



National Lawyers Guild *Review*



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PREFACE

by Dalia Fuleihan

We are facing the third year of a global pandemic, and a third year of disruptions to our traditional working and living patterns. After three years of varying levels of work from home, lock down, economic disruption, fear of the disease, and devastating loss of life, many of us have been called to reevaluate our priorities and question the values that have shaped our lives for so long.

Despite this, the world appears relatively unchanged and may in fact be regressing. Earlier this month, a draft decision reversing *Roe v. Wade* leaked from the Supreme Court. Not only does this fundamentally threaten the constitutional right to an abortion and bodily integrity but throws into doubt many more fundamental rights such as the right to marry whomever we choose, the right to choose when or if we have children, the right to raise children in the manner we deem appropriate among others.

This utterly devastating, although unsurprising, failure of the judicial system only throws into sharper relief the ineffectiveness of the legislative and executive branches of our government.. The minimum wage is not nearly enough to afford adequate housing. Promises made about investing in infrastructure, expanding the social safety net, and cancelling student debt have yet to be fulfilled. Communities of color are still disproportionately impacted by pollution, climate change, harmful economic policies, the pandemic, and increase in violence. The Biden administration has reneged on its promises to overhaul the prior administration's tightening of immigration. Black people are being murdered by the police all over the country, and anti-trans bills have been proposed and/or passed in numerous states. Meanwhile, the 75 richest people in the country have been getting even richer, billionaires are spending fortunes on vanity trips to space, the United States has managed to get embroiled in a new standoff with Russia and has conveniently lifted the immigration restrictions keeping black and brown migrants from entering the country to allow Ukrainian nationals pathways to legally enter the country.

While it would be easy to watch this parade of injustice and inaction and use it as an excuse to give up hope entirely, instead, I invite you take this moment to examine the root causes of these problems with a view towards reimagining possible solutions to widespread societal inequality. In this issue of the Review, we are excited to present a series of articles examining the structures that perpetuate the injustices we witness every day. In this issue, we will explore the systems that form the foundation of society and bring to light the ways in which these systems create the conditions for structural inequality to flourish.

In "The Moral Irredeemability of the Private Practice of Law" Da-

vid Wesley Frank lays bare the essential hypocrisy of the legal profession. He outlines the stark contrast between the profession's self-perpetuated image—dedicated to the public interest, the pursuit of justice, and service to the common good of society—and the reality of the egregious harm caused by a significant portion of legal practitioners in this country. Frank meticulously documents the rhetoric used by large corporate law firms to advertise their services and present themselves as defenders of justice while simultaneously actively working against the common good. Most large law firms represent the interests of large publicly traded companies and the ultra-wealthy, most often at the expense of the rights and economic situation of the majority of the population. Frank's article challenges us to reconsider our tacit acceptance of the legal profession's continued defense of itself despite the enormity of the harm it causes and perpetuates.

In "Beyond Barrett: Shifting A Progressive Legal Strategy From Federal to State Court" Steven Goldberg analyzes the effect of the wave of Trump appointees to the federal bench will have on civil rights in the United States. As we are already witnessing, the appointment of so many far-right judges, including to the Supreme Court, will usher in an era of conservative jurisprudence that will last for decades and the unraveling of fundamental rights that have been codified for years. Civil rights litigation has primarily taken place in federal courts. The appointment of so many conservative and undeniably politicized judges does not bode well for the fate of civil rights in the U.S. Goldberg proposes an interesting solution to this problem: look at state law. State constitutions and statutes is at least as protective as federal law, and in many cases, more protective. Goldberg discusses the ways in which civil rights litigation can be pursued through state courts, and shows how when one institution—the federal judiciary—becomes so heavily politicized, it is still possible to find a way to pursue justice.

In "Legal Service Centers as Voter Registration Centers: A Stop-Gap Solution to Support Clients' Civic Engagement," Jacob Carrel analyzes widespread voter disenfranchisement and the increasing numbers of restrictive voting laws. Widespread access to the ballot is a fundamental necessity of a healthy democracy. In the United States, a series of recent laws further restricting the right to vote have passed numerous state legislatures since the 2020 presidential election. Such voting restrictions disproportionately affect low-income voters (those most likely to use subsidized legal services), with fewer than 52% of legal service center clients exercising their right to vote. Carrel proposes a simple solution. Legal service centers are an ideal place for this population to register to vote. While this solution seems simple and uncontroversial, Carrel's article recounts the tortured political history of the Legal Services Corporation and explains the current political resistance to utilizing legal service centers to expand access to the ballot.

We close this issue with a review of Maclen Stanley's book *The Law*

Says What?: Stuff You Didn't Know About the Law (But Really Should!). The Review's Executive Editor, Michael Drake laments the legal industry's complete failure to make the substance of the law accessible to the general population. While Stanley's book is certainly a much-needed attempt to explain the American legal system in a digestible and enjoyable fashion, it perpetuates the legal education's incessant focus on broad theoretical concepts as opposed to the tangible skills necessary to navigate the system. Moreover, Drake skillfully demonstrates how Stanley's perpetuation of legal education's "neutrality" both perpetuates the flawed logic behind our system's more unjust elements and prevents students from fully understanding how the law functions in practice.

While we may be frustrated and exhausted with the seemingly endless turmoil of the past few years, it is important to remember that periods of upheaval provide unique opportunities to reimagine the world in which we wish to live. Reading this issue's articles, I am reminded that there is potential for improvement even in the bleakest aspects of our society, and many, many people with brilliant plans to build a better future.

THE MORAL IRREDEEMABILITY OF THE PRIVATE PRACTICE OF LAW IN THE UNITED STATES

David Wesley Frank¹

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INTRODUCTION

May I² describe a work of sacred art to you? It is a wood engraving by the 16th century German master Hans Holbein the Younger. The work is

1 David Frank, J.D., Ohio Northern University College of Law. d.frank@hushmail.com. Thank you to Emily Komp and Michael Drake for their editing and advice. This article is dedicated to my mom and dad.

2 "Since these laws and customs are often misapplied by the unwise and unlearned who ascend the judgment seat before they have learned the laws and stand amid doubts and the confusion of opinions, and frequently subverted by the greater judges who decide cases according to their own will rather than by the authority of the laws, I, [the author], to instruct the lesser judges, if no one else, have turned my mind to the ancient judgments of just men, examining diligently, not without working long into the night watches, their decisions, consilia and responsa, and have collected whatever I found therein worthy of note into a summa, putting it in the form of titles and paragraphs, without prejudice to any better system, by the aid of writing to be preserved to posterity forever." HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND 19 (Samuel E. Thorne trans., Harv. Univ. Press 1968) (1265).

titled *The Advocate*.³

The scene in the engraving depicts in its foreground two prosperous men meeting on the cobblestone street of a village. One of the prosperous men is shown delivering precious coins from his purse into the hand of the other man, apparently for some commercial service.

Behind these two prosperous men cowers a third man. The third man is poor, bald, and plain-clothed. He clutches his hands together. This third man looks on in distress at the business between the two prosperous men.

The artwork tells us that the prosperous man with the coin purse and the poor man with nothing have come into a legal dispute. This prosperous man with the coin purse has hired the other prosperous man in the scene, the Advocate, to represent him in the case. No advocate or attorney stands beside the poor man, however. He does not have a purse with precious coins. He will soon lose the legal dispute to his wealthy opponent.⁴

But this is not the whole engraving. Standing among the three men, the artist shows a fourth figure. This figure is Death. Death stands between the rich man and his Advocate at the point of exchange. Death stares directly into the attorney's face, grinning. The Advocate does not appear to notice the presence of Death over him.

Thank you for your indulgence. I asked to reflect on Holbein's work as a means of introducing what I hope will be accepted as an irrefutable assessment of the subject of this article, the legal industry in the United States today. The assessment: the private, and by private, I mean commercial, practice of law in the nation is not at all the public service it presents itself to be. The interests the practice represents are not the public's interests, and the damage caused by sanctioning the private and commercial practice of law, permitted only on the basis of the profession's presentation of itself as one operated in the public interest, is great. I seek, therefore, to remind the public that the professional license granted to the industry is one that may be revoked.

As it is, the private practice of law in the United States exists and profits by passing an impression of itself as a defender of the public interest, of the republican ideal, and of the oppressed and outcast. It excuses criti-

3 HANS HOLBEIN, *LES SIMULACHRES & HISTORIEES FACES DE LA MORT* (A Lyon, Soubz l'escu de Coloigne 1538) (1523-1525).

4 "Can the poor man (who cannot pay any of this 'order') receive equal advantage with the rich, while such a body of men exist, who stand ready to speak on any subject, and like mercenary troops, can be hired to support any cause for the consideration of a large reward? Will not the rich opponent overpower the poor man, by the greatness of his gifts to the lawyers?" Benjamin Austin Jr. (a future Massachusetts senator, writing under the pseudonym "Honestus"), *THE INDEP. CHRON.* (Boston), April 13, 1786 at 1.

cisms perennially raised and rediscovered as directed only against unfortunate excesses, and perhaps even necessary evils, which are not to be tolerated but nonetheless accepted. But the public may wish to consider whether these positions are true. After all, no people need tolerate an unnecessary evil.

For purposes of this paper, I will take it for granted that private attorneys, like other common criminals, are grasping, duplicative, vicious, petulant, paranoid, resentful, and, above all, protective of the small monopolies which they do little to keep beyond the mere maintenance of insisting to retain them. I will also take for granted that the majority of private attorneys in the United States, as a class, will serve the interests of any paying client for nothing more than the opportunity to lead lives of moderately exceptional status and security.⁵ This is not to say, of course, that these attorneys would not betray their benefactors and further debase themselves for the hope of accumulating greater wealth and undeserved distinction, all the while crowing of their cunning and complaining of their clients, who although deserving of no sympathy themselves have little choice but to hire private lawyers as intermediaries to plead away nuisances to their own estate. This is also a given.⁶

Private practitioners pride themselves as a profession as one primarily concerned with the pursuit of justice, the championing of right, and service of the common good. But this claim of fact and, consequently, to legitimacy is in almost every measurable sense wrong. Moreover, the misrepresentation causes great harm to the public and particularly to those it at best disregards and more regularly dispossesses. The profession, one of royalists,⁷ attempts to present its performance in the pageantry of legal pro-

5 “Woe to them that sow pillowes under all arme-holes, and put kerchifes under the heads of every age of hunt foules. They make the king glad with wickednesse, and the princes with their lyes. . . . The flattering mouth worketh ruine.” SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINALL CAUSES*, Ch. XCIX (W. Clarke and Sons. 1817) (1644).

6 “Ambition in idleness, meanness mixed with pride, a desire of riches without industry, aversion to truth, flattery, perfidy, violation of engagements, contempt of civil duties, fear of the prince’s virtue, hope from his weakness, but, above all, a perpetual ridicule cast upon virtue, are, I think, the characteristics by which most courtiers, in all ages and countries, have been constantly distinguished.” Charles Louis de Secondat, Baron de Montesquieu, *Spirit of the Laws*, Vol. , in 1 *THE COMPLETE WORKS OF M. DE MONTESQUIEU* (T. Evans and W. Davis 1777) (1748).

7 Tittering and scholastic, often ideologically misclassified as liberal. See, e.g., Adam Bonica et al., *The Political Ideologies of American Lawyers*, 8 *HARV. J. OF L. ANALYSIS* 277 (2016) (inaccurately assessing lawyers’ political views); Leo Gertner, *Which Side Are “Liberal” Lawyers On?*, *THE AMERICAN PROSPECT*, (Aug. 11, 2020) <https://prospect>.

cedure as itself a manifestation of the fruit of benevolence for the people.⁸ Again, this is false and, thus, the practice renders the public unprotected on one side and assailed on another by the only licensed class with entry to do otherwise and protect the public in the affairs of law.⁹

It has been known for hundreds of years in a broad line of religious and political tradition ascribed to by the majority of the nation's private lawyers that they may suffer damnation for their sins,¹⁰ or at least incur the moral opprobrium properly attached to their trade.¹¹ Yet, what is potentially remarkable in the contemporary moment, and what must be brought to account is that the industry of the commercial private practice of law in the

[org/justice/which-side-are-liberal-lawyers-on-labor-workers-rights/](#) (correctly questioning the narrative of the liberal U.S. lawyer).

8 “Although we have carefully established many things on behalf of the plebeians, we believe we have provided nothing for them unless we should give them suitable defenders.” CODE THEOD. 1.29.3 (Clyde Pharr trans., Princeton Univ. Press 1952) (5th cent.).

9 I refuse to use the term legal services. It miscasts the legal profession as some kind of craft guild. There is a temptation to compare lawyers to mercenaries. But the comparison is inappropriate. First, mercenaries often incur personal risk. Second, mercenaries must have personal commitment to their work. Third, mercenaries must necessarily deal fairly with clients.

10 “Do not exploit the poor because they are poor, and do not crush the needy in court, for the Lord will take up their case and will exact life for life.” *Proverbs* 22:22-23; “Woe unto you also, ye lawyers! for ye lade men with burdens grievous to be borne.” *Luke* 11:46

11 Since the declared founding of the United States, the commercial practice of law has been considered “that infernal knavery, which multiplies needless litigations, which retards the operation of justice, which, from court to court, upon the most trifling pretenses, postpones trial to glean the last emptyings of a client’s pocket, for unjust fees of everlasting attendance, which artfully twists the meaning of law to the side we espouse”. Dr. Rev. Timothy Dwight, *A Valedictory Address: To the Young Gentlemen, who Commenced Bachelors of Arts, at Yale College, July 25th, 1776*, AMERICAN MAG., Jan. 1788 at 99 It was seen early in the country: “The more we reflect upon all that occurs in the United States, the more shall we be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element.” ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 278 (Phillips Bradley ed., Henry Reeve trans., Francis Bowen rev., Knopf 1945) (1835). Even prior to independence, European colonies in the future United States often disfavored and at times banned the private commercial practice of law. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 53 (3d ed. Touchstone 2005). For instance, the practice was prohibited throughout the Colony of Carolina, consisting at its height of an area now occupied by the states of North Carolina, South Carolina, Georgia, Alabama, Tennessee and Mississippi, and parts of modern Florida and Louisiana, with these words: “It shall be a base and vile thing to plead for money or reward; nor shall any one . . . be permitted to plead another-man’s cause, till, before the judge in open court, he hath taken an oath that he doth not plead for money or reward, nor hath nor will receive, nor directly nor indirectly bargained with the party whose cause he is going to plead, for money or any other reward for pleading his cause.” Fundamental Const. of the Carolina, Sec. Seventy (1669).

U.S.—with earnest, few, and ultimately inconsequential exceptions—is set against the interests of the public and those most in need of its aid.¹² The private bar both projects and beholds to itself the image of public advocate, playing to a role it does not only not fulfill but actively works against, all the while preserving the franchise to operate on a critical plain of power, foreclosing discussion of alternative governance of the public's legal life, including whether it as a profession need exist at all.

I am only one of many Christians over millennia to conclude the commercial practice of law advances the worst and most abject parties and interests in society.¹³ Worst in the sense of rapaciousness, worst in the sense of actual violence, worst in the sense of danger and cowardice.¹⁴ It is almost as if there is no reason for the private practice of law in the U.S. other than as a grant to certain classes, an upwardly middling complacent life of ceremony and profit. Even if believed, despite its devastation, that a sincere aim of the private legal profession is to serve just ends¹⁵ rather than the extortion of the weak, the exaltation of the wicked, and the enrichment of itself, the opinion is irrelevant.¹⁶ The industry does not and cannot benefit the commonweal. In one sense, the private legal profession is like any other privileged profession of a modern capitalist state. But in another and truer sense, current commercial lawyering represents a unique evil of society today.

In this article, I first survey the state of the private for-profit commercial practice of law in the United States. I note where lawyers practice, what they practice, who they represent, the practices they employ, and the reasons which may motivate their practices. Next, I review how, very much

12 Lawyers “for all the ages ago . . . have been the mouthpieces of the capitalist class.” William D. Haywood. *Socialism, the Hope of the Working Class*, INT’L SOCIALIST REV., XII, Feb. 1912.

13 “Peasants and shepherds all go to heaven, advocates and merchants go burn in hell.” Catalan proverb. See PAUL FREEDMAN, *THE ORIGINS OF PEASANT SERVITUDE IN MEDIEVAL CATALONIA* 220 n.39. (1991).

14 “Are not the rich oppressing you? And do they themselves not haul you off to court?” *James* 2:6.

15 “And, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honourable professions), it hath been holden that a counsel is not answerable for any matter by him spoken relative to the cause in hand and suggested in his client’s instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless: but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured.” 2 WILLIAM BLACKSTONE, *COMMENTARIES* *28-29 (1765-1770)

16 “When the evil taints both giver and recipient, we hold recovery to be excluded . . .” DIG. 12.5.3 (Paul, Sabinus, 10) (Alan Watson ed., Pa. Univ. Press 1998) (6th cent.).

in contrast, the private profession presents and publicizes itself, observing that the interests it claims to promote are not at all those it represents and, rather, actively works against. Third, I consider the damage and loss caused by sanctioning the private practice of law, dismissing reforms put forward by the profession as, characterized generously, inadequate and self-serving. I conclude without a particular prescription. I do, however, encourage the public to reconsider the license it has granted profiteering attorneys and remind it that it is under no obligation to renew the privilege to the profession.¹⁷

I. REPRESENTATION OF THE U.S. LEGAL PROFESSION

Despite the profession's presentation of itself otherwise, the great wickedness of the for-profit private commercial practice of law in the United States cannot be a matter of serious debate.¹⁸ Assuming with cause the bar will nevertheless contest this conclusion, plain as the truth of it may be, the dispute can be resolved beyond contention by an accounting of the actual work private lawyers perform as professional representatives in this country. This legal work referred to for purposes of inventory is not what lawyers say they do, what they say they wish to do, what they say their or the profession's societal role as being, nor what they say they commit to charity through volunteerism or by donation. The question here is what private lawyers in the United States do as private lawyers, for whom do they do it, and to what end. An examination of the firms that retain them, the clients who engage them, and the practices which they employ should reveal the material nature of their enterprise and the interests they serve.¹⁹

17 "An evil custom is no more to be tolerated than a dangerous infection because, unless the custom is quickly torn up by its roots, it will be adopted by wicked men as entitling them to a privilege." GRATIAN, *DECRETUM GRATIANI*, D.8, C.3. (Augustine Thompson, O.P., trans., James Gordley, ordinary gloss trans., Catholic Univ. Press 1993) (12th cent.).

18 "Those who, in the City of Rome, have adopted the legal profession, are permitted to practice it as much as they desire, provided they do not take occasion to obtain dishonorable profits, and unreasonable fees . . . Where, however, they are influenced by the love of gain and money, they shall be considered abject and degenerate, and be classed as the meanest of mankind." Code Just. 2.6.6(5) (Valentinian & Valens 368) (S.P. Scott trans., Central Trust Co. 1932) (6th cent.).

19 In the end, "[t]he major share of legal services goes to business entities and wealthy people and the prestige and prosperity to the lawyers who serve them." Robert W. Gorden, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, DAEDALUS (Winter 2019).

A. The Private U.S. Legal Profession

More than one million attorneys are licensed by public authorities to practice law in the United States.²⁰ Most of these lawyers work at corporations or other businesses for profit in their capacity as legal representatives.²¹ Most of these publicly licensed lawyers represent for-profit corporations, other businesses, or the financial interests of the upper classes and the powerful in their work.²² With narrow exception for select areas of law, few

20 See PROFILE OF THE LEGAL PROFESSION 2019, A.B.A. MEDIA RELATIONS & STRATEGIC COMM'C'N DIV. 5 (2019) ; PROFILE OF THE LEGAL PROFESSION 2020, A.B.A. MEDIA RELATIONS & STRATEGIC COMM'C'N DIV. 2-3, 30, 106-08 (2020). The U.S. Bureau of Labor Statistics lists more than one million employed in "legal services," with about 400,000 to 800,000 as judges, lawyers, or other legal professionals, acknowledging and not disputing the ABA's figure. *The Employment Situation - June 2020*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., tbl. B-1 (2020), <https://www.bls.gov/news.release/pdf/empst.pdf>. See also the Bureau's May 2019 National Industry-Specific *Occupational Employment and Wage Estimates, NAICS 541100 - Legal Services*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., https://www.bls.gov/oes/current/naics4_541100.htm; *Employment Projections, National Employment Matrix, 23-1011 Lawyers Employment by industry, occupation, and percent distribution, 2018 and projected 2028*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., <https://data.bls.gov/projections/nationalMatrix?queryParams=23-1011&ioType=o>.

21 See Quintine Johnstone, *An Overview of the Legal Profession in the United States, How That Profession Recently Has Been Changing, and Its Future Prospects*, 26 QUINNIPIAC L. REV. 756 (2008); Judith N. Collins, *Jobs & JDs: Employment and Salaries of New Law Graduates*, NATIONAL ASSOC. FOR L. PLACEMENT (2018); EMPLOYMENT OUTCOMES AS OF APRIL 2020, 2020 A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR 1, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2019-law-graduate-employment-data.pdf. State surveys find similar distributions See, e.g., *Summary Results of Five-Year Attorney Survey, 2017*, THE STATE BAR OF CAL. 1-3 (2017), <http://www.calbar.ca.gov/Portals/0/documents/reports/ORIA/Survey-2017.pdf> *Results of the 2019 Membership Opinion Survey*, THE FLA. BAR 4-7 (2020), <https://www-media.floridabar.org/uploads/2020/01/2019-Membership-Survey-Report-Final.pdf>; *State Bar of Tex. Membership: Attorney Statistical Profile* (2019-20), STATE BAR OF TEX. DEP'T OF RESEARCH AND ANALYSIS 2, <https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=48808>; *Economics of Law Practice in Michigan*, STATE BAR OF MICH. 4-7 (2017), <https://www.michbar.org/file/pmrc/articles/0000154.pdf>. "Newly hired attorneys usually start as associates and work on teams with more experienced lawyers. After several years, some lawyers may advance to partnership in their firm, meaning that they become partial owners of the firm. Those who do not advance within their firm may be forced to leave, a practice commonly known as 'up or out.' After gaining a few years of work experience, some lawyers go into practice for themselves or move to the legal department of a large corporation." *Occupational Outlook Handbook, Lawyers*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., (2020), <https://www.bls.gov/ooh/legal/lawyers.htm#tab-4>.

22 This is the practice and business of all the largest and most profitable law firms in the United States and of almost all firms of any comparable size and revenue. See Ben Seal,

practice at nonprofit firms or otherwise generally offer services to the working classes and poor.²³

Further, even more so, the wealth of the largest and most powerful firms in the United States and that of the attorneys they employ is derived almost exclusively from business dealings with for-profit corporations and other financial interests.²⁴ These private firms and their lawyers are rewarded by their clients for rendering services, both in courts and with transactions, that at best ignore the public good while generally operating over and against it.²⁵

Given the actual representation of the private legal industry, it is perhaps strange the primary action of the practice is rarely acknowledged. This could be, as discussed later in this article, because the purpose is not fully understood by the public and is represented as other than what it is by the industry itself.

B. The Practice of the Private U.S. Legal Profession

Because the private bar will nevertheless inevitably persist in perpetuating a perception of itself as a custodian of justice and guardian of the laboring classes, it may be therefore illustrative to examine an entirely rep-

The 2019 Am Law 100: Gross Revenue, THE AMERICAN LAWYER (Apr. 23, 2019) <https://www.law.com/americanlawyer/2019/04/23/the-2019-am-law-100-gross-revenue/?slretu rn=20220102211036>.

23 See, e.g., Johnstone, *supra* note 21 at 768, 791-92 (This shortage of legal representation of the poor “is so substantial and the consequences of the shortage so undesirable as to constitute our legal system’s greatest disgrace. Due to this shortage, a vast number of poor people in the United States in need of legal services receive no legal services or the legal representation they receive often is inadequate. * * * As to law firms representing clients who can pay for the legal services they receive, these firms undoubtedly will remain major providers of legal services in the near-term future. * * * The near-term prospects of legal services for the poor in need of such services but unable to pay for them is very discouraging.”). There is approximately one civil legal aid attorney available for every 6,000 low-income individuals in the United States. See LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 20 (2009) (“The difference between the level of resources available to the general population and those available to the low-income population is enormous.”).

24 “[F]irms are especially interested in recruiting in the areas of finance, capital markets, and mergers and acquisitions.” Debra Cassens Weiss, *Legal jobs take another leap and hit 10-year high; what’s driving the increase*, A.B.A. J. (Dec. 9, 2019) <https://www.abajournal.com/news/article/legal-industry-jobs-hit-10-year-high-whats-driving-the-increase>.

