalogued them, these attributes include: "a willingness to empathize, a sense of civic or group responsibility, and earlier positive exposure to volunteers and volunteer work."<sup>24</sup>

However, not all people engaged in volunteerism fit neatly into these categories. It is not the case that individuals possessing these characteristics invariably volunteer and those without these attributes do not; external factors may exert a strong influence on such decisions. Further, individuals are not static. A number of studies note that volunteerism is often undertaken by those who are most likely to be sympathetic to the plight of those they are helping.<sup>25</sup> This chicken-egg problem makes it difficult, though not impossible, to determine what independent effects volunteerism may have on the volunteers. Considerable research demonstrates, however, that regardless of their age, initial sympathies, or alternative motivations for volunteering, once they have volunteered, individuals' experiences of volunteerism will have an impact on their political outlook and values.

#### A. Adults' Political Views

Some researchers have concluded that by the time a person reaches adulthood, his or her basic values and political beliefs are well-established—if not necessarily coherent. Indeed, Professor Rhode herself has written that "[b]y the time an individual launches a legal career, it is too late to alter certain personal traits and experiences

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23. Professor Rhode has noted the absence of discussions of altruism from the literature on lawyers' pro bono activities. Rhode, *Pro Bono in Principle and in Practice*, *supra* note 6, at 414. Part of the reason, she observes, "may be the daunting scope of relevant material across multiple disciplines, including philosophy, psychology, sociology, and political science, as well as applied work on philanthropy and community service." *Id.* The same might be said of discussions of this related topic of the political and psychological impacts on lawyers of pro bono activities.

24. *Id.* at 423.

25. Loder, *supra* note 22, at 480; Rhode, *Pro Bono in Principle and in Practice*, *supra* note 6, at 418.

that influence public service motivations.”<sup>26</sup> According to one sizeable longitudinal study, individuals’ political philosophies become well-defined during the college years and rarely change with the passage of time.<sup>27</sup> Even law school, which many lawyers remember as a time when their fundamental beliefs were challenged daily, has been found to have little impact on students’ political and social attitudes.<sup>28</sup> According to a recent analysis, while law students are generally left-of-center on social issues at the time they enter, “little attitudinal change takes place while they are in law school.”<sup>29</sup> Another study, looking at parents and children over time, similarly concluded that as individuals age and acquire greater political experience, their political affiliations crystallize and harden.<sup>30</sup>

More recent and nuanced research has, however, emphasized that adults’ political beliefs, while perhaps preliminarily shaped in young adulthood when an individual’s independent identity is formed, are really quite malleable and can change throughout the entire life course.<sup>31</sup> Even studies that ultimately support the “persistence” theory of attitude development acknowledge that there is also substantial evidence of attitude change. For example, a fifty-year study of Bennington College graduates of the 1930s and 1940s found that “some 60 percent of the variance in our latent attitude variables in 1984 could be predicted on the basis of 1930s attitudes, whereas 40

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26. Rhode, *Pro Bono in Principle and in Practice*, *supra* note 6, at 423.

27. George E. Vaillant, *Aging Well: Surprising Guideposts to a Happier Life* from the Landmark Harvard Study of Adult Development 155-58 (2002). This study followed a cohort of Harvard men recruited from the classes of 1939 through 1942 for the rest of their lives. While Professor Vaillant found that liberals were “more likely to be open to new ideas . . . [and] to display creativity,” for both liberals and conservatives, “[p]olitics are set in plaster.” *Id.* at 156-57. Quoting Gilbert & Sullivan’s *Iolanthe*, Vaillant concluded that “‘every boy and every gal, [t]hat’s born into the world alive, [i]s either a little liberal, [o]r else a little conservative!’” *Id.* at 158. Several subsequent studies have supported this conclusion, called the “generational theory,” though often with significant caveats. See Duane F. Alwin et al., *Political Attitudes over the Life Span: The Bennington Women After Fifty Years* 264 (1991) (accepting the generational hypothesis with “a number of qualifications”).

28. J.D. Drodny & C. Scott Peters, *The Effect of Law School on Political Attitudes: Some Evidence from the Class of 2000*, 53 *J. Legal Educ.* 33, 34 (2003).

29. *Id.* Interestingly, men and women do not start out in the same place politically: “Female law students are significantly more liberal than their male counterparts and are more liberal than the broader population of female college graduates.” *Id.* at 46.

30. M. Kent Jennings & Gregory B. Markus, *Partisan Orientations over the Long Haul: Results from the Three-Wave Political Socialization Panel Study*, 78 *Am. Pol. Sci. Rev.* 1000, 1006 (1984).

31. Roberta S. Sigel, *Conclusion: Adult Political Learning—A Lifelong Process*, in *Political Learning in Adulthood* 458, 459 (Roberta S. Sigel ed., 1989); see also William G. Mayer, *The Changing American Mind: How and Why American Public Opinion Changed Between 1960 and 1988*, at 188 (1992). Mayer also rejects the assertion that people become more conservative or attitudinally rigid as they grow older. *Id.*

percent of that variation reflected attitude change.”<sup>32</sup> In short, these lives were marked by significant amounts of both stability and change.

