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## Transactional Legal Services, Triage, and Access to Justice

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# Transactional Legal Services, Triage, and Access to Justice

Paul R. Tremblay\*

## I. INTRODUCTION

The provision of free legal services to entrepreneurs and emerging businesses has become much more prevalent in recent years.<sup>1</sup> Private law firms offer small business services as part of their pro bono commitments.<sup>2</sup> Law school clinics dedicated to entrepreneurship and small business development have proliferated in the past fifteen years.<sup>3</sup> Some conventional poverty-law-focused legal services offices

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\* Clinical Professor and Associate Dean of Experiential Learning, Boston College Law School. I thank the participants at the scholarship roundtable on *New Directions in Community Lawyering, Social Entrepreneurship, and Dispute Resolution* at Washington University School of Law for their useful feedback and critique. I regret that I have not come close to addressing many of their insightful suggestions. All errors, of course, are mine. Janelle Peiczarka, Susan Lydon, and Nicole Hauspurg provided valuable research assistance on this project.

1. The prevalence of free or subsidized transactional legal services has been the subject of much commentary, especially within the academy. See, e.g., Deborah S. Kenn, *Community Development Law and Legal Education*, in *ACADEMIC ENTREPRENEURSHIP AND COMMUNITY ENGAGEMENT* 61–72 (Bruce R. Kingma ed., 2011); Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL'Y 85, 87–88 (2014); cf. Darian M. Ibrahim, *How Do Start-Ups Obtain Their Legal Services?*, 2012 WIS. L. REV. 333, 335 (2012) (noting the prohibitive cost of counsel for start-ups). The commentary emerges from a broader ongoing discussion of the relationship between law and entrepreneurship. See, e.g., Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241 (1997).

2. “[Law f]irms have . . . focused increasing attention on transactional pro bono, in which lawyers handle matters for organizations engaged in community economic development efforts.” Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 149 (2004) [hereinafter *Politics of Pro Bono*]. See also James L. Baillie, *Fulfilling the Promise of Business Law Pro Bono*, 28 WM. MITCHELL L. REV. 1543 (2002); Thomas H. Morsch, *Discovering Transactional Pro Bono*, 72 UMKC L. REV. 423 (2003).

3. Jones & Lainez, *supra* note 1, at 85, 86 (“transactional legal clinics have grown exponentially” in recent years); Jayashri Srikantiah & Janet Martinez, *Applying Negotiations Pedagogy to Clinical Teaching: Tools for Institutional Client Representation in Law School Clinics*, 21 CLINICAL L. REV. 283, 284 (2014) (noting the prevalence of transactional clinics).

provide transactional services to eligible clients.<sup>4</sup> Even some public interest law firms include small business representation in their portfolio of work for underserved communities.<sup>5</sup> This trend raises questions about the policy justifications for allocating scarce lawyering resources toward enterprises that may not have any direct effect on the day-to-day struggles of low-income families living in disadvantaged communities. This Article represents one beginning attempt to canvass the arguments for and against dedicating legal resources in this way. It accepts as an organizing premise this sentiment articulated by Professor Rebecca Sharpless: “A central—if not *the* central—challenge for social justice lawyers is how, in a world of scarce resources, they should prioritize their goals and methods to maximize positive social change. We are constantly looking for practice visions to guide our allocation of scarce human capital.”<sup>6</sup>

This Article seeks to understand the allocation challenge in the following way. The Article first observes that transactional legal services (TLS) tend to be viewed as less important matters when compared to litigation legal services (LLS) and evaluated using a triage-driven social justice metric. But that familiar and intuitively attractive conclusion requires reexamination if one adjusts the frame and evaluates TLS using a more long-term, capacity-building and capital-nurturing metric. Perhaps TLS ought not fare so poorly after all if the access-to-justice goal is reframed in that way. The trouble is, as the discussion will show, the available research and commentary

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4. See Ben Quinones, *Serving Clients in New Ways: Community Economic Development, CED on the Job*, 27 CLEARINGHOUSE REV. 773, 773–74 (1993) (stressing the importance of economic development in legal services practice). For example, the Legal Aid Foundation of Los Angeles staffs a community economic development unit. See *Community Economic Development*, LEGAL AID FOUND. OF LOS ANGELES, <http://www.lafla.org/service.php?sect=ced&sub=main> (last visited Jan. 19, 2015).

5. See, e.g., ACCESS JUSTICE, PSC, <http://www.accessjustice.net> (full service, nonprofit law firm providing services to low- and moderate-income persons, and to qualified small businesses); THE PUBLIC LAW CENTER, *Community Organizations Legal Assistance*, THE PUBLIC LAW CENTER, <http://www.publiclawcenter.org/services/community-organizations-legal-assistance/> (offering free legal services to microenterprises) (last visited May 19, 2015); VOLUNTEERS OF LEGAL SERVICE, <http://www.volspobono.org> (providing pro bono legal assistance to microenterprises as well as low-income individuals) (last visited May 19, 2015).

6. Rebecca Sharpless, *More Than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347, 349 (2012) (italics in the original).

discourage that optimism, especially for what we might call ecumenical, entrepreneurial TLS, which seems to have weak currency in a strategy to reduce poverty and to foster neighborhood economic growth. A more collectivist TLS, by contrast, appears to offer better long-term hope as a contributor to social change, although it encounters complicated questions about respecting the choices of the prospective clients who wish to be successful entrepreneurs. Before rejecting the idea that entrepreneurial TLS is justified under a social justice metric, the Article considers whether, in some settings, legal assistance to a creative entrepreneur ought to have as much weight in a triage calculation as some other, conventionally-accepted income-generating strategies relied upon by poverty-law advocates.

The Article follows that general assessment of the policy justifications for TLS with a more focused and contextual discussion, exploring the implications of three likely sources of TLS: law firm pro bono, law school clinics, and public interest law firms. It concludes that TLS is more easily defended in the law firm and law school environments because of the differing missions of those institutions. For public interest law firms, the Article explains that current IRS rules discourage or perhaps even prohibit them for engaging in entrepreneurial TLS if the firms operate in the most common form of public interest firm. If instead such firms operate as legal services organizations, no IRS authority limits their freedom to offer TLS, but then the firms will be subject to the same triage and client-selection consideration described in the first half of the Article.

## II. THE ACCESS-TO-JUSTICE BASELINE

### *A. Efficient Use of Scarce Legal Resources*

This Article begins its assessment of TLS from an access-to-justice perspective. For those programs or institutions that *have a choice* about how to allocate scarce free legal services for those in need, is there a principled justification for using those resources for transactional work? For present purposes, TLS will refer to free or very low-cost legal assistance to entrepreneurs and businesses (both for-profit and nonprofit, and individualized or community-based)

intended not to resolve disputes in the way that litigators do, but to establish, organize, govern, and maintain the organization's work.<sup>7</sup>

At first blush one might conclude that ethical principles of triage and efficiency would support a policy favoring direct aid to individuals in distress rather than assistance to innovative businesses, however exciting those latter efforts might be. The following discussion will show why that argument has only limited merit. Even if the benchmark used to assess the value of transactional legal services was one emerging from the access-to-justice campaigns, those services offer important benefits.

There is a monumental need for affordable legal services in the United States. While the "access to justice" movement's concern is hardly a novel issue, the crisis of too few lawyers and too many needy clients continues to make news on a regular basis. In October 2014, the Boston Bar Association published a comprehensive report lamenting the terrible gap in civil legal services for low- and moderate-income residents in Massachusetts.<sup>8</sup> Quite soon, Samuel Estreicher and Joy Radice will publish an impressive collection of policy pieces addressing "access to civil justice for Americans of average means."<sup>9</sup> The number of unrepresented litigants in courts and administrative proceedings continues to grow, and, according to some reports, those unrepresented litigants fare poorly compared to litigants with counsel.<sup>10</sup> Policy makers, foundations, and law firms

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7. See ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 1–10 (2013) (describing the scope of transactional work).

8. STATEWIDE TASK FORCE TO EXPAND CIVIL LEGAL AID IN MASS., BOSTON BAR ASS'N, INVESTING IN JUSTICE, A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS *passim* (2014).

9. BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS (Samuel Estreicher & Joy Radice eds., forthcoming 2015). See also Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 LOY. U. CHI. L.J. 363 (2005); Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 FORDHAM L. REV. 1573, 1573–74 (2002); Patricia E. Roberts, *From the "War on Poverty" to Pro Bono: Access to Justice Remains Elusive for Too Many, Including Our Veterans*, 34 B.C. J.L. & SOC. JUST. 341, 341 (2014) (Symposium, *50 Years After the "War on Poverty": Evaluating Past Enactments and Innovative Approaches for Addressing Poverty in the 21st Century*).

10. See Jeanne Charn, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2217–24 (2013) (describing the

continue to explore avenues for subsidizing more lawyers for those who cannot afford market rates. Most notably, a “Civil *Gideon*” movement has emerged, advocating for the appointment of counsel at public expense for individuals facing serious civil proceedings who cannot afford counsel.<sup>11</sup> In addition, many creative programs supporting the development of private practices aimed at delivering affordable legal services to modest-means clients have appeared.<sup>12</sup> If we can afford to offer free or subsidized legal services, the argument holds, this is where the focus should be. Needy individuals and families suffer terrible injustices every day of the week.

Given this crisis, institutions that provide or fund free legal services encounter powerful moral and political arguments to increase the availability of lawyers for poor litigants. And those arguments plainly hold sway. Far fewer foundations and legal services providers allocate resources for entrepreneurship compared to their support for lawyers in courts and agencies, most likely because of those triage concerns.<sup>13</sup> The triage-driven sentiments of the access-to-justice campaigns plainly treat dispute resolution as more critically important than transactional business development.

That treatment is most likely sensible and defensible, and fits well with our collective intuitions, but it deserves some further scrutiny.

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studies); Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and Its Solutions*, 45 FAM. L.Q. 45 (2011).

11. See, e.g., Ingrid V. Eagly, *Gideon’s Migration*, 122 YALE L.J. 2282 (2013); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010). The phrase “Civil *Gideon*” references the decision of the United States Supreme Court declaring that individuals charged with certain serious crimes have a constitutional right to appointed counsel for their defense. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

12. See REINVENTING THE PRACTICE OF LAW (Luz Herrera ed., 2014); HANOVER RESEARCH, LAW SCHOOL SOLO PRACTICE INCUBATORS AND LEGAL RESIDENCY PROGRAMS (2012), <http://www.gaje.org/wp-content/uploads/2014/10/Hanover-Report.pdf> (last visited Jan. 15, 2015); Fred Rooney & Justin Steele, *Exporting the Legal Incubator: A Conversation with Fred Rooney*, 9 U. MASS L. REV. 108, 111–13 (2014).

13. The prevailing discussion of the application of triage principles in legal services and public interest practice does not typically include references to work for small businesses. See I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 244–45 (2013); Paul R. Tremblay, *Acting “A Very Moral Type of God”: Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999) [hereinafter *Triage*]; Richard Zorza, *The Access to Justice “Sorting Hat”: Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 DENV. U. L. REV. 859 (2012). See also Ronald W. Staudt & Andrew P. Medeiros, *Access to Justice and Technology Clinics: A 4% Solution*, 88 CHI.-KENT. L. REV. 695 (2013).

For ease of the following discussion, let us refer to the Civil *Gideon*-driven, court- and agency-focused representation characteristic of most legal services delivery schemes as “litigation legal services,” or “LLS,” to contrast with the “TLS” which is the focus of this Article. Of course these categories represent caricatures of more nuanced programmatic policies and representation models,<sup>14</sup> but the cleaner contrast may serve adequately for the proceeding analysis. A supporter of increased TLS would not readily accept the presumption that TLS does not contribute to alleviation of the access-to-justice challenges. Such a TLS advocate might make an argument that looks something like this:

Focusing one’s efforts on LLS is obviously important, but it is, at the same time, shortsighted. LLS helps allocate scarce societal resources among low-income families, or, more accurately perhaps, it transfers some of those resources from the haves to the have-nots. Yet the enterprise leaves the pot of those resources relatively fixed and finite. In addition to addressing the immediate needs of persons involved in legal disputes, policy makers must also support efforts to increase the available resources so that there are fewer low-income families competing for them. TLS is a healthy way to address longer-term issues plaguing underserved communities.<sup>15</sup> TLS helps businesses thrive, and thriving businesses create economic opportunity. Not only do those businesses increase the capital and wealth of their owners, but they also they lead to jobs, and increased employment spurs neighborhood vitality. Supporting neighborhood business initiatives in order to increase employment opportunities and stimulate more

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14. The LLS model oversimplifies what all effective neighborhood legal services offices provide to poor clients, and minimizes the role of impact litigation, community organizing, and legislative advocacy which are essential to the mission of those programs. The TLS reference implies lawyering for an individual who, or small business that, hopes to make a successful go at a new commercial endeavor, and implicitly neglects transactional work on behalf of social enterprises, community groups, and nonprofits.

