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RE-ENVISIONING MODELS FOR PRO BONO LAWYERING: SOME HISTORICAL REFLECTIONS

SUSAN D. CARLE*

Pro bono publico: literally, for the public good. ABA Model Rule of Professional Conduct 6.1(a) defines this term as the provision of legal representation without a fee to persons of limited means.¹ In my remarks I want to explore an implicit dichotomy underlying this definition of pro bono work—namely, the way it sets up a rigid binary opposition between public and private, and also between altruism and self-help. I'm going to take a somewhat provocative position and argue that this understanding of pro bono law is based in outmoded, early twentieth century ideas that do not serve us well today.

More specifically, I will argue, drawing on two historical case studies as examples, the core model for pro bono lawyering reflected in Model Rule 6.1 embodies a conception of pro bono lawyering out of a sense of *noblesse oblige*. That model can be traced to elite lawyers affiliated with leading public interest organizations at the turn of the twentieth century. The Model Rules' adoption of this vision of pro bono lawyering overlooks another model of public interest lawyering from the same period, which involved grassroots efforts by lawyers who were not part of the professional elite. These lawyers took on public interest cases out of a commitment to the same political and social goals as their clients, and did not rigidly distinguish between self and other, public and private, and no fee versus paid services. I question the consequences of our contemporary privileging of the first elitist model for public interest lawyering over the second, and urge us to discard the rigid and anachronistic dichotomies on which our thinking about public interest lawyering rests.

The history underlying our current conceptions of pro bono

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1. ABA MODEL RULE OF PROFESSIONAL CONDUCT 6.1(a) .

lawyering is complex, of course. One clear source can be traced to the explosion of national organizations working for civic improvement in the decades surrounding the turn of the twentieth century—that is, from 1890 or so until the United States’ entry into World War I in 1917, a period sometimes referred to as the Progressive Era.² In that period new national organizations experimented with litigation models and forms of legal practice that gave rise to ideas about how to organize lawyering “in the public interest” that are still very much with us today. It was, for example, during this period that earlier grassroots efforts to develop “test cases” to litigate civil rights in the courts coalesced in the birth of a new national civil rights organization called the National Association for the Advancement of Colored People (“NAACP”).³ We still view the NAACP’s national test case campaign to desegregate the nation’s schools as the epitome of American ideals about how to use public impact litigation to promote public interest objectives.

It was also during the early twentieth century that the National Consumers League (“NCL”) mounted its litigation campaign to defend state protective labor legislation from constitutional attack. Today the name of the National Consumers League is not nearly as evocative of conceptions of public interest law as is the NAACP’s. But the NCL’s legal work contributed to the development of public interest law in its own right. It was, for example, an NCL case that produced the famous “Brandeis brief,” a term that has come to refer to a briefing strategy that marshals facts and figures in lieu of precedents and legal doctrines to convince a court to rule in a certain way in the interest of making good public policy.⁴

Less well known is the fact that the Brandeis brief was drafted, not by Louis Brandeis, but by Josephine Goldmark, an assistant to Florence Kelley, the secretary (or what we would today call the executive director) of the NCL. Brandeis did argue the case before the U.S. Supreme Court, resulting in the Court’s opinion in *Muller v.*

2. See generally Louis Galambos, *The Emerging Organizational Synthesis in Modern American History*, 44 BUS. HIST. REV. 279 (1970) (analyzing changing conceptions of the role of national organizations’ development in American history).

3. On earlier efforts to develop test case civil rights litigation, see CHARLES A. LOFGREN, *THE PLESSY CASE 29-39* (1987), which traces the test case strategy in *Plessy v. Ferguson*; J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944* 283-85 (1993) (recounting earlier efforts to develop test case civil rights litigation); Elliott M. Rudwick, *The Niagara Movement*, 43 J. NEGRO HIST. 177, 177 (1957) (discussing how the Niagara movement was formed and worked to demand equal rights for African-Americans).

4. See Curtis J. Berger & Joan C. Williams, *PROPERTY: LAND OWNERSHIP AND USE* 818-19 (4th ed. 1997) (noting that the first “Brandeis brief” used in *Muller v. Oregon* presented comprehensive statistics to show working longer than ten hours a day in a factory was detrimental to the health, safety, and welfare of women).

Oregon,⁵ which upheld the constitutionality of sex-specific protective labor legislation on the grounds that women's "[p]hysical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man."⁶

Muller is sometimes cited as an early instance of the Court's acceptance of sociological jurisprudence, a forerunner of legal realism, which called on courts and lawyers to look beyond legal formalism to empirical data that would demonstrate the real impact of law on people's lives.⁷ More frequently, modern-day feminists cite *Muller v. Oregon* as a favorite "bad case" that demonstrates sex stereotyping by old-fashioned courts.⁸ Today we read *Muller* as showing how factual "truths" are deeply permeated by ideology and politics. *Muller* also stands for the historical origins of deep schisms in American feminism between so-called "equal treatment" and "difference" feminists. Another interesting group of historians has been studying the NCL and other women's civic reform groups of the Progressive Era in order to trace what they call the "maternalist" underpinnings of the New Deal welfare state.⁹

In short, both of these organizations, the NAACP and the NCL, have been important in the development of American public policy. What we don't think so much about, however, are the contributions these organizations made to the development of models about how to carry out public interest law practice. In my remarks I want to suggest

5. 208 U.S. 412 (1908).