The Bennington research and other studies have found that there can be subtle or even major shifts in response to external changes—and in the aggregate, entire generations may have less durable political associations than prior generations depending on their collective experiences.<sup>33</sup> This phenomenon may explain the different research outcomes of studies concerning stability of political views, because the persistence of views acquired in young adulthood may vary from generation to generation. Catastrophic events of national scope, such as the events of September 11, 2001 or incremental changes, such as greater access to information via the internet, may have broad impacts on political orientation.<sup>34</sup> Additionally, as President Clinton’s campaign mantra, “it’s the economy, stupid!” intimates, broad changes in the economy may encourage people to rethink their political affiliations on a large scale.<sup>35</sup>

Further, individuals’ political attitudes may change because of individual experiences. As Professor Roberta Sigel has observed, even so-called private roles such as mother or member of a religious community “involve or have the potential to involve political engagements.”<sup>36</sup> Divorce, perhaps precipitating a change in economic status, or some other private tragedy such as a parent’s death or loss of a job, may lead to dramatic shifts in an individual’s political socialization. Interestingly, as borne out by the increase in pro bono after the attacks on September 11, 2001 or Senator John Edwards’ entry into politics following his oldest son’s death, adults often “seek out [new] learning experiences in order to cope with specific life-changing events.”<sup>37</sup> It is at these points, when adults are already

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32. Alwin et al., *supra* note 27, at 265.

33. Mayer, *supra* note 31, at 274; Jennings & Markus, *supra* note 30, at 1007-08, 1015.

34. With respect to lawyers, the events of September 11, 2001 triggered a huge outpouring of pro bono legal work from lawyers around the country. See Ass’n of the Bar of the City of N.Y. Fund, Inc. et al., *supra* note 15. Other events—whether disasters or galvanizing political developments—have had similar triggering effects on the legal community. See, e.g., Doug McAdam, Freedom Summer 156-57 (1988) (describing lawyers who volunteered in the South during the Freedom Summer and were “radicalized”). For a discussion of crisis events and incremental changes, see Mayer, *supra* note 31, at 274-75.

35. See Michael X. Delli Carpini, *Age and History: Generations and Sociopolitical Change, in Political Learning in Adulthood*, *supra* note 31, at 23-25; see also Sharan B. Merriam & Baiyin Yang, *A Longitudinal Study of Adult Life Experiences and Developmental Outcomes*, 46 *Adult Educ. Q.* 62, 77 (1996) (concluding that experiencing a period of unemployment significantly impacted developmental outcomes such as social action participation).

36. Sigel, *supra* note 31, at 461.

37. Ron Zemke & Susan Zemke, *30 Things We Know for Sure About Adult Learning*, Innovation Abstracts, Mar. 9, 1984, at 6, available at <http://honolulu.hawaii.edu/intranet/committees/FacDevCom/guidebk/teachtip/adults->

dealing with a life transition of one kind, that they may be most ready to re-evaluate other aspects of their beliefs and values.

It has also long been accepted that, to the extent that political views change over time, they drift toward greater conservatism.<sup>38</sup> But again, such a drift is not inevitable, and varies tremendously from one individual to the next; in particular, the individual's larger social context is a critical factor.<sup>39</sup> For example, numerous studies indicate that a large percentage of law students are motivated to study law by their strong feelings about justice.<sup>40</sup> Yet few of these students ultimately enter full-time public interest work, and the profession as a whole provides only a relatively minimal per capita pro bono contribution. According to Professor Rhode, "the average [pro bono contribution] for the bar as a whole is less than half an hour a week and fifty cents a day."<sup>41</sup>

Robert Stover's classic study of law students' commitment to public interest work indicates that age is not a significant factor in these outcomes.<sup>42</sup> Rather, Stover found that one of the prerequisites for maintaining individual political constancy is group support.<sup>43</sup> At the University of Denver School of Law where Stover conducted his study, only a handful of students who entered with an aspiration to go into public interest law retained that commitment through law school.<sup>44</sup> Those who did had the benefit of peer group support and had successfully identified one or more mentors who supported their

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3.htm; see also Merriam & Yang, *supra* note 35 (identifying links between certain life experiences such as marriage and employment and developmental outcomes such as socio-political activity and political participation). This is the premise of at least one bestseller about the legal profession. See John Grisham, *The Street Lawyer* (1998). After being taken hostage by a homeless man, the story's protagonist, a partner in a large law firm, reevaluates his career and leaves his practice to join a legal clinic specializing in representing the homeless. See *id.*

38. See Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns*, 13 *Law & Soc'y Rev.* 11, 21 (1978) (finding that though they remained more liberal than the general population, all of the changes that their respondents registered over the course of law school were in the conservative direction).

39. For example, a classic study of students at Bennington College in the 1930s and 1940s found that Bennington women were "even more intensely liberal than women of their own generation." Alwin et al., *supra* note 27, at 262. In re-analyzing the data fifty years after the original study, the authors credited "the unique influences of the Bennington College environment" that supported such out-of-the-mainstream views. *Id.*

40. Richard L. Abel, *Choosing, Nurturing, Training and Placing Public Interest Law Students*, 70 *Fordham L. Rev.* 1563, 1563 n.4 (2002) (citing studies).

41. Rhode, *supra* note 5, at 145; see also Abel, *supra* note 40, at 1566 (few students ultimately engage in public interest work). Law schools' records of promoting pro bono work are also uneven. See Ass'n of Am. Law Schs., *supra* note 21.

42. Robert V. Stover, *Making it and Breaking it: The Fate of Public Interest Commitment During Law School 90-91* (1989).

43. *Id.* at 103-15.

44. *Id.*

goal.<sup>45</sup> As Professor Rhode reports, economic hurdles, such as the need to pay back hefty law school loans, can also have the practical effect of steering students away from public interest work.<sup>46</sup> Better financial aid and loan forgiveness programs would allow students to freely choose public interest careers rather than accept default positions with higher pay.

