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Let Me Show You How: Pro Se Deivorce Courses and Client Power

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PRO BONO WORK AND ACCESS TO JUSTICE FOR THE POOR: REAL CHANGE OR IMAGINED CHANGE?

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For the past twenty-five years, the American Bar Association and state and local bars have debated the responsibility of members of the profession to perform pro bono work on behalf of the poorest members of our society.[1] The debate recently extended into whether law students should be expected or required to perform pro bono work.[2] There seems to be no disagreement that the legal needs of the poor are not being met.[3] The debate swirls primarily around whether the responsibility for doing pro bono work is an individual moral decision to be undertaken voluntarily or whether it is a professional obligation which can be imposed upon each member of the bar.

The arguments for and against mandatory pro bono have been examined thoroughly over the past fifteen years in numerous scholarly articles and in law-related presses and journals. Yet, the issue of how to best address the unmet legal needs of the poor remains unresolved. Estimates indicate that presently only approximately twenty to twenty-five percent of the legal needs of the poor are being met.[4] Of the many states that have considered how to address the unmet needs of the poor, several have proposed the imposition of mandatory pro bono.[5] The

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1. *See* Ronald H. Silverman, *Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 888-94 (1991) (tracing the chronology of the debate beginning with a 1972 proposal to the American Bar Foundation).

2. Wendy F. Rau, *The Unmet Legal Needs of the Poor in Maine: Is Mandatory Pro Bono the Answer*, 43 ME. L. REV. 235, 262 (1991) (identifying Tulane Law School as the first law school to impose a requirement of mandatory pro bono on the students); *see also* Caroline Durham, *Law Schools Making a Difference: An Examination of Public Service Requirements*, 13 LAW & INEQ. 39, 40-41 nn.7-8 (1994) (identifying the 20 law schools adopting mandatory pro bono graduation requirements, as well as others that encourage voluntary student efforts).

3. Disagreement does exist, however, as to whether the need has reached "crisis" levels. *See* Committee to Improve the Quality of Legal Services, *Final Report to the Chief Judge of the State of New York*, 19 HOFSTRA L. REV. 755, 846 (1991) (statement by Thomas F. Gleason) [hereinafter *Marrero Committee Report*]; John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 HOFSTRA L. REV. 1229, 1234-35 (1991).

4. Omar J. Arcia, *Objections, Administrative Difficulties and Alternatives to Mandatory Pro Bono Legal Services in Florida*, 22 FLA. ST. U. L. REV. 771, 774 (1995) (noting in Florida the unmet need has been estimated at 20%).

5. Silverman, *supra* note 1, at 894 n.18 (describing the states which have suggested mandatory plans and the resulting action taken by the states).

organized bar membership regularly and routinely has spoken (and voted) against the adoption of mandatory programs.[6]

The opponents of mandatory pro bono offer legal, moral, and administrative objections to the imposition of a mandatory pro bono program.[7] The main legal objections are as follows: (1) mandatory pro bono constitutes a violation of the Thirteenth Amendment's prohibition against involuntary servitude;[8] (2) mandatory pro bono is a violation of the Fifth Amendment in that forcing lawyers to work without compensation constitutes an impermissible taking;[9] (3) mandatory pro bono forces lawyers to represent clients whose interests may not coincide with the lawyers' interests and beliefs, thereby violating lawyers' First Amendment right of freedom of association;[10] (4) mandatory pro bono violates the Fourteenth Amendment guarantee of equal protection because it singles out lawyers from other citizens and requires them to render service to the poor;[11] and (5) the judiciary lacks the inherent authority to order lawyers to perform uncompensated legal work.[12]

The first legal objection regarding involuntary servitude is inapplicable because the lawyer has a choice. The choice may be to not practice rather than perform the service, but that is still a choice. Involuntary servitude contemplates a condition of service where there is no choice. The second legal objection is also inapplicable because, according to established precedent, a taking only occurs when the thing taken is deprived of all value. Therefore, requiring a few hours per year of a lawyer's time does not constitute a taking.[13] In response to the third

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6. *Id.* at 894.

7. *See, e.g.*, Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78 (1990).

8. The Thirteenth Amendment stated, in pertinent part: "Neither slavery nor involuntary servitude, . . . shall exist within the United States. . . . " U.S. CONST. amend. XIII, § 1.

