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THE UNTOLD STORY OF THE JUSTICE GAP: INTEGRATING POVERTY LAW INTO THE LAW SCHOOL CURRICULUM

Vanita Saleema Snow*

Introduction

Once upon a time, not so long ago, a student entered law school with a commitment to change the world. The student quickly recognized that success in first-year classes required understanding the black letter law and applying the law to various scenarios that had little to do with social justice. During the second year, the student's career-services advisor reminded the student to think critically about post-graduation employment and the importance of on-campus interviews. Pressures to take bar-tested courses and securities law overshadowed the student's plan to enroll in a clinic. The student soon graduated from law school, but with limited skills that would help her address social justice and a diminished desire to change the world.¹

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1. See Scott L. Cummings, *The Future of Public Interest Law*, 33 U. ARK. LITTLE ROCK L. REV. 355, 358 (2011) (referencing Robert Granfield's study of law students in the 1980's and the socialization to "drift" from public interest

A traditional law school curriculum can effectively extinguish students' fire in the belly for social justice.² Although many schools now offer pro bono and clinic opportunities,³ these curricular realignments do not ensure that every law student receives sufficient training in representing low-income clients, just as they would receive preparation in legal writing, contracts, torts, or criminal law.⁴ Instead, schools promote social justice as something tangential to practicing law, creating a hidden curriculum—a curriculum that minimizes lawyers' ethical duty to address the access-to-justice crisis.⁵

In light of the American Bar Association's *MacCrate Report*,⁶ Clinical Legal Education Association's *Best Practices*

work). See also Emily Hughes, *Taking First-Year Students to Court: Disorienting Moments as Catalysts for Change*, 28 WASH. U. J.L. & POL'Y 11, 33 (2008).

2. See Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 77 n.4 (2002) (citing G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 11 AM. B. FOUND. RES. J. 225 (1986)).

3. Of the 164 schools that responded to the 2014 Survey of Applied Legal Education, only six schools required students to enroll in a law clinic, one required enrollment in a field placement, and 24 required either a law clinic or field placement. See Robert R. Kuehn & David A. Santacroce, *2013-14 Survey of Applied Legal Education*, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC. (2015), http://www.csale.org/files/Report_on_2013-14_CSALE_Survey.pdf.

4. See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017, Standard 303(b) (adopted 2016) [hereinafter ABA], which provides that "[a] law school shall provide substantial opportunities to students for: (1) law clinics or field placement(s); and (2) student participation in pro bono legal services, including law-related public service activities." The rule does not require that all students complete pro bono opportunities, just that the school offer them.

5. WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter Carnegie Report]. See Hannah R. Arterian, *The Hidden Curriculum*, 40 U. TOL. L. REV. 279 (2009); see also Christine Cerniglia Brown, *The Integrated Curriculum of the Future: Eliminating a Hidden Curriculum to Unveil a New Era of Collaboration, Practical Training, and Interdisciplinary Learning*, 7 ELON L. REV. 167 (2015).

6. See Robert MacCrate et al., *Legal Education and Professional Development—An Educational Continuum*, 1992 ABA SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE B. [hereinafter MacCrate Report].

for *Legal Education*,⁷ the Carnegie Foundation's *Educating Lawyers: Preparation for the Profession of Law*,⁸ and *Building on Best Practices: Transforming Legal Education in a Changing World*⁹ law schools are increasingly reassessing not only students' pro bono commitment, but other competency-based measures to determine whether the curriculum prepares students for practice.¹⁰ Another impetus for curriculum reform includes the American Bar Association (ABA) Standard 303, which mandates that schools offer students experiential course(s) and pro bono opportunities.¹¹ Likewise, the ABA Standard 302 requires that schools establish learning outcomes that include not only substantive legal knowledge, but also professional skills.¹² Shifts in the legal environment continue

7. The MacCrate Report opened the dialogue about lawyering competencies and identified ten skills and values for practitioners: (1) Problem solving, (2) Legal analysis and reasoning, (3) Legal research, (4) Factual investigation, (5) Communication, (6) Counseling, (7) Negotiation, (8) Litigation and alternative dispute-resolution procedures, (9) Organization and management of legal work, and (10) Recognizing and resolving ethical dilemmas. *Id.* at 135. See also ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 12 (2007) [hereinafter BEST PRACTICES].

8. The Carnegie Report identified three apprenticeships students should experience in law school: the cognitive apprenticeship, the apprenticeship of skills and practice, and the apprenticeship of professional identity and values. See Carnegie Report, *supra* note 5, at 8-10.

9. DEBORAH MARANVILLE ET AL., BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD (2015).

10. ABA, *supra* note 4. I would be remiss not to mention that in the 1970's, H. Russell Cort and Jack L. Sammons, developed competencies to drive the curriculum at the Antioch School of Law. H. Russell Cort and Jack L. Sammons, *The Search for "Good Lawyering": A Concept and Model of Lawyering Competencies*, 29 Clev. St. L.Rev. 397 (1980). Many of my colleagues at Antioch's successor law school, the University of the District of Columbia David A. Clarke School of Law, continue to use those competencies for course development and to map the curriculum. Significantly, the subsequent MacCrate Report aligned with the competencies Russ and Jack developed.

11. ABA, *supra* note 4.

12. *Id.* at Standard 302. Interpretation of ABA Standard 302-1 provides: "For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation." *Id.* at 16.

to pressure law schools to produce “practice-ready” graduates.¹³ This combination of circumstances has roused law schools to examine their curricula.¹⁴

Various articles, symposiums, and conferences have appropriately addressed the need for law school curriculum reform.¹⁵ Scholars have also addressed the role and development of poverty law in eradicating inequality in the judicial system, with some of the literature emphasizing the importance of poverty law courses.¹⁶ However, the linkages between poverty law, curriculum reform, professional values, and cognitive skills has not been fully explored. This article seeks to fill that gap.

13. The Class of 2015 had the fourth lowest employment rate for jobs requiring bar passage of any class since the National Association of Law Placement, Inc. (NALP) began collecting this data in 1985. See *Employment Rate of New Law Grads Unchanged as Both the Number of Graduates and the Number of Jobs Found Decline*, NALP BULLETIN (Oct. 2016), <http://www.nalp.org/1016research>. The Classes of 2012 and 2013 had the lowest employment rates for these positions, and the Class of 2011 had the third lowest. *Id.*

14. See *infra* Part IV for a discussion of the cognitive and values apprenticeships.

15. The topic of the 2012 Society of American Law Teachers (SALT) Biennial Conference focused on social justice and the role of legal education and the profession to address the justice gap. See *2012 SALT Teaching Conference: Teaching Social Justice, Expanding Access to Justice: The Role of Legal Education & The Legal Profession*, University of Maryland Francis King Carey School of Law (Oct. 5-6, 2012), https://www.law.umaryland.edu/about/news/images_news_n_events/files/salt_agenda.pdf.

For its 2016 Biennial Conference, The Legal Writing Institute (LWI) dedicated a conference track to social justice in the law school curriculum. See *Call for Proposals: 17th Biennial Conference: “Thriving in a Time of Change,”* LEGAL WRITING INST. (2015), <http://www.lwionline.org/uploads/BiennialMaterial/BC11-2016BiennialFinalCFP.pdf> (last visited Mar. 9, 2017). See Jackie Gardina & Ngai Pindell, *Teaching Social Justice, Expanding Access to Justice: An Introduction*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1 (2013).

16. See Robert Hornstein, *Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum*, 35 WM. MITCHELL L. REV. 1057 (2009); Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008); Martha F. Davis, *The Pendulum Swings Back: Poverty Law in the Old and New Curriculum*, 34 FORDHAM URB. L.J. 1391 (2007); Marie A. Failing, *A Home of its Own: The Role of Poverty Law in Furthering Law Schools’ Missions*, 34 FORDHAM URB. L.J. 1173 (2007).

Through the lens of poverty law attorneys, I contend that integrating poverty law into existing courses in the law school curriculum serves a dual purpose. First, it builds students' professional identities, preparing them to represent pro bono clients effectively and ultimately to work to close the justice gap. Second, integrating poverty law into existing courses enhances students' learning outcomes and critical lawyering skills. I maintain that the overarching and multifaceted layers of poverty law problems advance the competencies that the ABA expounds law students should acquire. To support this thesis, I draw on data from in-depth interviews with poverty law attorneys and a survey of their practice norms.

I begin the article with a definition of poverty law and its evolution since the development of the Legal Services Corporation. Part II explores pro bono representation as a strategy to close the justice gap¹⁷ and build a generation of lawyers who can significantly remediate the access to justice crisis. In Part III, I provide an overview of the qualitative methodology and phenomenological design I used to gain an understanding of the nature of poverty law practice. With the interview results as the foundation, in Part IV, I show how the skills that poverty law lawyers use can advance the analytical and professional development competencies the ABA requires and the *MacCrate* and *Carnegie Reports* recommend. In the final section, I provide strategies to seamlessly incorporate poverty law into a course.

I. The Evolution of Poverty Law

Defining poverty law is essential to a discourse of integrating it into the law school curriculum. However, a prerequisite to this discussion is understanding that poverty is a national problem.¹⁸ In 2015, there were 43.1 million people

17. The term "justice gap" symbolizes the barrier that denies low-income litigants meaningful access to the judicial system. *Mission*, U.S. DEPT OF JUST., OFFICE FOR ACCESS TO JUST., <https://www.justice.gov/atj> (last visited Mar. 12, 2017) [hereinafter OFFICE FOR ACCESS TO JUST.].

18. From 1959 to 1973, poverty decreased by 50%. See PETER EDELMAN, SO RICH, SO POOR: WHY IT'S SO HARD TO END POVERTY IN AMERICA 14, 18 (2013). This movement suggests that poverty was on a decline, but as the economy changed, we became a low-wage nation. This shift leaves one-third of the people in the country with incomes below the poverty line. See *id.*

in America living in poverty,¹⁹ with 19.7 percent of children under eighteen living below the poverty line.²⁰ The root causes of poverty are multi-faceted and beyond the scope of this article, but living in poverty leads to legal problems, often because laws are designed to protect others' power and privilege.²¹

Marginalized access to the courts and discriminatory laws create additional barriers to low-income households' abilities to end generational poverty. Thus, it is important to consider the correlation between access to justice developments and various anti-poverty initiatives. The term "poverty law" must also encapsulate the political landscape that led to using legal services attorneys as part of the anti-poverty movement.

In 1964, President Johnson's War on Poverty initiative led to the enactment of the Economic Opportunity Act.²² The Office of Economic Opportunity (OEO) was established to administer many of the war on poverty programs, such as Head Start, Job Corps, and VISTA.²³ The Community Action Agency would later develop as a way for low-income communities to

19. Bernadette D. Proctor et al, *Income and Poverty in the United States: 2015*, U.S. CENSUS BUREAU 12 (Sept. 2016), <http://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf>.

20. *Id.* Annually, using the Consumer Price Index, the Census Bureau establishes poverty guidelines using various income thresholds. *Id.* at 22. If a family income is less than the threshold, that family is in poverty. *Id.* In 2015, for example, the income threshold for a family of four with three related children under eighteen years old was \$24,120. *Id.* at 43. Thus, if a family's income fell below this level, the family was deemed to be living in poverty. U.S. CENSUS BUREAU, POVERTY THRESHOLDS, <http://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html>.

21. See Barbara Stark, *Theories of Poverty/The Poverty of Theory*, 2009 B.Y.U. L. REV. 381 (2009); Amy L. Wax, *Musical Chairs and Tall Buildings: Teaching Poverty Law in the 21st Century*, 34 FORDHAM URB. L.J. 1363 (2007); David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 371, 406 (2000).

22. Act of Aug. 20, 1964, ch. 34, 78 Stat. 508, 508-24, 42 U.S.C. §§ 2711-81, *repealed by Omnibus Budget Reconciliation Act of 1981*, ch. 106, § 683(a), 95 Stat. 357, 519.

23. See Peter Edelman, *The War on Poverty and Subsequent Federal Programs: What Worked, What Didn't Work, and Why? Lessons for Future Programs*, 40 CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 7, 7-18 (2006); See also PETER EDELMAN, *SEARCHING FOR AMERICA'S HEART: RFK AND THE RENEWAL OF HOPE* 37 (2003).

lead the local anti-poverty movements.²⁴ OEO also incentivized the expansion of legal services providers by funding 130 legal services programs.²⁵ Building upon the OEO model, many legal aid offices opened with the dual mission of eradicating poverty and increasing access to justice.²⁶ To effectuate these missions, lawyers often partnered with community-based organizations. For example, Action for Boston Community Development housed the Boston Legal Assistance Project,²⁷ United Planning Organization in the District of Columbia collaborated with the Neighborhood Legal Services Program, and Chicago's Legal Aid Bureau continued its alliance with United Charities.²⁸ These organizations strategized to use lawyers as part of a multi-faceted approach to eradicating poverty.²⁹

In 1974, a decade after the creation of OEO, a bipartisan Congress created the Legal Services Corporation (LSC).³⁰ Although this legislation resulted in an important expansion period for legal services, this heyday was short-lived.³¹ As governor of California, Ronald Reagan challenged OEO funding

24. See Brian Gilmore, *Love You Madly: The Life and Times of the Neighborhood Legal Services Program of Washington, D.C.*, 10 U. D.C. L. REV. 69, 81 (2007); Robert Halpern, *Neighborhood-Based Initiative to Address Poverty: Lessons From Experience*, 20 J. OF SOC. & SOC. WELFARE 111, 120-22 (1993).

25. See EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 103 (2013).

26. The District of Columbia's Neighborhood Legal Services Program articles of incorporation included a purpose statement of utilizing "legal resources and techniques for the elimination of the causes of poverty." Gilmore, *supra* note 24, at 87.

27. JOHNSON, *supra* note 25, at 50-52.

28. *Id.*

29. Law reform and legislative advocacy were important strategies in using the law to end the war on poverty. Legal services programs understood the important role lawyers would play in this strategy. See *id.* at 111-15.

