



## Professionalism Topics covered in this presentation

### 2.1 Making legal services available to the public and related access to justice principles

- What are the personal and communal motivations supporting pro bono legal services, in general society and in Jewish thought?
- How much time should a lawyer devote to pro bono services enabling access to justice?

### 3.18 Complying with Legal Aid Ontario provisions and procedures

- How should a society balance the role of pro bono services with funding for Legal Aid?
- How should a lawyer prioritize normal paid work, Legal Aid work, and pro bono work?
- How should a lawyer deal with particular ethical challenges which arise in Legal Aid work?

#### 1. *"Tension at the Border": Pro Bono and Legal Aid*, CBA Standing Committee on Access to Justice (2012)

There is an increasing and widespread acknowledgement among justice system participants that the problem of unmet legal needs in Canada is serious and growing, and significant effort is being dedicated to finding creative new approaches to solve the problem. Certainly, both pro bono and legal aid are aspects of that discussion, and the legal profession is an important participant. One unfortunate response has been to point the blame and responsibility elsewhere – lawyers at governments, demanding new money for legal aid, or judges and governments at lawyers, demanding an undefined and seemingly unlimited amount of pro bono work. Underlying the finger pointing are uncertainty and confusion regarding key issues that require further discussion and analysis.

#### 2. CBA Pro Bono Working Group (2003)

WHEREAS the CBA has called for each member of the legal profession to strive to contribute 50 hours or 3% of billings per year on a pro bono basis;

#### 3. Mike Foderick, Past President and Co-Chair of Parkdale Community Legal Services, *A modest (pro bono) proposal* Toronto Star 8/31/09 [https://www.thestar.com/opinion/2009/08/31/a\\_modest\\_pro\\_bono\\_proposal.html](https://www.thestar.com/opinion/2009/08/31/a_modest_pro_bono_proposal.html)

In an adversarial legal system like ours, the prospects for justice in criminal cases against poor defendants are jeopardized as a result. This debate has highlighted the cynicism and pessimism about the current legal aid regime that the next generation of Ontario lawyers does not wholly share and does not want to inherit. It is time that Ontario expected more of lawyers as licensed professionals, and lawyers as a whole offered to take a more direct, meaningful role in ensuring equality regardless of income in our justice system.

In order to get out of this mess, fresh new "outside the box" ideas are needed. Here's one: a minimum (and very modest) mandatory number of pro bono hours for every lawyer licensed to practise law in Ontario. A cash transfusion of millions (perhaps a few hundreds of millions) of dollars by the provincial government into legal aid might be a step in the right direction, but it can't solve the inherent problems of legal aid or do more than put a Band-Aid over the problem for a few years. The end result would still be a legal aid system that only barely meets the needs of Ontario's poor, and leaves the courtroom an ominous, prohibitively expensive and inaccessible place for the majority of Ontarians.

## Vignettes

- (1) Rhonda, a 35-year old family lawyer, is interested in branching out into Trusts and Estates. May Rhonda use pro bono cases in Trusts and Estates as a way to develop her knowledge and experience in that area?
- (2) Government budget officials are considering how much money to give to Legal Aid; they would like to reduce the amount available to reimburse lawyers, and instead promote pro bono work. Is such a policy ethically acceptable in Judaism?
- (3) Jason, a recently retired, 70-year old tax lawyer who is exempt from Lawpro premiums, is leaving the synagogue one morning when Susan, vice president of the synagogue, stops him and asks him questions related to the Rabbi's tax-related employment status. The synagogue, which is not associated with Pro Bono Ontario, acts on Jason's advice. As it turns out, Jason's advice was poor, and the synagogue suffers a significant loss. Would Jewish law hold Jason responsible for the results of his pro bono advice?

## What is Pro Bono?

4. Lorne Sossin, "The Helping Profession : Can Pro Bono Lawyers Make Sick Children Well?" In *In search of the ethical lawyer: stories from the Canadian legal profession*. Dodek, Adam, and Alice Wooley, eds. Pg. 151

*Pro bono publico* literally means "for the public good." The Canadian Bar Association, in adopting its 1998 resolution Promoting a *Pro Bono* Culture in the Legal Profession, defined lawyers as engaging in *pro bono* practice when they "voluntarily contribute part of their time without charge or at substantially reduced rates, to establish or preserve the rights of disadvantaged individuals; and to provide legal services to assist organizations who represent the interests of, or who work on behalf of, members of the community of limited means or other public interest organizations, or for the improvement of laws or the legal system." (CBA Resolution 98-01-A)

5. Michael Millemann, *Mandatory Pro Bono in Civil Cases*, Maryland Law Review 18 (1990)

The *patroni* were eminent private citizens who also were governmental leaders. As word of a patron's oratory skills spread, the number of his legal "clients" grew, including many who were not part of his household. The result was a new profession of trial lawyers, born in the dependency of Roman classes cultivated by the state, that was one segment of the developing bar. Patrons represented their dependents without fee, and this pro bono tradition was difficult to dislodge when *patroni* represented clients who lived and worked outside the household...