9. The Fifth Amendment states, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

10. The First Amendment states, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ." U.S. CONST. amend. I.

11. The Fourteenth Amendment states, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

12. Rebuttals to each of these legal challenges have been explored elsewhere. *See, e.g.*, Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18 (1990).

13. *But see In re* Nine Applications for Appointment of Counsel in Title VII Proceedings, 475 F. Supp. 87 (N.D. Ala. 1979) (holding unconstitutional the compulsory rendition of

legal objection, assignment to the representation of indigent clients does not require a lawyer to adopt a client's personal beliefs any more than being retained by a client forces the lawyer to adopt a client's personal views. The fourth objection fails because no equal protection claim exists. Lawyers are not a protected class although, by virtue of their monopoly on the practice of law, they are already essentially a special group. Finally, the fifth legal objection has no basis because the judiciary has the exclusive authority to regulate admission to practice and maintenance of the right to practice. The right to order mandatory pro bono falls within the gambit of that authority.

The moral objections raised are that, by establishing a mandatory pro bono obligation, the laudatory nature of volunteering will be removed,[14] and the poor will be subjected to a horde of lawyers who are incompetent to perform the specialized work involved in representing their interests.[15] However, lawyers engaged in voluntary efforts will not be compelled to forgo those efforts by mandatory plans. In fact, those lawyers, in all likelihood, will exceed the requirement of hours by work already being done.

The fear of incompetent lawyers set loose on the already disadvantaged poor raises a concern which, on the surface, appears legitimate. However, assigned lawyers still would be required to meet ethical obligations of providing the competent and zealous representation to indigent clients. Failure to do so would subject assigned lawyers to disciplinary procedures just as failure to provide competent representation to a paying client would trigger disciplinary action.[16]

Interestingly, those who object to mandatory pro bono sometimes are forced to argue against themselves in order to state all of the objections. For instance, the argument that poverty work requires specialized knowledge is countered by the argument that poor people's legal needs are simple and basic and do not require mandating enormous lawyer

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services).

14. *See* Lardent, *supra* note 7, at 80, 82, 88. Mandatory pro bono has been referred to as an oxymoron. *See id.* at 79.

15. There was a hint of concern on this issue expressed by Supreme Court Justice Sandra Day O'Connor. *See* Alan M. Slobodin, *Pro Bono Should Be Free Choice*, NAT'L L.J., May 25, 1992 (mandatory pro bono could become a "recipe for malpractice") (quoting Justice Sandra Day O'Connor speech to the American Bar Association Annual Meeting, August 1991).

16. I have questioned in another article whether disciplinary rules actually do require zealous representation on behalf of poor people. *See* Michelle S. Jacobs, *Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?*, 8 ST. THOMAS L. REV. 97, 102 (1995).

hours.[17] Both arguments have been made in opposition to mandatory pro bono.

The tension surrounding the issue of whether pro bono should be mandatory is fueled by the very nature of our professional work. The lawyer's historical image is that of a public servant. The image presented, both historically and contemporaneously, is that of the lawyer who always answers the call of service, both because it is morally right to do so and because it is professionally required. Historically, the requirement derived from the special duty that lawyers have to "do justice," as well as recognition of the monopoly over the provision of legal services that lawyers enjoy.[18] But the profession caters to the needs and wants of a very limited segment of society.[19] While current levels of competition for client dollars give the notion of monopoly a different pall from historic times, nonetheless, it still is true today that only licensed lawyers are authorized to do individual, unsupervised representation of clients.

Despite our noble, historical call to service, our commitment as a profession to providing access to justice for the poor is conflicting at best. As every state survey in the recent past has shown, the poor still have limited access to our judicial system.[20] Both mandatory and voluntary programs attempt to address the need and neither fare well. Perhaps efforts to resolve the problem of access to justice for the poor

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17. *See* Debra Burke et al., *Mandatory Pro Bono: Cui Bono?*, 25 STETSON L. REV. 983, 989 (1996) (arguing that the needs of the poor are simplistic); *but see* Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1127 (1991) (arguing that mandatory pro bono will burden the poor with unqualified lawyers because the legal needs of the poor are highly specialized).

18. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).

19. It has been stated that 90% of licensed lawyers represent the interest of 10% of the population. Comments by President Jimmy Carter at the ABA cited in Cramton, *supra* note 17, at 1119 (comments by President Jimmy Carter at the 100th Anniversary Luncheon of the Los Angeles County Bar Association).

