


2-7-2017

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Recommended Citation

John P. Gross, *Dispelling the Myth that Law Students Can Close the Justice Gap*, 58 B.C.L. Rev. E. Supp. 26 (2017), <http://lawdigitalcommons.bc.edu/bclr/vol58/iss6/4>

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DISPELLING THE MYTH THAT LAW STUDENTS CAN CLOSE THE JUSTICE GAP

JOHN P. GROSS*

Abstract: Recently, the idea that law students can bridge the “justice gap,” understood here as both the inability of low-income Americans to obtain civil legal services and the inadequacy of representation by overworked public defenders in criminal cases, has been gaining in popularity. This growing trend is embodied in the pro bono requirements imposed on bar applicants in a growing number of states. This Essay argues that the idea that law students can make a “significant” contribution to closing the existing justice gap overestimates the number of law students currently enrolled in our nation’s law schools and underestimates the volume of low-income Americans in need of legal services.

INTRODUCTION

The idea that law students can help our nation address the unmet civil legal needs of low-income Americans, often referred to as the “justice gap,” seems to be gaining in popularity. The New York State Court of Appeals imposed a fifty-hour pro bono requirement on applicants to the state bar effective January 1, 2015.¹ The purpose of this requirement, according to Chief Judge of the State of New York Jonathan Lippman, is “to meet the growing civil legal needs of low income populations while allowing prospective attorneys to build valuable skills and embrace our profession’s core value of service to others.”² The State Bar of California Task Force on Admissions Regulation Reform has proposed a similar requirement.³ Recently, in her remarks at the American Law Institute’s 93rd Annual Meeting, Supreme Court Justice Sonia Sotomayor endorsed the idea of a pro bono requirement for law students.⁴

The idea of a Supreme Court Justice endorsing the participation of law students in pro bono work is nothing new. Over four decades ago, in *Arger-*

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¹ N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (2017).

² JONATHAN LIPPMAN, CHIEF JUDGE OF THE STATE OF N.Y., THE STATE OF THE JUDICIARY 2013, at 12 (2013).

³ THE STATE BAR OF CAL., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE I FINAL REPORT (2013).

⁴ Sonia Sotomayor, Assoc. Justice of the U.S. Supreme Court, Remarks at the American Law Institute’s 93rd Annual Meeting (May 16, 2016), available at <https://www.ali.org/annual-meeting-2016/videos/> [<https://perma.cc/QPN4-PE2E>].

singer v. Hamlin, when the Supreme Court extended the right to counsel in criminal cases to misdemeanors, the Court was keenly aware that the decision would take an additional toll on the already heavily burdened legal profession.⁵ In his concurring opinion to *Argersinger*, Justice Brennan proposed that law students might be able to ease this burden. He noted that most states permit some form of student practice and that most law schools have “clinical programs in which faculty supervised students aid clients in a variety of civil and criminal matters.”⁶ Justice Brennan concluded that it is reasonable to expect law students to make “a significant contribution” to the representation of clients who are unable to afford legal counsel on their own.⁷

As a former public defender and as a clinical faculty member, I appreciate the desire to make law students aware of the justice gap and to encourage them to perform pro bono work for low-income clients. That being said, the idea that law students can make a “significant” contribution to closing the existing justice gap overestimates the number of law students currently enrolled in our nation’s law schools and underestimates the volume of low-income Americans in need of legal services.

The Legal Services Corporation (“LSC”), the nation’s largest funder of civil legal services, reports that they turn away nearly a million people each year because they lack the resources to provide them with representation.⁸ LSC also estimates that they were only able to provide legal assistance to 1.8 million of the 60.6 million people who are eligible for their services.⁹ Although the term “justice gap” typically refers to the inability of low-income Americans to obtain civil legal services, it is also fair to say that there is a justice gap when it comes to representation in criminal cases. The chronic underfunding of our nation’s criminal defense delivery systems results in the constructive denial of counsel to many low-income criminal defendants.¹⁰ To illustrate just how little impact pro bono representation by law students will have on the justice gap, this essay examines both the current funding crisis at the Missouri State Public Defender and a recent proposal to provide representation to low-income tenants in New York City Housing Court.

