

Spring 2016

## The Imposition of Social Justice Morality in Legal Education

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### Publication Citation

Julie D. Lawton, The Imposition of Social Justice Morality in Legal Education, 4 *Ind. J. L. & Soc. Equality* 57 (2016).

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## The Imposition of Social Justice Morality in Legal Education

Julie D. Lawton\*

### INTRODUCTION

There exists an undeniable need for social justice in this country. Our American society, in all its greatness, is still neither equitable nor just. It restricts access to justice based on income and too often denies access to those most in need. The question of how to manage this need is not novel: for years, the legal profession has struggled with whether it has a responsibility to address it and, if so, how. The profession has considered mandating attorney pro bono service and fees to support legal services providers, as well as lobbying federal and state governments to increase public funding for access to these services. More recently, advocates have called for mandatory pro bono and public interest service in law schools. New York, leading the charge, is now the first state to mandate pro bono service as a prerequisite for acceptance to the bar.

Law schools, in reflecting the social justice morality of its faculty and leaders, have increased their efforts to encourage students to engage in social justice. The vast majority of in-house, live-client experiential learning opportunities require law students to provide pro bono legal services for low- to moderate-income individuals. Law schools provide funding at a far greater rate to pre- and post-graduate students working in public interest than to those students working in business disciplines. In

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\* Julie D. Lawton is an Associate Clinical Professor of Law at DePaul University College of Law. This paper was presented at the *Indiana Journal of Law and Social Equality* symposium, *Living Without in America*, at Indiana University Maurer School of Law in Bloomington. Thanks to those attending my Work-in-Progress session at the 2015 AALS Conference on Clinical Legal Education and to Marshall Brown for helping me talk through this issue. For outstanding research assistance and much appreciated wit, thanks to J. Allen Thomas and sincere thanks to Amanda Roenius for her research assistance in completing this article. As always, for introducing me to this amazing world in which I continue to happily labor, eternal thanks to my mentor and friend, Michael Diamond.

many ways, law schools attempt to convince law students of the validity of working in the public interest for social justice.

While recognizing the need for improving access to justice, we must also recognize that the choice to support social justice is a value judgment, reflecting the morality of those performing the work. This choice is particularly important in the context of legal education, where our students likely (and rightly) have alternative views of morality than those of us who have accepted the responsibility of educating them. Law students should not be required to adhere to the social justice morality of law faculty and law school administrators any more than law faculty should be required to adhere to the social justice morality of law school and university administrations. Law schools, through their financial support of public interest students and programs, clinical programs, and mandatory pro bono requirements, attempt to inculcate law students with a responsibility of social justice that reflects the morality of the faculty and administration. While this Article does not call for law schools to cease supporting these important social justice programs, this Article does encourage law faculty to recognize law schools' attempts to impose a chosen morality upon law students and for law schools to have open conversations with students about whether social justice in law school is also a reflection of the students' chosen morality. This Article also encourages law schools to consider whether students who are not interested in engaging in social justice should receive the same financial support and experiential learning opportunities as those interested in social justice. The primary goal of a legal education should be to educate students through exposure to, and analysis of, competing ideas. However, in doing so, legal educators should be cautious of trying to impose their own morality upon students.

## I. SOCIAL JUSTICE

### A. *What is Social Justice?*

There is no uniform definition of social justice. Some view it as simply an outgrowth of the public interest law work supporting the poor that began in earnest in this country in the beginning of the twentieth century.<sup>1</sup> Gary Bellow and Jeanne Kettleson argue that a public interest lawyer working in social justice “is an attorney who provides subsidized legal services, on a full- or almost full-time basis, to those

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<sup>1</sup> MARTHA R. MAHONEY, JOHN O. CALMORE & STEPHANIE M. WILDMAN, *CASES AND MATERIALS ON SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW* 3 (1st ed. 2003).

who would otherwise be under- or unrepresented.”<sup>2</sup> Others view social justice as broader than just public interest, calling it a “commitment to work on behalf of marginalized, subordinated, and underrepresented clients and communities.”<sup>3</sup> Yet another author views social justice as “the elimination of institutionalized domination and oppression,”<sup>4</sup> but also recognizes an alternative philosophical theory of justice as “the morally proper distribution of social benefits and burdens among society’s members.”<sup>5</sup> Michelle Jacobs argues that social justice work only matters if it focuses on “eliminating the conditions, both legally and otherwise, which produce and institutionalize poverty.”<sup>6</sup> I view social justice as normative; that is, our laws and policies should be designed in a manner to create a just and equitable society.

### B. *The Need for Social Justice is Real*

A just and equitable society includes one where citizens are not forced to live without adequate housing, food, or healthcare, and where citizens receive equal justice under law. U.S. Supreme Court Justice Lewis Powell Jr. stated that “[e]qual justice under law is . . . perhaps the most inspiring ideal of our society . . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status.”<sup>7</sup> However, a 2009 report found that “only one legal aid attorney is available for every 6,415 low-income people” while “there is one private attorney providing personal legal services . . . for every 429 people in the general population who are above the [legal services] poverty threshold.”<sup>8</sup> This report is just one example of the unmet need for legal services in this country.

The undeniable truth is that our society, in its current form, is neither just nor equitable. A Wisconsin study found that up to eighty percent of poor households in the state that face legal issues do so without legal representation.<sup>9</sup>

<sup>2</sup> Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice in Lawyer’s Ethics and the Pursuit of Social Justice*, in *LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE* 136, 136 (Susan D. Carle ed., 2005).

<sup>3</sup> MAHONEY ET. AL., *supra* note 1, at 4–5.

<sup>4</sup> IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 15 (1990).

<sup>5</sup> *Id.*

<sup>6</sup> Michelle S. Jacobs, *Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?*, 48 FLA. L. REV. 509, 515 (1996).

<sup>7</sup> *Collected Quotes Pertaining to Equal Justice*, NAT’L LEGAL AID & DEFENDER ASSOCIATION (2011), [http://www.nlada.org/News/Equal\\_Justice\\_Quotes](http://www.nlada.org/News/Equal_Justice_Quotes) (quoting Justice Powell).

