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RESTRICTING ACCESS TO LEGAL
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UNDERMINING JUSTICE:
THE LEGAL PROFESSION'S ROLE IN RESTRICTING ACCESS TO
LEGAL REPRESENTATION

ROBERT R. KUEHN*

I. INTRODUCTION

It has often been said that a right without a remedy is no right at all. Even with a remedy, in most situations, enforcing or defending a legal right requires the assistance of an attorney. Complex legal rules, stringent procedural requirements, and an adversarial system that functions best when both sides are represented by competent attorneys leave the unrepresented at a substantial, and in most situations insurmountable, disadvantage. As the Supreme Court observed, “Even the intelligent and educated layman has small and sometimes no skill in the science of law”¹ Thus, one reason for the popular observation that only a fool would have himself as a client.

The absence of an attorney can be especially hard on the poor. Many lower-income people rely on government programs to obtain essential human needs,² making their reliance on the law and its enforcement greater than for more affluent citizens.³ One commentator argued, “[i]t seems self-evident that the poor . . . and other disadvantaged are . . . more likely to suffer distress and injustice than those better off.”⁴ As a consequence, the poor are more likely to need the assistance of the judicial system to address those wrongs. In addition, lower-income persons likely encounter greater geographical, literacy, cultural, and language barriers just to access the justice system, much less to use the system successfully. All of these factors

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¹ *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

² LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2005) [hereinafter LSC REPORT].

³ Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 750 (2002). As a legal needs study found, “[I]legal problems experienced by low-income people are substantially more likely [than moderate-income people] to relate to family safety (including domestic violence), economic security, housing and other basic needs.” TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING, WASH. STATE SUPREME COURT, THE WASHINGTON STATE CIVIL LEGAL NEEDS STUDY 37 (2003), available at <http://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf> [hereinafter WASH. STUDY].

⁴ JOEL F. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY 24 (1986).

come together to produce a perverse result—those most in need of legal assistance must overcome the greatest obstacles to obtain that assistance.

Congress recognized the important role legal assistance plays in protecting the poor when it declared the need “to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances” and created the Legal Services Corporation (“LSC”) to provide “high quality legal assistance to those who would otherwise be unable to afford adequate legal counsel.”⁵ More recently, the president of the American Bar Association (“ABA”) called on the legal profession to “make good, finally, on the promise of equal justice—and equal access to justice—for all Americans . . . [and] consider providing such a right [to counsel]—as many nations of the world already have—for serious civil matters that threaten the integrity of one’s family, shelter or health.”⁶ In sum, the American ideal of equal justice under law, described by a former Supreme Court Justice as “perhaps the most inspiring ideal of our society,”⁷ requires equal access to legal representation.

Yet, study after study has documented the wide gap between legal needs and the availability of an attorney, especially for the poor. A 1994 ABA study found that lower-income households averaged approximately one civil legal need each year, yet only about one in four were able to address the need through the civil justice system.⁸ A number of recent state legal needs studies similarly found that fewer than twenty percent of the legal problems experienced by low-income people are

⁵ Legal Services Corporation Act, 42 U.S.C. § 2996 (2000).

⁶ Michael S. Greco, *Address to the American Bar Association House of Delegates*, 16 PROF. LAW. 1, 4 (2005); see also TASK FORCE ON ACCESS TO CIVIL JUSTICE, ABA, REPORT TO THE HOUSE OF DELEGATES NO. 112A, at 1 (2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (urging federal and state governments “to provide legal counsel as a matter of right at public expense to low income persons in . . . proceedings where basic human needs are at stake”).

⁷ Francis J. Larkin, *The Legal Services Corporation Must Be Saved*, JUDGES’ J., Winter 1995, at 1, 1 (“Equal justice under law is not merely a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.” (quoting Justice Lewis Powell, Jr.)). Judge Learned Hand once said: “If we are to keep democracy, there must be one commandment: Thou shalt not ration justice.” Karen A. Lash et al., *Equal Access to Civil Justice: Pursuing Solutions Beyond the Legal Profession*, 17 YALE L. & POL’Y REV. 489, 501 & n.39 (1998) (quoting from Judge Hand’s February 16, 1951 address to the Legal Aid Society of New York); see also Robert A. Katzmann, *Themes in Context*, in THE LAW FIRM AND THE PUBLIC GOOD 1, 6 (Robert A. Katzmann ed., 1995) (“[A]ccess to minimal legal services is necessary for access to the legal system, and without access to the legal system, there is no equality before the law. The lawyer becomes the critical medium by which access to that legal system and the concomitant opportunity to secure justice is achieved.”).

⁸ CONSORTIUM ON LEGAL SERV. & THE PUB., ABA, LEGAL NEEDS AND CIVIL JUSTICE, A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 11, 23 (1994).

addressed with the assistance of an attorney.⁹ According to one study, nine out of ten low-income households that get no attorney assistance end up receiving no help at all; among the ten percent that try to get other help, most turn to community organizations that cannot provide legal assistance.¹⁰

One reason poor people experience a large percentage of unmet legal needs is that so few attorneys are available for the poor. Although one in seven Americans lives in poverty, only one percent of attorneys are dedicated to serving the legal needs of the poor.¹¹ “[T]here is about one lawyer for every 240 non-poor Americans, but only one lawyer for every 9,000 Americans whose low income would qualify for civil legal aid.”¹² As former Supreme Court Justice Sandra Day O’Connor observed:

While lawyers have much we can be proud of, we also have a great deal to be ashamed of in terms of how we are responding to the needs of people who can’t afford to pay our services [T]here has probably never been a wider gulf between the need for legal services and the availability of legal services.¹³

Individual attorneys and local, state, and national bar associations have recognized this serious problem and have made significant efforts to provide free legal assistance to those unable to afford the services of an attorney. A recent ABA pro bono survey found that sixty percent “of respondents provided free legal services to persons of limited means” and one-third provided free services to organizations that “serve the poor.”¹⁴ Of those attorneys doing pro bono work, the average attorney provided twenty-seven hours per year to people of limited means and twelve hours per year to organizations serving the poor.¹⁵ Yet overall, “[a]ccording to the best estimates available, the profession as a whole provides less than half an hour per

⁹ LSC REPORT, *supra* note 2, at 9 (reporting the results of studies from 2000 through 2005 in Connecticut, Illinois, Massachusetts, Montana, New Jersey, Oregon, Tennessee, Vermont, and Washington); *see also* Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004) (“According to most estimates, about four-fifths of the civil legal needs of low income individuals . . . remain unmet.”).

¹⁰ WASH. STUDY, *supra* note 3, at 49.

¹¹ Rhode, *supra* note 9, at 371.

¹² David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CAL. L. REV. 209, 211 (2003).

¹³ Katzmann, *supra* note 7, at 2 (containing excerpt from Justice O’Connor’s *Pro Bono Work—Good News and Bad News* speech at the ABA’s 1991 Annual Meeting in Atlanta, Georgia).

¹⁴ STANDING COMM. ON PRO BONO & PUB. SERV., ABA, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 11 (2005), *available at* <http://www.abanet.org/legalservices/probono/report.pdf> [hereinafter SUPPORTING JUSTICE].

¹⁵ *Id.* at 12–13.

week of assistance to the poor.”¹⁶ In addition, Professor Deborah Rhode argues that of the pro bono work that is done, most is donated to friends, relatives, or matters designed to help attract paying clients.¹⁷ Unpopular clients and causes are usually avoided, in particular by law firms not wanting to offend paying clients.¹⁸ Moreover, lengthy, complex cases that may provide significant benefits to large groups of the poor are unlikely to be handled by a private lawyer working pro bono.¹⁹

Despite the acknowledged importance of legal representation and widespread unmet legal needs of the poor, Congress has imposed significant restrictions on the types of indigent clients and cases that LSC attorneys may represent, as well as restrictions on how eligible cases may be handled.²⁰ These restrictions on access to legal representation have been criticized by the ABA and some state bar associations as contrary to the ideals of equal justice and principles of the legal profession.²¹ Notwithstanding this criticism, attorneys and bar associations have similarly restricted the assistance available to the poor through a number of civil legal assistance programs. In some situations, attorneys and bar associations have purposefully chosen to deny free legal assistance to certain unpopular clients or

¹⁶ Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 291 (1998); see also Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J.L. & POL’Y 1, 11 (2001) (“Most troubling, after growth in pro bono activity during the 1980s, the trend in the last years of the twentieth century was backward: The average attorney at the wealthiest 100 firms in the United States dedicated one-third less time to *pro bono* work in 1999 than in 1992.”); Lua Kamal Yuille, Note, *No One’s Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT’L L. 863, 902–03 (2004) (“[N]ationally, various estimates indicate that between 50% and 93% of lawyers do not perform any *pro bono* work at all.”).

¹⁷ Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2423 (1999); see also CHARLES W. WOLFRAM, MODEL LEGAL ETHICS § 16.9 (1986) (observing that what some lawyers call pro bono often advances new client development, seeks to create goodwill with judges and other attorneys, or consists of volunteer work for bar committees but does not address the legal needs of the poor); 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 some law firms use pro bono work to develop profitable business contacts).

¹⁸ See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 61–62 (1988); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1418, 1420 (1998).

¹⁹ See Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 91–92 (1990) (arguing that volunteer lawyer programs focus on simple matters and cases not addressing mainstream poverty issues).

²⁰ See *infra* Part II.

²¹ See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 399 (1996) [hereinafter Formal Op. 399] (discussing the ethical obligations of lawyers who receive LSC money and how ideally there would be no restrictions at all); Ass’n of the Bar of the City of N.Y., *A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers*, 53 REC. ASS’N BAR CITY N.Y. 13 (1998).

causes, or prohibit attorneys for the poor from using the same legal tools available to attorneys for private clients. In other situations, attorneys and bar associations have unwittingly imposed restrictions on the recipients of funds intended to expand access to free legal assistance.

This Article analyzes the complicity of lawyers in restricting the availability of legal assistance to low-income people. Part II examines the restrictions imposed by Congress on the availability of free legal assistance for the poor and their effects on access to justice. Part III chronicles the role the legal profession has played in imposing similar restrictions on lawyer-financed or -sponsored legal assistance programs for the poor.²² Part IV considers the professional implications of the profession’s role in restricting access to legal representation and making it more difficult for some unpopular clients and causes to obtain justice. Finally, Part V concludes that individual attorneys, judges, and organized bar associations must consider the extent to which their programs and policies restrict the ability of some unpopular clients and causes to gain access to justice and must actively remove these restrictions.

II. CONGRESSIONAL RESTRICTIONS ON LEGAL REPRESENTATION

The LSC funding is the largest single source of funding for civil legal assistance for the poor, providing over \$291 million in 2005.²³ However, through regulations and appropriations governing the LSC, Congress has imposed severe restrictions on access to legal representation for lower-income persons. Ideally, Congress would have formulated restrictions based on an analysis of the most important legal needs of the poor, but it did not. Instead, the restrictions are political choices reflecting congressional disapproval of certain unpopular clients or causes.

A. Restrictions on Unpopular Clients

As originally passed in 1974, the Legal Services Corporation Act (“LSC Act”) did not deny assistance to any class of persons, other than to limit eligibility to those unable to afford legal assistance.²⁴ Beginning in 1980, Congress adopted restrictions on the use of LSC funds for representing certain aliens, and expanded these

²² In focusing on legal assistance programs, this Article does not address the contention that the bar has denied access to legal assistance by fighting for restraints on the ability of nonlawyers to provide assistance on routine legal matters. See Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL’Y 47, 60–61 (2003).

²³ PROJECT TO EXPAND RESOURCES FOR LEGAL SERVS. (PERLS), ABA, A CHART OF SIGNIFICANT FUNDRAISING ACTIVITIES FOR LEGAL SERVICES, 2005 UPDATE (2006) [hereinafter PERLS CHART]; E-mail from Meredith McBurney, ABA PERLS, to author (July 17, 2006) (on file with author).

²⁴ Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified as amended at 42 U.S.C. § 2996 (2000)) [hereinafter LSC Act].

restrictions in 1983 and 1996 at the urging of farmers upset about migrant farm workers litigating for back wages.²⁵ Today, a number of categories of aliens residing in the United States, including many who are in the country legally, are ineligible for free legal assistance from funds appropriated by Congress.²⁶ Thus, LSC grantees are prohibited from representing not only undocumented or illegal aliens, but also many legal aliens, including some workers recruited into the country under special work visas and individuals on temporary visas, such as student visas.²⁷ In addition, under the 1996 restrictions, recipients of LSC funds cannot even represent these excluded categories of aliens with non-LSC funds, such as private or state-appropriated funds.²⁸ Because of the lack of non-LSC-funded legal services, aliens in some areas of the country are now effectively shut off from free legal assistance programs.²⁹

²⁵ Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 *FORDHAM L. REV.* 2187, 2194 (1999). The most stringent restrictions on LSC funds were imposed by Congress in 1996 with the enactment of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 [hereinafter LSC Appropriations Act]. These restrictions have been renewed by Congress in each subsequent LSC appropriation. See Pub. L. No. 109-108, 119 Stat. 2290 (2006); Pub. L. No. 108-447, 118 Stat. 2809 (2005); Pub. L. No. 108-199, 118 Stat. 3 (2004); Pub. L. No. 108-7, 117 Stat. 11 (2003); Pub. L. No. 107-77, 115 Stat. 748 (2001); Pub. L. No. 106-553, 114 Stat. 2762 (2000); Pub. L. No. 106-113, 113 Stat. 1501 (1999); Pub. L. No. 105-277, 112 Stat. 2681 (1998); Pub. L. No. 105-119, 111 Stat. 2440 (1997).

