

1999

## Cultures of Commitment: Pro Bono for Lawyers and Law Students

Deborah L. Rhode

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 Fordham L. Rev. 2415 (1999).

Available at: <https://ir.lawnet.fordham.edu/flr/vol67/iss5/26>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## Cultures of Commitment: Pro Bono for Lawyers and Law Students

### Cover Page Footnote

Ernest McFarland Professor of Law and Director, Keck Center on Legal Ethics at Stanford University; B.A., Yale (1974); J.D., Yale (1977). The research assistance of Sarah Killingsworth, Shawn Vietor, and Neta Ziv, and the comments of David Chambers, Thomas Ehrlich, Lawrence Friedman, Thomas LeBien, Lisa Lindefel, and William Simon are gratefully acknowledged.

# CULTURES OF COMMITMENT: PRO BONO FOR LAWYERS AND LAW STUDENTS

Deborah L. Rhode\*

“Every lawyer . . . has a responsibility to provide legal services to those unable to pay and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.”

American Bar Association,  
Model Rules of Professional Conduct

“To do good is noble. To teach others to do good is nobler, and no trouble [to oneself].”

Mark Twain<sup>1</sup>

NOWHERE is the gap between professional ideals and professional practice more apparent than on issues of pro bono responsibility. For decades, bar leaders, ethical codes, and countless commissions and committees have proclaimed that all lawyers have obligations to assist individuals who cannot afford counsel. And for decades, the percentage of lawyers who actually do so has remained dispiritingly small. Recent estimates suggest that most attorneys do not perform significant pro bono work, and that only between ten and twenty percent of those who do are assisting low-income clients.<sup>2</sup> The average for the profession as a whole is less than a half an hour per week.<sup>3</sup> Few lawyers come close to satisfying the American Bar Association’s Model Rules, which provide that “[a] lawyer should aspire to render at least [fifty] hours of pro bono publico legal services per year” primarily to “persons of limited means” or to “organizations in matters which are designed primarily to address the needs of [such] persons.”<sup>4</sup>

The bar’s failure to secure broader participation in pro bono work is all the more disappointing when measured against the extraordinary successes that such work has yielded. Many of the nation’s landmark public-interest cases have grown out of lawyers’ voluntary contribu-

---

\* Ernest McFarland Professor of Law and Director, Keck Center on Legal Ethics at Stanford University; B.A., Yale (1974); J.D., Yale (1977). The research assistance of Sarah Killingsworth, Shawn Vietor, and Neta Ziv, and the comments of David Chambers, Thomas Ehrlich, Lawrence Friedman, Thomas LeBien, Lisa Lindelef, and William Simon are gratefully acknowledged.

1. Jennifer Gerarda Brown, *Rethinking “the Practice of Law,”* 41 Emory L.J. 451, 465 n.61 (1992) (quoting Mark Twain).

2. See Tigran W. Eldred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More Than Charity?*, 96 W. Va. L. Rev. 367, 389-90 (1994).

3. See Deborah L. Rhode, *The Professionalism Problem*, 39 Wm. & Mary L. Rev. 283, 291 (1998) (discussing relevant surveys).

4. Model Rules of Professional Conduct Rule 6.1 (1998).

tions.<sup>5</sup> Moreover, particularly over the last decade, growing numbers of attorneys have donated time and talents to less visible but no less critical poverty law programs. For children with disabilities, victims of domestic violence, elderly citizens without medical care, and other low-income clients, these pro bono programs are crucial in meeting basic human needs.<sup>6</sup> For lawyers themselves, such work is similarly important in giving purpose and meaning to their professional lives. Our inability to enlist more attorneys in pro bono service represents a significant lost opportunity for them as well as for the public.

How best to narrow the gap between professional ideals and professional practice has been a matter of considerable controversy. Proposals for mandatory pro bono requirements have come and gone, but mainly gone.<sup>7</sup> The bar generally has resisted mandatory service, although a few jurisdictions require lawyers to accept judicial appointments for limited categories of cases, and one state, Florida, requires lawyers to report their annual pro bono contributions.<sup>8</sup>

This resistance to required contributions, coupled with the limited success of voluntary efforts, has encouraged more pro bono initiatives in law schools. By enlisting students early in their legal careers, these initiatives attempt to inspire an enduring commitment to public service. The hope is that, over time, a greater sense of moral obligation will "trickle up" to practitioners.<sup>9</sup> With that objective, an increasing number of schools have instituted pro bono requirements for students. So too, in 1996, the American Bar Association amended its accreditation standards to call on schools to "encourage . . . students to participate in pro bono activities and provide opportunities for them to do so."<sup>10</sup> These revised ABA standards also encourage schools to address the obligations of faculty to the public, including participation in pro bono activities.<sup>11</sup>

Despite such initiatives, pro bono still occupies a relatively marginal place in legal education. Only about ten percent of schools require

---

5. See Richard C. Reuben, *The Case of a Lifetime*, A.B.A. J., Apr. 1994, at 70, 73.

6. See American Bar Ass'n, *Promoting Professionalism: ABA Programs, Plans, and Strategies* 77-81 (1998).

7. The first draft of the ABA Model Rules of Professional Conduct required a minimum contribution of 40 hours a year for no fee or reduced fees, or the financial equivalent. See *Text of Initial Draft of Ethics Code Rewrite Committee*, Legal Times Wash., Aug. 27, 1979, at 45. For a history of unsuccessful state proposals, see Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 Md. L. Rev. 78, 92-99 (1990).