6. *Id.* at 422.

7. For general discussions of sociological jurisprudence, see Edward G. White, *From Sociological Jurisprudence to Realism*, in PATTERNS OF LEGAL THOUGHT 99 (Edward G. White ed. 1978), which describes how sociological jurisprudence emerged as part of the Progressive movement; see also JOHN W. JOHNSON, AMERICAN LEGAL CULTURE, 1908-1940, 129 (1981) ("[I]n order to grasp the real impact of industrialization, urbanization, and immigration on American life, the Progressives endorsed empirical studies of social phenomena."). See generally Robert Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise*, in PROFESSIONALS AND PROFESSIONAL IDEOLOGIES IN AMERICA 95 (G. Geison ed., 1983).

8. See generally Anne Dailey, *Lochner for Women*, 74 TEX. L. REV. 1217 (1996) (disputing conventional view of *Muller* as inaugurating new Progressive jurisprudence); Julie Novkov, *Liberty, Protection, and Women's Work*, 21 L. & SOC. INQUIRY 857, 857 (1996) (arguing that caselaw upholding protective labor legislation reflected courts' conceptions of men's and women's liberty interests as differing); see, e.g., Mary Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1219-25 (1986) (pointing out examples of sex stereotyping in NCL's briefs).

9. See generally MOTHERS OF A NEW WORLD (Seth Koven & Sonya Michel eds., 1993); WOMEN, THE STATE, AND WELFARE (Linda Gordon ed., 1990); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992); see, e.g., Linda Kerber, *Separate Spheres, Female Worlds, Woman's Place*, 75 J. AM. HIST. 9 (1988); Ann Shola Orloff, *Gender in Early U.S. Social Policy*, 3 J. POL. HIST. 249 (1991).

some lines of inquiry into that question.

THE NAACP

In a much longer paper I'm just completing now, I examine the first decade of the NAACP's legal work, in the years between 1910 and 1920.¹⁰ Although abundant scholarship examines the NAACP's history after 1920 through *Brown v. Board of Education* in 1954 and after,¹¹ this early period is not well explored. It is also, significantly, and perhaps relatedly, a period in which relatively conservative, elite members of the bar establishment, almost all of whom were white, directed the NAACP's national legal strategy.

To give one example: Moorfield Storey served as the NAACP's president and primary Supreme Court advocate in the 1910s and first half of the 1920s. Storey was a Boston blue blood whose parents had been active in the abolitionist movement.¹² Storey inherited from his father an outspoken commitment to African-American civil rights on the domestic front and anti-imperialism in the international context.¹³ But he was a deeply traditional legal thinker. Storey headed a highly successful law firm in Boston, where he represented many corporate clients including the notorious United Fruit Company.¹⁴

10. Susan Carle, *From Buchanan to Button: Legal Ethics and the Early NAACP, 1910-1920* 20 LAW & HISTORY REVIEW (forthcoming 2002) [hereinafter Carle, *From Buchanan to Button*].

11. See generally MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-61 (1994) [hereinafter TUSHNET, CIVIL RIGHTS LAW]; MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987) [hereinafter TUSHNET, THE NAACP'S LEGAL STRATEGY]; see, e.g., RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); LOREN MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO (1966).

12. For biographies of Storey, see WILLIAM B. HIXSON, MOORFIELD STOREY AND THE ABOLITIONIST TRADITION 2 (1972), which describes Storey's Puritan upbringing and the influence of his father's politics and social standing on his career as an activist [hereinafter, HIXSON, ABOLITIONIST TRADITION]; MARK DEWOLFE HOWE, PORTRAIT OF AN INDEPENDENT: MOORFIELD STOREY, 1845-1929, 22-23 (1932) (quoting Storey's explanation that "[his] father acted with anti-slavery Whigs and was a Sumner Republican. [His] mother was an abolitionist").

13. See HIXSON, ABOLITIONIST TRADITION, *supra* note 12, at 36-97 (identifying the Spanish-American War as a platform for Storey to voice his anti-imperialist views, particularly his concerns about how U.S. policy would affect the citizens of Cuba); HOWE, *supra* note 12, at 196-229 (recounting Storey's opposition to imperialism as president of the Anti-Imperialist League).

14. Storey successfully defended this client against antitrust charges after United Fruit engineered the Costa Rican government's seizure of a rival company's property and supplies in Panama. See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 359 (1909) (dismissing a complaint against the defendant under the Sherman Anti-Trust Act for conspiring with Costa Rican officials to put competitors out of business). Storey's biographers say remarkably little about his role in representing the United Fruit Company, a facet of his professional life that seems notably inconsistent with his political persona. Storey later explained in his unpublished autobiography, perhaps somewhat defensively, "We did not undertake to advise [United Fruit] on questions of business, only questions of law." HOWE, *supra* note 12, at 185.

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Even in the NAACP's first years, when white lawyers such as Moorfield Storey led the NAACP's national legal operations, the NAACP was experimenting with test case litigation strategies. Those strategies, as I examine in greater detail in my longer paper, included soliciting clients, advertising legal services, and staging facts to create just the right scenarios for test case litigation.¹⁵ These practices, as I also discuss in my longer paper, arguably violated certain legal ethics rules on the books at the time.¹⁶ But this misfit between traditional legal ethics rules and the NAACP's activities did not bother the members of the NAACP's first legal committee. To the contrary, these lawyers, notwithstanding their conservative bar establishment credentials, were highly enthusiastic about the NAACP's litigation plans.

