

Reclaiming the Role of Lawyers as Community Connectors

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Abstract: With the prospect of nonlawyers stepping in to do low-fee legal work, how should the legal profession conceive of its relationship to that work and ensure that nonlawyers bolster rather than undermine the value that lawyers add to society? Lawyers should reclaim their role as connectors in their communities: interstitial figures with the knowledge, skill, and trust to help resolve disputes, move beyond stalemates, dispel tensions, and otherwise bring people and resources together in productive solutions. They should do so, at least in part, through pro bono work for poor and low-income clients. It would be a mistake to stand in the way of innovative solutions to the justice gap. But it would also be a mistake, and a deep loss, if lawyers – particularly those who do not normally represent poor and low-income clients – turned their backs on the poor and low-income segments of our society.

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For many years, there has been a serious debate about the legal profession's exclusive role in the market for legal representation. The debate has focused on how that role factors into the systematic underrepresentation of poor and low-income people. One side argues that all law-related problems, for all people, require a lawyer's training and unique social role. As such, law reformers must address the gap in access to justice within the bounds of the legal profession. The other side contends that, whatever the benefits of professional training and oversight in theory, in reality, lawyers have failed to address the justice gap. As such, to make way for innovative solutions, law reformers should not defend the profession's exclusive charter, or should not defend it beyond the work lawyers actually perform. Both sides have a point; both sides also oversimplify. The set of solutions proposed by each fails to account for changing social and professional realities, and risks shortchanging important values.

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doi:10.1162/DAED_a_00532

A useful starting point is recognizing that lawyers and state bars will not continue to corner the market for work they do not do. The question is no longer whether nonlawyer providers (including paraprofessionals and artificial intelligence technologies) should enter the market for legal services; we are already past the point of no return. Nonlawyers have arrived in many places, and their arrival is imminent in many others. The question now is how to ensure that nonlawyer assistance serves, rather than harms, individual and societal interests. In particular, when faced with the prospect of others stepping in to address low-fee legal work, how should the profession conceive of its relationship to that work and ensure that nonlawyers bolster rather than undermine the value that lawyers add to society?

We propose that lawyers claim an essential role as connectors in their communities: interstitial figures with the knowledge, skill, and trust to help resolve disputes, move beyond stalemates, dispel tensions, and otherwise bring people and resources together in productive solutions. They should do so, in part, through pro bono work for poor and low-income clients. It would be a mistake to stand in the way of innovative solutions to the justice gap. But it would also be a mistake, and a deep loss, if lawyers – particularly those who do not normally represent poor and low-income clients – turned their backs on the poor and low-income portion of our society.

In 1950, Justice Robert H. Jackson described a lawyer who “understands the structure of society and how its groups interlock and interact,” and thereby gains a nuanced understanding of the role of the law in that community. That lawyer understands how the community “lives and works under the law and adjusts its conflicts by its procedures,” and

also understands “how disordered and hopelessly unstable it would be without law.”¹ Jackson’s description sets a challenge for the modern bar to reclaim that understanding by representing all segments of the society.

What the existing debate misses is that providing legal services to poor and low-income clients not only deepens the kind of community understanding that Justice Jackson highlighted, but also gives the lawyer an opportunity to learn about and embody the profession’s fundamental systemic role. The legal needs of poor and low-income clients often entail complex work, significant legal expertise, and professional judgment.² This work can also require an understanding of multiple layers of regulatory bodies and processes, and of possible public and private resources and interventions. This means that serving poor and low-income clients can create meaningful opportunities for lawyers to carry out their integral societal role through law reform advocacy. The bar should reinforce the underused idea that serving the community from within is meaningful education for lawyers, and is at least as worthy of continuing legal education credits as the refresher courses that most state bar associations require lawyers to take periodically.

