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Mandating a Culture of Service: Pro Bono in the Law School Curriculum

*Les A McCrimmon**

Introduction

In its review of the Federal civil justice system, the Australian Law Reform Commission recommended that, “in order to enhance appreciation of ethical standards and professional responsibility, law students should be encouraged and provided opportunity to undertake pro bono work as part of their academic or practical legal training requirements.”¹ This recommendation was endorsed by the National Pro Bono Task Force in its report delivered to the Federal Attorney General in June 2001. To achieve this goal, the Task Force recommended that *all* law students should be provided with:²

- opportunities for internships/outreach programs with a pro bono focus;
- opportunities to undertake clinical experience;
- clinical components within the academic curriculum;
- stand-alone electives such as “Public Interest Advocacy”; and
- opportunities for reflection upon and critical analysis of ethical matters (including pro bono) in the classroom.

It is argued that such opportunities will instil in law students one of the fundamental values of the legal profession

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- 1 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (Sydney: ALRC, 2000), p 308.
- 2 National Pro Bono Task Force, *Recommended Action Plan for National Co-ordination and Development of Pro Bono Legal Services* (Sydney: ALRC, 2001), pp 30-31, [http://nationalecurity.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/BF617EB4FCB29BBECA256BDF0016B234/\\$file/finalreport.pdf](http://nationalecurity.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/BF617EB4FCB29BBECA256BDF0016B234/$file/finalreport.pdf) (accessed 17 June 2003).

– the desire to promote justice, fairness and morality³ for all, and in particular the poor, disadvantaged and marginalised members of society.

The first four recommended methods of instilling a pro bono ethos recommended by the Task Force may be described as falling within the parameters of clinical legal education. While, as is noted below, it is sometimes difficult to obtain consensus on what constitutes a “clinical” course, in 2002, 17 Australian law schools identified courses that they describe as “clinical”.⁴ Of these, four have introduced a mandatory clinical requirement.⁵

The primary aim of this article is to explore the pitfalls associated with the underlying assumption that a clinical component in legal education will inculcate a desire once the student leaves university and enters the legal profession to fulfil the lawyer’s professional obligation to undertake pro bono work. Related to this inquiry is whether students should be required to undertake pro bono work as a prerequisite to graduation. An effort is made to define some of the key terms in the debate, in particular “pro bono”, “clinical legal education” and “public interest”. The application of the concept of pro bono to the legal profession, and the role of the law school in fostering a culture of volunteerism is discussed, followed by an analysis of the arguments for and against the institution of a mandatory pro bono requirement in the LLB. Integral to this discussion is a consideration of the interrelated matter of cost and program structure.

Defining “Pro Bono”, “Clinical Legal Education” and “Public Interest”

Pro bono, derived from the Latin *pro bono publico*, literally means “for the public good”. Attempts have been made to

3 The promotion of justice, fairness and morality was identified by the authors of the MacCrate Report as one of the four fundamental values of the profession, the other three being: (1) the provision of competent representation; (2) striving to improve the profession; and (3) professional self-development. See also American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development – An Educational Continuum* (the MacCrate Report) Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (Chicago: ABA, 1992), p 213.

4 Kingsford Legal Centre, *Clinical Legal Education Guide 2001/2002* (Sydney: Kingsford Legal Centre, 2001).

5 University of Newcastle, University of New South Wales, University of Notre Dame Australia, and University of Wollongong. See Kingsford Legal Centre, note 4, pp 14, 16, 19, 24.

define what the term means when applied to the work carried out by lawyers. The Australian Law Reform Commission defines pro bono work as “legal services provided in the public interest by lawyers for free or for a substantially reduced fee”.⁶ This definition informs us that a primary aspect of pro bono work relates to the ultimate monetary cost (if any) of that work to the recipient. But what constitutes “legal services provided in the public interest”?

The UCLA Program in Public Interest Law and Policy (PPILP) adopts a broad definition of “public interest” as “‘all interests under-represented by the private market,’ including the poor, ethnic minorities, unpopular causes ‘across the political spectrum’ and diffuse interests (such as environment and peace)”.⁷ The Centre for Legal Process, in addition to focusing on the fees charged for legal services, places under the umbrella of “pro bono”:

... legal services that involve the exercise of professional legal skills, and are services provided on a free or substantially reduced fee basis. They are services that are provided for:

- people who can demonstrate a need for legal assistance but cannot afford the full cost of a lawyer’s services at the market rate without financial hardship;
- non-profit organisations which work on behalf of members of the community who are disadvantaged or marginalised, or which work for the public good; and
- public interest matters, being matters of broad community concern which would not otherwise be pursued.⁸

It is difficult, and some might argue counter-productive,⁹ to attempt to formulate a fixed definition of what falls within the scope of “pro bono legal services”. That said, the educational objectives of a law course designed to promote a pro bono ethos must rest on a definition. The scope of the definition will have an impact on the teaching and learning methods that can be used to achieve those objectives. If the methodology adopted is a clinical placement, defining public interest in terms of assistance targeted to the poor will impact on the range of suitable placement sites.¹⁰ For example, adopting

6 ALRC, note 1, p 304.

7 R Abel, “Choosing, Nurturing, Training and Placing Public Interest Law Students” (2002) 70 *Fordham Law Review* 1563 at 1565.

8 Law Foundation of New South Wales, *Future Directions for Pro Bono Legal Services in New South Wales* (Centre for Legal Process, 1998), p ii.