20. The New York reports say only 20% of unmet needs are being addressed. Maine says 25%. The fact remains that, despite efforts, the poor remain under-served. *See, e.g.*, Patricia J. Brown & Peggi Cornelius, *Dispelling the Myths of Pro Bono*, 32 ARIZ. ATT'Y, Apr. 1996, at 15 (announcing conference to strategize ways to meet legal needs of the poor in Arizona); Marrero Committee Report, *supra* note 3 (New York); James W. Meeker & John Dombrick, *2020 Vision: A Plan for the Future of California's Courts*, 66 S. CAL. L. REV. 2217 (1993) (discussing unmet needs of California's poor); Millemann, *supra* note 12 (Maryland); *Minnesota Supreme Court Task Force on Racial Bias in the Judicial System*, 16 HAMLINE L. REV. 477, 665-93 (1993) (Minnesota's unmet legal need for people of color and the poor); William P. Quigley, *The Unmet Civil Needs of the Poor in Louisiana*, 19 S.U.L. REV. 273 (1992); Rau, *supra* note 2 (Maine); Louis S. Rulli, *Foreword: Pennsylvania Legal Services at Risk*, 68 TEMPLE L. REV. 541 (1995) (citing Pennsylvania Bar Association Task Force for Legal Services to the Needy A-2, Dec. 1990).

are doomed to fail because the profession does not have a clear vision or consensus of what the programs should achieve.

In filing its final report, the Committee to Improve the Availability of Legal Services (Marrero Committee) presented the goal of pro bono service in the manner that the majority of lawyers probably envision it. In the view of the committee, the lawyer's pro bono work should be restricted to improvement of the administration of justice by simplifying the legal process for, or increasing the availability and quality of, legal services to poor persons.[21] The committee stated that "it is grotesque to have a system in which the law *guarantees* to the poor that their basic human needs will be met but which provides individuals no realistic means with which to enforce that right."[22] The committee further stated that a "justice system which allows vast disparities in access to justice based on ability to pay cannot truly be called a system of justice at all."[23] The committee observed that lawyers have a special role in protecting the fairness and legitimacy of our legal system, a legitimacy which cannot stand if people are denied access on the basis of ability to pay.[24]

The Marrero Committee and others hope to provide better access to justice for the poor. However, the committee's approach serves to illuminate one of the problems with pro bono plans regardless of whether they are mandatory in nature. Such plans focus on providing access to a legal system which in many ways is ineffective in dealing with the complexities and realities of poverty. Pro bono programs attempt to place poor citizens in the same seats in the courtroom as those citizens who have the means to hire an attorney. In overly simplistic terms, the plans hope to assist the poor person in having her day in court.

A clear example of the ineffective results of one such plan is supplied by Professor Michael Millemann from the University of Maryland School of Law.[25] In an article supporting mandatory pro bono, Millemann describes a common scene occurring now in Baltimore City Rent Court where tenant after tenant, each unrepresented by

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21. The committee defined the provision of services in this way to intentionally narrow the category of services that would qualify as pro bono. There was concern among the committee that much of the voluntary pro bono effort being undertaken did not inure to the benefit of the poor people whose legal needs were unmet. *Marrero Committee Report, supra* note 3, at 793-94.

22. *Id.* at 775 (emphasis added).

23. *Id.*

24. *Id.* at 793.

25. *See* Millemann, *supra* note 12.

counsel, lines up to receive items called "white slips."[26] These tenants are present because they have received notices of eviction. They are accepting put-out orders and getting the slips so that they can obtain emergency Aid for Dependent Children (AFDC).[27] By agreeing to the put-out, the tenant gives up certain legal rights and remedies that she may have against the landlord.[28] In Millemann's vision of Baltimore City Rent Court several years after imposition of mandatory pro bono, tenants receiving notices for eviction still will line up for white slips, but there will be a lawyer present to explain the rights they are giving up and to counsel them on their ability to proceed on various claims against the landlord.[29]

The problem with this vision is that it still begins with many tenants lined up, after receiving notices of eviction, in Baltimore City Rent Court. The new presence of the lawyer, either in the advising role on the "white slip" line or as assigned counsel to handle the eviction case at trial, will not impact the ongoing inability of the tenant to pay the rent. Representation of the client's counterclaims at trial will mean nothing if the tenant has no way to compel the landlord to make repairs or to ensure that the repairs are made correctly with materials of appropriate quality. In truth, the individual client's battle with housing will be delayed for another day, but the question of whether a net benefit will have been achieved in providing access to justice must be asked.[30] Having one's day in court may be a hollow victory for a poor person.

