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A Normative Analysis of the Rights and Duties of Law Professors to Speak Out

Daniel M. Filler
Drexel University - Thomas R. Kline School of Law, daniel.m.filler@drexel.edu

Robert R. Kuehn
Washington University in St. Louis - School of Law, rkuehn@wustl.edu

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ROBERT R. KUEHN*

I. INTRODUCTION

* Professor of Law, University of Alabama School of Law. The author thanks Janet Andersen and Jenny Parker for their research assistance. The author also wishes to thank Judith McCormack of the University of Toronto Faculty of Law for organizing a panel at the 2003 American Association of Law Schools (AALS) Workshop on Clinical Legal Education in Vancouver on the right and duty of law professors to speak out and for allowing the use of the title of that panel.

Lawyers are well suited to identify and address social and political problems in society. Law school training involves not simply learning how the law addresses societal issues, but also striving to understand deficiencies in the law and the legal system and weighing possible solutions. In their law practice, attorneys often must look beyond purely technical legal advice and consider the moral, social, economic, and political factors that may be relevant to a client's situation. As a learned profession dedicated to serving more than simply private interests, lawyers are expected to volunteer in efforts to improve the law and legal system and, where a deficiency or injustice is observed, to work towards appropriate change. As members of a profession dedicated to equal justice under law, lawyers are also expected to lend their time and influence to help ensure access to legal representation.

Many lawyers have taken this public service ethic to heart. The famous cases of *Brown v. Board of Education*,[1] *Miranda v. Arizona*,[2] *Gideon v. Wainwright*,[3] *Furman v. Georgia*,[4] and *Roe v. Wade*,[5] to name a few, were handled by volunteer lawyers who saw injustices and decided to get involved.[6] Similarly, countless lawyers spoke out, often at great risk, against government infringements of civil rights and civil liberties in the 1950s and 1960s,[7] and continue today to lend their voices and talents to public causes.[8]

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1. 347 U.S. 483 (1954).
2. 384 U.S. 436 (1966).
3. 372 U.S. 335 (1963).
4. 408 U.S. 238 (1972).
5. 410 U.S. 113 (1973).
6. Richard C. Reuben, *The Case of a Lifetime*, 80 A.B.A. J. 70, 71–73 (Apr. 1994).
7. *See, e.g.*, Sobol v. Perez, 289 F. Supp. 392, 395–99 (E.D. La. 1968) (per curiam) (holding that state court prosecution of attorney for unauthorized practice of law was an unlawful attempt to harass the attorney over his representation of civil rights plaintiffs); S. REP. NO. 84–824 (1955) (reporting on the proceedings against attorney Harry Sacher for contempt of the Senate); CEDRIC BELFRAGE, THE AMERICAN INQUISITION 1945–1960 143 (1973) (noting several attorneys sentenced to jail for defending alleged Communists); JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 217–22 (1994) (describing legal efforts to destroy the civil rights work of the NAACP Legal Defense and Educational Fund's attorneys); DAVID M. OSHINSKY, A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY 457–64 (1983) (addressing attorney Fred Fisher's involvement in the Army-McCarthy hearings).
8. *See, e.g.*, Sam Howe Verhovek, *A Klansman's Black Lawyer, and a Principle*, N.Y. TIMES, Sept. 10, 1993, at B9 (noting NAACP attorney Anthony P. Griffin's unpopular representation of the leader of the Texas Knights of Ku Klux Klan); American Bar Association, *ABA Pro Bono Publico Award, at* http://www.abanet.org/legalservices/probono/probono publicoaward.html (last visited Dec. 19, 2003) (listing current and past recipients of public service awards for "outstanding commitment to volunteer legal services for the poor and disadvantaged"). Professor Geoffrey Hazard argues that the legal profession's norms are expressed not just by its rules, but also by narratives that are upheld as examples of virtuous lawyers. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1242–45 (1991). If so, then stories about altruistic lawyers reinforce an ideal of lawyers as professionals willing to give some of their time and resources to serve the public.

Law professors, too, have stepped out of the classroom and out of traditional academic scholarship to address perceived injustices. Examples of law professors speaking out encompass pro bono litigation,[9] legislative drafting and testimony,[10] community legal education, and the development of expanded legal services programs.[11] Law professors have spoken out on matters labeled as liberal political causes, such as civil rights and environmental law,[12] and those issues deemed more conservative, such as victims' and property rights.[13]

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9. *See, e.g.*, Martha I. Morgan & Neal Hutchens, *The Tangled Web of Alabama's Equality Doctrine After* Melof: *Historical Reflections on Equal Protection and the Alabama Constitution*, 53 ALA. L. REV. 135 n.* (2001) (noting the pro bono service of University of Alabama law professor Martha Morgan on behalf of schoolchildren in public education funding cases); Symposium, *The Rehnquist Years: A Supreme Court Retrospective*, 22 NOVA L. REV. 671 (1998) (describing some of the significant litigation of law professor Bruce Rogow); Georgetown Law—Faculty (Online Curriculum Guide), *David D. Cole*, *at* http://www.law.georgetown.edu/curriculum/tab_faculty.cfm? Status= Faculty&Detail=235 (last visited Dec. 19, 2003) (noting the pro bono litigation of law professor David Cole).

10. *See, e.g.*, Edward Cohn, *Paul Cassell and the Goblet of Fire*: *A Conservative Professor's Adventure in the Liberal Realm of the Law*, THE AM. PROSPECT, Aug. 28, 2000, at 32 (reporting on the legislative drafting work of University of Utah law professor Paul Cassell); Shailagh Murray, *Divine Inspiration: Seminary Article in Alabama Sparks Tax-Code Revolt*, WALL ST. J., Feb. 12, 2003, at A1 (reporting on the tax reform effort sparked by University of Alabama law professor Susan Pace Hamill); Cass R. Sunstein, *A Conservative Nominee Liberals Should Love*, WALL ST. J., Sept. 17, 2002, at A20 (noting the legislative testimony of University of Utah law professor Michael McConnell).

11. *See, e.g.*, AALS, PURSUING EQUAL JUSTICE: LAW SCHOOLS AND THE PROVISION OF LEGAL SERVICES 28 (2002) [hereinafter AALS, PURSUING EQUAL JUSTICE], *available at* http://www.aals.org/equaljustice/final_report.pdf (last visited Dec. 7, 2003) (noting the involvement of a number of law school faculty and deans in legal services planning processes); David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58, 73 (1999) (reporting the public service activities of law professors in using students from courses to help obtain earned income tax credits for low-income clients and teaching high school students legal research skills for a neighborhood improvement project); University of Tennessee College of Law, *Frances Lee Ansley*, *at* http://www.law.utk.edu/faculty/facultyansley.htm (last visited Dec. 19, 2003) (reporting on the community legal education work of law professor Frances Lee Ansley); *see also* Douglas L. Colbert, *Broadening Scholarship: Embracing Law Reform and Justice*, 52 J. LEGAL EDUC. 540, 542–43 (2002) (identifying public service opportunities for law professors that include drafting legislation, developing fact-finding reports, testifying before legislative committees, helping reorganize court systems, writing op-ed pieces, speaking to community groups, writing legal materials for lay audiences, and engaging in litigation).

12. *See, e.g.*, Robert R. Kuehn, *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, 26 HARV. ENVTL. L. REV. 417, 425–31 (2002) (reporting on the pro bono environmental work of law professors Zygmunt Plater at the University of Tennessee, William Luneburg and Jules Lobel at the University of Pittsburgh, Patrick McGinley at the University of West Virginia, and Mark Squillace at the University of Wyoming); Loyola University of New Orleans School of Law, *William P. Quigley*, *at* http://law.loyno.edu/faculty/quigley.html (last visited Dec. 19, 2003) (noting the public service work of law professor William Quigley on issues such as civil liberties, public housing, and voting rights).

13. *See, e.g.*, Cohn, *supra* note 10 (reporting on the public service work of law professor Paul Cassell on victims' rights, the death penalty, and the *Miranda* ruling); Richard A. Epstein, *Not Too Late to Stop Soldier Field Giveaway*, CHI. TRIB., May 5, 2002, at 11 (referencing University of Chicago law professor Richard Epstein's public service work on property rights

On a number of occasions, these public service activities risked damaging the professor's teaching position.[14] Yet, in spite of many publicized cases of law professor activism on issues of public concern, and in spite of American Bar Association (ABA) law school accreditation standards establishing an obligation on law faculty to engage in public service work,[15] the actual amount of legally-related public service work by law professors is thought to be quite modest.[16]

This Article analyzes the normative bases for the rights and duties of law professors to speak out on issues of public concern. Even though altruistic reasons, rather than professional expectations, likely motivated the exemplary members of the legal academy identified above to get involved in public issues, public service norms play an important role in the legal profession and academy. Public service norms express the values of the profession. As such, the prevalence and strength of the norms provide guidance to law professors concerning what they should teach and what behaviors they should emulate as role models for students. Furthermore, norms on the rights and the duties of lawyers express the expectations that the legal profession has for lawyers, both new and old.

For many, professional norms are a motivation to get involved, because they respect and wish to follow the profession's expectations. Identified norms also serve to validate behavior that some law professors would, in any event, like to emulate. Particularly where others may seek to prevent or punish public service, demonstrating the rights and duties to serve may help thwart such opposition. Clearly-defined norms also should motivate law schools and other academic institutions to value and support service activities. Finally, public service norms communicate to the public the values of the legal profession and the appropriate role of lawyers on issues of access to justice and legal system reform, thereby educating the public and possibly increasing public support for lawyer public service.

Focusing exclusively on norms creates the possibility that failing to establish a convincing or enforceable norm allows one to argue that no responsibility or expectation exists. Demonstrating a normative basis for a law

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issues).

14. *See, e.g.*, Kuehn, *supra* note 12, at 430–31 & n.64 (reporting on pressure to dismiss University of Pittsburgh law professor Tom Buchele and the attempt to deny tenure to University of West Virginia law professor Patrick McGinley over their public service work); Amy Sieckmann, *Hamill: Christian Coalition Trying to Discredit Her Stance*, ANNISTON STAR (Anniston, Ala.), Mar. 12, 2003, at 1A (reporting on attacks on University of Alabama law professor Susan Pace Hamill over her efforts to reform the state's tax code).

15. *See infra* notes 229–31 and accompanying text.

16. *See infra* notes 264–65 and accompanying text. Clinical law professors may be an exception to this limited amount of public service work since clinical professors often donate considerable time to outside public service projects. Colbert, *supra* note 11, at 550 (reporting that clinical law professors indicated in a 2001 survey that two-thirds had taken leadership roles in public service projects).

professor's extramural public service activities, however, does not suggest that in the absence of a norm a law professor should not or could not speak out.[17]

Thus, it is worthwhile to consider the presence and strength of the norms that govern the rights and duties of law professors to speak out. Looking at those norms, Part II of this Article addresses laws that affect the right of a law professor to participate in "out of the classroom," or extramural, activities. Part III explores the legal profession's established precepts on the rights and duties of a lawyer to perform public service. Part IV similarly addresses the legal academy's view of public service. Part V concludes that although there are established rights and duties of a law professor to speak out, the academy should do more to encourage and assist the public service activities of law professors.

II. LAWS AFFECTING THE RIGHT OF LAW PROFESSORS TO SPEAK OUT

Professors, as a general rule, have the same right to speak out on issues of public concern as other citizens. Yet university employers and rules of the legal profession may impose restraints on law professors that citizens do not generally face.

A. Restrictions on the Right of University Employees to Speak Out

State statutes addressing government employees[18] and university employment policies[19] often impose limits on the out-of-classroom activities of professors. In addition, even in the absence of laws or policies, universities

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17. *See* MODEL RULES OF PROF'L CONDUCT scope ¶ 16 (2003) [hereinafter MODEL RULES] (arguing that the Model Rules do not "exhaust the moral and ethical considerations that should inform a lawyer"); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974) (noting that just because certain behavior is not forbidden by disciplinary rules does not mean that such behavior is consistent with applicable ethical considerations).

18. *See, e.g.*, Hoover v. Morales, 164 F.3d 221, 223–24 (5th Cir. 1998) (analyzing an appropriations bill prohibiting state employees from serving as consultants or expert witnesses in litigation against the state); Atkinson v. Bd. of Trs. of Univ. of Ark., 559 S.W.2d 473, 474 (Ark. 1977) (en banc) (analyzing a law prohibiting certain law school faculty positions from handling or assisting in any lawsuit); *see also* Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 1977–78 (2003) (reporting the unsuccessful efforts of the Colorado and Idaho legislatures to prohibit law school faculty from participating in litigation against the state).

19. *See, e.g.*, Trister v. Univ. of Miss., 420 F.2d 499, 501 n.2 (5th Cir. 1969) (discussing a university policy that prohibited outside employment that brings discredit to the institution or brings the employee into antagonism with colleagues, the community, or the state); Crue v. Aiken, 204 F. Supp. 2d 1130, 1134–35 (C.D. Ill. 2002) (analyzing a university directive that prohibited contact by faculty with prospective student athletes without prior authorization from the university); UNIVERSITY OF MASSACHUSETTS, *Policy on Faculty Consulting and Outside Activities—Amherst & Boston* II.C.4 (2001), *available at* http://www.umassp.edu/policy/fiscal/facconsultab.pdf (last visited Dec. 8, 2003) (prohibiting any member of the faculty from accepting employment as an expert if it would conflict with the University's or State's interests).

sometimes seek to discipline professors for extramural activities.[20] Where these rules or employment actions simply aim to prevent outside activities from interfering with a professor's work responsibilities, they raise few legal concerns. However, when the university limits or punishes controversial extramural speech that is unrelated to the professor's ability to successfully perform her job, First Amendment, Equal Protection, and, in some cases, contract law principles may protect the professor's right to speak out.

"It is clearly established that a State may not discharge [or otherwise punish] an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."[21] Even where an employee may be discharged for any or no reason, the employee may be entitled to constitutional protection if punished for exercising a constitutional right to freedom of expression.[22] However, most constitutional rights only protect against infringement by governments or public officials.[23] Therefore, professors at private law schools generally do not have valid constitutional claims against the school for interference with their out-of-classroom speech because those universities are not considered state actors.[24]

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20. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 594–95 (1972) (addressing the termination of a professor for testifying before the legislature and participating in a newspaper advertisement critical of the college's board of regents); Jeffries v. Harleston, 52 F.3d 9, 11 (2d Cir. 1995) (addressing the university's action in removing a professor as a department chair because of a controversial off-campus speech); Matthew W. Finkin, *"A Higher Order of Liberty in the Workplace": Academic Freedom and Tenure in the Vortex of Employment Practices and Law*, 53 LAW & CONTEMP. PROBS. 357, 367–68 (1990) (reporting the dismissal of a professor because of an alleged false statement made during a speech on the steps of the state capital); Joseph S. Stroud, *Profs Say USC Dean Pressured Them*, THE STATE (Columbia, S.C.), Apr. 21, 2002, at B1 (reporting that the law school dean allegedly pressured two professors not to testify as expert witnesses in a legal malpractice action against a law firm that the dean was soliciting for a major gift to the school); Robin Wilson & Ana Marie Cox, *Terrorist Attacks Put Academic Freedom to the Test*, CHRON. HIGHER EDUC., Oct. 5, 2001, at A12 (reporting on pressure on university administrators to punish professors who publicly criticize United States foreign policy).

21. Rankin v. McPherson, 483 U.S. 378, 383 (1987) (citing *Perry*, 408 U.S. at 597).

22. *Id.* at 383–84 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283–84 (1977); *Perry*, 408 U.S. at 597).

23. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) (quoting Flagg Bros., Inc., v. Brooks, 436 U.S. 149, 156 (1978)). This "state action" requirement limits constitutional protection to instances where "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." *Id.* at 937; *see also* WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 46 (3d ed. 1995) ("Because the Constitution was designed to limit only the exercise of government power, it does not prohibit private individuals or corporations from impinging on such freedoms as free speech, equal protection, and due process.").