8. See Deborah L. Rhode & David Luban, *Legal Ethics* 792 n.9, 802-08 (2d ed. 1995).

9. See John R. Kramer, *Law Schools and the Delivery of Legal Services—First, Do No Harm*, in *Civil Justice: An Agenda for the 1990s* 47, 57 (Esther F. Lardent ed., 1989); see also *A Sampling of Progress: Questionnaire Results Show Law Schools Are Doing More on Poverty*, Consorting (Interuniversity Consortium on Poverty Law, Madison, Wis.), July 1994, at 5.

10. See *Recodification of Accreditation Standards Standard 302* (1996).

11. See *id.* Standard 404.

any service by students and only a handful impose specific requirements on faculty.<sup>12</sup> At some of these schools, the amounts demanded are quite minimal: less than twenty hours by the time of graduation.<sup>13</sup> Over ninety percent of institutions offer voluntary programs, but their scope and quality varies considerably. About one-third of schools have no law-related pro bono projects or projects involving a few dozen participants.<sup>14</sup> The majority of students have no legal pro bono work as part of their educational experience.<sup>15</sup>

What legal education could or should do to expand such public-service commitments is subject to increasing debate. While law school administrators overwhelmingly support pro bono participation, they are divided about whether current programs are adequate and whether required service is desirable.<sup>16</sup> To encourage a more informed analysis of these issues, the Association of American Law Schools, in 1998, appointed a presidential Commission on Public Service and Pro Bono Opportunities in Law Schools.<sup>17</sup> Its mission has been to collect data on existing programs and to issue a report with recommendations.

This Essay attempts to place the debate over pro bono initiatives in legal education in broader perspective. Although much has been written about the value of public service and the merits of requiring it, relatively little attention has focused on the factors that encourage support for either voluntary or mandatory programs. Even less effort has centered on evaluating the effectiveness of law school programs.

12. William B. Powers, Report on Law School Pro Bono Activities 2, 5 (1994) (reporting pro bono requirements for students in 17 of 172 responding schools and requirements for faculty in three of 105 responding schools).

13. The lowest minimum requirement appears to be eight hours. *See id.* at 3.

14. *See* Memorandum from David L. Chambers on AALS Survey of Pro Bono Programs (Sept. 2, 1998) (on file with author); Memorandum from David L. Chambers on AALS Survey of Pro Bono Programs (Nov. 11, 1998) (on file with author) (reporting that 13% of schools have no pro bono law projects and 28% have fewer than 50 participants); Notes of Focus Group Interviews Conducted by the Association of American Law Schools' Commission on Pro Bono and Public Service Opportunities in Law Schools (1998) [hereinafter Focus Group Interview Notes] (notes on file with author).

15. *See* Commission on Pro Bono and Pub. Serv. Opportunities, Association of Am. Law Schs., *Learning to Serve: A Summary of the Findings and Recommendations of the AALS Commission on Pro Bono and Public Service Opportunities* (forthcoming 1999) (manuscript at 4, on file with author).

16. *See* Richard A. White, Draft: Report on the AALS Survey of Law Schools and Public Service Programs, 4-5 (1998). Ninety-five percent of deans believed that an important goal of law schools was to instill in students a sense of obligation to perform pro bono work. *See id.* at 9, 15. About one-third of deans were dissatisfied, and two-thirds were satisfied with the amount of pro bono work done by their students. *See id.* at 15. About 41% agreed that mandatory pro bono requirements were inappropriate and 45% disagreed. *See id.* at 4-5.

17. In the interests of full disclosure, I should note that I was the president who appointed the Commission and helped obtain funding from the Open Society Institute for its work.

The effort here is to increase our understanding of what can build a culture of commitment to pro bono service.

To that end, discussion begins with the rationale for pro bono involvement by lawyers. Attention then turns to the characteristics and experiences that foster charitable work among Americans in general, and among lawyers and law students in particular. Subsequent analysis centers on legal education's efforts to encourage such work and the strategies most likely to increase their effectiveness.

## I. THE RATIONALE FOR PRO BONO SERVICES

The primary rationale for pro bono contributions rests on two premises: first, that access to legal services is a fundamental need, and second, that lawyers have some responsibility to help make those services available. The first claim is widely acknowledged. As the Supreme Court has recognized in other contexts, the right to sue and defend is the right that protects all other rights.<sup>18</sup> Access to the justice system is particularly critical for the poor, who often depend on legal entitlements to meet basic needs such as food, housing, and medical care. Moreover, in a democratic social order, equality before the law is central to the rule of law and to the legitimacy of the state. Social science research confirms what political theorists have long argued: Public confidence in legal processes depends heavily on opportunities for direct participation.<sup>19</sup>

In most circumstances, those opportunities are meaningless without access to legal assistance. Our justice system is designed by and for lawyers, and lay participants who attempt to navigate without counsel are generally at a disadvantage. Those disadvantages are particularly great among the poor, who typically lack the education and experience necessary for effective self-representation. For example, studies of eviction proceedings find that tenants with attorneys usually prevail; tenants without attorneys almost always lose.<sup>20</sup> Inequalities in legal representation compound other social inequalities and undermine our commitments to procedural fairness and social justice. As a New York judicial report noted: "Our justice system cannot proclaim in the bold letters of the law that it is just, but then block access to

---

18. See David Luban, *Lawyers and Justice: An Ethical Study* 257-66 (1988) [hereinafter *Luban, Lawyers and Justice*]; Frank Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 *Duke L.J.* 1153, 1172.