15. See Laurie A. Morin, *Legal Services Attorneys as Partners in Community Economic Development: Creating Wealth for Poor Communities Through Cooperative Economics*, 5 UDC/DCSL L. REV. 125, 132 (2000) (arguing that self-employment through new businesses is a “crucial component of sustained change” in poor communities).

investment in neighborhoods lacking commercial activity is an important component of any community economic development (CED) strategy.<sup>16</sup>

Put another way, the real problems leading to the great need for LLS are not the absence of enough lawyers, but the absence of enough power, opportunity, and capital among those who are the clients of LLS. The best social policy is not necessarily one that offers more LLS; it may be one that creates and nurtures structures that diminish the need for LLS.

As Michelle Jacobs has written,

Traditional notions of “access to justice” entertained by the majority in the profession narrowly embrace only helping the poor to have a voice in court. There is no commitment to alter fundamentally the legal structures which help institutionalize poverty. . . . In order to fundamentally change access to law and justice for poor people, lawyers would need to accept the premise that the conditions which produce poverty must change.<sup>17</sup>

The above arguments contend that an initiative aimed toward the development of long-term stability, power, and capital—especially in underserved communities—is fully warranted as a matter of a just social policy.<sup>18</sup> While the powerfully-felt “rescue mission”<sup>19</sup> can

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16. See, e.g., Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195 (1997); Greg Volz & Brad Caftel, *Job Strategies in the Era of Welfare Reform: A Community-Based Model of Legal Services*, 33 CLEARINGHOUSE REV. 569, 578–80 (2000); Michael E. Porter, *The Competitive Advantage of the Inner City*, HARV. BUS. REV., May-June 1995, at 55, 61–62; William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 455 (1994); Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217 (1999).

17. Michelle S. Jacobs, *Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?*, 48 FLA. L. REV. 509, 514–15 (1996).

18. See Alicia Alvarez, *Community Development Clinics: What Does Poverty Have to Do With Them?*, 34 FORDHAM URB. L.J. 1269, 1269 (2006) (community development clinics “must . . . acknowledge and focus their efforts on the elimination . . . of poverty”); Volz & Caftel, *supra* note 16, at 569 (“[W]e begin by describing a relatively new approach—called sector employment intervention (SEI)—to solving poverty. SEI . . . seeks to connect residents or poor



often distort resource allocation choices, as the desire to assist those in distress in the present can easily overshadow the longer-term strategies that might effect meaningful change, a principled response to poverty must overcome such distortion.<sup>20</sup> Every public health initiative or program rests on the principle that short-term gains must at times be sacrificed for long-term benefits.<sup>21</sup> TLS serves, in this sense, as a form of public health legal services. As the health care field understands quite well, a vibrant social policy must include triage-driven urgent care along with initiatives aimed at prevention and health maintenance over the long term.<sup>22</sup>

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communities to employment opportunities, livable wages and benefits, good working conditions, and advancement opportunities.”).

19. See Peter Margulies, *Re-framing Empathy in Clinical Legal Education*, 5 CLINICAL L. REV. 605, 620–21 (1999); Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947, 959–68 (1992) [hereinafter *Rebellious Lawyering*]. See also Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 175 (1990) (reviewing DAVID LUBAN, *LAWYERS AND JUSTICE* (1988)) (arguing that “human desperation” is a more apt term than “urgency” within triage discussions).

20. While not necessarily supporting entrepreneurial TLS, a vast collection of work supports the essential notion that long-term structural change is as important as, if not more important than, individual representation in promoting social justice. For a sampling of the literature, much of which emanates from community economic development visions, see, e.g., WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* (2001); Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239 (2010); Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999 (2007); Quigley, *supra* note 16; Shah, *supra* note 16. For an insightful argument that LLS is equally important, see Sharpless, *supra* note 6.

21. Jeffrey Levi et al., *Prevention for a Healthier America: Investments in Disease Prevention Yield Significant Savings, Stronger Communities*, Washington, DC: Trust for America’s Health (2008), available at <http://healthyamericans.org/reports/prevention08/Prevention08.pdf>; Jean C. O’Connor et al., *Paying for Prevention: A Critical Opportunity for Public Health*, 41 J.L. MED. & ETHICS 69, 71 (2013) (“The public health system is uniquely positioned to develop and implement primary prevention strategies in the community which are essential to the success of coordinated clinical health services.”); Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J.L. & PUB. POL’Y 47, 51 (2013) (health care policy’s commitment to social justice “ranges far beyond individual health-care rights to focus on collective needs and problem solving with regard to the social determinants of health, broadly defined”). Cf. Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, 8 N.Y.U. J. LEGIS. & PUB. POL’Y 35, 37 (2004) (describing need to “de-emphasize litigation as the primary tool for advancing social justice”).

22. See, e.g., U.S. Preventive Services Task Force, *THE GUIDE TO CLINICAL PREVENTIVE SERVICES 2014 v–vii* (2014), <http://www.ahrq.gov/professionals/clinicians-providers/guidelines-recommendations/guide/cpsguide.pdf> (last visited May 18, 2015); Viviana Balanescu, *Prevention is better than cure, say Romanian doctors*, 89 BULLETIN OF THE WORLD HEALTH

### *B. Transactional Legal Services as an Empowerment Enterprise*

An argument that lawyers committed to challenging poverty ought to eschew LLS in favor of a more structural empowerment agenda is hardly a new one. That theme serves as the central focus of what we might call the “rebellious lawyering” approach to poverty law, which emerged in the late 1980s and is still a vital component of progressive representational thinking today. Many observers, notably Lucie White, Gerald López, and Anthony Alfieri, articulated a critique of conventional poverty lawyering that focused on the privileging of lawyer expertise in solving client problems.<sup>23</sup> These observers argued explicitly for a relationship in which lawyer expertise ought to be downplayed in favor of client strategic leadership and inclusion of client stories and narratives.<sup>24</sup> The arguments were trenchant: lawyers do their poor clients no lasting benefits by achieving results using technical expertise *for* the clients, rather than developing meaningful resolutions of disputes *with* the clients, and with the clients as the creators of the strategies.<sup>25</sup> Lucie White’s story of Mrs. G’s welfare hearing stands as the preminent example of that theme.<sup>26</sup> Lawyers

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ORG. 248, 248–49 (2011); Steven H. Woolf et al., *The Economic Argument for Disease Prevention: Distinguishing Between Value and Savings* (P’ship for Prevention 2009), <https://www.prevent.org/data/files/initiatives/economicargumentfordiseaseprevention.pdf> (last visited May 18, 2015); C. Patterson & Larry W. Chambers, *Preventive Health Care*, 345 THE LANCET 1611, 1611 (1995).

23. See, e.g., Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) [hereinafter *Mrs. G.*]; Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994); GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) [hereinafter *Reconstructive Poverty Law Practice*]; Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993); Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992). Scott Cummings relies on those three thinkers in his evaluation of progressive CED. See Scott L. Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001) [hereinafter *Grassroots Movement*], as did I in my assessment of regnant lawyering. See also Tremblay, *Rebellious Lawyering*, *supra* note 19.

24. See Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994) [hereinafter *Recognizing Client Narrative*].

25. Alvarez, *supra* note 18, at 1273–75.

26. In her Essay, Professor White describes her relationship as the attorney for Mrs. G, who faced a hearing on welfare overpayment. The piece focuses on the strategic divide between White’s plan to craft Mrs. G’s story as an estoppel story, resulting from a county government

who privilege their own professional visions over the felt commitments of clients do those clients no favors, and possibly cause them harm.

This strand of community lawyering emphasized legal work (or, perhaps, not-quite-legal work)<sup>27</sup> that enhanced the power of disadvantaged populations. In critiquing what López termed “regnant” lawyering, these scholars discouraged litigation strategies that failed to alter the status quo landscapes, even if those strategies accomplished short-term gain.<sup>28</sup> Scott Cummings and Ingrid Eagly describe the project in this way: “By shifting the analysis away from results-oriented legal strategies and toward process-oriented client empowerment, [López and White] displaced lawyers as the focal point of social change practice and further undermined the legitimacy of [LLS-type] law reform tactics.”<sup>29</sup> In another pioneering work, William Quigley offered a like-minded prescription to progressive lawyers:

The lawyer who wants to serve poor people must put his skills to the task of helping poor people organize themselves. . . . The purpose of empowerment lawyering with community organizations is to enable a group of people to gain control of the forces which affect their lives. The substance of this lawyering is primarily the representation of groups rather than

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mistake, and Mrs. G’s necessity story, which seemed to have less conventional legal force but fit the lived experience of the client better. White, *Mrs. G*, *supra* note 23, at 27. See Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1061 (1994) (discussing the power and reach of the Mrs. G story).

27. A related theme of that progressive cohort was deprofessionalization of dispute resolution, and the encouragement of solutions relying less on the skill of lawyers. See Alfieri, *Impoverished Practices*, *supra* note 23; Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 CLINICAL L. REV. 109, 123 (2009); Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 33 (1984); Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1998 WIS. L. REV. 699 (1988).

28. “Regnant” lawyering is Gerald López’s term for the traditional conception of good faith, earnest poverty lawyering that primarily involves direct individual client representation and “impact” litigation. See LÓPEZ, *supra* note 23, at 23–24; Janine Sisak, *If the Shoe Doesn’t Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 FORDHAM URB. L.J. 873, 876 (1998).

29. Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 460 (2001).

individuals. This style calls for lawyering which joins, rather than leads, the persons represented.<sup>30</sup>

These writers share a growing and passionate commitment to work that bolsters and sustains the power of underserved communities and individuals within those communities, employing strategies different from the more conventional, individually-focused legal services aimed at assisting low-income clients to succeed in their disputes within courts and agencies.<sup>31</sup>

Supporters of TLS may argue that lawyering for entrepreneurs, businesses, and organizations can accomplish the goals embraced by the rebellious strand of the community lawyering movement. TLS strategies, if successful, foster the development of autonomy and capital among the clients who participate.<sup>32</sup> Their most important investment returns tend to be long-term, rather than short-term. And, contrary to regnant lawyering activity, TLS focuses the available lawyering expertise on supporting and furthering strategies that originate with the clients, rather than from the lawyers. In this respect, viewed from that access-to-justice lens with which we began, TLS has much richer potential value, and greater justification, than one might initially have surmised, if those above assumptions and arguments are sound.

### *C. The Critique of TLS as an Empowerment Enterprise*

The arguments that TLS furthers the development of power within underserved communities are attractive, but they are subject to important critiques deserving of careful inquiry. Whether transactional assistance to entrepreneurs serves empowerment ends is a considerably complicated question. In many respects this is the most challenging issue for TLS supporters to confront. The worry about allocating scarce legal resources to TLS arises in two separate

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30. Quigley, *supra* note 16, at 455–56.

31. The literature is wide-ranging. For a review of the field, see Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 440 (2000); Ascanio Piomelli, *Sensibilities for Social Justice Lawyers*, 10 HASTINGS RACE & POVERTY L.J. 177 (2013). For an insightfully critical review of that stance, see Rebecca Sharpless, *supra* note 6.

32. Morin, *supra* note 15, at 132.

ways. First, and most obviously, the entrepreneurs assisted by TLS may not be part of any disadvantaged community—indeed, they may be otherwise successful graduates of elite colleges and universities with many advantages and opportunities. TLS supporters must acknowledge that reality, and address whether a robust defense of that form of lawyering should embrace only TLS on behalf of members of underrepresented communities. Second, and perhaps a bit less obviously, entrepreneurial TLS (as opposed to community-building TLS, a distinction to be developed below) might be a particularly poor vehicle for developing meaningful capital within underserved communities. This Article considers each of these worries in turn.