⁵ 407 U.S. 25, 44 (1972) (Burger, J., concurring).

⁶ *Id.* (Brennan, J., concurring).

⁷ *Id.*

⁸ *The Unmet Need for Legal Aid*, LEGAL SERVICES CORP., <http://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> [<https://perma.cc/YF8C-U6DN>].

⁹ LEGAL SERVICES CORP., *BY THE NUMBERS: THE DATA UNDERLYING LEGAL AID PROGRAMS 1* (2015), <https://lsc-live.app.box.com/v/LSC-2015-ByTheNumbers>.

¹⁰ *See* NAT’L RIGHT TO COUNSEL COMM., *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 111 (2009).

I. THE JUSTICE GAP IN CRIMINAL COURTS: MISSOURI

The lack of funding for indigent criminal defense is nothing new and has been well documented.¹¹ The current indigent defense crisis in Missouri illustrates just how little funding states provide for legal services to the poor and the impracticality of using law students to make up for that lack of funding. An assessment of the Missouri State Public Defender (“MSPD”) in 2009 documented a decade of underfunding, finding that the caseload crisis confronted by the MSPD is so serious that it threatens to topple the entire criminal justice system in Missouri.¹² The seriousness of this crisis is further underlined by an attempt in 2016 by the head of the Missouri Public Defender’s Office to use his statutory authority to appoint the Governor to represent an indigent defendant.¹³

The American Bar Association’s (“ABA”) Standing Committee on Legal Aid and Indigent Defense (“SCLAID”) recently funded a study of MSPD with the goal of creating realistic workload standards.¹⁴ The resulting workload standards were compared to the actual time Missouri public defenders spent on specific types of cases. Not surprisingly, the differences were striking. For example, the study estimated that an attorney would need 11.7 hours to adequately represent someone charged with a misdemeanor, but public defenders reported only spending an average of 2.3 hours on their misdemeanor cases.¹⁵

Based on the attorney workload standards developed as part of the study, the Missouri Office of the Public Defender estimated that it would need to hire 270 additional lawyers in order to provide clients with adequate representation.¹⁶ If we assume that the 270 newly hired attorneys would work forty hours a week, that would yield an additional 10,800 hours of work per week, or 540,000 hours of annual work (assuming that each new attorney works fifty weeks per year).

Given this grave deficit in the availability of representation for low-income clients, it is clear that even under perfect circumstances, law student work would be inadequate to close Missouri’s justice gap. By way of illustration, Missouri is

¹¹ See *id.* at 50 (noting that the need for indigent defense reform has been well documented in national studies over several decades).

¹² See THE SPANGENBERG GROUP & CTR. FOR JUSTICE, LAW & SOC’Y AT GEORGE MASON UNIV., ASSESSMENT OF THE MISSOURI PUBLIC DEFENDER SYSTEM: FINAL REPORT 64 (2009).

¹³ See Matt Ford, *A Governor Ordered to Serve as a Public Defender*, THE ATLANTIC (Aug. 4, 2016, 10:56 PM), <http://www.theatlantic.com/politics/archive/2016/08/when-the-governor-is-your-lawyer/494453/> [<https://perma.cc/4D9V-3A43>].

¹⁴ See RUBINBROWN LLP, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS, at 2 (2014).

¹⁵ See *id.* at 21.