<sup>8</sup> LEGAL SERVICES CORP., *DOCUMENTING THE JUSTICE GAP IN AMERICA* 1 (Sept. 2009), [http://lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

<sup>9</sup> See *Bridging the Justice Gap: Wisconsin’s Unmet Legal Needs*, ST. BAR WIS. 1 (2007), <https://www.wisbar.org/aboutus/reports/Documents/bridgingthegap.pdf>.

Other states have similar challenges. President Carter, in an address many years ago, famously noted that “[t]oo often the amount of justice that a person gets depends on the amount of money that he or she can pay.”<sup>10</sup> He argued that “[a]ccess to justice must not depend on economic status, and it must not be thwarted by arbitrary procedural rules.”<sup>11</sup> But access to the justice system is absolutely dependent on economic status. While there is government legal aid and funding for criminal defense budgets, this amount is much less than what is actually needed.<sup>12</sup> Professor Deborah Rhodes notes that “[o]n average, court-appointed lawyers receive only about an eighth of the resources available to prosecutors.”<sup>13</sup> In many courts specializing in consumer needs, most litigants face the court system without attorneys.<sup>14</sup> This imbalance is a disservice to our court system, the practicing bar, and, mostly, to the low- to moderate-income men and women whose legal needs are so urgent that the lack of access to justice erects a barrier to stability.<sup>15</sup>

### C. *How to Address the Need for Social Justice*

#### i. *Addressing the Need Through the Practicing Bar*

Once we accept the need to improve access to the justice system, the question becomes determining what, if anything, should be done to address that need. This Article does not argue that the need is unjust or that we as a society do not have the responsibility to meet this need; instead, this portion of the Article questions who in our society bears the responsibility of addressing it. Since access to the justice system reflects a legal need, the obvious options for addressing it are current or retired bar members, future members of the bar, or society as a whole.

Some argue that current bar members address this gap in access to justice. In 1975, Justice Thurgood Marshall argued for “an ‘increase of funding of public interest legal services by lawyers, bar associations and individuals and organizations

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<sup>10</sup> President Carter, Address at the Los Angeles County Bar Association (May 4, 1978), in *President Carter’s Attack on Lawyers, President Spann’s Response, and Chief Justice Burger’s Remarks*, 64 A.B.A. J. 840, 844 (1978).

<sup>11</sup> *Id.*

<sup>12</sup> See Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 (2001) (“Governmental legal services and indigent criminal defense budgets are capped at ludicrous levels, which make effective assistance of counsel for most low-income litigants a statistical impossibility.”).

<sup>13</sup> DEBORAH L. RHODE, *ACCESS TO JUSTICE* 7 (2004).

<sup>14</sup> *Id.* at 5.

<sup>15</sup> See generally Sylvia A. Law, *The Messages of Legal Education*, in *LOOKING AT LAW SCHOOL: A STUDENT GUIDE FROM THE SOCIETY OF AMERICAN LAW TEACHERS* 155, 156 (Stephen Gillers ed., 4th ed. 1997).

concerned with social justice.”<sup>16</sup> This option would require the practicing bar to provide the labor for legal services needed (for a fee) with a wide swath of funders bearing the lawyers’ costs of providing the services. A different option is for the practicing bar to address this gap in access to justice through pro bono service, meaning that the practicing bar would provide the labor and fund the costs of addressing the need.<sup>17</sup> One question that then follows is—should the pro bono service be voluntary or mandatory? The American Bar Association (ABA) included in the Model Rules of Professional Conduct a call to the practicing bar to volunteer pro bono representation.<sup>18</sup> Public interest law advocate Deborah Rhode also makes a supporting argument for voluntary pro bono service:

The rationale for pro bono work rests on two central claims . . . The first argument . . . is that inadequate legal assistance jeopardizes individual rights, compounds other social inequalities, and undermines a commitment to justice. A second rationale for pro bono service rests on the benefits to those who provide it. A wide array of research, both on charitable involvement in general and lawyers’ public service in particular, finds that participants benefit personally and professionally.<sup>19</sup>

A competing argument is to make pro bono service mandatory. There is, however, philosophical and legal opposition to that idea. If the practicing bar is required to provide pro bono legal services, this suggests that lawyers would be required to forgo some portion of their work week that would otherwise be dedicated to paid legal work. If a third party does not fund such pro bono service, lawyers would then bear this resultant financial burden of addressing the access to justice gap. Others argue that lawyers should not be required to bear this financial burden since addressing the needs of society’s poor is a societal value and so, “then society as a whole should bear its cost.”<sup>20</sup> Some lawyers make a philosophical, oppositional argument that requiring pro bono service is an infringement of their own rights and a form of “involuntary servitude” or “latent fascism.”<sup>21</sup> Other view “compulsory charity” as a “contradiction in terms.”<sup>22</sup> Legal objections to mandatory

<sup>16</sup> Justice Thurgood Marshall, *Financing Public Interest Law Practice: The Role of the Organized Bar*, 61 A.B.A. J. 1487, 1488 (1975).

<sup>17</sup> See MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR ASS’N 2013) (“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono public legal services per year.”).

<sup>18</sup> *Id.*

<sup>19</sup> RHODE, *supra* note 13, at 146.

<sup>20</sup> Rhode, *supra* note 12, at 1811.

<sup>21</sup> Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 610 (1985).

<sup>22</sup> See JAMES MEADOWCROFT, *CONCEPTUALIZING THE STATE: INNOVATION AND DISPUTE IN BRITISH POLITICAL THOUGHT 1880–1914*, at 109 (1995).

pro bono work include violations of the Fifth and Thirteenth Amendment prohibitions against impermissible takings and involuntary servitude, as well as a violation of an attorney's First Amendment right to freedom of association.<sup>23</sup>

Despite calls from courts,<sup>24</sup> the ABA, Supreme Court Justices, and debate within the practicing bar about how to fill the access to justice gap, the need still exists. Advocates have begun to address these needs in recent years by looking beyond the practicing bar to future members of the bar—law students.

