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Pro Bono Publico Representation of the Poor: The Good as Enemy of the Best

Rob Atkinson

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A SOCIAL-DEMOCRATIC CRITIQUE OF
PRO BONO PUBLICO
REPRESENTATION OF THE POOR:
THE GOOD AS THE ENEMY OF THE
BEST

LE MIEUX EST L'ENNEMI DU BON.

FRENCH PROVERB

ROB ATKINSON*

I. INTRODUCTION

Professor Carle's symposium has given us a superb chance to reflect on the past and future of pro bono publico representation,¹ particularly as a means of meeting the legal needs of the poor.² But

* Professor of Law, Florida State University College of Law. My particular thanks to Susan Carle, organizer of this conference, and to its sponsor, the Washington College of Law at American University. Russell Pearce's comments on my draft and suggestions for further research were far more generous than his job as the conference's formal commentator could reasonably have required. Kristen Hatcher-Bollen, Susan Avellone, and Jed Freeland provided invaluable research assistance; my friends Sandy D'Alemberte, Stephanie Gamble, and Mark Seidenfeld, gave me their usual encouragement and support, including occasional criticism and correction. Deborah Rhode and David Luban, with whose views on the subject at hand I substantially differ, generously granted me the status of loyal opposition and offered most collegial responses.

1. No such reflection would be complete without reference to the magisterial study, now nearly a decade old but still invaluable, by Ronald H. Silverman, *Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885 (1991), which itself surveys the first generation of mandatory pro bono proposals, *id.* at 888-95.

2. For measures of those needs, see Report of the Florida Bar, FLORIDA BAR FOUNDATION JOINT COMMISSION ON THE DELIVERY OF LEGAL SERVICES TO THE INDIGENT IN FLORIDA (1991); CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC OF THE ABA, COMPREHENSIVE LEGAL NEEDS SURVEY (1993); *Symposium on Mandatory Pro Bono, Committee to Improve the Availability of Legal Services Final Report to the Chief Judge of the State of New York* (April 1990), reprinted in, *The Crisis of Unmet Civil Legal Needs*, 19 HOFSTRA L. REV. 755, 771-79 (1991); see also RICHARD L. ABEL, AMERICAN LAWYERS 128 (1989) ("Lawyers have long been cognizant of the gross inequalities

whenever I reflect along those lines, I'm driven to a sense of paradox, if not a mood of pessimism; particularly here, in this scholarly celebration of pro bono lawyering, I feel a bit like the skunk—or at best the ant—at the picnic. Nowhere is my ambivalence better captured than in the French aphorism I've taken as my epigraph: the best is the enemy of the good.

A. *Defining the Spectrum of Solutions: The Best, the Good, and the Bad*

To be frank (no pun intended), I'm convinced that pro bono representation is a decidedly second-best means of delivering legal services to the poor.³ It is, to be sure, a good thing—much better than nothing—but not the best. To my way of thinking, the best would be a dramatically expanded system of publicly-paid lawyers for the poor.⁴

that characterize the distribution of legal services.”); Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1121 (1991) (“But informed observers agree that there remains a tremendous unmet need, estimated at 75% to as much as 95% of the total legal needs of the poor.”) (citations omitted); Bruce A. Green, *Foreword: Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 FORDHAM L. REV. 1713, 1713 (1999) (“By now, it is a commonplace observation that many people in this country cannot afford a lawyer”); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 86 (1990) (pointing to “the existence of several recently completed, empirically sound studies which demonstrate the gap between legal resources and unmet legal needs”) (citations omitted); Honorable Sol Wachtler, *Introduction: Symposium on Mandatory Pro Bono*, 19 HOFSTRA L. REV. 739, 739 (1991) (quoting Marrero Committee, *infra* note 5, at 774, that “our society has evolved so that the poor need legal help to obtain basic human requirements and to an appalling degree cannot get it”). *But see* John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 HOFSTRA L. REV. 1229, 1234-35 (1991) (criticizing methodology of needs assessments cited in Marrero Committee Report).

3. *See* Wachtler, *supra* note 2, at 740 (“Mandatory pro bono is at best an inefficient way to deliver the very specialized kind of legal services that poor people need.”).

4. I am thankfully not alone in this assessment. *See id.* (“Indeed, almost everyone who has joined the debate about mandatory pro bono . . . agrees that the best way to provide legal services to the poor is to increase funding for legal services and other social programs.”); Cramton, *supra* note 2, at 1136 (“A more desirable alternative to mandatory pro bono, in my view, is an increase in public funding of civil legal assistance for the poor and a deregulation of the marketplace for services that would provide more low-cost alternatives.”); Marrero Committee Report, *infra* note 5, at 779 (“In the long run . . . it is likely that higher public appropriation for full-time professional legal services would be the most effective answer to the need.”); *see also* Consortium on Legal Services and the Public, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE, Agenda Item # 6: Affirm the Crucial Role of Public Funding for Legal Services that Provide Access to Justice for Low-Income Persons (1996).

I should point out, however, that I am not at all convinced that lawyers employed by the government agencies or affiliates are preferable to private lawyers paid from public funds. For a recap of that debate and a useful overview of sources, see Silverman, *supra* note 1, at 1032-37; *see also* SAMUEL J. BRAKEL, JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS AND POOR PEOPLE (1974) (evaluating quality of service among legal aid programs in Wisconsin, Montana and upper Michigan). Indeed, I find myself moved toward Silverman's conclusion: “While the subject is understandably delicate, no effort to evaluate potential institutional changes can avoid characterizing the current delivery system and its personnel in relatively unflattering terms.” *Id.* at 1055. *See also* E. Clinton Bamberger, Jr., *The American Approach: Public Funding, Law Reform, and Staff Attorneys*, 10 CORNELL INT'L L.J. 207, 210-12 (1977) (summarizing the history of the American debate over salaried lawyers and judicare). I lean—again, in quite heartening company—toward a mix of government-employed lawyers and publicly-subsidized private

But—here’s the pessimism—we are not going to see any such thing anytime soon. And—here’s the paradox—in holding out for the best, for publicly paid lawyers for the poor, in some distant future, we may undermine the merely good, pro bono publico representation, in the here and now.⁵

In a very real sense, I admit, Utopian idealism can seriously erode realistic reforms; that is the wholesome kernel of truth inside the prickly hull of my old French chestnut. Half a loaf is undeniably better than no bread, and to insist that the poor will eat cake after the Revolution is to sound more than a bit reactionary, particularly if they are to go hungry in the meantime. But, recognizing that risk, I want to warn of the opposite danger: dismissing realizable if ambitious reforms in favor of merely meliorative measures. For, by proverbial Gallic logic, the converse of my French proverb may also be true: the good may be the enemy of the best.⁶ We must be careful, in other words, not to hand the poor a half-loaf when fuller measures are within our common grasp. And we must be particularly careful if the half-measure is not especially wholesome, and helps push fuller, healthier fare farther out of reach.

My thesis, then, is that the good has become the enemy of the best, unfortunately and unnecessarily. First, I want to show you why pro bono, mandatory or voluntary, is merely good, and not even as good as we have tended to believe. From this discussion will emerge why a system of publicly subsidized legal services for the poor is best. Having thus distinguished the good from the best, I want, in the second place, to show how the good and the best have been at odds. In particular, I want to show how current defenses of mandatory pro

lawyers. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY*, 272 (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*] (calling for a mix of judicare, full-time legal aid lawyers, and other measures); see also James Gordley, *The Meaning of Equal Access to Legal Services*, 10 CORNELL INT’L L.J. 220 (1977) (assessing the relative merits of judicare and staff attorney programs and recommending a mixed system); ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, STANDARD 5-1.2 (arguing that systems for legal aid to indigent criminal defendants should include “a full-time defender organization” and “the active and substantial participation of the private bar”).

5. See *Symposium on Mandatory Pro Bono, Committee To Improve the Availability of Legal Services Final Report to the Chief Judge of the State of New York*, 19 HOFSTRA L. REV. 755, 758-59 (1991) [hereinafter Marrero Committee Report] (“To hold out indeterminately for the perfect societal response, to do nothing at all because we can do only a little, is unwise.”).

6. I am, thankfully, not alone in this fear. Esther F. Lardent reached essentially the same conclusion a decade ago: “The events of the last decade [the 1980s] strongly suggest that the heat and light accompanying the mandatory pro bono debate have diverted considerable resources from the real issue, ensuring access to justice regardless of economic status, without measurably improving such access.” Lardent, *supra* note 2, at 79. I should point out, in fairness to Lardent, that we are not in entire agreement. She is a major proponent and provider of voluntary pro bono, *id.* at 79. I have my doubts about voluntary as well as mandatory pro bono, see *infra* text at I.A.

bono play directly into the hands of those who oppose publicly subsidized lawyers for the poor. Finally, I want to propose a way that the good and the best can be re-aligned, even allied; I would rally them both behind what I call a Good Samaritan Tax, a steeply progressive emergency levy on lawyers as the model for expanded public subsidy of legal representation of the poor from general tax revenues.

The bottom line, alas, is this: in the short run, we may have no better recourse than taxing the bar to meet the legal needs of the poor. But mandatory pro bono is a most dubious form of tax, in terms of both efficiency and fairness. And, what may be worse, its current rationales are less than inadequate; they are subversive of the fairest and most efficient long-run solution, public subsidization. As Professor John MacArthur Maguire prophesied in 1923: "Any plan of doing justice to the poor by doing injustice to the bar will soon collapse."⁷ If only for that reason, we must not sign off on an emergency plan that burdens lawyers alone without simultaneously insisting on a much more nearly ideal system in the not too distant future.⁸

And, lest you think my quest for the ideal system Quixotic, let me give my Utopia a name: Europe. What the right in this country dismiss as undesirable and what leftists despair of as impossible has been the accepted reality there for at least a generation. Our sibling democracies are well ahead of us in what an American scholar described two decades ago as:

the pattern of progression in Western countries: "from a lack of concern for the problems of the legal representation of the poor, to a concept of personal charity mixed in varying proportions with notions of professional obligation, to acceptance of an affirmative duty resting on society as a whole (operating through the state) to meet the need."⁹

7. John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 392 (1923).

8. See Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 73 (1990) (insisting that the government's commitment to increased public funding be "an explicit predicate to a mandatory pro bono program").

9. David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 786 (summarizing the findings of MAURO CAPPELLETTI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975)); see also MAURO CAPPELLETTI, JAMES GORDLEY, and EARL JOHNSON, JR., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES 64 (1975) ("The pattern [in the West] is one of struggle towards realization of the principle that the state must affirmatively and effectively guarantee the right of all to competent legal assistance, wherever and in whatever form it is needed."). What's more, European law has explicitly held that compelled provision of legal services as contemplated by typical American schemes of mandatory pro bono are a form of "forced labor" forbidden by the Convention on Human Rights. Shapiro, *supra*, at 787. See also LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 242-43 (describing the American legal aid system as "a

One would be foolish, of course, to predict that we Americans will inevitably follow the rest of the West from the middle phase of this progression to the final. Indeed, it would be presumptuous to posit that we should. But it would be equally foolish to insist that we cannot, and deeply at odds with liberal values to pre-suppose that we should not. This last claim requires a word of explanation.

B. Claiming the Common Ground: Three Liberalisms Solving the Same Problem

Before turning to the subtopics of my central thesis, I should point out an important matter of perspective. My critiques of pro bono representation, voluntary and mandatory, and my defense of publicly subsidized legal services for the poor are all from a left-liberal perspective.¹⁰ This is particularly significant with respect to my critique of pro bono. Others have offered right-liberal or libertarian critiques of pro bono, particularly mandatory pro bono,¹¹ and illiberal rightwing critiques, even of voluntary pro bono, could easily enough

disaster" that is "distinctively American," in contrast particularly with Western Europe); Rudolf B. Schlesinger, *The German Alternative: A Legal Aid System of Equal Access to the Private Attorney*, 10 CORNELL INT'L J. 213, 217 (1977) (noting, with specific reference to Germany, that "there are some countries where, at least in litigated matters, indigent parties truly stand on an equal footing with wealthy litigants.").

10. More precisely, social democratic. See Schlesinger, *supra* note 9, at 213 (noting that the extensive judicare systems of Germany and Britain were both introduced by social democratic parties).

11. See Scully, *supra* note 2, at 1229, 1269 (criticizing mandatory pro bono from the perspective of "individuals who doubt the claims of the war on poverty or believe that there are solutions short of using the state to compel service."); see also Jonathan R. Macey, *Mandatory Pro Bono: Collective Discharge of Duty or Welfare for the Rich*, 77 CORNELL L. REV. 1115, 1116-17 (1992) (arguing that mandatory pro bono inefficiently requires the poor to expend resources in ways that probably do not reflect their real preferences, creating artificial demand for legal services). Cf. Debra Burke, *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61, 73-74 (1994) [hereinafter Burke, *Issues and Implications*] (setting out objections based on Thirteenth and Fourteenth Amendments); Kendra Emi Nitta, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909, 920-21 (1996) (setting out objections based on First and Fifth Amendments); Debra Burke, *Mandatory Pro Bono: Cui Bono?*, 25 STETSON L. REV. 983, 999-1006 (1996) [hereinafter Burke, *Mandatory Pro Bono*] (setting out First Amendment objections); Scully, *supra* note 2, at 1244-61 (arguing First, Fifth, Thirteenth, and Fourteenth Amendment objections); Shapiro, *supra* note 9, at 762-77 (reviewing First, Fifth, Thirteenth, and Fourteenth Amendment objections). See generally Omar J. Arcia, *Objections, Administrative Difficulties, and Alternatives to Mandatory Pro Bono Legal Services in Florida*, 22 FLA. ST. U. L. REV. 771, 786 (1995) (arguing mandatory pro bono is both inherently unfair and unfeasible); Jennifer Murray, *Lawyers Do It for Free?: An Examination of Mandatory Pro Bono*, 29 TEX. TECH. L. REV. 1141, 1143 (1998) (concluding that the infringement on lawyer liberty inherent in mandatory pro bono is unwarranted in view of the fact that it would not generate enough legal service to meet the needs of the poor, which in any case are a burden all of society should bear). For a particularly scathing denunciation of all forms of compulsory, student "volunteer" work, see Note, *Students or Serfs? Is Mandatory Community Service a Violation of the Thirteenth Amendment?*, 30 LOY. L.A. L. REV. 809, 833-39 (1997). But see Marrero Committee Report, *supra* note 5, at 833, 857-61 (reviewing and rejecting federal constitutional objections).

be inferred.¹² My critique does not rest or build upon these.¹³ Indeed, in what follows, I will take them up only as necessary to distinguish myself from them or, more importantly, to show how left-liberal defenses against them tend to undermine a broader and better left-liberal solution to the core problem, meeting the legal needs of the poor.

