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The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role, Rethinking the Legal Reform Agenda: Will Raising the Standards for Bar Admission Promote or Undermine Democracy, Human Rights, and Rule of Law?

Samuel J. Levine

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Cover Page Footnote

* Professor of Law, Pepperdine University. For their helpful comments, we thank the participants at the Symposium, The Lawyer's Role in a Contemporary Democracy, held at Fordham University School of Law on September 18–19, 2008. We also thank Paolo Galizzi, Bob Gordon, and Tanina Rostain for helpful conversations. Many thanks to Nadine Etienne and Diana Smithens for their excellent research. I thank Fraida Liba, Yehudah, Aryeh, and Rachel for their continued encouragement. ** Edward & Marilyn Bellet Professor of Legal Ethics, Morality, and Religion, Fordham University School of Law. I would like to thank Phanyo Rakate for suggesting this idea when we were both visitors at Tel Aviv Law School.

RETHINKING THE LEGAL REFORM AGENDA: WILL RAISING THE STANDARDS FOR BAR ADMISSION PROMOTE OR UNDERMINE DEMOCRACY, HUMAN RIGHTS, AND RULE OF LAW?

*Samuel J. Levine**

*Russell G. Pearce***

INTRODUCTION

Today, legal reformers are once again in the midst of a major effort to export American models of the American legal profession to developing countries.[1] These recent efforts began in the 1990s as countries in Eastern

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** Edward & Marilyn Bellet Professor of Legal Ethics, Morality, and Religion, Fordham University School of Law. I would like to thank Phanyo Rakate for suggesting this idea when we were both visitors at Tel Aviv Law School.

1. Commentators generally consider the first legal reform effort in the 1960s and 1970s to have been a failure. *See generally* JAMES A. GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA (1980); LAW AND DEVELOPMENT (Anthony Carty ed., 1992); David F. Greenberg, *Law and Development in Light of Dependency Theory*, 3 RES. L. & SOC. 129 (1980), *reprinted in* LAW AND DEVELOPMENT, *supra*, at 89; John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); Francis G. Snyder, *The Failure of "Law and Development,"* 1982 WIS. L. REV. 373 (reviewing GARDNER, *supra*); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

The movement was premised on the theory that an instrumentalist approach to law would engender "legal development," advancing the functioning of a just and equitable legal system. Matthew Stephenson, *A Trojan Horse in China?*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 191, 205 (Thomas Carothers ed., 2006) (quoting Trubek & Galanter, *supra*, at 1074). As the scholars cited above have documented, those involved in the law and development movement failed to appreciate the social and political context in which these legal reforms were to be implemented. First, "[a]n expanded and modernized legal profession tended to increase social inequality, because the social elite had greater access to the better-educated and professionalized legal personnel." *Id.* Second, "these conservative elites could make use of better-trained lawyers to block changes that

Europe, South America, Africa, and Asia began to transition to democratic political systems or market economies.[2] The reformers' agenda has been quite ambitious: nothing less than a rule of law program to promote democracy and human rights, as well as to end poverty and resolve intractable political conflicts.[3] The scope of this essay is far more limited. We raise concerns regarding one of the many planks in the reform platform: the goal of raising standards for legal education and admission to the bar. In particular, we question the wisdom of requiring lawyers to "have a formal, university-level, legal education."[4] The reformers claim that this requirement will help promote democracy, human rights, and the rule of law. Unfortunately, as this essay will explain, higher standards for admission to the bar are likely to have the paradoxical effect of impeding or undermining these goals.

For purposes of this essay, we will employ the following definitions for the terms democracy, human rights, and rule of law.[5] "Democracy" refers to majority rule.[6] "Human rights" refers to basic rights that individuals and groups possess against the government, even a government of majority rule.[7] A governmental system that provides for both majority rule and the protection of human rights is a "liberal democracy."[8] While "rule of law" includes many elements, this essay will focus in particular on the equal application of legal rules to all members of a society, whether or not they

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threatened their interests." *Id.* Rather than protecting individual rights, instrumentalism became a tool of the state to restrict individual rights, to serve the goal of development. *Id.* at 205–06.

2. For discussions of current efforts and proposals, see generally EAST ASIAN LAW—UNIVERSAL NORMS AND LOCAL CULTURES (Arthur Rosett et al. eds., 2003); PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 1; RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA (William P. Alford et al. eds., 2007); Stephenson, *supra* note 1. These commentators echo the critiques of the first legal reform effort. They argue that the conservative elites will be the ultimate beneficiaries of legal reform.

3. *See infra* Part I.

4. American Bar Association, Rule of Law Initiative – The Legal Profession Reform Index: Factors, http://www.abanet.org/rol/publications/legal_profession_reform_index_factors.shtml (last visited Feb. 25, 2009) (Factor 7).

5. These working definitions are necessary for the purposes of this analysis, as each of these concepts is susceptible to numerous and competing definitions.

6. *See, e.g.*, Ronald Dworkin, *The Secular Papacy*, *in* JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 67, 82 (Robert Badinter & Stephen Breyer eds., 2004) (defining democracy as "fair majority rule").

7. *See, e.g.*, Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 644 (2003) (referring to the "main sort of human rights that national constitutions and the international law of human rights protect: human rights *against government*"); Laurence H. Tribe, *In Support of a Victims' Rights Constitutional Amendment*, 9 LEWIS & CLARK L. REV. 659, 659 (2005) (referring to "basic human rights against government, rights that any civilized system of justice would aspire to protect and strive never to violate").

8. *See, e.g.*, Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 707 (1999) (defining a liberal democracy as "a political system with governments elected by popular majority, and with the rule of law enshrined to protect those not in the majority").

are part of the ruling elite.[9] While no society satisfies this element fully, legal institutions differ in the extent to which they provide more equal or less equal access to justice.[10]

We base our analysis on the premise that lawyers necessarily serve as a political leadership—or governing—class in a liberal democracy.[11] For purposes of this analysis, we use the term "lawyer" to refer to occupations that require nearly full-time expertise and commitment to analyzing, explaining, and arguing the law, whether they are expressly termed "lawyers" or not.[12] Although we recognize that societies differ in the extent to which they use legal experts to help explain the law or resolve disputes and that these differences may in turn shape the influence of legal services providers,[13] this essay focuses narrowly on the function of those we term "lawyers." A society that tempers commitment to majority rule with protection of rule of law, as well as individual and group rights, requires a vocation or vocations of lawyers to provide staff and expertise.[14] As a matter of formal government, lawyers play a vital role. While they will undoubtedly have responsibility in the executive and legislative functions that will vary according to culture, their responsibility in the judicial system will be dominant.[15] As a matter of informal government, lawyers are the intermediaries between the legal system and the people. As representatives of clients and community leaders, lawyers give advice, make legal arguments, draft laws, and render opinions.[16] In so doing, they shape the

9. We recognize that varying conceptions of rule of law place varying degrees of emphasis on equal justice under law. As one commentator has noted, "*rule of law* is a notoriously plastic phrase." Stephenson, *supra* note 1, at 191; *see also* Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, *in* ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 1, 1 (Randall Peerenboom ed., 2004) ("Rule of law is an essentially contested concept. It means different things to different people, and has served a wide variety of political agendas . . . ."). We focus on a commonly accepted core aspect of rule of law: that the legal system should apply the law equally to different individuals and segments of society.

10. *See generally* COMM'N ON LEGAL EMPOWERMENT OF THE POOR, UNITED NATIONS DEV. PROGRAMME, PROGRESS REPORT: WORKING GROUP 1: ACCESS TO JUSTICE AND RULE OF LAW (n.d.), *available at* http://www.undp.org/legalempowerment/pdf/WG1_Progress_Report.pdf.

11. *See infra* Part III.

12. Different countries use different terms to describe various types of legal services providers.

13. Indeed, our analysis focuses on China and South Africa, two societies in which many providers of legal services would not fit within narrow American notions and definitions of lawyers. *See infra* Parts II–III.

14. *See* Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 390–91 (2001). *See generally* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 1 (2007); Bruce A. Green & Russell G. Pearce, *"Public Service Must Begin at Home": The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. (forthcoming Mar. 2009).

15. *See* LUBAN, *supra* note 14, at 104, 131–32, 146–52, 160–61; Green & Pearce, *supra* note 14, at 17–20; Pearce, *supra* note 14, at 383, 387.

16. *See* Green & Pearce, *supra* note 14, at 19; Pearce, *supra* note 14, at 383.

popular understanding of the letter and spirit of the law, as well as the public good.[17] The work of lawyers is therefore fundamental to ensuring that government conduct and popular culture embrace democracy, human rights, and rule of law.

Applying the governing class understanding of the lawyer's role, this essay will critique the reform agenda of requiring a college education in law for bar admission. Part I describes the reform agenda's commitment to raising the standards for bar admission. As a test of this approach, Part II examines the legal professions of two countries in transition—China and South Africa—and suggests that imposing or maintaining high standards for bar admission would actually impede the development of democracy, human rights, and rule of law. Part III offers an example that runs contrary to the reform agenda—the advancement of liberal democracy in the United States in the nineteenth and early twentieth centuries. Based on this experience, Part III offers an alternative approach to bar admissions in countries in transition. Standards for bar admission should require only a threshold level of competence, in order to democratize the governing class of lawyers while enhancing both governmental and popular commitment to human rights and rule of law.

We offer two caveats. First, this essay offers a framework for further investigation and relies on analysis that is quite preliminary. We do not claim that we can prove the benefits of our approach with empirical data. Second, we do not seek to question the good faith of those pursuing the reform agenda. Rather, we offer both our critique and our proposal in order to demonstrate, in part, that the reformers cannot responsibly argue for goals, such as high standards for bar admission, solely because they resemble policies currently found in the United States or in other Western countries.

I. THE REFORM AGENDA OF PROMOTING HIGHER EDUCATIONAL STANDARDS FOR BAR ADMISSION

Perhaps the most influential organization among the current group of legal reformers is the American Bar Association (ABA) Rule of Law Initiative (the Initiative).[18] With more than "400 professional staff working in the United States and abroad," the Initiative works in Eastern and Central Europe, Asia, Africa, Latin America, and the Middle East.[19] The "primary funders" of the Initiative's "annual budget of over $30 million" are the U.S. Agency for International Development (USAID), the U.S. Department of

17. *See* Green & Pearce, *supra* note 14, at 1; Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1344–45 (2006).

18. *See* American Bar Association, Rule of Law Initiative, http://www.abanet.org/rol/ (last visited Feb. 25, 2009).