¹⁶ Kristen Taketa, *Missouri’s Head Public Defender Assigns Case to Gov. Nixon, Cites Overburdened Staff*, ST. LOUIS POST-DISPATCH (Aug. 3, 2016), http://www.stltoday.com/news/local/state-and-regional/missouri-s-head-public-defender-assigns-case-to-gov-nixon/article_37809be0-b7ee-56b4-b478-bf8dfe01720f.html [<https://perma.cc/A8WC-JWWG>].

home to four ABA-accredited law schools that collectively graduated 700 Juris Doctor candidates in 2015.¹⁷ If all of these students worked in the Missouri Public Defender's Office prior to graduation, they would each have to work around 771 hours per week over nineteen weeks (assuming a work week of forty hours) to approximate the number of hours that 270 full-time staff attorneys could work in a year.¹⁸ Since a typical law school semester is only fifteen or sixteen weeks long, even if every third year law student in Missouri in 2015 spent their last semester in law school working full time at MSPD, their best efforts would still fall shy of the Missouri Office of the Public Defender's estimated shortfall. Keep in mind that these estimates are what would be required from law schools to alleviate the shortage in state funding *only* to the Missouri Public Defender's Office, an office that is responsible for providing *constitutionally-required* representation to indigent criminal defendants.¹⁹

II. THE JUSTICE GAP IN CIVIL COURTS: NEW YORK

The Supreme Court requires that counsel be provided to those unable to afford it in criminal cases and in juvenile delinquency proceedings.²⁰ The Court, however, has declined to extend the right to counsel to litigants in proceedings that could result in the termination of parental rights or public benefits.²¹ Even in civil contempt proceedings where incarceration is a potential sanction, the Court has not required the presence of counsel, reasoning that due process can be satisfied if there are "alternative procedural safeguards."²² In

¹⁷ University of Missouri School of Law awarded 130 Juris Doctor degrees in 2015 according to ABA-required disclosures. UNIV. OF MO., STANDARD 509 INFORMATION REPORT (2015). Washington University School of Law awarded 229 Juris Doctor degrees in 2015 according to ABA-required disclosures. WASHINGTON UNIV. IN ST. LOUIS, STANDARD 509 INFORMATION REPORT (2015). University of Missouri-Kansas City School of Law awarded 141 Juris Doctor degrees in 2015 according to ABA-required disclosures. UNIV. OF MO.-KAN. CITY, STANDARD 509 INFORMATION REPORT (2015). Saint Louis University School of Law awarded 200 Juris Doctor degrees in 2015 according to ABA-required disclosures. SAINT LOUIS UNIV., STANDARD 509 INFORMATION REPORT (2015).

¹⁸ *But see* Giacomo Bologna, *Overworked and Underpaid, One Public Defender Says It's Her Dream Job*, SPRINGFIELD NEWS-LEADER (Springfield, MO) (Nov. 22, 2016, 5:46 PM), <http://www.news-leader.com/story/news/local/ozarks/2016/11/22/one-year-down-career-go-life-public-defender/91240690/> [<https://perma.cc/KL9Y-VCDB>] (noting that public defenders routinely work many more hours than the typical forty hour work week)

¹⁹ See U.S. CONST. amend. VI; MO. CODE REGS. ANN. tit. 18, § 10-2.010 (2016).

²⁰ See *In re Gault*, 387 U.S. 1, 41 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 340-41 (1963).

²¹ See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31-32 (1981) (holding that assistance of counsel is not constitutionally required in hearings to terminate parental rights); *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (holding that counsel is not required at hearing before the termination of public benefits, but that individuals may retain counsel if they so choose); see also *Mathews v. Eldridge*, 424 U.S. 319, 340-43 (1976) (distinguishing *Goldberg v. Kelly* on the basis that *Goldberg* involved means-tested benefits, whereas this case involved social security disability benefits that are not income tested, and thus less process is due).