30. In 1974, Congress enacted legislation to authorize LSC to serve as the federal agency to fund civil legal assistance. Legal Services Corporation Act of 1974, 42 U.S.C. § 2996 (1974) [hereinafter Legal Services Corporation Act]; see William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241 (1998).

31. Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 21 (2004).

to legal services entities.³² As President, he was equally aggressive toward LSC. President Reagan's allegation that legal services providers used federal funds to represent "welfare queens" who were attempting to defraud the government perpetuated an anti-legal services sentiment.³³ Stereotyped sound bites—lazy, welfare queen, drug addicts—became synonymous with legal services providers' clients and created a landscape that painted poverty as a crime, rather than a social injustice.³⁴ Armed with a welfare fraud slogan, President Reagan proposed a reduction of LSC funding, with total defunding within three years.³⁵ Lawyers for poor people were being eliminated, but poverty was not.

In support of his agenda, in 1981, President Reagan appointed conservative LSC board members, and the climate that gave birth to LSC drastically shifted.³⁶ Similar to other federally-funded social welfare programs, LSC was an easy target for the conservative political climate.³⁷ Although LSC survived Reagan's zero budget proposal, in 1996, the 104th Congress reduced LSC's operating budget from 400 million to 278 million.³⁸ On the state level, the LSC budget reduction hampered impact litigation and led to the elimination of various specialty units, including many appellate divisions.³⁹ Coupled with the budget reductions, Amendments to the Legal Services Corporation Act prevented legal services organizations from addressing various legal issues.⁴⁰ Significantly, at a time

32. JOHNSON, *supra* note 25, at 505-06.

33. Gene Demby, *The Truth Behind the Lies of the Original "Welfare Queen,"* NPR (Dec. 20, 2013, 5:03 PM), <http://www.npr.org/sections/codeswitch/2013/12/20/255819681/the-truth-behind-the-lies-of-the-original-welfare-queen>.

34. *Id.*

35. Cummings, *supra* note 31, at 21-22.

36. *Id.* at 22.

37. Cummings, *supra* note 1, at 362.

38. See Legal Services Corporation Act, *supra* note 30. This action was under President Bill Clinton and was a phased elimination that Congress proposed. See JOHNSON, *supra* note 25, at 740.

39. See Gilmore, *supra* note 24, at 118.

40. The Legal Services Corporation Act stipulates that LSC-funded programs cannot use either LSC or private funds for certain activities. See Legal Services Corporation Act, *supra* note 30. The Act and subsequent LSC regulations included certain restrictions on: (1) attempts to influence legislation and/or administrative rulemaking processes, 45 C.F.R. § 1612.3

when federally-funded legal aid entities were experiencing drastic budget cuts, LSC regulations prohibited grantees from collecting attorneys' fees⁴¹ and from filing class action lawsuits.⁴²

Many LSC-funded legal services organizations were forced to redefine their operations; some merged with other legal services providers, and others closed.⁴³ Many of these realignments coalesced with the LSC initiative for state-level planning that mandated legal services organizations merge with other similarly situated LSC grantees.⁴⁴ Funds from Interests on Lawyers Trust Accounts (IOLTA) and other private bar involvement allowed some providers to walk away from LSC funding and seek alternative support.⁴⁵ The remaining LSC-funded organizations grappled with shifting LSC restrictions.⁴⁶ Program audits were increasingly adversarial, and LSC restrictions hindered community organizing and meaningful social justice reform.⁴⁷

With these restrictive LSC guidelines, the anti-poverty movement morphed.⁴⁸ New legal services providers emerged

(2016), (2) initiation of, and participation in, class action lawsuits, *id.* at § 1617.3, (3) criminal cases, except for cases in Indian tribal courts, *id.* at § 1613.3, (4) redistricting, *id.* at § 1632.3, (5) welfare reform, *id.* at § 1639.3, and (6) prisoner litigation. *Id.* at § 1637.3. For restrictions on abortion, see 42 U.S.C. § 2996(f)(b)(8) (2012).

41. § 1642 *et seq.* However, in the FY 2010 Consolidated Appropriations Act (Pub. L. 111-117), Congress removed the 1996 restrictions on the ability of LSC grantees to claim, collect, or retain attorneys' fees. *See id.*

42. § 1617.3.

43. *E.g.*, Cummings, *supra* note 1, at 356-57.

44. Mostly because of mergers, state-level planning would ultimately reduce the number of LSC-funded legal services providers; from 1997 to 2004, the number of LSC grantees went from 261 to 138. LEGAL SERVICES CORPORATION, STATE PLANNING: A FIVE-YEAR OVERVIEW Appendix B (2003), http://www.lsc.gov/sites/default/files/LSC/pdfs/030194_sp5yrrprt.pdf.

45. Cummings, *supra* note 31, at 23.

46. LSC remains a moving target. In his 2018 budget, President Trump proposed zero funding for LSC. *See* Daniel Wiessner, *Trump Budget Would Defund Legal Services Corporation*, REUTERS (Mar. 16, 2017, 5:35 PM), <http://www.reuters.com/article/trump-legalservices-idUSL2N1GT24C>.

47. JOHNSON, *supra* note 25, at 605-607. Perhaps equally relevant was the shift in the social-political climate. Thus, even without restrictive LSC guidelines, legal services organizations were slowly shifting the way that they were addressing poor people's problems.

48. Stephen Loffredo, *Poverty Law and Community Activism: Notes*

and the poverty law landscape expanded to embrace various social justice issues,⁴⁹ including immigration status as a factor that may impede people's ability to maintain economic stability.⁵⁰ Many of these providers removed strict income guidelines, recognizing that even when clients live above the poverty line, many external barriers and societal factors hinder meaningful access to justice.⁵¹

The changing political climate, shifts in legal services providers' policies, and clients' needs have led to an expansion of the poverty law practice area. Appropriately, when exploring integrating poverty law into the law school curriculum, my definition of poverty law embraces these historical developments. It also considers the societal factors that perpetuate poverty and may create legal problems for people living in poverty. These factors include race; living in a neighborhood where the government over-polices; living in low-performing school districts; or living without adequate financial safety nets. External factors may also include limited employment options because of deficient transportation systems. Even inadequate financial literacy and banking opportunities are compounding factors that perpetuate poverty.⁵² Perhaps the most prevalent factor is living below, or slightly above the poverty line, but lacking the ability to secure

from a Law School Clinic, 150 U. PA. L. REV. 173, 175 (2001).

49. Professors Pamela Edwards and Sheilah Vance describe "social justice" as "the process of remedying oppression, which includes 'exploitation, marginalization, powerlessness, cultural imperialism, and violence.'" Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 J. LEGAL WRITING INST. 63, 64 (2001). They also provide a list of some social justice issues, including "problems involving race, ethnicity, and interracial conflict, 'class conflict, gender distinctions, . . . religious differences,' and sexual orientation conflicts." *Id.* Many law school poverty law courses reflect the shifting focus of the area of law, and poverty law classes are often referenced as "civil rights and poverty law" and "social welfare law." Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 CLINICAL L. REV. 5, 9 (2016); Wax, *supra* note 21, at 1367.

50. With a few exceptions, LSC programs limit their representation to U.S. citizens and eligible "aliens." 45 C.F.R. § 1626.3 (2016).

51. LSC regulations establish income eligibility guidelines for its grant recipients; generally, clients must live within 125% of federally established poverty guidelines. § 1611.49(c).

52. See generally Laurie A. Morin, *Legal Services Attorneys as Partners in Community Economic Development: Creating Wealth for Poor Communities Through Cooperative Economics*, 5 U. D.C. L. REV. 125 (2000).

an attorney when confronted with a legal problem, which exacerbates the presenting problem of poverty.

Thus, I define poverty law in its broadest context. It is legal representation and advocacy that addresses those impediments to low-income individuals, families, or communities being able to capitalize on financial opportunities.⁵³ Poverty lawyers seek to uphold the human rights and dignity of people living in poverty, including the right to healthy food, habitable and affordable housing, property ownership, clean air, safe communities, accessible transportation, and meaningful access to the judicial system. My definition also includes any area of law that touches the lives of individuals living in poverty.

II. The Justice Gap: Looking At Pro Bono

Former Attorney General Eric Holder described the gaps in legal services for the poor not just as a problem, but as a crisis.⁵⁴ Although the 43.1 million Americans who live in poverty⁵⁵ would be income-eligible to receive free representation from federally-funded legal aid offices, staffing deficiencies at legal services programs cause the entities to deny legal representation to more clients than they accept.⁵⁶ Consequently, many low-income litigants appear in court without legal representation and frequently receive less favorable results than litigants represented by counsel.⁵⁷ Other litigants forgo their legal rights altogether because they

53. Attorney interviews revealed various definitions for poverty law. One attorney indicated poverty law is “providing free legal services so that money is not a barrier to an individual’s access to justice. I also see it as trying to attack the roots of poverty, sometimes through the legal system, but more and more through just working with the community and providing support to that community as an attorney.” In-person interview with study participant #1 in Washington, D.C. (Feb. 24, 2016) (on file with author). See explanation of the study *infra* Section III.

54. Eric Holder, Former Attorney General, Remarks at the Shriver Center Awards Dinner (Oct. 14, 2010), <https://www.justice.gov/atj/about-office>.

55. U.S. CENSUS BUREAU, *supra* note 19.

56. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2009) [hereinafter LEGAL SERVICES CORPORATION].

57. Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 L. & SOC’Y REV. 79, 80 (2007).

lack the knowledge needed to navigate the judicial system efficaciously.⁵⁸

In recognition of the justice gap crisis, in 2010, the Obama administration established the Department of Justice Office for Access to Justice (ATJ).⁵⁹ The ATJ's mission is "to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status."⁶⁰ With ATJ funding, states have developed access to justice commissions that include members of the legal services community, bench, private bar, and academia.⁶¹ Members collaborate to address one of the greatest inequities in the judicial system—the justice gap.⁶² In the following sections, I explore efforts to close the justice gap through mandatory pro bono requirements and the role law schools play to prepare students for their pro bono responsibilities.

A. Pro Bono Legal Services and Ethical Standards

Jonathan Lippman, New York's former Chief Judge, stated, "[j]ustice, to be meaningful, must be accessible to all, both rich and poor alike. If we cannot live up to this most basic of principles, we might as well close our courthouse doors."⁶³ In addition to civil Gideon initiatives, the bench and bar often discuss pro bono representation as a strategy to close the justice gap.⁶⁴ Pro bono attorneys bring litigation resources, often have the capacity to increase awareness of social justice

58. LEGAL SERVICES CORPORATION, *supra* note 56.

59. Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 532 (2013).

60. OFFICE FOR ACCESS TO JUST., *supra* note 17.

61. The D.C. Access to Justice Commission has twenty-one commissioners who work on one of five committees. *See About the Commission*, D.C. ACCESS TO JUSTICE COMMISSION, <http://www.dcaccesstojustice.org/about-commission> (last visited Apr. 19, 2017). The Committee is chaired by Professor Peter Edelman. *Id.*

62. LEGAL SERVICES CORPORATION, *supra* note 56.

63. Jonathan Lippman, Chief Judge, N.Y. App. Ct. (2009-2015), Speech at Law Day Ceremony at the Court of Appeals in Albany (May 1, 2013).

64. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding a right to counsel under the Sixth Amendment to indigent criminal defendants). The civil Gideon movement seeks to provide a similar right to counsel in civil matters. *See Mark C. Brown, Comment, Establishing Rights Without Remedies? Achieving an Effective Civil Gideon by Avoiding a Civil Strickland*, 159 U. PA. L. REV. 893, 894 (2011).

issues, and have the finances to support protracted litigation.⁶⁵ Law firms are also more prone to contribute to legal services programs that provide pro bono opportunities for firm associates. These contributions are important incentives that legal services providers do not overlook.⁶⁶ However, there are two key barriers to pro bono initiatives: (1) an insufficient number of attorneys are willing to accept cases;⁶⁷ and (2) attorneys lack training in poverty law practice areas and cultural competency.⁶⁸

1. Insufficient Pro Bono Attorneys

The institutionalizing of pro bono remains ineffective if there are insufficient attorneys willing to accept pro bono cases.⁶⁹ The ABA recommends that attorneys provide at least fifty hours of pro bono services per year,⁷⁰ yet many attorneys provide no pro bono hours. State bar associations have taken various approaches to addressing this challenge, including examining the correlation between ethics and the pro bono requirement.

Dialogue about ethics and pro bono hours is far from novel.⁷¹ In 1908, the ABA first addressed ethical standards for

65. *Pro Bono*, LAW. COMMITTEE FOR CIV. RTS., <https://lawyerscommittee.org/project/legal-mobilization-project/pro-bono/> (indicating that pro bono attorneys expand the Lawyers' Committee's docket from approximately twenty matters to eighty matters per day) (last visited Mar. 12, 2017).

66. See e.g., Interview with study participant #9, in Washington, D.C. (Feb. 2, 2016) (on file with author). See also Interview with study participant #3, in Washington, D.C. (Feb. 5, 2016) (on file with author) (stating that pro bono attorneys gain knowledge about structural deficits in the legal system and "they use some of that knowledge to influence those around them or to give back to our program, through gifting. Those things are usually important.").

67. See Rhode, *supra* note 59, at 537.

68. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2428-29 (2010).

69. See Cummings, *supra* note 1.

70. See MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 2016); see also Deborah L. Rhode, *Equal Rights: Pro Bono Can't Fill the Gap*, *NAT'L L.J.*, Sept. 6, 1999, at A22.

71. See Deborah L. Rhode, *Essay: The Pro Bono Responsibilities of Lawyers and Law Students*, 27 *WM. MITCHELL L. REV.* 1201 (2000).

lawyers in the Canons of Professional Ethics.⁷² Although the original Canons failed to address specifically lawyers' duties to provide pro bono legal services, the ABA's recommended oath of office for attorneys incorporated a swearing-in statement to "never reject, from any consideration personal to himself, the cause of the defenseless or the oppressed."⁷³ In 1969, when the ABA adopted the Code of Professional Responsibility, the Code recommended: "every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."⁷⁴ In 1993, the ABA House of Delegates amended Model Rule 6.1 and indicated that "[a] lawyer[s] should aspire to render at least (50) fifty hours of pro bono public[] legal services per year."⁷⁵ Variations to Model Rule 6.1 have developed through the years, with the current version providing that "[e]very 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."⁷⁶ The current Model Rule 6.1 clarifies what types of legal services fall within the realm of pro bono.