On the other hand, while distinguishing my left-liberal position from right liberal critiques of pro bono representation, I want to be careful not to exaggerate the width of the politically relevant spectrum. As I set out what I think is the best solution to lack of legal counsel for the poor, it is important to bear in mind how relatively close it is to what I believe to be a bad solution. In the grand scheme of things, my moderately leftist tax-the-rich-to-spend-for-the-poor solution is not very far from a modified form of laissez-faire provision of legal services, supplemented by generous charity on the part of lawyers and others. My spectrum of best to bad runs, in other words, merely from the social democratic left to the neo-classical right. In what follows, it is extremely important to note how much common ground I share with my right-liberal opponents: we all believe in a vigorous, essentially market economy and a liberal democratic polity.¹⁴ On this particular issue, moreover, we share a common belief that poverty should not bar anyone from the exercise of basic civil rights.¹⁵

What we differ on, accordingly, is the best means to that end, not the end itself. And, even with respect to means, our differences are not as great as they might at first appear. At least from my side, I have no objection in principle to the laissez-faire model. My basic objection is not that purely market means are wrong in and of themselves, but rather that they are bad simply for failing to deliver

12. See *infra* notes 20 and 21.

13. Nor does my paper address constitutional or other technically legal assessments of mandatory pro bono. Here I share the view of Silverman, *supra* note 1, at 955 (“Despite the inclination of many opponents to argue against mandatory pro bono in rather technical constitutional terms, the truly important arguments are more accurately characterized as policy arguments.”) and Cramton, *supra* note 2, at 1126 (“Although constitutional doubts influence the discussion by suggesting a cautious approach respectful of the rights asserted, I believe that the policy issues are likely to be determinative.”).

14. See Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 267 (1995) (outlining common ground of “liberal legalism”) [hereinafter Atkinson, *A Dissenter’s Commentary*].

15. See Cramton, *supra* note 2, at 1113 (“The choice in this instance [for or against mandatory pro bono] is between relative goods rather than between two disastrous outcomes.”). See also ABEL, *supra* note 2, at 133 (“By 1980 . . . the legal profession (if not the courts) had come to view civil representation as essential to the liberal ideal of equal justice under law.”).

the goods, that is, legal services for the poor. The purely private solution, the market supplemental by individual charity, is bad because it is impractical,¹⁶ not because it is in any sense undesirable. If wishes were lawyers, doubtlessly the poor would be well represented.

C. Identifying the Outer Darknesses: Dangers Outside the Visible Political Spectrum

On the liberal political spectrum I thus identify three positions as to legal services for the poor: the centrist “good” of pro bono representation, mandatory as well as voluntary; the libertarian “bad” of private market and pure charity;¹⁷ and the left-liberal “best” of tax-financed public subsidization. All three, however, must be understood as competing means to attain an end their respective proponents, as liberals, all share: getting legal services to the poor in a system of advanced market capitalism and political democracy. Stated that way, the common goal has two correlative aspects, one static, the other dynamic. The more obvious aspect is the dynamic: fixing a current social problem, reforming a severe dysfunction in the market provision of a vital service. The other, static aspect is less obvious but equally important: leaving essentially intact our existing system of market economics and political democracy. We must be careful to observe, here at the outset, how removing either of these aspects, the static or the dynamic, takes us off one end or the other of the spectrum of liberal politics.

If we remove the dynamic aspect, the explicitly liberal goal of getting legal services to the poor, we lapse into some form of illiberalism beyond the libertarian far right of the liberal spectrum. Out here in the ultra-violet zone, attending to the legal needs of the poor simply is not a concern. Rawlsian worries about the “greatest benefit of the least advantaged,”¹⁸ rooted in ancient Judeo-Christian insistence on service to the poor,¹⁹ are nil, if not anathema. Here we

16. See Marrero Committee Report, *supra* note 5, at 822-31 (citing extensive empirical evidence that efforts to increase voluntary pro bono provision of legal services have not succeeded).

17. For a useful, if unsympathetic and Whiggish, historical account of this position, see CAPPELLETTI, *supra* note 9, at 5-27.

18. JOHN RAWLS, A THEORY OF JUSTICE 302 (1971).

19. See *Leviticus* 19:10 (King James) (“And thou shalt not glean thy vineyard, neither shalt thou gather every grape of thy vineyard; thou shalt leave them for the poor and stranger: I am the LORD your God.”); *Amos* 2:6 (King James) (“Thus saith the LORD; For three transgressions of Israel, and for four, I will not turn away the punishment thereof; because they sold the righteous for silver, and the poor for a pair of shoes.”); *Matthew* 25:40 (King James) (“And the King [Jesus] shall answer and say unto them, Verily, I say unto you, Inasmuch as ye have done it

have, for example, both the noble Nietzsche²⁰ and the nutty Ayn Rand.²¹ Theirs is not the resigned Devil-take-the-hindmost sight of Social Darwinism; it is closer to an enthusiastic rooting for the Devil, if not an actual following in his hoofmarks.

If, on the other hand, we remove the static aspect of the liberal goal, preservation of a market economy and a political democracy, we lapse into some form of illiberalism beyond the civic republican or communitarian far left of the liberal spectrum. Out here in the radical, infra-red zone, capitalism and pluralism are not sacrosanct, but near the root of the problem of poverty; indeed, of virtually all evil.²² It is sobering to remember that, within seven years of the Soviet suppression of the Prague Spring, an academic authority could write in a book on legal aid, "In Russia, where laissez-faire ideas had never genuinely taken hold, a new vision was [embraced taken] from the writings of Karl Marx, and Russia was eventually joined by other countries of Eastern Europe."²³ "Joined," indeed.

As my thoroughly tendentious spectrum suggests, I find these two extremes, the far left and the far right, deeply troubling. Nor do I find it particularly comforting that some of them, some of the time, ally themselves with their nearest neighbors in the liberal middle on meeting the legal needs of the poor (or, for that matter, on any other matter). Thus radical communitarians may well call for mandatory pro bono representation, even mandatory student pro bono²⁴ (despite their distaste for liberal education);²⁵ similarly, Randian egoists may well join in libertarian opposition to mandatory pro bono (though not, of course, in libertarian calls for private charity).

Either of these extremes is, I submit, substantially worse than anything in the liberal middle. But I choose the comparative advisedly here, to reserve the ultimate "worse" for later. Though the

unto one of the least of these my brethren, ye have done it unto me.").

20. See FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* (Random House 1967) (1887) (warning against "the instincts of pity, self-abnegation, [and] self sacrifice" as "the *great* danger to mankind, its sublimest enticement and seduction").

21. See AYN RAND, *THE VIRTUE OF SELFISHNESS* 32 (1964) ("Parasites, moochers, looters, brutes and thugs can be of no value to a human being—nor can he gain any benefit from living in a society geared to *their* needs, demands and protection, a society that treats him as a sacrificial animal and penalizes him for his virtues in order to reward *them* for their vices, which means: a society based on the ethics of altruism.").

22. See *generally* ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* (1975).

23. CAPPELLETTI, *supra* note 9, at 28. In fairness to the co-authors, I should point out that this passage appears in a separate section written by Cappelletti, and that the co-authors explicitly announced their intention to let each "reflect[] his particular perspective." *Id.* at xii.

24. Indeed, they may call, even more insistently, for publicly subsidized legal services.

25. See UNGER, *supra* note 22.

goals of these extremists are, I am convinced, much worse than the shared goal of all liberals, from left to right, at least these extremists have one thing going for them: Their motives may well be pure; they may really believe in the justice or virtue of their illiberal ends.

That, alas, is not true of the very worst, the most dastardly and the most dangerous. To identify them, we have to rise above (or, if you prefer, sink below) the political spectrum altogether. Up (or down) here we find the apparatchiks and unprincipled egoists.²⁶ They are, as the Puritan poet Milton said of his time-serving co-religionists in the first great liberal revolution, “hireling wolves whose gospel is their maw.”²⁷ What’s worse, these wolves may well appear in sheep’s clothing, as proponents of the good, even the best—but only so long as it is politically expedient.²⁸ Their motto is, *mutatis mutandi*, the boast of the Vicar of Bray, notorious time-server during England’s Puritan Revolution; that “[H]e has accommodated himself to the religious views of the reigns of Charles, James, William, Anne, and George and that, whatever king may reign, he will remain Vicar of Bray.”²⁹ They may often be our allies, but they can never be our friends.

And this is the worst of the worst: There may be no tell-tale hint of insincerity about them; they may deceive themselves as thoroughly as they deceive others. As George Eliot acutely observed, “the egoism which enters into our theories does not affect their sincerity; rather, the more our egoism is satisfied, the more robust is our belief.”³⁰ Like

26. I have also issued this warning in the broader context of the contemporary professionalism movement. Atkinson, *A Dissenter’s Commentary supra* note 14, at 264; *see also* Steven Lubet & Cathryn Stewart, *A “Public Assets” Theory of Lawyers’ Pro Bono Obligations*, 145 U. PENN. L. REV. 1245, 1245 n.5 (1997) (“We recognize that no amount or quality of argument will win over lawyers who object to pro bono plans on purely monetary grounds.”).

27. John Milton, *Sonnet XVI, To the Lord General Cromwell* (May 1652), in *PARADISE REGAINED THE MINOR POEMS AND SAMSON AGONISTES* 378, 378 (Merritt Y. Hughes ed., The Odyssey Press 1937) (1652).

28. *Cf.* Marrero Committee Report, *supra* note 5, at 812 (suggesting that opponents of mandatory pro bono may “disingenuously” overstate concerns about the competence of compulsory service).

29. George Orwell, *A Good Word for the Vicar of Bray*, in *SHOOTING AN ELEPHANT* 166, n.1 (1950). The good Vicar’s contemporary on the Scottish side of those parlous times was Baillie the Covenanter, immortalized in an essay by Carlyle. *See* Thomas Carlyle, *Baillie the Covenanter*, in *ESSAYS* 112 (J.M. Dent & Sons Ltd. 1950). But their particular mode of amorality was not perfectly wedded with shameless self-promotion until the next century, and across the English channel, in the person of Talleyrand, who managed to serve not only the French Revolution, in all its various permutations, including Bonapartisme, but also the restored Bourbons. Carlyle’s account, is, as usual, as good as any, and a good deal more colorful than most. *See generally* THOMAS CARLYLE, 1 *THE FRENCH REVOLUTION: A HISTORY* 129 (London, Chapman & Hall Ltd. 1837). As the great Carlyle said of the egregious Talleyrand, “A man living in falsehood, and on falsehood; yet not what you can call a false man: Have is the specialty!”

30. GEORGE ELIOT, *MIDDLEMARCH: A STUDY OF PROVINCIAL LIFE* (Alfred E. Knopf ed. 1930).

Woody Allen's Zelig,³¹ such a person simply becomes whatever is most advantageous at any particular time to be, automatically adopting the prevalent political colors with all the camouflaging skill of a chameleon. You can only know them for what they are after they have betrayed you—usually by their insistence that their apparent treachery was really for some higher cause, or your own good. But long before that—indeed, as soon as they become what they truly are—they stand under the highest moral condemnation: “This last is the highest treason, to do the right thing for the wrong reason.”³²

II. QUESTIONING THE GOODNESS OF THE GOOD IN LIGHT OF THE BEST: A LEFT-LIBERAL CRITIQUE OF PRO BONO REPRESENTATION

Within that spectrum of political positions, let us now narrow our focus back to the debate among conscientious leftist and centrist liberals over pro bono representation.

A. *Voluntary Pro Bono*

All along the liberal political spectrum, virtually everyone³³ agrees that voluntary pro bono representation is a good thing.³⁴ The ABA's 1983 Model Rules of Professional Conduct, as amended, proclaim that “A lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year.”³⁵ Those who think that this goes far enough tend to emphasize the virtue of voluntariness;³⁶ those who would like to go further tend to see legally uncoerced pro bono as morally superior on precisely this account.³⁷

It is all too easy to scoff at the ABA's position that the pro bono obligation it announces should not be legally enforceable, as if the notion of a legally non-binding duty were inherently contradictory or

31. ZELIG (Orion Pictures 1983).

32. T.S. ELIOT, MURDER IN THE CATHEDRAL (1935).

33. But not, of course, those outside that spectrum; doubtlessly followers of Ayn Rand, at least some disciples of Nietzsche, and the more rigorous of Social Darwinists would object to any assistance voluntary or otherwise to those less well off than oneself.

34. See Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *FORDHAM L. REV.* 2415, 2425 (1999) (“However the controversy over mandatory pro bono service is resolved, there is ample reason to encourage greater voluntary contributions.”) [hereinafter Rhode, *Cultures of Commitment*].

35. MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

36. See, e.g., Cramton, *supra* note 2, at 1133 (“The better view embraces the preference of private choice over public mandate.”).

37. Wachtler, *supra* note 2, at 743 (“Most importantly, voluntary service is preferable to compulsory service in any endeavor.”). Other proponents of mandatory pro bono—including the committee Judge Wachtler appointed to study the issue—have pointed to serious flaws in voluntary systems. See *infra* text p. 118-23.

automatically hypocritical.³⁸ Many obligations of the highest moral order are of precisely this character; they are binding on the individual as a moral person, though not enforceable by organs of the state as a matter of law.³⁹ To take only the most obvious, the Judeo-Christian summation of the entire moral law—love God with your whole being, and your neighbor as yourself⁴⁰—is exactly of this order. Indeed, it could plausibly be argued that the ABA's asserted duty to provide pro bono representation to the poor is implied by the second, if not the first, of these religious duties.

The voluntariness of the current regime is perhaps its most salient feature. But a second, more basic aspect is hidden by its very obviousness: The individual lawyer's asserted obligation to provide for the legal needs of the poor is to be fulfilled in kind. Lawyers, that is, are to pay these particular social dues with their labor, not with their money. As the debate on mandatory pro bono has made clear, this is hardly the only way that a lawyerly obligation to serve the poor might be met. As an alternative to giving one's professional labor, one could contribute the usual fruit of that labor, money. But this alternative is distinctly disfavored by proponents both of the voluntary regime and of mandatory pro bono.⁴¹ Their reason reveals

38. Cf. Shapiro, *supra* note 9, at 788 ("Though the distinction between enforceable obligation and aspiration has been overlooked by some eminent people [in the debate on pro bono representation], I believe it is an important one that should not evaporate.") (citations omitted).

39. See David Luban, *Faculty Pro Bono*, 49 J. LEGAL EDUC. 58, 58-59 (1999) [hereinafter Luban, *Faculty Pro Bono*] (arguing, in Kantian terms, that pro bono is a moral though not a legal obligation).