19. See E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 102-03 (1998); Luban, *Lawyers and Justice*, *supra* note 18, at 252-55.

20. See Access to Justice Working Group, State Bar of Cal., *And Justice For All: Fulfilling the Promise of Access to Civil Justice in California* 34 (1996); Committee to Improve the Availability of Legal Servs., *Final Report to the Chief Judge of the State of New York* (1990) [hereinafter *New York Report*], *reprinted in* 19 *Hofstra L. Rev.* 755, 773 (1991).

justice. We cannot promise due process, but raise insurmountable odds for those who seek it."<sup>21</sup>

While most lawyers acknowledge that access to legal assistance is a fundamental interest, they are divided over whether the profession has some special responsibility to help provide that assistance, and if so, whether the responsibility should be mandatory. One contested issue is whether attorneys have obligations to meet fundamental needs that other occupations do not share. According to some lawyers, if equal justice under law is a societal value, society as a whole should bear its cost. The poor have fundamental needs for food and medical care, but we do not require grocers or physicians to donate their help in meeting those needs. Why should lawyers' responsibilities be greater?<sup>22</sup>

One answer is that the legal profession has a monopoly on the provision of essential services.<sup>23</sup> Lawyers have special privileges that entail special obligations. In the United States, attorneys have a much more extensive and exclusive right to provide legal assistance than attorneys in other countries.<sup>24</sup> The American bar has closely guarded those prerogatives and its success in restricting lay competition has helped to price services out of the reach of many consumers. Under these circumstances, it is not unreasonable to expect lawyers to make some pro bono contributions in return for their privileged status. Nor would it be inappropriate to expect comparable contributions from other professionals who have similar monopolies over the provision of critical services.

An alternative justification for imposing special obligations on lawyers stems from their special role in our governance structure. As the New York Report explained, much of what lawyers do

is about providing *justice*, [which is] . . . nearer to the heart of our way of life . . . than services provided by other professionals. The legal profession serves as indispensable guardians of our lives, liberties and governing principles. . . . Like no other professionals, lawyers are charged with the responsibility for systemic improvement of not only their own profession, but of the law and society itself.<sup>25</sup>

---

21. New York Report, *supra* note 20, reprinted in 19 Hofstra L. Rev. 755, 779 (1991).

22. See New York Report, *supra* note 20, reprinted in 19 Hofstra L. Rev. 755, 782 (1991); Marvin E. Frankel, *Proposal: A National Legal Service*, 45 S.C. L. Rev. 887, 890 (1994).

23. See Amendments to Rule 4-6.1 of the Rules Regulating the Florida Bar—Pro Bono Public Service, 696 So. 2d 734, 735 (Fla. 1997); David Luban, *Mandatory Pro Bono: A Workable (and Moral) Plan*, 64 Mich. B.J. 280, 282 (1985) [hereinafter Luban, *Mandatory Pro Bono*].

24. For example, nonlawyers in other countries can provide legal advice. See Deborah L. Rhode, *The Delivery of Services by Non-lawyers*, 4 Geo. J. Legal Ethics 209, 231 & n.166 (1990).

25. See New York Report, *supra* note 20, reprinted in 19 Hofstra L. Rev. 755, 782 (1991).

Because lawyers occupy such a central role in our governance system, there is also particular value in exposing them to how that system functions, or fails to function, for the have nots. Pro bono work offers many attorneys their only direct contact with what passes for justice among the poor. To give broad segments of the bar some experience with poverty-related problems and public-interest causes may lay critical foundations for change. Pro bono programs have often launched leading social reform initiatives and strengthened support for government subsidies of legal services.<sup>26</sup>

A final justification for pro bono work involves its benefits to lawyers individually and collectively. Those benefits extend beyond the intrinsic satisfactions that accompany public service. Particularly for young attorneys, such work can provide valuable training, trial experience, and professional contacts. Through pro bono assistance, lawyers can develop capacities to communicate with diverse audiences and build problem-solving skills. Involvement in community groups, charitable organizations, and public-interest activities is a way for attorneys to expand their perspectives, enhance their reputations, and attract paying clients.<sup>27</sup> It is also a way for the bar to improve the public standing of lawyers as a group. In one representative ABA poll, nearly half of nonlawyers believed that providing free legal services would improve the profession's image.<sup>28</sup>

