

THE ONCE AND FUTURE PROFESSION: AUTONOMY, INTELLECTUALISM, AND OBLIGATION

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INTRODUCTION

“Not might makes right, but might *for* right!... [A] round table so there is no head.”
— Camelot¹

“There is no time for playing around: you have been retained as lawyer for unhappy humanity. You have promised to bring help to the shipwrecked, the imprisoned, the sick, the poor, to those whose heads are under the poised axe.”

— Seneca²

IN a provocative 2010 bestseller, Richard Susskind asked the question whether we are at the “End of Lawyers.”³ Since that time, many other scholars, analysts, and pundits have asked the same question. They are not alone. During the same period, applications to law schools have dropped nearly fifty percent.⁴ This precipitous drop may be the result of potential applicants

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1. ALAN LERNER & FREDERICK LOEWE, *CAMELOT*, act 1, sc. 3 (1960).

2. Seneca, *Moral Epistles*, reprinted in ARTHUR M. MELZER, JERRY WEINBERGER, & M. RICHARD ZINMAN, *THE PUBLIC INTELLECTUAL: BETWEEN PHILOSOPHY AND POLITICS* 201 (Rowman & Littlefield, 2004).

Do you want to know what philosophy offers humanity? Practical guidance. One man is on the verge of death. Another is rubbed down by poverty.... These are ill treated by men, those by the gods. Why, then, do you write me these frivolities? There is no time for playing around: you have been retained as lawyer for unhappy humanity. You have promised to bring help to the shipwrecked, the imprisoned, the sick, the poor, to those whose heads are under the poised axe.

Id.

3. RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 27-35 (rev. ed., Oxford Univ. Press 2010).

4. See Darin B. Scheer, *A Change Is Gonna Come: Is the Legal Profession Up to the Challenge?*, WYO. LAW., Oct. 2015, at 14 (“In 2014, the number who took the LSAT declined 8.1 percent from the previous year, and was nearly 50 percent below the same test period in 2009.”) (citing Elizabeth Olson & David Segal, *A Steep Slide in Law School Enrollment Accelerates*, N.Y. TIMES, Dec. 17, 2014, at B3)).

expressing similar concerns. The tremendous decline in the interest for law school strongly suggests a need for fundamental change. A reconceptualization of both law school and the practice of law are required. Looking back, in 1944, Roscoe Pound suggested that there were three attributes that made up the profession: “organization, learning, and a spirit of public service.”⁵ Many of the themes found in Pound’s concept of the professional remain true today, while others have been transformed by time, economics, and technology.

Going forward, I suggest that three critical elements will define the modern legal profession: autonomy, intellectualism, and obligation. The first of these elements is the personal autonomy that should protect the professional in her role as independent counselor, guide, and confidant. As discussed in Part I, this autonomy has eroded due to increased billing expectations, commoditization of practice, efficiencies of technology, and a comparison with more autonomous environments in the technology industries. Intellectualism, the second element, was once the critical intellectual role that lawyers played as thought leaders. Unfortunately, a systemic attack on intellectualism, which began during the McCarthy hearings, has continued with ever-greater impact, stripping public figures and civic leaders of their roles as public intellectuals, leading society with their insights and rigorous debate. The third element is the professional obligation to uphold justice, a concept that is perhaps the most discussed and its absence noted for centuries. The ideal of the lawyer’s obligation often falls far short of its reality, and the dissonance leaves lawyers frustrated. While this reality may have always been the case, the related changes to the accepted norms of equality and justice have made this a much more poignant concern.

Moreover, autonomy, intellectualism, and obligation have all been largely discarded in an effort to modernize the practice of law. In searching for efficiency, the law firm has regressed towards a mechanistic practice of law that undermines the modern lawyer and discourages new entrants from the profession.

As law schools look to shape the next generation of lawyers, we must reinvigorate these three attributes and establish a new legal profession that commits to them. The practicing bar, our trade association representatives, and our elected judiciary will be powerless to make this transition. Law school deans, faculties, and administrations are therefore the primary voices for change. The vehicle is a new legal services approach that funds law students’ tuition in exchange for years of moderate-pay legal service.

If justice is to return to society, we must prepare to spend a generation fighting to reinstate the profession of law. To do so, the country must invest in its legal services so justice can be accessible for all. Done well, this could usher in a resurgence for lawyers and a strategy to narrow the gap in the access to justice for so many who have no access to legal services. In the process, this new model can provide an effective strategy to help restore the legal profession to what once made it a noble calling.

5. Roscoe Pound, *What Is a Profession?*, 19 NOTRE DAME L. REV. 203, 204 (1944) (“These are essential. The remaining idea, that of gaining a livelihood, is incidental.”). See also Thomas W. Lyons, III, *Pro Bono*, 55 R.I.B.J. 3 (2006).

I. AUTONOMY

“[U]ndo the heavy burdens, and to let the oppressed go free.”

— Isaiah⁶

Prior to the 1950s, the cultural norms of individuality and autonomy were embodied in the metaphor of the “self-made man.”⁷ This changed during the ensuing decades as the postwar industrial boom placed a greater part of the workforce into large corporations.⁸ As these corporations grew, they created an army of white-collar workers in grey flannel suits, men who had lost much of their control and autonomy.⁹

But even as the economy favored increasingly large corporate entities, the quality of the job life was diminishing.¹⁰ Industrial psychologists tracked the negative consequences of high-demand, low-control positions.¹¹ Employees in such positions “reported significantly more exhaustion after work, trouble awakening in the morning, depression, nervousness, anxiety, and insomnia or disturbed sleep than other workers.”¹² Individuals who have more autonomy in the work they undertake and the method they complete the work are generally healthier and happier in their employment.¹³ In most industries, the expansion of autonomy was part of the goal to improve the success of the organization as well as to improve the experience for the employees.¹⁴

6. *Isaiah* 58:6 (King James).

7. See Thomas Andrew Joyce, *A Nation of Employees: The Rise of Corporations and the Perceived Crisis of Masculinity in the 1950s*, 3 *GRADUATE HIST. REV.* 24, 25-26 (2011).

8. Marion Crain, *The Transformation of the Professional Workforce*, 79 *CHI.-KENT L. REV.* 543, 570 (2004).

9. *Id.* at 562.

10. *Id.* at 615.

11. *Occupational Stress and Employee Control*, AM. PSYCH. ASS’N, <http://www.apa.org/research/action/control.aspx> (last visited Jan. 3, 2017).

12. *Id.* (citing J.R. Hackman & G.R. Oldham, *Motivation through the Design of Work: Test of a Theory*, 16 *ORG. BEHAV. & HUM. DECISION PROCESSES* 250, 252 (1976); R.A. Karasek, Jr., *Job Demands, Job Decision Latitude, and Mental Strain: Implications for Job Redesign*, 24 *ADMIN. SCI. Q.* 285, 292 (1979)).

13. See Carla Valencia, *Motivation and Productivity in the Workplace* (July 2004) (unpublished M.B.A. thesis, Westminster College), https://www.academia.edu/29192864/Employee_Motivation_in_the_workplaceThesis.docx (“When employees have high autonomy, receive feedback about their performance, and have an important, identifiable piece of work to do which requires skill variety, they may experience feelings of happiness and therefore intrinsic motivation to keep performing well.”). See also Christopher Michaelson et al., *Meaningful Work: Connecting Business Ethics and Organization Studies*, 121 *J. BUS. ETHICS* 77 (2014), <https://mgmt.wharton.upenn.edu/files/?whdmsaction=public:main.file&fileID=7294>.

14. See Josh Bersin, *Becoming Irresistible: A New Model for Employee Engagement*, 16 *DELOITTE REV.* 146, 151 (Jan. 26, 2015), <http://dupress.com/articles/employee-engagement-strategies/#sup-0> (“Despite these pressures to improve productivity, research shows that when we enrich jobs, giving people more autonomy, decision-making power, time, and support, the company makes more money.”).

Although postwar corporate America was mechanizing both physical labor and middle management, the legal profession remained largely unchanged.¹⁵ The law firm was largely patterned after the “Cravath System” developed at the Cravath, Swaine & Moore law firm in the 1800s to emphasize quality legal service rather than community standing.¹⁶ The system was built upon “rigorous long-term training and a ‘graduated increase in responsibilities’ over time.”¹⁷

The Cravath System assumes an exacting approach to practicing law, assuring precision in one’s work, and increasing personal responsibility for the decision-making in handling client matters.¹⁸ While some of these attributes remain true today, many of the areas of the lawyer’s control or autonomy have been reduced. These begin, but do not end, with the billable hour.¹⁹ The changes diminishing attorney autonomy include an increase in the precision and detail of hourly billing and use of the six-minute billing cycle; the increase in the number of billable hours expected of the attorney; the time pressure of instant communications; a gradual increase in the years it requires to become a partner; and the transformations within the firm. Taken together, these changes have enabled the twenty-first century law firm to emulate the worst employment environment of the corporatization of the prior half-century.

The billable hour was not always the primary method for determining the cost of representation.²⁰ Although billable hours were popularized during the 1960s by management experts, they operated alongside the more common practice of reference to state-bar mandated minimum pricing schedules. In

15. See Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 10-11 (discussing the attributes of the elite law firm that were established “[b]y about 1960”).

16. See Eli Wald, *The Rise and Fall of the Wasp and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1809 (2008) (“Cravath’s version of merit-based professionalism was aligned with the emerging notions of professionalism advocated by the newly organized legal profession.”).

17. Burk & McGowan, *supra* note 15, at 9-10 (quoting MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 9 (1991)).

18. See William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 376 (2011) (“The stated purpose of the Cravath system was to create ‘a better lawyer faster.’”); Wald, *supra* note 16, at 1809 (“Cravath’s version of merit-based professionalism was aligned with the emerging notions of professionalism advocated by the newly organized legal profession.”).

19. Robert E. Hirshon, *Preface to A.B.A. COMMISSION ON BILLABLE HOURS REPORT, 2001-2002*, at ix (2002) [hereinafter *A.B.A. BILLABLE HOURS REPORT*] (“It has become increasingly clear that many of the legal profession’s contemporary woes intersect at the billable hour.”). See also Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 192 (2005).

20. See William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 10-11 (1991).

During the 1960s, management experts concluded from various studies that lawyers who kept time records earned more than attorneys who did not... Similarly, hourly billing enabled business clients to “correlate the ‘product’ that they were buying to the products that they themselves produced and sold,” and made it easier for corporate managers of outside counsel to justify to their superiors the payment of legal bills.

Id.