9 National Pro Bono Task Force, note 2, p 7.

10 D Rhode, “Cultures of Commitment: Pro Bono for Lawyers and Law Students” (1999) 67 *Fordham Law Review* 2415 at 2442.

such a definition may give a green light to a placement at an organisation targeting access to antiretroviral treatment for persons living with HIV, for example Medecins Sans Frontieres, but a red light to a placement in the legal department of a multi-national pharmaceutical company. For the purpose of this discussion, the definition put forward by the Centre for Legal Process will suffice, but it is certainly not the only definition that can be adopted.¹¹

Less elusive in terms of definition is “clinical legal education”. It generally means a student’s involvement with “real clients” in a legal centre¹² or through a placement program or internship.¹³ Used in this sense, the term refers to, “any law school course or program in which law students participate in the representation of actual clients under the supervision of a lawyer/teacher”.¹⁴ Giddings notes that “there is clearly scope for other models and combinations of models to be used”, and suggests that:

sites for clinical teaching can be usefully characterised by way of a clinical continuum which relates to the degree of control exercised over the teaching setting. The emphasis on critique and reflection is a constant while control over the environment varies.¹⁵

This would accommodate a more expanded notion of “clinical” which includes, but is not limited to, the use of role plays, case simulations, moots and gaming.¹⁶

The use of clinical methods to promote a pro bono ethos sits most comfortably with the features Rice and Coss identify as defining “clinical” from other forms of legal education:

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- 11 See generally National Pro Bono Task Force, note 2, pp 4-8.
 - 12 See, eg, S Campbell, “Blueprint for a Clinical Program” (1991) 9 *Jour of Prof Legal Ed* 121 at 122; F Bloch, “The Andragogical Basis of Clinical Legal Education” (1982) 35 *Vanderbilt Law Review* 321 at 326.
 - 13 For a discussion of external placement programs, see G Coss, “Field Placement (Externship) – A Valuable Application of Clinical Education” (1993) 4 *Legal Ed Rev* 29. Cf: L Lundy, “The Assessment of Clinical Legal Education: An Illustration” (1995) 29 *Law Teacher* 311; J Motley, “Self-Directed Learning and the Out-of-House Placement” (1989) 19 *New Mexico Law Review* 211. See generally, S Rice and G Coss, *A Guide to Implementing Clinical Teaching Method in the Law School Curriculum* (Sydney: Centre for Legal Education, 1996), pp 9-10.
 - 14 Bloch, note 12.
 - 15 J Giddings, “A Circle Game: Issues in Australian Clinical Legal Education” (1999) 10 *Legal Ed Rev* 33 at 35.
 - 16 For an explanation of case simulations and gaming, see K Mack, “Bringing Clinical Learning into a Conventional Classroom” (1993) 4 *Legal Ed Rev* 89 at 93 et seq. See also R Grimes, “The Theory and Practice of Clinical Legal Education” in J Webb and C Maughan (eds), *Teaching Lawyer’s Skills* (London: Butterworths, 1996), pp 137-166.

- 1 the presence of a real client in the student's activities;¹⁷
- 2 a focus on ethics and professionalism, social needs and the lawyer's role in society, rather than development of legal skills competency;¹⁸ and
- 3 emphasis on community service to people with legal need but without the resources to address the need to a sufficient degree or at all.¹⁹

Following on from the discussion of the meaning of "pro bono", an emphasis on the following, provided that it is coupled with the supervision of a lawyer/teacher, could be considered as a sub-set of Rice and Coss's third defining feature:

- participation in "non-profit organisations which work on behalf of members of the community who are disadvantaged or marginalised, or which work for the public good";²⁰ and
- "interests under-represented by the private market, including the poor, ethnic minorities, unpopular causes 'across the political spectrum' and diffuse interests".²¹

Pro Bono and Clinical Legal Education: Similar but not Synonymous

Both the ALRC and the National Pro Bono Task force have identified clinical legal education as an excellent vehicle to instil in students the importance of pro bono contribution of legal services. However, it is important to keep in mind that while clinical courses and pro bono projects share common attributes, they are separate and distinct entities. This point is made in the Association of American Law Schools Pro Bono Project Report, *Learning to Serve*:

Both clinics and pro bono projects serve important educational values. They each provide students with an opportunity to learn about the needs of people who are poor. They each provide an opportunity to learn about the satisfactions [sic] of serving a client. But the principle goal of most clinics is to teach students lawyering skills and sensitivity to ethical issues through structured practice experiences and opportunities to think about and analyze those experiences. By contrast, the most important single function of pro bono projects is to open students' eyes to

17 Rice and Coss, note 13, p 9.

18 Rice and Coss, note 13, p 10.

19 Rice and Coss, note 13, p 11.

20 Law Foundation of New South Wales, note 8.

21 Abel, note 7, at 1565.

the ethical responsibility of lawyers to contribute their services.²²

The AALS Report alerts us to an important point. When assessing the viability of a pro bono project, the overall goals and educational objectives are determinative. Both clinicians and law school administrators should analyse critically the belief that a clinical program can achieve a myriad of educational objectives – for example skills competency, an understanding of ethical and professional responsibilities, *and* inculcate a pro bono service ethic that will manifest in professional practice. If the clinical experience is properly structured, this belief may be justified, however too often clinical programs and courses are implemented on the *assumption* that they will achieve their stated objectives – however diverse those objectives may be. For now, it is sufficient to highlight a danger implicit in the recommendations of both the ALRC and the National Pro Bono Task Force. Law schools should not assume that “even a good pro bono program is a substitute for a clinical program, or that a good clinical program eliminates the need for a law school to support student pro bono projects”.²³ While similar, the two are not synonymous. This danger is particularly acute in Australia, where neither clinical legal education nor student pro bono projects are entrenched in the undergraduate law curriculum.

The following illustrates the practical relevance of this point. If the focus is on learning values rather than legal skills, can non-legal community service fall within the definition of “pro bono”? At least one law school, Gonzaga University Law School²⁴ in the United States, has given an answer in the affirmative. The majority view appears to be that such service, while valuable, lacks the application of legal skills required to bring the activity within the parameters of “clinical legal education”.²⁵ This view has merit if we want our students to participate in a “clinical legal education” experience. However,

22 Association of American Law Schools Commission on Pro Bono and Public Service Opportunities, *Leaning to Serve: The Findings and Proposals of the AALS Commission on Pro Bono and Public Service Opportunities* (Washington: AALS, 1999), <http://www.aals.org/probono/report.html> (accessed 17 June 2003).

23 Association of American Law Schools Commission on Pro Bono and Public Service Opportunities, note 22.

24 Each student must complete 30 hours of public service after the first year of law school as a requirement for graduation. See Gonzaga University Law School, Public Service Requirement <http://law.gonzaga.edu/PublicService/PSR.htm> (accessed 17 June 2003).

