

TEACHING SOCIAL JUSTICE IN LAW SCHOOLS: WHOSE MORALITY IS IT?

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A few years ago, when I began interviewing for a position as a law professor, Pepperdine University School of Law invited me to interview for a position on their impressive law faculty. The Vice-Chair of the Faculty Appointments Committee asked if I would send for their review, as part of their normal evaluation process, a statement of my research agenda and a brief description of my teaching philosophy. These requests are relatively standard, but the third request was quite unusual—the Chair asked if I would also provide a statement describing how I could contribute to the mission of the University and the law school, including, of note to me, a description of my involvement, if any, with a community of faith. I responded that I was uncomfortable with a discussion of my faith, or my involvement in a faith community, as part of my professional interactions, and thus, declined the interview. However, the experience remained with me as I pondered the question that their faculty at the law school had already answered—what role should the personal ethics and morality of a law professor play in teaching?

At the time of the interview, I was teaching full-time at Georgetown University, a Catholic Jesuit university, and currently, I teach at DePaul University, a Catholic Vincentian university. In both instances, the universities promote certain values in their missions and seek to incorporate those social justice values into the curriculum. The law schools at both institutions promote an ideal of social justice that encourages law students to provide pro bono legal assistance, either in legal clinics or through pro bono programs, to those financially unable to afford it. However, a growing number of law schools go beyond simply making these social justice opportunities available to those students who choose to participate. Instead, some law schools now mandate legal clinics and pro bono service, many of which serve the dual purpose of promoting social justice and legal education, as a condition of graduation.

As a result, law professors, specifically those teaching in a law school legal clinic, are in a unique position to shape the social justice morality of law students. Many law professors embrace this role, extensively writing that clinicians, specifically, are in the best position to develop the next generation of social justice lawyers and have a duty to do so. Social justice advocacy is often an integral aspect of legal clinics and many law professors, as part of this advocacy, train students to view certain legal events as social or legal injustices and instill in the student a sense of obligation to resolve them.

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This Article vigorously advocates for exposing law students to social justice legal issues, but in contrast to other participants in this conversation, concludes that mandatory pro bono, while reflective of my personal ideals, is an encroachment upon law students' personal morality and an attempt to impose social justice service upon students based upon the moral and ethical lens of professors. This Article also concludes that mandatory legal clinics, while providing vital legal training and serving a population that is unquestionably in need of robust legal services, should only be mandatory when there is a sufficient variety of clinical offerings reflecting a meaningful range of social justice activities that extend beyond a limited set of moral views.

In April 2015, I was invited to speak at a symposium at Indiana University—Bloomington where I similarly argued that law schools, through their experiential learning opportunities, and summer and post-graduation financial support for public interest and social justice undertakings, impose a social justice morality upon law students. After the extensive debate that ensued¹ from the publication of those arguments,² this Article seeks to continue that debate and expand on these timely questions.

INTRODUCTION³

A few years ago, when I began interviewing for a position as a law professor, Pepperdine University School of Law invited me to interview for a position on their impressive law faculty. The Vice-Chair of the Faculty Appointments Committee asked if I would send for their review, as part of their normal evaluation process, a statement of my research agenda and a brief description of my teaching philosophy. These requests are relatively standard, but the third request struck me—the Chair asked if I would also provide a statement describing how I could contribute to the mission⁴ of the University and the law school, including a description of my involvement, if any, with a community of faith. I responded that I was uncomfortable with a discussion of my faith, or my involvement in a faith community, as part of my professional interactions, and thus, declined the interview. However, the experience remained with me as I pondered the question that their faculty at the law school had already answered—what role should the personal ethics and morality of a law professor play in teaching?

1. See *infra* Part I.A. and note 20.

2. See *infra* Part I.A. and note 21.

3. This Article is an expansion of arguments presented at the symposium, *Living Without in America*, at Indiana University-Bloomington in April 2015 and subsequently published as *The Imposition of Social Justice Morality in Legal Education*, 4 IND. J.L. & SOC. EQUAL. 57 (2016).

4. The mission, as stated in the communication, noted “Pepperdine is a Christian University committed to the highest standards of academic excellence and Christian values, where students are trained for lives of services, purpose and leadership.” Email from Robert F. Cochran, Jr., Faculty Appointments Comm. Vice-Chair, Pepperdine Univ. Sch. of Law, to author (Sept. 13, 2010, 6:32 PM) (on file with author).

At the time of the interview, I was teaching full-time at Georgetown University, a Catholic Jesuit university, and currently, I teach at DePaul University, a Catholic Vincentian university. In both instances, the universities promote certain values in their missions and seek to incorporate those social justice values into the curriculum.⁵ The law schools at both institutions promote an ideal of social justice that encourages law students to provide pro bono legal assistance, either in legal clinics or through pro bono programs, to those financially unable to afford it.⁶ With over 200 accredited law schools⁷ estimated to offer almost 1600 legal clinics, of which almost seventy percent focus on serving low and moderate-income clients, they are not alone.⁸ However, a growing number of these law schools go beyond simply making these social justice opportunities available to those students who choose to participate. Instead, some law schools now mandate legal clinics and pro bono service, many of which serve the dual purpose of promoting social justice and legal education, as a condition of graduation.⁹ This Article questions the basis for mandating social justice service. Some advocates promote mandatory service as a means of introducing students to a practitioner's ethical responsibility to provide pro bono service,¹⁰ while others point to a need to provide as many legal services as possible to poor residents in need of legal representation. Others note that the

5. *College of Law*, DEPAUL UNIV. COLL. OF LAW, <https://www.depaul.edu/university-catalog/colleges-and-schools/law/Pages/default.aspx> [https://perma.cc/HWH6-RZJJ] (last visited Mar. 8, 2017) ("The College of Law is part of a university that derives its fundamental mission from St. Vincent de Paul, who advocated the acceptance of all people and devoted his life to helping the disadvantaged lead dignified lives."); *Public Service*, GEO. LAW, <http://www.law.georgetown.edu/about/public-service/index.cfm> [https://perma.cc/8KZT-EUZX] (last visited Aug. 15, 2016) ("At Georgetown, we take pride in our Jesuit heritage—and in our motto: 'Law is but the means, justice is the end.'").

6. *Id.*

7. *ABA-Approved Law Schools*, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html [https://perma.cc/W869-Q9MK] (last visited Mar. 8, 2017).

8. Julie D. Lawton, *Law School Legal Clinic Survey* (Aug. 15, 2016) (unpublished manuscript) (on file with author). Please note that this information was obtained by reviewing the clinic listings on the websites of law schools. Some law schools may list courses as a clinic that might be more appropriately classified as an externship as described the ABA Standards.

9. As of 2014, twenty-four law schools mandated pro bono work as a graduation requirement. *Chart of Law School Pro Bono Programs*, AM. BAR. ASSOC. (Sept. 10, 2015), http://www.americanbar.org/groups/probono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/pb_programs_chart.html [https://perma.cc/6JH6-ZEME]. Also, six schools mandated a legal clinic as a graduation requirement. Robert R. Kuehn & David A. Santacroce, *2013-14 Survey of Applied Legal Education*, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC. 1, 10 (2014), http://www.csale.org/files/Report_on_2013-14_CSALE_Survey.pdf [https://perma.cc/A8Q6-6JW2].

10. See MODEL RULES OF PROF'L CONDUCT r. 6.1 (Am. Bar Ass'n 2016) (Voluntary Pro Bono Publico Service).

American Bar Association requires law schools to offer “substantial opportunities to students for . . . student participation in pro bono legal services” and mandatory pro bono is a means of accomplishing this.¹¹ However, while not disputing the legitimacy of any of those positions, this Article questions whether such mandatory service is also a means of promoting law professors’ ideals of social justice to law students while the students are still in a position to be influenced.

The Article begins in Part I with an overview of the meaning of social justice. Social justice is admittedly an ambiguous term and, thus, defining social justice has been the subject of much dispute¹² without resulting in a universal definition. However, social justice broadly refers to a desire to address the economic, social, and legal structures that contribute to the societal distribution of wealth and privileges.¹³ These structures vary, but often include income and health inequality, absence of affordable housing, unequal funding for education in poor and affluent neighborhoods, and more specific to this Article, access to legal representation.¹⁴ Individual morality and the ethical norms of a society or industry often influence, if not determine, whether an event is viewed as socially just. Similarly, law professors, specifically those teaching in a law school legal clinic, help determine the filters students use to develop their own social justice morality.¹⁵ Some law professors embrace this role, arguing that clinicians, specifically, are in the best position to develop the next generation of social justice lawyers and have a duty to do so.¹⁶ When questioned about the basis for the social justice advocacy in legal clinics, many have pointedly noted that legal clinics were originally designed to be the primary source of social justice learning in law school and should continue in that role.¹⁷ Part I of this Article disputes this conclusion with a historical analysis of legal clinics, demonstrating that even though the earliest legal clinics were partnerships with external legal aid organizations virtually assuring students worked on social justice legal issues, that such work was a by-product of the partnerships, not the primary goal of clinical legal education. Part I continues with a review of how law schools currently teach social justice, specifically through pro bono programs and legal clinics.

Social justice advocacy is often an integral aspect of legal clinics and many law professors, as part of this advocacy, train students to view certain legal events as social or legal injustices and instill in the student a sense of obligation to address them.¹⁸ In Part II, this Article, while sympathizing with such a noble goal

11. *ABA Standards and Rules of Procedure for Approval of Law Schools 2015-2016*, AM. BAR ASS’N 16, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_chapter_3.authcheckdam.pdf [<https://perma.cc/DD52-FJHN>].

12. *See infra* Part I.A.

13. *See infra* Part I.A.

14. *See infra* Part I.A.

15. *See infra* Part I.B.

16. *See infra* Part I.B.

17. *See infra* Part I.B.

18. *See infra* Part II.

and recognizing the need for law students to be exposed to social justice legal issues, scrutinizes the propriety of law professors mandating social justice service when such a requirement is predicated on a professor's individual interpretation of social justice or is based on a limited range of social justice service options.

This Article, in Part III, concludes that mandatory pro bono, while noble and reflective of my personal ideals, is an attempt to force social justice service upon students based upon the moral and ethical lens of professors. In Part III, this Article also concludes that mandatory legal clinics, while providing vital legal training and serving a population that is unquestionably in need of robust legal services, should only be mandatory when there is a sufficient variety of clinical offerings reflecting a meaningful range of social justice activities that extend beyond a limited set of moral views.

In April 2015, I was invited to speak at a symposium at Indiana University—Bloomington¹⁹ where I argued that law schools, through their experiential learning opportunities and summer and post-graduation financial support for public interest and social justice undertakings, impose a social justice morality upon law students. After the extensive debate that ensued²⁰ from the publication²¹ of those arguments, this Article seeks to continue that debate and expand on these timely questions.

I. TEACHING SOCIAL JUSTICE

To analyze the role a professor's social justice morality should play in teaching law students, this section will first review the meaning of social justice and how law schools teach social justice as part of their curriculum.

19. Symposium, *Living Without in America*, 4 IND. J.L. & SOC. EQUALITY (2015).

20. Jacob Gershman, *Law Schools Are 'Indoctrinating Students with a Social Justice Morality,' Says Professor*, WALL ST. J. (Apr. 13, 2016, 5:08 PM), <http://blogs.wsj.com/law/2016/04/13/law-schools-are-indoctrinating-students-with-a-social-justice-morality-says-professor/> [<https://perma.cc/5JUA-5TBE>]; Gary Stern, *Social Justice Education at Law Schools*, INSIGHT INTO DIVERSITY 46 (July/Aug. 2016), <http://www.insightintodiversity.com/wp-content/media/issues/julyaugust2016.pdf> [<https://perma.cc/VMA5-X2SD>]; Paul Caron, *Clinical Law Prof Questions Indoctrinating Students With Social Justice Morality and Requiring Pro Bono By Students, Not Faculty and Administrators*, TAXPROFBLOG (Apr. 14, 2016), http://taxprof.typepad.com/taxprof_blog/2016/04/clinical-proflaw-schools-indoctrinate-students-with-a-social-justice-morality-why-do-they-require-pr.html [<https://perma.cc/W44B-XJA8>]; Elizabeth Monkus, *Law Schools and the Duty of Pro Bono Service*, CHI. APPLESEED (May 31, 2016), <http://www.chicagoappleseed.org/law-schools-and-the-duty-of-pro-bono-service/> [<https://perma.cc/AU9Z-4LW3>]; Sam Wright, *Are Law Schools Just Liberal Indoctrination Factories*, ABOVE THE L. (Apr. 19, 2016, 2:29 PM), <http://abovethelaw.com/2016/04/are-law-schools-just-liberal-indoctrination-factories/> [<https://perma.cc/F9BP-Y286>].