²⁶ LSC Appropriations Act § 504(a)(11); 45 C.F.R. §§ 1626.1 to .12 (2005). David Pai explained Congress’s motivation for denying legal assistance to certain aliens:

Lobbyists sent wave after wave of complaints from private, individual farmers to testify about their business losses resulting from migrant farm workers who litigated for back wages. Ultimately, the farmers and their lobbyists convinced members of Congress that appropriating funds to be used by noncitizens against a sizeable voting constituency verged on political suicide.

David Pai, *When Congress Gives You Lemons: Alternatives to Legal Services Corporation Funding in the Quest to Provide Access to Justice*, 2 *HASTINGS RACE & POVERTY L.J.* 83, 88 (2004).

²⁷ Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges when Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 *FORDHAM URB. L.J.* 873, 878 & n.15 (2002); Laura K. Abel & Risa E. Kaufman, *Preserving Aliens’ and Migrant Workers’ Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 *U. PA. J. CONST. L.* 491, 496–97 (2003).

²⁸ LSC Appropriations Act § 504(d)(1) (“[N]o recipient [of LSC funds] shall accept funds from any source other than the Corporation, unless the Corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or this title.”); 45 C.F.R. §§ 1610.1 to .9 (2005).

²⁹ Abel & Kaufman, *supra* note 27, at 497; David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 *YALE L. & POL’Y REV.* 337, 359 (1998).

Denying aliens access to legal representation cannot be defended on the ground that aliens lack legal rights. Commentators have noted that “[b]oth legal and undocumented aliens in this country are generally entitled to the same legal protections as everyone else.”³⁰ Hence, rights under the Equal Protection Clause, labor laws, employment discrimination statutes, and workers’ compensation programs generally extend to undocumented workers.³¹ As the Supreme Court explained in 1896, because an alien owes obedience to the laws of the country where residing, that person is therefore entitled to the equal protection of those laws.³²

Nor can a restriction on access to legal representation for aliens be explained by a lack of need for assistance. Undocumented aliens are often particularly vulnerable to workplace exploitation because of the fear that if they seek to enforce legal rights their employers may retaliate by assisting with their deportation. Moreover, language barriers, lack of familiarity with the legal system, geographical isolation, and dependency on employers for food and housing make even legal aliens vulnerable to exploitation and being cut off from legal assistance.³³

Although the denial of legal assistance to undocumented aliens might seem satisfactory to those concerned with illegal immigration, legal residents of the United States may well be harmed by denying undocumented or illegal aliens access to attorneys. Because illegal workers are largely shut out of the legal system, employers who hire illegal aliens learn that those employees are unable to challenge unlawful employment practices or conditions, unlike employees who are able to access legal aid. An attorney for legal services in Florida observed that this denial of access to legal representation has encouraged employers seeking to evade enforcement of worker protection laws to favor illegal aliens over legal workers with access to attorneys and the justice system.³⁴

Prisoners are similarly unpopular with Congress. In 1996, Congress passed a broad prohibition on civil litigation by LSC attorneys on behalf of an incarcerated

³⁰ Abel & Kaufman, *supra* note 27, at 500.

³¹ Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 415–16 (1995) (noting that undocumented workers are protected by the Fair Labor Standards Act, the National Labor Relations Act, employment discrimination statutes, and workers’ compensation regimes).

³² *Wing v. United States*, 163 U.S. 228, 242–43 (1896) (Field, J., concurring in part and dissenting in part) (“A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws . . . in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.”).

³³ Abel & Kaufman, *supra* note 27, at 494; Sudha Shetty, *Equal Justice Under the Law: Myth or Reality for Immigrants and Refugees?*, 2 SEATTLE J. SOC. JUST. 565, 566–67 (2004).

³⁴ See BRENNAN CTR. FOR JUSTICE, HIDDEN AGENDAS: WHAT IS REALLY BEHIND ATTACKS ON LEGAL AID LAWYERS? 11 (2001), available at <http://www.brennancenter.org/dynamic/subpages/atj7.pdf>.

person.³⁵ Although the LSC funding restriction was prompted by objections to litigation over jail conditions, it broadly prohibits representation even if the potential client has not been convicted of a crime and extends to any civil case, even unrelated cases that may have arisen prior to the incarceration.³⁶ Professor Deborah Rhode contends that this unavailability contributes to a belief among prison employees that they will not be held accountable for sexual abuse of inmates.³⁷

Congress also deems persons charged with drug crimes, even where they have not yet been convicted, unworthy of legal representation in any eviction proceeding brought by a public housing agency because the illegal drug activity allegedly threatens health or safety.³⁸

The goal of Congress in enacting these restrictions was summarized by a congressman during the debate over the 1996 restrictions: to stop “unpopular individuals [from bringing] unpopular lawsuits” through the LSC.³⁹ The result is that significant numbers of aliens, prisoners, and persons charged with drug crimes lack access to civil legal services.⁴⁰ By forcing many poor persons to appear in court proceedings pro se, the restrictions also increase burdens on judges and courts.⁴¹

B. Restrictions on Unpopular Causes

If Congress deems aliens, prisoners, and those charged with drug crimes “unpopular individuals,” then it deems efforts to enforce rights relating to abortion, redistricting, desegregation, and selective service as “unpopular lawsuits” that the poor ought not to bring with federally funded attorneys. Thus, in adopting the LSC Act in 1974, Congress prohibited the use of funds to provide legal assistance to low-income persons for any proceeding relating to school desegregation, abortion, or a

³⁵ LSC Appropriations Act § 504(a)(15); 45 C.F.R. §§ 1637.1 to .5 (2005).

³⁶ Abel & Udell, *supra* note 27, at 878–79; Udell, *supra* note 29, at 360–61.

³⁷ Deborah L. Rhode, *Rape in Prison: Indifference Rules*, NAT’L L.J., Oct. 29, 2001, at A25.

³⁸ LSC Appropriations Act § 504(a)(17); 45 C.F.R. §§ 1633.1 to .4 (2005).

³⁹ 142 CONG. REC. 13, 18630 (1996) (statement of Rep. Schiff) (characterizing arguments against actions of LSC grantees). A Senate report on the 1996 LSC Act objected that LSC grantees “continue to represent plaintiffs in cases that the vast majority of Americans do not support.” S. REP. NO. 104-392, at 3 (1996).

⁴⁰ See Abel & Udell, *supra* note 27, at 875 n.3 (listing reports on the effects of the federal restrictions); Abel & Kaufman, *supra* note 27, at 497–98; Laurence E. Norton, II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601, 608–09 (1997).

⁴¹ Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1548 (2005) (“The increase in pro se litigation has disrupted the efficiency of the courts, causing courtroom delays and overburdening judges, attorneys, and court staff.”).

violation of the Military Selective Service Act.⁴² Those restrictions continue today, joined in 1996 by a new congressional restriction on advocating or opposing any legislative, judicial, or elective redistricting plan.⁴³

As with the client restrictions, Congress did not base these prohibitions on an assessment of the legal needs of the poor, the costs and benefits of such representation, or the availability of alternate sources of legal assistance. Rather, critics note the restrictions reflected the displeasure of certain members of Congress with court decisions or successful lawyering by advocates for the poor. For example, a representative critical of the role of a legal services grantee in a Detroit desegregation case introduced the restriction on school desegregation cases.⁴⁴ The stated purpose for denying assistance relating to a poor person's constitutional right to an abortion was to respond to the Supreme Court's recent decision in *Roe v. Wade*.⁴⁵ As one commentator noted, "the legislative history surrounding the restrictions . . . reveals a clear congressional intent to 'punish' advocates" of these disfavored causes.⁴⁶

Proponents claimed the restrictions would "de-politicize" legal services lawyers by removing them from controversial cases. However, it is not political for a lawyer to assist a poor person in enforcing or defending legal rights, as that is what lawyers do every day, without objection, for paying clients. In addition, access to legal assistance and the courts is often necessary to balance the power of the legislative and executive branches and to ensure that constitutional and legislatively created rights are equally available to the rich and poor. As one senator explained in rebutting charges that providing legal assistance was improperly political: "When migrant workers and other poor individuals assert their legal rights, they can offend

⁴² LSC Act § 1007(b)(7)–(9) (codified as amended at 42 U.S.C. § 2996(f)(8)–(10) (2000)); 45 C.F.R. § 1610.2(a)(7)–(9) (2005); see Military Selective Service Act, 50 U.S.C. §§ 451–71a (2000).

⁴³ See LSC Appropriations Act § 504(a)(1); 45 C.F.R. § 1610.2(b)(1) (2005).

⁴⁴ Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681, 697 n.115 (1976) (noting that the restriction was introduced by a representative who had focused on the role of the Center for Law and Education in the Detroit school desegregation case of *Bradley v. Milliken*, 345 F. Supp. 914 (E.D. Mich. 1972)).

⁴⁵ *Id.* at 697 n.116 (noting that one of Representative Hogan's stated purposes in adding the restriction on abortion was "to 'respond' to the 'shocking' Supreme Court decisions on abortion"); see *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁶ Clifford M. Greene et al., Note, *Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act*, 61 CORNELL L. REV. 734, 739 n.34 (1976). A report by The Association of the Bar of the City of New York drew a similar conclusion about the 1996 restrictions: "Congressional proponents of the LSC restrictions made clear that their aim was to reduce or eliminate advocacy of disfavored positions." Ass'n of the Bar of the City of N.Y., *supra* note 21, at 52; see also BRENNAN CTR. FOR JUSTICE, *supra* note 34, at 14–15 (arguing that the motive behind denying federal funding to enforce certain statutory and constitutional rights was that certain special interest groups disapproved of those rights).

powerful interests in society. That does not mean there is something wrong with the [LSC] program; it means that it is doing its job.”⁴⁷

In passing the LSC Act, Congress acknowledged that “providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice.”⁴⁸ Yet for a poor person with access only to an LSC-funded attorney, certain unpopular legal rights cannot be defended or enforced.

C. Restrictions on Methods of Legal Representation

The congressional purpose of the LSC Act declares that attorneys “must have full freedom to protect the best interests of their clients” in keeping with rules of professional responsibility and the high standards of the legal profession.⁴⁹ In fact, as David Udell observed, a number of bar associations conditioned their support for the LSC Act on the insistence that lawyers for the poor have the same independence of professional judgment as is guaranteed to attorneys representing paying clients.⁵⁰ Nevertheless, Congress now prohibits LSC grantees from participating in class action lawsuits, accepting attorneys’ fee awards, soliciting new clients, and lobbying legislatures or government agencies.

Class action lawsuits can be a significant and efficient means of addressing widespread violations of legal rights that otherwise might be ignored by the offending party or too difficult to litigate as individual cases. Commentators have documented numerous LSC class actions that brought important legal relief to large groups of poor persons.⁵¹ When Congress first adopted the LSC Act, it permitted

⁴⁷ Douglas S. Eakeley, *Role of the Legal Services Corporation in Preserving Our National Commitment to Equal Access to Justice*, 1997 ANN. SURV. AM. L. 741, 742 (quoting former Sen. Warren Rudman). As Rep. Christopher Shays argued: “What I cannot understand is why we blame [LSC-funded lawyers] for seeking to enforce laws we pass and the Constitution of the United States we would die defending.” BRENNAN CTR. FOR JUSTICE, *supra* note 34, at 20.

⁴⁸ LSC Act § 1000(1) (codified as amended at 42 U.S.C. § 2996(1) (2000)).

⁴⁹ *Id.* § 1000(6).

⁵⁰ David S. Udell, *Implication of the Legal Services Struggle for Other Government Grants for Lawyering for the Poor*, 25 FORDHAM URB. L.J. 895, 901–02 (1998).