19. American Bar Association, About the ABA Rule of Law Initiative, http://www.abanet.org/rol/about.shtml (last visited Feb. 25, 2009).

State, and the U.S. Department of Justice.[20] The Initiative's premise is "that rule of law promotion is the most effective long-term antidote to the pressing problems facing the world community today, including poverty, economic stagnation, and conflict."[21] Conceived and funded with the understanding that "'rule of law' is a fundamental building block to . . . democracy,"[22] the Initiative describes human rights and equal justice as key components of rule of law.[23] To achieve these goals, the Initiative's projects include reforming the legal profession[24] and promoting a "rule of law culture" among the population.[25]

The focus of this essay is the Initiative's commitment to achieving these goals by raising the standards for admission to the bar. The Initiative's Legal Profession Reform Index expressly requires that "[l]awyers have a formal, university-level, legal education from academic institutions authorized to award degrees in law."[26] In the context of Central and Eastern Europe, the Initiative has opposed the "proliferation of substandard law schools that are widely known to be 'diploma mills'"[27] and has had some success in encouraging the closing of such schools and dramatically decreasing the number of law schools.

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20. AM. BAR ASS'N, RULE OF LAW INITIATIVE: PROMOTING THE RULE OF LAW 3 (n.d.), *available at* http://www.ibanet.org/Document/Default.aspx?DocumentUid=f1b855c4-9a45-47df-8a1b-8058dedf06e6.

21. American Bar Association, *supra* note 18.

22. Maggi Carfield, Note, *Enhancing Poor People's Capabilities Through the Rule of Law: Creating an Access to Justice Index*, 83 WASH. U. L.Q. 339, 349 (2005); *see, e.g.*, *Prelude to Justice*, A.B.A. J., Mar. 1996, at 52, 52 (noting how the Initiative's predecessor "facilitated . . . shift to democracy" in Bosnia-Herzegovina).

23. *See* American Bar Association, *supra* note 18.

24. *See* American Bar Association, *supra* note 19.

25. *Id.*; *see also* American Bar Association, Rule of Law Initiative – Legal Education Reform and Civic Education, http://www.abanet.org/rol/programs/resource_legal_education.html (last visited Feb. 25, 2009) ("[The Initiative] seeks to create a more robust 'rule of law culture' by educating members of the public about their legal rights under domestic and international law. An educated public that is willing and able to demand that government act in a fair, transparent and law-based manner can help achieve peaceful change.").

26. American Bar Association, *supra* note 4 (Factor 7).

27. American Bar Association, *supra* note 25. As part of its Rule of Law Initiative, the American Bar Association (ABA) has called for "[l]egal education reform." *Id.* Focusing in part on "reform[ing] law schools," the ABA's proposal states that,

> In many parts of the world, the next generation of judges, prosecutors, and lawyers are being shaped today by a legal education system that is in dire need of reform. Law schools in the countries in which the ABA Rule of Law Initiative operates have, on the whole, been resistant to change. Particularly in Central and Eastern Europe and Eurasia, there are few examples of prestigious, state-run law schools that have undergone truly significant transformation in the past 15 years. Moreover, since the collapse of communism in Central and Eastern Europe and the former Soviet Union, law degrees have become highly sought after, spawning a proliferation of substandard law schools that are widely known to be "diploma mills." Unregulated in many countries, these unaccredited law schools have degraded the value of a law degree and continue to graduate law students who lack the training to be effective and ethical lawyers.

Id.

Some commentators and law schools have gone even further and sought to promote the American model of legal education as a graduate degree.[28] For example, in China, Korea, and Australia, leaders of the bar and academy have been urging a shift in this direction.[29] Indeed, in China,

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28. Unlike most countries, the United States requires a college degree before beginning legal education as a graduate degree. *See* AM. BAR ASS'N, 2008–2009 STANDARDS FOR APPROVAL OF LAW SCHOOLS ch. 5, standard 501(b) (2008), *available at* http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Chapter%205.pdf (stating that a law school should admit only those applicants who "appear capable of satisfactorily completing its educational program and being admitted to the bar"). The primary criterion for admission under the ABA standards relates to "[e]ducational requirements." *Id.* ch. 5, standard 502. Specifically, "[a] law school shall require for admission to its J.D. degree program a bachelor's degree, or successful completion of three-fourths of the work acceptable for a bachelor's degree, from an institution that is accredited by an accrediting agency recognized by the Department of Education." *Id.* ch. 5, standard 502(a).

29. *See* Leigh Jones, *They Do It Our Way: Foreign Law Schools Follow the U.S. Playbook*, NAT'L L.J., Sept. 8, 2008, at 1.

Zhenmin Wang, Professor of Law and Vice Dean at Tsinghua University Law School in Beijing, has suggested that "China needs to re-define the nature of legal education. . . . [L]aw study should be regarded as a professional education, not a general arts subject." Zhenmin Wang, *Legal Education in Contemporary China*, 36 INT'L LAW. 1203, 1211 (2002). Specifically, he poses the question: "Should legal education be redefined as professional education? Shall it be provided as undergraduate education like that in the United Kingdom, or graduate education like that in the United States?" *Id.* at 1212. He concludes that "[m]ore legal educators think it should be provided as graduate education." *Id.*

Likewise, a former lecturer of law at East China University of Politics and Law in Shanghai, who also studied law in the United States, proposed that the Chinese Ministry of Justice (MOJ) should adopt an ABA model for law school accreditation to ensure the quality of legal education. In addition, the MOJ and law school administrators

> should consider increasing the amount of time it takes to achieve the first law degree by introducing the practices of some European countries and the U.S. For example, in the first two years, students may have the opportunity to take any college course other than law, borrowing the U.S. practice that requires law applicants to first finish a college degree. In the third and fourth years, students should be focused on law courses, after which the students may get an LL.B. degree. If students want to practice law, they must finish yet another year or two in law school, during which time the students will learn practical skills, practice in school-affiliated legal clinics, or work in a practicum placement for a period of time under complete supervision and guidance. After finishing a dissertation, the students will receive their LL.M. degree, which should be the basic requirement for anyone hoping to take the Judicial Exam and practice law.

Lingyun Gao, *What Makes a Lawyer in China? The Chinese Legal Education System After China's Entry into the WTO*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 197, 230 (2002).

Similarly, Handong International Law School in Pohang, Korea, an international affiliate of the Association of American Law Schools, offers a three-year postgraduate program. Applicants are required to have completed a four-year undergraduate degree and to demonstrate proficiency in English. The dean of the law school and most of the faculty are American lawyers and are admitted to practice in the United States, while the curriculum focuses on American and international law. *See generally* Handong International Law School, http://lawschool.handong.edu/English (last visited Feb. 25, 2009).

The phenomenon of modeling law schools after the American system of legal education has extended to Australia as well. The University of Melbourne Law School has discontinued its undergraduate law degree and now offers only a J.D. program. The law school's website informs prospective students that "[t]he shift to graduate law at Melbourne

Jeffrey Lehman, formerly the president of Cornell University and dean of the University of Michigan Law School, has become the founding dean of Peking University School of Transnational Law in Shenzhen, a graduate law school.[30] Lehman claims that his law school will provide a model for legal education that will strengthen China's "rule of law."[31]

The grounds for this claim, as well as for the even more ambitious claims of the Initiative, are rather questionable.[32] These contentions appear to rely solely on the dubious assertion that imposing high standards for legal education and bar admission is essential to achieving democracy, human rights, and rule of law.[33] As William Alford has observed in the context of

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is part of a worldwide trend responding to the challenge of providing the best legal education to support the increasingly international profession of law." The University of Melbourne, About the Melbourne JD, http://jd.law.unimelb.edu.au/go/about-us/melbourne-jd/ (last visited Feb. 25, 2009). Therefore, "[i]n developing its own JD, Melbourne has drawn on international experience but adapted it to Australian circumstances." *Id.* Accordingly, admissions standards require that students have a bachelor's degree and take the Law School Admission Test. *Id.*

30. *See* Jones, *supra* note 29. In an effort to replicate the American model of legal education, the curriculum at the school consists of American law, taught in English by mostly American faculty. *See id.* Jeffrey Lehman plans to seek ABA accreditation, declaring that the school is "'determined to devote all necessary resources, and to do all that is required, to present a program of legal education that will qualify for approval by the ABA.'" Posting of Sky Canaves to China Journal, http://blogs.wsj.com/chinajournal/2008/06/06/an-american-law-school-in-china/ (June 6, 2008, 4:17 AM). As Lehman explained in a speech he delivered last year before the Woodrow Wilson International Center for Scholars, "We are intended to be a proof of concept for China. We are intended to show whether this . . . type of education will have value for China and is worthy for greater emulation." Andy Guess, *An American Law School in China*, INSIDE HIGHER ED, May 22, 2008, http://www.insidehighered.com/news/2008/05/22/china (alteration in original) (internal quotation marks omitted); *see also* Jeffrey S. Lehman, China's First US-Style Law School: Five Narratives in Search of an Author, Address at the Woodrow Wilson International Center for Scholars (May 21, 2008), *available at* http://www.jeffreylehman.com/wilson_center_five_narrativ.html. For a critique of the effort to promote democratic values in China through the establishment of law schools under the American model, see Posting of Tanina Rostain to Legal Ethics Forum, http://legalethicsforum.typepad.com/blog/2008/10/an-american-law.html (Oct. 27, 2008, 1:48 PM).

31. *See* Guess, *supra* note 30. For the reflection of an American law professor who taught a course in legal ethics at the Tsinghua School of Law in Beijing, see Eli Wald, *Notes from Tsinghua: Law and Legal Ethics in Contemporary China*, 23 CONN. J. INT'L L. 369, 370 (2008) (describing author's expectation "to learn that Chinese law students differ from American law students in big, ideological and explicit ways," but instead finding "that differences between Chinese and American law students emerged in subtle and implicit details").

32. *See* American Bar Association, *supra* note 18; *cf.* James E. Moliterno, *Exporting American Legal Education*, 58 J. LEGAL EDUC. 274 (2008) (describing author's experiences teaching in legal education programs outside the United States); *id.* at 278 (noting that "shifts to U.S. models do not always fit well with local conditions" and emphasizing the importance of "[p]aying attention to this possibility, rather than merely assuming that the U.S. model must fit all"); *id.* at 280 (observing that "[c]ultural imperialism is evident in the attitudes of some Americans (and Western Europeans) involved in these projects"); *id.* at 288 (concluding that "[w]e should be culturally sensitive to make meaningful change" and "[w]e should not merely export American legal education and legal ethics").