21. See generally Julie D. Lawton, *The Imposition of Social Justice Morality in Legal Education*, 4 IND. J.L. & SOC. EQUALITY 57 (2016).

A. What Is Social Justice?

Defining social justice is a virtual impossibility as there are a multitude of definitions. To provide some context for this discussion, however, a few representative definitions are set forth here. Dr. King, using an aspirational ideal of social justice, famously posited that “[i]njustice anywhere is a threat to justice everywhere.”²² Law professors have described social justice in the legal system in more practical ways. It has been described as “working to provide access to justice and understanding and addressing inequities in our justice system.”²³ Or, as a means of “promot[ing] the interests of people otherwise marginalized by society.”²⁴ Another describes social justice as “opening students’ eyes to the inequities in society and challenging them to do something about the system.”²⁵ Yet another writes that social justice is “furthered through the provision of services and pursuit of legal and social reform on behalf of clients and community groups lacking meaningful access to society’s institutions of justice and power.”²⁶ One law professor defines social justice as “the commitment to act with and on behalf of those who are suffering because of social neglect, social decisions or social structures and institutions.”²⁷ He encourages a social justice mission such that lawyers examine laws, not just as an objective set of rules, but from the perspective of the vulnerable populations who are subject to them and then seek out these populations to better understand laws’ impact.²⁸ Another argues for a much narrower consideration of social justice, theorizing that achieving social justice does not require legal services to be provided for every legal problem.²⁹

All of above definitions, while somewhat fractured, reflect each author’s determination of justice and injustice based on their religious beliefs, their upbringing, and their life experiences, which combined, frame each professor’s ethics and morality. When lawyers reflect on a legal event, each lawyer’s ethics, morality, and legal training will determine whether the lawyer views such events

22. Martin Luther King, Jr., *Letter from Birmingham Jail*, in *WHY WE CAN’T WAIT* 77, 79 (1964).

23. Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 *CLINICAL L. REV.* 307, 309, 316 (2001).

24. Claire Donohue, *Client, Self, Systems: A Framework for Integrated Skills-Justice Education*, 29 *GEO. J. LEGAL ETHICS* 439, 447 (2016).

25. Lopez, *supra* note 23, at 307, 309-18 (arguing one of the two key components of clinical legal education is teaching students about serving the needs of the poor and access to justice).

26. Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 *SMUL. REV.* 1461, 1475 (1998).

27. William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 *DEPAUL J. SOC. JUST.* 7, 13-14 (2007) [hereinafter Quigley, *Letter to a Law Student*].

28. *Id.* at 17.

29. John A. Humbach, *Serving the Public Interest: An Overstated Objective*, 65 *A.B.A. J.* 564, 565 (1979) (“If social justice requires legal services for every problem that could be handled legally, then the world will never know social justice. I do not believe, however, that the requirements of social justice are so stringent.”).

as serving a legal and social justice or creating a legal or social injustice. Upon graduation and entering practice, each new lawyer will have to individually determine the meaning of social justice and how, and whether, social justice will play a role in his or her practice. And this will be determined, partially, by the new lawyer's exposure to, and experience with, social justice in law school and is a basis for why law schools have begun to teach social justice more intentionally.

The next section will examine how law schools currently incorporate social justice into the legal curriculum through voluntary and mandatory social justice engagement.

B. How Law Schools Currently Teach Social Justice

Often, law school teaches a student that the ideal lawyer is one who is almost an agnostic—one who can argue both sides of a legal argument with equal skill and vigor regardless of the social justice implications.³⁰ Arguably, adoption of this agnosticism allows law professors and students to avoid moral questions in the classroom.³¹ Law school, as currently structured, often trains students to separate their personal beliefs from their professional work or to sequester those personal beliefs into pro bono or community work separate from their main legal activities.³² Thus, legal clinics for the indigent and pro bono programs are conceivably needed as a place for law students to dive deeply into moral questions of injustice.

Legal clinics, both voluntary and mandatory, provide an educational space for students to bridge the gap between doctrine and practice.³³ Further, legal clinics provide students the opportunity to receive regular, individual feedback on their performance and progression, which many doctrinal classes are unable to provide primarily because of the large class sizes.³⁴ Many law professors who teach legal clinics, commonly called clinicians, passionately argue that social justice should be an integral aspect of clinical instruction.³⁵ Clinicians are in a

30. John M. Breen, *Justice and Jesuit Legal Education: A Critique*, 36 LOY. U. CHI. L.J. 383, 386 (2005).

31. *Id.* at 409.

32. *Id.* at 385-86.

33. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 601 (1982) ("A second incapacitating device is the teaching of doctrine in isolation from practice skills.").

34. *Id.* at 600 ("If law schools invested some of the time and money they now put into Socratic classes into developing systematic skills training and committed themselves to giving constant, detailed feedback on student progress in learning those skills, they could graduate the vast majority of all the law students in the country at the level of technical proficiency now achieved by a small minority in each institution.").

35. C. Michael Bryce, *Teaching Justice to Law Students: The Legacy of Ignatian Education and Commitment to Justice and Justice Learning in 21st Century Clinical Education*, 43 GONZ. L. REV. 577, 601 (2007) ("Therefore, the first step in effectuating the promotion of justice is to have

unique position to shape the social justice morality of law students taking a clinical course³⁶ and are overwhelmingly encouraged, if not expected, to incorporate social justice issues in their students' clinical legal education.³⁷ For many, legal clinics offer an opportunity to combine personalized legal training in a format that directly exposes students to social justice issues.

Perhaps, as some have argued, clinics should focus exclusively on legal education training and less on social justice engagement, even if that means serving a client base that is not reflective of social justice.³⁸ In response, clinicians will often argue that the history of legal clinics dictates that clinics retain a social justice focus.³⁹ A review of the early literature suggests that law clinics were not always designed to be bastions of social justice.⁴⁰ From the beginning, service to the needs of the poor and training students for a social justice profession was secondary to educating students as practicing lawyers.⁴¹

a clinical course as a requirement . . ."); Spencer Rand, *An Interdisciplinary Search for Help Through Social Work's Empowerment Approach*, 13 CLINICAL L. REV. 459, 461 (2006) ("[Clinicians] must make clear to our students that our clinics exist to help our clients attain social justice and that social justice means more than just giving the poor access to counsel."); see also Lopez, *supra* note 23, at 309-10 (arguing one of the two key components of clinical legal education is teaching students about serving the needs of the poor and access to justice); Stephen Wizner, *Is Social Justice Still Relevant?*, 32 B.C. J.L. & SOC. JUST. 345, 347 (2012) ("[The founders of the modern era of clinical legal education] saw [clinical education] as an opportunity to involve law students in the struggle for social justice in America . . .").

36. Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 38 (1995) [hereinafter Quigley, *Seizing the Disorienting Moment*] ("Toward that end, an argument is presented here that lessons of social justice should be a core element of the law school curriculum in general and the content of clinical courses in particular.").

37. *Id.* ("This article answers these questions by advocating that a complete legal education and, in particular, a complete clinical educational experience, should include lessons of social justice. Clinical teachers should accept as part of their role the exposure of clinical students to experiences and reflective opportunities that will lead to social justice learning.").

38. See generally Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 331 (2012).

39. William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor; A View from the First Floor*, 28 AKRON L. REV. 463, 465-71 (1995) [hereinafter Quigley, *Introduction to Clinical Teaching*] (discussing the history of legal clinics).

40. Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 945 (1997) ("From the outset the principal purpose of the first clinics was education. As Bradway wrote in 1939, '[t]he legal aid clinic is a device to improve legal education in the United States, with objectives in the field of practical training and public service.' The goal was to replace the apprenticeship by providing 'practical experience.'") (quoting John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 173 (1930); John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S. CAL. L. REV. 252, 252 (1929)); see also *infra* Part I.B.1 (discussing the role of social justice in early legal clinics).

41. Blaze, *supra* note 40, at 951. Even though early programs provided legal aid to poor

1. *Early Legal Clinics.*—When considering the origins of legal clinics, it is important to remember that legal clinics were partially designed to replace the lawyer apprenticeship programs that existed prior to the widespread adoption of the case-law method of law school teaching.⁴² Up to the late 1800s, legal practitioners trained aspiring lawyers in law and practice in private law offices while supervising their work.⁴³ There was an unwritten agreement between the legal bar and law schools—law schools would teach law students the theoretical aspects of the law and the Bar would allow recent graduates to apprentice with an attorney to learn the practice of law.⁴⁴ However, once the apprenticeship model dissipated,⁴⁵ there remained the question of who would train law students or

residents, the service was not always about the legal needs of the poor. *Id.* (noting legal aid work was often used as “an opportunity to improve the public’s perception of the legal profession”).

42. Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 5 (2000); Blaze, *supra* note 40, at 943-44; Dubin, *supra* note 26, at 1463 (“The first phase of clinical education responded to the decline of apprenticeship requirements for law practice in the late 1800s . . .”).

43. Jerome Frank, *Why Not a Clinical Lawyer-School*, 81 U. PA. L. REV. 907, 909 (1933) (“[L]egal education in American universities . . . began with the apprentice system. The prospective lawyer ‘read law’ in the office of a practicing lawyer. He saw daily what courts were doing.”); M.U.S. Kjørlaug, *The Legal Clinic of the Law School of the University of Minnesota*, 124 ANNALS AM. ACAD. POL’Y & SOC. SCI. 136, 136-37 (1926) (“There was a time when future lawyers received all their training in a regular law office under the tutorship of a practicing attorney Under this system the student not only learned the principles of substantive law, but he . . . came to know the various methods of procedure and the theory of it through practical experience”); William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 591, 594 (1917) (“Accepting also, as we must, the further fact that the preliminary or probationary practical training for the bar, through the familiar office studentship or clerkship, deemed so essential in all common-law countries, has been largely lacking with us for the last twenty years, and that what the law office has refused the law school has failed to supply”).

44. John S. Bradway, *New Developments in the Legal Clinic Field*, 13 ST. LOUIS L. REV. 122, 127 (1928) [hereinafter Bradway, *New Developments*].