24. *See, e.g.*, Krohn v. Harvard Law Sch., 552 F.2d 21, 23–24 (1st Cir. 1977) (finding that the university and its law school were not state actors); Grafton v. Brooklyn Law Sch., 478 F.2d 1137, 1140–43 (2d Cir. 1973) (same); Allison v. Howard Univ., 209 F. Supp. 2d 55, 62 (D.D.C. 2002) (same); Martin v. Del. Law Sch. of Widener Univ., 625 F. Supp. 1288, 1300–01 (D. Del. 1985) (same); Bittle v. Okla. City Univ., 6 P.3d 509, 515–16 (Okla. Civ. App. 2000) (same); *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 837–43 (1982) (taking a narrow view of state action in considering allegations that discharges of teachers at a private school as a result of opposition to school policies violated federal constitutional rights of free speech and due process). *But cf.*

While the First Amendment protects the speech rights of professors at public law schools, the Supreme Court has recognized that the government may impose restraints on public employee speech that it could not otherwise impose on private persons or nongovernment employees.[25] In *Pickering v. Board of Education*,[26] the Court addressed the scope of First Amendment protection afforded a teacher who sent a letter to a local newspaper criticizing the way the school board handled tax increases.[27] The Court stated that in determining the scope of First Amendment protection afforded to public employees, a court must "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[28] Thus, when a law professor's speech pertains to a matter of "public concern," a public law school may only impose restrictions if the school shows that its interest as an employer in "efficiency" outweighs the professor's interest in free speech.

To determine if a matter may be "fairly characterized as constituting speech on a matter of public concern," courts look to the speech's content, form, and context.[29] Matters addressing political, social, or other community concerns are deemed of public concern; those characterized as employee grievances over internal office policies generally are not.[30] Likewise, statements addressed to public audiences, made outside the workplace, and

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Albert v. Carovano, 824 F.2d 1333, 1340–41 (2d Cir. 1987) (holding that, in certain circumstances, the state's involvement in college discipline might be sufficient to classify certain student disciplinary actions taken by private colleges as state action).

Freedom of speech and assembly provisions in some state constitutions may be interpreted to provide protection to professors at private universities. *See* Commonwealth v. Tate, 432 A.2d 1382, 1387–91 (Pa. 1981); State v. Schmid, 423 A.2d 615, 624–28 (N.J. 1980). In addition, state law may create a private cause of action against any person, whether or not acting under color of law, who interferes with the exercise of a person's federal or state constitutional rights. *See infra* notes 66–69 and accompanying text.

25. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465 (1995).

26. 391 U.S. 563 (1968).

27. *Id.* at 564.

28. *Id.* at 568.

29. Connick v. Myers, 461 U.S. 138, 146, 147–48 (1983).

30. *Id.* at 146, 154. Protected speech does not have to address issues of "transcendent importance" but simply needs to address "matters in which the public might be interested, as distinct from wholly personal grievances." Dishnow v. Sch. Dist. of Rib Lake, 77 F.3d 194, 197 (7th Cir. 1996).

In discussing speech related to university policies or decisions, one commentator observed that "no coherent, meaningful line separates intramural speech [critical of university policies or decisions] held to be of public concern and intramural speech held not to be of public concern." Ailsa W. Chang, Note, *Resuscitating the Constitutional 'Theory' of Academic Freedom: A Search for a Standard Beyond* Pickering *and* Connick, 53 STAN. L. REV. 915, 946 (2001). In *Honore v. Douglas*, however, the court found that a law professor's speech about the law school's admissions policy, the size of its student class, the school's budget, and delays in certifying graduates for the bar examination embraced subjects of public concern protected by the First Amendment. 833 F.2d 565, 567, 569 (5th Cir. 1987).

involving content largely unrelated to employment would more likely be deemed matters of public concern.[31] The Supreme Court also has held that providing free legal assistance to individuals or groups asserting their constitutional rights is a mode of expression and association protected by the Constitution.[32] Hence, a law professor's statements concerning perceived inequities in the law, judicial system, or judicial decisions, or their participation in pro bono legal activities, should constitute matters of public concern.

The *Pickering* balancing test requires weighing the employee's interest in self-expression and participation in public discussions, along with the public's interest in being informed, against the government's interest in providing efficient services.[33] Considerations for determining how the statement may affect the effective functioning of the public employer's enterprise include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[34] In the case of a teacher, the focus is on whether the statement impedes the teacher's proper performance of classroom duties or interferes with the school's regular operation.[35] An employer may only take action against the employee

31. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995). The initial burden is on the plaintiff to show that the conduct is protected and that protected speech was a substantial and motivating factor in an adverse employment decision. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). The employer is then allowed to show that it would have made the same employment decision even without the presence of the protected conduct. *Id.*

32. *See* NAACP v. Button, 371 U.S. 415, 428–29 (1963) (explaining that "the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion"); *In re* Primus, 436 U.S. 412, 432 (1978) ("The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights.'") (quoting *Button*, 371 U.S. at 437). *See generally* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001) (explaining that an attorney, when representing a client, speaks on behalf of that person).

33. Pickering v. Board of Education, 391 U.S. at 563, 568 (1968).

34. Rankin v. McPherson, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570–73). The state has the burden of justifying legitimate grounds for any restriction on employee speech. *Id.*

35. *Pickering*, 391 U.S. at 572–73. In *Rankin*, the Court also considered it important that there was no assertion that the remark demonstrated a character trait that made the employee unfit to perform her work. *Rankin*, 483 U.S. at 389. The American Association of University Professors (AAUP) argues that the right of faculty members to speak or write as citizens means that the extramural statements of professors should only be grounds for discipline if they demonstrate unfitness for continuing service. Am. Ass'n of Univ. Professors, *Committee, A Statement on Extramural Utterances* (1964), *reprinted in* AAUP POLICY DOCUMENTS & REPORTS 32 (9th ed. 2001) [hereinafter AAUP, *Statement on Extramural Utterances*].

based on the potential disruption caused by the speech, not in retaliation for the speech.[36]

As the public concern element of the speech increases, so does the need for showing that the statement disrupts the efficient operation of the school.[37] The public's strong interest in hearing from attorneys on matters of public debate further increases the burden on the state to show that the potential disruptiveness of the speech outweighs its value.[38] When the professor's speech is limited by an existing law or university policy that chills potential speech, the burden on the government is greater than in the case of an isolated disciplinary action against an employee.[39]

Cases addressing laws or university policies that chill potential speech demonstrate that limits on a professor's extramural expression are rarely constitutionally justified. In *Hoover v. Morales*,[40] university professors who had been retained or had volunteered pro bono to testify in litigation against the state challenged a state appropriations rider and university policy prohibiting professors from acting as consultants or expert witnesses on behalf of parties opposing the state.[41] The court applied the *Pickering* test and found that the

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36. Thus,

> a government employer [may] fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.

Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995) (citing Waters v. Churchill, 511 U.S. 661, 672–73, 677–78 (1994)).

37. *See* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 483 (1995) (O'Conner, J., concurring); Connick v. Myers, 461 U.S. 138, 152 (1983); *Jeffries*, 52 F.3d at 13. For constitutional purposes, it does not matter if the statement was true or false, although the veracity of the statement might affect the degree to which the statement interferes with the efficient operation of the employer's enterprise. *Pickering*, 391 U.S. at 570 & n.3. Before disciplining an employee, the public employer must undertake a reasonable investigation into what the speech actually was and must in good faith believe the facts on which the employer purports to act. *Waters*, 511 U.S. at 677–78.

38. *See Pickering*, 391 U.S. at 572 (noting how important it is for the public to hear from teachers since they are the members of the community most likely to have informed and definite opinions on school funding issues). *See generally* MODEL CODE OF PROF'L RESPONSIBILITY EC 8-1 [hereinafter MODEL CODE] ("By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein."). The Court has never addressed whether, in the *Pickering* balancing process, the academic freedom interests of a professor should be given greater weight than the speech interests of other public employees. Rachel E. Fugate, Comment, *Choppy Waters Are Forecast for Academic Free Speech*, 26 FLA. ST. U. L. REV. 187, 203 (1998).

39. *Nat'l Treasury Employees Union*, 513 U.S. at 468. Where the employer's action chills speech before it happens, "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* (quoting *Pickering*, 391 U.S. at 571).

40. 164 F.3d 221 (5th Cir. 1998).

41. *Id.* at 223.

rider and policy had the effect of curtailing speech on matters of public concern and that there was no evidence that the testimony would adversely affect the efficient delivery of educational services.[42] The rider and policy also drew an impermissible distinction under the First Amendment based on the content of the employee's speech—speech by experts on behalf of the state is permitted; speech on behalf of those who oppose the state is punished.[43]

The court in *Kinney v. Weaver*[44] interpreted the First Amendment to protect university employee speech from retaliation by public officials not directly associated with the university.[45] *Kinney* involved a boycott of certain classes at a local college by police chiefs and sheriffs as a means of pressuring the college to remove instructors from the faculty who had testified as experts against the police in police brutality cases.[46] The court found that this economic pressure, even though exerted by public officials who were not part of the college, was intended to deny the instructors the benefit of employment, and, therefore, violated the Constitution.[47]

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42. *Id.* at 226. The court noted that "there may be occasions when the State's interest in efficient delivery of public services will be hindered by a state employee acting as an expert witness or consultant." *Id.* at 227. It explained that the state's interests are greater when the employee is a policy maker and that restrictions might not violate the First Amendment if they are not content-based. *Id.*

43. *Id.* at 227. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Hoover v. Morales, 164 F. 3d 221, 227 (5th Cir. 1998) (quoting Regan v. Time, Inc., 468 U.S. 641, 648–49 (1984)). Further, *Sanjour v. Envtl. Prot. Agency*, 56 F.3d 85 (D.C. Cir. 1995), held that EPA regulations prohibiting employees from receiving travel expense reimbursement for unofficial speaking or writing engagements while permitting compensation for officially-authorized speech violate the First Amendment. *Id.* at 87. The court explained that there had been no showing that the employees' and their audiences' interests in the speech were outweighed by the speech's impact on government operations. *Id.*; *see also Nat'l Treasury Employees Union*, 513 U.S. at 470 (holding that the federal government's ban on receipt of honoraria by government employees could not be justified on the ground of workplace disruption where the speech at issue did not involve the subject matter of the employment and occurred outside the workplace).

44. 301 F.3d 253 (5th Cir. 2002), *reh'g granted en banc*, 338 F.3d 432 (5th Cir. 2003) (considering whether the qualified immunity holding in *Noyola v. Texas Dep't of Human Res.*, 846 F.2d 1021 (5th Cir. 1988), is applicable to the case).

45. *Kinney*, 301 F.3d at 275–78.

46. *Id.* at 257–60.

47. *Id.* at 269–70 (stating that "the Supreme Court has made clear that First Amendment protection does not depend on whether the governmental action at issue is 'direct' or 'indirect'"); *see also* Worrell v. Henry, 219 F.3d 1197, 1209–13 (10th Cir. 2000) (holding that efforts by government officials to pressure a private employer to punish an employee for speeches or publications on issues of public concern could subject the government to claims that it unlawfully retaliated against the private employee for exercising her right to free speech); Helvey v. City of Maplewood, 154 F.3d 841, 844 (8th Cir. 1998) (same); Korb v. Lehman, 919 F.2d 243, 248 (4th Cir. 1991) (same).

In another case involving efforts to suppress faculty out-of-classroom speech, the court in *Crue v. Aiken* struck down a university directive that prevented faculty members from contacting prospective student athletes to make them aware of concerns about the university's mascot. Crue v. Aiken, 204 F. Supp. 2d 1130 (C.D. Ill. 2002). The court found that, as a prior restraint on speech

Two cases illustrate the applicability of the Equal Protection Clause in protecting a law professor's outside activities. Spurred by complaints about the part-time legal services work of some law school faculty on a school desegregation case, the dean of the University of Mississippi School of Law conditioned the continuing employment of these faculty members on ending their involvement with the legal services program.[48] The dean relied in part on a university policy that prohibited outside work if it would "bring discredit to the institution" or "bring the employee into antagonism with his colleagues, community, or the State of Mississippi."[49] The professors filed suit against the university and the law school dean, alleging a violation of their "academic freedom, freedom of expression and association, and the right to equal protection" based on the fact that other faculty members were permitted to teach while still practicing law and because the university had not claimed that the outside work would hamper the professors' ability to teach.[50] While noting that the professors did not have a constitutional right to work part-time outside the university, the court held that the professors did have a right not to be treated significantly different from other faculty members.[51] Because the basis for singling out these faculty from others was only the clients they wished to represent, the distinction was not valid and denied plaintiffs the equal protection of the law.[52] Furthermore, given the court's determination that the motivation for the school's action was the identity of the professor's clients, as well as the court's finding that there was no evidence that part-time work would be detrimental to the quality of instruction received by the students, the law school's personnel action would not withstand constitutional scrutiny under the First Amendment standards set forth in *Pickering* and its progeny.

In *Atkinson v. Board of Trustees of the University of Arkansas*, the state legislature passed a law prohibiting certain faculty positions at the University of Arkansas School of Law from handling or assisting in any lawsuit.[53] The court held that the law violated the Equal Protection Clause of the Fourteenth Amendment since the classification, involving only three of six faculty classes and only one of two public law schools in Arkansas, was not reasonably related to the stated purpose of requiring law school personnel to devote full time to

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of public concern, the university had failed to meet its heavy burden of proving that the interests of university employees and potential audiences were outweighed by the speech's impact on the operation of the university. *Id.* at 1143. The court further noted the university failed to offer any evidence that the recited harms were real, not just conjectural. *Id.* at 1145.

48. Trister v. Univ. of Miss., 420 F.2d 499, 500–02 (5th Cir. 1969).

49. *Id.* at 501 n.2 (quoting minutes of the Miss. Bd. of Trs. of Insts. of Higher Learning (Nov. 17, 1966)).

50. *Id.* at 502.

51. *Id.*

52. *Id.* at 504.

53. 559 S.W.2d 473 (Ark. 1977).

their job duties.[54] The court made clear, however, that it was not saying that the legislature could not, if the classifications were appropriate, enact a law restricting outside employment by law school personnel.[55] Thus, to the extent that legislation or policies restrict the out-of-classroom activities of some law school personnel but not others, the classifications must be rational.[56]

A professor's employment contract may also affect the right to speak out if that agreement guards the extramural speech of the employee from reprisal by the university. The significance of such coverage is that these contracts would even protect the speech rights of academics at private universities.[57]

The difficulty in basing a right to freedom of extramural speech on contract law is demonstrating that the employment contract covers such activities. Some contracts may expressly guarantee the faculty member's academic freedom, but it is more likely that most simply incorporate by reference another document that addresses academic freedom, such as a faculty handbook or a statement by the American Association of University Professors (AAUP) or Association of American Law Schools (AALS). A majority of states recognize that employers may be bound by specific promises in personnel handbooks,[58] and some courts have incorporated the terms of handbooks even when there is an express disclaimer that the manual does not create enforceable rights.[59] Thus, when a

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54. *Id.* at 475–77. The court characterized as entirely speculative the argument that the restriction was passed for the purpose of silencing a professor who had represented a party in a suit involving the legislature, and refused to address it as a possible First Amendment violation. *Id.* at 476.

55. *Id.* at 477.

56. Professors employed by public universities also may be protected by federal and state procedural due process guarantees. *See* Perry v. Sindermann, 408 U.S. 593, 599–603 (1972); Bd. of Regents v. Roth, 408 U.S. 564, 569–78 (1972). To state a due process claim, the professor would have to show: (1) as a result of some state action in punishing the professor for extramural activities, the professor was deprived of a liberty or property interest; and (2) the deprivation of that interest was done without adequate notice and a fair opportunity to be heard. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–46 (1985) (holding that due process requires that a public employee with a property right in continued employment be given an opportunity for a hearing before being deprived of that property interest); Llano v. Berglund, 282 F.3d 1031, 1034–35 (8th Cir. 2002) (setting forth the two-step procedural due process analysis).

57. Jim Jackson, *Express and Implied Contractual Rights to Academic Freedom in the United States*, 22 HAMLINE L. REV. 467, 473 (1999) (noting that universities can define an employee's protected speech rights to be broader than the constitutional definition).

58. Richard J. Pratt, Comment, *Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-At-Will Doctrine*, 139 U. PA. L. REV. 197, 208 (1990). The employment-at-will doctrine, which generally proves fatal to any reliance on employee handbooks since an employer's oral or written promises are not binding unless the employee supplies additional consideration beyond her usual services, "is becoming increasingly rare in the United States." *Id.* (citation omitted).

59. *See, e.g.*, Greene v. Howard Univ., 412 F.2d 1128, 1135 (D.C. Cir. 1969) (holding a faculty handbook was contractually binding on the university where the handbook provided it would be university practice for deans to give written notice of nonreappointment); Jones v. Cent. Peninsula Gen. Hosp., 779 P.2d 783, 788 (Alaska 1989) (holding that the personnel policy manual "creates the impression, contrary to the 'disclaimer,' that employees are to be provided with

faculty handbook either explicitly recognizes the right of faculty members to participate as a citizen in public debates or adopts the AAUP's or AALS's academic freedom protections, the professor's term of employment will generally be viewed as including these protections.