33. Matthew Stephenson, one of the most prominent critics of the reformers' efforts in China, notes the inherent ambiguity of the phrase "rule of law," and observes that, although

China, the reformers rely on an unfounded "faith that scrupulous adherence to what is presented as the American model will suffice to bring about major and desirable legal and perhaps political reform."[34]

II. TESTING THE REFORM AGENDA: THE EXAMPLES OF CHINA AND SOUTH AFRICA

In order to assess whether the reform agenda for raising admission standards will promote democracy, this essay evaluates this question using the examples of China and South Africa. As this part explains, the reform agenda's approach prevents the democratization of the governing class of lawyers, hinders the development of a human rights culture, and impedes equal access to justice.

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the Chinese government has chosen to use a phrase often translated back into English as "rule of law" or "a country ruled according to law," a more accurate translation may be "rule *by* law." Stephenson, *supra* note 1, at 198–99. The subtle distinction in these concepts, according to Stephenson, reflects a more significant gap between the American policy of rule of law, which emphasizes individual human rights, and the Chinese policy, which seems to accept the principle of legal reform for less noble purposes, such as furthering economic success through improving the perceptions of China among other countries, or using the legal rules to solidify the control of the central government over the provinces. *Id.*

As a result, American rule of law efforts in China have employed an approach that Stephenson has dubbed a "'Trojan horse' strategy": once China begins to adopt legal reforms, the reforms "will take on a life of their own." *Id.* at 199. Specifically, building on the success that is expected to result from reforms in commercial areas, proponents of reform will begin to advocate for the application of the rule of law to other areas as well. *Id.* at 199–200. In Stephenson's depiction, one of the primary—and most questionable—methods devised for implementing the Trojan horse strategy in China is the attempt to effect a change in China's legal culture. Under this theory, the Chinese government will initially accept American educational programs, with the aim of improving the training of judges and lawyers; over time, the American programs will "transform the way the Chinese elite thinks about the law." *Id.* at 204. Among other changes in Chinese legal education, Americans would attempt to replace the dominant "formalistic" mode of thinking with a more "critical, policy-oriented, instrumental approach." *Id.* at 204–05. The resulting change in attitude toward the function of law will then provide an impetus for widespread reform of the legal system. *Id.* at 205.

34. William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People's Republic of China*, *in* RAISING THE BAR: THE EMERGING LEGAL PROFESSION, *supra* note 2, at 287, 287–88. William Alford finds that "[n]owhere is this cast of mind more evident than in treatment of the legal profession." *Id.* Alford goes so far as to label the legal reformers' approach as ignorant and arrogant. *Id.* at 297. Alford targets Anthony Kronman, in particular, for expressing such faith in the applicability of the American model of the legal profession in China. *Id.* at 298–302. In the past, Kronman has been criticized for a similar faith in the abiding professionalism model to portray American lawyers. *See generally* Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217 (2002); Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-as-Business Paradigm*, 27 FLA. ST. U. L. REV. 9 (1999) [hereinafter Pearce, *Law Day 2050*]; Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995); Thomas L. Shaffer, *The Lost Lawyer: Failing Ideals of the Legal Profession*, 41 LOY. L. REV. 387 (1995) (book review); *see also* Samuel J. Levine, *Professionalism Without Parochialism: Julius Henry Cohen, Rabbi Nachman of Breslov, and the Stories of Two Sons*, 71 FORDHAM L. REV. 1339 (2003).

A. *China*

1. The Chinese Legal Profession

Lawyers are one of China's three major categories of legal services providers. Since 2002, China has required a college degree, which can include a correspondence degree, to sit for the licensing exam for lawyers.[35] It does not require a law degree, and the exam passage rate is lower than ten percent.[36] The Ministry of Justice can "waive the exam [for] qualified persons."[37] After passing the exam or obtaining a waiver and before obtaining a law license, an applicant must complete a one-year apprenticeship.[38] As of 2004, China had approximately 130,000 "registered lawyers."[39]

The second category is "basic level legal workers." They "have received some legal training and are licensed by the provincial justice bureau, either through an exam or by meeting other requirements."[40] Approximately 100,000 basic level legal workers handle fifty percent more "litigation and non-litigation" matters than lawyers; they "represent parties in civil and administrative cases," but may not "represent criminal defendants."[41] They "have emerged as an important mechanism for facilitating claims by the rural poor," although they also practice in urban areas.[42] Despite, or perhaps because of their large caseloads, "many lawyers and justice bureau officials now argue that the basic level legal worker system should be abolished, or at the very least restricted to matters not involving litigation."[43]

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35. Gerard J. Clark, *An Introduction to the Legal Profession in China in the Year 2008*, 41 SUFFOLK U. L. REV. 833, 840 (2008); *see also* Ji Weidong, *Legal Education in China: A Great Leap Forward of Professionalism*, 39 KOBE U. L. REV. 1, 6–8 (2004) (Japan).

36. *See* Clark, *supra* note 35, at 840.

37. *Id.*

38. *See id.*

39. Benjamin L. Liebman, Assoc. Professor of Law, and Dir., Ctr. for Chinese Legal Studies, Columbia Law Sch., Congressional-Executive Commission on China, Prepared Statement at Roundtable on Access to Justice in China (July 12, 2004), *available at* http://www.cecc.gov/pages/roundtables/071204/liebman.php; *see* Weidong, *supra* note 35, at 3.

40. Liebman, *supra* note 39.

41. *Id.*

42. *Id.*

43. *Id.* It is not surprising that, particularly in urban areas, lawyers have resented the competition they face from basic level legal workers, who provide legal services at a lower cost. In response, lawyers have claimed that basic level legal workers are lacking in adequate training and ethical standards—to which Benjamin Liebman responds that "the same could be said of many lawyers." *Id.*

Likewise, Alford has noted that "anecdotal evidence suggests that abuses occur among both groups of practitioners and there is no systematic data [to] show that problems of corruption and pulling connections are more serious among legal workers than among lawyers themselves." Peng Wu, Note, *The Good, the Bad and the Legal: Lawyering in China's Wild West*, 21 COLUM. J. ASIAN L. 183, 209 (2008) (citing William P. Alford, Second Lawyers, First Principles? Lawyers, Rice-Roots Legal Workers, and the Battle over

The third category is "barefoot lawyers," who "generally are self-trained and not licensed."[44] In rural regions, they "assist fellow villagers in navigating the formal legal system, from writing legal documents to assisting them in court."[45] Although the law does not permit them to charge fees, whether they do so is not clear.[46] Barefoot lawyers have achieved notice as opponents of political corruption and advocates of human rights.[47]

2. The Implications of the Reform Agenda for China

a. *Applying the Agenda*

According to the reform agenda, China should make significant changes in the delivery of legal services. First, pursuant to the standards of the Legal Reform Index, China should prohibit nonlawyers, such as basic level legal workers and barefoot lawyers, from providing legal services. Many Chinese lawyers and Ministry of Justice officials also support this approach. Second, the reform agenda would require a college level law degree, and not just a general college degree, to sit for the lawyers' licensing examination. This idea also has gained support from Chinese lawyers and Ministry of Justice officials.

b. *Consequences for Democracy, Human Rights, and Rule of Law*

i. Democracy

The reform agenda would make the political leadership class of legal services providers far less democratic. It would restrict membership to a narrow elite, especially in a country where fewer than two percent of the population has the college degree required to become a lawyer, as opposed to a basic level legal worker or a barefoot lawyer. Restricting lawyers to

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Legal Professionalism in China 13 (n.d.) (unpublished manuscript, on file with the Fordham Law Review)); *see also id.* at 206–09 (describing differences—and tensions—between lawyers and basic level legal workers); *id.* at 206 ("The fees set for legal workers are lower than those for lawyers, even when the same service is being provided, leading to complaints that legal workers have 'attacked the market' in the cities." (translation into Chinese characters omitted)).

In any event, the reactions of Chinese lawyers echo the American historical record of opposition among lawyers to the unauthorized practice of law, ostensibly on the grounds of protecting the quality of legal representation, but arguably for the purpose of protecting the economic interests of lawyers. *See* Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1, 20–24 (2005).

44. Liebman, *supra* note 39.

45. *Id.*

46. *Id.*

47. *See, e.g.*, Bruce Gilley, *Books of the Times: Viewing China from the West and from Within*, N.Y. TIMES, May 19, 2004, at E8; Jim Yardley, *China Detains Lawyers for Peasants' Advocate*, N.Y. TIMES, Aug. 18, 2006, at A6.

law graduates, as the Initiative and as many Chinese leaders would prefer, would limit membership even further. Either way, the vast majority of the population would have no opportunity to become lawyers. Those from the larger population who have currently achieved the position of basic level legal worker or barefoot lawyer would face expulsion from political leadership, making China even less democratic than it is today.[48]

ii. Human Rights

China is a relatively closed society with limited human rights. Given this lack of transparency, the exact role of legal services providers in promoting human rights is difficult to determine. Nevertheless, commentators generally agree that the Chinese government has succeeded in co-opting lawyers and preventing them from championing human rights.[49] Certainly

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48. Moreover, there are troubling indications of widespread corruption in the Chinese legal system. Alford, *supra* note 34, at 292. As Alford bluntly puts it, his own study of the legal system in a number of major cities suggests that "the expansion of the Chinese bar has been accompanied by increasing corruption, with lawyers at times a conduit for, if not the instigators of, such behavior." *Id.* at 293. In fact, Alford has documented the prevalence of corruption among "urbanites with elite legal educations (whether obtained in China or abroad or both)" whose law practice and other experiences have provided them "greater exposure to the sort of international norms typically lauded by those who vest considerable hope in China's developing a domestic counterpart" to the American bar. *Id.*

Although numerous factors contribute to a culture of corruption, the degree of corruption found among the legal elite, who have benefited from elite legal education and practice experience, calls out for attention. In particular, in light of this corruption, there seems little reason to believe that increasing elitism among China's lawyers, through higher admissions standards for law school and the bar, would correlate with greater respect for and adherence to the rule of law.

49. Alford, for example, asserts that

> at least some in the Chinese bar, and perhaps most especially elite business practitioners in the capital, have struck a Faustian bargain with the party/state, willingly accepting a good life materially and in terms of prestige and security in return for foregoing certain of the attributes (most notably, a considerable measure of independence from the state) generally associated with legal professionalism in liberal democratic states and for acquiescing in the role the [Chinese Communist Party] has accorded itself in Chinese political and legal life.

Id. at 295.