25 C Rosas, “Mandatory Pro Bono Publico for Law Students: The Right Place to Start” (2002) 20 *Hofstra Law Review* 1069 at 1088.

if the goal is to inculcate a culture of commitment to public service work following graduation, there appears to be no reason why non-legal volunteer work at an appropriate site should not satisfy the pro bono requirement. Admittedly such service would not qualify as “pro bono *legal* service”, but law students are not yet lawyers. At the risk of repetition, if we accept the dichotomy identified by the AALS Pro Bono Project Report, our goal as legal educators should be to “open our students’ eyes to the ethical responsibility of lawyers to contribute their services”.²⁶ If one method we use to achieve this goal is mandatory “service”, the absence of “law” in the “service” should not necessarily preclude such activity from satisfying the pro bono requirement, even if it would not qualify as a clinical legal education experience. What now needs to be considered is whether *mandating* service is an appropriate way to “open our students’ eyes”.

Inculcating a Culture of Service

There is little argument that the provision of pro bono legal services is a professional obligation owed by legal practitioners.²⁷ This obligation rests on four pillars:

- 1 lawyers, as officers of the court and members of a profession, have a duty to facilitate access to justice by all members of society, including those without the financial resources to retain their services;²⁸
- 2 lawyers have the specific skills and training necessary to provide legal services;²⁹
- 3 lawyers have an exclusive licence to provide legal services, and “as a monopolist, [lawyers] should allocate some of [their] monopoly profits to a manifest public need that is related to the monopoly”;³⁰ and

²⁶ Association of American Law Schools Commission on Pro Bono and Public Service Opportunities, note 22.

²⁷ KB Glen, “Pro Bono and Public Interest Opportunities in Legal Education” (1998) 70 *New York State Bar Journal* 20.

²⁸ D Webb, “Why Should Poor People Get Free Lawyers” (1998) 28 *VUWLR* 65 at 76; R E Loder, “Tending the Generous Heart: Mandatory Pro Bono and Moral Development” (2001) 14 *Georgetown Journal of Legal Ethics* 459 at 462-463; Rhode, note 10, at 2418.

²⁹ J Baillie and J Bernstein-Baker, “In the Spirit of Public Service: Model Rule 6.1, The Profession and Legal Education” (1994) 13 *Law and Inequality* 51 at 61; Rhode, note 10.

³⁰ R Cramton, “Delivery of Legal Services to Ordinary Americans” (1994) 44 *Case W Res L Rev* 531 at 581; Loder, note 28, at 463.

4 representing the poor exposes lawyers to the impact of the legal system on disadvantaged segments of society.³¹

While the existence of the obligation is not seriously questioned, there is evidence that the profession's commitment to pro bono has been declining, due in large part, it is suggested, to the application of competition policy to the market for legal services.³² In an attempt to counter this trend, law schools, as the primary portal for entry into the legal profession, have a role to play. A specific recommendation is contained in the National Pro Bono Task Force Report. It recommends that the Council of Australian Law Deans (CALD), on which all Australian law schools are represented, review their policies and institutional commitment to clinical and pro bono placement programs. The Task Force urged CALD to "consider the development of national policy about whether at least one such program should be a compulsory part of the curriculum for all law students".³³ This raises two related questions. Can law schools mandate participation in a pro bono program? If so, should such a policy be adopted?

The first question can be disposed of briefly; the answer is "yes". I agree with Loder who notes that:

[a] student explicitly consents to substantive and procedural educational constraints by applying for admission to a degree-granting program. Students temporarily relinquish full autonomy to the experienced judgment of educators as part of the educational bargain. ... Intervention into the educational decision-making of the law student is not a unilateral limitation on freedom for the student's own good, since the student voluntarily assents to the limits.³⁴

By voluntarily agreeing to undertake the LLB, students agree to the curriculum requirements of the degree program. The university has a corresponding obligation to ensure that the contents of the program are pedagogically sound. This proposition is uncontroversial, and reflects current practice. In an effort to adhere to the recommendations of the 1992 Report of the Consultative Committee of State and Territorial Law Admitting Authorities,³⁵ most Australian law schools prescribe a "core" of courses around the following 11 areas of

31 Cramton, note 30, at 582.

32 National Pro Bono Task Force, note 2, pp 29-30.

33 National Pro Bono Tsk Force, note 2, p 32.

34 Loder, note 28, at 491.

35 Consultative Committee of State and Territorial Law Admitting Authorities, *Uniform Admission Requirements*, Discussion Paper and Recommendations (1992).

legal knowledge: criminal law and procedure, torts, contracts, property (including Torrens land systems), equity (including trusts), administrative law, Federal and State constitutional law, civil procedure, evidence, professional conduct and company law.³⁶ Mandating a pro bono requirement would sit comfortably within “professional conduct”.

One might argue on pedagogical grounds that no law course should be required, however there is no question that the university has both the capacity and the authority to require students to undertake a prescribed “core” of courses as a prerequisite to conferral of the degree. In this regard, arguments often relied upon by practising members of the legal profession to rebut attempts to introduce a mandatory pro bono requirement for lawyers – such as it is unjust to single out lawyers as a group to subsidise a collective societal obligation, that is, access to justice³⁷ – carry little weight. If the provision of pro bono legal services is a professional obligation owed by all lawyers, then a curriculum requirement that fosters a student’s commitment to pro bono work is a justifiable component of the LLB. The issue is not *whether* participation in a pro bono program can be mandated, but rather *should* such a requirement be imposed. The answer to this question is more complex.

Arguments For and Against Mandatory Pro Bono in Law Schools

Arguments for and against mandatory pro bono in law schools focus on two aspects of the law school’s mission:

- 1 the obligations owed by law schools as an institutional member of the legal profession; and
- 2 the role played by law schools in shaping a student’s values and aspirations.

The first is only tangentially relevant to the central thesis of this article, and can be dealt with briefly. The second requires a more detailed analysis.

36 These areas of knowledge are commonly referred to as the “Priestley 11”, after the Chair of the Consultative Committee, The Hon Justice LJ Priestley.

37 See Loder, note 28, at 491; Rhode, note 10, at 2419.

Law School as an Institutional Member of the Legal Profession

It has been suggested that law schools, as an integral part of the legal profession, “owe a concomitant obligation to perform a type of ‘institutional pro bono’ ”.³⁸ Australian law schools with a clinical component in their curriculum which focuses on public interest work are, to a varying extent, fulfilling this obligation, but, as has been noted above, this only represents slightly over half of the nation’s law schools. For the remainder, it might be argued that such an obligation does not apply in an Australian context, where the majority of students who undertake the LLB are in a combined degree program. Further, a significant number of Australian legal academics do not hold and are not, as a result of barriers to admission, such as the completion of practical legal training, eligible to hold a practising certificate. Finally, due to funding constraints, discussed in greater detail below, the provision of clinical opportunities as a vehicle for students and staff to engage in pro bono work is beyond the financial capacity of a number of the nation’s law schools.

