Public Interest Lawyering in the United States and Montana: Past, Present and Future

Kimberly McKelvey
Student, University of Montana School of Law

Follow this and additional works at: https://scholarship.law.umt.edu/mlr
Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.
PUBLIC INTEREST LAWYERING IN THE UNITED STATES AND MONTANA: PAST, PRESENT AND FUTURE

Kimberly McKelvey*

I. INTRODUCTION

Poor individuals and families in the United States and Montana suffer a dismal lack of access to legal counsel. One-seventh of the United States' population qualifies for legal aid, totaling over fifty million people. However, across the country, poor people receive legal counsel for merely 20% of their legal problems, and the working middle class find counsel only one-third of the time. Montana is on par with the nation, with poor and working middle class people having access to a lawyer's advice for 16.4% of their legal needs.

These figures cast an ominous shadow over the phrase "Equal Justice Under Law," etched into the portico over the door to the United States Supreme Court building. Practically speaking, the statistics indicate that only 20% of domestic violence victims seeking divorces from battering spouses have access to legal advice. Only 20% of people in protected classes seeking justice for discrimination claims will be able to find lawyers to bring their cases in court. Only 20% of people harmed by employer negligence will find counsel. Eighty percent or more of these people will not receive legal advice, and therefore, will not likely find access to justice.

* Candidate for J.D. 2007, The University of Montana School of Law. Thank you to Professor Ray Cross for his guidance.

1. Poor and working middle class people qualify for legal aid. The category of "poor people" is defined by the Federal Poverty Guidelines as people whose annual income is less than 125% of the poverty line. Working middle class is defined as people whose annual income is less than 200% of the poverty line. In 2002, the poverty line for poor people was $401 per week for a family of four, and $942 per week for working middle class families.

2. DEBORAH L. RHODE, ACCESS TO JUSTICE 7 (2004) [hereinafter RHODE, ACCESS].


5. Id.

6. DALE, supra note 1, at 21.

7. RHODE, INTERESTS, supra note 4.
The United States' approach to providing legal counsel for the poor differs significantly from that of most civilized countries. For example, the Italian, German, English, Dutch, French and Swiss governments grant a right to civil legal aid in their constitutions, and provide free legal aid to poor people. In marked contrast, the United States government spends "far less than any other western industrial nation on civil legal assistance." The federal government, which currently funds approximately two-thirds of all legal aid services to poor people, spends a mere $8 per year per person in poverty for civil legal aid.

Government-sponsored legal aid programs have witnessed numerous cuts and restrictions in the last three decades. The Legal Services Corporation (LSC), a product of the civil rights and poverty movements of the 1960s, was officially created by Congress in 1974. The LSC's mission is to provide legal services to America's poor, and its stated goal was to provide two lawyers for every 10,000 qualified people. The program was only able to achieve this goal once, in 1981, before suffering severe cuts under the Reagan administration. President Reagan's attempts to demolish the LSC resulted in an exodus of experienced lawyers from legal aid programs.

The downward trend continued into the 1990s, culminating in the 1996 Reform Act. The Reform Act reduced LSC funding by one-half, and placed restrictions on the types of cases programs can take. For many lawyers interested in serving the public good, such restrictions rule out practice with a legal aid program. The cuts have been felt in Montana as well. Only 9.3% of Montana's poor currently receive legal counsel from LSC-funded legal aid programs.

The remaining bulk of legal aid services is provided by law school clinics and the private bar. Like the LSC, law school clinics were inspired by the civil rights movements of the 1950s and 1960s, as well the Progressive Era and Supreme Court Justice Louis Brandeis calling for increased access to justice for poor people.

10. RHODE, ACCESS, supra note 2, at 7.
12. Eakeley, supra note 9, at 742.
13. Barringer, supra note 3, at 64.
14. DALE, supra note 1, at 21.
Clinical programs supervise law students as they meet the legal needs of their community. One hundred seventy-two of 183 ABA-accredited law schools currently offer clinical programs.

The American Bar Association has sought, through the Professional Rules of Conduct and various campaigns, to encourage the private bar to engage in pro bono activity. Despite these efforts, the average lawyer gives $85 a year and thirty minutes a week of pro bono service to his or her community. Only 130,000 of the approximately 700,000 lawyers in the United States provide pro bono services. In Montana, only 7.1% of poor clients find private attorneys willing to offer them pro bono aid.

While increased pro bono activity from the private bar would help the cause, it "cannot fill the void." Public interest law firms and legal aid programs remain essential to meet the needs of America’s poor. However, both suffer from a dearth of lawyers. While 70% of entering law students aspire to practice public interest law upon graduation, only 5% actually enter the field. Debt is a daunting obstacle. The average law school graduate owes between $45,000 and $70,000 upon leaving law school, resulting in loan payments as high as $1,000 a month. The median public interest law salary in 2001 was only $35,000. These figures combined prevent 66% of law students interested in public service from engaging in that field of practice after law school.

The question then becomes, in a nation in which 70% of citizens believe the government should provide legal representation to the poor in custody, adoption, and divorce cases, what can those citizens, in conjunction with lawyers, law schools, public interest law firms, the LSC and the government do to increase access to justice for poor people? After analyzing the history of pub-

17. Id. at 9-23.
19. Rhode, Interests, supra note 4, at 5.
lic interest lawyering and the LSC in the second section of this paper, I offer an answer to this question in the third section. I propose that such growth in public interest lawyering, particularly in Montana, will rely on an increased return to the basics. Emphasis will come from law school legal clinics, curricular efforts, state and local bar-funded initiatives, and the historic pro bono representational efforts of private law firms.