Thus, Alford cautions, rather than operating as a force for political freedom and reform, to a considerable degree, the Chinese legal profession "remains interwoven with the party/state." *Id.* at 293. This lesson is particularly important for American and other foreign reformers, who, according to Alford, are misled by appearances of the legal profession's independence, a central value in the American bar. *See, e.g.*, Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281 (2003); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988). In contrast to these perceptions, Alford cites government regulations that "require law firms to form Communist Party cells and senior lawyers to provide junior colleagues with ideological, as well as practical, training." Alford, *supra* note 34, at 294. Accordingly, for example, the governmental agency overseeing annual renewal of lawyers' licenses in Beijing prevented lawyers from representing detainees in the Falungong movement. *Id.* More generally, Alford suggests the possibility that increased economic opportunity for the Chinese legal profession "may be reinforcing the [Chinese Communist Party's] hold on power and impeding, rather than facilitating, movement toward the rule of law specifically and liberalism more generally." *Id.* at 295.

Indeed, "lawyers still must meet political correctness standards to practice law and pass the annual inspection test," and the MOJ has primary authority over the legal profession, including disciplinary authority. Randall Peerenboom, *Competing Conceptions of Rule of Law in China*, *in* ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S., *supra* note 9, at 113, 129.

> [T]he Ministry [of Justice] still has adequate arbitrary authority to intimidate its licensees. The administrative organs of the judiciary, operating under the Ministry, have extensive regulatory authority over law firms as well. They ultimately certify individual lawyers, approve the establishment of law firms, and have the power to regulate fees. Additionally, they regulate and sanction disciplinary cases and can actually intrude into a lawyer's or firm's handling of a controversial matter.

Clark, *supra* note 35, at 839.

Likewise, the concept of "cause lawyering" in China appears to strengthen, rather than challenge, the authority of the central government. For example, the Center for Women's Law Studies and Legal Services at Peking University has not brought cases challenging the central government or those connected with it. Instead, most of the Center's high-profile cases have been directed against local governments, alleging that they have not followed national laws. *See* Benjamin L. Liebman, *Lawyers, Legal Aid, and Legitimacy in China*, *in* RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA, *supra* note 2, at 311, 330. According to Liebman, "[n]either [the Peking Center] nor any other legal aid center in China has represented political dissidents or has directly challenged the authority of provincial or national government officials." *Id.*; *cf.* Clark, *supra* note 35, at 841–42 ("Many Chinese lawyers, especially those in the criminal and administrative fields, avoid litigating against the government because of its overwhelming power.").

Liebman has suggested similar motivations underlying the Chinese government's support for legal aid programs and for lawyers who bring lawsuits that challenge local authorities.

> By encouraging lawyers to focus on local abuses, the central government may be addressing a prime threat to its own legitimacy (corruption and lawless behavior by local governments) and also preventing lawyers from turning their sights on the central government itself. Thus, the development of legal aid programs may be serving to maintain a degree of government control over both lawyers and local governments . . . .

Liebman, *supra*, at 313. Thus, he suggests, "government efforts to expand legal aid may be as much about maintaining a degree of control over the legal profession and enlisting lawyers in implementing national policies as they are about increasing access to justice for those in need." *Id.* at 328; *see also* Kara Abramson, *Paradigms in the Cultivation of China's Future Legal Elite: A Case Study of Legal Education in Western China*, 7 ASIAN-PAC. L. & POL'Y J. 302, 312 (2006) ("[C]orruption and lack of independence continue to hinder the profession . . . ."); Clark, *supra* note 35, at 835–36 ("[A] lack of judicial independence may be the most serious obstacle for the rule of law in China today."); Melissa S. Hung, Note, *Obstacles to Self-Actualization in Chinese Legal Practice*, 48 SANTA CLARA L. REV. 213, 236 (2008) ("[L]awyers are consistently frustrated by political interference . . . . The present configuration and atmosphere limits the future development of both judges and attorneys as trusted professionals."); *id.* at 238 ("No inducements exist to adhere to ethical behavior since both lawyers and judges may expose themselves to political retribution.").

A *New York Times* article summarized a 2007 speech by Luo Gan, a member of the governing nine-man Politburo Standing Committee of the Communist Party and the country's most powerful judicial official: "'Enemy forces' are seeking to use China's legal system to Westernize and divide the country, and the Communist Party must fend them off by maintaining its dominance over lawyers, judges and prosecutors." Joseph Kahn, *Chinese Official Warns Against Independence of Courts*, N.Y. TIMES, Feb. 3, 2007, at A5. The official was further quoted as saying that, "There is no question about where legal departments should stand . . . . The correct political stand is where the party stands." *Id.* (internal quotation marks omitted).

the barefoot lawyers are the most publicized human rights champions.[50] In abolishing barefoot lawyers, the reform agenda would deal a blow to the promotion of a legal culture of human rights. It would also hinder the development of a popular commitment to human rights.[51] Together with basic level legal workers, who would also face discharge, barefoot lawyers educate large numbers of the population as to their legal and civil rights.[52]

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50. To be fair, a few lawyers have agreed to represent them as clients when the government seeks to prevent their human rights work. *See supra* Part II.A.1.

51. *Cf.* Stanley Lubman, *Chinese Courts and Law Reform in Post-Mao China*, *in* EAST ASIAN LAW: UNIVERSAL NORMS AND LOCAL CULTURES 205, 224 (Arthur Roseti et al. eds., 2003) ("There is, at base, the question of whether the Chinese leadership wishes to build a legal system . . . . [I]deology and lack of political will highlight the leadership's failure or unwillingness to choose to establish a meaningful rule of law. Institutional weakness is another powerful factor . . . . Substantial changes in [the] configuration of institutions would require major political decisions, little sign of which has appeared."); Clark, *supra* note 35, at 833 ("The Western notion of enforcing one's legal rights through litigation does not sit well with the Chinese."); *id.* at 834 ("Courts generally do not welcome litigation and often try to discourage it. Far more than in many other systems, the Chinese legal system is willing to forgo the enforcement of rights when other opposing values seem to be at stake . . . .").

52. *See* Liebman, *supra* note 39 ("In a system in which litigants are often distrustful of the courts, Basic Level Legal Workers also play important roles in explaining legal procedures and facilitating interaction between rural citizens and courts."). In light of these critiques, perhaps China would be better served by adopting Stephen Golub's "legal empowerment" model, which, according to Golub,

> both advances and transcends the rule of law. It advances the rule of law in the sense that where the poor have more power they are better able to make government officials implement the law and influential private parties abide by it. Such power also enables disadvantaged groups to play a greater role in local and national law reform. In these crucial respects, it builds good governance.

Stephen Golub, *The Legal Empowerment Alternative*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 161, 163 (Thomas Carothers ed., 2006).

Golub describes "legal empowerment" as "the use of legal services, often in combination with related development activities, to increase disadvantaged populations' control over their lives." *Id.* at 161. Notably, Golub offers legal empowerment as "both an alternative to the problematic, state-centric rule-of-law orthodoxy and a means of making rights-based development a reality by using law to support broader socioeconomic development initiatives." *Id.* Of particular relevance to discussions of law reform in China, Golub sees legal empowerment as "address[ing] a central reality that the rule-of-law orthodoxy overlooks: In many developing countries, laws benefiting the poor exist on paper but not in practice unless the poor or their allies push for the laws' enforcement." *Id.*

According to Golub, the salient features of legal empowerment distinguish it from rule-of-law orthodoxy in a number of significant ways:

> (1) attorneys support the poor as partners, instead of dominating them as proprietors of expertise; (2) the disadvantaged play a role in setting priorities, rather than government officials and donor personnel dictating the agenda; (3) addressing these priorities frequently involves nonjudicial strategies that transcend narrow notions of legal systems, justice sectors, and institution building; and (4) even more broadly, the use of law is often just part of integrated strategies that include other development activities.

Id. at 161–62. China's basic level legal workers and barefoot lawyers help fulfill these goals.

iii. Rule of Law

The reform agenda would markedly diminish equal justice under law. Abolishing basic level legal workers and barefoot lawyers would deny access to justice to persons outside of the privileged elite.[53] They will not have the ability to find, much less afford, legal representation. Underscoring the broad scope of this injustice is the fact that basic level legal workers and barefoot lawyers currently handle significantly more cases than licensed lawyers.[54] The reform agenda would severely undermine the component of rule of law that requires equal justice for all.[55]

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53. As Liebman has emphasized, China may be "moving too quickly toward its goal of a legal model in which legal services are provided by lawyers alone, without sufficient consideration of the actual situation on the ground." Liebman, *supra* note 39. Specifically, Liebman points to salient features of the Chinese legal system, including: the modest per capita number of lawyers that still exist in China; the varying degree of training among lawyers; and the need for services in rural areas beyond those likely to be provided by urban lawyers. *See id.* In Liebman's words,

> Some in China appear committed to moving toward a U.S. model of a large bar with strict limits on the unauthorized practice of law; experience to date suggests this model may be inappropriate. Basic Level Legal Workers have an important role to play in continuing to meet the demand for legal services in rural areas.

Id.; *see also* Liebman, *supra* note 49, at 327 ("The Ministry of Justice appears to be moving toward an American model of what lawyers may and may not do without considering whether other models might be more or equally relevant. In the legal aid context, China is pushing for an increased role for lawyers just as many other developed and developing countries are recognizing the need to expand the use of non-lawyers in an effort to expand the rights of the poor. . . . China may be moving in the opposite direction.").

Deborah Rhode has been a leading critic of strict American rules against unauthorized practice of law and has described the detrimental effect these regulations have had on access to justice. *See, e.g.*, Deborah L. Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996).

54. *See supra* notes 40–47 and accompanying text.

55. Compounding the inherent inequities in the Chinese legal system, as Benjamin Liebman has noted, an individual lawyer's relationship to courts and the local government plays an inordinate role in the lawyer's likelihood of achieving career success. "Power imbalances in China may be less between those who have money (and thus lawyers) and those who cannot afford lawyers, but rather more between those who have connections with courts and local governments and those who lack such connections." Liebman, *supra* note 49, at 321. In turn, "lawyers who use such connections to further their own and their clients' interests may also be contributing to the structural problems that weaken the effectiveness of Chinese courts." *Id.* at 322 n.20; *see also* Hung, *supra* note 49, at 237 n.256 (describing the emphasis on *guanxi*, loosely translated as "personal connections" in Chinese culture and in the legal system); *id.* at 238 (stating that "[t]he use of *guanxi* often results in disparate treatment under the law, further diminishing respect for the rule of law" and that "[t]he current structure provides no incentive for change, but rather reinforces corruption, interference, and *guanxi*"); Carlos Wing-Hung Lo & Ed Snape, *Lawyers in the People's Republic of China: A Study of Commitment and Professionalization*, 53 AM. J. COMP. L. 433, 454 (2005) (noting that a survey of lawyers in China revealed "the need to cultivate *guanxi* with judges and legal officials" and the "seeming arbitrariness of judgments and poor enforcement, which was said to undermine the public's trust in the law and in lawyers," leading to authors' conclusion that "development[] in the state's support for the rule of law, professional standards, and the role of the lawyers' associations are needed if the legal system and the law profession are to play their necessary role in China's modernization").