These arguments have merit, however an institutionalised pro bono obligation can go beyond the provision of legal advice and service to disadvantaged segments of the community. Institutionalised pro bono also includes research and scholarship that benefits the poor and under-represented.³⁹ In this respect, all law schools are in a position to provide such a service. Many legal academics are already engaged in such research and scholarship, and this work could form the foundation for new courses, or new components in existing courses. In addition, the prevalence of interim assessment in courses offered in Australian law schools provides an excellent vehicle for law students to become engaged actively in this process.

At the end of the day, law schools are the primary gatekeepers to the legal profession, and research indicates that 80% of Australian law graduates are engaged in legal work for at least some period after graduation.⁴⁰ Even if a clinical program is beyond the financial capacity of a law school, an obligation exists to perform some form of “institutional pro bono”.

38 Baillie and Bernstein-Baker, note 29, at 66.

39 Baillie and Bernstein-Baker, note 29, at 66.

40 M Karras and C Roper, *The Career Destinations of Australian Law Graduates* (Newcastle: Centre for Legal Education, 2000), p 41.

Law School's Role in Shaping a Student's Values and Aspirations

Studies support the view that "law school is as much a professional socialization experience as it is a scholarly and skills building enterprise".⁴¹ Unfortunately, research also suggests that the law school experience plays a significant role in devaluing the importance of public interest work.⁴² The corporate/commercial bias evidenced in the course offerings of most law schools may contribute to this phenomenon by marginalising courses focusing on poverty issues. This produces a "latent curriculum" which contributes significantly to a student's commitment or, perhaps more accurately, lack of commitment, to social justice issues following graduation.⁴³

Daicoff, in a comprehensive review of the research into the effects of law school on the characteristics and attitudes of law students, notes that students who "come to law school with a 'rights' orientation . . . are either unchanged or graduate with their orientation further ingrained".⁴⁴ Those with a "rights orientation" are characterised by a propensity toward "rights and justice, logic, thinking, and rationality without regard to their personal values".⁴⁵ Daicoff goes on to note that "[t]hose who come to law school with an 'ethic of care', appear to adopt a rights orientation by the end of the first year."⁴⁶ The research suggests that "[t]here is evidence, although not entirely uncontroverted, that law students' altruism and interest in

41 Baillie and Bernstein-Baker, note 29, at 67. One study by Evans is interesting in that it focuses specifically on law students' values. In relation to clinical experience, which, given the study sample is defined as those who had worked in a "real client" clinic, Evans' study "suggests, but does not confirm, that clinical experiences may make some difference to the attitudes that lawyers hold": A Evans, "Lawyer's Perceptions of Their Values: An Empirical Assessment of Monash University Graduates in Law, 1980-1998" (2001) 12 *Legal Ed Rev* 209.

42 J Chaifetz, "The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School" (1993) 45 *Stanford Law Review* 1695 at 1701; A Stone, "The Public Interest and the Power of Feminist Critique of Law School: Women's Empowerment of Legal Education and its Implications for the Fate of Public Interest Commitment" (1997) 5 *Amer Jour of Gender and Law* 525 at 530-531; R Stover and H Erlanger, *Making It and Breaking It: The Fate of Public Interest Commitment During Law School* (Chicago: University of Illinois Press, 1989) pp xix-xx.

43 Chaifetz, note 42, at 1698-1699; Baillie and Bernstein-Baker, note 29, at 65-66.

44 S Daicoff, "Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism" (1997) 46 *American University Law Review* 1337 at 1405-1406.

45 Daicoff, note 44, at 1405.

46 Daicoff, note 44, at 1405-1406.

public service decrease more than do other professionals' as a result of professional school and practice."⁴⁷

Daicoff's conclusions must be viewed with caution due to the heavy reliance on dated studies.⁴⁸ While not directly on point, recent empirical evidence available in Australia appears to support the observed indifference of law graduates to public interest work. From the data distilled from a recent survey of 700 Monash University law graduates, Evans concludes that "there is significant hesitation, possibly even a lack of sufficient interest, in working for the public good".⁴⁹ Evans qualifies his observations by noting that the results are "preliminary"⁵⁰ and that research into lawyers' values and correlating behaviour across many different jurisdictions is needed.⁵¹ However, at the very least the study highlights the possibility of disjunction between the law graduates' values and the professional obligation to perform pro bono legal work.

To counter the impact of this "latent curriculum" on a law student's values and aspirations, the following benefits of mandating a pro bono requirement in the curriculum are identified:

- By mandating pro bono, law schools address the corporate/commercial bias by making work for the poor and under-represented both legitimate and manifest;⁵²
- A law school's adoption and maintenance of such a program "is the strongest possible way for the school to convey the seriousness with which the school takes the message about the importance of volunteer service. A required program becomes a part of the fabric of the school";⁵³ and
- A mandatory requirement will ensure that those students who may benefit most, namely those who are least likely

47 Daicoff, note 44, at 1406. See also Aiken, who asserts that legal educators "are actively training students to divorce themselves from issues relating to justice, fairness and morality": J Aiken, "Striving to Teach 'Justice, Fairness, and Morality'" (1997) 4 *Clinical Law Review* 1 at 8.

48 In support of these propositions, Daicoff places heavy reliance on a 1963 study conducted by Miller, reported in P Miller, "Personality Differences and Student Survival in Law School" (1967) 19 *Jour of Legal Ed* 460 and on a study by Schwartz, reported in A Schwartz, "Law, Lawyers, and Law School: Perspectives from the First-Year Class" (1980) 30 *Jour of Legal Ed* 437.

49 Evans, note 41, at 240. The study included students who had graduated from Monash University Law School in the period 1980-1998.

50 Evans, note 41, at 265.

51 Evans, note 41, at 213.

52 Chaifetz, note 42, at 1709.

53 Association of American Law Schools Commission on Pro Bono and Public Service Opportunities, note 22.

to volunteer, are exposed to the unmet need which such programs address.⁵⁴ Having been exposed to such need, the student is more likely to volunteer her or his legal services following graduation.