45. The apprenticeship model has not disappeared completely. See Sean Patrick Ferrell, *The Lawyer’s Apprentice: How to Learn the Law Without Law School*, N.Y. TIMES (July 30, 2014), http://www.nytimes.com/2014/08/03/education/edlife/how-to-learn-the-law-without-law-school.html?_r=0 [https://perma.cc/VS2E-BR48] (“In Virginia, Vermont, Washington and California, aspiring lawyers can study for the bar without ever setting foot into or paying a law school. New York, Maine and Wyoming require a combination of law school and apprenticeship.”); see also ME. BAR ADMISSION RULES R. 10(C)(5) (discussing eligibility to take the bar exam without completing a juris doctor degree); N.Y. CT. APP. R. § 520.4 (discussing the “Study of Law in Law Office” Rule that allows individuals to take the bar exam without completing a juris doctor degree); Vt. Sup. Ct. R. 6.0 (listing the “Law Office Study Program Rule” as an alternative to a juris doctor degree); RULES OF THE VA. BD. OF BAR EXAMINERS § II(1)(C) (listing the “Law Reader Program Rule” as an alternative to a juris doctor degree); WASH. ADMISSION AND PRAC. RULES r. 6 (describing the “Law Clerk Program” as an alternative to a juris doctor degree); RULES OF THE STATE BAR OF CAL. tit. 4, div. 1, ch. 3, r. 4.29 (listing “study in a law office or judge’s chambers”

recent graduates in the practice of law. Law schools began to address these concerns in the late 1800s and early 1900s by incorporating experiential learning into the curriculum, including student opportunities in mock trial and moot court,⁴⁶ with the goal of training law students to be efficient practitioners and lawyers with strength of character.⁴⁷ However, the courses in mock trial and moot court were seen as insufficient means to accomplish these goals.⁴⁸ In comparison to other professions, while law schools were similarly teaching substantive law courses, law schools were almost singularly deficient in training in practice.⁴⁹ Something more—beyond the theoretical doctrine and simulation training—was demanded.⁵⁰

In response, law schools created legal clinics that were originally designed to be, first and foremost, about educating law students on the practice of law, with a secondary objective of addressing social justice issues.⁵¹ These early legal clinics were partnerships between the law school and outside legal aid societies

as an alternative to a juris doctor degree).

46. Bradway, *New Developments*, *supra* note 44, at 122; *Moot Court Origins*, WASH. & LEE SCH. L., <http://law2.wlu.edu/mootcourt/page.asp?pageid=1556> [https://perma.cc/3AYT-SCDR] (noting the school's moot court program began no later than 1861); Darby Dickerson, In Re *Moot Court*, 29 STETSON L. REV. 1217, 1223-24 (2000) (noting moot court started at Harvard in 1820, at the University of Virginia in mid-1840s, at Northwestern University in the 1860s, and at Boston University in the 1870s).

47. Bradway, *New Developments*, *supra* note 44, at 123.

48. *Id.*; Rowe, *supra* note 43, at 595-96 ("It is folly to waste time in the effort to teach practice in the classroom in the customary manner—a folly almost as pronounced as the continued encouragement of 'moot courts.'"); *see also* Bradway, *New Developments*, *supra* note 44, at 123 ("No one thinks for a moment that the training that a medical student gets in work on a corpse is *per se* adequate to enable him to prescribe medicines for, or to conduct surgical operations upon, a living person. Mock trials and moot court arguments are like corpses in this respect. They lack the vital human elements . . .").

49. Kjørlaug, *supra* note 43, at 140-41 ("The study of substantive law and the practice of law are two distinct fields of endeavor. Knowledge of one cannot be adequately derived from the other. It is paradoxical that law schools in the past have placed slight emphasis upon instruction in the practical phases of the legal profession. This neglect is apparent in no other profession. The engineer, while in training, works continually with the implements of his trade and builds in model form what he later will construct in reality; the chemist continually experiments with the very elements he treats with in his profession at all times; the theological student is taught to write his sermons and how to deliver them while in training; the medical student not only works with the anatomy during the time of formal instruction in medicine, but is required to serve a period of internship in a hospital before he is given his license.").

50. *Id.* ("Unless the practicing attorney soon gets to understand the human element in his profession, there will be little practical value in his theoretical knowledge.").

51. Blaze, *supra* note 40, at 945; Kjørlaug, *supra* note 43, at 139 ("The purpose of this method of operating the legal clinic is to give the students opportunity to perform the duties of a lawyer in a law office, and to give them an opportunity to make a practical application of the principles of substantive law.").

to help manage the clinics.⁵² However, contrary to the theory that such a connection was exclusively to expose law students to social justice, many early clinics worked with legal aid organizations for more practical reasons—to help manage the case load, particularly during times when the law school was not in session⁵³ and because legal aid groups had the volume and variety of cases that were educationally instructive.⁵⁴ These legal clinics began as a necessity to help law students obtain the training needed to move from a theoretical understanding of the law to a practical one by working with live clients that presented real ethical dilemmas.⁵⁵

In the very early law school clinics, students worked with, and under the supervision of, legal aid lawyers.⁵⁶ As such, law students working in these early legal clinics worked on behalf of the poor, not so much because social justice service was the primary purpose of the legal clinic, but because that was the nature of the work for which the law students were supervised.⁵⁷ An ancillary benefit, though maybe not the primary goal, was a law student's exposure to the needs of the poor and the needs of social reform.⁵⁸ This benefit was important and one that legal clinics were encouraged to preserve.⁵⁹ As a result of the partnership with legal aid groups, law students working in these early legal aid clinics could see the value of legal aid work, which, arguably, encouraged them to either

52. Bradway, *New Developments*, *supra* note 44, at 129.

53. *Id.* (noting a number of law school legal aid partnerships where the legal aid organization carries out the work throughout the year and where “the legal aid society shoulder[s] the task of handling the cases”).

54. Kjørlaug, *supra* note 43, at 142 (“No office is better qualified to lend itself for legal clinical purposes than that of the legal aid. It has the volume and variety of material necessary. It affords opportunity for the observation of the good and bad in law and in the profession. It gives a contact with human problems such as found no where else.”).

55. Bradway, *New Developments*, *supra* note 44, at 127; Kjørlaug, *supra* note 43, at 136-37 (“[The legal clinic’s] function is to give the student contact with real problems of actual clients, and to permit him to assume the duties of an attorney functioning in a law office.”).

56. See generally John S. Bradway, *The Legal Aid Clinic: A Means of Building Tough Mental Fiber*, 5 S. CAL. L. REV. 36 (1931) [hereinafter Bradway, *Legal Aid Clinic*].

57. *Id.* at 36 (“The Legal Aid Clinic is a piece of machinery set up to accomplish two purposes: Like any other legal aid society, it gives legal aid service to poor persons; also, it provides a certain process in the field of legal education.”).

58. Bradway, *Legal Aid Clinic—A Means of Coordinating the Legal Profession*, UNIV. OF PA. L. REV. 549, 552 (“The alliance tends to foster, not only practical expertness, but also knowledge of the need and of the principles of social law reform, and a high standard of professional ethics.”) (quoting ALFRED Z. REED, REVIEW OF LEGAL EDUCATION IN THE UNITED STATES AND CANADA FOR THE YEAR 1929, at 16 (1930)).

59. Kjørlaug, *supra* note 43, at 137 (“In considering a plan of legal clinic in conjunction with a legal aid society it must be with a view of maintaining the efficiency of its service. Legal aid exists for the purpose of rendering legal services for the poor man, who otherwise would not have them, and these services must not be interfered with in such a way to defeat the very object of legal aid.”).

continue legal aid work or support it upon graduation.⁶⁰

For John S. Bradway, an early proponent of legal clinics, the legal aid partnerships represented a means for the law school to teach students in the practice of law, and thus, enabled them to bridge the gap between theory and practice.⁶¹ It also represented an ability to provide young lawyers with a familiarity with courts and transactional office practice.⁶² It is important to note, however, that legal clinics that partnered with legal aid groups clearly provided additional social justice benefits⁶³ as well as provided an opportunity to expose law students to the need for social change.⁶⁴

Even when legal clinics began to be formed in-house, the focus on legal aid work was not purely altruistic, although that was a partial goal.⁶⁵ The legal aid work was also a means to establish positive connections between the university and the neighboring community.⁶⁶ The pioneers in clinical legal education, such as Charlie Miller, noted skills training and provision of legal services as the first two objectives in clinical legal education, before the goal of learning about society and its impact on poverty.⁶⁷ Another early advocate for legal clinics, William Rowe, similarly argued in 1917 for legal clinics to be a means of

60. *Id.* at 143 (“Nor is it an unwarranted supposition that these students, who have seen at first hand the practical operation of law and courts upon the people at large, in a way which they otherwise never could see it, will not only initiate but support every measure and project that tends to equalize and democratize the application of law and justice.”).

61. Bradway, *New Developments*, *supra* note 44, at 132 (“To the law school it offers an opportunity for bridging over the gap which too often exists between the theoretical training even under the “Case” method and the actual practice of the profession.”).

62. Wigmore, *infra* note 149, at 130 (“[The legal clinic] trains the embryo lawyer in the practical use of the law he has learned, and familiarizes him with courts and with the details of office practice.”).

63. *Id.* (“Besides its beneficent service to the poor and helpless who need legal assistance, it has a special educational value.”).

64. *Id.* (“By using the clientage and system of a legal aid bureau, it brings [the law student] directly in contact with clients [and] develops early his sense of personal responsibility in legal practice.”); *see also* Kjørtaug, *supra* note 43, at 142 (“The student, consciously or unconsciously, receives a practical lesson from a social point of view. His work in the legal aid office demonstrates to him the practical operation of the substantive law upon a very large portion of our people. . . . He observes the practical application of justice under our present system of procedure and may note its defects from real evidence.”).

65. John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 178 (1929) (noting “[i]t is the invariable rule of the clinic, as of other legal aid organizations, to reject” all clients except those deemed “real legal aid clients”).

66. *Id.* at 177 (noting the University of Southern California Law School sought to form a not-for-profit organization for an in-house legal clinic “not only because of the importance of training law students, but also because there was no specific legal aid society in Los Angeles rendering general legal aid service to poor persons, because there was an opportunity to making broad contacts between the University and the community at large, and for various other such reasons”).

67. Blaze, *supra* note 40, at 948-49.

providing law students with “education, training and discipline in the conduct of professional life.”⁶⁸ The goal, he argued, was to enable the student to “[live] in an atmosphere of the law, and [absorb] the spirit of its practice, day by day, in the course of actual dealings between lawyer and client”⁶⁹ so the future lawyer could learn “*how to practice and how to deal with clients, as the principal thing.*”⁷⁰ Continuing the trend of arguments that legal clinics are primarily tools to teach the practice of law, in 1933, Jerome Frank, from Yale Law School, argued for law school legal clinics to take on the same variety and complexity of legal services rendered by governmental agencies, quasi-governmental organizations, and private law offices, not a caseload focused on promoting social justice issues.⁷¹ Charlie Miller conceded that clinical legal education could be a valuable means for instilling in law students a professional concern for the legal needs of the poor; however, he contended that it was not a primary goal of clinical legal education.⁷² This review of the history of clinical legal education at least partially undermines the argument that the origins of legal clinics dictate a focus on social justice advocacy.

Despite this, legal clinics were also expected to be, at least, a supplemental means of teaching social justice to law students.⁷³ As early as 1926, advocates were calling for legal clinics to teach law students about the legal needs of the poor.⁷⁴ Soon thereafter, the external clinic model of partnering with outside legal aid organizations began to give way to an in-house clinic model, which also began a shift toward clinics formed primarily as a means of promoting social justice and addressing the legal needs of the poor. Clinical instruction changed from primarily partnering with external legal clinics to an in-house clinical instruction model when Duke University started the first in-house legal clinic in 1931 and when the University of Tennessee started the second in-house legal clinic in 1947.⁷⁵ In-house legal clinics grew in earnest in the late 1950s.⁷⁶ By 1958, five law schools adopted the clinical legal education model following the structure established at Duke.⁷⁷ In-house clinical legal education truly began to come into its own from 1959 to 1965, with the addition of nineteen new legal clinics, and became an integral part of numerous law school curricula with the addition of one hundred legal clinics at law schools by 1978.⁷⁸

As before, the focus on social justice issues partly resulted from more

68. Rowe, *supra* note 43, at 597.

69. *Id.*

70. *Id.* at 598 (emphasis added).

71. Frank, *supra* note 43, at 918.

72. Blaze, *supra* note 40, at 949.

73. *Id.* at 945.

74. *Id.*

75. *Id.* at 939-40.

76. Barry et al., *supra* note 42, at 10 (“By the end of the 1950s, thirty-five law schools reported some form of legal aid clinic.”).