For all these reasons, the vast majority of surveyed lawyers believe that the bar should provide pro bono services.<sup>29</sup> However, as noted earlier, only a minority in fact provide significant assistance and few of their efforts aid low-income clients.<sup>30</sup> The reasons for this shortfall do not involve a lack of need. A wide gap remains between the rhetoric and reality of America's commitment to equal justice. Studies of low-income groups find that over three-quarters of their legal needs remain unmet.<sup>31</sup> Studies cutting across income groups estimate that in-

---

26. See Reuben, *supra* note 5, at 73-74; Robert A. Stein, *Champions of Pro Bono*, A.B.A. J., Aug. 1997, at 100, 100.

27. See Thomas J. Brannan, *Pro Bono: By Choice or By Chance?*, 84 Ill. B.J. 481, 481 (1996); Donald W. Hoagland, *Community Service Makes Better Lawyers*, in *The Law Firm and the Public Good* 104, 109 (Robert A. Katzmann ed., 1995); Jack W. Londen, *The Impact of Pro Bono Work on Law Firm Economics*, 9 Geo. J. Legal Ethics 925, 925-26 (1996); Ronald J. Tabak, *Integration of Pro Bono into Law Firm Practice*, 9 Geo. J. Legal Ethics 931, 931-32 (1996).

28. See Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 60-61. A survey by the Oregon bar found when individuals were asked what information might cause them to have a higher opinion of the legal profession, they gave top ratings to knowledge that lawyers had given free legal advice to mass disaster victims and had made financial contributions to community legal services organizations. See Karen Garst, *Reporting on Surveys, Part II*, Ore. St. B. Bull., Dec. 1996, at 39, 46.

29. See Eldred & Schoenherr, *supra* note 2, at 390 n.94.

30. See *supra* text accompanying note 2.

31. See Roy W. Reese & Carolyn A. Eldred, American Bar Ass'n, *Legal Needs Among Low-Income and Moderate-Income Households: Summary of Findings from*



dividuals do not obtain lawyers' help for between thirty to forty percent of their personal legal needs.<sup>32</sup> Moreover, these legal needs studies do not include many collective problems where attorneys' services are often crucial, such as environmental risks or consumer product safety.

The bar's response to inadequate access alternates between confession and avoidance. Some lawyers simply deny the data. Unburdened by factual support, they insist that no worthy cause goes unassisted, thanks to voluntary pro bono efforts, legal-aid programs, and contingent fee representation.<sup>33</sup> A more common approach is to acknowledge the problem of unmet needs but to deny that mandatory pro bono service is the solution. In one representative survey, about sixty percent of California attorneys believed that poor people's access to legal assistance would continue to decline, but an equal number opposed minimum pro bono requirements.<sup>34</sup>

Opponents raise both moral and practical objections. As a matter of principle, some lawyers insist that compulsory charity is a contradiction in terms.<sup>35</sup> From their perspective, requiring service would undermine its moral significance and compromise altruistic commitments.

There are several problems with this claim, beginning with its assumption that pro bono service is "charity." As the preceding discussion suggested, pro bono work is not simply a philanthropic exercise; it is also a professional responsibility. Moreover, in the small number of jurisdictions where courts now appoint lawyers to provide uncompensated representation, no evidence indicates that voluntary assistance has declined as a result.<sup>36</sup> Nor is it self-evident that most lawyers who currently make public-service contributions would cease to do so simply because others were required to join them. As to lawyers who do not volunteer but claim that required service would lack moral

---

the Comprehensive Legal Needs Study 7-30 (1994) (citing relevant studies); Rhode & Luban, *supra* note 8, at 729.

32. See Reese & Eldred, *supra* note 31, at 19-24; Rhode & Luban, *supra* note 8, at 728-30.

33. See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *Stan. L. Rev.* 589, 609 (1985) [hereinafter Rhode, *Ethical Perspectives*] (quoting relevant sources); Vito J. Titone, *A Profession Under Siege*, N.Y. L.J., May 20, 1992, at 2.

34. See *Few Attorneys Willing to Help with "Access" Problem*, Cal. B.J., Nov. 1994, at 16, 16.

35. See *In re Amendments to Rules Regulating the Fla. Bar—1-3.1(a) and Rules of Judicial Admin.—2.065*, 598 So. 2d 41, 42 (Fla. 1992); Frankel, *supra* note 22, at 890-91.

36. See Esther F. Lardent, *Structuring Law Firm Pro Bono Programs: A Community Service Typology*, in *The Law Firm and the Public Good*, *supra* note 27, at 59, 83-84 [hereinafter Lardent, *Pro Bono Programs*] (noting the absence of research); Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 *Md. L. Rev.* 18, 64 (1990) (noting that the Maryland bar's experience casts doubt on the assumption that contributions would decline).

value, David Luban has it right: "You can't appeal to the moral significance of a gift you have no intention of giving."<sup>37</sup>

Opponents' other moral objection to mandatory pro bono contributions involves the infringement of lawyers' own rights.<sup>38</sup> From critics' vantage, conscripting attorneys undermines the fundamental rights of due process and just compensation; it is a form of "latent fascism" and "involuntary servitude."<sup>39</sup>

The legal basis for such objections is unconvincing. A well-established line of precedent holds that Thirteenth Amendment prohibitions extend only to physical restraint or a threat of legal confinement.<sup>40</sup> They do not apply if individuals may choose freedom at a price. Since sanctions for refusing pro bono work would not include incarceration, most courts have rejected involuntary servitude challenges.<sup>41</sup>