The first two points are relatively uncontroversial. The third benefit, which is perhaps the mandatory pro bono advocate's strongest point, requires a more detailed analysis. Can those charged with the responsibility of developing a curriculum rely on the arguably self-evident proposition that mandating pro bono service will inculcate a desire to fulfil the lawyer's professional obligation to undertake pro bono work following graduation? Given the empirical evidence which indicates that the law school experience likely devalues a student's commitment to pro bono work, one might conclude that, while mandating pro bono may not help, it certainly can't hurt. This assessment is seductive in its simplicity. Unfortunately, as I attempt to illustrate below, it may also be incorrect. Failure to structure the mandatory service properly may simply reinforce a student's pre-existing beliefs.⁵⁵ If a belief is founded on erroneous views and assumptions, mandating service to a disadvantaged group has the potential to "do more harm than good".

Can Empathy be Cultivated?

Proponents of a mandatory pro bono requirement often assert that:

... those students who experience pro bono service while in law school are more likely to continue to perform such work as attorneys, perhaps effecting a "trickle-up" phenomenon among their senior colleagues who have previously failed to satisfy their pro bono obligation.⁵⁶

In support of this proposition, reliance is often placed on personal observations and feedback from program participants.⁵⁷ Student evaluations, while a useful indicator

54 Rhode, note 10, at 2432; Rosas, note 25, at 1076.

55 Aiken, note 47, at 26-27.

56 Rosas, note 25, at 1078.

57 For example, "According to administrators who oversee the program at Penn, 94 percent of the school's last graduating class said they would do pro bono work again if given a choice": F Barbera, "Yard Work: Harvard Law Revives Mandatory Pro Bono Debate" (2000) 86 ABA Jour 26 at 26; "In surveys at several schools with pro bono requirements, most students report that public service experience has increased their willingness to contribute pro bono services after graduation": Association of American Law Schools Commission on Pro Bono and Public Service Opportunities, *Leaning to Serve: The Findings and Proposals of the AALS Commission on*

of current intent, are of limited value in determining whether the pro bono experience will have an impact on the student's future motivation to engage in pro bono work. Comprehensive longitudinal studies comparing the commitment to volunteerism of those who have participated in a pro bono program with those who have not, needs to be undertaken. To date, there is a paucity of empirical research in this area.⁵⁸

The proposition that exposure to the needs of the poor and disadvantaged will manifest in an ongoing commitment to pro bono service is often based on the following syllogism:

- 1 empathy can be cultivated;
- 2 exposing people to the needs of the poor and disadvantaged can facilitate empathy; therefore
- 3 mandating pro bono service to the poor and disadvantaged will instil empathy and change people's attitudes about the group as a whole.⁵⁹

Empathy can be cultivated and exposing people to the needs of the poor and disadvantaged can facilitate empathy, however exposure alone will not change a person's attitudes about the group as a whole. Loder notes:

Although empathy on the whole is an important emotion in serving people of limited fortune, greater exposure to impoverished or needy clients is not enough on its own to instill empathy. Indeed, derogating the victim is also a likely response, with the poor person being held responsible for his [sic] condition. Where negative stereotypes about poor people exist, empathy is not a default response.⁶⁰

Aiken refers to the reinforcing of negative views and assumptions about the group being served as "confirming moments". She notes that "[a]dult learning theory suggests that we search for ways to confirm rather than challenge or own meaning schemes. This is particularly troubling when those meaning schemes are founded upon sexist, classist, or

Pro Bono and Public Service Opportunities, Foreword (Washington: AALS, 1999), <http://www.aals.org/probono/report.html> (accessed 17 June 2003); "A survey of Tulane's class of 1990 found that sixty-five percent said the program had 'increased their willingness to provide pro bono services' after graduation ...": C Durham, "Law Schools Making a Difference: An Examination of Public Service Requirements" (1994) 13 *Law and Inequality* 39 at 49.

58 Evans' study is a good start, but he acknowledges that more empirical work needs to be done. See Evans, note 41, at 265.

59 The formulation of this syllogism is based largely on Loder, note 28, at 481-482. However, as the discussion will make clear, Loder does not ascribe to such an analysis.

60 Loder, note 28, at 482.

racist thinking”.⁶¹ Other risks of empathy include “burnout”,⁶² detachment, if the empathy is not accompanied by “outlets or effective translation into action”,⁶³ and bias, which may conflict with the need for impartial objectivity.⁶⁴

Loder also draws our attention to the “overjustification effect”, which may accompany coercive volunteerism. The “overjustification hypothesis” is that, “a person’s intrinsic interest in an activity may be undermined by inducing him [sic] to engage in that activity as an explicit means to some extrinsic goal”.⁶⁵ In other words, if a person comes to law school with a pre-existing desire to engage in pro bono work, mandating the task may reduce interest and participation in the mandated activity.⁶⁶ Stukas and his colleagues suggest that this diminished interest in volunteer activities may be attributed to two factors. First, mandating service may alter an individual’s perception of why they volunteer. “If mandated students begin to perceive that they help only when required or rewarded, then their intentions to freely engage in volunteer service in the future may be reduced.”⁶⁷ Second, requirements may engender “psychological reactance”.⁶⁸ In other words, “limiting an individual’s freedom to act may lead to desires to re-establish that freedom, which can be accomplished by derogating the forced activity and by refusing to perform it once the mandate has been lifted”.⁶⁹

If we accept that the “over-justification effect” exists, research suggests that it may impact most heavily on those who already come to law school with an ethic of volunteer service.⁷⁰ This cohort may not represent the majority of law students. What effect will institutionalising a pro bono requirement have on students who would not otherwise engage in such work? Stukas’ research suggests that externally imposed incentives to volunteer, whether in the form of a requirement or a reward, may reduce interest in the activity.⁷¹ This highlights the need to give detailed consideration to the decision to implement a

61 Aiken, note 47, at 26-27.

62 Loder, note 28, at 481-482.

63 Loder, note 28, at 483.

64 Loder, note 28, at 483.

65 Loder, note 28, at 472, citing the definition in M Lepper, “Undermining Children’s Interest with Extrinsic Reward: A Test of the ‘Overjustification’ Hypothesis” (1973) *Journal of Personal and Social Psychology* 129 at 130.