77. Blaze, *supra* note 40, at 941.

78. *Id.* at 942.

practical reasons; many of these newer in-house legal clinics were funded by external grants that often required clinics receiving their funding be “socially progressive.”⁷⁹ In addition to external grants from the Department of Education and the Legal Services Corporation,⁸⁰ the Ford Foundation significantly funded the expansion of law school clinical programs.⁸¹ By 1972, a number of law schools, including programs at Yale, University of Pennsylvania, UCLA, Stanford, University of Michigan, U.C. Hastings, University of Southern California, and Georgetown combined public interest work and clinical legal training.⁸² This funding, while allowing the expansion of clinical legal education, also required these new clinics to more explicitly combine a social justice mission of providing legal assistance to the poor with that of teaching the practice of law, which was the focus of the earliest legal clinics.

With this expansion of legal clinics with a social justice focus, there came opposition to the proposition that clinics were an appropriate and effective means of teaching social justice.⁸³ One law professor argues that while legal clinics *expose* students to the injustice of being unrepresented, “clinical instruction does not teach students how to *think* about justice.”⁸⁴ Clinical legal education, he argues, “does not so much promote justice as it does promote an emotional response to injustice.”⁸⁵ In doing so, he reasons, clinical legal education conflates empathy with critical thinking.⁸⁶ He concludes that clinical instruction’s contact and exposure to victims of injustice rather than deconstructing concepts of justice leaves law students unprepared to rigorously analyze the complex moral issues students must contend with as a practitioner.⁸⁷ It is true that such clinical

79. Dubin, *supra* note 26, at 1465, 1472-73 (noting external grants from the Department of Education’s Title IX Clinical Legal Experience Program, the Legal Services Corporation’s Civil Clinical Program, and various states’ Interest of Lawyer’s Trust Account (IOLTA) programs requiring the grant recipients to provide services to those in financial need).

80. *Id.*

81. SANFORD JAFFE, *PUBLIC INTEREST LAW: FIVE YEARS LATER* 37-39 (1976).

82. Gordon Harrison & Sanford M. Jaffe, *Public Interest Law Firms: New Voices for New Constituencies*, 58 A.B.A. J. 459 (1972); *Institute for Public Representation*, GEO. U.L. CTR., <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/IPR/index.cfm> [<https://perma.cc/8L8S-49Q9>] (noting the financial assistance from the Ford Foundation to establish the Institute for Public Interest Representation, which is a “public interest law firm and clinical education program”).

83. Breen, *supra* note 30, at 396.

84. *Id.*

85. *Id.* at 397.

86. *Id.*; see also Jan Costello, *Training Lawyers for the Powerless: What Law Schools Should Do To Develop Public Interest Lawyers*, 10 NOVA L.J. 431, 438 (1986) (“So, how do we get students to identify with clients to whom they were turned off at first glance? Easy. We require the students to spend time with the clients, to assist someone else in advocating for the clients, and finally, to do that advocating themselves.”).

87. Breen, *supra* note 30, at 397. While a debate on the viability of legal clinics to adequately teach social justice is beyond the scope of this Article, this description reflects a narrow view of

encounters can be emotional for the law student, but that does not prohibit the student from using the encounters to think critically about the legal needs of the client and talking through the issues of justice raised.⁸⁸

Pro bono programs and legal clinics are two common ways law schools expose students to, and teach students to contemplate, social justice legal issues. Logically, students' views of social justice, and, thus, the students' interest in this area, is at least influenced by what they are taught while law students.⁸⁹ This Article next evaluates the balance in teaching social justice in law school between exposing students to social justice by, for example, simply offering a pro bono program or a legal clinic course, and a more directive approach of mandating social justice legal clinic participation⁹⁰ or even more explicitly teaching students their upcoming ethical responsibility to donate pro bono service to the poor.⁹¹

2. *Exposure to Social Justice.*—Instead of mandating that students engage in social justice, a number of law schools simply expose students to social justice legal issues through voluntary social justice courses,⁹² voluntary pro bono programs,⁹³ or voluntary legal clinics.⁹⁴ These programs provide students with the choice to learn about social justice legal issues without imposing a requirement to participate in the programs. In this model, students are trusted to determine for themselves whether social justice is a desired part of their legal education and their professional interests and goals.

3. *Mandatory Participation in Social Justice.*—The next section will review

the instruction that clinics provide. Clinics provide not only the client work, but most often classroom seminar instruction when the professor and the student study the laws, policies, and economic structures that create the patterns of poverty that lead to the injustices Breen mentions. Clinical instruction also includes individual meetings with the professor, when students and the professor often spend hours deconstructing many of the concepts of justice Breen references.

88. Claire Donohue, *Client, Self, Systems: A Framework for Integrated Skills-Justice Education*, 29 GEO. J. LEGAL ETHICS 439, 461 (2016).

89. Costello, *supra* note 86, at 432 (“As a result of my experience, I believe: that more students would like to do public interest work than eventually do; that law school experiences—both in the classroom and in clinical programs—significantly influence whether students go into public interest law; and that law schools can and should do more to make public interest law a real option for law students and law graduates.”).

90. Costello, *supra* note 86, at 438.

91. Quigley, *Seizing the Disorienting Moment*, *supra* note 36, at 43 (“Put bluntly, social justice instruction can not be considered successful if its sole effect is to inspire future lawyers who will operate without social conscience in their primary work to donate a few pro bono hours to the poor of their community.”).

92. *Law School Public Interest Programs—Certificate and Curriculum Programs*, AM. BAR ASS’N (Nov. 18, 2015), https://www.americanbar.org/groups/probono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_certificate_curriculum.html [https://perma.cc/2APA-AMH2].

93. *Chart of Law School Pro Bono Programs*, *supra* note 9.

94. *Law School Public Interest Programs—Certificate and Curriculum Programs*, *supra* note 92.

how law schools are mandating social justice engagement through mandatory pro bono programs and mandatory legal clinics.⁹⁵

a. Mandatory pro bono.—The idea of mandatory pro bono is to require lawyers to provide legal services to those who need it but cannot afford it. As Professor Mary Coombs succinctly states, “A primary objective of any mandatory pro bono program is to increase the quantity of legal services available to the poor.”⁹⁶ Mandatory pro bono programs in law school⁹⁷ also seek to provide “a social justice neutrality” because according to at least one advocate, law school “effectively encourages students to choose the powerful.”⁹⁸ In 1987, Tulane University Law School became the first law school to mandate pro bono service as a condition of graduation.⁹⁹

This Article argues against mandatory pro bono programs in law school, and to do so effectively requires a review of the arguments in support and opposition to these programs. Since many of the rationales for mandatory pro bono in lawyers mirror the arguments for mandatory pro bono in law students,¹⁰⁰ this Article will provide a brief overview of the arguments in favor of, and in opposition to, mandatory pro bono for lawyers and law students.

(I) Arguments in favor of mandatory pro bono.—There are approximately nine consistent arguments for mandating pro bono service. One of the most popular arguments for mandatory pro bono is that it fulfills the lawyer’s ethical obligation to assist those with unsatisfied legal needs who do not have the financial means to acquire them.¹⁰¹ The obligation to provide pro bono legal

95. *A Survey of Law School Curricula: 2002-2010*, AM. BAR ASS’N (noting pro bono service requirement has increased since 2002 with eighteen percent of law school respondents in 2010 mandating pro bono service as a condition of graduation).

96. Mary Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3 B.U. PUB. INT. L.J. 215, 216 (1993).

97. Costello, *supra* note 86, at 439 (“The program would require for first-year students, and encourage for upper-level students, supervised work experience in public interest law.”).

98. *Id.* at 435 (“So why not just keep on doing more of what we do, which is to offer the traditional law curriculum and let students choose, upon graduating, whether to represent the powerful or the powerless? Why not just remain “neutral”? The answer is that the traditional law school experience is not “neutral”; it effectively encourages students to choose the powerful.”).

99. Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 53 (2004).

100. Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2433 (1999) (“The primary justifications for pro bono service by law students parallel the justifications for pro bono service by lawyers.”).

101. F. Raymond Marks, *A Lawyer’s Duty to Take All Comers and Many Who Do Not Come*, 30 U. MIAMI L. REV. 915, 924 (1976) (“As already mentioned, disciplinary sanctions are needed against any lawyer who refuses to take a matter because the individual or group seeking his or her services lacks a fee . . . [A]t rock bottom, the ethic needs to be stated in terms of a duty to take all comers. This is premised on the notion that a lawyer offers public services; that there is an individual duty not to assist the historical and heretofore persistent distribution of qualify legal services to a very narrow elite group within society. It is suggested that the freeze-out of certain groups has been systematic and that only drastic revision can change this configuration.”).

services has been proclaimed by both the American Bar Association¹⁰² and the U.S. Supreme Court.¹⁰³ However, because lawyers more often serve clients with the financial means to pay for legal services,¹⁰⁴ those who cannot afford legal services have few options for assistance. Since the Model Rules of Professional Conduct do not require lawyers to balance the needs of the poor against the needs of those able to pay for legal services, proponents see mandatory pro bono service as a means of helping to achieve that balance and fulfill the lawyer's pro bono ethical obligation.¹⁰⁵

A second argument supports mandating pro bono service as a way to address the historic economic inequality that has arisen partly from lack of legal representation.¹⁰⁶ This argument posits that because lawyers have not addressed the societal inequities caused by lack of access to legal services, lawyers now have a duty to provide pro bono services to shift wealth and opportunity to the less privileged.¹⁰⁷

A separate, but similar third argument is to require lawyers to provide pro bono services because of the special privileges that lawyers enjoy as part of the legal profession.¹⁰⁸

102. Ronald H. Silverman, *Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 890 (1991) (noting "the inherent responsibility of lawyers to participate personally—to become directly involved—in providing [public interest] legal services").

103. *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 310 (1989) (noting "lawyers' ethical obligation to volunteer their time and skill pro bono publico").

104. Thurgood Marshall, *Financing Public Interest Law Practice: The Role of the Organized Bar*, 61 A.B.A. J. 1487 (1975) ("There is often an imbalance in the legal process. Not all viewpoints are equally represented before most decision makers. For obvious reasons, lawyers generally represent clients who can afford to pay them. As a result, many persons and groups fail to receive adequate legal representation.").

105. Marks, *supra* note 101, at 916 ("The Code of Professional Responsibility fails to allow for, or even see the need for, a major redress of the imbalance in social justice; an imbalance produced in part, and reinforced substantially, by the persistent pattern of distributing quality legal services to those who can afford to pay the most for them.").

106. See, e.g., Cynthia R. Watkins, *In Support of a Mandatory Pro Bono Rule for New York State*, 57 BROOKLYN L. REV. 177, 195 (1991) ("A mandatory program is a simple and direct route to achieving the goal of increased access to the legal system for the poor.").

107. Marks, *supra* note 101, at 925 ("Whether the legal profession cares to recognize it or not, it has played a significant role in arriving at and failing to ameliorate present inequities in wealth, power, degrees of freedom, and human dignity within our society. The legal profession now has a duty, and has always had a duty, to participate in major reshifting of wealth and opportunity.").

108. Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1121 (1991) ("At the core of professional ideology is the idea that the special privileges of the profession are justified because its members are dedicated to the interests of clients and the public. Although lawyers earn their living by representing clients, they do so 'in the spirit of public service.'"). One of the arguments for mandatory pro bono "rests on the fact that the lawyer's license is an exclusive privilege—non-lawyers are prohibited from engaging in 'the practice of law'" and that lawyers have "exclusive privileges in maintaining and operating the legal infrastructure." *Id.* at 1134-35;

A fourth common theme is to mandate pro bono as a type of concession to society in exchange for the monopoly that lawyers have on the legal profession.¹⁰⁹ Because society has granted lawyers this monopoly, mandatory pro bono proponents task lawyers with the duty to ensure that the justice system functions fairly and effectively.¹¹⁰

A fifth, though less compelling argument for mandatory pro bono is the personal benefit lawyers would receive from the interaction with clients who are, assumedly, less like them.¹¹¹

A more controversial theory, known as the public assets theory, argues that lawyers are sellers of publicly created assets, and, thus, the public is entitled to recapture a portion of that asset in the form of in-kind services.¹¹²

A less common argument is that lawyers, as sworn officers of the court, can be called upon as counsel for indigent defendants in criminal cases.¹¹³ In this theory, lawyers are not compelled to provide pro bono services because of the need of the defendant or a duty to solve a societal need, but because they can be compelled by judicial decree.¹¹⁴

Proponents for mandatory pro bono specifically for law students consistently contend that compulsory service to poor clients in law school will encourage pro bono participation as a practicing attorney.¹¹⁵ Noted pro bono advocates argue

see also Steven Lubet & Cathryn Stewart, *A "Public Assets" Theory of Lawyers' Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1261-62 (1997).