II. History

A. The Early Years

Some might argue that legal representation for all citizens, regardless of ability to pay, is a foundational element of United States government. The Preamble to the United States Constitution, effective in 1789, includes the words “establish justice.” The Due Process Clause, effective in 1868, mandates equal protection under law for all citizens. Even the Pledge of Allegiance, written in 1892, promises justice for all.

Despite these auspicious beginnings, legal representation for poor people started slowly in the United States. For three years following the Civil War, the government funded the Freedman’s Bureau to represent indigent blacks in litigation.26 However, the first organized legal aid movement did not develop until 1876, when New York formed an assistance program for German immigrants. By 1900, only six cities had legal aid organizations.27 These local legal aid societies were funded by charitable donations and pro bono work of attorneys. They provided severely limited representation, and most poor people received no access to representation at all.28

In the early 1900s, legal thinkers embarked on a campaign to inspire legal representation for the poor. The new movement was perhaps inspired by the revitalization of professional legal organizations in the late 1800s, and the corresponding attention to lawyers’ responsibility to the public.29 Supreme Court Justice Louis Brandeis and Progressive Era lawyers encouraged other lawyers

27. ARON, supra note 11, at 7.
28. Eakeley, supra note 9, at 742.
29. F. RAYMOND MARKS ET AL., THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY 12-13, 17 (1972) (noting the ABA was not formed until 1887).
to think of themselves as advocates for the public good and advocates for their clients. In 1919, Reginald Smith wrote *Justice and the Poor*, in which he espoused a plan for the organized bar to finance legal aid activities. Also, the first convention of state and local bar associations in 1917 passed a resolution encouraging bars to create legal aid societies to help the poor. The efforts were successful; by 1940, fifty cities had legal aid organizations.

In the 1930s, concerns about the Sixth Amendment right to counsel for the criminally accused came to the fore. Between 1932 and 1963, the right to counsel was extended from indigent defendants in state capital cases to indigent defendants in all state felonies. Private firms and bars were forced to adjust to the ever-increasing need for pro bono work. Slowly, lawyers began to realize that, without government funding and administration, the needs of the poor could not be met. By the 1960s, only 400 full-time lawyers were available to provide legal aid to fifty million poor people.

### B. The 1960s and 1970s: Gaining Momentum

#### 1. The 1960s

The poverty, civil liberties and civil rights movements of the middle-1900s produced a new vision of public interest lawyering. The movements inspired lawyers to expand their view of the law. Instead of law being limited to the needs of individual clients, the law was viewed as having the ability to right societal wrongs. Public interest lawyering thus evolved into a public good that required funding.

In the 1950s and 1960s, the ACLU and the NAACP Legal Defense and Education Fund, founded in the early 1900s, saw many legal victories on behalf of the current movements. Private foundations, such as the Sierra Club and the Center for Law and Social Policy, developed to advocate for societal change. The government made public interest lawyering more profitable. Con-

30. *Id.*
33. *Quigley*, *supra* note 26, at 244-45.
36. *Id.* at 8-9.
37. *Id.* at 11.
gress mandated that unsuccessful public interest defendants pay the plaintiffs' legal fees. The Internal Revenue Service granted qualified public interest law firms tax-exempt status.38

The private bar became more engaged in pro bono work in the 1960s, in large part through the efforts of law students. The most highly qualified law students began to demand increased opportunity to litigate public interest cases. Law firms cited student demand as the single greatest factor contributing to law firm restructuring.39 Firms incorporated public interest law in a variety of ways. Some developed a public interest department, allowing individual lawyers to participate as time allowed, but staffed the department full-time. Some created public interest partners: one or more partners who performed the public interest lawyering in the firm and received the same salary as other partners.40

The biggest shift in public interest law in the 1960s occurred as a result of President Lyndon B. Johnson's War on Poverty.41 Congress created a Legal Services Program as part of the Office for Economic Opportunity (OEO) in 1965.42 In 1966, the OEO granted twenty-five million dollars to legal services programs.43 The OEO encouraged participating programs to engage in law reform to end poverty. However, the program was initially situated in the Executive Branch; therefore, it was highly politicized and subject to much controversy.44

2. The 1970s

The 1970s saw much success for government-sponsored legal aid programs; however, the 1970s also marked the beginning of increasing discontent with the movement. In 1971, critics of the politicized OEO program introduced legislation to create an independent legal services organization.45 The legislation underwent several changes, including restrictions on the types of cases the

38. Id. at 12.
39. Marks et al., supra note 29, at 204.
40. Id. at 65-66, 85-86.
41. Quigley, supra note 26, at 245.
42. Eakeley, supra note 9, at 741-42.
43. Quigley, supra note 26, at 245.
45. Id. at 250-51.
new organization could sponsor. In 1974, under President Richard Nixon, Congress created the LSC.\textsuperscript{46} LSC’s mission is to administer nation-wide funding for local programming, with limited oversight. LSC gives grants to local programs. The programs, in turn, provide legal services to low-income people. According to the 1997 Chairman of the LSC, Douglas Eakeley, the process allows grantees to prioritize the needs of their communities so community members can receive substantive assistance and full representation.\textsuperscript{47}

The years immediately following the creation of LSC marked the high point for legal aid in the United States.\textsuperscript{48} The private bar continued to lure talented law students with opportunities for pro bono work. The Ford Foundation’s Council for Legal Education for Professional Responsibility helped many interested law schools develop clinical programs and internships.\textsuperscript{49} Furthermore, the LSC received increased funding from 1974 to 1981. The LSC was able to serve over a million poor people a year, and grant-funded offices supported over 6,000 attorneys.\textsuperscript{50} However, the goal to remove the organization from the politics of the Executive Branch was stymied in large part by the LSC’s reliance on Congress for funding.\textsuperscript{51} As Congress shifted priorities or political perspective, the LSC would be at risk.