As I explain in further detail in my longer paper, the NAACP's first national lawyers did not worry about running afoul of traditional legal ethics rules because they viewed their work for the NAACP as being in the "public interest."¹⁷ Closely connected to this idea was a concern that the organization not be seen as taking fees from clients. So here in 1910, we see the idea that representing clients for fee and doing public interest work are incompatible.¹⁸ This idea persists to this day, as shown by ABA Model Rule 6.1(a)'s linkage or conflation of no fee representation and pro bono practice.¹⁹

I also show how the NAACP's first legal committee's separation of fee-for-service work from lawyering in the "public interest" disadvantaged African-American lawyers in competing to handle the NAACP's high profile test cases.²⁰ This was because few African-

15. See generally Carle, *From Buchanan to Button*, *supra* note 10.

16. *Id.*

17. *Id.*

18. This idea was central to the public interest practice of other prominent Progressive Era lawyers as well, such as Louis Brandeis. See Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as a People's Lawyer*, 105 YALE L.J. 1445, 1472 (1996) (describing how Brandeis preferred not to accept fees from his public interest clients).

19. ABA MODEL RULE OF PROFESSIONAL CONDUCT Rule 6.1(a) provides that "[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year," and that most of these services should be provided "without fee or expectation of fee" to "persons of limited means" or organizations in matters "designed primarily to address needs of persons with limited means."

Model Rule 6.1(b) provides that "any additional services" should be provided "at no fee or a substantially reduced fee" to various types of organizations "where the payment of standard legal fees would significantly deplete the organization's economic resources or otherwise be inappropriate"; or "at a substantially reduced fee to persons of limited means"; or through "participation in activities for improving law." MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1(b) (1983). Thus, the Rule emphasizes that the primary focus of pro bono work should be non-fee, rather than reduced fee, work. *Id.*

20. See generally Carle, *From Buchanan to Button*, *supra* note 10, at 33-34 (noting that only

American lawyers at the time had the economic resources to take on sustained litigation without the prospect of getting at least some compensation. In effect, a policy that sought to distance the handling of legal work for the public good from the receipt of legal fees greatly reduced the likelihood that cases would be handled by members of the very community on whose behalf they were being litigated.

This is not to say that the NAACP never paid lawyers to do its legal work. It frequently did so, especially in recruiting local counsel. One such lawyer was Scipio Africanus Jones, whom Professor Kilpatrick has already discussed.²¹ Jones's defense of his clients in *Moore v. Dempsey*,²² the Elaine riot case, in which he eventually saved all the defendants who received capital sentences from death, won him high regard within the NAACP. His outstanding performance greatly helped in building the national NAACP office's willingness to trust African-American lawyers to serve as chief counsel in high-profile cases.²³

established white lawyers could afford to work on long-term cases for no compensation). The NAACP did, however, refer cases it did not want to litigate to African-American lawyers to handle on a contingency fee basis.

21. My information on Scipio Jones comes from Professor Kilpatrick's important work. See Judith Kilpatrick, *Race Expectations: Arkansas African-American Attorneys (1865-1950)*, 9 AM. U. J. GENDER SOC. POL'Y & L. 63 (2001) and from SMITH, EMANCIPATION, *supra* note 3, at 325-27; MARY WHITE OVINGTON, PORTRAITS IN COLOR 92 (1927); and Tom Dillard, *Scipio A. Jones*, 31 ARK. HIST. Q. 201 (1972). Born enslaved, Scipio Jones attended public schools after emancipation and then attended a private college. He was denied admission to the University of Arkansas law school on account of race but gained entry to the Arkansas bar in 1889 after reading law in the offices of various white lawyers in Little Rock. *Id.* at 203.

22. 261 U.S. 86 (1923).

23. The story behind *Moore v. Dempsey* bears fuller retelling. I draw my account here from RICHARD C. CORTNER, A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS RIOT CASES (1988). This is the most detailed account of the facts and legal proceedings in the case; the primary materials connected with the case unfortunately were subsequently lost, so they have been examined by few other scholars.

Moore arose when a group of African-American tenant farmers in rural Arkansas held a meeting in a church to raise money to start a tenants' association. The group invited the son of a white lawyer, U.S. Bratton, to the meeting to consult about their legal rights. A group of whites stormed the church and a shoot-out ensued, in which a white man was killed. The confrontation quickly escalated into a county-wide rampage that left more than 200 African-Americans and several whites dead. Nearly ninety African-Americans—but no whites—were indicted on murder charges. *Id.*

The NAACP decided to take the case and retained a prominent white Arkansas law firm to conduct the defense. At the same time, an independent local committee began its own fundraising efforts and retained Scipio Jones as its lawyer. After some initial distrust and competition, the two organizations worked out an arrangement by which the NAACP law firm represented one group of defendants and Jones represented the rest. In time, Jones proved the more dedicated lawyer and the bulk of the work of the defense, which spanned five years and included several rounds of appeals, retrials, and *habeas* proceedings, fell to him.