109. JAFFE, *supra* note 81, at 7 ("This is not a problem for the legal profession alone, but, it is a problem which the legal profession has a special responsibility to address. The legal profession, after all, holds a monopoly on legal services and it has particular duties to see that our legal institutions operate fairly and effectively."). But see Lubet & Stewart, *supra* note 108, at 1259-1260 (rebutting the monopoly theory by arguing while the profession has a monopoly on the provision of legal services, no individual or subgroup of lawyers has a monopoly, and thus, the monopoly theory fails empirically).

110. JAFFE, *supra* note 81.

111. Coombs, *supra* note 96, at 220 ("Second, the service option facilitates, while not compelling, those benefits which may arise when lawyers whose usual client base is wealthy and corporate engage directly with the poor and their legal problems.").

112. Lubet & Stewart, *supra* note 108, at 1261 (arguing that lawyers sell privately created assets, such as the lawyer's education, experience, and good judgment, and publicly created assets such as confidentiality and enforceable duties of loyalty, created through statutes and judicial codes of conduct and that the public is entitled to some portion of the profit lawyers generate from the commoditization of these publicly created assets).

113. *Id.* at 1257-59.

114. *Id.*

115. Dubin, *supra* note 26, at 1476 ("Second, justice ideals are served by exposing law students to an ethos of public service or pro bono responsibility in order to expand access to justice through law graduates' pursuit of pro bono activities or public service careers."); Frederick J. Martin III, *Law School's Pro Bono Role: A Duty to Require Student Public Service*, 17 FORDHAM URBAN L.J. 359, 368 (1989) ("[E]arly pro bono experience and training will encourage pro bono participation after admission to the bar.").

that mandatory pro bono activities in law schools are directly related to a practitioner's willingness to engage in pro bono.¹¹⁶ Further, mandatory pro bono while in law school will provide the student unique insight into the necessity of pro bono service¹¹⁷ and the training needed to perform pro bono as a practicing attorney.¹¹⁸

The final major argument for mandatory pro bono specifically for law students is to instill in the student a professional obligation to provide pro bono legal representation¹¹⁹ and to "convert" those who otherwise would not have participated.¹²⁰

(ii) *Arguments in opposition to mandatory pro bono.*—Despite the argued benefits of mandatory pro bono, there are also some argued limitations. As an initial matter, there is the argument of hypocrisy: In mandating pro bono work for law students, law professors would require of law students what the American Bar Association does not require of lawyers—service to a client that the lawyer did not choose, nor has any ability to decline. Neither the current drafts of the Model Rules of Professional Responsibility ("Rules"), nor the forerunner to the Rules mandated pro bono legal services.¹²¹ Like the current Rules, the early version of the Rules only encouraged, but did not mandate, lawyers to provide pro bono legal services.¹²²

There is also the concern about the morality required for pro bono service. If a law student arrives in law school without the underlying moral traits that would make an attorney more likely to engage in pro bono, the mandatory pro bono experience in law school might have limited impact on that attorney's willingness to participate in pro bono upon graduation.¹²³ Instead of incentivizing pro bono service, required pro bono service could breed resentment of that service and undermine one of the primary goals to encourage more pro bono work from practitioners.¹²⁴

In addition, mandatory pro bono, without the performance awards given to those who volunteer to do pro bono, may not offer the motivation that external

116. Rhode, *supra* note 100, at 2416 ("By enlisting students early in their legal careers, these initiatives attempt to inspire an enduring commitment to public service. The hope is that, over time, a greater sense of moral obligation will 'trickle up' to practitioners. With that objective, an increasing number of schools have instituted pro bono requirements for students.").

117. Martin III, *supra* note 115, at 369.

118. *Id.*

119. Rhode, *supra* note 100, at 2432.

120. *Id.* at 2434.

121. See generally MODEL CODE OF PROF'L RESPONSIBILITY (Am. Bar Ass'n 1980).

122. MODEL CODE OF PROF'L RESPONSIBILITY CANON 4 (Am. Bar Ass'n 1980) ("A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.").

123. Rhode, *supra* note 100, at 2431 (noting the beginning of a legal career is too late to alter certain personal traits, such as empathy and a sense of group responsibility, that influence public-service motivations).

124. *Id.* at 2432 (noting mandatory pro bono could diminish participants' sense of altruism).

rewards provide to incentivize participation.¹²⁵

There are also economic and more provocative arguments in opposition to mandatory pro bono. Mandatory pro bono is criticized as simply inefficient¹²⁶ or that those in need simply would not take advantage of the legal services.¹²⁷ One author went so far as to argue that the poor really do not need legal services, but instead, would benefit more from other forms of charity.¹²⁸ Attorney John Scully similarly contends that poor men and women might actually prefer a cash payment to legal representation to assist them with their financial challenges.¹²⁹ Scully further disputes the need for legal services for the poor citing authors who contend that the poor would in fact benefit from the elimination of government welfare programs because these programs essentially perpetuate poverty by “[promoting] the value of being poor.”¹³⁰ Agreeing with this assessment, another author likewise contends that the poor’s low utilization of legal services stems from the poor’s rational economic determination that their limited resources are more productively spent on life’s basic staples than on the “expendable luxury” of legal services.¹³¹ That author suggests that poor clients would be better served by a cash infusion from an attorney than an attorney’s legal services.¹³² If a cash exchange were to occur, he argues, “[t]he lawyers could put the time they saved to more productive uses, and the clients could buy some of the virtually infinite array of goods and services they actually need.”¹³³ This, he suggests, would make everybody “better off.”¹³⁴

Less controversially, critics argue that mandatory pro bono would be an unfair burden on lawyers,¹³⁵ would require a legal expertise that a lawyer may

125. *Id.*

126. Humbach, *supra* note 29, at 564 (“The answer is priorities. Nobody wants to devote \$500 blocks of lawyers’ time to \$15 problems.”).

127. *Id.* at 564-65 (“Except for a narrow range of property-related matters . . . the middle class makes just about as little use of legal services as those who literally cannot afford them. . . . Why? Because people do not want to give up what they would have to in order to buy a little more of our lawyer justice, except when the expected benefit is worth the cost. People’s priorities are different.”).

128. *Id.* at 565 (arguing the poor, in need of so many services, might prefer forms of charity other than pro bono legal services).

129. John Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 HOFSTRA L. REV. 1229, 1235 (1991).

130. *Id.* at 1234 n.31.

131. Jonathan Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115, 1116-17 (1992) (“The low demand for lawyers’ services by the poor and the middle class provides strong evidence that most people regard legal services as an expendable luxury rather than as a necessity In other words, poor people do not hire lawyers because they use their limited resources to buy things that they value more than legal services.”).

132. *Id.* at 1117.

133. *Id.*

134. *Id.*

135. Humbach, *supra* note 29, at 566 (“But since this is essentially a part of a much larger

lack,¹³⁶ and would be unduly burdensome to small and solo practices.¹³⁷

Critics also make constitutional arguments to oppose mandatory pro bono. Mandatory pro bono has been criticized as an impermissible regulatory tax¹³⁸ and involuntary servitude.¹³⁹ Others argue that mandatory pro bono is an assault on a lawyer's First Amendment right against compelled speech because lawyers would be compelled to not only indirectly support a position, but also "actively foster or defend policies and programs that might fairly be regarded as political or ideological in character."¹⁴⁰ Others make a quasi-Fifth Amendment argument

problem—the social problem of poverty—it is illogical to saddle one small group in society with a very burdensome special tax.”).

136. *Id.* (“If we are going to help the poor, we should offer them more than the diminished enthusiasm of forced labor or the seat-of-the-pants guesswork of high-minded poverty law dilettantes. They are entitled to lawyers who take their causes seriously and are able to handle them as serious causes.”); Coombs, *supra* note 96, at 216-17 (“Fourth, opponents contend that mandatory pro bono may harm potential clients because most lawyers are untrained in the areas of law relevant to poor peoples’ needs. Mandatory pro bono work, then, may result in a higher incidence of malpractice. Alternatively, it is claimed that it is inefficient to require every lawyer to become proficient in such arcane areas as public benefits or eviction law in order to do a modest amount of legal work for the poor.”).

137. *Id.* (noting small and solo practitioners earn by selling billable hours and there are fewer of them in a small firm to share the burden).

138. Coombs, *supra* note 96, at 222 (“In effect, [mandatory pro bono] is a tax on a profession, a variant on traditional income taxes and franchise fees, with a service alternative to the monetary obligation.”); Ronald H. Silverman, *Conceiving A Lawyer’s Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 941-42 (1991) (“However we may characterize the Marrero Committee proposal for mandatory pro bono, there can be little doubt that it amounts to a form of ‘regulatory tax.’ If a tax may be defined as a compulsory levy or exaction, regularly imposed by government without conditioning taxpayer liability on any specific benefit received, surely the [mandatory pro bono] proposal qualifies.”).

139. Humbach, *supra* note 29, at 566 (“A tax payable only in services, not commutable to a cash payment, would be particularly insidious in imposing what would be in effect, and perhaps in law, an involuntary servitude.”).

140. Silverman, *supra* note 138, at 950 (“Whether or not our principled lawyer is right or wrong is irrelevant for First Amendment purposes. What matters is that, through a strict mandatory service policy, he or she is being forced by government not just to indirectly support but to actively foster or defend policies and programs that might fairly be regarded as political or ideological in character. While this conclusion is more compelling where actual service to the poor is required, there is also arguably a ‘fostering’ or ‘disseminating’ of objectionable policy even where dollar contributions are allowed as a substitute for service-in-kind.”); *see also* Scully, *supra* note 129, at 1245 (“Compelling an attorney to choose between practicing law and participating in a mandatory pro bono program raises First Amendment issues. An attorney might object to participation in such programs for various political and ideological reasons.”). *But see* Coombs, *supra* note 96, at 223 (“Finally, mandatory pro bono, especially in the form proposed here, does not require the lawyer to profess or support any particular belief, and thus raises no First Amendment problem. The obligation can be met by providing any form of legal work to indigent persons or monetary support

that mandatory pro bono is a type of conscription of an attorney's services¹⁴¹ and a "confiscation" of an attorney's private funds and time that are not public resources to be redistributed.¹⁴²

One of the more convincing arguments against mandatory pro bono is that it places an unwarranted burden on the legal profession to address issues caused by society's challenges.¹⁴³ There are a number of reasons why individuals lack legal representation, but it is difficult to argue that the legal profession is either the exclusive cause or the exclusive remedy.¹⁴⁴ A broad swath of society's ills—poverty, economic inequality, stagnant wages, excessive student loan debt, to name just a few—significantly impact a person's ability to afford legal services, and thus, there is debate whether lawyers have a duty to resolve these ills.¹⁴⁵ There are many societal "needs" that go unfilled, so perhaps lawyers should not be singularly compelled to fulfill this particular need.¹⁴⁶ It is, critics argue, an unpersuasive conflation of need and duty.¹⁴⁷

b. Mandatory legal clinics.—In addition to mandatory pro bono, some law schools also mandate social justice learning in law school through mandatory legal clinics.¹⁴⁸ The idea of requiring legal clinics is not a new one. In 1919, in what may have been a first, Northwestern University Law School required its law students to participate in a legal clinic for three half-days each week for three

to any organization doing such work. It is difficult to imagine anyone claiming that she has a belief system which is offended by providing any legal assistance to any group of poor people.”).