25 I am simply advocating the traditional case “for seeing English law merely as the tool of the ruling elite, a weapon useful only for the protection of property and the oppression by the gentry of the rest of the population.” CHRISTOPHER W. BROOKS, *LAWYERS, LITIGATION AND ENGLISH SOCIETY SINCE 1450*, 5 (Hambleton Press 1998).

representative selection of the most respected and successful private law firms in the United States, characteristic in kind of the private bar as a whole, and the law they in fact do practice.

A number are then selected here. Among the most revered private law firms in the U.S., each with thousands of lawyers in house and billions of dollars in hand, are Kirkland & Ellis, Sidley Austin, Hogan Lovells, Baker & McKenzie, Latham & Watkins, and Skadden Arps.²⁶ These law firms are consistently listed as among the largest and most profitable firms in the country, and, like all of the largest and most profitable law firms in the U.S., among the largest and most profitable law firms in the entire world.²⁷

To begin with one of the firms cited here, Kirkland & Ellis, based in Chicago, Illinois, regarded as liberally minded even to a fault, not only does not generally defend the public interest, but actively works against it through their clients by force of the United States legal system. Kirkland almost admits this when not facing a client audience. The firm, speaking with the enthusiasm and euphemism employed by other global corporations, tells clients²⁸ and others with whom it might contract business that its

26 See Ben Seal, *The 2019 Am Law 100: Gross Revenue*, THE AMERICAN LAWYER, (Apr. 23, 2019) <https://www.law.com/americanlawyer/2019/04/23/the-2019-am-law-100-gross-revenue/>; Ben Seal, *The Global 200, Ranked by Revenue*, THE AMERICAN LAWYER, (Oct. 22, 2018) <https://www.law.com/americanlawyer/2018/10/22/the-global-200-ranked-by-revenue/>; *America's 350 Largest Law Firms*, PUBLICLEGAL, (July 2019) <https://www.ilrg.com/nlj250/>; *Kirkland & Ellis World's Highest-Grossing Law Firm . . . Again*, L. FUEL, (March 23, 2020) <https://www.lawfuel.com/blog/kirkland-ellis-worlds-highest-grossing-law-firm-again/>.

27 Almost all of the largest private law firms in the world in terms of profits and number of lawyers on staff are based in the United States. *Id.* It goes without saying there are no nonprofit firms in the U.S. of any significant size and wealth. Numerous statistics not already noted could illustrate this point, but to place it in perspective, there are more lawyers on staff together at any of three given big law firms than there are legal services attorneys in the entire country. *Id.*; *By the Numbers*, LEGAL SERV. CORP. 79 (2018), <https://lsc-live.app.box.com/s/w1p4wvk95r99gbwtj9cjwp3s3oprxbq>. The business industry, its counsel, and its legislative representatives often complain of plaintiffs' side lawyers whose clients may include the working class and poor. These lawyers may represent the population in contingency fee arrangements in damages suits typically for common law torts, medical malpractice, or federal or state statutory violations in employment, consumer, or even, although rare, civil and constitutional rights law. But while this legal practice is clearly an annoyance to the powerful, the size of such plaintiffs' firms tends to be meager not only when compared to the dominant firms in the private industry but also to more local mid-sized corporate defense firms who represent businesses, collectors, and other more provincial financial interests.

28 Including: Bain Capital, Blackstone Group, the Carlyle Group, Dow Chemical, Honeywell International, and Raytheon. See *Kirkland & Ellis LLP*, THE LEGAL 500, <https://www.legal500.com/firms/50540-kirkland-ellis-llp/53108-new-york-usa/> (last visited Feb. 2, 2022). To be more complete, while Kirkland almost exclusively represents large for-profit

lawyers work for “companies and boards in white collar and government-facing litigation.”²⁹ The attorneys “negotiate and close highly sophisticated transactions, representing public and private companies and private equity investors across a broad range of complex engagements.”³⁰ As succinctly and honestly as it can describe itself, the organization is at its core “an international law firm that serves a broad range of clients around the world in private equity, mergers and acquisitions, and other corporate transactions, litigation, white collar and government disputes, restructurings and intellectual property matters.”³¹

Kirkland’s named practice specialties further clarify the nature of its work for its corporate and financial industry clients. Like many of the most successful U.S. firms, these practices include three primary areas. First, tending the fortunes of the wealthy and protecting the owning class from related legal accountability.³² Second, defending large employers from liability for, among other things, claims from the employees³³ they allegedly robbed and retaliated against.³⁴ And third, civil suits by consumers and other

corporations and other powerful financial interests, these are not its only clients. The firm also represented Jeffrey Epstein. On the opposing side in the case for this Kirkland client and for the prosecution was Alex Acosta, a Kirkland alumnus. Julie Brown, *How a future Trump Cabinet member gave a serial sex abuser the deal of a lifetime*, MIAMI HERALD (Nov. 28, 2018) <https://www.miamiherald.com/news/local/article220097825.html>. On the opposing side in the case for this Kirkland client and for the prosecution was Alex Acosta, a Kirkland alumnus.

29 *About Kirkland*, KIRKLAND & ELLIS <https://www.kirkland.com/content/about-kirkland>.

30 *Id.*

31 *Id.* I assume “broad range of clients” is being used in a technical sense meaning “very narrow range of clients.”

32 In the area of asset financing and securitization, for instance: “We are regularly engaged in securitization transactions involving: auto and other vehicle loan, lease and floorplan assets, marketplace loans, trade receivables, equipment loans, commercial loans, healthcare receivables, credit card receivables, timeshare loans, single-family rental properties, mortgage servicing rights, manufactured housing loans, other real estate-related assets.” *Services*, KIRKLAND & ELLIS <https://www.kirkland.com/services>.

33 “We are skilled in handling complex employment litigation, including class actions and claims under various statutes such as the FLSA and ERISA. We regularly counsel clients in connection with the ever-increasing number of federal and state statutes and regulations affecting the employment relationship. We are experienced in actions to enforce non-competition agreements and trade secrets. We represent clients seeking to recover sensitive documents and prevent corporate raiding of staff and customers We also have extensive experience with #metoo litigation and related counseling, at the board level and in the context of sensitive internal investigations.” *Employment Litigation and Counseling*, KIRKLAND & ELLIS [HTTPS://WWW.KIRKLAND.COM/SERVICES/PRACTICES/LITIGATION/EMPLOYMENT-LITIGATION-AND-COUNSELING](https://www.kirkland.com/services/practices/litigation/employment-litigation-and-counseling).

34 “Kirkland lawyers are currently engaged in a wide range of employment and

members of the public they have killed, injured, or defrauded, allegedly, in the course of business.³⁵

The first area of practice for Kirkland and other like firms is opaque

labor law matters on behalf of a variety of employers. These matters include the following substantive practice areas: Labor Management Relations, including union avoidance, decertification, union election campaigns, contract negotiations, unfair labor practices, lockouts, strike contingency planning and injunctions, damage suits for illegal strikes, labor contract administration, arbitration, and employee participation committees; Employment Termination, including layoffs and reductions-in-force, wrongful discharge and employment-at-will litigation, work relocation, and plant closings (including WARN (Worker Adjustment and Retraining Notification Act) advance notice compliance); Employment Policies Development and Litigation, including wage and hour issues, drug and alcohol testing, no-smoking programs, AIDS and communicable diseases, disabilities, family and medical leave, and disciplinary and grievance procedures; Employment Contracts, and Confidentiality and Noncompete Agreements; Immigration Enforcement and Compliance, including business visas, permanent residency and citizenship applications and procedures, and deportation litigation; Occupational Safety and Health Enforcement and Compliance; Legislative Matters, Legislation Analyses, and Preparation and Delivery of Expert Testimony; and Wage and Hour, Service Contract Act, and Prevailing Wage Standards, including overtime, FLSA exemptions, conciliation, and remedial actions.” “Current legislative activities of Firm lawyers include civil rights, striker replacements, employee committees (TEAM Act), OSHA reform and whistle blowers.” *Employment & Labor*, KIRKLAND & ELLIS [HTTPS://WWW.KIRKLAND.COM/SERVICES/PRACTICES/TRANSACTIONAL/EMPLOYMENT--LABOR](https://www.kirkland.com/services/practices/transactional/employment--labor). “Kirkland has successfully represented numerous clients in a long list of employment and labor law cases before courts and juries throughout the United States.” *Id.* “Kirkland has represented numerous clients in a variety of employment and labor law matters. These representations have included NLRB unfair labor practice proceedings involving successorship, bargaining impasses and strikes, secondary boycotts and picketing, striker reinstatement, employee terminations and hiring practices, plant closings, and work relocation; federal court litigation on illegal strikes and injunctions, including a multimillion-dollar verdict against a national union; federal grand jury proceedings; wrongful discharge, race, age, and sex discrimination litigation; acquisitions and sales, including due diligence investigations and employment planning and compliance issues; Wage and Hour and OSHA litigation; arbitrations over terminations and work relocation; RICO litigation; labor negotiations, and strike and lockout planning; unemployment compensation litigation; pension withdrawal liability litigation against the Teamsters Central States Pension Fund; union organizing drives; and appellate representations in the federal circuit courts of appeal and the Supreme Court of the United States.” *Id.*

35 “We draw on the deep government service of many of our partners, including a former U.S. Attorney General and former U.S. Deputy Attorney General, a former White House Counsel and former Deputy White House Counsel, and multiple former senior DOJ, SEC and FTC officials. Our trial-ready reputation gives us an edge in dealing with state and federal regulators and in litigation with private parties. Given our deep bench of leading national trial lawyers, we stand ready to defend our clients all the way to the courtroom instead of bowing to the settlement pressures presented by many consumer protection matters.” *Consumer Protection*, KIRKLAND & ELLIS [HTTPS://WWW.KIRKLAND.COM/SERVICES/PRACTICES/LITIGATION/CONSUMER-PROTECTION](https://www.kirkland.com/services/practices/litigation/consumer-protection).

because unless there is a dispute between private parties that erupts into legal action, or unless the firm publicly boasts about their association, their dealings are between private parties and not divulged except where required by regulation. The second area of practice, however, to the extent not disappeared into arbitration, often at least begins in public litigation and the proceedings are recorded.³⁶ It is therefore unnecessary to take their political opinions on these subjects on their word alone.

In the field of labor and employment law,³⁷ Kirkland has succeeded in convincing the U.S. Supreme Court to, for instance, narrow the category of workers who may claim overtime pay,³⁸ limit the ability of workers to challenge the mismanagement of their retirement savings,³⁹ and expand the number of employees locked out of public courts and subjected to secret private arbitration for legal claims.⁴⁰ In its work outside the high court, Kirkland devotes its advocacy to, among other things, corporations who wish to deny benefits to union factory laborers.⁴¹

In consumer law and related areas of its practice,⁴² Kirkland represents global corporations alleged to have defrauded the public,⁴³ money

36 “Kirkland has a proven record because we understand that building a foundation to defeat class certification should be at the forefront of a client’s defense strategy from the very outset of the case. All affirmative and defensive discovery, all filings and arguments submitted to the court, and all expert testimony must be prepared with an eye toward defeating the elements for class certification.” “From the day a class action complaint is filed, Kirkland digs into the claims and masters the facts, routinely winning dismissals on the pleadings. Our focus on early resolution saves our clients from incurring years of litigation expenses. We have secured dispositive motion victories in every type of class action, from consumer fraud and product liability cases, to antitrust and shareholder suits, among others.” *Class Action Litigation*, KIRKLAND & ELLIS <https://www.kirkland.com/services/practices/litigation/class-action-litigation>.

37 Anti-unionism is the uniting project of modern U.S. liberalism and conservatism. While some employment anti-discrimination protections may comport with or even advance their vision, the best impulses in labor toward a shared distribution of wealth and democratization of work cannot.

38 See *Encino Motorcars v. Navarro*, 138 S. Ct. 1134 (2018).

39 See *IBM v. Jander*, No. 18-1165, 589 U.S. ____ (Jan. 14, 2020).

40 See *Epic Systems v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018).

41 See *UAW v. Honeywell Int’l*, Nos. 18-1471/1975/1976 (6th Cir. April 3, 2020).

42 Private law firms agitate for markets without consumer protection. Their strategy is twofold and not complex. Simultaneously, they fight state regulation saying that if any harm has been done by their clients a private suit is the proper and most effective remedy. But in litigation, they point to a regulator, if possible one that they have most completely captured, as having sole dominion over the subject matter of the suit.

43 See Graham Ruddick, *Volkswagen hires BP oil spill lawyers to defend emissions cases*, THE GUARDIAN (Sept. 23, 2015) <https://www.theguardian.com/business/2015/sep/23/volkswagen-hires-kirkland-ellis-to-defend-emissions-cases> (“Kirkland will offer VW some much-needed assistance as it gears up for legal battles on both sides of the Atlantic. The

lenders charged with deceit,⁴⁴ and drug makers alleged to have sickened patients.⁴⁵ Kirkland was the law firm hired to defend BP America in civil and criminal proceedings after one of the worst human-caused environmental disasters of this century.⁴⁶

Turning to the legal action of other private U.S. law firms mentioned, Sidley Austin, like Kirkland & Ellis, makes its earnings from its arrangements with corporate and financial interests.⁴⁷ While Sidley and other major firms position themselves as specialists of one kind or other, their general practices, again, remain the same and mirror too the nature of the commercial private law industry generally and its role as shield and sword for the fortunes of the fortunate against the workers and public from whom their treasure is drawn. Business and finance, consumer and environmental, labor and employment law, therefore, necessarily tend to be these firms' specializations. This is represented for Sidley Austin too in its areas of practice⁴⁸ and circle of clients.⁴⁹

Looking to just a handful of labor and consumer cases this one firm has litigated at the United States Supreme Court, the destruction by the private practice of law brought upon working and public life is exemplified. For instance, it is now in the United States more difficult for elderly em-

law firm led BP's defence in the criminal investigation into the Deepwater Horizon disaster of 2010, which claimed 11 lives.""); *Litigation Powerhouse: Kirkland & Ellis LLP*, LAW360 (July 29, 2016) <https://www.law360.com/articles/822472/litigation-powerhouse-kirkland-ellis-llp> ("Kirkland has the ability to move forward in a steely-eyed way no matter the stakes," said partner James F. Hurst.").

44 See *FTC v. Lending Club Corporation*, No. 3:18-cv-02454 (N.D. Cal.) (ongoing); *Bulk Of FTC's False Ad Suit Against Lending Club Kept Alive*, LAW360, (June 1, 2020) <https://www.law360.com/articles/1278748>.

45 See *In re National Prescription Opiate Litigation*, MDL 2804 (N.D. Ohio) (ongoing); *In re Testosterone Replacement Therapy Products Liability Litigation*, MDL 2545 (N.D. Ill.) (ongoing).

46 See *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La.; 5th Cir.), <http://deepwaterhorizoneconomicsettlement.com/docs.php>.

47 See *supra* note 27.

48 Including antitrust defense, banking, capital markets, consumer class action defense, venture capital, employee benefits defense, ERISA litigation defense, medical device regulation defense, global finance, "government strategies," labor and employment claims defense, private equity, products liability defense, real estate, securities litigation, "tax controversy," and white collar criminal investigations. *Services*, SIDLEY [HTTPS://WWW.SIDLEY.COM/EN/US/SERVICES/](https://www.sidley.com/en/us/services/).

49 Including finance, energy, insurance, investment, real estate, and "agribusiness" corporations. *Industries*, SIDLEY, <https://www.sidley.com/en/us/industries/>.

employees who are discriminatorily terminated to sue their former employers,⁵⁰ it is now more difficult for certain workers to collect medical benefits upon injury or disability,⁵¹ and it is even easier for companies to force consumers and employees into arbitration to pursue legal claims because of the firm's successful representation.⁵²

The effect and nature of the litigation of the attorneys of other prominent U.S. private firms including those cited, Hogan Lovells,⁵³ Baker

50 See *Gross v. FBL Financial Services*, 557 U.S. 167 (2009).

51 See *Roberts v. Sea-Land Services*, 132 S. Ct. 1350 (2012).

52 See *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011).

53 “We’ve helped countless clients through every crisis imaginable – from environmental disasters, data breaches, and #metoo issues, to transportation incidents, foodborne illnesses, and bribery and corruption scandals. Already in crisis with no time to plan? No worries – we’ve got you covered. We’ve tread a well-worn path in protecting our clients’ interests, making for a simple, streamlined, and prioritized approach that provides you with the clarity and confidence you need to steer your business in the face of the unthinkable . . . Our dedicated staff has put into place proven playbooks, infrastructure, and resources to streamline your response, and we offer innovative packages to expedite the intake and engagement aspects of lining up support.” *Crisis Leadership Team*, HOGAN LOVELLS [HTTPS://WWW.HOGANLOVELLS.COM/EN/SERVICE/CRISIS-LEADERSHIP-TEAM](https://www.hoganlovells.com/en/service/crisis-leadership-team) (last visited Feb. 3, 2022). “Regulatory investigations; allegations of fraud, bribery, and corruption; sanctions and money laundering; whistle-blower complaints; dawn raids – multinationals and their executives face these and other threats to their businesses and reputations. If you get hit, you’ll need a strong investigative team.” *Investigations, White Collar, and Fraud*, HOGAN LOVELLS [HTTPS://WWW.HOGANLOVELLS.COM/EN/SERVICE/INVESTIGATIONS](https://www.hoganlovells.com/en/service/investigations) (last visited Feb. 3, 2022).

“Human rights risk is a legal risk, and businesses should carefully consider how they manage this risk in their corporate structures and third party relationships. Many companies in the energy and natural resources sector have extensive global operations, and work with other companies to finance and carry out their business abroad. Adverse human rights impacts may arise in the course of doing business, which in turn could crystallize into possible legal liability.” “The best way to reduce human rights related legal liability is to identify human rights risks throughout your value chain and to take steps to prevent these risks from materializing, as you do for any other legal risk. Get this wrong and the scope for legal liability expands.” *Managing human rights risk*, HOGAN LOVELLS (Sept. 27, 2018) <https://www.hoganlovells.com/en/publications/managing-human-rights-risk>.

& McKenzie,⁵⁴ and Latham & Watkins,⁵⁵ and others are little different. The victories of these three firms against workers, consumers, and the public at the U.S. Supreme Court alone show their true practice. These “victories” include revoking the ability of workers to bring class action suits against employers,⁵⁶ stripping retired factory workers and their families of pensions,⁵⁷ and blocking cancer patients’ access to more affordable generic label medication.⁵⁸ Victories of similar private firms over the interests of working classes across the nation, particularly at the U.S. Supreme Court, are common.⁵⁹

54 “We provide financial institutions with sector-specific, pragmatic advice on tax structuring, M&A and joint ventures, intellectual property protection, IT, outsourcing, real estate portfolio management, global and local employment, compensation schemes and pensions, regulatory compliance, investigations, financial crimes and dispute resolution.” *Financial Institutions*, BAKER & MCKENZIE, <https://www.bakermckenzie.com/en/expertise/industries/financial-institutions> (last visited Feb. 3, 2022). “Our team includes one of the largest contingents of former US Department of Justice prosecutors, state prosecutors, SEC and other regulators. We have extensive experience assisting companies and financial institutions conduct cross-border investigations. We also represent corporations, officers and directors in criminal investigations and prosecutions, and advise on SEC disclosure, self-reporting, corporate governance and internal controls issues. Our lawyers also defend clients in class actions and other suits that often follow criminal allegations.” *Investigations & White Collar Crime*, BAKER & MCKENZIE <https://www.bakermckenzie.com/en/expertise/areasofpractice/investigations-and-white-collar-crime> (last visited Feb. 3, 2022). “Our tax litigators represent clients at all stages of disputes, from controlling the flow of information during audits to presenting persuasive arguments in court, appeals and alternative dispute resolution proceedings. Many of our lawyers are former tax enforcement and other government officials who use their understanding of procedural rules and substantive issues to develop creative approaches to problem solving.” *Tax Dispute Resolution*, BAKER & MCKENZIE <https://www.bakermckenzie.com/en/expertise/areasofpractice/tax-dispute-resolution> (last visited Feb. 3, 2022).

55 Which specializes in representing military arms contractors including BAE Systems, Booz Allen Hamilton, and Honeywell International. *See Aerospace, Defense, and Government Services*, LATHAM & WATKINS, <https://www.lw.com/industries/aerospace-defense-and-government-services> (last visited Feb. 3, 2022).

56 *See Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018) (Hogan Lovells sharing victory with Kirkland & Ellis).

57 *See M&G Polymers USA v. Tackett*, 574 U.S. 427 (2015) (Baker & McKenzie successfully representing amici).

58 *See Hospira v. Eli Lilly*, Nos. 19-1058, 19-1061 (U.S. June 15, 2020) (cert. denied) (Latham & Watkins successfully defending drug company).

59 Examples from the recent U.S. Supreme Court terms include: *Seila Law LLC v. Consumer Financial Protection Bureau*, No. 19-7 (U.S. Jun. 29, 2020) (weakening power to regulate predatory market practices) (Paul Weiss) (with amici Mayer Brown, Baker Hostetler, O’Melveny & Myers, and Boies Schiller Flexner, among others); *Thole v. U.S. Bank*, No. 17-1712 (U.S. Jun. 1, 2020) (limiting ability of workers to challenge the fraudulent mismanagement of their retirement plan) (Morrison & Foerster); *Comcast Corp.*

Also named is another venerated private U.S. law firm, Skadden Arps. Perhaps more than other prominent law practice, Skadden is viewed as an advocate for fairness and equality in the legal system. But it is questionable if this opinion is complete. Like the other named firms, almost all of its legal work is in service of business and financial concerns, and very little is done in the public interest.⁶⁰ For instance, in actual practice, the firm's clients include private insurance companies, and international financial holdings accounts, and corporations like Wells Fargo, and its practices areas include banking, capital markets, corporate restructuring, investment management, labor and employment, mass tort, private equity, government regulatory compliance, and "outsourcing."⁶¹ Representative victories of Skadden in labor and consumer law include dismissal of a wrongful death suit by the family of an employee who allegedly died after a poorly main-

v. National Ass'n of African American-Owned Media, No. 18-1171 (U.S. Mar. 23, 2020) (limiting scope of claims for racial discrimination in the area of contracts under post-Civil War statute) (*Gibson Dunn*); *Rotkiske v. Klemm*, No. 18-328 (U.S. Dec. 10, 2019) (making it more difficult to hold debt collectors civilly responsible for abusive practices that violate federal consumer law) (*Jones Day*); *Dutra Group v. Batterton*, 139 S. Ct. 2275 (2019) (denying maritime workers ability to recover punitive damages for personal injuries sustained during the course of employment) (*Wilmer Hale*).

60 "We have defended clients in numerous class actions involving claims under the Fair Housing Act, the Equal Credit Opportunity Act, the Civil Rights Acts, federal securities laws, unfair and deceptive business practice statutes, and numerous state consumer protection, sales practices, privacy and anti-discrimination statutes. We also have represented international banks in federal courts." *Consumer Financial Services, Litigation*, SKADDEN <https://www.skadden.com/capabilities/practices/financial-services/cc/consumer-financial-services> (last visited Feb. 3, 2022); "Additionally, we have been involved in numerous developments in class action law. For example, several attorneys in our group were instrumental in the passage of the Class Action Fairness Act, which expanded federal jurisdiction over class actions and prevents plaintiffs from 'forum shopping' by filing their claims in state courts known to be plaintiff-friendly. We also regularly represent the Product Liability Advisory Council and the U.S. Chamber of Commerce as amici in appeals involving important class action principles." *Mass Torts, Insurance, and Consumer Litigation*, SKADDEN [HTTPS://WWW.SKADDEN.COM/CAPABILITIES/PRACTICES/MASS-TORTS-INSURANCE-AND-CONSUMER-LITIGATION](https://www.skadden.com/capabilities/practices/mass-torts-insurance-and-consumer-litigation) (last visited Feb. 3, 2022); "The firm has represented employers in claims involving pattern and practice discrimination, civil rights violations, wage and hour collective actions, enforcement of restrictive covenants, accommodations under disabilities laws and wrongful discharge." *Labor and Employment Law, Litigation*, SKADDEN [HTTPS://WWW.SKADDEN.COM/CAPABILITIES/PRACTICES/LABOR-AND-EMPLOYMENT-LAW](https://www.skadden.com/capabilities/practices/labor-and-employment-law) (last visited Feb. 3, 2022); "Skadden also is positioned to handle 'offshore' outsourcing transactions. This includes projects where the outsourcer is in a foreign country or where the customer will be receiving services in locations around the world. We regularly rely on our international offices to support these transactions and assist with local law issues." *Outsourcing*, SKADDEN [HTTPS://WWW.SKADDEN.COM/CAPABILITIES/INDUSTRIES/OUTSOURCING](https://www.skadden.com/capabilities/industries/outsourcing).

