PUBLIC INTEREST LAW AND LEGAL EDUCATION: WHAT ROLE SHOULD LAW SCHOOLS PLAY IN MEETING THE LEGAL NEEDS CRISIS?

BY
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Students often enter law school full of idealism. Many hope to make the world a better place after graduation by applying their legal training to benefit others. Incoming students often plan to work for a public interest law firm upon graduation or to find other ways to help indigents in need of legal representation. However, during the law school years, an institutionally imposed "realism" replaces the previous idealism, leading some of these students to pursue other avenues of employment.

Within the last few years, a public interest movement has steadily gained support among law students across the country. As a result of this movement, a number of law schools have become vehicles to meet the legal needs of the poor through instituting mandatory *pro bono publico*[1] programs for students in their second and third years. Proponents claim that such programs may successfully combat the forces which pull students away from public interest law during law school by increasing student awareness of the benefits of a public interest practice. Critics assert that such programs are unconstitutional and perhaps immoral. These critics also charge that law schools are not the proper forum for such programs. Proponents vigorously dispute such allegations.

Mandatory *pro bono* programs are not the only option available to law schools wishing to serve the immediate and long-term needs of indigents. Other potential solutions to the legal needs crisis include changes in law school curricula, faculty *pro bono* requirements, and loan forgiveness programs. Many schools also have legal clinics that serve the immediate legal needs of the poor while offering law students experience representing the indigent, thus promoting the idea of a long-term public interest practice. Like mandatory *pro bono* service, these programs also have their supporters and detractors.

This article examines what role law schools may play in both causing and

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[1] *Pro bono publico*, or "in the public good," hereinafter *pro bono*.

curing the legal needs crisis. Section I reviews the failure of the legal profession to provide adequate representation to the needy. Sections II and III discuss possible solutions to the legal services crisis and analyze the desirability of each proposal. Section IV then outlines feasible and desirable approaches to promote public interest law reform in law schools.

I. THE FAILURE OF THE LEGAL PROFESSION TO PROVIDE ADEQUATE REPRESENTATION

It is axiomatic that indigents facing criminal prosecution by the legal system have the constitutional right to adequate representation.[2] However, this constitutional mandate does not protect the rights of indigent civil litigants who face deprivation often as significant as criminal incarceration. As a result, more than 80% of the legal needs of people living below the poverty line remain unmet.[3]

Paradoxically, poor people[4] need legal services on a daily basis much more than other societal groups.[5] A recent study examining the crisis of unmet legal

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[2] Penson v. Ohio, 488 U.S. 75, 86-87 (1988) (quoting Von Moltke v. Gillies, 332 U.S. 708, 725 (1948)) ("[T]he right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client."); *see also* Glasser v. United States, 315 U.S. 60, 70 (1942). Some states also allow indigent defendants to petition the court for counsel in civil cases brought by the state. Hon. Arthur Gilbert & William Gorenfeld, *The Constitution Should Protect Everyone — Even Lawyers*, 12 PEPP. L. REV. 75, 78 (1984).

[3] JASON ADKINS ET. AL., CAMPAIGNING FOR A LAW SCHOOL *PRO BONO* REQUIREMENT, National Association for Public Interest Law 1 (1990) (instruction manual for law students hoping to institute a mandatory pro bono requirement at their law school). *See also* Stephen T. Maher, *No Bono: The Efforts of the Supreme Court of Florida to Promote the Full Availability of Legal Services*, 41 U. MIAMI L. REV. 973, 977 (1987) (citing Center for Government Responsibility, Holland Law Center, University of Florida, *The Legal Needs of the Poor and Underrepresented Citizens of Florida: An Overview* (J. Mills ed. 1980) (estimating that indigents face over six million legal needs each year in Florida alone)). The 1991 federally established poverty line income is $13,924 for a family of four. Spencer Rich, *Poverty Found To Grow Fastest Among Whites*, L.A. TIMES, Oct. 9, 1992, at A24.

[4] For the purposes of this paper, the term "poor people" represents those living near, at, or below the federally established poverty line. *See* Rich, *supra* note 3.

[5] Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970). This comment established the following relationship between poor people's economic status and their need for representation:

> Poverty is both a cause and a consequence of underrepresentation in the legal-political process. The poor need legal services as much as anyone else, and the profession has always recognized, at least in principle, a duty to provide these services without regard for the ability to pay. But the poor also need legal services *because they are poor*; the very fact of poverty fiercely intensifies an individual's need for legal representation in almost all facets of his life.

Id. at 1072. Additionally, the poor need access to an attorney to determine whether

needs reported that:

> Our society has evolved in a way that makes access to legal services increasingly crucial to handling the emergencies which routinely beset poor persons. Whereas people of means can regard the services of a lawyer as an optional convenience to be availed of only in certain relatively well-defined circumstances, the poor paradoxically live in circumstances in which they need legal services more but can obtain them less. Typically, their needs for legal services are not in any sense optional but rather deal with access to essentials of life: shelter, minimum levels of income and entitlements, unemployment compensation, disability allowances, child support, education, matrimonial relief, and health care.[6]

There are several reasons why the legal needs crisis is worse now than any other time in the history of this country.[7] First, increasing numbers of American families live below the poverty line.[8] Second, federally funded legal assistance programs faced severe budget cuts during the early 1980s and continue to face financial hardship.[9] As a result, government offices which previously had provided almost all legal representation to indigents are now critically understaffed. As one director of a government-sponsored legal services office stated:

> Turning people down is the toughest thing I have to do. On intake days our waiting room is full of people. They have no other place to turn. They

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they do have a viable claim. One reason for this is that "individuals who lack continuous legal assistance do not perceive many legal opportunities to use the legal system actively to advance their preferences." H. Craig Becker, Note, *In Defense of an Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice*, 90 YALE L.J. 1436, 1447 (1981) (citing Gresham M. Sykes, *The Legal Needs of the Poor in the City of Denver*, 4 LAW & SOC'Y REV. 255, 262-63 (1969)).

[6] COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 14 (April, 1990) [hereinafter LEGAL SERVICES REPORT] (commissioned by Chief Judge Sol Wachtler of the New York Court of Appeals).

[7] William J. Dean, "Survey of Volunteer Activity," N.Y. L.J., "Pro Bono Digest" section at 3 (Jan. 24, 1991) ("Public interest work is about balancing the influence of society of those with resources and those without. . . . The need for public interest work has never been greater. . . . The situation is daunting and, occasionally, depressing.") (quoting a Skadden Fellowship recipient. This Fellowship subsidizes the often meager salary provided to graduating law students who elect to enter public interest law).

[8] LEGAL SERVICES REPORT, *supra* note 6, at 16.

[9] Maher, *supra* note 3, at 978 & n.29 ("Beginning in 1982, substantial budget cuts in [the federal legal services] program crippled legal services providers and created what some viewed as a legal aid crisis."); *see also* Anastasia Toufexis, *The Return of Unequal Justice?*, TIME, Dec. 27, 1982, at 48. For a history of the rise of legal aid in America, *see* Stephen K. Huber, *Thou Shalt Not Ration Justice*, 44 GEO. WASH. L. REV. 754 (1976); and for an account of its decline, *see* Carrie Menkel-Meadow, *Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's*, 22 OSGOODE HALL L.J. 29 (1984).

> have rights they won't be able to exercise unless they are provided a lawyer. Without legal help they may lose their apartment, go hungry or go medically untreated. The very hard choice [is whether] to take a case, or not, because we are so understaffed . . . .[10]

The debate continues to rage over who should be responsible for ameliorating the legal needs crisis. Some assert that this crisis is a societal problem which society as a whole should address. Others argue that the legal profession has a monopoly on providing legal services and thus should shoulder the burden of providing legal services to all — even those unable to pay. Indeed, the Model Rules of Professional Conduct suggest that lawyers bear an obligation to satisfy the legal needs of the poor. Model Rule 6.1 provides the following:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.[11]

Despite this exhortation, only one in six practicing lawyers participates in any type of *pro bono* activity. The legal system has failed those who need it most[12]

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[10] William J. Dean, *Law Firms Matched With Legal Services Offices*, N.Y. L.J., "Pro Bono Digest" section at 7 (Feb. 20, 1991) (quoting Arnold S. Cohen, Director of Litigation, Bronx Legal Services, North Office, thanking the law firm of Simpson Thatcher & Bartlett for their *pro bono* efforts). *See also* Sandra Torry, *Legal Aid Program Struggles to Attract Top Candidates for Low Pay*, WASH. POST, Dec. 17, 1990, at F5 ("For the past year, the program has been forced to turn away new clients at its Anacostia office, where one lawyer has been trying to do the work of four. Other offices, deluged with work, have rejected new clients, referring them to other programs. No one really knows if they ever found assistance.").

[11] MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1990). This rule has guided the legal profession for many years as past versions of ethical rules indicate. For example, the 1980 version of the ABA's Model Rules of Professional Conduct states:

> The basic responsibility for providing legal services for those unable to pay rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1980). In addition, the Legal Services Corporation Act, which established the Legal Services Corporation — a publicly funded federal program designed to provide legal services to the indigent, — "states that the poor need 'equal access. . . to justice' and that 'high quality legal assistance' is needed for those 'otherwise unable to afford adequate legal counsel.' " Roger C. Cramton, *The Task Ahead in Legal Services*, 61 A.B.A. J. 1339, 1343 (1975) (quoting 42 U.S.C. § 2996).

[12] The Committee to Improve the Availability of Legal Services made the following comment about the crisis facing those who need legal services but cannot afford them:

> The Committee has encountered no significant debate concerning the existence of

and should respond to this crisis.[13] Law schools, as part of the legal system, can and should contribute to the solution.

II. The Role of Law Schools in Preparing Law Students to Provide Adequate Representation to Indigents

Few would disagree that the legal needs crisis facing the indigent demands resolution, but should law schools be the vehicle for change? Although law schools cannot provide the entire solution, some evidence suggests that because law schools have contributed to the problem, law schools can and should contribute to the solution.

A. *Legal Education's "Contribution" to the Crisis of Unmet Legal Needs*

One study has shown that a significant percentage of incoming law classes hope to serve the legal needs of the poor.[14] The figure hovers around 35% at most law schools.[15] However, upon graduation, generally only three percent of law school graduates go directly into public interest practice.[16] Something during the law school experience turns students away from a public interest practice.[17]

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a dire need for more civil legal services for the poor. Indeed, in much of the testimony at the Committee's public hearings and the written correspondence elicited by the Preliminary Report, the need is assumed or acknowledged.

LEGAL SERVICES REPORT, *supra* note 6, at 24.

[13] This article assumes that the government cannot, or will not, expend the tremendous resources necessary to solve the problem without independent help from the legal profession.

[14] *See* HARVARD LAW SCHOOL, REPORT OF THE DEAN'S PUBLIC INTEREST ADVISORY COMMITTEE (1990) [hereinafter HARVARD PUBLIC INTEREST REPORT]; ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL (1989). *See also* Steven D. Pepe, *Clinical Legal Education: Is Taking Rites Seriously a Fantasy, Folly, or Failure?*, 18 U. MICH. J.L. REF. 307, 325 (1985).