Scholarly literature about the legal profession and the justice gap is generally divided into two camps. One side urges that only lawyers can competently and ethically perform legal work, and that maintenance and protection of the legal profession’s monopoly is necessary to the fair and equal treatment of poor and low-income members of society.³ The other side asserts that the profession is mere cover for lawyers’ self-interest: a means of suppressing competition and increasing fees. The first camp argues that lawyers must address the justice gap

through increased pro bono or low bono services. The second camp argues that lawyers have proven themselves unwilling to perform such work and that the only solution is to deregulate provision of services for poor and low-income clients, allowing for less expensive providers who are not lawyers.⁴ Behind this debate lurks further skepticism about lawyers' exclusive claim over even the most lucrative legal services, given the lower cost and perhaps comparable quality of nonlawyer alternatives.

This oversimplified, binary understanding of the problem produces oversimplified solutions.⁵ There is no question that the profession is falling short in the provision of legal services to poor and low-income people, and that it can no longer maintain a monopoly over work that it has long failed to perform. Even if all lawyers were entirely devoted to addressing the justice gap with some portion of their time, the depth and breadth of the gap make it unlikely that the profession could address it on its own. But, as we will explain, there is also no question that the legal profession does some things very well, such that taking lawyers out of the picture for poor and low-income clients would impose great costs on society.

To start, the profession trains lawyers and judges to understand the importance of legal interpretation by persons deliberately independent from market forces and political pressures: to push against the rule of rulers and toward the rule of law.⁶ The profession also trains lawyers and judges to operate according to norms that are counterintuitive to nonlawyers but that are at the basis of our legal system. For example, our society puts a high value on individual liberty: all criminal defendants, even those who appear guilty of heinous crimes, have important rights deserving of protection. Lawyers and judges fulfill structural roles that

reinforce the preference to see a guilty person go free rather than an innocent one put behind bars, even for the defendants who make that choice feel wrong.

Regarding access to justice, the legal profession can produce lawyers and judges who have a day-to-day understanding of the entire range of social life in a community. The profession can produce lawyers who, in the Jacksonian tradition, serve and embrace "persons of every outlook" and background.⁷ These lawyers can better understand what it means to be poor or disabled or a member of a minority group and, at the same time, can understand how aggregations of power and wealth are organized and motivated in business, government, and elsewhere. They can put this broad knowledge and experience to good use in solving difficult and recurring social problems for the benefit of individuals and the community. In this way, efforts to troubleshoot the profession's shortcomings should challenge lawyers to live out the notion that they are an interstitial, unifying, stabilizing force in society.

Cost is certainly part of the problem and, for simple and routine tasks for which low-cost nonlawyer alternatives can be effective, cost can be part of the solution. Promising examples include interactive computer programs that produce legal forms, automated approaches to dispute resolution, and nonlawyer advocates trained to do repetitive work, like consumer bankruptcy filings and restraining orders in criminal and family cases.⁸

For more complex matters, however, a single-minded focus on cost shortchanges clients, lawyers, and society. Cost might not even be the gateway problem for many people in need of legal help. Empirical research suggests that more salient problems could be "lack of awareness or understanding that a problem is legal in

nature, lack of belief that a lawyer could help, embarrassment, perceived futility, fear, and resignation.”⁹

Even when cost is a core problem, it is not clear that nonlawyer alternatives will be less expensive.¹⁰ Although lawyer earnings do not necessarily indicate the cost of services, the stratified market for legal compensation lends useful insight. If a “typical” lawyer salary ever existed, it disappeared twenty years ago when some Silicon Valley firms began paying associates \$125,000 annually.¹¹ Since then, associate salaries have had two tiers, a divide that grew during the 2008 recession as law firms merged and dissolved, and many clients increased pressure to keep costs low by outsourcing work to temporary contract lawyers, nonlawyers, and technology.¹² By 2014, the higher average salary was around \$160,000 and the lower around \$55,000 – not far from the \$50,000 estimated median salary for paralegals or the \$48,000 median for legal services attorneys.¹³ Some lawyers and nonlawyers now work for less than they did a decade ago. In many locations, lawyers may be as willing to step in to handle low-fee work as nonlawyer paraprofessionals, though this point may be moot because of user-friendly and accessible technology.