The importance of support was also a key finding in Doug McAdam's research on volunteers (including some lawyers) who participated in Mississippi's Freedom Summer in 1964. Surveying volunteers' lives in the wake of that experience, McAdam found that community support was critical to volunteers' continued activism decades later. As he put it:

Activism depends on more than just idealism. It is not enough that people be attitudinally inclined toward activism. There must also exist formal organizations or informal social networks that structure and sustain collective action . . . . Those volunteers who remain active today are distinguished from those who are not by virtue of their stronger organizational affiliations and continued ties to other activists.<sup>47</sup>

To an extent, then, a life of volunteerism and political activism can begin with just one step. McAdam surveyed both Freedom Summer volunteers and the group of "no-shows" (those who registered but did not participate), who were not initially attitudinally distinguishable from the volunteers.<sup>48</sup> Importantly, the no-shows' reasons for not showing up to participate in Freedom Summer activities were not political, but pragmatic, including parental opposition and being too young.<sup>49</sup> Experiences can change attitudes, however, and by the end of the summer, the Freedom Summer participants' views had moved farther toward the radical left.<sup>50</sup> This gap between volunteers and no-shows persisted for the rest of their lives. The volunteers, to a greater extent, "made politics the central feature of their lives," while for the no-shows, "activism remained subordinate to the rest of their lives."<sup>51</sup> McAdam concludes that one of the critical factors separating these groups was their social context. His study found that the greater the number of Freedom Summer volunteers an individual was in contact with, the higher his or her level of activism.<sup>52</sup> At bottom, then, the

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45. *Id.* (describing students' experiences accessing subcultural support for public interest work).

46. Rhode, *supra* note 5, at 174.

47. McAdam, *supra* note 34, at 237.

48. *Id.* at 61.

49. *Id.* at 54, 61, 189-90 & app. F. Though Freedom Summer activities were targeted at college students, the average age of volunteers was 23.2. These were, in fact, young adults. *Id.* at 43.

50. *Id.* at 186-87.

51. *Id.*

52. *Id.* at 190.

difference between these two groups began with, and was perpetuated by, the initial decision to show up or not.

### B. *Formative Experiences*

As the Freedom Summer study suggests, to the extent that adults' values are not rigid and can shift over time, participation in service-learning or volunteer projects can have a significant effect on their moral reasoning and, consequently, concepts of justice. To date, most research has focused on high school and college-age youth.<sup>53</sup> Several studies have examined how high school and college students' participation in public service projects influences their thinking about social problems, or their political engagement. In general, such programs have shown statistically significant results, with participants experiencing "greater increases in social responsibility and moral reasoning than their counterparts in traditional school programs."<sup>54</sup> One large longitudinal study conducted by University of California researchers collected data from 22,236 college undergraduates, and found that service participation showed "significant positive effects on . . . values," defined as "commitment to activism and to promoting racial understanding."<sup>55</sup>

On a smaller scale, a study of students at a Michigan college found that those participating in service-learning courses "demonstrated greater resolve to act in the face of acknowledged uncertainty and greater awareness of the multiple dimensions and variability involved in dealing with social problems."<sup>56</sup> In addition, "[s]ervice-learning appears to have influenced participants' use of prosocial decision-making and advanced forms of prosocial reasoning."<sup>57</sup> While the evidence that community service programs trigger future participation

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53. Spurred in part by school-based service learning programs, rates of volunteerism among young-people have risen in recent years and now reach nearly ninety percent. See Nat'l Ass'n of Secretaries of State, *New Millennium Fact Sheet* (2000), available at <http://www.stateofthevote.org/survey/sect2.htm>. Yet according to the New Millennium Survey conducted by the National Association of Secretaries of State, much of this student activity is apolitical, centered on community service projects rather than social change activity. *Id.*

54. Thomas H. Batchelder & Susan Root, *Effects of an Undergraduate Program to Integrate Academic Learning and Service: Cognitive, Prosocial Cognitive, and Identity Outcomes*, 17 *J. Adolescence* 341, 342 (1994); see also Wilson & Musick, *supra* note 14, at 146-47 (citing "convincing evidence that early volunteering increases the likelihood that young people will become active members of their political community" as adults).

55. Alexander W. Astin et al., Higher Educ. Research Inst., *Executive Summary: How Service Learning Affects Students 2* (2000).

56. Batchelder & Root, *supra* note 54, at 352.

57. *Id.* at 354. The term "prosocial" is the opposite of antisocial and generally denotes behavior that is altruistic. See Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers, in Cause Lawyering: Political Commitments and Professional Responsibilities*, *supra* note 3, at 31, 38.

in civic and political issues is more mixed, several studies report that students engaged in political and social action through school-based programs become more "open-minded."<sup>58</sup> Further, the large University of California study demonstrated that "service participation appears to have its strongest effect on the student's decision to pursue a career in a service field," an effect that carried over regardless of the student's initial career choice.<sup>59</sup>

Consistent with findings about the importance of peer group and mentoring support, students also benefited from the personal connections that they established in the community through public service projects.<sup>60</sup> For example, a drop-out prevention project that utilized service-learning found that such experiences had an "important and positive influence on young people," and contributed to school success.<sup>61</sup>

The few studies focusing on adults have also found significant connections between life experiences and individuals' propensity to be socially and politically active. In particular, a study of more than 6000 individuals surveyed in both 1974 and 1986 found that work experiences influenced these adults' attitudes. According to the researchers, "the more one works with people, the greater the impact on developmental outcomes. Apparently the more one is exposed to and interacts with people, the more sensitive one becomes to social inequality, [and] the more likely one is to participate politically and socially."<sup>62</sup>