61 *Capabilities, Practices, and Industries*, SKADDEN <https://www.skadden.com/capabilities#industries> (last visited Feb. 3, 2022).

tained company car crashed and the corporate defendants refused to provide proper medical care;⁶² and defeating, at least temporarily, suits by consumers who allegedly developed cancer as the result of chemicals in household personal care products.⁶³

But, again, while Kirkland,⁶⁴ Sidley,⁶⁵ Logan,⁶⁶ Baker,⁶⁷ the others named, and similar such firms⁶⁸ are exceptionally successful, they are not

62 See *Fekah v. Baker Hughes Inc.*, 2019 NY Slip Op. 07500 (N.Y. App. Div. Oct. 17, 2019).

63 See Nate Robson and Alaina Lancaster, *Johnson & Johnson Gets Second Talc Defense Win in a Week*, LAW.COM, (Dec. 21, 2019) <https://www.law.com/2019/12/21/johnson-johnson-gets-second-talc-defense-win-in-a-week/>. See also *Johnson & Johnson Secures Victory in St. Louis Baby Powder Trial*, SKADDEN (Jan. 3, 2020) <https://www.skadden.com/about/news-and-rankings/news/2020/01/johnson-johnson-secures-victory-in-st-louis>. (“On behalf of Johnson & Johnson, Skadden secured a defense jury verdict in a Missouri state court case alleging that Johnson’s Baby Powder causes ovarian cancer and seeking up to \$5 billion in damages, including punitive damages.”).

64 Which supports various other undemocratic, anti-humanitarian, and reprehensible causes in other areas of practice not specifically discussed above, in cases including: *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (broadly permitting partisan gerrymandering in elections); *Jesner v. Arab Bank*, 138 S. Ct. 1386 (2018) (finding foreign corporations cannot be held liable under the Alien Tort Statute, even for financing terrorist attacks on civilians); *United States Forest Service v. Cowpasture River Preservation Ass’n*, No. 18-1584 (U.S. Jun. 15, 2020) (allowing private company to build gas pipeline through national forest).

65 Same. See *Florence v. Board of Chosen Freeholders of the County of Burlington*, 132 S. Ct. 1510 (2012) (allowing strip searches of arrestees including inspection of their genitalia at jails regardless of whether they have been suspected of possessing contraband); *Muehler v. Mena*, 544 U.S. 93 (2005) (allowing officers to handcuff and interrogate woman for hours at her home, including about her immigration status, even though she personally was suspected of no crime); *Baker et al. v. Atlantic Richfield Co. et al.*, Nos. 19-3159 & 19-3160 (7th Cir. June 18, 2020) (defending manufacturers who polluted site of public housing complex with lead and arsenic).

66 Same. See *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (making it easier for companies to sell unregulated genetically altered crops).

67 Same. See Brian Baxter, *Baker & McKenzie’s UBS Memo Takes Center Stage at Tax Hearing*, THE AM LAW DAILY (March 4, 2009) <https://amlawdaily.typepad.com/amlawdaily/2009/03/ubs-memo.html> (representing Swiss banks in U.S. Department of Justice investigation of offshore bank accounts).

68 To name only a few other well-regarded private U.S. firms and citing only one recent federal appellate court victory for each, see: *Tomasella et al. v. Nestle et al.*, Nos. 19-1131 & 19-1132 (1st Cir. June 16, 2020) (dismissing unjust enrichment and consumer protection claims against corporations brought by West African children alleging they were subject to forced labor, debt bondage, and kidnapping) (White & Case and Williams & Connolly); *Greene et al. v. Westfield Insurance*, No. 19-2260 (7th Cir. June 25, 2020) (defending insurance company from liability for coverage of claims by residents of neighborhood injured by pollution from recycling plant’s waste) (Fox Rothchild); *Cigar Ass’n of America et al v. United States Food and Drug Admin. et al*, No. 18-5195 (D.C. Cir. July 7, 2020) (blocking consumer safety regulations on tobacco products) (Steptoe &

exceptional to the profession of the private practice of law in the United States. Instead, they are representative of the commercial industry's real function and purpose.⁶⁹

II. PRESENTATION OF THE PRIVATE U.S. LEGAL PROFESSION

Yet, in vanity and for private gain, the profession of law in the United States displays a very different image of itself. The fantastical representation portrays ranks of lawyers, loyal to justice, rising up in courts amidst adversaries on all sides, against menaces to liberty, alone as the public's true advocate and defender at law.⁷⁰

The image is of course false, but the projection and management of the misrepresentation has nonetheless been successful.⁷¹ Unless an observer be a beneficiary both of the civil conspiracy of the license granted to the legal industry and of society's neglect of the great masses, any one person could not be expected to be in a position to assess the nature of legal commerce in the country let alone conclude that its abolition in form would harm only those against whom the profession vows to protect the public.⁷²

Johnson); *Wallace et al v. Grubhub*, Nos. 19-1564 & 19-2156 (7th Cir. Aug. 4, 2020) (binding low-wage employees of digital meal ordering company to private arbitration) (Littler Mendelson); *Lowe v. Lincoln National Life Insurance*, No. 19-6249 (6th Cir. July 21, 2020) (dismissing fraud, consumer, and tort claims by woman alleging corporation concocted a study in order to deny her long-term disability benefits after she suffered a stroke) (Bradley Arant Boult Cummings).

69 "The besetting sin, almost a trade-mark of the lawyers, is avarice. Refusing to share knowledge except for money appears a simple lack of charity, and the esoteric language and exclusiveness of the profession seem a conspiracy to fleece the layman." E.W. Ives, *THE COMMON LAWYERS OF PRE-REFORMATION ENGLAND* 285 (Cambridge Univ. Press 1983).

70 "For these reasons, then, did I pass from the secret places of the heaven's court above, and descend to the lowlands of this mortal earth, that I might, with thee as with my friend and confidant, lay down my sad burden of the accursed vices of men, and with thee determine what answering punishment should be given to such rebellion in crime, in order that the sting of the punishment might be made as great as the scourge of those crimes, and might equal them in retribution." ALANUS DE LILLE, *THE COMPLAINT OF NATURE*, PROSE IV (Douglas M. Moffat trans., Yale 1908) (12th cent.).

71 "For a profession and a public accustomed to hearing (if not as often believing) lawyers' attempts to justify the bar by invoking republican ideas about virtue and the public good, defending lawyers' own private interests was no mean task. In a democratic society concerned in theory with equality, convincing the public of the legitimacy of a self-described learned and educated elite took some doing." Alfred S. Konfsky, *The Legal Profession: From the Revolution to the Civil War*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, VOL. II: THE LONG NINETEENTH CENTURY (1789-1920), 103 (Michael Grossberg et al. eds., Cambridge Univ. Press 2008).

72 From ancient Rome, to Medieval Europe, to the colonization of the Americas,

It must be uncontroversial to propose that the right and basic purpose of a publicly supported system of professionalized legal representation in any nation be the provision of fair legal representation in courts for all and for, if anyone, those most in need. The private practice of law in the United States, however, produces an inverse system. It universally ensures representation for the powerful, seldom for the working classes,⁷³ begrudgingly where it must, tirelessly defending the greatest financial interests, ever expanding, consolidating, and quarrelling in pursuit of commission.⁷⁴

This has not changed despite numerous resolutions by the private bar to alter its practice. The status of the profession cannot improve or at least will not.⁷⁵ The purpose of the private bar and the working lives of its

for-profit lawyering as an enterprise, has frequently been discouraged, disfavored, or even banned. Simply put, permitting the profession to practice as it does now in the U.S. has not been the general rule in the West. *See generally* JAMES A. BRUNDAGE, *MEDIEVAL ORIGINS OF THE LEGAL PROFESSION* (Chi. Univ. Press 2008); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 53 (3d ed. Touchstone 2005). In the 17th century Massachusetts, as in ancient Greece, it was that: “Every man that findeth himself unfit to plead his own cause in any Court shall have Liberty to employ any man against whom the Court doth not except, to help him, Provided he give him no fee or reward for his paines.” *The Liberties of the Massachusetts Collonie in New England* 26 (1641), in *AMERICAN HISTORICAL DOCUMENTS, 1000–1904* (P.F. COLLIER & SON CO. 1909-14).

73 As example, the profession rightly denounces federal authorities’ abuses of the human rights of immigrants. However, even in the most critical legal proceedings and even for these individuals agreed to be among those most in need of assistance, the majority remain unrepresented by counsel. *See, Transactional Records Access Clearinghouse, State and County Details on Deportation Proceedings in Immigration Court by Hearing Location and Attendance, Representation, Nationality, Custody, Month and Year of NTA, Outcome, and Current Status*, SYRACUSE UNIV., <https://trac.syr.edu/phptools/immigration/nta/> (last visited Feb. 4, 2022). Immigrants represented by counsel are much more likely to find relief. *See, e.g.,* THE NEED FOR ACCESS TO COUNSEL IN IMMIGRATION PROCEEDINGS IN NEW YORK, 2019 N.Y. STATE BAR ASS’N, SPECIAL COMM.ON IMMIGR. REPRESENTATION 9-15 (2019) <https://nysba.org/app/uploads/2020/02/Resolution-as-Approved-by-the-House-of-Delegates-on-June-15-2019.pdf>.

74 Simony in the context of civil law may be thought of bribery and the “prostitution of a public trust for private gain.” *United States v. Forsythe*, 429 F. Supp. 715, 721 (W.D. Penn. 1977).

75 “[A] certain prebendary, named Gedeon, a vain and worldly man, was attacked by a grievous sickness; and causing himself to be carried in his bed to the holy man, he and all those present besought him with tears to make the sign of the Cross over him. But the holy man replied: ‘Thou hast lived until now according to the desires of the flesh, nor hast thou ever feared the judgments of God; wherefore, then wouldst thou have me sign thee with the sign of the Cross? Nevertheless, because of the devout prayers of these who intercede for thee, I will sign thee with the Cross in the Name of the Lord. But know this, that if, after thou shalt be delivered, thou return to thy evil ways, thou shalt suffer far greater torments than these.’ He signed him, therefore, with the Cross: and immediately he, whose limbs had been all contracted, arose in perfect health, and breaking forth into the praises of God,

professionals is to provide representation where the opportunity for profit is greatest, not where the call for justice is greatest, or even merely where the demand for skilled legal assistance is most concentrated.⁷⁶

Still, the private profession stridently and even at times perhaps earnestly encourages a hope the practice is at its heart other than what it is. The argument, which is without evidence, is based on a conclusion drawn from the opinion that inevitably by charity a right ordering of society will be produced and on a plain factual misunderstanding of the private practice of law in the United States.

The private bar has not even begun to reconcile its rhetoric with its transgressions against the poor and working classes, almost all of whom it either opposes or ignores,⁷⁷ let alone renounce the sins of its station.⁷⁸ However, it is quite sensitive to the possibility the public may perceive that it may not be what it says it is and that there may come a time when it becomes apparent, in an instant, that it can make no claim to the legitimacy at which it grasps.⁷⁹

he cried: 'I am free;' and at the same instant his bones seemed to crack, as when dry wood is broken by the hand, and that sound was heard by all present. But after a short time had passed, he forgot God, and returned again to his sins." ST. BONAVENTURE, *THE LIFE OF SAINT FRANCIS OF ASSISI* 90 (Cardinal Henry Edward Manning ed., circa 1867) (Tran. 2010) (1263).

76 This is not to suggest an economic marketplace in legal relations exists, could exist, or if possible should.

77 For example, one state court administration survey found that most members of the working classes and poor "for critical types of cases: evictions; domestic violence; child custody; guardianship; visitation; support; and paternity" were not represented by an attorney. SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES, 2005 N.Y. STATE UNIFIED COURT SYSTEM'S OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, (2005) http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/AJJI_SelfRep06.pdf. "[A] large proportion of the respondents were in the lower-income brackets." *Id.* at 8. "During the past fifteen years, a number of studies have examined pro se ('self-represented') litigants and the causes of pro se litigation. In general, these studies have highlighted the increase in self-represented litigation nationwide and observed that self-representation is likely to be a major feature of litigation in courts over the long-term." *Id.* at 1 (internal citations omitted). New York has more lawyers than any other state in the country. See PROFILE OF THE LEGAL PROFESSION 2020, *supra* note 20.

78 I will attend a Red Mass when it is a penance service.

79 "Marcus: A law of the Twelve Tables orders that a dead person shall neither be buried nor burned within the city Atticus: How is it, that, notwithstanding this law of the Twelve Tables, so many of our great men have been buried in the city?" MARCUS TULLIUS CICERO, *DE LEGIBUS*, BOOK II, 455 (Charles Duke Yonge, trans., H.G Bohn 1853) (1st cent. BCE). Marcus and Atticus are discussing here Section 1 of Table X of the Law of the Twelve Tables of ancient Rome. The section referenced reads: "A dead person shall not be buried or burned in the city." ALLAN CHESTER JOHNSON ET AL., *ANCIENT ROMAN STATUTES: A TRANSLATION WITH INTRODUCTION, COMMENTARY, GLOSSARY, AND INDEX* (Clyde Pharr et

A. Public Suspicion of the Private Legal Profession

Before reviewing examples of how individual firms endeavor to tailor the industry's frame of the bar to each's own commercial ambitions, it may be helpful to pause to cite proof that the public's suspicion of the practice's legitimacy is a sentiment the industry is aware of and to which it has taken pains to respond.

The American Bar Association, the largest voluntary membership organization of attorneys in the country, and generally well-meaning, produced a study at the beginning of the century titled *Public Perceptions of Lawyers*.⁸⁰ The report is surprisingly candid about the responses received, despite their accuracy. At the same time, the firm that compiled the report is undisturbed from the worldview it shares with the bar and assures lawyers the public can be appeased with time and tact. This should be dealt with, the report seems to say, but there is no need for alarm.⁸¹

The report on the public's view of U.S. lawyers found: "Americans are ...uncomfortable with the connections that lawyers have with politics, the judiciary, government, big business, and law enforcement;" "Bar associations are not viewed as protectors of the public or the public interest, but as clubs to protect lawyers;"⁸² Further, "[t]he American public says that lawyers are greedy; lawyers are manipulative; lawyers are corrupt; and that the legal profession does a poor job of policing itself."⁸³ In sum, "the legal profession is among the least reputed institutions in American society."⁸⁴

Nevertheless, the report comforts U.S. lawyers, telling them they are essential "in preserving our democracy and the American way of life" and suggesting a "dissatisfied" public is simply misinformed and could be won over if the bar would only better "communicate" its indispensability and best intentions.⁸⁵

Similarly, in another earlier study commissioned by the Ameri-

al. eds., Univ. of Tex. Press 1961) (5th cent. BCE).

80 PUBLIC PERCEPTIONS OF LAWYERS, CONSUMER RESEARCH FINDINGS, A.B.A. SECTION OF LITIGATION, (2002) https://www.americanbar.org/content/dam/aba/administrative/market_research/public_perception_of_lawyers_2002.pdf.

81 The firm which compiled the study, now named Shapiro+Raj, is a polling and marketing firm. *About Us*, SHAPIRO+RAJ [HTTPS://WWW.SHAPIRO+RAJ.COM/ABOUT-US](https://www.shapiro+raj.com/about-us) (last visited Feb. 4, 2022).

82 PUBLIC PERCEPTIONS OF LAWYERS, *supra* note 80 at 4-5.

83 *Id.* at 6.

84 *Id.*

85 *Id.* at Forward.

can Bar Association on the same subject,⁸⁶ compiled by a research firm,⁸⁷ concedes there is “room for improvement” by the legal industry in public relations.⁸⁸ However, the issue is addressed again only as one of perception and warranting of correction by lawyers only in order to raise public “confidence” in the profession and produce a more pliable population.⁸⁹ The bar should “work to improve people’s perceptions of lawyers, which vary based on their own experiences. . . . [L]awyers are often perceived to be more concerned about their own interest than the public’s or the clients.”⁹⁰ Without conceding the fact, the study notes: “A substantial number of people believe that the justice system treats different groups of people unequally.”⁹¹ The conclusion of the report, while somewhat obtuse, is true in substance: “It is clear from people’s lack of confidence in the profession and their questioning of lawyers’ motives and efforts that some public relations is in order. Importantly, many people seem to think that the legal profession should have some altruistic or civil servant aspects to it. They believe lawyers should have in mind the welfare not only of their clients but also of the public.”⁹²

Other professional associations for lawyers also enthusiastically attempt to present their members as the advocates, civil servants, and defenders of the common good the public expresses it wishes them to be. As the New York State Bar Association proclaims: “As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to promote access to the legal system and the administration of justice.”⁹³ Among the priorities of the State Bar of California are to create “an agency focused on public protection, regulating the legal profession, and promoting access to justice” that will support “access to legal services for low- and moderate-income Californians and promote policies and programs to eliminate bias and promote an inclusive environment in the legal system and for the public it serves.”⁹⁴ The Florida Bar similarly seeks to “ensure the judicial sys-

86 PERCEPTIONS OF THE U.S. JUSTICE SYSTEM, A.B.A. (1999) https://www.americanbar.org/content/dam/aba/administrative/market_research/perceptions_of_justice_system_1999_1st_half.pdf; https://www.americanbar.org/content/dam/aba/administrative/market_research/perceptions_of_justice_system_1999_2nd_half.pdf.

87 M/A/R/C Research, <https://www.marcresearch.com/>.

88 *Perceptions of the U.S. Justice System*, *supra* note 86 at 12.

89 *Id.* at 13.

90 *Id.* at 12.

91 *Id.*

92 *Id.* at 70.

93 New York Rules of Prof. Conduct 3 (2009).

94 2017-2022 STRATEGIC PLAN 2, THE STATE BAR OF CAL 5 (2020). Yet, “most low-

tem, a coequal branch of government, is fair, impartial, adequately funded and open to all” and to “strive for equal access to and availability of legal system,” all while being mindful to “enhance the legal profession and the public’s trust and confidence in attorneys and the justice system.”⁹⁵ The State Bar of Texas, for its part, “is committed to ensuring that all Texans, regardless of income, have access to our courts.”⁹⁶ Among its priorities as the voice of lawyers in the state are “service to the public,” “protection of the public,” and “access to justice.”⁹⁷ As the executive director of this state bar wrote, “it is the oath we take as lawyers, and the right to access to justice that we defend every day, that make our profession different from all others.”⁹⁸

B. Self-Presentation of the Private Legal Profession

Lawyers’ true beliefs concerning the morality of their work is neither knowable nor so interesting as to attempt to determinatively ascertain.⁹⁹ The practice each individual and the profession as a whole performs, however, is a point of fact for which the private bar must be made to account. The alienable patrimony, granted by the public, to operate as an industry is mistakenly conferred if the reason for the grant is premised not on the work the bar actually does but on lawyers’ self-portrayal. The real character of the practice will be at center in considering alternative models to the present system of legal representation in the United States.

income Californians do not receive the legal help they need For those low-income Californians who did receive legal assistance, the services most often amounted to one-time help, rather than ongoing legal representation. One-time help included legal advice, assistance filling out documents, or referrals to legal information online.” KELLY JARVIS ET AL., SARGENT SHRIVER CIVIL COUNSEL ACT EVALUATION 6 (2020) <https://www.courts.ca.gov/documents/Shriver-20200326-Materials.pdf>.

95 THE 2019-22 STRATEGIC PLAN FOR THE FLORIDA BAR, THE FLA. BAR, 2-4 (2019) <https://www-media.floridabar.org/uploads/2019/05/TFB-2019-22-Strategic-Plan-Final.pdf>

96 ANNUAL REPORT 2018-2019, STATE BAR OF TEX., 3 (2019) https://www.texasbar.com/Content/NavigationMenu/NewsandPublications/Annual_Report2/2018-2019Annual-Report.pdf.

97 *Id.* at 4.

98 *Id.* at untitled introduction.

99 “Business lawyers liked to strike libertarian attitudes, comparing their jobs with the heroic role of the criminal defense lawyer who protects the liberty of the individual against the overreaching state. But in fact what most business clients wanted lawyers to get from the state were favors: concessions, franchises, tax exemptions, subsidies, regulatory loopholes, monopoly rights, and public works contracts.” Robert W. Gordon, *The American Legal Profession, 1870-2000*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA*, VOL. III. THE TWENTIETH CENTURY AND AFTER (1920 -) 95 (Michael Grossberg et al. eds., Cambridge Univ. Press 2008).

Individual cases of the private industry's presentation of itself to the public will be taken up now. The denial and deceit of the bar concerning its legal representation need not be wrestled with other than to be rejected as false if characterized as other than what it has been documented to be. Examples, chosen because they are illustrative and unexceptional, include, among others, the private firms whose work was reviewed in the preceding section of this paper.¹⁰⁰

For instance, and to begin, at Baker & McKenzie, the lawyers at this private corporate law firm "are proud to leverage our talent, innovation and relationships to make a positive and sustainable societal impact for our clients, our people and the world. We are global citizens and recognize that the rule of law is an essential foundation for economic growth and development."¹⁰¹ Kirkland & Ellis, another named for-profit private law firm, frames the societal function of its lawyers in a similar way: "We are committed to advancing the communities in which we live and work, and we dedicate substantial energy, talent and resources to meaningful causes and initiatives that reflect our values and vision. For us, it's simple. We have a responsibility to make a difference and to help our communities succeed."¹⁰² At Latham & Watkins, "lawyers and professional staff performed approximately 225,000 hours of pro bono work in 2019 and approximately 3.7 million hours between 2000-2019, valued at more than US\$1.8 billion."¹⁰³ The firm's "fundraising efforts for D.C.'s Children's Law Center (CLC) in 2019 has once again earned the firm recognition as a Champion for Children, which recognizes the generosity of law firms and corporations whose total 2019 annual giving to Children's Law Center exceeded that of their peers."¹⁰⁴ The lawyers at the law firm of Hogan Lovells, too, "give back to our communities" through their pro bono and community service work.¹⁰⁵ Sidley Austin's advocates volunteered to reduce infant mortality in Vietnam.¹⁰⁶ Skadden Arps is renowned for sponsoring many leading pub-

100 See *supra* Sec. I.

101 *About Us*, BAKER & MCKENZIE, <https://www.bakermckenzie.com/en/aboutus> (last visited Feb. 4, 2022).

102 *Social Commitment*, KIRKLAND & ELLIS, <https://www.kirkland.com/social-commitment> (last visited Feb. 4, 2022).

103 *About Us*, LATHAM & WATKINS, <https://www.lw.com/AboutUs> (last visited Feb. 4, 2022).

104 *Latham Honored as 2019 Champion for Children*, LATHAM & WATKINS (March 26, 2020) <https://www.lw.com/awards/2019-champion-for-children>.

105 *About Us, Our Values*, HOGAN LOVELLS, <https://www.hoganlovells.com/en/about-us/our-values> (last visited Feb. 4, 2022).

106 *Going the Extra Mile: Sidley Team Cycles Across Vietnam to Help Save New-*

lic interest legal programs and causes.¹⁰⁷ Skadden believes “not only in a lawyer’s social responsibility, but that we all benefit when the legal system is accessible to everyone. Those views continue to thrive at Skadden, where we have dedicated nearly 2 million hours to pro bono over the last 10 years alone.”¹⁰⁸

Relentless statements issued on behalf of coalitions and committees of lawyers and law firms tending to characterize the private bar collectively as the ultimate protector of the common good are unending.¹⁰⁹ Individual law firms are never reluctant to wear make-work honors.¹¹⁰

borns, SIDLEY AUSTIN,

<https://www.sidley.com/en/us/ourstory/ourstorieslanding/going-the-extra-mile/> (last visited Feb. 4, 2022). (“It was humbling to see first-hand how we can play a small part in helping Newborns Vietnam and all the medical professionals who have achieved so much through selfless dedication,” said [Allan] Wardrop [partner in Sidley’s Hong Kong office]. “Building deep bonds with key clients across the region, while at the same time making a difference, was a priceless opportunity, and we look forward to once again joining forces with our clients next year to, hopefully, raise even more money.”).

107 See *About, Pro Bono*, SKADDEN, <https://www.skadden.com/about/pro-bono/overview> (last visited Feb. 4, 2022).

108 *Id.*

109 For example, a group of more than one hundred private law firms calling themselves the Law Firm Antiracism Alliance declared in July 2020: “Lawyers and law firms are uniquely positioned to analyze and advocate to change laws and policies that encourage, perpetuate or allow racial injustice. Many legal services organizations have spent decades working to dismantle systemic racism, and the private bar has historically been involved in serving underrepresented communities and individuals, supporting entities that serve those communities and advancing civil rights causes primarily through law firm pro bono programs.” LAW FIRM ANTIRACISM ALLIANCE (“LFAA”), <https://www.povertylaw.org/wp-content/uploads/2020/07/law-firm-antiracism-alliance.pdf>. The vast majority of lawyers in the United States, more than 85 percent, are white. PROFILE OF THE LEGAL PROFESSION, A.B.A. MEDIA RELATIONS & STRATEGIC COMM. DIV. 33-34 (2020).