66 Loder, note 28, at 473.

67 A Stukas, M Snyder, E G Clary, “The Effects of ‘Mandatory Volunteerism’ on Intentions to Volunteer” (1999) 10 *Psychol Sci* 59.

68 Stukas et al, note 67.

69 Stukas et al, note 67.

70 Loder, note 28, at 474. Cf Stukas, note 67, at 61.

71 Stukas, note 67, at 59; Loder, note 28, at 476.

pro bono requirement, and if such a decision is made, care must be taken in structuring the method used to enforce the obligation.

It must be emphasised that most of the social science research discussed above is not law specific.⁷² Further, social scientists are not unanimous in their acceptance of the existence, or impact, of the “over-justification effect”.⁷³ However, as Loder cautions, “empirical information about dampening effects on motivation should not be ignored in discussions of institutionalized service”.⁷⁴ There is clearly a need for empirical research into the impact of mandated service on law students. It may be that the acknowledged existence of a legal practitioner’s professional obligation to engage in pro bono work may abrogate or lessen the psychological pitfalls of mandated service. Until such research is carried out, we can only speculate. With that caveat in place, I suggest that a clear lesson to be gleaned from the existing research is that the students’ exposure to disadvantaged or marginalised individuals or groups needs to be handled with great care. Simply participating in a pro bono program while at law school will not necessarily manifest in a willingness to engage in pro bono work following graduation. The experience must be monitored closely to ensure that the educational objective – that is, to foster or, in some cases, to inculcate, an ethic of volunteer service – is achieved. Some thoughts on how this might be done are set out in the penultimate section. However, before we engage in that discussion, we must first address the perennial question of funding.

Show Me the Money: Resourcing Mandatory Pro Bono in the LLB

In Australia, law has been viewed by government and by university administrations as a discipline that can be taught with high student/staff ratios at a low capital cost.⁷⁵ Wade suggests that this assessment has its roots in the first half of the 20th century when Australian legal education, like its North American counterpart, “marched willingly into the Langdellian trap of low cost – large lecture hall – appellate

72 For example, the studies conducted by Stukas and his colleagues involved undergraduate business students and undergraduate psychology students: Stukas, note 67, at 60, 62.

73 See, eg, Stukas, note 67, at 59. See also Loder, note 28, at 475-476.

74 Loder, note 28, at 473.

75 D Weisbrot, “Recent Statistical Trends in Australian Legal Education” (1991) 2 Legal Ed Rev 218 at 221.

casebook education on the cheap".⁷⁶ This, coupled with the fact that before the end of World War II law teachers were drawn almost exclusively from the practising profession who did not rely on teaching for their livelihood,⁷⁷ secured law's place at the end of the funding cue.

In the 1990s, the Federal Government's approach to the funding of the discipline of law was reflected in the Relative Funding Model (RFM) for higher education. This model, introduced in 1991, was used as the basis of a one-off adjustment of funding to public universities. It is still used by many university administrations to justify the allocation of funds within the institution.⁷⁸ Law, as evidenced by Table 1 below, was placed in cluster 1, the lowest funding level.⁷⁹

Goldsmith notes that "[c]ritics have pointed to the limited sample upon which the calculations were based, which included two notoriously under-funded law schools, and to the lack of discrimination between LLB teaching costs and law for non-lawyers."⁸⁰ However, the RFM does not represent a departure from the status quo. "As long ago as 1964 the Martin Report⁸¹ was noting law's inferior funding position against most other disciplines."⁸² It is axiomatic that inadequate funding has a direct impact on student/staff ratios. This, in turn, impacts on the ability to incorporate pedagogically sound pro bono requirements in the curriculum.

76 J Wade, "Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges" (1994) 5 Legal Ed Rev 173 at 184.

77 M Tsamenyi and E Clark, "An Overview of the Present Status and Future Prospects of Australian Legal Education" (1995) 29 *Law Teacher* 1 at 2. The authors note: "[i]t was not until the 1930s that any Australian law school (except Sydney) had more than one full-time teaching staff; and by 1946 there were only 15 full time law teachers throughout the country." See also Centre for Legal Education and The Committee of Australian Law Deans, *The Cost of Legal Education in Australia. The Achievement of Quality Legal Education: A Framework for Analysis* (Sydney: Centre for Legal Education, 1994), p 9.

78 Centre for Legal Education and The Committee of Australian Law Deans, note 77, p 2; Giddings, note 15, at 45; A Goldsmith, "Why Should Law Matter? Towards a Clinical Model of Legal Education" (2002) 25 UNSWLJ 721 at 730.

79 Centre for Legal Education and The Committee of Australian Law Deans, note 77, p 2.

80 Goldsmith, note 78, at 730.

81 Committee on the Future of Tertiary Education in Australia, *Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia* (the Martin Report) (Commonwealth of Australia, Canberra: 1964).

82 Centre for Legal Education and The Committee of Australian Law Deans, note 77, p 1.

Table 1
Relative Funding Model: Clustering of Undergraduate
Disciplines and Relative Weightings

Cluster	Discipline	Relative Weight
1	Law Accounting Administration/ Economics Other Humanities	1.0
2	Behavioural Science Education Mathematics/ Statistics Other Social Studies	1.3
3	Computing Nursing Other Built- Environment Other Health Other Languages Visual/Performing Arts	1.6
4	Engineering Science Surveying	2.2
5	Agriculture Dentistry Medicine Veterinary Science	2.7

The authors of the "Pearce Report" into tertiary legal education in Australia noted that, in 1984, the average student/staff ratio in law was 20.8:1.⁸³ According to a study completed in 1993 by the Centre for Legal Education, the average student/staff ratio has, based on figures received from 20 Australian law schools, declined slightly. This study found that the average student/staff ratio of the 20 law schools surveyed was 18.8:1.⁸⁴ Whether this figure applies today is questionable.⁸⁵

83 Commonwealth Tertiary Education Commission, *Australian Law Schools: A Discipline Assessment* (the Pearce Report) (Vol 1, 1987), p 160.