Model Rule 6.1 has stirred up significant debate and raised some questions both within the ABA and at the state level.⁷⁷ These debates surround whether the ABA should recommend, and states should impose, mandatory pro bono hours.⁷⁸ Opponents argue that mandating pro bono legal services diminishes the intrinsic reward associated with complying with

72. Steven Lubet & Cathryn Stewart, *A "Public Assets" Theory of Lawyers' Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1250 (1997).

73. ABA Canons of Prof'l Ethics (1908), http://www.americanbar.org/content/dam/aba/migrated/cpr/1908_code.authcheckdam.pdf.

74. Lubet & Stewart, *supra* note 72, at 1250.

75. *Id.* at 1252.

76. MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR ASS'N 2011).

77. See Kellie Isbell & Sarah Sawle, *Current Development 2001-2002: Pro Bono Publico: Voluntary Service and Mandatory Reporting*, 15 GEO. J. LEGAL ETHICS 845 (2002).

78. The rules of professional responsibility are generally premised on the assumption that mandatory rules with corresponding punishments are more effective in regulating professional behavior than aspirational moral standard. See Brian Sheppard & Fiery Cushman, *Evaluating Norms: An Empirical Analysis of the Relationship between Norm-Content, Operator, and Charitable Behavior*, 63 VAND. L. REV. 55, 60 (2010).

an aspirational standard and will result in attorneys providing fewer pro bono hours.⁷⁹ This conjecture is grounded in the psychological theory that intrinsic motivation diminishes when organizations impose mandatory rules.⁸⁰

Professors Brian Sheppard and Fiery Cushman conducted an empirical qualitative research study to examine the relationship between voluntary and aspirational normative behavior and charitable giving.⁸¹ The study sample consisted of 213 students attending Harvard Law School.⁸² The researchers provided each participant with \$10 and instructions concerning donating the money to a pro bono legal services provider.⁸³ Some participants were mandated to donate money to the pro bono programs, while others were given discretion to either donate or keep the money.⁸⁴ Another variable was a specified amount of money to donate.⁸⁵ The researchers hypothesized that mandatory rules for giving should produce higher levels of giving than aspirational norm-based standards.⁸⁶ They further hypothesized that when numerical standards were established within the aspirational standard, participants would be drawn to the minimum numerical amount.⁸⁷ The results revealed a significant relationship between the level of giving and mandatory conditions.⁸⁸

When participants were mandated to give a specific minimum charitable amount, they were three times more likely to contribute the exact minimum mandated than they did under aspirational conditions.⁸⁹ However, with aspirational conditions, there was no significant relationship between the level of giving and recommended normative amount to contribute.⁹⁰ Thus, there was anchoring under mandatory

79. See Rhode, *supra* note 71, at 1205-1207.

80. *Id.*

81. See generally Sheppard & Cushman, *supra* note 78.

82. *Id.* at 78.

83. *Id.* at 71.

84. *Id.* at 83-84.

85. *Id.* at 77.

86. Sheppard & Cushman, *supra* note 78, at 79.

87. *Id.* at 80.

88. *Id.* at 80-81.

89. *Id.* at 82.

90. *Id.* at 83.

conditions, but no anchoring effect under aspirational conditions.⁹¹

Professors Sheppard and Cushman's research suggests mandatory norms—such as mandatory pro bono hours—may increase the level of charitable activity, but will anchor attorneys to limit their pro bono service to the minimum hours imposed by the mandatory ethical rule. However, the aggregate mandatory pro bono hours would still outweigh aggregate pro bono hours under merely aspirational standards.⁹²

Critics of mandatory pro bono services also argue that the lack of intrinsic motivation may lead to diminished quality of representation to low-income clients.⁹³ Although no empirical studies examine this hypothesis, attorneys have an ethical obligation to represent clients diligently. This standard applies to both paying and nonpaying clients. Thus, the possibility of a low-income client charging an attorney with an ethical violation that could subject the attorney to a public reprimand, or even disbarment, should have a chilling effect that prevents attorneys from providing sub-par representation to their pro bono clients. However, because of critical power and privilege dynamics between low-income clients and pro bono attorneys, it is unknown but likely that pro bono clients would be less inclined to file an attorney complaint than paying clients. This area needs further research.⁹⁴

91. Sheppard & Cushman, *supra* note 78, at 85.

92. *Id.* at 83-84.

93. The New York County Lawyer's Association raised important concerns about whether New York's mandatory pro bono rule would hurt the level and quality of legal services for low-income communities. Letter from Stewart D. Aaron, President, N.Y. Cty. Lawyers' Ass'n, to The Honorable Jonathan Lippman, Chief Judge, N.Y. App. Ct. (2009-2015) (May 21, 2012) [hereinafter NYCLA]; see also Leslie Boyle, *Current Development 2006-2007: Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 421-22 (2007).

94. Opponents of mandatory pro bono service have also raised constitutional challenges under the Thirteenth Amendment. Courts have failed to support the involuntary servitude argument in analogous cases. See *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989 (3d Cir. 1993) (finding students' mandatory participation in community service did not constitute involuntary servitude); *Dolan v. United States*, 351 F.2d 671 (5th Cir. 1965); *Roth v. King*, 449 F.3d 1272 (D.C. Cir. 2006).

Advocates for implementing mandatory pro bono legal services recognize that the practice of law is a self-regulated profession. This autonomy is premised on the belief that attorneys are officers of the court who hold a societal responsibility to govern the legal profession and ensure attorneys protect the public interest, including meaningful access to the courts.⁹⁵ Because of this special advantage, lawyers have an asset that other members of society lack. These benefits increase lawyers' economic marketability and should come at a cost. The way lawyers fulfill their debt to society is to provide pro bono legal services.⁹⁶

In 2012, New York took a leadership role in becoming the first and to date the only state to require fifty hours of pro bono legal services as a condition for admission to the bar.⁹⁷ California considered implementing mandatory pro bono requirements beginning in 2016, but the state's Committee on Bar Admissions has not finalized approval.⁹⁸

95. Sandefur, *supra* note 57, at 85.

95. *Id.* at 83-84.

96. Professors Steven Lubet and Cathryn Stewart have constructed a public asset theory that lawyers should perform pro bono legal services as a condition of the societal benefits they receive from practicing law. Lubet & Stewart, *supra* note 72, at 1246-47. These benefits include exclusivity to represent others in legal matters. *Id.* Embedded in the exclusive practice of law is the protection of communication between clients and their attorneys. *Id.* These confidential communications are a benefit that society has elected to bestow upon lawyers, which ultimately increases lawyers' value to clients. *Id.*

97. 22 N.Y.C.R.R. § 520.16(a) (2016).

98. *Task Force On Admissions Regulation Reform (TFARR):Phase II Implementation*, THE ST. B. OF CALI., <http://www.calbar.ca.gov/AboutUs/BoardofTrustees/TaskForceonAdmissionsRegulationReform.aspx> (last visited Jan. 29, 2017); see also ABA, *Bar Pre Admission Pro Bono: The Role of Pro Bono Services as a Condition for Receiving a Law License*,

http://www.americanbar.org/groups/probono_public_service/policy/bar_pre_admission_pro_bono.html (last visited Jan. 29, 2017).

California's Task Force on Admissions Regulation Reform recommended a:

Pre-admission or post-admission: An additional competency training requirement, fulfilled either at the pre- or post-admission stage, where 50 hours of legal services is specifically devoted to pro bono or modest means clients. Credit towards those hours would be available for "in-the-field" experience under the supervision and guidance of a licensed practitioner or a judicial officer.

Forty-three states have incorporated the original version of Rule 6.1 into the states' ethical rules as an aspirational standard.⁹⁹ Other states have added language to Rule 6.1 that gives attorneys the option to pay a fee to opt out of the fifty-hour aspirational standard.¹⁰⁰ Nine states require attorneys to report their level of pro bono services to the local bar association.¹⁰¹ Although these states require attorneys to report their pro bono hours, there is no corresponding requirement for attorneys actually to provide any pro bono legal services.¹⁰² However, two of these nine states do impose disciplinary action if an attorney fails to comply with the pro bono reporting requirement.¹⁰³

Another foundational question surrounds the issue of ethics and pro bono requirements: is the ABA recommendation that attorneys perform fifty hours annually appropriate and the most effective means for lawyers to meet the unmet legal needs of indigents? While New Hampshire reduced the fifty-hour recommendation to thirty hours, in 2012,¹⁰⁴ Oregon became the only state to recommend more hours than the ABA fifty-hour standard, recommending that attorneys should aspire to provide eighty hours of pro bono legal services.¹⁰⁵

The diverse perspective on the role of formalized ethical standards and pro bono services reinforces the concept that normative behavior within the legal profession is not

Memorandum from David Gibbs, Assoc. Prof. of Practice, Chapman Univ. Fowler Sch. of Law, to Daniel Bogart, Assoc. Dean, Chapman Univ. Fowler Sch. of Law, *Overview of Proposed Mandated Experiential Requirements of the State Bar of California* (July 2, 2015), <http://www.lls.edu/media/loyolalawschool/events/2015/wrlwc/Fri%20pm%20-%20Complying%20with%20the%20New%20ABA%20and%20California%20State%20Bar%20Skills%20Requirements.pdf>. The proposal is pending before the California Supreme Court. *Id.* at 2.

99. Boyle, *supra* note 93, at 419.

100. *Id.*

101. *Pro Bono Reporting*, ABA, http://www.americanbar.org/groups/probono_public_service/ts/pbreporting.html (last visited Apr. 19, 2017).

102. Boyle, *supra* note 93, at 423.

103. ABA, *Pro Bono Reporting*, ABA, *supra* note 101.

104. N.H. RULES OF PROF'L CONDUCT r. 6.1 (2004), https://www.courts.state.nh.us/rules/pcon/pcon-6_1.htm

105. OR. STATE BAR BYLAWS s. 13.1 (2017), https://www.osbar.org/_docs/rulesregs/bylaws.pdf

monolithic. Instead, normative professional standards are region-based and grounded in communities of practice. These diverse ethical standards do not negate that the ABA and the legal profession should continue to use ethical rules and standards to institutionalize pro bono services.¹⁰⁶ Instead, they reinforce the importance of building pro bono cultures.

Similarly, law firm norms should influence the level of associates' pro bono services.¹⁰⁷ This assertion is thorny because law firms, like other businesses, are driven by the goal to increase value to shareholders. Although accepting pro bono cases does not directly work toward that goal, law firms are increasingly pressured to have socially responsible businesses.¹⁰⁸ Building a firm culture of pro bono may help to reconcile the dual and conflicting demands of operating to increase firm value and fulfilling societal obligations.¹⁰⁹ Also, pro bono work is an effective recruitment tool and generates positive public relations for the firm.¹¹⁰

106. Another strategy to increase pro bono legal services has been examining attorneys' abilities to provide limited legal services to low-income clients. Deborah L. Rhode, *Symposium: Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 898 (2009). Limited retainer agreements, also referenced as unbundled legal services, allow pro bono attorneys to provide a discrete task to a low-income client. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 760-61 (2015). That limited service may range from providing general advice to a legal problem, drafting court documents, or writing a demand letter to a creditor. *Id.* Unbundled legal services is a means to increase access to the courts, but may not fully secure the ultimate results that clients seek, if represented by counsel in the court proceedings; research is inconsistent in determining whether limited legal services positively impacts the final legal result. *Id.* at 780-84.

107. Large law firms are often in a better position to contribute to legal services providers and to provide pro bono attorneys. See Susan Beck, *The Justice Gap: How Big Law is Failing Legal Aid*, THE AM. LAWYER (June 29, 2015), <http://www.americanlawyer.com/id=1202730102717/The-Justice-Gap-How-Big-Law-Is-Failing-Legal-Aid?slreturn=20160001210423>.

108. Steven A. Boucher, *Rethinking Culture: Organized Pro Bono and the External Sources of Law Firm Culture*, 8 U. ST. THOMAS L.J. 108, 124 (2011) (noting clients are increasingly requesting information about law firms' pro bono activities); See Jolie L. Justus, *Using Business Strategies and Innovative Practices to Institutionalize Pro Bono in Private Law Firms*, 72 UMKC L. REV. 365, 369 (2003).

109. See Cummings, *supra* note 1, at 358.

110. Cummings, *supra* note 31, at 123.

2. Training Barriers

Even when law firms develop supportive pro bono cultures, there are other challenges. The greatest challenge is acclimating pro bono attorneys to the dynamics of representing people living in poverty.¹¹¹ The New York County Lawyers' Association (NYCLA) criticized New York's preadmission fifty-hour rule for this reason.¹¹² NYCLA suggested recent graduates would lack appropriate training and skills to assist low-income clients which would make the initiative costly,¹¹³ and the financial commitment to train pre-admits was a cost legal services providers could not bear.¹¹⁴ Likewise, legal services providers would need to restructure their pro bono programs to accommodate the many law students seeking to complete their fifty-hour requirement.¹¹⁵ NYCLA also commented that the fifty-hour rule would divert resources and opportunities from practicing attorneys who are in a better position to represent pro bono clients.¹¹⁶

NYCLA's comments are not without merit. Legal services providers often express that even fully bar-certified attorneys lack the skills to represent their impoverished clients.¹¹⁷ In addition to having limited knowledge of poverty law practice areas, most pro bono attorneys lack cultural competence to work with low-income clients.¹¹⁸ This challenge appears to

111. One study participant stated, "[I]t takes up a lot of our resources to mentor folks who have taken on a case. And so then from our perspective, it would've been more efficient for us just to do the case ourselves." Interview with study participant # 1, in Washington, D.C. (Feb. 24, 2016) (on file with author).