## II. EMPATHY AND JUSTICE

Lawyer-client relationships, of course, are different from peer relationships, precisely because of the professional screen that separates lawyers from clients. While attitudes toward stigmatized groups may change through strategies involving cooperation, equal status, and personal contact, the contact between lawyers and clients is complicated by status differences and power differentials.<sup>63</sup> As Professor Lynne Henderson has observed, lawyers have a tendency to

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58. Andrew Furco, *A Conceptual Framework for the Institutionalization of Youth Service Programs in Primary and Secondary Education*, 17 J. Adolescence 395, 400 (1994). Another study of adolescents ages eleven to seventeen showed a slight gain in attitudes toward society's obligation to meet the needs of others, but no significant gains in the adolescents' own sense of personal duty to meet such needs. Wilson & Musick, *supra* note 14, at 145 (describing the study).

59. Astin et al., *supra* note 55, at 2. Rhode summarizes several of these studies in *Access to Justice*. Rhode, *supra* note 5, at 158, 164.

60. Robert Shumer, *Community-Based Learning: Humanizing Education*, 17 J. Adolescence 357, 366 (1994).

61. *Id.* at 367.

62. Merriam & Yang, *supra* note 35, at 76.

63. C. Daniel Batson et al., *Empathy and Attitudes: Can Feeling for a Member of a Stigmatized Group Improve Feelings Toward the Group?*, 72 J. Personality & Soc. Psychol. 105, 117 (1997).

“deny a role to empathic responses in their approach[] to legal problems.”<sup>64</sup> Because they are taught not to identify with clients, but to represent them, lawyers may deliberately or unconsciously avoid empathizing with clients’ situations when such empathy would expose the lawyers to greater attitudinal influence.<sup>65</sup> In extreme cases, empathy might inhibit lawyers’ pursuit of justice. One experimental study suggests that empathy-induced altruism can lead one to act in a way that violates the moral principle of justice.<sup>66</sup> Thus, by minimizing empathy, lawyers can avoid the “two masters” problem that might be raised by conflicts between their altruistic impulses and the requirements of justice. Perhaps in doing so, however, lawyers sacrifice competent representation of the client and appreciation of the larger social justice context of the representation.

This tension between feeling empathy for a client and pursuing impartial justice on the client’s behalf is one of the things that distinguishes legal representation from a social work approach or a peer relationship. As set out above, social workers profess to work *with* their clients, not *for* them.<sup>67</sup> Reacting against the traditional account of lawyers as independent actors, some scholars have argued that the best legal representation is “client-centered,” i.e., a relationship that transcends lawyers’ independent and preconceived notions of clients’ desired outcomes to focus on client communication and participation.<sup>68</sup>

One might assume that in a “client-oriented practice,” empathy should prevail over lawyers’ instincts for justice. For example, Stephen Ellman has asserted that empathy has a “central role in client-centered practice.”<sup>69</sup> Undue emphasis on empathy may, however, swing the pendulum too far in the other direction. Interestingly, psychologists argue that the most positive approach in a legal context is not to denigrate or suppress the theoretical concepts of justice that animate lawyers, but to make these factors—justice and empathy—work together. According to Professor C. Daniel Batson and his co-authors, “[d]esire for justice may provide perspective and reason; empathy-induced altruism may provide emotional fire and a

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64. Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1576 (1987).

65. For a definition of empathy, see Menkel-Meadow, *supra* note 57, at 39 & n.69. See also Loder, *supra* note 22, at 479-80 (defining empathy as “sharing the perceived emotion of another person”).

66. C. Daniel Batson et al., *Immorality from Empathy-Induced Altruism: When Compassion and Justice Conflict*, 68 J. Personality & Soc. Psychol. 1042, 1051-52 (1995).

67. See Nat’l Ass’n of Social Workers, *supra* note 4, at pml., available at <http://www.socialworkers.org/pubs/code/code.asp>.

68. See, e.g., Stephen Ellman, *Lawyers and Clients*, 34 UCLA L. Rev. 717, 720 (1987); Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 Emory L.J. 1065 (2003).

69. Stephen Ellman, *Empathy and Approval*, 43 Hastings L.J. 991, 1011 (1992).



push toward seeing the victims' suffering end, preventing rationalization and derogation."<sup>70</sup> In short, exercising empathy does not require that lawyers abandon the goal of justice altogether. Instead, empathy can help overcome lawyers' predilection for settling for procedural justice, opening up an expanded vision of justice that is responsive to clients' substantive needs and the larger social context of the representation. In fact, recent legal scholarship has even suggested that one way to balance empathy and justice in practice is to "make empathy a kind of ritual in one's work," thus transforming it into a "professional" emotion alongside justice.<sup>71</sup>

If combining individual empathy with a sophisticated understanding of justice is a solid basis from which to engage in public interest representation, can this approach be taught? Moreover, can such enlightened pro bono representation open a gateway through which a lawyer re-evaluates and expands her understanding of justice on a more systemic scale?

As an initial matter, there is a widespread belief among lawyers that empathy can be taught or induced.<sup>72</sup> While individual lawyers may have varying capacities for empathy based on their backgrounds, it is uncontroversial to assert that some degree of empathy is a professional imperative for a competent lawyer working with clients.<sup>73</sup> Empathy is fully consistent with, and indeed is virtually required by, standards of professionalism; that is, it is integral to the profession's own sense of fairness and process.<sup>74</sup> Because of its central role in legal

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70. Batson et al., *supra* note 66, at 1053.