6. Poor's Roll, Scottish Parliament, 1424 (adapted for modern English)

If there be any poor person, for want of sophistication or expenses, that cannot or may not follow his cause, the King for the love of G-d shall order the judge, before whom the cause shall be determined, to obtain and get a loyal and a wise advocate, to follow such poor person's causes; and if such causes are successful, the wrongdoer shall compensate both the party wronged, and the advocate's costs and travel.

7. Ministry of the Attorney General, *Ontario Legal Aid Review Ch. 7: The Choice of Delivery Models for Legal Aid*

No single issue in the history of legal aid, both in Ontario and elsewhere, has inspired as much intense debate as the choice of delivery models for legally aided services. Much of this debate in the past has focused on the advantages and disadvantages of a pure *judicare* model and those of a pure staff model. These differences in viewpoints are reflected in the equally divergent approaches of these delivery models. In terms of the allocation of legal aid resources within Canada, Ontario, Alberta, and New Brunswick utilize predominantly the *judicare* model, whereas Prince Edward Island, Nova Scotia, and Saskatchewan rely predominantly on the staff model. Quebec, Manitoba, British Columbia, the Northwest Territories, and the Yukon have adopted a mixed model, with major *judicare* and staff elements.

## Vignette 1: Pro Bono and the Individual Lawyer

8. LSO Rules of Professional Conduct (2014), Rule 4.1-1 and Commentary [2]

A lawyer shall make legal services available to the public in an efficient and convenient way.

[2] As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services *pro bono* and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

9. David Scott, Address at 3rd Annual Pro Bono Conference, September 15-17, 2010, Calgary, Alberta

Occupying the field, and controlling the delivery of services as we do, we have traditionally recognized a responsibility to serve the public within reason, regardless of ability to pay

10. LSO Rules of Professional Conduct (2014), Rule 2.1-2 and Commentary [1](b)

A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

[1] Collectively, lawyers are encouraged to enhance the profession through activities such as...

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

### 11. Ministry of the Attorney General, *Ontario Legal Aid Review Chapter 10: Family Law Legal Aid Services*

Judges are being required to make important interim decisions about custody, access, and support on the basis of incomplete, untested, and possibly untrue evidence and the limited submissions of duty counsel. Property claims are often not pursued because they can be brought only in the General Division, where proceedings are more formal, expensive, and intimidating...

Trials with unrepresented litigants are a particular problem. Judges report that such trials often take twice as long as those in which counsel are present...

The increasing length and inefficiencies in family court proceedings increases costs not only for courts and their staff, but for institutional litigants such as the Ministry of Community and Social Services, the Children's Aid Society, and the Family Responsibility Office. As well, social assistance costs are increased if women are unable to access a share of property that might allow them to achieve financial independence, or if they receive a support award that is lower than might have been obtained with lawyer involvement. Further, if paternity is not established, the state may be required to assume responsibility for support of the child for 18 years. In the long term, the health care and criminal justice systems will bear the costs of not dealing appropriately with issues of family violence. Family law problems dealt with inappropriately do not disappear; they reappear in other forums. As a result, the ultimate cost of unrepresented litigants is often borne by other arms of the provincial government.

### 12. Dr. Melina Buckley, *Moving Forward on Legal Aid* (2010)

Although there is clearly some overlap between the work of legal aid and pro bono, they have developed out of somewhat different traditions. Early pro bono work by private lawyers was largely based on two principles: charity and professionalism. The rise of legal aid, on the other hand, was based on a concept of rights – that is, people are entitled to legal information and assistance.

### 13. Talmud, Ketuvot 85b-86a

קריבתי דרב נחמן זבינתה לכתובתה בטובת הנאה, איגרשה ושכיבה. אתו קא תבעי לה לברתה, אמר להו רב נחמן, "ליכא דליסבא לה עצה? תיזיל ותיחלה לכתובתה דאמה לגבי אבוה, ותירתה מיניה." שמעה, אזלה אחילתה. אמר רב נחמן, "עשינו עצמינו כעורכי הדיינין!" מעיקרא מאי סבר ולבסוף מאי סבר? מעיקרא סבר "ומבשרך לא תתעלם (ישעי' נח:ז)", ולבסוף סבר אדם חשוב שאני.