112. NYCLA, *supra* note 93.

113. *Id.*

114. The estimated training cost associated with each hour of pro bono service is \$61; this cost does not include the pro bono attorney's time and any other related expenses associated with the attorney providing pro bono services. NYCLA, *supra* note 93.

115. NYCLA, *supra* note 93.

116. However, there is limited data available on the cost effectiveness of delivery models, including pro bono initiative. See Cummings & Rhode, *supra* note 68, at 2401, 2405.

117. Interview with study participant #5, in Washington, D.C. (Nov. 18, 2016) (on file with author); Interview with study participant #8, in Washington, D.C. (Feb., 2016) (on file with author); Participant #3, *supra* note 66.

118. Interview with study participant #11, in Washington, D.C. (Feb.,

exist even when firms integrate pro bono as an aspect of training protocols for new associates.¹¹⁹ When attorneys lack appropriate training, legal services attorneys spend more time training and mentoring pro bono attorneys than the time it would take for legal services attorneys to represent the actual clients themselves.¹²⁰ For the associate who is fulfilling the aspirational fifty hours because of firm pressure, the legal services provider fails to see the long-term return on the upfront cost of training and mentoring the attorney.¹²¹

It is neither efficient, nor possible, for the legal services community to bear the cost and time associated with training pro bono attorneys. Instead, pro bono training should begin with a law school curriculum that allows a seamless pathway from law school to pro bono client representation. The success of that journey depends on whether law school culture and curriculum directly and inferentially reinforce the importance of representing clients living in poverty and educate students about how to represent them.

B. Pro Bono Legal Services in Law Schools

Despite their unique position in training students, most law schools have failed to instill an ethos of pro bono service in graduates.¹²² In his 2012 Law Day remarks, Chief Judge Lippman emphasized the importance of developing a culture of pro bono with new attorneys:¹²³

2016) (on file with author); Interview with study participant #4, in Washington, D.C. (Feb. 22, 2016) (on file with author).

119. Cummings & Rhode, *supra* note 68, at 2427.

120. In 2012, LSC created a Pro Bono Task Force charged with identifying best practices in pro bono. LEGAL SERVICES CORPORATION, REPORT OF THE PRO BONO TASK FORCE 4 (2012). One of the Committee's recommendations was to increase awareness of the justice gap with the general public and the private bar. *Id.* Significantly, the Task Force highlighted that pro bono attorneys want legal services providers to provide training and mentorship. *Id.*

121. *Id.*

122. Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1372-73 (2007); see also Susan Beck, *supra* note 107 (focusing on how law firms are failing to address the justice gap).

123. Jonathan Lippman, Chief Judge N.Y. Ct. of App. (2009-2015), Speech at Law Day 2012, at 1, <http://www.nycourts.gov/whatsnew/Transcript-of-LawDay-Speech-May1-2012.pdf>.

The new protocols that I will announce today for admission to the bar in New York, will challenge every law student to answer very basic questions that are fundamental to the very fibre of the legal profession: How will you choose to benefit your fellow man and your community with your new skills? Will you use your legal acumen to foster equal justice in our state? Do you recognize that being a lawyer requires an understanding that access to justice must be available to all New Yorkers regardless of their station in life? From the start, these responsibilities of the profession must be a part of every lawyer's DNA - - to support the values of justice, equality and the rule of law that make this state and this country great.¹²⁴

Lippman's comments are well-founded. The ABA Standard 303(b) provides that "a law school shall provide substantial opportunities to students for: (1) law clinics or field placement(s); and (2) student participation in pro bono legal services, including law-related public service activities."¹²⁵ The

124. *Id.*

125. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017 STANDARD INTERPRETATION 303-03, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3.authcheckdam.pdf. The interpretation to ABA Standard 303-3 provides:

Rule 6.1 of the ABA Model Rules of Professional Conduct encourages lawyers to provide pro bono legal services primarily to persons of limited means or to organizations that serve such persons. In addition, lawyers are encouraged to provide pro bono law-related public service. In meeting the requirement of Standard 303(b)(2), law schools are encouraged to promote opportunities for law student pro bono service that incorporate the priorities established in Model Rule 6.1. In addition, law schools are encouraged to promote opportunities for law students to provide over their law school career at least 50 hours of pro bono service that complies with Standard 303(b)(2). Pro bono and public service opportunities need not be structured to accomplish any of the outcomes required by Standard 302. Standard 303(b)(2) does not preclude the inclusion of credit-granting activities within a law school's overall

standards require that the law school curriculum includes instruction in values of the profession and substantial opportunities for pro bono legal services.¹²⁶ However, the ABA has provided limited guidance on what constitutes “substantial” pro bono opportunities.¹²⁷ Perhaps it is the very vagueness of the term “substantial” under ABA 302 that has led to divergent standards for law school pro bono programs.¹²⁸ Some schools, however, are effectively adhering to this mandate with groundbreaking programs, where faculty or school administrators oversee the pro bono initiatives and require students to volunteer with a legal services provider.

Conversely, other law schools’ pro bono programs are student-led and students complete non-legal volunteer opportunities to fulfill pro bono hours.¹²⁹ Such law school cultures may undermine the goal of shaping law students into lawyers who will ensure low-income litigants are not denied access to justice. Perhaps if the ABA accreditation standards were to measure the quality of law schools’ pro bono initiatives, then these programs would benefit from that stronger

program of law-related pro bono opportunities so long as law-related non-credit bearing initiatives are also part of that program.

Id.

126. *Id.*

127. See Deborah Rhode & David Udell, *Clock’s Ticking on ABA Pro Bono Requirement*, THE NAT’L L.J. (Aug. 6, 2013), <http://www.nationallawjournal.com/id=1202614134383/Clocks-Ticking-on-ABA-Pro-Bono-Requirement?slreturn=20160104145213>.

128. Of the 184 ABA accredited schools surveyed, 126 schools reported having a formal pro bono program, but students are not required to complete pro bono as part of a graduation requirement. *Directory of Law School Public Interest and Pro Bono Programs*, ABA (2016), http://www.americanbar.org/groups/probono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/pb_programs_chart.html (last visited Apr. 19, 2017). Only forty-one schools have pro bono graduation requirements. *Id.* In some schools, faculty or associate deans of a clinic or experiential learning program lead the pro bono initiatives. *Id.* The remaining sixteen schools have student-led pro bono initiatives. *Id.*

129. MODEL RULES OF PROF’L CONDUCT r. 6.1 (AM. BAR ASS’N 2011). ABA Model Rule 6.1 defines the scope of pro bono as free legal services provided to “persons of limited means” or free legal services provided to non-profit organizations providing organizations “in matters that are designed primarily to address the needs of persons of limited means.” *Id.* Some schools have used ABA Model Rule 6.1 as guidance for what constitutes ‘substantial’ pro bono work.

framework and more adequately match the needs of legal services providers and their students.¹³⁰ Such robust pro bono programs would help students to understand Jonathan Lippman's call that "access to justice must be available to all."¹³¹ However, pro bono programs in law school are not enough to fill this training need. This Article has challenged the idea that isolated clinics or pro bono initiatives properly prepare all students to fulfil their ethical duty to represent low-income clients. Instead, the law school curriculum must take a more holistic approach to address the justice gap.

III. Poverty Law Study

*"Don't tell me what the law is;
tell me what the law ought to be."*¹³²

A. Research Purpose and Method

In his seminal Yale Law Review article, *Practicing Law for Poor People*, Stephen Wexler wrote: "[T]here will be a different tone and style in a poverty practice."¹³³ This qualitative study has sought to discover those differences that Stephen Wexler described. It also seeks to identify the potential impact integrating poverty law into the law school curriculum could have on students' cognitive skills and their professional development as lawyers committed to closing the justice gap. Through interviews, the study explores attorneys' lived experiences providing legal representation to low-income

130. See Rhode & Udell, *supra* note 127.

131. Lippman, *supra* note 123.

132. Willie E. Cook served as the Executive Director of the Neighborhood Legal Services Program of D.C. (NLSP). I was fortunate to begin my legal career under his leadership. During his orientation training for new lawyers, he reminded staff attorneys that he did not want to hear about what the law is, but what the law should be. Attorneys at NLSP reframed a tenant's nonpayment of rent into a contract between a landlord and a tenant with an implied warranty of habitability in the rental property. *Javins v. Southhall* revolutionized how courts analyze nonpayment of rent cases, so that tenants' failure to pay rent is no longer bifurcated from landlords' duty to keep the rental unit in a habitable condition. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

133. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1049 (1970).

clients and the skills that poverty law attorneys use.¹³⁴ Although my background, values, and personal beliefs lend meaning to this study, interviews with lawyers currently practicing in poverty law settings served as the primary basis to identify practice norms.¹³⁵

The data collection method consisted of in-person interviews with twelve attorneys working at non-profit legal services providers in the District of Columbia.¹³⁶ The study focuses on the District of Columbia because I am familiar with the legal services community, the area has a high poverty rate, and there is a high concentration of attorneys working in the area.¹³⁷ Through purposeful sampling, I identified attorneys who are members of the D.C. Consortium of Legal Services Providers.¹³⁸ As new themes and information developed, this

134. After working for over fourteen years as an attorney in the legal services community, I recognize some of the dynamics of working with low-income clients. However, interviews with lawyers currently working in poverty law settings serve as the primary basis to identify practice norms. In-depth interviews are a significant data collection technique for phenomenological studies because conversations effectively uncover nuances about human experiences. See JOHN W. CRESWELL, *QUALITATIVE INQUIRY AND RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES* (3d ed. 2013). The interview approach requires the researcher to recount not only participants' communications, but the essence of the interviews as reflected through the researcher's lens of experience. *Id.* at 60-61.

135. My sample began with six attorneys who currently work at legal services organizations. In some instances, I used referrals from the original attorneys to secure referrals to other poverty law attorneys, or attorneys who have expert knowledge on the operation of poverty law practice. The rationale for this snowballing is that participants in a particular field are often well-versed in identifying others who have rich experiences and in-depth understanding on the topic.

136. The eligibility criteria for the selection of participants included that the attorney worked as a full-time poverty lawyer for a minimum of five years immediately preceding the interview. This selection criterion helped to ensure that participants have information-rich experiences concerning the phenomenon of poverty law practice. I conducted all interviews at the attorneys' respective law firms to maintain a naturalistic setting.

137. In 2015, there were 52,089 active attorneys in the District of Columbia. U.S. CENSUS BUREAU, *QuickFacts* (Jan. 26, 2017, 10:34 AM), <http://www.census.gov/quickfacts/map/PST045214/11>. In 2014, 18.2% of District of Columbia residents lived in poverty; this statistic places the District of Columbia poverty level as the sixth highest in the nation. *Id.* The District of Columbia's child poverty rate was the second highest in the country. *Id.*

138. Members of the D.C. Consortium of Legal Services Providers are

emergent insight led to an expansion in the original questions.¹³⁹

The process of documenting the results included recording all interviews, coding interview data by identifying significant phrases, and clustering the phrases into themes. Word-based techniques served as a dominant method of data analysis to identify recurring themes.

B. *Limitations and Delimitations*

This study solely focuses on legal services providers in the District of Columbia. Therefore, one limitation is that this geographic area may not accurately reflect national trends. Various factors contribute to the region having a better than average pro bono legal services initiative and strong legal services community, which may make the data inapplicable to other regions.¹⁴⁰ Also, the dynamics of an urban legal community are not necessarily applicable to rural legal communities.

Other delimitations are that the study does not incorporate perspectives of members of the judiciary, pro bono attorneys, or clients. Finally, the study does not attempt to identify attorneys' social-economic background, race, practice area, or gender as identifying factors on their perspective of the delivery of poverty law.

considered experts concerning the operation of poverty law services.

139. The majority of the interview questions were open-ended with a limited number of closed-ended introductory questions. The purpose of the questions was to explore the participants' experiences in the District of Columbia providing legal services to low-income clients. Responses from participants led to some revisions in the interview questions for future participants, but I generally followed the interview questions as written.

140. See Kathryn Alfisi, *An Interview With Kirra L. Jarratt: Executive Director of the D.C. Bar Foundation*, WASH. LAW. (Oct. 2014), <https://www.dcb.org/bar-resources/publications/washington-lawyer/articles/october-2014-kirra-jarratt.cfm>; see also Peter B. Edelman, *Access to Civil Justice in the District of Columbia: A Case Study of the D.C. Access to Justice Commission*, 47 THE JUDGE'S J. 1, 10 (Oct. 2008).

IV. Poverty Law Results and Discussion

Despite the study participants' diverse practice areas, prevailing themes emerged. Dominant themes include the context of client representation, forum disparities, overlapping social issues, multifaceted legal problems, inadequate law to support clients' claims, and variability in pro bono attorneys' preparation to represent clients. I use these results to show how poverty law practice norms can inform law school curriculums and improve law students' lawyering competencies.

A. Cognitive Apprenticeship

This section explores the correlation between the skills poverty lawyers indicated that they use and the legal reasoning and analysis competency under ABA Standard 302. Although the catch-all phrase of thinking like a lawyer has blurred meaning,¹⁴¹ professors often expect students to develop analytical skills, question and explore ambiguity, and extract and apply black letter law to diverse situations.¹⁴² Thinking like a lawyer also involves thinking in an aggregate way, asking critical questions, and letting go of assumptions and conclusory thinking.¹⁴³

The *MacCrate Report* commentary describes legal analysis and reasoning as "reasoning from existing law and applying rules and principles established in prior judicial decisions (as well as other sources of law) to a new factual situation."¹⁴⁴ The report also identifies five subcategories under legal analysis and reasoning.¹⁴⁵ I use four of the MacCrate legal reasoning sub-categories as an organizing mechanism to assess the

141. Law professors, unlike other educators, often have limited understanding and training in learning theory. See Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 356 (2012).

142. *Id.* at 366-68.

143. To increase cognitive outcomes and encourage students to "think like a lawyer" professors often instruct students to separate their emotional intelligence from the facts and the "neutral" law. See Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 750 (2011).

144. MacCrate Report, *supra* note 6, at 156.

145. *Id.* at 151-155

patterns and correlations between the skills poverty lawyers use and the legal analysis and reasoning outcomes students should acquire.¹⁴⁶ These subcategories are outlined below.