71. Note, *Being Atticus Finch: The Professional Role of Empathy in To Kill a Mockingbird*, 117 Harv. L. Rev. 1682, 1702 (2004). The author concludes: "This is not, however, to say that empathy should always be tightly controlled; there may come a time, as there did for Atticus Finch, when one feels compelled to break the ritual and let empathy have full sway." *Id.*

72. Loder, *supra* note 22, at 481 (citing studies to support the proposition that "empathy can be encouraged or cultivated"); see also Rhode, *Pro Bono in Principle and in Practice*, *supra* note 6, at 422-23 (discussing community service programs designed to foster empathy).

73. See Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 Clinical L. Rev. 755, 758 (2004) ("Empathy and its cousins, including sympathy, approval and support, are key ingredients in [a]... respectful and helping lawyer-client relationship . . . ."); Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 Idaho L. Rev. 399, 426 (2003) (noting that empathy "can have a positive and powerful effect on client representation").

74. See Dinerstein et al., *supra* note 73, at 758-59. Empathy is a particularly important aspect of the lawyer-client relationship. Indeed, these authors characterize empathy as an "ethical obligation" that is "integral to shaping relationships through which you can effectively assist your clients." *Id.* at 804; see also Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 Clinical L. Rev. 135, 136 (2002) (empathy is "part of the process of gathering information"). Nevertheless, even within an empathetic lawyer-client relationship, "you will need to maintain a certain boundary between you and your client so that you can deliver the critical or negative assessments and information

practice, law schools, and particularly law school clinics, have devoted significant resources to developing techniques for teaching empathetic practices such as active listening and other supportive techniques.<sup>75</sup> Further, techniques for inducing empathy in fully-formed adults are well known to lawyers, who routinely use them when appealing to judges and juries on behalf of their clients.<sup>76</sup> Some practitioners even identify empathy as a trial skill to be taught in skills-based courses or continuing legal education seminars.<sup>77</sup>

Direct contact with individuals is one of the ways that empathy may be induced. For example, studies of juries have found that “[e]mpathy is[] more likely when a courtroom decision-maker observes distress, rather than merely imagines it.”<sup>78</sup> Similarly, law teachers and practitioners have used techniques such as storytelling—crafting a narrative to explain the client’s predicament in terms that resonate with the listener—to induce empathy.<sup>79</sup>

Once learned or induced, empathy itself may open doors to a greater appreciation of the larger political issues implicated by pro bono work.<sup>80</sup> Significantly, an influential study led by Professor

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that are a routine part of the lawyer-client relationship.” Dinerstein et al., *supra* note 73, at 766; see also Fletcher & Weinstein, *supra*, at 145 (“Self-awareness and boundary setting are critical outgrowths of empathic communication with clients.”).

75. See generally Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F. L. Rev. 621, 638-39 (2002) (describing class on interpersonal dynamics for lawyers that involved teaching empathy).

76. See, e.g., ABA, *Guidelines for the Appointment and Performances of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1068 (2003) (“Counsel who seeks to persuade a decisionmaker to empathize with the client must convey his or her own empathy.”); Michael Frost, *Ethos, Pathos & Legal Audience*, 99 Dick. L. Rev. 85, 113 & n.117 (1994) (citing modern trial advocacy texts that advise using storytelling to create empathy); Sunwolf, *Talking Story in Trial: The Power of Narrative Persuasion*, *The Champion*, Oct. 2000, at 26, 30 (“Storytelling is an empathy-building tool for lawyers, offering a unique method for creating connected persuasion, both with clients and with the jurors . . .”).

77. For example, one article claims that with only four hours of training lawyers and law students can learn to respond empathetically to clients. John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 Sw. U. L. Rev. 505, 508 (1983); see also Philip M. Genty, *Clients Don’t Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 Clinical L. Rev. 273, 275 (2000) (stating that “[e]mpathy is among the most important lawyering skills that students can learn in a clinic”).

78. Douglas O. Linder, *Juror Empathy and Race*, 63 Tenn. L. Rev. 887, 897 (1996).

79. Henderson, *supra* note 64 at 1576; Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099, 2104-05 (1989) (describing stories told to different audiences in order to “facilitat[e] empathic understanding”).

80. Rosenberg, *supra* note 75, at 633. For example, one author states that:

I believe that empathy is important not just for what financial rewards it can bring to a person, or for what a person can get with it, but also for what it can do to a person. Aside from its productive utility, empathy can shape a person’s experiences, thoughts, and actions in a morally positive way.

*Id.* (emphasis omitted).

Batson indicates that feeling empathy for a single member of a stigmatized group can improve attitudes toward the group as a whole—a precursor to seeking group-based justice.<sup>81</sup> Professor Batson's team began by inducing people to feel empathy for individual members of stigmatized groups, such as AIDS victims, the homeless, or convicted murderers.<sup>82</sup> The team found, first, that arousing a person's empathy for such a stigmatized individual was fairly easy with guidance. Indeed, the researchers found that it was even possible to induce empathy for individuals who were responsible for their own plight, provided the "empathy induction occurred before participants learned about [the] victim[']s own] responsibility."<sup>83</sup> Further, they observed that, once aroused, empathy changed people's attitudes about the group as a whole. Finally, the team concluded that changes in perceptions through empathy were more effective and enduring than attitude changes triggered by providing cognitive information about the group.<sup>84</sup> This effect proved true even for highly stigmatized groups. It was especially persistent for convicted murderers.<sup>85</sup>