When some of the defendants' cases went up to the U.S. Supreme Court on appeal, the NAACP approached Storey, on Jones's urging, to handle the argument. Storey agreed to take the case and won, producing *Moore v. Dempsey's* important holding that expanded criminal

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Jones is not the only example of grassroots lawyer-activism in this period in which the lawyer received modest compensation for the legal work performed. There were quite a few other lawyers in communities around the country, very much like the lawyers whose civil rights and other professional activities Professor Kilpatrick has documented in her important research on Arkansas,²⁴ who were fighting important civil rights battles using similar lawyering models.²⁵ The national NAACP office did not seek to promote this grassroots model of public interest lawyering, however; instead, in this early era it sought to recruit the most professionally successful and powerful counsel available, especially for high-profile test cases it hoped to litigate before the U.S. Supreme Court.²⁶

This policy, of seeking elite, high-profile lawyers to volunteer their legal services to the NAACP for no fee, had some positive effects and some negative ones. To the good, having lawyers such as Moorfield Storey in the public spotlight gave the organization power and credibility it would not otherwise have had in its early years. To the bad, this policy kept elite white lawyers in charge of the NAACP's legal agenda until well into the 1930s. While a lawyer such as Moorfield Storey could lend great personal and professional capital to the NAACP, he could also, by virtue of his very prominence, hold back the organization in certain respects.

One example of Storey's power in this respect comes from the NAACP's work for national anti-lynching legislation.²⁷ That campaign had begun as a public education and investigation effort, which Storey wholeheartedly supported.²⁸ When the NAACP planned a national conference on lynching, to be held in 1919, Storey

defendants' due process rights. *Compare* Frank v. Magnum, 237 U.S. 309 (1915) (holding the Court would apply an extremely deferential standard of scrutiny in cases raising due process violations based on allegations of mob-dominated trials), *with* Moore v. Dempsey, 261 U.S. 86, 92 (remanding case to lower court with instructions to conduct fuller factual inquiry into conditions surrounding trial, based on evidence the lower court had already considered in dismissing defendants' habeas corpus petition).

24. See Kilpatrick, *supra* note 21.

25. See SMITH, *supra* note 3, at 352-54 (detailing how African-American lawyers throughout the country resisted mob rule and intimidation to make new civil rights law).

26. Carle, *From Buchanan to Button*, *supra* note 10.

27. My account here draws William B. Hixson, *Moorfield Storey and the Defense of the Dyer Anti-lynching Bill*, 42 NEW ENG. Q. 65-81 (1969) [hereinafter Hixson, *Defense of the Dyer Anti-lynching Bill*], and my own review of Storey's correspondence in several manuscript collections housed at the Library of Congress in Washington, D.C. See PAPERS OF THE NAACP (University Publications of Am., 1982) (microfilm edition); ARTHUR B. SPINGARN PAPERS, Box 6, Folders dated 1919-1921; MOORFIELD STOREY PAPERS, Box 2, Folder dated 1919-1921.

28. For a discussion of the general shift among Progressive-Era activists from educational campaigns to calls for state and federal legislative action, see ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877-1920*, 140-71, 198-212 (1967).

energetically served as chair, drawing up long lists of prominent lawyers with whom he was acquainted and sending them personal letters urging them to become signatories to the call for the conference. Despite the organization's enormous efforts, however, turnout at the conference proved disappointing and the NAACP started to consider other avenues to address the lynching crisis.²⁹

This revelation that public education would not solve the lynching crisis came as far more of a surprise to Storey than it did to NAACP Acting Secretary James Weldon Johnson³⁰ and Assistant Secretary Walter White,³¹ both African-Americans who had experienced near lynchings personally.³² These NAACP staff members began to push the NAACP to refocus its resources on a new strategy: a national campaign for passage of legislation that would make lynching a federal crime. Johnson spearheaded and served as chief lobbyist of this campaign, with assistance from White.³³ But Storey questioned the proposed statute's constitutionality under Supreme Court precedents holding that the Reconstruction Era Amendments did not reach private individuals' lawless action.³⁴ As Storey's biographer describes, Storey found himself in a quandary between two deeply held beliefs: his abhorrence of lynching and desire to do something to stop it, on the one hand, and a strong professional commitment to the Supreme Court's interpretations of the Constitution as pronouncements of unambiguous law, on the other.³⁵

29. The NAACP antilynching campaign is detailed at length in ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING 1909-1950* (1980) (describing strategies that the NAACP implemented in order to combat lynching, which included "open meetings" in localities nationwide, protest marches, public education efforts, and anti-lynching legislation at both state and federal levels).

30. Johnson was a renowned songwriter and poet of the Harlem Renaissance and had formerly been a lawyer. He was, indeed, the first African-American admitted to the Florida bar following Reconstruction. See JAMES WELDON JOHNSON, *ALONG THIS WAY: THE AUTOBIOGRAPHY OF JAMES WELDON JOHNSON* 141-44 (6th ed. 1938); SMITH, *supra* note 3, at 279.

31. See generally WALTER WHITE, *A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE* (2d ed. Univ. of Georgia Press 1995).

32. See ZANGRANDO, *supra* note 29, at 32-33 (stating Johnson was almost lynched for talking to a white woman as was White for investigating the 1906 Atlanta riot).