[15] *See* HARVARD PUBLIC INTEREST REPORT, *supra* note 14, at 8. The definition of "public interest" has been debated. *See supra* notes 41-54 and accompanying text. Most students have an expansive definition of a "public interest practice" which extends beyond serving the legal needs of the poor, to include any type of government work (such as a public defender's or U.S. attorney's office). Because of this, even the three percent figure is not an accurate representation of the number of law school graduates who actually serve the poor. The true figure is probably much lower.

[16] HARVARD PUBLIC INTEREST REPORT, *supra* note 14, at 6 (citing National Association for Law Placement statistics for 1988). Related to the problem of students who come to law school full of idealism yet lose that idealism during law school is the problem of students who enter law school without any idealism. If law schools fail to maintain idealism among students who bring it with them, they also fail to instill idealism in those who never had it. Robert B. McKay, *Law, Lawyers, and the Public Interest*, 55 U. CIN. L. REV. 351, 370 (1986).

[17] Howard S. Erlanger, *Young Lawyers and Work in the Public Interest*, 1978 AM.

Professor Robert Stover conducted an original study which examined the reasons why law students turn away from public interest law career-paths.[18] Stover described one law school's approach to public interest law as "bookends without books."[19] The description stemmed from his experience as a law student where fervent speeches celebrating public interest law were given during orientation and three years later at the bar induction ceremonies following graduation. Little reference to public interest law was made in between.[20] Professor Stover noted the difference in student response to the two speeches. The first speech was given by a public defender who "admonished [the students] to 'just once' think about the poor and dispossessed persons [they] would inevitably abandon."[21] The students reacted enthusiastically, giving the speaker a standing ovation. The students' response to a similar speech heard nearly three years later was strikingly different:

> The polite, almost strained applause that greeted the end of Justice Dubofsky's speech stood in stark contrast to the spontaneous ovation that had marked our enthusiasm three years before. As I glanced at the faces around me, I thought I saw lowered eyes, guilty half-grins, almost imperceptible shrugs of indifference, and even a few disdainful smirks.[22]

Professor Stover then explained, based on student surveys, some possible causes of this transformation in student attitudes towards public interest law during their law school years.

One factor causing this shift in attitude was the law school's failure to stress the importance of the public service obligation.[23]

B. FOUND. RES. J. 83, 89. This article suggests that the difficulty students have finding public interest jobs may decrease students' attraction to public interest work during law school.

[18] Professor Stover was a political science professor at the University of Colorado when he decided to enroll in Denver University Law School. His observations and those of the students in his class who responded to his questionnaires make up the statistical base for his findings. Scholars have welcomed Professor Stover's contribution to the correlation between students' law school experiences and their choice of careers. *See, e.g.*, Laura M. Schachter, Book Note, 88 MICH. L. REV. 1874 (1990) (reviewing ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL (1989)). Because few other resources provide empirical evidence for the proposition that law school changes students' attitudes about public interest work, this section of the paper relies heavily on the results of Professor Stover's study.

[19] STOVER, *supra* note 14, at 1.

[20] *Id.* at 1-2.

[21] *Id.* at 1.

[22] *Id.* at 2.

[23] Although Professor Stover did not view this failing as a major factor in the transformation of student attitudes toward public interest law, *id.* at 3-4, his statistics could be interpreted to belie such a conclusion. *Id.* at 14-16. *See also id.* at 87 ("[I]t would be incorrect to conclude that the law school's stance toward public interest practice was irrelevant to the students' changing expectations."). Furthermore, other scholars who

Changes in student values and expectations also contributed to the decrease in student commitment to public interest careers.[24] For example, during law school, students devalued the importance of advancing the goals of other social groups and demonstrated a decreased commitment to altruistic goals. In contrast, students increasingly placed a higher premium on effective on-the-job training, a congenial work atmosphere, and professional advancement.[25]

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have analyzed Professor Stover's statistics have come to the conclusion that law schools overtly destroy law students' original idealism by instilling in them the notion that law is a business rather than a profession. Chris Goodrich, *A Problematic Profession*, THE NATION, February 12, 1990, at 205, 206.

Other commentators disagree, claiming that law schools are not at fault because law students are qualified to make their own choices. For example, the following response was made to a law professor's contention that law schools are failing to instill non-monetary values in students:

> It is true that most lawyers seek jobs with large commercial law firms. However, I disagree with placing the blame on the law schools. By the time a person decides to attend law school, he or she is generally at the very least 21 years old. And many people make the decision to attend law school after having worked several years or after having raised a family, or both. By then, the vast majority of us have established our values. We may not know exactly what type of law we want to practice or exactly where, but we do know whether we are "in it for the bucks" or in it to help.
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> . . . .
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> It isn't the schools that are losing their souls -- it's young lawyers who have sold their souls.

Vanessa Alexander, *Pro Bono Law*, CHI. TRIB., August 5, 1990, at C2.

[24] STOVER, *supra* note 14, at 25-30.

[25] STOVER, *supra* note 14, at 22-25, 34. *See also* Maria Morocco, *Law Students on Law School: The Job Chase*, 76 A.B.A. J. 66 (Sept. 1990) (students express their need for practical training in a first job and worry that a public interest employer cannot provide such supervision). Another law professor made the following commentary on the role of law schools in shaping the career plans of their students:

> American law schools are losing their souls. Entering the 1990s, the primary function of legal education in America is to train students to serve affluent people and business interests. The large majority of law school resources is devoted to the study of the legal problems of these groups.
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> . . . .
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> Students enter law school wanting to do good, and leave wanting to do well.

Henry Rose, *Law Schools Are Failing to Teach Students to Do Good*, CHI. TRIB., July 11, 1990, at 17 (Rose is a law professor at Loyola University School of Law).

When Professor Stover summarizes his findings regarding the value-shifts which occur during law school, he reflects a cynical attitude also expressed by other commentators:

> In summary, students became somewhat less concerned with finding a job in which they could change the world and help others and a little less enthusiastic about result-oriented, creative work. At the same time, they became somewhat more concerned with securing a "comfortable" job — one in which they could receive

Law students' changing expectations significantly affected their job preferences. These modified expectations included a lack of satisfactory public interest jobs, the discovery that corporate law firms provided very intesting work, and the lack of what students viewed as necessary salary,[26] prestige, security, and long-term benefits at public interest law firms when compared with medium or large private firms.[27] In addition, students found that they could achieve the same level of job satisfaction in the private sector as in public interest practice.[28] The students' expectation that they could change the world through their public interest work declined significantly as students became more "realistic" about their possible effect on society.[29]

Professor Stover then examined the process through which students' values

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needed guidance while avoiding unwanted control, work with friendly and cooperative people, and advance professionally with the initial employer. With only a bit of oversimplification, one might say that during law school DU [Denver University] students decided they were willing to trade some of the excitement and stimulation of helping others or being challenged professionally for increased freedom from certain kinds of on-the-job aggravation, anxiety, and uncertainty.

STOVER, *supra* note 14, at 23.

[26] For a discussion of the ever-widening discrepancy between public interest salaries and salaries offered by private firms, *see* Saundra Torry, *Legal Aid Program Struggles to Attract Top Candidates for Low Pay*, WASH. POST, Dec. 17, 1990, at F5.

[27] STOVER, *supra* note 14, at 23-25. Professor Stover offered the following summary of changes in students' expectations during law school:

First, the students' expectations that a job would have attributes they desired greatly declined for the public interest jobs and increased for the conventional jobs. The mean ratings dropped on almost all of the attributes for the public interest jobs, while they rose on most of the attributes for more conventional jobs. As a result of these changes, the public interest jobs' initial disadvantage with regard to attributes involving salary, prestige, security, and long-term benefits became even greater over time. The public interest jobs' initial advantage with regard to altruistic goals was reduced but not eliminated, while their initial advantage with regard to craft satisfaction was eliminated but not reversed.

Id. at 25.

[28] *Id.* at 25.

[29] *Id.* at 23. In other words, some students determined during law school that they would have a higher probability of benefitting society through work in the private sector than in public interest law. Professor Stover makes the following comment about this phenomenon:

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. At the beginning of law school, DU [Denver University] students perceived public interest jobs as providing greater opportunity to achieve altruistic goals . . . than conventional jobs. But by the end of law school, students had downgraded the opportunities for altruism in public interest law, while upgrading them for business-oriented jobs (in part, perhaps, through a redefinition of worthy beneficiaries). . . .

Id. at 34.

and expectations changed during their law school experience. Some significant modifications among students' values and perceptions occured during the first year. Students became so busy during the first year of law school that many no longer had the time or the energy to devote to altruism. Instead, students worried more about doing well on their exams.[30] Further, first-year students were impressionable and placed perhaps undue emphasis on off-hand comments by professors and second and third-year students. Professor Stover asserted that these casual comments did not overtly denigrate public interest practice so much as stress the importance of other values, such as income.[31] However, other commentators disagree, claiming that law professors and others explicitly promote the supremacy of career pursuits other than public interest practice. For example, one reviewer of Professor Stover's book stated that "[l]aw professors make the legal hierarchy very clear: academia at the top, corporate law in the middle and public service at the bottom."[32]

Professor Stover found that during the second and third years of law school, students were more relaxed and, as a result, were more willing to consider altruism as part of their career plans. However, the majority of students, even those who entered law school with the desire to benefit society, never regained

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[30] *Id.* at 50.

[31] *Id.* at 52, 65. Stover reports that a professor commented to one class that they would make more money if they did their research the way he told them. Many such comments were made in jest, but students "did not interpret it in that way. The students believed that they were being told that money is *and should be* important to lawyers." *Id.* at 53.

It is interesting to note that Professor Stover downplays the significance of the monetary factor in altering students career paths. Others clearly feel that money is a primary factor influencing students because law schools fail to promote any alternative values, such as serving the public good. A biographical story on one Harvard law student reflects this:

> Something happens to idealistic young people at Harvard law school. On the first day, Bryan recalls, his entering class was asked how many planned to practice public interest law after graduation, and probably 70 percent of the hands went up. But very few entered the field. Last year, only about 3 percent of Harvard Law graduates went directly into the legal or public service organizations. In Bryan's class, the overwhelming majority of graduates took prestigious clerkships or cut to the chase and took $70,000-plus jobs with big law firms. "everybody came into law school wanting to help the poor," Bryan says. "But when the big law firms offered $1,500 a week, they all went."
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> It was a seduction. On that first day, students were told to look around at their 500 classmates. "They tell you you're sitting with future congressmen, leading partners of important law firms. You are pushed to compete to 'get to the top.' Only nobody ever stops to define 'the top.' There's no value orientation about finding meaning in what you do."

Bryan Stevenson, *How Can Anyone Do Anything Else?*, WASH. POST, January 6, 1991, at W12.