110 See, e.g., *King & Spalding’s Chicago Office Again Named to Public Interest Law Initiative’s Pro Bono Recognition Roster*, KING & SPALDING, (June 17, 2020) <https://www.kslaw.com/news-and-insights/king-spaldings-chicago-office-again-named-to-public-interest-law-initiatives-pro-bono-recognition-roster> (“King & Spalding’s Chicago office has earned a spot on the Public Interest Law Initiative’s annual ‘Pro Bono Recognition Roster’ in recognition of its strong dedication to pro bono work. This is the third consecutive year since its founding in September 2017 that the office has been recognized by PILI for its lawyers’ high level of involvement in providing ‘inspiring and life-changing’ free legal services to those in need.”); *Winston & Strawn Files Amicus Brief to Support Adoption of Equal Rights Amendment*, WINSTON & STRAWN, (July 1, 2020) <https://www.winston.com/en/thought-leadership/winston-and-strawn-files-amicus-brief-to-support-adoption-of-equal-rights-amendment.html> (“Winston & Strawn is a proud and active supporter of the Equal Rights Amendment and the modern effort to make it part of the U.S. Constitution. Winston’s involvement began in 2017, as the firm joined the revived campaign for ratification in Illinois. Winston has hosted events, coordinated activists, published legal research,

These sentiments are echoed by U.S. law schools, including the most elite,¹¹¹ which train students who graduate to often practice in the same areas

led webinars, submitted witness slips, and testified at a legislative hearing. After the state's historic ratification in 2018, Winston joined the national ERA Coalition as a Lead Organization—the first law firm to do so. The firm was part of the effort to secure ratification in Virginia and remains actively engaged in support of additional ratification campaigns and full adoption to the U.S. Constitution.”). Yet, Winston & Strawn was co-counsel for the successful petitioner in the landmark U.S. Supreme Court ruling that helped advance the movement to crush public sector labor unions. *See Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018). *What happens to a dream deferred?*, ORRICK HERRINGTON & SUTCLIFFE, <https://www.orrick.com/en/Reflections-On-Where-We-Stand> (“Change starts at home, and we have work to do. As lawyers and legal professionals, we have a heightened duty. We took an oath – and with it comes professional responsibility to stand up and fight for racial and social justice. Orrick will be devoting greater resources to pro bono civil rights and social justice matters, including opportunities for our staff to participate through Orrick Cares. To start, we will launch the Orrick Racial Justice Fellowship Program to enable at least five Orrick lawyers to devote a year each to working on civil rights and social justice issues.”); *Florida's Small Businesses Still Need Pro Bono Counsel: As the SBA resumes emergency funding programs, attorneys can help small businesses navigate the process*, BOIES SCHILLER FLEXNER, <https://www.law.com/dailybusinessreview/2020/06/19/floridas-small-businesses-still-need-pro-bono-counsel/> (“One small business owner who owned a food truck could not get her bank to return her phone calls. Evident of the lack of clear guidance, she was told that, as a sole proprietor, she would not be eligible for relief when indeed she was. More than legal advice, she needed someone to tell her that it was going to be OK, that none of this was her fault, and that we are going to get through this together.”),

Ice Miller Welcomes Diane Menashe, Director of Litigation Training and Pro Bono Activities, ICE MILLER, (Jan. 28, 2020) <https://www.icemiller.com/ice-on-fire-insights/press-releases/ice-miller-welcomes-diane-menashe,-director-of-lit/>; (“At Ice Miller, we strive to not only provide pro-bono opportunities as professional development for our attorneys, but also as an opportunity to be more fully involved in the community. We work to ensure access to justice for all”.);

DLA Piper partner Kenneth Schmetterer to receive pro bono award from Chicago Bar Foundation, DLA PIPER, (July 7, 2020) https://www.dlapiper.com/en/us/news/2020/07/kenneth-schmetterer-receives-pro-bono-award-from-chicago-bar-foundation/?_lsrc=f0f61bf2-1e8f-4ae5-8600-01ed9f43ba06 (“In addition to his juvenile justice work, Ken is always willing to mentor associates in their pro bono matters, and recently was involved in a case that cleared the way for the opening of a homeless assistance program in the Chicago suburbs. His commitment, dedication and generosity have had a remarkable impact. Ken is the best example of what it means to serve in our profession. He truly makes a difference for his clients and for our community.”). This law firm at the time of the announcement was defending an international hotel chain against claims of sex trafficking. *See A. B. v. Marriott Int'l, Inc.*, No. 2:19-cv-05770 (E.D. Penn). A passing question: How can one class believe it has justly earned its privileged position in society while simultaneously believing, or at least saying, the unprivileged majority has unjustly been assigned its station?

111 For instance, Yale Law School. “Yale Law School’s tradition of emphasizing public as well as private law proved ever more prescient as events of the 20th century increased the role of public affairs in the life of the law. Yale graduates found themselves

of law for the same category of client at the same set of private firms, for profit. The promises of law schools to nurture law students over a period of years through a practicum that will produce champions of righteousness are not based in fact, and are frequently done by conflating public service with dominance over all of the earth.¹¹² Again, most graduates of law school who go on to practice law will work as relatively well-paid lawyers for commercial profit at private law firms defending the power and capital of corporations and financial interests over and against the poor and great masses of people in need of legal aid.¹¹³

uniquely well prepared to play important roles in the rise of the administrative state, the internationalization following the world wars, and the domestic civil rights movement. In the 1950s and 1960s, the School became renowned as a center of constitutional law, taxation, commercial law, international law, antitrust, and law and economics. In recent decades, the pace of curricular innovation has, if anything, quickened, as the School has developed new strengths in such fields as comparative constitutional law, corporate finance, environmental law, gender studies, international human rights, and legal history, as well as an array of clinical programs taught by a clinical faculty of exceptional breadth and devotion.” *Our History, Emphasis on Public Law*, YALE L. SCHOOL <https://law.yale.edu/about-yale-law-school/glance/our-history>. “This is a school where ideas are the coin of the realm, where theory is taught at the highest level and our clinics do work of an unrivaled scope and ambition. Our practical engagement informs our theoretical commitments and our theoretical commitments, in turn, inform our practical engagement.” *Bulletin of Yale Law School, A Message from the Dean*, YALE L. SCHOOL 18, (Aug. 10, 2020) <https://bulletin.yale.edu/sites/default/files/yale-law-school-2020-2021.pdf>. “We want you to think of Yale not just as the place you received your legal education, but as one of the places where you found your moral compass.” *Harold Hongju Koh, Yale Sterling Professor of International Law and Former Dean*, YALE L. SCHOOL <https://law.yale.edu/student-life/career-development/alumni>. Professor Koh is a former lawyer for the U.S. State Department, where he defended drone warfare and extrajudicial killings. *See, e.g.,* Jess Bravin, *State Department’s Top Lawyer Heading Out*, WALL STREET JOURNAL, (Dec. 7, 2012) <https://blogs.wsj.com/law/2012/12/07/state-departments-top-lawyer-heading-out/>; Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIOJURIS, (May 19, 2011) <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>.

112 Ambitious execution of devise in pursuit of power, control, ownership, or social advancement can often be misunderstood as self-sacrifice.

113 Although seemingly to a notably lesser degree, this trend appears to hold even at the nation’s most elite law schools, which are far better able than other law schools to place graduates in prestigious academic, public interest, and government service careers, including in clerkships and, it is hoped, judgeships. *See Graduate Employment Outcomes*, STANFORD L. SCHOOL <https://law.stanford.edu/careers/employment-outcomes/graduate-employment-outcomes/#slsnav-overview> (showing the majority of graduates take positions at law firms, particularly large law firms, and in business); , *Recent Employment Data*, HARV. L. SCHOOL <https://hls.harvard.edu/dept/ocs/recent-employment-data/>. *But see, 10th Year Survey Results, Class of 2009*, YALE L. SCHOOL https://law.yale.edu/sites/default/files/area/departments/cdo/document/10th_year_class_of_2009_for_web_.pdf. This survey showed

The damage of the success of the self-presentation of the private legal profession leaves the public with a political choice. It can accept the failed solutions presented by the private bar. Or, as might be suggested, implement a new model for legal advocacy not built on the favors of economic conquest and reward.¹¹⁴

III. MISREPRESENTATIONS OF THE PRIVATE U.S. LEGAL PROFESSION

Despite public suspicion of the private legal profession's posturing, the United States has relented to the bar's self-justifying presentation of itself as vindicator of equality and justice before law. The practice of private lawyers remains tolerated on the basis of acquiescence to this claim. The damage of accepting the commercial practice of law on the premise it performs any necessary let alone charitable service for society, where another form of legal governance could stand in its place is, therefore, real and continues.

A. Irreconcilability the Private Legal Profession's Self-Presentation and Real Representation

And this is the great trick of the professional legal estate. The private bar has agreed to assume the duty of performing legal representation in the public interest and acknowledges its assumption of the duty. However, at the same time, it universally breaches that duty while objecting it has not done so, and that, if it has done so, it has done so reparably and only very slightly. The bar then claims that if it is causing any harm by its breach of duty, while not conceding it has, this harm can be remedied by the profession itself and without political intervention. Challenged with conclusive evidence of the damage it causes, the bar produces remedies and narratives about the efficacy of these remedies that make whole and preserve only the profession itself.¹¹⁵

that ten years after graduation a plurality, but not a majority, of graduates worked at private firms and in business. However, it is not clear if and to what extent practicing lawyers from these elite law schools enter for-profit legal practice as the surveys do not distinguish among graduates who are full-time practicing lawyers and graduates working elsewhere in roles as judges, elected officials, administrative officers, etc.

114 For centuries, many a scholar and saint have "disapproved of advocates and legal advisers who took fees. Either a case was just or it was unjust, he reasoned. If it was just, they should provide their services free of charge; if it was unjust, they should not involve themselves with it at all." JAMES A. BRUNDAGE, *MEDIEVAL ORIGINS OF THE LEGAL PROFESSION* 195 (Chi. Univ. Press 2008).

115 "When it came to defending the ethical standards associated with zealous advocacy, the bar had only a few intellectual choices. It could admit that zealous advocacy was

The private practice of law, where it does allow that the commodification of professionalized legal representation may be catastrophic to the rights of the poor and working classes, takes the view that the problem while unfortunate is a separate question from any concerning the power of its members. If only there were a skilled set of legal officers with the training to aid those in need, if only the interests opposed to the unfortunate were not universally assisted in their victories at law.¹¹⁶

The pride that private attorneys nevertheless take in their practice is distasteful to any outside the profession and repulsive to all who have studied their trade. These lawyers often proclaim their admiration for the law and, worse, their love of it.¹¹⁷ This is a love of a courtly way of life and of a corresponding ordering of society. It is a love of palaces of formality, gossip, and flattery; the love of being presented and received.¹¹⁸

What is not the object of lawyers' love is love of the poor and love of those resistant to the arrangements of privileges of this age. The present function of private lawyers in this country is to politely give exposition to the present state of class and power relations.¹¹⁹

Lawyers also enjoy praising in speeches and papers the procedure

for private interest or gain. Or it could try to convince the public that zealous advocacy was yet another selfless act by lawyers serving their communities; that what lawyers were doing was consistent with republican virtue because lawyers were not acting in their own behalf, but selflessly for others; that the nature of legal representation had changed as society changed; and that lawyers were still meeting the needs of a public they had always served. Much of the anti-lawyer sentiment sought to strip away the veil of the public-spirited rationale of lawyers. The bar, attuned to the critique, tried to secure its place in society by reassuring its members that it was doing society's work and carving out ethical prescriptions to meet its needs." Konfsky, *supra* note 27, at 103.

116 "Among the evils of the times were the informers and their instigators, who had enjoyed a long standing license. After these had been soundly beaten in the Forum with scourges and cudgels, and finally led in procession across the arena of the amphitheatre, he [Emperor Titus, deified for his public acts of charity] had some of them put up and sold, and others deported to the wildest of the islands." SUTONIUS, *TWELVE CAESARS, THE LIFE OF TITUS*, Sec. 8 (J.C. Rolfe trans., Heinemann 1913-14) (121).

117 As if botanists enraptured by the exquisiteness of some rare species.

118 "The 'certainty of the law' became, and continued to be, the certainty of social order" during the rule of Napoleon. MANLIO BELLOMO, *THE COMMON LEGAL PAST OF EUROPE, 1000-1800*, 8 (Catholic Univ. Press 1995).

119 "[I]t must consequently be in their power, whenever they are pleased to show their disesteem of the government, to prevent the advancement of any sum of money for the public service. And this experiment may be a trial of their skill, to let us see what they are able to do, if the city does not take care to oblige them by choosing magistrates or representatives to their mind or out of their party." DANIEL DEFOE, *THE VILLAINY OF STOCK-JOBBER DETECTED: AND THE CAUSES OF THE LATE RUN UPON THE BANK AND BANKERS DISCOVERED AND CONSIDERED* 15 (London 1701).

and process of the law they practice. This is simply an opportunity for lawyers to commend themselves for their foreknowledge of particular legal rules and their unremarkable physical presence during the happening of co-occurring judicial events.¹²⁰ Lawyers' love of law above all is a love of the gentility of their station.¹²¹ Again, the public need not any longer tolerate a profession so ordered.¹²²

B. Incredibility of the Private Legal Profession's Preferred Reforms

The U.S. private legal profession offers a number of defenses and solutions to the problem of the present regime of privatized commercial law. They are generally given together in response to criticism or inquiry, never expounded upon or accounted for. They need not be. Those able to profit from a private attorney's services have no general objection to the present legal order, as they are its beneficiaries and have great utility for the paid advocates of the profession.¹²³

The remedies suggested by the private bar to solve the problem of its despoliation of the public trust include professional self-regulation of the practice and voluntary pro bono legal representation for the poor. These remedies leave the people nearly nothing yet remain evangelized by the bar without examination of the remedies repeated.¹²⁴

120 "[W]hat can be so insignificant as the office of those men who are consulted as advocates . . ." MARCUS TULLIUS CICERO, *DE LEGIBUS*, BOOK I, 404 (Charles Duke Yonge trans., H.G Bohn 1853) (1st cent. BCE).

121 "Law became a much sought-after occupation during the long twelfth century as it became increasingly obvious that legal training often led to positions of power in the church and in royal government. Aside from the fortunate few upon whom the accidents of birth bestowed entitlement to wealth and authority, trained lawyers had surer access than did other men to the power and perquisites that went with influential positions." JAMES A. BRUNDAGE, *MEDIEVAL ORIGINS OF THE LEGAL PROFESSION* 166 (Chi. Univ. Press 2008).

122 "It has become increasingly evident that some advocates have preferred enormous and illicit profits to their own reputation It is Our pleasure, therefore, that all those persons who persist in such criminal perversity shall be completely excluded from this profession." CODE THEOD. 2.10.3 (Clyde Pharr trans., Princeton Univ. Press 1952) (5th cent.).

123 "Perhaps the reason is that where all are defiled the filthiness of one attracts no special attention. What avaricious man, for instance, what libertine was ever ashamed of another avaricious man, or another libertine?" ST. BERNARD OF CLAIRVAUX, *TREATISE ON CONSIDERATION* 28-29 (Mount Melleray Abbey trans., Browne & Nolan circa 1921) (12th cent.).

124 "[T]he formal institutions and organizations through which associations of lawyers seek and exercise state authority to regulate training and admission to their guilds, to enforce their rules against members, and to protect their privileges against outsiders" is "ineffectual to police any but the most egregious misconduct of non-elite practitioners." Gordon, *supra* note 99, at 73-74.

The first remedy the private bar proposes is that the for-profit practice be operated in the public interest through mechanisms of professional self-regulation and management. Harmony will be achieved within the tiers of courts in this way, it is argued, and upon oaths made in the presence of society and state. But progress by public nonintervention and deference to the supposed honor of advocates cannot be taken seriously. This proposal's claim has never been true.¹²⁵

An anecdote for the scandalized and incredulous. Only a few years ago, a national news magazine launched an investigation upon suspecting the private legal profession on the whole to be irredeemably corrupt. The results of the investigation were startling but not unexpected. The report seemed to show a vast majority of private lawyers surveyed in the report were allegedly open to offer legal assistance in service of flagrantly suspect financial transactions.¹²⁶ Summarizing the news investigation:

To prove our point, we went undercover and approached 13 New York law firms. We deliberately posed as someone designed to raise red flags for money laundering. We said we were advising an African minister who had accumulated millions of dollars, and we wanted to buy a Gulfstream Jet, a brownstone and a yacht. We said we needed to get the money into the U.S. without detection. To be clear, the meetings with the lawyers were all preliminary. None of the law firms took our investigator on as a client, and no money was moved. Nonetheless, the results were shocking; all but one of the lawyers had suggestions on how to move the funds. . . . Only one of the lawyers refused to speak to us at all.¹²⁷

In the end:

Aside from that one exception, 12 out of the 13 law firms, including 15 out of the 16 lawyers, not only heard [the inves-

125 See generally Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1174 (2009) ("The persistence of this self-regulation paradigm has adverse effects on state supreme courts, trial courts supervising litigation, bar regulators, lawyers, and laypersons dealing with, or observing, the bar.").

126 See Steve Kroft, *Anonymous Inc.*, CBS NEWS (Jan. 31, 2016) <https://www.cbsnews.com/news/anonymous-inc-60-minutes-steve-kroft-investigation/>; Louise Story, *Report Describes Lawyers' Advice on Moving Suspect Funds Into U.S.*, N.Y. TIMES (Jan. 31, 2016) <https://www.nytimes.com/2016/02/01/us/report-describes-lawyers-advice-on-moving-suspect-funds-into-us.html>; *Lowering the Bar*, GLOBAL WITNESS, (Feb. 1, 2016) <https://www.globalwitness.org/en/reports/loweringthebar/>; *Undercover in New York*, GLOBAL WITNESS (Jan. 31, 2016) <https://www.globalwitness.org/shadyinc/>.

127 *Undercover in New York*, *supra* note 126.

tigator posing as a representative of the foreign state minister] out, they suggested ways that the suspicious funds could be moved into the U.S. without compromising the minister's identity.¹²⁸

One of the private lawyers who did speak with the undercover investigator was the then-president of the American Bar Association.¹²⁹

From this scandal, the sole response professional self-regulation could offer was to publicly scold with censure one of the lawyers who had "suggested that the minister could move his money out of West Africa to Europe, where it could be 'scrubbed' in an anonymous corporate entity that his firm would be happy to set up."¹³⁰ That is all.¹³¹

Additional examples of the failure of professional self-regulation as a solution to its damage to the welfare of society are innumerable. To mention only a pair of examples, there is the lawyer who allegedly allowed his client to be detained in jail without legal justification for more than a year who then was suspended from practice for a period of only six months;¹³² as well as the lawyer suspended from practice for the length of one year for allegedly filming with a hidden camera a woman changing in the restroom at his law office.¹³³

But the point here cannot be allowed to be misdirected by the private bar. These are not cases of rogue lawyers or of lax enforcement.¹³⁴ This is the functioning of private lawyers regulating themselves and the laws that regulate themselves. The final indictment of the failure of professional self-regulation of the private legal industry is not individual scandals but the actuality that the supposed solution has permitted and perpetuated the legal profession as it is presently in place.

The second remedy the private bar commonly proposes as a pre-

128 Kroft, *supra* note 126.

129 *Undercover in New York*, *supra* note 126.

130 Kroft, *supra* note 125.

131 See *In Matter of Koplik*, 168 A.D. 3d. 163 (N.Y. App. Div. Jan. 19, 2019) (per curiam) See also Marc C. Koplik, *Managing Partner*, HENDERSON & KOPLIK LLP <http://www.kopliklaw.com/marc-s-koplik>.

132 See *Board v. Anderson*, No. 17-0896, *9-10 (W. Va. March 20, 2019) (technically, a sixty-day suspension with sixty days of supervised probation, as well as other crushing sanctions, including the imposition of taking an additional "six hours of continuing legal education in the area of criminal law").

133 See *In re Wiegand*, No. 2019-B-0170 (La. April 8, 2019) (per curiam) (reciprocal disciplinary proceeding).

134 In the modern age of professional legal practice "high-end lawyers almost entirely escaped the notice of disciplinary committees, whose mission seemed increasingly to scapegoat low-end lawyers for the ethical failings of the profession." Gordon, *supra* note 99, at 82.

scription to the otherwise exclusivity of access to assistance by licensed attorneys in the United States is pro bono legal representation. With this solution, the bar insists that whatever systemic deficiency of service in the legal industry may exist, it can be met by the marshalling of republican-minded lawyers volunteering to take up the cause of the less fortunate.

But this remedy, pro bono legal representation, is a promise without obligation, and a service without mandate,¹³⁵ accomplishing little other than existing as an offering to be named in defense and praise of the private bar. The actual availability of pro bono service is rarely acknowledged.¹³⁶

Proponents of pro bono representation as any kind of real solution to the scandal of the private professionalized law, whatever their thinking, naive or crass, herald its good tidings of legal blessing upon otherwise unrepresented litigants unable to hire a lawyer for themselves.¹³⁷ Pro bono representation is both materially insignificant and philosophically objectionable as it proactively silences cries for progress. Yet the bar carries on claiming to offer a service it does not, praising that said service, and rewarding its members for their ministry to the service. The misrepresentations benefit all except those to whom aid has said to have been rendered.¹³⁸

The private bar's representation of the system of pro bono services if it is to be quantified in any way is false. With noteworthy exceptions, coordinated campaigns for private pro bono legal representation accomplish almost nothing for the great masses of working people and the poor. It must be recognized: first, pro bono volunteer legal representation is seldom available to those in need; second, pro bono service even where offered

135 See *Mallard v. District Court*, 490 U.S. 296, 303-04 (1989) (lawyers cannot be compelled under law to represent indigent civil litigants). See also *Cartwright v. Silver Cross Hospital et al.*, No. 19-2595, *8 (7th Cir. June 18, 2020) ("It's worth reemphasizing that the assistance of a pro bono lawyer in civil litigation is a privilege. The valuable help of volunteer lawyers is a limited resource. It need not and should not be squandered on parties who are unwilling to uphold their obligations as litigants." (internal citations omitted) (scolding district court judge who recruited attorneys to volunteer to represent indigent plaintiff in employment discrimination suit)).

136 Journalists and social scientists may wish to study this phenomenon.

137 "If he has dedicated a brass ring in the temple of Asclepius, he will wear it to a wire with daily burnishings and oilings. It is just like him, too, to obtain from the prytaneis by private arrangement the privilege of reporting the sacrifice to the people; when, having provided himself with a smart white cloak and put on a wreath, he will come forward and say: 'Athenians! we, the prytaneis, have been sacrificing to the Mother of the Gods meetly and auspiciously; receive ye her good gifts!'" THEOPHRASTUS (372-287 BCE), *CHARACTERS*, XXI, *THE MAN OF PETTY AMBITION* (R.C. Jebb trans., Macmillan 1870).

138 "Wolf and wolf devour not one another, but they eat the flesh of others." ST. BERNARDINE OF SIENA, *SERMONS*, CHAP. XII, Para. 5 (Don Nazereno Orlandi ed., Helene Josephine Robins trans., Siena, Tipografia sociale 1920) (15th cent.).

is usually brief and limited in scope; and third, pro bono representation is infrequently offered by most private attorneys.¹³⁹

Hubristically, pro bono is presented by the private legal industry not only as a panacea but also celebrated as proof of the bar's self-portrayal as servant and defender of public rights. To hear it from private practitioners and legal groups, pro bono is the primary business of the bar. The industry's misrepresentation of the work of the profession as principally an act of charity damages the legal, economic, and personal lives of the most vulnerable. The gain of popular goodwill and preservation of its particular peerage may be reasons for the publicity.

It could be asked how, despite pro bono and other promoted good works of its members, are wealthy corporations and financial interests are always represented by private law firms and the most vulnerable, including those whom lawyers themselves agree are most deserving of legal representation,¹⁴⁰ nearly never represented by private counsel despite their need?¹⁴¹ The failure of pro bono shows the private legal industry is un-

139 Most private lawyers offer few to zero hours of free volunteer pro bono legal services each year. *See, A Look at Associate Hours and at Law Firm Pro Bono Programs*, NATIONAL ASS'N FOR L. PLACEMENT (2010), <https://www.nalp.org/july2009hoursandpro-bono>; PROFILE OF THE LEGAL PROFESSION 2019, *supra* note 20. Almost half of all attorneys report working zero pro bono hours. *Id.* at 43. Even the pro bono that is offered is very limited. "The most common tasks performed were providing advice (74%), reviewing or drafting documents (66%), interviewing clients (64%)," and only a minority of those who offered any volunteer legal assistance were actually provided legal representation. PROFILE OF THE LEGAL PROFESSION (2020), *supra* note 20.