### 1. Which Prospective TLS Clients Should Qualify?

If TLS supporters seek to defend the provision of free lawyer services on behalf of entrepreneurs because that effort will aid in the long run to diminish poverty and to strengthen neighborhoods, that proposition is more difficult to sustain if the clients of TLS services have no connection to communities of color or other underserved groups and neighborhoods. There are, of course, many creative, innovative entrepreneurs with promising business-development ideas who cannot afford counsel. Many, if not most, participants in business incubators do not have a great deal of money, precisely because they use their available time working on their exciting business leads which have not yet managed to attract funding or to find customers.<sup>33</sup> Since the startup founders typically have limited funding for their business development, their capacity to pay market rates for legal counsel is not very likely.<sup>34</sup> For purposes of affording

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33. Observers often report the need for new businesses and entrepreneurs to have access to affordable counsel. See Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249, 255–56 (2004); Dana Thompson, *Accelerating the Growth of the Next Generation of Innovators*, 8 OHIO ST. ENTREP. BUS. L.J. 379, 382 (2013); Anthony J. Luppino, *Introduction: Symposium on Law, Entrepreneurship, and Economic Recovery*, 78 UMKC L. REV. 319, 321 (2009); Jeff Thomas, *The Legal Spark*, 78 UMKC L. REV. 455, 456–57 (2009).

34. See Ibrahim, *supra* note 1; Thomas, *supra* note 33, at 456; Scott Edward Walker, *Top 10 Reasons Why Entrepreneurs Hate Lawyers* (Venture Hacks 2010) <http://venturehacks.com/articles/hate-lawyers> (last visited May 19, 2015).

private lawyers, these entrepreneurs are “indigent.”<sup>35</sup> Many creative entrepreneurs, though, attended good schools, come from families with money, and, as a result, could be supporting themselves rather nicely if they were less entrepreneurial. These individuals comprise the client pool for much of the most cutting-edge TLS services.

It is therefore difficult to defend what we might call an “ecumenical” TLS, through which free legal services become available to the most innovative and promising entrepreneurs regardless of their home community or background. At least when viewed through the access-to-justice lens, assisting Cal Tech, Washington University, or Boston College graduates to develop new software apps that just might be the rage in a few years is simply not the most productive use of scarce legal resources given the usual metrics for evaluating allocation of those resources. This is not to say that wide-ranging entrepreneurial TLS is not justified and ought not be offered by some providers—only that an ecumenical account of TLS is difficult to justify based upon an access-to-justice benchmark. Other good reasons besides the access-to-justice goals might justify wide-ranging TLS in certain contexts, such as law firm pro bono efforts or law school clinics. Part III of this Article addresses those possibilities. Before we reach that topic, we must first consider a less-ecumenical account of TLS, one focused on entrepreneurship emanating from within underserved communities.

## 2. Focused Entrepreneurial TLS as an Anti-Poverty, Empowerment Enterprise

Many startup entrepreneurs live, work, or grew up in underserved communities. Imagine a program that dedicated its free lawyering capacity to support of entrepreneurs who have connections to

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35. There remains uncertainty in many jurisdictions on the question of how the income limits that typically apply to prospective clients of legal services organizations ought to apply to prospective clients who need transactional legal services. One identifiable context for that consideration is that of the student practice rules of the respective states, and whether a small business that cannot afford private counsel ought to be considered as “indigent” for purposes of student representation. For a discussion of these themes, see Baillie, *supra* note 2, at 1564–65 (discussing law firm pro bono); Jones & Lainez, *supra* note 1, at 116–19 (discussing the student practice rules).

disadvantaged neighborhoods, doing so intending to accomplish access-to-justice goals. The question we consider here is whether that strategy would be justifiable given access-to-justice or similar programmatic social justice ends. To add some important texture to the question, imagine that the program did not distinguish among the types of startup businesses the entrepreneurs chose to develop, so long as the business had some connection to an underserved community. The free legal services would be available, for example, to the creators of an innovative mobile app called “Drizly,” which lets users order alcohol for quick home delivery,<sup>36</sup> as well as to the founders of Metrowest Worker Center, Inc./Casa do Trabalhador/Casa del Trabajador, an immigrant worker rights center,<sup>37</sup> so long as the founders had some important connection to a community that had been ignored, distressed, or underserved. In working with either of these businesses, the program would accomplish its mission to use the available legal talent to support business initiatives emanating from the communities historically short-changed by conventional economic policies.

That less-ecumenical strategy, while more justifiable than the broader approach described above, still may come up short when evaluated through the access-to-justice, poverty-fighting, or community-building benchmarks. Contrary to some earlier aspirations, observers have concluded that focused, individualistic, entrepreneurial strategies promise little success as anti-poverty measures.<sup>38</sup> That opinion has earned adherence in community economic development (CED) literature. CED writers have encountered policies aimed at developing homegrown,

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36. This is a real business. See DRIZLY, <http://www.drizly.com> (last visited May 19, 2015).

37. This is also a real nonprofit organization. See GUIDESTAR CHARITY CHECK, <http://www.guidestar.org/ReportOrganization.aspx?ein=27-2850017> (last visited May 19, 2015). The founders of Drizly.com and Metrowest Worker Center were clients of the Community Enterprise Clinic where I teach, and many students worked with both clients and learned a great deal in the process.

38. See, e.g., NANCY C. JURIK, *BOOTSTRAP DREAMS: U.S. MICROENTERPRISE DEVELOPMENT IN AN ERA OF WELFARE REFORM* 154–55 (2005); Cummings, *Grassroots Movement*, *supra* note 23; Rashmi Dyal-Chand & James V. Rowan, *Developing Capabilities, Not Entrepreneurs: A New Theory for Community Economic Development*, 42 *HOFSTRA L. REV.* 839 (2014).

entrepreneurial businesses in underserved neighborhoods, the goals of which were to diminish the effects of poverty through the emergence of vibrant commercial activity, with jobs and street-level vitality.<sup>39</sup> CED writers note that such policies have not had appreciable effect on the quality of life in the affected communities. Scott Cummings has described a wave of criticism “of the apolitical, free-market approach to CED . . . question[ing] the efficacy of business development strategies that fail to address larger economic and political forces.”<sup>40</sup>

More recently, Rashmi Dyal-Chand and James Rowan have argued, using both economic theory and empirical data, that “[entrepreneurship] has thus far failed as a framework for widespread and reliable local economic development and poverty alleviation.”<sup>41</sup> Dyal-Chand and Rowan demonstrate that successful entrepreneurs need to have sufficient capital available—both financial and social—to endure the significant risks inherent in startup enterprises. That capital, and the resources necessary to sustain the risks involved, are inevitably scarce in communities where poverty is most prevalent.<sup>42</sup> Some such entrepreneurs succeed in spite of those obstacles, of course, but they argue that a CED strategy grounded in an expectation of persistent successes is shortsighted. It will not accomplish the economic development goals its proponents hope, and it diverts resources from the kind of transactional CED that might serve to alter the underlying conditions that sustain poverty.<sup>43</sup>

If these observers are correct, an access-to-justice justification for focused, less-ecumenical TLS remains elusive. As noted above, there

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39. See Susan R. Jones & Roger A. Clay, Jr., *What Is Community Economic Development?*, in BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS, AND POLICYMAKERS 3, 3–5 (Susan R. Jones & Roger A. Clay, Jr. eds., 2009); Michael E. Porter, *The Competitive Advantage of the Inner City*, HARV. BUS. REV., May–June 1995, at 55, 56.

40. Cummings, *supra* note 23, at 407. See also Louise A. Howells, *Dimension of Microenterprise: A Critical Look at Microenterprise as a Tool to Alleviate Poverty*, 9 J. AFFORDABLE HOUSING & CMTY. DEV. L. 161 (2000).

41. Dyal-Chand & Rowan, *supra* note 38, at 839.

42. *Id.* at 844, 859–60.

43. See *id.* at 867 (noting “the disturbing implications of using a mode of poverty alleviation that targets only a ‘chosen few,’” and suggesting that “practitioners focus on the question of how best to alleviate poverty and produce local economic development by creating a means of sustainable income for people below the poverty line”).



may be other good reasons aside from access-to-justice principles for focused TLS; such a strategy would contribute to some increase in the chances of success among entrepreneurs from underserved communities and therefore has much to offer. But there remains one more permutation of TLS as a poverty-challenging strategy, one with seemingly greater principled justification. That permutation we might call collectivist-focused TLS. The next subsection describes that strategy.

### 3. Collectivist TLS as an Anti-Poverty, Empowerment Enterprise

The critics of entrepreneurial TLS do not argue for more short-term, regnant lawyering in the mode of the Civil *Gideon* campaigns. They search for and support TLS strategies to accomplish meaningful redistribution of power, the development of genuine capital in underserved communities, and greater autonomy for those living in those communities.<sup>44</sup> The critics do not dismiss TLS as a proper lawyering strategy; they object to viscerally seductive, but ultimately ineffectual, entrepreneurship TLS.<sup>45</sup> Instead, those progressive writers propose a community-based, collectivist TLS, which they argue will be much more likely to accomplish the long-term empowerment and poverty-challenging goals described above.<sup>46</sup> Scott Cummings, for example, outlines “an alternative model of politically engaged CED that integrates legal advocacy and community organizing to build cross-neighborhood coalitions that promote broad-based economic reform.”<sup>47</sup> He urges lawyers and policy-makers “to deploy transactional lawyering in a way that builds organized low-income constituencies that can challenge the distribution of political power.”<sup>48</sup> Focused entrepreneurial TLS is not such an approach. The kind of TLS he urges includes living wage

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44. See Cummings, *Grassroots Movement*, *supra* note 23, at 478–83; Howells, *supra* note 40, at 166–71; Dyal-Chand & Rowan, *supra* note 38, at 888.

45. See Cummings, *Grassroots Movement*, *supra* note 23, at 447–51; Dyal-Chand & Rowan, *supra* note 38, at 843 (“Most importantly for our purposes, despite the enormous potential that entrepreneurship seems to hold, it thus far has failed as a framework for widespread and reliable local economic development and poverty relief.”).

46. See Cummings, *Grassroots Movement*, *supra* note 23, at 399, 472–78.

47. *Id.* at 399.

48. *Id.* at 459.

campaigns, worker cooperatives, and jobs initiatives, not the creation of small startup businesses.<sup>49</sup>

Carmen Huertas-Noble has developed similar arguments in her description of effective TLS provided to worker organizations.<sup>50</sup> She argues that progressive transactional lawyers should encourage clients to create worker cooperatives when they are choosing among business entities, instead of the typical corporation or LLC models. She writes:

Worker-owned cooperatives can foster two essential goals of empowerment-centered [CED]: (1) promoting individual efficacy through meaningful job creation and (2) promoting collective empowerment by keeping jobs, income and profits within the community and by serving as a space for community organizing that enables cooperative members to participate in the larger economic justice movement. In this way, a worker-owned cooperative can empower not only its members, a laudable achievement in and of itself, but also larger segments of communities.<sup>51</sup>

Dyal-Chand and Rowan, while pessimistic about the achievement prospects of entrepreneurial TLS, embrace the long view of TLS as an alternative to regnant, individualist representation. Like Cummings and Huertas-Noble, they argue for collective action in the work that progressive transactional lawyers accomplish: “A . . . critical component for success is collective action, either within the business or with a network of similar businesses. When collective action produces success, an increase in power vests with the participants.”<sup>52</sup>

Dyal-Chand and Rowan, crafting a “capabilities approach” to TLS emerging from the writing of the economist and scholar Amartya

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49. *Id.* at 399.

50. Carmen Huertas-Noble, *Promoting Worker-Owned Cooperative as a CED Empowerment Strategy: A Case Study of Colors and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change*, 17 *CLINICAL L. REV.* 255 (2010).

51. *Id.* at 266.