Traditional notions of "access to justice" entertained by the majority in the profession narrowly embrace only helping the poor to have a voice in court. There is no commitment to alter fundamentally the legal structures which help institutionalize poverty. Despite the Marrero Committee's claim that poor people are guaranteed basic human needs, the Committee's own definition of access more realistically reflects the scope of what pro bono work seeks to accomplish.[31] Neither our

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26. *Id.* at 25.

27. *Id.*

28. *Id.*

29. *Id.* at 76. The vision includes other stages of assistance as well, i.e., actual appointment of lawyers to represent the clients if they chose to go forward. *Id.*

30. The complexity of this issue is explored by Silverman, *supra* note 1, at 1067-70. Without doubt this is a difficult issue for the profession. The individual need for representation is great and efforts to secure representation must continue. However, the inability or unwillingness to recognize the fact that individual representation never can produce sufficient access to legal justice for poor people inherently dooms the ability of pro bono plans to achieve the level of success needed to help the poor.

31. *See supra* note 24 and accompanying text.

society nor legal professionals have accepted the necessity of guaranteeing basic human needs.

In order to fundamentally change access to law and justice for poor people, lawyers would need to accept the premise that the conditions which produce poverty must change.[32] If pro bono work is to matter in any real sense, the work would need to be focused on eliminating the conditions, both legally and otherwise, which produce and institutionalize poverty. In other words, pro bono work would need as one of its goals the accomplishment of social justice. On this point, there is clear disagreement within the bar. The disagreement has been explicitly stated[33] as well as demonstrated in the ambivalence of lawyers toward programs aimed at truly assisting the poor. Whether mandated or not, our view of work performed on behalf of the poor is that it is "charity" work.

Many in our profession are unwilling to undertake pro bono work, reflecting the profession's failure to acknowledge its superficial commitment to the eradication of poverty and its conflict over providing services to the "undeserving poor." The ambivalence is rooted in the ways American culture views the poor. Both our culture and law, as well as the British legal culture from which it came, distinguished between the poor who deserved help and those who did not.[34] Historically, widows and pensioners were considered "deserving poor" to whom the charity of the state was appropriately directed. Immigrants, single mothers, and people of color were not viewed as worthy of assistance from the state. Their conditions of poverty were deemed by the public and political leaders as products of defects in character (either because of immorality, as in the case of single mothers, or because of laziness, as was typically claimed of immigrants and people of color).[35] These people were regarded as undeserving poor. And society put great effort into limiting the amount of benefits they could collect from the state's coffers.[36]

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32. The necessity for fundamental change was noted by Alexander D. Forger in his comments in a symposium on mandatory pro bono. "[An] important aspect is getting the lawyer to see the circumstances that give rise to the problems with which he is now coping. There is a hope always that somebody will want to get into the issue of social justice, not just legal justice." *Comments on Mr. Tabak's Paper*, 1989 ANN. SURV. AM. L. 115, 121 (Response of Alexander D. Forger to Ronald J. Tabak, *How Law Firms Can Act to Increase the Pro Bono Representation of the Poor*, 1989 ANN. SURV. AM. L. 87).

33. *See* Silverman, *supra* note 1, at 1047, 1066 (noting that the bar always has been split on the issue of whether pro bono efforts should be used to effect redistributive justice).

34. *See generally* JOEL HANDLER, THE POVERTY OF WELFARE REFORM (1995).

35. *Id.* at 12-14.

36. *Id.*

The split between the deserving poor and the undeserving poor is firmly entrenched in all of our entitlement programs.[37] Thus, it comes as no surprise that while the Reagan administration pushed for the elimination of the Legal Services Corporation, increased funds were allocated to legal services entities that provided services to senior citizens.[38] The most recent reincarnation of the deserving/undeserving debate was displayed prominently during arguments and debates regarding welfare reform.[39] Single mothers were demonized by both Congress and the President, despite the fact that the program which specifically deals with the children of single mothers, AFDC, constituted approximately two to three percent of the entire entitlement budget.