²² See *Turner v. Rogers*, 564 U.S. 431, 448 (2011).

contrast, the ABA has adopted a resolution calling for states to “provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”²³

The lack of civil legal services is perhaps felt most acutely in eviction proceedings. Low-income tenants in eviction proceedings go largely unrepresented, whereas landlords are typically represented by counsel. Studies have shown that when low-income tenants are provided with representation, eviction rates drop significantly.²⁴ While the presence of an attorney clearly makes a difference to the outcome of eviction proceedings, the primary objection to providing counsel to low-income tenants is the potential expense that some believe would be prohibitive.²⁵

A study commissioned by the New York City Bar Association’s Pro Bono and Legal Services Committee, however, found that providing free legal counsel to low-income tenants facing eviction would actually save the city hundreds of millions of dollars.²⁶ A similar study in Massachusetts found that every dollar spent on providing counsel to low-income tenants in eviction proceedings would save the state \$2.69.²⁷ These savings come from a decrease in sheltering costs associated with homelessness. New York City is now considering providing counsel to low-income tenants in eviction proceedings.²⁸ If New York City used 200% of the Federal Poverty Guidelines as the income eligibility threshold for low-income tenants seeking counsel, then that would result in an estimated 128,692 additional cases where counsel would be needed.²⁹

Could law students close the justice gap in New York City Housing Court? In proposing the mandatory fifty hours of pro bono work for applicants to the New York State Bar, Chief Judge Jonathan Lippman pointed out that there are roughly 10,000 applicants a year that would generate half a million

²³ AM. BAR ASS’N ET AL., REPORT TO THE HOUSE OF DELEGATES 1 (2006).

²⁴ See Emily S. Taylor Poppe & Jeffery J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation on Civil Disputes*, 43 PEPP. L. REV. 881, 900–10 (2016) (summarizing the existing research on the impact of counsel in housing courts).

²⁵ See Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 229 (2009) (“In terms of the costs of providing the right, the greatest impediment appears to be a concern for the overall cost associated with providing counsel to all income-eligible individuals.”).

²⁶ See STOUT RISIUS ROSS, INC., THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A, at 3 (2016).

²⁷ BOS. BAR ASS’N STATEWIDE TASK FORCE TO EXPAND CIVIL LEGAL AID IN MASS., INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS 4 (2014).

²⁸ Jessica Silver-Greenberg, *For Tenants Facing Eviction, New York May Guarantee a Lawyer*, N.Y. TIMES (Sept. 26, 2016), <http://www.nytimes.com/2016/09/27/nyregion/legal-aid-tenants-in-new-york-housing-court.html> [<https://perma.cc/4PL3-PQ4K>].

²⁹ See STOUT RISIUS ROSS, INC., *supra* note 26, at 3.

hours of pro bono work.³⁰ Although half a million hours of pro bono work sounds significant, it is less impactful than one might expect.

Again, consider for example that New York City's eight ABA accredited law schools graduated 2,727 *juris doctors* in 2015.³¹ If each of these third year students spent 50 hours providing pro bono representation for low-income clients, that amounts to 136,350 *hours* of work, compared with an estimated 128,692 additional *cases* in New York City Housing Court. If we assume that the typical eviction case cannot be adequately handled in just over an hour, that means that these law students could not even close the justice gap in Housing Court, let alone at large.

CONCLUSION

Pointing out that law students can't close the justice gap by themselves is not to say that they can't be part of a solution to the problem of providing representation to low-income litigants. In addition, proponents of mandatory pro bono service for law students argue that the good work the students do will encourage them to remain actively engaged in pro bono efforts throughout their legal careers. Although there is no empirical evidence to support this argument, there is evidence that the students appreciate the opportunity to gain practice skills through engaging in pro bono representation while in law school.³² The reality is that whatever role law students can or should play in closing the justice gap, it will be a small one.

³⁰ Jonathan Lippman, Chief Judge of the State of N.Y., Speech at Law Day 4 (May, 1, 2012).