Legal Analysis and Reasoning
• Identifying and Formulating Legal Issues
• Formulating Relevant Legal Theories
• Evaluating Legal Theory
• Criticizing and Synthesizing Legal Argumentation ¹⁴⁷

1. Identifying and Formulating Legal Issues

The first step in effective legal analysis and reasoning is students' ability to identify legal issues. To effectively identify and formulate legal issues, students must apply any applicable rule that governs clients' problems. The skill also includes identifying and critically analyzing facts.¹⁴⁸

Many of the poverty lawyers interviewed indicated that people living in poverty rarely have isolated legal problems.¹⁴⁹ Instead, attorneys must spot multiple issues to protect clients' existing public benefits. Consider, for example, a client who contacts a legal services office seeking help with a potential public housing eviction. As part of the case intake, an attorney may complete a food stamp assessment to determine if the family was eligible for the Supplemental Nutrition Assistance Program (food stamps). If the family was receiving food

146. Professors Marjorie Shultz and Sheldon Zedeck conducted a multi-year empirical study to assess the traits and skills for effective law practice. MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL RESEARCH REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING (Sept. 2008). By interviewing clients, lawyers, law professors, judges, and students, Shultz and Zedeck identified twenty-six essential lawyering skills, which they organized into eight umbrella categories. *Id.* at 26-27. These twenty-six skills align with the ABA competencies and the *MacCrate* and *Carnegie Reports'* lawyering outcome measures.

147. *MacCrate Report*, *supra* note 6, at 138.

148. Weak issue spotting skills lead to disastrous examination answers in law school, and potential ethical problems in practice. See Nelson P. Miller & Bradley J. Charles, *Meeting the Carnegie Report's Challenge to Make Legal Analysis Explicit—Subsidiary Skills to the IRAC Framework*, 59 J. LEGAL EDUC. 192 (2009).

149. Participant #4, *supra* note 118; See also Participant #8, *supra* note 117.

stamps, the food stamp assessment could determine if the family was receiving the correct benefits amount.

The research for the eviction case may begin with an analysis of the various state and federal procedural requirements before the housing authority could file an eviction proceeding. The attorney's research may determine that there were various procedural violations, and the housing authority violated the tenant's due process rights. An investigation into the tenant's public housing file may determine that the housing authority had miscalculated household income by including a non-countable income source, such as supplemental social security income. The recalculation may determine that the family was paying more rent than required under federal law because the housing authority failed to apply the proper rent deductions. The attorney would likely file a stay in the landlord-tenant matter and proceed with an administrative proceeding to determine the proper rent amount. After the administrative hearing, the attorney may find that the tenant had a credit in rent, and the housing authority would likely agree to dismiss the landlord-tenant action. As part of the settlement agreement, the attorney may demand that the housing authority pays the family a refund check, instead of a rent credit. However, the attorney would need to consider whether the refund settlement would jeopardize the families' monthly food stamp allotment and supplement security income—both which have monthly asset ceilings. The attorney's investigation may also reveal that a household member had income that the head of household never reported to the housing authority. That unreported income could lead the housing authority to allege that the household committed fraud. A fraud determination could result in permanent loss of public housing assistance. As part of the investigation, a lawyer may also discover that a member of the household has a recent drug distribution charge that could jeopardize the family assistance. The head of household may choose to remove the accused family member from the household lease, but the family member with the drug charge may claim his/her innocence and insist on staying on the

lease.¹⁵⁰

One simple public housing case has procedural issues, investigation strategies, due process defenses, and the intersection of federal, administrative, and state laws. It also has professional responsibility issues as to who is the client and joint-client conflicts that may require mandatory withdrawal from the case. This withdrawal means the family would likely appear in court without any legal representation. Of course, many housing cases would not have all of these overlappings issues. However, an effective poverty law attorney considers how legal strategies impact various public benefits.¹⁵¹

Because of the multiple issues, poverty lawyers' research is often broad. Rarely will attorneys limit their legal research to one jurisdiction or forum because most public benefits have both federal and state statutes and regulations. There are common issues of preemption when state regulations fail to adhere to federal due process standards. Like other attorneys, poverty lawyers must know the procedural and substantive law for the overlapping practice areas. Attorneys must specialize in knowing court rules for various court branches and administrative forums.¹⁵² For poverty lawyers, practicing in multiple forums is the norm—not the exception.

Because many professors' casebooks use edited judicial opinions to focus on a specific rule, students have limited opportunities to analyze a problem with multiple legal issues.¹⁵³ Although this teaching methodology may have pedagogical value, approaching legal problems in this manner

150. Based on the 1988 Anti-Drug Abuse Act, the Department of Housing and Urban Development established a "one strike" policy, which authorized public housing authorities to evict tenants if a member of the household, or the tenant's guests were involved in any drug-related criminal activity. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 131 (2002) (holding public housing authorities may evict a tenant if other household members or guests are involved in drug-related criminal activity, even if the tenant lacked knowledge of the criminal activity).

151. *See* Wexler, *supra* note 133, at 1051.

152. Participant #11, *supra* note 118.

153. Judicial opinions are sanitized and then placed in casebooks so that students can easily focus on isolated black letter law. Holmquist, *supra* note 141, at 357.

is contrary to the practice of law.¹⁵⁴ Clients do not always come to an attorney with a legal problem that is confined to one practice area.¹⁵⁵ Further, courts are holding attorneys accountable for advising their clients about the implications that a legal action may have on other legal matters.¹⁵⁶

By examining cases that are germane to poverty law practices, and especially, cases that show the full complexity of overlapping issues, students have opportunities to consider overriding legal issues and strengthen their issue spotting skills—an essential skill for passing law school examinations, the bar, and succeeding in practice.

“This is more than showing up and giving a scoop of food. This is actually learning an area of law.”¹⁵⁷

2. Formulating Relevant Legal Theories

The cognitive skill of formulating legal theories includes lawyers’ ability to “analyz[e] and synthesiz[e] the pertinent legal rules and principles in light of the facts.”¹⁵⁸ Elaborating legal theories includes “[i]dentifying arguments in different dimensions (such as, for example, doctrine, history, practicality, justice and equity), that can be brought to bear to support (or oppose) the legal theories that have been formulated.”¹⁵⁹ Professors Laurel Currie Oats and Anne Enquist remind students that developing a legal theory includes “selecting the lens through which you want the court to view the client’s case.”¹⁶⁰ However, students rarely consider legal theories unless they are enrolled in a clinic, trial advocacy, or drafting a persuasive brief in a legal writing course.

154. *Id.* at 359.

155. *Id.* at 361.

156. *See* Padilla v. Kentucky, 559 U.S. 356 (2010) (holding that counsel must inform a client whether a criminal plea carries a risk of deportation in an immigration matter).

157. Participant #9, *supra* note 66.

158. MacCrate Report, *supra* note 6, at 152.

159. *Id.* at 153.

160. LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING 304 (6th ed. 2014).

This study results show a promising correlation between poverty law practice norms and this complex component of legal reasoning and analysis. Poverty law attorneys reported that their clients are confronted with issues of fundamental fairness against a body of law that rarely supports their claims.¹⁶¹ For many participants, practicing law for poor people is often about developing a legal theory and related theme that reminds the court about equity and fairness because they are battling a history of legal doctrine that was designed to erode the rights of their clients or at least to support the rights of those with wealth and power.¹⁶²

Like all attorneys, poverty lawyers must recognize a legally deficient argument and determine an alternative strategy. Although one study participant recognized that the office may not take a case if it lacks legal merit, there are times when an attorney represents a client because “even though the law may be against us, the facts are sufficiently sympathetic . . . that we think we can probably get the person a good settlement without having to go to trial.”¹⁶³ In other instances, the attorneys will take the case using the case as leverage to change the law.¹⁶⁴

It is an attorney’s ability to capitalize on the human element that opens opportunities to solve many poverty law problems.¹⁶⁵ Issues of poverty allow students to consider what it means to the legal strategy when the law is not just. One study participant referenced public housing one-strike laws as an example of arguing a “losing” case:¹⁶⁶

There’s grandma [living in public housing] and she raised grandson and now grandson is twenty

161. The appellate body of law that supports issues for marginalized communities is particularly scarce in civil litigation, in part, because many legal services organizations closed their appellate divisions with the 1997 LSC funding reductions. See Gilmore, *supra* note 24.

162. Participant #10, in Washington, D.C. (Feb. 2016) (on file with author); see *infra*, Part V for a discussion of how the law discriminates against people living in poverty, people of color, and women, particularly in the area of property law.

163. Participant #2, in Washington, D.C. (Feb. 2016) (on file with author).

164. *Id.*

165. Participant #9, *supra* note 66.

166. See Rucker, *supra* note 143, at 125.

and he's still on her lease, but he lives most of the time at his girlfriend's house and he's out there selling drugs and he's picked up and convicted of possession with intent to distribute. And so, now, she's being evicted . . . [M]ost people don't actually want to throw grandma out on the street for something her grandson did.¹⁶⁷

Affordable and safe housing is the policy justification for public housing. Thus, even though the law is the law, the discretion in that law is also a human experience. Poverty lawyers find ways to humanize the law so that their clients' most basic needs are met.¹⁶⁸

*"Part of being a lawyer is not just knowing the law, but presenting the facts in the most sympathetic way possible so that you move, not just the judge, but you move the other side to want to come to some reasonable resolution."*¹⁶⁹

3. Evaluating Legal Theory

In defining the skill of evaluating legal theory, the *MacCrate Report* indicates that a lawyer should be familiar with the skills and concepts involved in identifying and assessing the biases of the decision maker, the current trends in the law, competing rules or concepts, and extension of the law.¹⁷⁰

167. Participant #2, *supra* note 163.

168. In commenting about humanizing the law, the participant stated, "I'm picturing either members of the jury or a judge who may not necessarily relate to the circumstances that my client is living in. And so for me, it's giving a full picture and a human side of who this individual is, and what their life is like . . ." Participant #4, *supra* note 118.

169. Participant #2, *supra* note 163. One participant considered the impact of storytelling on the client: "[B]eing able to tell the story, is important. And I think that it's not only important as far as justice, but really a person's own sense of well being and I end up taking on skills where I feel like I'm a [counselor] for somebody, and I think really being heard whether that's on a legal forum or otherwise is really important for people." Participant #3, *supra* note 66.

170. *MacCrate Report*, *supra* note 6, at 153-55.

The disparity in how the courts treated poor people's issues was a prevalent theme in the study. One respondent reported that because of disparities in the judicial system, poverty law attorneys have to do more for their clients.¹⁷¹ First, they must overcome the implicit bias embedded in the court system and then argue against a body of law that does not support poor people's issues.¹⁷²

Study participants reported that because of judges' misconceptions about poverty, they often subject people living in poverty to harsher scrutiny.¹⁷³ Something as simple as filing a motion to proceed *in forma pauperis* may result in a judge denying the motion because the client has a television or cable.¹⁷⁴ Non-custodial parents who lack the financial ability to meet arbitrary child care standards are deemed to have willfully disregarded court orders, and, in some instances, jailed as if being poor is willful and a criminal offense.¹⁷⁵

Another study participant indicated that courts do not necessarily treat poor people differently, but the judicial system relegates their cases to "poor people's court."¹⁷⁶ She explained,

There are certain branches of the court that are dominated by poor people: Landlord-tenant, child support, I think a lot of domestic relations. Those branches are understaffed. They [are] under-judged. They're often run sort of by one side, so landlord-tenant court is more or less run by [the] landlord's lawyers and then child support court is more or less run by the government attorneys. . . It's sort of going in with . . . a lower level of respect.¹⁷⁷

171. Participant #5, *supra* note 117.

172. *Id.* See *infra*, Part V for a discussion on bias in the law.

173. Participant #12, in Washington, D.C. (Feb. 2016) (on file with author).

174. Participant #7, in Washington, D.C. (Feb. 2016) (on file with author).

175. *Id.*

176. *Id.* See generally Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473 (2015).

177. Participant #2, *supra* note 163.

Judges on summary calendars, such as landlord-tenant branches, may overlook procedural violations and focus exclusively on the substantive law issue—did the tenant pay the rent, does the consumer acknowledge the bill, has the non-custodial parent paid the outstanding child support? Judges’ dockets are so burdened that they are tempted to move cases without giving credence to issues of whether the tenant had proper notice of the dispossessory action, if the court improperly calculated the child support payment, or that the parent’s inability to pay child support cannot serve as grounds for contempt. Poverty law attorneys painstakingly raise these arguments and have to be quick to articulate their client’s defense and position.¹⁷⁸

Poverty law attorneys constantly consider how to develop a legal theory that can overcome the biases of the decision maker. They take their disliked clients,¹⁷⁹ unfavorable law, and biased forums, and craft persuasive legal theories. These practice norms show promising correlations to the skills required when students need to evaluate a legal theory.

“The clients that we represent aren’t pretty clients.”¹⁸⁰

4. Criticizing and Synthesizing Legal Argumentation

The skill of criticizing and synthesizing legal arguments involves: (1) critically explaining legal rules in line with their purposes and circumstances; (2) assessing the rationale upon which legal argumentation is based, and (3) “[i]dentifying and evaluating other possible legal theories.”¹⁸¹

Synthesizing skills also require students to read purposefully and determine how a case fits within the greater body of law covered in the course.¹⁸² Once students understand the black letter law, they must apply it to other facts.

178. *Id.*

179. Participant #9, *supra* note 66, stated that “Not all of our clients are likeable . . . but they still have legal problems.”

180. Participant #4, *supra* note 118.

181. MacCrate Report, *supra* note 6, at 154-55.

182. *Id.* at 130-33. Purposeful reading requires a critical analysis of the text to understand how the various aspects of judicial decision connect.