⁵¹ Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PENN. ST. L. REV. 1, 11–14 (2005); Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 GEO. L.J. 1669, 1686 (1995). Maryland Attorney General J. Joseph Curran explained in a 1995 letter to Congress why class actions are an important tool for the poor:

Sometimes Legal Services attorneys enforce the law by filing class-actions against the state Although I am happy to say that I believe the state of Maryland has had the better legal position in most of the cases, sometimes we don’t. Government is not infallible. As uncomfortable and irritating as it may be, sometimes it is class-

class action suits, provided the local project director approved the case in accordance with policies adopted by the grantee’s governing board.⁵² Upset with the success of some class actions and pressured by special interest groups to rein in LSC attorneys, Congress acted in 1996 to bar LSC grantees from initiating or participating in any class action lawsuit, even with non-LSC funds.⁵³

There are many objections to denying an attorney the ability to address legal problems through a class action. In many situations, unlawful actions will go unchallenged, especially where claims may be too small or cumbersome to pursue individually, because a class action may be the only way to address such problems.⁵⁴ In addition, while class actions can force the defendant to change an entire program rather than simply the treatment of one complainant, the defendant can easily resolve or moot an individual lawsuit simply by settling with one plaintiff.⁵⁵ Consequently, class actions can have a much greater deterrent effect on unlawful conduct than individual suits. In some cases, the mere threat of being able to bring a class action lawsuit can deter the wrongdoer.

Moreover, contrary to Congress’s stated intent to ensure lawyers have full freedom to protect the interests of their clients, the restriction on class actions denies LSC attorneys the freedom to use a legal tool that may be in the best interests of their clients and available to other attorneys not encumbered by the restriction. As a practical matter, while restricted attorneys can attack the client-by-client symptoms of the problems that poor persons face, congressional restrictions largely deny them the ability to attack the legal causes of such problems.⁵⁶

The unavailability of class actions is especially problematic for the poor as their legal problems are often institutional in nature and in need of systemic changes.⁵⁷

actions by Legal Services lawyers that require the state to do what it is legally bound to do.

BRENNAN CTR. FOR JUSTICE, MAKING THE CASE: LEGAL SERVICES FOR THE POOR 13–14 (1999) (quoting from the letter).

⁵² LSC Act § 1006(d)(5) (codified as amended at 42 U.S.C. § 2996e(d)(5) (2000)). In addition, grantees could use non-LSC funds for class actions. Houseman, *supra* note 25, at 2200.

⁵³ LSC Appropriations Act § 504(a)(7); 45 C.F.R. § 1617.5 (2005).

⁵⁴ See Blank & Zacks, *supra* note 51, at 11.

⁵⁵ Marie A. Failing & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 17–18 (1984); Rhode, *supra* note 9, at 389.

⁵⁶ The inability to potentially bring a class action lawsuit to address illegal conduct has pushed legal services offices away from “wholesale justice” strategies to “retail justice” services with more limited relief to plaintiffs and fewer poor people assisted. Udell, *supra* note 29, at 362–63.

⁵⁷ Failing & May, *supra* note 55, at 18. As the Supreme Court observed, for politically and economically weak groups, “association for litigation may be the most effective form of political association.” NAACP v. Button, 371 U.S. 415, 431 (1963); see also NAACP v.

For the poor, most class actions seek government agency or private party compliance with the law, rather than monetary damages.⁵⁸ The ban means that many unlawful actions will now go unchallenged and LSC-funded attorneys will be unable to bring greater legal relief to large groups of affected persons. Illegal acts against large classes of poor persons may be immunized from some claims, especially where the monetary harm to each individual person is relatively small.

Congress also acted in 1996 to prohibit LSC attorneys from accepting attorneys’ fees.⁵⁹ The attorneys’ fee restriction, enacted in response to complaints from the Farm Bureau over awards to legal aid lawyers from farmers who violated the law, applies even where the fees are statutorily permitted or required and even if the LSC grantee did not request fees but a court wished to grant them anyway.⁶⁰ The inability to obtain attorneys’ fees from the losing party means that poor persons have lost a form of legal relief that can significantly deter illegal conduct, since a prospective defendant might be less likely to engage in illegal conduct knowing it would be subject to the additional penalty of having to pay the poor person’s attorneys’ fees. Indeed, one reason courts award fees in civil rights cases is to help ensure compliance with the laws, both by increasing the costs of noncompliance with the law and by supporting lawsuits where the costs of bringing suit might otherwise be prohibitive.

The ban on attorneys’ fees may also harm a poor person’s ability to induce a settlement. When a party is faced with the possibility of paying both its own and its opponent’s attorneys’ fees, any advantage from dragging out the lawsuit can become prohibitively costly.⁶¹ In addition, the ban denies any opportunity to structure a settlement that might involve waiving some statutory fees. Thus, an attorney for a poor person is without the same leverage in settlement negotiations that other parties enjoy. Finally, the ban on attorneys’ fees denies legal services offices an important potential source of funding, effectively losing millions of dollars in fee awards that could be used to serve other needy clients.⁶² Once again, a legal tool available to wealthier clients is denied to attorneys representing the poor.

Alabama, 357 U.S. 449, 460 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”).

⁵⁸ Blank & Zacks, *supra* note 51, at 15.

⁵⁹ LSC Appropriations Act § 504(a); 45 C.F.R. § 1642.3 (2005).

⁶⁰ LSC Appropriations Act § 504(a); 45 C.F.R. § 1642.3 (2005); BRENNAN CTR. FOR JUSTICE, *supra* note 34, at 6.

⁶¹ See *Hensley v. Eckerhart*, 461 U.S. 424, 443 n.2 (1983) (Brennan, J., concurring in part and dissenting in part) (observing that the availability of statutory attorneys’ fees to prevailing plaintiffs in civil rights cases “gives defendants strong incentives to avoid arguable civil rights violations in the first place and to make concessions in hope of an early settlement”); ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1403 (1977) (observing that the availability of statutory attorneys’ fees is a negotiation tool for legal aid clients); see also Udell, *supra* note 50, at 903.

⁶² See, e.g., Udell, *supra* note 29, at 359 (discussing how Florida Rural Voting Rights Project received over \$2 million in attorneys’ fees during the first half of the 1990s and how it

Congress also prohibits lawyers for the poor from representing a client whom the lawyer advised to obtain counsel or take legal action, even if the attorney simply communicated the advice by a personal letter or telephone call.⁶³ Agricultural employers pushed Congress to adopt this restriction as a way to limit the ability of LSC grantees to reach out to migrant farm workers in need of legal assistance.⁶⁴ The LSC has interpreted this restriction to prohibit a grantee from handing out an informational brochure about the availability of its free legal services to unrepresented tenants waiting in the courthouse for their eviction hearings.⁶⁵

The restriction on solicitation is especially harmful to poor people. The ABA and numerous state legal needs studies have found that two primary reasons poor persons do not seek legal assistance are because they are unaware of their legal rights and potential solutions, and they do not know about the availability of free legal assistance.⁶⁶ Congress's motivation for the ban may be the concern that in the absence of a prohibition on solicitation, a legal services lawyer might encourage a poor person to assert a legal right. However, the Supreme Court declared that although providing a person with information about legal rights "might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action."⁶⁷

The Supreme Court held that under the First Amendment, a state may not prohibit an attorney seeking to advance political or ideological goals or to advance association values from advising a person of their legal rights and offering free legal assistance.⁶⁸ Similarly, rules of professional responsibility do not prohibit in-person or live telephone solicitation where the attorneys' motivation is not pecuniary, nor

lost this source of funding after the 1996 restrictions were imposed); ALASKA ACCESS TO CIVIL JUSTICE TASK FORCE, REPORT AND RECOMMENDATIONS 18 (1999), *available at* <http://www.state.ak.us/courts/civjust.pdf> [hereinafter ALASKA REPORT] (noting that Alaska allows the prevailing party in a lawsuit to collect attorneys' fees and costs and that Alaska Legal Services relied heavily on this as a source of funding before the 1996 restrictions were imposed).

⁶³ See LSC Appropriations Act § 504(a)(18); 45 C.F.R. § 1638.3 (2005).

⁶⁴ Norton, *supra* note 40, at 611 n.31.

⁶⁵ Office of Legal Affairs, Legal Servs. Corp., *Interpretation of 45 CFR 1638*, External Op. EX-2003-1011, at 3 (2003), <http://www.lsc.gov/laws/pdfs/olaeo/Ex-2003-1011.pdf>. The LSC regulations do allow public service announcements, legal presentations to groups that request them, and informational brochures placed in clerk of court offices. 45 C.F.R. § 1638.4(a) (2005).

⁶⁶ See LSC REPORT, *supra* note 2, at 13–14 (explaining the results of seven state legal needs studies); CONSORTIUM ON LEGAL SERVS. & THE PUB., *supra* note 8, at 20–21.

⁶⁷ Bates v. State Bar, 433 U.S. 350, 376 (1977); see also Amy Busa & Carl G. Sussman, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 512–15 (1999) (arguing that the LSC restriction on the use of private funds for solicitation is unconstitutional).

⁶⁸ *In re Primus*, 436 U.S. 412, 414, 439 (1978); NAACP v. Button, 371 U.S. 415, 428–29 (1963).

providing the same means of legal representation available to clients of private attorneys.

Perhaps most harmful to poor persons is that in 1996 Congress did not just expand the restrictions on representing politically unpopular clients and causes by denying LSC attorneys the legal methods often most effective in addressing the problems faced by the poor, but it also banned LSC funds recipients from using other funds for any purpose prohibited by Congress. Hence, no LSC-funded entity can engage in any of the congressionally restricted activities, even if the activity is funded by non-LSC monies from the state, private foundations, or the bar.⁷⁷ In turn, if an LSC-funded recipient transfers any funds to another person or entity, all of the congressional restrictions “will apply both to the LSC funds transferred and to the non-LSC funds of the person or entity to which those funds are transferred.”⁷⁸

As a result of these additional funding rules, congressional restrictions encumber up to eighty-five percent of funding for civil legal services nationwide.⁷⁹ In twenty-one states, there is no legal service provider unencumbered by the restrictions; in fourteen others, there is only one unrestricted civil legal assistance entity.⁸⁰

When the restrictions are considered as a whole, Congress’s claimed effort toward de-politicalization has actually been an attempt to protect the status quo and reward special interests.⁸¹ The result is that it is now much harder for the poor to get an attorney, especially if they are a member of an unpopular group or if they are asserting an unpopular claim, and it is harder for that attorney to be effective.

resources, and their communications with government are conventionally mediated through an attorney.” Ass’n of the Bar of the City of N.Y., *supra* note 21, at 37.

⁷⁷ LSC Appropriations Act § 504(d)(1); 45 C.F.R. § 1610.3 (2005).

⁷⁸ 45 C.F.R. § 1610.7(a) (2005). However, if the funds are transferred to a bar association, pro bono program, or private attorney solely for the purpose of funding private attorney involvement in the delivery of legal assistance to eligible low-income clients, then the restrictions shall apply only to the funds transferred. *Id.* § 1610.7(c); *see also id.* §§ 1614.1 to .7; *infra* notes 130–132 and accompanying text.

⁷⁹ Abel & Udell, *supra* note 27, at 881. For a list of studies noting the effects of the federal restrictions, see *id.* at 875 n.3, 880 n.26. State and local governments have become increasingly important sources of funding for legal assistance. ABA, INNOVATIVE FUNDRAISING IDEAS FOR LEGAL SERVICES 115 (2004). In 2005, legal assistance funding from state legislatures through appropriations and court fees and fines totaled over \$163 million. PERLS CHART, *supra* note 23; E-mail from Meredith McBurney, *supra* note 23. As of 2002, legislative funding in eighteen states was encumbered by restrictions. BRENNAN CTR. FOR JUSTICE, CHART OF RESTRICTIONS ON STATE AND IOLTA FUNDING FOR CIVIL LEGAL AID (2002) (on file with author) [hereinafter BRENNAN CTR. CHART].

⁸⁰ Brief of the New York State Bar Ass’n et al. as Amici Curiae Supporting Respondents at 23 n.8, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (Nos. 99-603 & 99-960) (citing statistics compiled by the ABA and the National Legal Aid and Defender Association as of 2000); *see also* Rhode, *supra* note 9, at 388–89 (“In many jurisdictions, no non-federally funded organizations are available to pursue restricted activities.”).

⁸¹ *See* Greene et al., *supra* note 46, at 775.

Although all members of the legal profession should strenuously object to such restrictions, the next section demonstrates that lawyers actually have reinforced this unequal treatment of the poor.

III. THE LEGAL PROFESSION’S RESTRICTIONS ON LEGAL REPRESENTATION

Members of the legal profession in every state have responded to the widespread unmet legal needs of low-income persons by developing fundraising and volunteer lawyer programs to help provide free legal assistance. These programs generally are run by the state supreme court or bar association, which usually define who is eligible to receive the funds or other assistance and impose any restrictions on their use. Although intended to help lower-income persons gain equal access to the legal system, many of the programs developed or controlled by members of the bar contain the same onerous restrictions on legal representation imposed by Congress on recipients of LSC funds. In some bar legal assistance programs and in rules relating to representation by law school clinics, members of the legal profession have knowingly chosen to deny legal assistance or certain legal services to needy lower-income persons. In other situations, it appears that attorneys and judges have failed to appreciate that their efforts to expand civil legal assistance actually have reinforced Congress’s denial of assistance. The net results of these actions by attorneys are to further deny legal assistance to disfavored clients or causes and to limit the effectiveness of legal representation for the poor.