Goldfarb v. Virginia State Bar,²¹ these pricing schedules were struck down by the Supreme Court as a form of price fixing.²² The Virginia Bar unsuccessfully argued the need for professions to be exempt from antitrust regulation to protect the professional character of the lawyer's craft.²³ The Supreme Court acknowledged there were some additional concerns regarding the billing practices of lawyers, but did not find these outweighed the antitrust considerations.²⁴ With the loss of the price-fixing system, the billable hour became the primary method of firm billing practice.²⁵

The importance of the billable hour and demands for billing transparency gave birth to careful time records, typically in six-minute increments.²⁶ While carefully recorded time noting activities in six-minute increments creates careful documentation, it is not necessarily true that these records are more accurate.²⁷

The intersection between tight billing increments and excessive billable goals creates a particularly pernicious form of piece-meal work. “[U]sing the number of hours to bill clients and assess productivity reduced attorneys’ work to something on par with a quota system’ condemned in other settings.”²⁸ The practice of law has always been grueling and much of the work involves some degree of drudgery. But control is a multi-faceted concept. The six-minute billing unit, for example, emphasizes the lack of the attorney’s control.²⁹

21. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 783 (1975).

22. *Id.* at 782 (“[A] naked agreement was clearly shown, and the effect on prices is plain.”).

23. *Id.* at 791-92.

24. *Id.* at 792-93.

We ... recognize that in some instances the State may decide that “forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.” The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been “officers of the courts.”

Id. (internal citations omitted).

25. Fortney, *supra* note 19, at 171-72.

26. See, e.g., *G.B. ex rel. N.B. v. Tuxedo Union Free Sch. Dist.*, 894 F. Supp. 2d 415, 441 (S.D.N.Y. 2012); *United States v. Sixty-One Thousand Nine Hundred Dollars and No Cents*, 856 F. Supp. 2d 484, 490-91 (E.D.N.Y.2012) (noting a split within the Second Circuit regarding a potential prohibition on billing in increments larger than six minutes to provide courts with the ability to track the activities of attorneys in fee-setting cases).

27. See Ross, *supra* note 20, at 15 (discussing the breadth of billing fraud noted “a California lawyer has remarked that filling out time sheets is the most creative professional activity of many of the partners and associates with whom he is acquainted”).

28. Fortney, *supra* note 19, at 177 n.29 (quoting Robert Pack, *The Tyranny of the Billable Hour*, WASH. LAW., Jan. 2005, at 20).

29. Neal Conan, ‘Drive’ Not Always Explained by Rewards (broadcast on NPR’S TALK OF THE NATION, Jan. 4, 2010, 1:00 PM ET), <http://www.npr.org/templates/story/story.php?storyId=122221202> (interview with Daniel Pink, author of *DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US* (2009)). Daniel Pink stated in the interview:

[T]he billable hours is a classic case of restricted autonomy. I mean, you’re working on—I mean, sometimes on these six-minute increments. So you’re not focused on doing a good job. You’re focused on hitting your numbers. It’s one reason why lawyers typically are so unhappy. And I want a world of happy lawyers.

Even as the billing increment has become smaller, the number of billable hours has become much, much larger. “Billable hour requirements have increased dramatically over the past half-century, moving from 1100 hours per year in 1950 to 1900 hours per year in 2000.”³⁰ In the ensuing decade, the 2000-hour goal—and many firms with goals substantially higher—have become common.³¹ After all, there are 2000 hours in a forty-hour, fifty-week work cycle, assuming the work cycle excludes lunches and all breaks. Assuming any common-sense level of human efficiency, it requires at least an additional hour for every two hours billed, so the attorney likely works at least 3000 hours, though the level of efficiency will depend on many factors.³²

Worse, the new lawyer is expected to enter the 2000-hour billing environment as a “practice-ready” attorney, trained in both the vast knowledge of the law and the techniques most prized by the attorney’s new employer.³³ Law firms “do not want to pay to ‘train’ new graduates to become practice-ready.... Firms are making more lateral hires, looking for already seasoned lawyers with a book of business and experience under their belt.”³⁴ The expectations on the new lawyer become necessarily greater, creating additional pressure to practice precisely in the manner expected for that particular employer, therefore making it more difficult for the attorney to make choices, develop a support network, or acclimate into a successful rhythm.³⁵

Id. Host Neil Conan responded: “We all want a world of happy—there’s a great quote from former Chief Justice Rehnquist saying: When billable hours are the goals, sometimes it’s understandable that people may exaggerate those a little bit from time to time.” *Id.*

30. Crain, *supra* note 8, at 571-72.

31. *The Truth About the Billable Hour*, YALE L. SCH., <https://www.law.yale.edu/student-life/career-development/students/career-guides-advice/truth-about-billable-hour> (last visited Jan. 3, 2017) (“Firms ‘average,’ ‘target’ or ‘minimum’ stated billables typically range between 1700 and 2300, although informal networks often quote much higher numbers.”).

32. See Ross, *supra* note 20, at 14-15; *The Truth About the Billable Hour*, *supra* note 31 (“With a half hour commute you are ‘working’ from 7:30am to 8:30pm Monday-Friday [a]nd 9:30am-5:30pm three Saturdays a month.”).

33. See, e.g., Gary Gildin, *Practice-Ready Legal Education, The Four New Demands Law Schools Must Satisfy*, PENN. LAW., May/June 2015, at 33, 33-34 (“Judges and lawyers have turned up the volume of their perennial complaint about the failure of law schools to prepare students for the practice of law As a consequence, the latest trend in legal education is the marketing of the law school as a manufacturer of ‘practice-ready’ lawyers.”); Ed Finkel, *Training a New Breed of Lawyers*, ABA FOR L. STUDENTS (Nov. 1, 2014), <http://abaforlawstudents.com/2014/11/01/training-new-breed-lawyers/> (quoting Terri Mascherin, a senior partner at Jenner & Block in Chicago) (“There’s more pressure on students to be able to perform quickly It’s not as forgiving a profession as it was 5, 10, 20 years ago.”); Timothy J. Storm, Chair’s Column, *Developing “Practice-Ready” Lawyers*, IL. ST. B. ASS’N (Oct. 2011), <https://www.isba.org/sections/generalpractice/newsletter/2011/10/chaircolumndevelopingpracticeready> (“After decades of avoiding the issue, law schools (some of them, anyway) are now taking the question of producing ‘practice ready’ lawyers quite seriously.... The less heartening news is that, in doing so, law professors are often talking mostly to themselves, rather than to experienced practicing lawyers.”).

34. Christine M. Stouffer, *Closing the Gap Teaching “Practice-Ready” Legal Skills*, AALL SPECTRUM, Feb. 2015, at 10, 10-11 (“Law firms are finding that clients refuse to pay for the work of anyone but a senior lawyer or partner, rendering the work of newer lawyers uncollectable.”).

35. See Finkel, *supra* note 33 (“Clients are in the driver’s seat and demanding efficiency from their law firms, which in turn forces firms to demand the same of their first-year attorneys....

Against the backdrop of excessive billable requirements and disappearing investment in training, the speed of technological communications means that attorneys are regularly emailed, texted, or pinged by fellow attorneys, clients, and even opposing counsel, heightening the pressure to respond to all requests instantly.³⁶ The instant communication creates expectations on the part of clients and members of the firm that the attorney is on call at all times.³⁷ By placing one's schedule in the hands of those on the other side of the smartphones, computers, and tablets, the lawyer has ceded another important aspect of control in her daily life.

Less immediate, but perhaps equally influential, was *Bates v. State Bar of Arizona*, which applied First Amendment protection to attorney advertising.³⁸ Advertising helped fuel competition between law firms, which necessarily moved the culture towards one of direct market competition.³⁹ As the First Amendment's application to attorney advertising evolved, there was resistance from the bar,⁴⁰ but the constitutional nature of the transformation made limitations difficult.⁴¹ Advertising profoundly impacted the self-identity of the

Angela Vigil, director of pro bono and community services at Baker & McKenzie in North America and a faculty member on Northwestern's clinic, said that firm practice area leaders need to be able to delegate to young associates without fear.”)

36. See, e.g., Elizabeth Ruiz Frost, *Notes on Electronic Professionalism E-Communication Etiquette*, 76 OR. ST. B. BULL., May 2016, at 13 (“Electronic communication has become a significant element of legal practice. Fewer discussions with counsel and clients are had in person or by telephone. Legal analyses are frequently communicated via email instead of through the traditional printed memorandum. Even text messaging is becoming more commonplace in professional communication.”); Thomas J. Watson, *Beware of Raising Clients' Expectations of Your Availability*, 82 WIS. LAW., Dec. 2009, at 26 (“Just because technology makes it possible to communicate 24-7 doesn't mean you should be available 24-7. Although it is important that lawyers be responsive to clients and keep them informed, it is equally important to set the ground rules for communicating early on to avoid giving clients unrealistic expectations.”).

37. Watson, *supra* note 36, at 26 (“Every device that allows constant access and immediate response ... carries the perhaps unintended message that the lawyer is available to the client around the clock, every day, seemingly without regard to the fact that the lawyer has other clients and other matters to tend to.”) (quoting Katja Kunzke, president and CEO of Wisconsin Lawyers Mutual Insurance Co.).

38. *Bates v. State Bar of Arizona*, 433 U.S. 350, 368 (1977) (“[W]e find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar.”).

39. See Gary A. Munneke, *Law Firm Restructuring: The Big Picture*, 19 LAW PRAC. MGMT. 34, 40 (1993), http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1825&context=law_faculty.

40. See Ralph H. Brock, “*This Court Took a Wrong Turn with Bates*”: *Why the Supreme Court Should Revisit Lawyer Advertising*, 7 FIRST AMEND. L. REV. 145, 153-54 (2009) (“While the Court in *Bates* determined that truthful, restrained advertising of the prices of ‘routine’ legal services would not have an adverse effect on the professionalism of lawyers,” the *Ohralik* Court said that “this was only because it found ‘the postulated connection between advertising and the erosion of true professionalism to be severely strained.’” (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 368 (1977)).

41. See Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1183 (1972) (“Advertising and solicitation, it is said, would

law firm, highlighting the transition from learned profession to commercial enterprise.⁴² Chief Justice Warren Burger identified advertising as one of the key changes that eroded professionalism in the law.

[T]he standing of the legal profession is perhaps at its lowest ebb in this century—and perhaps at its lowest in history. Anyone who scans the writings of lawyers and judges on this subject and looks at the outrageous advertising of lawyers on television, on billboards, and in print will find abundant reason for this low standing.... [P]ossibly even worse in its long-range impact than courtroom misconduct—because most courtroom misconduct does not reach the public—is the outrageous breach of professional conduct we see in the huckster advertising of some attorneys. Perhaps “huckster” is not strong enough a word. “Shyster” is more appropriate, but I find on consulting the dictionary that even “shyster” is not strong enough. Tonight I will settle for “huckster-shyster” advertising.⁴³

Success for the advertising-funded practice derives from the marketing campaign and messaging crafted in the advertisements rather than from an earned reputation among judges, lawyers, and established institutional clients.⁴⁴ Since the initial bond is based on a response to a TV ad, flyer, or website, advertising tends to reinforce a consumer relationship between the client and the attorney instead of a counselor relationship.⁴⁵ As a result, advertising diminishes the professional standing of the lawyer, placing the legal services as a commodity item evaluated merely for cost and convenience.

encourage lawyers to engage in overreaching, overcharging, underrepresentation, and misrepresentation.”).