B. *South Africa*

1. The South African Legal Profession

South Africa's legal profession follows a two-tiered English model of attorneys and advocates. Although advocates "specialise in representing clients in court," and attorneys handle transactional matters and manage relationships between advocate and clients, today attorneys are able to appear in court as well.[56] The requirements for becoming an attorney or an

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It should be noted that, in contrast to the harsh critiques set forth by many scholars, Randall Peerenboom has offered a more optimistic—though at the same time more modest—view of the potential for promoting rule of law in China and the role of the Chinese legal profession in legal reform efforts. In fact, Peerenboom argues that,

> Criticisms of a legal system in a country such as China . . . that point out the many ways in which the system falls short of a liberal interpretation of rule of law are likely to fall on deaf ears and may indeed produce a backlash that undermines support for rule of law, and thus, ironically, impede reforms favored by liberals.

Peerenboom, *supra* note 9, at 7–8.

"Conversely," he suggests, "criticisms are more likely to be taken seriously and result in actual change given a shared understanding of rule of law. To the extent that there is common ground and agreement on at least some features of a thin theory of rule of law, parties can set aside their political differences and focus on concrete reforms." *Id.* at 8. He explains, "the U.S. and the People's Republic of China (PRC), notwithstanding the U.S.'s liberal democratic conception of rule of law and the Chinese government's statist socialist conception, have been able to agree on a wide range of reforms to improve the PRC legal system" including "a symposium to discuss the legal aspects of protecting human rights." *Id.*

Moreover, according to Peerenboom, "[t]he legal profession and the legal complex more broadly have become an important force for legal reforms aimed at implementing rule of law." Randall Peerenboom, *Searching for Political Liberalism in All the Wrong Places: The Legal Profession in China as the Leading Edge of Political Reform?* 16 (La Trobe Law Sch. Legal Studies, Research Paper No. 2008/7, 2008), *available at* http://ssrn.com/abstract=1265080. At the same time, he finds that "lawyers have not been, and are not likely to emerge as, a significant force for political liberalism and liberal democracy." *Id.* Indeed, Peerenboom acknowledges that "the ability of the legal profession to play a leading role in political reforms is limited" by a number of factors, including—but not limited to—"the continued strength of the ruling regime and its ability to control any group that threatens socio-political stability." *Id.*

Nevertheless, Peerenboom concludes that "[t]he legal profession is playing a role in moderating state power and protecting individual rights," and he anticipates that "[a]s China becomes wealthier and more urbanized, and more integrated into the international legal order, support for liberalism, or at least a more expansive interpretation of human rights, is also likely to grow." *Id.* In addition, based on the experiences in a number of other Asian countries, he argues that "it need not be for lawyers to play a positive role in promoting greater protection of human rights and other reforms that provide the foundation for a more liberal polity in the future." *Id.*; *see also* Randall Peerenboom, *Law and Development in China and India: The Advantages and Disadvantages of Front-Loading the Costs of Political Reform* 13 (La Trobe Law Sch. Legal Studies, Research Paper No. 2008/15, 2008), *available at* http://ssrn.com/abstract=1283209 (concluding that China "is following the path of other East Asian countries that were able to make the transition from middle to upper income countries, from weak institutions and rule of law to strong institutions and rule of law, and from authoritarianism to democracy").

56. AFRIMAP & OPEN SOCIETY FOUND. FOR S. AFR., SOUTH AFRICA: JUSTICE SECTOR AND THE RULE OF LAW 66 (2005) [hereinafter AFRIMAP]; Peggy Maisel, *An Alternative Model to United States Bar Examinations: The South African Community Service Experience in Licensing Attorneys*, 20 GA. ST. U. L. REV. 977, 978 (2004).

advocate include a college level law degree, a short period of practical training in legal skills, and an apprenticeship.[57] In addition, approximately 350 "community advice centers," and 56 "paralegal advice offices," some of the staff of which have completed "an intensive three month training program," provide advice "at the community level," especially "in rural areas."[58]

By 2003—"nearly ten years after South Africa's first truly democratic elections in 1994"—blacks comprised a scant 15% of the legal profession in South Africa, as compared to 79% of the overall population.[59] Including Asian, Indian, and other lawyers of color, the percentage of nonwhite lawyers rises to more than 25%, still far below the 90.6% of nonwhites in the population.[60] As of 2003, only 6% of University students were "[c]oloured," and 73% percent were nonwhite.[61] Those nonwhites who graduate with law degrees continue to face discrimination in obtaining apprenticeships in the largely white legal profession.[62]

2. The Implications of the Reform Agenda for South Africa

a. *Applying the Agenda*

South Africa's approach already conforms with the reform agenda's recommendations by requiring a college degree in law for admission to practice law either as an attorney or an advocate.[63] We suggest that South

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57. AFRIMAP, *supra* note 56, at 68; Maisel, *supra* note 56, at 983.

58. David J. McQuoid-Mason, *The Delivery of Civil Legal Aid Services in South Africa*, 24 FORDHAM INT'L L.J. S111, S132–35 (2000).

59. *See* Maisel, *supra* note 56, at 984 & n.21; *see also* McQuoid-Mason, *supra* note 58, at S111 ("As a result of the legacy of apartheid, . . . only fifteen percent [of lawyers] are black."). *See generally* KENNETH S. BROUN, BLACK LAWYERS, WHITE COURTS: THE SOUL OF SOUTH AFRICAN LAW (2000).

60. STATISTICS S. AFR., MID-YEAR POPULATION ESTIMATES, 2008, at 3 (2008); Lisa R. Pruitt, *No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession*, 23 MICH. J. INT'L L. 545, 582 (2002).

61. DEP'T OF EDUC., REPUBLIC OF S. AFR., EDUCATION STATISTICS IN SOUTH AFRICA AT A GLANCE IN 2003, at 39 (2005); *see* Pruitt, *supra* note 60, at 579.

62. Peggy Maisel, *Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa*, 30 FORDHAM INT'L L.J. 374, 376 (2007); *see* Thuli Mhlungu, *Educating and Licensing Attorneys in South Africa*, 20 GA. ST. U. L. REV. 1005, 1013 (2004).

63. In contrast to China, the South African legal system is generally more conducive to foreign rule of law efforts. South Africa's history is replete with influences from other legal systems, such that, in 1887, Victor Sampson wrote, "To say that there is not a book of law in the whole civilised world which may not possibly be an authority in the . . . [South African] Courts, is not to go beyond the truth." Francois du Bois & Daniel Visser, *The Influence of Foreign Law in South Africa*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 593, 593 (2003) (quoting Victor Sampson, *Sources of Cape Law*, 4 CAPE L.J. 109, 109–10 (1887) (S. Afr.)). As contemporary commentators have noted, "this is still the case more than a century later, perhaps even more so since the adoption of South Africa's first democratic constitution in 1994." *Id.* at 593. Of course, unlike the past, which involved the "*imposition* of foreign law" on the South African legal system, postapartheid reliance on foreign law involves the

Africa's problems arise from satisfaction of the reform agenda, not from the failure to meet its high standards for admission to law practice.

b. *Consequences for Democracy, Human Rights, and Rule of Law*

i. Democracy

Although blacks now have the right to vote in South Africa, their representation in the political leadership class of lawyers is quite low.[64] As noted above, blacks comprise 79% of the population and only 15% of lawyers.[65] South Africa's embrace of the reform agenda's admissions standards means that democratization of the bar will occur quite slowly.[66]

"*consultation* of foreign law" for the purpose of "strengthening the rule of law and supporting multi-party democracy." *Id.* at 658.

Notwithstanding this important distinction, the South African Constitution illustrates the extent to which the current legal system accords persuasive and, at times, binding legal authority to foreign and international sources of law. For example, South Africa's Constitution states, "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." S. AFR. CONST. 1996 § 233. In addition, in interpreting the Bill of Rights, courts "must consider international law" and "may consider foreign law." *Id.* § 39(1)(b)–(c). This embrace of foreign and international law and principles would seem to include openness to foreign rule of law efforts.

64. Indeed, law school applicants and candidate attorneys from historically disadvantaged groups continue to experience discrimination from the elitist and exclusivist atmosphere that permeates the upper echelons of South African legal education and legal practice. *See* Pruitt, *supra* note 60, *passim*; *see also* Mhlungu, *supra* note 62, *passim*. Raising admission standards would likely fail to bring about the intended goals of renewing confidence in and respect for the legal system among these groups; instead, the result may be an increased sense of disempowerment and dissatisfaction. In place of a rehabilitated perception of the rule of law among those who suffered under apartheid, the legal system will remain a source of frustration and resentment.

65. *See supra* text accompanying note 59.

66. Indeed, the experience of previously disadvantaged groups—primarily blacks and other people of color who have tried to gain entry into the South African legal profession—demonstrates that higher admissions standards for law schools and legal practice would exacerbate, rather than ameliorate, the obstacles that have confronted these groups in the past.

In a 2002 address before the Annual Congress of the Society of Law Teachers of Southern Africa, Justice Kate O'Regan of the Constitutional Court lamented the extent to which the "legacy of apartheid . . . reflected in all its grim and ghastly reality" continues to plague South Africa's educational system. *See* Kate O'Regan, *Producing Competent Graduates: The Primary Social Responsibility of Law Schools*, 119 S. AFR. L.J. 242, 245 (2002). Emphasis on matric exam results in university and law school admissions extends this legacy of discrimination, as success on these exams appears to correlate largely with race, as well as geographic location, parental income, and social class. *See id.* At the same time,

> mediocre matric results may not be an accurate representation of a learner's ability. In particular, where a learner is from a disadvantaged background and where the school he or she attended is under-resourced, it may well be that the matric results grossly under-reflect the ability of the learner.

Id.