141. Scully, *supra* note 129, at 1256 (“Attorneys make their living through their services. Their services are the means of their livelihood. We do not expect architects to design public buildings, engineers to design highways, dikes, and bridges, or physicians to treat the indigent without compensation. When attorneys’ services are conscripted for the public good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good.”).

142. *Id.* at 1243 (“The Marrero Committee acknowledges in the Report that the legislative and executive branches of government have *not* funded legal services for the poor at the level desired by the Committee. The Committee’s proposal would have the Chief Judge of New York order the confiscation of some of the private funds of attorneys—or some of their time—and treat those resources as public resources to be redistributed.”).

143. Coombs, *supra* note 96, at 218 (“One could argue that the need for legal services, like the need for food or housing or medical care for the poor, is a general social obligation to be met by taxes. Certainly, such general societal subsidization of the legal needs of the poor is appropriate.”).

144. *Id.*

145. Lubet & Stewart, *supra* note 108, at 1254-55 (arguing that simply because lawyers can fill the need, does not mandate that lawyers must fill the need).

146. *Id.* (listing a number of societal needs that remain unfulfilled without mandatory service on other professions).

147. *Id.* at 1254-56 (conceding that while it is efficient to obligate attorneys as a group to fulfill this need for legal services that can only be filled by licensed lawyers, that the obligation cannot be placed on individual lawyers to solve what is, in their analysis, a societal problem).

148. *Chart of Law School Pro Bono Programs*, *supra* note 9.

months under the supervision of a faculty member and under the direction of an attorney with the Legal Aid Bureau.¹⁴⁹ By 1926, the University of Minnesota also required its third year law students to participate in a legal clinic taught under the supervision of a practicing attorney.¹⁵⁰ As of 2014, at least six law schools have a mandatory clinic requirement.¹⁵¹ While these legal clinics certainly provide students with robust training in the practice of law, most legal clinics are also social justice oriented. For example, University of Maryland requires students to take a legal clinic that provides “access to justice for people in need.”¹⁵² A recent study by the Center for the Study of Applied Legal Education shows that an overwhelming percentage of legal clinics promote social justice causes.¹⁵³ In fact, a recent review of legal clinics also shows that almost seventy percent of legal clinics serve low to moderate-income clients.¹⁵⁴ Proponents of mandatory service theorize that lawyers who participated in a legal clinic while in law school would seek to recapture the professional fulfillment and sense of purpose they experienced while working in the law school legal clinic, which would prompt these recent graduates to offer pro bono services.¹⁵⁵ This rationale suggests that legal clinics can be a means to encourage pro bono service by lawyers who, without the exposure, would not have otherwise provided pro bono representation.

II. EXPOSURE TO SOCIAL JUSTICE IS VITAL

When law schools mandate pro bono service and service in a legal clinic for low and moderate income clients, that mandate imposes upon a student the requirement to engage in social justice work, ostensibly as a means of learning about social justice. The next section evaluates whether students should be required to learn social justice and, if so, whether that learning should extend beyond a classroom experience and include forced client service either in a pro

149. John H. Wigmore, *The Legal Clinic: What It Does for the Law Student*, 124 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 130 (1926).

150. Kjørlaug, *supra* note 43, at 136.

151. Kuehn & Santacroce, *supra* note 9, at 0 (“Six schools required students to enroll in a law clinic, one requires enrollment in a field placement, and 24 required either a law clinic or field placement.”).

152. Delece Smith-Barrow, *Freddie Gray Course Teaches Social Justice to Law Students*, U.S. NEWS (Sept. 21, 2015, 8:30 AM), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2015/09/21/launch-a-career-in-social-justice-with-law-school> [<https://perma.cc/N6MD-2KVW>] (“Every student at Maryland is required to take a clinic and required to take a clinic that helps provides access to justice for people in need.”).

153. Kuehn and Santacroce, *supra* note 9, at 1, 7-10.

154. Law School Legal Clinic Survey, Aug. 15, 2016 (unpublished manuscript) (on file with author).

155. Dubin, *supra* note 26, at 1476 (“Through pro bono and public service work, clinic graduates may also seek to recapture experiences of professional fulfillment, gratification, or a sense of purpose often missing from traditional legal careers.”).

bono program or legal clinic.

A. Social Justice Is an Essential Part of Legal Education

Partially due to the legal bar's inability and unwillingness to provide pro bono time or financial contributions,¹⁵⁶ law schools have a responsibility to teach social justice, and this exposure is an essential part of legal education.¹⁵⁷ Incorporating social justice into the legal curriculum facilitates students' exposure to what law professors perceive as legal and social injustices to enable students to reflect on the root causes of these injustices.¹⁵⁸ Law schools should teach social justice to expose students to the social constructs that impact a lawyer's clients so that students will be better prepared to represent them. Additionally, while in law school, students engage in the essential exploration of self—law students learning the type of lawyer they choose to be after learning about the law, the law's impact on society, and the legal needs of different types of clients. Arguably, exposure to law school pro bono programs' and legal clinics' low and moderate-income clients enables law students to identify more with this group of clients,¹⁵⁹ and thus, make them more appealing, or at least, acceptable as clients.¹⁶⁰ While there is disagreement over whether exposure to social justice lawyering and the attendant clients are an impetus for a public interest career or whether students who pursue a public interest career already had such tendencies upon entering law school, an increasing number of law schools now intentionally incorporate social justice into their curriculum.¹⁶¹ For many schools, if social

156. Rhode, *supra* note 100, at 2416.

157. Quigley, *Seizing the Disorienting Moment*, *supra* note 36, at 44 ("Law schools should therefore not be wary of acknowledging their duty to explicitly—and accurately—teach the lessons of social justice necessary for a complete legal education.").

158. Bryce, *supra* note 35, at 582.

159. Costello, *supra* note 86, at 437.

160. *Id.* ("Clients and attorneys identify with each other, a process which takes place quite early in an attorney's career—often during law school.").

161. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 592 (1982) ("A surprisingly large number of law students go to law school with the notion that being a lawyer means something more, something more socially constructive than just doing a highly respectable job . . ."). See Monroe H. Freedman, *The Loss of Idealism—by Whom? And When?*, 53 N.Y.U. L. REV. 658, 658-59 (1978) ("A recurring theme at the SALT conference was the view that students come to law school full of fervor to further social justice and law reform, and leave with no other interest than to practice in prestigious law firms and become rich. The law school experience is thus viewed as one that is destructive of idealism and that produces a profession of legal technicians devoid of a sense of social responsibility. . . . What happened, then, to all those others who entered law school with the sole goal in mind of righting social wrongs? The answer, it seems to me, is clear. Those people never existed. Law school did not destroy their sense of social justice, because they never had it in the first place. That, at any rate, is the conclusion I draw after a quarter of a century of involvement with law students as a student, teacher, and administrator. That conclusion should surprise no one. We admit people into law school principally

justice exposure is truly absent in legal instruction, then incorporating social justice into the law school curriculum is a means of addressing that gap and fulfilling this essential part of legal education.¹⁶²

B. ABA Requirements

Law schools have a responsibility to make available, though not mandatory, social justice training. The American Bar Association requires law schools to “provide substantial opportunities to students for student participation in pro bono legal services.”¹⁶³ Arguably, law schools should then make learning how to perform these services mandatory.¹⁶⁴ One could argue that part of a law school’s responsibility in preparing law students to become competent practitioners means that in addition to teaching courses on substantive law, law schools must also teach students how to become competent lawyers to low and moderate-income individuals.¹⁶⁵ If law schools are required to teach law students professional responsibility, conceivably professional responsibility also includes rendering effective counsel to the poor, thereby requiring law schools to teach students how to provide effective counsel to the poor.¹⁶⁶ If so, then mandatory pro bono and legal clinics would not be an intention to inculcate social justice norms in law students, but would simply be a means of teaching students the skills needed to fulfill their professional responsibility obligations. It would be, as one author noted, a fulfillment of the law school’s “professional responsibility to have a

on the basis of their technical skill in attaining high test scores, either by repeating back what they have been told, or by marking the appropriate box in a short-answer machine-graded examination. We give virtually no weight in the law school admissions process to a candidate’s manifest concern with social problems. The end product of a legal education, therefore, is not conditioned in the classroom, but is predetermined before students enter class, in the admissions process.”).

162. Breen, *supra* note 30, at 385 (“From almost the first day of law school, most prospective lawyers are taught to separate their most fundamental moral beliefs (including their beliefs about justice) from their understanding of the law.”); Quigley, *Letter to a Law Student*, *supra* note 27, at 13 (noting there is far too little about justice in the law school curriculum and in the legal profession).

163. *ABA Standards and Rules of Procedure for Approval of Law Schools Standard 2015-2016*, *supra* note 11. In 2013, the ABA’s Section of Legal Education and Admissions to the Bar considered a proposal to require law schools to mandate pro bono service as a condition of graduation. Mary Dunnewold, *Mandatory Pro Bono: Is It Right for Law Students?*, AM. BAR ASS’N (Feb. 1, 2014), <http://abaforlawstudents.com/2014/02/01/mandatory-pro-bono-right-law-students/> [https://perma.cc/LF7X-9C5Q]. The proposal was not adopted. *Id.*

164. Martin III, *supra* note 115, at 365 (“Because lawyers have a duty to perform pro bono services, law schools should teach students *how* to fulfill this lawyer’s obligation. The ethical and professional responsibility to serve the legal needs of the poor applies to law schools as well as to law students and practicing lawyers.”).

165. *Id.*

166. *Id.* at 366.

public service clinical program for all students.”¹⁶⁷

C. Unaddressed Legal Needs

Justice Thurgood Marshall argued that the right to competent legal representation was “[o]ne of the most important ideals of the legal profession.”¹⁶⁸ A means of accomplishing legal representation of those in need is to promote participation in public interest law and pro bono representation to “assure that all interests get a fair chance to be heard with the help of a lawyer.”¹⁶⁹ Public interest lawyers are necessary to maintain a fair and accessible justice system.¹⁷⁰ However, the legal profession consistently fails to meet the legal needs and social justice causes of the poor.¹⁷¹

The American Bar Association imposes on every lawyer a “professional responsibility to provide legal services to those unable to pay.”¹⁷² To accomplish this, the Rules levy an aspirational goal for every attorney “to render at least fifty hours of pro bono legal services” every year to persons of “limited means” or provide the same level of pro bono work or voluntary financial support to organizations that “are designed primarily to address the needs of persons of limited means.”¹⁷³ Despite this aspirational goal,¹⁷⁴ the Rules do not impose a specific individual requirement upon each lawyer to engage in some public interest practice or pro bono service.¹⁷⁵ The Rules reflect only a collective duty of the profession to make legal counsel available, not the individual duty that would be required to accomplish Justice Marshall’s ambitious ideal to provide all those in need competent legal representation.¹⁷⁶

A number of law school administrators recognize a law school’s responsibility to prepare law students for their pro bono professional

167. *Id.* at 374.

168. Marshall, *supra* note 104, at 1487.

169. *Id.* at 1488.

170. Harrison & Jaffe, *supra* note 82, at 459 (“For poor or otherwise deprived individuals who are unable to hire counsel, it has long been accepted not only as legitimate but necessary to the functioning of our system of justice.”).

171. Marks, *supra* note 101, at 915 (“The legal profession as it is currently organized in the United States has failed to meet the needs of many individuals and groups within our society. It has also failed to play a significant role in the quest for social justice and a viable society.”).