Courts also have incorporated protections and benefits into employment contracts when the customs, traditions, and past practices of the institution imply, through a type of institutional common law, that the employee has a legitimate claim of entitlement to the benefit of such protection.[60] Thus, as one commentator observed, "there is a reasonable chance that courts may apply a common law of the university finding that academic freedom is so entrenched in the very concept of an American university that it will be implied generally into employment contracts."[61]

To enforce any contractual right to freedom of speech, a professor would also have to demonstrate that academic freedom, even when expressly or impliedly included in a law school employment contract, protects the extramural utterances of law professors from reprisal. The AAUP believes that it does: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness to serve. Extramural utterances rarely bear upon the faculty member's fitness for continuing service."[62] The AALS agrees that academic freedom protects extramural utterances since it requires member schools to provide a faculty member with "academic freedom

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certain job protections"); Dillon v. Champion Jogbra, Inc., 819 A.2d 703, 708–09 (Vt. 2002) (holding that, notwithstanding an employment manual's disclaimer, the employer's practices were consistent with systems set forth in the manual and inconsistent with at-will employment). *See generally* AAUP, FACULTY HANDBOOKS AS ENFORCEABLE CONTRACTS: A STATE GUIDE (1998) (providing a state-by-state analysis of decisions on whether provisions of a faculty handbook are enforceable as a contract).

60. *See, e.g.*, *Perry*, 408 U.S. at 602 (observing that there may be an unwritten common law in a university that creates certain employment rights); Bason v. Am. Univ., 414 A.2d 522, 525 (D.C. 1980) (holding that resolution of whether a law professor's contract included a right to certain tenure procedures requires consideration of not only the actual employment contract and documents expressly incorporated therein, but also of the university's customs and practices); Matthew W. Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119, 1146–55 (1980) (recognizing that institutions undertake certain commitments to the faculty to abide by the institution's rules and customary practices). *But cf.* KAPLIN & LEE, *supra* note 23, at 154 ("Although academic custom and usage can fill in gaps in the employment contract, it cannot be used to contradict the contract's express terms.").

61. Jackson, *supra* note 57, at 494.

62. AAUP, *Statement on Extramural Utterances*, *supra* note 35; *see also* Am. Ass'n. of Univ. Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, *reprinted in* AAUP, POLICY DOCUMENTS & REPORTS 3 (9th ed. 2001) [hereinafter AAUP, *Statement of Principles on Academic Freedom and Tenure*] ("When [college and university teachers] speak or write as citizens, they should be free from institutional censorship . . . ."). This freedom of extramural speech also comes with special obligations that may not be expected of other citizens when they speak in public: "to be accurate, to exercise appropriate restraint, to show respect for the opinions of others, and to make every effort to indicate that they are not speaking for the institution." AAUP, *Statement on Extramural Utterances*, *supra* note 35, at 32.

and tenure in accordance with the principles of the American Association of University Professors."[63]

Professor William Van Alstyne argues that academic freedom should not protect the extramural speech of a university professor, in part because he views political activities as unrelated to the professor's duty or the school's mission.[64] However, as Professor Peter Byrne observed, and as discussed in Parts III and IV of this Article, the ethical responsibilities of law professors and the professional standards for law schools and law professors encourage faculty members to be involved in public service work, which may involve controversial extramural utterances.[65] Thus, when a law professor engages in controversial extramural public service, academic freedom should protect the professor from discipline or censorship by the institution since it would be inappropriate to label activities expected by the profession and institution as "aprofessional."

As a final matter, even in the absence of an enforceable contractual right to speak out without recrimination, some states "insulate political speech and association generally from employer reprisal."[66] Thus, courts recognize an exception to the at-will employment doctrine when an employee's discharge is contrary to a clear mandate of public policy articulated by constitutions, statutes, or in some states, professional codes of ethics.[67] However, the

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63. AALS, *Bylaws of the Association of American Law Schools, Inc.*, § 6-8(d) (2000), *available at* http://www.aals.org/bylaws.html (last visited Dec. 19, 2003).

64. William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, *in* THE CONCEPT OF ACADEMIC FREEDOM 59, 64, 68–69 (Edmund L. Pincoffs ed., 1975) (labeling such extramural speech "aprofessional").

65. J. Peter Byrne, *Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education*, 43 J. LEGAL EDUC. 315, 330 n.28 (1993). Byrne suggests that extramural speech in the role of a law professor, such as when the professor is commenting on a matter relating to the law or legal system, may be distinguished from overtly political speech by the same person in a nonacademic role. *Id.; see also* Finkin, *supra* note 20, at 367–70 (disagreeing with Van Alstyne); Martin H. Malin & Robert Ladenson, *University Faculty Members' Right to Dissent: Toward a Unified Theory of Contractual and Constitutional Protection*, 16 U.C. DAVIS L. REV. 933 (1983) (arguing that the law should forbid interference with university faculty expression in the same way that the First Amendment forbids government interference with the rights of citizens generally).

66. Finkin, *supra* note 20, at 370; *see also* CONN. GEN. STAT. ANN. § 31-51q (2003) (creating liability for any employer who disciplines an employee for the exercise of First Amendment rights); Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 901 (1st Cir. 1988) (applying the Massachusetts Civil Rights Act to create a private cause of action against any person who interferes or attempts to interfere with the exercise of rights secured by the federal or state constitution).

67. *See, e.g.*, Rocky Mt. Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 523–25 (Colo. 1996) (en banc) (holding that professional ethical codes may be a source of public policy as long as the codes serve the public interest and are definite enough to place employers and employees on notice of required behavior). To prevail, an employee must prove: (1) the existence of a clear mandate of public policy (clarity element); (2) that discouraging the conduct the employee engaged in would jeopardize that public policy (jeopardy element); (3) that the conduct caused the termination (causation element); and (4) that the employer is not able to offer an overriding

prevailing view is that free speech provisions in state or federal constitutions provide a public policy exception to the employment-at-will doctrine only if there is state action.[68] Nonetheless, the exception has been interpreted to protect private sector employees who provide testimony at legislative or judicial hearings.[69]

B. Restrictions on a Lawyer's Out-of-Court Speech

Law professors who are attorneys also may face legal restraints on their right to speak out publicly about the qualifications or integrity of judges or other public legal officials or about judicial proceedings. These restrictions apply broadly to any law professor licensed as an attorney who makes a false statement about a judicial officer and more narrowly to law professors who participate in the investigation or litigation of a case.

The ABA's Model Rules of Professional Conduct (Model Rules), the basis for ethics rules in forty-three states and the District of Columbia,[70] provide in Rule 8.2(a) that a lawyer "shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer."[71] Furthermore, a lawyer shall not make false statements concerning a candidate for a judicial or legal office.[72] The ABA's Model Code of Professional Responsibility (Model Code), originally adopted in 1969 and still the primary source for the rules of professional conduct in five states,[73]

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justification for the termination (absence of justification element). Gardner v. Loomis Armored Inc., 913 P.2d 377, 382 (Wash. 1996) (en banc).

68. Tiernan v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 578, 589–90 (W.Va. 1998) (listing cases).

69. *See* Bishop v. Fed. Intermediate Credit Bank of Wichita, 908 F.2d 658, 662–63 (10th Cir. 1990); Wholey v. Sears Roebuck, 803 A.2d 482, 495 (Md. 2002).

70. ABA Center for Prof'l Responsibility, *Dates of Adoption of the Model Rules of Professional Conduct* [hereinafter ABA Center for Prof'l Responsibility, *Dates of Adoption*], at http://www.abanet. org/cpr/mrpc/alpha_states.html (last visited Dec. 19, 2003) (listing the states that have adopted the Model Rules). In February 2002, the ABA amended certain provisions in the Model Rules in accordance with changes made by the ABA's Ethics 2000 Commission. *See* ABA Center for Prof'l Responsibility, *Ethics 2000 - February 2002 Report, available at* http://www.abanet.org/cpr/e2k-202report_summ.html (last visited Dec. 19, 2003).

71. MODEL RULES, *supra* note 17, at R. 8.2(a). Restrictions on a lawyer's false criticism of judicial officers are justified on two grounds: (1) the need to protect public confidence in the fairness and impartiality of the judicial system from false accusations that might bring the system into disrepute; and (2) lawyers, as officers of the court and members of a regulated profession, give up certain rights to speech that otherwise might be protected by the Constitution. ABA CTR. FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROF'L CONDUCT 582–84 (5th ed. 2003) [hereinafter ANNOTATED MODEL RULES].

72. MODEL RULES, *supra* note 17, at R. 8.2(a).

73. The ABA identifies California, Iowa, Maine, Nebraska, New York, Ohio, and Oregon as not having adopted some version of the ABA Model Rules of Professional Conduct. ABA Center for Professional Responsibility, *Dates of Adoption*, *supra* note 70. With the exceptions of California and Maine, which never adopted the Model Code or the Model Rules, the other five

similarly prohibits a lawyer from knowingly making a false statement concerning a candidate for a judicial office or against a judge or other adjudicatory officer.[74] The Restatement of Law Governing Lawyers (Restatement) tracks the Model Rules by forbidding a lawyer from knowingly or recklessly making a false statement concerning a judicial officer or candidate for such an office, but it does not extend the prohibition to statements about nonjudicial public legal officers.[75]

These ethics restrictions apply to lawyers, such as most law professors, even when not representing clients and to matters not involving litigation.[76] In certain situations, false criticism of a judge, particularly where there is an ongoing or pending trial, could also be disciplined as conduct prejudicial to the administration of justice.[77]

Nevertheless, ethics rules cannot punish activity protected by the First Amendment, even if the attorney violates an ethics rule the attorney swore to obey when admitted to the bar.[78] The Supreme Court has held that an attorney remains free under the First Amendment to criticize laws, including the efficacy and administration of laws controlling judicial power.[79] Lawyers are

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states follow the Model Code. ABA/BNA, LAWYERS' MANUAL ON PROF'L CONDUCT 01:3–7 (2003) [hereinafter LAWYERS' MANUAL ON PROF'L CONDUCT].

74. MODEL CODE, *supra* note 38, at DR 8-102(A) & (B). The Model Code explains: "While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system." *Id.* at EC 8-6. The Model Code's "knowingly" standard "has been interpreted by many courts as encompassing the reckless disregard standard found in the [Model] Rules." LAWYERS' MANUAL ON PROF'L CONDUCT, *supra* note 73, at 101:602.

75. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 114 (2000) [hereinafter RESTATEMENT]. A comment to the Restatement argues that special protection should not apply to nonjudicial public legal officials, which could be interpreted to include prosecutors or other government attorneys, because, unlike judges, such lawyers are not constrained from publicly responding to charges and can defend themselves. *Id.* at cmt. b.

76. *Id.* at cmt. a. *But cf.* Polk v. State Bar of Tex., 374 F. Supp. 784, 788 (N.D. Tex. 1974) (finding that a statement made by a lawyer who was also a defendant in a pending action did not warrant discipline because the statement was made in the lawyer's capacity as a private citizen).

77. *See* MODEL RULES, *supra* note 17, at R. 8.4(d); MODEL CODE, *supra* note 38, at DR 1-102(A)(5); LAWYERS' MANUAL ON PROF'L CONDUCT, *supra* note 73, at 101:601 ("A lawyer may not criticize the judiciary or its officers during an ongoing trial or the pendency of a case if such conduct would interfere with the fair administration of justice."). False accusations also might be viewed under the Model Rules and Model Code as misconduct involving dishonesty or misrepresentation, *see* MODEL RULES, *supra* note 17, at R. 8.4(c); MODEL CODE, *supra* note 38, at DR 1-102(A)(4), and under the Model Code as conduct that adversely reflects on the lawyer's fitness to practice law, *see* MODEL CODE, *supra* note 38, at DR 1-102(A)(6).

78. Gentile v. State Bar of Nev., 501 U.S. 1030, 1054 (1991). For an extensive discussion of how the First Amendment applies to the speech of attorneys, see W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305 (2001).

79. *In re* Snyder, 472 U.S. 634, 646 (1985); *In re* Sawyer, 360 U.S. 622, 631–32 (1959); *accord* State *ex rel.* Okla. Bar Ass'n v. Porter, 766 P.2d 958, 965 (Okla. 1988). "To say that 'the law is an ass, a idiot' is not to impugn the character of those who must administer it." *Sawyer*, 360 U.S. at 634.

also free to allege a judge's error in interpreting the law.[80] Similarly, a lawyer facing civil or criminal liability for an out-of-court false statement criticizing a judge cannot be found liable unless the false statement was made with a high degree of awareness of its probable falsity, the same standard used to determine if a nonlawyer defamed a judge.[81]

The Court has never decided, however, the degree of First Amendment protection that applies to attorneys facing professional discipline for false criticism of a member of the judiciary. In lawyer discipline cases involving criticism of judges, a majority of courts have adopted an objective standard of intent.[82] Under this standard, a lawyer may be disciplined where his conduct was a departure from reasonably prudent conduct, even if the lawyer did not know the statements were false.[83] The question is what a reasonable attorney, in light of her professional functions, would do in similar circumstances.[84] It is the reasonableness of the belief of the statement's truth, not the state of mind of the attorney, that is determinative.[85]

In contrast, a minority of cases have adopted the subjective libel standard, which is used for statements about public officials and public figures, to determine whether a lawyer should be disciplined for false statements

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80. *Sawyer*, 360 U.S. at 635 ("The public attribution of honest error to the judiciary is no cause for professional discipline in this country."). In contrast, nonspeech conduct of lawyers, even where related to alleged injustice or judicial misconduct, is not protected by the First Amendment. ANNOTATED MODEL RULES, *supra* note 71, at 591 ("First Amendment protection, whatever its precise contours, has not been extended to a lawyer's nonspeech conduct."); *see also* Eisenberg v. Boardman, 302 F. Supp. 1360, 1364–65 (W.D. Wis. 1969) (holding that a lawyer's threatening and harassing conduct against a judge was not protected by the First Amendment, although the lawyer's derogatory statements against the judge were protected).

81. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

82. RESTATEMENT, *supra* note 75, § 114 reporter's note cmt. b (citing *In re* Palmisano, 70 F.3d 483 (7th Cir. 1995); *In re* Graham, 453 N.W.2d 313 (Minn. 1990); *In re* Westfall, 808 S.W.2d 829 (Mo. 1991); *In re* Holtzman, 577 N.E.2d 30 (N.Y. 1991)). In *In re Johnson*, 729 P.2d 1175 (Kan. 1986), the court gave two reasons why the "actual malice" standard used in libel cases should not apply to lawyer discipline cases: (1) those libel cases dealt with the constitutional privilege afforded to the press, while an attorney, as an individual, has no similar right, and (2) it is widely recognized that neither civil nor criminal liability is necessary to maintain a disciplinary action. *Id.* at 1181.

83. By imposing discipline even where the attorney may have believed the allegation to be true, the objective standard applies a lesser standard of constitutional review to lawyer disciplinary actions than to the review of restrictions placed on the speech of nonlawyers. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

84. United States Dist. Ct. v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993); *Graham*, 453 N.W.2d at 322.

85. *Holtzman*, 577 N.E.2d at 34; *see also* Fla. Bar v. Ray, 797 So. 2d 556, 558 (Fla. 2001) (rejecting attorney's defense that he had an objectively reasonable basis in fact for the false accusations); La. State Bar Ass'n v. Karst, 428 So. 2d 406, 410 (La. 1983) (rejecting the argument that the lawyer's good faith, subjective belief in the truth of the allegation excused his reckless disregard for the truth).

criticizing the judiciary.[86] Under this "actual malice" standard of *New York Times v. Sullivan*, the disciplinary authority would have to show that the lawyer either knew the statement was false or acted with reckless disregard of the statement's falsity.[87] Reckless disregard means that a statement was made with a "high degree of awareness of [its] probable falsity,"[88] or that the speaker "entertained serious doubts as to the truth"[89] of the statement. The Restatement of the Law of Governing Lawyers argues that because lawyers are especially situated to assess the performance of judges and because judges are public officials, the subjective actual malice standard applied to false criticism of other public officials should also apply in lawyer discipline cases.[90]

As a final note, the ethics rules regarding criticism of judges, other legal officers, and candidates for judicial office apply only to false assertions of fact, not to opinions.[91] Nonetheless, where the attorney's statement of opinion implies a false assertion of fact that is capable of being proved true or false, it loses its First Amendment protection.[92] Thus, as lawyers, law professors have a First Amendment right to speak out against unjust laws or erroneous judicial decisions and to express opinions that do not imply false assertions of fact about the qualifications and integrity of judicial officials. However, they cannot make statements about judges that they know to be false or that are made with reckless disregard as to the statement's truth or falsity.