140 For instance, immigrant children fleeing war famine and war, abused impoverished women seeking safety, elderly homeless veterans in need of shelter. The private bar could choose to devote significantly more of its time and wealth to representing these groups of individuals rather than the clients it chooses to represent, but it does not, and it has never done so.

141 In more than three-fourths of civil trials in the United States, at least one party is unrepresented by counsel. *See generally* REBECCA BUCKWALTER-POZA, MAKING JUSTICE EQUAL, CENTER FOR AMERICAN PROGRESS 1-2, (Dec. 8, 2016) <https://cdn.americanprogress.org/content/uploads/2016/12/07105805/MakingJusticeEqual-brief.pdf?ga=2.204083478.747926008.1597338332-1412202155.1597338332>.

("Figures are even starker when it comes to family law, domestic violence, housing, and small-claims matters. . . . At least one party lacks representation in 70 to 98 percent of these cases. And these are just the Americans who make it to court. Without access to legal advice, many are unaware of their legal rights and potential claims. Past estimates and more recent state-by-state studies suggest that about 80 percent of the civil legal needs of those living in poverty go unmet as well as 40 to 60 percent of the needs of middle-income Americans. But because these figures depend upon self-selection and self-reporting, however, and because many Americans do not identify their unmet legal needs as such, it is impossible to estimate Americans' total unmet legal needs. To deny Americans access to legal assistance is to deny them their rights and protections. This is because, to a greater

amenable to even moderate voluntary reform.¹⁴² But the celebration of its triumph continues.¹⁴³

While the private legal profession when it must¹⁴⁴ cautiously accepts the limited entrance of public interest law as a solution to its simultaneous abandonment and quelling of the American people, it does so only to the extent useful to misdirect scrutiny and where not interfering with its commercial prospects. Consequently, public interest legal representation remains a limited and usually unobtainable resource for a majority, and the forces of law allow those most in need of free civil legal aid only the hope of representation.¹⁴⁵ Practically, they are left or even encouraged to take up their own cases as pro se lay advocates against often well-represented and resourced opponents, a strategy never advised for the powerful or recommended to family and friends of lawyers' own class.¹⁴⁶

degree than other countries, the United States places the burden on an individual to seek justice by going to court. Other developed democracies have enshrined the right to counsel in civil cases and devote 3 to 10 times more funding to civil legal aid than the United States. In areas from environmental regulation and workplace discrimination to civil rights and housing, Americans must hire or find their own attorneys to enforce the law. The result is a divide between those who can afford legal assistance and those who cannot.” (internal citations omitted).

142 “The ideal social democratic solution would be to alleviate these and other inevitable dislocations of the market by shifting resources from its principal beneficiaries to its principal victims.” Rob Atkinson, *A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 AMERICAN J. GENDER SOC. POLICY & L. 129, 165 (2001).

143 See, e.g., *The 2020 Pro Bono Scorecard: The National Rankings*, THE AMERICAN LAWYER, (July 6, 2020) <https://www.law.com/americanolawyer/2020/07/06/the-2020-pro-bono-scorecard-the-national-rankings/>.

144 For instance, in jurisdictions where a public defender agency has been created and is appointed by law to represent indigent criminal defendants. Without U.S. Supreme Court precedents upholding the right of legal representation to indigent criminal defendants and laws creating nonprofit firms to provide such representation, private attorneys certainly in given the opportunity would attempt to re-monetize this practice. Shamelessness and graft is characteristic of the trade. See generally *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998).

145 See generally LEGAL SERV. CORP., MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), <https://www.lsc.gov/sites/default/files/images/TheJustice-Gap-FullReport.pdf>.

146 “And thou lookest on at the poor man who doth perish with cold, and thou takest no heed thereof. Thou dost not hear any sound of cries, forsooth. Knowest thou why? Because thou sufferest not from the cold; thou dost fill thy belly with good food, thou dost drink thy fill, and thou hast many garments upon thy back, and oftentimes dost thou sit by a fire. Thou takest thought for naught else: with a full belly thou art comforted in thy soul.” ST. BERNARDINE OF SIENA, SERMONS, CHAP. XXVII, Para. 8 (Don Nazereno Orlandi ed., Helene Josephine Robins trans., Siena, Tipografia sociale 1920) (15th cent.).

The practice of law is the negotiation of the administration of already formalized power. The commercial for-profit bar in the United States cannot answer for itself or provide a remedy that would satisfy the public interest while permitting it to continue to operate as recognizably constituted. The licensed agents of the system have offered little to the public and nothing in apology despite all opportunity to prove themselves. They deserve no defense if the people choose to intervene.¹⁴⁷

CONCLUSION

It would be imprecise to say the private for-profit practice of law in the United States is a professional order without a purpose. Better, it is a profession with a clear and quite useful purpose, simply not that purpose which it claims to pursue or that demanded by the public, or that which would permit it to continue to hold a license to serve the people in the courts of the country.¹⁴⁸

To this and to the observations found in this paper, I anticipate disbelief, defensiveness, and recrimination by U.S. private lawyers and those who sit in their company. Whatever the response, the state of the bar presented cannot be denied and no solution that has not been addressed or that does not preserve the privileges of its business will be put forward. And so,

147 “It suffices here to have made it clear that the pretended utility of a privileged order for the public service is nothing more than a chimera . . . that without it the superior places would be infinitely better filled; that they naturally ought to be the lot and the recompense of ability and recognized services, and that if privileged persons have come to usurp all the lucrative and honorable posts, it is a hateful injustice to the rank and file of citizens and at the same a treason to the public weal. * * * It is not sufficient to show that privileged persons, far from being useful to the nation, cannot but enfeeble and injure it; it is necessary to prove further that the noble order does not enter at all into the social organization; that it may indeed be a burden upon the nation, but that it cannot of itself constitute a nation. In the first place, it is not possible in the number of all the elementary parts of a nation to find a place for the caste of nobles. I know that there are individuals in great number whom infirmities, incapacity, incurable laziness, or the weight of bad habits render strangers to the labors of society. The exception and the abuse are everywhere found beside the rule. But it will be admitted that the less there are of these abuses, the better it will be for the State. The worst possible arrangement of all would be where not lone isolated individuals, but a whole class of citizens should take pride in remaining motionless in the midst of the general movement, and should consume the best part of the product without bearing any part in its production. Such a class is surely estranged to the nation by its indolence.” Abbé Emmanuel Joseph Sieyès, *What is the Third Estate*, in *TRANSLATIONS AND REPRINTS FROM THE ORIGINAL SOURCES OF EUROPEAN HISTORY, VOL. 6: FRENCH PHILOSOPHERS OF THE EIGHTEENTH CENTURY* 32-35 (Univ. of Pa. Press 1899) (1789).

148 “[T]hey have united their practices of this civil law, as they call it, to just so much as gives them a hold on the interests of the people.” MARCUS TULLIUS CICERO, *DE LEGIBUS*, BOOK I, 404 (Charles Duke Yonge trans., H.G Bohn 1853) (1st cent. BCE).

the old hand of the profession will grasp a sheet prepared for it and fix its yellowing eyes upon the lines. It will bend forward over its tumid gut and repeat errors in reason. It will rest its figure upon the counsel's bench and grow impatient. Then finally, as it always does, it will reveal itself to be the fundamentally reactionary force it is.

It will be asked contentiously in so many words if I am suggesting that a certain class of middling professionals no longer be able to profit from an enterprise which should if there was anything like parity in the administration of justice be a public or at least actually available social service. To that question I would answer that, yes, I am.¹⁴⁹ I would add, too, that, while this paper does not touch on the wider subject of expropriation, I am not at all concerned with protection of the unspoken entitlements, elaborately codified, formally and informally, of critics to the accumulation of greater wealth and rank.¹⁵⁰

Defenders of the commercialized for-profit legal profession will likely demand critics of their practice produce in whole a ready alternative, rather than engage with, let alone concede the facts of the state of the bar as recounted. To respond, I do not demand any particular program or prescription. I do not feel compelled to do so.¹⁵¹ And even if I did, I have not settled upon a particular solution. It is not my place.¹⁵² I would say that all structural legal problems are political problems too often thought to be technical matters outside of our moral and religious life rather than, as they are, properly at its center.¹⁵³ If pressed, I would also say the practice of law operated

149 "Ordinances were made so that, by fear of them, human temerity can be controlled, innocence can be protected in the midst of wicked people, and the capacity of the wicked to harm others can be restrained by fear of punishment." GRATIAN, *DECRETUM GRATIANI*, D.4, C.1. (Augustine Thompson, O.P., trans., James Gordley, ordinary gloss trans., Catholic Univ. Press 1993) (12th cent.).

150 "As soon as peace is restored, we will remove from the kingdom all the foreign knights, bowmen, their attendants, and the mercenaries that have come to it, to its harm . . ." MAGNA CARTA 51 (G.R.G Davis trans., British Museum Trustees 1963) (1215).

151 There are many scholars and a number of attorneys, including Urooj Rahman and Colinford Mattis, from whom I would certainly welcome responses to the question of our age: What then must we do?

152 "Whether any of these things are considered, I leave it to the wise heads of the nation, now concerned to reflect and examine, whether it be consistent with the safety of the English nation, with the honor of the English government, or with the nature of the English trade, to suffer such sort of people to go on unprescribed and unlimited, or indeed unpunished." DANIEL DEFOE, *THE VILLAINY OF STOCK-JOBBER DETECTED: AND THE CAUSES OF THE LATE RUN UPON THE BANK AND BANKERS DISCOVERED AND CONSIDERED* 21 (London 1701).

153 Too often in the academy there is the assumption that "law can be distinguished from other matters." MARIANNE CONSTABLE AND SAMERA ESMEIR, *RHETORIC AND THE POSSIBILITIES OF LEGAL HISTORY*, in *OXFORD HANDBOOK OF LEGAL HISTORY* 79 (Markus D.

as a privatized business for profit and financial gain should be ended.¹⁵⁴ It is a good place to begin and the only appropriate punishment for lawyers.¹⁵⁵

There are practical and programmatic solutions that can also be proposed. Both courses are likely needed. For instance, practically, a greater democratization of society would alleviate the need for legal disputes, and the de-financialization of everyday life would move the country to a more equal society of universal support of those in need.¹⁵⁶

Programmatically, much can be done to reform the law and many lessons can be drawn from contemporary movements and from history.¹⁵⁷ The exercises of the law already are a public function. The question is who operates this function and how.¹⁵⁸

Most private attorneys in the United States no doubt mean well and do not intend for the majority of individuals in the nation who own little or nothing¹⁵⁹ to also have no access to representation in courts. I myself for years practiced as a private attorney. Nevertheless, personal views on the subject are truly irrelevant to the analysis here. And what I am relaying and what might be received as implied accusations against any individual are no

Dubber et al. eds., Oxford Univ. Press 2018).

154 “In former times great abuses have been by attornies of this court, by suing out of judiciall proces without any originall: which when it hath been found out, it hath beene feverly punished; for many invonveniences thereupon doe follow.” SIR EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS*, Chap. X (W. Clarke and Sons 1817) (1644).

155 “There are advocates who by means of criminally extortionate agreements rob and strip bare those persons who need their help We order that such advocates shall be excluded from the assembly of the honorable and from the sight of the courts.” *CODE THEOD.* 2.10.4 (Clyde Pharr, trans. Princeton Univ. Press 1952) (5th cent.).

156 One minor example, universal public auto insurance would allow many to avoid civil and criminal litigation, involvement in the legal system and the consequences it can bring. It would also have the benefit of thus threatening the livelihoods of many lawyers. The Insurance Corporation of British Columbia provides one model for reform in this area.

157 “[I]t is easy, by diligent study of the past, to foresee what is likely to happen in the future in any republic, and to apply those remedies that were used by the ancients, or, not finding any that were employed by them, to devise new ones from the similarity of the events. But as such considerations are neglected or not understood by most of those who read, or, if understood by these, are unknown by those who govern, it follows that the same troubles generally recur in all republics.” Niccolo Machiavelli, *Discourses on Livy*, Chap. XXXIX, in *THE HISTORICAL, POLITICAL, AND DIPLOMATIC WRITINGS* (Christian Detmold trans., J. R. Osgood 1882) (1513).

158 “When the truth has becomes manifest, let custom yield to the truth. So, respond plainly: who would doubt that custom should yield to manifest truth?” GRATIAN, *DECRETUM GRATIANI*, D.8, C.4 (Augustine Thompson, O.P. trans., James Gordley, ordinary gloss trans., Catholic Univ. Press 1993) (12th cent.).

159 *See generally* THOMAS PIKETTY, *CAPITAL AND IDEOLOGY* (Arthur Goldhammer trans., Belknap Press 2020).

more provocative than the legal industry's presentation of itself as working in the public interest rather than defending privileges it has created for its own class.¹⁶⁰

Returning to Holbein, part of what makes his work, *The Advocate*, so compelling is that it allows us to see what is ignored and rationalized away in the United States. The rich man is able to hire a lawyer and remain rich because he is rich. The poor man is not able to hire a lawyer and will remain poor because he is not rich and cannot hire a lawyer. All legal, economic, political, and personal rights are contingent on recognition by popular authority. The poor and working classes in the country are unheard and dispossessed in every way. In the portrait of the United States, who will Death come for, the poor man or *The Advocate*? That is a question for the people. It is for them to demand the public appearance of the private counsel assigned to them be withdrawn.¹⁶¹

160 "A man of this kind is said to be guilty of avarice, which is regarded by God as a great and mortal sin, and a serious and evil condition in the world. For since every man sins who acts in this manner, how much more so does a king, upon who God will inflict punishment because he made a bad and miserly use of the property which He bestowed upon him." KING ALFONSO X OF CASTILE, *SIETE PARTIDAS*, SECOND PARTIDA, Tile III, Law IV (Robert I. Burns, S.J. ed., Samuel Parson trans., Pa. Univ. Press 2001) (1265).

161 "I shall heartily desire the wise hearted and expert builders to amend both the method or uniformity, and the structure it selfe, wherein they shall finde either want of windowes, or sufficient lights, or other deficiency in the architecture whatsoever. And we will conclude with the aphorisme of that great lawyer and sage of the law, Blessed be the amending hand." SIR EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS*, Epilogue (W. Clarke and Sons 1817) (1644).

BEYOND BARRETT: SHIFTING A PROGRESSIVE LEGAL STRATEGY FROM FEDERAL TO STATE COURT

Steven Goldberg

INTRODUCTORY THOUGHTS

When I graduated from law school in 1972, excited to do poverty and civil rights law, my assumption was that I would be litigating constitutional claims in federal court. I was inspired by attorneys such as William Kunstler who, in the early 1960s, developed the strategy of removing state prosecutions of civil rights activists from state court to federal court.¹ My first case, argued while I worked for Legal Aid in Jacksonville, Florida, was a substantive due process challenge to a Florida law which suspended an individual's driver's license for failure to meet certain statutory requirements which his financial status precluded him from satisfying.² The challenge was unsuccessful. Nonetheless, my appetite for federal litigation was whetted and continued throughout my career.

Those of us who have litigated constitutional and civil/human rights cases in federal courts find ourselves in a difficult situation as judicial vacancies were filled by Trump appointees.³ The addition of Justice Barrett to the U.S. Supreme Court heralds a conservative and less diverse majority in the Court, likely for generations. Although challenging, this is not a unique situation. As the Burger Court emerged in the 1970s, and many of the Warren Court's decisions on civil and constitutional rights were undone, Justice William Brennan developed a strategy in a series of lectures and law review articles which is particularly relevant as the courts turn increasingly right-

1 D.B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker*, 29 U.S.F.L. REV. 645, 651, n. 22 (1995).

2 *McKinney v. O'Malley*, 379 F. Supp. 135 (M.D. Fla. 1974).

3 At the end of four years, Trump had won confirmation of three Supreme Court justices, 54 appeals court judges and 174 district court judges. Carl Hulse, *Biden Facing Resistance on His Picks for Federal Judges After Early Winning Streak*, N.Y. TIMES (Dec. 5, 2021), <https://www.nytimes.com/2021/12/05/us/politics/biden-judges-senate-confirmation.html>. President Biden has sent the Senate 64 judicial nominations; 28 nominees have been confirmed as of December 5, 2021. *Id.* Many of those judges "were more openly engaged in causes important to Republicans, such as opposition to gay marriage and to government funding for abortion." Rebecca Ruiz et. al, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020) <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> (last visited Mar. 31, 2022); *see also* Charlie Savage, *G.O.P. – Appointed Judges Threaten Democracy, Liberals Seeking Court Expansion Say*, N.Y. TIMES (Oct. 16, 2020), <https://www.nytimes.com/2020/10/16/us/politics/court-packing-judges.html?referring=Source=articleShare>.

ward.

In the context of the civil rights movement in the 1960s, the Supreme Court issued a series of opinions enforcing the equal protection and due process protections of the Fourteenth Amendment, and guaranteeing other provisions of the Bill of Rights against encroachment by state action.⁴ As the composition of the Court changed in the 1970s and this focus diminished, Brennan found that “state courts are now beginning to emphasize the protections of their states’ own bills of rights.”⁵ Brennan pointed to state court decisions in California, New Jersey, Hawaii, Michigan, South Dakota, and Maine.⁶

This pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights. The lesson of history is otherwise; indeed, the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions. . . .

The essential point I am making, of course, is not that the United State Supreme Court is necessarily wrong in its interpretation of the federal Constitution. . . . It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.⁷

Justice Brennan’s analysis was premised on the principle that when a decision rests on an independent state ground, it is not reviewable by the federal courts.⁸ Brennan’s advice: “I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.”⁹ In fact, as Justice Brennan noted in 1986, in the ten years since his initial Harvard Law Review article, state courts had issued more than 250 published decisions affording greater protection to individual liberty than the constitutional minimums set by the U.S. Supreme Court.¹⁰

4 Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493-494 (1977).

5 *Id.* at 495.

6 *Id.* at 499-501.

7 *Id.* at 501-502.

8 *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983).

9 *Id.* at 502; see also Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

10 *Id.* at 548.

For those of us practicing law in Oregon, it seemed Brennan was advocating a position long articulated by Hans Linde, a constitutional law scholar who taught at the University of Oregon and was then a justice on the Oregon Supreme Court from 1977 until 1990. Linde argued that state constitutions, independent of the federal constitution, safeguarded the civil liberties of its citizens and that state constitutional law was primary; in other words, one should not examine whether a state law violated a federal constitutional guarantee until state constitutional remedies had been exhausted.¹¹

My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right.¹²

Other State court jurists adopted this analysis, such as Judith Kaye who became Chief Judge of the New York Court of Appeals. Justice Ruth Bader Ginsburg supported the same position in her article: *In Praise of Judith S. Kaye*:

Taking a cue from Justice Brennan, [Kaye] . . . understood that New York's constitution and common law had important roles to play in the protection of fundamental human rights. On her watch, the state's constitution and laws were read to advance due process, freedom of expression, freedom from unreasonable searches and seizures, and genuinely equal opportunity. The U.S. Supreme Court's sometimes constricted reading of parallel provisions of the Federal Constitution did not overwhelm her judgment.¹³

Applying this analysis, various scenarios are possible: The state's guarantee may be the same as federal law; the state law may be more protective than federal law, making analysis under federal law unnecessary; or the state law may be less protective in which case "the court must go on to decide the claim under federal law, assuming it has been raised."¹⁴

11 Jack L. Landau, *Of Lessons Learned and Lessons Nearly Lost: The Linde Legacy and Oregon Constitutional Law*, 43 WILLAMETTE L. REV. 251, 253 (2007).

12 Hans Linde, *E Pluribus –Constitutional Theory and State Courts*, 18 GEORGIA L. REV. 165, 178 (1984).

13 The Honorable Ruth Bader Ginsburg, *Tribute: In Praise of Judith S. Kaye*, 84 N.Y.U. L. REV. 653, 653-54 (2009).

14 Linde, *supra* note 12, at 179.

There are, of course, cases which must be brought in federal court or where it is likely federal removal will be invoked,¹⁵ for example cases involving challenges to federal officials or agencies and cases based on violations of federal law. However, in some situations, the practitioner has the option of framing the legal challenge exclusively in the context of state law where a state law or constitutional provision applies, thereby insulating the case from removal. That decision will be based in major part on whether such laws exist in a particular state and how the equivalent state constitutional provision has been interpreted. And the decision will be influenced by the political complexion of the judiciary where one is litigating. Even with the federal judiciary becoming more conservative, the state court bench may be no better. Some academic research in the past several years has attempted to measure the political ideology of state supreme court justices by constructing ideological measures from campaign finance records.¹⁶ Professors Bonica and Woodruff's research, for example, examined the records of 340 justices and concluded that 171 could be categorized as liberal and 165 as conservative.¹⁷ The top five most liberal courts were in New Mexico, Maine, Oregon, New Hampshire, and Washington.¹⁸ The most conservative courts were South Dakota, North Dakota, Texas, Alabama, and Idaho.¹⁹ It would seem appropriate and realistic to consider this analysis when litigating a civil rights claim in a more conservative court.

I expect there will be some who will be offended by these arguments, that the choice of a forum should never be based on such political considerations. Conservative jurists can at times issue unexpectedly liberal decisions, for example the opinion by Justice Gorsuch holding that gay and transgender workers are protected under Title VII of the Civil Rights Act of 1964.²⁰ But for those of us bringing constitutional and civil rights cases, my contention is that we have no choice but to consider the political context and realities in which we litigate.

LESSONS FROM CASELAW

Although some scholars have suggested that **federal** constitutional

15 28 U.S.C. §§ 1441-1453.

16 Bonica and Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, 31 J. OF L., ECONOMICS AND ORGANIZATION, Vol. 31, No. 3 (2014). A summary of the research is available at https://ballotpedia.org/Political_outlook_of_state_supreme_court_justices (last visited Apr. 11, 2022).

17 *Id.*

18 *Id.*

19 *Id.*

20 *Bostock v. Clayton*, ___ U.S. ___, 140 S. Ct. 1731 (2020).

law claims should only be litigated in federal court,²¹ there is disagreement on that point.

[T]he state courts will and should continue to play a substantial role in the elaboration of federal constitutional principles. The continuation of this role is particularly important in the many situations when the state court is part of the enforcement system, and the federal question is relevant to whether the state court should participate in or authorize enforcement.²²

And, as noted, historically state courts have adjudicated claims based on interpretations of **state** constitutional provisions avoiding any federal analysis and eventual Supreme Court review.²³ The question is what analysis should be used in deciding to litigate constitutional claims in state court?

Reproductive Rights Litigation

In the early post-*Roe v. Wade* climate, the Massachusetts Supreme Judicial Court struck down a law limiting state medical assistance for abortion to cases of life endangerment.²⁴ A similar restriction had been upheld by the U.S. Supreme Court under the Federal Constitution: *Williams v. Zbaraz*, 448 U.S. 358 (1980). The Massachusetts Court's analysis was based on a guarantee of privacy rooted in the due process clause of the Massachusetts Declaration of Rights, Article 10: "In sum, we deal in this case with the application of principles to which this court is no stranger, and in an area in which our constitutional guarantee of due process has sometimes impelled us to go further than the United States Supreme Court."²⁵ Obviously decisions like *Moe v. Secretary of Administration* are critical as we anticipate the U.S. Supreme Court significantly limiting if not eliminating any federal right to abortion.

However, it is also clear in this divisive political climate that victories based on state laws and constitutions are tenuous. In Kansas, for example, abortion is currently protected by a 2019 decision of the Kansas Supreme Court which interpreted Section 1 of the Kansas Constitution Bill of Rights to guarantee the right to personal autonomy. "This right allows a woman to make her own decisions regarding her body, health, family

21 Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

22 Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 637 (1981).

23 Brennan, *supra* note 9.

24 *Moe v. Secretary of Administration*, 417 N.E. 2d 387 (Mass. 1981).

25 *Id.* at 399.

formation, and family life – decisions that can include whether to continue a pregnancy. Although not absolute, this right is fundamental.”²⁶ As a result of this decision, and as the states circling Kansas continue to tighten abortion restrictions, Kansas has increasingly become the easiest access point in the region for abortions. Yet in 2022, a proposal to amend the state Constitution to remove abortion as a fundamental right will be voted on by Kansas voters in a statewide election.

One clear lesson for those bringing cases such as *Hodes & Nauser, MDS, P.A. v. Schmidt*, then, is that the state court legal strategy must envision and be part of a broader political strategy to defend such court victories.