\section*{C. The 1980s and 1990s}

\subsection*{1. 1980s}

Interestingly, one of the biggest setbacks for the LSC occurred before it was created. In 1968, the OEO sponsored the California Rural Legal Assistance program (CRLA). CRLA had great success in a case involving Medi-Cal funds, with the result that California had to return $200 million to the state Medi-Cal account. The restoration of the funds hampered then-Governor Ronald Reagan from balancing the budget as he had promised. In response, Gov-

\begin{itemize}
  \item \textsuperscript{46} Forbidden cases include those involving abortion, welfare reform, prisoners’ rights and others. Barringer, \textit{supra} note 3, at 64.
  \item \textsuperscript{47} Eakeley, \textit{supra} note 9, at 744, 745.
  \item \textsuperscript{48} Quigley, \textit{supra} note 26, at 254.
  \item \textsuperscript{49} ARON, \textit{supra} note 11, at 13.
  \item \textsuperscript{50} Quigley, \textit{supra} note 26, at 254-55.
  \item \textsuperscript{51} Kelly, \textit{supra} note 44, at 251-52.
\end{itemize}
Governor Reagan spent most of the 1970s restricting or attempting to eliminate OEO programs in California.52

When Reagan was elected President in 1980, he continued the undertaking he had begun in California with a three-pronged attack on the LSC. The first prong, attempted in 1981,53 was to eliminate the LSC altogether,54 calling for defunding the “radical” and “socialist” program.55 Deans of 141 law schools, over 100 judges from New York State (in addition to hundreds from other states), and fourteen past ABA presidents, among others, rose up to thwart the effort.56 The resistance succeeded, but President Reagan had other strategies waiting.

President Reagan’s second strategy was to reduce funding to LSC.57 LSC received $321,300,000 in 1981,58 which allowed it to meet its goal of providing two lawyers for every 10,000 qualified people.59 Under Reagan, however, Congress funded the program at $241,000,000, a loss of 25%, in 1982 and 1983.60 Reagan attempted (unsuccessfully) to push the Legal Fees Equity Act through Congress.61 The Act would have reduced fees for PIL lawyers who prevailed against government entities. Reagan also failed to stop the Equal Access to Justice Act which allows attorneys to recover fees if government action against them is unjustified.62

President Reagan’s third prong of attack correlated to management of LSC.63 Reagan first increased the oversight power of the Office of Management and Budget (OMB). With its new power, the OMB negatively affected civil rights legislation.64 Reagan also appointed people to the LSC Board of Directors whose “stated mission was to eliminate the Legal Services Corporation.”65 And, in 1982, Reagan prohibited public interest law

52. Quigley, supra note 26, at 248-49.
53. ARON, supra note 11, at 20.
54. Stuart Taylor, Jr., Legal Aid for the Poor: Reagan’s Longest Brawl, N.Y. TIMES, June 8, 1984, at A16.
55. Quigley, supra note 26, at 255.
56. LUBAN, supra note 8, at 299-300.
57. Taylor, supra note 54, at A16.
58. Gillespie, supra note 25, at 43.
59. Eakeley, supra note 9, at 742.
60. Gillespie, supra note 25, at 43.
61. ARON, supra note 11, at 17.
62. Id.
63. Taylor, supra note 54, at A16.
64. ARON, supra note 11, at 15.
groups from receiving money from the Combined Federal Campaign (a fund drive of government employees).66

While President Reagan did not achieve his goal to eliminate the LSC, his efforts had sweeping results for legal aid programs in the United States. As a result of his attempts to end the program, local programs suffered low morale and large numbers of lawyers left administrative roles.67 LSC programs lost 30% of staff attorneys (often the more experienced attorneys) in the late 1980s. Over half of the programs could not find attorneys to replace the losses. The number of LSC offices dropped by 25%.68

Most critically, over 86% of LSC programs turned away 500 to 4,000 potential qualified clients in 1983. Some programs had to cut particular types of cases (notably, child abuse and neglect, divorce, custody, and bankruptcies).69

2. 1990s

The beginning of the 1990s showed an improvement in LSC funding, and the birth of new initiatives by law schools and the private bar to promote public interest law. Between 1990 and 1994, LSC funding increased from $321,000,000 to $400,000,000.70 Eight Loan Repayment Assistance Programs (LRAP) for public service lawyers began between 1988 and 2001.71 In 1996, the ABA officially required law schools to encourage and provide opportunities for student participation in pro bono activities. The standard also required law schools to allow for faculty participation in pro bono work.72 Private law firms showed an increase between 1990 and 1993 in the number of pro bono hours contributed by the firm.73

However, in 1991, a renewed assault began on LSC. In 1991, additional restrictions were placed on LSC funding, including a prohibition against class action suits.74 In 1992, the House de-