Nevertheless, as my informal social work experiment suggested, lawyers engaging in pro bono work may find that their views of justice (and ability to empathize) have been circumscribed by their professional training; like me, they may start to believe that access *is* justice, and that once a lawyer has performed a piecemeal act of goodwill on her client's behalf, her job is done. Indeed, several studies indicate that over the course of law school, students become more committed to the importance of lawyers' role as advocate and less committed to promoting lawyers' role in social change.<sup>86</sup> Nor is this phenomenon limited to law students; as one would expect, the profession's prevailing view influences public perceptions as well. In one particularly telling survey, Gonzaga University students were asked to define "justice." According to Professor Mary Pat Treuthart, the Gonzaga faculty and administration were dismayed to find that "students defined 'justice' procedurally, and made virtually no connection to other issues such as peace and justice, gender and race, equality and justice or poverty and justice."<sup>87</sup>

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81. Batson et al., *supra* note 63, at 105; *see also* Loder, *supra* note 22, at 482.

82. *See generally* Batson et al., *supra* note 63.

83. *Id.* at 117. Empathy was induced when participants heard a victim's story and were asked to imagine the victim's feelings while listening.

84. *See id.*

85. *Id.* at 115-16.

86. *See* Drodny & Peters, *supra* note 28, at 35; Susan Ann Kay, *Socializing the Future Elite: The Nonimpact of a Law School*, 59 Soc. Sci. Q. 347 (1978); Gregory J. Rathjen, *The Impact of Legal Education on the Beliefs, Attitudes and Values of Law Students*, 44 Tenn. L. Rev. 85, 118 (1976).

87. Mary Pat Treuthart, *Weaving a Tapestry: Providing Context Through Service-Learning*, 38 Gonz. L. Rev. 215, 223 (2002).

Pro bono work will not reach its transformative potential if volunteer lawyers rely on a narrow vision of justice as a basis for their work. Direct engagement with clients and communities—acquiring an understanding of clients’ “social world” as well as their personal situation—is an antidote to such a circumscribed view of the purposes of pro bono representation and the possibilities of justice.<sup>88</sup> Professor Peter Margulies calls this process “empathetic engagement,” and it extends beyond the interpersonal aspects of empathy to encompass political commitments as well.<sup>89</sup>

A critical site for exercising, and inducing, empathetic engagement is the client interview—the actual interaction with the client, as opposed to the behind-the-scenes legal work on the clients’ behalf. A trust relationship built on genuine communication, with a lawyer who is listening to and learning from her client, is the widely-recognized first step in providing responsible and responsive legal representation.<sup>90</sup> At the same time, this is where—through direct experience—a lawyer’s notions of justice may be initially challenged and re-shaped, provided the lawyer really has a complete grasp of the client’s situation and goals, uncolored by the lawyer’s own penchant for hyper-technical approaches or procedural solutions.<sup>91</sup> Of course, it is not easy to bridge gaps of class, geography, and law school training. Taking to heart the widely-cited social work motto “be where the client is,”<sup>92</sup> one author has even suggested that lawyers look to the Settlement House movement for approaches to forging close connections with clients across disparate circumstances.<sup>93</sup>

Pro bono lawyers who engage in this open client-lawyer dialogue about the goals of representation may be surprised by what they learn about their clients’ goals. For example, at a June 2004 public forum in Essex County, New Jersey, dozens of welfare recipients spoke directly

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88. Genty, *supra* note 77, at 274-76. Discovering connections with your client may be hard work: “[E]ducating yourself about the experiences and lives of homeless people, or mentally challenged people or people who are recent immigrants or people from different racial or ethnic groups is often essential to supplement your well-intentioned attempts to connect with people who are different from you.” Dinerstein et al., *supra* note 73, at 769.

89. Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 *Clinical L. Rev.* 605, 614-17 (1999).

90. See, e.g., Sarat & Scheingold, *supra* note 3, at 9 (stating that lawyers should “relate to clients as listeners and learners rather than as translators”).

91. Elizabeth Reilly observes that the “robust openmindedness” required for empathy “permits one’s own ideas and beliefs to develop during a true engagement conversation.” Elizabeth Reilly, *Priest, Minister, or “Knowing the Instrument”: The Lawyer’s Role in Constructing Constitutional Meaning*, 38 *Tulsa L. Rev.* 669, 692 (2003).

92. Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 *Wash. U. J.L. & Pol’y* 133, 143 (2004).

93. Michelle Nunn, *Building the Bridge from Episodic Volunteerism to Social Capital*, Fletcher F. World Aff., Fall 2000, at 115, 123.

to the County Executive about their needs. Respect was high on the list, with most complaints “directed at caseworkers who, they said, are inattentive to client needs and often withhold important information about their cases from them.”<sup>94</sup> A database of 208 surveys completed by low-income people in the wake of the 1996 welfare reform law, compiled by the Alliance for Children and Families, reveals that many of the low-income authors would like more social services from government, including more comprehensive child care assistance and therapeutic assistance with depression.<sup>95</sup> A fifty-six-year-old Cuban woman in East Harlem, New York, hoped to secure job training and a part-time job.<sup>96</sup> A twenty-two-year-old mother living with her two children in Green Bay, Wisconsin, quite simply needed money.<sup>97</sup>

A handful of the Alliance for Children respondents identified critical assistance that they had received from lawyers, often in negotiating divorce and custody arrangements, or obtaining additional benefits.<sup>98</sup> Not one of the authors, however, suggested that more lawyers—or more hearings (which might require more lawyers)—would make their lives better.<sup>99</sup>

Clients who are organized to advocate on their own behalf may articulate a more specific and far-reaching agenda. For example, the Welfare Rights Initiative (“WRI”) of Hunter College has as one set of long-term goals “to democratize [the politics of poverty and welfare], to inject the voices of the poor into the poverty and welfare debate, to debunk the negative stereotypes that have driven public policy, and to

94. Jonathan Casiano, *Welfare Caseworkers Should Be More Helpful, Clients Complain*, Newark Star-Ledger, June 10, 2004, at 25.