## ii. Addressing the Need Through Law Schools

The unsatisfied need for access to justice is a reflection of society's choices and the failures of the practicing bar. To address this ongoing need, advocates and the ABA have worked to incorporate law students in providing access to justice. The idea is to “expose” students to the concept of social justice and try to encourage them to enter into public interest law while also providing much needed legal resources to low- and moderate-income individuals with legal needs. The ABA recently revised its accreditation standards to require law schools to provide “substantial opportunities” for student participation in pro bono work.<sup>25</sup> The revision now encourages law schools to promote opportunities for law students to

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<sup>23</sup> See Jacobs, *supra* note 6, at 510 (“The opponents of mandatory pro bono offer legal, moral, and administrative objections to the imposition of a mandatory pro bono program. The main legal objections are as follows: (1) mandatory pro bono constitutes a violation of the Thirteenth Amendment's prohibition against involuntary servitude; (2) mandatory pro bono is a violation of the Fifth Amendment in that forcing lawyers to work without compensation constitutes an impermissible taking; (3) mandatory pro bono forces lawyers to represent clients whose interests may not coincide with the lawyers' interests and beliefs, thereby violating lawyers' First Amendment right of freedom of association; (4) mandatory pro bono violates the Fourteenth Amendment guarantee of equal protection because it singles out lawyers from other citizens and requires them to render service to the poor; and (5) the judiciary lacks the inherent authority to order lawyers to perform uncompensated legal work.”).

<sup>24</sup> See Joseph A. Dailing, *Illinois Supreme Court Access to Justice Commission Begins Work to Improve Access to Justice in Illinois*, ILL. ST. B. ASS'N (2015), <https://www.isba.org/probono/illinoissupremecourtaccesstojustice/> (last visited July 12, 2015) (noting that the Illinois Supreme Court announced the formation of an Access to Justice Commission). See generally *Access to Justice Partnerships State by State*, A.B.A. (2005), <http://www.nlada.org/DMS/Documents/1113666733.35/NLADA-AccessToJustice%239.pdf/> (describing and detailing various Access to Justice Programs across the country).

<sup>25</sup> ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014–2015, at 16, [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_bookmarked.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf) [hereinafter A.B.A.] (“A law school shall provide substantial opportunities to students for . . . student participation in pro bono legal services, including law-related public service activities.”). *Interpretation 303-3* states, “In meeting the requirement of Standard 303(b)(2), law schools are encouraged to promote opportunities for law student pro bono service that incorporate the priorities established in Model Rule 6.1.” *Id.* at 17.

perform a minimum of fifty hours of pro bono service, similar to the ABA request of practicing lawyers.<sup>26</sup> Even when law schools comply with the ABA's request, some argue persuasively that law schools should not simply offer students opportunities for pro bono service, but should be more directive and "act affirmatively to attempt to ensure that their graduates begin their careers with an enthusiasm for public interest practice."<sup>27</sup> In support of this position, Professor Jane Aiken notes that we, as legal educators, must do more than simply offer public interest work as an alternative to corporate practice, but should instead "assist the student in making an initial commitment to justice as an essential part of their identity as lawyers."<sup>28</sup> Professor Robert Stover similarly argued that law professors should exhort students to practice public interest law more frequently.<sup>29</sup> Other public interest law advocates contend quite forcefully that the message of public service as professional responsibility must be given in law school.<sup>30</sup> However, while the need for social justice remains, whether and how to incorporate law students in our response to this need requires a chosen morality. This task requires an examination of the role the instruction, exposure, or imposition of social justice morality should play in legal education.

## II. SOCIAL JUSTICE MORALITY IN LEGAL EDUCATION

We can fill your heads with knowledge, and we can train your hands, to work with skill, but unless all this training of head and hand is based upon high, upright character, upon a true heart, it will amount to nothing. You will be no better off than

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<sup>26</sup> See *id.* at 17 ("In addition, law schools are encouraged to promote opportunities for law students to provide over their law school career at least 50 hours of pro bono service that complies with Standard 303(b)(2)").

<sup>27</sup> ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL 4 (Howard S. Erlanger ed., 1989).

<sup>28</sup> Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 296 (2001).

<sup>29</sup> STOVER, *supra* note 27, at 2-3 ("During my three years of law school, there was little other mention of public interest law during class. One professor described his efforts on behalf of needy tenants, and a couple of others made brief passing references to their own activity in the public interest, but in most classes the subject was completely ignored.").

<sup>30</sup> RHODE, *supra* note 13, at 19 ("If we want lawyers to see public service as a professional responsibility, that message must start in law school."); see *id.* at 193 ("Legal education plays an important role in socializing the next generation of lawyers, judges, and public policymakers. As gatekeepers to the profession, law schools have a unique opportunity and obligation to make access to justice a more central social priority."); see also *id.* at 157 ("During the formative stages of their professional identity, future lawyers need to develop the skills and values that will sustain commitment to public service. To that end, schools need to offer effective pro bono programs, and faculty need to model such service commitments themselves.").



the most ignorant.<sup>31</sup>

As educators, particularly educators of law students, what is our role in teaching social justice morality to our students? Is it our role to teach them a specific morality, or to expose them to different moralities and encourage them to incorporate their chosen morality into their practice? One author posed the question:

Is it unrealistic, or at least unsympathetic, to recognize, on the one hand, that law students today are subject to enormous pressures growing out of the insecurity and injustice generated by gross disparities in the distribution of wealth and power, and to suggest, on the other hand, that law students have a high degree of responsibility in addressing these issues and making decisions about their own careers?<sup>32</sup>