40. *Leviticus* 19:18 (enjoining love of neighbor); *Deuteronomy* 6:4-5 (enjoining love of God); *Matthew* 22: 34-40; *Mark* 12:28-34; *Luke* 10:25-28.

41. See A.B.A. Special Committee on Public Interest Practice, *Implementing the Lawyer's Public Interest Practice Obligation*, 63 A.B.A. J. 678, 679 (1977); The Association of the Bar of the City of New York, Recommendation and Report of the Special Committee on the Lawyer's Pro Bono Obligations, Toward a Mandatory Contribution of Public Service by Every Lawyer at 17-20 (1979); Lubet & Stewart, *supra* note 26, at 1301-07; see also Chesterfield H. Smith, *Sixth Annual Baron de Hirsch Meyer Lecture Series; Mandatory Pro Bono Service Standard—Its Time Has Come!*, 35 U. MIAMI L. REV. 727, 731 (1981) [hereinafter *Mandatory Pro Bono Standard*] ("Despite the fact that for some attorneys contributing cash is far more practical than contributing time, personal time—that priceless and unique measure of personal devotion—remains the best contribution an attorney can make to the public interest.").

The Marrero Committee Report tried to have it both ways. It justified a narrow buy-out provision in its proposal, on the one hand, on the grounds that "the primary aim of its plan was to improve the availability of legal services to the poor and thereby also enhance the administration of justice," *supra* note 5, at 802. On the other hand, it rejected a broad buy-out option on the basis of its belief in the "inherent value to individual lawyers and to the profession in having some pro bono legal services provided individually." *Id.* at 805. It should be noted that this ambivalence on the part of advocates for the poor has not always been the case. One of the earliest and most illustrious proponents of private legal aid, Reginald Haber Smith, emphatically called for lawyers to donate their money as well as their time, without expressing any preference for the latter. R.H. SMITH, JUSTICE AND THE POOR 233 (1919) [hereinafter JUSTICE]; see also R.H. SMITH, BALANCING THE SCALES 22-26 (1976) (noting the

something absolutely fundamental about virtually all present and proposed forms of pro bono representation: they are designed to be good not only for the receiver, but also for the provider.⁴²

Proponents of pro bono identify several goods that accrue to the providers of pro bono services one seems to be a sense of moral uplift, the good feeling that most proponents believe (or hope) will (or should) follow from doing the right thing.⁴³ But the most widely cited good, principally recommended for the uninitiated, is education, in any one of several senses. It is sometimes said, in essence, that one who provides pro bono services to the poor will learn how the other half really lives.⁴⁴ Along the same lines, it is suggested that, once one sees how badly off the needy really are, one will want to pitch in even more. If one does, presumably, one will then receive even more of the blessedness that is the giver's primary entitlement and reward.⁴⁵

But in-kind provision of any service, legal representation included, poses problems for both the giver and the receiver, problems that are simply the mirror images of each other. From the perspective of the giver, the problem has been anciently recognized: in matters of charity, the right hand should not know what the left hand does.⁴⁶ In

efforts of Smith and other early leaders of the legal aid movement to encourage financial contributions from the bar and individual lawyers).

42. See Burke, *Mandatory Pro Bono*, *supra* note 11, at 998 (“[N]either collective satisfaction nor buy-out options should be prohibited [under mandatory pro bono plans] unless the only goal is to require attorneys to serve individually for their own edification.”); Shapiro, *supra* note 9, at 782 (“The only argument I can see for the exaction of services without any alternative is that it is good for the professional soul of the draftee—that he will benefit from the exaction because it has made him a better and more understanding person.”) (citations omitted). *But cf.* Lubet and Stewart, *supra* note 26, at 1304-06 (arguing that the presence of high-profile lawyers in lower-echelon courts, where the poor generally appear, raises the level of practice there).

43. See Rhode, *Cultures of Commitment*, *supra* note 34, at 2420 (arguing that the benefits flowing to lawyers themselves from pro bono service “extend beyond the intrinsic satisfactions that accompany public service.”).

44. See *id.* at 2420 (“Because lawyers occupy such a central role in our governance system, there is also particular value in exposing them to how the system functions, or fails to function, for the have-nots.”); see also LUBAN, *LAWYERS AND JUSTICE*, *supra* note 4, at 282 (“Pro bono practitioners have a better chance to understand and represent the interests of members of an entirely different social class and background from most lawyers and their clients; to gain insights into the day-to-day problems of the poor (and of those who adopt their interests), to ‘see around one’s own corner.’”).

45. This analysis omits a third possible beneficiary: those who impose the obligation. See Shapiro, *supra* note 9, at 782 (“And certainly there is little to be said for imposing the service obligation solely to increase the satisfaction of those who are doing the imposing.”). This possibility forms the basis of several trenchant criticisms of mandatory pro bono. See Arcia, *supra* note 11, at 787 (“One must wonder why it is that those who most vehemently petitioned the Supreme Court of Florida to adopt a program of organized voluntary pro bono, and undoubtedly those who may soon petition the court for a mandatory system, are the members of elite groups within the legal community.”); Macey, *supra* note 11.

46. *Matthew* 6:3.

the mild words of the medieval Jewish sage Maimonides, a distinctly better charity is triply anonymous: Neither the giver nor the receiver knows the other, nor does anyone else.⁴⁷ By contrast, when the lawyer delivers legal services directly to the needy client, anonymity on both the donor and donee side is lost. Perhaps, in the older and sterner words of the Christian Gospels, those who practice their charity in public view already have their reward.⁴⁸

Ironically, that is precisely what some, but by no means all, proponents of voluntary pro bono systems like that of the ABA's Model Rules have in mind. One does not have to be completely cynical to suspect that at least one intended function of Model Rule 6.1's call for morally obligatory but legally unenforced pro bono is window dressing, part of the bar's image-polishing campaign in an era of apparently rampant lawyer-bashing.⁴⁹ We have their own word on it.⁵⁰

Nor would it be cynical in the slightest to point out that, in the considered opinion of many, voluntary pro bono is the preferred alternative not only to mandatory pro bono, but also to state-subsidized legal services.⁵¹ Like the conscientious opponents of expanded state responsibility in the last century, they believe that voluntary relief by the helping hands of private individuals is preferable to public provision through the anonymous and coercive arm of the state.⁵² To put their position in terms of my epigram,

47. MOSES MAIMONIDES, *MISHNEH TORAH*, excerpted in JACOB R. MARCUS, *THE JEWS IN THE MEDIEVAL WORLD* 364-65 (1938). Not everyone, apparently, would entirely agree. Cf. Council Wooten, Jr. & John M. Kest, *Legal Services for Those in Need: Every Lawyer's Duty*, 30 TRIAL 53, 55 (July 1994) (suggesting, in the words of another commentator, Arcia, *supra* note 11, at 777 n.50, that "the smile of a child, a heartfelt 'thank you' of a mother, or the firm handshake of a man who is a little better-off is a sufficient incentive for all attorneys to engage in pro bono.").

48. *Matthew* 6:2.

49. Cf. Lubet & Stewart, *supra* note 26, at 1262 ("... image repair, no matter how desirable, cannot provide the rationale for the establishment of a compulsory pro bono obligation."); Shapiro, *supra* note 9, at 789 (conceding that pro bono work may improve the bar's image, but concluding that does not "justify compulsory service"). See generally Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules*, 59 TEX. L. REV. 639 (1981) [hereinafter Rhode, *Perspectives on Professional Codes*].

50. Not always, I should point out, without ambivalence. Cf. Rhode, *Perspective on Professional Codes*, *supra* note 49, with Rhode, Fordham.

51. See Marrero Committee Report, *supra* note 5, at 823 ("Some proponents of voluntarism seem to regard lawyers' public interest service as individual *charity*.") (emphasis added).

52. See Council for Public Interest Law, *Balancing the Scales of Justice: Financing Public Interest Law in America* 42 (noting widespread fears in the 1950s "that if the private bar did not respond to the need to provide legal representation to the poor, the federal government might," particularly in view of the adoption of "judicare" in Britain) (1976); see also Shapiro, *supra* note 9, at 790 ("A persistent theme in the call for increased public service is the perceived danger of state control, and even of the 'socialization' of the practice of law, if the need is not met by lawyers acting on their own.") (citations omitted). The ABA, a pretty good proxy for centrist,

voluntary pro bono over against state funding of legal services is not the good in opposition to the best; it is the best as alternative to the bad, if not the worst.

This is not the place to try to refute that position. (My own view, adumbrated above, is that it is bad simply because it won't work.) But two things about it warrant our attention here. First, it has not, traditionally at least, been the position of the secular left. Thus, for secular leftists who espouse this position, it is worth wondering whom you're marching with, and toward—or away from—what. Moreover, even in terms of traditional religious ethics, this approach has a serious problem. In this respect, Marx and other critics of traditional charity in the nineteenth century merely borrowed a page from Maimonides's charitable account book, particularly the recipient's side of the ledger. Harkening back, knowingly or not, to his call for anonymous charity, they pointed out that having the poor receive their relief directly from private benefactors engenders a degrading sense of beholdenness. It is hard not to get the feeling that those who extend the hand that does the feeding expect it to be kissed, preferably from a kneeling position. And note, too, what else Maimonides implicitly recognized: this sense of beholdenness on the part of the recipient of charity is not altogether good for the giver, either.⁵³

Nor are all the progressive arguments against voluntary pro bono strictly moral. Some of the more telling are economic. Most basically, contributions in kind, all things being equal, may be much less efficient than contributions in cash.⁵⁴ Stated somewhat crudely, contributions in kind tend to require more social resources for a desired level of need or want satisfaction than equivalent contributions in cash. At this point the securities lawyer always makes his or her appearance in debates on pro bono representation.⁵⁵ The

establishment opinion, passed a resolution in 1950 opposing any government role in providing legal services to the poor, *id.*, a position that was not to be reversed for a decade and a half, when the ABA endorsed the *fait accompli* of legal aid provisions in President Johnson's Great Society programs. See Council for Public Interest Law, *supra* at 50.

53. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 244 n.1 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge University Press 1991) (1821) ("The disposition of the master over the slave is the same as that of the slave . . . These two sides, poverty and wealth, thus constitute the corruption of civil society.").

54. See Russell F. Settle & Burton A. Weisbrod, *Financing Public Interest Law: An Evaluation of Alternative Financing Arrangements*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 532, 544 (Burton Weisbrod ed. 1978) ("A well-established theorem of welfare economics holds that, as long as donors do not prefer in-kind to cash contributions, economic efficiency favors cash contributions.").

55. See Cramton, *supra* note 2, at 1127-28 (questioning the efficiency of having "an officer lawyer specializing in corporate tax matters" undertake representation of the poor); Rhode, *Cultures of Commitment*, *supra* note 34, at 2423 ("In opponents' view, having corporate lawyers

specialties of such lawyers, it is often said, seldom have any direct usefulness to the poor. To be sure, these specialists are doubtlessly quick studies, and presumably could come up to speed on areas of law more immediately relevant to indigents.⁵⁶ But, so the argument runs, why don't these specialists simply stick with their day jobs, bill at their regular rates, and set aside an amount equal to their routine hourly rates times the number of hours they would otherwise have worked pro bono? They could then donate the earnings thus earmarked to lawyers specially trained to handle the legal needs of the poor, or to organizations that employ such lawyers. Wouldn't the poor be better off?⁵⁷ It is hard to see why not.⁵⁸

dabble in poverty cases will provide unduly expensive, often incompetent services."); Shapiro, *supra* note 9, at 781-82 (arguing in more general terms for the greater efficiency of exacting pro bono service from lawyers as a "tax" rather than a "draft"); Silverman, *supra* note 1, at 917-25 (analyzing economic incentives for specialized, large firm lawyers to discharge pro bono obligations through alternatives to their own direct provision of legal services to the poor).

56. See Marrero Committee Report, *supra* note 5, at 812 ("Even in an age of pervasive specialization, lawyers are known for their versatility as generalists, for their capacity to master the unfamiliar complexities of cases in areas of the law in which they may have had little or no prior training or exposure."); Cramton, *supra* note 2, at 1127 ("An able lawyer can pick up these skills given sufficient training and hard work."). I assume this for the sake of argument; not everyone is willing to concede the point. See Murray, *supra* note 11, at 1163 (citing concern that many lawyers may not be competent to handle the legal needs of the poor). For a creative solution, see LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 277-82. Luban proposes that lawyers receive pro bono credit for studies that prepare them for doing the legal work of the poor. But, as I argue in the text following this note, that may not be the use of their time that most benefits the poor.

57. This is a time-honored suggestion, traceable not only to giants of the bench and bar, *see, e.g.*, Murray, *supra* note 11, at 1142 (quoting Charles Evans Hughes, Symposium on Legal Aid 1920) ("The lawyer in a great city best discharges his obligation to the poor, not by attempting to deal with matters to which his experience is foreign, but by supporting the legal aid association."), but also to the principle progenitor of the modern legal aid movement. *See* Smith, JUSTICE, *supra* note 41, at 220-25. And this suggestion continues to attract adherents. *See, e.g.*, Mary Coombs, *Your Money of Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3 B.U. PUB. INT. L.J. 215, 220 (1993) ("[T]he poor will benefit more under a plan with a buy-out option than under a straight time obligation, because they will receive either work performed by those who choose to do such work or an equal or larger quantity of services from public interest lawyers funded through monetary contributions."). *See also* Marc Galanter & Thomas Palay, *Let Firms Buy and Sell Credit for Pro Bono*, NAT'L L.J., Sept. 6, 1993, at 17; Burke, *Mandatory Pro Bono*, *supra* note 11, at 997 n.70 (citing other recent proponents); Wachtler, *supra* note 2, at 740 ("Mandatory pro bono is at best an inefficient way to deliver the very specialized kind of legal services that poor people need. The most common and critical problems faced by people in need . . . require the aid of a lawyer who works on a day-to-day basis with the complex and ever-changing maze of statutes and regulations that govern such matters."); Cramton, *supra* note 2, at 1128 ("Funds for the provision of training, backup, and support of thousands of compelled lawyers might better be spent in hiring poverty law specialists to do the job."); Stephen Ellman, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 164 (1990) (same); Marrero Committee Report, *supra* note 5, at 839 (calling for greater public subsidies of legal services lawyers "to deal more effectively and efficiently with the crushing volume of cases requiring special knowledge in these public entitlement laws and procedures").