Important questions to ask during this process include:

- “What is the law that governs this condition and where does it come from? (A statute? cases? both?)
- How are the cases that address this condition alike or different factually?
- How are the cases addressing this condition alike or different in the courts’ explanation or application of the law?
- Are the courts establishing a trend with their decisions regarding this condition?”¹⁸³

Although there is limited law to support poor people’s issues, one study participant indicated that the nature of law is the nature of life. There are unanswered questions everywhere in the law. Civil work is the entire universe of people suing. You have to know how to research them and what the answer should be.¹⁸⁴ Often, there may not be any on-point case law that addresses the poverty lawyer’s issue.¹⁸⁵ Thus, attorneys use analogous cases or use persuasive authority from other jurisdictions to show courts the trends in the law.¹⁸⁶ While law students may grasp the holding in a case, it is not as easy for them to understand the policy rationale for the holding. Often, a policy argument is all a poverty lawyer has to support clients’ claims.

Perhaps the most enlightened result was a study participant who acknowledged that she had been practicing housing law for fifteen years, but every week some unanswered question arises. As a poverty lawyer, she found herself using skills that attorneys at firms are only able to use at the partner

183. See CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN & SANDY PATRICK, *A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS* 67-68 (2d ed. 2013).

184. Participant #2, *supra* note 163.

185. People living in poverty often do not appeal their cases because few legal services providers have an appellate division. Jonathan M. Smith, the former executive director of the D.C. Legal Aid Society, had a vision to develop an appellate division to address the dearth of appellate cases that addressed low-income clients’ problems. Participant #2, *supra* note 163. The organization now has a robust appellate division. *Id.*

186. *Id.*

level.¹⁸⁷ She stressed that the scale of poverty law problems may be smaller, but complex legal issues frequently arise. This response reinforces that poverty law issues are equally complex and should serve to build students' lawyering competencies.

5. Problem Solving¹⁸⁸

As noted in the *Carnegie Report*, "a problem cannot be defined solely in terms of legal constructs: It must take into account a wide range of fact-specific variables as well as the client's goals, attitudes, and feelings."¹⁸⁹ Many clients' legal issues are caused by economic problems, at least in part.¹⁹⁰ Thus, poverty lawyers often find themselves resolving "non-legal" issues so that they can address their clients' legal problems. Some housing attorneys know the rental assistance social services programs almost as well as they know landlord-tenant law. These rental assistance programs may provide the client with the money to pay past due rent when the tenant is faced with an eviction because of nonpayment of rent.¹⁹¹

As a result of these peripheral social and economic issues and because time and the law are often not on a client's side, poverty lawyers frequently apply strategies that can obtain the fastest legal result. "Where is the client going to get food? How [will the client] secure medical care while grappling with insurance?"¹⁹² Poverty lawyers must consider these issues while awaiting the legal ruling on a public benefits denial. One study participant stressed the importance of informal advocacy and optimistically believes that governmental agencies may

187. She also acknowledged not having the resources, and other luxuries that attorneys at firms may have. *Id.*

188. The MacCrate Report does not include problem solving under the umbrella of legal analysis and reasoning. Instead, the authors list problem solving as a separate lawyering skill. MacCrate Report, *supra* note 6, at 135. Shultz and Zedeck include problem solving under their cognitive umbrella, which I believe is appropriate. SHULTZ & ZEDECK, *supra* note 139, at 26. Many lawyering skills overlap and should not be analyzed exclusively under one particular category.

189. Carnegie Report, *supra* note 5, at 141.

190. Holistic client-centered approaches to lawyering were at the core of most legal services offices because low-income clients' "legal" problems were often intertwined with economic issues. See Wexler, *supra* note 133, at 1050.

191. Participant #11, *supra* note 118

192. Participant #9, *supra* note 66.

make the right decision if they get the right information and if an attorney can present the information in the right way.¹⁹³ However, other participants are not as optimistic.

*"[The] system doesn't work and at the same time [there are not] any solutions for improving that [problem]."*¹⁹⁴

First-year courses do not teach law students how to reach a homeless client who needs to sign the verified complaint, affidavit, or assist with responses to discovery. Perhaps more significantly, these courses fail to teach students how the law is often inadequate to solve poor clients' problems.¹⁹⁵

This training and cognitive gap exists because the theoretical introduction of the black letter law in doctrinal courses rarely meets the practical application of skills. This format of instruction is a misrepresentation of how lawyers approach client representation and the problem-solving skills needed in practice. Embedding poverty law into existing courses would build students' problem-solving skills, while simultaneously building their ability to extract, retain, and apply black letter law to various situations.¹⁹⁶

B. Apprenticeship of Professional Identity and Values

Building analytical skills to think like a lawyer does not equate automatically to developing law students who are prepared to demonstrate the values inherent in the practice of law.¹⁹⁷ The *Carnegie Report* acknowledged law schools' ability to develop curriculums to build students' cognitive skills and

193. *Id.*

194. Participant #3, *supra* note 66.

195. Charles Hamilton Houston challenged law students and attorneys to be social engineers who could use the Constitution to solve community problems and improve the conditions of marginalized populations. ARTIKA R. TYNER, *THE LAWYER AS LEADER: HOW TO PLANT PEOPLE AND GROW JUSTICE* 234 (2014).

196. "Regnant lawyers tend to assume that the client's primary goal is to win the case and address a narrow legal problem, thus they may fail to gain an understanding of how the client's struggle fits into a larger context of the quest to achieve social justice." *Id.* at 222.

197. See generally ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND (CRITICAL SOCIAL THOUGHT)* (1992).

also to think like a lawyer.¹⁹⁸ This cognitive apprenticeship builds students' subject-matter mastery but is largely ineffective in building skills for lawyering mastery, including professionalism.¹⁹⁹ Thus, the *Carnegie Report* identified the professional identity and values apprenticeship as an important aspect of the law school curriculum.²⁰⁰

ABA Standards 302 and 303 also support the development of students' professional identity.²⁰¹ This development entails law schools offering not only courses in formal ethical rules, but also teaching adherence to widely accepted norms of honesty, fairness, civility, and respect for societal interests—including pro bono publico.²⁰² These characteristics are essential aspects of the profession and valued leadership traits needed by all lawyers, and by society as the ultimate beneficiary of high quality lawyers.²⁰³ These values also positively shift public perception and confidence in the legal profession, while simultaneously moving toward a more equitable judicial system.²⁰⁴ However, law schools vary in how they prepare students for this apprenticeship.²⁰⁵ This unevenness leads to considerable variability in students' willingness and preparedness to represent pro bono clients.²⁰⁶

198. Carnegie Report, *supra* note 5, at 54.

199. Sarah O. Schrup & Susan E. Provenzano, *The Conscious Curriculum: From Novice Towards Mastery In Written Legal Analysis and Advocacy*, 108 NW. U. L. REV. COLLOQUY 80, 83-84 (2013).

200. Carnegie Report, *supra* note 5, at 127-132.

201. ABA, *supra* note 10, at 15-17.

202. William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 468 (1994).

203. Professor Deborah L. Rhode defines ethical leaders as those “who exemplify integrity and social responsibility in their personal conduct and who institutionalize practices that encourage such conduct by others.” See generally ROBERT K. GREENLEAF, *THE SERVANT AS LEADER* (1998).

204. *Id.*

205. Only forty-one schools reported having a mandatory pro bono requirement. See ABA Standing Committee on Pro Bono & Public Service: *Pro Bono Programs Chart*, ABA (Nov. 2, 2016), http://www.americanbar.org/groups/probono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/pb_programs_chart.html.

206. See generally Artika R. Tyner, *Planting People, Growing Justice: The Three Pillars of New Social Justice*

Study participants indicated that one of the challenges with existing pro bono models is variability.²⁰⁷ Although some attorneys take to the work intuitively, others need considerable structure and supervision. Interestingly, when describing a pro bono attorney who intuitively understood the work, the study respondent referenced a pro bono attorney who had volunteered with the legal services program for twenty-three years and is a partner in a firm.²⁰⁸ The respondent saluted the pro bono attorney's brilliance—his ability to quickly assess and resolve legal issues and his ability to work with government bureaucrats. However, this pro bono attorney appears to be an anomaly.

The variability factor includes what participants reported as pro bono attorneys' failure to "get it" when it comes to representing low-income clients. The "get it" factor was a recurring theme, but unraveling the meaning and components of "getting it" had multiple layers. Participants described pro bono attorneys as uncomfortable with the poverty-specific challenges that poor clients may bring and with the practical aspects of representing clients living in poverty.²⁰⁹ "Legal issues that come through the door are laden with family dynamics, drug abuse, domestic violence, and pro bono attorneys think that their one intervention into clients' lives is going to solve all of the problems."²¹⁰

In describing the "get it" factor, another respondent indicated: "It boils down to compassion and caring about what happens to people. Seeing everyone in our community as someone to whom you owe some responsibility regardless of their circumstances."²¹¹

One study participant reflected on the District of Columbia's child poverty rate. "[Twenty-five percent] of kids in the D.C. live in poverty[.] Why is that? What does that mean

207. Participant #3, *supra* note 66.

208. Participant #9, *supra* note 66.

209. Participant #12, *supra* note 173.

210. Participant #4, *supra* note 118.

211. Although, in a firm context, there are clients who are not likeable, low-income clients do not have the structure or support that paying clients may have. Pro bono attorneys are more prone to withdraw from a case if the client is deemed "difficult."

for them? What does it mean for their daily lives? I think, particularly some of the places where people might be inclined to make judgments, like, ‘This person is twenty-five and she has four children.’”²¹² The comment coincides with the common theme of “getting it” and how important it is for attorneys to understand what the law and clients’ facts mean within a poverty law context. It is the effects of poverty that lead clients to a legal services provider, and many pro bono attorneys have little context to understand what this dynamic means.²¹³

Study participants also reported that pro bono attorneys were surprised that representing clients living in poverty personally impacted them. Although most pro bono attorneys learn the legal issues, their unfamiliarity with people living in poverty and their attachment to the client would cloud their objective legal thinking.²¹⁴ Poverty lawyers are not immune to this syndrome, but are more client-centered and committed to fulfilling their clients’ goals, even when they run in juxtaposition to the poverty lawyers’ worldview.²¹⁵ One study participant commented,

You go to court, [and] you don’t necessarily get justice when you go to court. And it’s a sad thing to have to say to some people, but people don’t necessarily always get what they think is fair, or what I think is fair. And I don’t know if everyone appreciates that.²¹⁶

Conversely, pro bono attorneys were reported as having a paternalistic approach to their cases.²¹⁷

212. Participant #2, *supra* note 163.

213. *See* Wexler, *supra* note 133, at 1050-52.

214. Participant #4, *supra* note 118.

215. Participant #10, *supra* note 162.

216. Participant #1, *supra* note 53.

217. Various theories of social justice lawyering promote the concept that lawyers work in partnership with their clients to solve problems. These collaborative strategies stress that the lawyer’s role is to build capacity within the client community. *See generally* PLANTING PEOPLE, GROWING JUSTICE, <http://artikatyner.com/planting-people-growing-justice/> (last visited Mar. 14, 2017).

*"[T]here was a] savior approach, as if our clients were somehow lost puppies who had to be saved from themselves."*²¹⁸

Despite these challenges, poverty law attorneys seem to agree that pro bono attorneys add important value:

We often look at did they do this form right? . . . [T]hat's not the full reason why we're really working with volunteers. It's not just to lighten our load. We're really working with volunteers because volunteers make our work possible, make our work possible through being our supporters and our cheerleaders, being our allies, being our supporters through gifting. It's never going to be a totally wasted effort when working with volunteers . . . Everyone has skills and assets; [We] marry those skills with the needs of the program.²¹⁹

Many of the pro bono attorneys' challenges of working with people living in poverty are grounded in stereotypes. Undoubtedly, society often blames poverty on the victim, instead of addressing the societal factors that lead to poverty. Narratives about "poor people" failing to take advantage of educational opportunities and living extravagantly above their means create negative attitudes about poverty. These false narratives are equally entrenched in the legal system.²²⁰ A study participant commented that judges often feel people make choices, and they need to live with those choices. Thus, the grandmother living in public housing who chose to have her grandson on her lease now has to suffer the consequences of an eviction when the grandson sells drugs.²²¹

In reality, people living in poverty have their choices circumscribed. One participant indicated:

[t]he effects of poverty are [the] inability to make choices in your life, to make the same kinds of

218. Participant #3, *supra* note 66.

219. *Id.*

220. See Wexler, *supra* note 133, at 1053.

221. Participant #4, *supra* note 118.

choices that people with money have, choices about where to live, choices about where to send your kids to school, choices about what to eat, choices about what you disclose to officials and what you don't. All those choices are, if not taken away, vastly reduced for people living in poverty.²²²

Effective representation of people living in poverty requires students and pro bono attorneys to understand these important dynamics. Although clinics and poverty law courses expose students to these issues, students who enroll in these courses are more prone to have a social justice commitment and may be considering a career in public interest law.

It is the other 93% of graduating law students who need to understand their ethical duty to help close the justice gap.²²³ However, students' professional identity cannot happen in isolation. Students need ongoing exposure to various social justice issues. Instead, most law schools train students to learn and apply black letter laws that rarely address the issues confronting people living in poverty. By embedding poverty law issues into core curriculum courses, professors can begin to heighten students' cognitive skills, sensitize students to the disparities in the judicial system, and reinforce the responsibility and societal privilege associated with a law degree. Perhaps the most apparent reason to include poverty law into existing core curriculum courses is the value clarification effect it has on law students.

*"[Clients] are human, and [] they are worthy. And just because they're in this particular situation doesn't make them less worthy . . . of a fair, just decision in a case."*²²⁴

222. Participant #2, *supra* note 163.

223. NALP employment data shows that 7.3% of graduates in the class of 2014 entered public interest jobs. NALP, CLASS OF 2014 NATIONAL SUMMARY REPORT (July 2015), <http://www.nalp.org/uploads/NationalSummaryChartforSchools2014Class.pdf>.