Given that blacks comprise approximately 50% of law students, that percentage becomes a ceiling on black participation in the governing class of lawyers. At the current rate of enrollment, it will take many years even to reach the 50% level. An alternative approach analogous to that in China could dramatically increase the pace of democratizing the legal profession.

ii. Human Rights

The dramatic underrepresentation of blacks in the legal profession is itself a human rights challenge.[67] Moreover, black communities in South Africa do not have the same access to law offices and therefore to the services of lawyers to vindicate their human rights complaints. This absence also deprives these communities of the role lawyers can play in developing a popular human rights culture.

Moreover, Justice O'Regan declared that "once law schools have admitted students, law schools bear an obligation towards them to give them the best possible chance of becoming competent lawyers." *Id.* at 246. Thus,

> [t]o the extent that a law school admits students whose matric record is not prima facie evidence of their ability to succeed, the law school has undertaken a responsibility towards those students—a responsibility to assist them to the best of the law school's ability to overcome the disadvantage[s] of their primary and secondary education.

Id.

In this context, efforts to raise admissions standards for South African law schools following the more elitist American model appear to ignore Justice O'Regan's salient observations and admonitions. More fundamentally, advocating such standards for admission evinces a failure to appreciate South Africa's societal need for law school admissions policies that encourage, rather than exclude, applicants from disadvantaged backgrounds.

67. One of the primary obstacles to admission to the profession has been the requirement that, in addition to a law school education and passing a bar examination, candidates must complete two years of "articles of clerkship"—a form of apprenticeship with a practicing attorney. *See* Maisel, *supra* note 56, at 983. Although the purported aim of the articles system is to produce "better-prepared attorneys," Peggy Maisel has observed that the system has also contributed to continued discrimination against previously disadvantaged groups. *Id.* Specifically, "because the legal profession historically has been comprised overwhelmingly of white attorneys in a racially segregated legal system, and because candidate attorneys had to find the lawyer or law firm that would offer them articles, this practice had the practical effect of keeping non-white law graduates from obtaining admission." *Id.* at 983–84.

Reflecting in part upon her own experiences as a black South African navigating the process of legal education and admission to practice, Thuli Mhlungu identifies some of the reasons the articles system poses barriers to black law graduates, particularly those from historically black or disadvantaged universities. *See generally* Mhlungu, *supra* note 62. Like Maisel, Mhlungu emphasizes the prominence of white attorneys in the South African legal profession, which results in what she describes as "subtle barriers": "(1) differences in language, (2) perceived incompetence, and (3) educational discrepancies brought about by apartheid-era education policies." *Id.* at 1013. At the same time, the presence of "black law firms" does not offer an attractive alternative, because in the past these firms have been restricted in their access to commercial and other areas of practice; according to Mhlungu, "this situation, like so much else, has been slow to change." *Id.*

iii. Rule of Law[68]

South Africa's adherence to the reform agenda's standards for admission to the legal profession has resulted in: a relatively small number of lawyers of all races; a small number of lawyers from black communities; a small number of lawyers in black communities; and a small amount of low-cost legal services for black communities, which continue to have more limited resources than white South Africans.[69] Together, these factors deny equal access to justice for black South Africans.[70]

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68. South Africa has placed the rule of law at the center of the postapartheid legal system. Section 1 of the Constitution reads, "The Republic of South Africa is one, sovereign, democratic state founded on the following values: . . . (c) Supremacy of the constitution and the rule of law." S. AFR. CONST. 1996 § 1(1). The emphasis on the rule of law aims in large part to remedy the damage that was inflicted on rule of law principles under apartheid. In the words of Chief Justice Ismail Mohamed, "The legitimacy of law itself was deeply wounded." Tholakele H. Madala, *Rule Under Apartheid and the Fledgling Democracy in Post-Apartheid South Africa: The Role of the Judiciary*, 26 N.C. J. INT'L L. & COM. REG. 743, 748 (2001) (quoting *Azanian Peoples Org. v President of S. Afr.* 1996 (4) SA 671 (CC) at 1 (S. Afr.)).

As Chief Justice Tholakele Madala explained at length,

> The rule of law was among the greatest and most serious casualties of apartheid. The practice of the law and fundamental human rights were on one side of the system. A decline in the moral fibre of society and a collapse of social values were on the other side. The system created a society in which the majority came to regard the courts, judges, and the administration of justice with suspicion and anger. In the eyes of the oppressed, the system came to represent an enforcement of injustice and a denial of protection. Society reached a stage where it was ready to defy and disobey the law and, in fact, did so.

Madala, *supra*, at 748; *see also* Maisel, *supra* note 62, at 379 ("The South African legal system was one of the pillars of apartheid and was utilized to enforce State mandated inequality.").

69. *See* Anashri Pillay, *Accessing Justice in South Africa*, 17 FLA. J. INT'L L. 463, 469 (2005) ("Most people in South Africa cannot access justice in any real sense because of financial, economic and geographical factors."); *id.* at 466 ("In South Africa, the prevailing levels of poverty and illiteracy have the result that many people are simply unable to place their problems effectively before the courts." (quoting Geoff Budlender, *Access to Courts*, 120 SALJ 340, 341 (2004) (S. Afr.))).

70. Notably, the community service model provides an admirable but very minimal increase in access to justice for those who would otherwise be denied adequate legal resources. Maisel, *supra* note 56, at 1000. In addition to the current legal representation offered by justice centres and law school clinics, these institutions help train lawyers to work in public interest fields such as poverty law and development needs, thus setting the stage for wider availability of these resources in the future. *Id.* at 999–1000. The provision of legal services for needy and disadvantaged segments of South African society constitutes yet another avenue of instilling confidence in the rule of law among those who have reason to doubt the legal system's fairness and effectiveness.

Supplementing the work of legal aid institutions, in particular in South Africa's rural areas where lawyers are not readily available, paralegals offer legal advice to the poor, dispensing what is sometimes called "palm tree justice." Maisel, *supra* note 62, at 383. The paralegals perform a function that, in the context of their own society and legal system, plays an important role in providing access to justice. As Maisel emphasizes,

> Being aware of this role, which is different from the one paralegals play in most developed countries, is crucial in the South African context and demonstrates the need to understand the system for legal services delivery in each particular country prior to establishing effective law clinics and clinical education programs there.

III. AN ALTERNATIVE PERSPECTIVE: THE AMERICAN HISTORICAL EXPERIENCE

Drawing on the American historical experience, we propose an alternative to the reform agenda's commitment to a fixed, high educational standard for admission to the legal profession. Viewing lawyers as central to governance in a liberal democracy, we suggest flexible education standards that permit as many people as possible to become lawyers consistent with a threshold level of competence. We argue that this approach will improve the likelihood that the legal profession will promote the goals of democracy, human rights, and rule of law, but we do not contend that it will guarantee their perfect realization. Indeed, as the American historical analogy reveals, inclusive standards for the legal profession comprise only one among many significant factors. Nonetheless, applying the flexible approach to China and South Africa results in a very different prescription for educational standards than that of the reform agenda.

A. *The Alternative Perspective*

Although the trend in the nineteenth century was to increase the educational requirements for entry into the legal profession, standards remained relatively diverse and flexible until the 1930s. The basis for this approach was the recognition that, through both private practice and

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Id. at 383–84. In the words of David McQuoid-Mason, "Access to justice must be considered holistically, and paralegals are in the front line in the field when communities make their first contact with the law." McQuoid-Mason, *supra* note 58, at S135. This, too, is quite a minimal contribution. The numbers are quite low. Moreover, there is no indication that these paralegals have any greater ability to provide legal advice and representation than lawyers for legal services offices in the United States; that is, they are not even permitted to provide the same services as lawyers in the manner of China's barefoot lawyers.

As Maisel further observes, "All legal clinics which provide free representation to indigent persons face serious caseload pressures, but those are greatly magnified in developing countries, such as South Africa, where a majority of the population lives in poverty." Maisel, *supra* note 62, at 414–15. In fact, Maisel suggests that South African society would be better served if practice rules were relaxed to allow legal representation by law students working at law clinics. *Id.* at 415. According to McQuoid-Mason, "if each of the approximately 3,000 final-year law students participated in a law clinic and handled ten cases annually, . . . they could provide representation for 30,000 criminal defendants each year." *Id.* at 415 n.167 (citation omitted).

For a discussion of the work of paralegal advice offices, focusing on the Community Law and Rural Development Center in Durban (CLRDC), established in 1989 at the University of Natal, see McQuoid-Mason, *supra* note 58, at S132–34. McQuoid-Mason describes the establishment of the CLRDC as aimed to "empower rural communities to (a) participate in a changing South Africa by increasing individual accountability, skills, self-reliance, and confidence; (b) educate rural communities about democracy, voting, and civil society; and (c) to strengthen the rule of law in rural South Africa." *Id.* at S134.

In particular, the CLRDC "seeks to develop the skills of rural communities so that they can participate in the transformation of the country" and "promotes the attainment and maintenance of democracy through the development of a rights-based culture to ensure that all levels of South African government are made accountable to their communities." *Id.* at S134–35.

government service, lawyers served as America's governing class[71] and that the maintenance of a democratic society required that people from all backgrounds could become lawyers.[72]

Alfred Z. Reed eloquently articulated this understanding in the 1921 and 1928 studies of the legal education he conducted for the Carnegie Foundation. He observed that "[l]awyers constitute our governing class, not merely because a large portion of public officials and representative law-makers are chosen from their ranks, but, more fundamentally, because even in private practice they play a supremely important part in the administration of the law."[73] In Reed's view, "democratic ideals"[74] required "that participation in the making and administration of the law shall be kept accessible to Lincoln's plain people."[75] In order to best fulfill

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71. *See* Pearce, *supra* note 14, at 386–87. *See generally* THE FEDERALIST NO. 35 (Alexander Hamilton).

72. This analysis relies in part on an account of the governing class perspective as grounded in the political underpinnings of American lawyers. *See* Pearce, *supra* note 14, at 385. *See generally* Pearce, *supra* note 17; Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992).

An alternative account, grounding the governing class perspective in Alexis de Tocqueville, would likely reach a similar conclusion regarding law reform efforts advocating adoption of an American model for lawyers in China. Indeed, in closing his critical study of these efforts, William Alford references Tocqueville's famous statement that "it is at the bar or the bench that the American aristocracy is found." Alford, *supra* note 34, at 304 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 266 (Vintage Books 1990) (1848)). However, Alford misses the benefits Tocqueville identifies and instead focuses on some of Tocqueville's more cautionary observations, seeing lawyers as "valu[ing] liberty" but "generally rat[ing] legality as far more precious," and therefore as "less afraid of tyranny than of arbitrariness, and[,] provided that it is the law-giver himself who is responsible for taking away men's liberty, they are more or less content." *Id.* at 304–05.