58. You could, of course, assume a change in taste, the kind of second-order effects that neo-classic economics discountenances. Maybe, for example, the boutique lawyers would donate more of their time to the poor in the future if they saw, first-hand, how needy the poor really are or how rewarding working directly for the poor really is. *See* Ellmann, *supra* note 57,

And, in addition to being more economically efficient—delivering more bang for the buck—this form of privately-funded legal service for the poor has another advantage over traditional pro bono: It separates the giver from the receiver.⁵⁹ This helps break down the relation of subservience that direct donor provision may engender, as we have seen. To be sure, a lawyer will still be providing the needed service, but it is a lawyer who is being paid for the work.

This system of in-cash voluntary provision of legal services, however, has two related disadvantages. One disadvantage is economic; the other, moral. These disadvantages deserve close analysis, moreover, because both of them beset every voluntary system of providing legal services to the poor, whether in cash and indirectly, as I prefer, or in kind and directly, as in the prevailing system.

The economic problem of voluntary provision, whether in cash or in kind, is a special case of the free-rider problem. Any public good financed by voluntary private donations is likely to be undersupplied.⁶⁰ Rather than contribute, some of those who will consume the good in question “free ride” on the contributions of others. Listener-sponsored public radio is a classic example;⁶¹ it’s easy to tune in without paying up. This is an entirely rational strategy for any particular individual, since, by definition, enjoyment of public goods cannot be restricted to those who pay for them. At the collective level, however, this strategy may well result in an

at 164 (citing this possible advantage of in kind payment). You could also tip the scales in favor of the relative inefficiency of pro bono representation by throwing in the benefits to the lawyers themselves from serving the poor directly. But you’d have to be careful here. Some moralists of the highest rank consider that the most moral of actions are done from the purest sense of duty, not from any desire for self-satisfaction. See generally IMMANUEL KANT, *THE FOUNDATIONS OF THE METAPHYSICS OF MORALS* (1969). Thus the security lawyer who toils away extra hours at the Wall Street job in order to donate the extra billings to the poor may be more virtuous than the fellow who puts the time in at Legal Services, precisely because the former derives less pleasure from his charitable work than the latter.

Most opponents of buy-out provisions see it not as bad for the poor, but as unfair to the conscripted lawyer. See Joseph W. Bellacosa, *Obligatory Pro Bono Publico Services*, 19 *FORDHAM L. REV.* 745, 749 (1991) (comparing pro bono buy-out provisions with Civil War paid military substitutes); Statement by Thomas F. Gleason, 19 *FORDHAM L. REV.* 846, 846 (1991) (dissenting from Marrero Committee Report on same ground); see also Marrero Committee Report, *supra* note 5, at 802 (“Opponents of the [buy-out provision of the committee’s mandatory] plan contended that from the public policy perspective this practice would appear no different from the hiring of substitute conscripts by the wealthy to escape military duty.”).

59. See Council for Public Interest Law, *supra* note 52, at 21 (noting that the legal service rendered by the proto-typical legal aid program, that offered immigrants by the German Aid Society of New York in 1876, was not provided as a gift from individual lawyers to individual poor clients thrown together by chance. It was a social service under the third-party subsidy of an independent organization.).

60. MARK SEIDENFELD, *MICROECONOMIC PREDICATES TO LAW AND ECONOMICS* 122 (Anderson Pub. Co. 1996).

61. See Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 *YALE L.J.* 835, 850-51 (1980).

undersupply of the good in question, as each consumer hangs back hoping others will pay. Meeting the legal needs of the poor is an obvious public good, from the perspective of all those who enjoy living in a more just society.⁶² But—here is the free rider problem—that increase in social justice is one that many will be tempted to enjoy without making any contribution of their own.⁶³

This free-rider problem may perhaps be partially overcome by private contributions of money or services. This occurs fairly often in the case of other public goods; think, again, of the example of listener-sponsored radio.⁶⁴ But then the economic problem with voluntary subsidies of legal services to the poor merely gives way to a moral problem: Provision of public goods by voluntary contributions amounts to a tax on the more generous of citizens. A critical public need is met, but only at the expense of the unusually virtuous, those who pay (or work) when others hold back (or out).⁶⁵

These last two problems—the free rider problem and the implicit tax on willing donors—are, I suspect, what lead most leftists to enlist in the cause of mandatory pro bono.⁶⁶ In the next section, accordingly,

62. See B. WEISBROD ET AL., PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 20-29 (1978) (citing as a positive externality of subsidized legal services improvement in “the face of justice,” public satisfaction with the administration of justice); see also Cramton, *supra* note 2, at 1125 (“[T]he widespread unavailability of legal assistance to poor persons undermines ideals we all take seriously (e.g. equal justice under law, access to the legal system, and the rule of law).”) (citing Marrero Committee Report, *supra* note 5); Marrero Committee Report, *supra* note 5, at 774 (“This failure [to meet the legal needs of the poor] takes an intolerable toll not only on the poor but [also] on the public as a whole.”); Shapiro, *supra* note 9, at 789 (“[T]here may be significant benefits to others accruing from [legal] representation that would not be realized if we left all responsibility for such matters with the people directly affected.”).

63. See Shapiro, *supra* note 9, at 789-91 (analyzing likely undersupply of voluntary pro bono legal services to the poor as a classic free rider problem); see also Smith, *Mandatory Pro Bono Standard*, *supra* note 41, at 729 (“The majority of lawyers have used the fact that some lawyers have provided legal assistance to the poor for free, or at a reduced fee, as an excuse not to render any type of public service themselves.”).

64. See Hansmann, *supra* note 61, at 850-51.

65. See Marrero Committee Report, *supra* note 5, at 758 (“To shift the burden to a small force of volunteers is unrealistic and unfair and would condone the shirking of professional duty by those who decline to contribute.”); *id.* at 776 (“Voluntary programs tend to spread the burden of providing legal services unevenly and unfairly”); *id.* at 828-29 (“To shunt the weight of this responsibility to a limited number of volunteers . . . is unconscionable in principle and inherently unfair to those who do contribute.”). Rather ironically, however, the Committee Report heaps scorn on the proposition that voluntary pro bono programs might discourage public funding for indigent legal services. *Id.* at 831-32.

66. See Arcia, *supra* note 11, at 778 (“As voluntary pro bono programs nationwide have failed to adequately address and remedy the increasing legal needs of the poor, so also has it been the trend for the strongest proponents of pro bono service to become frustrated with the ineffectiveness of these voluntary programs, and become ardent supporters of mandatory schemes.”) (citations omitted); Marrero Committee Report, *supra* note 5, at 827 (“In several other jurisdictions in which courts, legal services and organized Bar groups obtained consistently disappointing results from appeals for volunteers, they chose to support judicially-imposed pro bono legal services programs in order to address the critical need.”).

we need to examine the promises and limitations of this alternative.

B. *Mandatory Pro Bono*

Mandatory lawyer pro bono may go a long way toward overcoming two problems of voluntary lawyer pro bono, the free rider problem and the tax on willing donors.⁶⁷ But mandatory pro bono leaves other problems untouched,⁶⁸ and creates some of its own.⁶⁹ It leaves the non-anonymous charity problem essentially untouched; both the recipient and others know the provider. It might be objected, of course, that the provision itself is no longer charitable, and thus potentially degrading to the recipient, once it is made mandatory. But that is only true in general, not in particular. As long as lawyers may turn down any particular client, then, with respect to any such client, the provision of service is a boon.⁷⁰ If you are a poor person, your pro bono lawyer is doing you a favor as long as he or she could have chosen someone else to work for.

As we have seen, even voluntary pro bono representation can sensibly be seen as a sort of substitute tax system. The analogy of mandatory pro bono to taxation is even more obvious, and more

67. I say "may" because no such program has actually been tried on anything but a very limited local level, and, without proper enforcement mechanisms, even the most carefully crafted program would simply regress back to a de facto voluntary system. See Lardent, *supra* note 2, at 79-81 (discussing a few jurisdictions that prevented bar membership instead of preventing practice altogether).

68. As a practical matter, no mandatory pro bono program offers any real hope of actually coming anywhere close to meeting the legal needs of the poor. See Burke, *Mandatory Pro Bono*, *supra* note 11, at 1019 (basing this conclusion on economic models of various pro bono plans); see also Arcia, *supra* note 11, at 797 (concluding that twenty hours of unpaid legal services by every Florida lawyer would nevertheless leave the legal needs of the poor "drastically unmet"). But see Marrero Committee Report, *supra* note 5, at 784-85 (asserting that "the combined contribution of legal services" produced by compliance of most of New York state's 88,000 lawyers with a minimum twenty hours per year requirement "would be significant"); Silverman, *supra* note 1, at 1024, 1030 (conceding that the Marrero Committee proposal for mandatory pro bono in New York state "will fall far short of completely meeting the estimated extreme need," but concluding, on the basis of plausible approximations, that its effect "is difficult to dismiss . . . as quantitatively insubstantial").

69. One of these is the problem of a "hidden" tax. See Cramton, *supra* note 2, at 1134 ("When the costs of a social program are buried in a less visible 'professional obligation,' issues concerning alternative ways to provide low-cost legal services to the poor are also submerged.").

70. See Silverman, *supra* note 1, at 947 ("[T]he lawyer taxpayer may directly control which eligible client, organization or service group receives and retains the use of her tax contribution."). This problem could be lessened, perhaps, by implementing mandatory pro bono through a voucher system, which would allow pro bono clients to shop for their own lawyers, as under *judicare* systems. *Id.* at 1100, 1107. Some academic proponents of mandatory pro bono have proposed the use of vouchers, *id.* at 1099-1108; LUBAN, LAWYERS AND JUSTICE, *supra* note 4, at 279-81, but their ideas have not been taken up in formal proposals. And, even if they were, elements of the problem would remain. Unless lawyers were compelled to take any voucher-bearing client, the ultimate choice would still lie with the lawyer. And every client paying with a voucher, and every lawyer so paid, would know that the service was "free."

problematic.⁷¹ The problem here is inadequate progressivity. Progressive taxation, as its name implies, has been a part of the progressive program since the days of Woodrow Wilson's New Freedom⁷² (if not Robin Hood's Sherwood Forest). Simply stated, it involves taxing the relative well off at higher rates than the less well off, then using the revenues for programs that benefit the latter—taking from the rich to give to the poor, if you will. We haven't the time here to address the moral and economic cases against progressive taxation, though I'm convinced that both can be more than adequately met.⁷³ Deferring that debate for another day—most likely with another audience—I want to show why mandatory pro bono is almost certainly a regressive—or inadequately progressive—form of tax.

On first face, mandatory pro bono seems to be progressive. It does, after all, compel lawyers to confer benefits on the indigent, and the latter class is certainly less well off economically than the former. Indeed, a system of mandatory pro bono can easily be designed to ensure that no lawyer ever confers a benefit on any client who is economically better off. That, so far as it goes, would be perfectly progressive.⁷⁴

There are, however, three progressivity problems. The first has to do with the incidence of the tax, with, in non-technical terms, the question of who will ultimately bear the burden. The argument outlined above assumes that the burden will fall on lawyers; that, however, may well not be true, or at least not entirely true.⁷⁵ Lawyers

71. See Silverman, *supra* note 1, at 942 ("If a tax may be defined as a compulsory levy or exaction, regularly imposed by government without conditioning taxpayer liability on any specific benefit received, surely [the Marrero Committee's mandatory pro bono] proposal qualifies.") (citation omitted); see also Cramton, *supra* note 2, at 1130 ("Whether a pro bono obligation takes the form of an exaction of time, money, or leaves this choice to the individual lawyer, it constitutes a special tax on lawyers."); Ellman, *supra* note 57, at 167-68; John A. Humbach, *Serving the Public Interest: An Overstated Objective*, 65 A.B.A. J. 564, 566 (Apr. 1979); Shapiro, *supra* note 9, at 783.

72. ARTHUR S. LINK, *WILSON: CAMPAIGNS FOR PROGRESSIVISM AND PEACE* 64-65 (1965).

73. See Silverman, *supra* note 1, at 1007 ("[I]t is arguable that real vertical equity requires progressive taxation . . .") (citation omitted). *But cf.* WALTER J. BLUM & HARRY KELVEN, JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* (1953). See generally JOHN F. DUE & ANN F. FRIEDLAENDER, *GOVERNMENT FINANCE: ECONOMICS OF THE PUBLIC SECTOR* 237 (7th ed. 1981) (justifying progressive taxation on the diminishing marginal utility of money).

74. See Silverman, *supra* note 1, at 1006 ("While the burdens of a mandatory pro bono program are hardly trivial in absolute dollar terms, it is also difficult to resist the judgment that many in the profession will be able to bear the burden without a significant adverse impact upon their professional or living standards.")

75. See Shapiro, *supra* note 9, at 783; Silverman, *supra* note 1, at 944 ("Perhaps the most bedeviling uncertainty relates to the very complex phenomenon of tax shifting regularly involves very high, if not impossible, information costs."); see also Ellman, *supra* note 57, at 165-66 (analyzing possibility of lawyers' passing the burden of mandatory pro bono through to

may well be able to pass the real cost of providing “free” legal services to the poor along to their other, paying clients, in the form of higher fees. To the extent that this shifting occurs,⁷⁶ mandatory pro bono, for all its superficial appearance as an in-kind tax on lawyers, becomes a kind of hidden excise tax on the consumers of legal services.⁷⁷ The general justification of such a tax is deeply dubious. Consumers of legal services neither benefit directly from the tax nor uniquely increase the social problem that the proceeds of the tax are used to remedy.⁷⁸ Nor is there any reason to think them more able to pay than the class of taxpayers as a whole, or that subset of all citizens with relatively high incomes. Thus the progressivity of such a tax is at best difficult to assess, and quite possibly negative.⁷⁹

Even if the burden of pro bono representation as an in-kind tax were borne by lawyers, such a tax would still pose real problems of progressivity. In the first place, within the class of lawyers, the lower echelons of lawyers may well already be doing the bulk of uncompensated service to the poor.⁸⁰ A requirement that each lawyer work a set number of hours may in fact enhance progressivity, as upper echelon lawyers typically bill at higher hourly rates. But this potential progressivity can be, and often is, undermined by provisions that let elite lawyers “buy out” at flat rates or substitute the hours of lower-rate, junior lawyers within their firms.⁸¹ Moreover, to the extent

paying clients and concluding that their success is “not clear”).

76. See Shapiro, *supra* note 9, at 783 (explaining that the extent to which the tax can be passed on consumers typically depends on the elasticity of demand for the good or service taxed).

77. See *id.* at 943.

78. See *id.* at 943.

79. See *id.* at 944 (“It will be very difficult to conclusively characterize the Marrero Committee’s tax proposal as either regressive or progressive as long as serious tax incidence questions persist.”) (citation omitted).