33. For an account of how Johnson's leadership gradually changed the racial composition of those in charge of the NAACP, see August Meier & Elliott Rudwick, *The Rise of the Black Secretariat in the NAACP, 1909-35*, in *ALONG THE COLOR LINE: EXPLORATIONS IN THE BLACK EXPERIENCE* 94-127 (1976).

34. See *The Civil Rights Cases*, 109 U.S. 3, 23-25 (1883) (holding that the Fourteenth Amendment does not reach beyond state action to private discrimination); *United States v. Harris*, 106 U.S. 629, 641 (1883) (declaring unconstitutional criminal provision of Civil Rights Act of 1875 that prohibited private conspiracies to deprive persons of their civil rights); *United States v. Cruikshank*, 92 U.S. 542, 556-57 (1875) (invalidating criminal indictment of men engaged in lynching of African-American on the ground that the indictment failed to sufficiently allege interference with constitutionally protected rights).

35. See Hixson, *Defense of the Dyer Anti-lynching Bill*, *supra* note 27, at 65, 68 (characterizing

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Storey's ambivalence greatly frustrated Johnson and White and other organizers of the anti-lynching campaign. Worse yet, Storey's reticence weakened the NAACP's lobbying efforts at key moments. At first, Storey refused to testify in support of the NAACP's proposed legislation. Storey eventually offered to appear before the House Committee on the Judiciary to speak on the need for further investigation into the problem of lynching, but refused to press the Committee to move the bill forward. Johnson and White, viewing such half-hearted testimony as more harmful than helpful, did not follow up on Storey's offer.

Storey's absence from the hearings was conspicuous to those expecting the organization's president to lend his considerable weight to the campaign. Albert E. Pillsbury, a prominent lawyer who had written an article arguing for federal anti-lynching legislation,³⁶ wrote to Johnson to warn that Storey's absence would play into the hands of the Southern Democrats, who were using the threshold issue of constitutionality to suppress the bill's advancement.³⁷ Storey eventually did express support for a federal antilynching measure to members of Congress in letters and a brief,³⁸ but, despite being urged to do so, never agreed to appear personally before Congress to support the bill on the NAACP's behalf, leaving the job of orally defending his written brief to Herbert Stockton, a young Wall Street lawyer. In 1922 the Dyer bill passed the House and emerged from the Senate Judiciary Committee, but was quickly scuttled in the full Senate as election time approached, signaling the end of more than a decade of intense work by the NAACP.

NATIONAL CONSUMERS LEAGUE

The National Consumers League had a similar, mixed experience

Storey as a literal reader of the Constitution but also as an abolitionist who had difficulty reconciling his complex political views and personal feelings).

36. See Albert E. Pillsbury, *A Brief Inquiry into a Federal Remedy for Lynching*, 15 HARV. L. REV. 707, 707-13 (1901) (arguing that the United States owes its citizens protection from the harm of lynching).

37. Copies of this sequence of correspondence is on file with the author.

38. ZANGRANDO, *supra* note 29, at 69. Storey's biographer has argued that, in putting his name on a brief supporting the Dyer bill's constitutionality, Storey showed that he had changed his mind about the bill and that, after great personal conflict, Storey in the end abandoned his allegiance to a natural-law view of the Supreme Court's interpretations of the Constitution in favor of his stronger allegiance to the NAACP's policy objectives. See HIXSON, *Defense of the Dyer Anti-lynching Bill*, *supra* note 27, at 79-81. Walter White, the NAACP staff member in most frequent contact with Storey about the Dyer legislation, was convinced, however, that Storey never fully lent his support to the NAACP's legislative campaign. *Id.* at 80 n.55 (citing WALTER WHITE, *ROPE AND FAGGOT: A BIOGRAPHY OF JUDGE LYNCH* 219 (Reprint ed. Ayer Co. Publishers, Inc. 1992) (1929)).

in relying on lawyers with great public stature to bring its programs before the public eye. In some respects, the NCL was a very different organization than the NAACP. The NAACP, for all its national office, top-down control, was supported from the start by an extensive, growing, grass-roots membership, and consciously and very successfully used its court victories to organize a strong base in African-American communities across the country. The NCL, in contrast, was never a grassroots membership organization composed of the people it sought to help. Instead, the NCL was made up of socially prominent women—"society ladies"—mostly from the east and midwest, who had time on their hands to volunteer for charitable causes and were concerned about the plight of women less fortunate than themselves.³⁹ Indeed, the leaders who articulated the NCL's organizing philosophy, somewhat like the members of the NAACP's first national legal committee, thought that they gained greater credibility by *not* being composed of the people whose interests were affected by their organization's work.

In the place of a strong membership base, the NCL had, from 1899 to 1932, a charismatic national leader in the person of Florence Kelley.⁴⁰ Kelley was a socialist and a settlement house worker. She lived for years at Chicago's Hull House and was a close friend of Jane Addams. A strong personality, Kelley displayed an interesting mix of old fashionedness, even for her time, and forward looking thinking.⁴¹ She was a trained and licensed lawyer but she did not claim this status, preferring to stake out the moral high ground based on her claims to a special "feminine" sensibility.⁴² Much as the NAACP's leaders did, Kelley decided that the NCL should recruit white male lawyers with the highest professional credentials to serve as legal figureheads. One such lawyer was Louis Brandeis.