42. See, e.g., *New Partner in the Firm: The Marketing Director*, N.Y. TIMES, June 2, 1989, at B6, <http://www.nytimes.com/1989/06/02/us/the-law-new-partner-in-the-firm-the-marketing-director.html> (“Organized marketing programs have encountered the most resistance from veteran lawyers, who tend to view salesmanship as unprofessional.... ‘If you start off having established a reputation for personal probity and legal ability, that’s the best form of marketing there is.’ ...But many lawyers now agree with marketers who say hard work and a good reputation are no longer enough to attract clients.”).

43. Chief Justice Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 950, 953 (1995).

44. See, e.g., *Marketing for Personal Injury Lawyers*, ENVERSA, <http://www.enversa.com/marketingarticles/marketingcampaignsforpersonalinjurylawyer.html> (“With more attorneys than ever competing for clients, we can make your law firm visible and profitable. It’s about going one step further than the competition.”).

45. Jonathan K. Van Patten, *Lawyer Advertising, Professional Ethics, and the Constitution*, 40 S.D. L. REV. 212, 213 (1995) (“Television and other mass media advertising by lawyers is simply trolling for cases. It is a search for the easy case and easy money. It is designed to pump up cash flow.”). Research has shown that the public accepts lawyer advertising, and many lawyers have used advertising successfully. Christopher R. Lavoie, *Have You Been Injured in an Accident? The Problem of Lawyer Advertising and Solicitation*, 30 SUFFOLK U. L. REV. 413, 433 (1997) (“The public, however, prefers dignified and tastefully presented lawyer advertisements over tacky, greedy, or unrealistic ones.”). But see Linda Morton, *Finding the Suitable Lawyer: Why Consumers Can’t Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283, 287 (1992) (“The gap between the public’s needs and the legal profession’s compliance with those needs only frustrates the public and exacerbates its distrust of lawyers.”).

On top of these many changes, the firm itself has changed significantly. In 2012, the partnership track for the Am Law 100 firms rose to 10.5 years.⁴⁶ Many firms have grown through mergers, lateral hires, and the acquisition of multiple offices.⁴⁷ As a result, the largest firms have become significantly larger and less personal.⁴⁸ Associates are much more likely to transfer laterally rather than stay with a single firm.⁴⁹ And in many firms, there are lawyers employed as full-time staff attorneys in categories outside the traditional associate or partner category. The environment of the law firm has become increasingly isolating and disengaged.

In addition, the legal profession has further eroded its credibility. The culture built around the aim of achieving the 2000-billable-hour goal has corrupted additional facets of the profession.⁵⁰ As one attorney noted, “an ‘efficient and productive associate’ is ‘penalized,’ while the associate who may ‘pad’ hours ‘gets a significant raise/bonus.’”⁵¹ The effective billing attorney is likely not engaging in civic exercises, working with the community, developing the skills of the public leader, or serving as the public intellectual needed to serve as problem solver on behalf of society.⁵² Instead, the high-billing lawyer is becoming technically proficient—and nothing more.⁵³

46. Sara Randazzo, *For This Year's New Partners, Perseverance Pays*, AM. LAW. DAILY (Jan. 17, 2012), http://www.americanlawyer.com/id=1202538405500?id=1202538405500&et=editorial&bu=The%2520American%2520Lawyer&cn=Am_Law_Daily_20120117&src=EMC-Email&pt=Am%2520Law%2520Daily&kw=%2520For%2520This%2520Year%2527s%2520New%2520Partners%252C%2520Perseverance%2520Pays&slreturn=20160602182307.

47. See Debra Cassens Weiss, *If Law Firms Grow, Will Client Come? Report Discounts the Idea*, A.B.A. J. (Jan. 8, 2014, 12:35 PM CST), http://www.abajournal.com/news/article/if_law_firms_grow_will_clients_come_report_discounts_the_idea; Sara Randazzo, *Study: Law Firms Shouldn't Chase Growth Just to Grow*, AM. LAW. DAILY (Jan. 6, 2014), <http://www.americanlawyer.com/id=1202636526256> (discussing sophisticated analysis law firms use to evaluate firm mergers).

48. See Henderson, *supra* note 18, at 379 (citing William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 GEO. J. LEGAL ETHICS 1395, 1396-97 (2009) (“Over the last three decades, the 250 largest firms based on size (the National Law Journal 250) have grown by more than 500%.”)).

49. Matt Shinnars, *How to Become a Law Firm Partner*, A.B.A. SEC. LITIG. (June 7, 2012), <http://apps.americanbar.org/litigation/committees/youngadvocate/email/spring2012/spring2012-0612-how-become-law-firm-partner.html>.

While the Cravath model involved hiring outside the firm only when there was a deficiency in an in-demand practice area, associates are increasingly “jumping ship” after three or four years for another firm at which they don’t have a history of being viewed as a “lowly” associate. The “up or out” model is becoming more of an “over and up” model.

Id.

50. See Ross, *supra* note 20, at 3-4 (“During the past decade, economic changes in the legal profession have stimulated substantial increases in billable hours, making annual billings in excess of 2,000 hours per lawyer commonplace in many firms.”).

51. Fortney, *supra* note 19, at 178.

52. See RENNARD STRICKLAND & FRANK T. READ, *THE LAWYER MYTH: A DEFENSE OF THE AMERICAN LEGAL PROFESSION* 63 (2008).

In sum, there has been an inexorable move towards isolating, hyper-efficient sweatshops in at least some of the modern, multinational law firms, and there have been a multitude of efforts to improve efficiency throughout every other aspect of the law firm ecology. In contrast, Silicon Valley has moved in a very different direction.

Beginning with enterprises like Google, Silicon Valley has encouraged a new way of thinking about the responsibility of its employees. Google has been generous with perks like free lunches, commuter busses,⁵⁴ and professional services provided on campus.⁵⁵ But more importantly, it has created an environment where employees can take some control over their work.⁵⁶ Ironically, the best illustration of this practice was more conceptual in approach than in actual practice.

At the time of the Google IPO in 2004, founders Larry Page and Sergey Brin wrote: “We encourage our employees, in addition to their regular projects, to spend 20% of their time working on what they think will most benefit Google. This empowers them to be more creative and innovative. Many of our significant advances have happened in this manner.”⁵⁷ The founders’ IPO letter identified AdSense and Google News as deriving from this 20% time.⁵⁸ As tracked over the years, the actual proportion of Google employees who take advantage of this level of flexibility is only 5-10% of the workforce, but the idea of this opportunity helps shape the Google culture.⁵⁹ The culture of Google stresses both excellence and fun.⁶⁰

Law firms and fun may not be synonymous, but there are important lessons from an environment that can be both highly demanding and highly empowering. These firms, when they are at their best, create a very exciting environment.

Lawyers are expected to restore equilibrium, to be balancers. Every discipline, every profession, every job, and every calling has a cutting edge. At that cutting edge, lines are drawn. Lawyers and judges are society’s ultimate line drawers. On one side of the line, the conduct, action, or inaction is proper; on the other side of the line, it is not.

Id.

53. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 756-57 (“The Cravath system was established in a less competitive law firm environment than prevails today. Once a Cravath-type firm has to start generating higher profits in order to retain its stars, it may have to resort to lateral hiring and increasing the ratio of associates to partners.”).

54. See Miguel Helft, *Google, Master of Online Traffic, Helps Its Workers Beat the Rush*, N.Y. TIMES, Mar. 10, 2007, at A1.

55. See *How We Care for Googlers*, GOOGLE.COM, <https://www.google.com/about/careers/how-we-care-for-googlers/> (last visited Feb. 27, 2017) (detailing health-care services available on-campus).

56. See Jillian D’Onfro, *The Truth About Google’s Famous ‘20% Time’ Policy*, BUS. INSIDER (Apr. 17, 2015, 1:02 PM), <http://www.businessinsider.com/google-20-percent-time-policy-2015-4>.

57. Google Founders’ IPO Letter, “*An Owner’s Manual*” for Google’s Shareholders (2004), <https://abc.xyz/investor/founders-letters/2004/ipo-letter.html>. See also D’Onfro, *supra* note 56.

58. Google Founders’ IPO Letter, *supra* note 57.

59. D’Onfro, *supra* note 56.

60. LASZLO BOCK, WORK RULES!: INSIGHTS FROM INSIDE GOOGLE THAT WILL TRANSFORM HOW YOU LIVE AND LEAD 31-32 (2015).

What the Silicon Valley and other industries have learned is that employees want autonomy, and they are more productive when they have it.⁶¹ “There is mounting evidence that suggests employees who exercise autonomy regularly at work are happier and more productive. The right workers in the right role can transform an entire department—maybe even an entire organization—but only if their ability to act on their intuition and creativity is unleashed.”⁶² “[A]utonomy is not something that is going to be just a perk but an expectation.”⁶³

Autonomy represents one of the key aspects of a professional’s happiness.⁶⁴ A 2015 study by the Wisconsin Bar Association found that “autonomy on the job is 3.5 times as important as income and 5.5 times as important as law school class rank in predicting if a lawyer finds happiness.”⁶⁵

Critics of this argument can point to many problems with Silicon Valley’s employment practices. There is rampant ageism,⁶⁶ which makes the years of success pale in comparison to lawyers who can continue to be successful many decades after they begin their careers.⁶⁷ The 20% time policy is more a conceptual approach to the workplace than an actual benefit.⁶⁸ The competition and work intensity in Silicon Valley undoubtedly rivals that of the largest law firms.

61. Shelley Prevost, *The Compelling Case for Giving Employees More Freedom*, INC.COM (Mar. 31, 2014), <http://www.inc.com/shelley-prevost/5-ways-to-create-more-autonomy-at-work.html>.

62. *Id.*

63. Jacob Morgan, *The Future of Work Is About Flexibility, Autonomy, and Customization*, FORBES (Sept. 22, 2015, 3:59 AM), <http://www.forbes.com/sites/jacobmorgan/2015/09/22/the-future-of-work-is-about-flexibility-autonomy-and-customization/#263f4f5a2d59> (“Instead of having someone watching over your shoulder every few minutes to make sure you are working, employees are going to have to motivate and drive themselves to succeed.”).