Most important, cost-based solutions to the justice gap assume that the legal problems faced by poor and low-income people are the simplest and least important for lawyers to understand. But that perceived correlation does not hold up. Wealthy and indigent clients alike have some matters that are complex or of profound social consequence, and other matters that are simple and routine. Immigration, government benefits, child custody, housing, and civil rights work for poor and low-income clients may require understanding not just the particulars of the case, but also the context in

which the case arises. Lawyers who understand why these legal issues take shape have a road map to better navigate the path toward lasting solutions for their clients. And lawyers who undertake the further task of finding general solutions, whether through regulation, legislation, or class-wide injunctions, will call on sophisticated legal skills. Focus on cost, by contrast, has the troubling potential to define a lawyer’s professional obligations and abilities in terms of the client’s ability to pay, rather than in terms of the skills necessary to resolve the matter.

Clients and lawyers both stand to gain by expanding incentives for lawyers to seek out the complex cases to which professional counsel, competence, problem-solving creativity, and judgment add value. Clients gain access to the legal services they need, but also access to lawyers who can “distinguish legal from non-legal problems” and help with both, and who offer the important, nontechnical, non-cost-related attributes of “trustworthiness and ability to provide a close and personal relationship.”¹⁴ Technologies and market-based solutions do not and cannot provide clients with this combination. Lawyers, for their part, gain good legal work and valuable experience. They derive significant satisfaction from solving problems for individuals who are in desperate straits. Society gains citizen lawyers who can guide the community’s overall approach to deep social problems that underlie specific cases.

For this reason, when experienced attorneys share stories about their most “important” cases, they often speak about pro bono matters or something similar. Emphasizing the educational, personally gratifying, and socially valuable aspects of service – and increasing its practicality – could drive essential change in how lawyers regard pro bono work and the amount of time they commit to it.

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Justice Jackson captured the ideal of the interstitial lawyer with the paradigm of the “county-seat lawyer.” He lamented the mid-twentieth-century disappearance of lawyers who “did not specialize,” did not “pick and choose clients,” and “rarely declined service to worthy ones because of inability to pay.” Justice Jackson credited the “free and self-governing Republic” to the lawyer from a small town who “lives in a community so small” that it was possible to “keep it all in view.”¹⁵ We find an important truth in this vision, one worth reclaiming and implementing. Part of the solution to the justice gap is to reinvigorate professional enthusiasm for traditional community obligations, by supporting the important practical and educational benefits available through legal work for all segments of society. That reframes the discussion about access to justice and the professional monopoly in a way that holds the profession accountable to its ideals. It offers an old and honorable vision of how the profession can renew itself. By clarifying that the struggle is – at least in part – about preserving the profession’s core tenets, fewer lawyers will be able to convince themselves they do not belong in the fray.¹⁶

Another part of the task is to identify matters for which professional judgment and skill are especially critical, and to abandon staunch monopolistic protections of work that does not call upon these qualities. Regardless of cost, does a matter affect pressure points in the system that require professional expertise to find good solutions on an individual and system-wide level?

If not, it should be opened to nonlawyer competition. Technology and nonlawyers are entirely appropriate for routine legal matters that do not require extensive professional judgment or understanding. These solutions exist and continue to grow.

If so, the legal profession ought to protect this work, which calls for lawyers’ acumen, expertise, and judgment, by giving lawyers incentives to seek it out. The increasingly successful law school clinical model – one study estimates that there were 1,433 clinics at American law schools in 2017, compared with 809 just a decade ago – reflects the Jacksonian ideal in many ways.¹⁷ Students must develop a broader view of the set of legal problems clients face and come up with comprehensive solutions that rely on a variety of skills and knowledge about underlying causes and conditions.¹⁸ Some law firms have taken steps in this direction by implementing programs that systematically build pro bono assignments into each lawyer’s standard workload.

The profession should build on this momentum, and state bars are in the best position to do so. One growing but underused solution is to offer continuing legal education credit for pro bono work. As of 2018, twelve states already do this, and four of those began doing so in the last couple of years.¹⁹ Notably, attorneys in states featuring such programs do more pro bono work than attorneys in states that do not.²⁰

The traditions of the legal profession encourage each lawyer to join the ranks of the many “unsung heroes of the Republic” who demonstrate heroism in their work as lawyers. The country needs to expand their numbers and extend their influence. Without the commitment of the legal profession to preserve and expand the profession’s broader interstitial role, the United States will lack the leadership it needs to address and bridge the justice gap.