52. Dyal-Chand & Rowan, *supra* note 38, at 879.

Sen,<sup>53</sup> endorse the creation of worker cooperatives<sup>54</sup> as well as business models (for those not established as cooperatives) that prioritize the needs of workers over those of the owners of the entity.<sup>55</sup> Laurie Hauber agrees: “To be a community-centered program . . . it is imperative a program is structured with the following three elements as its foundation: (i) a ‘holistic approach,’ (ii) ‘empowerment through knowledge,’ and (iii) ‘mechanisms of accountability.’”<sup>56</sup> Hauber describes a community-based entrepreneurship assistance program she helped develop in Boston, whose mission supports those businesses that respond to the needs of the local community and emerge from participatory decision-making within neighborhoods.<sup>57</sup>

These writers are persuasive. Organizations with available legal capital to use for social justice ends are justified in using that capital for collectivist, community-enhancing TLS. That conclusion, however, triggers some discomfoting reactions.

#### 4. Objections to the Collectivist TLS Focus

If one embraces the insights about the effectiveness of collectivist TLS relative to entrepreneurial TLS, the question of “who decides” surfaces.<sup>58</sup> Some versions of progressive lawyering theory emphasize the centrality of client narrative and client autonomy within the lawyering collaborations. As noted earlier, the critics of conventional

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53. *Id.* at 884–87 (relying on AMARTYA SEN, *THE IDEA OF JUSTICE* (2009); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999). *See also* Amartya Sen, *Capability and Well-Being*, in *THE QUALITY OF LIFE* 30 (Martha C. Nussbaum & Amartya Sen eds., 1993); Amartya Sen, *Conceptualizing and Measuring Poverty*, in *POVERTY AND INEQUALITY* 47 (David B. Grusky & Ravi Kanbur eds., 2006).

54. Dyal-Chand & Rowan, *supra* note 38, at 897–98.

55. *Id.* at 901–02.

56. Laurie Hauber, *Promoting Economic Justice Through Transactional Community-Centered Lawyering*, 27 *ST. LOUIS U. PUB. L. REV.* 3, 6–7 (2007).

57. *Id.* at 28–29. *See also* Gowri J. Krishna, *Worker Cooperative Creation as Progressive Lawyering? Moving Beyond the One-Person, One-Vote Floor*, 34 *BERKELEY J. EMP. & LAB. L.* 65 (2013); Ariana R. Levinson, *Founding Worker Cooperatives: Social Movement Theory and the Law*, 14 *NEV. L.J.* 322 (2014); Alicia E. Plerhoples, *Representing Social Enterprise*, 20 *CLINICAL L. REV.* 215, 229–30 (2013).

58. *See* Troy E. Elder, *Poor Clients, Informed Consent, and the Ethics of Rejection*, 20 *GEO. J. LEGAL ETHICS* 989 (2007) (exploring the tensions involved in poverty lawyers choosing clients based on community needs).

regnant lawyering objected to the silencing of client voice in poverty law representation, and the privileging of the lawyer's perspective.<sup>59</sup> A more substantive, genuine lawyering practice, those commentators assert, will embrace client stories, preferences, and goals. Reyna Ramolete Hayashi, describing the need for TLS representation of domestic worker cooperatives, captures this sentiment well:

[I]nserting disadvantaged people into the hierarchal structure of the attorney-client relationship—which does not challenge existing institutional distributions of power and privilege, but instead, reproduces those same oppressive systems and power relations—only leaves clients powerless and dependent.<sup>60</sup>

The collectivist approach to TLS, like some other strands of “cause lawyering,”<sup>61</sup> is not easily squared with the progressing commitment to client story and autonomy.<sup>62</sup> As developed by its adherents, the collectivist TLS model appears to privilege the lawyers' view of a proper business model and an effective organizational orientation—that is, a collectivist, cooperative enterprise connecting as many community members as possible.<sup>63</sup> The model implies, if it does not state outright, that in counseling a client about a choice of entity, a progressive TLS lawyer ought to encourage the formation of a worker cooperative instead of a traditional corporation or LLC.<sup>64</sup> The

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59. See *supra* notes 28–29 and accompanying text. Writing about the lawyering approaches to resolving disputes faced by poor clients, Ascanio Piomelli observes that the “most significant common theme” of this movement “is its commitment to more active client participation in the framing and resolution of disputes” with “active collaboration between attorneys and clients.” Piomelli, *supra* note 31, at 440.

60. Reyna Ramolete Hayashi, *Empowering Domestic Workers Through Law and Organizing Initiatives*, 9 SEATTLE J. FOR SOC. JUST. 487 (2010).

61. See CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998); Anna-Maria Marshall & Daniel Crocker Hale, *Cause Lawyering*, 10 ANN. REV. L. & SOC. SCI. 301, 307–08 (2014); Scott Barclay & Daniel Chomsky, *How Do Cause Lawyers Decide When and Where to Litigate on Behalf of Their Cause?*, 48 LAW & SOC'Y REV. 595, 597–606 (2014); Deborah J. Cantrell, *Sensational Reports: The Ethical Duty of Cause Lawyers to Be Competent in Public Advocacy*, 30 HAMLINE L. REV. 567, 569–71 (2007).

62. See Ann Southworth, *Representing Agents of Community Economic Development: A Comment on Recent Trends*, 8 J. SMALL & EMERGING BUS. L. 261, 271–72 (2004).

63. Rashmi Dyal-Chand and Jim Rowan acknowledge the conflict the activist lawyer encounters in proposing collectivist TLS protecting worker rights while working with the founders of a business. Dyal-Chand & Rowan, *supra* note 38, at 849–50.

64. See, e.g., Huertas-Noble, *supra* note 50; Krishna, *supra* note 57.

motives in doing so are honorable, of course, especially given the data about what measures work to achieve CED and the choice to allocate the scarce lawyer resources toward that achievement. And many cause lawyering advocates in fact downplay client preference if more effective mobilization strategies are available.<sup>65</sup> If it is true that many low-income prospective clients would prefer a more individualized model of business ownership, the progressive TLS model cannot honor those preferences.<sup>66</sup>

The collectivist proponents would point out that theirs is an orientation about one's choice of clients and application of scarce resources, and less about persuading clients to pursue aims favored by the lawyers.<sup>67</sup> In other words, in evaluating a TLS strategy through an access-to-justice lens, the collectivist stance simply holds that it is better to choose to represent collectives rather than individual entrepreneurs and to establish worker cooperatives instead of individual LLCs or Subchapter S corporations.

If that is the collectivist stance, it is coherent and sensible, and true to the social justice commitment. But that view of the stance assumes that certain selected clients come to the lawyers asking for worker cooperatives, and the world may be much more fluid and ambiguous than that. Much of the collectivist literature supports a

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65. See, e.g., Peter M. Cicchino, *To Be a Political Lawyer*, 31 HARV. C.R.-C.L. L. REV. 311 (1996) (arguing that clients may not know best because of false consciousness); Kevin Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 206 (1999–2000) (“[An] attorney’s professional responsibilities to clients, specifically to zealously represent one’s clients within the bounds of the law, limit his or her power to proceed independently on a path seeking true social transformation.”); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1102 (1994) (“The Dark Secret of Progressive Lawyering is that effective lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments.”).

66. This tension within progressive lawyering has not gone unnoticed in more traditional representational contexts. See, e.g., Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretic of Practice Movement*, 61 BROOK. L. REV. 889 (1995); Southworth, *supra* note 62; Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123 (1992).

67. Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 343–44 (1978) (offering justification for case, issue, and client selection and denial based on the goals of the organization); W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987, 1028 (2006) (“lawyers have the de facto power to determine which rights are enforced” by which clients they choose to represent).

lawyer encouraging entrepreneurs from underserved neighborhoods to appreciate the benefits to the community of less individualistic business schemes. If that is true, it also may be coherent and sensible, but it tends to conflict with the deep commitment to client narrative.<sup>68</sup> Of course, the stance leaves the energetic software app developer who wants to be as successful as possible without the free legal services that she needs to get there.<sup>69</sup>

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68. Laura Notess, *Preserving the Human in Human Rights: Incorporating Informed Consent into the Work of International Human Rights NGOs*, 27 *GEO. J. LEGAL ETHICS* 765, 776 (2014) (“[L]ike other cause lawyers, poverty lawyers frequently encounter tensions between the wishes of their client and the broader social change they wish to advocate for.”); see also Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 *LAW & SOC. INQUIRY*, 657, 693 (2004) (“Law reform was made difficult by the fact that it was often difficult for lawyers to convince clients to hold out through the long process of precedent-setting litigation and appeal, when in contrast, settlement offered immediate and much-needed results.”); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 *VA. L. REV.* 1103 (1992).

69. The other complication emerging from the arguments supporting collectivist TLS relates to the role that the lawyer’s expertise plays in her relationship with her client. It seems that in TLS settings, including collectivist TLS, the availability of the lawyer’s technical expertise is both more essential and less damaging than some critics, writing typically about dispute resolution contexts, have feared. Much progressive lawyering literature downplays lawyer expertise, emphasizing the dangers of the privileging of lawyers’ professional visions over more meaningful client narratives. See López, *supra* note 28 (describing the benefits stemming from the combination of problem-solving and persuasive storytelling); see also Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 23 (“When the client’s voices are silenced and her narratives are displaced by the lawyer’s narratives, client integrity is tarnished and client story is lost. The intent of this Essay is to understand and rectify the loss of client narratives in lawyer storytelling.”); Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 *GEO. J. LEGAL ETHICS* 619, 620–26 (1991) (noting the critical role of client voice); Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 *CLINICAL L. REV.* 333, 375–77 (2009) (describing “the Lawyer Domination Problem” and the benefits of neighborhood-based community lawyering); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 *CORNELL L. REV.* 1298 (1992) (discussing the role of the lawyer as a “translator” for clients in the legal system); Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 *GEO. J. LEGAL ETHICS* 1, 3 (2000) (criticizing the trend in legal scholarships to tell a client’s story without her input); Miller, *Recognizing Client Narrative*, *supra* note 24 (the traditional “notion of case theory ignores context and misconceives the power of important facts—especially the client’s life facts”); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 *CLINICAL L. REV.* 157 (1994) (incorporating the client and her story into the lawyering process); White, *Mrs. G*, *supra* note 23 (exploring the strategic divide between telling the lived story and the legal story). In TLS settings, however, the businesses, whether collective or individual, often need precisely the lawyer’s technical expertise in order to sustain their enterprises. See Southworth, *supra* note 62, at 263–64.

*D. An Alternative Access-to-Justice Lens: The Triage Analysis*

The exploration thus far has led us to the conclusion that if we evaluate TLS through the benchmark of access-to-justice, and if we understand access-to-justice as essentially a CED consideration, through its poverty-attacking strategy, then entrepreneurial TLS fares far less well than more progressive collectivist TLS. There is, though, another way to use the access-to-justice lens to assess entrepreneurial TLS. That lens is triage. The triage principle within ethical thought holds that scarce resources should be used in ways that achieve one's goals most effectively.<sup>70</sup> That principle may be applied to choices about delivery of entrepreneurial TLS.

There is little question that the Civil *Gideon* movement's litigation-focused strategies fare well under the access-to-justice (ATJ) benchmark. Indeed, the calls for greater availability for unrepresented litigants are always presented in terms of ATJ, so much so that the concepts are close to identical.<sup>71</sup> But that ATJ conception is quite different from a CED conception. Few ATJ proponents argue that Civil *Gideon* is a long-term, poverty-fighting strategy. The press for more lawyers for unrepresented litigants is instead aimed to confront the immediate, short-term crisis of individuals and families in distress. While observers have commented with regularity about the limited social change capacity of LLS,<sup>72</sup> few if any have argued that LLS is a bad thing, and not a justified use of the resources available to legal services organizations, law firms, and

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70. See GEORGE WINSLOW, TRIAGE AND JUSTICE (1982).