39. See Susan D. Carle, *Gender in the Construction of the Lawyer's Persona*, 22 HARV. WOMEN'S L.J. 239, 256 (1999) [hereinafter Carle, *Lawyer's Persona*] (outlining the makeup of the NCL).

40. See generally KATHRYN KISH SKLAR, *FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830-1900* (1995) (examining Kelley's life prior to her leadership in the NCL, particularly her role as an activist during the Progressive Era and her advocacy of women's issues). Kelley arrived at Hull House at the end of 1891. *Id.* at 171. Hull House was a settlement house founded in 1889 by Jane Addams and Ellen Gates Starr, *id.* at 172, who were dedicated to "the expansion of civil society in which women could play a substantial role." *Id.* at 176. Kelley remained at Hull House until the spring of 1899 when she left for New York to take the Secretary position at the NCL. *Id.* at 311.

41. As Kelley's friend and colleague Josephine Goldmark explained: "[Kelley's] deep-rooted feminism, her passionate championship of the rights of women, her denunciation of wrongs still suffered by them were never in conflict with her fundamental belief in the claims of the family. She was, in the intensity of that belief, what might today be called old-fashioned." JOSEPHINE GOLDMARK, *IMPATIENT CRUSADER* 18 (1953).

42. See Carle, *Lawyer's Persona*, *supra* note 40, at 263-65 (analyzing reasons Kelley eschewed a public identity as a lawyer).

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Brandeis was a successful and well-respected Boston lawyer, different from Moorfield Storey in ethnicity and perspective (Brandeis was Jewish, Storey Protestant; Brandeis a progressive; Storey a legal traditionalist) but of similar elite professional stature. Goldmark happened to be Brandeis's sister-in-law, and this connection gave Kelley entree to persuade Brandeis to lend his name to NCL briefs defending protective labor statutes.⁴³ Like the NAACP's lawyers, Brandeis accepted no fee for his work, and believed that refusing to do so left him free to pursue "the public interest," as Clyde Spillenger has explored in his important article.⁴⁴

In 1916, Brandeis was appointed to the U.S. Supreme Court, and passed his public interest work for the NCL on to his protege, Felix Frankfurter. Frankfurter continued Brandeis's previous practice of lending his name to NCL briefs, which, in this time period, were drafted by Molly Dewson. Dewson, a new assistant to Florence Kelley, would go on to play a role in Franklin Roosevelt's inner circle during the New Deal.⁴⁵

Thus, the NCL, like the NAACP, gained a lot by having lawyers outside its own ranks, of the stature of Moorfield Storey, Louis Brandeis and Felix Frankfurter, serving as legal figureheads. For both organizations, this strategy brought respect, recognition, and legal success. But Frankfurter, much like Moorfield Storey, sometimes got in the way of his client organization's wishes. This happened in the aftermath of *Adkins v. Children's Hospital*,⁴⁶ the case in which the U.S. Supreme Court reversed course from the sympathy it had shown for protective labor legislation in *Muller v. Oregon*. In *Adkins*, the Court struck down a District of Columbia minimum wage law for women, on the rationale that women no longer needed special protections that interfered with their "rights to freedom of contract" after the Nineteenth Amendment granted them the right to vote.⁴⁷ *Adkins* spelled the end of the NCL's success in defending its protective labor legislation and Kelley was understandably troubled

43. Josephine Goldmark provides a first-hand account of the meeting in which Kelley and Brandeis negotiated over the terms under which Brandeis agreed to participate in the *Muller* case. See GOLDMARK, *supra* note 42, at 154-55. A general account of the working relationship between Brandeis and Goldmark in *Muller* and other cases can be found in PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 114-31 (1984).

44. See Spillenger, *supra* note 19, at 1477-87.

45. See generally SUSAN WARE, PARTNER AND I: MOLLY DEWSON, FEMINISM, AND NEW DEAL POLITICS (1987) (describing Molly Dewson's work on *Adkins v. Children's Hospital* and her later involvement in the New Deal).

46. 261 U.S. 525 (1923).

47. *Id.* at 553.

by its effects.⁴⁸

Kelley quickly decided that the NCL should spearhead a campaign for passage of a constitutional amendment that would prohibit the U.S. Supreme Court from striking down state labor legislation.⁴⁹ Frankfurter was deeply opposed to this plan, believing, much as Moorfield Storey had, that the strategy his client had proposed violated constitutional law norms that were shared by members of his insider legal culture. Frankfurter therefore used his considerable influence within the NCL to mount a battle against Kelley. Archival records show him attending chapter meetings in Boston to argue against Kelley's proposal and scheming in correspondence with Robert Szold, another progressive lawyer who worked pro bono for the NCL, to "put on their fighting armor" and stop Kelley from "running away with her own ideas when we don't believe in them."⁵⁰ These actions are a far cry from the kind of "client centered lawyering" we teach in law schools today.⁵¹

The struggle between Kelley and her male lawyers ended in a stalemate. No constitutional amendment passed, of course, and the NCL lost momentum in the 1920s. Kelley clashed with equal rights feminists such as Alice Paul of the National Women's Party, about whom we will hear more from Professor Hamm.⁵² In 1932, Kelley died, believing that the NCL's work to protect women workers from harsh labor conditions had largely come to naught. But some of the social policy ideas she had passed on to a new generation of women, such as Molly Dewson and others active in the NCL, became national policy during the New Deal.⁵³

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So what does this all mean as we sit here thinking about the

48. See Carle, *supra* note 40, at 260-61.

49. *Id.*

50. *Id.* at 261 & nn.82 & 83.