Challenges to State Education Systems

In 2014, the Michigan Supreme Court rejected a claim by students in Highland Park that the failure of the public schools to provide adequate and sufficient instruction resulted in their inability to obtain basic literacy skills and reading proficiency. The lawsuit was based on the Michigan constitution and Michigan law.²⁷

The students did not give up. They next filed in a Michigan federal court, arguing that they had been denied access to literacy on account of their races, in violation of their rights under the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution. Despite finding that the conditions and outcomes of Plaintiffs’ schools were “nothing short of devastating,” the court ruled against the students finding that education is not a fundamental right under the Federal Constitution.²⁸

In 2020, the Sixth Circuit Court of Appeals reversed the lower court, holding that a basic minimum education, meaning one that plausibly provides access to literacy, is a fundamental right under the Constitution, something which the U.S. Supreme Court had never explicitly held.²⁹ The decision, however, was vacated when the Court granted *en banc* review.³⁰ A settlement agreement was then reached by the parties resulting in some increased funding for the schools, and the case was dismissed on June 10, 2020.³¹

At first it would seem what happened in the Michigan litigation undercuts the thesis of this article: A plaintiff may in fact have more success

26 *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P. 3d 461, 466 (Kan. 2019).

27 *LM v. State of Michigan*, 307 Mich. App. 685, 690-691 (2014).

28 *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018).

29 *Gary B. v. Whitmer*, 957 F. 3d 616 (6th Cir. 2020).

30 *See Gary B. v. Whitmer*, 958 F. 3d 1216 (6th Cir. 2020).

31 *Gary B. v. Whitmer*, No. 18-1855, 2020 U.S. App. LEXIS 18312 (6th Cir. June 10, 2020)

filing a constitutional claim based on the federal rather than state constitution. I would argue, however, that the likelihood that the federal courts will recognize education as a fundamental right has diminished as the federal courts become more conservative. Going forward, state courts may be more receptive to these arguments. Every state constitution has language that mandates the creation of a public education system. “Based on their own constitutions, the states have generally been more welcoming to claims of education as a fundamental right.”³² California was one of the first states establishing this principle when its Supreme Court held in *Serrano v. Priest* that education is a fundamental right under the California Constitution.³³ Courts in numerous other states have followed suit.³⁴

In *McCleary v. State*,³⁵ the adequacy of state funding for K-12 education in Washington was challenged under article IX, section 1 of the Washington State Constitution which stated that “[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders.”³⁶ The Supreme Court affirmed the trial court’s conclusion that “‘paramount’ means the State must amply provide for the education of all Washington children as the State’s first and highest priority before any other State programs or operations.”³⁷ The state legislature was ordered to remedy the deficiencies found by the Court. In 2015, the Court imposed sanctions of \$100,000 per day on the legislature based on the legislature’s inadequate response to the 2012 judgment. On June 7, 2018, the Court determined that the state had sufficiently complied with the Court’s 2012 judgment, lifted the monetary penalty, and terminated its retention of jurisdiction in the case.

Again, whether it makes sense to pursue such litigation depends upon various factors such as the political perspective of the state judiciary, or whether a state law or constitution provides the legal basis for such claims. However, electing different judges, enacting new laws, amending state constitutions are generally more feasible than making such changes on the federal level, again depending on the particular state’s political complexion. **One purpose of this article is to encourage the consideration and development of such strategies.**

32 Brooke Wilkins, *Should Public Education be a Federal Fundamental Right?*, 2005 BYU EDUC & L.J. 261, 285 (2005).

33 *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (Cal. 1971).

34 Brennan-Gac, *Educational Rights in the States*, Vol. 40, No. 2, HUMAN RIGHTS MAGAZINE (American Bar Assn., April 1, 2014).

35 173 Wash. 2d 477, 269 (2012).

36 *Id.*

37 *Id.* at 248-49.

Climate Litigation

In August 2015, twenty-one children and young adults filed suit in federal court in Oregon against agencies of the federal government, alleging that industrial-scale burning of fossil fuels was causing catastrophic and destabilizing impacts to the global environment, and threatening the plaintiffs' right to a healthy, habitable living environment.³⁸ Plaintiffs' claim was rooted in the Due Process Clause of the Federal Constitution, and based on the "public trust doctrine." A favorable district court opinion allowing the case to proceed to trial was ultimately overturned by the Ninth Circuit Court of Appeals which "reluctantly" concluded the claim was not redressable by an Article III court.³⁹

The U.S. Constitution, unlike that of many other countries, does not explicitly contain a right to a healthy environment, and it is unlikely the federal courts would ultimately uphold claims similar to plaintiffs. However, the organization which supported the *Juliana* litigation, has also filed numerous climate change lawsuits in state courts.⁴⁰ Most of these cases have not succeeded, yet. For example, the plaintiffs in *Juliana* filed a separate action in state court in Oregon, not based on the Oregon Constitution which has no provision asserting the "right to a healthy environment," but rather based on a common law doctrine: the public trust. Ultimately the Oregon Supreme Court refused to extend that doctrine to plaintiffs' claims.⁴¹ A case filed in Washington state by Our Children's Trust, in part based on the Due Process and Equal Protection clauses of the Washington Constitution, was also rejected by the Washington Court of Appeals: "The Youths deserve a stable environment and a legislative and executive branch that work hard to preserve it. However, this court is not the vehicle by which the Youths may establish and enforce their policy goals."⁴²

Rooting the right to a healthful environment in state due process and equal protection clauses, or in the public trust doctrine, has been challenging. As with any political case, the chances of success increase if community organizations bring attention to these cases through publicity, demon-

38 *Juliana v. United States of America*, 217 F. Supp. 3d 1224 (D. Or. 2016).

39 *Juliana v. United States*, 947 F. 3d 1159, 1175 (9th Cir. 2020).

40 See Our Children's Trust, ourchildrenstrust.org (last visited Apr. 11, 2022).

41 *Chernaik v. Brown*, 367 Or. 143 (Or. 2020). Arguably the Oregon Constitution has no due process or equal protection clauses although other clauses could be used to support such constitutional claims. Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); Balmer, Thomas A., *Does Oregon's Constitution Need a Due Process Clause?* "Thoughts on Due Process and Other Limitations on State Action", 91 WASH. L. REV. 157 (2016), available at <https://digitalcommons.law.uw.edu/wlro/vol91/iss1/8>.

42 *AJI P. v. State*, 16 Wash. App. 2d 177, 211-212 (2021).

strations. However, litigation can be easier if the case is rooted in a state constitution which explicitly recognizes the right to a healthy environment. Several states constitutionally guarantee such a right: Montana, California, Hawaii, Illinois, Pennsylvania, Rhode Island, and Massachusetts.⁴³ Other states provide monetary support or bonds for protecting the environment or give the legislature the duty to enact laws to preserve the environment.⁴⁴ This is not to say that litigating in states with explicit constitutional guarantees to a healthy environment assures success. Courts have undercut these provisions by holding they are not self-executing, by denying standing to private citizens, or by establishing relatively easy standards for meeting the constitutional requirements.⁴⁵ But some cases have succeeded.

Montana Environmental Information Center (“MEIC”) v. Department of Environmental Quality, 988 P.2d 1236 (Mont. 1999) was a challenge to a statute which exempted ground water pump tests for new mines from environmental review. Plaintiff alleged the pump tests at issue would have discharged large quantities of groundwater with high concentrations of heavy metals into the Blackfoot River. Ultimately the Court found the right to a clean and healthful environment in Articles II and IX of the Montana Constitution was a fundamental right, gave plaintiffs standing to enforce that right, and applied strict scrutiny to overturn the challenged statute.

A recent decision in the Louisiana Court of Appeals, Third Circuit, is also instructive. The Bayou Bridge Pipeline Company (BPP) owns a crude oil pipeline that runs from near Lake Charles to St. James, a historic Black community. Three landowners challenged an eminent domain lawsuit filed by BPP. The Appellate Court rejected constitutional challenges to the state’s eminent domain scheme. However, the court found that BPP’s decision to begin construction before obtaining a judicial determination of the public and necessary purpose for the land taking “not only trampled Defendants’ due process rights [specifically recognized in La. Const. art 1, § 4], it eviscerated the constitutional protections laid out to specifically protect those property rights.”⁴⁶ Each Defendant was awarded \$10,000 in damages as well as attorney fees.⁴⁷

Obviously prevailing in such lawsuits as *MEIC v. Department of Environmental Quality* and the Louisiana litigation (filed by the New

43 J. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 INT’L. LEGAL PERSP. 185, 185-186 (1999).

44 *Id.*

45 J. Tuholske, *U.S. State Constitutions and Environmental Protection: Diamonds in the Rough*, 21 WIDENER L. REV. 239, 240 (2015).

46 *Bayou Bridge Pipeline, LLC v. 38.00 Acres*, 304 So.3d 529, 549 (La. App. 2020).

47 *Id.* at 552.

York-based Center for Constitutional Rights) is no easy task. If one's state constitution does not have the explicit language of the Montana document, then one will need to try to find some other basis for the legal claim: a due process clause, an equal protection clause (assuming those are in one's state constitution), establishing the public trust doctrine. And victories are also possible in federal court. In *Guertin v. State*,⁴⁸ a lawsuit arising out of what the court described as the "infamous government-created environmental disaster commonly known as the Flint Water Crisis[;]"⁴⁹ the court allowed plaintiffs' Section 1983 lawsuit to proceed based on the alleged violation of the right to bodily integrity as guaranteed by the Substantive Due Process Clause.⁵⁰ Given changing attitudes towards climate change, perhaps more effort should be made to amend state constitutions which do not have an explicit guarantee to a healthy environment.

CONCLUDING THOUGHTS

In a New York Times guest opinion written on November 16, 2020,⁵¹ Gurbir S. Grewal, New Jersey's attorney general, and Jeremy Feigenbaum, the state solicitor, discussed how progressive states can respond to conservative courts. Four strategies were discussed:

- State elected officials must be ready to respond to, or act in advance of, Supreme Court rulings.⁵²
- State officials such as attorneys general must enforce newly enacted laws and existing protections in state courts.⁵³
- Progressive advocacy groups and lawyers outside government should litigate rights enshrined in state constitutions. "This will be particularly important in states where leaders hew to a conservative agenda."⁵⁴
- We need to rethink the arguments we make and language we use in a conservative legal environment.⁵⁵

My sense is that whether to raise constitutional or civil rights (discrimination, employment, etc.) issues in federal or state court depends on a

48 912 F. 3d 907 (6th Cir. 2019) *cert. den.* ___ U.S. ___ (01/21/2020).

49 *Id.* at 915

50 *Id.*

51 Gurbir S. Grewal & Jeremy Feigenbaum, *How Progressive States can Respond to Conservative Courts*, N.Y. TIMES (Nov. 16, 2020), <https://www.nytimes.com/2020/11/16/opinion/progressive-conservative-courts.html>.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

multitude of factors:

- The composition of the respective judiciaries in terms of political perspective or bias.
- How the constitutional provisions or laws at issue have been interpreted in the past, and whether that is likely to change given the increasingly more conservative perspective of the federal courts.
- In a case likely to be tried before a jury, the make-up of the jury panels in state and federal court.
- The rules regarding discovery in the different fora.
- The likelihood of being awarded attorney fees. A significant reason for filing lawsuits constitutionally challenging state action is the availability of an attorney fee award under statutes such as 42 U.S.C. §1983 or statutes prohibiting discrimination. In Oregon, constitutional challenges in state court had no explicit statute providing for fees to the prevailing party analogous to 1983. However, in 1975, the Oregon Supreme Court held that Oregon courts have inherent equitable power to award attorney fees to a party that prevails on a constitutional claim.⁵⁶ In states where this has not been established, proposing a 1983 analogue in the state legislature should certainly be pursued.
- Electing more responsive state court judges, proposing new state laws, even proposing amendments to state constitutions although no easy task, is certainly more of a possibility than making such changes on the federal level.

I agree with Grewal and Feigenbaum that a state court litigation strategy should, at a minimum, be evaluated and considered when challenging state actions – and even federal actions – which are arguably illegal under state laws and constitutions.⁵⁷ Many such actions have been and continue to be brought by community organizations and their advocates in state courts. For example, a recent lawsuit was filed in Oregon by the NYU Policing Project challenging the Oregon TITAN Fusion Center's actions monitoring and intimidating environmental, indigenous rights, and social justice activists who had (ultimately successfully) challenged the Jordan Cove pipeline, a \$10 billion fossil fuel pipeline. Plaintiffs allege that the Center, run by the Oregon Department of Justice, regularly collected infor-

⁵⁶ *Deras v. Myers*, 272 Or. 47, 65-66 (1975).

⁵⁷ See also Erwin Chemerinsky, *To Rein In the Police, Look to the States, Not the Court*, N.Y. TIMES (Dec. 20, 2021), <https://www.nytimes.com/2021/12/20/opinion/police-supreme-court-states.html>. Chemerinsky suggests, and I agree, that the focus should not exclusively be on the courts, but also be on adopting state laws and local ordinances. See *id.*

mation on the activists, and then shared the files with “intelligence” partners ranging from the federal government and local law enforcement agencies to oil companies and public relations firms. The claim is premised on the allegation that the program was conducted without any legislative authorization or oversight.⁵⁸

Further, state courts have become a primary forum for challenging gerrymandered political maps whereas, historically, such challenges have generally been brought in the federal courts. As noted by Michael Li, a redistricting expert at the Brennan Center for Justice:

There’s a renewed interest in this rich vein of state constitutional tradition that many people had ignored, because as lawyers, we’ve been training for 60 years that the federal court is where we’re going to vindicate rights . . . And we’ve sort of tended to treat state courts and state constitutions almost as a stepchild. And then, we’re realizing there’s actually a lot there.⁵⁹

Finally, although beyond the scope of this essay, we should also be creative in thinking about how to expand state court litigation to encompass issues which are increasingly foreclosed in federal courts. One example is the consideration of international law in support of claims brought in state court. In *Namba v. McCourt*, 185 Or. 579 (1949), the Oregon Supreme Court discussed Article 55 of the U.N. Charter to support its declaration that the Oregon Alien Land Law violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. And in a decision by Justice Linde in *Sterling v. Cupp*, 290 Or. 611 (1981), the Court examined a variety of international treaties and covenants regarding the treatment of detainees to interpret a phrase in Oregon’s Constitution which prohibits the treatment of prisoners with “unnecessary rigor.”

Yes, even as attorneys, there should be no limit to our creativity.

58 *Farrell-Smith et al. v. The Oregon Department of Justice et al.*, Marion County Circuit Court, Case No. 21CV47809 (filed 12/14/2021).

59 Nick Corasaniti & Reid J. Epstein, *State Courts Emerge as Firewall Against Gerrymandering by Both Parties*, N.Y. TIMES (Apr. 2, 2022), <https://www.nytimes.com/2022/04/02/us/politics/congressional-maps-gerrymandering-midterms.html>.

LEGAL SERVICES CENTERS AS VOTER REGISTRATION CENTERS: A STOP-GAP SOLUTION TO SUPPORT CLIENTS' CIVIC ENGAGEMENT¹

By Jacob Carrel²

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1 I would like to thank Professor Jeanne Charn for her thoughtful and helpful comments on this paper. My views expressed here are mine alone and do not reflect the views of my employer.

2 EJW Voting Rights Fellow at the National Redistricting Foundation, Sponsored by the Selbin Family Foundation and Anonymous. J.D., Harvard Law School, 2021.

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APPENDIX I

I. INTRODUCTION

“The vote is precious. It is almost sacred. It is the most powerful non-violent tool we have in a democracy. . . We must have the capacity and the ability to redeem the soul of this nation and set it on the right course. We must do all we can to make this a nation where justice and the voice of the people prevails.”

– Congressman John Lewis, June 2019³

The Legal Services Corporation (“LSC”), administered nationally, provides funding to local legal services centers to provide free or low-cost, subsidized civil legal aid. The program successfully supports well over a million vulnerable Americans each year⁴ in judicial proceedings, but due to politicized skepticism rooted in the program’s history, LSC attorneys are barred from registering their clients to vote. This voter registration ban,⁵ codified in 1978, is on surprisingly shaky footing. As it currently stands, voter registra-

³ John Lewis, *Rep. John Lewis on The Mandate to Restore Voting Rights in America*, The United State House of Representatives (June 25, 2019), <https://web.archive.org/web/20200226095521/https://johnlewis.house.gov/media-center/press-releases/rep-john-lewis-mandate-restore-voting-rights-america>.

⁴ LEGAL SERVICES CORPORATION, *Grantee Client Demographics*, <https://www.lsc.gov/state-data-grantee-client-characteristics>.

⁵ 43 Fed. Reg. 32,772 – 32,774 (July 28, 1978)

tion could likely occur if done exclusively by pro bono volunteers. Furthermore, changing one agency advisory opinion could transform voter registration practices within LSC-funded centers. This minor change could make significant progress towards the LSC's mission of "promot[ing] equal access to justice"⁶ by empowering clients to access more civic engagement opportunities without violating any other restrictions.

This paper explains the history behind the registration ban and the possibility for Legal Services Corporation-sponsored civil legal aid centers to allow pro-bono law students or other non-attorney volunteers register interested clients to vote. The paper begins by highlighting the importance and urgency of voter registration for LSC clients. Section III summarizes the history behind the Legal Services Corporation's political and civic engagement restrictions and concludes with an explanation of why voter registration, while limited, can be a step forward. Sections IV and V describe a key opportunity arising from the surprisingly shaky footing upon which the current voter registration ban sits. The section advocates for a change in LSC's Advisory Opinion 98-47, which interprets 45 C.F.R. 1608 to restrict LSC attorneys from registering clients to vote. Finally, Section VI provides best-practices for voter registration and a step-by-step checklist of shovel-ready steps LSC-funded civil legal aid centers could employ when the advisory opinion is amended to properly and effectively register clients to vote.

II. ACCESS TO THE VOTE IS ESSENTIAL TO DEMOCRACY

Registering to vote is often the first step to casting a ballot in a U.S. election. A total of 49 states and the District of Columbia require all voters be registered to cast a ballot.⁷ Barriers to voter registration vary by state. Some states have lowered barriers to registering, including offering same-day voter registration,⁸ registering people to vote at DMVs,⁹ and most-recently,

6 LEGAL SERVICES CORP., [HTTPS://WWW.LSC.GOV/ABOUT-LSC](https://www.lsc.gov/about-lsc) (last visited Apr. 8, 2022).

7 See *Voter Registration*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct 11, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-registration.aspx> ("In 49 states, an eligible citizen must be registered to vote."); see also Vote.org, *Voter Registration Rules*, <https://www.vote.org/voter-registration-rules/> (providing state-by-state breakdown of rules for voter registration in each state). North Dakota is the exception and does not require voter registration. *Id.*

8 24 states offer this in some capacity. See VOTING RIGHTS LAB: STATE VOTING RIGHTS TRACKER (2020), <https://tracker.votingrightslab.org/issues/SameDayRegistration>.

9 This was made possible by the passage of the National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77, 42 U.S.C. ch. 20, subch. I-H § 1973gg et seq., transferred to 52 U.S.C. §§ 20501–20511; see also *Automatic Voter Registration*, NATIONAL CONFERENCE OF STATE LEGISLATURES (April 14, 2020), <https://www.ncsl.org/research/>

enacting so-called “automatic voter registration” laws that register residents to vote automatically whenever they interact with various state agencies.¹⁰ Conversely, many other states employ strict rules to make voter registration complicated and challenging, such as cumbersome and inconsistent voter identification requirements or waiting periods between registration and eligibility to vote.¹¹

A. Despite its importance to democracy, voter registration is needlessly politicized.

Attempting to manipulate who has access to the ballot is not a new phenomenon. Voter registration remains critical to advancing many social justice causes, but voter registration has long been subject to attacks by incumbent elected officials and others fearful of losing power.¹²

Unfortunately, access to the vote has become increasingly politicized over the past five years. The increased waiting times at polling locations is just one particularly egregious example of the recent political impact on voting. Throughout the nation, long lines left voters waiting in some cases for over six hours¹³ after a number of polling places closed due to COVID-19.¹⁴

[elections-and-campaigns/automatic-voter-registration.aspx](https://www.elections-and-campaigns/automatic-voter-registration.aspx).

10 See National Conference of State Legislatures, *supra* note 7.

11 *State Voter Suppression Effort Is Highly Partisan*, BRENNAN CENTER FOR JUSTICE (June 11, 2021), <https://www.brennancenter.org/our-work/research-reports/state-voter-suppression-effort-highly-partisan> (hereinafter, *Partisan Suppression*).

12 See, e.g., Jaweed Kaleem, *They dared to register blacks to vote, and the KKK killed them: A 52-year-old case is closed & unsolved*, LA TIMES, (June 21, 2016), <https://www.latimes.com/nation/la-na-doj-civil-rights-20160621-snap-story.html> (describing the story of James Chaney, Andrew Goodman, and Michael Schwerner in Mississippi in 1968); Greg Palast, *Georgia Voter Roll Purge Errors*, PALAST INV. F. 6 (Sept. 1, 2020), https://www.acluga.org/sites/default/files/georgia_voter_roll_purge_errors_report.pdf (news investigation conducted for the ACLU in 2020, finding that 198,351 Georgia voters’ registrations were purged from voter rolls, and that the purged registrations were “concentrated among younger citizens and citizens of color”).

13 Tim Carman, *New limits on food and water at Georgia’s polls could hinder Black and low-income voters, advocates say*, WASHINGTON POST (April 9, 2021, 9:00AM), <https://www.washingtonpost.com/food/2021/04/09/georgia-voting-laws-food/>.

14 In April 2020, Wisconsin’s largest city could only open five polling places on Election day, instead of the typical 180 polling places, because of a poll worker shortage. statewide election. For example, for a statewide election held in Wisconsin in April 2020, the state’s largest city, Milwaukee, had only five polling places open on Election Day, instead of the typical 180 polling places, because of a shortage of poll workers. Alison Dirr & Mary Spicuzza, *What we know so far about why Milwaukee only had 5 voting sites for Tuesday’s election while Madison had 66*, MILWAUKEE J. SENTINEL (April 9, 2020 6:36PM), <https://www.jsonline.com/story/news/politics/elections/2020/04/09/wisconsin-election-milwaukee/>

Rather than appropriating funding to hire more poll workers and prevent these barriers to voting, some state legislatures responded by creating additional restrictions on what could be provided to people in line to vote, including banning nonpartisan civic engagement organizations from providing bottles of water.¹⁵ Similarly influenced by this growing politicization, Republicans broke with longstanding election norms by refusing to accept the 2020 results and alleging widespread “voter fraud” without evidence in an effort to justify increasingly restrictive measures.¹⁶

These trends are bimodal across the nation. Some states and municipalities, spurred by a pandemic, came up with creative solutions to promote access to the ballot, such as expanding vote-by-mail opportunities¹⁷ and providing additional ballot drop boxes¹⁸ and early vote sites.¹⁹ Others, unfortunately, did just the opposite, by restricting access and attacking positive reforms.²⁰ The result is that “access to the right to vote increasingly depends on the state in which a voter happens to reside.”²¹ States either embrace voter registration and access to the ballot, or make registration harder and less obtainable. This needless politicization of critical institutions for short-term political gain has long-term negative consequences that disproportionately affect many vulnerable Americans, particularly those who are of lower income.²²

[kee-had-5-voting-sites-while-madison-had-66/2970587001/](https://www.kee-had-5-voting-sites-while-madison-had-66/2970587001/).

15 Carman, *supra*, note 13.

16 See *Partisan Suppression*, *supra* note 11. Examples are numerous of recent attempts to suppress votes. Common examples include closing polling locations, limiting early voting or creating statewide limits on early voting that disproportionately affect cities, or bans on ballot drop boxes or mail-in absentee voting. See *id.* FN2.

17 Jen Kirby, *Oregon already votes by mail. Here's what it can teach us in 2020*, Vox (Sep 28, 2020, 10:30AM), <https://www.vox.com/21401321/oregon-vote-by-mail-2020-presidential-election>; see also OREGON SECRETARY OF STATE, OREGON VOTE BY MAIL, <https://sos.oregon.gov/elections/Documents/statistics/vote-by-mail-timeline.pdf>.

18 Kaanita Iyer, *Some states have tried to limit ballot drop-off locations, but the voters keep coming*, CAPITOL NEWS SERVICE (Oct 22, 2020), <https://cnsmaryland.org/2020/10/22/some-states-have-tried-to-limit-ballot-drop-off-locations-but-the-voters-keep-coming/>.

19 See, e.g., Va. Code § 24.2-701.1 (as amended in the 2021 Special Session I of the General Assembly) (new Virginia law, effective July 1, 2021, that allows for in-person absentee voting on Sundays).

20 See, e.g., Miles Parks, *The Use of Ballot Drop Boxes May Change Due To Republican Pushback*, NPR (Sept 21, 2021, 4:58PM), <https://www.npr.org/2021/09/21/1038395191/the-use-of-ballot-drop-boxes-may-change-due-to-republican-pushback> quoting Florida Governor Ron DeSantis as stating “We need to address these drop boxes. I think they’re a big problem.”).

21 See *Partisan Suppression*, *supra* note 11; see also *Voting Laws Roundup: October 2021*, BRENNAN CENTER FOR JUSTICE (Oct 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021>.