64. See Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 582 (2015) (“[A]utonomy support could prove to be the single most important consideration for lawyers, and for their teachers and employers interested in fostering well-being and maximal performance.”).

65. Dianne Molvig, *What Makes Lawyers Happy?*, 87 WIS. LAW. 24, 26 (2014).

66. See Noam Scheiber, *The Brutal Ageism of Tech*, NEW REPUBLIC (Mar. 23, 2014), <https://newrepublic.com/article/117088/silicons-valleys-brutal-ageism> (“When ... PayScale ... surveyed the country’s 32 most successful tech companies, it found that just six of them had a median age over 35. (The median age at Facebook, Google, Zynga, AOL, and Zynga [sic] was 30 years or younger.) By contrast, the median age for all workers in the U.S. economy is 42 years.”). See generally Michelle Quinn, *Quinn: Time to Challenge Silicon Valley’s Youth Premium*, MERCURY NEWS (Oct. 24, 2015, 12:45 PM), http://www.mercurynews.com/michelle-quinn/ci_29018606/quinn-time-challenge-silicon-valleys-youth-premium (discussing ageism in Silicon Valley).

67. The median age for lawyers has risen to 49 in 2005 from 39 in 1980. See A.B.A., *LAWYER DEMOGRAPHICS* (2014), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2014.authcheckdam.pdf [hereinafter 2014 LAWYER DEMOGRAPHICS].

68. See Kathy Gersch, *Google’s Best New Innovation: Rules Around ‘20% Time’*, FORBES (Aug. 21, 2013, 10:23 AM), <http://www.forbes.com/sites/johnkotter/2013/08/21/googles-best-new-innovation-rules-around-20-time/#5006867f68b8>; Yoram Solomon, *Why Google’s ‘20 Percent’ Rule Is Actually Useless*, INC. (Mar. 10, 2016), <http://www.inc.com/yoram-solomon/20-of-my-time-will-not-make-me-more-creative.html>.

But there remains a striking difference between Silicon Valley companies and Am Law 200 firms. The Silicon Valley firms continue to experiment with perks ranging from student-loan reimbursements, to ski passes, to year-long maternity leaves (for parents of either sex).⁶⁹ Many of these successful companies have generous parental leave policies—some including bonuses for having a baby.⁷⁰ Fortunately, there are signs of progress among some law firms. For example, Orrick, Herrington & Sutcliffe LLP has added a \$100 monthly student debt benefit.⁷¹ The global law firm Robins Kaplan LLP recently made news for increasing its paid parental leave to ten weeks.⁷² These changes represent a good first step for firm ecology, but they are far less than its corporate counterparts.

Benefits that value attorneys as parents or care-givers send a different message to the employees than benefits that provide limited paid vacation days and billing goals that make those vacation days illusory. Control over what to wear within the office, control over a small percentage of one's client load, control to choose to telecommute during some portion of the week, better management of deadlines so partners do not regularly create artificial deadline crises, agreements with clients on timeliness of responses, and a host of other possible choices can create an environment where the lawyer has more autonomy, control, and well-being. There must be something to this need for control. After all, nearly half of all attorneys are in solo practice.⁷³

For recent college graduates considering whether to choose a career in law or to choose a career in Silicon Valley, the lifestyle described in California is far more enticing than those often published about practicing lawyers.⁷⁴ While lawyers may have had one of the better work environments for intellectual leaders during the postwar era, today, the legal profession has regressed to that of the assembly line while Silicon Valley and the many markets emulating it have created an environment providing the potential for autonomy, control, and

69. Zoë Henry, *20 Hottest Tech Companies with the Best Employee Perks*, INC. (Feb. 3, 2016), <http://www.inc.com/zoe-henry/glassdoor-top-companies-employee-benefits.html>.

70. *See id.* (discussing Facebook, Pinterest, Spotify, and Zillow).

71. Elizabeth Olson, *Firms Offer Cash to Help New Lawyers Pay Student Debt*, N.Y. TIMES, July 15, 2016, at B3 (“People ‘have an emotional reaction to carrying debt, and they like it when employers show that they appreciate the financial challenges that people are facing,’ said Beth Akers, an economist at the Brookings Institution’s Center on Children and Families.”).

72. Katie Scott, *US Law Firm Enhances Paid Parental Leave Policy*, EMP. BENEFITS (June 23, 2016, 12:03 PM), <https://www.employeebenefits.co.uk/issues/june-online-2016/us-law-firm-increased-paid-parental-leave/>.

73. The percentage of attorneys in solo practice is 49% as of 2005. 2014 LAWYER DEMOGRAPHICS, *supra* note 67.

74. *See, e.g.*, Bill Haltom, *Being a Lawyer Is Tougher than Nails*, 50 TENN. B.J. 36, 36 (2014) (“According to *U.S. News and World Report*, we lawyers have the 51st best job in America. And get this: we rank behind message therapists (#27), accountants (#39), high school teachers (#40), bookkeepers (#43), and ... believe it or not ... nail technicians (#49)!”); Anne M. Brafford, *Remodeling the “Unhappiest Job in America,”* 56 ORANGE COUNTY LAW. 12, 12 (2014) (“Lawyers play ... the ‘My-Life-Sucks-More-Than-Yours-A-Thon.’ This is a competitive race to the bottom in which lawyers trade tales about how little sleep they’ve gotten, the number of vacations they have not enjoyed, the number of births of their children they’ve missed, and so on.”).

professional success. Without the offer of an environment providing meaningful autonomy and a sustainable working environment, legal education and the legal profession will continue to lose high quality applicants to their choices in other professions.

II. INTELLECTUALISM

The law is a science of such vast extent and intricacy, of such severe logic and nice dependencies, that it has always tasked the highest minds to reach even its ordinary boundaries. But eminence in it can never be attained without the most laborious study, united with talents of a superior order. There is no royal road to guide us through its labyrinths. These are to be penetrated by skill, and mastered by a frequent survey of landmarks.

– Judge Joseph Story⁷⁵

If the work environment has declined, perhaps there remains an opportunity to recruit future lawyers because they represent the intellectual leadership of our nation and our best hope for a civil society.⁷⁶ As the Supreme Court noted, “law schools ... represent the training ground for a large number of our Nation’s leaders.”⁷⁷ If intellectual leadership is the purpose of law schools, however, then it is remarkable that the declines in applications are not far larger. Legal education remains committed to an ideal that has been attacked—if not repudiated—by the society it serves.

Intellectual leadership may not be too far different than Roscoe Pound’s call for “[l]earning, the pursuit of a learned art.”⁷⁸ As Pound explained, “problems of the upright life guided by religion are to be dealt with by the resources of cultivated intelligence by lawyer, physician, and clergyman, and to carry on their tasks they must be more than resourceful craftsmen, they must be learned men.”⁷⁹

Intellectual leadership has been under attack since the McCarthy witch-hunts of the 1950s.⁸⁰ The House Un-American Committee of the House of Representatives (“HUAC”) and the Senate Committee on Government Operations, featuring Senator Joseph McCarthy, both targeted intellectuals as part of their war on Communism.⁸¹ The HUAC “feared artists and intellectuals,

75. 2 JUDGE JOSEPH STORY, *STORY’S LIFE AND LETTERS* 145 (William Story ed., 1851).

76. See *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (“Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives.”).

77. *Id.*

78. Pound, *supra* note 5, at 205 (“Learning, the pursuit of a learned art, is one of the things which distinguishes a profession from a calling or vocation or occupation.”).

79. *Id.*

80. RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 3 (1963) (“During [the 1950s] the term *anti-intellectualism*, only rarely heard before, became a familiar part of our national vocabulary of self-recrimination and intramural abuse.... Primarily it was McCarthyism which aroused the fear that the critical mind was at a ruinous discount in this country.”).

81. See JEFFREY MEYERS, *JOHN HUSTON: COURAGE AND ART* 121 (2011) (discussing McCarthyism); Jon M. Garon, *Hidden Hands that Shaped the Marketplace of Ideas: Television’s*

thought films were a dangerous propaganda weapon and wished to eliminate all liberal content from motion pictures.⁸² Led by McCarthy, the Senate took this attack further and more broadly. “During the McCarthy era intellectuals were regarded as either closet communists who covertly supported the Soviet Union, perhaps even as spies, or liberal ‘dupes’ whose innocence about the realities of Stalinism misled their readers and students into accepting a benign view of Russian developments during and after the war.”⁸³

The anti-intellectualism movement targeted the philosophical approach that was open to scientific inquiry, robust intellectual debate, and non-traditional customs and values. According to a *New York Times* editorial written in 1954, “when anti-intellectualism takes hold of a nation that nation is in danger.”⁸⁴ “[Anti-intellectualism] is a resentment and suspicion of the life of the mind and of those who are considered to represent it; and a disposition constantly to minimize the value of that life.”⁸⁵ “Famous science fiction writer Isaac Asimov once said: ... ‘The strain of anti-intellectualism has been a constant thread winding its way through our political and cultural life, nurtured by the false notion that democracy means that my ignorance is just as good as your knowledge.’”⁸⁶

The anti-intellectual witch-hunts of the 1950s have been replaced by a more systematic devaluation of education, complex analysis, scientific research, and thoughtful public policy development.⁸⁷ For example, higher education expenses have risen more than 112% with a substantial portion of that amount coming from private tuition.⁸⁸ Total amounts expended have risen, but at a far slower pace than inflation. “If states had provided the same level of funding per public, full-time equivalent student as in 1990-1991, total appropriations in 2009-2010 would have equaled approximately \$102 billion, an amount 35.3 percent higher.”⁸⁹

Anti-intellectualism has evolved over the past sixty years from attacks on elite, typically left-leaning academics and policy makers to encompass virtually

Early Transformation from Medium to Genre, 19 U. DENV. SPORTS & ENT. L.J. 29, 56-57 (2016) (discussing the HUAC).

82. MEYERS, *supra* note 81, at 121.

83. John Patrick Diggins, *The Changing Role of the Public Intellectual in American History*, in RICHARD M. ZINMAN, JERRY WEINBERGER, ARTHUR M. MELZER, *THE PUBLIC INTELLECTUAL: BETWEEN PHILOSOPHY AND POLITICS* 101 (2004).

84. Editorial, *The Anti-Intellectual*, N.Y. TIMES, Sept. 11, 1954, at 16.

85. HOFSTADTER, *supra* note 80, at 7.

86. Ray Williams, *Anti-Intellectualism and the “Dumbing Down” of America*, PSYCHOL. TODAY (July 7, 2014), <https://www.psychologytoday.com/blog/wired-success/201407/anti-intellectualism-and-the-dumbing-down-america> (quoting Isaac Asimov).