A. Interest on Lawyer Trust Account Restrictions

Interest on Lawyer Trust Account (“IOLTA”) programs exist in all states as a means of generating funds for civil legal services for the poor.⁸² Although five IOLTA programs were created by state legislatures, the rest are established under the authority and rules of the state supreme courts and run by committees of attorneys.⁸³ Under IOLTA, client funds that otherwise would not earn interest are pooled into interest-bearing accounts; after bank fees are paid, the remaining funds are dedicated to access-to-justice programs.⁸⁴ In 2005, IOLTA programs raised over \$107 million for legal assistance programs.⁸⁵

⁸² Brennan J. Torregrossa, Note, *Washington Legal Foundation v. Texas Equal Access to Justice Foundation: Is There an Iota of Property Interest in IOLTA?*, 42 VILL. L. REV. 189, 191 (1997); ABA, Commission on Interest on Lawyers’ Trust Accounts, *What Is IOLTA?*, <http://www.abanet.org/legalservices/iolta/ioltback.html> (last visited Nov. 13, 2006) [hereinafter *What Is IOLTA?*].

⁸³ ABA, Commission on Interest on Lawyers’ Trust Accounts, *Status of IOLTA Programs*, <http://www.abanet.org/legalservices/iolta/ioltus.html> (last visited Nov. 13, 2006).

⁸⁴ *What Is IOLTA?*, *supra* note 82. In *Brown v. Legal Foundation of Washington*, the Supreme Court upheld the constitutionality of IOLTA programs against claims that they violated clients’ First and Fifth Amendment rights. 538 U.S. 216, 240–41 (2003). Even on the issue of lobbying, the Supreme Court of Washington recently denied a proposal to prohibit the

As of 2002, the rules governing at least fifteen IOLTA programs restrict access to legal representation on grounds other than income or limit the legal services that attorneys may provide to needy clients.⁸⁶ All fifteen prohibit the use of IOLTA funds for lobbying, with at least three prohibiting any attempt to influence executive branch rulemaking or orders.⁸⁷ These prohibitions apply even where the attorney believes that lobbying is the most effective means of representation for that client.⁸⁸ Three state IOLTA programs mirror the federal congressional restriction on participating in class action lawsuits.⁸⁹ Again, even if it is determined by the attorney or another appropriate person that a class action is needed to bring relief to a large group of otherwise unrepresented poor persons, no exception is made.

In addition to these restrictions, the IOLTA program in Texas prohibits the use of funds for any lawsuit against a governmental entity unless the suit is on behalf of an individual seeking to compel entitlement to government benefits.⁹⁰ Pennsylvania's IOLTA program includes a restriction prohibiting representation of a person seeking an abortion and limits eligible clients to the elderly, disabled, homeless, farm workers, or victims of crime or abuse.⁹¹ New York's IOLTA rules do not contain restrictions but critics charge that the oversight board has exercised its

use of IOLTA funds for lobbying, rejecting the argument that such use violates the First Amendment rights of clients. *In re Adoption of the New Set of Rules of Prof'l Conduct and Necessary Companion Amendments Thereto*, No. 25700-A-851 (Wash. July 10, 2006) (including dissent to order on rules); *see also* Curt Woodward, *Legal Services Firm, Farm Bureau Face Off over Lobbying*, ASSOCIATED PRESS, Aug. 5, 2006, available at 8/5/06 APALERTPOLITICS 20:44:51 (Westlaw).

⁸⁵ PERLS CHART, *supra* note 23; E-mail from Meredith McBurney, *supra* note 23.

⁸⁶ BRENNAN CTR. CHART, *supra* note 79. State IOLTA boards sometimes impose restrictions on the use of funds by individual grantees even where the rules do not contain such limits. *See, e.g.*, Interest on Lawyer Trust Accounts Program of the State of Delaware, Grant Package (2007) (on file with author); E-mail from Susan W. Corbin, Del. Bar Found., to author (July 14, 2006) (on file with author).

⁸⁷ BRENNAN CTR. CHART, *supra* note 79 (identifying lobbying restrictions in Alabama, Connecticut, Hawaii, Iowa, Louisiana, Maryland, Michigan, Nevada, New Mexico, North Dakota, Pennsylvania, South Carolina, Texas, and West Virginia). In contrast, the Washington Supreme Court, at the urging of the Washington State Bar Association and Legal Foundation of Washington (the entity administering the state's IOLTA program), recently rejected a petition from the Washington State Farm Bureau to prohibit the use of IOLTA funds for lobbying. Woodward, *supra* note 84; Letter from M. Janice Michels, Wash. State Bar Ass'n, to Charles W. Johnson, Justice, Wash. Supreme Court (Jan. 23, 2006) (on file with author); Letter from Michael E. Schwab & Caitlin Davis Carlson, Legal Found. of Wash., to Charles W. Johnson, Justice, Wash. Supreme Court (May 3, 2006) (on file with author).

⁸⁸ Under South Carolina's IOLTA rules, lobbying any governmental body is prohibited unless a waiver is obtained from IOLTA's Board of Directors. BRENNAN CTR. CHART, *supra* note 79.

⁸⁹ *Id.* (identifying class action restrictions in Maryland, Nevada, and Texas).

⁹⁰ *Id.*

⁹¹ *Id.*

grant discretion to discourage or prevent challenges to government agencies and representation of undocumented aliens.⁹²

Even if explicit IOLTA restrictions do not apply to the use of the funds, where IOLTA access-to-justice funds are provided to an LSC grantee, the state IOLTA funds become subject to the same broad array of restrictions imposed by Congress.⁹³ In some states, such as Arkansas, Missouri, and West Virginia, nearly all IOLTA funds have been allocated to LSC grant recipients and are now effectively encumbered with Congress’s expansive restrictions.⁹⁴

Because of restrictions in some bar IOLTA programs, many poor clients that have been cut off by Congress from federally funded legal representation also have been denied representation through the very bar-sponsored programs whose stated purpose is to expand the availability of much needed legal assistance to the state’s poor residents.

B. Restrictions on the Use of Bar Membership Dues

A growing number of state supreme courts or bar associations have increased annual fees or dues to help fund free legal assistance for indigent residents or added a line item on annual dues statements directing funds to legal assistance programs.⁹⁵ In some states these additional legal aid dues are mandatory, while in others members are allowed to opt out of the additional dues or simply allowed to pay an additional voluntary assessment to assist with access-to-justice programs.⁹⁶ As with IOLTA programs, some state fees or dues programs restrict the poor clients or causes that may benefit from the contribution, either by dedicating the funds to the state’s restricted IOLTA program or by directing all funds to LSC grantees who cannot use the dues for any purpose prohibited by Congress.⁹⁷

⁹² See Victoria Rivkin, *IOLA Funding Changes Prompt Attacks by Critics*, N.Y. L.J., Mar. 20, 2000, at 1, 6; Randal C. Archibold, *Funds Stopped for Legal Programs Helping Illegal Immigrants*, N.Y. TIMES, July 6, 2001, at B6.

⁹³ 45 C.F.R. § 1610.3 (2005); LSC Appropriations Act § 504(d); BRENNAN CTR. FOR JUSTICE, STRUGGLING TO MEET THE NEED: COMMUNITIES CONFRONT GAPS IN FEDERAL LEGAL AID 18 (2003), available at <http://www.brennancenter.org/dynamic/subpages/atj8.pdf>.

⁹⁴ BRENNAN CTR. FOR JUSTICE, *supra* note 93, at 18–19.

⁹⁵ National Legal Aid & Defender Association, Access to Justice Support Project, Bar Dues Increase to Help Fund Legal Aid in West Virginia (2005), http://www.nlada.org/Civil/Civil_SPAN/SPAN_Library/document_list?state=WV (follow “West Virginia State Bar dues increase to help fund legal aid” hyperlink); PERLS CHART, *supra* note 23. A number of voluntary local bar associations also include bar due assessments for legal assistance. PERLS CHART, *supra* note 23.

⁹⁶ Pai, *supra* note 26, at 95 (discussing the mandatory fee increases); ABA, *supra* note 79, at 10–16 (describing efforts of state bars to increase attorney registration fees or dues to fund legal services for the poor).

⁹⁷ See, e.g., Supreme Court of Pa., Pennsylvania Interest on Lawyers Trust Account Board (on file with author) (directing bar dues to restricted IOLTA program); TEX. EQUAL

Some have questioned the appropriateness of using bar dues to support legal aid programs. However, the Supreme Court held in *Keller v. State Bar of California* that where dues are required as a condition of practicing law, the mandatory assessment would not violate the bar member’s First Amendment rights if the bar spends members’ dues on activities “necessarily or reasonably incurred for the purpose of regulating the legal profession or ‘improving the quality of the legal service available to the people of the State.’”⁹⁸ As the Wisconsin Supreme Court stated, because mandatory assessment funds “are specifically designated to provide direct legal services to the poor, so as to maintain access to the justice system and improve the quality of the legal services available for all the citizens of this state,” they are consistent with activities recognized as permissible under the state and federal constitutions.⁹⁹ Thus, there should be no constitutional objection to using bar dues to help provide access to legal representation to those without the financial means to hire an attorney.

C. Restrictions on Law School Clinics

Law school clinics provide a significant amount of free legal assistance to the poor and other unrepresented individuals and groups. Professor David Luban estimated that with 1400 law clinic instructors and thousands of law students, clinics at 182 law schools provide as many as three million hours of free legal work each year for needy clients.¹⁰⁰ On a number of occasions, attorneys have sought to prevent law school clinics from providing assistance to controversial clients that otherwise would go unrepresented.

ACCESS TO JUSTICE FOUND., RESTRICTIONS ON LEGAL SERVICES FUNDS IN TEXAS (2004), http://www.teajf.org/grants/docs/Funding_Restrictions.pdf (detailing restrictions on Texas Basic Civil Legal Services Program funds); E-mail from Keith A. Birkes, Executive Dir., Mo. Bar, to author (June 12, 2006) (on file with author) (stating that bar dues are distributed to restricted LSC grantees); E-mail from Emily Jones, Access to Justice Div. Dir., State Bar of Tex., to author (June 13, 2006) (on file with author) (stating that sixty-five dollars of the Texas bar membership fee is deposited into the Basic Civil Legal Services Program Account).

⁹⁸ *Keller v. State Bar*, 496 U.S. 1, 14 (1990) (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)). The court further explained:

The State Bar may therefore constitutionally fund activities germane to those goals [of regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id.

⁹⁹ *In re* Petition of the Wis. Trust Account Found., Inc., 2005 WI 35, 277 Wis. 2d xiii, xvi (2005); *see also* *Pai*, *supra* note 26, at 95–97.

¹⁰⁰ Luban, *supra* note 12, at 236 & n.108. Luban estimates that law schools invest around \$280 million annually in law clinics. *Id.* at 236 & n.107.

In 1998, the Louisiana Supreme Court was urged by the governor, business interests, and some prominent attorneys to curb the activities of the Tulane University School of Law's Environmental Law Clinic.¹⁰¹ The attorneys attacking the clinic never showed how the clinic clients would find alternative representation. They simply argued that it was not fair for businesses to have to defend lawsuits brought by the clinic.¹⁰² The state bar stood silent, refusing to take a position on the appropriateness of restricting the ability of the state's law clinics to provide free representation.¹⁰³

Nevertheless, the justices of the court adopted new restrictions both on the kinds of needy clients eligible for representation by the state's law clinics and on how clinics can represent those clients. Among other new restrictions, the justices mandated that law clinics in Louisiana may only represent clients who meet the LSC's indigent guidelines (rather than simply showing that they cannot afford the services of a private attorney), cannot represent any organization unless the clinic certifies that at least fifty-one percent of the organization's members meet the LSC's poverty guidelines, cannot represent any person if the clinic initiated contact for the purpose of providing representation, and cannot appear in any representative capacity before the legislature.¹⁰⁴ The chief justice of the court sought to justify the restrictions by arguing that poor persons were not entitled to the same legal representation as those who can afford private attorneys: "widespread advocacy campaigns by professors and students are beyond the legal parameters of helping indigent people."¹⁰⁵ One commentator characterized the justices' actions as "the equivalent of selectively disbaring attorneys who have won on controversial matters."¹⁰⁶

The attorney who represented the Louisiana Supreme Court when law clinics and clinic clients challenged the new restrictions later sought to get the United States Court of Appeals for the Fifth Circuit to restrict the ability of law clinics to appear before that court, but was unsuccessful.¹⁰⁷ Attorneys also have sought to restrict the free legal services offered by law clinics at the University of Tennessee, University of Oregon, and University of Pittsburgh law schools.¹⁰⁸ At the University of

¹⁰¹ See Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 65-75 (2000) (noting the efforts of the governor's special counsel and New Orleans attorneys). The author was the director of the Tulane Environmental Law Clinic at the time of these events.