71. A Westlaw search for the phrases "Civil *Gideon*" and "access to justice" produces 307 sources that contain both references. For an example of the connection, see Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106 (2013); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 970 (2012); Russell Engler, *Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives*, 40 CLEARINGHOUSE REV. 196 (2006); Stan Keillor, James H. Cohen & Mercy Changwasha, *The Inevitable, If Untrumpeted, March Toward "Civil Gideon"*, 64 SYRACUSE L. REV. 469 (2014). While the Civil *Gideon* movement is directly concerned with access to justice, not all of the participants agree that a civil right to counsel is an effective vehicle through which to achieve better access to more effective justice for more individuals. See, e.g., Barton & Bibas, *supra* (disagreeing that a right to counsel for categorical civil matters is the best use of scarce legal capital); Charn, *supra* note 10, at 2217 (supporting better pro se assistance models as more effective than a civil right to counsel).

72. For a review of those arguments, see Sharpless, *supra* note 6.

NGOs.<sup>73</sup> Most critics will agree that the progressive legal establishment should combine attention to those in need now without forgetting the need to effect some long-term change—and to establish capital and power within communities lacking both.

Given that, how does entrepreneurial TLS fare when compared to individualized LLS? To understand that inquiry, it is important to recognize that a justified Civil *Gideon* or LLS strategy must incorporate a triage component—that is, any plan for using the available scarce legal resources must include an assessment of the most effective use of those resources.<sup>74</sup> As David Luban wrote many years ago, a legal aid office will justifiably turn down a prospective client who has a legitimate dispute with a department store over its failure to honor his dryer warranty in order to assist a client facing the loss of a home or a stream of income.<sup>75</sup> The question confronted here is how a similar choice between an entrepreneur and a litigant with an otherwise high-priority legal services matter ought to be assessed.

This question may be considered with two separate comparisons. Imagine that an overburdened, under-resourced community legal services organization has room for one new client, and only one new client.<sup>76</sup> Two possible opportunities present themselves:

*Mithra Garcia* is forty-four years old, an immigrant from Central America, living with her eighteen year-old son in a small apartment nearby. She works part-time at the Dollar Store in the next town, and her son receives SSI benefits. The

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73. One observer who comes close to asserting that individual representation is more harmful than no representation is Steven Wexler in his seminal article about poverty lawyering. See Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

74. Barton & Bibas, *supra* note 72, at 980–81; Cohen, *supra* note 13, at 244–45; Tremblay, *Triage*, *supra* note 13, at 2479–82.

75. LUBAN, *supra* note 19, at 309 (defending a principled triage and suggesting that a lottery or a queue would give equal opportunity to a woman facing court-sanctioned sterilization as a woman in dispute with Montgomery Ward over the store's failure to honor her clothes dryer warranty).

76. At the symposium discussion at Washington University, some participants suggested that the organization squeeze in one more client and take both of these applicants. While that of course may be a realistic possibility in some settings, it sidesteps the critical question that must be addressed here. Given that organizational resources are finite, at some point some final “in or out” decisions must be made. See Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990).



father of her son has stopped paying the weekly child support ordered by the county family court. He claims he has lost his job, but Ms. Garcia is quite sure that some investigation will show that he has been working under the table. She asks for legal help to enforce the child support order.

*Netia Lee* is a twenty-six year-old African-American woman who grew up in the high-poverty neighborhood where your office sits, and then graduated from the local community college with a degree in software engineering. Ms. Lee has an exciting new business project she has developed, a mobile phone app that lets its users efficiently and effectively manage emails. The business plan is promising and with a little more help she could possibly attract investors. She wants your help to register a trademark for the app and to establish a Subchapter C corporation (or similar entity) through which she can manage the business.<sup>77</sup>

There is no question that in a typical neighborhood legal services office Ms. Garcia would be eligible for free legal services and Ms. Lee would not.<sup>78</sup> But is that necessarily a sensible policy preference? Perhaps, the question is closer than one might initially conclude.<sup>79</sup> The goal of each representation would be to establish a reliable income stream for a person who does not yet have an adequate means of support. The arguments for assisting Ms. Garcia would include the fact that she is presumably more unsophisticated than Ms. Lee and would have a more difficult time without counsel navigating the family court processes and, importantly, developing the admissible evidence to prove that the obligor is indeed working when he claims he is not. Ms. Lee, with her better education and familiarity with the business world, has more resources available to her. Additionally,

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77. While both of these examples are fictional, the entrepreneur described here is not dissimilar from a client represented by a pro bono lawyer and offered as an example of creative contemporary TLS. See Terry Carter, *Grassroots Growth*, 86 A.B.A. J. 25 (2000) (describing a corporate lawyer's pro bono entrepreneurial client).

78. See, e.g., Cohen, *supra* note 13, at 227–33 (describing Connecticut Legal Services' case selection priorities, which are typical of neighborhood legal service organizations).

79. For purposes of this thought experiment, assume (most likely counter-factually) that the organization has expertise in both areas, and (less counter-factually) that no pro bono lawyer is available to take the matter that the legal services office turns away.

Ms. Garcia is “stuck” more than Ms. Lee; she has fewer life choices, whereas Ms. Lee could, given her skills and her education, earn a living in some other way.

But other arguments favor accepting Ms. Lee’s matter. She needs a lawyer just as much as Ms. Garcia, notwithstanding her greater education. It is not terribly speculative to assert that without access to free legal counsel her business—and her hoped-for income stream—has a lower chance of succeeding.<sup>80</sup> Indeed, Ms. Lee may need to speak with a lawyer for that guidance more than Ms. Garcia, oddly enough. Litigants in family and housing courts do have some, if not perfectly adequate, access to legal advice, since clerks review papers, judges ask questions, and proceedings are controlled by precedent.<sup>81</sup> Participants in transactions do not have any similar forum, aside from on-line services like LegalZoom, which is not free and whose reliability is not entirely assured.<sup>82</sup> Further, the goals of representing Ms. Lee are equally desirable as those of representing Ms. Garcia. Success in either endeavor would provide the client with a good chance of a sustainable income stream. A successful business not only provides that client with capital and economic power; it might

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80. See Abraham J.B. Cable, *Startup Lawyers at the Outskirts*, 50 WILLAMETTE L. REV. 163, 167–69 (2014); Viktor Mayer-Schönberger, *The Law as Stimulus: The Role of Law in Fostering Innovative Entrepreneurship*, 6 I/S: J. L. & POL’Y FOR INFO. SOC’Y 153, 175–81 (2010); SEAN M. O’CONNOR, HOW TO BUILD IPR-FOCUSED ENTREPRENEURIAL LAW & BUSINESS CLINICS TO ASSIST REGIONAL ECONOMIC DEVELOPMENT AROUND THE GLOBE 5 (Int’l Intellectual Prop. Inst. 2008), available at [http://iipi.org/wp-content/uploads/2010/07/How\\_to\\_Build\\_IP-Focused\\_Law\\_Clinics.pdf](http://iipi.org/wp-content/uploads/2010/07/How_to_Build_IP-Focused_Law_Clinics.pdf) (last visited May 20, 2015) (microentrepreneurs who receive technical assistance appear to have greater business creation, survival and growth rates).

81. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 977 (2004).

82. See Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205, 211 (2014) (noting that LegalZoom’s effectiveness has not yet been proven); Robert R. Stachen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 254 (2011) (most clients who have used LegalZoom need assistance to correct or refine the documents received). Anecdotally, one hears many stories about business founders using software programs to create documents that do not effectively satisfy the required governance or regulatory elements.

even have ripple effects, such as employment of others to assist in the business.<sup>83</sup>

The point to be noted here is that providing legal assistance to an entrepreneur might accomplish the well-established goal of income maintenance as well as, if not better than, offering legal services to a more typical legal services client, such as an individual seeking child support or SSI benefits. That conclusion is not undercut by the entrepreneur's express desire for wealth maximization.

What if the choice were between Ms. Lee and a client whose need is not an income stream? The choice between Ms. Garcia and Ms. Lee is seemingly comparable and not incommensurate, since both prospective clients need income and the lawyer's goal would be to obtain that income. What if the choice were between developing a business and preventing or ameliorating a tragic and painful state of affairs? This question invites a new hypothetical client to compare to the Lee representation:

*Robert Johnson* is a thirty-three year-old veteran of the first Gulf War. He suffers from symptoms of PTSD and as a result has had considerable difficulty holding a job. He qualified for Social Security disability benefits which serve as his only source of income. Fortunately, he has managed to lease a public housing unit whose rent will always be calculated based on his income, and therefore is close to affordable.<sup>84</sup> He now faces eviction, and comes to the legal services office with court papers. The local police arrested his girlfriend for possession of cocaine while visiting his apartment, and federal law states that he may lose his housing rights as a result.<sup>85</sup> A tenant who is evicted for cause from public housing is typically barred

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83. Many commentators note the critical importance of assets and capital in overcoming poverty. See, e.g., Patience A. Crowder, *Inequality, Economic Development, and the New Regional Community*, 43 SW. L. REV. 569, 584 (2014); Vada Waters Lindsey, *Encouraging Savings Under the Earned Income Tax Credit: A Nudge in the Right Direction*, 44 U. MICH. J.L. REFORM 83 (2010).

84. The federal public housing laws tie rent to income. Housing and Urban Development Act of 1969 (Brooke Amendment), Pub. L. No. 91-152, § 213, 83 Stat. 379, 389 (1969) (codified as amended at 12 U.S.C. § 1715z-1a).

85. See Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (public housing authorities can "evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity").

from applying for public housing for a long time,<sup>86</sup> so losing this court matter means likely homelessness for Mr. Johnson. Let us also assume that a trained housing lawyer might develop a potentially successful defense to this action.

If the choice for the hypothetical legal services office, which has the time to accept only one new client project, is between Ms. Lee and Mr. Johnson, are there any reasons for that lawyer, or her organization, to choose to represent Ms. Lee, the entrepreneur? This is a harder call, to be sure, and the values at stake are less commensurate than in the previous example. A careful triage analysis, applying the principle that the organization ought to address the most serious and urgent matters before less serious and less urgent ones,<sup>87</sup> would appear to favor Mr. Johnson given the immediate difficulties he faces. If so, perhaps the lesson to be drawn is that an organization might treat entrepreneurial requests as somewhat comparable to those requests for income maintenance, but not to requests for assistance with evictions or similarly compelling plights. But even that triage analysis may prove too much. As long as the programmatic goals of the legal services organization include long-term capital development and empowerment strategies, cases like that of Mr. Johnson might be deferred in favor of that long-term goal to effect broader change.<sup>88</sup> And, if the organization embraces a mix of urgent-triage and longer-term power, the factors favoring Ms. Lee might make this choice not as one-sided as it originally appeared.

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86. An eviction from public housing is a serious negative consideration in a later application for subsidized housing. *See* 24 C.F.R. § 960.203 (2014) (Standards for PHA tenant selection criteria); U.S. DEP'T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 54 (2003), *available at* <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf>.

87. Cohen, *supra* note 13, at 247–54; Tremblay, *Triage*, *supra* note 13, at 2492.

88. While legal services organizations struggle under the crushing burden of immediate needs, many include long-term transactional empowerment components. *See, e.g.,* Zenobia Lai et al., *The Lessons of the Parcel C Struggle: Reflections on Community Lawyering*, 6 ASIAN PAC. AM. L.J. 1, 2 (2000) (describing efforts of attorneys at Greater Boston Legal Services to effect important change through community lawyering).

*E. A Summary of the Foregoing Discussion*

The above discussion suggests the following imperfect and tentative conclusions: if the value or justification of TLS is assessed using an empowerment, community-building standard, the ecumenical, entrepreneurial TLS is rather difficult to defend. While ecumenical, entrepreneurial TLS will likely help individual entrepreneurs and spur some isolated economic development, that strategy appears not to accomplish a sufficient social justice mission when compared to a more collectivist, community-building version of TLS. But if the value or justification of TLS is assessed using an access-to-justice lens, then the issue is a closer one. While most access-to-justice strategies incorporate, implicitly or otherwise, a triage analysis in their campaigns for more lawyers for litigants, some of those arguments will support dedication of legal resources to individual, entrepreneurial TLS, especially if the entrepreneur has connections to communities that have traditionally been underserved or distressed.