When a law professor participates in the investigation or litigation of a case, the parties' and judicial system's interests in having a fair trial place additional restrictions on the professor's right to speak out. Generally, comments by the press or public on pending litigation can only be restricted

86. *See, e.g.*, *In re* Green, 11 P.3d 1078, 1083–85 (Colo. 2000) (en banc) (holding that courts should look for false statements accompanied with actual malice when determining the discipline of attorneys who criticize judges). *But see Palmisano*, 70 F.3d at 487 (stating that under the subjective standard, an attorney could not attack a judge with the same minimal attention to the truth of the allegations as an ordinary citizen could in attacking a political officeholder).

87. 376 U.S. at 279–80.

88. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989) (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

89. *Id.* (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

90. RESTATEMENT, *supra* note 75, § 114 cmt. b.

91. ANNOTATED MODEL RULES, *supra* note 71, at 589; *see also* Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995) (stating that there is a constitutional privilege to expressions of opinion); *Green*, 11 P.3d at 1084 (same); Owen v. Carr, 497 N.E.2d 1145, 1148 (Ill. 1986) (same).

92. *Yagman*, 55 F.3d at 1438; *Green*, 11 P.3d at 1084. "Even a statement cast in the form of an opinion ('I think that Judge X is dishonest') implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty." *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995) (citing Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)). However, "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich*, 497 U.S. at 20.

upon a showing of a "clear and present danger" of harm to the proceeding.[93] Model Rule 3.6, however, prohibits a lawyer who participates in a matter from making an extrajudicial statement "that the lawyer knows or reasonably should know" will be publicly disseminated and has "a substantial likelihood of materially prejudicing an adjudicative proceeding."[94] The Model Code, using lists of prohibited and permitted statements, also prohibits extrajudicial statements by lawyers participating in adjudications where a "reasonable person would expect [the statements] to be disseminated by means of public communication."[95] The Restatement, following the Model Rules, prohibits statements to the media about a matter pending before a tribunal where there is a substantial likelihood of materially prejudicing jurors or influencing witnesses.[96] Recognizing the importance to the public of informed commentary and the small likelihood of prejudice to a proceeding from a lawyer who is not involved, the trial publicity restrictions apply only to lawyers, and their associates, who are or have been involved in the case.[97]

Restrictions on trial publicity reflect a concern that while the public and the media have a right to information about cases, the parties have an interest in preventing out-of-court statements from interfering with the fair adjudication of the case.[98] Yet, because trial publicity restrictions interfere with the

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93. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 573 (1998); *see* Landmark Communications, Inc. v. Va., 435 U.S. 829, 845 (1978); Wood v. Georgia, 370 U.S. 375, 385 (1962).

94. MODEL RULES, *supra* note 17, at R. 3.6(a). The Model Rules and Restatement additionally prohibit prosecutors, as well as others assisting the prosecutor in a criminal case, from making extrajudicial comments that heighten public condemnation of the accused. *Id.* at R. 3.8(f); RESTATEMENT, *supra* note 75, § 109(2). Both the Model Rules and Restatement provide an exception for statements necessary to inform the public about the prosecutor's actions and serving a legitimate law-enforcement purpose. *Id.*

95. MODEL CODE, *supra* note 38, at DR 7-107(A)–(H). The language of Model Code DR 7-107 is considered "less protective of lawyer speech than Model Rule 3.6, in that it applies a 'reasonable likelihood of prejudice' standard." Gentile v. State Bar of Nev., 501 U.S. 1030, 1068 (1991). Professors Hazard and Hodes note that because of the Model Code's "lists" approach, "[p]ractically every court that considered constitutional challenges to DR 7-107 said that the rule was overbroad." GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 32.4 (3d ed. 2003).

96. RESTATEMENT, *supra* note 75, § 109(1).

97. MODEL RULES, *supra* note 17, at R. 3.6 cmt. 3; *see also* RESTATEMENT, *supra* note 75, § 109 cmt. b (observing that an advocate's right of free expression is less than those of nonlawyers or of lawyers not involved in the proceeding).

98. RESTATEMENT, *supra* note 75, § 109 cmt. b. Although the trial publicity restrictions apply to civil and criminal proceedings, as well as to jury and nonjury cases, the nature of the proceedings is relevant in determining possible prejudice. MODEL RULES, *supra* note 17, at R. 3.6 cmt. 6. Criminal trials are the most sensitive to extrajudicial speech, with nonjury proceedings and arbitrations being the least. *Id.; see also* Gentile v. State Bar of Nev., 501 U.S. 1030, 1077 (1991) (Rehnquist, J., dissenting) (arguing that the substantial risk of the material prejudice test "will rarely be met where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or

attorney's right of free expression, the Supreme Court has carefully scrutinized such limitations. In *Gentile v. State Bar of Nevada*, the Court reviewed disciplinary sanctions against an attorney who, upon his client's indictment on theft charges, held a press conference at which he challenged the evidence in the case and suggested that the likely thief was a police detective.[99] The Court held that Nevada's prohibition on attorney speech that will have a "substantial likelihood of materially prejudicing an adjudicative proceeding"[100] was permissible under the First Amendment, explicitly refusing to require the more demanding clear and present danger of actual prejudice or imminent threat standard used for regulation of the press during pending proceedings.[101]

Nevertheless, the Court did find that Nevada's trial publicity rule was void for vagueness. Its safe harbor provision, allowing a lawyer to state the general nature of the defense, failed to provide attorneys with sufficient guidance as to the limits of permissible speech.[102] The Court further held that an attorney may take reasonable steps prior to trial to defend a client's reputation and reduce the adverse consequences of an indictment, including an attempt to demonstrate to the public that the client is innocent.[103] Hence, notwithstanding the restriction on statements that have a substantial likelihood of materially prejudicing the proceeding, the Model Rules and the Restatement recognize the lawyer's right to "make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."[104]

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disregard it"); RESTATEMENT, *supra* note 75, § 109 cmt. b ("Thus, media comments by a lawyer outside a nonjury proceeding will pose a significant and direct threat to the administration of justice and thus warrant application of the rule [restricting comments on pending adjudications] only in extreme situations.").

99. 501 U.S. at 1033, 1059–60.

100. *Id.* at 1069 n.4 (quoting NEV. SUP. CT. R.177(1)).

101. *Id*. at 1074–75. Some states still require the more demanding showing of a clear and present danger or serious and imminent threat to the judicial proceeding before restricting a lawyer's statements about a pending case. LAWYERS' MANUAL ON PROF'L CONDUCT, *supra* note 73, at 61:1005–07 (citing Colorado, District of Columbia, Illinois, New Mexico, North Dakota, Oregon, and Virginia).

102. *Gentile*, 501 U.S. at 1048 (quoting NEV. SUP. CT. R.177(3)(a)).

103. *Id.* at 1043.

104. MODEL RULES, *supra* note 17, at R. 3.6(c) & cmt. 7; RESTATEMENT, *supra* note 75, § 109(1).

A law professor participating in a trial may also be subject to a gag order issued by the trial judge to prevent the participants from speaking with the media about the case. The Court has not determined whether the showing necessary to impose such prior restraints on attorney speech is a reasonable or substantial likelihood of harm or the more stringent standard of clear and present danger or serious and imminent threat. ANNOTATED MODEL RULES, *supra* note 71, at 378; Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 876 (1998). As in the case of other prior restraints on speech, a gag order should be narrowly tailored and "no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." United States v. Salameh, 992 F.2d 445, 447 (2d Cir. 1993) (citing *Gentile*, 501 U.S. at 1075). The trial court also must explore whether other less restrictive alternatives would effectively avoid or mitigate the prejudicial publicity. *Id.*; Levine v.

As a final cautionary note on laws affecting the right of a law professor to speak out, a law professor may become a "public figure" by participating in a public debate about the law, legal system, or judicial officials. Public figures include those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[105] Public figures and those who hold public office may only recover for injury to reputation on clear and convincing proof of "actual malice," the more stringent libel standard.[106] Thus, by speaking out publicly, and thereby accepting "certain necessary consequences of that involvement in public affairs,"[107] a law professor runs the risk of being subjected to false statements against her that she can only address by proving that the speaker made the allegation with a high degree of awareness of its probable falsity or with serious doubts as to its truth.[108]

III. LEGAL PROFESSION PRECEPTS ON A LAWYER'S RIGHTS AND DUTIES TO SPEAK OUT

Most law professors also are attorneys and are guided by various norms of the legal profession. Among the legal profession's longstanding norms are the responsibilities of all lawyers to lend their time and civic influence to assure the availability of legal services and to advance law reform.

A. The Duty of Pro Bono Publico Service

The notion that an American lawyer's professional duties include the representation of those who cannot afford to pay for legal services can be traced back at least to the 1836 treatise of Baltimore attorney David Hoffman. In his *Fifty Resolutions in Regard to Professional Deportment*, Hoffman states "[t]hose who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given."[109] The 1854 publication of Judge George

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United States Dist. Ct., 764 F.2d 590, 595 (9th Cir. 1985); Twohig v. Blackmer, 918 P.2d 332, 337 (N.M. 1996).

105. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). Public figures also include those who have assumed roles of special prominence in the affairs of society and those who occupy positions of persuasive power and influence. *Id.*

106. *See id.* at 342.

107. *Id.* at 344.

108. Laurie L. Levenson, *Reporting the Rodney King Trial: The Role of Legal Experts*, 27 LOY. L.A. L. REV. 649, 665–66 (1994). *But cf.* Time, Inc. v. Firestone, 424 U.S. 448, 454–55 (1976) (rejecting the argument that a person became a public figure by exercising the right to resort to the judicial process to obtain a highly publicized divorce).

109. HENRY S. DRINKER, LEGAL ETHICS 342 (1953) (including the resolutions from DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752–75 (2d ed. 1836)).

Sharswood's lectures on professionalism argued "[t]here are many cases, in which it will be his duty, perhaps more properly his privilege, to work for nothing."[110] Similarly, the 1850 Field Code, adopted by twenty-two states to govern the admission and regulation of attorneys, listed among the eight duties of lawyers "never to reject, for any consideration personal to [myself], the cause of the defenseless or the oppressed."[111] The first ethical code, Alabama's 1887 Code of Legal Ethics, likewise stated that a client's inability to pay for the attorney's services may require a charge of nothing at all and that an attorney "should always be a friend to the defenseless and oppressed."[112]

The ABA's first statement of ethical principles, the 1908 Canons of Professional Ethics (ABA Canons), stated that a client's poverty may require the client to pay nothing at all for the lawyer's services and that a lawyer appointed to represent an indigent prisoner "ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."[113] At the same time it developed the Canons, the ABA adopted a proposed oath of admission containing the general principles that should control a lawyer's practice and violation of which could result in disbarment.[114] The lawyer's oath provided, "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed."[115]

The ABA's more recent rules of professional responsibility expand on this historical norm of assisting in the availability of legal services. One of the nine canons of the Model Code declares that "A Lawyer Should Assist the Legal

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110. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1854), *reprinted in* 32 A.B.A. REP. 1, 151 (1907). "It is to be hoped, that the time will never come, at this or any other Bar in this country, when a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel, in the prosecution or defence of his rights." *Id.* Hoffman's and Sharswood's works were, in effect, the first American professional creeds and the bases for the first state ethics code, the 1887 Alabama Code, and the 1908 ABA Canons of Professional Ethics. James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 787–90 (1997).

111. *See, e.g.*, COMMISSIONERS ON PRACTICE AND PLEADING, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK—NEW YORK FIELD CODES 1850–1865, VOL. I, 205 (1998) (including the language in § 511(8) of the Field Code). The explanatory notes to the code explain that the duties were taken substantially from a Swiss oath that required a lawyer, *inter alia*, "not to reject, for any considerations personal to myself, the cause of the weak, the stranger, or the oppressed." *Id.* at 205.

112. ALABAMA STATE BAR ASS'N, CODE OF ETHICS, Rs. 48, 56 (1887), *reprinted in* DRINKER, *supra* note 109, at 361–63.

113. ABA CANONS OF PROF'L ETHICS Canons 4, 12 (1908) [hereinafter ABA CANONS]. Lawyers also are reminded, "In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade." *Id.* at Canon 12.

114. ABA OATH OF ADMISSION (1908), *reprinted in* 34 ABA REP. 1169–70 (1909).

115. *Id.* at 1170. A 1935 ABA ethics opinion endorsed the voluntary efforts of attorneys to defend citizens unable to retain counsel when the citizens believed their constitutional rights were imperiled. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 148 (1935); *see also* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 191 (1939) ("Free legal clinics carried on by the organized bar . . . serve a very worthwhile purpose and should be encouraged.").

Profession in Fulfilling Its Duty to Make Legal Counsel Available."[116] Noting that "[t]he fair administration of justice requires the availability of competent lawyers," the Model Code proclaims that "persons unable to pay for legal services should be provided needed services."[117] The Model Code explains that the responsibility to provide legal services to persons unable to pay rests with the individual lawyer who, "regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."[118] Every attorney also is expected to support efforts of the profession to meet the need for free legal services.[119]

The preamble to the Model Rules explains the special responsibilities of a lawyer as a public citizen and as a member of the legal profession.[120] As a citizen, a lawyer should seek to improve the law, the administration of justice, and access to the legal system.[121] As a member of the legal profession,

> [a] lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives . . . .[122]

Model Rule 6.1 codifies this pro bono responsibility by declaring that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay."[123] When unable to engage in pro bono services, a lawyer may discharge her individual ethical commitment by giving financial support

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116. MODEL CODE, *supra* note 38, at Canon 2; *see also id.* at EC 2-1 (stating that an important function of the legal profession is to assist in making legal services fully available). The Model Code's Canons are described as "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession." *Id.* at prelim. statement.

117. *Id.* at EC 8-3.

118. *Id.* at EC 2-25.

119. *Id.*; *see also* MODEL CODE, *supra* noe 38, at EC 2-16 (repeating that "persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective") (citations omitted).

120. MODEL RULES, *supra* note 17, at pmbl. ¶ 1.

121. *Id.* at pmbl. ¶ 6.

122. *Id.* The preamble also states that a lawyer, "guided by personal conscience and the approbation of professional peers," should strive "to exemplify the legal profession's ideals of public service." *Id.* at pmbl. ¶ 7.

123. *Id.* at R. 6.1. The 1993 amendments to Model Rule 6.1 set a pro bono publico service goal for each lawyer of at least fifty hours per year. *Id.*

to organizations that provide free legal assistance to persons of limited means.[124] In addition to either providing direct pro bono services or making a financial contribution when that service is not feasible, the Model Rules expect every lawyer to give financial support to government and professional programs that provide free legal services to those with limited means.[125] The Model Rules also urge law firms "to act reasonably to enable and encourage all lawyers in the firm to provide the pro bono services called for" by Rule 6.1.[126]

The Model Rules further promote pro bono work by easing conflict of interest restrictions on lawyers who participate as nonemployees in legal services organizations. Lawyers who serve as officers or members of legal services organizations do not establish an attorney-client relationship with those served by the organization, and therefore, may participate in the organization even though it provides free legal services to persons having interests adverse to a client of the lawyer.[127]

Participation in certain decisions or actions of a legal services organization may be limited by the lawyer's obligations to a private client under conflict of interest rules.[128] The ABA recently amended the Model Rules to ease conflict of interest restrictions for lawyers participating in nonprofit or court-sponsored programs that provide short-term limited legal services to a client, such as advice or completion of legal forms, in which there is no expectation by either side that the lawyer will provide continuing representation.[129]

Thus, historic and current codes of the legal profession impose a responsibility on lawyers to render pro bono service to those otherwise unable to secure legal representation.[130] This pro bono norm is based on two notions.[131] First, it is imperative that all persons, including the poor, have access to the legal system. Without such access, basic rights cannot be asserted or defended and a justice system built on the notion of equal justice for all cannot retain

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124. MODEL RULES, *supra* note 17, at R. 6.1 cmt. 9.

125. *Id.* at R. 6.1 cmt. 10.

126. *Id.* at R. 6.1 cmt. 11.

127. *Id.* at R. 6.3 & cmt. 1. Although "legal services organization" is not defined in the Model Rules, other uses of the term indicate that it "should be construed to apply to pro bono organizations that provide legal services for indigents." ANNOTATED MODEL RULES, *supra* note 71, at 519–20. The rule assumes that the lawyer will not be acting as lawyer for the legal services organization or its clients and assumes that the clients of the organization will be served by staff lawyers. HAZARD & HODES, *supra* note 95, § 52.2.