Rav Nachman's relative sold an option on her *ketubah* claim. She was divorced, and then she died. They came to claim the *ketubah* from her daughter. Rav Nachman said to the sages, "Will no one counsel her? Let her go forgive her mother's *ketubah* claim to her father, and then inherit it from him!" She heard, and went and forgave it. Rav Nachman then said, "We have made ourselves as those who arrange the judges!" What did he think beforehand, and afterward what did he think? At first he thought, "Do not ignore your flesh." In the end he thought that a person of status is different.

### 14. Talmud, Bava Batra 9a

הנהו בי תרי טבחי דעבדי עניינא בהדי הדדי דכל מאן דעביד ביומא דחבריה נקרעוה למשכיה. אזל חד מנייהו עבד ביומא דחבריה, קרעו למשכיה. אתו לקמיה דרבא, חייבינהו רבא לשלומי... היכא דאיכא אדם חשוב לאו כל כמיניהו דמתנו.

Two butchers arranged together that if either one worked on the other's day, they would tear up the hides from his animals. One of them worked on the other one's day, and the other tore up his hide. They came to Rava, who required the other to pay... Where there is a person of stature [to govern], they may not make independent arrangements.

### 15. Proverbs 31:8-9

פֶּתַח פִּיךָ לְאֵלִים אֶל דִּין כָּל בְּנֵי חַלּוּף: פֶּתַח פִּיךָ שְׁפֹט צָדִק וְדִין עֲנִי וְאֶרְבִּיוֹן:

Open your mouth for the mute, for the judgment of all whose aid is transient. Open your mouth, judge righteously, litigate for the poor and indigent.

### 16. Talmud, Bechorot 29a

משנה: הנוטל שכרו לדון דיניו בטילים להעיד עדותיו בטילין להזות ולקדש מימיו מי מערה אפרו אפרו מקלה...  
גמרא: דאמר קרא ראה למדתי אתכם וגו' - מה אני בחנם אף אתם בחנם.

**Mishnah:** One who takes payment to judge, his rulings are void; to testify, his testimony is void; to [purify the impure] or sanctify [the purification water], his [purification materials are invalid]...

**Gemara:** For Deuteronomy 4:5 says, "See, I have taught you." Just as I taught you for free, so you must teach for free.

17. Talmud, Ketuvot 105a

ובתורת אגרא מי שרי? והתנן "הנוטל שכר לדון, דיניו בטלין!" הנ"מ אגר דינא, קרנא אגר בטילא הוה שקיל... והתניא "מכוער הדיין שנוטל שכר לדון"...

How was Karna permitted to take payment as salary [for judging]? Does the mishnah not say, "One who takes payment to judge, his verdicts are invalid"! That's payment for judging; Karna took payment for not working... But don't we learn, "It is ugly for a judge to accept salary for judging?"...

18. Rabbi Ovadia miBartenura (15<sup>th</sup> century Italy, Jerusalem), Commentary to Mishnah Bechorot 4:6

וברבני אשכנז ראיתי שערוריה בדבר זה, שלא יבוש הרב הנסמך ראש ישיבה ליטול עשרה זהובים כדי להיות חצי שעה על כתיבת ונתינת גט אחד, והעדים החותמים על הגט שני זהובים או זהוב לכל הפחות לכל אחד, ואין זה הרב בעיני אלא גזלן ואנס, לפי שהוא יודע שאין נותנים בעירו גט שלא ברשותו, ונותן הגט בעל כרחו צריך שיתן לו כל חפצו. וחושש אני לגט זה שהוא פסול...

And among the German rabbis I have seen chaos in this matter. An ordained rabbi, head of a yeshiva, will not be ashamed to take ten gold coins for half an hour of writing and giving a single *get*, and each witness who signs the *get* takes two gold coins, or at least one gold coin. This rabbi, in my eyes, is only a thief and bandit; he knows that they will not give a *get* in his city without his license, and the person giving the *get* is forced to give whatever he wants. I wonder if such a *get* is not invalid...

19. Mishnah, Nedarim 4:4

המודר הנאה מחבירו... מרפאהו רפואת נפש אבל לא רפואת ממון

One who is not permitted to benefit another due to a vow... is permitted to heal him, but not to heal his property.

20. Rambam, Commentary to Mishnah Nedarim 4:4

והרי הוא בכלל אמרם בפירוש הכתוב והשבתו לו לרבות את גופו

This is included in their statement explaining the verse, "You shall return it to him," that this includes his body.