95. Alliance for Children and Families, *Faces of Change: Personal Experiences of Welfare Reform in America* 140 (Thomas E. Lengyel ed., 2001) [hereinafter *Alliance for Children and Families, Faces of Change*]. Since 2001, the Alliance has continued to collect a range of qualitative data from low-income individuals. A complete searchable set of survey results can be found at Alliance for Children and Families, at <http://www.alliance1.org> (last visited Oct. 20, 2004).

96. Alliance for Children and Families, *Faces of Change*, *supra* note 95, at 175-77.

97. See Alliance for Children and Families, WI-18(II), at [http://www.alliance1.org/Research/foc/articles/WI-18\(II\).htm](http://www.alliance1.org/Research/foc/articles/WI-18(II).htm) (last visited Oct. 14, 2004).

98. See Alliance for Children and Families, *Faces of Change*, *supra* note 95, at 148 (lawyer assisted in obtaining custody of grandchildren); Alliance for Children and Families, PA-11(II), at [http://www.alliance1.org/Research/foc/articles/PA-11%20\(II\).htm](http://www.alliance1.org/Research/foc/articles/PA-11%20(II).htm) (last visited Oct. 14, 2004) (lawyer assisted in securing Social Security payments).

99. Alliance for Children and Families, *Faces of Change*, *supra* note 95. Similarly, the Community Service Society of New York conducted a survey of over 1000 low-income New Yorkers to identify their needs. Respondents identified job training, housing, and education needs as their top priorities. See Cmty. Serv. Soc’y, *The Unheard Third: Bringing the Voices of Low-Income New Yorkers to the Policy Debate* (2003), available at <http://www.cssny.org/pubs/special/2003-11survey.pdf>; see also Cmty. Voices Heard, *The Journey Towards Self-Sufficiency* (2002) (survey of welfare recipients in New York City report that increased “sensitivity and support” from caseworkers would help them transition off welfare), at [http://www.cvhaction.org/english/policy\\_reports\\_capstone\\_sum.htm](http://www.cvhaction.org/english/policy_reports_capstone_sum.htm).

empower poor people to influence public decisionmaking."<sup>100</sup> More immediately, WRI seeks to help welfare recipients enrolled in the City University of New York to "stay in school and to agitate for reforms that expand welfare recipients' access to higher education."<sup>101</sup>

If pro bono lawyers from private practice are to stand in for underfunded full-time public interest lawyers, and undertake to pursue justice as well as provide access to low-income clients, they must have a nuanced understanding of, and empathetic engagement with, low-income clients' needs.<sup>102</sup> Not surprisingly, more lawyers and more legal services are not high on most clients' lists. But the point here is not to denigrate or marginalize technical fixes or procedural protections that may have significant practical value to clients and may be easier to secure from courts than more costly, substantive results.<sup>103</sup> Indeed, if lawyers have a more acute awareness than their clients of the importance and benefits of procedural protections, an important part of the lawyers' role is to share that expertise.<sup>104</sup> However, clients' substantive goals, which may require that pro bono lawyers champion expanded notions of justice, should also have a place at the table as part of providing empathetic, competent representation.

### III. NEXT STEPS

The existing research on political psychology and on the relationship between public service and political values points toward several directions for future inquiry. First, the data compiled through Professor Rhode's own extensive empirical study of the factors contributing to lawyers' pro bono involvement provides a starting point for the next question: Does doing pro bono work influence lawyers' political attitudes? Because so much of the research about

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100. Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. Pa. L. Rev. 173, 191 (2001).

101. *Id.*

102. Law firm pro bono programs have taken on this project. See Esther F. Lardent, *Structuring Law Firm Pro Bono Programs: A Community Service Typology*, in *The Law Firm and the Public Good* 59 (Robert A. Katzmann ed., 1995); see also John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in *Cause Lawyering: Political Commitments and Professional Responsibilities*, *supra* note 3, at 181. The challenges raised by relying on pro bono attorneys to handle work that might otherwise be accomplished by full-time public interest lawyers are similar to the issues arising from reliance on amateurs or volunteers in other settings. See, e.g., Charles T. Clotfelter, *Why "Amateurs"?*, 62 *Law & Contemp. Probs.* 1, 3-6 (1999) (discussing problems with reliance on volunteers).

103. See Aryeh Neier, *Only Judgment: The Limits of Litigation in Social Change* 138 (1982); see also White, *supra* note 1, at 874 (noting that the *Kelly* Court mandated process instead of money transfers).