128. MODEL RULES, *supra* note 17, at R. 6.3(a); *see also* RESTATEMENT, *supra* note 75, § 135 cmt. e.

129. MODEL RULES, *supra* note 17, at R. 6.5. These short-term limited legal services programs include pro se counseling programs and legal-advice clinics and hotlines. *Id.* at cmt. 1.

130. For an analysis of the history and changing nature of lawyers' pro bono responsibilities, see Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91 (2002).

131. Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 394 (1993–1994) (citing DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 237–66 (1988)).

legitimacy.[132] Second, because of the complexity of the legal process and the bar's monopoly on legal services, meaningful access to the legal system requires the assistance of attorneys.[133] As the ABA and AALS's Joint Conference on Professional Responsibility observed, the ideal of equality before the law "remains an empty form of words unless the legal profession is ready to provide adequate representation for those unable to pay the usual fees."[134]

Numerous ABA ethics opinions reinforce the ethics rules' pro bono obligations. Addressing the responsibility of lawyers to raise funds and handle matters that can no longer be addressed by legal services office staff, ABA Formal Opinion 347 explained that the problem of reduced availability of legal services for indigent clients is a problem for all lawyers.[135] Finding no uncertainties in the ethics rules as to the professional responsibility of the individual lawyer, the 1981 Opinion stated, "[t]he legal profession has a clear responsibility to respond by helping to obtain funds for existing legal services programs and by providing free legal services to indigent clients who would be served by legal services offices were funding available."[136] Later, in a 1996 ethics opinion, the ABA argued that the responsibility to provide legal services to indigent clients "lies not only with legal services lawyers but with the legal profession as a whole."[137] The ethics committee contended that all lawyers must be prepared to provide extraordinary pro bono services to persons who, because of reductions in government funding or restrictions on government-funded cases, are no longer eligible for legal services representation.[138]

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132. LUBAN, *supra* note 131, at 252–56.

133. *Id*. at 244; Eldred & Schoenherr, *supra* note 131, at 395. As Chief Justice Sol Wachtler of the New York State Court of Appeals argued, "a justice system which allows vast disparities in access to justice based on ability to pay cannot truly be called a system of justice at all." Committee to Improve the Availability of Legal Services, *Final Report to the Chief Judge of the State of New York*, 19 HOFSTRA L. REV. 755, 775 (1991).

134. Joint Conference on Professional Responsibility, ABA & AALS, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958) [hereinafter Joint Conference on Professional Responsibility]. The ABA-AALS Joint Conference concluded that the legal profession has a clear moral obligation to see "that those already handicapped do not suffer the cumulative disadvantage of being without proper legal representation." *Id.* at 1216. A New York judicial report on the availability of legal services similarly maintained:

> Our justice system cannot proclaim in the bold letters of the law that it is just, but then block access to justice. We cannot promise due process, but raise insurmountable odds for those who seek it. Nor can we say that we stand for equality before the law, but honor this right only for those who can afford to pay their own way. To give with one hand and take away with the other is mean deception.

Committee to Improve the Availability of Legal Services, *supra* note 133, at 779.

135. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981).

136. *Id.*

137. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 399 (1996).

138. *Id.*

The oaths of admission of lawyers in a number of states reinforce the pro bono imperatives of ethics rules by requiring newly-admitted members of the bar to swear to "never reject, from any consideration personal to myself, the cause of the defenseless or oppressed."[139] Similarly, some states impose general statutory duties on attorneys that include the duty not to reject, for personal reasons, the defenseless or oppressed.[140]

The significance of the Model Rules' pro bono norm is also confirmed by the Multistate Professional Responsibility Examination (MPRE). The MPRE, which seeks to "measure the examinee's knowledge and understanding of established standards related to a lawyer's professional conduct,"[141] is required for admission to the bars of forty-seven states and the District of Columbia.[142] Among the established standards that an examinee is expected to know is the responsibility of a lawyer to improve the legal system,[143] including Model Rule 6.1's pro bono responsibilities.[144]

Beyond the formal rules of ethics that govern lawyer conduct, notions of professionalism encompass pro bono publico service. Although the concept of lawyer professionalism remains elusive, Dean Roscoe Pound's often-quoted interpretation described it as "pursuing a learned art as a common calling in the spirit of a public service."[145] Expanding on Pound's interpretation, the ABA's Professionalism Committee defined a "professional lawyer," in part, as one acting "in the spirit of public service . . . as part of a common calling to promote justice and public good."[146] Invoking this definition, bar association reports on improving lawyer professionalism repeatedly call on all members of

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139. *See, e.g.*, WASH. REV. CODE ANN. § 2.48.210 (2003); MICH. SUP. CT. R. 15 § 3 (2002); *In re* Amendments to Rules Regulating the Fla. Bar 1-3.1(a) and Rules of Judicial Admin. 2.065 (Legal Aid), 573 So. 2d 800, 803 (Fla.1990) (quoting Rules Relating to Ethics Governing Bench & Bar, 145 Fla. 763, 797 (1941)); La. Supreme Court Committee on Bar Admissions, *The Lawyer's Oath*, *available at* http://www.lascba.org/lawyers_oath.asp (last visited Dec. 19, 2003); *see also* CAL. BUS. & PROF. CODE §§ 6067, 6068(h) (2003) ("Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.").

140. *See, e.g.*, ALA. CODE § 34-3-20(7) (2002); GA. CODE ANN. § 15-19-4(6) (2001); IOWA CODE ANN. § 602.10112(7) (2003); MINN. STAT. ANN. § 481.06(6) (2002); OR. REV. STAT. § 9.460(4) (2001).

141. NATIONAL CONFERENCE OF BAR EXAMINERS, THE MPRE: 2003 INFORMATION BOOKLET 30 (2002).

142. *Id.* at 2.

143. *See id.* at 33, 35.

144. *See* RICHARD C. WYDICK, BARBRI BAR REVIEW: PROFESSIONAL RESPONSIBILITY 106 (2000) (including the obligations of Model Rule 6.1 in the materials designed to prepare the reader for the MPRE).

145. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953). Professor Roger Cramton argues that one of the chief elements of a renewed vision of legal professionalism will be a "lawyer who cares about equal access to justice." Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 611 (1994).

146. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 6 (1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM]. The Committee also declared the following: "In short, public service is not merely an aspiration or an ideology. It is the very essence of being a lawyer in our society." *Id.*

the bar to recognize their obligation to, and increase their participation in, pro bono activities.[147]

For example, the ABA's 1992 MacCrate Report on professional development listed "Striving to Promote Justice, Fairness, and Morality," which includes ensuring that legal services are available to those unable to pay, as one of the legal profession's four fundamental values.[148] In 2000, the ABA's House of Delegates identified the duty to promote access to justice as one of the six core values of the profession.[149]

Similarly, a number of professionalism codes or creeds include pro bono pledges. The ABA's creed of professionalism and accompanying pledge direct a lawyer to remember that his responsibilities as a lawyer include a devotion to public service and to pledge to contribute uncompensated time and resources to persons who cannot afford adequate legal assistance.[150] State professionalism ideals and pledges likewise include a commitment to public good and access

147. *See, e.g.*, ABA COMM'N ON PROFESSIONALISM, ". . . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 15, 47–50 (1986), *reprinted in* 112 F.R.D. 243 (1987) (discussing the goal that lawyers recognize their obligation to participate in and increase their participation in pro bono activities); AALS COMM'N ON PRO BONO AND PUB. SERV. OPPORTUNITIES, LEARNING TO SERVE 22 (1999) [hereinafter LEARNING TO SERVE], *available at* http://www.aals.org/probono/report.html (last visited Dec. 19, 2003).

148. *See* ABA SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 140–41 (1992) [hereinafter MacCrate Report]. The MacCrate Report notes that it is "now well-accepted that all lawyers bear a *pro bono* obligation." *Id.* at 214.

149. ABA House of Delegates, *Resolution* 10F (July 11, 2000), *reprinted in* L. Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution* 10F, 36 WAKE FOREST L. REV. 133, app. at 164–65 (2001).

150. ABA House of Delegates, *A Lawyer's Creed of Professionalism* (Aug. 9, 1988), *reprinted in* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 691, 694 (John S. Dzienkowski ed., 2003-2004); ABA, *Lawyer's Pledge of Professionalism* (1988), *reprinted in* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES, *supra* at 694. The professionalism pledge of the ABA's Young Lawyers Division contains a similar pledge to contribute time and resources to pro bono activities and to work to make the legal system more accessible. ABA Young Lawyers Division, *Lawyer's Pledge of Professionalism* (1988), *reprinted in* ABA CTR. FOR PROF'L RESPONSIBILITY, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 393 (2003 ed.).

to legal services,[151] as do the stated ideals of lawyer professionalism organizations such as the American Inns of Court.[152]

While not ignoring the nonlegal charitable and civic activities contributed by members of the bar, pro bono norms focus on the "specific need for particular services that only lawyers can provide and for which other kinds of selfless activity by lawyers are not practical substitutes."[153] Acceptable pro bono work consists of the full range of legal services needed by persons of limited means.[154] The latest version of the Model Rules expects that a substantial portion of the pro bono legal services rendered annually should be to financially disadvantaged individuals or to organizations that serve those of limited means.[155] As one author argued, the legal needs of those without financial resources are often derived specifically from their poverty status and "may involve the essentials of life, making representation more vital for the poor than middle-class citizens."[156]

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151. *See, e.g.*, Center for Professionalism, The Florida Bar, *Ideals and Goals of Professionalism* (1990), *at* http://www.flabar.org (last visited Dec. 19, 2003) (including a commitment "to provide all persons, regardless of their means or popularity of their causes, with access to the law and the judicial system"); Supreme Court of Texas and Texas Court of Criminal Appeals, *The Texas Lawyer's Creed—A Mandate for Professionalism* (1989), *reprinted in* PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES, *supra* note 150, at 697–98 (committing a lawyer "to assure that all persons have access to competent representation regardless of wealth or position in life" and "to an adequate and effective pro bono program").

152. American Inns of Court, *Professional Creed*, *available at* http://www.innsofcourt.org/contentviewer.asp?breadcrumb=6,9,342 (last visited Dec. 19, 2003) (including pledge to "contribute time and resources to public service . . . and pro bono work").

153. ABA COMM'N ON PROFESSIONALISM, *supra* note 147, at 48 n.*. As two authors explained, "Rule 6.1 and all of its predecessors apply only to the provision of legal services. While it is admirable for lawyers to serve their community in a variety of ways, community service stems from a more general obligation that belongs to all citizens and not solely to lawyers." James L. Baillie & Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1,The Profession, and Legal Education*, 13 LAW & INEQ. 51, 61 (1994).

154. MODEL RULES, *supra* note 17, at R. 6.1 cmt. 2 (including "individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means" as examples of the pro bono legal services endorsed by the rule).

155. *Id.* at Rule 6.1(a). The pre-1993 version of Model Rule 6.1, still in effect in many states, did not favor pro bono service to persons of limited means over assistance to public service or charitable organizations seeking social change. ABA CTR. FOR PROF'L RESPONSIBILITY, *supra* note 150, at 510. Instead, it shadowed the 1975 ABA House of Delegates resolution that each lawyer should provide public interest legal services, defined as services provided for free or at a substantially reduced fee, in poverty law, civil rights law, public rights law, charitable organization representation, and administration of justice. *Proceedings of the 1975 Annual Meeting of the House of Delegates*, 100 REP. A.B.A. 642, 684–85 (1975) (reprinting the "Montreal Resolution").

156. Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 750 n.60 (citing Ronald H. Silverman, *Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 900–01 (1991)). Professor Charles Wolfram observed that what some lawyers consider to be pro bono legal services often advance new client development, seek to create goodwill with judges or other attorneys, or consist of volunteer work for groups or bar committees that do not address the unmet legal needs of the poor. CHARLES W.

Therefore, there can be little debate that pro bono publico service is a longstanding and fundamental norm of the legal profession. However, despite repeated calls for mandatory pro bono service, such activity is a voluntary, aspirational goal in state ethics rules[157] and is not enforced through disciplinary action.[158] Some states' statutory duties and oaths of admission directing lawyers not to reject the cause of the defenseless or oppressed are mandatory and could, if violated, subject the lawyer to sanctions.[159] Nonetheless, there does not appear to be any reported case of an attorney sanctioned for violating this aspect of an attorney's duties or oath.

B. The Duty Not to Deny Representation to Unpopular Clients or Causes

Related to the idea that justice requires that all persons have access to the legal system is the additional professional standard that legal representation should not be denied to persons or causes that are controversial. The 1850 Field Code, the 1887 Alabama Code of Ethics, the ABA's 1908 Oath of Admission, and other state oaths vow not to allow the "oppressed" to go unrepresented.[160] The Model Code states that the legal profession's objective of making legal services fully available requires that "[r]egardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse."[161] Thus, the "preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community," "the repugnance of the

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WOLFRAM, MODERN LEGAL ETHICS § 16.9 (1986); *see also* Carolyn Elefant, *Can Law Firms Do* Pro Bono? *A Skeptical View of Law Firms'* Pro Bono *Programs*, 16 J. LEGAL PROF. 95, 102–03 (1991) (arguing that law firms use pro bono work to develop profitable business contacts); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 92 (1990) (arguing that volunteer lawyer pro bono programs focus on simple matters and on cases not involving mainstream poverty law issues); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1420 (1998) (arguing that paying clients often influence a firm's pro bono work, with unpopular clients and causes going without assistance).

157. *See, e.g.*, MODEL RULES, *supra* note 17, at R. 6.1 (setting forth the "responsibility" of every lawyer to provide pro bono publico legal service but conditioning that responsibility with the terms "should" and "aspire"); MODEL CODE, *supra* note 38, at EC 2-25, 8-3 (limiting the "responsibility," "obligation," and "duty" of attorneys to make legal counsel available to those unable to pay by using the term "should" and by excluding pro bono duties from the Disciplinary Rules).

158. *See* MODEL RULES, *supra* note 17, at R. 6.1 cmt. 12 ("The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.").

159. *See, e.g.*, ALA. CODE § 34-3-87(3) (2002) (subjecting attorneys to removal or suspension for rejecting the cause of the defenseless or oppressed for consideration personal to themselves); CAL. BUS. & PROF. CODE § 6103 (2003) (subjecting attorneys to suspension or disbarment for violating their oath or duties); MONT. CODE ANN. § 37-61-301(2)(b) (2003) (same); WASH. REV. CODE ANN. § 2.48.220(3) (2003) (same).

160. *See supra* notes 111–15, 139–40 and accompanying text.

161. MODEL CODE, *supra* note 38, at EC 2-26 to -27.

subject matter of the proceeding," or "the identity or position of a person involved in the case" does not justify refusing to provide legal assistance.[162]

The Model Rules continue this professional duty to help ensure access of unpopular clients or causes to legal assistance. A comment to Model Rule 1.2 states that "[l]egal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval."[163] Thus, one way lawyers can ensure equal access to the justice system for all those who, because of social barriers, cannot secure adequate legal counsel is by representing indigent or unpopular clients.[164] Similarly, a lawyer shall not seek to decline a court appointment just because the client or the cause is controversial or repugnant to the lawyer.[165] Instead, good cause to decline an appointment exists only where the lawyer finds the

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162. *Id.* at EC 2-28 to -29 (citations omitted); *see also id.* at EC 2-30 ("Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client.").

163. MODEL RULES, *supra* note 17, at R. 1.2 cmt. 5. Rule 1.2(b) provides one rationale for the obligation not to refuse unpopular clients or causes — "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." *Id.* at R. 1.2(b). *See generally* HAZARD & HODES, *supra* note 95, § 5.8 n.1 (concluding that "[p]rofessional detachment is often discussed in terms of a principle of 'neutrality' or 'nonaccountability'"); WOLFRAM, *supra* note 156, § 10.2 (discussing professional detachment and unpopular clients and causes); Andre A. Borgeas, Note, *Necessary Adherence to Model Rule 1.2(b): Attorneys Do Not Endorse the Acts or Views of Their Clients by Virtue of Representation*, 13 GEO. J. LEGAL ETHICS 761, 761 (2000) (concluding "[l]awyers are agents . . . not principals, and they should not be criticized for the clients whom they represent") (citing Abe Fortas, *Thurman Arnold and The Theater of the Law*, 79 YALE L. J. 988, 1002 (1970)).

164. MODEL RULES, *supra* note 17, at R. 6.2 cmt. 1 ("An individual lawyer fulfills this responsibility [to provide pro bono publico service] by accepting a fair share of unpopular matters or indigent or unpopular clients."); *see also id.* at pmbl. ¶ 6 (stressing that "all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel").