When teaching my seminar on housing and community development, I always ask my students, “why does this country have poverty?” The class ponders and responds with varying reflections of their individual perspectives: because the wealthy enact policies that maintain the status quo; because segregation and discrimination impede a person’s ability to escape poverty; because the poor make choices that stymie their progress; or, quite simply, because discrimination is real. While all of these insights have some truth to them, there is another truth: this country, with all of its resources, has poverty because we, as its citizens, choose to allow it to exist. It is our choice. We live in a capitalist society where employers quantify an employee’s financial worth by paying what we broadly term the “free market” will bear. We, as a society, continue to participate in an economic system that financially devalues the financial worth of jobs we view as “low-skilled labor” while placing a significantly higher financial value on those we view as “higher skilled.” Because of the quantifiable nature of our chosen economic system, we allow thousands of people, despite working multiple jobs, to live in poverty.<sup>33</sup>

The congressional leaders of our country, chosen by a majority of participating voters in their congressional districts, make other choices that institutionalize poverty. For example, Congress has the primary authority to appropriate federal funds for use by federal administrative agencies to provide

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<sup>31</sup> BOOKER T. WASHINGTON, CHARACTER BUILDING: ON MOTHER AND FATHER (1902), in *Character Building*, BTW SOC’Y, [http://btwsociety.org/library/books/Character\\_Building/29.php](http://btwsociety.org/library/books/Character_Building/29.php) (last visited Feb. 28, 2016).

<sup>32</sup> Law, *supra* note 15, at 171.

<sup>33</sup> See, e.g., U.S. DEPT. OF LABOR, BUREAU OF LABOR STAT., WORKING POOR RATE 7.2 PERCENT IN 2010 (Apr. 5, 2012) [http://www.bls.gov/opub/ted/2012/ted\\_20120405.htm](http://www.bls.gov/opub/ted/2012/ted_20120405.htm) (“There were 4.8 million workers who lived below the poverty threshold and usually worked full time in 2010.”).

federal support to citizens.<sup>34</sup> More specifically, Congress, with the consent of the president, sets the federal minimum wage.<sup>35</sup> For years, Congress has neglected to increase the minimum wage to a level that allows full-time workers to earn enough money to exist without additional federal or state government assistance.<sup>36</sup> For years, Congress has chosen to appropriate less federal funds than needed to enable the federal Department of Housing and Urban Development to supply enough safe and affordable housing to eliminate homelessness.<sup>37</sup> For years, Congress has chosen to appropriate less federal funds than needed to enable the federal Department of Health and Human Services or Department of Agriculture to provide sufficient funding for the poor to eat well and stay healthy.<sup>38</sup> Prior to the passage of what is commonly called “Obamacare,” Congress refused to appropriate sufficient funding for citizens to have full access to health care.<sup>39</sup> We have allowed our elected leaders to appropriate funds and pass legislation that, in effect, institutionalizes poverty.

These choices are a reflection of our chosen morality as a country. There is no uniform, purely objective reasoning for how our economic structure financially values an employee’s labor or an employer’s required return for operating a company. The current wage valuation exists because that is the labor wage structure

34 SANDY STREETER, CONG. RESEARCH SERV. THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION (2008), <http://www.senate.gov/reference/resources/pdf/97-684.pdf>.

35 *Wages*, U.S. DEP’T LABOR <http://www.dol.gov/dol/topic/wages/> (last visited Mar. 2, 2016).

36 See DAVID H. BRADLEY, CONG. RESEARCH SERV., THE FEDERAL MINIMUM WAGE: IN BRIEF 6–7 (2015), <http://www.fas.org/sgp/crs/misc/R43089.pdf> (detailing arguments for raising the minimum wage); see also *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938–2009*, U.S. DEP’T LABOR, <http://www.dol.gov/whd/minwage/chart.htm> (last visited July 12, 2015) (detailing the historical and current federal minimum wage rates).

37 See, e.g., Douglas Rice, *House HUD Bill Would Cut Assistance to Low-Income Renters*, CTR. BUDGET & POL’Y Priorities (May 22, 2014), <http://www.cbpp.org/research/house-hud-bill-would-cut-assistance-to-low-income-renters> (stating that a 2015 Congressional budget proposal “results in . . . significantly *reducing* the overall level of funding for HUD programs and operations.”).

38 See, e.g., ALISHA COLEMAN-JENSEN, MATTHEW P. RABBITT, CHRISTIAN GREGORY, & ANITA SINGH, U.S. DEPT. AGRIC., ERR 194, *HOUSEHOLD FOOD INSECURITY IN THE UNITED STATES IN 2014* (2015), <http://www.ers.usda.gov/media/1896841/err194.pdf> (reporting that 14% of American households were ‘food insecure’ in 2014 and that 61% of those residents participated in one or more of the three largest Federal food and nutrition assistance programs during the month prior to the 2014 survey).

39 Melissa Majerol, Vann Newkirk, & Rachel Garfield, *The Uninsured: A Primer – Key Facts about Health Insurance and the Uninsured in the Era of Health Reform*, HENREY J. KAISER FAMILY FOUND. 2 (Nov. 2015), <http://files.kff.org/attachment/primer-the-uninsured-a-primer-key-facts-about-health-insurance-and-the-uninsured-in-the-era-of-health-reform> (“While [prior to passage of the federal Affordable Care Act] Medicaid and the Children’s Health Insurance Program (CHIP) had expanded over time to cover more low-income individuals (primarily children) and have been an important source of coverage during economic downturns, many poor parents and most poor adults without dependent children remained ineligible. As a result of these gaps in our public and private health insurance systems, the number of uninsured people increased over time, leaving over 41 million nonelderly people in the country without health coverage in 2013.”).

we choose. Whether this market accurately quantifies the employee's financial worth is a matter of debate; however, we as a country continue to choose this economic system. As an educator, do I impose upon my students my views of the validity or fault in this system's financial valuation, or do I only expose them to the existence of this economic construct? Our economic structures, as well as our societal norms and values, are choices; a construct of our choosing, a construct of our making, and a construct that we support by our continued participation in it. Is it my role as an educator to educate my students only on the existence of this construct, but not manipulate their view of the moralities that shape it? A natural question follows—can I expose my students to the existence of the construct without shaping their view of it with my own? In order for law students to be effective lawyers, it is important for them to understand the construct and the morality that influences our collective and individual decisions.