21. Rambam (12<sup>th</sup> century Egypt), Mishneh Torah, Hilchot Avel 14:1

מצות עשה של דבריהם לבקר חולים... ולהתעסק בכל צרכי הקבורה... אע"פ שכל מצות אלו מדבריהם הרי הן בכלל ואהבת לרעך כמוך

There is a rabbinic mitzvah to examine the sick... and to be involved in all burial needs... Even though all of these are rabbinic mitzvot, they are included in, "Love your neighbour as yourself."

22. Rabbi Yaakov Yeshayah Blau (21<sup>st</sup> century Israel), Pitchei Choshen I 1:14

בעל חנות שעיקר פרנסתו בכך, אינו חייב לתת סחורתו בהקפה.

A store owner whose main support is from this source is not obligated to give his merchandise on credit.

23. Scott Cummings, The Politics of Pro Bono, UCLA Law Review Sept. '04 <http://ssrn.com/abstract=594525>

Moreover, there is sense in which many small-scale lawyers believe that their practice already encompasses significant pro bono to the extent that they work under contingency fee arrangements and often reduce hourly rates or write off charges for clients who cannot afford to pay. Additional pro bono demands are seen as an unfair imposition. In response, the organized bar and pro bono programs have therefore looked for ways to motivate greater pro bono activity by small-scale lawyers. One tactic has been to emphasize the financial virtues of volunteering: Particularly for solos who are seeking to enter a new area of practice, pro bono is promoted as a vehicle for building substantive expertise and making important contacts...

24. "Tension at the Border": Pro Bono and Legal Aid, CBA Standing Committee on Access to Justice (2012)

While pro bono legal services certainly have the potential to enhance access to justice for clients, there are inherent limits to the capacity of pro bono work to address the unmet legal needs that currently exist in Canada...

Law firms may assign junior associates to a pro bono file, at least partially because that junior will gain legal experience and knowledge while engaged in the work. Offering lawyers or students who are not knowledgeable in the area of law involved may well impact the quality of legal help offered. One response is that the underlying rationale of pro bono is that the good should not be the enemy of the best, in other words, that some legal help is better than none at all.

25. Lorne Sossin, "The Helping Profession : Can Pro Bono Lawyers Make Sick Children Well?" In *In search of the ethical lawyer: stories from the Canadian legal profession*. Dodek, Adam, and Alice Wooley, eds. Pp. 160-161

An interesting question has also arisen with respect to *pro bono* representation and costs. If a case is taken on *pro bono*, but with the expectation that a victory might bring a costs award, is it truly *pro bono* (i.e., work done for the public good without compensation)? If so, how does this differ from contingency fee arrangements (i.e., a lawyer who expects to be compensated if successful but willing to bear the financial risk of an unsuccessful outcome)? One key difference is the *expectation* of compensation. The *pro bono* lawyer does not expect to be paid a fee but might receive costs if successful and if the court awards costs...

In its decision, the Court of Appeal accepted that costs should be available at least in some circumstances for parties represented by *pro bono* counsel and adopted "access to justice" as a newly recognized cost criterion in Ontario. To do otherwise, it was argued, would be to place significant disincentives for lawyers who take on cases on this basis (particularly lawyers who practise on their own or in small firms).

26. Talmud, Bava Kama 85a

ואי א"ל: מייתבנא אסיא דמגן במגן, א"ל: אסיא דמגן במגן - מגן שוה.

If an assailant says, "I will bring you a doctor for nothing," he may reply, "A doctor who heals for nothing is worth nothing."

27. Rabbi Shlomo ibn Aderet (13<sup>th</sup> century Spain), Responsum I 581

איני רואה שיוכלו הצבור לעכב מן הדין ולא מן הראוי מכמה צדין. כי המקדיש והבונה משלו לשמים מי מעכב על ידו מלהזכיר שמו בשלו?... ועוד דבכמה מקומות בקהילות הקדש שנוהגין כן. גם במקומנו הוא כתוב בכותל ההיכל. וזו מדת חכמים היא ומדת וותיקין כדי ליתן שכר לעשות מצוה. ומדת התורה הוא שהיא כותבת ומפרסמ' עושה מצוה...

I don't see how the community may prevent [an inscription on a gift], not legally and not in terms of what is appropriate, for several reasons. For one who dedicates and builds of his own for Heaven, who can prevent him from mentioning his name on his own?... Further, in several holy communities they do this. In our place, too, it is inscribed on the walls of the sanctuary. This is the trait of scholars, an ancient practice, to reward mitzvot. And it is the trait of the Torah, which records and publicizes mitzvah performance...