[32] Goodrich, *supra* note 23, at 205.

their pre-law school ideals.[33] Professor Stover credits this shift in values to the lack of support structures within his law school for students wishing to pursue a public interest practice.[34] Generally, this lack of support is evidenced by inadequate funding of legal aid programs and the failure to combat the perception that student-led public interest groups are "radical left-wing" organizations.[35]

Professor Stover discovered that the changes in values and expectations which tend to lead students away from a public interest practice largely occurred among those students who did not participate in the law school's public interest courses or clinical opportunities. The students who participated in these programs, however, maintained values and expectations similar to the original altruistic vision of incoming students.[36]

Professor Stover also found that second and third-year students were heavily affected by the anti-public interest sentiment they encountered during their summer clerkships with private firms.[37] This bias appears to be a national problem. As Professor Stover stated:

> The best available evidence suggests that most practicing attorneys demonstrate little support for professional altruism, in either their attitudes or in their behavior. . . . Moreover, these attorneys may have communicated to their student employees the relatively low esteem in which public interest practice is generally held by members of the bar. According to Laumann and Heinz's study of Chicago lawyers, even with other factors being constant, "the higher a (legal) specialty stands in its reputation for being motivated by altruism (as opposed to profitable) considerations, the lower it is likely to be in the prestige order."[38]

Law schools cannot directly control what employers tell their summer law clerks. However, law schools can prevent their students from being unduly biased by what they hear outside of law school by presenting an opposing alternate viewpoint. This can only be done effectively if the structural deficien-

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[33] Stover, *supra* note 14, at 56-57.

[34] STOVER, *supra* note 14, at 57. Another factor cited by Professor Stover was a noted "turn to the right" in the students' political views which took place during the law school years. *Id.* at 91-97.

[35] Another problem with the student public interest groups was that some of their members tended to isolate themselves from the rest of the school, thereby creating the impression among the student body that public interest law was not a dominant force at Denver University Law School. *Id.* at 60.

[36] *Id.* at 77.

[37] *Id.* at 61.

[38] *Id.* (quoting Edward O. Laumann and John P. Heinz, *Specialization and Prestige in the Legal Profession*, 1977 AM. B. FOUND. RES. J. 155, 202). *See also* JOEL F. HANDLER ET AL., CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); JOEL F. HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS (1978); Joel F. Handler et al., *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A. J. 1388-94 (1975).

cies noted above, and those discussed more fully below, are eliminated. Law schools must make public interest law available to students by establishing it as a part of the mainstream curriculum and by offering greater opportunities to participate in programs providing practical experience. Although obstensibly a simple solution, several institutional barriers must be overcome before such a solution can be successfully implemented.

B. *Barriers to Law Schools Providing Significant Exposure to Public Interest Practice*

1. Law School Curriculum is Driven by the Content of the Bar Exam

(a) *The Bar Exam Does Not Sufficiently Address Public Interest Law*

One of the primary goals of any law school is to provide its students with sufficient knowledge and training to pass the bar exam. Consequently, most law school curricula focus on topics covered by the bar exam. For example, first-year curricula generally include four or five of the following classes: Torts, Contracts, Real Property, Criminal Law, Evidence, Civil Procedure, or Constitutional Law. Not surprisingly, these courses appear in the uniform multistate section of the bar exam.

Usually, these courses do not significantly address the legal needs of the indigent. Each course may contain issues which directly face the poor; for example, many property courses deal with landlord-tenant law. Exposure is usually limited to abstractions, rather than, for example, how to combat an eviction. This shortcoming occurs because professors may provide "black letter" legal rules to students rather than policy-oriented presentations or practical demonstrations.

In addition to the uniform multistate section of the bar exam, each state also tests on several other areas. A survey of state-specific subjects reveals that the majority focus on the needs of businesses rather than the needs of individuals.[39] Moreover, the few courses which do touch on the needs of individuals may not address poverty law issues.

(b) *Few Law Schools Offer Significant Courses on Issues Surrounding the Legal Needs of the Poor Because Law School Curricula is Bar Exam Driven*

Typically, law schools only offer courses which a faculty member wants to teach and which receives significant student interest. Students enroll in those classes which are offered either on the multistate or state-specific portion of the bar exam because their ultimate goal is to pass the bar exam. Bar exams do not focus at all on the legal needs of the poor, and thus, it is unlikely that

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[39] Typically, bar exams include a combination of the following topics: corporations, commercial law, tax, administrative law, wills and estates, partnership and agency, civil procedure, criminal procedure, domestic relations and/or community property, personal property, professional responsibility, federal jurisdiction, conflicts, and debtor/creditor rights. Bar/Bri Digest 1991.

schools will offer a significant number of classes addressing poverty law issues. Likewise, even if law schools began to offer a curriculum which addressed public interest law, few students would probably take such courses because so few electives remain after a student takes those courses which appear on the bar exam.

2. Law School Curriculum is Driven by Accreditation Standards Set by the ABA and the AALS

Most states require graduation from an accredited law school before one can take the bar exam. Currently, neither the American Bar Association ("ABA") nor the American Association of Law Schools ("AALS") require that schools provide a significant exposure to public interest law. Accreditation inspection teams often have a member with experience running a law school's legal aid clinic, but thus far, no law school has been denied accreditation or reaccreditation on the basis of a weak public interest law program. This approach may be due in part to the fact that neither the ABA nor the AALS requires schools to offer clinical programs. Therefore, law schools feel little external pressure to provide training and service opportunities to students interested in public interest law.

3. Expense

In order to restructure a law school to place more emphasis on public interest law — through curriculum reform and/or through expansion of clinical opportunities — a law school must first have the means to do so. Any significant curricular change may mean hiring new faculty members and perhaps building new classrooms. Likewise, expanding legal clinics requires hiring competent practitioners who can supervise and train student participants. Many law schools simply cannot afford this type of restructuring or are unwilling to cut back on other programs in order to implement these changes.

4. The Political Component of Public Interest Work

Defining a "public interest program" presents a critical problem for those who hope to see more law students participate in public interest law both during law school and following graduation. In general, there are three basic definitions of a "public interest program:"

1) Law schools becoming a vehicle to better the position of people who need legal services but cannot afford to pay for them.[40]

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[40] Advocates of this definition include Menkel-Meadow, *supra* note 9, at 31 (an "immutable characteristic" of legal aid to the poor is "the use of explicitly political forms of advocacy to better the conditions under which poor people live."); Edgar S. Cahn & Jean Camper Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1027-30 (1970) (law schools must be a vehicle for societal change); Comment, *supra* note 5, at 1146 (Although directed

2) Law students providing legal services to those who need them but cannot afford to pay for them.[41]
3) Law students providing service to society.[42]

Supporters of the first definition argue that law schools have an obligation to serve the legal needs of the indigent and that law schools should be a tool for social reform. For example, the founder of the Legal Services Corporation — the government agency instituted to serve the legal needs of the poor — stated:

> [T]he law school — as an institution — has failed to acknowledge that it has an institutional obligation to the legal system as a whole. . . . The issue is whether the law school . . . can utilize its unique vantage point and its relative detachment to enable society to proceed more rationally to reshape its legal system, to provide effective redress of grievances and to permit orderly and rapid social change within the framework of the rule of law.
>
> . . . .
>
> . . . [T]he third year of law school is devoted to "clinical work" but clinical work largely takes the form of providing legal aid — discharging the "service function" of the law. The third year law student thus may come out more nearly a competent practitioner. His guilt will be assuaged, and his demand for "relevance" seemingly met because the needs of society for traditional legal representation in both civil and legal cases is well nigh infinite. But if this is the sum total of law schools' response, it is in fact a default.[43]

This statement is representative of a group of reformists who have been linked to traditionally liberal causes.[44] The long-term goal of many such advocates is

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at public interest lawyers rather than law students, this article supports the notion that public interest lawyers "are committed ultimately to causes, not clients."). Tulane's public interest program, a mandatory *pro bono* program, has been criticized as politically biased because it allows "work for legal service and public defender programs as well as for non-profit interest groups, but not for prosecutors or other government employers." Washington Legal Foundation, Legal Studies Division, *In Whose Interest? Public Interest Activism in the Law Schools* 49 (1990) [hereinafter Washington Legal Foundation Study].

[41] The University of Pennsylvania uses this definition. *Comparison Chart of Pro Bono Programs*, in Adkins, *supra* note 3, at appendix B.

[42] This broad definition is supported by the National Association for Public Interest Law in their "instruction manual" on how law students around the country can persuade their schools to adopt mandatory *pro bono* requirements. Adkins, *supra* note 3, at 19.

[43] Cahn & Cahn, *supra* note 40, at 1027-30.

[44] *See also* Ralph Nader, *Law Schools and Law Firms*, 54 MINN. L. REV. 493 (1970); Menkel-Meadow, *supra* note 9, at 58; MacKerron, *Legal Services Corp. Supporters Fear It May Be "Block-Granted" to Death*, NAT'L, Feb. 28, 1981, at 360 (quoting Senator Jesse Helms).

to redistribute wealth and power more equitably throughout society.[45] Naturally, those that have achieved wealth and power — both individuals and businesses — oppose law schools acting against their interests, particularly when the law school is a public institution financed by tax dollars.[46] This definition is also opposed by other groups who see it as an unfair imposition of values. Activist public interest lawyers, within or without law schools, are also criticized for placing the interest of the cause — either their own or the cause of their financial supporter — above the client's interest, resulting in inferior representation.[47]

The second definition of a "public interest program" details a program designed primarily to provide legal services to those who cannot afford to pay. Some commentators consider the proponents of this definition as motivated by an interest in redistributing society's wealth more equitably. Judge Richard Posner, for example, opposes granting free legal services to the poor. Professor Roger Cramton summarized Judge Posner's position:

> Judge Posner argues in his book *Economic Analysis of the Law* (1977) that providing free legal services to the poor "prevents many poor people from achieving their most efficient pattern of consumption." A poor person, he contends, would prefer $100 in cash rather than $100 in free legal services. Given only the latter option, a poor person will accept the free legal services unless their value to him is outweighed by the lost time and other inconveniences of dealing with a lawyer. As a result, the demand for free legal services will invariably exceed the supply, creating a serious rationing problem. Since the value to some recipients will be less than it

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[45] Comment, *supra* note 5, at 1087-89; Menkel-Meadow, *supra* note 9, at 51, 58; Becker, *supra* note 5, at 1437-38.

[46] One legal commentator notes:

> Idealism is wonderful, but why should law schools promote it? The very infrastructure of the nation . . . is threatened by the litigiousness such activism fosters, and the anti-business, no growth, strict government regulation attitudes it indoctrinates into law students. The integrity and character of law schools and the legal profession suffer from contorting the law into a political tool.

Washington Legal Foundation Study, *supra* note 40.

[47] BURTON A. WEISBROD ET AL., PUBLIC INTEREST LAW 81-89 (1978); Derrick A. Bell, *Serving Two Masters: Integration and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 490 n.59 (1976); Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 343 (1978); Leroy D. Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Revolutionary?*, 19 KAN. L. REV. 459, 469 (1971); Note, *supra* note 5, at 1439. *But see*, D. CLOVIS & N. ARON, SURVEY OF PUBLIC INTEREST LAW CENTERS: NARRATIVE REPORT 1 (1980) (asserting that public interest lawyers are concerned with the needs of their clients).