87. See, e.g., CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* 11 (2007) (“[S]cience abuse threatens not just our public health and the environment, but the very integrity of American democracy, which relies heavily on scientific and technical expertise to function.”); SUSAN JACOBY, *THE AGE OF AMERICAN UNREASON* 104 (2009).

88. Equal Justice Works, *Declining Investment in Higher Education Hurts Students*, U.S. NEWS (Apr. 18, 2012, 10:00 AM), <http://www.usnews.com/education/blogs/student-loan-ranger/2012/04/18/how-our-declining-investment-in-higher-education-hurts-students>.

89. *Id.*

all experts.⁹⁰ Trust in science and confidence that research is something other than another a cynical form of political rhetoric has significantly impacted the ability of research to drive decision-making.⁹¹ Today, attacks of scientific delegitimization come from advocacy groups on both the political right and left that are willing to attack and invalidate scientific research that disagrees with their political positions.⁹² These new attacks join the more traditional attacks that combine xenophobia and anti-elite rhetoric to make populist appeals.⁹³

Professionals, like lawyers, who strove to be thought leaders, risked political and social attacks on their ideology, loyalty, and effectiveness. This is not to suggest that all lawyers are intellectuals, but an effective lawyer should be a thoughtful, analytical expert on any matter on which she is making public comment.⁹⁴

In the 1950s debate on intellectualism, there was only some room for lawyers as intellectuals. A lawyer's work was characterized as requiring intellect, but "though vitally dependent upon ideas, is not distinctively intellectual."⁹⁵ As explained by Max Weber, "the professional man lives *off* ideas, *not* for them."⁹⁶ It is only the intellectual lawyer who serves in a special role providing bespoke⁹⁷ ideas and novel arguments. For example, Thurgood Marshall's recasting of "separate but equal" schools as incapable of being made equal rewrote American history.⁹⁸ Or Justice Cardozo's opinion in *Palsgraf*, which established the parameters of proximate cause.⁹⁹ Or Justice Louis D.

90. See, e.g., CHARLES P. PIERCE, *IDIOT AMERICA: HOW STUPIDITY BECAME A VIRTUE IN THE LAND OF THE FREE* 8 (2010) ("The rise of Idiot America, though, is essentially a war on expertise."); JACOBY, *supra* note 87, at 280-83.

91. See Mark Lynas, *Even in 2015, the Public Doesn't Trust Scientists*, WASH. POST (Jan. 30, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/01/30/even-in-2015-the-public-doesnt-trust-scientists/> ("America risks drifting into a new Age of Ignorance. Even as science makes unparalleled advances in genomics to oceanography, science deniers are on the march—and they're winning hearts and minds more successfully than the academic experts whose work they deride and undermine.").

92. See *id.* ("Lobbyists and activists who promote their ideological agendas and financial interests over those of good science and public policy must take much of the blame for this situation.").

93. See Ellen Schrecker, *The New McCarthyism*, CHRON. HIGHER EDUC., June 30, 2016, at B4 ("Xenophobia aside, what should also be of concern to the academic community is the former House speaker's [Newt Gingrich] attack on the 'national elites' who, he insists, facilitate terrorism by adhering to political correctness.").

94. See HOFSTADTER, *supra* note 80, at 26.

95. *Id.*

96. *Id.* at 27.

97. See SUSSKIND, *supra* note 3, at 29 ("In the UK, we speak of bespoke software when we mean software that is specially written for one client or customer. We also talk about bespoke tailoring—a bespoke suit, of a Savile Row variety for example, is tailored for one individual.").

98. See *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483, 488 (1954) ("[S]egregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws.").

99. See generally *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

Brandeis, co-author of perhaps the single most influential law review article¹⁰⁰ and contributor of significant judicial opinions on privacy and justice.¹⁰¹ Or the body of decisions by Sandra Day O'Connor that made her the architect of the Supreme Court for much of the Rehnquist Court.¹⁰²

Intellectual legal leadership may no longer matter. Trust in the criminal and civil justice systems are under significant duress. “[P]ublic confidence is the lifeblood of [the criminal justice] system—a belief that any dispute will be resolved in a fair, transparent, and efficient manner consistent with the principles of truth and justice.”¹⁰³ Speaking to the ABA, Sherrilyn Ifill, President of the NAACP Legal Defense and Educational Fund, spoke out about the crisis of confidence.¹⁰⁴

We are losing a whole generation, maybe more than one, who are losing their confidence in our justice system. Increasingly they believe that the rule of law is selective, unfair, and inequitably applied. We must take responsibility for strengthening the integrity of our justice system so that it is worthy of the confidence and faith of younger generations.¹⁰⁵

An ABA task force has begun to address some of the perception issues for the criminal and civil justice system. As the ABA recently noted, “minority perceptions of the justice system are *often* negative and *sometimes* inaccurate.”¹⁰⁶ Worse, for much of the public, it is the police who shape the public perception of the criminal justice system.¹⁰⁷ The continuing distrust of police within minority

100. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

101. See JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 100-03 (2016). See also *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (“The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.”).

102. See generally Paula A. Monopoli, *The Sway of the Swing Vote: Justice Sandra Day O'Connor and Her Influence on Issues of Race, Religion, Gender and Class*, 4 U. MD. L.J. RACE RELIGION GENDER & CLASS 207 (2004).

103. Hon. Michael P. Donnelly, *End Factually Baseless Plea Bargains*, 42 LITIG. 4, 6 (2016). See also Hon. Patricia Breckenridge, *Missouri Chief Justice Calls on Lawyers, Judges to Stand Together in Ensuring Justice System Earns Public's Trust, Confidence*, 71 J. MO. B. 300, 301 (2015) (“The Department of Justice report further identified race-based disparities in the treatment of defendants, noting these disparities ‘are not isolated or aberrational; rather, they exist in nearly every aspect of Ferguson ... operations.’”).

104. See Video Highlights: *National Summit on Innovation in Legal Services*, at 5:10-5:38, AM. B. ASS'N (May 22, 2015, 3:51:58 PM), http://www.americanbar.org/news/abanews/aba-news-archives/2015/05/video_highlightsna.html.

105. *Id.* See also Keith Roberts, *Perceptions of Justice: Time to Act*, 54 JUDGES' J., Fall 2015, at 26, 27.

106. Roberts, *supra* note 105, at 27 (emphasis added).

107. *Id.* at 28.

Two basic observations about justice system personnel predominated at the programs. One was that the police, not the courts, primarily shape [perception of justice] in minority

communities¹⁰⁸ and general disconnect between the public and the legal community has eroded the legal community's role to claim intellectual leadership.

The loss of leadership, then, has multiple causes. Lawyers must be part of the solution to the distrust by the public of the criminal justice system and the lack of access to the civil justice system.¹⁰⁹ Lawyers also must be part of the return to confidence of expertise and more general value of intellectual discourse and leadership. The legal community, in turn, must be part of the broader effort to educate the public to demand thoughtful, intellectually rigorous leaders and strategies.

The effort to make these changes, however, has significant opposition. Both intellectualism and intellect are discouraged, and leaders are distrusted. The effort may require a new start, reshaping all of education. Christopher Nelson, President of St. John's College, has argued that intellectual freedom and the pursuit of reason is essential for the future of our country:¹¹⁰

For the sake of our country, then, we need our citizens to have two kinds of education that are in a very healthy tension with one another: (1) an education in the political and intellectual foundations, including the economic, scientific and social traditions and principles that have shaped our nation, and (2) an education in the arts needed to question and examine those very foundations and traditions in the light of reason, so that we may keep them vibrant and alive, and so that we may redefine and improve on them when we discover we have good cause. These are called the arts of freedom because they are grounded in the kind of free inquiry that helps us

communities. Contact with the police usually initiates the experience of young minorities with the justice system, and the close working relationship between police, prosecutors, and judges usually means that police decisions largely determine the results.

Id.

108. See Daniel Dale, *U.S. Shootings Highlight Deteriorating Race Relations*, TORONTO STAR (July 8, 2016), <https://www.thestar.com/news/world/2016/07/08/us-shootings-highlight-deteriorating-race-relations.html>; Matt Furber & Richard Perez-Pena, *11 Officers Shot, 4 Fatally, at Rally Against Violence*, N.Y. TIMES, July 8, 2016, at A1; James B. Comey, Director, Fed. Bureau of Investigation, Remarks at Georgetown University, *Hard Truths: Law Enforcement and Race* (Feb. 12, 2015) (transcript available at <https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>) ("First, all of us in law enforcement must be honest enough to acknowledge that much of our history is not pretty. At many points in American history, law enforcement enforced the status quo, a status quo that was often brutally unfair to disfavored groups.").

109. See ALFRED Z. REED, CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 3 (1921).

Practicing lawyers ... are part of the governing mechanism of the state. Their functions are in a broad sense political.... [P]rivate individuals cannot secure justice without the aid of a special professional order to represent and to advise them. To this end lawyers were instituted, as a body of public servants, essential for the maintenance of private rights.

Id.

110. Christopher B. Nelson, *Lincoln and Liberal Education*, HUFFINGTON POST: THE BLOG (last updated May 28, 2013, 1:31 PM), http://www.huffingtonpost.com/christopher-nelson/liberal-arts-education-lincoln_b_2966192.html.

understand our world better and inspires in us a sense of wonder and longing to learn more.¹¹¹

The liberal educational ideal of problem solver is essential to intellectual life and to a thoughtful development of the law.¹¹² The U.S. educational model has shifted from an intellectually-based approach of preparing our students to think and solve problems to one more like that of a European educational model based on training and apprenticeships.¹¹³

Legal education provides the most comprehensive education in reasoning.¹¹⁴ It is the hallmark of the first-year law school curriculum.¹¹⁵ Lawyers must continue to value the intellectual rigor that comes with hard cases establishing new law. To reduce legal education to an apprenticeship is more than to roll the clock back beyond the days of Langdell—it is to destroy the skills lawyers need to be the leaders society requires.

As law is de-intellectualized and society rejects those who use intellectual rigor to address problems with thoughtfulness and nuance, there is less and less value in legal education. If legal education turns its back on its liberal education attributes or if our society further rejects its need for leaders who can serve as public intellectuals, then the lawyer becomes more like the electrician or the software engineer—technically proficient but untrained for the unknown challenges that lie ahead.

The drive to be a lawyer rather than a software engineer will not come merely from the enticement of the office in which they both work. It will come from the intellectual breadth and inquiry available to the lawyer. If it does not, then again, the rational applicant will choose software engineering over law. As the data reflect, thousands have already made just this decision.

III. OBLIGATION

“[A]sk not what your country can do for you—ask what you can do for your country.”