A. *Social Justice is a Value Judgment*

At least partly because of our country's economic choices, there are millions who live in poverty. When these individuals need free legal assistance, the decision of whether to assist them is, at least in part, a moral judgment. Whether we—as a country, a profession, or individual lawyers—represent them pro bono, work on their behalf as public interest lawyers, or disregard their need entirely, is a reflection of our collective and individual chosen morality. While the need for social justice may be objectively valid, the choice to support it is not. We, as a society (and on a smaller scale, as individual lawyers), are choosing whom we support and subsidize and whom we do not. It reminds me of the argument about the deserving poor and the undeserving poor.<sup>40</sup> Our social norms and morality direct whom we choose to help and whom to leave unsupported. Herbert Gans, a sociologist, noted that we use our societal norms to determine whom we, as a society, determine are “deserving” of support and who are not.<sup>41</sup> We view poor widows and children of first responders as deserving of help.<sup>42</sup> In contrast, American society has not expressed a similar outpouring of support for poor, young, single mothers living in public housing. Who we choose to help is a value judgment. But based on whose values? And whose

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<sup>40</sup> See generally HERBERT GANS, *THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY*, 74-102 (1995).

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g. *Red Cross Defends Handling of Sept. 11 Donations*, CNN (Nov. 6, 2001, 9:39 PM), <http://edition.cnn.com/2001/US/11/06/rec.charity.hearing/index.html> (pointing out that widows of first responders received funds from Red Cross after the terrorist attacks on September 11th).

responsibility is it to shape the values and morality of the next generation of legal providers—in this case, current law students?

### B. *The Imposition of Social Justice Morality*

Despite the individual value judgment required in the decision to support social justice, law schools continue to attempt to impose a chosen social justice morality onto law students. Law schools seek to instill this morality in three major ways: pro bono requirements, experiential learning opportunities, and summer and post-graduate funding support.

Currently, almost forty law schools require either pro bono or public service as a condition of graduation.<sup>43</sup> One state, New York, now requires pro bono work as a condition of admittance to the bar.<sup>44</sup> Three other states (California, Montana, and New Jersey) are considering imposing a pro bono requirement on applicants for the bars of those states.<sup>45</sup>

For experiential learning opportunities, law schools use the scarce and valuable tuition dollars of all law students, regardless of the students' support for social justice, to impose educators' social justice morality on law students. Virtually every law school has a clinical offering; on average, law schools have seven clinical offerings per school.<sup>46</sup> Of those offerings, the vast majority—it appears as though almost ninety-five percent—involve working in the public interest.<sup>47</sup> In support of this, clinical professors have argued vigorously that clinics are not only a natural place for students to learn social justice, but some have argued that clinics *must* teach students social justice.<sup>48</sup> If law students want in-house, live-client practice

43 *Chart of Law School Pro Bono Programs*, A.B.A., [http://apps.americanbar.org/legalservices/probono/lawschools/pb\\_programs\\_chart.html](http://apps.americanbar.org/legalservices/probono/lawschools/pb_programs_chart.html) (last updated Sept. 10, 2015).

44 *Bar Pre-Admission Pro Bono*, A.B.A. [http://www.americanbar.org/groups/probono\\_public\\_service/policy/bar\\_pre\\_admission\\_pro\\_bono.html](http://www.americanbar.org/groups/probono_public_service/policy/bar_pre_admission_pro_bono.html) (last visited Oct. 18, 2015) (“In 2012 New York became the first U.S. jurisdiction to require pro bono service as a condition to become licensed for law practice. As New York’s ‘50-hour Rule’ has evolved from proposal to policy, other states are formally considering related requirements that tie pro bono to law licensing.”).

45 *Id.*

46 See Robert R. Kuehn & David A. Santacroce, *2013–14 Survey of Applied Legal Education*, CTR. FOR STUDY APPLIED LEGAL EDUC. 7 (2014), [http://www.csale.org/files/Report\\_on\\_2013-14\\_CSALE\\_Survey.pdf](http://www.csale.org/files/Report_on_2013-14_CSALE_Survey.pdf).

47 See *id.* at 7–8. The subject areas of criminal prosecution, legislative advocacy, securities, and international transactions, comprising a little over 5% of all clinical offerings, are those subject areas of the study that appeared, by their titles, to be non-public interest work. *Id.*

48 See RHODE, *supra* note 13, at 156 (“Most students’ exposure to public interest causes and low-income clients occurred in clinical courses, externships, or summer jobs.”); see also Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 331, 333 (2012) (“Over the decades, representing the underserved and subordinated operated as the anchor for clinical legal education, almost religiously. If the modern clinical movement was the Church, then

experiences, they are required, by virtue of taking a clinical course, to perform pro bono legal services and pay thousands of dollars in tuition to do so.<sup>49</sup>

Law schools further attempt to inculcate students with the moral value of social justice work by funding pre- and post-graduate work for law students working in the public interest. Well over a quarter of law schools offer financial support specifically for students and graduates working in the public interest industry.<sup>50</sup> Two law schools, Georgetown University Law Center and Roger Williams University School of Law, recently announced the creation of public interest law firms to be staffed by their graduates.<sup>51</sup> Both law firms are designed to provide low-cost and pro bono assistance to low- and moderate-income individuals. Law schools fund employment opportunities for graduating law students who must work in social justice to obtain this employment. Even the federal government conditions one of its few loan forgiveness programs on a recipient's willingness to work in public service.<sup>52</sup> The Federal Student Aid Public Service Loan Forgiveness Program is designed to encourage graduates to "enter and continue to work full-time in public service jobs" and forgives a graduate's federal student loans if the graduate complies

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the Great Clinicians were its clergy. The message was clear: to be a good clinician meant believing in the Great Clinicians' concept of social justice and inculcating students with that belief."); Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 *FORDHAM L. REV.* 997, 997 (2004) ("Nevertheless, law schools do have some obligation to contribute to the solution of the crisis in access to justice, and it seems obvious that the obligation is best accomplished by law school clinics assisting low-income individuals and communities that are underserved or have particular difficulty obtaining lawyers because of the nature of their legal problems.").