51. Important discussions of this model of "client-centered" or "collaborative" lawyering, which is sensitive to the expressed interests of clients and engages in a process of dialogue in lieu of lawyer domination, include Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L.J. 501, 511-56 (1990) (explaining and marshalling arguments in favor of client-centered counseling); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 485-576 (1994) (examining how clients' life experiences provide the narrative for developing case theory); Lucie E. White, *Subordinating Rhetorical Survival Skills and Sunday Shoes: Notes on the Meaning of Mrs. G.*, 38 BUFF. L. REV. 1, 46 (1990) (discussing self-critique of White's impulses to substitute her lawyerly judgments for the story her client wanted to tell in a welfare rights hearing).

52. Richard Hamm, *Mobilizing Legal Talent for a Cause: The National Woman's Party and the Campaign to Make Jury Service for Women*, 9 AM. U.J. GENDER, SOC. POL'Y & L. 97 (2001).

53. See WARE, *supra* note 45, at 97-102.

historical heritage of pro bono lawyering? Both of my case studies are similar in that national public interest advocacy organizations relied on outside lawyers, recruited from the upper echelons of the bar, to lend them credibility and social capital before the public and the courts. In both cases, these arrangements benefited the advocacy organizations in important ways. But in both cases the lawyers involved, by virtue of their disproportionate social resources and power, imposed their ideas of the public interest on their client organizations' leaders. Now folklore, at least, has it that Brandeis was prone to taking a similar heavy handed approach in counseling his paying clients.⁵⁴ But Moorfield Storey was not—he does not, for example, appear to have let his anti-imperialism views affect his representation of the United Fruit Company, a notoriously bad actor in Latin America in this period and later.⁵⁵

I suggest that these lawyers did not find their conduct vis-a-vis their clients problematic because they conceived of the public interest in early twentieth century terms, as unitary and consensual. These early twentieth century lawyers had an abiding faith in the ability of social science and empirical inquiry to provide the right answers to public policy questions and thought that, with sufficient study and education, everyone would agree on such answers.⁵⁶

This is a faith that we at the start of the twenty-first century have largely lost. We fight a lot about identity politics—about the idea that one's experiences in society shape one's views of what is good policy, and that without representation of affected groups important insights will be overlooked. At their most radical extreme these claims are very controversial. But basic notions of interest group pluralism are integral to most contemporary thinking about how public policy should be made.

Those ideas, in turn, make issues about how to serve as a lawyer for the public interest far more complex and problematic than Moorfield Storey, Louis Brandeis, or Felix Frankfurter would ever have considered them. We do not today think of “the public interest” as something about which we are likely to reach consensus. Instead, our notions of public interest lawyering are anchored in ideas about

54. See Spillenger, *supra* note 18, at 1473-74 (describing instances in which Brandeis acted as “counsel for the situation” even though he had been retained by a particular client).

55. For a discussion of United Fruit Company's actions in Central America during the early twentieth century, see generally PAUL J. DOSAL, *DOING BUSINESS WITH THE DICTATORS: A POLITICAL HISTORY OF UNITED FRUIT IN GUATEMALA: 1899-1944* (1993); CHARLES D. KEPNER & JAY H. SOOTHILL, *THE BANANA EMPIRE: A CASE STUDY OF ECONOMIC IMPERIALISTS* (1935).

56. Cf. Susan D. Carle, *Lawyer's Duty to Do Justice: A New Look at the History of the 1908 Canons* 24 *LAW & SOC. INQUIRY* 1, 27 (1999) (discussing world view of Progressive Era lawyers).

increasing the voice of the underrepresented. Thus, Rule 6.1 provides that lawyers should give approximately fifty hours per year to pro bono work and that work should primarily involve working for no fee for persons of limited means or organizations serving persons of limited means. This is the representation enforcement idea—the idea that giving good legal representation to people without the ability to hire high priced legal talent will advance the public interest. But why should this idea be coupled with the idea that the legal work must be done for no fee?

It is as if acceptance of a fee from a client somehow “taints” the nature of the representation. But it is hard to understand why this should be so if we understand public interest lawyering as amplifying the voice of the less powerful, rather than allowing elite lawyers to pursue their own ideas of the public interest. Is it possible that this distaste for the acceptance of fees in doing pro bono work stems from the ideas of early twentieth century lawyers, such as those for the NCL and the NAACP, that accepting no fees leaves lawyers freer to pursue their own ideas of good public policy, even when they conflict with their clients? I am not here suggesting that this is all that lies behind the conflation of pro bono and no-fee work, but I do think that we have a long way to go in carefully thinking through what we mean by “public interest” lawyering and how closely we think such lawyering should be connected to a client’s expressed desires, rather than to a political or ideological agenda separate from the client’s wishes.