³¹ Brooklyn Law School awarded 335 Juris Doctor degrees in 2015 according to ABA-required disclosures. BROOKLYN LAW SCH., STANDARD 509 INFORMATION REPORT (2015), available at <http://www.abarequireddisclosures.org/> [<https://perma.cc/UAL5-6M3Z>]. Cardozo School of Law awarded 363 Juris Doctor degrees in 2015 according to ABA-required disclosures. CARDOZO SCH. OF LAW, STANDARD 509 INFORMATION REPORT (2015). Columbia Law School awarded 421 Juris Doctor degrees in 2015 according to ABA-required disclosures. COLUMBIA LAW SCH., STANDARD 509 INFORMATION REPORT (2015). City University of New York awarded 111 Juris Doctor degrees in 2015 according to ABA-required disclosures. CITY UNIV. OF N.Y., STANDARD 509 INFORMATION REPORT (2015). Fordham University School of Law awarded 410 Juris Doctor degrees in 2015 according to ABA-required disclosures. FORDHAM UNIV. SCH. OF LAW, STANDARD 509 INFORMATION REPORT (2015). New York Law School awarded 351 Juris Doctor degrees in 2015 according to ABA-required disclosures. NEW YORK LAW SCH., STANDARD 509 INFORMATION REPORT (2015). New York University School of Law awarded 485 Juris Doctor degrees in 2015 according to ABA-required disclosures. N.Y. UNIV. SCH. OF LAW, STANDARD 509 INFORMATION REPORT (2015). St. John's School of Law awarded 249 Juris Doctor degrees in 2015 according to ABA-required disclosures. ST. JOHN'S SCH. OF LAW, STANDARD 509 INFORMATION REPORT (2015).

³² See generally Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355 (2007) (noting the importance of practical experience to a law student's development).

Although the need for legal service continues to grow, law schools are often criticized for producing too many lawyers.³³ The number of students enrolling in law school, however, continues to decline. In 2015, there were 37,058 1L matriculants in ABA-accredited law schools,³⁴ the lowest number since 1973.³⁵ Graduating students also face declining job prospects. Only 62.4% of law graduates in 2015 found long term, full time employment that required a Juris Doctorate.³⁶ Another 10.9% found full-time, long-term employment in what the ABA defines as “J.D. Advantage” positions, which do not require bar passage or an active law license or involve the actual practice of law.³⁷ That same year, almost 10% of law students reported they were unemployed.³⁸ Considering the size of the justice gap, one has to wonder whether law schools are producing too many lawyers or whether states are failing to adequately fund legal services to low-income litigants.

It is clear that there is a profound need for legal services among low-income populations, but requiring law students to meet that need does not make sense when there are unemployed law graduates and when paying those graduates to provide those same services would result in a net financial gain to the state. Requiring pro bono work by law students may even have the unintended consequence of discouraging state and local governments from providing additional funding for civil legal services for low-income litigants.

The continued emphasis on pro bono representation by student attorneys also reinforces the idea that the representation of low-income litigants in civil proceedings should be a private act of charity and not a state obligation. This runs contrary to the ABA’s position that supports a civil right to counsel when basic human needs are at stake.

It is time we put to rest, once and for all, the myth that law students can play a significant role in closing the justice gap. In order to close the justice gap, states need to adequately fund the indigent defense delivery systems in place for low-income defendants in criminal matters and significantly increase the funding of legal services to low-income litigants in civil proceedings. Law

³³ Steven J. Harper, *Too Many Law Students, Too Few Legal Jobs*, N.Y. TIMES (Aug. 25, 2015), <http://www.nytimes.com/2015/08/25/opinion/too-many-law-students-too-few-legal-jobs.html> [https://perma.cc/L6BR-E2YU].

³⁴ AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, 2015 FALL 1L DATA, available at http://www.americanbar.org/groups/legal_education/resources/statistics.html [https://perma.cc/773A-FW8F].

³⁵ AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, ENROLLMENT AND DEGREES AWARDED 1963–2012

³⁶ AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, 2015 LAW GRADUATE EMPLOYMENT DATA.

³⁷ *See id.*

³⁸ *See id.*

students cannot close the justice gap, but lawyers can if states take an active role in providing funding to legal services for low-income populations.

Preferred Citation: John P. Gross, *Dispelling the Myth That Law Students Can Close the Justice Gap*, 58 B.C. L. REV. E. SUPP. 26 (2017), <http://lawdigitalcommons.bc.edu/bclr/vol58/iss6/4>.