28. Rabbi Dr. Cyril Domb, Maaser Kesafim, pg. 130

If a professionally qualified person furnishes his services gratuitously to a Torah institution or for a poor person, can he deduct his fee from maaser? Rabbi S. Z. Auerbach says that this is legitimate provided he remembers to include the fee in his maaser accounting. If he has no overhead expenses he may deduct 9/10 of his professional fee.

#### Review Questions from Vignette 1

- What are the three layers of self-interest driving a lawyer's Pro Bono work, apart from the desire to help others?
- What biblical passage expresses a Jewish imperative for helping others seek justice?
- If Judaism prohibits taking money directly to help people by practicing medicine, why may a lawyer take money directly to help people by practicing law?
- In general society and Jewish thought, may a lawyer benefit from aiding others in Pro Bono work?

#### Vignette 2: Legal Aid and Society's Duty

29. "Tension at the Border": *Pro Bono and Legal Aid*, CBA Standing Committee on Access to Justice (2012)

In addition, it has often been observed that an increased reliance on, and demand for organized pro bono services, along with recognition of pro bono work as a responsibility within lawyers' codes of professional conduct, has coincided with the erosion of public funds for legal aid programs. For example:

Lorne Sossin says that "It is perhaps no coincidence that the rejuvenation of pro bono as an element of legal professionalism coincides with the demise of the profession's stewardship over legal aid", and "(i)ronically, the failure of legal aid schemes to meet the still growing needs of the poor may be seen as a catalyst for the rise of pro bono programs and organizations in the later 90 and early 2000s." He also notes that pro bono has been particularly relevant when legal aid is unavailable, and that efforts for more developed and organized pro bono may undercut legal aid

30. Chief Justice Nemetz, Supreme Court of BC (reported at (1985), 64 B.C.L.R. 113 (B.C.C.A.))

We have no doubt that the right to access to the courts is under the rule of law one of the fundamental pillars protecting the rights and freedoms of our citizens.

31. Dr. Melina Buckley, *Moving Forward on Legal Aid* (2010)

Public funding is an essential part of a government legal aid scheme as, in theory, it removes the need to rely on the 'charity' of the profession and it gives the system public accountability. However, a reliance on public funding means that the legal aid budget is limited, particularly in a climate of reduced government spending on services in general.

32. Erika Heinrich, *Canadian Jurisprudence Regarding the Right to Legal Aid* (2013)

Indeed, in limited circumstances, in both criminal and civil proceedings, courts have recognized that individuals may have a right to government-funded counsel. Nevertheless, Canadian courts have rejected arguments that there is a general constitutional right to legal aid.

33. Rabbi Yitzchak Zilberstein (21<sup>st</sup> century Israel), *Shiurei Torah l'Rofim* III 165, citing Rabbi Yosef S. Elyashiv

ולכן אע"פ שמחלקת ההשתלות זקוקה לתקציב גדול יותר, שבו היה אפשר לטפל ולהציל נפשות רבות, בכל זאת עצם קיום מחלקה כזו מרגיע את הציבור, היודעים שבעת הצרה ניתן כאן להשתיל, וכמוהו כפיקוח נפש.

Therefore, even though the transplant unit needs a greater budget, which could have been used to save many more lives, still, the very existence of such a unit calms the community, as they know that in a time of need they could receive a transplant there, and that is like saving a life.

34. Deuteronomy 16:18

עֲפֹטִים וְשֹׁטְרִים תִּתֶּן-לָהֶם בְּכָל-שְׁעָרֶיךָ אֲשֶׁר ד' אֱלֹהֶיךָ נָתַן לָךְ לְשֹׁבְטֶיךָ וְשֹׁפְטֵי אֶת-הָעָם מִשְׁפֹּט־צֶדֶק:

You shall place judges and officers at all of your gates, which Hashem your Gd gives you for your tribes, and they shall judge the nation righteously.

35. Talmud, Bava Kama 82a

ודנין בשני ובחמישי דשכיחי דאתו למקרא בסיפרא

Courts judge on Mondays and Thursdays, because people are available as they come read from the Torah.

36. Talmud, Sanhedrin 8a

"כקטן כגדל תשמעון" - אמר ריש לקיש שיהא חביב עליך דין של פרוטה כדין של מאה מנה. למאי הלכתא? אילימא לעיוני ביה ומיפסקיה, פשיטא! אלא לאקדומיה.