66. ARON, supra note 11, at 18.
68. Id.
69. Id. at 242.
70. Quigley, supra note 26, at 259.
71. LRAP, supra note 24, at 5.
72. RHODE, INTERESTS, supra note 4, at 203-4.
74. Quigley, supra note 26, at 260.
bated over a bipartisan proposal to eliminate LSC.75 Finally, in the 1996 Reform Act, Congress cut LSC funds by 30%.76

The 104th Congress's $122,000,000 reduction77 was prompted in large part by lobbyists, including the American Farm Bureau (lobbying against advocacy for migrant farm families), the Christian Coalition and the National Rifle Association.78 The reduction not only eliminated support for national and state support centers for legal services,79 but added additional restrictions.80 The restrictions require that any legal services agency receiving federal funds refrain from taking cases involving abortion, prisoners' rights, welfare reform, and public housing, among others. Furthermore, lawyers may not lobby or give advice on poverty law, or seek attorney fees.81 Funding remains low today, and in 2006 funding was again cut from $335,000,000 to $319,000,000.82 Thus conditioned, public interest lawyering in the United States enters the twenty-first century.

III. ANALYSIS AND RECOMMENDATIONS

As public interest lawyering in the United States enters the twenty-first century, it brings with it the cumulative knowledge gained in the past century. This section focuses on five arenas of past and future growth: (1) government funding of public interest work; (2) for-profit law firm contributions to the representation of the poor; (3) not-for-profit public interest law firm work; (4) bar association encouragement; and (5) law school contributions. Specifically, this section seeks to outline techniques and programs undertaken in each arena. The work of the past can provide a solid foundation for recommendations for improvement in each area.

The section is premised on two questions. How can past programming and techniques, in addition to innovative new programming, best increase poor people's access to representation? As the number of poor people grows, how will nationwide, statewide and local programming meet their legal needs? The section concludes with specific directions for Montanans.

75. Vivero, supra note 65, at 1324.
76. Kelly, supra note 44, at 251; Quigley, supra note 26, at 261.
77. Barringer, supra note 3, at 61.
78. Eakeley, supra note 9, at 743.
79. Barringer, supra note 3, at 60.
80. Kelly, supra note 44, at 252.
81. Barringer, supra note 3, at 64.
82. LSC's Budget, http://www.lsc.gov/about/budget.php (last visited April 9, 2006).
A. Government Funding

Increasing government funding for public interest work is imperative to creating a system of adequate representation of poor people for two reasons. First, other countries that provide adequate representation for poor people rely almost entirely on government funds to do so. Second, the federal government currently funds approximately two-thirds of all public interest work. It is highly unlikely, even with increased pro bono activity from the private bar, that the needs of the poor will be met without significant government funding.

Therefore, organizations must continue to focus on research and lobbying efforts. As indicated by the 1992 failure to eliminate the LSC, the efforts of deans, judges, lawyers, and bar associations can have a profound effect on legislative voting. Organizations might consider a multi-faceted approach, in which lobbyists seek to maintain current funding levels, increase funding, and remove funding from the discretionary power of Congress. Lobbyists should also focus on increasing tax incentives for public interest lawyering (for example, refundable tax credits or deductions for pro bono work).

Lobbyists must work toward eliminating the restrictions on LSC funding. Each restriction limits LSC-funded programs from taking cases that further the public good, and most should be removed. However, the most pernicious restriction prohibits LSC-funded groups from lobbying for changes in poverty law. The LSC grew out of the War on Poverty, and, in its initial years, had as its primary goal to end poverty. Without the ability to attack the problem at its source, LSC-funded programs will continue to react to the results of poverty (by providing crisis response services) but not the cause. Such a reactionary position hampers lawyer morale, as many lawyers interested in public interest law aim for sweeping system changes.

For-profit and not-for-profit law firms, law students and faculty, the bench, and bar associations are more likely to lobby on behalf of the LSC if each has internal organizational support for

83. See supra notes 8-9 and accompanying text.
84. See supra note 10 and accompanying text.
85. See supra note 56 and accompanying text.
87. See supra note 44 and accompanying text.
lobbying efforts. Organizational support includes paid or allowed
time for lobbying, accessible networks of fellow lobbyists, and
technologically savvy response systems. However, the most im-
portant motivation for lawyer lobbying is information. Therefore,
the LSC must provide information to lawyers about its work
through a variety of sources, including law school curriculum, law
school pro bono and clinical opportunities, newsletters and flyers
to lawyers, and writings, speeches and lectures.

B. For-Profit Law Firms

For-profit law firms have traditionally supported representa-
tion of poor people in a variety of ways and for a variety of rea-
sons. Methods have included establishing public interest partner-
ships or departments, creating policies supporting pro bono work,
providing funds for public interest groups, and specializing in
community-minded fee service. Motivators for firms have in-
cluded attracting talented lawyers, retaining experienced lawyers,
and fostering respect for the legal profession.