165. *See id.* at R. 6.2(c). This principle is illustrated by an ethics opinion involving a Tennessee lawyer who sought to decline a court appointment to represent minors seeking court permission to obtain abortions. The lawyer sought to decline the appointment on the ground that he was a devout Catholic and advocating a right to abortion would violate his ethical and moral beliefs. Tenn. Bd. of Prof'l Responsibility, Formal Op. 96-F-140 (1996). The Tennessee ethics committee advised the attorney that where there is a conflict between the attorney's moral and ethical beliefs and those of the client, the "lawyer must allow the court to determine the propriety of his withdrawal after motion and hearing to develop an adequate record." *Id.* Only where the attorney's beliefs or repugnance toward the client or cause are so compelling that they will impair the attorney's independent professional judgment and ability to represent the client may the attorney be excused from the representation or should the attorney refuse to represent an unpopular client. *See* MODEL RULES, *supra* note 17, at R. 6.2(c); MODEL CODE, *supra* note 38, at EC 2-30.

client or cause so repugnant as likely to impair the attorney-client relationship.[166]

ABA ethics opinions repeatedly remind members of the bar, and law school faculty in particular, about their obligation not to reject the representation of controversial clients or causes. In a rebuke to a local bar association that wanted a legal aid society to avoid representation of "militant" groups and causes, ABA Formal Opinion 324 stated that attorney members of a legal aid society's board of directors, just like individual attorneys, are bound by "the Code of Professional Responsibility from exercising their authority so as to discourage the representation of controversial clients and causes or matters which would align the legal aid society against public officials, governmental agencies or influential members of the community."[167] In ABA Informal Opinion 1208, the ABA's ethics committee addressed the propriety of law school guidelines that sought to avoid the acceptance of controversial cases by the school's law clinic.[168] The ethics committee declared that the lawyers on the governing body of a law school clinic, which includes a law school's nonclinical faculty and dean, should avoid adopting guidelines that prohibit the acceptance of controversial cases.[169] Instead, the lawyer-members "should seek to establish guidelines that encourage, not restrict, acceptance of controversial clients and cases," particularly if the prospective law clinic clients would otherwise be unable to obtain legal services.[170] In a later opinion, the ABA's ethics committee reiterated that all lawyers should seek to avoid, and where necessary remove, unreasonable and unjustified restraints on the types of clients and cases that may be represented by legal services offices and should support efforts to address the public's unmet need for legal services.[171]

Beyond ethics opinions, the ABA and AALS have spoken on the duty of an attorney to represent unpopular causes. In 1953, the ABA House of Delegates, in reaction to attacks on attorneys providing representation to unpopular clients, resolved that a lawyer had a right to represent and defend any client without being penalized by imputation of the client's reputation, views, or character to the lawyer.[172] The ABA vowed to support any lawyer

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166. MODEL RULES, *supra* note 17, at R. 6.2(c). "In contrast to Rule 6.1, which states an aspirational [pro bono] goal, Rule 6.2 provides the basis for disciplinary action for a lawyer's failure to comply with its mandate." ABA CTR. FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 484 (4th ed. 1999).

167. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 324 (1970).

168. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972).

169. *Id.*

170. *Id.* For an analysis of the ethical issues raised by attempts to interfere in law school clinic case and client decisions, see Kuehn & Joy, *supra* note 18.

171. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974).

172. *Proceedings of the House of Delegates*, 78 A.B.A. ANN. REP. 133 (1953). The ABA premised its resolution on two convictions: that the bar has a duty to provide all persons, even the most unpopular defendants, the benefit of legal representation and that a client's views or conduct should not be imputed to the lawyer. *Id.; see also Report of the Special Committee on Individual Rights as Affected by National Security*, 78 A.B.A. ANN. REP. 304, 305–06 (1953) (discussing the

against such criticism and to educate the public and legal profession on a lawyer's rights and duties in representing an unpopular client or cause.[173] In the report of its Joint Conference on Professional Responsibility, the ABA and AALS proclaimed that "[o]ne of the highest services the lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the general public."[174] While noting that a lawyer's decision to undertake the representation of an unpopular cause is a matter for individual conscience, the ABA and AALS observed that the legal profession "has a clear moral obligation with respect to this problem."[175]

C. The Duty to Assist in Law Reform and Improving the Legal System

Lawyers, because of their education and experience, are particularly qualified to recognize deficiencies in the law and administration of justice and to initiate corrective measures.[176] As a way of advancing the public service conviction of the profession, lawyers are expected to participate voluntarily in law reform and in improving the legal system.[177]

The 1908 ABA Canons encouraged lawyers to strive to improve the law and administration of justice.[178] The Model Code highlights the importance of this duty by including as one of its nine axiomatic norms that a lawyer should help improve the legal system.[179] Thus, lawyers should aid in making needed changes and improvements to the legal system and to laws that the lawyer believes are unjust.[180] Lawyers can participate in efforts to improve the legal system "without regard to the general interests or desires of clients or former clients."[181]

The Model Rules continue this notion of the responsibility for the quality of justice by encouraging lawyers to employ their knowledge "to improve the

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public's misperception of a lawyer's duty to provide representation to unpopular clients and causes and the ABA's need to educate the public of this duty).

173. *Proceedings of the House of Delegates*, *supra* note 172, at 133.

174. Joint Conference on Professional Responsibility, *supra* note 134, at 1216.

175. *Id.* at 1216–17.

176. MODEL CODE, *supra* note 38, at EC 8-1.

177. *Id.*

178. ABA CANONS, *supra* note 113, at Canon 29.

179. MODEL CODE, *supra* note 38, at Canon 8.

180. *Id.* at EC 8-1 to -2, -9.

181. *Id.* at EC 8-1. The Model Code explains:

> The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

Id. at EC 7-17.

law . . . and to exemplify the legal profession's ideals of public service."[182] Beyond exhortation, the Model Rules facilitate law reform activities by allowing lawyers to participate in organizations "involved in the reform of the law or its administration notwithstanding that the reform may [adversely] affect the interests of a client."[183]

Ideals of professionalism likewise include a commitment to legal reform.[184] The ABA and AALS's Joint Conference on Professional Responsibility characterized legal reform as "[t]he special obligation of the profession," noting that "few great figures in the history of the Bar . . . have not concerned themselves with the reform and improvement of the law."[185] The ABA's creed and pledge of professionalism exhort lawyers to devote time to improve the administration of justice and to make the legal system more accessible and responsive.[186] The ABA's MacCrate Report argues that members of the legal profession bear a responsibility for the quality of justice and should be committed to the fundamental professional value of enhancing the capacity of the law and legal institutions to provide justice.[187] In a like manner, members of the Inns of Court pledge to "work to make the legal system more accessible, responsive and effective."[188]

D. The Lawyer-Law Professor's Duty of Public Service

Despite the pervasiveness of the legal profession's stated expectations that all members of the profession render pro bono public service, assure the

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182. MODEL RULES, supra note 17, at pmbl. ¶ 7; *see also id.* at pmbl. ¶ 1 (noting that lawyers have a "special responsibility for the quality of justice").

183. *Id.* at R. 6.4. Organizations involved in law reform include those that sponsor scholarly debate and research, assist in legislative drafting or lobbying, or file amicus briefs in their own names. ANNOTATED MODEL RULES, *supra* note 71, at 496 (citing HAZARD & HODES, *supra* note 95, § 53.2).

The comment to Model Rule 6.4 explains that lawyers involved in law reform organizations do not have an attorney-client relationship with the organization. MODEL RULES, *supra* note 17, at R.6.4. cmt. 1. Nevertheless, in determining the nature and scope of participation in law reform activities, a lawyer is warned to be mindful of obligations to clients under conflict of interest rules and to make appropriate disclosure to the law reform organization when aware that a private client might materially benefit from the proposed reforms. *Id. But see* RESTATEMENT, *supra* note 75, § 125 cmt. e (discussing the ability of a lawyer openly to express policy views inconsistent with a client's position and the corresponding limitation on this ability).

184. *See, e.g.*, LEARNING TO SERVE, *supra* note 147, at 6–7 (defining lawyer professionalism and a professional lawyer to include acting "in the spirit of public service" and "dedicated to justice and the public good").

185. Joint Conference on Professional Responsibility, *supra* note 134, at 1217. The conference report argued that lawyers have both the special expertise to know when the law is in need of reform and the special competence to implement the necessary reforms. *Id.*

186. *A Lawyer's Creed of Professionalism*, *supra* note 150; Young Lawyers Division, *Lawyer's Pledge of Professionalism*, *supra* note 150.

187. MacCrate Report, *supra* note 148, at 213.

188. American Inns of Court, *supra* note 152.

representation of unpopular clients and causes, and assist in law reform and improving the legal system, some argue that these responsibilities do not impose any obligation on individual members of the bar or at least do not apply to members of the bar who earn their living by teaching law. For instance, Professor Timothy Terrell and James Wildman argue that while lawyers have a responsibility to see that the bar as an entity assists and enables lawyers desiring to provide legal services to the needy, "[p]rofessionalism does not necessarily demand . . . that each of us personally pledge to devote time and effort to legal help for the poor."[189] The argument for a collective rather than personal responsibility for pro bono work, tenuous as it is,[190] has been soundly rejected as a predominant norm of the legal profession. The Model Code, Model Rules, and other commanding statements of professional norms stress that every lawyer, regardless of professional prominence or workload, is expected to donate legal services to the disadvantaged.[191]

Terrell and Wildman complain that requiring pro bono service by some members of the bar, such as law professors who do not regularly represent clients, may force those attorneys to undertake matters that are too complicated, thus compromising competence or requiring the attorney to donate an unfair portion of her time to the pro bono matter.[192] However, the legal service needs of pro bono clients involve such a wide array of legal tasks, from litigation to appellate work, legal advice, transactional work, lobbying, and rulemaking, that any law professor could find some activity that matched her training and skills.[193] Law professors also can address competence concerns by assisting

189. Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 430 (1992). Terrell and Wildman's justification for this position includes the argument that the Bar no longer enjoys a monopoly on legal services. *Id.* at 421–22.

190. For rebuttals to Terrell and Wildman's justifications for contending that lawyers do not have a personal responsibility to provide pro bono services, see Richard C. Baldwin, "*Rethinking Professionalism*"*—And Then Living It!*, 41 EMORY L.J. 435, 436–47 (1992); Jennifer Gerarda Brown, *Rethinking "The Practice of Law*," 41 EMORY L.J. 451, 454–60 (1992); Steven Lubet, *Professionalism Revisited,* 42 EMORY L.J. 197, 199–208 (1993).

191. *See, e.g.*, MODEL CODE, *supra* note 38, at EC 2-25 ("Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."); MODEL RULES, *supra* note 17, at R. 6.1 ("Every lawyer . . . has a responsibility to provide legal services to those unable to pay."); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 347 (1981) ("While not providing Disciplinary Rules, the Model Code leaves no doubt as to the professional responsibility of the individual lawyer . . . 'The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . . .'") (quoting MODEL CODE, *supra* note 38, at EC 2-25); MacCrate Report, *supra* note 148, at 215 ("This section reaffirms that it is the responsibility of every lawyer to provide *pro bono* service."); *A Lawyer's Creed of Professionalism*, *supra* note 150 (noting that the legal profession's goals include "the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance"); American Inns of Court, *supra* note 152 ("I will contribute time and resources to . . . pro bono work.").

192. Terrell & Wildman, *supra* note 189, at 430.

193. *See, e.g.*, MODEL RULES, *supra* note 17, at R. 6.1 cmt. 2 (noting that eligible pro bono legal services consist of a full range of legal activities); Lubet, *supra* note 190, at 204 (noting that poor people have the need for, in addition to complex criminal and civil rights representation,

more experienced lawyers who take professional responsibility for the pro bono case, much as lawyers do in jurisdictions where they are not licensed and as law students do before gaining their licenses to practice law.[194] Further, if law schools can successfully impose mandatory pro bono requirements on law students without compromising issues of competence,[195] then law professors licensed as attorneys ought to be able to engage in similar services without violating any duties to clients.

Terrell and Wildman also argue that the focus of pro bono service on the economically disadvantaged imposes a politically-based morality on attorneys who might not share the same goal of assisting the poor.[196] Yet, the scope of needed pro bono services is so broad that every lawyer can find a client or case that fits the attorney's moral or political views or find work that does not reflect any political perspective. Pro bono activities may involve such nonpolitical work as handling a divorce or drafting a will. Such work can even be done for organizations spanning the political spectrum, rather than for individuals.[197] As Professor Jennifer Gerarda Brown concluded, "[g]iven the variety of matters and clients for whom lawyers can work on a pro bono basis, it does not appear

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assistance with "will drafting, probate administration, real estate closings, domestic relations representation, social security appeals, contract negotiation, and all sorts of simple litigation"); *see also supra* notes 9–13 and accompanying text (giving illustrations of the broad array of legally-related public service that law professors have performed).

194. *See, e.g.*, MODEL RULES, *supra* note 17, at R. 5.5(c)(1) (permitting a lawyer admitted in another jurisdiction to provide legal services on a temporary basis where associated with a lawyer admitted to practice in the jurisdiction); *id.* at R. 5.3 cmt. 1 (allowing a lawyer to use nonlawyer assistants provided the lawyer is responsible for their work product); MODEL CODE, *supra* note 38, at EC 3-6 (authorizing a lawyer to delegate tasks to a nonlawyer if the lawyer supervises and maintains responsibility for the delegated work). *But cf.* Rory K. Little, *Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-Flagellation*, 42 S. TEX. L. REV. 345, 346–47 (2001) (questioning whether law professors may need to maintain an "active" law license even when simply giving advice to current or former students).

195. *See* AALS PRO BONO PROJECT, A HANDBOOK ON LAW SCHOOL PRO BONO PROGRAMS 9 (2001), *available at* http://www.aals.org/probono/probono.pdf (last visited Dec. 21, 2003) (listing fourteen law schools that require law student pro bono work as a condition of graduation); LEARNING TO SERVE, *supra* note 147, at 30–32 (describing three successful mandatory law student pro bono programs).

196. Terrell & Wildman, *supra* note 189, at 421, 431.

197. Lubet, *supra* note 190, at 199–200. Professor Steven Lubet explained:

> To be sure, many "poverty lawyers" have their own ideological agendas, and as laudable as their aims might be, it is not the burden of the profession to advance them. On the other hand, most of the legal needs of the poor are decidedly nonpolitical. Not all indigent representation involves a lawsuit against the welfare bureaucracy or class actions against consumer finance companies. Helping the poor need not be the equivalent of engaging in class warfare.

Id. at 200. *But see supra* notes 12–13 and accompanying text (noting the involvement of law professors in pro bono work involving liberal and conservative causes).

that pro bono service advances any particular political ideology. Altruism is a moral value, not a political one."[198]

Terrell submits that law professors have an additional argument against a duty to engage in pro bono work—training law students is a form of public service that meets any pro bono obligation of the legal profession.[199] Under this view, because there is no personal responsibility of lawyers to engage in pro bono service, but only a duty owed by the Bar as a whole, law professors meet their responsibility for adequate distribution of legal services "just by training their students to take an active and productive role in the legal profession" and by making their students understand the importance of lawyer services.[200] Professor David Luban refutes the suggestion that teaching law is a comparable substitute for pro bono service by noting that teaching law does nothing to address the problem that many people and organizations cannot afford legal services and are therefore denied access to justice.[201] Luban further notes that although law professors make less money than large-firm lawyers of comparable seniority, the relevant peer group is colleagues in other university departments, compared with whom law professors are well compensated.[202] Thus, law teaching cannot be considered reduced-cost legal services. Even if the appropriate comparison group for law professors is practicing lawyers, practicing lawyers are a group that clearly has pro bono service responsibilities, thus contradicting the argument that law professors should not fulfill similar duties.[203]

A final argument against a duty of law professors to perform pro bono service and other public service is the claim expressed by some law professors that "I'm not a lawyer. I'm an academic."[204] The simple response to this argument is that if the law professor is a member of the Bar, then the professor is subject to the same rules and duties as any other lawyer. The Model Rules

198. Brown, *supra* note 190, at 460; *see also* Baldwin, *supra* note 190, at 437–38 ("Our social commitment to establishing justice and making the machinery of justice available to all members of society is not a politically biased value; rather, this commitment represents values fundamental to our system of government.").

199. Timothy P. Terrell, *A Tour of the Whine Country: The Challenge of Extending the Tenets of Lawyer Professionalism to Law Professors and Law Students*, 34 WASHBURN L.J. 1, 25–26 (1994); *see also* Saundra Torry, *On Public Service Issue, Professors Urged to Teach by Example*, WASH. POST, Jan. 7, 1991, at F5 (reporting the belief of some law professors that their teaching is a form of public service).