ENDNOTES

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- ¹ The quotations in this paragraph are from Robert H. Jackson, "The County-Seat Lawyer," *American Bar Association Journal* 36 (1950): 497.
- ² For our purposes, it is unnecessary to define or quantify legal complexity. As an example, however, the Legal Services Corporation sorts its cases between "limited service cases," for matters that "require, on average, less staff time and resources to complete," and "extended service cases," for everything else. In 2017, 76.2 percent of reported cases were designated as limited service, and the remaining 23.8 percent designated extended service. Legal Services Corporation, *By the Numbers: The Data Underlying Legal Aid Programs, 2017* (Washington, D.C.: Legal Services Corporation, 2018), 40–42, <https://www.lsc.gov/media-center/publications/2017-lsc-numbers>.
- ³ See Lawrence J. Fox, "Can Client Confidentiality Survive Enron, Arthur Andersen, and the ABA?" *Stetson Law Review* 34 (1) (2004): 156; Lawrence J. Fox, "Ethics 2000: Is It Good for the Clients?" *Professional Lawyer* 12 (3) (2001); and Lawrence J. Fox, "Pro: Taking a Stand for Professionalism," *Pennsylvania Lawyer* 14 (1992): 16.
- ⁴ See Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1988), 184–186; Richard L. Abel, *American Lawyers* (New York: Oxford University Press, 1989), 20; Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976), 88; Deborah L. Rhode, "Access to Justice: Connecting Principles to Practice," *Georgetown Journal of Legal Ethics* 17 (2004): 371–372, 409; and Deborah L. Rhode, "Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice," *New York University Review of Law and Social Change* 22 (1996): 709–713.
- ⁵ Long ago, Robert Gordon recognized the importance of avoiding an oversimplified understanding of the modern lawyer's societal role. See, for example, Robert W. Gordon, "The Citizen Lawyer: A Brief Informal History of a Myth with Some Basis in Reality," *William and Mary Law Review* 50 (2009): 1203–1206.
- ⁶ This independence is critical for the rule of law in a liberal democracy; indeed, every liberal democracy in the world has some form of an independent legal profession. Robert Gordon observes that case studies show that lawyers have been a "spearhead of bourgeois liberalism" for "societies that have succeeded in building liberal institutions like parliaments, competitive elections, and relatively independent courts." Robert W. Gordon, "Are Lawyers Friends of Democracy?" in *The Paradox of Professionalism: Lawyers and the Possibility of Justice*, ed. Scott L. Cummings (New York: Cambridge University Press, 2011), 32.
- ⁷ Jackson, "County-Seat Lawyer," 497.
- ⁸ For discussion of the aptitude of technology-based legal service providers, see Dana A. Remus and Frank Levy, "Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law," *Georgetown Journal of Legal Ethics* 30 (2017): 518–519.
- ⁹ Dana A. Remus, "Reconstructing Professionalism," University of North Carolina Legal Studies Research Paper No. 2676094 (Chapel Hill: University of North Carolina, 2015), 6.
- ¹⁰ For further discussion of this assertion, see *ibid.*, 40, notes 223–224.
- ¹¹ David Leonhardt, "Law Firms' Pay Soars to Stem Dot-Com Defections," *The New York Times*, February 2, 2000, <https://www.nytimes.com/2000/02/02/business/law-firms-pay-soars-to-stem-dot-com-defections.html>. In the late 1990s, legal salaries fit a bell curve with a \$50,000 median. National Association for Law Placement, "What Do New Lawyers Earn? A 15-Year Retrospective 1994–2008," *Bulletin*, August 2009, <https://www.nalp.org/aug09newlawyersal>.
- ¹² For detail about the legal market's postrecession structure and its effect on salaries, see National Association for Law Placement, "Top Salaries for First-Year Associates Remain Flat at \$160,000, But Prevalence Shrinks as Large Law Firm Market Becomes Less Homogenous," press release, October 9, 2014, <https://www.nalp.org/uploads/PressReleases/2014ASSR>