In the 1960s and 1970s, as firms began increasing pro bono
hours, different organizational structures developed to support
pro bono work. Firms experimented with public interest partners
and committees tasked with regulating public interest work.
Often these partners or committees provided oversight of the
firm’s pro bono activity. They created procedures for acquiring
cases and avoiding conflicts of interest, and supervised the work.
In some instances, the partners or committees chose one public
interest project for the entire firm.88

Fewer firms have developed public interest departments.
These departments have the same goals as the partner-committee
approach. However, public interest departments receive the
firm’s money, and are usually staffed, thus creating permanency
and continuity. In addition, such departments normalize pro bono
work by incorporating the work directly into the work of the
firm.89

Some firms simply create policies regarding pro bono activi-
ties. According to Deborah Rhode, a formal policy is essential to
foster pro bono work in law firms. The policy must include explicit
instructions on how lawyers become involved in pro bono activity,
and how the work is billed (ideally, each hour equals a normal

88. Marks et al., supra note 29, at 66-68.
89. Id. at 85-87.
billable hour). In addition, firms can create reward structures for pro bono work, and publicly award those who participate. The policy must guarantee participants that they will be compensated and promoted at the same rate as those who do not participate.  

Also, because fewer than 10% of lawyers take referrals from public interest corporations, and most pro bono work is done on behalf of boards, friends and families, pro bono policies must also address what constitutes appropriate pro bono work.  

Law firms have other options for supporting pro bono work. Small law firms can put into practice critical lawyering skills learned in law school. Critical lawyering develops a relationship between legal work and political mobilization. Critical lawyering law firms combine social justice work with fee-for-service lawyering, resulting in community-minded lawyering that achieves many of the same interests as pro bono activity.  

Larger firms must strike a precarious balance to provide pro bono opportunities. Large firms with larger revenues are, in general, better capable of supporting pro bono work. However, when large law firms grow too quickly, they can lose profits as they struggle to support the firms’ infrastructures. This problem is sometimes solved by increased commercialization and specialization. These larger firms might be better situated to participate in Interest on Lawyers’ Trust Accounts (IOLTA) than in a high quantity of pro bono work. IOLTA pools together monetary advances from clients, and the interest on the pool often benefits LSCs, PIL firms and non-legal projects supporting reform. IOLTA funds raise over $62 million a year. Large firms can also establish fund drives (like United Way campaigns and others) to benefit local groups.  

Law firms benefit from establishing pro bono programs in a variety of ways. Pro bono work helps firms reestablish ties with local communities. The community-based work has an immedi...
acy that most large projects in firms cannot provide. The projects usually involve face-to-face work with clients, and the cases are often resolved more quickly. In an increasingly specialized profession, lawyers often find themselves working on the same types of cases repeatedly and in isolation, and pro bono work is a welcome relief. Finally, many of the nation's most talented lawyers are drawn to progressive work, and will choose firms that allow them to return to the social justice impulses they had when they entered law school.

C. Not-For-Profit Public Interest Law Firms

Despite diminished funding from the LSC, not-for-profit public interest law firms have options for maintenance and growth. The companion-delivery system offers the most innovative approach to funding programs. The system, originally developed in Washington, is three-fold. The first step is to merge all LSC-funded programs into one non-profit organization, and cut LSC funding to that program. The new large program can have an unrestricted caseload. The program is usually funded by grants, bar donations, IOLTA money, and private donations.

The second step is to form a companion program for the large non-profit. The companion program receives only LSC funding and abides by the LSC restrictions. The LSC-funded program no longer requests money from IOLTA, grants, or other funding sources that support the large non-profit. In the third step, states form a centralized intake and referral program to delegate cases, complete with specially designed software.

Public interest law firms and centers have other options. They can expand their funding sources by adding fee-generating cases, soliciting foundation grants, fundraising, and encouraging IOLTA programs. They can also expand their donor bases and fundraising for private donations. Many firms create campaign drives, similar to the United Way workplace donation campaign,

98. RHODE, ACCESS, supra note 2, at 18.
99. Reflections, supra note 97, at 94.
100. RHODE, BALANCED LIVES, supra note 90, at 18; RHODE, ACCESS, supra note 2, at 18.
101. Barringer, supra note 3, at 64, 66.
102. Id. at 64.
103. Id. at 66.
104. ARON, supra note 11, at 133.
which allow employees to donate a portion of their paychecks to public interest firms.\textsuperscript{105}

Firms can build citizen support in a variety of ways. Media and public relations campaigns can be effective tools, as can consumer check-offs, in which consumers of a product or service are asked if they would like to join a group that advocates on their behalf.\textsuperscript{106} Citizen groups may also be able to lobby on behalf of public interest firms.\textsuperscript{107} Firms can support the work of citizens' groups by offering technical assistance and resources, and creating communication pathways between groups and firms.\textsuperscript{108}

Firms can create trust funds with money won in court battles, especially class action suits. For example, in \textit{California v. Levi Strauss \& Co.}, the defendant was forced to refund customers' money, but much of the money went unclaimed.\textsuperscript{109} The California Supreme Court allowed the plaintiff to create a trust fund with the unclaimed money.\textsuperscript{110}

Finally, public interest firms can continue to utilize and support alternatives to litigation. Many public interest law firms do not have the resources to litigate every case, and focus instead on other avenues to resolve cases. Firms can support mediation, arbitration, and negotiation programs. Firms can also educate lay advocates to perform some legal tasks.

\textit{D. Bar Associations}

Bar associations have a number of options available to increase representation of America's poor. The most controversial is to mandate pro bono hours. Mandatory pro bono hours are not a new idea; early drafts of the 1979 Model Rules of Professional Conduct required a certain number of pro bono hours each year to maintain licensure.\textsuperscript{111} The arguments for mandatory pro bono are both moral and practical.