104. As Dinerstein stresses, disagreement with clients is perfectly appropriate, and may even be expected by the clients. Dinerstein et al., *supra* note 73, at 760.

the impact of public service on political attitudes has been conducted on students, there remain lingering questions about extrapolating these findings to adults more generally, and particularly lawyers. Targeted research on this issue—and for these purposes, research that looked directly at development of lawyers' attitudes in professional contexts—would make an enormous contribution to efforts to gauge the broad impact of pro bono initiatives. Such a study would also help shape the profession's pro bono requirements in order to maximize their impact, not only on clients but on lawyers themselves.<sup>105</sup>

Second, there is a need for more clarity about the ways in which empathy can be induced or maximized between prospective pro bono lawyers and their clients. Again, many of the existing studies have focused on younger students rather than adults,<sup>106</sup> or have addressed the role of empathy in jury trials.<sup>107</sup> Research involving adults in a more representative capacity, specifically lawyers, would be illuminating. Questions remain about how empathy develops in such relationships, and whether empathy develops even when it did not figure in the lawyer's initial decision to provide representation. Meanwhile, advocates of expanded pro bono involvement would do well to look to the profession itself, and to utilize the techniques developed by lawyers to induce empathy for ostensibly unpopular causes and clients. These techniques—which include crafting storytelling narratives, and creating opportunities for direct contact between, for example, the jury and victim—could be tailored to the goal of promoting greater pro bono involvement by lawyers.<sup>108</sup> Creating such empathy will not only attract more pro bono lawyers to the cause, but will enhance the experiences of both lawyers and clients engaged in pro bono work.<sup>109</sup>

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105. Professor Rhode describes her empirical research on the pro bono practices of both lawyers and students in detail. See Rhode, *supra* note 5, at 160-79. While her survey corroborates the impact that pro bono work has on future altruism, she did not find a significant correlation between types of law school pro bono policies (mandatory vs. voluntary) and subsequent pro bono work. *Id.* at 176.

106. See *supra* note 53 and accompanying text.

107. See *supra* note 78 and accompanying text.

108. See, e.g., Henderson, *supra* note 64 (describing power of storytelling to induce empathy).

109. At the center of recent pro bono debates has been the question of whether mandatory pro bono programs are self-defeating. Interestingly, another study of service-learning found that female high school students viewed mandatory community service requirements more favorably than did male students. Fayneese Miller, *Gender Differences in Adolescents' Attitudes Toward Mandatory Community Service*, 17 J. Adolescence 381, 381 (1994). A recent study of "mandatory volunteerism" also concluded that those who are least likely to volunteer are most likely to feel that their future intentions to volunteer are undermined by a mandate. Arthur A. Stukas et al., *The Effects of "Mandatory Volunteerism" on Intentions to Volunteer*, 10 Psychol. Sci. 59, 63 (1999). It is this group that might be reached by some sort of "empathy initiative."

Third, rather than shy away from underlying issues of justice, pro bono programs should encourage both access and justice by supporting the personal, political, and moral growth of lawyers in the context of providing pro bono representation. A number of studies have suggested that even a voluntary pro bono program can influence concepts of justice if the program provides support and continuity. Interestingly, one study of school-based programs found that it was the reflective component of the program that made “a clear difference in students’ intellectual and social dimensions of development.”<sup>110</sup> Along these lines, the American Association of Law Schools (“AALS”) Pro Bono Project suggested that, among other things, school-based pro bono experiences could be enhanced by “curricular integration of materials concerning access to justice and pro bono service.”<sup>111</sup> However, such efforts to contextualize pro bono work are often lacking once lawyers enter practice. Incorporating opportunities for discussion and reflection into pro bono practice—through firm-based programs, through bar associations, or through supervision and mentoring—may be a key component of connecting access and justice.

Fourth, in the context of pro bono representation, the standard of competent representation must include both empathetic engagement and a willingness to examine one’s own political values that may be in tension with the client’s needs. This is not an exercise reserved for “cause” lawyers and public interest lawyers. Overbroad notions of “professionalism” should not be used to exempt pro bono lawyers from active engagement in underlying issues of justice raised by their clients’ situations.<sup>112</sup> As Lucie White has put it, this means that a lawyer must “embrace[] as her professional ethic a practice of unceasing, other-focused self-critique.”<sup>113</sup> Pro bono lawyers, like full-time public interest or cause lawyers, should understand this dynamic.

#### CONCLUSION

The challenge that my social work students posed to lawyers was to step away from technique and procedure, and pursue a broader vision of justice on behalf of low-income clients. Social science research suggests that pro bono work itself, facilitated by empathetic lawyer-client relationships, may influence pro bono lawyers to alter and expand their notions of justice. As a result, they may be prepared to

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110. Furco, *supra* note 58, at 400; *see also* Nunn, *supra* note 93, at 121 (suggesting that the same results are likely for adults).

111. Rhode, *supra* note 5, at 181. Not incidentally, the AALS Pro Bono Project was headed by Professor Rhode.

112. *See, e.g.*, William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1131-32 (1988) (arguing that ethical lawyers cannot rely on impersonal professional role expectations to shield them from the necessity of moral decision making).

113. White, *supra* note 1, at 862.



move beyond procedural or technical solutions to use the law, or other tools at their disposal, to champion a more comprehensive social change agenda for their clients.

The organized bar has framed pro bono work as a means to hone lawyers' skills, to improve the profession's image, and to do good by providing access to the justice system. *Access to Justice* persuasively reiterates and expands on these arguments. But the organized bar's vision may be too narrow, particularly given the evidence that pro bono work can contribute to changing lawyers' own political attitudes. Pro bono work that begins and ends with providing access alone is little more than a band-aid that masks larger social problems. If instead, pro bono representation meant a meaningful increase in both access and justice, you can be sure that clients would clamor for more lawyers, and the legal profession would be both transformative and transformed.

*Notes & Observations*