172. MODEL RULES OF PROF’L CONDUCT r. 6.1 (Am. Bar Ass’n 2016).

173. *Id.*

174. *Id.*

175. Marks, *supra* note 101, at 917.

176. *Id.* at 923-24 (“The individual lawyer should not be exempted from the imposition of a specific and enforceable duty . . . to spend a certain percentage of time delivering services to those who cannot pay, or extending time in the public interest or other socially relevant ways, such that each lawyer is required to relate to all individuals and all groups on a more equal basis than the present system allows.”).

responsibility.¹⁷⁷ Aside from the Rule's aspirational goals, law schools also recognize that the unrepresented require legal representation not only to protect their legal needs, but also to empower them with a sense of autonomy that comes with the ability to protect one's legal rights.¹⁷⁸ It is important to teach future lawyers that the judicial system is structured around an ostensibly objective third party listening to arguments on both sides of a question and then making an informed determination after reviewing the merits of those arguments.¹⁷⁹ If one side does not have access to a legal representative, that party is incalculably disadvantaged.¹⁸⁰ The public is also disadvantaged because without the views of the unrepresented, important decisions would be made that affect everyone, not just those with the resources to present their arguments before a tribunal.¹⁸¹ To protect the ability of all viewpoints to be heard in administrative and judicial proceedings, public interest lawyers are necessary, not just sporadically, but continuously.¹⁸² A number of lawyers are needed to fulfill this need lest the clients in need will either be turned away because there are too few lawyers to represent them or receive insufficient assistance as the few lawyers will be stretched too thin trying to serve as many people in need as possible.¹⁸³ Given the need for legal services and the need for lawyers to provide these legal services, law students should be encouraged to practice social justice lawyering. Law

177. Rhode, *supra* note 100, at 2433 (referencing an AALS survey showing that ninety-five percent of deans recognized a law school's responsibility to instill an ethic of pro bono in law students).

178. Marks, *supra* note 101, at 921 ("Any model of legal need must also recognize what access to lawyers means, independent of actual use. . . . It relates to a sense of power and autonomy not heretofore enjoyed by under-users of the legal system.").

179. Marshall, *supra* note 104, at 1488 ("We condemn the adversary system to one-side justice if we deprive the legal process of the benefit of differing viewpoints and perspectives on a given problem.").

180. *Id.*

181. JAFFE, *supra* note 81, at 6 ("It is often impossible to protect or further important interests without legal help, yet many persons and groups do not have access to a lawyer. This problem produces an imbalance and distortion in the legal process. Certain viewpoints do not have access to important decision-makers. Decisions are made without benefit of an adversary presentation of all the facts and arguments. Significant injuries may go without remedy. Justice is parceled out unequally, and unwise decisions are made affecting all of us. Public interest law seeks to fill some of the gaps in our legal system.").

182. Marshall, *supra* note 104, at 1489 ("When one reviews the current situation, it is clear that institutionalization of the public interest bar is necessary to establish a constant presence for the points of view of underrepresented persons in society and in administrative, judicial, and other legal proceedings.").

183. Gary Bellow & Jeanne Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 353-54 (1978) ("The same problem of scarcity that produces decisions to turn clients away also results in efforts to take more cases than can be properly handled. This pattern is most often found in legal aid and public defender offices, but the pressures that produce it are pervasive in public interest practice.").

schools should facilitate this exposure through available, though not mandatory, pro bono programs and legal clinics.

D. Responsibilities as a Professor

Admittedly, I assume some responsibility in teaching social justice legal contexts because I am a law professor. Part of the role of a professor is to teach and through that teaching, train law students to evaluate the law's impact on society. It is also our task to teach students what we have collectively and individually determined is necessary to practice law. However, there is a danger in *imparting* morality, instead of teaching students to contemplate and analyze morality—unlike substantive areas of law, there is less objectivity or settled precedent from which to teach. Clearly, whether teaching a mandatory or voluntary doctrinal or clinical course, a law professor's morality likely emerges. Intentionally or not, it will be seen in the professor's verbal and non-verbal cues, in the types of questions asked, in the professor's reactions to student questions or in the commentary offered during discussion—it is a difficult task to mask one's moral reactions to law cases and legal current events during a thirteen or fourteen-week semester. In this sense, pure objectivity in teaching a law course is a fiction and, thus, also is the idea of not at least implicitly teaching morality when teaching law. However, professors, like the clinical legal education pioneers like Charlie Miller, must balance incorporating personal and professional social justice goals with professional teaching responsibilities as educators.¹⁸⁴ Like Miller, the responsibilities as an educator must always come first, but should be carried out so that education goals and social justice goals “complement rather than compete with each other.”¹⁸⁵ Professors must educate students about social justice issues in a way that reflects a trust in their ability to objectively evaluate these issues and make their own decisions.

III. EXPOSURE TO SOCIAL JUSTICE, NOT MANDATORY SERVICE

A few years ago, as director of pro bono at a large law firm where I worked, an elderly man contacted me seeking legal assistance appealing a recent change to his veteran's benefits. He had been receiving just enough in benefits to pay rent on a small apartment in Washington, D.C. and live a frugal, though comfortable life. His brother was recently deceased and the gentlemen received a small, \$10,000 inheritance. With these funds, he provided some cash to his children and treated himself to a new set of dentures, the receipt of which made him

184. Blaze, *supra* note 40, at 952, 953-54 (“For Charlie, education was always first, but service was an inherent and appropriate byproduct that greatly enhanced pedagogical objectives of developing a true professional. He firmly believed that the two outputs of clinical legal education, service and education, can complement rather than compete with each other.”).

185. *Id.* at 953 (“Charlie Miller believed that legal education could provide only ‘peripheral support’ to the effort to make legal services available to everyone for several reasons. First, the primary objective of law schools must be to provide legal education while the legal profession bears ultimate responsibility for service.”).

endearingly happy. However, because he was receiving government benefits, this cash infusion triggered a reduction in his benefits. Instead of receiving his regular monthly benefits, his benefits were reduced to a little over \$400 per month. With such a small payment in one of the most expensive housing regions in the country, the gentleman was immediately at serious risk of eviction or hunger without sufficient funds to live, eat, and function. Without the pro bono assistance of attorneys at my firm, he would have been without legal assistance in filing for an appeal.

Sadly, thousands of similar stories of legal need abound in this country. I accept a moral obligation to help the vulnerable and to help the next generation have context as to why these tensions exist. However, I struggle with whether that obligation extends to imposing upon the next generation a similar responsibility for helping these populations that I see as vulnerable. I am inclined to see an obligation, though maybe not a right, to train the next generation to view these populations as vulnerable and to instill in that generation a similar responsibility to help the disenfranchised. However, that right becomes murky when I am no longer simply a fellow citizen, but instead a professor charged with teaching the law to students in my courses. I vacillate between a responsibility to ensure that the next generation accepts a responsibility to help others and a responsibility to teach them as objectively as possible intending to simply expose them to the different moralities of social justice.

I have long believed in helping others. Maybe, it is because I am an African-American female raised in the patriarchal, racially charged south; maybe, it was my visits to the King Center in Atlanta as a child; or maybe, it was growing up in an environment where I encountered more confederate flags than I could count. I have spent much of my legal career and my entire academic career working in, and on behalf of, the development and preservation of affordable homeownership in the belief that homeownership is a vital aspect of wealth creation and stability, particularly in communities of color. I long for a world where we celebrate our similarities and our differences alike and where we spend more effort supporting each other than diminishing each other. This was my goal when I was director of the pro bono program at the law firm where I previously worked, and this was my goal when I worked pro bono in economic development in low and moderate-income areas of Washington, D.C. I sincerely believe that working in economically distressed neighborhoods and working with low and moderate-income individuals gives the affluent more insight into why poverty is so pervasive and why the poor are often invisibly victimized by the very economy that enriches attorneys. So, I would be thrilled if every law student graduated with a sense of obligation to help those mired in poverty and if every lawyer spent some portion of their professional lives in service to those who cannot pay.

However, that is the world I hope we become. My work in these communities and in this area is a reflection of the choices I have made for my career. There are many who also hope for such a world. For us, it takes but a short glimpse at history to see how our world can devolve without the protection of law; a short glimpse to see how racially restrictive covenants and segregated education can flourish without the law to protect us from our baser instincts. My personal sense of ethics and morality dictates that those with financial and legal resources have

a responsibility to use those resources, at least partially, to help those who are vulnerable. As a professor, though, I recognize that my views of support and assistance do not disappear when I enter into the classroom. I am frequently tempted to impart this sense of personal obligation upon my students. It is antithetical to my personal ethics to ignore the opportunity to influence students to become what I view as a better self by teaching them the importance of self-sacrifice for those less fortunate. However, I must acknowledge that requiring law student participation in pro bono and legal clinics serving the indigent, as a condition of their graduation, is an improper imposition of my personal social justice morality upon my students.

Many years ago, Duke University law professor John Bradway mused that lawyers can be trained to react a certain way if, as law students, they learn certain habits that will enable them to have the type of character “which the community approves.”¹⁸⁶ The goal then, he argued, is to train law students in “habits of good moral character.”¹⁸⁷ On the surface, this is an admirable and enviable position—to be able to shape the characters of law students with the habits that the community or law professors approve and think are preferable. However, there appears a presumption of some moral superiority in such a decision. As a law professor, have I sufficiently studied the long arc of history to have an expertise in good moral character? Have I traversed the world enough to have sufficiently extensive insight into what constitutes ‘good’ to shape the moral character of another? Have I worked with each individual law student in my class for enough time to discern how to shape that student’s character? Have I spent enough time studying the various cultures of the world to know, with certitude, what is ‘good’ for that culture? If I have not, and I will concede that by all measures I have not, then who am I to choose for my students what constitutes a good moral character for them?

While the exposure model respects a student’s autonomy, it also enables students to avoid learning an aspect of professionalism that will be a part of their practice. Regardless of whether a lawyer works with low and moderate-income clients, the challenges of the poor remain, as does the lawyer’s professional obligation to provide pro bono assistance.¹⁸⁸ Exposing, instead of mandating, social justice engagement admittedly restricts law schools’ ability to train students to be social engineers. In this model, law schools relinquish their opportunity—some would argue duty—to incorporate social justice legal work into every student’s legal education. Law students could complete law school without ever working for a low or moderate-income client and lose an opportunity to learn how to assist this population with significant, unmet legal needs.

The exposure model also restricts law professors’ ability to shape how law students view and define social justice. For example, for years, Chicago’s public housing developments suffered high crime and high drug use in those

186. Bradway, *New Developments*, *supra* note 44, at 125.

187. *Id.*

188. MODEL RULES OF PROF’L CONDUCT r. 6.1 (Am. Bar Ass’n 2016).

communities.¹⁸⁹ In response, the City of Chicago embarked on an ambitious plan, the Plan for Transformation, to demolish a number of the public housing high-rises and replace them with mid-rise, mixed income residences.¹⁹⁰ Public housing residents were required to relocate from their homes to other areas of the city to accommodate the market-rate units built in the mixed-income developments. Without the requirement to work with a law professor as pro bono counsel to the residents to combat the residents' eviction, law students may never consider such forced relocation as a social or legal injustice. Instead, they could view the relocation and anticipated decrease in crime and drug activity solely as a benefit to the city and the community. Under the mandatory model, a law student would be compelled to work with such clients potentially with a law professor who frames such forced relocation as a social or legal injustice and train the students to interpret these circumstances as such. While some would argue that such framing is part of the benefit of mandatory pro bono and legal clinics, this Article posits that it is part of the risk. The long-time lawyer for, and developer of, affordable housing in me views such forced relocation of poor residents who do not have individual legal counsel as a tragic social injustice; however, the law professor in me needs my students to evaluate the arguments of all relevant stakeholders to appreciate the context of such a legal event. Such detached analysis is difficult in a forced representation, yet is vital to law students' development of their own views of social justice. Law students should not be *required* to treat such activity as an injustice or be *required* to work to correct such perceived injustices, but should be allowed to choose such representations, freely enabling the student to make this determination independently.

When there are a limited number of legal clinics at each law school and the majority of those legal clinics are serving low to moderate-income clients, mandating legal clinics is akin to mandating participation in social justice issues, similar to mandatory pro bono service. This mandate of social justice service suggests an unwarranted imposition on a student's moral independence.