### III. ALTERNATIVE, CONTEXT-SPECIFIC JUSTIFICATIONS FOR ENTREPRENEURIAL TLS

The discussion thus far has addressed the question of the best use of scarce legal resources if the choice were between ordinary litigation-directed help for low-income persons in disputes and transactional help for an entrepreneurial individual aiming to start a successful small business. That discussion assumed very little context aside from the availability of free lawyer time and prospective clients with differing goals and legal needs. Part III of this Article considers context, recognizing that the setting and the available choices might really matter. It addresses three identifiable sources of free legal help, to explore whether the specific context and role responsibilities might change one's assessment of the justification for using scarce legal resources for entrepreneurship. Those three contexts are law firm pro bono, law school clinics, and public interest law firms.

### A. Law Firm Pro Bono

Providing free legal services to persons who cannot access counsel is the responsibility of every lawyer and, while not mandated by the American Bar Association or by many states,<sup>89</sup> is energetically encouraged across the country.<sup>90</sup> Established law firms, particularly larger national or international firms, engage in significant pro bono efforts<sup>91</sup> and enjoy the reputational benefits of doing so.<sup>92</sup> As pro bono administrators at law firms choose where to allocate their available legal talent and time, they encounter the same questions addressed here—is TLS a justifiable commitment by the firms? In this respect, law firms are a ready laboratory in which to test some of the ideas developed above.

To put the law firm pro bono question in proper context, one must first explore and clarify, at least in brief fashion, the normative qualities of the choice that lawyers face in providing pro bono legal services.<sup>93</sup> The legal profession's pro bono commitment is grounded

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89. See MODEL RULES OF PROF'L CONDUCT R. 6.1 (2014) (recommending, but not requiring, lawyers to provide fifty hours per year of pro bono legal services). Most states follow the Model Rule's policy of not requiring pro bono. See STANDING COMM. ON PRO BONO & PUB. SERV. & THE CTR. FOR PRO BONO, STATE REPORTING POLICIES, Am. Bar, available at <http://apps.americanbar.org/legalservices/probono/reporting/pbreporting.html> (last visited Apr. 8, 2015). New York recently instituted a requirement that applicants to the New York bar perform fifty hours of pro bono service before admission. See N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (2015).

90. Several states require attorneys to report their pro bono activity annually as a condition of licensure, including Florida, Hawaii, Illinois, Indiana, Maryland, Mississippi, Nevada, and New Mexico. See STANDING COMM. ON PRO BONO & PUB. SERV. & THE CTR. FOR PRO BONO, *supra* note 89.

91. The American Lawyer, a leading legal news source, annually releases a list of the 200 highest-grossing firms ranked by pro bono performance performed by United States-based lawyers. Criteria include the average number of pro bono hours performed by lawyers and the percentage of lawyers contributing at least twenty hours of pro bono work. See THE AM. LAWYER, NATIONAL PRO BONO RANKINGS 56 (2014), available at <http://www.americanlawyer.com/id=1202660999888/National-Pro-Bono-Rankings?slreturn=20150013203410> (last visited Jan. 13, 2015).

92. Law firms consider their reputation of pro bono to be an important recruitment asset. See Darhiana Mateo, *Pro Bono, Transactional Style*, 15 A.B.A. J. 2 (2005); Cummings, *supra* note 2, at 107–15 (describing the “business case” for pro bono at large firms); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2371–72 (2010) (describing the AmLaw rankings).

93. See Morsch, *supra* note 2 (describing the reasons for transactional lawyers to engage in this enterprise).

in the stark realization that legal services are both essential and expensive.<sup>94</sup> Persons who cannot afford lawyers cannot exercise the rights to which the law entitles them, and lawyers, who benefit from the monopoly the state provides to them to deliver these necessary services, shoulder an ethical responsibility to help overcome the effects of the scarcity of this needed good.<sup>95</sup> Therefore, the profession encourages lawyers to provide pro bono *that matters*. Lawyers may always agree not to charge a client for services, for whatever reasons the lawyer may have. But to “count” as pro bono, and to respond to the ethical responsibility, the pro bono offerings must address the underlying need for the legal assistance.<sup>96</sup> In this way, a lawyer’s decision about whom to represent for free in response to the ethical responsibility will implicate the same questions this Article has attempted to address.

If that analysis follows, then law firm pro bono committees ought to consider the arguments and considerations developed above in deciding whom to represent for free.<sup>97</sup> It may appear that nothing about the law firm terrain alters or complicates what we encountered earlier in our assessment of the justification of entrepreneurial TLS. But that may not be the case. It may be that a law firm pro bono committee has reasons to view entrepreneurial TLS more favorably than a hypothetical funder with dollars to spend on whatever legal services ought to receive them. The difference is in the available expertise and the incentives to offer the free legal services.

The arguments above provide relatively weak justification for a law firm pro bono committee to include entrepreneurial TLS in its mix of pro bono—particularly ecumenical, entrepreneurial TLS. However, better justifications do exist for law firms with corporate,

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94. See, e.g., LEGAL SERVICES, DOCUMENTING THE JUSTICE GAP IN AMERICA (2009); Elena Romerdahl, *The Shame of the Legal Profession: Why Eighty Percent of Those in Need of Civil Legal Assistance Do Not Receive It and What We Should Do About It*, 22 GEO. J. LEGAL ETHICS 1115, 1117–18 (2009).

95. Cummings, *supra* note 2.

96. LEGAL SERVICES CORP., REPORT OF THE PRO BONO TASK FORCE, at 5 (2012), available at [http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF\\_%20Report\\_FINAL.pdf](http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf); Roberts, *supra* note 9, at 352.

97. See Cohen, *supra* note 13, at 223 n.4 (describing that pro bono departments ought to use different selection criteria than legal services organizations given the absence of any formal commitment to engage in charitable activity).

intellectual property, and tax departments, with specialists in each. For a law firm offering only litigation legal services, this reasoning will apply less well, but, since most, if not all, regional, national, and international law firms have such transactional departments, the following observations, if sound, would have broad reach.

Assume that a law firm wishes to encourage as much pro bono as possible, and wants any such pro bono to be effective. If the firm focuses primarily on LLS, and responds to the powerful Civil *Gideon* stories of unrepresented litigants facing significant challenges in court, it will have a harder time persuading its non-litigation lawyers to join in. Not an impossible task, to be sure, and stories abound of corporate lawyers appearing on behalf of a low-income client in family or housing court, or at an immigration hearing, and learning a great deal as a result.<sup>98</sup> There are also poignant stories in which a litigant in a busy urban court represented by a less-than-experienced lawyer from a powerful law firm can achieve considerable benefit merely from that lawyer's having shown up, even if the lawyer does not know much about the substance of that practice area.<sup>99</sup> But asking corporate lawyers to handle evictions and immigration appeals seems not to be the best use of those lawyers' expertise, and assuredly limits their willingness to volunteer.<sup>100</sup>

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98. See, e.g., The Legal Aid Soc'y, *LAS Volunteer Rebecca Berlow: Making the Law Accessible to People that Have Been Shut Out of Its Reach*, PRO BONO NET (Mar. 4, 2014), [http://www.probono.net/ny/news/article.512680-LAS\\_Volunteer\\_Rebecca\\_Berlow\\_Making\\_the\\_Law\\_Accessible\\_to\\_People\\_that\\_Have](http://www.probono.net/ny/news/article.512680-LAS_Volunteer_Rebecca_Berlow_Making_the_Law_Accessible_to_People_that_Have) (last visited May 20, 2015) (securities lawyer); Adiyah Ali, *Mayer Brown Attorney Helps Boy Who Was Abused, Abandoned and Neglected*, KIDS IN NEED OF DEF. (2012), <http://supportkind.org/stories/james-clegg/> (last visited May 20, 2015) (tax lawyer). See also Lynnise Pantin, "You Are Not Lawyering Unless You Are Litigating": Integrating Social Justice and the Transactional Law Clinic to Debunk This Fiction (Sept. 1, 2009) (unpublished manuscript) (on file with author) (describing her experience with pro bono litigation work while a corporate lawyer at the law firm Debevoise & Plimpton).

99. See Steven Lubet, *Professionalism Revisited*, 42 EMORY L.J. 197, 206–07 (1993), in CLINICAL ANTHOLOGY: READINGS FOR LIVE CLIENT CLINICS 235–38 (Alex J. Hurder, Frank S. Bloch, Susan L. Brooks & Susan L. Kay eds., 2d ed. 2011) (describing Albert Jenner of Jenner & Block appearing in a housing court in Chicago).

100. See STANDING COMM. ON PRO BONO & PUB. SERV. & THE CTR. FOR PRO BONO, STATE REPORTING POLICIES, Am. Bar, available at [http://apps.americanbar.org/legalservices/probono/corporate\\_counsel.html#barriers](http://apps.americanbar.org/legalservices/probono/corporate_counsel.html#barriers) ("Corporate counsels traditionally possess business law and/or transactional skills, which may not be helpful to programs serving individual clients with bread and butter cases. Also, their background may make them hesitant to accept litigation-oriented matters[.]") (last visited Apr. 8, 2015).



If the pro bono committee instead offers to represent entrepreneurs who cannot afford counsel, both of those problems are ameliorated. The firm takes the best advantage of the lawyers' expertise, and the odds are good that more lawyers will participate. The universe of pro bono services will be larger, and the quality of the legal work higher. If the case for ecumenical entrepreneurial TLS is weak but still plausible, this factor ought to provide the kind of added weight to justify offering services to the entrepreneurs. Since the evidence that assisting those entrepreneurs who do not have a social mission but only have a wealth-accumulation goal is mixed on the question of how much social good that assistance accomplishes, this added positive factor may serve to justify the allocation of the scarce legal services to that type of client. This is especially true if, as seems likely, the universe of social venture entrepreneurs is somewhat limited, so that there is excess capacity of lawyers available to entrepreneurs above that needed by social entrepreneurs.

However, the nonprofit organization most widely respected as an arbiter of what pro bono "counts" for larger law firms does not yet embrace this position. The Pro Bono Institute (PBI), a recognized authority on "what counts" as pro bono legal services,<sup>101</sup> supports TLS as acceptable pro bono only in its most social-entrepreneurship or collectivist guise. PBI does not recognize hours dedicated to entrepreneurial TLS. In order for a legal service to count in its tally of firm pro bono efforts, PBI requires that the entrepreneurs and owners of the business be of limited means or that the business contribute to the public good:

For-profit business ventures are rarely eligible for pro bono legal services. However, where the individuals behind the

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101. PBI has established the Pro Bono Challenge, an initiative through which the most prominent firms in the nation strive to meet the goal of 3 percent of the firm's annual billable hours (or 5 percent for the most ambitious firms) applied to the kinds of pro bono that PBI deems eligible to "count." For a description of the challenge, see *Law Firm Pro Bono Challenge*, PRO BONO INST., <http://www.probonoinst.org/projects/law-firm-pro-bono/law-firm-pro-bono-challenge/> (last visited May 20, 2015). Nearly 150 of the largest firms participate in the challenge. For a list of the firms currently participating, see *Law Firm Pro Bono Challenge Signatories List*, PRO BONO INST., <http://www.probonoinst.org/projects/law-firm-pro-bono/law-firm-pro-bono-challenge-signatory-law-firms/law-firm-pro-bono-challenge-signatories-list/> (last visited May 20, 2015). The American Lawyer magazine's annual ranking of law firm pro bono efforts uses the PBI standards as its metric. See Rhode & Cummings, *supra* note 92.

venture themselves would be eligible for pro bono legal services or where the venture benefits society *and is the functional equivalent of a non-profit*, the for-profit business could be eligible for pro bono legal services associated with that venture.<sup>102</sup>

Conventional small businesses without a social mission will not qualify under the PBI standards. Metrowest Worker Center would count; Drizly would not.<sup>103</sup> Nor would the hypothetical client identified as Netia Lee in our earlier discussion.<sup>104</sup>

The PBI criteria for what “counts,” with entrepreneurial TLS not satisfying that criteria, appear to be shared by other agencies and organizations monitoring pro bono efforts. For instance, in Illinois, as in several states, each member of the bar must report annually the number of pro bono hours he or she performed.<sup>105</sup> Performing pro bono is not mandatory; reporting how much the lawyer offered is mandatory.<sup>106</sup> Pro bono legal services that count for reporting purposes include legal services “without charge or expectation of a fee” (a) to a person of limited means; (b) to an organization “designed to address the needs of persons of limited means”; (c) to certain “charitable, religious, civic, or community organizations”; and (d) pro bono “training intended to benefit legal service organizations or lawyers who provide pro bono services.”<sup>107</sup> The rule explains that “persons of limited means” include the “working poor” along with those who have even less income.<sup>108</sup> The literal reading of the rule

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102. PRO BONO INSTITUTE, LAW FIRM PRO BONO CHALLENGE COMMENTARY TO STATEMENT OF PRINCIPLES (2015) [hereinafter PRO BONO CHALLENGE COMMENTARY], available at <http://www.probonoinst.org/wp-content/uploads/Law-Firm-Challenge-Commentary-20151.pdf> (last visited Oct. 24, 2014) (Commentary to *Principle 7*) (emphasis added).