Leading decisions have also dismissed objections based on the takings clause. Their reasoning is that "the Fifth Amendment does not require that the Government pay for the performance of a public duty [if] it is already owed."<sup>42</sup> As long as the required amount of service is not unreasonable, takings claims generally have failed.<sup>43</sup> Although the Supreme Court has never ruled directly on the scope of judicial authority to compel uncompensated legal assistance, its dicta and summary dismissal of one challenge suggest that such authority is constitutional.<sup>44</sup>

---

37. Luban, *Mandatory Pro Bono*, *supra* note 23, at 283.

38. *See* Rhode, *Ethical Perspectives*, *supra* note 33, at 610.

39. *Id.*; *see* Eldred & Schoenherr, *supra* note 2, at 391 & n.97 (discussing references to "Big Brother" and the Soviet Union); Frankel, *supra* note 22, at 890-91.

40. *See* United States v. Kozminski, 487 U.S. 931, 952 (1988); *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1357-58 (6th Cir. 1996); *United States v. Shackney*, 333 F.2d 475, 486-87 (2d Cir. 1964).

41. *See* Family Div. Trial Lawyers v. Moultrie, 725 F.2d 695, 704-05 (D.C. Cir. 1984); *In re* Amendments to Rules Regulating the Fla. Bar—1-3.1(a) and Rules of Judicial Admin.—2.065 (Legal Aid), 573 So. 2d 800, 805 (Fla. 1990); *Stephan v. Smith*, 747 P.2d 816, 846-47 (Kan. 1987).

42. *See* *Hurtado v. United States*, 410 U.S. 578, 588 (1973); *United States v. Dillon*, 346 F.2d 633, 635-36 (9th Cir. 1965).

43. *See* *Williamson v. Vardeman*, 674 F.2d 1211, 1214 (8th Cir. 1982); *Dillon*, 346 F.2d at 635-36; *see also* *Schwarz v. Kogan*, 132 F.3d 1387, 1394 (11th Cir. 1998), *cert. denied*, 118 S. Ct. 2372 (1998) (affirming the district court's holding that there was no Fifth Amendment violation); *Moultrie*, 725 F.2d at 705-09 (remanding case for decision on Fifth Amendment violation).

44. *See* *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (stating that "[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment"). In *Sparks v. Parker*, the Alabama Supreme Court upheld an uncompensated assignment system for indigent criminal defense, and the United States Supreme Court summarily dismissed an appeal. 368 So. 2d 528, 534 (Ala. 1979), *appeal dismissed*, 444 U.S. 803 (1979). Both *Powell* and *Sparks* involved criminal proceedings. In civil cases, because the courts have found no right of counsel except under narrow circumstances, the scope of judicial appointment powers is less clear. The Supreme Court reserved decision on the issue in a case involving interpretation

Not only are lawyers' takings and involuntary-servitude objections unpersuasive as a legal matter, they are unconvincing as a moral claim. Requiring the equivalent of an hour a week of uncompensated assistance hardly seems like slavery. Michael Millemann puts the point directly:

It is surprising—surprising is a polite word—to hear some of the most wealthy, unregulated, and successful entrepreneurs in the modern economic world invoke the amendment that abolished slavery to justify their refusal to provide a little legal help to those, who in today's society, are most like the freed slaves.<sup>45</sup>

The stronger arguments against pro bono obligations involve pragmatic rather than moral concerns. Many opponents who support such obligations in principle worry that they would prove ineffective in practice. A threshold problem involves defining the services that would satisfy a pro bono requirement. If the definition is broad, and encompasses any charitable work for a nonprofit organization or needy individual, then experience suggests that poor people will not be the major beneficiaries.<sup>46</sup> Most lawyers have targeted their pro bono efforts at friends, relatives, or matters designed to attract or accommodate paying clients.<sup>47</sup> A loosely defined requirement is likely to assist predominately middle-class individuals and organizations such as hospitals, museums, and churches. By contrast, limiting a pro bono requirement to low-income clients who have been given preferred status in the ABA's current rule<sup>48</sup> would exclude many crucial public-interest contributions, such as work for environmental, women's rights, or civil rights organizations. Any compromise effort to permit some but not all charitable groups to qualify for pro bono credit would bump up against charges of political bias.

A related objection to mandatory pro bono requirements is that lawyers who lack expertise or motivation to serve under-represented groups will not provide cost-effective assistance.<sup>49</sup> In opponents' view, having corporate lawyers dabble in poverty cases will provide unduly expensive, often incompetent services. The performance of attorneys required to accept uncompensated appointments in criminal cases does not inspire confidence that unwillingly conscripted practi-

---

of federal statutory authority. See *Mallard v. United States District Court*, 490 U.S. 296, 310 (1989).

45. Millemann, *supra* note 36, at 70.

46. See Esther F. Lardent, *Pro Bono in the 1990s*, in *Civil Justice: An Agenda for the 1990s* 423, 434 (Esther F. Lardent ed., 1991).