22 See Carman, *supra*, note 13 (noting that voter protection organizations have

B. Legal services clients are among the population most affected by restrictive ballot laws.

Conducting voter registration at legal services centers follows the logic of the landmark Motor Voter Law,²³ which encourages states to provide voter registration opportunities when they interact with various state services, such as Departments of Motor Vehicles. While legal services centers are not direct state services,²⁴ they nonetheless provide an opportunity for people to interact with informed advocates who can encourage and empower them to be civically engaged.

Nonpartisan voter registration opportunities are critical to expanding citizens' access to the ballot. Providing these opportunities empowers clients with an additional path to enacting change and addressing their needs. This is particularly impactful for legal services clients. At least 21.4% of the U.S. voting-eligible population is not registered to vote.²⁵ Lower-income Americans are disproportionately less likely to be registered. For example, only 52% of Americans making less than \$50,000 per year voted in 2016.²⁶ Lower-income citizens are also more likely to use free or subsidized legal services; in fact, LSC grantees specifically serve households with annual incomes at or below 125% of the federal poverty guidelines.²⁷

Bringing voter registration to individuals seeking subsidized community services can improve long-term civic engagement. Vanessa Williamson, a fellow at the Brookings Institution, conducted a voter registration experi-

indicated the bottled water ban would most “hurt low-income voters who stand in line with their children as the dinner hour comes and, sometimes, goes.”).

23 National Voter Registration Act of 1993, Pub. L. 103-31, 107 Stat. 77, 42 U.S.C. ch. 20, subch. I-H § 1973gg et seq., transferred to 52 U.S.C. §§ 20501–20511.

24 *How We Work*, LEGAL SERVICES CORP. <https://www.lsc.gov/about-lsc/what-legal-aid/how-we-work> (identifying LSC as “a grant-making organization” that distributes the funding it receives from the federal government to “independent” nonprofit organizations).

25 *Why Are Millions of Citizens Not Registered to Vote?*, PEW CHARITABLE TRUSTS (Jun 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/06/why-are-millions-of-citizens-not-registered-to-vote>.

26 Vanessa Williamson, *The Filer Voter experiment: How effective is voter registration at tax time?* BROOKINGS INST. (April 2, 2019), <https://www.brookings.edu/research/the-filer-voter-experiment-how-effective-is-voter-registration-at-tax-time/>; see also Danielle Root & Liz Kennedy, *Increasing Voter Participation in America: Policies to Drive Participation and Make Voting More Convenient*, CENTER FOR AMERICAN PROGRESS (July 11, 2018), <https://www.americanprogress.org/issues/democracy/reports/2018/07/11/453319/increasing-voter-participation-america/>.

27 *What is Legal Aid?*, LEGAL SERVICES CORP., [HTTPS://WWW.LSC.GOV/ABOUT-LSC/WHAT-LEGAL-AID](https://www.lsc.gov/about-lsc/what-legal-aid) (“LSC-funded programs help people who live in households with annual incomes at or below 125% of the federal poverty guidelines – in 2021, that is \$16,100 for an individual, \$33,125 for a family of four.”).

ment at seven Volunteer Income Tax Assistance (“VITA”) centers in Cleveland, OH, and Dallas, TX in 2018.²⁸ VITA centers are coordinated by local nonprofits and provide free tax return preparation assistance to Americans making less than \$55,000 per year.²⁹ Williamson’s experiment found that the mere presence of voter registration volunteers at these clinics more than doubled the likelihood that an eligible person would register to vote. Further, those who registered also voted in the next Ohio primary election at a higher rate than the state’s overall turnout rate,³⁰ a fantastic achievement. Thus, voter registration opportunities for legal services clients may be similarly impactful.

In addition to receiving legal support, potential LSC clients can seek structural change from their elected officials once the barrier to participating in the democratic process no longer remains. Providing voter registration opportunities to potential legal services clients meets them where they are, expands their ability to affect change, and equips them with a trusted messenger who can explain the benefits of voting. This trusted messenger can also support them (without providing legal advice) through what can be a confusing and cumbersome process.

III. THE BARRIERS PREVENTING THE LEGAL SERVICES CORPORATION FROM OFFERING VOTER REGISTRATION STEMS FROM ITS COMPLICATED HISTORY AS A SOURCE OF POLITICAL IRE FROM CONSERVATIVES.

All nonprofit work conducted by local legal services centers is nonpartisan. Despite their nonpartisan nature, local centers receiving any funding from the LSC are subject to significant restrictions beyond those imposed on typical nonprofits. These restrictions stem in part from the LSC’s history as a political pin-cushion.

Subsidized legal services have long been a hot-button issue for conservative activists.³¹ Consequently, volunteers engaged in voter registration must be aware of past partisan criticism surrounding the Legal Services Corporation to ensure that their important work is not needlessly politicized. This remains the case even though much of the partisan critiques and fears were unsubstantiated and motivated by short-term political gain.

28 Williamson, *supra* note 26.

29 *Id.*

30 *Id.*

31 Despite requiring a meager degree of funding, legal aid has received a disproportionate amount of criticism from skeptics. *See infra*.

- A. *Since the inception of federal subsidies for legal services, the federal government's goals have included structural reforms as well as direct services.*

In 1964, as part of President Johnson's War on Poverty, the Economic Opportunity Act created the Office of Economic Opportunity ("OEO").³² The OEO was the first opportunity for Americans to receive civil legal services funded by the federal government.³³ It established legal aid centers to provide low-income Americans full-service legal support from qualified attorneys in nearly every state.³⁴

Additionally, impact litigation-focused "back-up centers" supported the regional legal aid centers in high-profile litigation, training, and research.³⁵ These back-up centers, alongside local OEO centers, brought many successful challenges to protect the poor;³⁶ however, they also received political backlash, in part because of their successful advocacy for the poor.³⁷

- B. *Despite Republican opposition, back-up centers prevailed through the 1990s with the support of bipartisan compromise.*

In 1969, President Richard Nixon appointed then-Republican Congressman Donald Rumsfeld as OEO Director.³⁸ Rumsfeld promptly fired OEO's then-heads of legal services and restructured the organization in a manner advocates at the time referred to as "dismantling" it.³⁹ These moves

32 Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508.

33 Alan Houseman & Linda E. Perle, *Securing Equal Justice for All A Brief History of Civil Legal Assistance in the United States*, CENT. LAW & SOC. POL'Y (May 2018), 11, https://www.clasp.org/sites/default/files/publications/2018/05/2018_securingequaljustice.pdf.

34 Alan W. Houseman, *To Establish Justice for All: The Past and Future of Civil Legal Aid in the United States*, 23 GEO. J. ON POVERTY L & POL'Y 325, 330–32 (2016) (hereinafter, Houseman).

35 *Id.* at 332–33.

36 *Id.* at 333. Challenges included high-profile cases such as *Goldberg v. Kelly*, 397 U.S. 254 (1970). *See also* SUSAN LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING*, 77 (2014).

37 *See* Houseman, *supra*, note 33, at 334 ("The Murphy Amendment was widely viewed as an attempt to give Governor Reagan the power to veto the grant to California Rural Legal Assistance (CRLA). CLRA was a particularly aggressive legal services program that had gained notoriety for its successful efforts to stop certain draconian welfare and Medicaid policies in California").

38 Paul Delaney, *Man in the News*, NY TIMES (Nov. 12, 1971), <https://www.nytimes.com/1971/11/13/archives/pragmatic-aide-to-nixon-donald-rumsfeld.html>.

39 *Id.*

were largely political: conservatives, including Rumsfeld, were skeptical of the broader role backup centers held in affirmative litigation.⁴⁰ Consequently, conservatives sought to eliminate back-up centers through limits on centralization and coordination.⁴¹

Despite some conservative legislative opposition, staff of subsidized legal services resisted changes, and the programs persevered. In 1974, President Nixon signed compromise legislation that continued subsidized legal work under the newly formed Legal Services Corporation.⁴² Funding steadily increased under President Carter in spite of continued harsh conservative opposition.⁴³ When President Reagan attempted to eliminate the program, the private bar advocated for its continued existence.⁴⁴ Although it remained a constant target of outright hostility by conservatives, the LSC survived this political turmoil⁴⁵ and continued through President H.W. Bush's tenure and the election of President Clinton, as well.⁴⁶

C. Unflinching conservative radicalism following the 1994 Republican takeover of the House of Representatives led to the elimination of backup centers.

In 1994, Republicans swept into the House of Representatives. Perhaps threatened by the prospect of advancing the rights of the poor, conservatives proposed to eliminate the LSC.⁴⁷ A compromise was ultimately reached, but at the cost of significant reductions in funding and the elimination of backup centers.⁴⁸ Much of the work conducted by these backup centers included ensuring that lower-income Americans received the benefits to which they were constitutionally entitled from the government or back pay that they

40 *Id.*

41 *Id.* at 334–36.

42 Houseman, *supra* note 33, at 338.

43 *Id.* at 339.

44 *Id.*

45 *Id.* at 339–41; *see also* Jeanne Charn, *Forward*, 7 HARV. L. AND POL'Y REV. 1, 6 (2013) (“[F]rom 1980 until the late 1990s were a period of crisis that threatened the very existence of the program. First, during the Reagan Administration, and then again in the mid-1990s after the Republicans gained majorities in both houses of Congress, federal funds were slashed, and Congress restricted both the type of clients the legal services lawyers could represent and the permissible modes of representation. The restriction that barred legal aid lawyers from filing class actions was an unmistakable repudiation of the law reform agenda that had defined the program in the OEO years”).

46 *Id.* at 341–42.

47 *Id.* at 342.

48 Earl Johnson, Jr., *To Establish Justice For All: The Past And Future Of Civil Legal Aid In The United States*, 269 (2014).

were legally entitled from their employers. Rather than viewing these cases as appropriate functions to ensure institutions and workplaces treat people fairly, conservatives found these causes to be “social engineering.”⁴⁹ This was not because the programs failed to advance the rights of the poor, but because of their *success*. Deeming the program’s work “left wing,” legislators pounced on the program, which was coincidentally unpopular with major donors to the Republican Party.⁵⁰

D. The short-term political benefit for elected Republicans led to long-term losses for low-income Americans in need of legal services.

Along with the elimination of back-up centers came a series of additional restrictions on the previously less controversial local LSC-funded centers: class actions,⁵¹ affirmative lobbying activity,⁵² attorney voter registration,⁵³ and other nonpartisan activities that Republicans nonetheless deemed “too partisan” were banned.⁵⁴ These restrictions continue to apply not only to activity directly funded by the LSC, but to *all* activities by *any* recipient of LSC funding, even if the local entity receives local support for such efforts.⁵⁵ In response to these restrictions, many previously-LSC-funded local centers refused LSC support altogether and sought alternative funding from state bar associations and local philanthropies.⁵⁶

Conservative opposition to support for the poor appeared to stem at least in part from a broader ideological disagreement with the LSC mission, rather than secondary disagreements about logistics. There is some evidence that this sentiment continues today.⁵⁷ Thus, regardless of the ideological basis

49 *Id.*

50 *Id.*

51 Houseman, *supra* note 33, at 343.

52 *Id.*

53 45 C.F.R. § 1608.6.

54 45 C.F.R. § 1608.6.

55 Houseman, *supra* note 334, at 343.

56 *See, e.g., Significant Events In GBLS' History*, GREATER BOSTON LEGAL SERVICES, [HTTPS://WWW.GBBS.ORG/ABOUT/HISTORY](https://www.gbbs.org/about/history) (noting that in 1996, “GBLS relinquish[ed] \$1,400,000 in federal funding due to major restrictions imposed by Congress.”).

57 In a 2008 speech before the Federalist Society, Federal Circuit Judge Dennis Jacobs criticized significant portions of pro-bono work, claiming it has an ideological basis and is self-serving: according to Jacobs, “[l]awyers use public interest litigation to promote their own agendas, social and political--and (on a wider plane) to promote the power and the role of the legal profession itself.” *Speech by Judge Dennis G. Jacobs*, THE FEDERALIST SOC. (Oct. 6, 2008) <https://fedsoc.org/commentary/publications/speech-by-judge-dennis-g-jacobs> This acknowledgement alone indicates a conservative apprehension towards pro-bono work, as well as a willingness among attorneys speaking to the Federalist Society to

for the opposition, LSC-funded centers remain under intense scrutiny.

IV. WITH ONE CHANGE IN INTERPRETATION FROM A SCANT, DECADES-OLD ADVISORY OPINION, NON-ATTORNEY EMPLOYEES OF LSC-FUNDED CENTERS COULD REGISTER CLIENTS TO VOTE.

Due to these politically-charged and longstanding restrictions, attorneys at LSC-funded local centers are prohibited from registering their clients to vote; however, the current restriction specifically preventing non-attorney employees from engaging in this nonpartisan activity stems from an advisory opinion that is overdue for review.

A. *LSC attorneys are prohibited by statute from participating in “any voter registration activity.”*

42 U.S.C. § 2996f(6)(C) provides restrictions to attorneys at LSC-funded entities. Under the law, the grantee agency is required to “insure that all attorneys engaged in legal assistance activities supported in whole or in part by the Corporation refrain, while so engaged, from [] any political activity, or . . . any voter registration activity (other than legal advice and representation).”⁵⁸ Although voter registration is non-partisan and catego-

heavily criticize pro-bono work for ideological reasons. Judge Jacobs has strong ties to the organization as well: the judge, who was appointed by President H.W. Bush to the United States Court of Appeals for the Second Circuit in 1992, noted in his official court biography that he was the recipient of the James Madison Award from the Federalist Society. “Hon. Dennis Jacobs,” UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, <https://www.ca2.uscourts.gov/judges/bios/dj.html>.

Further, Judge Jacobs’ speech laid the groundwork for a far more controversial push, perhaps best summed-up in a letter by Harvard Federalist Society students that implied that clinics for law students *should* have an ideological basis, and that the school’s offerings were insufficiently conservative. The letter, which claimed that “the clinical opportunities for students with right-of-center viewpoints are lacking” requested various clinics the letter writers believed had an ideologically conservative bent, including a “Religious Liberty Clinic,” a “Conservative Appellate Advocacy Clinic,” a “Pro-Life Clinic,” and others. *See Letter from Harvard Law School Federalist Society* (on file with the author).; *see also* Elie Mystal, *Harvard FedSoc Demands Right-Wing Clinics, ‘Cause I Guess Helping Poor People Is Liberal?*, ABOVE THE LAW (Oct 28, 2019, 3:15 PM), <https://abovethelaw.com/2019/10/harvard-fedsoc-demands-right-wing-clinics-cause-i-guess-helping-poor-people-is-liberal/?rf=1> (noting that conservative law students continue to be against pro bono support to the poor for apparently ideological reasons); Jacob Carrel, *Purpose: What the Federalist Society Got Wrong About Clinics, and How Students Can Learn From Their Mistake*, HARV. C.R.-C.L. AMICUS, Nov 19, 2019, <https://harvardcrcl.org/purpose-what-fedsoc-got-wrong-about-clinics-and-how-students-can-learn-from-their-mistake/>.

58 42 U.S.C.S. § 2996f(6)(A)–(C) (LexisNexis, Lexis Advance through Public Law

rized as so in other contexts,⁵⁹ this statute specifically extends its prohibition to encompass “voter registration activity.” Thus, under the current law, attorneys at local centers receiving LSC funding are prohibited from directly registering their clients to vote.

B. When a statute governing a particular agency contains ambiguity, courts generally must defer to the respective agency’s interpretation.

In many circumstances, courts must defer to an agency’s interpretation of its own regulations.⁶⁰ Before granting such deference, courts must first find the regulation to be “genuinely ambiguous” after using all available tools of statutory construction in an attempt to resolve the ambiguity.⁶¹ If genuinely ambiguous, the agency’s interpretation of the regulation will be provided deference so long as it (a) is reasonable,⁶² (b) is authoritative, such as a formal letter declaring the agency’s policy,⁶³ (c) implicates the agency’s substantive expertise,⁶⁴ and (d) reflects “fair and considered judgment.”⁶⁵ Critically, this deference remains even if the agency, drawing on its expertise in the area, decides to reevaluate the ambiguity and reinterpret its intended meaning.⁶⁶

Although the LSC is considered a private corporation, courts have applied similar standards to LSC decisions as they would to administrative agencies. This is sensible; many of the rules the LSC applies to grantees function similarly to agency regulations. “Although the administrative decisions of such entities are not literally subject to the requirements of the Administrative Procedure Act . . . , analogous standards have been applied to district court review of LSC decisions.”⁶⁷ Thus, just as courts should defer to

117-70, approved December 3, 2021, with a gap of Public Law 117-58).

59 See, e.g., *Political Campaign Intervention by 501(c)(3) Organizations: Get-Out-the-Vote Activities*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/frequently-asked-questions-about-the-ban-on-political-campaign-intervention-by-501c3-organizations-get-out-the-vote-activities> (noting that non-profits organized under 501(c)(3) of the Internal Revenue Code can conduct neutral, non-partisan get-out-the-vote drives).

60 *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

61 *Kisor*, 139 S. Ct. at 2415.

62 *Id.*

63 *Id.* at 2416.

64 *Id.* at 2417.

65 *Id.*

66 *Perez*, 135 S. Ct. at 1199.

67 *W. Ctr. on Law & Poverty v. Legal Servs. Corp.*, 592 F. Supp. 338, 342 (1984);

an agency's interpretation of its own statutes, courts should similarly defer to the LSC's interpretation of its own statutes as well.

C. The LSC has promulgated an ambiguous regulation apparently prohibiting non-attorney employees from registering clients to vote as well.

The LSC promulgated 45 C.F.R. Part 1608 after interpreting the restrictions under 42 U.S.C. § 2996f(6)(C). This interpretation specifically states that, “[w]hile engaged in legal assistance activities supported under the act, no attorney shall engage in (a) Any political activity, (b) Any activity to provide voters with transportation to the polls, or to provide similar assistance in connection with an election, or (c) Any voter registration activity.”⁶⁸ Further, “[n]o employee shall use any Corporation funds for activities prohibited to attorneys under § 1608.6; nor shall an employee intentionally identify or encourage others to identify the Corporation or a recipient with such activities.”⁶⁹ By the plain language of this regulation, no Corporation funds can be expended by any employee for purposes of voter registration,⁷⁰ nor may any attorney engage in voter registration activity.⁷¹ But the particular phrase, “nor shall an employee intentionally identify or encourage others to identify the Corporation or a recipient with such activities[.]” leaves a degree of ambiguity.⁷²

The LSC narrowly interpreted the term “intentionally identify” in 2002, when the Deputy Director of Passaic County Legal Aid Society, an LSC grantee, ran in a local election. At issue was whether the Deputy’s campaign literature stating he “manages a multi-million dollar budget as the Deputy Director of Passaic County Legal Aid” violated 45 C.F.R. 1608.4(a), a similar section of the regulation banning employees from “intentionally identifying” the LSC with any political activity.⁷³ In its advisory opinion, the LSC

see also Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp. (Texas Rural Legal Aid II), 940 F.2d 685, 689 (D.C. Cir. 1991) (internal citation omitted) (“We conclude that the basic principles of *Chevron* apply to the statutory scheme created by the Act and the role contemplated for LSC under it.”).

68 45 C.F.R. § 1608.6.

69 45 C.F.R. § 1608.4(b).

70 *Id.* § 1608.4(b).

71 *Id.* § 1608.4(b).

72 *Id.*

73 *See* 45 C.F.R. § 1608.4(a) (Lexis Advance through the Dec. 14, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 70751) (“No employee shall intentionally identify the Corporation or a recipient with any partis[an] or nonpartisan political activity, or with the campaign of any candidate for public or party of-

narrowly interpreted the phrase “intentionally identify,” and found that the campaign literature’s language regarding Passaic County Legal Aid did not violate the Act’s ban on intentionally identifying the LSC with political activity. The advisory opinion noted that “the longstanding OLA interpretation of section 1608.4(a) has been that it is intended to refer to such actions which would make it appear that the program itself was engaged in political activities (partisan or non-partisan) or that the program supported or endorsed any candidate for public office.”⁷⁴ Based on this narrow interpretation, a violation of the regulation may be found if (1) an individual engages in a willful act that (2) would lead a reasonable person to believe that the program itself was associated with the individual’s activity.

The inclusion of “the Corporation or a recipient” includes both the LSC-funded center as well as the LSC itself. But merely registering clients to vote, regardless of the registrar’s relationship to the agency, is distinguishable from intentionally identifying the activity with the LSC-funded center. There is no express requirement within the regulation that activities by outside volunteers must be prohibited; rather, their *association* with the LSC may not be “encourage[d].”⁷⁵ Thus, voter registration can be accomplished if orchestrated entirely by non-employees who expressly state that the activity is not associated with the center.

The LSC itself has acknowledged the need to address certain gaps within this regulation: A 2017 advisory opinion issued by the LSC interpreted the same regulation to allow LSC-funded centers to provide legal guidance related to re-enfranchisement of previously convicted individuals under Alabama’s re-enfranchisement laws.⁷⁶ While the reasoning centered on interpretations of a different provision and did not address voter registration activity itself, the opinion acknowledges that there are gaps in this regulation.

Additionally, other ambiguities in the statute have been addressed before. In *Western Center on Law and Poverty, Inc., v. Legal Services Corporation*,⁷⁷ an LSC grantee had its funding revoked after allegedly taking part in a campaign to defeat a ballot initiative; however, the grantee’s funding was restored in federal court. The case centered on the ambiguity in the exception to the statute that prohibited voter registration by attorneys

fice.”).

74 *Meaning of “intentionally identify” in 45 CFR 1608.4(a)*, External Opinion 2006-1005 (October 05, 2006), <https://www.lsc.gov/sites/default/files/LSC/pdfs/EX-2006-1005.PDF>.

75 *Id.* § 1608.4(b).

76 *Legal Information and Assistance Involving Voting Rights*, Advisory Opinion 2017-08 (Dec. 1, 2017), <https://www.lsc.gov/ao-2017-008>.

77 592 F. Supp. 338 (1984).

“other than legal advice and representation.” The president of the LSC at the time interpreted the exception “narrow[ly]”⁷⁸ to include only a specific scope of representation, and not a more general definition of legal advice and representation. The court found that the exceedingly narrow interpretation of the exception was “unsupported by the statutory language and interpreting regulations.”⁷⁹ Moreover, the court found that the funding decision was arbitrary and capricious and consequently in violation of the Administrative Procedure Act.⁸⁰

Further, in 1990 the LSC promulgated a regulation prohibiting LSC-funded grantees from engaging in redistricting litigation. Interpreting the statute’s ban on political activity broadly, the LSC reasoned that redistricting decisions are “not related to the delivery of basic day-to-day legal services to the poor and are intertwined with impermissible political activity.”⁸¹ This broad interpretation was challenged in court and initially struck down,⁸² but the D.C. Circuit upheld the regulation on appeal, finding that the LSC’s interpretation was entitled to deference.⁸³

D. Although the ambiguity within 45 C.F.R. Part 1608 has been addressed by the LSC before, its previous interpretation is ripe for re-evaluation.

In response to an inquiry as to “whether 45 C.F.R. Part 1608 prohibits voter registration activities by non-attorney personnel in LSC-funded legal services programs” in a 1998 advisory opinion, the LSC interpreted the phrase “identifying the recipient” broadly. In a meager, three-paragraph explanation, it stated:

“Section 1608.4 extends this prohibition to all recipient employees. It provides that: ‘No employee shall use any Corporation funds for activities prohibited to attorneys under Section 1608.6; nor shall an employee intentionally identify or encourage others to identify the Corporation or a recipient with such activities.’

78 *Id.* at 344.

79 *Id.*

80 *Id.* at 348.

81 54 F.R. 10569

82 *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp. (Tex. Rural Legal Aid I)*, 740 F. Supp. 880, 888 (1990).

83 *Tex. Rural Legal Aid II*, 940 F.2d at 689 (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984)).

The second clause of this provision prohibits identifying the recipient with any voter registration activity. Thus, even if non-LSC funds or no funds supported the activity, no recipient can be identified with voter registration activity.”⁸⁴

Thus, as it currently stands, the advisory opinion prohibits voter registration by non-attorney *employees*. Nevertheless, given its ambiguous nature and limited analysis or explanation, this advisory opinion is ripe for review.

E. Upon renewed review, an alternative interpretation could distinguish between merely allowing an activity to occur and formally identifying with the activity.

The meager guidance issued in 1998 fails to fully address the ambiguity of Part 1608, but it need not be permanent, because agencies – and by extension, the LSC – are empowered to reconsider their previous guidance at any time. Thus, the LSC may draw on its expertise in the field of legal services and appropriately revisit and reconsider its opinion. Such reinterpretation would be entitled to considerable weight.⁸⁵

A new interpretation could allow local LSC-funded entities to permit non-attorney staff to register voters, provided that the staff do not “identify the Corporation or a recipient with such activities,”⁸⁶ presumably by expressly stating that they are not acting in affiliation with or encouragement by the center.⁸⁷ Further, the Corporation could even provide grantees guidance for compliance recommending that they follow particular steps when conducting voter registration.