Public interest lawyers have two responses to this criticism: (1) repetitive litigation of the same problem wastes public and private resources; and (2) only a very small percentage of all cases litigated by public interest attorneys can be characterized as "test cases." Roger C. Cramton, *Why Legal Services for the Poor?*, 68 A.B.A. J. 550, 552 (1982).

costs to some taxpayers, Posner contends, the distribution of free services is wasted.[48]

Professor Cramton, a former chairman of the Board of Directors for the Legal Services Corporation, disagrees with Judge Posner's analysis, claiming that free legal services for the poor actually benefit everyone because they provide access to justice to those who otherwise would not have it, ameliorate the bias of law against the unrepresented, and help poor people help themselves.[49] Arguably, a fair economic exchange occurs because students receive training through their services, and society at large benefits.[50] In addition, because each indigent client uses the law to address grievances against another person or business, that other person or business will likely retain counsel, and produce an economic benefit for the lawyers opposing the student-represented clients.

Finally, a "public interest program" may be defined as one where students provide a benefit to society. This definition is the least partisan of the three. Students can work for a variety of groups or individuals depending on personal desires. Because of the natural political spectrum among law students, the services they provide will also promote a broad array of political interests.

The law schools which have a mandatory *pro bono* program allow their students the freedom to choose where they will work. For example, students at the University of Pennsylvania can participate in any "work that is unpaid, non-clerical, law-related, done for non-profit organizations, public interest law firms, legal aid offices, *pro bono* projects, or government employers."[51] This approach is problematic because, although non-partisan, it may not serve to ameliorate the legal services crisis facing the poor because it does not require students to serve indigents.

These three definitions of a "public interest program" range from highly partisan to almost non-partisan. Many fight actively against any imposition of public interest programs in law schools because they believe that public interest law is largely a service which promotes leftist ideals of certain special interest groups.[52] However, such criticism loses strength when made against a

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[48] Cramton, *supra* note 44, at 553. *See also* John A. Humbach, *Serving the Public Interest: An Overstated Objective*, 65 A.B.A. J. 564 (1979) (making substantially the same economic arguments against free legal aid as Posner). *But see* Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 757 (1988) (contending that Posner's economic analysis of the law seriously detracts from the ideal that our legal system exists to provide justice, not economic efficiency).

[49] Cramton, *supra* note 47, at 554.

[50] *Id.*

[51] *Comparison Chart of Pro Bono Programs*, in ADKINS, *supra* note 3, at appendix B.

[52] *See, e.g.*, Washington Legal Foundation Study, *supra* note 40 (vigorously arguing that the current trend of public interest activism in law schools is motivated and supported by leftist organizations to sustain and promote their own political objectives). Although this book promotes a conservative viewpoint, it is based on a very helpful

public interest program which limits its work to non-partisan representation of the poor or whose participants work for a variety of non-profit groups with differing political or non-political views. Nevertheless, many believe that any public interest reform in law schools necessarily means a shift to the left and, therefore, fight against such reforms.[53]

C. *Potential Solutions at the Law School Level that Provide for the Legal Needs of the Indigent*

In order to combat the structural failures of law schools in providing public interest opportunities, an effective solution must reasonably address both the institutional barriers to any significant change in law schools' approaches to public interest law and the counter-arguments. This section analyzes specific proposals to remedy the legal services crisis facing the poor.

1. Mandatory *Pro Bono* Programs

Much of the debate on whether law schools should provide legal assistance to the poor has focused on mandatory *pro bono* programs. These programs mandate that students, and sometimes faculty, perform from twenty to seventy hours of *pro bono* work annually.[54] Such a requirement gives rise to serious constitutional, moral, and practical questions concerning the desirability of such a program. Nevertheless, several schools have instituted *pro bono* requirements as a prerequisite to graduation.[55]

(a) *The Mandatory Pro Bono Movement*

The National Association for Public Interest Law ("NAPIL") organized a student-run campaign to institute mandatory *pro bono* programs at law schools nationwide. Tulane Law School instituted the first mandatory *pro bono* program in 1987.[56] Since that time, at least four other schools have implemented *pro bono* graduation requirements.[57]

As of March 1991, only five law schools had mandatory *pro bono* programs: Tulane, Florida State, Valparaiso, South Carolina, and the University of Pennsylvania.[58] The requirements at these schools vary from 20 to 35 hours

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extensive survey of the public interests programs currently in use at law schools around the country. *See id.*, at appendix C. "The law school public interest programs . . . are the coercive means of extending the politicization of the law school classroom to the courtroom, in order to attack society at large." *Id.*, at ii.

[53] *Id.* at ii.

[54] ADKINS, *supra* note 2, at appendix B.

[55] *See infra* note 56-59 and accompanying text.

[56] John Kramer, *Mandatory Pro Bono at Tulane Law School*, reprinted in Adkins, *supra* note 3, at appendix D.

[57] *Id.*

[58] *Id.* Other law schools are currently exploring the possibility of implementing mandatory *pro bono* programs. *See, e.g., Fordham to Examine Mandatory Pro Bono,*

annually during students' second and third years. Students do not receive academic credit for this work.[59]

(b) *Advantages of a Mandatory Pro Bono Program*

Proponents of mandatory *pro bono* programs see both short and long-term benefits. The most obvious short-term benefit is that law students could provide thousands, perhaps millions, of free hours of legal service to those who desperately need it. The desired long-term benefit is that as students serve the public interest during law school, they will become more aware of the pressing legal needs of the poor, and will thus be more likely to serve in the public sector following graduation. As more students make such career choices, the legal needs crisis would then theoretically subside.

i. Mandatory *Pro Bono* Programs Increase Student Awareness of Indigents' Legal Needs

Mandatory *pro bono* programs have been found to increase students' awareness of the poor's legal needs and to foster students' desire to participate in public interest programs in the future.[60] Schools with mandatory *pro bono* programs assert that their programs increase student exposure to public interest law, resulting in a greater likelihood that students will pursue public interest careers following graduation.[61] *Pro Bono* requirements force student exposure to the legal needs of indigents while many other programs, such as elective courses in poverty law or clinical programs with few openings, fall well short of this goal.

N.Y. L.J., Feb. 13, 1992, at 9 (discussing possible adoption of *pro bono* requirements at Fordham Law School).

[59] Adkins, *supra* note 3.

[60] *See, e.g.*, Heather Munro, *New York Law Students Push for Pro Bono Curriculum*, States News Service, Nov. 16, 1990, *available in* LEXIS, Nexis Library, SNS File (reporting that 65% of Tulane students participating in the mandatory *pro bono* program said that their work in the program "increased their willingness to provide *pro bono* services in the future."); Janice Lohr Fisher, *Law Students Like Community Service*, Inside Tulane, May 1989, at 8 (reporting that Tulane's mandatory *pro bono* program resulted in altered feelings in favor of public interest work).

[61] *See, e.g.*, Proposal of the Committee on Professionalism and Public Service to Institute a Public Service Requirement for Graduation 1-2 (University of Louisville School of Law adopted this proposal on November 5, 1990). Professor Stover's study supports this assertion. He reported that students who participated in *pro bono* programs were more likely to view public interest law favorably, and thus were more likely to choose that career path. STOVER, *supra* note 14, at 76.

ii. Nationwide Mandatory *Pro Bono* Programs Would Provide Millions of Hours of Free Legal Service

Proponents of mandatory *pro bono* programs at law schools stress that such programs, in addition to increasing student awareness of the legal needs of the poor, would also meet a critical need which the bar of practicing lawyers does not satisfy.[62] Student advocates of mandatory *pro bono* programs point out that if all of the nation's 129,000 law students contributed 100 *pro bono* hours per year, they would provide 12.9 million hours of free legal service to the poor annually.[63] These hours would do much to alleviate the legal services crisis but present an overly optimistic scenario. Yet, if even a quarter of the nation's 129,000 law students were to offer a more modest 25 hours per year, the result — 806,250 hours — would be a significant contribution by law students to a pressing societal problem. Given that most *pro bono* cases take approximately 25 hours to complete,[64] 32,250 otherwise unrepresented indigents would receive legal services.

iii. Mandatory *Pro Bono* Programs Increase the Public's Perception of Law as a Profession

Some commentators argue that establishing a mandatory *pro bono* program for law students and practicing lawyers would salvage the low esteem in which the legal profession is held by the public today.[65] However, the danger exists that, since such programs would be mandatory, the public would not give recognition to the students or the profession for their contributions.

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[62] The LEGAL SERVICES REPORT supports this conclusion:

> In short, then, the "voluntarism" so eloquently extolled and advocated by the organized Bar may well amount to little more than a rallying cry for the status quo. When all is said and done, only the same disappointingly small proportion of practicing attorneys who now contribute *pro bono* efforts to the poor would be counted upon to continue bearing the full load for the rest of the legal profession.

LEGAL SERVICES REPORT, *supra* note 6, at 106.

[63] Munro, *supra*, note 60.

[64] *Sol Wachtler, Chief Judge of the State of New York, Supports Efforts to Provide Legal Aid to Thousands of Poor*, PR Newswire, Feb. 22, 1991, *available in* LEXIS, Nexis Library, PR NEWS File.

[65] *See, e.g.*, Chesterfield H. Smith, *A Mandatory Pro Bono Service Standard — Its Time Has Come*, 35 U. MIAMI L. REV. 727, 730 (1981). Mr. Smith, former chair of the American Bar Association, commented about the relationship between the public's respect for lawyers and mandatory *pro bono* requirements:

> The legal profession will not maintain the public's respect if it supports a random and haphazard [*pro bono*] standard under which some lawyers contribute *pro bono* services while other contribute little or none. No standard of *pro bono* obligation should exonerate some lawyers from free public service while requiring it of others.

Id.

iv. Mandatory *Pro Bono* Programs Provide Practical Legal Training Such as Client Interviewing and Brief Writing

Seventy-two percent of students participating in Tulane's mandatory *pro bono* program reported that their *pro bono* activities "increased their confidence in their ability to handle cases for indigent clients."[66] One columnist lauded NAPIL's mandatory *pro bono* program which she believed would increase the overall competence of the legal profession:

> It's enormously encouraging, and not only to the poor people who will directly benefit from expert, free intervention in their hitherto hopeless quarrels with landlords or bureaucrats. The rest of us can look forward to having lawyers who have been exposed to the real, raw needs of the community and may even understand that there is more to life than a berth at a posh Wall Street firm.[67]

In addition, the training law students receive through school *pro bono* activities will benefit them as they participate in *pro bono* activities throughout their careers. This experience is particularly helpful given the sometimes complex nature of indigents' legal needs. With supervised training during law school, graduates will be more competent to handle such issues when they arise. Some assert that such training is a prerequisite to any large-scale *pro bono* plan instituted by a state bar.[68]

(c) *Disadvantages of a Mandatory Pro Bono Program*

Several philosophical and practical problems confront the implementation of a mandatory *pro bono* program. Some argue that forcing people to serve others by providing free legal representation is unconstitutional under the Fifth and Thirteenth Amendments. Others oppose mandatory *pro bono* service because they view it as imposing morality. Underlying the latter objection is the premise that charitable contributions — here in the form of legal service — should be a voluntary undertaking. Also structural problems associated with a mandatory law school *pro bono* program include placement, enforcement, and funding of a large program.