¹⁰² *Id.* at 66-69, 121.

¹⁰³ *Id.* at 70.

¹⁰⁴ LA. SUP. CT. R. XX (Limited Participation of Law Students in Trial Work).

¹⁰⁵ James Varney, *Justice Calogero Seeking 3rd Term: Rough Campaign Is Anticipated*, TIMES-PICAYUNE (New Orleans), Aug. 7, 1998, at A2.

¹⁰⁶ Frank H. Wu, *A Lesson in Power Politics*, NAT'L L.J., May 3, 1999, at A21.

¹⁰⁷ Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 1985 (2003).

¹⁰⁸ Robert R. Kuehn, *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, 26 HARV. ENVTL. L. REV. 417, 425-26, 429-30 (2002).

Pittsburgh, a state supreme court justice stepped into a controversy over the school's environmental law clinic by characterizing the clinic's efforts to enforce planning requirements in a federal environmental law as the inappropriate "teaching of rudimentary social activism rather than law" and proposing that the clinic be shut down.¹⁰⁹ In none of these instances did the state bar association defend the actions of the law clinics or argue against imposing restrictions on the availability of legal assistance to needy clients.¹¹⁰

Even law school faculties have at times sought to limit the ability of law clinics to provide free legal assistance to controversial cases or clients. At the University of Oregon School of Law, some members of the faculty proposed shutting down the school's environmental law clinic as a way to appease critics of the clinic.¹¹¹ At the University of Tennessee, a young law professor active in controversial pro bono environmental cases was denied tenure after being told that he "did not sufficiently understand the moderation expected of Tennessee law professors."¹¹²

As a result of these and other attacks by attorneys on law school clinics, "some law professors and law clinics have refused to represent certain cases or clients out of fears that taking such cases could result in problems with their job security or threats to their school's funding."¹¹³ In none of the instances where attorneys sought to restrict the ability of needy clients to gain access to law clinic representation did those attorneys provide an alternative source of representation. As one law professor explained, attorneys attacking law clinics are upset because the clinics are "bringing suits that wouldn't be brought at all if the clinic didn't do it."¹¹⁴

D. Restrictions in Other Access to Legal Representation Initiatives

State supreme courts and bar associations have developed a number of volunteer lawyer programs and innovative initiatives to raise funds for legal services such as lawyer-sponsored foundations, cy pres awards, and pro hac vice fees. A significant number of these pro bono and funding programs restrict the legal assistance provided to poor persons.

¹⁰⁹ Letter from Ralph J. Cappy, Justice, Supreme Court of Pa., to William V. Luneburg, Professor, Univ. of Pittsburgh Sch. of Law (Oct. 2, 2001) (on file with author).

¹¹⁰ See Kuehn, *supra* note 108, at 425-32.

¹¹¹ Alan Pittman, *UO Environmental Law Clinic Funding Axed*, WHAT'S HAPPENING? (Eugene, Or.), Sept. 2, 1993, at 1.

¹¹² E-mail from Zygmunt Plater, Professor, Boston Coll. of Law, to author (Sept. 17, 2001) (on file with author); E-mail from Zygmunt Plater, Professor, Boston Coll. of Law, to author (Sept. 13, 2001) (on file with author).

¹¹³ Kuehn, *supra* note 108, at 431; see also Luban, *supra* note 12, at 240 (arguing that even if the previous attacks on clinics failed, "they were near misses, and eventually some will succeed. Indeed, they may already have succeeded in one of their aims, because clinic directors will undoubtedly hesitate before taking on volatile cases that may provoke dangerous backlash against the clinics or their law schools").

¹¹⁴ A.F. Conard, "Letter from the Law Clinic," 26 J. LEGAL EDUC. 194, 204 (1974).

Lawyer-sponsored contributions can involve either one-time or annual solicitations of donations from lawyers or law firms toward free legal assistance for the poor. These programs are present in most states and provide significant financial assistance to LSC offices and other providers of free legal assistance.¹¹⁵ In 2005, the legal profession contributed over \$57 million to legal assistance programs through attorney fee registration funds, bar dues assessments, pro hac vice fees, or other lawyer or bar association donations.¹¹⁶

Although information is not available on the extent of any restrictions on the use of these funds, grant guidelines or discretionary decisions on individual grant awards for these programs may impose some of the same restrictions on the use of the funds as those imposed by Congress on LSC funds, either by explicitly excluding some clients or means of representation, or by indirectly incorporating restrictions in the state IOLTA or other program to which the funds are dedicated. Moreover, where the funds are provided to recipients of LSC grants, those private bar funds may not be used for any purpose or activity prohibited by Congress.¹¹⁷

Unclaimed class action awards or criminal restitution funds are often distributed using the doctrine of cy pres by directing the residuals to another use that still furthers the objectives of the underlying award or fund.¹¹⁸ In a number of cases, these cy pres awards have gone to legal organizations and law school clinics to help advance their legal assistance programs, including awards of up to \$2 million.¹¹⁹

Courts controlling cy pres funds look to the attorneys in the case for direction on how best to distribute the residual funds and for nominations of appropriate recipients. As with other discretionary decisions to distribute funds for legal assistance to the poor, judges and attorneys in these cases may, either consciously or

¹¹⁵ ABA & NATIONAL LEGAL AID & DEFENDER ASSOCIATION, ACCESS TO JUSTICE PARTNERSHIPS STATE BY STATE 29–31 (2005) [hereinafter ACCESS TO JUSTICE PARTNERSHIPS] (providing examples of successful lawyer fundraising programs in Arizona, Colorado, Delaware, Indiana, Iowa, Maine, Michigan, New Hampshire, Oklahoma, Oregon, Utah, Virginia, Washington, West Virginia, and Wisconsin); ABA, *supra* note 79, at 3–9, 29–33 (providing similar examples in Atlanta, Boston, Columbus, Nashville, Oregon, Texas, Utah, and West Virginia). The National Legal Aid and Defender Association estimates that bar campaigns for civil legal assistance exist in nearly one hundred communities. National Legal Aid & Defender Association, Civil Resources, IOLTA & Other Funding, http://www.nlada.org/Civil/Civil_IOLTA/IOLTA_Bar (last visited Nov. 14, 2006).

¹¹⁶ PERLS CHART, *supra* note 23; E-mail from Meredith McBurney, *supra* note 23.

¹¹⁷ See *supra* notes 77–78 and accompanying text; see also ACCESS TO JUSTICE PARTNERSHIPS, *supra* note 115, at 30 (explaining that lawyer foundation funds in Colorado and Delaware were distributed to LSC grantees).

¹¹⁸ Pai, *supra* note 26, at 93.

¹¹⁹ *Id.* at 94–95 (identifying cy pres awards for legal assistance in California, Illinois, and New York); see also ACCESS TO JUSTICE PARTNERSHIPS, *supra* note 115, at 29 (providing similar examples from Minnesota, Montana, New York, Pennsylvania, and Washington); ABA, *supra* note 79, at 45–49 (providing similar examples from Illinois, Oregon, and Washington).

inadvertently, restrict the use of these funds either by directing the funds to another program (such as IOLTA) with existing restrictions or to a restricted LSC grant recipient.

Pro hac vice fees paid by out-of-state lawyers to appear in state courts are another newer source of funding for civil legal assistance.¹²⁰ Where the proceeds of those fees are controlled by the state supreme court,¹²¹ the court must consider, as with the other innovative funding programs above, if it is appropriate to restrict the use of those funds or if providing the funds to some legal assistance providers may encumber those pro hac vice proceeds with the congressional LSC restrictions.¹²²

A final area where the legal profession may be reinforcing congressional restrictions on access to legal representation is through volunteer lawyer or other pro bono programs (“VLPs”). The ABA estimates there are over 900 pro bono programs referring civil matters for lower-income persons to private attorneys.¹²³ As many as 150,000 private attorneys are registered to participate in LSC-funded pro bono programs.¹²⁴ Those familiar with pro bono programs believe that proportionally few serve the residual poor clients that are prohibited by Congress from representation, in part because the programs often obtain referrals or funds from the local LSC office and, consequently, tend to follow the office’s restrictions.¹²⁵

¹²⁰ ACCESS TO JUSTICE PARTNERSHIPS, *supra* note 115, at 28 (identifying pro hac vice fees as funding sources for legal aid in Mississippi, Missouri, New Mexico, Oregon, and Texas); ABA, *supra* note 79, at 25–27 (identifying Mississippi, Missouri, Oregon, and Texas as using pro hac vice fees to fund legal services).

¹²¹ In some states, the legislature, rather than the state supreme court, may dictate how pro hac vice fees may be used. In Texas, for example, the legislature has directed that the fees be deposited into the restricted Basic Civil Legal Services account. *See generally* TEX. EQUAL ACCESS TO JUSTICE FOUND., *supra* note 97.

¹²² *See, e.g.*, E-mail from Keith A. Birkes, *supra* note 97 (explaining that all of Missouri’s pro hac vice fees go to LSC recipients).

¹²³ SUPPORTING JUSTICE, *supra* note 14, at 6.

¹²⁴ ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN OVERVIEW OF THE PROGRAM IN 2003, at 3 (2003), *available at* http://www.clasp.org/publications/Legal_Aid_2003.pdf.

¹²⁵ E-mail from Linda Lund, Volunteer Lawyers Program, Ala. State Bar, to author (June 7, 2006) (on file with author) (estimating that a majority of pro bono programs are run by the LSC-funded program in the state); E-mail from Cheryl Zalenski, ABA Ctr. for Pro Bono, to author (July 24, 2006) (on file with author) (explaining that over thirty-five percent of the 932 pro bono programs in the ABA’s database appear to receive LSC funding in some form); E-mail from Cheryl Zalenski, ABA Ctr. for Pro Bono, to author (July 14, 2006) (on file with author) [hereinafter Zalenski July 14 E-mail] (opining that, based on anecdotal evidence, proportionally few pro bono programs handle LSC-restricted cases); *see, e.g.*, Delaware Volunteer Legal Services, <http://www.dvls.org/> (last visited Nov. 14, 2006) (not providing representation for any class action); Houston Volunteer Lawyers Program, Do You Qualify?, <http://www.houstonlegalhelp.org/doyouqualify.asp> (last visited Dec. 31, 2006) (not providing representation to any incarcerated person); Mobile Bar Association Volunteer Lawyers

Attorneys running these VLPs need to understand that ineligible LSC clients can be referred by an LSC office to pro bono attorneys without subjecting the program to congressional restrictions. For example, the LSC restriction on assistance for certain aliens states that none of the funds appropriated by Congress may be used to provide “legal assistance for or on behalf of any alien.”¹²⁶ The implementing regulations explicitly state that “legal assistance does not include normal intake and referral services.”¹²⁷ Therefore, where the LSC office does the intake for the VLP, some programs have likely been excluding aliens who are not otherwise prevented by Congress from receiving that voluntary assistance.

Prisoners likewise can be referred by LSC grantees to VLPs. Congress prohibits funds to any person or entity “that participates in any litigation on behalf of a person incarcerated in a Federal, State or local prison.”¹²⁸ By simply referring a prisoner to a pro bono program, the LSC grant recipient does not participate in litigation. Therefore, LSC grantees can and should refer prisoners through their normal intake and referral services to pro bono programs.

The same is true for persons who are ineligible for legal representation in a public housing eviction proceeding because of a drug charge. Congress has only prohibited funding an entity “that defends a person in a proceeding to evict the person from a public housing project.”¹²⁹ Because an intake referral of a person charged with a drug crime to a pro bono program would not constitute defending that person in an eviction proceeding, VLPs that rely on LSC grantees for intake and referral should receive referrals of and provide legal assistance to such persons.

Although it appears that Congress’s restrictions would disallow VLPs who receive LSC funds from aiding certain clients at all, in fact VLPs may match these LSC ineligible clients with private pro bono attorneys even if the program receives “private attorney involvement” (“PAI”) funds from an LSC grantee. Generally, a recipient of LSC funding must devote at least twelve-and-one-half percent of the annual award to the involvement of private attorneys in the delivery of legal services to the poor.¹³⁰ Many state VLPs receive PAI funds to help finance their programs.¹³¹

Although a transfer of LSC funds to another entity usually requires the entity receiving the transferred funds to comply with all of the congressional restrictions, an exception is made for transfers of PAI funds. LSC regulations specify that where funds are transferred to bar associations, pro bono programs, private attorneys, or law firms for the sole purpose of funding PAI activities, the congressional

Program, <http://www.vlpmobile.org/> (follow “download the Application and Eligibility Form” hyperlink) (last visited Dec. 31, 2006) (not providing representation to aliens).