47. See Philip R. Lochner, Jr., *The No Fee and Low Fee Legal Practice of Private Attorneys*, 9 *Law & Soc'y Rev.* 431, 442-46 (1975).

48. See Model Rules of Professional Conduct Rule 6.1 (1998) (referring to serving "persons of limited means").

49. See Roger C. Cramton, *Mandatory Pro Bono*, 19 *Hofstra L. Rev.* 1113, 1127-31 (1991); Frankel, *supra* note 22, at 890.

tioners would provide acceptable representation.<sup>50</sup> Critics also worry that some lawyers' inexperience and insensitivity in dealing with low-income clients will compromise the objectives that pro bono requirements seek to advance.<sup>51</sup>

Requiring all attorneys to contribute minimal services of largely unverifiable quality cannot begin to satisfy this nation's unmet legal needs. Worse still, opponents argue, token responses to unequal access may deflect public attention from the fundamental problems that remain and from more productive ways of addressing them. Preferable strategies might include simplification of legal procedures, expanded subsidies for poverty law programs, and elimination of the professional monopoly over routine legal services.

Those arguments have considerable force, but they are not as conclusive as critics often assume. It is certainly true that some practitioners lack the skills and motivation necessary to serve those most in need of assistance. As Michael Millemann notes, however, the current alternative is scarcely preferable:

Assume that after four years of college, three years of law school, and varying periods of law practice, some lawyers are "incompetent" to help the poor . . . . All this despairing assumption tells us is that the poor are far less competent to represent themselves, and do not have the readily available access to attaining competency that lawyers have.<sup>52</sup>

To be sure, hiring additional poverty law specialists would be a more efficient way of increasing services than relying on reluctant dilettantes. Unfortunately, the funding increase that would be necessary to meet existing demands does not appear plausible in this political climate. Nor is it likely, as critics claim, that requiring pro bono contributions would divert attention from the problem of unmet needs. Whose attention? Conservatives who have succeeded in curtailing legal-aid funds do not appear much interested in increasing representation for poor people, whether through pro bono service or government-subsidized programs.<sup>53</sup> As earlier discussion suggested, exposing more lawyers to the needs of poverty communities might also increase support for crucial reform efforts.<sup>54</sup>

Moreover, mandatory pro bono programs could address concerns of cost-effectiveness through various strategies. One option is to allow

---

50. See Report of the Committee to Review the Criminal Justice Act, Jan. 29, 1993, reprinted in 52 *Crim. L. Rep.* 2265, 2281-85 (1993).

51. See Sharon Tisher et al., *Bringing the Bar to Justice: A Comparative Study of Six Bar Associations* 132-35 (1977); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 *Stan. L. Rev.* 1395, 1418-20 (1998).

52. Millemann, *supra* note 36, at 62.

53. For a representative overview of conservatives' position, see Jonathan R. Ma-  
cay, *Not All Pro Bono Work Helps the Poor*, *Wall St. J.*, Dec. 30, 1992, at 7.

54. See *supra* text accompanying note 26.

lawyers to buy out of their required service by making a specified financial contribution to a legal-aid program. Another possibility is to give credit for time spent in training. Many voluntary pro bono projects have effectively equipped participants to provide limited poverty-law services through relatively brief educational workshops, coupled with well-designed manuals and accessible backup assistance.<sup>55</sup>

A final objection to pro bono requirements involves the costs of enforcing them. Opponents often worry about the "Burgeoning Bureaucratic Boondoggle" that they assume would be necessary to monitor compliance.<sup>56</sup> Even with a substantial expenditure of resources, it would be extremely difficult to verify the amount of time that practitioners reported for pro bono work or the quality of assistance that they provided.

Supporters of mandatory pro bono programs have responded with low-cost enforcement proposals that would rely heavily on the honor system.<sup>57</sup> In the absence of experience with such proposals, their effectiveness is difficult to assess. There is, however, a strong argument for attempting to impose pro bono requirements even if they cannot be fully enforced. At the very least, such requirements would support lawyers who want to participate in public-interest projects but work in organizations that have failed to provide adequate resources or credit for these efforts. Many of the nation's most profitable law firms and leading corporate employers fall into that category.<sup>58</sup> They could readily afford a greater pro bono commitment and a formal requirement might nudge them in that direction. As to lawyers who have no interest in public-interest work, a rule that allowed financial contributions to substitute for direct service could materially assist underfunded legal-aid organizations.

However the controversy over mandatory pro bono service is resolved, there is ample reason to encourage greater voluntary contributions. Lawyers who want to participate in public-interest work are likely to do so more effectively than those who are fulfilling an irksome obligation. How best to encourage a voluntary commitment to pro bono service demands closer scrutiny.

---

55. See John Greenya, *Partners in Justice: Mentoring in the Pro Bono Program*, Wash. Law., May-June 1997, at 26, 26-28 (describing the mentoring program of the Law Firm Pro Bono Clinic of the D.C. Bar's Public Service Activities Corporation); Eileen J. Williams, *PSAC in Action*, Wash. Law., May-June 1996, at 36, 36-38 (describing the training provided for attorney and paralegal volunteers).