84 *Whether 45 CFR Part 1608 Prohibits Voter Registration Activities by Non-Attorney Personnel in LSC-Funded Legal Services Programs*, External Opinion 1998-47, <https://www.lsc.gov/whether-45-cfr-part-1608-prohibits-voter-registration-activities-non-attorney-personnel-lsc-funded>.

85 *Perez*, 135 S. Ct. at 1199.

86 45 C.F.R. § 1608.4.

87 An interpretation that “identify the Corporation. . . with” could be defined to mean “approach the activity in such a way that a reasonable person would believe the activity was endorsed by the Corporation or LSC center.” The guidance accompanying that interpretation could require any such activity to be accompanied by a verbal or written explanation that the activity is *not* endorsed by or intentionally identified with the LSC center, to ensure compliance with the regulation. For an example of language that may fit the regulation’s intended interpretation, see Appendix I, Section 3(B).

V. IN THE MEANTIME, VOTER REGISTRATION AT LSC-FUNDED CENTERS CAN LIKELY BE CONDUCTED BY NON-ATTORNEY VOLUNTEERS

Missing from the 1998 opinion is whether non-employees or non-attorney volunteers (such as law students or other interns) can engage in voter registration; consequently, there may already be existing opportunities to offer LSC clients voter registration opportunities.

Until the LSC revisits its advisory opinion, volunteers may conduct voter registration under the current regulations. Although volunteer-led voter registration may be less effective, it would support the broader goal of empowering citizens to vote and engage in the democratic process. This is an immediately available opportunity that would restore a measure of local control to LSC-funded entities, allowing them to engage in this non-partisan activity once again without resorting to changing regulations or enacting new legislation.

VI. SHOULD VOLUNTEERS – OR, IN THE FUTURE, NON-ATTORNEY EMPLOYEES – ENGAGE IN VOTER REGISTRATION, CERTAIN PRACTICES SHOULD BE FOLLOWED TO REMAIN COMPLIANT WITH THE LSC'S REGULATIONS

Voter registration is not as simple as asking someone to fill out a form. It is even more complicated when considering the serious implications of violating an LSC regulation. With the risk of losing the center's funding in mind, registrars must be strategic and diligent with any voter registration activity to ensure the activity is not expressly affiliated with the center.⁸⁸

First, care should be employed to ensure that voter registration is not disruptive to volunteers' existing high workload. When efficient measures are in place, there should be no notable disruption to the volunteers' workloads. For example, Williamson's results in the tax clinic found "no measurable change in the rate of tax preparation when voter registration was offered."⁸⁹ Ensuring that volunteers are prepared in advance can ease this process.

Second, voter registration must be clearly framed as (1) non-partisan, and (2) separate and distinct from the local center or the LSC itself. This must be as clear as possible so as to avoid confusing clients or violating 45 C.F.R. § 1608. Volunteers can simply identify themselves as such and suggest that potential clients fill out a voter registration form while they are in a waiting

⁸⁸ See, e.g., *Western Center*, 592 F. Supp. at 340 (requests by LSC center for future funding initially denied based on "significant evidence" the center engaged in prohibited activities).

⁸⁹ See Williamson, *supra* note 26.

room, for example.

Voter registration requires a clear plan and thoughtful implementation, but it is relatively easy to master. It should be non-disruptive, non-coordinated, and non-partisan. At the same time, it should demonstrate how voting is a widespread norm. Because the legal restrictions have implications at a practical level as well, Appendix I provides a checklist to help volunteers implement their own voter registration plan at an LSC-funded center.

VII. CONCLUSION

Democracies require widespread and inclusive access to the ballot. Vulnerable groups, including lower-income Americans, are less likely to be registered voters; outreach and opportunities to register may be particularly impactful in reducing the barrier to vote. Although there are several restrictions on LSC-funded local centers, opportunities to meet LSC clients where they are and register them to vote are on the horizon. By reevaluating one terse advisory opinion from over two decades ago, the LSC could empower non-attorney employees to register clients to vote. In the meantime, volunteers at LSC-funded centers can currently register clients to vote if they do so carefully.

Both current volunteer-led opportunities and future non-attorney staff possibilities would allow LSC-funded centers to reach more individuals and assist them in an essential but complicated process. While some legal services staff may be understandably nervous about volunteers conducting voter registration, it can nonetheless be done effectively and legally.⁹⁰

Most importantly, any voter registration at these centers must remain non-partisan and in compliance with existing guidance. Despite being baselessly attacked for decades as a partisan activity, voter registration by LSC volunteers and non-attorney staff members can be non-disruptive, non-coordinated, and non-partisan. At a time where voter intimidation and disenfranchisement efforts are on the rise, it has never been more critical to expand opportunities for every American to vote.

90 Many legal services entities do not receive LSC funding. *See* Greater Boston Legal Services, *supra* note 41. Thus, voter registration can be immediately implemented by legal services organizations that are not subject to the overbroad LSC restrictions. Furthermore, large-scale opportunities, such as additional causes of action and preclearance opportunities, could be enforced by LSC-oriented entities with additional legislation. *See* Cody Gray, *A New Proposal to Address Local Voting Discrimination*, 50 U. RICH. L. REV. 611 (2016), <https://scholarship.richmond.edu/lawreview/vol50/iss2/6>.

APPENDIX I: VOTER REGISTRATION CHECKLIST

The following checklist can be used by a volunteer interested in registering LSC-funded legal services clients to vote.

1. *Obtain any required local licensures.* Some states require voter registration officials to undergo training or obtain basic licensures to register people to vote.⁹¹ Thus, any volunteers who choose to register voters should obtain any required licensure before registering anyone to vote.
2. *Print all materials at home or at your law school; bring pens.* Because no costs can be borne by LSC-funded entities, no voter registration papers can be printed from the centers' printers. Law-student volunteers should take care to print registration forms ahead of time at their schools, and other volunteers should print forms at home or at a local print center. Similarly, any pens or clipboards to facilitate the activity should be brought from home.
3. *Make one request of clients while they wait in any waiting room.*
 - A. Drawing on Williamson's experience at VITA centers,⁹² the best chance to register a potential client to vote is to give them the form when they first enter. This can be in addition to any other forms given during a basic intake procedure. In the VITA centers, having the clients simply fill out the voter registration form alongside other intake documents saved time and "allowed participants to complete their forms on their own time."⁹³ In doing so, it created no added time to the entire process, thus being non-disruptive to the existing important work going on in the centers.
 - B. To emphasize how it is non-coordinated, the volunteer should provide a verbal explanation, such as "I'm registering people to vote today while you wait. This is entirely separate from the work of [*the name of the local center*]. It is not connected to, supported by, or affiliated with [*the name of the local center*]. Whether you choose to register or

⁹¹ See, e.g., TEX. ELEC. CODE § 13.047 (establishing requirements including an examination for volunteer deputy registrars).

⁹² See Williamson, *supra* note 26 ("When a client enters a VITA site, they are typically greeted by an intake volunteer who provides the client with the IRS-mandated intake form. . . . At the Ohio Filer Voter sites, the intake materials included the IRS form, the experimental consent form, and the voter registration form.").

⁹³ *Id.*

not will not affect any of any legal representation you may receive.”

- C. Drawing on behavioral science research, the volunteer should next ask the potential registrant, “Are you a voter? Have you had a chance to register yet?” Voter registration should be tied to the client’s identity and should “reveal voting to be a widespread norm.”⁹⁴ The question posed should be, “are you a voter? Have you had a chance to register yet?” rather than, “are you registered to vote?” Emphasizing the framing of *being* a voter taps into one’s identity and reinforces descriptive social norms.⁹⁵
 - D. If the client says they are interested in registering, the volunteer should give them the form to register, and specify that the registration form needs to be returned directly to them only. The volunteer could state, “Because I am registering you to vote today in my personal capacity, please return this voter registration form directly to me and do not leave it here or with anyone else.”
- 4. *Collect all voter registration forms.* It would be a problem if the volunteer were to forget a form, as any other staff potentially handling the form would potentially violate 45 C.F.R. § 1608.
 - 5. *Return all completed forms promptly.* As some states have timeline restrictions on how quickly a volunteer voter registrar must turn in a completed voter registration form, volunteers should be aware of their own state’s restrictions and return all forms promptly.
 - 6. *Maintain awareness of strict separation.* Volunteers should always take care to separate any voter registration activity from any LSC work.

94 *Id.* at 19.

95 See Alan S. Gerber and Todd Rogers, *Descriptive Social Norms and Motivation to Vote: Everybody’s Voting and so Should You*, 71 J. OF POLS., 178-191 (2009); see also Christopher J. Bryan, Gregory M. Walton, Todd Rogers, and Carol S. Dweck, *Motivating voter turnout by invoking the self*, 108 PROC. OF THE NAT’L ACAD. OF SCI. 31, 12653 (2011).

Book Review: “The Law Says What?: Stuff You Didn’t Know About the Law (But Really Should!)”

By: Michael Drake¹

In his book, “The Law Says What?”, Maclen Stanley sets out two goals: “To introduce you to the interesting, weird, and sometimes irritating things that you don’t know about the law, but really should[;]”² and, “to show you how to think like a lawyer.”³ From my readthrough, he achieves both goals. Stanley’s book is easy to read, entertaining, and manages to provide a broad overview of legal education. However, Stanley – like many legal educators – undercuts his otherwise enjoyable book by approaching legal issues “objectively”, i.e., justifying both sides of an issue instead of taking a position or engaging in critical analysis. While this is to be expected in a legal book trying to reach the broadest audience possible, it is disappointing nonetheless.

Stanley organizes his book into six “global sections”: 1. The police; 2. Crime and Punishment; 3. Self-Defense; 4. Your Rights; 5. Employers and Landlords; and, 6. The Court System.⁴ Within each “global section,” he covers multiple topics. For example, some topics covered in “The Police” include, “You Can Legally Flip the Bird to Police”,⁵ “No, the Police Don’t Always Need a Warrant”,⁶ and “Crossing County Lines Doesn’t Mean the Police Will Stop Chasing You”.⁷ Within each subsection, Stanley provides an example from a case or a practical hypothetical to introduce the topic. Then, he explains the applicable law and how it relates to the example and the subsection in general.

Stanley’s prose is strong. So is his ability to explain complex legal issues in a digestible manner, which is only made clearer through his precise method of organization. In fact, I have not read a book that purports to explain the law that is as easy to read and understand as Stanley’s book. Further, Stanley’s employment of humor and contemporaneous examples renders the majority of his book enjoyable and accessible.

Right from the jump, it is clear that Stanley’s intent is not to cri-

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2 MACLEN STANLEY, *THE LAW SAYS WHAT? STUFF YOU DIDN’T KNOW ABOUT THE LAW (BUT REALLY SHOULD!)* 3 (2021).

3 *Id.* at 4.

4 *Id.* at 3.

5 *Id.* at 15.

6 *Id.* at 20.

7 *Id.* at 34.

tique the existing legal system. To me, this is a missed opportunity. While he acknowledges that some legal topics he discusses may make the reader “angry” or “infuriate[d]”, he backs away from blaming the legal system: “Seldom are judges, lawmakers, and lawyers seeking to make the world even more unfair.”⁸ Rather than weighing in on legal topics in any meaningful way, Stanley instead seeks to “explain” the “underlying rationales” of the legal topics he discusses and leaves it to the reader “to decide whether [the rationales] pass muster.”⁹

To my surprise, Stanley comes close to engaging in a Marxist analysis of the law early in his book by noting that “the law sets the standard for those who *have* and those *have not*.”¹⁰ Sadly, he fails to expand on this materialist analysis. Instead, he continues, “[I]and, money, access to good and services, fundamental rights and privileges, and even basic freedoms – those are all shaped by the hands of the law.”¹¹ Stanley follows by stating he “will aim to approach the law factually and in an unbiased manner[.]”¹² As I learned in law school, teaching the law “objectively” does little more than justify an inherently biased system.

Like law school, Stanley takes the position that the law itself is complicated and hard to understand—to grasp it, you must study it. This position is both widespread and self-serving, the harder the law is to understand, the more business there is for lawyers and law schools. I acknowledge that the law can be convoluted, contradictory, and dense. However, as a Marxist, I believe that people’s confusion about the law can be explained, primarily, from two points: 1. The law is inaccessible to most people; and, 2. the law is, at its core, a mechanism of control implemented by the ruling class. If one accepts these two propositions, then, it follows that the confusing nature of the law is by design.

The solution to this problem, in my opinion, is not to provide people with neat tidbits about the law, or to teach them to “think like a lawyer”.¹³ Rather, the solution is to make the law more accessible – both substantively and financially. A book on general legal principles suffers the same setbacks as the Uniform Bar Exam¹⁴ and law school in general: General legal prin-

8 *Id.* at 4.

9 *Id.*

10 *Id.* at 5.

11 *Id.*

12 *Id.*

13 I have always considered that teaching someone to “think like a lawyer” is just a weird way of saying developing analytic skills.

14 The National Conference of Bar Examiners defines the purpose of the Uniform Bar Exam as follows: The UBE is designed to test knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law. NCBE, <https://www.ncbex.org/exams/ube/> (last visited Apr. 21, 2022).

ciples are not the law as it is applied to individuals throughout various states and municipalities. Understanding the general, guiding concepts of landlord tenant law does not mean that you have the tools or resources required to defend yourself in an eviction suit. Knowing how most states interpret and apply criminal statutes does not mean you know how the state you reside in interprets and applies criminal statutes. The availability of state statutes is not enough to offset this knowledge divide. Assuming one can decipher the general meaning of a statute, without access to case law, it is more or less impossible to determine how the relevant courts interpret the statutes in question. In short, one needs more than a generalized understanding of the law and the ability to “think like a lawyer” to effectively prosecute or defend a case.

To be fair, Stanley does not advertise his book as a resource to navigate legal proceedings. His book is not marketed as a solution to the inaccessibility of the legal system. He wrote a fun book that, I imagine, he hopes to sell as many copies of as possible. I further imagine that a book covering the topics that I outlined above would not be as marketable as Stanley’s book. Such a book – covering the fact that the vast majority of legal sources and scholarship is concealed behind insurmountable paywalls and opaque prose – hardly qualifies as an enjoyable read. I suppose that is why Stanley is publishing a book while I am reviewing it for a legal journal. Still, while I understand Stanley’s choices when it comes to the manner in which he discusses the law, I do not understand his insistence on defending so many indefensible legal principles.

Throughout his book, Stanley attempts to justify the existence and maintenance of indefensible laws perpetuated by an unjust system. For example, when discussing the felony murder rule,¹⁵ Stanley correctly points out that “a great deal of criticism has focused on the disproportionate impact these laws have on young minority populations.”¹⁶ He continues: “Indeed, some studies have shown that African American and Hispanic first-time offenders form the majority of those affected by felony murder laws.”¹⁷ I draw issue with this framing. By stating that “some studies have shown” he undercuts an observable fact. I would defy anyone to find a study on felony murder that does not show the disproportionate impact the rule has on non-white populations. A recent study conducted by Duke Law School found that in Cook County, Illinois, “almost 75 percent of cases had a Black

15 For in an in-depth discussion of the felony murder rule and its results, see Alison Flowers & Sarah Macaraeg, *Charge with Murder, but they didn’t Kill Anyone – Police did*, READER (Aug. 18, 2016), <https://chicagoreader.com/news-politics/charged-with-murder-but-they-didnt-kill-anyone-police-did/>.

16 STANLEY, *supra* note 2, at 60.

17 *Id.*

defendant, while less than eight percent had a white defendant.”¹⁸ When considering equal rates of charge reduction or dismissal, the outcome is that 81% of people sentenced in Cook County under the felony murder rule are Black.¹⁹ Approximately 23.8% of the Cook County population are black while approximately 42% are white.²⁰ That same study found that, in Pennsylvania, “more than 1,000 people convicted of felony murder are serving life without parole sentences. Seventy percent of them are Black, nearly eight times the proportion of Black people living in the state.”²¹

Stanley does not stop at the misleading framing. He goes on to defend the felony murder rule by discussing two recent, racially charged murders – the murders of Ahmaud Arbery and George Floyd.²² First, Stanley notes that “it would be extremely difficult for the prosecution to prove that the McMichaels intended to kill Arbery, particularly to a rural, largely white, and largely conservative Georgia jury.”²³ This is a bizarre sentiment to share considering that a video exists of Travis McMichael shooting Arbery in the chest with a shotgun. It is even weirder when you consider the fact that Travis McMichael *was* convicted of malice murder.²⁴ Malice murder is not felony murder.²⁵

After discussing Arbery, Stanley moves to George Floyd. Stanley asserts that, like the Arbery case, it would be hard to convict Chauvin without the Felony Murder Rule: “[I]n order for ‘regular’ murder charges to stick, all twelve Minnesota jurors would have to believe beyond a reasonable doubt that Chauvin intended to kill Floyd, and all twelve Georgia jurors would have to believe beyond a reasonable doubt that the McMichaels intended to kill Arbery.”²⁶ Stanley then asks the reader to imagine themselves as a prosecutor, “wouldn’t you go with proverbial ‘sure bet’ and charge felony murder instead?”²⁷ Ultimately, Derek Chauvin was charged with, and convicted of, an iteration of felony murder – as were Travis McMi-

18 Shobha L. Mahadev & Steven Drizin, *Felony Murder, Explained*, THE APPEAL (Mar. 4, 2021), www.theappeal.org/the-lab/explainers/felony-murder-explained/.

19 *Id.*

20 U.S. Census, <https://www.census.gov/quickfacts/cookcountyillinois> (last visited Mar. 24, 2022).

21 Mahadev & Drizin, *supra* note 17.

22 STANLEY, *supra* note 2, at 60-62.

23 *Id.* at 61.

24 E.g., Eric Ortiz, *Why Was Only One Defendant in Ahmaud Arbery’s Killing Guilty of Malice Murder?*, NBC (Nov. 24, 2021), www.nbcnews.com/news/crime-courts/only-one-defendant-ahmaud-arbery-killing-was-guilty-malice-murder-rcna66660. It is worth noting that Travis McMichael was convicted of malice murder in November of 2021; Stanley’s book was released in the summer of 2021.

25 See Ga Code § 16-5-1 (2014).

26 STANLEY, *supra* note 2, at 62.

27 *Id.*

chael, Gregory McMichael, and William Bryan for their murder of Ahmaud Arbery. Despite that fact, it is unsettling that he chose these examples to illustrate a legal principle wielded as a weapon almost exclusively against black men – and almost never against police officers.

After outlining these examples, Stanley proposes the following: “Thus, a strange role-reversal has surfaced: the felony murder doctrine that has typically been derided by progressive thinkers as racially oppressive and unjust has recently formed the most tenable basis for charging and prosecuting the killers of two unarmed Black men for murder. Has your initial reaction to the felony murder doctrine changed?”²⁸ For me, no, not at all. This kind of strained, both-sides argument that law schools drill into students is neither necessary nor helpful to gaining an understanding of how, and why, the law functions as it does. The fact that an unjust, racially charged legal doctrine has been recently invoked to charge racists does not justify the doctrine. A few high-profile cases where the felony murder rule is used in a “good” way does little to erase the decades it has been used a cudgel against poor, non-white populations. Arguments like this are nothing more than rhetorical tricks that resonate with the overly analytical – i.e., lawyers. I would caution Stanley, and anyone reading this, against using the exceedingly rare prosecution of murderous police officers to justify the inherently racist legal system – lest you end up arguing that felony assault charges should run consecutively.²⁹

While not as egregious, Stanley also attempts to justify civil forfeiture³⁰ laws. After providing a thorough, accessible understanding of the basics of civil forfeiture laws,³¹ he once again cannot resist the insatiable urge of a law school graduate to provide “both sides” of the issue. First, Stanley explains how civil forfeiture laws are used to fund police departments – and the inherent problems therein – as well as noting accusations that the laws are wielded in a racist manner at the border.³² Despite failing to explain how civil forfeiture laws – like most laws – are enforced in a racialized way outside of the border area,³³ Stanley does remark on how the existence of

28 *Id.*

29 Illinois Attorney General, www.illinoisattorneygeneral.gov/press-room/2019_02/20190211.html (last visited Mar. 24, 2022) (announcing that the Illinois Attorney General’s Office filed a writ of mandamus challenging the sentence of former Chicago Police Officer Jason Van Dyke arguing that he should have been sentenced to 16 charges of aggravated battery that would run consecutively).

30 For an explanation of civil forfeiture laws, see, e.g., Waseem Salahi, Jessica Brand, & Callie Heller, *Civil Asset Forfeiture: Explained*, THE APPEAL (Jan 3, 2018), <https://theappeal.org/understanding-civil-asset-forfeiture-e803c59e633b/>.

31 STANLEY, *supra* note 2, at 75-82.

32 *Id.* at 82.

33 See, e.g., ACLU, *Civil Asset Forfeiture: a 5-Month Snapshot in New Jersey*, <https://www.aclu-nj.org/theissues/criminaljustice/civil-asset-forfeiture> (last visited Mar. 24,

the Federal Equitable Sharing Program³⁴ undercuts any meaningful state reforms.³⁵ Still, he finishes the section by noting that “[i]n spite of all the problematic practices we have covered thus far, civil forfeiture laws actually have positive intentions at heart. When used for their proper purpose, these laws have historically enjoyed bipartisan support.”³⁶

There is a clear fault with the assumption that bipartisanship equates to positive intentions – by that metric, both the Iraq War and the Patriot Act had positive intentions at heart. But, to me, the real issue in this section is Stanley’s final example. To justify civil forfeiture – presumably by providing an example of a “proper purpose” of civil asset forfeiture – Stanley has the reader imagine the existence of a Chinese spy ring.³⁷ He implores the reader to imagine a situation where said ring is busted by the FBI and the spies flee to China.³⁸ He finishes the section by explaining that, without civil forfeiture, there would be no way to seize the assets of the Chinese spy ring.³⁹ While I doubt that the executive branch needs civil forfeiture laws to curb foreign spy rings, such an extreme example – ostensibly given to people unfamiliar with the law – distorts the reality of civil forfeiture. It takes a mechanism by which police departments all over America seize property with impunity to fund advanced surveillance apparatuses levied against citizens⁴⁰ and turns it into a way to curb foreign spying. It would be laughable if the underlying sentiment was not so alarming.

Overall, I did enjoy Stanley’s book. The portions critiqued above are a fraction of his book. Outside of the sections outlined above, I did not have issue with Stanley’s framings and explanations. While I do not believe that I am the intended audience, I would recommend it to anyone seeking a straightforward, easy to understand – and, above all entertaining – overview of the law.⁴¹

2022).

34 The equitable sharing program “allows state and local law enforcement agencies to partner with the federal government to seize and forfeit property under federal law—and receive up to 80% of the proceeds—regardless of state law.” Institute for Justice, *Equitable Sharing Creates a Giant Loophole*, <https://ij.org/report/policing-for-profit-3/pfp3content/equitable-sharing-creates-a-giant-loophole/#> (last visited Apr. 25, 2022).

35 STANLEY, *supra* note 2, at 80-81.

36 *Id.* at 82.

37 *Id.* at 83.

38 *Id.*

39 *Id.*

40 See, e.g., Matthew Guariglia, *End Two Federal Programs that Fund Police Surveillance Tech*, EFF (Jan. 25, 2021), <https://www.eff.org/deeplinks/2021/01/end-two-federal-programs-fund-police-surveillance-tech>; Shannon Dooling & Christine Willmsen, *Boston Police Bought Spy Tech with a Pot of Money Hidden from the Public*, WBUR (Dec. 17, 2021), <https://www.wbur.org/news/2021/12/17/massachusetts-cell-site-simulator-civil-forfeitures>.

41 While I may have been a bit hard on Stanley considering the above examples, in all fairness, his agent did ask *The Review* to author a book review. I have to imagine this is what they expected.

ABOUT THE REVIEW

National Lawyers Guild Review, formerly Guild Practitioner, is published triannually by the National Lawyers Guild, a non-profit institution, at 132 Nassau Street, # 922, New York NY 10038. ISSN 0017-5390. Periodicals postage paid at New York, NY and at additional mailing offices.

Subscription rates are \$75/yr for libraries and institutions; \$25/yr for lawyers; \$10/yr for legal workers/law students; \$5/yr for incarcerated persons; add \$5/yr for overseas; \$6.50/single copy, and should be sent to:

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New York NY 10038

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Address all editorial correspondence and law-related poems, criticisms, articles and essays to:

Editor-in-Chief
National Lawyers Guild Review
132 Nassau Street, # 922
New York NY 10038

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