¹²⁶ LSC Appropriations Act § 504(a)(11); 45 C.F.R. § 1626.3 (2005).

¹²⁷ 45 C.F.R. § 1626.3 (2005).

¹²⁸ LSC Appropriations Act § 504(a)(15); *see also* 45 C.F.R. § 1637.3 (2005).

¹²⁹ LSC Appropriations Act § 504(a)(17); *see also* 45 C.F.R. § 1633.3 (2005).

¹³⁰ 45 C.F.R. § 1614.1(a) (2005).

¹³¹ Zalenski July 14 E-mail, *supra* note 125 (identifying over thirty-five percent of the 932 pro bono programs in the country as receiving LSC funding in some form).

restrictions apply only to the funds transferred and not to all of the programs or funds of the private attorney recipient.¹³² Thus, a VLP may accept PAI funds without having to comply with the congressional restrictions imposed on LSC funds in general, provided the VLP also is funded from other non-LSC sources.

Between the ability of LSC grantees to engage in intake and referral activities even for ineligible clients and the ability of VLPs to accept PAI funding without having to comply with the LSC restrictions, the lawyer programs should not allow the congressional restrictions to discourage them from providing free legal assistance to any needy person. As noted above, because in many places there are no non-LSC funded organizations to represent persons or causes restricted by Congress,¹³³ it is particularly important that VLPs, and indeed all programs sponsored by or assisted by the bar, be available to provide such assistance. Otherwise, certain groups may be completely cut off from legal assistance and the ability to obtain equal justice under the law.

In all legal assistance programs created or controlled by the legal profession, the judges and attorneys involved must keep in mind that the restrictions imposed by Congress on LSC grantees do not reflect objective decisions about the neediest poor clients, the most significant legal needs of the poor, or the most appropriate legal methods for attaining a client's goals. Instead, as outlined above in Part II, those restrictions on clients, causes, and methods of legal representation are political and ideological judgments reflecting hostility toward certain controversial clients and causes. Thus, in adopting restrictions that Congress has imposed on LSC grantees, members of the legal profession are not objectively directing the funds to those most in need or to where the funds will be most beneficial. Furthermore, as the next section argues, professional norms prohibit attorneys from condoning efforts to deny legal assistance to any unpopular clients or causes.

IV. THE NORMATIVE CASE AGAINST THE LEGAL PROFESSION'S INVOLVEMENT IN RESTRICTING ACCESS TO LEGAL REPRESENTATION

The principles of the legal profession strongly promote unrestricted access to legal representation for all persons unable to afford the assistance of an attorney. The concept of equal access to the justice system has been repeatedly and forcefully stated by ethics rules, ethics opinions, the organized bar, and notions of professionalism. By making it clear that attorneys must uphold the ideal of equal access, it follows that the legal profession should play no part in conditioning the availability of legal assistance or the type of legal assistance rendered on any criteria other than objective resource allocation or legal needs.

¹³² 45 C.F.R. § 1610.7 (2005).

¹³³ See *supra* note 80 and accompanying text.

A. Ethical Precepts Advance Unrestricted Access to Legal Representation

The legal profession’s commitment to equal access to legal representation is reflected in the ethical precepts governing the profession. The ABA’s Model Rules of Professional Conduct (“Model Rules”), the basis for ethics rules in forty-six states and the District of Columbia, states in the preamble that:

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.¹³⁴

The ABA’s Model Code of Professional Responsibility (“Model Code”), the primary source for ethics rules until the adoption of the Model Rules and still the basis for ethics rules in two states, similarly declares that “every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence” and reminds lawyers that an important function of the profession is to “assist in making legal services fully available.”¹³⁵

This commitment to access to legal representation is reflected in ethics rules creating the duty on all individual lawyers to help those unable to afford an attorney. The Model Rules both create a professional responsibility on every lawyer to provide legal services to those unable to pay and direct every lawyer to support government and bar programs that provide free legal services to persons of limited financial means.¹³⁶ The Model Code states that “[a] lawyer should assist the legal profession in fulfilling its duty to make legal counsel available,” and enjoins every

¹³⁴ MODEL RULES, *supra* note 69, at pmb1. ¶ 6, available at <http://www.abanet.org/cpr/mrpc/preamble.html>; see ABA, Center for Professional Responsibility, Model Rules of Professional Conduct: Dates of Adoption, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Nov. 14, 2006) (listing the states that have adopted the Model Rules).

¹³⁵ MODEL CODE, *supra* note 70, at EC 1-1, 2-1. New York and Ohio presently follow the Model Code, while California and Maine have not adopted either the Model Code or the Model Rules. ABA/BNA, LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 01:3–4 (2006). Ohio is dropping its Model Code-based standards and will replace them with a version of the Model Rules on February 1, 2007. ABA/BNA, *In Switch to Model Rules, Ohio Adopts MJP but Keeps Unique Standards from Prior Code*, in LAWYER’S MANUAL ON PROFESSIONAL CONDUCT 389 (2006).

¹³⁶ MODEL RULES, *supra* note 69, at R. 6.1 & cmts. 1, 10. The Model Rules add that “[l]aw firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.” *Id.* at R. 6.1 cmt. 11.

lawyer to support efforts to meet the need for legal services of those unable to pay for an attorney.¹³⁷

The Model Rules are particularly strong in condemning any denial of legal representation based on the identity of the client or cause: “Legal 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.”¹³⁸ The Model Code likewise states that representation should not be declined “because a client or cause is unpopular or community reaction is adverse” or “to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community.”¹³⁹

Ethics rules clarify that representation of a client, as well as a lawyer’s or the bar’s role in making legal representation fully available to all needy persons, “does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”¹⁴⁰ This position is reinforced by a comment in the Restatement of Law Governing Lawyers (“Restatement”) that “it is a tradition that a lawyer’s advocacy for a client should not be construed as an expression of the lawyer’s personal views.”¹⁴¹

The Model Rules go even further and declare that individual lawyers have an obligation to represent the kinds of unpopular clients that are denied assistance by some legal aid programs: “All lawyers have a responsibility to assist in providing pro bono publico service An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients.”¹⁴² An ABA report on professional responsibility argued that one of the highest services the bar can render to society is to represent the very clients and causes that are disfavored by Congress or the public.¹⁴³ Hence, in the view of ethics rules and the ABA, ensuring that a full range of legal services is available to all needy persons is

¹³⁷ MODEL CODE, *supra* note 70, at Canon 2, EC 2-25.

¹³⁸ MODEL RULES, *supra* note 69, at R. 1.2 cmt. 5.

¹³⁹ MODEL CODE, *supra* note 70, at EC 2-27, 2-28.

¹⁴⁰ MODEL RULES, *supra* note 69, at R. 1.2(b) & cmt. 5 (“By the same token, representing a client does not constitute approval of the client’s views or activities.”); *see also* MODEL CODE, *supra* note 70, at EC 7-17 (noting that an attorney “may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client”).

¹⁴¹ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 125 cmt. e (2000) [hereinafter RESTATEMENT].

¹⁴² MODEL RULES, *supra* note 69, at R. 6.2 cmt. 1. The Model Code explains that furtherance of the bar’s objective to make legal services fully available “requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.” MODEL CODE, *supra* note 70, at EC 2-26.

¹⁴³ *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958) (reprinting report of the ABA and Association of American Law Schools Joint Conference on Professional Responsibility).

neither a political statement by an attorney or the bar nor an endorsement of that person’s positions. It is simply a commitment to equal access to legal representation.

In addition to condemning any effort to deny legal services to unpopular clients or causes, ethics rules aim to ensure that all lawyers exercise independent professional judgment in determining the best means to meet each client’s objectives¹⁴⁴ and “take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”¹⁴⁵ The Restatement warns that lawyers who are paid to represent indigent clients must ensure they will exercise the same independent professional judgment that other attorneys must traditionally follow in determining how best to represent a client.¹⁴⁶ By nowhere suggesting that the legal services provided to the poor should be in any way different from those provided to the rich, ethics precepts thereby proscribe efforts by attorneys to restrict the means by which a poor person can be represented.

As a final ethics prescript, both the Model Rules and the Model Code prohibit “conduct that is prejudicial to the administration of justice.”¹⁴⁷ The fair administration of justice requires the availability of legal representation and the ability of that person’s lawyer to make unrestricted decisions about how best to serve the client.¹⁴⁸ Professors Ted Finman and Theodore Schneyer have argued that the proscription on conduct that is prejudicial to the administration of justice could be invoked to prohibit board members of a legal services office from basing client representation considerations on the identity of adverse parties or the controversial nature of the subject matter.¹⁴⁹ A similar argument could be made against members of the bar that support restrictions in bar legal assistance programs.

¹⁴⁴ See MODEL RULES, *supra* note 69, at R. 2.1, 1.8(f), 5.4(c); MODEL CODE, *supra* note 70, at Canon 5.

¹⁴⁵ MODEL RULES, *supra* note 69, at R. 1.3 cmt. 1.

¹⁴⁶ RESTATEMENT, *supra* note 141, § 134 cmt. g.

¹⁴⁷ MODEL RULES, *supra* note 69, at R. 8.4(d); MODEL CODE, *supra* note 70, at DR 1-102(A)(5).

¹⁴⁸ See MODEL CODE, *supra* note 70, at EC 8-3 (“The fair administration of justice requires the availability of competent lawyers Those persons unable to pay for legal services should be provided needed services.”).

¹⁴⁹ Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 135 (1981); see also Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. NEW ENG. L. REV. 49, 58 n.44 (1998) (“An argument can be made that the refusal to represent a client in a situation where no other competent attorney is available might impact on the integrity of the judicial process.”). An attorney may violate this rule even though the conduct does not take place in court or affect an ongoing proceeding. CTR. FOR PROF’L RESPONSIBILITY, ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 614 (5th ed. 2003).

B. Ethics Opinions Condemn Restrictions on Access to Legal Representation

Ethics opinions repeatedly condemn efforts to restrict the clients or causes that legal assistance programs may represent. The earliest relevant ABA opinion addressed a proposal by a state law school to develop case acceptance guidelines that would help avoid lawsuits against government officials or suits that were controversial on social or political grounds. In Informal Opinion 1208, the ABA’s ethics committee held that the lawyer-members of the governing board of a legal aid clinic “should seek to avoid establishing guidelines (even though they state only broad policies; see Formal Opinion 324¹⁵⁰) that prohibit acceptance of controversial clients and cases or that prohibit acceptance of cases aligning the legal aid clinic against public officials, governmental agencies or influential members of the community.”¹⁵¹ Instead, the lawyers “should seek to establish guidelines that encourage, not restrict, acceptance of controversial clients and cases, and this is particularly true if laymen may be unable otherwise to obtain legal services.”¹⁵²

The ethics committee was particularly concerned that legal aid or volunteer lawyer programs are often the last lawyers in town for indigent persons, arguing that the “[u]se of guidelines that avoid controversial cases and controversial clients is particularly unfortunate if the organization happens to be the only local organization providing aid to indigents.”¹⁵³ The Supreme Court in *Legal Services Corp. v. Velazquez* also recognized that restrictions on how a lawyer may represent a client are more problematic when the client is an indigent person because there often will be no alternative source of assistance for interference with constitutional and statutory rights.¹⁵⁴

ABA Formal Opinion 334 addressed efforts to restrict the activities of legal services attorneys. The opinion held that activities on behalf of clients “may be limited or restricted only to the extent necessary to allocate fairly and reasonably the resources of the office and establish proper priorities in the interest of making maximum legal services available to the indigent.”¹⁵⁵ Case priorities “may not be

¹⁵⁰ See *infra* note 155.

¹⁵¹ ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1208 (1972) (quoting MODEL CODE, *supra* note 70, at EC 2-28, 2-29) (footnote added). “Acceptance of such controversial clients and cases by legal aid clinics is in line with the highest aspirations of the bar to make legal services available to all.” *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ 531 U.S. 533, 546 (2001). “Thus, with respect to the litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict.” *Id.* at 546–47.