Deuteronomy 1:17 says, "Hear the small like the great." Reish Lakish said: The law of a *perutah* should be as beloved to you as the law of 100 *maneh*. For what? If to examine and rule properly, that's obvious! Rather, to put it first.

37. Talmud, Yevamot 122b

דבר תורה אחד דיני ממונות ואחד דיני נפשות בדרישה וחקירה שנאמר משפט אחד יהיה לכם

Biblically, both financial and capital matters should require high-level interrogation of witnesses, as Leviticus 24:22 states, "There shall be one law for all of you."

38. Rabbeinu Asher (13<sup>th</sup>-14<sup>th</sup> century Germany/Spain), *Rosh to Bava Kama* 1:5

וכן מצאתי בשם הגאון ז"ל כתוב דתקנתא דרבנן הוא באיניש דמפסיד נכסיה משום השבת אבידה. ולי נראה דלא צריכנא לתקנתא דרבנן אלא דין גמור הוא שחייב אדם להציל עשוק מיד עושקו בכל טעדיקי דמצי למיעבד.

I have found from the Gaon z"l, that there is a rabbinic injunction against [a defendant] who [might] destroy his property, to restore loss. It appears to me that there is no need for a rabbinic enactment; it is straightforward law that one is obligated to save the abused party from one who would abuse him, with any available strategy.

39. Rabbi Moses Maimonides (Rambam, 12<sup>th</sup> century Egypt), *Mishneh Torah, Hilchot Sanhedrin* 2:7

ובכלל "אנשי חיל" שיהיה להן לב אמיץ להציל עשוק מיד עושקו, כענין שנאמר "ויקם משה ויושיען."

Including in "men of *chayil*" is that they must have a brave heart, to save the abused from one who would abuse him, as it says, "And Moshe arose and saved them."

#### 40. Talmud, Gittin 37b

כי אתו לקמיה דרב, אמר ליה "מידי פרוסבול היה לך ואבד?" כגון זה 'פתח פיך לאלם הוא'.

When they came to Rav, he would ask, "Perhaps you had a *prozbul* and it was lost?" This is an example of "Open your mouth for the mute."

#### 41. Talmud Yerushalmi Sanhedrin 3:8

רב הונא כד הוה ידע זכו לבר נש בדינא ולא הוה ידע ליה, הוה פתח ליה, על שם [משלי לא ח] "פתח פיך לאלם."

When Rav Huna knew merit for a litigant and the litigant did not know, he would start for him, for, "Open your mouth for the mute."

#### 42. Dealing with a Self-Represented Party <https://www.yutorah.org/lectures/lecture.cfm/897065/>

#### 43. Leviticus 25:35

וְכִי־יִמּוּךְ אֶחָיִךְ וּמָטָה יָדוֹ עִמָּךְ וְהִחֲזַקְתָּ בוֹ גֵר וְתוֹשֵׁב וְחֵי עִמָּךְ:

And if your brother becomes needy and his hand falls among you, you shall hold him, stranger or settler, and he shall live with you.

#### 44. Deuteronomy 15:7-8

כִּי יִהְיֶה בְּךָ אֶבְיוֹן מֵאֶחָד בְּאֶחָד שְׁעָרֶיךָ בְּאֶרֶצְךָ אֲשֶׁר ד' אֱלֹהֶיךָ נָתַן לְךָ לֹא תִאֲמָץ אֶת לִבְּךָ וְלֹא תִקְפֹּץ אֶת יָדְךָ מֵאֶחָד הָאֶבְיּוֹן: כִּי פָתַח תִּפְתַּח אֶת יָדְךָ לוֹ וְהֶעַבְטָה תִּעְבִּיטְנוּ דִּי מִחֲסָרוֹ אֲשֶׁר יִחְסַר לוֹ:

When there is a pauper among you, one of your brethren in one of your gates, in your land which Hashem your Gd is giving you, you shall not harden your heart and you shall not clench your hand, from your brother the pauper. For you shall surely open your hand to him, and you shall lend to him that which he lacks, which is lacking for him.

#### 45. Rabbi Chaim Soloveitchik (19<sup>th</sup>-20<sup>th</sup> c. Russia), per Reshimot Shiurim to Bava Kama 36b

שתי פרשיות אלו הן שני חיובים נפרדים, שחובת היחיד במצות הצדקה נלמדת מהפרשה בראה הכוללת העשה של פתח תפתח והלאוין של לא תאמץ ולא תקפץ. ואילו בפ' בהר, "והחזקת בו גר ותושב וחי עמך", מדובר על חובת הציבור

These two sections involve two separate duties. The *tzedakah* duty of the individual is learned from Deuteronomy, which includes the command of "you shall surely open" and the prohibitions of "you shall not harden" and "you shall not clench." Leviticus, "you shall hold him, stranger or settler, and he shall live with you," speaks of the community's duty.