Moral rationale for mandatory pro bono is premised on the concern that people who can afford a lawyer's help are able to disadvantage and even harm people who cannot afford legal assis-
Also, as noted in the *New York Times*, lawyers hold the monopoly on the legal profession, and, therefore, lawyers have an obligation to provide service for those who cannot afford it. Economists argue the market is imperfect, causing increased negative externalities for citizens. These imperfections and externalities impair the profession from meeting its ethical obligations to society, and cannot be fixed without external regulation. In other words, the costs to society have become too great to allow the profession to continue with the status quo. Finally, some lawyers are benefiting from the public’s trust in the profession, but are not contributing in any way to that public trust.

Moral objections to mandatory pro bono include questions about who should bear the cost of societal inequity. Some argue that poverty is a societal concern which should be resolved by the government or by society as a whole. Forcing lawyers to solve problems created by society by giving up valuable time and money is the equivalent of a tax on lawyers. In addition, lawyers assert their right to decide how to spend their time. Finally, some argue mandatory pro bono turns a gift into a duty.

Practical arguments for mandatory pro bono range from justifying the number of hours to justifying the additional bureaucracy created by a mandatory system. Practical objections include concerns that the pro bono work will not actually benefit poor people, and will be accomplished by overworked associates with little extra time. Another concern is incompetency. As the profession becomes more specialized, lawyers are not capable of handling non-routine cases.

Despite the objections, at least seven jurisdictions have mandated a modest number of pro bono hours or cases lawyers must complete each year. In one model, potential clients go to a centralized office to get a referral. The attorney who takes the case receives a set number of hours, depending on the type of the case.

112. *Id.* at 286.
114. RHODE, INTERESTS, *supra* note 4, at 144.
115. *Id.*
116. LUBAN, *supra* note 8, at 278.
117. *Id.*
118. *Id.* at 277.
119. *Id.* at 277, 279.
Another option, slightly less controversial than mandatory pro bono hours, is mandatory reporting of pro bono hours. For example, in Florida, lawyers and law firms report pro bono hours to the Florida Bar, and the Bar publishes the hours. California recently instigated another version of mandatory reporting. In 2004, California passed law requiring that any law firm contracting with a state agency for over $50,000 in legal services must undertake and report a certain number of pro bono hours during the period of the contract.

Bar associations can promote even less controversial options to encourage firms to give pro bono hours. For example, the state bar can work with local governments to require that a percentage of profit for state legal work goes to charitable legal activities. The bar can also instigate and widely publish a voluntary reporting system. State bars can create achievement award programs modeled after the ABA pro bono awards program, thus providing public recognition and incentive for pro bono work. Lawyers can perform pro bono service to meet their CLE credit requirements.

State bars should, at a minimum, have standing committees committed to the promotion of public service work. The committees can advertise pro bono work through media or on-line. Bar committees across the country provide essential research and lobbying efforts. For example, the lobbying efforts of the American Bar Association were the impetus behind the creation of the Legal Service Program through the OEO in 1965, and were a large force in fighting LSC's elimination in 1992.

Bar associations can manage public and private money for public interest work. The committees can advertise and oversee IOLTA accounts, solicit private donations, and route public money. Committees can fund and oversee LRAP programs, reaching out to graduates in the state to perform public service work.

Finally, bar associations can instigate public interest or pro bono campaigns. For example, in the 2003-2004 bar year in Min-

120. RHODE, ACCESS, supra note 2, at 182.
121. Id. at 179.
122. Id. at 180.
123. Id.
124. Thiemann, supra note 86, at 365.
126. Thiemann, supra note 86, at 368.
127. MARKS ET AL., supra note 29, at 186.
nnesota, the Minnesota Bar Association ran a pro bono initiative titled "A Call to Honor." The campaign set specific goals (for example, locate 500 new volunteers and serve 1000 additional clients). Organizers developed ways to achieve the goals which included individual outreach to firms resulting in formal pro bono commitments, asking new graduates to commit to pro bono service, aiding poverty movements by providing business law advice, forming pro bono committees in every judicial district, and recognizing the work of each group through media. 128

### E. Law Schools

Law schools have a primary role in promoting public interest lawyering. With over 70% of entering students interested in public interest law careers, law schools must provide the information and motivation for those students to "stay the course," graduate and find employment in a public interest field. 129 An emphasis on public interest law in law school provides students with "valuable legal skills and experience." 130

Law schools must continue to encourage students who are interested or become interested in public interest law to pursue their goals. Encouragement is best accomplished through a unified public interest program that includes several or all of the following elements: designated public interest advisor, student groups, collaborative efforts outside the law school, curricular focus, clinical or pro bono requirements, and awards, fellowships, scholarships and stipends for public interest work. 131

Students need continued encouragement to pursue public interest work because law school curriculum overall has a tendency to diminish student desire to perform public interest work. 132 Students hone their analytical and critical skills, but usually in a context that is removed from societal concerns. 133 The law school environment thus discourages altruism. 134

Law classes also do not support altruism. Most law schools offer few classes in civil rights or public interest lawyering to off-
set the large number of classes focusing on business and corporate concerns. As students progress, they believe less and less that legal aid work will be challenging or financially beneficial.\textsuperscript{135} Many students begin to believe public interest jobs carry little prestige. They hear horror stories about heavy caseloads and low salaries.\textsuperscript{136}

Furthermore, law students are distracted and unbalanced by the day-to-day work and new information.\textsuperscript{137} In their second and third years, most law students undertake legal work that does not support public interest or pro bono activity.\textsuperscript{138} They have less and less time to explore other options, and become more focused on finding the best possible jobs with the most prestige and money.\textsuperscript{139}

The antidote to this situation is first-hand contact with public interest law. While most students report little first-hand contact with public interest law centers, those who made contact with two or more public interest centers during law school overwhelmingly favored public interest law as a career.\textsuperscript{140}

Access to public interest law centers often occurs in clinical or mandatory pro bono programs. Clinical programs require a set number of supervised hours performing legal work in the community, usually with public interest law firms or government offices. Mandatory pro bono programs require a set number of hours, usually supervised, but often students can provide service to a variety of organizations.