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[66] Munro, *supra* note 60.

[67] Mary McGrory, *Law Students' Pro Bono Backlash*, WASH. POST, Oct. 28, 1990, at C1. *But see* Glenn G. Lammi, *Mandatory Volunteer Work*, WASH. POST, Nov. 14, 1990, at A16 (letter to the editor criticizing McGrory's column for failing to recognize that mandatory *pro bono* programs in law schools are the work of liberal activists grabbing for more power by forcing students to serve their causes at no cost).

[68] *See, e.g.*, Martin Fox, *Legal Aid Proposes Changes in Mandatory Pro Bono Plan*, N.Y. L.J., December 8, 1989, at 1, (statement of New York Legal Aid Society President Steven B. Rosenfeld) ("[F]or a large *pro bono* program to be effective and efficient, the influx of 'new legal talent' must be trained, harnessed and directed. . . . The legal problems of the poor, no less than those of the rich, require counsel with knowledge, expertise and experience dealing with the issues or areas of law involved.").

i. Constitutional Issues

In 1983, the Florida Supreme Court reviewed a petition to implement a mandatory *pro bono* plan among practicing attorneys in the state.[69] The court rejected the idea because of potential constitutional obstacles. The opinion stated: "We have been loathe to coerce involuntary servitude in all walks of life; we do not forcibly take property without just compensation; we do not mandate acts of charity. We believe that a person's voluntary service to others has to come from within the soul of that person."[70] Many others have echoed the court's view on each of these assertions.[71]

Responses to arguments against implementing a mandatory *pro bono* program are made at two levels: (1) general responses in favor of mandatory *pro bono* programs imposed on members of the bar, and (2) specific responses against *pro bono* programs that are imposed only on law students.

The general responses involve analyses of the Fifth, Thirteenth and Fourteenth Amendments. Regarding involuntary servitude, a close analysis of the Thirteenth Amendment and the decisions construing it "makes it clear that the Thirteenth Amendment does not prohibit the court from requiring an attorney to serve at the court's direction without compensation."[72] Although no Supreme Court opinions directly address this issue, a 1987 Supreme Court decision, which held that the Thirteenth Amendment does not prevent government-compelled rendition of "certain civic duties,"[73] provides the foundation for the assertion that mandatory *pro bono* does not fall within the ambit of the Thirteenth Amendment. Because representation of indigents can be classified as a duty borne by all members of the legal profession due to the profession's sanctioned monopoly,[74] mandatory *pro bono* is not a violation of the Thir-

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[69] The Florida Bar, In re Emergency Delivery of Legal Services to the Poor (Mandatory Pro Bono), 432 So.2d 39 (1983).

[70] *Id.* at 41. *See also* Maher, *supra* note 3, at 980-82 (criticizing the decision).

[71] Maher, *supra* note 3, at 988 (citing Steven B. Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255, 290 (1981); Note, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 COLUM. L. REV. 366, 378-82 (1981)); Vincent T. McManus, Jr., *Mandatory Pro Bono Should Be Disdained As A Blow To Liberty*, LEGAL TIMES, Nov. 26, 1990, at 20 ("While a rose by any other name may smell as sweet, labeling involuntary servitude 'mandatory *pro bono* legal service' does not make it smell any better than slavery.") (letter to the editor by a student advocating mandatory *pro bono* in law schools). For a view that coerced representation violates the Equal Protection Clause, *see* Gilbert & Gorenfeld, *supra* note 2, at 84-86.

[72] Maher, *supra* note 3, at 988. *See also* Smith, *supra* note 61, at 734 (the involuntary servitude argument is unacceptable).

[73] United States v. Kozminski, 487 U.S. 931, 944 (1987); *see also* Butler v. Perry, 240 U.S. 328, 333 (1915) (rejecting a Thirteenth Amendment challenge to a statute requiring certain individuals to work on bridges and roads without compensation).

[74] *See supra*, note 11 and accompanying text.

teenth Amendment.[75]

Moreover, a majority of courts have held that compelled representation without compensation does not constitute a "taking" in violation of the Fifth and Fourteenth Amendments,[76] although at least one court has held it to be such a violation.[77] Proponents of mandatory *pro bono* programs claim that because lawyers are under a duty to provide free legal services to those who cannot afford to pay for them, there can be no taking.[78] New York's *Legal Services Report* supports this conclusion:

> New York lawyers have no legitimate expectation of being excused from providing uncompensated services to the poor pursuant to judicial direction. Accordingly, the threshold "taking" of property, necessary to trigger scrutiny under the takings clause, is absent. Significantly, it has been held that the assignment of uncompensated counsel does not constitute a taking without compensation.[79]

Perhaps a more persuasive takings argument against a mandatory *pro bono* plan is that such plans constitute a regulatory taking. These takings occur when the government, through legislation or rule-making, in effect "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[80] Arguably because attorneys and law students are not responsible for indigents' disadvantageous position, it is therefore unfair for attorneys and law students to spend valuable time to remedy a problem which should be solved by society as a whole.[81] Again, the

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[75] Maher, *supra* note 3, at 988.

[76] Maher, *supra* note 3, at 988; Steven B. Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255, at 288 n.140 (1981); Note, *supra* note 71, at 383-90.

[77] Bedford v. Salt Lake County, 22 Utah 2d 12, 447 P.2d 193 (1968) (a state statute requiring uncompensated representation for involuntary hospitalization held to be a taking).

[78] Maher, *supra* note 3, at 988-89; *see also* United States v. Dillon, 346 F.2d 633 (9th Cir.), *cert. denied*, 382 U.S. 978 (1965) (lawyer performing uncompensated legal services for indigent clients has no takings claim because such a lawyer is "performing 'an obligation imposed on him by ancient traditions of his profession and as an officer assisting the courts in the administration of justice.' "). Maher, *supra* note 3, at 989 n.85 (quoting Dillon, 346 F.2d at 636). The Supreme Court has also supported this assertion in the context of requiring witnesses to testify without compensation. Hurtado v. United States, 410 U.S. 578 (1973). There the Court held that "the Fifth Amendment does not require that the . . . Government pay for the performance of a duty which is already owed." *Id.* at 588 (quoted by LEGAL SERVICES REPORT, *supra* note 6, at 155).

[79] LEGAL SERVICES REPORT, *supra*, note 6, at 155-156 (citing Dillon, 346 F.2d at 635-36) (other citations omitted).

[80] Armstrong v. United States, 364 U.S. 40, 49 (1964), cited in LEGAL SERVICES REPORT, *supra* note 6, at 157.

[81] Humbach, *supra* note 48, at 565-66 (arguing against mandatory *pro bono* on several grounds, among them that indigents' lack of legal services is only a symptom of

response to this argument is that lawyers are the only ones in society who can provide legal services and, therefore, must shoulder this burden.

In addition to these general arguments against allegations of unconstitutionality, several specific responses can be made to the application of mandatory *pro bono* programs at law schools. For example, because in most states law students are not yet authorized to practice law,[82] there can be no "taking" of potential income from law students who provide legal services to the poor. Further, law schools are authorized, within certain broad limits established by the accreditation process, to determine what is in the educational interest of their students. Arguably, since schools possess this discretion, they impose no involuntary servitude or taking.[83]

ii. Imposing Morality — Service Should Be Voluntary

The argument that pro bono requirements impose morals is less compelling when made against law school administrations than against state bar associations.[84] If one defines a *pro bono* requirement as a non-partisan educational benefit to students, then no morals are being imposed. Instead, students are simply learning how to meet the needs of clients through a practical program. However, if a law school defines its *pro bono* program in a partisan way, forcing students to participate in causes they may fundamentally oppose, this arguably constitutes an unwarranted imposition of morality. In addition, many students and faculty members see a *pro bono* requirement as an imposition of morals regardless of whether partisan concerns are being served.[85]

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poverty, which is a problem that must be resolved by society as a whole, not just the legal profession).

[82] Law students are authorized to practice law in some states pursuant to special laws and judicial orders. *See, e.g.*, MASSACHUSETTS SUPREME JUDICIAL COURT Rule 3:03 (1989) and ORDER IMPLEMENTING Rule 3:03 (1986). However, even in these jurisdictions, students do not receive income for providing legal service. Therefore, there can be no taking.

[83] It is interesting to note that the same Florida court which ruled mandatory *pro bono* potentially unconstitutional held that mandatory continuing legal education requirements were constitutional. Maher, *supra* note 3, at 980 n.38.

[84] For an argument against legislating morality through mandatory *pro bono* programs, *see* James N. Adler et al., *Pro Bono Legal Services: The Objections and Alternatives to Mandatory Programs*, 53 CAL. ST. B.J. 24, 24-25 (1978).

[85] *See, e.g.*, Anne Kornhauser, *Mandatory Pro Bono Sought for Law Schools*, LEGAL TIMES, Oct. 29, 1991, at 6 (Dean of George Washington University National Law Center commenting that mandatory *pro bono* programs in law schools represent the imposition of a moral code on law students); Thomas K. Plofchan, Jr., *Pro Bono Work—A Matter For Choice*, WASH. POST, Jan. 23, 1991, at A16 (Although [NAPIL] is pushing for mandatory *pro bono* programs in law schools, NAPIL "has been successful at only seven of 180 law schools. And that lack of success is not because students and professors are hypocritical or selfish. It's because, though they believe in the need for legal advice, they also recognize that public service is personal and should be voluntary. . . . I advocate volunteerism and try to do my part, but I would resent being told

iii. Administrative Obstacles

(A) *Placement.* Communities surrounding law schools may not have the positions or legal needs to warrant a mandatory *pro bono* program. When the dean of Tulane Law School instituted a mandatory *pro bono* program "he found that the New Orleans area did not have enough natural outlets for students to fulfill their *pro bono* requirement. So [Dean] Kramer had to hire lawyers to create additional programs" at a cost of $125,000.[86]

(B) *Enforcement.* Another administrative obstacle involves enforcing the terms of a mandatory *pro bono* program. Determining compliance with the minimum hours required is especially difficult.[87] Furthermore, because many students may oppose the mandatory nature of the requirement,[88] it is likely that some students may refuse to participate. If this occurs, the long term goal of the program, to foster the goodwill of law students towards public interest law, may be compromised by necessary discipline.

(C) *Cost.* As discussed above, the legal needs of the poor require expertise. Before law students can adequately deal with the legal needs of the poor, the students must receive proper training.[89] Consequently, before students could discharge their 20 to 35 hours of *pro bono* duty, they would need to spend additional time in preparation. Without training, their hours of service would probably be largely ineffective.[90] Training would require adding courses to law school curricula and possibly hiring new faculty members to teach these courses. Furthermore, supervising a large number of students participating in *pro bono* work would require hiring additional support staff.

Such costs may be prohibitive for most law schools, especially when combined with additional costs stemming from placement programs and other administrative requirements. For example, *The National Law Journal* reported that the University of Pennsylvania's program cost $115,000 to administer, Tulane's, between $75,000 and $100,000, and the University of Maryland's (involving an integrated system of training and supervision), over

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how to manifest my charity.") (letter written by Plofchan, a University of Virginia law student).