49 Students are not paid for legal work performed in a clinical course or for work performed in a school-sponsored externship. Currently, Interpretation 305-3 prohibits a law school from granting credit to a student for participation in a field placement program for which the student receives compensation. A.B.A., *supra* note 25, at 115.

50 *Cf. Guide to Law Schools*, EQUAL JUST. WORKS, <http://205.251.74.105/ejw2011/Main/AdvancedSearch.aspx/> (last visited Oct. 20, 2015).

51 Press Release, Georgetown Law, Arent Fox and DLA Piper Create Nonprofit Law Firm (Apr. 13, 2015), <http://www.law.georgetown.edu/news/press-releases/georgetown-law-arent-fox-dla-piper-partner-to-create-nonprofit-law-firm.cfm> ("[T]he D.C. Affordable Law Firm . . . [w]ill provide affordable, high quality legal services to D.C. residents who do not qualify for free legal aid and to small businesses and nonprofits in the District"); *see also* Karen Lee Ziner, *New Center Promises Access to Justice*, PROVIDENCE J. (Apr. 9, 2015, 12:01 AM), <http://www.providencejournal.com/article/20150409/NEWS/150409337/13748/NEWS> ("A new Rhode Island Center for Justice was officially launched Thursday to provide 'a new voice for access to justice' for Rhode Islanders in need, and training for new attorneys in public-interest and poverty law.").

52 *Federal Student Aid: Public Service Loan Forgiveness Program*, U.S. DEP'T EDUC. 1, <https://studentaid.ed.gov/sa/sites/default/files/public-service-loan-forgiveness.pdf> (last visited Feb. 29, 2016).

with the requirements, including working full-time with certain public service employers.<sup>53</sup>

With the imposition of mandatory pro bono and public interest requirements, the restrictions on school-funded public interest summer support and school-funded, post-graduate work, and clinic work overwhelmingly geared toward working in a public interest field, law schools give a significant public push to instill in students the importance and value in social justice lawyering.

### C. *Reasons for the Imposition of Social Justice Morality*

There are a number of potential reasons why legal educators work to impose educators' morality of social justice upon law students. Many legal educators likely want to find a way to help alleviate the gap in access to justice. If we, as a profession, agree that there are insufficient legal resources available to those in need of legal assistance, then a logical argument follows that matching law students' interest in practical legal experience with the unmet need for legal assistance for low- and moderate-income individuals is a rational decision. It naturally follows, then, that in-house legal clinics at many law schools began as a means of providing free legal services to the poor.<sup>54</sup>

Another reason is that helping law students understand the challenges of poverty exposes them to more social contexts, enabling them to be better informed as attorneys. In addition, legal educators propagate the same method of professional socialization that they received concerning how people ideally should view and treat the impoverished in our society.<sup>55</sup> Reviews show that students who have service learning experiences in law school "typically report a greater willingness to volunteer in the future" than students who do not, prompting legal educators to push students into social justice experiences.<sup>56</sup>

Legal educators also impose their social morality on law students simply because they can. Law professors, like teachers in elementary school, high school, and college, are leaders in the lives of students. Students often look to professors when they try to navigate their lives as law students. At this point in students' lives, they are very open to socialization.<sup>57</sup> Students, by their natures, are a vulnerable

53 *Id.*

54 *See* Wizner & Aiken, *supra* note 48, at 997-98.

55 MAHONEY ET AL., *supra* note 1, at 7 ("Thus, professional socialization is a process by which lawyers internalize the norms and values of the profession, and each lawyer simultaneously learns what her role is and how to perform it.").

56 RHODE, *supra* note 13, at 158.

57 *See* ELIZABETH DVORKIN, JACK HIMMELSTEIN & HOWARD LESNICK, BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM 1 (1981) ("We believe that a

population subject to influence about the law—an area in which they have an immense interest, but often very little understanding of its practice.<sup>58</sup>

#### D. *Challenges with the Imposition of Social Justice Morality*

There are a number of challenges in attempting to indoctrinate law students into social justice work. As an initial matter, students have their own legitimate interests. While many students enter law school with the goal of helping the vulnerable and impoverished, a number of students enter wanting to practice corporate law, securities law, or provide legal services to the wealthy.

Debt loads also influence student choices. “The greater the income gap between the for-profit and non-for-profit sectors, the more likely it is that graduates will choose the former.”<sup>59</sup> Students graduate from private law schools with an average of \$125,000 in law school loan debt; this number is \$75,000 for students graduating from public law schools.<sup>60</sup> When legal service attorneys’ entry-level salaries are approximately \$45,000 a year, and law school students are graduating with tens of thousands of dollars in debt, it is understandable that these students are swayed to work in the private industry, especially given how long it often takes public interest organizations to make a job offer to an applicant.<sup>61</sup>

In addition, students switch interests in disciplines. One study of law students showed that student interest in public interest jobs fell over time but increased for jobs with private law firms.<sup>62</sup> In addition to debt, there are other

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subtle process of professionalization occurs during law school without being addressed or even acknowledged . . . [T]hese questions about professional identity are difficult and elusive, hard to capture as they arise moment-to-moment in the classroom or practice, and hard to respond to.”)

58 Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591 (1982) (“Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world. This is the link back that completes the system: students do more than accept the way things are, and ideology does more than damp opposition. Students act affirmatively within the channels cut for them, cutting them deeper, giving the whole a patina of consent, and weaving complicity into everyone’s life story.”).

59 Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 833 (1995).

60 Debra Cassens Weiss, *Average Debt of Private Law School Grads Is \$125k; It’s Highest at These Five Schools*, A.B.A. J. (March 28, 2012, 10:29 AM), [http://www.abajournal.com/news/article/average\\_debt\\_load\\_of\\_private\\_law\\_grads\\_is\\_125k\\_these\\_five\\_schools\\_lead\\_to\\_m/](http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/).