Mandatory social justice service can introduce students to their upcoming ethical obligation as a lawyer to provide pro bono service to the poor,¹⁹¹ but such mandated service imposes upon students a view of social justice that can be more of a reflection of the social justice morals of professors than students. Ideally,

189. See, e.g., Sharon Cohen, *Duck the Bullet: How Children Survive Chicago's Cabrini-Green: Poverty: Gunfire is Not the Only Danger in this High-Rise Housing Project. Kids Must Also Try to Dodge Drugs, Gangs and Despair*, L.A. TIMES (Nov. 1, 1992), http://articles.latimes.com/1992-11-01/news/mn-1692_1_housing-project [<https://perma.cc/Y27X-JFYM>] ("Al Carter believes there is a code of survival that all young people must learn at Cabrini-Green. He sums it up in three simple words: Duck the bullet."); Nathaniel Sheppard, *Fear Returns to Project Where Mayor Stayed*, N.Y. TIMES, (Feb. 22, 1982), <http://www.nytimes.com/1982/02/22/us/fear-returns-to-project-where-mayor-stayed.html?pagewanted=all> [<https://perma.cc/874E-F8QT>] ("[M]any of the 13,500 residents say gang violence and extortion are growing problems once more.").

190. *Plan for Transformation*, CHI. HOUSING AUTHORITY, <http://www.thecha.org/about/plan-for-transformation/> [<https://perma.cc/PRR5-DSAZ>] (last visited Mar. 8, 2017).

191. Rhode, *supra* note 100, at 2433.

students have a responsibility to learn about social justice, but mandatory service in social justice advocacy is a misuse of power—potentially, we mandate service out of a sense of ethical obligation, but definitively, we also mandate service because we can.

Working from the premise (with which I firmly agree) that a lack of legal representation is an injustice, there must exist a moral center that dictates this is so. It is entirely plausible that law students do not yet have a highly-developed sense of legal injustice when they arrive in law school and that professors help them shape it. Thus, it is likely that law professors are not just helping students identify their own views of legal justice, but are molding students' views of legal justice to reflect our own through the mandatory pro bono and legal clinics for the indigent. As Professor Breen simply states, "while everyone is in favor of 'justice,' people often mean radically different things by the use of that term."¹⁹² Clearly, trying to craft a single idea of justice is both timeless and impossible, but without rigorous debate about what social or legal justice means to each student, they are susceptible to a law professor's ideals of justice.¹⁹³ As a professor, I must identify the line between teaching students about the moralities of social justice and imposing my views of it upon them. There are some who openly seek to shape law students' views of social justice to reflect a singular view that society and the legal system need to be 'fixed,' and that lawyers have a special responsibility to 'fix' it.¹⁹⁴ Students need to analyze and understand their role in the societal and legal systems that impact social justice, and clinics, specifically, can play an integral role in accomplishing that.¹⁹⁵

Clinicians are urged to "inculcate in their students an understanding of and concern for the circumstances of those who live in poverty . . . and a feeling of professional responsibility for increasing their access to justice."¹⁹⁶ However,

192. Breen, *supra* note 30, at 404.

193. Alan Wolfe, *The Intellectual Advantages of a Roman Catholic Education*, CHRON. REV. (May 31, 2002), <http://pdf.amazingdiscoveries.org/References/RtR/PDF-903/The%20Intellectual%20Advantages%20of%20a%20Roman%20Catholic%20Education.pdf> [<https://perma.cc/3VZ8-8CTC>] ("But before one can advance social justice, one must first know what justice is, a question that has preoccupied philosophers from Plato to John Rawls. All too often, students are rushed into the field to make justice happen, without sufficiently rigorous intellectual inquiry into what justice means and how its conditions ought to be fulfilled.").

194. Wizner, *supra* note 35, at 348 ("[L]aw students need 'to learn to recognize what is wrong with the society around [them]—particularly what is wrong with the machinery of justice in which [they are] participating and for which [they have] a special responsibility.'" (quoting William Pincus & Peter deL. Swords, *Educational Values in Clinical Experience for Law Students*, COUNCIL ON LEGAL EDUC. PROF. RESP. NEWSLS. (Council on Legal Educ. for Prof'l Resp., Inc., New York, N.Y.), Sept. 1969, at 4).

195. Quigley, *Seizing the Disorienting Moment*, *supra* note 36, at 41 ("Legal education needs to confront this narrow vision of legal advocacy not only because it is in error, but because critical analysis of one's role in the social and legal systems should be an essential part of any higher education experience.").

196. Wizner, *supra* note 35, at 352.

somewhat controversially, Professor Breen argues that legal clinics actually do not teach students how to think critically about justice, but instead simply illicit an emotional response to the injustices that the unrepresented experience because of their lack of legal representation.¹⁹⁷ While many clinicians would be justified in vigorously disputing that,¹⁹⁸ Breen's argument suggests that not teaching students *how* to think about justice is improper. Understandably, students must be encouraged to *think* about justice to enable them to identify, on their own, what justice means to them, not just to *feel* if injustice is present.¹⁹⁹ Law professors could teach law students how law students *should* respond to what the law professor presumes is an injustice. Conceivably, it is part of the law professor's academic responsibility to shape a law student's moral filter so that when a law student sees what the law professor views as a legal injustice, the law student becomes trained to similarly view it as an injustice that should be rectified. Perhaps students should be trained with a preferred narrow view of social justice to "use as a constant target toward which they *should* aim their practice."²⁰⁰ However, such a narrow interpretation reflects a particular view of what *should* be done and *who* should be helped. Students are entitled to make those choices independently after exposure to the substantive training of doctrinal courses and different available legal clinics—clinics that represent a variety of clients in a variety of areas so that students can choose the clients and practice areas that best fit their professional goals.

Notwithstanding, neither law schools nor law professors can, in good conscious, ignore the potential dangers to society if we choose not to help mold social engineers to balance against the economic and societal forces that keep so many of society's vulnerable populations in need. If law schools do not mandate social justice service, there is, admittedly, a risk in avoiding shaping the social justice morality of law students. This risk scares me, but then I must contemplate the propriety of intentionally shaping the morality of students to reflect the world I hope they will create. However, I must also acknowledge the very real social risks if I do not. There are countless indigent tenants, immigrants, battered spouses, refugees, or consumers who would suffer unjustly without legal

197. Breen, *supra* note 30, at 403 ("What is worse, if students are not encouraged to think about justice, only to feel if injustice is present, it will be easy for them to conclude that 'justice' is like so many other insoluble questions in life—something that is not subject to rational scrutiny, let alone definition. They will be left with the mistaken impression that defining justice in a given situation is simply a matter of intuition: 'You just know it when you see it.'").

198. Bryce, *supra* note 35, at 595 (noting clinical law students encounter many of the same ethical and moral questions that they would face in practice and that clinic law students discuss these issues, not only with other clinical law students, but also with faculty members who have also faced similar challenges in practice); Rand, *supra* note 35, at 468 (relating a story about a clinic student working with a client on a troubling legal issue and affirmatively stating that the student needed a sense of social justice and without it the student lacked the tools to effectively analyze the situation to assist the client).

199. Breen, *supra* note 30, at 403.

200. Rand, *supra* note 35, at 461 (emphasis added).

representation. The very existence of public interest law in its current form—working on behalf of the indigent and voiceless—is generally traced as an outgrowth of the 1950s and 1960s victories of civil rights lawyers.²⁰¹ These were the lawyers who, often working pro bono, litigated to obtain the legal rights that now enable me, as an African-American female, to be a lawyer, professor, voter, and homeowner. There was, and still remains, a need for lawyers to work on behalf of clients whose legal needs would go unaddressed until legal services, provided for free or paid by someone else, are provided.²⁰² These are the lawyers who would represent individuals who are otherwise unable to afford an attorney.²⁰³ When there are too few lawyers to serve indigent clients, those lawyers are left with few choices of how to manage their services—either they turn needy clients away, providing only limited or emergency services or try to serve as many clients as possible despite the real risk of providing “some, although perhaps inadequate, legal advice.”²⁰⁴ Admittedly, if law schools and professors do not embrace every ethical means to influence as many law students as possible to recognize and then work to address social and legal injustices, we as law professors may have failed in our societal responsibilities to foster a new generation of lawyers who will obtain for future generations the very rights the current generation enjoys.

CONCLUSION

While professors may want to teach students to work to minimize poverty and its effects, law professors must allow students to conclude this on their own. In other contexts, law professors teach students to be objective in analyzing an issue, to consider the merits of both sides of an argument, and to apply the law to the facts presented.²⁰⁵ Law professors train law students to see beyond emotions to analyze the applicable law, and at times, the policy implications of the analysis.²⁰⁶ Professors train students using cases that make students emotionally crave an outcome that an objective application of the law prevents. In doing so, professors train students that objective analysis is superior to ideas of fairness in the application of the law. With such training, law professors then must trust that

201. JAFFE, *supra* note 81, at 10 (noting the origin of public interest law in its current form is generally traced to the NAACP Legal Defense Fund, established in 1939, which established the groundwork for public interest practice as well as the litigation work of the ACLU, the Office of Economic Opportunity Legal Services program, and legal defense groups of Native Americans, Mexican Americans, and Puerto Ricans).

202. Humbach, *supra* note 29, at 564 (“In fact, the entire range of supposed legal protections is subject to the following rueful but real qualification: they are available only if somebody, willingly or unwillingly, pays the cost of providing them.”).

203. Marshall, *supra* note 104, at 1488 (“Almost by definition, public interest lawyers represent persons or groups who cannot easily compete in the ordinary market for legal services.”).

204. Bellow & Kettleson, *supra* note 183, at 354.

205. *See supra* Part II.

206. *See id.*

students learn the necessity of the objectivity of the rule of law.

It is unlikely that there exists a similar objectivity to teaching social justice. Mandating pro bono is not teaching students to objectively consider both sides of the issue. When law schools mandate working for a public interest oriented legal clinic, they are not teaching with the same level of objectivity.²⁰⁷

When considering how law schools teach social justice, including the decision to “teach” it at all, we must consider that when teaching social justice via mandatory pro bono and mandatory legal clinics that are overwhelmingly focused on social justice, law schools are teaching law students to view our client population through a specific lens and training students with a sense of obligation to serve them. In doing so, law schools impose a chosen social justice morality—and unilaterally decide that law students should be taught this lesson regardless of whether they, as independent adults, similarly choose this morality. Requiring students to work in social justice as a condition of graduation is to impose upon students a particular view of social justice engagement. While requiring students to serve the poor and unrepresented is personally fulfilling and reflective of the world I hope to see, it is, undeniably, a reflection, and thus an imposition, of my morality.

While this Article does not advocate for eliminating teaching social justice nor dispute its importance, this Article does encourage law schools to teach such pro bono and legal clinics serving the indigent as an option along an educational continuum—a continuum that includes, for example, legal clinics with complex business or tax legal work on behalf of medium and large businesses that may be more reflective of the work students will encounter upon graduation.

These debates about justice—how to think, analyze, and react to justice and what constitutes injustice, is a reflection of our moral filters. Every individual, law professor, and student alike is entitled to discern through their own moral filter what they view as social justice and how each chooses to react to it. It is a terrifying thought that this world could devolve to a place where what I view as injustice is viewed as normal and acceptable. It is even more terrifying to be a law professor and thus, in a position to prevent such devolution, but actively choose the principled, yet, unsatisfying—some would argue cowardly—approach of neutrality while the world crumbles to a place I no longer recognize. As a law professor tasked with helping to mold the next generation of lawyers whose talents will be a part of the moral fabric of our future society, am I respecting the intellectual autonomy of my students or am I abdicating my responsibility to the moral growth of my students? This is a question with which I struggle and that I revisit every year when I walk into the classroom with a new group of eager students, and I wonder, yet again, whether to avoid conflating my individual social justice morality with my students’ often nascent understanding of their ethical obligations and the needs of the many indigent persons without legal representation.

207. *But see* Quigley, *Letter to a Law Student*, *supra* note 27, at 10-11 (commenting that social justice is taught in law schools to counter-balance the perceived normality of corporate, non-public interest, non-pro bono work amongst law students and practitioners).