84 Centre for Legal Education and The Committee of Australian Law Deans, note 77, at 60. The following law schools were surveyed: Australian National University, Bond University, Deakin University, Flinders University, Griffith University, James Cook University, LaTrobe University, Macquarie University, Monash University, Murdoch University, The University of Newcastle, The University of New South Wales, The University of the Northern Territory, The University of Queensland, Queensland University of Technology, The University of Sydney, The University of Tasmania, The University of New England, University of Technology Sydney, and The University of Western Australia.

85 Goldsmith asserts that "[l]aw not uncommonly has ratios in the low to mid 20s or even higher". See Goldsmith, note 78, at 722.

The National Pro Bono Task force identified clinical experience as an effective way to enable students to undertake pro bono work in their undergraduate legal education.⁸⁶ For the reasons discussed in the next section, I agree with this recommendation. However, it must be acknowledged that the implementation of this recommendation has significant cost implications. It has been suggested that the student/staff ratio for a clinical course should not exceed 8:1.⁸⁷ Used in this sense, “clinical course” refers to supervised student interaction with real clients in a legal centre. A placement program, which is arguably the most feasible way to accommodate a mandatory pro bono requirement, may allow for a larger student/staff ratio because the individual supervision occurs at the placement site. From the law school’s perspective, the optimum student/staff ratio is governed by the seminar component, which is an essential element of any externship program. In my experience, ratios above 14:1 impact significantly on the teacher’s ability to provide feedback, monitor reflection, facilitate insight and structure meaningful discussion within a seminar setting.

The cost to the faculty of maintaining a clinical program can be substantial. For example, the Kingsford Legal Centre, a “real-client” clinic operated by the University of New South Wales – which is the medium used to accommodate the students’ mandatory clinical requirement at that institution’s law school – required a deficit funding infusion from the Faculty of Law of \$240,257.38 in 2000⁸⁸ and \$277,130.82 in 2001.⁸⁹ Placement programs are generally perceived as less expensive,⁹⁰ however the American law school experience indicates that the administrative and related costs of mandatory pro bono programs based on externships can be substantial.⁹¹ For the

86 National Pro Bono Task Force, note 2.

87 D Flint, “Financing Law Schools” (1991) 9 *Jour of Prof Legal Ed* 73 at 77.

88 Kingsford Legal Centre, *Annual Report 2000* (Sydney: Kingsford Legal Centre, 2000), p 28.

89 Kingsford Legal Centre, *Annual Report 2001* (Sydney: Kingsford Legal Centre, 2001), p 36: the significant increase in deficit funding in 2001 appears to be attributable to expenditure on capital equipment. For a discussion of the costs associated with clinical legal education in the United States, see M Barry, J Dubin, and P Joy, “Clinical Education for this Millennium: The Third Wave” (2000) 7 *Clinical Law Review* 1 at 18-30.

90 Rice and Coss, note 13, p 51; Barry, Dubin and Joy, note 89, at 22.

91 Based on somewhat dated figures from the mandatory pro bono programs offered by Tulane University and the University of Pennsylvania, “[t]he cost to a law school of administering a mandatory pro bono program ... runs in excess of \$100,000 [USD] per year”: S Befort and E Janus, “The Role of Legal Education in Instilling an Ethos of Public Service Among Law Students: Towards a Collaboration Between the Profession and the Academy on Professional Values” (1994) 13 *Law and Inequality* 1 at 17. See also L Calderon, L Bortstein, R Frommer, D Karp and J Silverstein,

reasons discussed in greater detail below, a full-time academic member of staff should take responsibility for coordinating the placements and the seminar program. At least one full-time administrative person is required to accommodate the number students participating in the program each year. The number of academic staff required to teach in the seminar program depends on the number of students completing the requirement and the frequency of the seminars. To maintain an acceptable student/staff ratio, the number could be significant.

Law faculties attempting to shoulder the financial burden of mandatory pro bono programs are in a very difficult position. The development and implementation of such initiatives may require the reallocation of financial and staff resources. In addition to the obvious resource implications of attempting to achieve the low student/staff ratios that the seminars require, faculty involved in program development will need time to do the job properly. This may necessitate a short-term release from teaching, or a reduction in course load. Further, faculty with experience in clinical teaching may have to be recruited. Given the increasing demands on shrinking funds, mandatory pro bono initiatives, “simply may not rank high enough in any constituency’s pecking order to become an institutional priority”.⁹²

If the recommendation that all law students be “provided opportunity to undertake pro bono as part of their academic or practical legal training requirements”⁹³ is to move from aspiration to reality, the funding pie must be expanded. This will require the coordinated efforts of the major stakeholders – university administrations, law schools, government, the private legal profession, and the students themselves. It will also require the participation of faculty alumni and private foundations – a relatively untapped resource to date in Australia. Law students are already bearing a greater proportion of the cost of their legal education. Goldsmith notes that, from 1983 to 1994, student charges in the form of HECS increased from 0% to 13%,⁹⁴ and this percentage contribution continues to increase.⁹⁵ In the same period, “governments in Australia managed to reduce their contributions from 91 per

“Mandatory Pro Bono for Law Students: Another Dimension in Legal Education” (1993) 1 *Jour of Law and Policy* 95 at 105.

92 Rhode, note 10, at 2439.

93 Australian Law Reform Commission, note 1, p 308.

94 Goldsmith, note 78, at 725.

95 Goldsmith, note 78, at 725. If the reforms announced by the Federal Minister for Education, Science and Training on 13 May 2003 come into effect, law students will continue to pay a disproportionate share

cent in 1983 to 62 per cent by 1994",⁹⁶ and this trend shows no signs of reversing.

While overall government funding to higher education is in decline, in 1998 the Commonwealth Government did allocate \$1.74 million dollars over four years to encourage the development of clinical legal education programs. Giddings notes that this was "a significant development for Australia's small clinical legal education (CLE) movement which, with only one exception, had not previously received direct Federal funding".⁹⁷ While such initiatives are welcome, this source of funding will come to an end in 2003, and it remains to be seen whether the Commonwealth will put more money into clinical legal education. Further, the money allowed only four clinical projects to go forward. Two new clinics were established, and the remaining funds were used to maintain existing programs.⁹⁸

Structuring a Pro Bono Program

At the risk of falling into the trap I cautioned against earlier, that is, undue reliance on anecdotal evidence, I do believe that a clinical experience can instil in students a desire to promote justice, fairness and morality for the poor, disadvantaged and marginalised members of society.⁹⁹ We can hope that this experience will play some part in motivating students to fulfil their professional obligation to provide pro bono legal services following graduation. It follows that the more students who have an opportunity to engage in volunteer service through participation in a *properly structured clinical experience*, the

of their course cost (compared to students in other disciplines) through HECS contributions. For example, by 2005 universities will be allowed to charge up to \$8,355 a year for a place in law, dentistry, medicine and veterinary science. The current government contribution for law is \$1,509. By contrast, the current government contribution for the other disciplines noted is \$15,422. These figures are based on information provided by the DEST at <http://www.backingaustraliasfuture.gov.au> (accessed 16 June 2003), and reported in *The Australian Higher Education Supplement* (4 June 2003), p 31.