- PressRelease.pdf; and National Association for Law Placement, “Salary Distribution Curves,” <https://www.nalp.org/salarydistrib> (accessed September 2, 2018). For discussion of client pressure to cut costs, see Remus and Levy, “Can Robots Be Lawyers?” 530–531. As for temporary contract attorneys, Anna Stolley Persky posits that clients focus more on reducing costs and “less on the pedigree of the people who conduct research and reviews.” Anna Stolley Persky, “Under Contract: Temporary Attorneys Encounter No-Frills Assignments, Workspaces,” *Washington Lawyer* 28 (2014): 26.
- ¹³ National Association for Law Placement, “Top Salaries”; United States Department of Labor, Bureau of Labor Statistics, “Occupational Employment and Wages, May 2017: 23-2011 Paralegals and Legal Assistants,” <https://www.bls.gov/oes/2017/may/oes232011.htm>; and National Association for Law Placement, “Findings from the NALP/PSJD Public Service Attorney Salary Survey,” *Bulletin*, June 2018, <https://www.nalp.org/o618research>.
- ¹⁴ Remus, “Reconstructing Professionalism,” 25.
- ¹⁵ Jackson, “County-Seat Lawyer,” 497.
- ¹⁶ This framing addresses a practical challenge that Deborah Rhode has identified: specifically, that lawyers “do not lack for reform strategies. The challenge remaining is to convince lawyers that they have a stake in that agenda for change.” Deborah L. Rhode, *The Trouble with Lawyers* (New York: Oxford University Press, 2015), 8.
- ¹⁷ David A. Santacroce and Robert R. Kuehn, *Report on the 2007–2008 Survey* (Ann Arbor: Center for the Study of Applied Legal Education, 2017), 8, <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf>; and Robert R. Kuehn and David A. Santacroce, *The 2016–17 Survey of Applied Legal Education* (Ann Arbor: Center for the Study of Applied Legal Education, 2007), 8, http://www.csale.org/files/Report_on_2016-17_CSALE_Survey.pdf.
- ¹⁸ Law students in the Durham Eviction Project (cosponsored by the Duke Civil Justice Clinic and Legal Aid of North Carolina) understand their clients’ needs to be sure, but further, they obtain a deep understanding of the landlords’ needs to identify legal and nonlegal issues and negotiate efficient, effective solutions. Charles R. Holton (director, Civil Justice Clinic, Duke Law School), conversation with Abigail Frisch, Durham, North Carolina, March 26, 2018. See Max Blau, “It Does Something to Your Soul When Everyone Losing Their Homes Looks Like You,” *Politico Magazine*, May 24, 2018, <https://www.politico.com/magazine/story/2018/05/24/what-works-next-durham-evictions-218416>.
- ¹⁹ Michael Smith (special assistant to the president, Legal Services Corporation), e-mail message to authors, March 16, 2018. States can determine how many pro bono hours equate to the typical continuing education hour. Lawyers in Colorado, for example, receive one credit for every five billable hours representing low-income clients. Continuing Legal and Judicial Education Committee, *Rule 250: Mandatory Continuing Legal and Judicial Education* (Denver: Colorado Supreme Court, 2018), 17, http://www.coloradosupremecourt.com/PDF/CLE/CRCP250_Mandatory_Continuing_Legal_and_Judicial_Education_July_2018.pdf. The American Bar Association recently added pro bono work as an optional qualifying activity to fulfill its suggested fifteen-hour annual continuing education requirement, but it took “no position on whether such credit should be granted.” Standing Committee on Continuing Legal Education, *Model Rule for Minimum Continuing Legal Education* (Chicago: American Bar Association, 2017), 13, https://www.americanbar.org/content/dam/aba/directories/policy/2017_hod_midyear_106.authcheckdam.pdf.
- ²⁰ Pro bono work in Washington, Tennessee, and Wyoming—where pro bono work earns continuing education credits—surpassed that of the twenty-one other states surveyed. Standing Committee on Pro Bono and Public Service, *Supporting Justice: A Report on the Pro Bono Work of America’s Lawyers* (Chicago: American Bar Association, 2018), 38, https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.authcheckdam.pdf.