#### 46. Rambam (12<sup>th</sup> century Egypt), Mishneh Torah, Hilchot Matnot Aniyim 7:1, 5

מצות עשה ליתן צדקה לעניים כפי מה שראוי לעני, אם היתה יד הנותן משגת, שנאמר פתוח תפתח את ידך לו [...] די מחסורו אשר יחסר לו]... בא העני ושאל די מחסורו ואין יד הנותן משגת, נותן לו כפי השגת ידו. וכמה? עד חמישית נכסיו מצוה מן המובחר, ואחד מעשרה בנכסיו בינוני, פחות מכאן עין רעה...

There is a commandment to give *tzedakah* to paupers as suits them, if the donor can afford it, as it is said, "You shall surely open your hand for him [...his deficit, which is lacking for him]"... If the pauper requests his deficit and the donor cannot afford it, he gives as he can afford. How much? Ideally, up to 1/5 of his assets. 1/10 is average. Less is stingy...

#### 47. Rambam (12<sup>th</sup> century Egypt), Mishneh Torah, Hilchot Matnot Aniyim 9:12

מי שישב במדינה שלשים יום כופין אותו ליתן צדקה לקושה עם בני המדינה, ישב שם שלשה חדשים כופין אותו ליתן התמחוי, ישב שם ששה חדשים כופין אותו ליתן צדקה בכסות שמכסים בה עניי העיר, ישב שם תשעה חדשים כופין אותו ליתן צדקה לקבורה שקוברין בה את העניים ועושין להם כל צרכי קבורה.

One who dwells in a land for 30 days is compelled to give *tzedakah* to the [weekly] *kupah* with the citizenry. One who dwells there for three months is compelled to give to the [daily] *tamchui*. One who dwells there for six months is compelled to give clothing for the local needy. One who dwells there for nine months is compelled to give *tzedakah* for burial...

48. Rabbi Shabtai Rappaport (20<sup>th</sup>-21<sup>st</sup> century Israel), קדימיות בהקצאת משאבים ציבוריים לרפואה, Assia 7  
לעומת זאת, טעם חיוב הציבור בצדקה אינו לחנכם לרחמנות, אין זה נראה שעניין חינוך והרגל שייך בכלל לגבי הציבור. הציבור חייב להסיר עוול מתוכו, והימצאותם של אנשים שאין להם צרכי חייהם היסודיים בתוך ציבור שיש לו צרכי חייו, היא עוול של ממש.

In contrast, the reason for the community's obligation in *tzedakah* is not to teach them mercy; teaching and habituation do not seem at all relevant for a community. The community is obligated to remove injustice from their midst, and the presence of people who lack their basic needs, in a community which possesses its basic needs, is true injustice.

49. Rabbi Eliezer Waldenberg (20<sup>th</sup> century Israel), Tzitz Eliezer 15:40:6-7  
ועד כדי כך היה פשוט הדבר להפוסקים ז"ל שישנו חיוב כזה [לשלם לרפואת חולה-מ.ט.]. על כל הסובבים את החולה עד שדנים בהיכא שהוציאו הוצאות עבור כך מבלי לשאול את החולה באם מחויב החולה אח"כ להחזיר להם ההוצאות, בהיות ומחויבים ועומדים על כך...

It was so obvious to halachic authorities that there is such a duty [to pay for an ill person's treatment] upon all of those around the ill person, to the point that they debated the case in which the community had spent for this without asking the ill person – is the ill person obligated to repay them for their expenditures, since they were obligated to do this...

50. Talmud, Ketuvot 105a  
גזרי גזירות שבירושלים היו נוטלין שכרן תשעים ותשע מנה מתרומת הלשכה.

The authors of decrees in Jerusalem would collect wages of 99 *maneh* from the half-shekel collection.

### Review Questions for Vignette 2

- For what two reasons does society fund Legal Aid?
- Might Judaism support Legal Aid spending as a function of self-interest?
- In Judaism, Access to Justice is a value of society, but does that mean society must fund it, as with Legal Aid?