Because the notions of deserving and undeserving poor are deeply imbedded in our culture, it follows that the law institutionalizes our cultural notions. Thus, the view of the indigent client as "undeserving" unconsciously becomes a part of the reality of the profession. The insidiousness of the view regarding client worthiness is demonstrated in the profession's reaction to the legal services crisis, as well as in the very ways the plights of the poor are discussed within our ranks. When the Legal Services Corporation was under the first stage of attack by the Reagan Administration, to the credit of organized bars throughout the country lawyers rallied and called for continuing and maintaining the existence of the Legal Services Corporation. Many bar associations called upon their members to step forward and volunteer to close the anticipated gap in representation that the loss of funds would create for legal services clientele. The Legal Services Corporation did survive both the Reagan and Bush Administrations. However, deep cuts were made in the programs which have not been restored to date. Local bars in many states reported increases in the numbers of lawyers agreeing to volunteer.

However, in the final analysis, the number of lawyers who agreed to step forward was comparatively small. Many of those volunteering did not actually accept cases from the target client population.[40] The level

37. *Id.* at 28 (discussing the history in the United States of limiting aid for mothers with children to only white women).

38. *See* Rau, *supra* note 2, at 240. This is not to debate that senior citizens are needy of legal services as well, but merely to point out that the retention and expansion of legal services to the elderly, a traditional "deserving" group, was valued (without restrictions based on income), despite some data which suggests that the elderly poor face fewer legal problems then do, for example, single mothers. *Id.* at 238.

39. The virulent attack on single mothers undercut previous attempts to explain attacks on other programs servicing the poor as just the personal agenda of President Reagan. Rather, they demonstrate a systematic approach to the evaluation of the worth of poor people who fit into the definition of the "undeserving poor."

40. The words of Forger underscore that the lack of sufficient voluntary efforts result from

of volunteerism fell woefully short of meeting the new need. As a profession, we expressed our public objections to the reduction and restriction of legal services to the poor but we did not combine the objections with private contributions of lawyer time. Even today, Congress continues to restrict and reduce the efforts of the Legal Services Corporation. Although volunteerism has increased among lawyers, painfully little of that volunteerism is addressed *specifically* to the unmet legal needs of the poor. It is this very aversion to actually representing the targeted population that the Marrero Committee sought to eliminate by restricting what kinds of lawyer contributions would qualify as pro bono.

Further examples of the undercurrent of ambivalence to the necessity for helping the poor can be found in some of the comments opposing mandatory pro bono. It has been argued, for example, that if poor people have access to lawyers at the same level as paying clients, there will be an explosion of litigation which will force the already crowded dockets of the courts to collapse. The implicit, though unstated conclusion is that poor people should be excluded from the process so that the process can continue to function. This is as close to a statement that the rights of the poor are not "important" as one can find.[41] Legal services lawyers have commented that private lawyers, while voicing their understanding and support of the need for representation for poor people, often chastise them when they vigorously pursue a matter on behalf of a poor client. The private lawyers only accept the validity of the representation to the point it does not inconvenience their paying clients or make it more expensive for them to litigate against the poor person.[42] Other lawyers try to evaluate the legal needs of poor people in terms of their material wealth, equating the presence or absence of material wealth as a guidepost for establishing the necessity of counsel.[43] Since poor people lack material wealth, it is regarded as

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overall lack of interest within the profession. "Frankly, the lawyers aren't interested. It is not simply a question of providing the opportunity [for lawyer participation]." *Comments on Mr. Tabak's Paper, supra* note 32, at 120.

41. It seems completely improper to suggest poor people should bear the burden of court congestion. Excluding poor litigants from the courthouse will not solve the problem of docket control as the problem is a result of inadequate funding by state legislatures, not overuse of the courts by the poor.

42. Interview with Andrea Williams and Siobhan McGowan, former attorneys with Bergen County Legal Services, Hackensack, New Jersey, Dec. 20, 1995.

43. *See* Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115, 117 (1992). One such economically-based argument reasoned that poor people may decline to retain lawyers in matrimonial matters because there are not enough assets in the matrimonial estate to justify the expense. *Id.* This ignores the need and value for an orderly resolution of other matrimonial issues for poor people, such as child

inefficient and ineffective to use lawyer time on such matters. Others argue that mandatory pro bono would force lawyers into pursuing meritless claims on behalf of the poor, thereby implying that the poor have no real or legally "significant" problems.[44]