— John F. Kennedy¹¹⁶

111. *Id.*

112. See Jon M. Garon, *Legal Education in Disruption: The Headwinds and Tailwinds of Technology*, 45 CONN. L. REV. 1165, 1214 n.216 (2013) (discussing problem solving as one of the core fundamental skills of legal education).

113. See FAREED ZAKARIA, IN DEFENSE OF A LIBERAL EDUCATION 20 (2016).

114. Garon, *supra* note 112, at 1215 (“[T]he first year is intended to focus on the MacCrate skill of analytical reasoning.”). See generally A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [hereinafter MACCRATE REPORT].

115. See generally WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT]; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007) [hereinafter BEST PRACTICES REPORT].

116. President John F. Kennedy, Inaugural Address (Jan. 20, 1961), <http://www.presidency.ucsb.edu/ws/index.php?pid=8032&>.

Roscoe Pound characterized the obligation of the legal profession as steeped in a spirit of public service.¹¹⁷ This obligation, however, must be reconciled with the competing demands on the lawyer, and it must be intellectually honest if the law hopes to remain a profession.¹¹⁸ Justice Stephen Breyer, writing in the foreword of the 2001-02 ABA Commission on Billable Hours Report, summed up the loss of obligation quite succinctly: “[O]ver the past four decades it has become increasingly difficult for many lawyers to put this spirit [of public service] into practice.”¹¹⁹

The lack of flexibility to choose to provide public service and pro bono work is driven, in part, by the increase in billable hour requirements. Another critical issue, however, is the debt many students find themselves struggling to pay upon completion of law school.¹²⁰ The 2015 annual survey conducted by Barbri reports that “83% of current law school students expect to have education loans when they graduate. More than half expect to have over \$100,000 in loans when they graduate.”¹²¹ This sometimes-crippling debt may force some lawyers to choose higher-paying private employers rather than accepting government and public interest jobs. It forces other attorneys to work “overtime” to find ways to increase their remuneration so they can meet this significant student debt.¹²²

If the obligation of public service defines the legal profession, then the dissonance between the obligation and the practice must be rectified. “Society . . . grants the professions elevated social status and an implicit right to working conditions that other employees do not enjoy—particularly autonomy, freedom from external authority, the right to work without supervisory constraint, and the

117. Pound, *supra* note 5, at 205 (quoting GEORGE HERBERT PALMER, *THE IDEAL TEACHER* 5 (1910) (“A trade aims primarily at personal gain; a profession at the exercise of powers beneficial to mankind.”)). Palmer’s book, however, was focused on convincing teachers to work for their noble profession despite the “poor and disappointing business” when viewed as a trade. Since the profession’s requirement of public obligation need not be inconsistent with the goal of earning a good living, the distinction will not be pursued further in this article.

118. James M. Altman, *Trouble with the Bottom Line*, 68 N.Y. ST. B.J., Nov. 1996, at 6, 6 (“Today most American lawyers need to earn a living, and that need has become harder to satisfy as the American standard of living declines and law firm costs escalate.”).

119. A.B.A. BILLABLE HOURS REPORT, *supra* note 19, at vii.

120. See AM. BAR ASS’N, AMERICAN BAR ASSOCIATION TASK FORCE ON THE FINANCING OF LEGAL EDUCATION REPORT 8 (2015), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2015_june_report_of_the_aba_task_force_on_the_financing_of_legal_education.authcheckdam.pdf (“Using inflation-adjusted (CPI) 2014\$, the average debt for private law school students increased from \$102,000 in AY2005-06 to \$127,000 in AY2012-13; for public law school students the figures are \$66,000 and \$88,000.”). See also Editorial, *The Law School Debt Crisis*, N.Y. TIMES, Oct. 25, 2015, at SR8 (reporting the 2012 average student loan debt at \$140,000 for those who had student loans).

121. There remains good news. “Although most law students will have significant debt at graduation, 82 percent of them expect to get good value out of that investment. And 78 percent of practicing attorneys agree that their income since graduation has justified the cost of their J.D.” BARBRI GRP., STATE OF THE LEGAL FIELD SURVEY 8 (2015), http://www.thebarbrigroup.com/files/white-papers/220173_bar_research-summary_1502_v09.pdf.

122. While the burden of debt likely affects the new lawyers’ autonomy in work as well as their ability to meet their professional obligations, the harm to the profession may be worse than the harm to the individual lawyers. See Olson, *supra* note 71.

right ... to exercise one's skills consistent with professional ethics and training."¹²³ Without the moral obligation at the heart of the professional legal practice, it becomes a difficult and largely thankless task.

The profession places the obligation to provide pro bono service to the poor in the ABA Model Rules of Professional Conduct. Rule 6.1 articulates this uniform obligation. "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."¹²⁴ According to a 2013 ABA survey, this obligation is respected.¹²⁵ According to the survey, only 20% of attorneys failed to provide pro bono services while 36% achieved the 50-hour minimum specified by the model rule.¹²⁶ American Lawyer reports that among the Am Law 200 firms, 47.3% of lawyers contributed more than 20 hours, and the total average exceeded the Rule 6.1 minimum at 54.1 hours per attorney on pro bono.¹²⁷ These numbers could be heartening. "The sad fact, however, is that most American lawyers do not make contributing legal services a significant part of their practice."¹²⁸ Other estimates place the number of attorneys providing pro bono to the poor at closer to 5%.¹²⁹

Pro bono is not the only aspect of this obligation. It could not possibly be the solution to the 80% of legal work that has not been addressed for the poor and over 60% of legal work that has not been addressed for the middle class. State and federal funding for the justice system, including the judiciary, public defenders offices, and legal aid organizations, also creates a significant gap between the lawyer's obligation and the profession. Graduating individual

123. Crain, *supra* note 8, at 550.

124. MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 1983), http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html.

125. See A.B.A. STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 33 (2013), http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lr_pb_Supporting_Justice_III_final.authcheckdam.pdf.

126. *Id.* at vi-vii.

127. Nell Gluckman, *Best Firms for Pro Bono*, AM. LAW. (June 27, 2016), <http://www.americanlawyer.com/id=1202760647192/Exclusive-Survey-Pro-Bono-Rankings?slreturm=20160609171431>.

128. THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 220 (2010). See also Deborah L. Rhode, *Pro Bono in Principal and in Practice*, 26 *HAMLIN J. PUB. L. & POL'Y* 315, 328 (2005) ("American lawyers average less than half an hour of work per week and under half a dollar per day in support of pro bono legal services. *Pro bono* programs involving the profession's most affluent members reflect a particularly dispiriting distance between the bar's idealized image and actual practices.").

129. Spencer Rand, *A Poverty of Representation: The Attorney's Role to Advocate for the Powerless*, 13 *TEX. WESLEYAN L. REV.* 545, 555 (2007) (discussing a meeting between the Philadelphia legal organizations and members of the bar where the legal aid organizations "came armed with statistics, believing that between us, we represented virtually all of the pro bono agencies and that we could identify about 5% of the bar taking cases from us").

lawyers who plan to commit their careers to fulfill this obligation is part of the lawyer's collective responsibility.¹³⁰

Another part of the obligation or spirit of public service is the universal imperative to operate one's legal services in a manner that fulfills the more general obligation to pursue justice.¹³¹ In looking at the potential disconnect between the rhetoric of the legal profession's self-identified duty and the actual service provided to clients, the moral imperative to pursue justice may be too vague. Instead, the oath of office might provide some interesting guidance.¹³² The oath of the modern attorney harkens back until at least 1402 and may stretch back in similar form to Roman times.¹³³

The two clauses most relevant to the discussion of obligation are that the attorney "shall Delay no Man for lucre Gain or Malice" and the attorney "shall increase no fee but you shall be contented with the old Fee accustomed."¹³⁴ These two clauses again emphasize that the income to the attorney is secondary, at best, and the interest of the client should predominate all decisions by the lawyer.¹³⁵

130. See, e.g., *Public Interest Lawyers Help Us. Here's How We Can Help Them*, HUFF. POST: THE BLOG (Sep. 29, 2015, 9:49 AM), http://www.huffingtonpost.com/equal-justice-works/public-interest-lawyers-h_b_8213806.html.

131. See *Deuteronomy* 16:20 (tzedek, tzedek tirdof (צדק צדק תירדוף), translated as "Justice, justice you shall pursue.").

132. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1404 (2004) (quoting JOSIAH HENRY BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* 28 (Rockwell and Churchill Press 1909)):

You shall doe no Falsehood nor consent to any to be done in the Office of Pleas of this court wherein you are admitted an Attorney. And if you shall know of any to be done you shall give Knowledge thereof to the Lord Chief Baron or other his Brethren that it may be reformed you shall Delay no Man for lucre Gain or Malice you shall increase no fee but you shall be contented with the old Fee accustomed. And further you shall use your self in the Office of Attorney in the said office of Pleas in this Court according to your best learning and discretion. So help you God.

Id.

133. See Anton-Hermann Chroust, *The Legal Profession in Ancient Republican Rome*, 30 NOTRE DAME L. REV. 97, 100-101 (1954). See also LeRoy Costner, *Law: A Profession or Just Another Job?*, FLA. B. NEWS (Sept. 15, 2006), <https://www.floridabar.org/divcom/jn/jnnews01.nsf/Articles/4EFE8411C1A331AB852571E6006E27DC>.

134. Andrews, *supra* note 132, at 1404.

135. C.D. Potter, *Correspondence—The Professional Oath* (Oct. 16, 1877), 5 CENT. L.J. 395 (1877). A young attorney, writing in 1877, noted the frustration caused by those who misconstrue the oath:

The force and effect, however, of this obligation depends, at least, upon its conscientious interpretation A lawyer owes no fidelity to anyone except his client, and the latter is the keeper of his professional conscience. He violates his official oath when he consciously presses for an unjust judgment, much more so, when he presses for the conviction of an innocent man. The high and honorable office of a counsel would be degraded to that of a mercenary were he compelled to do the biddings of his client against the dictates of his conscience.

Id.

The pernicious pressure of billing and the challenge of provisioning legal services to the poor continue to pull at the professional construct one holds as a lawyer. To make the obligation and spirit of public service meaningful, there must be more than an admonition to fill the justice gap.¹³⁶ There must be a shared responsibility to address this obligation, but it is naïve to think pro bono is anything more than a small part of the solution. The lack of access to legal services was described by Attorney General Eric Holder as nothing short of a “crisis.”¹³⁷

The justice gap is not only a direct threat to the stability of the United States, but it is also an existential threat to the lawyers who provide legal services and the students who are considering joining this noble profession. Lawyers and law students understand the professional obligation.¹³⁸ An obligation that cannot be fulfilled becomes hollow rhetoric, and the cynicism that it engenders poisons the good intentions from which it began.¹³⁹ Without a radical change, the next generation of lawyers will face an expanding justice gap for the poor and middle class, while continuing to feel the financial pressures to maximize billing before anything else.