In the context of China, Alford concludes, Tocqueville's warning leads us to think carefully and critically about "why the Chinese leadership, which is quite committed to maintaining its distinctly non-democratic hold on power, seems so intent on promoting the growth of the legal profession." *Id.* at 305–06. Indeed, we should be wary of "the subtle and not always self-conscious ways in which lawyers and law may channel energies for political change into legal avenues, often to the fundamental preservation of the status quo and, not coincidentally, the enrichment of lawyers themselves." *Id.* at 306. These concerns are of particular moment when applied to a country governed by an authoritarian regime. *Id.*

73. ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 237 (1921).

74. *Id.*

75. *Id.* at 418; *see also id.* at 38 (referring to the "[d]emocratic desire to keep the privilege of practicing law within the reach of the average man"). Likewise, Julius Henry Cohen insisted,

> In our country we shall never permit the Bar to become recruited from the ranks of the sons of the wealthy alone. . . . [T]he passage through the universities and the law schools of poor men's sons shows clearly that these obstacles are overcome in our day as they were overcome in the past by men of real merit.

JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? 317 (1916).

The statements of Alfred Z. Reed and Cohen were prompted, in part, by opposition among the organized bar to the growing number of evening law school programs, which purportedly threatened the academic standards for the study of law. *See* Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy:*

this goal, educational standards should be set "sufficiently low" to maximize access to the legal profession while satisfying the minimum level of competence.[76]

Reed's notion that lawyers were America's governing class represented the original understanding of the role of the American lawyer. The *Federalist Papers* explained that protecting the rule of law and the public good in a liberal democracy required that a political leadership class of professionals counsel and constrain the majority. Leading legal thinkers, such James Kent, Joseph Story, David Hoffman, and George Sharswood, described how lawyers filled this role. Lawyers' higher degree of virtue gave them the capacity to identify and pursue the public good. Their work, whether as public officials or as private practitioners who counseled clients, made legal arguments, or published commentary on the law, put them in a position to "'diffuse[] sound principles among the people'" and bring the law "'home . . . to every fireside.'"[77] This perspective remained the dominant, though not exclusive, understanding of the lawyer's role until the 1960s and continues even today as a minority view among the elite.[78]

Within the governing class perspective, evolving notions of lawyers' capacity for leadership influenced changing requirements for bar admission. In the first half of the nineteenth century, when lawyers' capacity was attributed to virtue, which was not easily translated into educational standards, many states did not require formal training to practice law. In the second half of the nineteenth century, the explanation for lawyers'

A Study in the Discourse of Early Twentieth Century Legal Professionalism, 47 AM. J. LEGAL HIST. 1, 16–20 (2005). In closing a 1920 article offering one of the strongest defenses of evening law programs, Fordham Law School Professor Maurice Wormser wrote eloquently that,

> To deny [evening students] the right to study law because of conditions which render it impossible for them to attend law school in the daytime would strike, as one of the evening law students well says, "at the fundamental American doctrine of giving equal opportunity to all, whether rich or poor, to gain an education in what they think themselves best fitted for."

I. Maurice Wormser, *The Problem of Evening Law Schools*, 4 AM. L. SCH. REV. 544, 547 (1922); *cf.* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 188 n.59 (1983) (stating that the "proposition is undemocratic and tends to create by law a favored class of professional aristocracy to consist alone of those who have the good luck to be born well off financially, or who have rich friends who will let them have the means to take up these long years of study" (quoting George H. Ethridge, *Unjust Standards for Law Practice*, 2 MISS. L.J. 276, 284 (1929))).

76. Reed, *supra* note 73, at 237. As Reed explained,

> [I]t is not reasonable to expect a democracy to raise the amount of general education requisite for admission to its public service beyond the level that can be reached by the average man . . . . [I]t does not necessarily follow that the states ought to raise this minimum beyond the now generally accepted high school requirement. . . . [T]here is much to be said in favor of continuing the English custom of relatively low formal requirements by the admitting authorities . . . .

Id. at 52–53.

77. Pearce, *supra* note 14, at 390 (quoting GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 31, 54 (Fred B. Rothman & Co., 5th ed. 1993) (1884)). *See generally* Green & Pearce, *supra* note 14.

78. *See generally* Pearce, *Law Day 2050*, *supra* note 34.

capacity for leadership shifted from virtue to education and experience.[79] Elite lawyers used these notions to campaign for higher standards for bar admission.[80] The widespread commitment to democratic access to the legal profession slowed their success. For example, the requirement of a high school degree did not become pervasive until the twentieth century.[81]

The advocates of high standards finally routed the champions of democratic access in the 1930s when the ABA required a college degree for admission to law school.[82] Bar leaders did not discard the notion of lawyers as America's governing class. Rather, they rejected the value of democratic access in favor of limiting the legal profession to a highly educated elite. On the floor of the ABA, Henry Drinker, then one of the leading voices in the field of legal ethics, explained the importance of restricting law practice to the "right kind of people."[83] He stressed the value of a college requirement in excluding the "Russian Jew boys" who were too often "guilty of professional abuses."[84] They came from poor backgrounds and would not be able to afford college in addition to law school.[85]

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79. *See* Pearce, *supra* note 17, at 1345–58.

80. *See generally* OLIVER WENDELL HOLMES, JR., THE PATH OF THE LAW (Kessinger Publ'g 2004) (1897).

81. *See, e.g.*, STEVENS, *supra* note 75, at 96.

82. *See* Grutter v. Bollinger, 539 U.S. 306, 369 (2003).

83. Levine, *supra* note 75, at 8–9.

84. *Id.*

85. Indeed, scholars have documented the organized bar's notorious response to the increasing number of Jewish lawyers in the first half of the twentieth century. Employing a combination of both thinly veiled and overtly anti-Semitic and nativist rhetoric, along with dubious justifications based in economic protectionism, leaders of bar organizations and law schools enacted admissions standards aimed at reducing the percentage of lawyers from immigrant communities. *See, e.g.*, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 50–53, 99–101, 106–29 (1976); MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 3 (3d ed. 2004); STEVENS, *supra* note 75, at 100–01, 176; Levine, *supra* note 75, at 3–13; George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2118–19 (1998).

Likewise, the American Bar Association's accreditation standards for law schools have been shown to produce ongoing barriers to the inclusion of African American law students and lawyers. *See generally* Adjoa Artis Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendants*, 18 GEO. MASON U. CIV. RTS. L.J. 51 (2007); George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103 (2003). According to one harsh critic of these policies, "Other than a specific prohibition on blacks' receiving legal education, a dedicated racist could not have constructed standards that more effectively permit whites to enter the legal profession but filter out blacks." Shepherd, *supra*, at 119.

There does not appear to be any support for the claim that restricting admission for Jewish applications would have helped improve the quality of law students. In fact, in 1923, Dean Thomas Swan acknowledged that emphasizing the importance of grades in admission decisions would increase the percentage of "foreign" students in place of those of "old American parentage." John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 472 n.69 (1979) (citation omitted) (internal quotation marks omitted). According to Dean Swan, however, preventing

Before the ABA created this barrier, low standards for admission had played an important, but incomplete, role in promoting democracy, human rights, and rule of law. From early in the nineteenth century, they made it relatively easy for low- and middle-income whites, such as Abraham Lincoln, to become part of the governing class. When large numbers of white Catholic and Jewish immigrants came to the United States in the period from 1880 through 1920, many of them and many of their children were able to enter the governing class of lawyers and to expedite the movement of their families and communities into the American political mainstream. Democratic access to the legal profession also resulted in expanded and more equal access to justice.[86] Moreover, it enabled lawyers effectively to disseminate to America's diverse communities a conception

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such a result was supposedly justified to avoid producing an "'inferior student body, ethically and socially.'" *Id.*

In a similar vein, George Shepherd has described the ABA's accreditation policy as a form of "inefficient racism," because it results in "few benefits but many harms" to the legal profession and to society. Shepherd, *supra*, at 148.

86. As illustrated by the experience of African American and Jewish lawyers in the twentieth century, participation of lawyers from underrepresented communities helps promote the rule of law by providing access to justice as well as building a sense of respect for the legal system and its processes. For example, Jewish lawyers were instrumental in resolving the 1910 garment workers' strike in New York, which grew out of a dispute between employers and laborers who were mostly members of a closely knit Jewish community. *See* Samuel J. Levine, *Louis Marshall, Julius Henry Cohen, Benjamin Cardozo, and the New York Emergency Rent Laws of 1920: A Case Study of the Role of Jewish Lawyers and Jewish Law in Early Twentieth Century Public Interest Litigation*, 33 J. LEGAL PROF. 1, 9 (2008).

One of these lawyers, Julius Henry Cohen, later recalled the dedication of such prominent lawyers as Louis Marshall and Louis D. Brandeis, as well as the cooperative approach of various lawyers of differing political views, all of whom appreciated the importance of finding a resolution in the matter that would serve the public interest and the needs of the Jewish community. *See id.* at 10 n.59 (citing JULIUS HENRY COHEN, THEY BUILDED BETTER THAN THEY KNEW 183 (1946)); *see also id.* ("[T]he sensitivity to public opinion, the strong tradition of arbitration, and the common ethnic, cultural, and religious background[] probably contributed very considerably to the achievement of the Protocol of Peace and to the development of industrial relations in the major Jewish unions for some time thereafter." (quoting Will Herberg, *The Jewish Labor Movement in the United States*, *in* 53 THE AMERICAN JEWISH YEAR BOOK 3, 20 (Morris Fine & Jacob Sloan eds., 1952))).

Similarly, Cohen and Marshall, who both typified the public interest lawyering model, were two of the primary lawyers in the litigation surrounding the New York Emergency Rent Laws of 1920, in which a large number of both tenants and landlords were Jewish as well. *See* Levine, *supra*, *passim*. The opportunity to access the legal system to resolve communal disputes, while represented by Jewish lawyers, helped instill in Jewish communities a confidence in the role of the rule of law in the United States. *Cf.* ANDREW L. KAUFMAN, CARDOZO 99 (1998) (referencing early-twentieth-century "Jewish lawyers . . . who were deeply involved with new immigrant groups, unionism, the use of arbitration in industrial disputes, and public service as counsel to various administrative agencies").