### Vignette 3: Liability for Pro Bono Work (briefly)

51. Joost Blom, Do We Really Need the Anns Test for Duty of Care in Negligence?, 2016 53-4 *Alberta Law Review* 895, 2016 CanLII Docs 78, <<http://www.canlii.org/t/6t1>>, retrieved on 2020-06-12

The Supreme Court of Canada adopted the two-stage approach in Kamloops, also an action by a house buyer against a municipality for economic loss caused by defective foundations. The Court held, as Anns had done, that a duty of care was established. Justice Wilson restated the test as follows:

- (1) is there a sufficiently close relationship between the parties ... so that, in the reasonable contemplation of [one person], carelessness on its part might cause damage to [the other] person? If so,
- (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

The changes in the "slightly modified version" adopted in Kamloops are essentially editorial. 10 Even the truncation of the reference in the first limb of the test, from Lord Wilberforce's "sufficiently close relationship of proximity or neighbourhood" to Justice Wilson's "sufficiently close relationship," has proved to be insignificant given the Court's subsequent emphasis on the significance of "proximity."

52. Code of Jewish Law (16<sup>th</sup> century), Choshen Mishpat 386:3  
הזורק כלי שלו מראש הגג, והיו תחתיו כרים וכסתות שאם יפול עליהם לא ישבר, וקדם אחר וסלקם, ונחטב הכלי בארץ ונשבר, חייב המסלק; וכן כל כיוצא בזה.

הגה: וי"א דזה מקרי גרמא בנזקין ופטור... ולכן אפילו זרק כלי מראש הגג והיו תחתיו כרים וכסתות, וקדם בעצמו וסלקו, אפ"ה פטור, דעל הזריקה לא מיחייב דלא היו ראויים לישבר, ומה שסלקן הוי גרמא בעלמא (טור בשם הרא"ש ור"י פ' לא יחפור)... מיהו משמתינן ליה עד דמסלק היוקא.

Rabbi Yosef Karo: If one throws his own implement from a roof, over cushions which would prevent it from breaking, and another removes them and it smashes on the ground, the remover is liable. The same is true in all similar cases.

Rabbi Moshe Isserless: Some say removal is called *grama* and one is exempt... Therefore: Even if one throws an implement off a roof over cushions and then personally removes the cushions, he is exempt. He is not liable for throwing, since at that time it would not have broken, and the removal was only *grama*.... However, we ex-communicate such a person to remove harm.



53. Rabbi Shlomo Ibn Aderet (13<sup>th</sup> century Spain), Rashba 1:99

ואם פתהו שמעון להתגייר וקבל ממנו ונתגייר אין שמעון חייב כלום לרבו. שהוא לא הזיקו בכלום והעבד הוא שנתגייר מרצונו... ולא מצינו בשום מקום משיא עצה ואפילו בנזקים שהוא חייב בדיני אדם

If Shimon persuaded [a servant] to convert, and the servant accepted and converted, Shimon owes nothing to the master, for he harmed nothing; the servant converted on his own... We never find that one who gives advice is liable in human courts, even for causing harm.

54. Rabbi Yechiel Michel Epstein (19<sup>th</sup>-20<sup>th</sup> century Lithuania), Aruch haShulchan Choshen Mishpat 306:13

ואם אינו בקי חייב לשלם, והוא שיאמר להשולחני "אני סומך עליך" או שהיו הדברים מראים שהוא סומך לגמרי רק על ראיתו, ובלא זה אין לנו לחייב את השולחני מפני שיכול לומר "לא ידעתי שתסמוך עלי לבדי, ותשאל עוד אצל אחרים, ולכן לא דקדקתי יפה יפה." וי"א דאפילו סתמא נמי חייב, דכל המראה לשולחני מסתמא סומך עליו לגמרי. וכתב רבינו הרמ"א דהסברא הראשונה נראה עיקר. ובשכר חייב אף על פי שלא אמר "עליך אני סומך" [נה"מ], דכיון דנוטל שכר וודאי דסמך עליה לגמרי. וחייב זה הוא מדיני דגרמי שיתבאר בסי' שפ"ו ובשכר הוי חיובו כשומר שכר:

If the moneychanger is not expert, then he is liable if the client told the moneychanger, "I depend on you", or if his words demonstrate that he depends entirely on his examination. Otherwise, we should not hold the moneychanger liable, since he can say, "I didn't know you would depend on me alone; I thought you would ask others, and so I was not very careful." And some say that the moneychanger is liable even if the person did not say, "I depend on you"; since he takes payment, the client certainly depends on him entirely. And this liability is from *garmi* – see Choshen Mishpat 386 – and when paid his liability is as a paid guardian.

### Review Questions for Vignette 3

- What does the first arm of the Anns Test seek to determine?
- In Judaism, does pro bono work carry liability if it directly leads to harm?