¹⁵⁵ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 334 (1974) [hereinafter Formal Op. 334]. Formal Opinion 334 clarified and superseded Formal Opinion 324, which had similarly held that members of a legal services board “should strenuously attempt to fulfill their broad obligations under Canon 2 of the Code of Professional Responsibility by setting policies designed to make legal services as fully available to all who need them as resources

based on considerations such as the identity of the prospective adverse parties or the nature of the remedy (‘class action’) sought to be employed.”¹⁵⁶ Although limited resources may require some allocations of funds, it must be done “fairly and reasonably with the objective of making maximum legal services available, within the limits of available resources.”¹⁵⁷ Limitations stemming from motives inconsistent with the obligation of the bar to make legal services fully available to indigent persons “are always improper.”¹⁵⁸

Formal Opinion 334 is also important in reiterating that all lawyers, not just those serving on a legal aid board, “should use their best efforts to avoid the imposition of any unreasonable and unjustified restraints upon the rendition of legal services by legal services offices for the benefit of the indigent and should seek to remove such restraints where they exist.”¹⁵⁹ ABA Formal Opinion 399, which addressed the 1996 congressional restrictions, stated a similar obligation on all attorneys.¹⁶⁰ It argued that until Congress reverses the restrictions, the legal profession must support organizations not funded by LSC where they exist and help establish them where they do not.¹⁶¹ In particular, the opinion calls on lawyers to step forward and provide pro bono service to “those whose cases or strategies are prohibited” by Congress’s LSC restrictions.¹⁶² ABA Formal Opinion 347 also reiterated the legal profession’s “clear responsibility” to take all necessary steps to prevent the abandonment of indigent clients that can no longer be served by LSC offices.¹⁶³

Among state and local ethics opinions, a 1996 Utah opinion on the proposed LSC restrictions advised that all members of the bar have an ethical duty to assist in

permit” and “not to reject certain types of clients or particular kinds of cases merely because of their controversial nature, anticipated adverse community reaction, or because of a desire to avoid alignment against public officials, governmental agencies, or influential members of the community.” ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 324 (1970) (citing MODEL CODE, *supra* note 70, at EC 2-25, 2-27, 2-28).

¹⁵⁶ Formal Op. 334, *supra* note 155 (citing MODEL CODE, *supra* note 70, at EC-1).

¹⁵⁷ *Id.* Informal Opinion 1359 similarly sanctioned a priority system or other caseload limitation only “if it is a fair and reasonable method of making maximum legal services available to the indigent and not inconsistent with the Code.” ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1359 (1976).

¹⁵⁸ Formal Op. 334, *supra* note 155

¹⁵⁹ *Id.*

¹⁶⁰ Formal Op. 399, *supra* note 21.

¹⁶¹ *See id.*

¹⁶² *Id.*

¹⁶³ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 347 (1981). “If these traditional principles of our profession are to be accepted as more than hollow rhetoric, lawyers in every jurisdiction acting through the organized bar should take all necessary actions to prevent the abandonment of indigent clients.” *Id.*

the provision of legal services to persons adversely affected by the restrictions.¹⁶⁴ The Bar Association of the City of New York, in a lengthy report on the 1996 congressional restrictions, characterized the limitations on how a lawyer may represent a client as “inconsistent with the ethical norms designed to assure the quality of those [legal] services . . . and inconsistent with our nation’s historic realization that the autonomy and independence of the Bar is a powerful force for securing the rule of law.”¹⁶⁵ The association urged the repeal or invalidation of the 1996 congressional restrictions.

C. The Legal Profession’s Other Commitments to Equal Access

Beyond ethics rules and opinions, the organized bar, and in particular the ABA, have expressed a strong commitment to providing equal access to legal representation. In 2000, the ABA’s House of Delegates listed as one of the six core values of the legal profession “the lawyer’s duty to promote access to justice.”¹⁶⁶ Similarly, the ABA’s widely publicized MacCrate Report on professional development identified “Striving to Promote Justice, Fairness, and Morality” as one of the profession’s four fundamental values.¹⁶⁷ That fundamental value includes ensuring that adequate legal services are provided to those unable to pay.¹⁶⁸ The ABA and the American Association of Law Schools (“AALS”) also have recognized the duty of lawyers to provide representation to unpopular clients and causes, observing that the legal profession “has a clear moral obligation” to ensure their representation.¹⁶⁹

Recently, the president of the ABA called for “a recommitment to the noblest principles that define our profession: providing legal representation to the poor, disadvantaged and underprivileged; and performing public service that enhances the common good.”¹⁷⁰ Similarly, members of the American Inns of Court pledge to

¹⁶⁴ Utah State Bar Ethics Advisory Opinion Comm., Op. No. 96-07, 1996 WL 509207, at *2 (Aug. 30, 1996).

¹⁶⁵ Ass’n of the Bar of the City of N.Y., *supra* note 21, at 59.

¹⁶⁶ 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) (citing to resolution 10F, adopted by the ABA House of Delegates in 2000).

¹⁶⁷ SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 140 (1992) [hereinafter MACCRATE REPORT].

¹⁶⁸ *Id.*

¹⁶⁹ *Professional Responsibility: Report of the Joint Conference*, *supra* note 143, at 1217; see also *Proceedings of the House of Delegates*, 78 A.B.A. ANN. REP. 133 (1953) (reprinting an ABA resolution declaring the bar’s duty to provide all persons, even the most unpopular persons, the benefit of legal representation).

¹⁷⁰ Michael S. Greco, *A Renaissance of Idealism: A Lawyer’s Gift of Time and Expertise Can Change a Needy Client’s World*, A.B.A. J., September 2005, at 6, 6. Among the ABA’s goals is “to promote meaningful access to legal representation and the American system of

efficient, or even the only, means to resolve the client’s problem.¹⁷⁶ The fact that lobbying may be “controversial should not be a barrier to a practitioner pursuing it.”¹⁷⁷ The practice restrictions in a number of bar-supported legal assistance programs, therefore, are directly contrary to the ABA Standards.

Thus, the organized bar’s position is clear—the legal profession has a duty to promote legal representation for all those who cannot afford an attorney, and that representation should include the full range of legal services traditionally provided by an attorney.

Lawyer oaths reinforce the obligation to promote equal access to legal representation. When the ABA adopted the Canons of Professional Ethics as its first statement of ethical principles in 1908, the organization also adopted a proposed oath of admission setting forth the “general principles which should ever control the lawyer in the practice of his profession” and “duties which they are sworn on admission to obey and for the willful violation of which disbarment is provided.”¹⁷⁸ Among those seven duties, a lawyer swears to “never reject, from any consideration personal to myself, the cause of the defenseless or oppressed.”¹⁷⁹ Oaths committing attorneys not to reject the cause of the defenseless or oppressed exist today in eleven states;¹⁸⁰ statutes or court rules in at least eight more states create a similar obligation on attorneys.¹⁸¹ Although this duty only constrains the lawyer from personally rejecting a defenseless or oppressed person, it reinforces the responsibility of that lawyer to avoid assisting in actions that deny legal assistance to unpopular clients or causes.

Judges have a special role in protecting and promoting access to legal representation. As the president of the ABA explained: “The Constitution establishes the fundamental right of access to the judicial system. The courts, as guardians of every person’s individual rights, have a special responsibility to protect and enforce

¹⁷⁶ *Id.* at 94 standard 5.6 cmt.

¹⁷⁷ *Id.* at 4.

¹⁷⁸ *Oath of Admission*, 33 A.B.A. REP. 584, 584–85 (1908).

¹⁷⁹ *Id.* at 585. The oath was derived from a similar pledge in the 1850 Field Code, which was adopted by at least seventeen states to govern the admission and discipline of lawyers. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1424–26, 1440 (2004).

¹⁸⁰ Carol Rice Andrews, *Oaths Based on the Field Code Duties* (2006) (unpublished survey) (on file with author) (identifying oath provisions in Colorado, Florida, Idaho, Indiana, Louisiana, Michigan, New Mexico, South Carolina, South Dakota, Washington, and Wisconsin).

¹⁸¹ See Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 S.C. L. REV. 253, 278 nn.139–40 (2003) (citing to statutory duties in Alabama, California, Georgia, Iowa, Minnesota, and Oregon); see also OKLA. STAT. tit. 5, § 3 (2006); ARIZ. SUP. CT. R. 41(h). Violation of an oath or statutory duty is grounds for disciplinary action. See, e.g., CAL. BUS. & PROF. CODE § 6103 (West 2006); MONT. CODE ANN. § 37-61-301(2)(b) (2006); WASH. REV. CODE § 2.48.220(3) (2006).

the right of equal access to the judicial system.”¹⁸² The Conference of Chief Justices, which includes the highest judicial officer of each state and the District of Columbia, has stated that the promise of equal justice under law is not realized for those with no meaningful access to the justice system.¹⁸³ The conference resolved that judges should develop and support civil legal services for individuals and families without access and “take action necessary to ensure access to the justice system for those who face impediments they are unable to surmount on their own.”¹⁸⁴ Similarly, the American Judges Association has resolved that a major goal of all judges should be to provide and protect access to justice for people who are poor, elderly, or who have disabilities.¹⁸⁵

As Judge Judith Billings of the Utah Court of Appeals explained, “judges have a special opportunity, and obligation, to use their positions to provide access to our justice system.”¹⁸⁶ Therefore, judges, as guarantors of equal justice, should be particularly vigilant in ensuring that no program of the court excludes certain

¹⁸² Robert J. Grey, Jr., *Access to the Courts: Equal Justice for All*, EJOURNAL USA: ISSUES OF DEMOCRACY, August 2004, at 6, 9, <http://usinfo.state.gov/journals/itdhr/0804/ijde/ijde0804.pdf>; see also CANONS OF JUDICIAL ETHICS pmbl. § 2 (1924) (“Courts exist to promote justice, and thus to serve the public interest.”); Hon. Judith Billings & Jenny M. McMahon, *Expanding Pro Bono: The Judiciary’s Power to Open Doors*, DIALOGUE, Spring 1998, at 1, 1 (“The judiciary has a special responsibility to insure access to justice.”).

¹⁸³ Conference of Chief Justices, Policy Statements & Resolutions, Resolution 23: Leadership to Promote Equal Justice (2001), <http://ccj.ncsc.dni.us/accesstojusticeresolutions/resol23leadership.html>.

¹⁸⁴ *Id.* The chief justice of the Wisconsin Supreme Court has stated that the judicial branch is responsible for “offering everyone equal access to justice.” Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 4 (2003). The executive director of the Vermont Bar Association asserts that “[b]ar associations and the judiciary share in the responsibility to insure access to justice.” Robert M. Paolini, *Pro Bono Is Better than Pro Se*, VT. B.J. & L. DIG., June 1998, at 7, 7.

¹⁸⁵ American Judges Association, Judicial Concerns Resolutions, Resolution on Access to Justice and Protection of the Rights of People (Sept. 25, 1997), <http://aja.ncsc.dni.us/htdocs/resolutions/aboutaja-resolutions-judicialconcerns.htm>. The Honorable John N. Kirkendall, past chair of the National Conference of Specialized Court Judges, similarly noted: “Today, I am aware of no serious argument among scholars or others that judges should be exempt from participation in improving the profession by continually working toward the goal of making available legal services for everyone in our society.” John N. Kirkendall, *The Judiciary and Pro Bono—How May We Help?*, 70 MICH. B.J. 912, 912 (1991).

¹⁸⁶ Judith Billings, *Using the Judiciary to Promote Pro Bono Activity*, DIALOGUE, Summer 1997, at 14, 14. Judge Robert McBeth of Washington argues that judges must actively promote equal access to legal representation: “Access to justice should be a fundamental concern of every judge in the country. We can no longer sit on the sidelines and ‘let the lawyers do their thing’—we need to take positive steps to ensure that our system of justice is fair to all participants.” Robert E. McBeth, *Judicial Activism*, JUDGES’ J., Winter 2001, at 12, 13, 40.

persons or causes from obtaining legal assistance or restricts what a lawyer for the poor might do on behalf of her client.

The final relevant professional norms apply to law school professors. Law professors who are members of the bar are subject to the same legal profession ethical precepts as other attorneys in the jurisdiction where the professor is admitted, even if the professor is not engaged in the active practice of law.¹⁸⁷

Beyond ethics rules, the professional norms of the legal academy promote unrestricted access to legal representation. Both the ABA and the AALS argue that because law professors function as important role models for law students, they should be guided by the highest standards of ethics and professionalism and “should assist students to recognize the responsibility of lawyers to advance individual and social justice.”¹⁸⁸ The ABA’s MacCrate Report reiterated this same responsibility: “Law school deans, professors, administrators and staff should be concerned to convey to students that the professional value of the need to ‘promote justice, fairness and morality’ is an essential ingredient of the legal profession.”¹⁸⁹ The AALS goes even further, stating that the financial freedom a law professor enjoys from not having to serve the interests of private clients creates “an enhanced obligation to pursue individual and social justice.”¹⁹⁰

¹⁸⁷ *In re Peters*, 428 N.W.2d 375, 380 (Minn. 1988) (rejecting the contention that a law professor’s ethical obligations and professional responsibilities only apply when representing a client); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 336 (1974) (holding that a lawyer must comply at all times with the rules of conduct, even if the lawyer is not acting in a professional capacity).

¹⁸⁸ AALS, Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities (2003), in ASSOCIATION OF AMERICAN LAW SCHOOLS 2006 HANDBOOK 91, 92 (2006), *available at* http://www.aals.org/about_handbook_sgp_eth.php [hereinafter Statement of Good Practices]; *see also* COMM’N ON PROFESSIONALISM, ABA, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 19 (1986), *reprinted in* 112 F.R.D. 243, 268 (1987).