96 Goldsmith, note 78, at 725.

97 Giddings, note 15.

98 Giddings, note 15. Giddings notes that new projects were established at Griffith University and Monash University. Murdoch University and the University of New South Wales used the funds to maintain existing programs.

99 While this belief is based largely on my experience, and as such is of limited value, I take comfort in Evans' empirical evidence that clinical experiences may make some positive difference to the attitudes that lawyers hold in relation to social justice issues. See Evans, note 41, at 213.

better. Therefore, some brief thoughts on the structure of such a program, whether mandated or voluntary, are warranted.

Why the emphasis on a clinical experience? Admittedly, this is certainly not the only model that can be used. For example, the pro bono program at Gonzaga University Law School referred to earlier does not rely on a clinical structure.¹⁰⁰ The answer lies in the essential element of a clinical experience, namely an “emphasis on critique and reflection”.¹⁰¹ Aiken cautions that “[i]t is not enough to create the opportunity for a disorienting moment. Without greater intervention by the teacher, we risk creating a series of confirming moments”.¹⁰² I share Aiken’s fear that an unstructured exposure by students to the life experiences of those less fortunate may reinforce stereotyped views and result in a graduate “more sure of their incorrect assumptions”.¹⁰³ Providing an opportunity for reflection may help to alleviate these concerns. The reflection should focus on the student’s associated beliefs and attitudes towards the group to whom the student has been exposed.¹⁰⁴ Critique, or perhaps more appropriately constructive feedback, should take place in structured discussion sessions that examine the commonly held stereotypes of the stigmatised group. Such sessions also provide an opportunity for the dissemination and analysis of cognitive information that explores the factual foundation upon which negative opinions are based.

Feedback and reflection, while important, should not be the only activity engaged in during the discussion sessions. Aiken notes that:

Reflection and reorientation by themselves, will not have a lasting impact on a learner’s drive to champion justice. We must add a step in the reflection and reorientation phase. Not only should we help our students reflect carefully on the disorienting moments caused by the insights into “different” worlds, but we must help our students in reflecting on *why* the moments are “disorienting”. This requires students not only to analyse the world outside of them but also to

100 See above, note 24.

101 Giddings, note 15.

102 Aiken, note 47, at 44. The term “disorienting moment” is drawn from the work of Quigley, and is used to describe “when the learner confronts an experience that is disorienting or disturbing because the experience cannot be easily explained by reference to the learner’s prior understanding . . . of how the world works”: F Quigley, “Seizing the Disorienting Moment” (1995) 2 *Clinical Law Review* 37 at 51. The term “confirming moment” is discussed above.

103 Aiken, note 47, at 27.

104 Loder, note 28, at 484.

turn inward and analyse themselves. They must seize the moment of their disorientation and deconstruct it.¹⁰⁵

This type of discussion and insight is unlikely to occur in a large class. Low student/staff ratios, a hallmark of clinical teaching, are required. This has been discussed above. Students also need time to process the experience, which militates against the use of intensives. Ideally the discussion sessions, and the student's volunteer work, should be spread over the course of a semester. That said, strict adherence to a set number of hours, particularly when assessing the adequacy of the student's volunteer work, should be avoided. The quality of the experience is more important than the quantity of time spent in the activity. Further, given the nature of the experience, comparisons with non-clinical courses are not helpful. The educational goals and objectives should drive the structure, not a formulaic adherence to a set number of contact hours per credit point.

In addition to (but not in substitution for) the discussion sessions, reflection can be facilitated in other ways. Perhaps the most common is the requirement that students maintain a reflective journal, which is periodically reviewed by the teacher. Peer learning can also be used, for example through the implementation of an e-mail discussion group, internet chat-room or a co-operative learning group.¹⁰⁶ Whatever teaching methods are used, the student's experience must be monitored and evaluated to ensure that the educational objectives are being met.

Conclusion

Law school is generally a student's first exposure to the professional obligations associated with the practice of law. The provision of pro bono legal services is a professional obligation owed by all legal practitioners. It follows that a curriculum requirement that fosters a student's commitment to pro bono work is a justifiable component of the undergraduate law degree. The structuring of such a requirement must be

¹⁰⁵ Aiken, note 47, at 26 (emphasis in text).

¹⁰⁶ For a discussion of teacher-less, cooperative learning groups, see Dick, Godden, Healy, LeBrun, Airo-Farulla and Lamb, "A Case Study of the 'Offices' Project (Teacher-less, Cooperative Learning Groups) at Griffith University: Implementing Educational Theory" (1993) 4 *Legal Ed Rev* 273. For a discussion of the use of community development methods in clinical education, see A Evans, "Client Group Activism and Student Moral Development in Clinical Legal Education" (1999) 10 *Legal Ed Rev* 179.

handled with care. I have attempted to show that simply exposing students to the needs of the poor and disadvantaged is not sufficient. It is essential that the negative impact of unstructured exposure, such as reinforcing negative attitudes and beliefs, be minimised. Clinical methods which facilitate constructive feedback, reflection and student insight, provide a good model on which to structure a pro bono program.

From the foregoing, one might conclude that I do not favour the implementation of mandatory pro bono as a prerequisite to graduation. This is not entirely true, however I am concerned that attempts to implement such a requirement without adequate resources may do more harm than good. If law schools are serious about instituting mandatory pro bono, and a clinical model is used to deliver such a program, adequate, long-term funding must be secured. The program must be structured so as to avoid the potential negative impact of mandated service. If it is to be done, it must be done properly. Our students, and the constituency they will ultimately serve, deserve no less.