Finally, the legal profession’s obligation to provide access to justice must be universal rather than apportioned only to certain benefitted members of society. It is axiomatic that race, gender, nationality, and other attributes should never bar a client’s access to justice.¹⁴⁰ It would seem equally self-evident that

136. Anna Blackburne-Rigsby, *Ensuring Access to Justice for All: Addressing the “Justice Gap” Through Renewed Emphasis on Attorney Professionalism and Ethical Obligations in the Classroom and Beyond*, 27 GEO. J. LEGAL ETHICS 1187, 1189 (2014) (“There is a pervasive ‘justice gap’ today between the level of civil legal assistance available and the level necessary to meet the needs of low-income Americans.”).

137. *Id.* (quoting Attorney General Eric Holder). Judge Blackburne-Rigsby further noted that “[a]s a judge who has sought to promote all peoples’ ability to access legal services and the court system for the past nineteen years, I can attest that this is not a hyperbolic statement.” *Id.*

138. See Jan L. Jacobowitz & Judge Vance E. Salter, “*As the Twig Is Bent*”: *Law Student Insights Regarding Pro Bono and Public Interest Law*, 86 FLA. B.J., May 2012, at 50, 52 (“The students believe that once a student is exposed to the extreme need in the community, the often troubling impact of personal awareness will encourage participation in either public interest or pro bono work after graduation.”).

139. *Id.* (quoting from a parody of a law firm’s recruiting website: “‘We look for associates who have what it takes to succeed here: a hearty work ethic, a keen understanding of the law, an eye for detail, an ability to be influenced, a heart of stone, and a lack of outside interests and pursuits.’ It’s that ‘heart of stone’ that is so particularly troublesome.”).

140. See Martha F. Davis, *Access and Justice: The Transformative Potential of Pro Bono Work*, 73 FORDHAM L. REV. 903, 919 (2004) (quoting Mary Pat Treuthart, *Weaving a Tapestry: Providing Context Through Service Learning*, 38 GONZ. L. REV. 215, 223 (2002)) (“Students defined ‘justice’ procedurally, and made virtually no connection to other issues such as peace and justice, gender and race, equality and justice or poverty and justice.”); Naseem Stecker, *An Interview with Reginald M. Turner*, 81 MICH. B.J., Oct. 2002, at 16, 18 (state bar president discussing initiatives to provide access to justice regardless of economic status and “regardless of superficial variables like gender, race, or ethnic origin”); Artika R. Tyner, *Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering*, 10 HASTINGS RACE & POVERTY L.J. 219, 223 (2013) (“Client-centeredness ... focuses on giving voice to the voiceless, providing power to the powerless, and aiding in overcoming subordination. For instance, it explores how social factors, such as race, class, or gender and challenges disparate outcomes, impact procedural fairness.”);

these characteristics should have no place in determining the success of lawyers in our profession.¹⁴¹ “Despite our efforts thus far, racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession.”¹⁴² The legal profession does not reflect the community it serves.¹⁴³

The failure to diversify the bar is particularly disturbing since law schools have made substantially more progress than law practice.¹⁴⁴ As a result, the legal profession is failing a portion of its recent graduates based on those new lawyers’ race, nationality, and gender.¹⁴⁵ Female lawyers and lawyers of color are less satisfied in their positions.¹⁴⁶ And there is a direct relationship between the diversity of the legal profession and the access and outcomes of legal services for all communities and people.¹⁴⁷

There are many potential causes for the disparity between the diversity in the United States and the diversity in the legal profession, and there are undoubtedly many potential strategies to erase this gap. Changes to firm hiring practices and procedures, less reliance on elite law schools, bar mentoring programs, greater use of field placement opportunities for law students, and similar proposals will all help to break down barriers and improve success. Since the problem is a profound one, all these efforts should certainly continue.

The underlying issue, however, provides yet another example of the structural failures of the present legal practice model. The public can correctly demand that the legal profession answer for this failing: How can the bar claim the professional right of self-regulation when decades of well-intended programs have failed to meet our obligation to demonstrate equality within our ranks? How can the bar claim to meet its collective professional obligation to pursue

Nelson P. Miller, *Beyond Bias—Cultural Competence as a Lawyer Skill*, 87 MICH. B.J., June 2008, at 38, 39-40.

141. A.B.A. PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 5 (2010) [hereinafter A.B.A. DIVERSITY REPORT].

142. *Id.* See also Gerald L. Green, *The Importance of Diversity in Our Profession*, 84 J. KAN. B. ASS’N, Jan. 2015, at 6; Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1045 (2011) (“In major law firms, they represent approximately 12% of attorneys and 6% of the partners, a significantly lower percentage than their representation in even the most elite law schools, which constitute the primary hiring pool for these firms.”).

143. Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011 (2009) (“The legal field is disproportionately, overwhelmingly white. Whites make up 67 percent of the U.S. population, but are almost 90 percent of its lawyers.”).

144. Women represent approximately half of the law school students, one third of the lawyers, and one fifth of the law partners. See, e.g., Rhode, *supra* note 142, at 1042-43.

145. See A.B.A. DIVERSITY REPORT, *supra* note 141, at 12-13 (“While the legal profession has achieved some diversity in the ‘lower ranks,’ diversity remains thin in the ‘higher ranks’ of law firm managing and equity partners, general counsels, state or federal appellate judges, and tenured law professors.”).

146. *Id.* at 34.

147. Anderson, *supra* note 143, at 1016 (citing David L. Chambers et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 499 (2000) (“[A]ttorneys of color were more likely to serve clients of color, engage in public interest and public service practice, and offer pro bono legal services.”)).

justice in a spirit of civic engagement if we cannot meet our goals of equal treatment for the very lawyers who serve the public? Where is the will to address the unmet legal needs of women and minorities in a profession that has not demonstrated the will to fully resolve its own issues on disparate treatment?

The failure to resolve the profession's systemic challenges to racial and gender equality, like the profession's failure to bridge the justice gap, requires a new approach to the provision of legal services.

IV. REINVENTING A LEARNED PROFESSION

“In future it will be your glorious doom to take up the burden and to enjoy the nobility of your proper title”

— T.H. White¹⁴⁸

The efforts to reinvigorate the professional obligation, to empower intellectual leadership, and to afford attorneys the autonomy to direct some portion of their time to their preferred purposes must each be improved through specific changes to the way we prepare our law students and how we provide legal services in our existing law firms and organizations. Each of these three areas must be addressed by the existing institutions within the legal profession. The scale of the challenge cannot excuse us from action or discourage us from meeting the challenge. Nonetheless, I do not expect that the scale of the challenge can be answered with adjustments to the third year of law school,¹⁴⁹ new diversity initiatives, changes to the billing practices of Am Law 200 firms,¹⁵⁰ or an increase in the IOLTA accounts.¹⁵¹

I suggest that in addition to the many small changes intended to improve the provision of legal services, it is time to undertake a bold new initiative. Just as John F. Kennedy initiated the Peace Corps to address the global needs of public

148. T.H. WHITE, *THE ONCE AND FUTURE KING* 212 (1939).

149. See Karen Tokarz et al., *Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!*, 43 WASH. U. J.L. & POL'Y 11, 35 (2013) (“[A]bandoning the third year will eliminate or diminish important educational and professional opportunities that have significant value in the marketplace.”); George Critchlow, *Beyond Elitism: Legal Education for the Public Good*, 46 U. TOL. L. REV. 311, 316 (2015); Paul Radvany, *Preparing Law Students to Become Litigators in the New Legal Landscape*, 33 REV. LITIG. 881, 893 (2014); Michael A. Olivas, *58,000 Minutes: An Essay on Law Majors and Emerging Proposals for the Third Year of Law Study*, 45 MCGEORGE L. REV. 115, 126 (2013). See generally DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

150. See, e.g., Christine Parker & David Ruschena, *The Pressures of Billable Hours: Lessons from a Survey of Billing Practices Inside Law Firms*, 9 U. ST. THOMAS L.J. 619, 624 (2011) (“[C]ompensation creates a vicious circle of competition and a means of salving the hurts that excessive competition inflicts upon lawyers' professional lives.”).

151. See *What Is IOLTA*, IOLTA.ORG, <http://www.iolta.org/what-is-iolta> (last visited Jan. 6, 2017) (“Interest on Lawyers Trust Accounts (IOLTA) ... is pooled to provide civil legal aid to the poor and support improvements to the justice system Every state ... operates an IOLTA program. In 2009, the U.S. IOLTA programs generated more than \$124.7 million nationwide.”).

service,¹⁵² the federal government must come together with the law schools, the ABA, and the state bar associations to create a new national initiative to provide free and low-cost legal services to the poor and middle class. The Peace Corps model has been operating within the U.S. since 1994 under the Corporation for National & Community Service, known as AmeriCorps.¹⁵³ The existing AmeriCorps model, however, is geared primarily for college students rather than new professionals.¹⁵⁴

The simplest version of this proposal would be to work with AmeriCorps to include the provision of legal services as one of the fields supported in the AmeriCorps efforts. This would help provide new lawyers and resources to provide free legal services to clients in poverty. But that effort alone will not address the broader, structural issues described throughout this article.

Instead, a comprehensive program would engage the students at the time they applied to law school (and ideally include college applicants as well). Program participants would receive loans sufficient to cover the cost of in-state public tuition. Upon graduation, the participants would work for a number of years providing free legal services through new or existing nonprofit legal services organizations, earning loan forgiveness for the law school debts incurred to the program. While working for the program, these participants would also earn a modest-but-meaningful income, receive health benefits, and continue to receive post-JD professional training. Students would be selected based on their commitment and their competency, not on the ranking of their law school. The size of each year's entering class will be determined by the funding levels available.

The key to the success of the program would be its scale and flexibility. There are examples of initiatives that have similar missions. For example, the Skadden Fellowship Program, founded in 1988, provides at least twenty-five grants each year to recent law graduates to provide legal services through nonprofit legal services organizations.¹⁵⁵ While the Skadden Fellowship Program is a great service for the lawyers and agencies benefited by the program, it does

152. See *The Founding Moment*, PEACE CORPS, <https://www.peacecorps.gov/about/history/founding-moment/> (last visited Jan. 6, 2017) (scroll down to "Full Text of Kennedy's Remarks").

153. See *AmeriCorps*, CORP. FOR NAT'L & CMTY. SERV., <http://www.nationalservice.gov/programs/amicorps> (last visited Jan. 6, 2017) ("AmeriCorps engages more than 75,000 Americans in intensive service each year at nonprofits, schools, public agencies, and community and faith-based groups across the country.").