80. See Cramton, *supra* note 2, at 1129 (criticizing Marrero Committee mandatory pro bono proposal on the ground that “[m]any lawyers in sole or small firm practice currently provide reduced fee service to the near poor or the working poor”); Murray, *supra* note 11, at 1146 n.29 (“Small firm attorneys argue that ‘the ‘little people’ (small-firm attorneys and sole practitioners) already ‘donate’ many more than fifty hours per year in *actual* service to the indigent and near indigent’ as they ‘routinely collect less than half of [their] agreed-upon fees.’”) (emphasis added) (quoting Letter to the Editor, *Pro Bono Plan Doesn’t Understand Small-Firm Practice*, TEX. L. REV., Sept. 3, 1990, at 2). But see Smith, *Mandatory Pro Bono Standard*, *supra* note 41, at 732 (arguing that even lawyers who work full-time in legal aid or government offices “still have an obligation to provide free legal services outside the scope of their employment”).

81. See Cramton, *supra* note 2, at 1133 (“[M]andatory pro bono proposals tend to be regressive and inequitable, imposing a heavy burden on economically marginal lawyers and harried associates, while treating more gently those at the senior ranks of large law firms.”); Arcia, *supra* note 11, at 785; Steven Weshler, *Attorneys’ Attitudes Toward Mandatory Pro Bono*, 41 SYRACUSE L. REV. 909, 952-53 (1990); Humbach, *supra* note 71 at 566; see also Macey, *supra* note 11, at 1120-21 (criticizing certain features of the proposed New York mandatory pro bono plan as regressively favoring law firms over small firms and solo practitioners); Silverman, *supra* note

that solo practitioners and small firm lawyers are drawn disproportionately from the ranks of minorities and women, as there is at least some reason to believe they are,⁸² then this regressivity may well compound other significant inequities.

In the second place, even a program that was progressive within the class of lawyers might well not be progressive in comparison with the funding of indigent legal services out of general revenues. This becomes apparent as soon as we consider those whom mandatory pro bono programs inevitably exclude from the class of benefit providers—from, in tax terms, the tax base. Since mandatory pro bono systems are effectively in-kind taxes on lawyers alone, they automatically exclude everyone who is not a lawyer. Now lawyers, as we have just seen, are, both as a class and as individuals, better off than the recipients of their pro bono services. But there is no reason to think that lawyers are the best off of all citizens, either individually or collectively. Indeed, it seems much more reasonable to assume otherwise. Proponents of progressive taxation should want a system that taxes non-lawyers also—indeed, a system that taxes them more, precisely to the extent that they are more wealthy. Accordingly, why should the mechanism for delivering legal services to the poor be funded, in effect, by a tax on lawyers alone?⁸³

A phrase from the famous (and recently re-affirmed) *Miranda*⁸⁴ litany should remind us that it isn't: "If you can't afford a lawyer, one will be provided for you by the public."⁸⁵ In the criminal context, as

1, at 1075-76 (noting that Marrero Committee, which proposed mandatory pro bono for New York State, may have under-represented the smaller-firm practitioners, particularly from suburban and upstate areas); *id.* at 998 (providing an analysis of mandatory pro bono as an excise tax "supports the charge that the Marrero Committee's mandatory pro bono proposal discriminates against solo and smaller-firm practitioners."); *id.* at 1005 ("[T]he ability of numerous solo and small-firm practitioners to bear the burden of a mandatory pro bono tax is clearly much less than that of larger-firm lawyers uniquely situated in the extraordinary professional environment of New York City."). *But cf.* Smith, *Mandatory Pro Bono Standard*, *supra* note 41, at 736 ("[T]he bar should encourage large firm lawyers to allow some members to pursue primarily or even exclusively major pro bono projects while the other lawyers in the firm perform their regular work.").

82. *See* Silverman, *supra* note 1, at 1078 ("[A] growing number of solo practitioners may be minority group members or women practicing part-time because of heavy family responsibilities.").

83. I am hardly the first either to raise this question, in these terms, or to give a negative answer. *See* Shapiro, *supra* note 9, at 783-84; Marrero Committee Report, *supra* note 5, at 766 (citing "general agreement that society as a whole has paramount responsibility for solving the problem and that it should respond by augmenting public funds for legal service providers"); *Id.* at 770-71 ("We therefore recommend increased public spending for legal services to the poor.").

84. *See* *Miranda v. Arizona*, 384 U.S. 436 (1966), *aff'd*, *Dickerson v. United States*, 120 S. Ct. 2326 (2000) (holding that Fourteenth Amendment requires states to provide Sixth Amendment right to counsel to criminal defendants).

85. *See* *Gideon v. Wainwright*, 372 U.S. 335 (1963) or, if you prefer, watch Gideon's

everyone who watches television knows, indigent defendants are guaranteed legal representation. And that guarantee, as all lawyers know, rests upon the Constitution.

As every student of Constitutional law—and Poverty Law—knows, the guarantee of a publicly-paid lawyer extends to very few non-criminal matters.⁸⁶ But that is no reason why other legal services to the poor could not be funded in the same way. In fact, of course, some are, and have been for decades. That is precisely what the federal Legal Services Corporation and its local affiliates and analogues do: provide lawyers to indigents in civil matters at the general taxpayers' expense. (And, as we have seen, that is the rule in most of Western Europe today.) But virtually no one believes that this publicly funded system, as currently funded, is anywhere near sufficient to meet all the legitimate legal needs of the poor. Why not expand it?

Here, of course, we meet hard political reality, and here, I shall argue, the response of liberalism's left has been very shallow moral and economic theory. Liberals of the left believe we should expand public provision of legal services to the poor (even liberals of the center believe we should not contract it). But opponents have had the upper hand, and the cause of expansion has been a rear-guard action, not a vanguard, since the end of Johnson's Great Society.⁸⁷

Trumpet (Worldvision Enterprises, Inc. 1985).

86. See *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18 (1981) (holding Federal due process does not require state to provide counsel for indigent parent in child custody case); see also *In re Gault*, 387 U.S. 1 (1967) (providing right to counsel to confined juveniles); *Argersinger v. Hamilin*, 407 U.S. 25 (1972) (extending right to counsel in misdemeanor cases which can result in imprisonment). My long-time patron and present boss, Sandy D'Alemberte, has petitioned the Florida Supreme Court to adopt a rule recognizing the inherent power of Florida Courts to appoint unpaid counsel in civil cases, based largely on a statute to that effect enacted by the English Parliament in 1495, during the reign of Henry VII. Presumably, Justice Holmes's argument against the inherent wisdom of ancient rules, invoking as it does the era of an even more remote King Henry, applies *a fortiori*: "It is revolting to have no better reason for a rule than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from imitation of the past." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). What is more, the precedent of English practice as to appointment of unpaid counsel seems especially weak. See Shapiro, *supra* note 9, at 740-49 (examining English precedents, including the statute of 1495, and concluding that "the case for compulsory, gratuitous service by American lawyers—in particular cases or on a broader scale—cannot be based in substantial part on English tradition."); see also *id.* at 753 ("To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there."). See *e.g.*, *Mallard v. District Court*, 490 U.S. 296, 303-04 (1989) (relying in part on Shapiro's study to reject an interpretation of a federal statute that would have permitted courts to compel lawyers to provide uncompensated services for indigent civil clients).

87. See Talbot D'Alemberte, *The Role of the Courts in Providing Legal Services: A Proposal To Provide Legal Access for the Poor*, 17 FLA. ST. U. L. REV. 107, 109 (1989) ("I have watched with dismay as federal funds for legal services have been held to an obviously inadequate level . . ."); Wachter, *supra* note 2, at 741 (noting that "although greater public funding may be a more efficient and more equitable answer, it is simply unrealistic to believe it will be forthcoming in

Faced with that politically reality, proponents of expanded legal services to the poor made a fateful choice. They essentially abandoned the high ground of publicly funded legal services and turned to a much less ambitious alternative: mandatory pro bono.⁸⁸ We have already seen why, of these two means, mandatory pro bono is the second best. What remains to be seen, in the next section, is how its advocates have played into the hands of opponents of the best.

III. THE GOOD AS THE ENEMY OF THE BEST

The key here is a mistake of moral and economic theory that is also a major blunder of political tactics. Proponents of mandatory pro bono have offered justifications that are not only dubious on their own merits, but also extremely useful to the opponents of publicly-subsidized legal services for the poor. Nor is that the worst of the campaign for the second best. Many of its proponents, having despaired of publicly subsidized legal services and failed at imposing mandatory lawyer pro bono in its stead, have urged—with sad success—throwing law students into the breach. Faced with a series of disappointing harvests, they are suggesting we eat the seed-corn.

the near future,” especially since “the trend in the last decade has been to the contrary.”). For an astute analysis of why elected officials have been, and will likely continue to be, leery of increasing public expenditures for legal services to the poor, see Silverman, *supra* note 1, at 971-84.

88. See Lardent, *supra* note 2, at 101 (“The emphasis on mandatory pro bono . . . constitutes a troubling retreat from the central proposition that addressing that issue [legal aid to the poor] is primarily a matter of public, not professional obligation . . .”). New York’s Marrero Committee was particularly pointed, and poignant, in making this choice. See Marrero Committee Report, *supra* note 5, at 779-80 (“If the Committee were satisfied that higher public appropriations commensurate with the demand were a realistic prospect in the immediate future, it might reach a different conclusion. . . .”); *id.* at 781 (“While the Committee concurs that solutions of the unmet civil legal services crisis is indeed a societal obligation, our point of departure regarding the responsibility issue relates to the question of whether, absent any foreseeable, adequate societal response, lawyers should be obligated to contribute reasonable services and resources to relieve the problem.”); see also Ellman, *supra* note 57, at 167 n.12 (“If no other politically feasible plan for supplying legal services to the poor is now on the horizon, then I believe the tax inefficiencies of mandatory *pro bono* would be worth accepting.”); Alexander Forger, *Mandatory Pro Bono: Yes*, 74 A.B.A.J. 46 (May 1, 1998) (agreeing “that justice is the responsibility of all of society, and that it ought to be prepared to fund the Legal Services Corporation,” but insisting that “until that occurs, I don’t think lawyers can afford to sit on the sidelines.”); Lardent, *supra* note, 2 at 88-92, 95 (tracing the support for mandatory pro bono to disappointment with voluntary pro bono programs that were themselves responses to Reagan-era budget cuts); Rhode, *Cultures of Commitment*, *supra* note 34, at 2424 (conceding that “hiring additional poverty law specialists would be a more efficient way of increasing services than relying on reluctant dilettantes,” but concluding that “[u]nfortunately, the funding increase that would be necessary to meet existing demand does not appear plausible in this political climate”).

A. *The Bad Arguments for the Second Best*

The first dubious justification for mandatory pro bono rests on the premise that lawyers extract inappropriate benefits from society; the second assumes they inflict inappropriate harms. In the first theory, mandatory pro bono re-captures some of the ill-gotten gains; in the second, it provides compensation or deterrence for the wrongs. But in both cases, either there is no such crime or the punishment does not fit it.

1. *Lawyers as Monopolists: Making a Travesty of Trust-Busting*

Here, disassembled into its component parts, is the principal petard with which defenders of mandatory lawyer pro bono are hoisting the left-liberal case for expanded public assistance.⁸⁹

Major premise: Lawyers have a monopoly on the provision of legal services.⁹⁰

Minor premise: This lawyer monopoly prices many poor people out of the market.

Conclusion: Lawyers themselves should meet the legal needs of the poor.

In other words, meeting the legal needs of the poor is a moral obligation of lawyers as a class, since it is lawyers' monopoly on the delivery of legal services that prices the poor out of the market for legal services.

This petard–canard, really, as we shall soon see—has an appropriately peculiar provenance. The notion that law and other professions operate as exploitative monopolies, long the darling of economic theory's far right,⁹¹ has lately become the pet hypothesis of

89. For various versions of this argument, and rebuttals, see Macey, *supra* note 11, at 1121-22 (arguing that lawyers cannot now charge monopoly rents owing to competition from new entrants); Millemann, *supra* note 8, at 72-75 (presenting a version of the monopoly justification); Murray, *supra* note 11, at 1150-51; Rhode, *supra* note 34, at 2419 (summarizing argument); Wachtler, *supra* note 2, at 740 (summarizing lawyer monopoly argument and parallel argument about other licensed occupations); see also Cramton, *supra* note 2, at 1126, 1134-36 (stating and rejecting monopoly rationale); Marrero Committee Report, *supra* note 5, at 783 (“[B]oth the lawyers’ greater public obligations and their related privileges give rise to the public’s right to place reasonably greater burdens on lawyers than on other citizens to improve our legal system.”); *id.* at 780 (recounting lawyers’ special duty, beyond that of ordinary citizens, “arises principally from the lawyer’s possession of unique training and skills and of the exclusive, publicly granted franchise to practice law.”); Silverman, *supra* note 1, at 1018-19 (“Lawyers have a certain collective responsibility . . . for the high costs of access to our formal system of justice.”); see also *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 *FORDHAM L. REV.* 1751, 1786 (1999) [hereinafter *Fordham Conference Recommendations*] (“Access to justice is the responsibility of every lawyer.”).

90. *Cf.* Cramton, *supra* note 2, at 1136 (“[I]t is no longer accurate to speak of a professional monopoly.”).

91. See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

sociology's far left.⁹² But its tersest statement came from socialism's literary left, in George Bernard Shaw's dictum that "All professions are conspiracies against the laity."⁹³

The traditional view of both sociology and economics was just the reverse. Both functionalist sociologists and welfare economists have seen professions as means of ensuring that difficult-to-evaluate services get delivered to consumers at reasonable prices. The truth, as most scholars are coming to admit, doubtlessly lies somewhere in the middle, between traditional functionalist theorists on the one hand and revisionist dominance theorists on the other.⁹⁴ Some aspects of professional regulation are clearly monopolistic; others, equally clearly pro-consumer;⁹⁵ still others, like high standards of legal education, may be pro-consumer in the net and the long run, though not without identifiable costs to some in the short run.⁹⁶

Recognizing this complex truth about the bar's putative monopoly on legal services is particularly important in the context of providing legal services to the poor, for two reasons. The first has to do with those aspects of professional regulation that are anti-competitive; the second, with those that are legitimately pro-consumer. Ideally, the former should be identified and simply eliminated.⁹⁷ This would predictably lower the cost of legal services, enabling more of the poor or nearly poor to afford lawyers. A perfect example, long advocated by liberals of both the left and the right, would be licensing para-professions to perform a wide range of relatively straightforward legal jobs that have been unnecessarily limited to lawyers.⁹⁸

92. See generally RICHARD L. ABEL, *United States: The Contradictions of Professionalism*, in 1 *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* (R. Abel & P. Lewis eds. 1989); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977).