103. See *supra* text accompanying note 36.

104. See *supra* text accompanying note 77.

105. Ill. Sup. Ct. R. 756(f).

106. *Id.* Commentators have argued that requiring reporting of pro bono work is more effective than mandating pro bono service itself. See, e.g., Lisa Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 415 (2007).

107. Ill. Sup. Ct. R. 756(f)(1) (requiring all attorneys licensed in Illinois to report, in connection with the attorney’s annual registration, pro bono legal services provided and qualified monetary contributions made during the preceding twelve months).

108. *Id.* at 756(f)(2).

would arguably allow “countable” pro bono for entrepreneurial legal services if the entrepreneur were a low-income individual, but not for a business entity unless it were a nonprofit. Such work for the low-income individual entrepreneur does not appear to meet the spirit of the rule, however. Other states requiring the reporting of pro bono have similarly restrictive definitions.<sup>109</sup>

Of course, a law firm may provide free legal services to entrepreneurs even if it cannot count the work for state or monitoring agency purposes, and even if that work does not help with the firm’s national ranking of its pro bono efforts.<sup>110</sup> If the challenge the firm encounters is whether that use of its available free legal services is justified, the above analysis should offer some justification for assisting entrepreneurs, especially those from underserved neighborhoods or backgrounds. If the challenge is how to incentivize the firm to do so, then the states or monitoring agencies will need to develop a broader definition of what counts.

### *B. Law School Clinics*

Law school clinical programs, for many years dominated by litigation-driven poverty law offerings, now include at a substantial number of law schools some transactional or business clinics.<sup>111</sup> While many, and perhaps most, of those clinics are directly connected to social entrepreneurship and conventional CED work,<sup>112</sup>

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109. See, e.g., MISS. R. PROF’L CONDUCT 6.1 (2015); NEV. R. PROF’L CONDUCT 6.1 (2013).

110. The American Lawyer magazine annually ranks law firms by the extent of their countable pro bono efforts, using standards developed by PBI as discussed above. See *supra* note 91. For the 2014 rankings, see THE AM. LAWYER, PRO BONO: HOW DOES YOUR FIRM RATE? (2014), available at <http://www.americanlawyer.com/id=1202608682486/Pro-Bono-How-Does-Your-Firm-Rate> (paid subscription required).

111. See Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 85 (2009). The nonprofit Kauffman Foundation monitors and supports law school transactional clinics, and its website lists 127 law schools with 154 separate clinics available. See *Law School Entrepreneurship Clinics*, EWING MARION KAUFFMAN FOUNDATION (2015), <http://www.entrepreneurship.org/entrepreneurship-law/law-school-entrepreneurship-clinics.aspx> (last visited Jan. 10, 2015).

112. See, e.g., *Community and Economic Development Clinic*, THE UNIV. OF MICH. LAW SCH., <http://www.law.umich.edu/clinical/CEDC/Pages/default.aspx>; *Social Enterprise and Nonprofit Clinic*, GEORGETOWN LAW, <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/social-enterprise/index.cfm>.

in recent years some law schools have innovated with courses serving private, profit-seeking entrepreneurial clients.<sup>113</sup> Indeed, a few schools have begun to offer “live client” clinical courses<sup>114</sup> on behalf of successful, established businesses that can easily afford private counsel, but accept representation by clinic students in order to assist with the pedagogical goals of the institutions (and, perhaps, to reduce legal bills a bit).<sup>115</sup>

It is easy for a law school to defend clinic-generated TLS on behalf of social entrepreneurs and community groups. That defense is hardly different from the justification the school might offer to provide free legal services to victims of domestic violence, criminal defendants, tenants fearing eviction, etc.—the clients that are typically represented by litigation clinics. But the justification for offering free legal services to entrepreneurs, either those who cannot afford legal services, or those who can, requires different considerations.

At a superficial level, law schools have a ready justification. The mission of a law school is to educate its students, and not all of its educational components must at the same time serve social justice goals.<sup>116</sup> Unless one emasculates the conception of social justice, so that anything that makes for more effective practicing lawyers serves a social justice objective, law schools may justifiably offer courses and programs that are agnostic on the justice question. A truly effective Mergers and Acquisitions classroom course, to choose one

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113. See, e.g., *Law & Entrepreneurship Clinic*, UNIV. OF WIS. LAW SCH., <https://www.uwle.org>; *Entrepreneurship Legal Clinic*, UNIV. OF PA. LAW SCH., <https://www.law.upenn.edu/clinic/entrepreneurship>.

114. The term “live client” means that the work performed by the students as part of their educational curriculum consists of lawyering on behalf of actual clients who need that representational work, and not through simulations. See, e.g., Ann Juergens, *Using the MacCrate Report to Strengthen Live-Client Clinics*, 1 CLINICAL L. REV. 411, 411 n.2 (1994); *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508 (1991).

115. For example, at the University of Michigan Law School, Professor Michael Bloom offers a “Transactional Lab” where students work with successful, large corporations. See Transactional Lab Course Description, MICHIGAN LAW, <http://www.law.umich.edu/CurrentStudents/Registration/ClassSchedule/Pages/AboutClass.aspx?term=2020&classnbr=10048> (last visited Jan. 10, 2015). The Kirkland & Ellis Corporate Lab at The University of Chicago Law School also undertakes project with major corporations such as Microsoft Corporation and Accenture. See <http://www.law.uchicago.edu/corporatelab> (last visited on May 20, 2015).

116. Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 331 (2012).

example, would ordinarily not be considered a component of an institution's justice mission, but such a course would be deemed an essential component of a legal education curriculum. So, from that vantage point law schools, even more so than law firms, may defend providing entrepreneurial TLS because of its dual mission of educating law students while also contributing to social justice, if perhaps not always at the same time.<sup>117</sup>

At a less superficial level, however, this inquiry is more complicated. Two arguments would discourage law schools from using client work unrelated to service to disadvantaged populations as a vehicle to teach their students. The first emerges from a claim that an essential mission of clinical legal education is to instill a sense of social justice in students, and therefore the work of clinics must address or confront injustice.<sup>118</sup> As Jane Aiken writes, "Should clinics aim to teach students awareness of injustice and the role that lawyers play in fighting it? Or is that not an essential component of clinical legal education?"<sup>119</sup> If so, then one might conclude from that premise that law school clinics ought to (or perhaps must) choose clients whose work advances the cause of justice. If entrepreneurial TLS unconnected to underserved communities does not advance justice, then, the argument proceeds, law schools ought not offer clinics whose work focuses on such ecumenical entrepreneurial TLS.

That argument does not hold up in the end, even if one embraces its premises. There is no doubt that many within law schools would advocate clinics' choosing transactional work on behalf of collectivist or CED clients, rather than entrepreneurial TLS. But the Aiken thesis, shared by others, makes a different point. Aiken argues that law schools must teach about justice, and that clinical work cannot avoid questions of justice, because, as she writes, "There is no such thing as neutrality; everything has just or unjust effects. Therefore, clinical

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117. See Praveen Kosuri, "Impact" in *3D—Maximizing Impact Through Transactional Clinics*, 18 CLINICAL L. REV. 1 (2011) (defending a model where pedagogy possesses at least as strong a role as social justice in a transactional business clinic).

118. Jane H. Aiken, *The Clinical Mission of Justice Readiness*, 32 B.C. J.L. & SOC. JUST. 231, 231 (2012); Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 997–98 (2004).

119. Aiken, *supra* note 117, at 231.

legal education cannot avoid dealing with justice.”<sup>120</sup> Accepting her underlying assumptions as sound, a clinic focused on entrepreneurial TLS could accomplish the goals of teaching about entrepreneurship and, to the extent that all lawyering implicates power and justice concerns, also tease out from that entrepreneurial work those important lessons.<sup>121</sup> The fact that some teachers may choose not to use entrepreneurial TLS as a vehicle to explore power and justice issues is a separate consideration for our purposes.

The other argument we must confront focuses less on the pedagogy and more on the political, moral, or even legal implications of law schools—and here we are primarily, and perhaps only, considering nonprofit law schools—providing free legal services to persons who either are well-off, or hope to be well off if their businesses succeed. The political and moral aspects of that argument are weaker. Politically, it may not be wise for law schools to offer free legal services to businesses that might find representation in the private market, as alumni and other constituencies may object to the anticompetitive strategy of the institution. That fear is low, if only because so few clinics would accept clients that can reliably afford or retain in some fashion private counsel. That is not the worry with which this Article is attempting to wrestle. The moral question simply reprises the discussion that began this subsection, where this Article concluded that the educational mission of the law school will

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120. *Id.*

121. Aiken argues both that clinical education inevitably invokes questions of justice, *see id.*, and that the clinic’s choice of clients can affect critical thinking about power and justice, *see id.* at 242. She also tends to assume that clinics will represent poor persons, *see id.* at 242–43. Given her attention to client type, an ecumenical entrepreneurial TLS focus may not easily invite justice considerations. But other scholarship, including prior work by Aiken, affirms her assertion that the clinical experience itself, regardless of the clients served, may engage students in the justice mission if the teachers so choose. *See* Jane H. Aiken, *Striving to Teach “Justice, Fairness and Morality,”* 4 CLINICAL L. REV. 1, 10 (1997) (justice teaching involves being “explicit about how power operates, particularly in its subtle and invisible manifestations”); John C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1477 (1998) (clinical education furthers justice education “through the deconstruction of power and privilege in the law”). Other commentators, though, argue more directly that clinics, in order to achieve the necessary social justice mission, must work with disadvantaged clients on matters directly implicating subordination. *See, e.g.,* Sameer Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 387 (2008) (“[c]ase-centered clinics . . . fail to serve political collectives”); Brodie, *supra* note 69, at 351 (community lawyering cases are the best vehicles to pursue a social justice agenda).

inevitably include training students to participate in wealth-generating (and therefore weakly justified on a social justice scale) endeavors.

The *legal* question for nonprofit law schools is somewhat more intriguing, but ultimately not a serious worry. All nonprofit organizations must engage “exclusively,”<sup>122</sup> which to the Internal Revenue Service in fact means “primarily,”<sup>123</sup> in activities deemed to be “charitable”<sup>124</sup> in order to maintain their tax-exempt status. A nonprofit law school offering through its clinics free litigation-based legal services to poor clients risks nothing with the IRS, as that service qualifies as charitable<sup>125</sup> and as educational,<sup>126</sup> both exempt purposes. The potential worry about a nonprofit law school offering free entrepreneurial TLS is that those services may not qualify as “charitable,” and therefore a school may have a worry about maintaining its exempt status.<sup>127</sup> A moment’s reflection shows that such a worry is entirely unfounded.

Whether a nonprofit organization whose explicit mission was to assist profit-seeking entrepreneurs to become successful would qualify for tax-exempt status under Section 501(c)(3) is an interesting question.<sup>128</sup> The IRS would almost assuredly approve of such a mission,<sup>129</sup> but even if supporting private entrepreneurship were not

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122. I.R.C. § 501(c)(3) (2012).

123. Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 2008) (providing that “[a]n organization will be regarded as ‘operated exclusively’ for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes”).

124. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008).

125. The “charitable” element includes “[r]elief of the poor and distressed or of the underprivileged . . .” *Id.* at (d)(2).

126. *Id.* at (d)(1)(i)(f).