[86] Kornhauser, *supra* note 85.

[87] Although some argue for no minimum hourly requirements and simply ask students to engage in *pro bono* service, the quick response to this suggestion is: "[n]ot imposing a quantity minimum is 'like saying you've got to love your mother' . . . . It makes the obligation meaningless." Nancy Cowger, *Proposal Readied on Mandatory Pro Bono*, 65 A.B.A. J. 1779, 1780 (1979) (quoting Ralph Gampell, President of the California State Bar).

[88] For example, in a recent poll taken at Georgetown, 55 percent of the students were opposed to a mandatory *pro bono* program. Kornhauser, *supra* note 85.

[89] Fox, *supra* note 68, at 1.

[90] *See generally* Gary Brown et al., *Starting a TRO Project: Student Representation of Battered Women*, 96 YALE L.J. 1985 (1987) (students must be trained before they can provide competent representation of battered women). Note that this article also asserts that such training can be given at low cost. *Id.* at 1986.

$500,000.[91] Clearly many schools cannot shoulder such a heavy financial burden.

(D) *Conclusion.* In the past, some critics found that law schools were an improper forum for potentially far-reaching mandatory *pro bono* programs. For example, both Judge Wachtler and his committee, which assembled to study a mandatory *pro bono* program for the New York State Bar, found such mandatory programs undesirable in the law school context. Judge Wachtler stated that such programs "are not the most effective for law schools . . . 'and should be a matter of last resort.' "[92] The committee declined to recommend the adoption of mandatory *pro bono* programs by law schools despite its recommendation of a mandatory program for members of the state bar:

> [A]ny requirement that students participate in such programs would impose intolerable fiscal burdens on law schools and interfere with their educational mission, including their skills training programs. Moreover, law school buildings, developed primarily for instructional purposes, have only limited facilities for client-oriented clinical programs. Given the limited return in legal services, requiring that the law school curriculum be altered for this purpose would be unproductive and unwise. It would represent an unwelcome intrusion of government into the pedagogic content of legal education.[93]

Given these concerns and shortcomings, mandatory *pro bono* programs may be a good idea for some, but not all, law schools. Therefore, law schools must explore further alternatives.

2. Imposing Mandatory *Pro Bono* Service on Faculty Members

Another possible solution to the legal needs crisis is to impose a *pro bono* requirement on faculty members. Such requirements could be used in conjunction with student *pro bono* programs.

Faculty participation in *pro bono* work has several benefits. When faculty members have had limited experience with public interest representation, they generally failed to use in-class hypotheticals involving indigents. Students may interpret this failure as a silent judgment against public interest causes and lawyers.[94] *Pro bono* service by faculty members will likely provide experiences with indigent clients that professors can share with the class to illustrate legal principles. These perspectives will in turn reinforce a more positive impression of public interest work among law students.[95]

A public interest workshop held at the 1991 AALS Conference, stressed the

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[91] Ken Myers, *Students Try to Press the Issue of Mandatory Pro Bono Work*, NAT'L L.J., Feb. 18, 1991, at 4.

[92] Sheryl Nance, *Law Students Support Mandatory Pro Bono*, N.Y.L.J., Feb. 25, 1991, at 2.

[93] LEGAL SERVICES REPORT, *supra* note 6 at 117.

[94] STOVER, *supra* note 14 at 119.

[95] *Id.* at 117.

importance of having law professors lead by example. Professors were told that they "still have a long way to go when it comes to doing public interest work."[96] Northwestern University law professor Steven Lubet urged professors to participate in public interest programs. To illustrate the effect faculty *pro bono* work could have on law students, Professor Lubet said, "If a law student walked in and found a welfare recipient in our office being represented, that would do more for students than anything else we're talking about."[97]

Moreover, law professors have the unique opportunity to instill in their students the notion that law is a profession rather than a business. Because *pro bono* work offers one of the few opportunities any lawyer has to demonstrate this concept, faculty members, no less than any other member of the bar (and perhaps more so due to their influential positions), have the obligation to provide *pro bono* services.[98] By participating in *pro bono* work, professors will exemplify the ideal of the lawyer as a professional, a view of the occupation which is not widely held. This role model could be invaluable in preparing students to be future leaders of the bar and of society.[99] Another advantage of this proposal is that it offers professors the opportunity to gain additional experience practicing law at a time when legal education is criticized as overly theoretical due to law professors' lack of practical experience.[100]

Potential disadvantages of imposing a mandatory *pro bono* program on law faculties have been recognized. One major criticism of imposing mandatory *pro bono* programs on law professors argues that such programs impermissibly interfere with law professors' academic freedom.[101] Furthermore, many profes-

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[96] Saundra Torry, *On Public Service Issue, Professors Urged to Teach by Example*, WASH. POST, Jan. 7, 1991, at F5. The article continued, "Like many lawyers in private practice who are too busy making money to be bothered with *pro bono* work, professors caught up in the pursuit of tenure and prestige give little thought to the professional ideal that public service is every lawyer's job." *Id.*

[97] *Id.*

[98] MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2-25 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983). *See also supra* note 11 and accompanying text.

[99] One author made the following comment about the need for professional role models in legal education: "Law students begin their studies with great idealism. Many wish to serve disadvantaged persons or causes. Yet, they do not find in the law school a professional role model that will allow them to fulfill the social responsibility of the profession to seek greater justice." Pepe, *supra* note 14, at 325.

[100] *See, e.g.*, Stephen Wizner, *What is a Law School?*, 38 EMORY L.J. 701, 710 (1989) ("The lack of practical experience in law school professors continues to be a weak point of legal education. How can a teacher train lawyers to do what she has never done? . . . The lack of experience of most law school professors does a disservice to their students and to the public which receives a constant stream of new lawyers ill-equipped to deal with real legal conflicts.").

[101] For example, Tulane, which instituted the first mandatory *pro bono* graduation requirement for students, initially planned also to require the faculty to contribute a minimum number of *pro bono* hours each year. However, this part of the proposal was

sors consider sacrificing high-income jobs with private firms for teaching a form of public service.[102]

The constitutional challenges to mandatory *pro bono* service discussed above would also present potential obstacles to such a program. However, administrative difficulties facing student *pro bono* programs, such as placement and enforcement, may not constitute severe problems for *pro bono* requirements imposed on law faculties. Unlike students, law professors require no supervision and could alleviate some of the administrative burden of student programs by supervising student *pro bono* work.

3. Curricular Changes

Many public interest law advocates feel that law school curricula fail to serve larger legal education goals.[103] The current law school curricula, as mentioned above,[104] focuses largely on the needs of businesses and affluent individuals. Because of this focus, students tend to believe that the legal needs of the poor are not as interesting as the legal needs of society's upper classes.[105] A change in current law school curricula which would mandate coursework in public interest law could do much to improve law students' perception of this field, improving the chances that students entering law school with the desire to practice public interest law would maintain that desire.[106] At the same time, students who had no prior inclination to practice public interest law, perhaps would develop such an inclination from exposure to the needs of indigents through public interest law coursework.

Harvard Law School recently decided to change its curriculum in an effort to channel more of its students toward public interest law careers. Among the

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dropped because planners feared that the entire program would be rejected. Robert Clayton, an associate dean and one of the founders of the mandatory *pro bono* program at Tulane, stated: "[w]e felt politically our faculty, for academic freedom reasons, would not buy into imposing [mandatory *pro bono*] on themselves." Torry, *supra* note 96.

[102] *Id.* Note also that many law professors have led the fight against mandatory *pro bono* requirements in general, and would perhaps fight even harder against the imposition of a *pro bono* requirement upon law faculty.

[103] *See, e.g.*, Pepe, *supra* note 14, at 325 ("The present isolated, esoteric, and largely non-critical curriculum constitutes inadequate preparation for . . ." serving "disadvantaged persons or causes."); Anita P. Arriola & Sidney M. Wolinsky, *Public Interest Practice in Practice: The Law and Reality*, 34 HASTINGS L.J. 1207, 1209-10 (1983) ("In general law schools offer courses and programs that tend to serve the business community and the social, political, and economic status quo. Indeed most lawyers are trained to and ultimately do serve the interests of the corporate and business community and institutions of wealth and power. Law schools certainly have been less responsive to the less "establishment" segments of society.") (footnote omitted).

[104] *See supra* part II. B.2.

[105] *See supra* notes 23-29 and accompanying text.

[106] *See, e.g.*, STOVER, *supra* note 14, at 17.

courses which were introduced or expanded are poverty law, consumer law, environmental law, and criminal defense.[107] Such coursework is voluntary,[108] and all students, including first-years, can enroll in the new classes.

In addition to the new courses, the Harvard faculty endorsed a mission statement which vowed support of public interest law and promised that more school resources would be devoted to counseling students about careers in public interest law. As one faculty member said, "The bottom-line message here is that Harvard's faculty voted to move forward and make additional commitments to preparing Harvard students for public interest careers and *pro bono* work in their private practices."[109] The willingness of the often divided Harvard faculty to support such a proposal may indicate that law professors around the country are prepared to support similar institutional and curricular changes at their law schools.[110]

4. Legal Aid Clinics

Legal aid clinics which focus on serving indigents' legal needs can effectively train students to serve as public interest lawyers after graduation. The clinics provide law students with practical experience in interacting with indigent clients during law school,[111] which may increase the likelihood that those

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[107] HARVARD PUBLIC INTEREST REPORT, *supra* note 14 at 24; Alexander Reid, *Harvard Faculty Proposes More Public Interest Courses*, BOSTON GLOBE, Feb. 23, 1991, at 25.

[108] The students voted 54-46% in favor of instituting a mandatory *pro bono* program similar to that in effect at Tulane, with many students adamantly opposed to the requirement. Peter S. Canellos, *Harvard Law Students Endorse Free Legal Work*, BOSTON GLOBE, April 16, 1990, at 15. In addition, one member of the advisory committee, Professor Charles Fried, worried that the mandatory *pro bono* requirement was politically rather than educationally motived. Skye Wilson, *Harvard's Public Interest Proposal*, AMERICAN LAWYER, Nov. 1990, at 22.

[109] Alexander Reid, *supra* note 107 at 29 (quoting Gary Singsen, a lecturer at Harvard Law School who was a member of the eight member Advisory Committee which drafted the mission statement and also suggested the additions to the curriculum).

[110] Christopher Edley, a member of the faculty who headed up the advisory committee, stated: "It is a truly remarkable development in that the consensus on the faculty is overwhelmingly supportive of an invigorated public interest mission for the law school. I can't imagine this kind of success five years ago." *Id.*

[111] Don J. DeBenedictus, *Learning by Doing: The Clinical Skills Movement Comes of Age*, 76 A.B.A. J. 54, 55 (Sept. 1990) (most legal clinics are used to teach students about the needs of the poor). Notre Dame has a clinical program which has the express mission of serving the poor and exposing students to indigents' legal problems:

> The [Notre Dame Legal Aid] Clinic exposes students to the legal problems of impoverished clients and permits them to explore interesting legal issues which are often unique to their clientele. All Clinic clients must meet the income guidelines which are based on the national poverty level.