93. GEORGE BERNARD SHAW, *THE DOCTOR'S DILEMMA*, act I (Brenatno's ed., 1923) (1911).

94. See Atkinson, *A Dissenter's Commentary*, *supra* note 14 (summarizing trends in academic treatments of professionalism from positive to negative and back to a more balanced middle).

95. See Shapiro, *supra* note 9, at 787 ("Some of these ethical standards may exist because the imperfections of the market make it impossible to rely solely on free competition among suppliers. Other standards may reinforce those imperfections. And still others may be rooted in concerns transcending the functioning of the market.") (citations omitted).

96. See Silverman, *supra* note 1, at 1019 (citing legal education as example of the organized bar's "long and controversial history of promoting high-cost justice systems, sometimes seemingly for the best of reasons"). Cf. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 108-09 (1976) (noting anti-competitive motives that often accompanied efforts to raise standards of legal education).

97. See Silverman, *supra* note 1 at 945 ("The classic concern, of course, is that an unregulated monopoly will restrict output or curtail service to maximize prices.") (citation omitted).

98. See Burke, *Mandatory Pro Bono Standard*, *supra* note 11, at 989 ("A preferred alternative to attorney involvement in these problems might be paraprofessional specialist involvement."); see also Cramton, *supra* note 2, at 1137 (recommending, in a range of preferable alternatives to mandatory pro bono, that "the bar should seek to further the competitive marketplace in the

The second reason, concerning legitimate professional regulation, is even more critical. To the extent that a particular restriction on the delivery of legal services operates in favor of consumers, it makes no sense to see lawyers themselves as its principal beneficiaries. If the public is the real and intended beneficiary of such measures, then their incidental cost—pricing the poor out of the private market for such services—is properly laid at the feet of the public, not the bar. Accordingly, it is the public, not the bar, that should properly finance legal services to the poor.⁹⁹

Steven Lubet and Catheryn Stewart have offered a variation on the lawyer monopoly justification of lawyers' pro bono obligations that tries to take account of this latter point.¹⁰⁰ They concede that many of the price-increasing aspects of the regulation of the delivery of legal services, in particular the ethical and evidentiary rules designed to protect confidentiality, are pro-client rather than anti-competitive. They argue, however, that lawyers themselves nonetheless reap the benefits of such rules, principally in the form of higher fees. Since these rules are, in effect, "public assets," some of the unearned "rents" lawyers derive from them may appropriately be "recaptured" in cash or in kind through mandatory pro bono programs.

This is a subtle but ultimately unsatisfactory refinement, for two reasons. First, Lubet and Stewart confuse monopoly rents with price increases attributable to consumer-friendly regulations and other real costs. They argue, for example, that lawyers, protected as they are by more aggressive confidentiality rules, are at a competitive advantage over against alternative providers, particularly accountants, of

delivery of routine legal services by abandoning some restrictive practices that reduce the availability and increase the cost of routine legal service."); Green, *supra* note 2, at 1727 ("[I]t has become increasingly plain that, with training, individuals who are not licensed to practice law may competently assist low-income persons in dealing with legal problems that are not being addressed by lawyers."); Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *FORDHAM L. REV.* 2241, 2241 (1999) ("Nonlawyer legal assistance is a necessary ingredient of any plan for meaningful access to the courts."); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 *GEO. J. LEGAL ETHICS* 209, 213 (1990) (noting that "do-it-yourself" kits are available for lay persons representing themselves); Shapiro, *supra* note 9, at 791 (arguing that preservation of a putative lawyer monopoly cannot justify mandatory pro bono, because elimination of any such monopoly would be socially beneficial); see also LUBAN, *LAWYERS AND JUSTICE*, *supra* note 4, at 269-72 (calling for the deregulation of routine legal services). *But see* Smith, *Mandatory Pro Bono Standard*, *supra* note 41, at 735 ("If the profession does not provide the needed service, the public will have no choice but to permit encroachment by nonlawyers.").

99. See Lubet & Stewart, *supra* note 26, at 1248 ("While the need for broader legal services is relatively easy to demonstrate, it has not been rigorously established that individual lawyers should bear the burden of meeting that need.").

100. See *id.*; see also Silverman, *supra* note 1, at 945-46 (comparing mandatory pro bono proposals to classic public utility regulation in general and to obligation of public utilities to provide free or below-cost service in particular).

otherwise fungible services. Without the greater confidentiality that lawyers can offer under publicly created rules, clients might purchase tax advice from accountants at lower rates. Since they cannot—so the argument runs—lawyers are able to pocket the difference between their rates and the lower rates of accountants as additional profits.

But this argument assumes that there are no legitimate, pro-competitive reasons for protecting information in lawyers' hands more than in accountants' hands. If there are not, then the appropriate response would be to extend the fuller protection to accountants and perhaps others, or to deny it to all; this is but a special case of the elimination of lawyer cartelling, which I advocated above. On the other hand, if there are pro-competitive reasons for giving lawyers special advantages, then it is unlikely that lawyers will be able to collect monopoly rents on their more valuable services. Rather, competition among lawyers should eliminate any such rents.¹⁰¹ To be sure, the services of lawyers, enhanced by the greater protection the law affords client secrets in their hands, may well cost more than analogous services from other providers. But this will be attributable to the real costs of training lawyers or protecting secrets, not to any anti-competitive extraction of monopoly rents by lawyers.¹⁰²

The second problem with the Lubet-Stewart “public assets” theory is that it proves too much. As they rightly argue, the secrets that the law protects in the hands of lawyers are a species of property that could not exist without legal protection. But this is true of all property; as Bentham rightly perceived, “Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”¹⁰³ David Luban, explicitly generalizing from Lubet and Stewart's point,¹⁰⁴ suggests otherwise: “In principle, pharmaceuticals and food could be produced and marketed without with intervention or even existence of the state, which confines its role to regulating and policing

101. See Ellman, *supra* note 57, at 168 (“[A]lthough it is true that the bar has a monopoly on the right to perform legal services, individual lawyers do not exercise monopolistic power.”) (citation omitted).

102. Typical of Lubet and Stewart's confusion is their lumping real costs like legal education together with likely anti-competitive practices like state-by-state bar exams and admissions as “barriers to entry.” Lubet & Stewart, *supra* note 26, at 1259. In technical economic parlance, barriers to entry refer only to artificial, cartel-imposed restrictions, not real costs.

103. JEREMY BENTHAM, *THEORY OF LEGISLATION* 113 (2d ed. 1950); see also Ellman, *supra* note 57, at 168 (rejecting distinction between lawyers and grocers on the grounds that both occupations in their present form are “very much a matter within the actual or potential control of the modern state”).

104. David Luban faults Lubet and Stewart for failing to see how much lawyers benefit from all law, not just the specific aspects they rely on. Luban, *Faculty Pro Bono*, *supra* note 39, at 64 n.12. But he himself, in turn, fails to see that the same point applies to all other citizens as well.

markets.”¹⁰⁵ “In principle,” perhaps. But when drug-abusers burglarized my father’s veterinary hospital when I was a boy, I became a practical, if limited-purpose, Benthamite. And, short of Utopia, even libertarians prefer states to anarchy, if only to protect their property.¹⁰⁶

It is precisely this inevitably state-backed, social basis of property that justifies taxation to meet social needs. It is doubtlessly appropriate to tax lawyers to provide for such needs, on account of the benefits they themselves reap from living in a civil society. But there is no reason to limit what these taxes buy to legal services for the poor. On the other hand, and much more to the present point, there is no reason to tax lawyers any more or less than others who share that very general benefit.¹⁰⁷ The only real question is who to tax, and how much. This, of course, only takes us back to where we began: the social democratic preference for progressive taxation. If we could prove in the case of lawyers how much they benefit from particular socially-created “property,” then it might well be appropriate to tax them on that basis. That, in effect, is what user fees are for. But we lack the critical data to charge lawyers’ user fees for the “public assets” Lubet and Stewart purport to have identified. Even Lubet and Stewart concede that they have “not been able to locate the appropriate number of pro bono hours”; though they “posit that it probably lies between 20 and 50 hours per year,” they leave that range as a pure, unproved postulation.¹⁰⁸

By arguing otherwise, in order to persuade the bar to favor a second best measure, mandatory pro bono, proponents of that measure give opponents of publicly funded legal services a valuable argument. If the shortfall in legal services to the poor is the fault of lawyers, then it would hardly be fair to impose that burden on the innocent public. Thus, in arguing a dubious moral case for their second-best measure, proponents of mandatory pro bono play into the hands of the opponents of the best and fairest solution to a

105. Luban, *Faculty Pro Bono*, *supra* note 39, at 63.

106. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

107. David Luban is thus entirely right to insist that law professors have obligations precisely parallel to those lawyers who provide legal services to the poor. Luban, *Faculty Pro Bono*, *supra* note 39, at 68. And he is quite right to insist, further, that our obligation is greater than that of impecunious humanities professors. *Id.* at 67. But I think he is wrong not to think that the same principle of social obligation applies to everyone, and is measured better by their income or net economic worth than by their proximity to the practice of law.

108. Lubet & Stewart, *supra* note 26, at 1307. Lubet and Stewart concede there are flaws in their analogies to other public assets but their analogies are informative in that they illustrate the uniqueness of the relationship between public assets and the practice of law.

general social problem.¹⁰⁹

2. *Lawyers as Polluters: Imposing a Pseudo-Pigouvan Tax*

Lubet and Stewart purport to find the justification for a special tax on lawyers in special benefits lawyers derive from the law. David Luban takes the converse approach, finding his justification in the harms lawyers inflict through the law.¹¹⁰ Against the argument that mandatory pro bono is a “conscription tax” on the role of lawyers, Luban recommends it as a way “to guard against third-party harms created [by] the business-as-usual work of that role—‘externalities,’ an economist would call them—inflicted upon the unrepresented.”¹¹¹

This externality argument, like the monopoly argument (which Luban also deploys), is designed to explain why lawyers have a special obligation, over and above that of the citizenry in general, to meet the legal needs of the poor. The reason, so the argument runs, is that harm to others, in particular the poor, is a necessary by-product of the lawyer’s role in an adversarial system of justice. Luban’s reference to externalities suggests that he has in mind a kind of effluent tax or enterprise liability, at least by analogy.

There is, as the bulk of Luban’s book shows in persuasive detail, a dangerous model of lawyering—the standard conception, as he calls it there,¹¹² or neutral partisanship, as he calls it elsewhere.¹¹³ That model calls for lawyers to concern themselves solely with client gains and to ignore, as far as the law will allow, harms to third parties and to the public at large. And, as he suggests with particular reference to unrepresented poor people in housing court, doubtlessly the

109. *But see* Wachtler, *supra* note 2, at 743 (“It will certainly be more difficult to generate public support for such measures [as increased public funding for legal service organizations] if attorneys do not consider the problem significant enough to make sacrifices of their own.”).

110. Luban has his own version of the monopoly theory, which he couches in essentially social contract terms. Lubet & Stewart, *supra* note 26, at 1262-84; Luban, *Faculty Pro Bono*, *supra* note 39, at 63-70. The complementarity of these benefit-reaped and harm-wrought theories is not, as Luban points out, accidental: “These two sources . . . correspond to the social contract principle and the no-harm principle that most soft-line libertarians accept.” LUBAN, *LAWYERS & JUSTICE*, *supra* note 4, at 287. Interestingly, however, Luban emphasizes the benefit-reaped, not the harms-wrought, justification in his most recent defense of pro bono. Luban, *Faculty Pro Bono*, *supra* note 39, at 63-70.

111. Lubet & Stewart, *supra* note 26, at 1287; *see also* Silverman, *supra* note 1, at 1022 (“Such a problem of negative externalities, as the economists call it, is a classic justification for both certain forms of public regulation and some longstanding excise taxes.”).

112. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 4, at xix-xx.

113. DEBORAH RHODE & DAVID LUBAN, *LEGAL ETHICS* 135-36 (2d ed. 1995). I prefer this latter term because, as I have said elsewhere, it tends “to emphasize the two key elements of this model and the fact that this model is not the only option available to lawyers in our culture.” Rob Atkinson, *Neutral Partisan Lawyering and International Human Rights Violators*, 17 *FORDHAM INT’L L.J.* 531, 531 n.1 (1994).

doings of some of these lawyers directly do-in the poor. I have long since joined ranks with Luban and a host of others, in and out of academia, in condemning such lawyering, particularly with respect to innocent and indigent victims. Legal though it may be, “tricking the good in a bad cause is bad”—you can quote me on that.¹¹⁴

I have also argued—again, in the good company of many others—that this form of lawyering is notoriously difficult to correct either by classic, command-and-control legal regulations or by traditional tort remedies.¹¹⁵ Here, one might reasonably think, attention to other fields of regulation might provide useful cross-pollination. In particular, the law of lawyering might borrow from environmental law the notion that the level of noxious by-products can be reduced to a more nearly optimal level by burdening those by-products with a tax designed to bring their otherwise “external” costs or harms home to roost with their producers. Similarly, we might borrow from tort law the concept of strict product liability, the notion that those who benefit from the sale of products that produce foreseeable harms should compensate those who suffer from those harms.

But, whatever the validity of these approaches in their proper fields, they hardly seem a plausible basis for a mandatory pro bono requirement on the part of all lawyers. Most obviously, the burden of the mandatory pro bono system is not designed to rest on those who directly harm the poor—those whose hired-gun, no-holds-barred practice produces the analogue of noxious effluents or accidental injuries. Instead, Luban, like other proponents of mandatory pro bono, explicitly anticipates that virtually all lawyers would have to shoulder equal parts of the pro bono burden, irrespective of how scrupulously they practice, or for whom.

But why burden the innocent along with the guilty, the virtuous lawyers along with the vicious?¹¹⁶ It is as if organic farmers were taxed

114. Rob Atkinson, *Br'er Rabbit Professionalism: A Homily On Moral Heroes and Lawyerly Mores*, 27 F.S.U. L. REV. 137, 141 (1999).

115. Atkinson, *A Dissenter's Commentary*, *supra* note 14, at 280-302; Ellman, *supra* note 57, at 146. Cf. David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392, 422 n.152 (1990) (“[I]t seems odd to demand redress for an injury while not requiring the lawyer to avoid it in the first place, by assuming a less adversarial role.”).