56. See Ted R. Marcus, *Letter to the Editor*, Cal. Law., Aug. 1993, at 12; see also Cramton, *supra* note 49, at 1128 (raising the issue of administrative difficulties); Luban, *Mandatory Pro Bono*, *supra* note 23, at 280 (stating that enforcement "would require an elephantine bureaucracy").

57. See Luban, *Mandatory Pro Bono*, *supra* note 23, at 280-82; Marc Galanter & Thomas Palay, *Let Firms Buy and Sell Credit for Pro Bono*, Nat'l L.J., Sept. 6, 1993, at 17.

58. See David E. Rovella, *Can the Bar Fill the LSC's Shoes?*, Nat'l L.J., Aug. 5, 1996, at A1.

## II. THE ORIGINS OF PRO BONO COMMITMENTS

Despite the substantial scholarly literature and bar resources focusing on pro bono contributions, surprisingly little attention centers on their origins. Few systematic attempts have been made to explore the roots of commitment among public-interest and poverty lawyers, and virtually none have addressed pro bono participants.<sup>59</sup> Nor have there been significant efforts to draw on research concerning altruism and volunteer activity among the general public for insights relevant to the legal profession.

This Essay is a step toward filling that void. The discussion that follows aims to increase our understanding of several key issues. What are the motivations and characteristics of American volunteers? What factors most influence their giving patterns? To what extent can experiences in postgraduate education affect later public-service contributions? What strategies are most likely to foster pro bono commitments among lawyers?

Efforts to account for charitable activity confront a threshold question: To what extent is such activity altruistic? Underlying that question are more basic issues concerning the meaning and possibility of altruism. As these issues cast light on the motivations of lawyers and law students, a brief overview seems useful.

According to conventional definitions, altruistic behavior involves conduct that seeks to promote the interests of others, rather than a person's own interests.<sup>60</sup> That definition has, however, provoked longstanding debates. For example, many economists assume that all rational action aims, in some sense, to maximize individual self-interest. When people attempt to benefit another person, it is because they derive some pleasure or satisfaction from that conduct.<sup>61</sup> The rational choice branch of economics views such self-interested actions as efficient, and the ethical egoism branch of philosophy considers them morally appropriate.<sup>62</sup> According to these theories, individuals are the best judges of their own interests, and their pursuit of those interests will result in the greatest good for the greatest number.

Such claims are problematic on both normative and factual grounds. As an ethical matter, egoism is not a satisfactory generaliz-

---

59. For the most comprehensive effort and discussion of the absence of such research, see Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in *Cause Lawyering: Political Commitments and Professional Responsibilities* 31, 38 (Austin Sarat & Stuart Scheingold eds., 1998).

60. See Thomas Nagel, *The Possibility of Altruism* 79 (1970); Lawrence Blum, *Altruism*, in 1 *Encyclopedia of Ethics* 35 (Lawrence C. Becker & Charlotte B. Becker eds., 1992).

61. See David Gauthier, *Morals by Agreement* 3-4 (1986); Dennis C. Mueller, *Public Choice II*, at 1-2 (1989).

62. See Joel Feinberg, *Psychological Egoism*, in *Reason and Responsibility* 529, 529 (Joel Feinberg ed., 4th ed. 1978).

able principle. In many contexts, individuals will not be well served by having everyone else act solely out of self-interest. An obvious illustration involves victims facing physical peril through no fault of their own. It does not advance their personal welfare or the common good to have others refrain from assistance that would result in only minor inconvenience. Moreover, as a descriptive matter, to assume that all efforts to help others reflect self-interest either fails to account for much human activity or requires such a broad definition of interest that the claim becomes tautological. Any act can be viewed as serving the actor's purposes; why else would someone act? Such a sweeping definition of interest is inconsistent with common usage and ordinary moral intuitions.

For example, it is difficult to see how gifts to a charity serving unknown recipients benefit the donor, unless benefit is defined to include the moral satisfaction that comes from aiding others. Yet as many theorists have noted, there is a relevant moral distinction between actions motivated by intrinsic rather than extrinsic rewards.<sup>63</sup> An anonymous gift to help starving children overseas stands on different ethical footing than an alumni contribution for a building named after the donor. Both are charitable, but only the first seems wholly altruistic.

However, as that last example suggests and psychological research confirms, motivations for assisting others are usually mixed.<sup>64</sup> For that reason, many theorists avoid the term "altruism" and refer instead to "prosocial" behavior or voluntary assistance.<sup>65</sup> For similar reasons, it makes sense to define pro bono work broadly and to consider the full range of factors that can motivate such activity. As noted earlier, we lack systematic research concerning lawyers' pro bono work. However, the limited evidence available indicates that attorneys' public-service contributions are influenced by the same range of intrinsic and extrinsic factors that account for voluntary assistance by other individuals.<sup>66</sup> Intrinsic factors include the personal characteristics, values, and attitudes that influence decisions to help others.

---

63. See Jon Elster, *Selfishness and Altruism*, in *Beyond Self-Interest* 44, 44-52 (Jane J. Mansbridge ed., 1990).

64. See Neera Kapur Badhwar, *Altruism Versus Self-Interest: Sometimes a False Dichotomy*, in *Altruism* 90, 93 (Ellen Frankel Paul et al. eds., 1993); Elster, *supra* note 63, at 44-52; Jane J. Mansbridge, *On the Relation of Altruism and Self-Interest*, in *Beyond Self-Interest*, *supra* note 63, at 133, 133.