154. *I'm Ready to Serve*, CORP. FOR NAT'L & CMTY. SERV., <https://www.nationalservice.gov/programs/amicorps/join-amicorps/im-ready-serve> (last visited Jan. 6, 2016) ("Most AmeriCorps members receive student loan deferment, and training, and may receive a living allowance After you complete your term of service, you will also receive a Segal AmeriCorps Education Award to help pay for college, graduate school, or vocational training or to repay student loans.").

155. *Skadden Fellowship Program Marks 25 Years*, SKADDEN (Aug. 21, 2013), <https://www.skadden.com/news-events/skadden-fellowship-program-marks-25-years>. See also Cait Murphy, *Skadden Fellows: Prestige and Service*, MOD. ETHICAL LAW. (Sept. 20, 2012), <http://modernethicallawyer.com/test-1/>.

not meaningfully impact the justice gap. This proposal calls for a massively larger initiative.

A closer model can be found from the Legal Services Corporation (“LSC”).¹⁵⁶ The Legal Services Corporation Act of 1974¹⁵⁷ initiated what is now the largest and most comprehensive nonprofit corporation providing grants and legal services.¹⁵⁸ LSC received \$385 million for fiscal 2016.¹⁵⁹ At this funding level, approximately “50% of all those who sought legal assistance from LSC grantees were turned away because of the lack of adequate resources.”¹⁶⁰ These data suggest that \$730 million would address the LSC client base, a significant percentage of the underserved. Unfortunately, however, this only reflects the legal services provided to those potential clients who are at or below 125% of the poverty line and who sought these legal services.¹⁶¹ The unmet need for legal services is far larger, so the additional funds—and rules to allow sliding scale “low bono”—would be necessary to address the broader societal needs to truly close the justice gap.

The proposed “LawCorps” program will require at least \$1 billion to close the justice gap and reconstruct the operations of legal education and law firms. This would be slightly less than three times the current LSC funding level, so it would reach beyond the current LSC client-base need and provide services for additional low-income and lower-middle-income clients.¹⁶²

If Congress chose to fund LSC at this level, the quality of justice in the United States would improve dramatically, and the provision of justice would greatly improve for the poor in America.¹⁶³ This proposal, however, suggests

156. See *How Legal Aid Works*, LEGAL SERVS. CORP., <http://www.lsc.gov/> (last visited Jan. 6, 2017).

157. Nancy Guadagno, *Access to Justice Strategic Legal Aid*, ARIZ. ATT’Y, Apr. 2016, at 32 (“President Richard Nixon signed into law the Legal Services Corporation Act of 1974, which promotes equal access to justice by funding high-quality civil legal assistance for low-income Americans.”).

158. See *How Legal Aid Works*, *supra* note 156 (“LSC promotes equal access to justice by providing funding to 134 independent non-profit legal aid programs in every state, the District of Columbia, and U.S. Territories. LSC grantees serve thousands of low-income individuals, children, families, seniors, and veterans in 813 offices in every congressional district.”).

159. *LSC Appropriations Acts with Committee Reports*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/laws-regulations-guidance/lsc-appropriations-acts-committee-reports> (last visited Jan. 6, 2017).

160. *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., <http://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> (last visited Jan. 6, 2017) (quoting LSC’s 2009 report DOCUMENTING THE JUSTICE GAP IN AMERICA).

161. See 45 C.F.R. § 1611.3(c) (2005) (establishing the poverty guidelines which are established by the U.S. Department of Health and Human Services).

162. In addition to additional funding, other statutory and regulatory amendments would be required to expand the eligibility of the legal services. See Legal Services Corporation Act, 42 U.S.C. § 2996f(a)(2) (2010); 45 C.F.R. § 1611.3(c) (2016) (detailing requirements to establish maximum income levels for individuals eligible for legal assistance which are 125% of the Federal Poverty Guidelines issued by the U.S. Department of Health and Human Services).

163. See LEGAL SERVS CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 28 (updated report 2009) (“As a first, critical goal, there must be enough funding to serve all of those *currently*

that the funding should be invested at the law student level so the structural improvements impact legal education and legal services in addition to helping close the justice gap.¹⁶⁴

Under the “LawCorps” proposal, any law school that enrolls a participating student would be prohibited from charging that student any additional tuition. This allows both public and private law schools to be part of the program and assures that there are enough law school seats for all the interested students. If the schools were eligible to supplement the tuition cost with additional payments by the participating students, the program funding could trigger another rapid increase in the cost of law school. Instead, the program will encourage some private law schools to lower their tuition to be closer to public institutions.

The guaranteed jobs and loan forgiveness should enable students of modest means to attend law school without the threat of life-long student loan repayments. One would also expect that the composition of the participating law students would more accurately reflect the diversity of the U.S. law schools, creating an improved professional career path for women and minorities that now continues to lag in the private sector.

The expansion of the work force providing legal services should help to reduce the justice gap and to reduce the caseload for lawyers providing these legal services.¹⁶⁵ While the program helps lawyers fulfill their obligation to promote access to justice and public service, the expansion of the workforce should help provide the flexibility required to improve the autonomy essential to the personal needs of the lawyers. If the agencies employing these program lawyers do not provide a healthy work environment, the program lawyers will move to other agencies or opt not to participate in the program. The goal is to improve the working environment for the lawyers by using market competition rather than regulation to assure that the quality of life improves.

Similarly, the proposal helps rebuild the public trust in the intellectual leadership of attorneys throughout the country, much as community policing builds trust relationships for those departments that take the time and effort to know their local communities.¹⁶⁶ If the “LawCorps” program is successful, then

seeking help from LSC-funded programs. This requires a doubling of LSC funds and a doubling of the state, local and private funds that also support LSC grantees.”).

164. *But see* Dion Chu et al., *Measuring the Justice Gap: Flaws in the Interstate Allocation of Civil Legal Services Funding and a Proposed Remedy*, 33 PACE L. REV. 965, 1003-04 (2013) (“The funding that the LSC distributes to a particular state should be linked to the unmet needs for civil legal services in the state.”). The needs-based funding model suggested by Chu, Greenfield, and Zuckerman can best be incorporated into a model that moves beyond the bright-line cut-off at 125% of the poverty line. This proposal can help address that concern.

165. *See generally* Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL’Y 571, 610-14 (2011) (discussing mandatory pro bono and expanded law school pro bono programs).

166. *See* Patricia E. Campie, *Build Trust and Justice Locally*, USA TODAY (Sept. 10, 2014, 7:00 AM), <http://www.usatoday.com/story/opinion/2014/09/10/ferguson-police-trust-justice-communities-column/15280723/>; Susan Shah & Jim Burch, *How to Build Trust in Policing*, MARSHALL PROJECT (Oct. 23, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/10/23/how-to-build-trust-in-policing#.WsJ80K7ey> (“In the 1980s, a few large police departments sought

the communities served by these lawyers will come to respect them and, through them, respect the broader justice system.¹⁶⁷ Over time, the next generation of judges and law faculty will likely be dominated by attorneys that honed their craft through this “LawCorps” program.

Not all potential law students will want to commit three to five years of their post-JD experience. Many Am Law 200 law firms will want to maintain their existing summer program selection process. But over time, if enough law students participate in the program, the change in legal education funding and the commitment to post-J.D. training will transform the provision of legal services for the benefit of the lawyers, the clients, and the society.

Undoubtedly, this is not the first \$1 billion proposal to reform the commitment to the spirit of legal services. The specifics cannot be detailed in a few paragraphs. LSC, AmeriCorps, and the Peace Corps provide guidance on how to build national programs that bring Congress, members of the justice system, and the general public together to build a new national consensus. Hopefully, however, the call by Attorney General Holder to address the crisis of the justice gap can be answered in a way which benefits the public and structurally reforms legal services as well.

CONCLUSION

“All this will not be finished in the first 100 days. Nor will it be finished in the first 1,000 days, nor in the life of this Administration, nor even perhaps in our lifetime on this planet. But let us begin.”

— John F. Kennedy¹⁶⁸

Nothing short of a new public program will restore the public’s trust in the legal system. Investing a mere \$1 billion is essential to fulfill the commitment to a just society governed by the rule of law. Without such a vehicle, incremental changes to the pedagogy of law schools, to practice rules, or to billing goals will be insufficient to bridge the chasm that has separated so many of our neighbors from access to justice.

Richard Susskind has asked whether we are at the end of lawyers. The answer to the question will turn on whether we address the justice gap by broadly embracing change to the funding of both legal education and the provision of legal services for the poor and middle class or whether we hope to stay the course. If we stay the course, then smart candidates will choose more lucrative

to establish healthy relationships with those they serve through community policing, such as the Community Patrol Officer Program The program was successful”).

167. See, e.g., BUREAU OF JUSTICE ASSISTANCE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION 13-15 (1994), <https://www.ncjrs.gov/pdffiles/commp.pdf> (“Establishing and maintaining mutual trust is the central goal of the first core component of community policing—community partnership. Police recognize the need for cooperation with the community.”).

168. John F. Kennedy, Inaugural Address, Jan. 20, 1961, <http://www.presidency.ucsb.edu/ws/index.php?pid=8032&>.

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jobs with better working conditions and fewer personal demands. The profession of law will continue to decline.

Just as Roscoe Pound called for a rebuilding of the profession based on organization, learning, and a spirit of public trust, we must today call for a rebuilding of the broader justice system by appealing to the next generation of attorneys with a respectful work environment, a community-based respect for the intellectual leadership they bring, and a meaningful strategy to meet the professional obligations that will then rekindle and instill the spirit of public trust. To achieve these three necessities, there must be a comprehensive strategy. Giving back to society through publicly funded legal services achieves these three goals.

Autonomy, intellectualism, and obligation have all been lost to economic efficiency, overzealous billing objectives, and financial goals that drown out all other goals. Justice will only be served when lawyers can return to their calling. Only by addressing the needs for autonomy, intellectualism, and obligation will lawyering continue to be a professional calling, and only by maintaining its professional dignity, can we rely on the rule of law. The proposed new program will not be easy to accomplish, but since it will build a more just society, we are obligated to pursue it.

Along the way, law schools and practitioners should take all the other steps necessary to restore the professional dignity of those in this generation of lawyers who work to provide legal services and who promote access to justice. Changes to billing practices, benefits, and other aspects of the lawyer's control over the work environment will improve the retention for these lawyers. Community engagement will help build trust and respect for lawyers as intellectual leaders who can be trusted. And expansion of pro bono will make a difference for both the additional clients served and the attorneys who serve those clients. In each area, the professional role of the lawyer can be enhanced. It may not resolve the justice gap, but it will narrow it for all of those benefitted. Each client matters, so these changes are also worth the effort.

Whether we accomplish the foundational change or merely improve the lives of some clients and some attorneys, the efforts will not be wasted. The time has come to begin again.