116. See Ellman, *supra* note 57, at 169 (“It is not clear why lawyers whom we *want* to inflict externalities [that tend to promote justice] should be liable for those externalities at all, nor why lawyers who inflict varying degrees of externalities should be subject to the same measure of redress.”); Silverman, *supra* note 1, at 1022 (“While it is clear that not all working lawyers are equally involved in professional work that adversely affects the welfare of lower-income persons and populations, any mandatory pro bono program that tried to differentiate lawyers, based on the actual degree of low-income injury caused, would be hopelessly expensive if not impossible to administer.”).

on the production of vegetables to reduce the use of harmful pesticides, or solar-powered electrical producers were assessed the same per-kilowatt sulfur dioxide effluent fee as coal-powered plants. The absurdity in each case is obvious: If you want to discourage the bad, you don't impose the same penalty on the good. Mandatory pro bono is not absurd, but neither is it analogous to an effluent tax or strict product liability. It is not a tax or liability system designed to curb anti-social conduct; it is a tax (or draft) designed to conscript social resources.

In anticipating this response, Luban and his allies allege a form of lawyer-generated harm that is far too generalized to make their case. The problem, they insist, is not merely with individual lawyers practicing by an ethically contemptible model on behalf of morally dubious clients. The problem, rather, is that our legal profession—indeed, our system of justice—is adversarial. And, if some “office” lawyers are outside the court system altogether, they nevertheless “set up a network of social practices from which the poor are, willy-nilly, excluded.”¹¹⁷

If this generalization were true, it would prove entirely too much. Read for all it's worth, it comes close to a *tout court* condemnation of law, or capitalism, or both; as such, it risks lapsing out of liberalism altogether, either leftward into socialism or rightward into the more anarchistic reaches of libertarianism. Read more strictly, it simply makes an obvious, but here very damaging, point: Our system of legally regulated market capitalism, for all its manifest virtues, has undeniable short-comings. The most salient, for present purposes, is this: Without careful attention to the distribution of its bounties, the rich tend to get richer and the poor, poorer. Indeed, unless the poor have lawyers, the rich will get the poor themselves, or at least all of theirs that's worth having. But that, again, is a problem of mature market economies, not of lawyers as a class, irrespective of how conscientiously they practice law.

From the liberal perspective, it is not the case, as Luban concedes to those on the far left and the far right, that “the community has shaped the lawyer's retail product with her in mind; it has made the law to make the lawyer indispensable.”¹¹⁸ The most we can fairly say

117. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 4, at 287; see also Silverman, *supra* note 1, at 1020-22 (detailing hypothetical cases of how individual lawyers directly and indirectly harm the poor).

118. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 4, at 286. Luban repeats this claim, in these words, in Luban, *Faculty Pro Bono*, *supra* note 39, at 65. But see Ellman, *supra* note 57, at 168-69 (“The claim [in *Lawyers and Justice*] that the law has been shaped to fit the interests of lawyers . . . is over-stated.”).

along these lines is this: The West's complex economy and advanced democracy require a legal regime of rules and rights that, in turn, make lawyers indispensable.

Luban himself elsewhere admits as much: "I am skeptical about how simple the law could be made in a society as enormously complex as ours."¹¹⁹ But that simply takes us back to the point Luban would like to get beyond: The poor's lack of lawyers is a generalized social problem; as such, it calls for a general, social solution, not a tax on lawyers.¹²⁰ In a society like ours, poor people, right along with the rest of us, are very much in the dark without illumination from lawyers. It's a sad day for the liberal left when the general public curses the candlemakers, but a sadder day when scholars propose to tax them on their product.

This approach has another corrosive effect as well. Lawyers themselves may experience Luban's pseudo-Pigouvan pollution tax, not as a penalty, but as a form of penance. Doing pro bono work may neither effectively deter nor fully offset the kind of purely private-interested lawyering that Luban effectively criticizes in the first part of his book. Ironically, something close to the reverse may occur. They may see pro bono work as penance that fully absolves them of responsibility for the publicly harmful aspects of their dubious model of private practice.

This, indeed, seems to be precisely what happened at the dawn of the heyday of neutral partisan lawyering. In the era of the robber barons, many elite lawyers experienced what legal historian Robert Gordon described as "institutionalized schizophrenia: the position that lawyers should take some time off from private practice to engage in public service, but that the two roles were antagonistic: so that it was appropriate for lawyers in one role to do the utmost to undo their accomplishments in the other."¹²¹ It was against precisely this kind of unstable compromise, both socially and personally destructive, that Brandeis proposed his integration of public values and private practice, the very model Luban himself adopts and elaborates.¹²²

119. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 4, at 244-45 n.20.

120. See Wasserman, *supra* note 115, at 422 n.152 ("While the harm of adversary representation may require subsidies for the injured class, it does not require that those subsidies come out of lawyers' pockets.").

121. Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1970*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* (G. Gawalt, ed.,) (1984).

122. See generally LUBAN, *LAWYERS AND JUSTICE*, *supra* note 4, at 288.

3. Conclusion

In the final analysis, with respect to both these allegedly left-liberal arguments for a special lawyerly obligation to serve the poor, I cannot help but share the view of former California Supreme Court Justice Rose Bird (no slouch of a left-liberal herself!): “As with any other working person, lawyers should be properly compensated for their time and effort ‘Lawyers in our society are entitled to no greater privileges than the butcher, the baker and the candlestick maker; but they are certainly entitled to no less.’”¹²³ And, it is worth pointing out, here left-liberals like Bird and me are in agreement with an important strand of right-liberal thought. As Charles Fried, a representative of that strand, has said, “It is cheap and hypocritical for society to be unwilling to pay the necessary lawyers from the tax revenues of all, and then to claim that individual lawyers are morally at fault for not choosing to work for free.”¹²⁴

B. *The Worst of the Second Best: Mandatory Student Pro Bono*

These self-defeating defenses of mandatory pro bono are not the worst of the second best. Indeed, even with this support, mandatory pro bono itself has not really gotten off the ground; in fact, it is not a condition of practicing law anywhere in the entire United States.¹²⁵ As Deborah Rhode has wryly remarked, “Proposals for mandatory pro bono requirements have come and gone, but mainly gone.”¹²⁶ David Luban, her co-author and fellow pro bono campaigner, is even more pessimistic: “[M]andatory proposals have always been met with hostility, and in my view the prospects for mandatory pro bono are so dim that it is a waste of time to continue talking about it.”¹²⁷

Not coincidentally, I suspect, calls for mandatory student pro bono are on the rise.¹²⁸ According to special American Association of Law

123. *Yarbrough v. Superior Court of Napa County*, 702 P.2d 538, 590 (1985) (Bird, J., dissenting) (quoting King, J., concurring in the decision below).

124. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1080 (1976).

125. See Murray, *supra* note 11, at 1146-47 (“Despite the abundance of mandatory pro bono proposals, including one by the ABA, no state has adopted a comprehensive mandatory pro bono requirement to date [1998].”). But see Silverman, *supra* note 1, at 893 (describing several limited court-ordered programs as forms of mandatory pro bono).

126. Rhode, *Cultures of Commitment*, *supra* note 34, at 2416; see also Lardent, *supra* note 2, at 98-99 (describing typical course of unsuccessful mandatory pro bono proposal).

127. Luban, *Faculty Pro Bono*, *supra* note 39, at 58.

128. See Rhode, *Cultures of Commitment*, *supra* note 34, at 2416 (“This resistance [of the bar] to required contributions, coupled with the limited success of voluntary efforts, has encouraged more pro bono initiatives in the law schools.”); see also Murray, *supra* note 11, at 1167-73 (listing, describing, and evaluating existing mandatory law school pro bono programs).

Schools commission on pro bono and public service opportunities: “*Our central recommendation is that law schools make available to all law students at least once during their law school careers a well-supervised law-related pro bono opportunity and either require the students’ participation or finds ways to attract the great majority of students to volunteer.*”¹²⁹

Mandatory student pro bono is much to be deplored—again, I emphasize, from a left-liberal, social democratic perspective. From that perspective, its deficiencies fall under three principal heads: the economic, the political, and the cultural.

Economically, the problem with mandatory student pro bono has to do with progressivity. Mandatory lawyer pro bono, as we have already seen, is not a particularly progressive form of in-kind taxation, because it almost certainly excludes from the tax base many who are wealthy. Mandatory student pro bono exacerbates this problem. It excludes from the tax base not only all non-lawyers, but also all lawyers already in practice. In so doing, it effectively taxes an already improperly defined class precisely when they are likely to be least able to pay—while they are still in professional training. Lawyers per se, as we have seen, are not a particularly attractive class to tax; law students per se are a particularly appropriate class *not* to tax.

The political problem with mandatory student pro bono nicely parallels the economic. Just as law students, as such, are least able to pay, so also, at that point in their career, do they have the least say in their professional obligations. Lawyers, through bar associations, have substantial influence on the regulatory regime to which they are subject; law students, by contrast, have relatively little say in law school curricular requirements. Thus, I suspect, it is no accident that, while many law schools have mandatory student pro bono, no integrated bar has mandatory lawyer pro bono. Nor, I suspect, is it any accident that, at my own institution, a majority of the law faculty voted against mandatory faculty pro bono seconds after a vote in favor of mandatory student pro bono. Mandatory student pro bono, in other words, is not merely regressive taxation; it is also taxation without representation. Left to their own device, students tend to leave mandatory pro bono alone, or, like the rest of us, impose it only on others.¹³⁰ In what proved to be an embarrassingly frank acknowledgement of this problem, a National Association for Public

129. *Learning to Serve: The Findings and Proposals of the AALS Commission on Pro Bono and Public Service Opportunities* 7 (Oct. 1999) (boldface and italic in original) [hereinafter AALS Report].

130. See Rhode, *Cultures of Commitment*, *supra* note 34, at 2439-40 (“Few student bodies have voted in favor of pro bono requirements, and one that did, Columbia, opted to exclude itself and to bind only future classes.”).

Interest Law handbook urged promoters of mandatory law student pro bono to avoid “the democracy trap” of submitting their proposal to a vote of the student body.¹³¹

It is entirely possible, of course, to square the presence of mandatory student pro bono with the absence of mandatory pro bono for either law faculty or practicing lawyers.¹³² What makes student pro bono requirements different, so this argument runs, is its educational value. Under this rationale, students are required to perform pro bono work not because it meets the legal needs of the poor, but because it meets the educational needs of the student.¹³³ It would be most unseemly of me to question the sincerity of this argument. But, even taking it on its face, note that it has an interesting peculiarity: It is not clear how the educational benefits would be lost if the students were paid. Indeed, by paying students for mandatory pro bono work, the political and economic objections could be eliminated without, presumably, undercutting the educational benefits.

Here, however, we must note a most significant division of the assertedly educational benefits of mandatory student pro bono. According to its proponents, the principal benefit is not to help students appreciate the problems of the poor; it is, rather, to inculcate into students their moral obligations as individual lawyers to provide free legal service to the poor.¹³⁴ The former learning

131. Murray, *supra* note 11, at 1168 n.225.

132. For an argument in favor of faculty pro bono that parallels standard defenses of lawyer pro bono, see Luban, *Faculty Pro Bono*, *supra* note 39, at 58; see also AALS Report, *supra* note 129, at 17-19 (urging all law schools “to encourage and support” faculty pro bono service, in part by adopting an “expectation” that each faculty member perform some such service each year).

133. See AALS Report, *supra* note 129, at 9 (“Law schools can justify adopting a required program of service for their students on a ground that is unavailable for justifying required pro bono service by members of the bar: law schools are, after all, responsible for the education of their students.”); *id.* at 4 (“But law schools are primarily in the business of educating law students, not in the business of providing direct public service, and it is the important educational values of pro bono programs that justify the commitment of substantial law school resources to their support.”); see also Rebecca A. Cochran, *Legal Research and Writing Programs as Vehicles for Law Student Pro Bono Service*, 8 B.U. PUB. INT. L.J. 429, 442-46 (1999) (setting forth pro bono assignments as an excellent means of integrating the typical theoretical law school curriculum with those practical skills associated with legal research and writing courses). *But see* Rhode, *Cultures of Commitment*, *supra* note 34, at 2443 (“[I]f the primary goal of a mandatory [law school pro bono] program is to create a culture of commitment to public service, the exempting faculty role models is counterproductive.”); Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24, 32 (1999) [hereinafter Rhode, *Professional Schools*] (suggesting that both students and teachers would benefit because pro bono programs “provide many participants their only direct knowledge of how the system functions, or fails to function, for the have-nots”); Deborah L. Rhode, FORWARD, AALS Report, *supra* note 129, at viii (“Pro bono work can also offer faculty and students a range of practical benefits.”).

134. See Sandra Day O’Connor, *Legal Education and Social Responsibility*, 53 FORDHAM L. REV. 659, 661 (1985) (suggesting that clinical courses and pro bono activities in law school “can help to develop a sense of civic and professional responsibility that recognizes that lawyers must

experience would not be undercut by paying law students to represent the poor; the latter, presumably, would.

We may well doubt the likelihood of persuading people to do something voluntarily by forcing them to do it against their considered objections.¹³⁵ In this respect, mandatory student pro bono is the law school equivalent of leading horses to water, making them drink—and hoping they will learn to like the exercise. Leaving that aside, this tactic poses much deeper problems of pedagogical principle, what I would call the cultural problem with mandatory student pro bono. It is one thing to require future lawyers to learn the legal landscape, even those aspects of the legal landscape that involve forcing people to act against their wills. That, after all, is the deep paradox, if not tragedy, that lies at the core of liberal law. But it is quite another thing to try, by coercive means, to make students—or anyone else, for that matter—adopt any particular value as their own. At the extreme, a liberal state may have to send its citizens to die in a war they do not believe in, but it will not make them pledge allegiance to the flag they must die under—at least as long as they are

assure the availability of legal assistance” and “can lead new lawyers to develop a habit of pro bono service”); see also Fordham Conference Recommendations, *supra* note 89, at 1791 (“Law schools, as the first socializers of law students into their professional role, have the opportunity and the duty to make students aware of their professional responsibilities to serve low-income persons.”); Marrero Committee Report, *supra* note 5, at 829 (“It seems to be the virtually uniform experience that exposure to the plight of the poor tends to breed in persons of good will a commitment to their aid that in turn yields new efforts on their behalf.”); Rhode, *Cultures of Commitment*, *supra* note 34, at 2413 (“An increasing number of schools have initiated pro bono requirements for students” in order to “inspire an enduring commitment to public service”); Rhode, *Professional Schools*, *supra* note 133, at 33 (“Ninety-five percent of deans responding to the AALS Commission survey agreed that it is an important goal of law schools to instill in students a sense of obligation to perform pro bono service”); AALS Report, *supra* note 129, at 4 (listing first among benefits of student pro bono help[ing] students develop a sense that a responsible lawyer’s professional responsibilities include giving back to the community”).