We might also ask whether conflating the notions of pro bono work and work without any fee tends to perpetuate a system in which pro bono or “public interest” law is dominated by two nonrepresentative groups of American lawyers: first, corporate law firms that can afford to let their associates cut their teeth handling pro bono cases and, second, the tiny handful of lawyers able to get work at the few surviving nonprofits engaged in public interest advocacy. Why should only these lawyers shape our nation’s public interest agenda?

What happened to the grass roots public interest litigation model exemplified by lawyers such as those about whom Professor Kilpatrick has written, who pursue legal work for political and ideological reasons but accept modest fees from clients, when possible, in order to keep their practices afloat? In this category of lawyers I would include many plaintiffs’ employment law, civil rights, union-side labor, and criminal defense firms, as well as others.⁵⁷ These firms

57. For a description of one such firm, see MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* 145-66 (University of Michigan Press 1996) (describing the

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charge fees (much lower than the market rate, to be sure), and thus do not fit within the core definition of pro bono service in ABA Model Rule of Professional Responsibility 6.1(a).⁵⁸ But this manner of providing legal services to underrepresented interests has much to commend it, including, possibly, as I've already mentioned, heightened loyalty to the clients represented.⁵⁹

I hasten to add that, in making this point, I am not intending to suggest that all lawyers are engaged in public interest work when they represent fee paying clients, or that representing a client paying reasonable fees is just as valuable in advancing the public interest as representing a client who can pay no fee at all. What I am questioning is the rigidity with which we insist on preserving the distinction between paid legal work and unpaid, "pro bono" legal service.⁶⁰

Not insignificantly, this distinction is yet another variant of the rigid public/private distinction that scholars have attacked in many other contexts.⁶¹ That distinction has no more obvious claim to

struggles of a small civil rights/criminal defense firm to stay afloat); *see also* Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm, The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293, 296 (1993-94) (explaining that a public interest law firm "provides maximum discretion to select cases, guided by [the firm's] views of social justice").

58. *See supra* note 19.

59. For one argument that representation of civil rights clients by nonprofits may reduce lawyers' accountability to clients' stated interests, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 476-77 (1976), which argues that, in remedial cases following the NAACP's victory in *Brown v. Board of Education*, civil rights lawyers who single-mindedly pursued desegregation goals failed to take into account African-American communities' interest in improved schools.

60. Another place in which this rigid distinction is apparent is in the U.S. Supreme Court's rulings on the constitutionality of legal ethics rules prohibiting client solicitation and related practices. The Court has held that lawyers working for legal advocacy organizations structured as nonprofits are constitutionally exempt from such anti-solicitation rules on First Amendment grounds, but that lawyers in fee-for-service arrangements can be prosecuted under such rules, even, presumably, for the identical conduct. *Compare* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978) (upholding state bar's prosecution of a personal injury lawyer for client solicitation), *with* *In re Primus*, 436 U.S. 412, 439 (1978) (invalidating, in case decided on same day as *Ohralik*, South Carolina's prosecution, under disciplinary rules almost identical to those of Ohio, of ACLU lawyer who solicited client with offer of free legal services); *see also* *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632-33 (1995) (rejecting challenge to constitutionality of state bar rules prohibiting lawyers from soliciting personal injury clients by mail within thirty days of accident). I explore this distinction, which emanates from an NAACP legal ethics case, *NAACP v. Button*, in my longer paper on the NAACP's early legal ethics experience. *See* Carle, *From Buchanan to Button*, *supra* note 10.

61. *See, e.g.* Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 223-24 (1999) (showing how private law played at least as significant a role as public law in defining race and sex relationships in the antebellum period); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 544 (2000) (pointing out the public/private interdependence in administrative law); Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 4-22 (1984) (criticizing use of public/private distinction to curtail free speech rights in labor context); Frances Olson,

legitimacy in the lawyering arena. Somewhat surprisingly, however, even scholars in tune with the critical legal studies approach do not seem as yet to have taken on the sacred cow of “public” versus “private” interest in the lawyering context.

The rigidity of the distinction between no fee/pro bono and fee-for-service work may also fuel ideas that accepting a fee absolves lawyers from concerning themselves about the public interest implications of their work. Why should lawyers have to worry about advancing the public interest only when they are doing legal work for free?⁶² Are lawyers, in other words, to spend only fifty hours per year advancing the public interest, and another 2000 hours per year undermining it?

Other related themes emerge as well: the problem of lawyer domination of public interest organizations’ policy agendas; the power of elite lawyers to shape professional norms to their liking; the benefits and drawbacks of relying on the voluntary commitments of elite big firm lawyers to satisfy huge unmet legal service needs. All of these are questions I hope we explore in discussion.

Constitutional Law: Feminist Critiques of the Public/Private Distinction, 10 CONST. COMMENT. 319, 319-27 (1993) (presenting basic feminist critique of public/private distinction); see also *A Symposium: The Public/Private Distinction*, 130 U. PENN. L. REV. 1289-1608 (1982).

62. The question of lawyers’ duties to attend to the public interest outside the context of pro bono representation has been a hotly contested topic for many years. Leading work in this area includes Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); DAVID LUBAN, *LAWYERS AND JUSTICE* 391 (Princeton Univ. Press, 1988); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998). For an historical analysis of this debate, see Carle, *Lawyers’ Duty to Do Justice*, at 6-10, *supra* note 56, which explores the early twentieth century debate about lawyers’ duty to concern themselves about the justice of their clients’ cases.