Both serve the same goals. Service in law school provides access to low-income communities, giving students a sense of how justice might differ for poor people. Access, in turn, gives students a sense of professional responsibility and the need for legal reform.\textsuperscript{141} For many students, their service requirement was the highlight of their law school experience.\textsuperscript{142}

Law schools also help students retain an interest in public interest law by advertising and promoting public interest employment options. Public interest employment should be a primary focus of career placement activities, including access to public interest career fairs, requiring interviewing firms to disclose their pro

\textsuperscript{135} Id. at 75.
\textsuperscript{136} Id. at 82-83.
\textsuperscript{137} Id. at 46.
\textsuperscript{138} Id. at 61.
\textsuperscript{139} Id. at 65.
\textsuperscript{140} STOVER, supra note 132, at 77, 110.
\textsuperscript{141} RHODE, INTERESTS, supra note 4, at 204.
\textsuperscript{142} DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE 164-65 (2005).
bono activity, and active networking through organizations such as Public Service LawNet, the National Lawyers Guild, and the National Association of Public Interest Lawyers.  

Employment options do not have to be limited to positions in public interest firms. For example, law schools can promote and fundraise for summer and post-graduate fellowships and stipends for students wishing to do other kinds of work in public interest fields. Law schools can further support public interest lawyering by creating monetary awards and scholarships for students participating in service activities.

Law schools can encourage student participation in public interest student groups. These groups can raise funds for scholarships and stipends, network nationwide with similar groups, and sponsor symposia and periodicals. In addition, the groups can actively collaborate with other community groups, local lawyers and law firms, and bar associations to make changes in public service systems in the community or state.

Finally, law schools can actively engage students in critical thinking about the purpose of lawyering, and the current system. Law school curricula generally focus on the adversarial approach with its corresponding emphasis on advocacy for the individual. These curricula should be balanced with information about societal injustice and the need for advocacy for societal reform.

F. Implications for Montana

Montana has made strides in many of the areas listed above. Below is a sample of what Montana has accomplished, and recommendations for future growth.

LSC budget cuts and decreased IOLTA funding have harmed public interest work in Montana. In 2002 and 2003, the Montana Legal Services Association (MLSA) closed LSC-funded programs in Havre and Great Falls. The Havre office closure affected residents from Butte to Billings, as well as residents of two reservations. The office served 400 clients annually. The MLSA did receive “Live Help,” a technical assistance grant from LSC to pro-

---

143. Lichtenstein, supra note 16, at 9; Aron, supra note 11, at 133.
144. Aron, supra note 11, at 132-33.
145. Id.
146. See supra note 93 and accompanying text.
147. Kathleen A. Schultz, Budget Cutbacks Strip Legal Aid from Needy, GREAT FALLS TRIB., Jan. 14, 2003, at 1A.
vide internet access to legal resources throughout the state.\footnote{148} However, Montana's federal LSC budget continues to vary, at the whim of Congress.

MLSA receives almost all of the state, private and federal public service funding funneled through the State Bar of Montana. Montana does not, as yet, have a companion-delivery system whereby the LSC-funded program is offset by another non-profit organization that is not forced to abide by LSC restrictions. This is problematic because the one-tier program substantially limits the scope of public interest advocacy in the state. Montana would benefit by creating a non-profit organization that can lobby for welfare reform, poverty laws, abortion rights, and participate in other LSC-restricted activities. Ideally, the non-profit organization would be funded by IOLTA funds and private donations, and the LSC-funded programs would only receive LSC funds.\footnote{149}

On a positive note, Montana's lawyers perform a relatively high level of pro bono service. Approximately 1,000 Montana lawyers perform pro bono work (almost one-third of the active members of the State Bar).\footnote{150} This percentage is well above the national average which hovers closer to 20%.\footnote{151} It is particularly impressive considering that large law firms with high profit margins tend to be in the best financial position to offer pro bono service.\footnote{152}

In Montana, the majority of lawyers are sole practitioners, or practice in firms with five or fewer lawyers.\footnote{153}

However, the private bar still has much work to do. Only 7.1% of poor people in Montana receive representation from the private bar.\footnote{154} Montanans who are poor suffer from over 200,000 legal disputes a year for which no legal aid is available.\footnote{155}

In order to inspire the private bar to perform more pro bono service, the State Bar of Montana needs to market the Montana Lawyer Referral Service more aggressively. In a 2005 survey of the 3,134 active members of the bar, 54% of the members who do

\footnote{148. Mike Dennison, Montana Receives Grant for New Online Legal Help for Low-Income, GREAT FALLS TRIB., Sept. 12, 2004, at 3M.}
\footnote{149. See supra note 96 and accompanying text.}
\footnote{151. See supra note 20 and accompanying text.}
\footnote{152. See supra notes 94-95 and accompanying text.}
\footnote{154. DALE, supra note 1, at 21.}
\footnote{155. Id. at 56.}
not participate in the referral service indicated they felt pro bono work was inapplicable to their work. Many surveyed were unfamiliar with the program. A significant number of respondents indicated they might participate if they had more knowledge about the program in general and how it would benefit their practices.\textsuperscript{156}