135. See Shapiro, *supra* note 9, at 782 (suggesting “at least an equal risk of an opposite reaction. The draftee may well end up simply resenting the exaction.”); see also Cramton, *supra* note 2, at 1133 (“[R]equirements that take the form of personal service are more likely to result in angry or principled opposition.”); *id.* at 1138 (“[I]nducements and rewards are often more efficacious in changing behavior than commands or threats of punishment.”); Lardent, *supra* note 2, at 101 (“The argument that lawyers, once forced to provide services, inevitably will embrace the cause of public service is not borne out by experience,” particularly that of mandatory continuing legal education). Cf. Rhode, *Professional Schools*, *supra* note 133, at 33 (“the limited data points in positive directions”); Rhode, *Cultures of Commitment*, *supra* note 34, at 2434 (noting that evidence that public service requirements encourage future public service is “thin but consistent”); *id.* at 2441 (“For these reluctant participants, client contact often served to confirm adverse stereotypes of poverty communities.”); *id.* at 2431 (concluding, after a survey of research on the origins of altruistic activity, that “well designed strategies by law schools, bar associations, and law firms could significantly affect pro bono commitments,” but cautioning that “the capacities of even the best designed programs should not be overstated”); Abbe Smith, *For Tom Joad and Tom Robinson: The Moral Obligation to Defend the Poor*, 1997 ANN. SURV. AM. L. 869, 880-81 (noting not only the problem of already overburdened agencies supervising law students, but also the lack of enthusiasm of law students conscripted into the service of the indigent).

in its schools.

Mandatory student pro bono poses other pedagogical, or cultural, problems as well. These can best be understood as what economists call opportunity costs. Even if we admit mandatory pro bono work to have legitimate educational value, it necessarily comes at a cost of other curricular opportunities (or sleep).¹³⁶ Stated most starkly, mandatory pro bono distracts students from their only real chance for full-time formal legal education. Law schools must, at a minimum, ensure that their students are competent lawyers, in command of both basic legal knowledge and basic legal skills. Given that necessity, what is most likely to be sacrificed to mandatory pro bono requirements are precisely those courses in which the basic assumptions behind our legal system are systematically explored, even called into question. It would be the ultimate travesty of liberal education to sacrifice the questioning of the most basic values to the inculcation of a single, much-debated duty.

III. TOWARD A UNITED FRONT OF LIBERALS FOR THE POOR: THE BEST AS ALLY OF THE GOOD¹³⁷

Where does my critique of pro bono publico proposals leave me as a left-liberal, or social democratic, lawyer? Though the formal studies of the unmet need for lawyers may well be flawed in various ways, at some point one must trust the evidence of one's eyes: poor people need lawyers, and much else besides; they need lawyers in particular, because without lawyers they may not get much else, and they may well lose what little they've got. The reasons the poor have so little have much to do with the complexities of an advanced capitalist economy, and no more to do with the work of most lawyers than with the work of any other vital component of such an economy.

The ideal social democratic solution would be to alleviate these and other inevitable dislocations of the market by shifting resources from its principal beneficiaries to its principal victims. The classic

136. Thus, in rejecting mandatory student pro bono, even as it recommended mandatory lawyer pro bono, the Marrero Committee concluded that "[L]aw schools, here [in New York] and in other states, would be pressured to offer client-oriented programs that they cannot afford and that they might consider educationally undesirable in comparison to other traditional and skills training courses." Marrero Committee Report, *supra* note 5, at 835; *see also* Rhode, *Cultures of Commitment*, *supra* note 34, at 2439 ("[G]ood pro bono programs require substantial administrative resources."). *See, e.g.*, Murray, *supra* note 11, at 1171 ("The sheer amount of supervision required to successfully operate an efficient clinical or mandatory student pro bono program simply makes resolution of the problem through a mandatory pro bono program not only economically infeasible, but also prohibitively time consuming.") (citation omitted).

137. *See* Arcia, *supra* note 11, at 792-97.

social democratic means of achieving this shifting is by progressive taxes invested in safety nets like health care, social ladders like public education, and, more recently, civil legal services. In most of the world's liberal democracies today, these systems are alive and well; in America in the last three decades, all of them have suffered, and the last, civil legal services, has been critically wounded. What's worse, given widespread lack of sympathy for the plight of the poor and profound public distaste for lawyers, both carefully cultivated by rightist politicians, the chance of increased public subsidy of the legal needs of the poor in the short run is virtually nil. And in the long run, as the great Keynes reminded us, we're all dead.

What, then, are we to do? Faced with this grim reality, many of my fellow travelers have hit upon mandatory lawyer pro bono as a second best alternative to the social democratic ideal. (And so, too-tellingly, I believe—have others with no sympathy whatsoever for that ideal.) For the reasons I have given, I find this turn deeply troubling. But doing nothing is a good deal worse, and criticizing the current effort without proposing a better alternative, maybe worst still. Accordingly, in the first section of this final part, I address how to think about the problem and, in the second, I offer a suggestion on what to do about it. I call my alternative to mandatory pro bono the Good Samaritan Tax. It is designed both to avoid the principal problems and thus to move us closer to the social democratic ideal.

A. *A Matter of Perspective: Considering the Possibility that We May Err, and How*

As Silverman pointed out, “The explicit debate over mandatory pro bono proposals . . . has been heavily instrumental in character, focusing on means rather than ends and incorporating key assumptions.”¹³⁸ Even opponents of mandatory pro bono tend to assume that more subsidized legal services to the poor is a desirable end.¹³⁹ But, as conservative critics, particularly those relying on economic analysis, have reminded us, that is only an intermediate end. We would do well to remember that, from a truly liberal perspective, increased public funding for legal aid is itself only a means to the higher end, helping the poor, that left-liberals share with all, or virtually all, liberals and, thankfully, with many who are emphatically not liberals.¹⁴⁰

138. Silverman, *supra* note 1, at 1056.

139. Silverman, *supra* note 1, at 1056.

140. See, e.g., Scully, *supra* note 2, at 1269 (emphatically embracing right-liberal position against mandatory pro bono but agreeing that “[h]elping the indigent is an important social

We would do well to remember the American origins of the kind of subsidized legal services I, along with most other left-liberal commentators, have recommended as the ideal. The present Legal Services Corporation had its origins in the aptly named Office of Economic Opportunity. The federal legislation creating the OEO was quite explicit about its ultimate end: “to improve . . . living conditions and develop skills necessary for a productive and self-sufficient life in an increasingly complex and technological society.”¹⁴¹ And this end, it is worth pointing out, is essentially what Maimonides identified as the highest form of charity: helping put our fellows back on their feet, as fully functioning members of a shared commonwealth.

This distinction between the intermediate end of enhanced legal aid and the higher end of helping the poor is important in several respects. Most fundamentally, it helps distinguish precisely where we might err from where error is simply not a possibility. With respect to the former, increasing legal aid to the poor, particularly certain kinds of legal aid, may well be counterproductive. Resources may be diverted from programs that would benefit the poor more; political backlashes or economic dislocations may reduce the share of the poor rather than expand it; publicly subsidized ideological advocacy on behalf of the poor may unacceptably compromise core liberal values. On these points, we need to listen carefully to the opposition, especially those who can plausibly claim to have the interests of the poor at heart.¹⁴²

Having the interests of the poor at heart, on the other hand, is a matter on which we simply cannot err. Unlike many,¹⁴³ I do not

goal”).

141. Economic Opportunity Act of 1964, Title III-B, Section 2861 (providing assistance to migrant and other seasonally employed farmworkers).

142. See Silverman, *supra* note 1, at 979-84 (demonstrating why even publicly-spirited legislators may hesitate to favor expanded governmental spending for legal services); *id.* at 1056 (“despite its ideological passion, the conservative critique has identified certain serious, if not fundamental, problems”); *id.* at 1057-64 (analyzing efficiency concerns); *id.* at 1064-70 (analyzing distributive concerns); *id.* at 970 (“A self-righteous over-reliance on supposedly obvious need-related facts, and on supposedly systematic but flawed scientific efforts, only reduces prospects for a truly productive and resolving debate among interested parties with very sharply competing points of view.”); see also Scully, *supra* note 2, at 1234 (“there is no necessary connection between an increase in poverty and the need for increased legal services”). Cf. Marrero Committee Report, *supra* note 5, at 843 (“That improving one aspect of the legal system may worsen circumstances elsewhere in the process only points to the interrelationship among the issues and the need for a comprehensive response to the entire problem, one that would spread responsibility for corrective action to other segments of society.”).

143. See generally JOHN RAWLS, A THEORY OF JUSTICE (The Belknap Press of Harvard Univ. Press 1st ed. 1971) (deriving his “maxi-min” principle from an idealized original socio-political position); John Finnis, *Natural Law and ‘Is’-‘Ought’ Question: an Invitation to Professor Veatch*, in NATURAL LAW 313 (Finnis, ed., 1981) (grounding care for the poor in a neo-Thomistic natural

purport to ground my commitment to the poor on any sort of objective proof; anything that rests on such proof is, at least in principle, always subject to disproof. Rather, I maintain that such fundamental commitments cannot, in their very nature, be proved or disproved. In that sense, they are matters of faith, not reason, and faith understood, not as that which ensures knowledge of unseen truths, but as that to which one is most deeply devoted, what one aspires to become and to make the world. In committing ourselves to the cause of the poor, in that sense, we simply cannot be wrong: That is the kind of people we choose to be; that is the kind of world we want to build.¹⁴⁴

These two spheres—those that one can be mistaken about, and those that lie at a deeper level, personally and theoretically, than matters of rational proof—must both be borne in mind as we attend to the legal needs of the poor. Summarizing radically, our guiding principle must be something like this: Given the priority of helping the poor in our left-liberal constellation of commitments, and given the undeniable fact of real poverty among us, we must immediately support measures that offer reasonable promise of making the poor better off. On how much better off, in what ways, and at what costs, we will of course disagree.¹⁴⁵ But surely we agree that the poor deserve adequate legal representation whenever their basic civil rights and fundamental human needs are at stake. As a corollary, we must be willing to support measures to provide that representation, even if those measures are not ideal. On the other hand, we should not support third-best measures when second-best measures are at hand. I offer the following proposal with those considerations firmly in mind.¹⁴⁶

B. A Pragmatic, Social Democratic Alternative: Implementing a Good Samaritan Tax

The sorry state of the poor in our society cannot but remind us of the plight the Good Samaritan remedied. Innocently going about his

law).

144. See Rob Atkinson, *Beyond the New Role Morality*, FLA. ST. U. L. REV. (forthcoming 2000).

145. And the “we” who decide should of course include our fellow citizens who are poor. Complaints about our paternalism must certainly be heard. See Scully, *supra* note 2, at 1235 (“If given the option, the poor might very well prefer a cash payment in lieu of legal services.”). But these complaints ring particularly hollow when our prospective wards are children, the mentally infirm, and fully consenting adults.

146. Others have suggested alternatives or complements to mandatory pro bono that also could easily complement what I propose here. See, e.g., *supra*, text at note 99 (loosening restrictions on unauthorized practice).

worldly work, he found a stranger robbed, beaten, and left for dead in a wayside ditch. He did what needed doing—took the stranger to a wayside inn and paid for his care there—without apparent worry, or ever awareness, that others had been better positioned to help. And such others there surely were. Two high-status, and doubtlessly high-income, members of the legal and religious establishment, a priest and a Levite, had previously passed the needy stranger by, careful to cross the road rather than come too close to unsightly human suffering.

To my mind, this story contains at least the seed of the best justification we are likely to find for a special lawyerly obligation to help the poor: right now we can, no one else will, and waiting around is out of the question.¹⁴⁷ That, of course, is but a special application of the Sunday school moral of the story: Everyone is your neighbor; help them when you can (especially when no one else will).

But the teller of the story, the heretical Hebrew prophet, Joshua ben Joseph, had more in mind. He wanted his audience—ordinary, working-class Jews—to notice two other, radically related, things. First, that the social and political leaders of their nation were falling down on the job, not doing their most basic moral duty, in a word, not practicing what they were preaching. Second, relief could come—and, at least in the story, did come—from a most unexpected source, the lowly Samaritan, member of a mixed-race, religiously heterodox social order much disparaged, on both counts, by the social and political elite. Thus, in moral terms at least, the last were already first and the first, last.

Fitting, against that background, that lawyers take the next step in remedying the legal needs of the poor. In part, as we have already seen, because we can. But also, as I hope you will now agree, because we have too long been political pariahs, easy effigies for the political and religious right. This point, of course, is dangerously close to the image-polishing rationale of the current mandatory pro bono

147. [W]e recognize that in times of crisis the efficiency and pragmatic objectives which the Committee's proposal would promote are not devoid of their own moral edge Almost as a given, when the crisis at hand affects justice and its adequate administration, and when the people who would benefit the most from speedy and efficient remedies are the members of society most in need, the moral imperatives of crafting a maximally useful response is correspondingly enlarged.

Marrero Committee Report, *supra* note 5, at 804. See Silverman, *supra* note 1, at 959 (“[I]t is especially important for proponents to make the case for overwhelming need in scarcity terms.”); *id.* at 1015 (“Since public treasury support, for a variety of reasons, has proven inadequate to the task, it may be easier to justify imposing a special burden on the lawyers as a kind of funding last resort.”) (citation omitted). Cf. Alexander Forger, *Mandatory Pro Bono*, 74 A.B.A. J. 46, 47 (May 1, 1988) (“My feeling is that mandatory pro bono should be an absolute last resort.”).

crusade, and I have already joined those who condemn coercing individual lawyers' work to cultivate the bar's general image. My program is different, I want to suggest, in a way that nicely parallels the other lesson of the Good Samaritan tale. My program would be both structured and justified in ways designed to make clear, just as Jesus's parable did, not only who is doing the good work, but who is not—and, by implication, who should be.

Here, in briefest outline, is how my Good Samaritan Tax would work. Instead of having to work a minimum number of hours for poor people, lawyers would have to pay a special tax, designated as such, to pay for lawyers for the poor. The tax would be noticeably—preferably, steeply—progressive; lawyers who earn more would have to pay a higher percentage of their earnings. Not, to return to the basic rationale of the tax, because they have done more harm, or received more benefit, but simply because they are the most able to pay.

CONCLUSION

I began by pointing out a paradox, if not by sounding a note of pessimism: The currently most popular means of meeting the legal needs of the poor, pro bono publico representation, has distracted us from another means, publicly subsidized legal services, that is both more efficient and more fair. I have been at pains to show, in short, how the good has tended to be the enemy of the best. But I hope I have concluded on a note of optimism. The ancient goal of all liberals—left and right, religious and secular—is, after all, caring for the worst off among us. If we reach out to each other, and re-focus our attention on that common goal, I believe we can realistically expect to build a better world for us all, but especially for those among us who are poor.