61 Law, *supra* note 15, at 160 (“Students interested in pursuing public-interest work are often confronted with a choice between a secure, well-paying job offered months in advance, or waiting in the hopes that if they hustle and are lucky they will be able to find a minimally paid position doing socially interesting work.”).

62 STOVER, *supra* note 27, at 16 (“A strong trend away from a preference for public interest practice and toward conventional practice is clear.”).

reasons for students' change of interest in public interest work, including exposure to the intellectual rigors of new practice areas,<sup>63</sup> changes in political beliefs,<sup>64</sup> and their inability to obtain a public interest legal position.<sup>65</sup> While in law school, students learn about themselves and new areas of the law. This trend away from the ideal of working for the public good<sup>66</sup> and to a more conventional practice should be expected.<sup>67</sup>

In addition, many law students majored in liberal arts and humanities studies, with little to no exposure to business and finance.<sup>68</sup> When exposed to these areas in legal courses such as Business Organizations, Corporate Finance, and Business Fundamentals for Lawyers, it is logical that some will discover an interest in these areas and shift toward a corporate practice.

Despite the overt efforts of law schools to indoctrinate students with a social justice morality, law schools actually undermine those efforts in subtle, more effective ways by perpetuating a preference for working in private industry. The required first-year courses focus more on individual needs, rather than the public

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63 *Id.* at 63 (“Whereas during the first year the professors had sometimes been very explicit about the importance of analytical precision, by the second year it was simply taken for granted. The impact of this continuing emphasis on intellectual rigor appeared substantial . . . . Furthermore, in some cases this shift seems to have had a fairly direct impact on job preferences.”).

64 *Id.* at 91 (“Some observers of legal education have argued that the drift away from public interest practice during law school is accounted for by socialization to conservative belief systems and to conventional conceptions of the attorney’s proper role.”).

65 *Id.* at 98 (“The data indicate that over time the students became less optimistic about their ability to obtain public interest jobs. . . . At the same time, the data show an *increase* in the students’ perceived employability with small and medium-sized general practice firms and with small firms specializing in criminal and personal injury litigation.”).

66 Law, *supra* note 15, at 157 (“The disparity in the distribution of wealth and power, particularly in a time of deep economic insecurity, is a major factor motivating people to go to law school.”); STOVER, *supra* note 27, at 34–35 (“In general, the students’ *expectations* about their ability to fulfill their values in public interest practice declined, while their corresponding expectations for conventional practice increased.”).

67 Monroe Freedman, *The Loss of Idealism—By Whom? And When?*, 53 N.Y.U. L. REV. 658, 658 (1978) (“What happened, then, to all those others who entered law school with the sole goal in mind of righting social wrongs? . . . Those people never existed. Law school did not destroy their sense of social justice, because they never had it in the first place. . . . We admit people into law school principally on the basis of their technical skill. . . . We give virtually no weight in the law school admissions process to a candidate’s manifest concern with social problems.”).

68 *Office of Undergraduate Admissions Pre-Law Information Page*, U. CAL. BERKELEY, <http://admissions.berkeley.edu/prelaw> (“The most popular undergraduate majors of students admitted to law schools are political science, economics, business administration, history, English, and rhetoric.”); Carol Leach, *Undergraduate Majors of 1998 applicants to U.S. Law Schools*, <https://www.csu.edu/prelaw/lawmaj.htm> (reporting that the top five majors for applicants to U.S. Law Schools were Political Science, History, English, Psychology, Criminal Justice).



good.<sup>69</sup> In addition, the means by which law schools admit, sort, and evaluate law students creates a competitive environment where the “best” students—sorted by grade point averages and LSAT scores, not social justice work—are accepted into the “best” law schools, receive the “best” grades, and receive what are often characterized as the most coveted job offers—working at a large, private law firm.<sup>70</sup>

Another challenge in imposing a chosen social justice morality is the assumption that educators’ morality is the superior morality, without subjecting that conclusion to objective analysis or external review. A popular argument in support of the imposition of social justice morality is that we, as legal educators, are tasked with determining the law school curriculum, and requiring participation in social justice activities is within our rights as educators. The argument is that we require students to take first year courses, experiential learning courses, or exams as part of their requirement to graduate. Why, then, would we not also require law students to engage in social justice work to, in the words of one law professor, “ensure that the future lawyers we are training have an appreciation for justice and work to inspire them to use their legal skills to bring about a more just society?”<sup>71</sup> A major difference is that most of the curricular requirements are subject to extensive analysis, review, and discussion, often via the governing body of the ABA or in extensive consultation with other law schools, to determine whether (and how) these requirements best prepare law students to practice law.<sup>72</sup> This review allows for open debate and a forum for the affected parties, including law students, to participate.

A further challenge to the imposition of social justice morality by legal educators is the hypocrisy of pro bono requirements for law students, but not for law school faculty and administrations. If legal educators genuinely believe that mandatory pro bono is a necessary part of our collective responsibility, why are educators not arguing for a similar requirement for law school faculty? If students are required to perform, and are required to subsidize other students working in pro bono and public interest, why is there not a mandatory requirement of faculty as a

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69 Law, *supra* note 15, at 157.

70 *Id.* at 159 (“The effect of exams and grading is to take a group of people, all of whom were smart and competent when they arrived at law school, and to sort them into a pecking order in which almost everyone ‘fails.’ The process reinforces the student’s sense that it is both inevitable and just that someone else will define your worth, and will find you wanting.”); *id.* at 161 (“In short, what American legal education does in the first year of law school purports to be a value-neutral meritocracy, but it has the effect of generating insecurity and hierarchy, and of pushing students in particular directions.”).