224. Participant #9, *supra* note 66.

V. Integrating Poverty Law Into The Curriculum

Dispelling perceptions that justice is separate from the black letter law is one of the benefits of embedding poverty law into a course.²²⁵ Although the case-method with a Socratic approach has limitations and inherent biases, professors who choose this pedagogy can still embed poverty law into their courses.²²⁶ As a preliminary matter, professors may feel that time constraints prevent them from covering social justice issues, particularly when students are struggling with the rule against perpetuities or other difficult bar examination topics.²²⁷ Concurrently, students may resist professors' attempts to discuss seemingly irrelevant social justice issues.²²⁸ However, teaching the black letter law and how the law impacts people living in poverty are not mutually exclusive.

Below I outline four steps a professor can take to integrate poverty law into a law school course. This seamless integration

225. *Id.*

226. The case method as the dominant teaching method in law schools has its roots in Christopher Columbus Langdell, who integrated scientific principles of proof into the law school classroom; Langdell's case method continues to serve as the prevailing method of inquiry, particularly in first-year classes. See Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is The Socratic Method a Proper Tool For Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 267 (2007); Edward Rubin, Symposium, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 610 (2007) (finding that the case-dialogue method is most effective in first year; the impact appears to dissipate after the first year); Susan Sturm & Lani Guinier, Symposium, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 516-17 (2007) (revealing how the Socratic method marginalizes women and students of color, and hinders cooperative learning). In particular, the aggressive antagonist Socratic method approach counters how women are socialized and hinders diversity of thought. *Id.*

227. Symposium, *Workshop on the Future of the Legal Course Book*, 33 SEATTLE U. L. REV. 292, 306 (2010).

228. Bell-Degado survey shows that professors who employ non-traditional teaching styles provoke student resistance; students often just want to learn the law, and extraneous materials, such as poverty and justice, seem like barriers to the real work. Veryl Victoria Miles, *Raising Issues of Property, Wealth and Inequality in the Law School: Contracts & Commercial Law School Courses*, 34 IND. L. REV. 1365, 1365-1368 (2001); see also Kathryn Pourmand Nordick, *A Critical Look at Student Resistance to Non-Traditional Law School Professors*, 27 W. NEW ENG. L. REV. 173, 185 (2005). Students often perceive these non-traditional professors as "less than" their "well-informed" colleagues, particularly if the professor is not a white male. *Id.* at 179-81.

deepens students' legal analysis skills and returns many students to the reason they entered law school—to change the world.²²⁹

A. *Selecting a Course Text*

The first step in the poverty law integration method is book selection. Undoubtedly, choosing a course book is multifaceted, including how students will receive the text and how well the text explains prevailing doctrine and its historical development.²³⁰ Thus, I do not suggest that professors select textbooks solely because of the treatment of issues of social justice. However, professors should consider how a book examines the historical biases in the law and the lasting impact those biases continue to have against people living in poverty.²³¹ A textbook may cover these issues of disparities through appellate cases, a problem approach, questions, hypotheticals, or illustrations. What becomes critical is including poverty law integration as one of the pedagogical goals. Taking this deliberate approach may mean professors do not select the popular casebook for their course. This selection process recognizes that the safe casebook is not always the best choice to meet learning outcomes.²³²

229. Symposium, *supra* note 227, at 298.

230. Other factors professors will consider are the number of credit hours for the course and the depth of material the professor must cover. HOWARD E. KATZ & KEVIN FRANCIS O'NEILL, STRATEGIES AND TECHNIQUES OF LAW SCHOOL TEACHING: A PRIMER FOR NEW (AND NOT SO NEW) PROFESSORS 14 (2009), https://www.wklegaledu.com/File%20Library/Faculty-Resources/KatzandONeill_LawSchoolTeaching.pdf.

231. Professor Keith Sealing examined fifteen property law texts and assessed how the authors addressed the relationship between property law and various social justice issues. Keith Sealing, *Dear Landlord: Please Don't Put a Price on My Soul: Teaching Property Law Students that "Property Rights Serve Human Values"*, 5 N.Y. CITY L. REV. 35, 54 (2002). One of the issues he assessed concerned poverty, socio-economic status. *Id.* at 62-63. Other topics included race, environmental justice, Fair Housing Act, gender, sexual orientation and familiar status, the differently-abled, and the environment. *See generally id.* His examination revealed that some casebooks included salient cases and extensive notes in this area, while others limited discussion to an isolated footnote. *Id.* His article is a valuable resource for property law professors and a good guidepost for others as they begin the casebook selection process.

232. Many professors may remain reluctant to change their casebook, particularly when they have developed teaching notes that align with a prior

Although professors often supplement a casebook with news stories and pending cases, relying on supplemental materials as the sole source of poverty law materials defeats the purpose on many fronts.²³³ First, this approach can become time consuming and result in foregoing these materials as the semester progresses and time becomes increasingly limited. Also, adding to the casebook suggests that social justice is separate from the doctrine and perpetuates its “otherness” stigma.²³⁴ Perhaps most significant, students entered law school motivated to understand the law’s impact on society; a casebook should build upon that curiosity while simultaneously teaching doctrine and legal reasoning. Despite these shortcomings, professors may elect to use a shadow text or other supplements as the first step in this process.

B. Develop a Class Definition of Poverty Law²³⁵

The next step in the poverty law integration method is to challenge students to approach cases through a poverty law lens. Students often assume that all people have equal and meaningful access to the courts.²³⁶ Thus, asking students to consider the overarching question of how poverty impedes access to the legal system and procedural fairness may be a good way to address this flawed assumption. To begin, during the first or second class, students should discuss social justice for people living in poverty and develop a working definition of poverty law.²³⁷ Students may not agree on the framing of the

text. See KATZ & O’NEILL, *supra* note 230, at 9.

233. Shadow sources often become a mechanism to supplement students’ casebook. *Id.* at 10. The shadow source, whether another casebook, teaching manual, or other supplemental teaching material, may not meet the overarching pedagogical goals as a student casebook. *Id.*

234. *Id.*

235. This idea of students defining poverty law developed from a presentation at the 2016 Legal Writing Institute Biennial Conference. An unknown professor referenced that he begins his criminal law class with students defining social justice. 2016 LWI Biennial Conference, <http://lwionline.org/biennial-conference/11-2016>.

236. Professor Salsich stresses that property law assumes “parties of relatively equal status and lawyers advising them.” Peter W. Salsich, Jr., *Property Law Serves Human Society: A First-Year Course Agenda*, 46 ST. LOUIS L.J. 617, 625 (2002). Yet, rules such as acquisition by discovery/control as enumerated in *M’Intosh* show just the opposite. *Id.* at 618-20.

237. As part of the discussion, it may help for students to consider how

final poverty law definition, but they should agree on the salient features. One study participant defined poverty law as:

[P]overty law really is about having this conversation and empowering and representing . . . people who are have[-]nots to have their stories heard, have their grievances aired, and have an opportunity to be more civilly-engaged in society. [P]overty law is . . . where a person is subject to being on the unfair side of a dynamic of power and privilege.²³⁸

The above definition, or one that students develop, can serve as the barometer for analyzing cases.²³⁹ It also serves as a gauge to examine the inherent privileges embedded in the law, while helping students to understand the black letter law and its underlying policy. This competency is a critical aspect of legal analysis with policy-based arguments.

C. Identify Leading Cases for Enhanced Discussion

After establishing a working definition of poverty law, throughout the course a professor can identify specific cases that are uniquely rich with examples of how the law disproportionately impacts people living in poverty.²⁴⁰ These targeted cases allow students to assess the biases of the decision makers, the trends in the law, and competing rules or concepts.²⁴¹ In many instances, these cases are part of a standard course casebook, but few professors explore them through a poverty law lens.²⁴²

As an example, I have outlined cases in a property law course that could serve this purpose. I have chosen property law because real property ownership is a strategy to perpetuate generational wealth, but it is embedded in laws that protect

people with financial means disproportionately benefit from the law.

238. Participant #3, *supra* note 66.

239. See *supra* Part I for the author's definition of poverty law.

240. See generally Sealing, *supra* note 210.

241. As a competency, the MacCrate Report expounds students should acquire skills in identifying the inherent biases in the law. MacCrate Report, *supra* note 6, at 141.

242. See generally Sealing, *supra* note 231.

race-based property ownership.²⁴³ Specifically, the law of property includes the right to exclude,²⁴⁴ excluding people of color from various neighborhoods, excluding the availability of mortgage financing in certain neighborhoods, and zoning ordinances excluding low-income housing.²⁴⁵ These exclusionary practices have created financial gain for some communities, while others have been deprived of property acquisition and wealth accumulation.²⁴⁶ Also, the right to housing has become an international issue, grounded in the premise that regardless of income, all should have housing that is affordable, secure, habitable, and accessible.²⁴⁷

To further illustrate these points, below I highlight property law cases that raise important poverty law issues.²⁴⁸ The cases span four topics covered in many property law courses: (1) Introduction to Property, including acquisition by discovery, capture, and creation; (2) Co-Ownership Interests; (3) Land Use Controls and Exclusionary Zoning; and (4) Leaseholds: Landlord and Tenant Law.²⁴⁹

243. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107 (2013).

244. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996); But see Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647 (2013).

245. Redlining served to exclude African Americans from securing mortgages in predominately white communities. See Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 676 (2002) (citing *Assoc. Home Equity Serv. Inc. v. Troup*, 778 A.2d 529 (2001)). Its contemporary replacement became predatory lending, which excluded African Americans from securing mortgage financing at reasonable rates, resulting in high default rates among African Americans. *Id.* at 669.

246. Progressive property scholars expound the social responsibility of property ownership, with a particular emphasis on the right to exclude and the social limitations on that right. See also Rosser, *supra* note 243, at 111-12.

247. OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RTS., THE RIGHT TO ADEQUATE HOUSING: FACT SHEET No. 21/REV.1 (2017), www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf.

248. The cases are standard in many property law casebooks. This deliberate approach is to avoid referencing cases that are somewhat obscure, so that the objective of building legal analysis skills and values do not overshadow teaching important property law cases and concepts that are likely to appear on bar examinations and are essential to students' success.

249. These areas are also frequently tested on most bar examinations. Roger Bernhardt & Joanne Martin, *Teaching the Basic Property Course in*

1. Introduction to Property

Property syllabi may begin with the nature of property and property acquisition by purchase, discovery, and conquest. This introduction provides students a foundation for how the law creates and distributes property and defines property—including people as property.²⁵⁰ It is this overview that gives context for the specific rules that will follow, including the bundle of rights associated with property ownership and how social relationships are defined through property.²⁵¹

Johnson v. M'Intosh is a common case to introduce land ownership acquisition and how social stratification is related to property ownership and aboriginal title.²⁵² In *M'Intosh*, Chief Justice Marshall crafts a holding that positions Indians (Native Americans) as occupants of the land, but Europeans as acquiring the land because discovery gave superior title.²⁵³ He reasons that Indians failed to efficiently use the land and thus had title by occupancy, not an ownership interest.²⁵⁴ The *M'Intosh* decision is more than archaic jurisprudence.²⁵⁵ It shows the legacy of property entitlement law, the problems of conquest, and, when examined through a poverty law lens, it

U.S. Law Schools, PROBATE & PROPERTY, Sept./Oct. 2007, at 36-42.

250. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993).

251. Rosser, *supra* note 243; see also Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 749-50 (2009).

252. *Johnson v. M'Intosh*, 21 U.S. 543 (1823). Other cases for coverage on Indian property issues include *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005); *Brendal v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); and *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

253. Chief Justice Marshall references the doctrine of conquest. *M'Intosh*, 21 U.S. at 589.

254. *Id.* at 563. In *M'Intosh*, Indians conveyed property to British settlers, but another settler acquired titled to the same property through a land grant from the United States government. *Id.* Perhaps even more theoretical, but an enlightening part of the discussion, is how Indians' willingness to share property led to a ruling on acquisition by discovery, even though the land was unoccupied. *Id.*

255. Rosser, *supra* note 243, at 129-31; see e.g., Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763 (2011).

shows how acquisition by discovery has lasting poverty and property implications.²⁵⁶ For centuries, and to date, Indians have the highest poverty rate of any group.²⁵⁷ Although various factors account for this economic disparity, including unfair trade practices, the trust status of native land, and loss of Indian property through allotment, ultimately the billions of acres stolen from Indians deprived them of generational wealth.²⁵⁸

M'Intosh and other cases addressing dispossessing Indians of property ownership are teaching opportunities to explore the correlation between property acquisition and how the law protects race-based property ownership, resulting in disproportionate and lasting poverty in certain groups.²⁵⁹ Exploring *M'Intosh* as part of a trilogy builds students' cultural competency to understanding the roots of economic disparity and that the solution is not grounded in encouraging people to "pull themselves up by their bootstraps."²⁶⁰

As an introduction to the theories of property, professors often cover property owners' "bundle of rights," including the

256. *Id.* See also Joseph William Singer, *Reply Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F.1, 3-7 (2005); Rosser, *supra* note 243, at 130-33.

257. Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives are Living in Poverty*, (June 13, 2014), <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/>

258. The nexus among property law, British imperialism, and indigenous economics are beyond the scope of this article, but the topic warrants continued scholarship. See generally Rosser, *supra* note 243; see also Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 13-14 (1995).

259. See e.g., Joseph William Singer, *supra* note 243; Harris, *supra* note 250; Rosser, *supra* note 243, at 129.

260. The flawed narrative that people living in poverty are to blame for their situation because they are not working hard enough overlooks how a legacy of discrimination creates wealth advantages for some racial groups. Ezra Rosser references this fallacy as the "mythology of merit" when it comes to property acquisition. Rosser, *supra* note 233, at 134; See Artika R. Tyner, *Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering*, 10 HASTINGS RACE & POVERTY L.J. 219, 231 (2013) (describing Professor Lani Gunier's story of power). White generational wealth often derives from a legacy of property laws that were designed to discriminate against Indians and African Americans. Rosser, *supra* note 243, at 133-134; see also *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

right to control and to exclude others from property.²⁶¹ *State v. Shack* analyzes private and public controls on land use, including how the right to exclude has limits that are bound by social justice policies.²⁶² The case can also be used to reinforce the fact that disparities in the law are not easily challenged. In *Shack*, a private land-owner filed trespassing claims against a medical worker and a legal services attorney for entering his land to provide assistance to migrant workers who lived on the property.²⁶³ The defendants challenged the constitutionality of the trespassing statute, but the court declined to address the constitutional issue because the land was not open to the public.²⁶⁴ However, the court held that the migrant farm workers were entitled to receive visitors, members of the press, and persons providing charitable and governmental services.²⁶⁵ Significantly, the court identified migrant workers as a vulnerable population, subject to the abuse of landowners.²⁶⁶

Shack introduces students to the notion that the power of ownership is not absolute, raises students' consciousness, and emphasizes that property ownership rights are tied to social obligations.²⁶⁷ *Shack* also exposes students to the work of legal services attorneys and the clients they represent. Introducing students to access to justice issues aligns with ABA Standards 302 and 303 that the law school curriculum should develop students' professional identity, including opportunities and exposure to pro bono services.²⁶⁸

261. Rosser, *supra* note 243, at 412.

262. *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971).