In a state with so few attorneys, the State Bar of Montana has great potential for outreach. Montana might benefit from a program like the one started by the Minnesota Bar Association.\textsuperscript{157} The Montana Bar could likely set goals to increase the number of volunteers and clients by individual outreach to law firms and individuals. The Bar could ask graduates to sign up for the Montana Lawyer Referral Service upon taking the oath. Each judicial district could be encouraged to form a pro bono committee within a given period of time. And the Bar could offer pro bono awards as incentives for outstanding pro bono work done by Montana attorneys.\textsuperscript{158}

The Montana Bar has established two programs that stimulate public interest work in the state. In January 2006, the Bar announced its LRAP program.\textsuperscript{159} The program will pay toward student loans for five years if graduates work in one of six approved public interest legal programs. The program encourages law students to seriously consider public interest lawyering as a career choice. The LRAP program would also benefit from a companion-delivery system.\textsuperscript{160} Currently, applicants must work for the MLSA or one of five other programs, four of which are domestic violence programs. More graduates would participate in a program that offered a wider variety of options, such as those that are able to take cases normally prohibited by LSC restrictions.

The Bar also established the Montana Justice Foundation (originally the Montana Law Foundation) in 1979. The foundation funnels money from the government, IOLTA funds, and private donations into grants to MLSA and to organizations that


\textsuperscript{157} See supra note 129 and accompanying text.

\textsuperscript{158} See supra note 129 and accompanying text.

\textsuperscript{159} State Bar of Montana, Montana Justice Foundation, Loan Repayment Assistance Program (LRAP), Program Description, http://www.montanabar.org/groups/montanajusticefoundation/lrapprogramdescription.html (last visited May 12, 2006).

\textsuperscript{160} See supra note 102 and accompanying text.
work with the poor. The foundation also administers and distrib-
utes IOLTA funds.161

The University of Montana School of Law, located in Mis-
soula, Montana, provides a variety of programs to encourage pub-
lic interest lawyering. The school recently reinstated the Mont-
tana Public Interest Law Coalition, a student group that seeks to
foster participation in public interest activities. The Student Bar
Association sought in 2005 to establish a grant program for stu-
dents interested in engaging in public interest activities while in
law school. That same year, the law school hired a Career Ser-
vices Coordinator who will, among other duties, help coordinate
public interest efforts at the school. The school requires all gradu-
ates to participate in a four-credit clinical program. The program
allows students to choose amongst a variety of government and
non-profit organizations.

Until 2005, the school offered a course in public interest law-
yering. The school does offer several elective courses that focus on
areas of the law often covered by public interest law firms. For
example, the school offers several environmental and Indian Law
courses, as well as domestic violence, lawyers’ values, and non-
profit organizations courses. Finally, the school selects two stu-
dents each year to receive awards for their volunteer work.

However, the law school could do more to inspire students
and the Montana legal community to engage in public interest
lawyering. The current curricular approach to public interest
lawyering involves some discussion of the importance of pro bono
activity, but does not include statistics or figures that illustrate
the difficulty poor people have in finding legal representation.
With no public interest lawyering course, students interested in
that part of the law have no access to detailed instruction.

The school’s public interest student group would likely benefit
from membership in the National Association of Public Interest
Law (NAPIL). NAPIL has 153 chapters in the nation, providing
networking opportunities through an annual career fair and con-
ference. In addition, NAPIL provides information about finding
public interest law jobs and generating funds for summer fellow-
ships in public interest areas.162

montanabar.org/groups/montanajusticefoundation/aboutusnew.html (last visited May 12,
2006).

At Montana’s law school, the new Career Services Coordinator will hopefully fill the current gap in pro bono offerings during law school, and will help students find employment with firms that promote pro bono work. The coordinator might also be able to locate fellowships and stipends for public interest lawyering during school and after graduation.

Finally, the law school is a leader in the legal community. Therefore, the school should provide opportunities for the legal community to gather information, network and discuss issues regarding public interest lawyering. To this end, the law school would benefit the legal community by offering a public interest symposium or conference, and a periodically published journal or newsletter.

IV. CONCLUSION

Legal representation of poor people in the United States is a multi-faceted endeavor, undertaken by government-funded programs, private and non-profit law firms, bar associations and law schools. However, only a few jurisdictions currently have an approach that is adequate to meet the increasing legal needs of poor people. The government continues to cut funding. Law firm specialization and commercialization decrease lawyers’ abilities to provide pro bono service. Bar associations struggle to provide incentives or mandatory requirements for pro bono activity, and law schools continue to create educational environments that discourage graduates from pursuing public interest work.

The 1960s and 1970s witnessed a movement toward government-funded legal services for the poor. That movement has declined since 1982, but it continues to be important today. As the legal profession enters the twenty-first century, it must return to the basics to increase legal representation for the poor. Practitioners in each arena of the profession must raise awareness of the need for public service and encourage participation in public service activities. Law schools and bar associations can be, as they once were, the primary vehicles of the movement, coordinating lobbying efforts, inspiring lawyers and students to undertake service for the public good in meaningful ways, and engaging the legal community in ongoing conversation about the need for reform.