¹⁸⁹ MACCRATE REPORT, *supra* note 167, at 333. “Law school deans, professors, administrators and staff must not only promote these values by words, but must so conduct themselves as to convey to students that these values are essential ingredients of our profession.” *Id.* at 236. “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.” Thomas D. Morgan, *Law Faculty as Role Models*, in TEACHING AND LEARNING PROFESSIONALISM: SYMPOSIUM PROCEEDINGS 37, 47 (1996).

¹⁹⁰ Statement of Good Practices, *supra* note 188. The ABA’s law school accreditation standards require law schools to establish policies that address a full-time faculty member’s “[o]bligations to the public, including participation in pro bono activities” and to evaluate periodically whether faculty members are meeting this obligation. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 404(a)(5), 404(b) (2005), *available at* <http://www.abanet.org/legaled/standards/chapter4.html>; *see also* ASS’N OF AM. LAW SCH., PURSUING EQUAL JUSTICE: LAW SCHOOLS AND THE PROVISION OF LEGAL SERVICES 29 (2002), *available at* http://www.aals.org/equaljustice/final_report.pdf (“[L]aw schools and law faculty

clear that Congress’s restrictions are based on politics and should not be emulated by the legal profession. In fact, some proponents of LSC restrictions justified denying representation by arguing that certain poor persons would not be without access to attorneys because other public and private entities, such as private attorneys and the bar, would fund the representation that the federal government prohibited.¹⁹³ Of course where the legal profession’s legal assistance programs mirror the LSC restrictions, the profession is not providing this presumed representation to non-LSC-eligible clients but is reinforcing the denial of access to legal representation sought by LSC’s critics.

In addition, denying assistance to certain unpopular clients or causes serves to insulate some laws from judicial review or law breakers from enforcement and makes those clients even more vulnerable to infringements of their legal rights. For example, in the case of undocumented aliens and prisoners, the failure of the bar to provide legal assistance is believed to have exacerbated violations of their legal rights and emboldened unscrupulous employers and prison officials to violate the law.¹⁹⁴ If anything, the unpopularity of the clients or causes should motivate individual lawyers and the bar to provide legal assistance since the restrictions in federal and state-funded legal assistance programs have made these groups even more in need of help.

A related argument claims that poor people are better served when limited legal assistance is focused on the most typical day-to-day legal problems of the poor and on individual cases rather than on larger cases or more complex legal problems. Yet, the legal profession should be concerned about how best to advance equal access to justice and the client’s cause. Denying a lawyer for the poor the ability to address the client’s concerns through lobbying, class actions, or attorneys’ fee requests may prevent the attorney and client from choosing the best means to achieve the desired goal and may result in second-class legal representation for the poor.¹⁹⁵ The legal profession cannot countenance a restriction on a lawyer’s practice that is not based on an objective determination of the prospective client’s and community’s needs and of the lawyer’s professional judgment about the best way to address those needs.

¹⁹³ Abel & Kaufman, *supra* note 27, at 510 & n.93 (quoting statements by Congressmen Robert Dornan (R.-Cal.) and Charles Taylor (R.-N.C.)); *see also* BRENNAN CTR. FOR JUSTICE, *supra* note 93, at 19 (quoting a 1995 pledge from a former LSC president that lawyer pro bono efforts “will cushion the termination of federal funding for legal services”); *End Legal-Aid Program for Poor?—Interview with Edwin Meese III*, U.S. NEWS & WORLD REP., Aug. 3, 1981, at 33, 33 (arguing that cutbacks in LSC activities could be offset by expanding law school clinical programs).

¹⁹⁴ *See supra* notes 34, 37 and accompanying text.

¹⁹⁵ Two experts on civil legal assistance for the poor characterized the restriction on the kinds of legal work that lawyers can perform as “perhaps even more damaging and insidious” than the restrictions on the kinds of cases and clients that legal services offices can handle. ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW & SOC. POLICY, *SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES* 35 (2003).

The mantra of the legal profession should be that if a lawyer representing a paying client is not restrained, then a lawyer for a poor client should not be restrained.

A third argument in defense of some restrictions is that the bar should avoid assisting clients or causes that are “political” or “ideological.” Yet, as argued above, there is nothing political or ideological about ensuring that legal representation is fully available or that both sides of an issue are well represented.¹⁹⁶ If it is not political for a business to hire an attorney to sue the government over new regulatory restrictions, then it is no more political for an undocumented alien to have the ability to sue to enforce employment-related rights. As explained by the Wisconsin Supreme Court, the bar’s involvement, and even use of members’ dues, in providing legal services to the poor is non-ideological.¹⁹⁷ Lawyers simply cannot allow Congress, state legislators, or others to define the act of providing a poor person with a lawyer as a political or ideological activity.¹⁹⁸

V. CONCLUSION

The legal profession must move beyond the rhetoric of equal access to legal representation. Individual lawyers and judges, along with courts and bar associations, must take steps to ensure they are not contributing to the inability of some unpopular clients or causes to gain access to legal representation. They must also avoid placing restraints on the legal services that lawyers for the poor may provide. Indeed, the legal profession must actively seek to ensure that clients restricted by Congress or state legislatures are provided access to legal representation through the various funding and service programs of the legal profession and that lawyers for the indigent are not restricted in ways that do not also apply to lawyers representing paying clients.

The profession should begin by pressing Congress to remove the 1996 restrictions on clients, causes, and methods of legal representation. These restrictions were the result of politics and enacted to appease special interests hostile to legal assistance to the poor. They do not comport with the legal profession’s position that allocations of limited resources must be done fairly and reasonably. Professor David Luban argues that “neither the Bar nor legal-services establishments offered any organized protest when the 1996 restrictions were enacted—unlike a similar assault in 1981, when law school deans and the organized bar united in protest against

¹⁹⁶ See *supra* text accompanying notes 47, 140–143. This is particularly true in the case of programs, such as those developed and operated by the legal profession, that are not financed by taxpayer funds.

¹⁹⁷ See *In re* Petition of the Wis. Trust Account Found., Inc., 2005 WI 35, 277 Wis. 2d xiii, xvi (2005).

¹⁹⁸ Professor David Luban has extensively addressed the attack on the LSC and the contention that lawyers for the poor “practice politics, not law” in DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 293–391 (1988).

efforts to abolish the LSC.”¹⁹⁹ The bar claims it was active in 1996, saving LSC from being abolished.²⁰⁰ However, even if the bar’s past efforts were significant, prominent members of the legal profession and the organized bar must consistently and strongly press Congress to abolish those restrictions.

This is not to imply naively that rolling back restrictions will be easy, given the enmity of some members of Congress and certain special interest groups toward many legal aid cases and methods. However, at the very least, the legal profession should press for changes that would allow recipients of LSC funding to be able again to use non-LSC funds to engage in restricted activities. Prohibiting the primary LSC-funded legal services organizations in a state from using non-LSC funds for any prohibited purpose and applying the restrictions to other entities that receive transfers of LSC funds have left many states with no provider able to serve restricted clients.²⁰¹ Alan Houseman argued:

[T]hose who care about equal justice for the poor must take whatever steps possible to remove restrictions on which clients can be served and what legal services can be provided. Perhaps the most pernicious is the restriction on the use of non-LSC funds by LSC-funded recipients, which dries up funding sources that have in the past and would have in the future provided resources to serve the critical legal problems of low-income clients.²⁰²

The legal profession’s goal of removing congressional restraints on equal access to legal representation could begin, therefore, with an effort to return to the pre-1996 rules on use of non-LSC funds.

The legal profession should similarly use its influence to convince state legislatures to remove existing civil legal assistance funding restrictions and not to adopt any new restrictions that have the effect of denying access to representation to some groups or limiting the legal services they can receive. At the very least, where legislatures seem unwilling to remove all restrictions on class actions or lobbying, they should be pressed to impose only the conditions on legal services that existed prior to the 1996 congressional restrictions. Thus, class actions could be pursued where the case is first approved by the governing board of the grantee, and lobbying

¹⁹⁹ Luban, *supra* note 12, at 225.

²⁰⁰ ABA, PROMOTING PROFESSIONALISM 64 (1998) (“Since 1995, the ABA working with state and local bars, created and guided a national grassroots network reaching more than 100,000 lawyers to fight for the preservation of the Legal Services Corporation. These efforts have resulted in strong, bipartisan votes in both Houses of Congress to preserve the Corporation and its funding.”).

²⁰¹ Abel & Udell, *supra* note 27, at 880 n.26; *see supra* note 80 and accompanying text. Note, however, that with transfers of LSC funds for the sole purpose of funding private attorney involvement activities, the restrictions only apply to the LSC funds transferred. *See supra* note 132 and accompanying text.

²⁰² Houseman, *supra* note 25, at 2188 n.8.

would be allowed where the attorney determined it was necessary for the proper representation of a particular client. Even many objections to attorneys’ fees could be ameliorated by directing that any awards be placed into the state’s legal assistance fund and distributed broadly, rather than awarded to the office of the attorney handling the case.

Restrictions in judge- and lawyer-sponsored or controlled legal assistance funding and volunteer service programs also should be abolished. With these programs, the profession has no one to blame for the restrictions other than its own acquiescence to efforts to deny access to legal representation or ignorance of the effects of its program decisions. As Part IV of this Article established, the politics, interest group pressure, and hostile public sentiment that have driven Congress and state legislatures to restrict legal services should play no role, either knowingly or unwittingly, in the legal profession’s decisions on eligibility for free legal representation. Those decisions must strive for universal access. Where limited resources prevent that ideal, the profession must allocate available funds and volunteers through objective decisions motivated by a desire for equal access to legal representation and reflective of need, merit, and likely benefits.

The legal profession’s funding and volunteer lawyer program decisions must be conscious of the effect that congressional and other restrictions are having on the goal of equal access to legal representation in that particular state. Some states have done legal needs studies that have helped identify the restricted groups, sometimes referred to as “gap clients,” excluded from funding by LSC restrictions.²⁰³ Those states have then sought to ensure that decisions on how to distribute scarce legal resources take into account and seek to address these gap clients.²⁰⁴ The legal profession too should direct its attention and resources to making sure gap clients have equal access to available legal resources.

On the issue of class actions, lobbying, and other restrictions on methods of representation, with the increased devolution of government social service programs from the federal government to the state, “state level advocacy has become essential to ensuring that the rights and interests of low-income persons are protected and enhanced.”²⁰⁵ A study by Alan Houseman concluded that successful advocacy for poor persons required that each state have “a capacity independent of LSC funded

²⁰³ See, e.g., ALASKA REPORT, *supra* note 62, at 19–22; Abel & Udell, *supra* note 27, at 875 n.3, 880 n.26 (listing state reports in Alaska, California, Georgia, New Jersey, Pennsylvania, and Texas that identify gaps in access to legal services caused by the congressional restrictions).

²⁰⁴ See, e.g., WASH. STATE ACCESS TO JUSTICE BD., PLAN FOR THE DELIVERY OF CIVIL LEGAL AID TO LOW INCOME PEOPLE IN WASHINGTON STATE 6, 22–24 (2006), *available at* <http://www.wsba.org/atj/committees/2006stateplan.pdf>; Memorandum from Jamie L. Mack, Ga. Access to Justice Project, to All Attendees of the Closing the Gap Symposium (Sept. 23, 1998) (on file with author).

²⁰⁵ ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, THE MISSING LINK IN JUSTICE COMMUNITIES: THE CAPACITY IN EACH STATE FOR STATE LEVEL ADVOCACY, COORDINATION AND SUPPORT 7 (2001).

providers to engage in restricted representation that cannot be undertaken by LSC funded providers” through statewide advocacy, including representation before legislative and administrative bodies.²⁰⁶ The ABA’s standards for civil legal assistance programs seek to address this need, in part, by directing that programs provide for lobbying and class action representation.²⁰⁷ Thus, the legal profession’s efforts to expand legal assistance should address this need for unrestricted advocacy, especially in states where there is little or no legal assistance funding unencumbered by LSC restrictions.²⁰⁸

The legal profession must cease to be an accomplice in efforts to provide “liberty and justice for some.” The profession cannot paradoxically proclaim its commitment to access to legal representation and yet subvert that very goal by imposing restrictions on unpopular clients or types of legal services. If the principles of the legal profession mean anything, then all lawyers, courts, and bar organizations need to fight to ensure access to justice is truly equal and without restrictions.

²⁰⁶ *Id.* at 1, 7.

²⁰⁷ *See supra* notes 173–177 and accompanying text.

²⁰⁸ “State justice communities also must ensure that a capacity exists to provide representation on restricted cases and for clients who cannot be represented by LSC-funded providers.” HOUSEMAN, *supra* note 205, at 8.