200. Terrell, *supra* note 199, at 25–26.

201. Luban, *supra* note 11, at 71.

202. *Id.* Luban refers to this as the "opportunity-cost argument." Furthermore, law professors receive countless other nonpecuniary benefits that large firm lawyers do not. *Id.* at 71–72.

203. *Id.* Luban also argues that because law teachers reap economic rewards from the legal profession, they have pro bono responsibilities similar to those of private practitioners. *Id.* at 67–70.

204. *Id.* at 66.

and Model Code apply to "every lawyer."[205] Although some rules apply to a lawyer only when representing a client or acting as a third-party neutral, the relevant public service provisions in the Model Rules and Model Code apply to "a," "all," and "every" lawyer(s) regardless of the lawyer's professional position.[206] The AALS stresses that law professors who are lawyers are subject to, and at a minimum should adhere to, the legal profession ethical rules in force in the jurisdictions where the professor is admitted.[207]

A member of the bar must comply with certain ethics rules, including the rules addressing pro bono and public service, even when the lawyer is not engaged in the practice of law. The ABA's ethics committee explained that "a lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional Responsibility whether or not he is acting in his professional capacity."[208] *In re Peters* illustrates the obligation of a law professor to comply with the rules of professional conduct, even when acting solely in a teaching capacity.[209] In that case, the dean of a law school was found to have violated the Model Code by his repeated, unwelcome physical contact and communication of a sexual nature toward female employees, some of whom were also students.[210] The court rejected the contention that a law professor's ethical obligations and professional responsibilities only apply when representing a client[211] and disciplined the dean as a member of the bar for failing to comply at all times with applicable disciplinary rules.[212]

Thus, applicable legal profession norms create unquestionable rights and duties of a law professor to speak out through pro bono or other volunteer law-related public service work.

IV. LEGAL ACADEMY NORMS ON THE RIGHTS AND DUTIES TO SPEAK OUT

Although less forceful than the legal profession norms governing attorneys, legal academy norms also articulate rights and duties of law professors to speak out.

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205. MODEL RULES, *supra* note 17, at pmbl. ¶ 12 ("Every lawyer is responsible for observance of the Rules of Professional Conduct."); MODEL CODE, *supra* note 38, at prelim. statement (explaining that the Canons, Ethical Considerations, and Disciplinary Rules define the type of ethical conduct expected of every lawyer).

206. *See* MODEL RULES, *supra* note 17, at Rs. 1.2(b), 6.1, 6.2, 6.3, 6.4; MODEL CODE, *supra* note 38, at Canons 2, 8, EC 2-25 to -29, -33, 7-17, 8-1 to -3, -9.

207. AALS, *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities* (1989) [hereinafter AALS, *Statement of Good Practices*], *available at* http://www.aals.org/ethic.html (last visited Dec. 21, 2003).

208. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 336 (1974).

209. *In re* Peters, 428 N.W.2d 375 (Minn. 1988) (per curiam).

210. *Id.* at 376. The dean's law school activities were found to demonstrate an indifference to ethical and legal obligations that reflected adversely on his fitness to practice law and, therefore, violated Model Code DR 102(A)(6). *Id.* at 382.

211. *Id.* at 380.

212. *Id.* at 382.

A. Legal Academy Norms Governing Law Student Public Service

Because of its predominant role in preparing students to enter the legal profession, the legal academy has a significant responsibility to educate law students about the profession's norms. The ABA's Commission on Professionalism noted that law schools represent the greatest opportunity to impact professional development and values.[213] As the first introduction to the legal profession and its norms, the attention law schools pay to ethics and professionalism will influence the 35,000 annual law graduates and, hence, the legal profession, for decades to come.[214] The ABA's MacCrate Report argues that law schools have a responsibility to stress the fundamental values of the profession, which include promoting justice, fairness, and morality, and encompass helping to ensure that assistance is available to those unable to pay for legal services.[215] These values "are at least as important as the substance of courses or the skills of practice."[216] Law schools are enjoined not only to teach these values, but also to "instill in students the desire to achieve them" later in practice.[217]

ABA law school accreditation standards require schools to provide an educational program that ensures its graduates understand their ethical responsibilities "for the quality and availability of justice" and "for performance of pro bono legal services."[218] Thus, the ABA requires that all students in a J.D. program receive instruction in the values regarded as necessary to participate effectively and responsibly in the legal profession and in the goals, duties, values, and responsibilities of the legal profession and its members.[219] Similarly, the AALS requires member schools to implement a J.D. program that assures its students appreciate the role that the law and lawyers

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213. ABA COMM'N ON PROFESSIONALISM, *supra* note 147, at 16.

214. *Id.*; TEACHING AND LEARNING PROFESSIONALISM, *supra* note 146, at 13 (observing that the "law school experience has a profound influence on [law students'] professional values and their understanding of the practice of law and the role of lawyers in our society"). Law schools are urged not to limit discussion of ethics and professionalism to a single class on professional responsibility and not to limit discussion to the minimum standards required by rules of professional conduct when issues of values and ethics are raised. ABA COMM'N ON PROFESSIONALISM, *supra* note 147, at 17; *see also* TEACHING AND LEARNING PROFESSIONALISM, *supra* note 146, at 18–23 (arguing for a more expansive ethics and professionalism curriculum in law schools).

215. MacCrate Report, *supra* note 148, at 136, 140–41, 235–36.

216. *Id.* at 235.

217. *Id.*

218. ABA Section of Legal Educ. and Admissions to the Bar, *Standards for the Approval of Law Schools*, pmbl. (2003), *available at* http://www.abanet.org/legaled/standards/preamble.html (last visited Dec. 19, 2003).

219. *Id.* at Std. 302(a)(1), 302(b), *available at* http://www.abanet.org/legaled/standards/chapter3.html (last visited Dec. 19, 2003).

play in society.[220] One way law schools implement these accreditation and membership requirements of teaching the values of the legal profession, including public service, is by instructing students in the Model Rules.

An additional and increasingly common way that law schools convey the public service values of the profession is through student pro bono programs. In 1996, the ABA amended its law school accreditation standards to state that, in addition to curricular instruction in professional values and responsibilities, a law school should encourage and provide opportunities for student participation in pro bono activities.[221] The AALS's *Learning to Serve* report, addressing the role of pro bono and public service in legal education, noted many objectives of such noncurricular pro bono programs. Pro bono activities provide positive experiences for students that instill a greater sense of the importance and benefits of pro bono work and hopefully inspire students toward greater participation in pro bono activities as practicing lawyers.[222] Law schools and the legal profession hope that this greater interest by students in pro bono also will help motivate law firms and more experienced lawyers to perform more pro bono services.[223] In addition, pro bono work serves to educate students about the legal system and its shortcomings and to sensitize students to the legal needs of the poor and their treatment in the justice system.[224] Student pro bono work helps address the unmet societal need for,

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220. AALS, *Bylaws of the Association of American Law Schools, Inc.*, *supra* note 63, at § 6-3(a); *see also id.* at § 6-9(b); AALS, *Executive Committee Regulations*, § 7.3(a) (2003), *available at* http://www.aals.org/chapter7.html (last visited Dec. 19, 2003) (requiring member schools to "provide students with an opportunity . . . to gain an understanding of the lawyer's professional responsibility").

221. ABA Section of Legal Educ. and Admissions to the Bar, *supra* note 218, Std. 302(e). The ABA also encourages students choosing a law school to consider whether a particular school has the necessary foundation to meet the student's pro bono goals. Standing Committee on Pro Bono and Public Service, ABA, *Pro Bono Publico - Legal Services*, *at* http://www.abanet.org/legaled/probono/probono.html (last visited Dec. 19, 2003).

222. LEARNING TO SERVE, *supra* note 147, at viii, 4; *see also* Kristin Booth Glen, *Pro Bono and Public Interest Opportunities in Legal Education*, N.Y. ST. B.J., May/June, 1998, at 20, 20–21 (explaining benefits of exposing law students to pro bono opportunities); Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2433–35 (1999) (discussing the rationale for law student pro bono programs).

223. This is referred to as the "trickle-up" theory of moral obligation—students who perform pro bono work as law students will be more inclined to perform pro bono later in their professional career and these student pro bono experiences will trickle up to others in the legal profession. Lewis S. Calderon et al., *Mandatory Pro Bono for Law Students: Another Dimension in Legal Education*, 1 J.L. & POL'Y 95, 102 (1993); Deborah L. Rhode, *The Professional Responsibilities of Professional Schools*, 49 J. LEGAL EDUC. 24, 33 (1999). Students are encouraged to ask prospective law firms questions about their pro bono program in the hope that this will motivate firms to do more pro bono work and do it better. *See* ABA Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, *The Path to Pro Bono: An Interviewing Tool for Law Students* (2001), *available at* http://www.abanet.org/legalservices/ downloads/probono/path.pdf (last visited Oct. 16, 2003).

224. LEARNING TO SERVE, *supra* note 147, at viii, 4; *see also* Glen, *supra* note 222, at 20; Rhode, *supra* note 222, at 2435.

and lawyers' professional responsibility to provide, legal representation for those who cannot afford an attorney.[225] Pro bono work can supply immediate benefits to students by assisting them to develop lawyering skills, improve their resumes, and make contacts with members of the local bar.[226] Finally, pro bono programs benefit law schools by improving relationships with the local community and alumni.[227]

The shared belief in the importance of fostering a sense of professional public service is so pervasive that ninety-five percent of deans in a 1997 AALS survey agreed that "it is an important goal of law schools to instill in students a sense of obligation to perform pro bono work during their later careers."[228] Thus, the issue is not whether law schools should seek to instill the legal profession's public service norms, but rather, how this should best be done.

B. Legal Academy Norms Governing Law Professor Public Service

Beyond the norms expressed in curricular and extracurricular programs for students, law schools express public service norms through their expectations for members of the academy. The ABA's law school accreditation standards, in determining the necessary number of full-time faculty, include as a factor the opportunities for effective participation "in service to the legal profession and the public."[229] Law schools are expected to establish policies that address a full-time faculty member's "[o]bligations to the profession, including working with the practicing bar and judiciary to improve the profession," and "[o]bligations to the public, including participation in pro bono activities."[230] Schools also are required to evaluate periodically whether faculty members are discharging their responsibilities to the profession and the public.[231]

Although AALS standards address the competence of faculty and the need for conditions conducive to the effective discharge of their teaching and scholarly responsibilities, the standards do not address the faculty's public service obligations or the law school's responsibility to assist faculty in

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225. Glen, *supra* note 222, at 20. A 1994 ABA report estimated that seventy-one percent of low-income and sixty-one percent of moderate-income households' legal problems are never addressed by the civil justice system. ABA CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 23 (1994).

226. LEARNING TO SERVE, *supra* note 147, at viii, 5; Rhode, *supra* note 222, at 2435.

227. LEARNING TO SERVE, *supra* note 147, at 5–6. In an AALS survey of law school deans, ninety-one percent believed that the school's public service projects provided valuable good will in the community; sixty-nine percent believed the projects provided valuable good will among alumni. *Id.* at 6.

228. *Id.* at 3.

229. ABA Section of Legal Educ. and Admissions to the Bar, *supra* note 218, at Std. 402 (a)(3).

230. *Id.* at Std. 404(a)(4)–(5). Outside professional activities must not "unduly interfere with one's responsibility as a [full-time] faculty member." *Id.* at Std. 402(c).

231. *Id.* at Std. 404(b).

fulfilling those duties.[232] However, the AALS's *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities* provides guidance.[233] Professors are advised that their responsibilities extend beyond the classroom to include service to others and are instructed not to be limited by the pursuit of self interest.[234] In particular, law professors are reminded that as role models they share the traditional public service and pro bono publico obligations of the bar.[235] Significantly, in stating the expectation that law professors engage in public service work, the ABA and AALS do not distinguish between law professors who possess licenses to practice law and those who do not, although the form of that public service could differ.[236]

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232. *See* AALS, *Bylaws of the Association of American Law Schools, Inc.*, *supra* note 63, §§ 6-5, -8. The AALS bylaws do discuss faculty public service in the section addressing the amount of professional activities outside of law school that should be allowed. In determining whether outside activities are properly limited, the AALS notes that it is appropriate to consider whether the activities are for a public service or private purpose, implying that outside public service work, although limited, should be given preference over outside private work. *See id.* at § 6-5(f)(iv). The AALS's *Executive Committee Regulations* embrace teaching law outside the law school as an appropriate professional activity but make no reference to pro bono or other forms of law-related public service. AALS, *Executive Committee Regulations*, *supra* note 220, at § 7.8.

233. AALS, *Statement of Good Practices*, *supra* note 207; *see also* Wilson Ray Huhn, *A Proposed Code of Ethics for Law Educators*, 6 J.L. & RELIGION 25, 35–36 (1988) (including in a proposed code of ethics for law educators a requirement that a law professor devote a reasonable amount of time to pro bono publico work); Robert B. McKay, *Ethical Standards for Law Teachers*, 25 ARK. L. REV. 44, 46–47 (1971) (including in nine proposed canons of ethics for law teachers a reminder that, as members of the bar, law professors are bound by the rules of professional responsibility "to the same extent as any other lawyer" and an expectation that law teachers "should work for the advancement of justice and law reform" and impart to students "an understanding of, and a belief in, high standards of . . . ethical responsibility"); Norman Redlich, *Professional Responsibility of Law Teachers*, 29 CLEV. ST. L. REV. 623, 628–29 (1980) (proposing a code of professional responsibility for law teachers that includes an expectation that law professors devote time for pro bono activities).

234. *See* AALS, *Statement of Good Practices*, *supra* note 207, § V.

235. *Id.* The statement includes a list of ways that law professors can meet this responsibility: representing clients through legal aid, public defender, or public interest organizations; teaching in continuing legal education programs; teaching nonlaw students and other groups about the legal system; advising government officials on legal issues; assisting in legislative drafting; or engaging in other law reform activities. *Id. But cf. supra* note 155 and accompanying text (noting the expectation of the latest version of the Model Rules that a substantial portion of a lawyer's pro bono services should be to financially disadvantaged individuals or to groups that serve persons of limited means). The statement warns professors to ensure that these activities do not significantly diminish their ability to meet obligations to students, colleagues, and the law school. AALS, *Statement of Good Practices*, *supra* note 207, § IV.

236. *See generally* State *ex rel* Norvell v. Credit Bureau, 514 P.2d 40, 45 (N.M. 1973) (identifying six indicia of the practice of law for which a law license is needed); RESTATEMENT, *supra* note 75, § 4 ("A person not admitted to practice as a lawyer . . . may not engage in the unauthorized practice of law, and a lawyer may not assist a person to do so."); LAWYERS' MANUAL ON PROF'L CONDUCT, *supra* note 73, at 21:8001 (discussing the legal-related activities that nonlawyers may perform).

A law professor's right to speak out is advanced by academic freedom safeguards. The ABA's accreditation standards require law schools to have a policy on a law professor's academic freedom and reference as an example the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure*.[237] Likewise, the AALS mandates that law school faculty members shall have the academic freedom accorded by the principles of the AAUP.[238] The AAUP's academic freedom principles state that when professors speak or write as citizens they should be free from censorship or discipline.[239] However, professors are warned that "they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution."[240] As the AAUP later explained, "the controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness to serve. Extramural utterances rarely should bear upon the faculty member's fitness for continuing service."[241]

The same academic freedom extends to political activity. Like other citizens, faculty members "should be free to engage in political activities so far

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The public service duties of law professors at Jesuit law schools, and other religiously affiliated schools with public service values, are also informed by the institution's justice and public service missions. *See, e.g.*, Marquette University Law School, *Jesuit Mission at the Law School*, *at* http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=134 (last visited Dec. 21, 2003) (describing the Jesuit mission of the law school). *See generally* Association of Jesuit Colleges and Universities, *Our Members*, *at* http://www.ajcunet.edu/ areas/ji/members.asp (last visited Dec. 19, 2003) (identifying Jesuit schools).

237. ABA Section of Legal Educ. & Admissions to the Bar, *supra* note 218, at Std. 405(b) & app. I.

238. AALS, *Bylaws of the Association of American Law Schools, Inc.*, *supra* note 63, § 6-8(d).

239. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, *supra* note 62. The AAUP explains that "the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time probationary and the tenured teacher, but also to all others, such as part-time faculty and teaching assistants, who exercise teaching responsibilities." AAUP, *1970 Interpretative Comments*, *reprinted in* AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 62, at 6.

240. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, *supra* note 62; *see also* AAUP, *Statement on Professional Ethics* (1987), *reprinted in* AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 62, at 133, 134 (noting that professors, although they have the rights and obligations of other citizens, "have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom"). The AAUP has clarified that the obligation to use "appropriate restraint" refers "solely to choice of language and to other aspects of the manner in which a statement is made. It does not refer to the substance of a teacher's remarks. It does not refer to the time and place of his utterance." AAUP, *Advisory Letters from the Washington Office*, 49 AAUP BULL. 393 (Winter 1963) (quoted in NEIL W. HAMILTON, ZEALOTRY AND ACADEMIC FREEDOM 176 (1995)).

241. AAUP, *Statement on Extramural Utterances*, *supra* note 35.

as they are able to do so consistently with their obligations as teachers and scholars."[242]

Peter Byrne observes that the academic freedom of a law professor is not infringed by expecting or even requiring the professor to engage in public service.[243] As members of the legal profession, law professors are already obligated to engage in public service.[244] More importantly, as Byrne argues, obliging a law professor to serve does not control the form or ideological nature of that service "any more than a requirement to write dictates the political tendency of such writing."[245] However, there is a risk of outside interference in the academic freedom of the law school by expecting law professors to do more than simply teach and write since the school could be attacked for the controversial pro bono or other public service work of its faculty.[246] This is clearly a risk that law schools must be prepared to bear and defend against.[247]

By not having the same worries as practicing lawyers about offending paying clients or taking positions that might be viewed as conflicting with those of a current client, law professors also enjoy a form of economic freedom.[248] Significantly, the AALS takes the position that with enhanced academic and economic freedoms, law professors assume a greater duty to speak out on issues of individual and social justice than practicing lawyers:

> The fact that a law professor's income does not depend on serving the interests of private clients permits a law professor to take positions on issues as to which practicing lawyers may

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242. AAUP, *Statement on Professors and Political Activity* (1990), *reprinted in* AAUP, POLICY DOCUMENTS & REPORTS, *supra* note 62, at 33.

243. Byrne, *supra* note 65, at 329.

244. *Id.*

245. *Id.* at 330.

246. *See* Kuehn & Joy, *supra* note 18, at 1975–89 (including descriptions of politically, economically, and ideologically-motivated efforts to restrict law school activities because of the public service actions of law professors).

247. *See* Byrne, *supra* note 65, at 330 n.28

> Yet, if one subscribes to the view that law professors should speak to the general public as a service to society, it may make sense that academic freedom should protect such public utterances. The professor's speech advances the ethical obligation of the professor and the academic mission of the professional school.

Luban, *supra* note 11, at 61 n.5.

248. *See* Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279, 2289–90 (1999) (discussing the overly broad definition of positional conflicts that some law firms employ, in part, because of their concern over upsetting paying clients); Spaulding, *supra* note 156, at 1418–20 (reporting that legal services organizations report that most law firms are careful to avoid certain types of pro bono work for fear of alienating paying clients). *But cf.* Kuehn & Joy, *supra* note 18, at 1975–89 (describing instances of outside interference by politicians, alumni, and economic interests in the case and client selection decisions of law school clinics professors).

> be more inhibited. With that freedom from economic pressure goes an enhanced obligation to pursue individual and social justice.[249]

In addition to the enhanced right and duty to pursue justice that comes from having such freedom, a law professor's function as a role model mandates greater sensitivity to ethical norms and a greater expectation of public service. The AALS's *Statement of Good Practices* notes the profound influence law professors can have on student attitudes toward professional responsibility.[250] Because they function as role models, professors "should be guided by the most sensitive ethical and professional standards" and "should assist students to recognize the responsibility of lawyers to advance individual and social justice."[251] The ABA's 1986 report on lawyer professionalism likewise argued that law professors, through their conduct inside and outside the classroom, serve as important examples for law students of proper professional behavior.[252] If there are not adequate role models in law schools or if those role models lack a commitment to public service, young lawyers may begin the practice of law with little appreciation for or commitment to the profession's public service ideals.[253] "Therefore, the highest standards of ethics and professionalism should be adhered to within law schools."[254]

The AALS's *Learning to Serve* report stresses the importance of law professors as role models and the need for all law teachers, not just professional responsibility teachers, to teach responsibility for public service through their actions:

> The Commission believes that active faculty participation in pro bono work is highly important for the sake of their students. Law teachers teach as much about professional responsibility by what they do as by what they say. If our conduct and actions are inconsistent with the principles and rules that we teach, we undermine both our credibility as teachers and the legitimacy of the ethical principles and rules themselves. If we appear to be insincere about our *pro bono*

249. AALS, *Statement of Good Practices*, *supra* note 207, § V.

250. *Id.* § I.

251. *Id.*

252. ABA COMM'N ON PROFESSIONALISM, *supra* note 147, at 19; *see also* Baldwin, *supra* note 190, at 445 (noting the important role professors play in a student's professional training); Howard Lesnick, *Why Pro Bono in Law Schools*, 13 LAW & INEQ. 25, 26 (1994) (observing that "whether we desire to or not, teachers convey to our students an idea of the meaning of professional responsibility"). "Law professors can, we believe, positively influence the values and ethics of students by example and through creative teaching." ABA COMM'N ON PROFESSIONALISM, *supra* note 147, at 16.

253. ABA COMM'N ON PROFESSIONALISM, *supra* note 147, at 19.

254. *Id.*

> responsibilities, we also will encourage law students to be skeptical, indeed cynical, about the many other moral principles that distinguish our profession from a trade.[255]

The ABA's report on teaching and learning professionalism argued that, "for most [law] students law school professors are their first and most important role models of lawyers."[256] Professors' out-of-classroom behavior can enhance or undermine professionalism ideals.[257] Professor Thomas Morgan emphasized the unassailable importance of modeling a commitment to public service as a norm of the legal academy: "The sense that professors are uniquely situated to model a commitment to justice and the public interest—and their moral obligation to do so—should be largely beyond dispute."[258]

Modeling public service may even be more important because of the "latent curriculum" of law schools. Some studies have found that many students who enter law school highly idealistic and intent on using their legal training to right perceived injustices leave "jaded or indifferent to the burning issues which brought them to law school."[259] Similarly, students who enter law

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255. LEARNING TO SERVE, *supra* note 147, at 17–18.

256. TEACHING AND LEARNING PROFESSIONALISM, *supra* note 146, at 13.

257. *Id.; see also id.* at 17 ("Professors whose consulting or research activities make them unavailable for . . . *pro bono* service send an unmistakable message to law students about these professors' and their law school's value system."). The MacCrate Report similarly observed that "[l]aw school deans, professors, administrators and staff must not only promote these values [of justice, fairness, and morality] by words, but must so conduct themselves as to convey to students that these values are essential ingredients of our profession." MacCrate Report, *supra* note 148, at 236.

258. Thomas D. Morgan, *Law Faculty as Role Models*, *in* SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA, TEACHING AND LEARNING PROFESSIONALISM—SYMPOSIUM PROCEEDINGS 37, 47 (1997).

259. Glen, *supra* note 222, at 21; *see also* ROBERT GRANFIELD, MAKING ELITE LAWYERS 36–50, 168–97 (1992) (demonstrating that law students who enter law school for altruistic reasons experience a disjuncture between their personal interests in justice and the ones articulated in law school and examining whether a public interest law school produces greater numbers of social activist lawyers); RICHARD D. KAHLENBERG, BROKEN CONTRACT 237 (1992) (observing that law students lose some of their idealism while attending law school); ROBERT V. STOVER, MAKING IT AND BREAKING IT 12–16 (Howard S. Erlanger ed., 1989) (providing survey results showing students' declining interest in public interest work over the course of entering and attending law school); Howard S. Erlanger et al., *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 LAW & SOC'Y REV. 851, 853–55 (1996) (providing survey information on entering law students' job preferences and the actual jobs subsequently taken by those students); Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns*, 13 LAW & SOC'Y REV. 27–30 (1978) (providing survey results showing a decrease in law students' interest in pursuing public interest work entering law school compared to later in law school); Henry Rose, *Law Schools Should Be About Justice Too*, 40 CLEV. STATE L. REV. 443, 444–48 (1992) (observing that law students' "altruistic aspirations are often subverted by the process of legal education" and, hence, students' interest in public interest work declines throughout law school and also examining the underlying reasons for such a result); Craig Kubey, *Three Years of Adjustment: Where Your*

school with a public-interest orientation sometimes find themselves diverted away from public interest jobs and into largely corporate careers.[260] The possible causes are many—high tuition and student loans; placement priorities that value corporate work; and courses that undermine a commitment to social change and law reform.[261] As Dean Kristin Glen argued, exposing students to pro bono and public interest opportunities reinforces the high ideals of most students and can serve to counteract unwitting instructional factors that might otherwise undermine those ideals.[262] Additionally, emphasizing the importance of pro bono and other public service work by modeling such activities may help overcome the perception that many law school professors have a disdain for the practice of law and, impliedly, for the pro bono and public service responsibilities of private practitioners.[263]

Despite the importance of modeling a commitment to public service, the amount of law faculty public service work is limited. An AALS survey of law school deans found that about sixty percent were satisfied with the amount of the faculty's pro bono work, with only half agreeing that many at their schools "provide good role models to the students by engaging in uncompensated public service work."[264] The AALS concluded that "the overall state of pro bono work currently performed by America's law faculty members is a mixed tale."[265]

Ideals Go, 6 JURIS DR., Dec. 1976, at 34, 34, 36 (reporting on survey results that "confirmed the belief that students leave law school less 'idealistic' . . . than [when] they arrive"). *But see* J. D. Roddy & C. Scott Peters, *The Effect of Law School on Political Attitudes: Some Evidence from the Class of 2000*, 53 J. LEGAL EDUC. 33, 34–36, 46 (2003) (arguing that previous research on the effect of law school on student attitudes is indeterminate and finding, based on their own research, "no overwhelming support for theories that law school contributes to major attitudinal changes").

260. *See, e.g.*, Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 STAN. L. REV. 1695, 1699–1702 (1993) (citing numerous articles and studies on the shift during law school in student interests away from public interest work); Eldred & Schoenherr, *supra* note 131, at 401, 402 n.129 (citing studies that the authors describe as not definitive but generally supportive of the proposition "that the law school experience tends to diminish law student desire to engage in public service activities and to pursue careers in public interest law").

261. *See* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 875–76 (3d ed. 2001).

262. Glen, *supra* note 222, at 21.

263. For a discussion of this disdain, see Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285, 293 (1988); Luban, *supra* note 11, at 68; Carrie Meckel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 7–8 (1991); Terrell, *supra* note 199, at 5 & n.2.

264. LEARNING TO SERVE, *supra* note 147, at 17.

265. *Id.; see also* Torry, *supra* note 199 (reporting one law professor's estimate that "a substantial minority" of law professors perform public service). *But cf.* Colbert, *supra* note 11, at 550 (reporting that a "high percentage" of clinical law professors indicated they had taken leadership roles in public service law reform activities). Professor David Luban reports that the usual reaction when he suggests to law colleagues that they have the same pro bono responsibilities as other lawyers is that they had never thought about the matter. Luban, *supra* note 11, at 70–71. Luban describes this situation as a question of identity as most law professors consider themselves academics and not also lawyers. *Id.* at 66–67.

Perhaps it is not surprising that positive modeling by law professors of public service work is limited, given the unsupportive messages that law schools convey about such work. Most law schools do not have faculty policies that require or encourage faculty members to participate in public service or pro bono activities, despite the ABA requirement for such policies.[266] Service is the least important of the three criteria for promotion and tenure, far less than teaching and scholarship.[267] Neither the ABA nor the AALS seeks information on faculty pro bono activities.[268] Similarly, pro bono activities are not a factor in the law school rankings by *U.S. News & World Report*.[269] Finally, a good faculty public service program requires an institutional commitment, yet because of the factors noted above, such programs find it hard to compete with other demands on a law school's time and resources.[270]

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266. LEARNING TO SERVE, *supra* note 147, at 18; *see* ABA Section of Legal Educ. and Admissions to the Bar, *supra* note 218, at Std. 404(a)(4)–(5). "At most of the schools that did have policies, the policy simply took the form of a highly general statement that 'service' is considered along with scholarship and teaching in decisions about promotion or salaries." LEARNING TO SERVE, *supra* note 147, at 18; *see also* AALS PRO BONO PROJECT, *supra* note 195, at 31 attachment 18 (containing examples of faculty pro bono policies); ABA STANDING COMM. ON PRO BONO & PUBLIC SERV., DIRECTORY OF LAW SCHOOL PUBLIC INTEREST AND PRO BONO PROGRAMS (2003), *available at* http://www.abanet.org/legalservices/probono/lawschools/individual_schools_listings.html (last visited Dec. 21, 2003) (listing public interest and pro bono programs at various law schools).

267. *See* AALS, PURSUING EQUAL JUSTICE, *supra* note 11, at 73; AALS, *Bylaws of the Association of American Law Schools, Inc.*, *supra* note 63; *supra* note 232 and accompanying text (noting the failure of the AALS standards on law school faculty to address public service obligations). Professor Henry Gabriel explained the limited significance of public service work in the tenure process:

> The reality of legal academia presents us with two models of professional survival. The first model is excellence in scholarship and something less than a disaster in the classroom. The second model is excellence in teaching and having put something in print. With either paradigm, community service, whether university and law school committee work, working with professional organizations, or other activities, such as *pro bono* representation of indigents, counts very little.

Henry Gabriel, *Juggling Scholarship and Social Commitment: Service to the Community Through Representation of Indigent Criminal Defendants*, 20 N.C. CENT. L.J. 223, 225–26 (1992); *see also* AALS, PURSUING EQUAL JUSTICE, *supra* note 11, at 73 ("[Law professor John Powell] pointed out that although we require public service of all faculty, faculty are not turned down for tenure if their service is inadequate."). To help address the disincentives of public service work, Professor Douglas Colbert proposes that the definition of acceptable scholarship be broadened to embrace law reform and justice works, such as drafting legislation, developing fact-finding reports, writing legal briefs, and publishing op-ed articles. Colbert, *supra* note 11, at 543–45, 550.

268. Rhode, *supra* note 222, at 2439. Professor Deborah Rhode argues that "[t]he absence of data on nonparticipation makes it easy to draw unduly positive generalizations" about faculty participation based on a few high-profile faculty pro bono cases. *Id.*

269. *Id.* at 2440.

270. *Id.* at 2439. "The values reflected in the institutional framework of a law school have an important impact on law students' perception of what is important in the legal system." TEACHING AND LEARNING PROFESSIONALISM, *supra* note 146, at 25 (recommending that law schools develop more co-curricular activities that advance professionalism).

V. CONCLUSION

Both the legal profession and the legal academy have clearly established norms that create rights and duties of law professors to speak out, yet the actual amount of such public service work by law faculties remains modest. This failure of law schools and law faculties to "walk the talk" of the importance of pro bono and other public service activities creates the impression in students that these norms are largely hollow, hypocritical rhetoric. The academy cannot expect students to take public service seriously or emulate it later as practicing attorneys if law faculty do not. Though only speculative, perhaps the failure of law schools to adopt and seriously follow public service norms for law faculties is one reason why practicing lawyers, after getting at best indifferent messages as law students from law faculty, have failed to live up to the legal profession's public service duties. Law schools, which are accused of doing little to facilitate and encourage extramural public service activities by law faculties, need to do more.

There have been many good proposals to enhance faculty public service: clearer, and perhaps mandatory, faculty policies that include annual public service expectations and public reporting of that service; ABA and AALS review of faculty public service performance and development of enforceable public service expectations; law school supplied research assistance and administrative support similar to support for scholarship; sabbatical or release time for such work; increased valuation of public service work in the promotion and tenure processes; recognizing and rewarding faculty public service work; including law faculty pro bono work in law school malpractice insurance policies; and pro bono coordinators for faculty public service work.[271] Of course, these actions may not furnish the necessary motivation for faculty members hostile to the notion that the legal profession and legal academy should lend their voices and time to issues of public concern. But as pervasive as public service norms are in the legal profession and academy, it is likely that law professors share those ideals, and with increased institutional support, more would be motivated to speak out on public issues.

271. *See* LEARNING TO SERVE, *supra* note 147, at 18–19 (recommending faculty pro bono policies with six components: an annual expectation; universality; beyond teaching and institutional service; institutional support; faculty autonomy; and annual reporting); Luban, *supra* note 11, at 74–75; Rhode, *supra* note 222, at 2444–45; Rhode, *supra* note 223, at 34–35.