For examples of Cohen's public service, see *J.H. Cohen Dies; Ex-Counsel to Port Authority*, N.Y. HERALD TRIB., Oct. 7, 1950, at 12; *Julius Cohen, 77, Lawyer 53 Years*, N.Y. TIMES, Oct. 7, 1950, at 19; *Necrological: Julius Henry Cohen*, N.Y.L.J., Oct. 18, 1950, at 844. It would be difficult to overstate the extent of Marshall's public interest work. For a summary of these activities, see Oscar Handlin, *Introduction* to I. LOUIS MARSHALL: CHAMPION OF LIBERTY, SELECTED PAPERS AND ADDRESSES, at ix–xx (Charles Reznikoff ed., 1957).

of political and civil rights that was at the same time a beacon to the world in its ambition and a tragedy in its toleration of slavery, discrimination, and the denial of suffrage to African Americans and women.[87]

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87. Beyond their intrinsically unfair and discriminatory nature, as well as the questionable premises upon which they have been based, efforts to limit access to the legal profession for Jewish immigrants and African Americans have ignored the societal benefits that result from empowering underrepresented groups with the tools to utilize the legal system. As Robert Gordon has observed, the historical record demonstrates the contributions made by "lawyers relegated by prejudice to the margins of their profession," particularly in areas of social justice. Robert W. Gordon, Lawyers and Liberalization—Lessons from Western Experience for Projects to Export the "Rule of Law" (n.d.) (unpublished manuscript, on file with authors).

Gordon documents the work of Jewish, black, and women lawyers who "dominated what we now call public interest-lawyering and cause lawyering," promoting: civil rights for African Americans, *id.* (referencing Charles Hamilton Houston, Thurgood Marshall, and Sadie Alexander); equal rights for women, *id.* (referencing Alice Paul and Pauli Murray); labor rights for workers, *id.* (referencing Florence Kelley, Louis Brandies, and Felix Frankfurter); and the protection of free speech and the free exercise of religion, *id.* (referencing Carol Weiss King and Morris Ernst).

The success of this work, accomplished in spite of the barriers that confronted both marginalized lawyers and the clients and causes they represented, points to the important role lawyers from disadvantaged groups can play in identifying and responding to inequities in society. *See, e.g.*, Marc Galanter, *A Vocation for Law? American Jewish Lawyers and Their Antecedents*, 26 FORDHAM URB. L.J. 1125, 1125 (1999) (observing that Jewish lawyers in the United States "have contributed disproportionately to many branches of the 'public interest sector,' with particular prominence in public service, public interest law firms and the defense of minorities and unpopular causes, to name a few"); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 33 (1988) (stating that "the ideal of independent lawyering" has "found some of its greatest exponents among Jewish lawyers (for example, Louis Brandeis, Louis Marshall, Felix Frankfurter, Jerome Frank), who, excluded from the inner circles of the WASP elite, had the vantage point of marginality to scold that elite for selling out its public service traditions to big business clients" (footnote omitted)); Samuel J. Levine, *A Look at American Legal Practice Through a Perspective of Jewish Law, Ethics, and Tradition: A Conceptual Overview*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 20–22 (2006); Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613, 1616–23 (1993).

The experience of African Americans includes dramatic examples of lawyers whose work in the public interest led the American legal system in the direction of progress and reform. The incidences and legacies of slavery, segregation, and other forms of legally sanctioned discrimination have presented repeated challenges to the legitimacy of the rule of law in the United States. Charles Black may have put it best when he famously suggested that, when faced with the claim that segregation was consistent with equality, "we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter." Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

The work of lawyers such as Thurgood Marshall, Charles Hamilton Houston, and other leaders of the National Association for the Advancement of Colored People (NAACP) during the desegregation cases provides a particularly salient model of members of a disadvantaged community whose public interest efforts empower their own community, while at the same time effecting more general sociolegal change. Indeed, according to David Wilkins, the "heroic litigation campaign in *Brown* [*v. Board of Education*] . . . created the modern public interest law movement." David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 14 (2004). For studies of public interest work of African Americans and other civil rights lawyers, both prior to the establishment of the legal committee of the NAACP and within the NAACP, see, for example, ROBERT J. BLAKELY WITH MARCUS SHEPARD, EARL B. DICKERSON: A VOICE FOR FREEDOM AND EQUALITY (2006); MARK V. TUSHNET, MAKING

This latter failing underscores both the advantages and the limitations of a flexible, open approach to standards for bar admission. Such an approach helps promote democracy, human rights, and rule of law, but only within the bounds of cultural norms that may, at times, limit or resist this dynamic.

B. *An Alternative Approach for Countries in Transition*

Based on the American experience, we propose flexible and open education standards. Valuing democratic access to the legal profession, education standards should be no greater than necessary to ensure a threshold level of competence in legal representation. In China, we would reject the legal reform agenda and the position of China's legal elite. Instead, we would recommend making it easier—not harder—to become a lawyer and would encourage the dramatic expansion of basic level legal workers and barefoot lawyers. In South Africa, we would again reject the legal reform perspective and the status quo of the South African legal profession. We would recommend both lowering the educational requirements for admission to the bar and following a model analogous to that of China, whereby South Africa would create a new category or categories of legal services providers requiring lower educational standards for admission.

While we believe that our proposal would democratize the legal profession and promote both human rights and rule of law, we acknowledge its limitations. For example, in China, both the authoritarian governmental structure and cultural resistance to the legalization of dispute resolution will impede the realization of those goals. Nonetheless, because the barefoot lawyers have played a leadership role in pushing the boundaries of human rights, expanding their numbers would likely boost the fight for human rights.

CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994); Susan D. Carle, *From* Buchanan *to* Button*: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281 (2001); Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97 (2002); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256 (2005).

Of course, more than fifty years after *Brown*, many forms of systemic discrimination remain, both within and without the legal system, legal education, and the legal profession. *See, e.g.*, COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, AM. BAR ASS'N, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (2000); Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711 (2004); Jane E. Cross, *The Bar Examination in Black and White: The Black-White Bar Passage Gap and the Implications for Minority Admission to the Legal Profession*, 18 NAT'L BLACK L.J. 63 (2004); Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721 (1996); William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547 (2004).

Nevertheless, the civil rights movement and the model of public interest lawyering that it spawned serve as another illustration of the vital role lawyers from disadvantaged communities can play in improving access to justice and the legitimacy of the rule of law.

In contrast, calls for China to adopt American methods of law and legal education ignore the potentially negative consequences of such changes. Conservative and social elites may benefit most from the higher standards of education and bar admission, which may function to ensure that the elites maintain control of the legal system. The new standards will serve to provide opportunities for the elites to obtain better training and education, while at the same time withholding these benefits from those in greatest need of improved legal training and access to the legal system. With the support of the Chinese government, the elites will utilize these advantages to further their own interests, preventing the genuine legal reforms that are envisioned by advocates of rule of law projects. Finally, an increased emphasis on the instrumentalist function of law will merely allow the Chinese government and those elites allied with the government to use instrumentalist claims to justify their self-serving legal policies.

Similarly, although South Africa differs from China in its embrace of rule of law principles that are consistent with American and Western ideals, two of South Africa's most compelling sociolegal needs might be better served through a more inclusive model of admission to law school and legal education. First, allowing greater participation for those who have been marginalized and excluded from positions of authority in the legal establishment would help rehabilitate the rule of law in the view of South Africa's majority.[88] Second, expanding, rather than restricting, the pool of lawyers willing and able to provide services for indigent groups would respond to South Africa's increasingly dire need for access to justice for those with limited resources.

CONCLUSION

In light of the apparently accelerating global trend toward an American model of legal education and bar admission, it may be prudent to step back and consider the broader societal impact of such changes. Because of the restrictive nature of higher admissions standards, one of the immediate results of these efforts is likely to be a smaller pool of law students and lawyers. Applying the American model to developing legal systems and emerging democracies, such as China and South Africa, threatens to exacerbate the acute lack of access to justice that already plagues many of these societies. Rather than promoting the rule of law, these reforms will prove detrimental to human rights and the functioning of the legal system.

Calls for such reform are premised on the assumptions that higher standards will lead to better legal services and improved access to justice, engendering a greater respect for and confidence in the rule of law and human rights among both lawyers and the general population. The reality,

88. For discussions of the vital roles lawyers play in promoting the rule of law in transitional democracies, see, for example, Okechukwu Oko, *Consolidated Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT'L L. 573 (2000); H. Kwasi Prempeh, *Lawyers and Liberal Democracy*, 11 J. DEMOCRACY 71 (2000).

however, appears to be quite different; in fact, each of these assumptions may be flatly contradicted by the social and political situation that actually exists in China. Higher standards for legal education and bar admission in China will quite possibly result in strengthening the power of the conservative elite legal establishment, which has been shown to promote its own interests through complicity with the central government's oppressive policies and the corrupt legal system. At the same time, these policies may work to deny access to justice to those in rural areas and others who have long been denied adequate legal services and representation, let alone protection of individual rights. Rather than functioning as agents for positive change, those advocating the adoption of an American legal model without understanding the social and political realities in China may be further undermining the possibilities of genuine human rights reform and confidence in the rule of law.

Moreover, as the American experience demonstrates, raising admissions standards has the likely effect of denying law school admission for individuals from communities that have been disadvantaged in the past. At the same time, these communities are in greatest need of empowerment and legal representation, and may hold the potential to bring about important legal change. These lessons are of particular relevance in postapartheid South Africa, where black lawyers and law students continue to face discrimination and other barriers to admission to the legal profession and the legal elite, frustrating the country's efforts to achieve its democratic and human rights aspirations.

Indeed, the American historical record, in which lawyers serve as a governing class, documents the contributions that lawyers from disadvantaged communities have made to improve the law and the legal system. Therefore, societies undergoing legal reform might rethink their willingness to move their system of legal education and bar admission in the direction of the current American model. Embracing higher admissions standards could reinforce the lack of confidence in the legal system among those who, as a result of these changes, will be prevented from joining the ranks of the legal profession. Instead, countries seeking to promote the rule of law might be wise to opt for more inclusive admissions standards, instilling a greater sense of empowerment through the legal system and a stronger sense of respect for the law among all members of society.

If rule of law and human rights efforts are to succeed in China, South Africa, and other parts of the world, advocates of legal reform must abandon the parochial view of the American model as a paradigm for aspiration and adoption in other countries. Advocates of exporting the American model fail to recognize the unique sociolegal conditions that exist in each country, which often differ in significant ways from American society, but which comprise the broader context within which the legal system functions. Indeed, reforms based on the American model may have the unintended and unfortunate result of entrenching the interests that have been served by the inequities of the legal system, leading to increased

experiences of alienation among those who have been underrepresented and lacking in power, thus undermining, rather than furthering, the goals of democracy, rule of law, and human rights.