Notre Dame Law School Legal Aid and Defender Association, *Clinic Description*

students will practice public interest law upon graduation, or at least that they will be more likely to participate in *pro bono* work if they join a private firm.[112]

Cost constitutes the primary obstacle in using clinical programs as a vehicle to encourage *pro bono* work among law students. A low student-to-faculty ratio is necessary because clinical programs require close supervision.[113] As a result, many schools must limit student enrollment to only a few students.[114] The supervision and training necessary for successful clinical experiences makes some feel that student clinical programs are not "an economical source of legal services."[115] In response, one group of authors reported that "we know of no work that can be said to have demonstrated that students are such a[n economical] source."[116]

Another problem with using clinical education as a means to influence students to participate in *pro bono* programs is that many clinical professors are considered "second rate."[117] Often, law schools have lower hiring standards for such faculty members and do not offer clinical teachers tenure.[118] Such treatment may well reinforce the student perceptions that working with indigents is "second rate" employment.

5. Financial Incentives

Increased availability of student loans has broadened access to higher education.[119] In particular, loans have made legal education available to many who could not otherwise afford it. However, heavy student loan debt forces new attorneys to reconsider their intial hopes of a public interest practice.[120] As one commentator observed:

(unpublished, no date).

[112] *See supra* note 14 and accompanying text. Practical experience supplements a curriculum which some argue is overly theoretical in nature, rendering law graduates unprepared for legal practice. *See, e.g.*, Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 584 (1987).

[113] Morocco, *supra* note 25, at 66; DeBenedictus, *supra* note 111, at 56 ("Clinical courses admittedly are much more expensive than traditional lecture courses. A clinician can supervise from six to twelve students and their cases in-house, perhaps twice that many on externships. A contracts professor on the other hand, can teach 100 or 150 students in one class.").

[114] DeBenedictus, *supra* note 111, at 56.

[115] H. PACKER ET AL., NEW DIRECTIONS IN LEGAL EDUCATION 40-41 (1972).

[116] *Id.* at 41.

[117] Eleanor M. Fox, *The Good Law School, The Good Curriculum, and the Mind and the Heart*, 39 J. LEGAL EDUC. 473, 478 (1989).

[118] David Lauter, *A Clinical Tenure Track?* NAT'L L.J., Jan. 23, 1984, at 4.

[119] A. Kenneth Pye, *Legal Education in an Era of Change: The Challenge*, 1987 DUKE L.J. 191, 193 (1987).

[120] *Id.* at 194; Morocco, *supra* note 25, at 66. *See also* John R. Kramer, *Will Legal Education Remain Affordable, by Whom, and How?* 1987 DUKE L.J. 240 (1987).

> As much as we would like to avoid acknowledging it, money fuels career decisions and forces career choices. The cost of attending law school is a severe financial burden on many students. Although there are federal and private loan programs available, they do little more than leave the student with a financial albatross when he leaves school. . . . The government or private lender does not care whether a law graduate is doing public-spirited work for the homeless, or hostile takeovers; it simply wants its money. The salaries paid for public interest legal work just do not reflect the reality that most young lawyers, carrying substantial financial burdens, are not independently wealthy.[121]

Understandably, many students abandon public interest careers for jobs in the private sector.[122]

If part of the legal needs crisis stems from the shortage of new attorneys who can afford to practice public interest law, then one way to alleviate the crisis is by increasing the number of financial incentives such as loan forgiveness and other fellowships. For example, in 1989, New York University School of Law instituted a large scale loan repayment program to assist students interested in practicing public interest law but who were unable to do so due to the heavy burden of student loans.[123] Interestingly, New York University targeted its fundraising efforts at attorneys practicing at large, private firms. One of these private attorneys made a leadership contribution of $250,000.[124]

Rule 6.1 of the American Bar Association Model Rules of Professional Conduct suggests that lawyers may discharge their responsibility to perform *pro bono* work by providing monetary contributions to public interest programs.[125] Such contributions enable both those who wish to participate in public interest law but could not otherwise afford to do so, and those who could afford participation but wish to pursue other careers, to fulfill their professional obligation to the underprivileged.[126]

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[121] Wizner, *supra* note 100, at 706.

[122] Pye, *supra* note 119, at 202.

[123] *Campaign Launched to Raise $5 Million for NYU Law School Student Loan Repayment Program*, Nov. 14, 1989 (PR Newswire) [hereinafter *NYU Campaign*]. In 1989, 15 law schools had loan repayment programs for students who embark on a public interest careers following graduation. Jonathan Kaufman, *Are Law Schools Doing the Right Thing?*, BOSTON GLOBE, Sept. 24, 1989, at A27. Currently, 43 schools, eight employers and seven states (Arizona, California, Florida, Missouri, Minnesota, North Carolina and Tennessee) have such loan repayment programs. Telephone Interview with Caroline Durham, National Student Organizer of NAPIL (Oct. 20, 1992).

[124] *NYU Campaign*, *supra* note 123.

[125] MODEL RULES OF PROFESSIONAL CONDUCT, Rule 6.1 (1990).

[126] Some private law firms also contribute to public interest law through their own loan repayment programs. The large New York firm of Skadden, Arps, Slate, Meagher & Flom is one such firm. Skadden's fellowship program consists of 25 law students per year selected on the basis of their commitment to public interest law. For each student selected, the firm pays a salary of $32,500 plus the students' loans for up to two years.

6. Admissions

Law schools could encourage more graduates to practice public interest law by admitting students based on past public service commitment and an expressed desire to practice public interest law in the future. Some experts doubt whether many students are deeply committed to public service upon graduation, and view the admissions process as one way to screen applicants to ensure that some public-service-oriented students are admitted to law school.[127]

Georgetown University Law Center instituted a Public Interest Scholars Program which requires applicants to indicate their intention to pursue public interest careers. The admissions committee considers this intent when reviewing the applications.[128] Students accepted for the Public Interest Scholars Program receive faculty advisors to assist in curriculum decisions and career choices. During their second year, these students (known as Georgetown University Law Center Public Interest Scholars) attend a special section of the school's Professional Responsibility course, focusing on ethical issues confronting public interest lawyers. During their third year, students receive training to practice public interest law in a unique and mandatory class. In addition, Public Interest Scholars are guaranteed at least ten weeks experience at a public interest firm or government agency. If the particular institution does not pay its interns, the school pays the scholars at the rate of a research assistant to a faculty member. The law school also attempts to place Public Interest Scholars in public interest positions following graduation.[129]

Georgetown's program is exemplary because it targets students with an interest in public interest law and then provides them with a support structure sufficient to maintain their interest during law school. One limitation of the program, however, is its size: only eight scholars are selected from each applicant class, with additional space for seven students who apply during their first

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Kathleen Teltsch, *Fellowships Help Promote Public Interest Law*, N.Y. TIMES, Feb. 23, 1990, at B6.

[127] One author made the following somewhat cynical comment about public interest law and the admissions process:

> What happened, then, to all those 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.

Monroe H. Freedman, *The Loss of Idealism — By Whom? and When?*, 53 N.Y.U. L. REV. 658 (1978).

[128] Students not applying for the program during the admissions process may also enroll in the program during their first year. Georgetown University Law Center, Public Interest Law Scholars Program (no date).

[129] *Id.*

year.[130]

7. Teaching Methodology

Law professors often do not employ teaching techniques which emphasize or even recognize the legal needs of indigents.[131] Instead, professors concentrate on the legal needs of corporations and affluent individuals.[132] To some extent the curriculum dictates this focus. Without altering the curriculum, professors could change students' views and attitudes about public interest work and their obligation to serve the underrepresented through the use of illustrative hypotheticals involving indigent subjects.[133]

Another failure of current teaching techniques in the eyes of public interest advocates is the concentration on "black letter" law rather than on the policies underlying the decisions of courts and legislatures.[134] If legal education seeks primarily to prepare students to pass the bar exam, concentrating on legal rules serves this goal.[135] However, since bar exams focus on rules, and there-

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[130] *Id.*

[131] *See supra* text preceding note 35.

[132] Arriola & Wolinsky, *supra* note 103 at 1209-1210; Chris Goodrich, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers; Book reviews*, THE NATION, Feb 12, 1990, at 205 ("The curriculum at almost all law schools is heavily weighted toward corporate law courses. . . .").

[133] STOVER, *supra* note 14, at 119. As noted above, a faculty *pro bono* requirement could result in the use of such hypotheticals. *See supra* note 92 and accompanying text.

[134] James Boyd White, *Doctrine in a Vacuum: Reflections on what a Law School Ought (and Ought Not) To Be*, 18 U. MICH. J.L. REF. 251, 252 (Winter 1985); Cahn & Cahn, *supra* note 40, at 1026. *See also* Arriola & Wolinsky, *supra* note 103, at 1207. Arriola & Wolinsky note the failure of current teaching methodologies to inspire students to consider broad social values:

> The traditional method of teaching law can be deceptive because it leads law students to believe that only those doctrines that are being taught are important in the practice of law; it is frequently inadequate in that students are given little opportunity to test or evaluate such doctrines or compare them with other disciplines. In this regard, law schools are neither designed to nor serve as training grounds where the nation's future lawyers are challenged to consider the character and exigencies of their important social role.

Arriola & Wolinsky, *supra* note 103, at 1212.

[135] *See* ROBERT BOCKING STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 266 (1983) ("Despite all the rhetoric, the American law school was founded and developed as a professional school stressing the knowledge needed to pass the bar examination and to succeed in practice. Although some elite schools had gone beyond these objectives, most law schools retained this fundamental, practical orientation."). One could even argue that the mandatory course in legal ethics taught in each law school is actually oriented on the Model Rules of Professional Responsibility and the Code of Professional Responsibility rather than on why lawyers should act morally. This focus on the rules enables students to pass the MPRE, an exam given by each state bar which tests knowledge of these rules.

fore schools focus on rules, values are consequently underemphasized.[136]

If, however, legal education seeks primarily to train students not only to "think like a lawyer," but to become a "professional," then abstract legal rules must be tied to societal values and policies. After all, legal rules are simply a reflection of society's values. This is not to say that law schools should avoid teaching students legal rules. Indeed, understanding policies and values without expertise in the application of legal rules would lead to incompetence.[137] However, a combination of these two pedagogical goals — training law students to become competent practitioners and training law students to become competent professionals — is an ideal for which law professors should strive.

III. CHANGES IN LAW SCHOOLS IMPOSED FROM WITHOUT

A. *Change the Content of the Bar Exam*

Susan Westerberg Prager, Dean of UCLA Law School and former president of the AALS, asserted: "Bar exams probably have more of an impact on the law school curriculum than any other factor."[138] The former president of

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[136] One commentator, summarizing this position rather than advocating it, made the following statement:

> Law students are taught that it is the system that is the ultimate savior of justice. The people involved occasionally may be corrupt, motivated by greed and self-interest, but as long as the process is pure, then justice, or at least equity, is preserved. This approach makes it irrelevant who the parties are or what their respective social, economic, or political status is.

Wizner, *supra* note 100, at 705.