Even within the legal services community, there can be tension and debate as to whether the needs of the poor are properly valued by the lawyers who dedicate themselves to representing the indigent.[45] Some legal services lawyers have argued that, while it is important to represent individual clients in all phases of poverty work, landlord tenant court, family court, consumer matters, and administrative tribunals regarding entitlement, nonetheless the leadership of legal services organizations have not had sufficient appreciation for the complexities of the lives of poor people and have undervalued the need of the client population for institutional change.[46] Included within that critique has been the allegation that the legal services community has failed to include the voice of the poor client in any significant way on the boards which set policy and allocate resources for individual legal services organizations,[47] and also has failed to hire lawyers whose background and ethnicity reflect those of the client population.[48] Finally, the legal services community has been criticized for its failure to understand the intersection of race, poverty, and the ways in which the ongoing deprivation of civil rights for people of color contribute to the institutionalization of poverty.[49] In this way, the legal services

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support and visitation and the equitable distribution of marital debt.

44. *Id.* at 1118. Of all of the disparaging comments, this one is the oddest. Pro bono plans usually call for service in either one of two ways. A lawyer may be required to take one or two cases a year, or some relatively minimal amount of time may be designated to be given over the period of one year or in some cases on a biennial basis. The estimate of hours range from 10-40. No plan requires any lawyer to file a lawsuit on behalf of the assigned client. Moreover, when a client pays a lawyer to represent the client in obtaining redress for an wrong, imagined or not, wouldn't that lawyer have a greater incentive to view a potentially meritless case as one having litigation potential?

45. *See* Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1109 (1990).

46. *See* Paul E. Lee & Mary M. Lee, *Reflections from the Bottom of the Well: Racial Bias in the Provision of Legal Services to the Poor*, 1993 CLEARINGHOUSE REV. 311, 311-21 (Special Issue).

47. *Id.* at 315.

48. *Id.* at 314.

49. *See* john a. powell, *Race and Poverty: A New Focus for Legal Services*, 1993 CLEARINGHOUSE REV. 299, 299-309 (Special Issue). The author critiques the legal services approach of "universality" in the rendering of service: that is, if all poor people are helped, then "minority" poor people will be helped as well. In the opinion of the author, this approach ignores the needs of the legal services populations of color, as there are distinct differences in the lives and conditions of even blacks and whites who live in relative economic parity. *Id.* at

lawyer community is no more free from entrenched notions of worthiness than is its counterpart in the private bar.[50]

The deeply ingrained notion of the selective worthiness of poor people's claims is reflected even in the attitudes of law students, whom for the most part have never participated in representing the interests of the poor. From the vantage of a clinical program, these attitudes are reflected in the students' evaluations of the worthiness of their clients cases and of the worthiness of the clients themselves.[51] It is apparent that the notion of service, for both lawyers and students, is tied to a belief that poor clients should be grateful for the efforts of an attorney on their behalf.[52]

Perhaps the Marrero Committee had this in mind when it recommended mandatory pro bono as opposed to voluntary efforts. The committee understood that lawyers view voluntary efforts as charity.[53] While charity may produce benevolent feelings on behalf of those rendering service, charity work does not necessarily assume the priority that the committee believed provision of legal services for the poor requires. The committee observed that public service work, as a charity, is likely to take lesser rank among lawyers' other professional pressures

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50. *See* Lee & Lee, *supra* note 46, at 312 (stating that it has been suspected by many legal services clients and their advocates of color that members of the legal services community have gained self-esteem by looking down on their poor clients of color); *see also* Silverman, *supra* note 1, at 1038 (arguing that even among most lawyers who are deeply committed to the poor many factors may prevent clients from being able to evaluate the quality of legal services rendered. Among the factors cited are the distancing effects of class and racial attitudes, real or perceived).

51. *See* Jacobs, *supra* note 16, at 101. The suspicion often is echoed in a student's willingness to criticize a client's failure to appear for appointments or court dates as a moral defect. The assumption is made before any investigation is conducted as to why the client missed the appointment. In a discussion of a mock client interview among clinical students at Columbia University, one student commented, after learning that a "client" could not make an appointment because his daughter was ill, that the client should be grateful the clinic wanted to serve him, because there were others that the clinic could serve. The student felt that if the client was not going to be "responsible," then the clinic should not help him. The exercise did take place at the beginning of the semester, prior to the students' exposure to client-centered counseling, but the student's security in the validity of his view was instructive for me.