71 Aiken, *supra* note 28, at 306.

72 See generally A.B.A., *supra* note 25, at 16–17.

condition of obtaining perks, such as summer stipends or merit raises? How do we, as legal educators, justify this requirement only on the group who arguably has the least power in a law school? Based on those law schools that report pro bono requirements to the ABA, only two have a mandatory requirement that faculty complete pro bono work, while only a handful of others express an “expectation” of pro bono or public interest work.<sup>73</sup>

#### E. *Exposure to Social Justice Morality, Not Imposition*

Education should not be about indoctrinating students. It should be about expanding their ideas and training them to see context and to recognize the need for perspective. Legal educators should resist pushing students into a particular practice area based on the educators’ moralities. Each new lawyer has the right to choose their own substantive area, free from the moral judgments of others, particularly their educators.<sup>74</sup>

However, given the decrease in the number of students interested in public interest lawyering (from the beginning of law school to graduation), it appears that

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<sup>73</sup> “It is expected [at Harvard Law School] that all members of the regular, full-time teaching faculty will perform, on the average, at least a similar amount of pro bono activity to what is required of students (40 hours). . . . The aspirational goal with respect to faculty service is included to stress the importance of the professional value of pro bono service.” *Directory of Law School Public Interest and Pro Bono Programs*, A.B.A., [https://apps.americanbar.org/legalservices/probono/lawschools/pb\\_faculty.html](https://apps.americanbar.org/legalservices/probono/lawschools/pb_faculty.html) (last visited Oct. 20, 2015). “The [University of Denver] College of Law’s Personnel Policies and Procedures, which govern the granting of tenure and promotion, require assessment of faculty members’ contributions to public service. Faculty members’ performance is measured, in part, by their contributions to such activity, including pro bono legal representation.” *Id.* “In 1997, Chapman [University] adopted a mandatory pro bono policy for full-time faculty. Pro Bono is defined broadly as ‘uncompensated legal or law-related service to people or groups that tend to be underrepresented due to inability to pay, minority status, unpopularity of position or the widely diffused public benefits of their cause.’” *Id.* “[Charleston School of Law faculty] must complete 30 hours of pro bono work every three years.” *Id.* “In 1995, Fordham adopted guidelines for faculty pro bono involvement. It is suggested that members of faculty should volunteer at least 50 hours of pro bono work annually, as suggested by the ABA.” *Id.* “The Faculty at [Southern Methodist University] supports the need for public interest legal services and commits each member of the faculty to engage in public interest legal services consistent with the public service requirement for students. In addition to the student requirement, the faculty passed a resolution requiring faculty members to perform public service.” *Id.* “[Stetson University College of Law] [f]aculty are encouraged to complete 10 hours of pro bono service per year. Pro bono service is part of their annual evaluation.” *Id.*

<sup>74</sup> Abe Fortas, *Thurman Arnold and the Theatre of the Law*, 79 *YALE L. J.* 988, 1002 (1970) (“Lawyers are agents not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent or the cause that they prosecute or defend. They cannot and should not accept responsibility for the client’s practices. Rapists, murderers, child-abusers, General Motors, Dow Chemical—and even cigarette manufacturers and stream-polluters—are entitled to a lawyer; and any lawyer who undertakes their representation must be immune from criticism for so doing.”).

law schools are undermining their efforts to convince students to work in social justice. Some may argue that the current push to instill a social justice morality for public interest lawyering is a counter to the number of law students who were being placed in high-paying jobs at large law firms before the Great Recession.<sup>75</sup> However, if students choose to work in a large law firm, they should have the right to do so without the judgment of their educators. Each of us, as legal educators, exercised our right to make a choice of our practice area and profession, and we should not encroach upon that same choice for our students.

In many ways, big and small, intentional and not, legal education in its current format guides those students originally interested in public interest into private industry.<sup>76</sup> While this might be true, it is an insufficient argument for imposing legal educators' social justice moralities upon law students. Legal educators should offer opportunities for exposure to the different areas of law to enable our students to determine for themselves their morality and what role they want this morality to play in their professional lives. If the legal academy truly wants to spur more students into public interest, we should continue to expose students to the virtues, viability, and value of public interest—not just in spurts, but also in our everyday teaching. However, law schools should also recognize the value in other disciplines and provide as much visible support for those disciplines as well. Law school clinics should provide experiential education in the preferred subject matters of the students, not primarily based on the social justice missions of the clinic director or law school faculty. The law school should provide pre- and post-graduation support for students working and interested in disciplines other than public interest, to demonstrate respect for, and support of, law student career path choices. And law schools should maintain an open dialogue with their student bodies about the role the students want social justice to play in their legal education. As educators, it is our duty to expose our students to the different areas of law and to be careful in attempting to impose our morality upon them. If for no other reason,

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<sup>75</sup> Robert J. Condlin, *“Practice Ready Graduates”: A Millennialist Fantasy*, 31 *TOURO L. REV.* 1, 77 (2015) (“The legal labor market was overbuilt and has retrenched.”).

<sup>76</sup> See *STOVER*, *supra* note 27, at 63 (“The absence of any environment supporting altruistic values during the second and third years of law school was accompanied by continued support for a number of alternative values. For example, in varying ways and to varying degrees the students were encouraged to maintain or increase the importance attached to analytical thinking, monetary rewards, professional prestige, and career advancement. . . . It is simply that reinforcement for these values, combined with lack of reinforcement for altruistic values, may have helped to reduce the chances that altruistic values would return to the forefront of concern for those students who previously had been motivated toward public interest practice.”).

it has not proven to be a successful method of facilitating more law students to engage in public interest practice upon graduation.<sup>77</sup>

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<sup>77</sup> *Id.* at 87. The author's study notes that law schools are competing against external factors in influencing law student interest in the preference for working in public interest. "At DU I saw little evidence that either law professors themselves, or the written material which they assigned, directly conveyed a negative image of the craft satisfaction, long-term benefits, or opportunities for altruistic action available from public interest practice. Instead, students appeared to be more frequently exposed to such sentiments by practicing attorneys or by fellow law students who themselves had acquired their views from practicing lawyers. Thus the law school seems to play a much less important role than the practicing bar in transmitting the professional myth of public interest ineptitude and marginality." *Id.*