127. Note that this question is separate from that of a law school operating a functioning law firm with paying clients, as some have urged. See Vincent D. Rougeau, *Law schools should consider med-school model—a dean’s view*, LEGAL REBELS (Mar. 13, 2013, 1:54 PM), [http://www.abajournal.com/legalrebels/article/law\\_schools\\_should\\_consider\\_med-school\\_model\\_-\\_a\\_deans\\_view/](http://www.abajournal.com/legalrebels/article/law_schools_should_consider_med-school_model_-_a_deans_view/). For a discussion of that prospect, see Bradley T. Borden & Robert J. Rhee, Essay, *The Law School Firm*, 63 S.C. L. REV. 1 (2011).

128. See Matthew J. Rossman, *Evaluating Trickle Down Charity: A Solution for Determining When Economic Development Aimed at Revitalizing America’s Cities and Regions Is Really Charitable*, 79 BROOK. L. REV. 1455, 1457–61 (2014) (describing economic development organizations that have received IRS approval for tax-exemption under Section 501(c)(3)).

129. For instance, the Ewing Marion Kauffman Foundation, a 501(c)(3) private foundation, is dedicated to encouraging and advancing entrepreneurship. See EWING MARION KAUFFMAN

deemed charitable standing alone, a law school could provide the same services without any risk to its exempt status. The IRS has declared that activities that on their own would not qualify for exemption may be permitted if those activities advance the mission of the exempt organization.<sup>130</sup> The most common examples involve commercial activities—even successful, revenue-generating businesses—that serve an essential role in otherwise exempt organizational missions. For instance, colleges may operate bookstores and restaurants without risking their exempt status.<sup>131</sup> An art school that sells the works created by its students, even for a profit which would be retained privately by the artist-students, may maintain its tax-exempt designation if the primary mission of the organization is educational.<sup>132</sup>

Law schools offering free transactional legal services to entrepreneurs who hope to succeed in the marketplace and who will own the resulting profits are in an even stronger place than the art schools, because the law schools conduct no commercial activities. The clinics do not operate the businesses nor facilitate any private inurement involving the finances of the nonprofit entity.<sup>133</sup> The sole reason to work with entrepreneurs is to advance the educational mission of the institution. No IRS or Tax Court authority would disallow that ancillary activity as long as the primary mission of the law school remains educational.<sup>134</sup>

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FOUNDATION, <http://www.kauffman.org> (last visited May 20, 2015); *see also* Ewing Marion Kauffman Foundation Listing, GUIDESTAR, <http://www2.guidestar.org/organizations/43-6064859/ewing-marion-kauffman-foundation.aspx> (last visited May 20, 2015) (GuideStar listing Kauffman Foundation as a recognized nonprofit).

130. I.R.S. Gen. Couns. Mem. 39,862 (Nov. 22, 1991).

131. Rev. Rul. 58-194, 1958-1 C.B. 240 (bookstores and restaurants); *Squire v. Students Book Corp.*, 191 F.2d 1018 (9th Cir. 1951) (finding a corporation organized to operate a campus bookstore and restaurant to be exempt “as being organized and operated exclusively for an educational purpose”); *see also* Rev. Rul. 76-336, 1976-2 C.B. 143 (college housing).

132. *Goldsboro Art League v. Commissioner*, 75 T.C. 337, 345 (1980).

133. In *Goldsboro*, the arts organization sold the artwork, collected applicable sales tax, maintained a commission for its marketing and sales services, and remitted the remaining proceeds to the artists. *Id.* at 340–41.

134. *Cf.* Rev. Rul. 73-128, 1973-1 C.B. 222 (“An organization that is otherwise qualified for exemption from income tax will not fail to qualify merely because its education and vocational training of unemployed and under-employed individuals is carried out through the manufacturing and selling of toy products.”).



Therefore, law schools that choose to educate students through the representation of companies and individuals dedicated to developing, or having developed, successful private businesses do not have any worry about jeopardizing their tax-exempt status. As noted above, the schools may have other misgivings about allocating their valuable free legal services to such private initiatives, but they have no concerns emanating from the IRS.

### *C. Public Interest Law Firms*

Besides pro bono from private law firms and free legal services through the student work in law school clinics, another potential source of entrepreneurial TLS would be through private, nonprofit law firms or community-based organizations supporting the creation of new private businesses. There are two possible categories of NGOs that might offer such TLS. One does not seem to be cognizable as a tax-exempt organization under Section 501(c)(3); the other may be so, but would be unlikely, in the current political climate, to support entrepreneurial TLS, because of the triage considerations discussed above in Part II.

The first NGO to consider is a public interest law firm (PILF), which is a term of art in the IRS context. The IRS will grant a PILF tax-exempt status under Section 501(c)(3) if the organization engages in litigation that serves the public interest.<sup>135</sup> The IRS established guidelines in 1992 describing what qualities a firm that represents clients and receives fees for its representation must exhibit in order to qualify as a public charity. In those guidelines, the IRS focused on the most common, but not the exclusive, vehicle for achievement of social change—litigation.<sup>136</sup> The Internal Revenue Manual, which

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135. Rev. Proc. 92-59, 1992-2 C.B. 411; see also Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 DENVER U. L. REV. 441, 469–70 (2014).

136. Rev. Proc. 92-59, *supra* note 134. As several commentators have observed, the goal of Revenue Procedure 92-59 was to differentiate those fee-generating law firms that truly qualify as “public interest” firms and those that are essentially commercial practices serving a specialized clientele. See, e.g., Richard N. Goldsmith, *The IRS Man Cometh: Public Interest Law Firms Meet the Tax Collector*, 13 ARIZ. L. REV. 857, 859 (1971); Sabbeth, *supra* note 136, at 454–57; Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1249 n.137 (2005). Besides the commitment to

provides interpretive guidance to assist taxpayers, describes the requirements for a tax-exempt PILF as follows:

To qualify for [Section 501(c)(3) tax] exemption, public interest law firms must adhere to the following:

The organization's litigation must be designed to present a position on behalf of the public at large on matters of public interest.

The organization can not attempt to achieve its objectives by illegal activity or through a program of disruption of the judicial system.

The organization can not violate any canons of legal ethics.<sup>137</sup>

Therefore, absent some forthcoming interpretive changes from the Service, a law firm established to provide entrepreneurial TLS to clients who paid some fees would seemingly not qualify for tax-exempt status.

But a second type of NGO would fare better under the IRS regime. A tax-exempt conventional legal services organization may offer free legal services without limiting its legal representation to those presenting "position[s] on behalf of the public at large on matters of public interest."<sup>138</sup> Conventional legal services organizations—the typical neighborhood legal aid organizations, for example—represent private parties pursuing purely private interests, even if collectively their achievements accomplish considerable public benefit. Such a legal aid organization will qualify as a tax-exempt organization under Section 501(c)(3) not by its dedication to serving purely "public" interests but by its commitment to provide free or below-market services only to those clients who are poor or otherwise underrepresented.<sup>139</sup> One observer has noted that the IRS

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litigation aimed at some public good, the PILF organizations face strict limits on the fees they may receive from clients. *See* Rev. Proc. 92-59, *supra* note 134.

137. Internal Revenue Manual § 4.76.9.3 (Apr. 1, 2003), available at [http://www.irs.gov/irm/part4/irm\\_04-076-009.html](http://www.irs.gov/irm/part4/irm_04-076-009.html).

138. *Id.*

139. John D. Colombo, *The Role of Access in Charitable Tax Exemption*, 82 WASH. U. L.Q. 343, 362 (2004) ("Traditional 'legal aid' services for the poor have long been recognized

has permitted exempt status for “the familiar legal aid groups which provide representation for specifically identified groups, such as poor or underprivileged people that are traditionally recognized as objects of charity.”<sup>140</sup>

For those organizations, no IRS regulation or guideline requires that the lawyers limit their work to litigation,<sup>141</sup> and legal aid programs sometimes offer transactional or legislative advocacy services on behalf of community organizations.<sup>142</sup> The salient quality of their work entitling them to tax-exempt status is the fact that the beneficiaries of their charitable work are poor or disadvantaged persons, a category expressly contemplated within the IRS’s Section 501(c)(3) guidelines.<sup>143</sup> Those IRS guidelines do not define “poor,”<sup>144</sup> and standard eligibility measures for legal services organizations typically do not inquire about whether the applicant has any control over whether he or she remains poor.<sup>145</sup> A legal services organization that chose to represent entrepreneurs who do not have the resources available to hire private counsel, or organizations that have insufficient assets to obtain needed legal advice from the private market, would seemingly face no risks with its tax-exempt designation.<sup>146</sup>

Therefore, in contrast to law firm pro bono departments or law school clinics, nonprofit legal services organizations confront in the

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as tax-exempt because they limit their services to individuals who cannot afford legal representation.”)

140. Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1443–44 (1984).

141. Rev. Proc. 71-39, 1971-2 C.B. 575 (1971).

142. See *supra* note 4 and accompanying text.

143. Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2008); Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 258–59 (1988).

144. Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2008) (noting the criterion of “poor” without any definition of that term).

145. See *Client Income Eligibility Standards*, LEGAL SERVICES CORP., <http://www.lsc.gov/media/news-items/2013/client-income-eligibility-standards-updated-2013> (last visited Apr. 10, 2015) (listing income limits); *Income Eligibility Guidelines*, GREATER BOSTON LEGAL SERVICES, <http://www.gbbs.org/get-legal-help/can-gbbs-help-me> (last visited May 20, 2015) (listing income limits without inquiry to reasons for being low-income). Of course, in choosing which of the many prospective clients to whom it will provide free legal services, a legal aid organization will likely consider as an important factor the likelihood that the prospective client could achieve a more favorable social status by taking advantage of available opportunities.

146. Cf. Colombo, *supra* note 140, at 345 (arguing that the defining quality for tax-exemption is providing access to those who otherwise cannot obtain counsel).

most straightforward way the policy question with which this Article began: Is it a justifiable use of scarce legal services to provide lawyers to entrepreneurs who hope to be successful? While those organizations have fewer ancillary reasons to provide those services, as law firms and clinics do, they do face that question with a profound and understandable bias. That bias is the result of the immense, immediate needs of so many visible prospective clients in distress.<sup>147</sup> It would require a powerful analytical and empirical thesis for a community-based legal aid organization to justify—to its intake staff (especially), its board, its donors and supporters, and the staff lawyers and advocates themselves—denying lawyers to families facing homelessness, vulnerable persons who need protection from domestic violence, disabled individuals who need income and medical care, children who have been denied appropriate schooling, and so forth, in order to assist entrepreneurs with their exciting new business ideas. Even if that thesis were available (and we saw above that it probably is not, especially for ecumenical, entrepreneurial TLS), the odds are it would not prevail, because of the rescue mission sentiments that play such an important cognitive role in an organization's choice of clients. Hence, we see little, if any, entrepreneurial TLS emanating from neighborhood legal aid offices, and we are unlikely to see such in the future.

#### IV. CONCLUSION

Emerging businesses, startups, and beginning entrepreneurs have a genuine need for legal counsel in order to sustain their enterprises, and usually do not have the funds to pay for that assistance. As more organizations recognize that reality and offer free counsel to those clients, questions will arise about whether that allocation of a valuable and scarce asset is the wisest choice. This Article offers one beginning take on some answers to those questions. It is easy to conclude that offering free transactional legal services to social entrepreneurs and to collectives comprised of members of underserved communities is a justifiable use of scarce legal capital. Allocating those resources to purely entrepreneurial efforts is harder

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147. See discussion *supra* at notes 19–20 and accompanying text.

to justify as a categorical matter, but may be a perfectly wise choice in some individual circumstances. If the question arises in the law firm or law school contexts, the missions of those institutions permit much greater flexibility and easier justification for supporting entrepreneurs.

If nothing else, this Article should demonstrate that these questions deserve considerably more attention going forward, especially as the legal profession—along with the nation as a whole—embraces the continued growth of entrepreneurship, especially within previously underserved communities.<sup>148</sup>

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148. For one example of a new program aimed at encouraging entrepreneurship within a historically neglected community, see SMARTER IN THE CITY, <http://smarterinthecity.com/index.html> (last visited June 6, 2015) (high tech incubator in Dudley Square in Boston).