52. The Honorable Joseph W. Bellacosa of the New York State Court of Appeals was prompted to comment that, "The needy give lawyers something to be proud of as well. They allow us to give rise to greater, more humane heights as professionals. For that, they deserve *not* a patronizing attitude of *noblesse oblige*, but one of great dignity, respect and appreciation." Joseph W. Bellacosa, *Obligatory Pro Bono Publico Legal Services: Mandatory or Voluntary? Distinction Without a Difference?*, 19 HOFSTRA L. REV. 745, 747 (1991).

53. *Marrero Committee Report, supra* note 3, at 823; *see also* Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity*, 96 W. VA. L. REV. 367, 374 (1993/94) (legal culture understands pro bono to be an act of personal charity).

and personal commitments that are not obligatory.[54] Moreover, charity work is regarded as purely a discretionary act of kindness rather than a professional duty.[55] For the poor, charity work provides an uneven and unreliable level of representation.[56]

The discussion above focuses mainly on the influence of tendencies and biases which remain hidden from the lawyer's conscious mind. The discussion presumes that the lawyers involved are competent and not resistant to the "principle" of pro bono. The analysis must take on a different tone when the lawyer involved actively resists or resents the imposition of a pro bono requirement. It is this aspect of mandatory proposals which is most troubling. To assert that the lawyer once compelled will comply with her duty, even if begrudgingly, should not produce a vision of comfort for advocates for the poor.

Even within the very dedicated legal services community it is difficult to ensure a consistent level of quality of service to the client.[57] Office resources, client education, and level of sophistication, as well as client expectation, can seriously impact a lawyer's ability to render consistent quality service.[58] Beyond the issue of willingness, training in lawyer-client dynamics is woefully deficient for most lawyers. Little attention is given in most law school curriculums to the dynamics of the lawyer-client relationship. Nor is it an area where continuing legal education courses abound. Further, we pay little attention, in the few courses that do exist, to the ways in which lawyer-initiated behavior adversely impacts the quality of the lawyer-client interaction. This is particularly troublesome when the lawyer is interacting with a client population that does not reflect the lawyer's own culture and values[59]—a population in which many mandatorily-assigned indigent clients will surely fit.

To this already difficult scenario, mandatory pro bono adds a reluctant or resentful attorney. It would be fair, and probably highly realistic, to assume that the resentful lawyer only will do the minimally-mandated hours under the relevant provisions. There is no incentive to provide a high-quality level of representation to the assigned client, and

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54. *Id.*

55. *Id.*

56. *Id.* at 824.

57. Silverman, *supra* note 1, at 1036.

58. *Id.*

59. The problems that lawyer ignorance can create are explored in Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 346 (1997).

as long as the lawyer performs in a way that is minimally competent, there can be no recourse through disciplinary action either. Such an assignment would technically provide "access to justice" for the client, but in form only—not in substance.[60] Again, we return to the root question: what is mandatory pro bono trying to accomplish?

The social and legal needs of the poor are complex at the same time they are incredibly simple. The poor need to have a standard of living that allows them to escape the clutches of poverty. The law impacts on the ability of the poor to escape poverty in many ways, both by institutionalizing the poverty and by denying that the poverty itself shapes the way law is applied to the poor. The desire to provide access to justice for the poor is a laudatory one, which I support wholeheartedly. However, before our profession can make lasting and permanent progress toward providing that access, we must come to grips with the reality of our own divisions and diversity of opinion.

If the profession wants to provide a measure of social justice to the poor, mandatory pro bono, as we are envisioning it now, will not accomplish this goal. We cannot lull ourselves into feeling good about support for mandatory programs when we know that realistically they are too narrowly constructed to accomplish social justice. If our view of access to justice is closer to the individual representation model, then mandatory pro bono will not help ensure that poor people receive quality representation any more than does the existence of formal legal services organizations. The minimal hours proposed can do little more than help the clients stay in place. Until we can agree as a profession that it is social justice and access to legal justice that we are trying to achieve, mandatory pro bono requirements ring false.[61]

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60. A similar effect is created by The Florida Bar's position on pro bono. Pro bono work is not actually mandated, but everyone is required to report whether or not they have performed any pro bono work.

61. I do not mean to disparage the great efforts made by many lawyers to engage in pro bono work. If it were not for their valiant efforts, the poor would not even be able to maintain the status quo. My comments, however, are directed beyond the status quo and require us to ask ourselves individually, and as members of our profession, whether we want to envision a world in which a person's economic wealth does not control her real access to justice.