[137] Wizner, *supra* note 100, at 711 ("A course of study which neglects to describe adequately how the law actually works today fails to provide the groundwork necessary for an examination of whether the law works as well as it should.") (quoting Leon H. Keyserling, *Social Objectives in Legal Education*, 33 COLUM. L. REV. 437, 440 (1933)). Several schools have tried to focus almost exclusively on policy, to the detriment of other legal training. This has sometimes resulted in revocation of ABA and AALS accreditation due to very low bar pass rates. For example, Antioch Law School in Washington D.C. focused its curriculum heavily on policy, and required its students to receive one-third of credits necessary for graduation by serving the city's underprivileged. Lawrence Feinberg, *U.S. Agency Lashes Antioch Law School, Ends $447,000 Grant*, WASH. POST, Sept 10, 1986 at C1. However, the school eventually lost its accreditation due to a low bar passage rate as well as financial problems. Lawrence Feinberg, *Antioch Law School Plans "Calm and Humane" Death After UDC Trustees' Vote Ends Hopes*, WASH. POST, May 31, 1986 at B1. It is ironically fitting that the building that housed the school also housed homeless people until it was destroyed by fire. Debbi Wilgoren, *Fire Damages Antioch Law Building in NW*, WASH. POST, Jan. 2, 1991, at C6. Out of Antioch's ashes arose the D.C. School of Law, which adopted Antioch's educational mission — "teaching through legal clinics, serving the disadvantaged, imbuing students with a sense of public service" — while attempting to improve on Antioch's shortcomings. Saundra Torry, *D.C. School of Law Earns Credit Where Credit is Due*, WASH. POST, Feb. 4, 1991, at F5.

[138] Stephanie B. Goldberg, *Bridging the Law School Gap: Can Educators and Prac-*

the ABA, Talbot D'Alemberte, agreed: "The only other way I know of changing legal education is to get the bar exam changed. You can do that faster than changing accreditation standards, and it has a pretty quick impact. . . ."[139] Assuming that these propositions are true, changing the multistate section of the bar examination to include questions on public interest law — both the legal rules and the public policies underlying these rules — would cause law schools to change their curricula to prepare students accordingly.

B. *Institute an ABA/AALS Accreditation Requirement of "Commitment to Public Interest"*

Accreditation is critical to any law school.[140] Indeed, without accreditation from the ABA and/or the AALS, many law schools would shut down.[141] In forty-three states graduates cannot sit for the bar exam without a degree from an accredited law school.[142] In addition, some student financial aid goes only to those who attend accredited schools.[143] As a result, law school administrations may be particularly receptive to suggestions made by accreditation committees. Thus, if accreditation and reaccreditation required a commitment to public interest law, law schools would probably initiate programs to fulfill such a requirement.

C. *Law School Autonomy*

External imposition of a public interest program on a law school would arguably infringe upon the schools' autonomy. Consequently, the ABA, the AALS, or state bars must carefully craft any public interest requirements. Otherwise, such an imposition may undermine the academic freedom many feel is a necessary characteristic of any great learning institution.[144]

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titioners Agree on the Role of Law Schools in Shaping Professionals? Yes and No, 76 A.B.A. J. 44, 49 (Sept. 1990) (interviewing Dean Prager and other experts on legal education).

[139] Talbot D'Alemberte, *Talbot D'Alemberte on Legal Education*, 76 A.B.A. J. 52, 52 (Sept. 1990).

[140] Currently, 176 law schools are approved for J.D. accreditation by the ABA. Telephone Interview with a staff member of the ABA's Section on Legal Eduction and Admission to the Bar, (Oct. 19, 1992). Of those, 158 are members of the AALS and enjoy AALS accreditation. Telephone Interview with Barbara Studenmund, Administrative Associate for Accreditation, AALS, (Oct. 19, 1992).

[141] NAT'L L.J., Dec. 10, 1990, at 4 (If the University of Oregon loses its accreditation, the school will close); NAT'L L.J., Oct. 8, 1990, at 14 (Unaccredited Atlanta Law School shut its doors when Georgia adopted a requirement that applicants for the Georgia Bar Exam must graduate from an ABA accredited law school.).

[142] Kathleen Snyder, *Court Gets Tougher On Bar Entry*, NAT'L L.J., April 11, 1983, at 5.

[143] *See* Keith Hariston, *Bar Association Accredits District's School of Law*, WASH. POST, Feb. 13, 1991, at D1.

[144] Pye, *supra* note 119, at 202.

IV. A Compromise Proposal

As two commentators have noted, "Law schools have . . . largely failed to propose creative solutions to the problems of sustaining and promoting the practice of public [interest] law."[145] Underlying this lack of creativity is the fact that no single solution can be implemented at all law schools. Some programs would work at some schools but not at others. Therefore, rather than detailing a specific proposal, this section describes some desirable characteristics of a law school public interest program and suggests that each law school should implement a program with as many of the characteristics as possible.

First, the law school must define the nature of the work its program will perform. Not only must the definition of "public interest" or "*pro bono*" be non-partisan, but also, it must require that the work satisfy the legal needs of the poor rather than the causes of various politically active groups. Otherwise, free service may be provided, but the legal needs crisis facing the poor will not be ameliorated. The Law Student Division of the ABA proposed the following definition:

> Be it further resolved that public service work be defined as any legal work performed without compensation (although school credit could be granted) which is provided for indigent clients at no cost to the client or which is performed in the public interest. The notion of public interest espouses no partisan program or philosophy. It is work which, judged on the merits of the issue addressed, furthers justice, fairness and the public good rather than the interests of a client who is represented on familiar commercial grounds.[146]

This definition serves the legal need crisis because it is non-partisan and focuses on indigents' legal needs rather than the goals of special interest groups. Therefore, this definition ensures that the interests of the client, not the "cause," would be paramount.

Cost must play a prominent role in the design of any public interest law program. If the imposition of a public interest program raises the cost of legal education, then many of those from poorer segments of society who aspire to attend law school to serve the legal needs of the underrepresented will be "priced out of the market."[147] Indeed, for any student wishing to pursue a public interest career, the more expensive the law school, the more likely it is that a student will place greater emphasis on starting salaries due to large law school loans.

For those law schools with the money and resources to support a mandatory *pro bono* program, such a program has several advantages. The mandatory

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[145] Arriola & Wolinsky, *supra* note 103, at 1218.

[146] A.B.A., Law Student Division Report to the Assembly, August 1990, No. 90-14 (Aug. 1990) Some groups do not like this definition because it has too much room for the partisan philosophies of program directors to become infused into the program. *See, e.g.*, Washington Legal Foundation Study, *supra* note 40, at 48.

[147] Fox, *supra* note 117, at 483.

nature of these programs benefits the poor because the increased participation provides more hours of free legal service. In addition, these programs ensure that more students would receive exposure to public interest work along with practical training. This experience may result in a higher percentage of new lawyers engaging in full-time or *pro bono* public interest work.[148] Therefore, such programs should be encouraged where feasible. However, mandatory *pro bono* programs cannot comprise the nationwide solution because not all schools can afford such programs.

The least expensive alternative for law schools is to offer a mandatory course in public interest law during students' first or second years. Such an alteration in the curriculum would provide additional exposure to public interest law, increasing the likelihood that students will develop and/or retain a desire to practice public interest law. Many law schools, for political and financial reasons, would likely reject such mandatory courses without some external influence.

Law schools could also improve their students' perception of public interest law by encouraging faculty members to alter their teaching methodologies and to participate in *pro bono* work. For example, if professors changed their teaching methodologies to include indigent clients in some of their illustrations of legal principles, law students' view of public interest law and public interest lawyers might change. In addition, if professors increasingly discussed the values and policies underlying legal rules, law students would be more inclined to think about larger, societal interests.

In addition, professors could fulfill their professional obligation to serve the needs of the economically disadvantaged by participating in *pro bono* work themselves. This participation would provide students with a professional role model and give professors *pro bono* experience. Professors could then use these experiences in class to illustrate the legal rules. This would likely increase values- and policy-based discussions as well as improve students' and professors' perception of public interest work.

Another means of exposing students to the legal needs of indigents would be to promote participation in clinical programs through offering clinical externships. These externships would allow students under the supervision of trained lawyers, to begin working on indigents' cases while still in school. One successful approach several communities have implemented uses lawyers at local law firms to supervise the students' *pro bono* work.[149] This approach has at least three advantages over programs adminsitered solely by law schools. First, the clinical externships provide more students with public interest work opportuni-

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[148] Robert B. Crothy, *Bar Exams Should Be Conducted a Year Earlier*, TEXAS LAWYER, Nov. 19, 1990, at S-2 ("[T]here is no doubt that a healthy dose of reality — that doing *pro bono* work can provide — will have a consciousness-raising effect on today's law students and tomorrow's lawyers.").

[149] *See, e.g.*, William J. Dean, *Pro Bono Digest*, NEW YORK L.J., July 16, 1990, at 3 (discussing ongoing clinical fellowships in Baltimore, Dallas, Chicago, and New York).

ties than clinical programs run by a law school. Second, practicing lawyers supervise the work, drawing on their own experience with indigent clients. This arrangement allows the law student to receive an excellent learning opportunity while the law school incurs only minimal administrative costs. Finally, such a program delivers more *pro bono* work than current clinical programs, thus meeting the legal needs of more indigent clients.

Law schools would be more likely to adopt a program having some of these desirable characteristics if the National Board of Bar Examiners took the initiative to change the content of the bar exam. For example, if the multistate bar exam contained a section on poverty law, as well as relevant policy considerations underlying these topics, law schools would probably adopt such courses. Consequently, many law students — both those who choose courses solely to prepare for the bar exam and those who choose courses to prepare for altruistic service — would take such classes.[150] Furthermore, if the ABA and the AALS discussed a law school's treatment of public interest law during accreditation visits, some schools might be persuaded to place more emphasis on public interest law.[151]

V. CONCLUSION

The dimensions of the legal needs crisis suggest that current legal structures do not adequately serve the poor.[152] The private bar has failed to provide a remedy. Law schools may indirectly contribute to the bar's failure simply because the schools prepare law students to become members of the bar. Law schools may directly contribute to the crisis by failing to inculcate the necessary values which would lead students to practice full-time public interest law or at least to engage in part-time *pro bono* work. Because law schools are part of the problem, they must also be part of the solution. Each law school should prepare its students to become public interest lawyers — whether their commitment is full-time or part-time.

At a minimum, law schools should expose students to the legal needs of indigents. Requiring students to attend a course on public interest law would enhance their exposure. Although curriculum reform is difficult to accomplish, bar associations can facilitate such reform by changing the content of the bar exam and by making "commitment to public interest law" a factor in accreditation and reaccreditation proceedings.

Law schools are generally successful in teaching students to "think like a lawyer." Now law schools must teach students to "act like a lawyer," with all the rights and privileges, but especially the obligations, that are bestowed upon members in this profession.

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[150] *See supra* notes 39, 138-39 and accompanying text.

[151] *See supra* notes 38, 140-44 and accompanying text.

[152] *See* ADKINS, *supra* note 3 and accompanying text.