263. *Id.* at 370.

264. *Id.* at 371-372.

265. *Id.* at 374.

266. *Id.* at 373.

267. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 748-52 (2009).

268. ABA, *supra* note 4; Salsich, *supra* note 236, at 624 (Professor Salsich stresses that property law assumes "parties of relatively equal status and lawyers advising them").

2. Co-ownership Interests

Law schools teach students that the law is fair, when in some instances, it was designed to be just the opposite.²⁶⁹ A prominent injustice associated with land ownership is classifying African Americans as property and the subsequent Black Codes preventing African Americans from owning property.²⁷⁰ Despite the abolition of slavery and repeal of the Black Codes, discriminatory practices continued to hinder black land ownership. The aftermath is that African Americans now own less than one percent of all farm land in the United States.²⁷¹

One of many factors contributing to the disparity in African American land ownership is the loss of heirs' property through partition-by-sale.²⁷² Although various cases address co-ownership interests and partition sales, course coverage on this topic should address the egregious practice of investors using partition-by-sale as a means to divest ownership interest in land.²⁷³ This exploration should include the impact this practice has on low-income property owners who often lack the means to challenge wealthy and powerful land investors.²⁷⁴

269. Civil rights activists commonly developed norm-challenging arguments. See Suzanne B. Goldberg, *Risky Arguments in Social Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2089 (2014).

270. *Dred Scott v. Sandford*, 60 U.S. 393 (1856), *superseded by* Constitutional Amendment (Jan. 1, 1868).

271. Compare Jess Gilbert et al., *Who Owns the Land? Agricultural Land Ownership by Race/Ethnicity*, 17 RURAL AM. 55, 56 (2002), http://www.farmlandinfo.org/sites/default/files/Rural_America_1.pdf, with Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 575-578 (2005) (explaining that data sets on African America land loss and ownership is inadequate).

272. See generally Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs' Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1 (2007); Mitchell, *supra* note 271.

273. If it is impartible to divide cotenants' shares in land, each tenant in common has a right to file for judicial partition of the property; because partition is an equitable action under common law, courts consider the best interest of all parties and deny the partition if it would harm one of the cotenants. RICHARD R. POWELL, 7-50 POWELL ON REAL PROPERTY § 50.07 (2015).

274. Low-income African Americans' property is often transferred intestate. See Rivers, *supra* note 272, at 9. Their property may then be

Delfino v. Vealencis covers the appropriate remedy for a court to apply when the property can practicably be physically divided.²⁷⁵ The court uses strong language that a person's property should not be sold without her consent.²⁷⁶ Although the court held that partition in kind is preferable to partition by sale, courts continue to pursue partition by sale against many low-income African Americans owning rural property as tenants in common.²⁷⁷ Yet, few casebooks cover how co-ownership interest contributes to the loss of land for low-income families, particularly African Americans in rural communities. Because of the gap in casebooks on this subject, I cautiously recommend that professors use supplemental materials for this topic.²⁷⁸

3. Land Use Controls and Exclusionary Zoning

Local zoning ordinances are designed to protect what is desirable for the general community and to avoid public nuisance.²⁷⁹ Historically, these ordinances have survived Supreme Court challenges unless the ordinance was "clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or general welfare."²⁸⁰ This

subject to public partition-by-sale when the property is held as tenants in common. *Id.* at 6. Generally, a court must determine that partition in kind is impracticable or inequitable; and the partition-by-sale is in the owners' best interests. Gillian K. Bearns, *Real Property—Giulietti v. Giulietti—Partition by Private Sale Absent Specific Statutory Authority*, 26 W. NEW ENG. L. REV. 125, 133 (2004).

275. In *Delfino*, the defendant lived on the property and had a garbage and waste removal on a portion of the land. *Delfino v. Vealencis*, 436 A.2d 27 (Ct. 1980).

276. *Id.* at 30.

277. *Id.*

278. This topic has become such an important issue in the progressive property community that it is unfortunate that it has not become a part of many standard casebooks. Professors should explicitly stress that the supplement is not because the material is insignificant, but because it is the most persuasive material to demonstrate the challenges of tenancy in common and its implications on low-income communities. A number of articles address this issue. See Rosser, *supra* note 243; Mitchell, *supra* note 272, at 562-568.

279. *Katobimar Realty Co. v. Webster*, 118 A.2d 824 (1955).

280. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (citations omitted) (holding that zoning is a constitutional exercise of state's police power to maintain public safety, health, welfare). The Supreme Court

standard led to zoning restrictions that excluded apartment complexes in single-family home communities and narrowly defined “family” to restrict roommate situations so as to maintain “social homogeneity.”²⁸¹ These types of zoning ordinances, and many others, resulted in a reduction in the availability of low-income housing and prevalent racial discrimination practices.²⁸²

In the *Village of Belle Terre v. Boraas*, the ordinance limited land usage to one-family dwellings, with a restriction that a maximum of two non-family members could live together.²⁸³ Six college students challenged the constitutionality of the ordinance.²⁸⁴ The court held that police power extended beyond health and safety issues and included family values and quiet seclusion.²⁸⁵ What becomes an opportunity to explore is whose family values the court referenced, particularly when multigenerational families sharing housing is culturally preferred for some, and an economic necessity for others.

In *Moore v. City of East Cleveland*, the court took a different direction by invalidating a similar ordinance that prohibited a grandmother from living with her son and her two non-biological grandchildren.²⁸⁶ The court held that the ordinance encroached into the sanctity of the family and had marginal nexus to the objectives of the ordinance that related to avoiding overcrowding.²⁸⁷ The court recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause.²⁸⁸ Particularly noteworthy is Brennan’s concurring opinion. Justice Brennan, with whom Justice Marshall concurred, wrote, “[t]he line drawn by this ordinance displays a depressing insensitivity toward the economic and emotional needs of a

did not fully analyze the issue again until 1974. See *Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974).

281. *Id.* at 6-7.

282. *Id.* at 9.

283. *Id.* at 2.

284. *Id.*

285. *Boraas*, 416 U.S. at 4.

286. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

287. *Id.* at 505-506.

288. *Id.* at 503-504.

very large part of our society.”²⁸⁹ He also described how the ordinance could have a disparate impact on communities of color, who have different family structures than whites.²⁹⁰

In *Southern Burlington County NAACP v. Township of Mount Laurel*, the court addressed the tension between zoning that protects “social homogeneity” and ordinances that are a back door for white communities to exclude people of color and low-income families.²⁹¹ The court held that the ordinance must provide a realistic prospect for low- and moderate-income housing.²⁹²

While restrictive zoning may protect public safety, health, and welfare, exclusionary zoning disproportionately benefits the wealthy over the poor, contributing to a lack of affordable housing, unfair distribution of wealth, and economic exclusion.²⁹³ These cases clarify the legal roots of that disparity.

4. Leaseholds: Landlord and Tenant

Connected to municipalities’ duty to remove legislative barriers to affordable housing is the landlord’s duty to provide safe and habitable housing. The following cases show trends in landlord-tenant law, and reinforce the public policy to protect tenants, who lack meaningful bargaining power in most rental markets.²⁹⁴ They also address issues of unconscionability

289. *Id.* at 542.

290. *Id.*

291. *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975). The series of *Mount Laurel* cases are rich with opportunities to discuss municipalities’ duty to provide low- and moderate-income housing that adequately meets the needs of all residents of the community.

292. *Id.* at 187.

293. See *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853 (D.C. Cir. 1972); See Rosser, *supra* note 243, at 144-145.

294. There are a number of landlord and tenant cases that enumerate these principles. See *Jancik v. Dep’t of Hous. & Urban Dev.*, 44 F.3d 553 (7th Cir. 1995); *Swann v. Gastonia Hous. Auth.*, 675 F.2d 1342 (4th Cir. 1982); *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968) (holding landlord may not evict for retaliatory motive). But see *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002) (upholding the housing authorities’ power to evict a public housing tenant for the actions of another member of the household, or a guest under the tenant’s control involved in drug-related activity). An analysis of *Rucker* could include coverage of the covenant of quiet enjoyment

within the context of leasehold agreements.²⁹⁵ Willie E. Cook, Jr. referred to these cases as “a revolution in the practice of law, in terms of transferring power from landlords to tenants.”²⁹⁶

In the District of Columbia, *Brown v. Southall Realty Co.* created the foundation for many tenant protections in landlord and tenant law.²⁹⁷ At trial, counsel for Lillie Brown argued that the landlord, Southall Realty Company, was not entitled to rent because at the time she leased her apartment there were housing code violations.²⁹⁸ The court held that a lease is void and cannot be the basis of a landlord’s nonpayment of rent dispossession action if, at the time of the execution of the lease, a landlord knows that housing code violations exist.²⁹⁹

Although Brown carved out the void lease argument and legally framed the landlord-tenant relationship as one grounded in contract, it limited its holding to defects at the time of the lease.³⁰⁰ In the landmark decision, *Javins v. First National Realty Corporation*, the court expanded the *Brown* holding and established that there is an implied warranty of habitability in every residential lease and a tenant may raise a landlord’s breach of housing regulations as a defense to an eviction action based upon nonpayment of rent.³⁰¹

An important issue to explore in *Javins* and *Brown* is the impact pro bono representation had for the clients and the future legal landscape.³⁰² It is unlikely that these tenants would have secured favorable results without pro bono representation, particularly when 90% of District of Columbia

and whether the standard should be different for tenants living in public versus private housing.

295. Anne Fleming, *The Rise and Fall of Unconscionability as the “Law of the Poor”*, 102 GEO. L.J. 1383 (2014).

296. Gilmore, *supra* note 24, at 108.

297. *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Cir. 1968).

298. *Id.*

299. *Id.* See also *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984) (holding that there is an implied warranty of habitability in residential housing and contract damages are available to the tenant when the landlord breaches that obligation).

300. *Brown*, 237 A.2d at 834.

301. *Javins v. First Nat. Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

302. Neighborhood Legal Services Program represented the four tenants in *Javins* and Lillie Brown. See Gilmore, *supra* note 24, at 91-97.

landlords are represented by an attorney, but less than 10% of tenants have legal representation.³⁰³

The above-referenced cases and concepts are familiar to most property law professors. They are presented as a reminder that the poverty law integration method is a seamless process to teach students black letter law in any course. By examining the cases through a poverty lens, a professor enhances students' ability to think like a lawyer, reinforcing the legal analysis skills the MacCrate Report argues students should acquire. In particular, legal analysis and legal reasoning involve evaluating theories and criticizing arguments.

D. Include a Poverty Law Simulation as Part of the Course

Finally, I propose a poverty simulation or hypothetical as part of the course. One of the best practices for the delivery of instruction is to encourage collaboration.³⁰⁴ Through collaboration, students build problem-solving skills and deepen their understanding of various legal principles. With a poverty law simulation, students will simultaneously gain an appreciation of the challenges clients living in poverty confront. The problem should require students to spot multiple issues, identify the underlying policy rationale for judicial decisions, and address issues of fairness and justice. All of these factors have the potential to give meaning to the law, heighten students' motivation, deepen learning, build students' professional identity, and strengthen, instead of wilting, students' commitment to social justice.³⁰⁵

303. LEGAL AID SOC'Y OF THE DISTRICT OF COLUMBIA, *Testimony of Eric S. Angel, Exec. Director & Beth M. Harrison, Supervising Atty., Legal Aid Society*, http://www.legalaiddc.org/wp-content/uploads/2016/10/bharrison_B21-879_10.19.16.pdf, at 5 (last visited Mar. 14, 2017).

304. BEST PRACTICES, *supra* note 7, at 120 (noting "collaboration helps students realize the 'discrepancy between reality of the legal system and the dream of social justice in our pluralistic American Culture. Students better understand legal rules and procedures as cultural phenomena, as complex compromises between competing social, political and economic agendas"); *see also* Patricia Grande Montana, *Peer Review Across the Curriculum*, 91 OR. L. REV. 783, 787 (asserting that students working in isolation is contrary to how lawyers practice and undermines students' confidence).

305. Hess, *supra* note 2.

CONCLUSION

Legal services attorneys interviewed for this article stressed that people living in poverty face restrictions that work to strip their human dignity.³⁰⁶ Regrettably, some law schools perpetuate this dilemma with a curriculum that inferentially minimizes lawyers' social justice responsibility to restore human dignity through pro bono representation. But what would happen if issues of economic disparity and social justice were fully embedded in core law school courses? Would law school culture and socialization shift in a new direction? Would students graduate law school with heightened skills and desire to eradicate the inequalities in society and the judicial system?

People living in poverty rarely have isolated legal problems. Steven Wexler introduced this concept in his prominent Yale law review article.³⁰⁷ He recognized that poverty lawyers used multifaceted strategies to address the discriminatory practices their clients confront, develop heightened problem-solving skills, and specialize in policy-based arguments.³⁰⁸ If students had this exposure through their law school career, law schools would enhance students' ability to be practice-ready with a commitment to address the justice gap. Perhaps on graduation day, students would be able to look to their left and look to their right and know that their classmates will use their law degrees to address social justice in a meaningful way.

306. *E.g.*, Participant #2, *supra* note 163.

307. Wexler, *supra* note 133, at 1049-1050.

308. *Id.*