65. See Margret S. Clark, *Editor's Introduction to Prosocial Behavior* 7 (Margaret S. Clark ed., 1991); *The Development of Prosocial Behavior* 6 (Nancy Eisenberg ed., 1982).

66. See David Rosenhan, *The Natural Socialization of Altruistic Autonomy*, in *Altruism and Helping Behavior: Social Psychological Studies of Some Antecedents and Consequences* 251, 251-52 (Jacqueline R. Macaulay & Leonard Berkowitz eds., 1970) (discussing motivations for people in general); Lochner, *supra* note 47, at 442-48 (listing forces that motivate lawyers); Reuben, *supra* note 5, at 73-74 (discussing motivations for lawyers).

Extrinsic factors involve the social rewards, reinforcement, costs, and other situational characteristics that affect voluntary assistance.

Research on such assistance builds on varied methodological approaches. Some data emerge from large-scale studies comparing Americans who make significant charitable contributions with those who do not.<sup>67</sup> Qualitative studies of volunteers yield other insights.<sup>68</sup> Psychological research that explores prosocial behavior in experimental circumstances helps identify the situational factors that may contribute to voluntary assistance.<sup>69</sup> Finally, child development studies suggest explanations for the personal traits that affect giving behavior.<sup>70</sup> Taken together, this research yields common findings that may inform our understanding of lawyers' motivations.

Of the intrinsic factors linked to volunteer activity, two personal characteristics appear most significant: a capacity for empathy and a sense of human or group solidarity.<sup>71</sup> Volunteers generally seem able to identify with others and to see themselves and those whom they help as part of a common human condition. A sense of civic obligation and identification with the group giving or receiving aid also can be an important motivation.<sup>72</sup> Lawyers who assist civil rights, women's rights, and community organizations often report a feeling of responsibility to give something back to others with whom they share common bonds.<sup>73</sup>

For many individuals, voluntary assistance is also a way to express deeply felt ethical and religious commitments.<sup>74</sup> Volunteers' self es-

---

67. See Virginia A. Hodgkinson et al., *Giving and Volunteering in the United States: Findings from a National Survey* 12 (1996).

68. For discussions of volunteers' motivations, see Robert Coles, *The Call of Service: A Witness to Idealism* 91-94 (1993); Eva Fogelman, *Conscience and Courage* 155-60 (1994); and Samuel P. Oliner & Pearl M. Oliner, *The Altruistic Personality: Rescuers of Jews in Nazi Europe* 165-67, 173-75 (1988).

69. See William Damon, *The Moral Child: Nurturing Children's Natural Moral Growth* 116-20 (1988) (discussing the role of affective, cognitive, and social forces in developing prosocial commitments in children); Alfie Kohn, *The Brighter Side of Human Nature: Altruism and Empathy in Everyday Life* 85-97 (1990) (discussing the psychological, economic, and ideological factors influencing prosocial behavior in children).

70. See Joan E. Grusec, *The Socialization of Altruism*, in *Prosocial Behavior* 9, 13 (Margaret S. Clark ed., 1991) (discussing children's natural altruistic proclivities).

71. See Oliner & Oliner, *supra* note 68, at 165-67, 173-75; Martin L. Hoffman, *Empathy and Prosocial Activism*, in *Social and Moral Values: Individual and Societal Perspectives* 65, 65 (Nancy Eisenberg et al. eds., 1989); Menkel-Meadow, *supra* note 59, at 39.

72. See David Horton Smith, *Determinants of Voluntary Association Participation and Volunteering: A Literature Review*, 23 *Nonprofit & Voluntary Sector Q.* 243, 251-52 (1994).

73. See David B. Wilkins, *Two Paths to the Mountain Top? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 *Stan. L. Rev.* 1981, 1999-2002 (1993).

74. See Coles, *supra* note 68, at 91 (discussing ethical motivations); E. Gil Clary & Mark Snyder, *A Functional Analysis of Altruism and Prosocial Behavior: The Case of*



teem and moral identity often become bound up in efforts to help others.<sup>75</sup>

If the goal is encouraging such efforts, the question then becomes how best to foster these underlying motivations. Although social science research suggests a number of strategies, it yields no clear consensus about the extent of their influence or their relative importance. Some evidence suggests that all humans have an innate capacity for empathy. Sociobiologists theorize that certain basic altruistic responses have evolved through natural selection.<sup>76</sup> Such theories are consistent with psychological research finding that even infants and toddlers respond empathetically to others' distress or need.<sup>77</sup>

It is clear, however, that adults vary in their ability to empathize, and that childhood socialization encourages voluntary service later in life.<sup>78</sup> Students who participate in volunteer activities and observe parents who also participate are much more likely to volunteer as adults than individuals who lack such experiences.<sup>79</sup> Charitable conduct is also greater by those who observe such conduct by someone outside the family, particularly if the person is powerful or admired.<sup>80</sup> In this, as in other contexts, actions speak louder than words and example works better than exhortation.<sup>81</sup>

Observation of other people's behavior can also discourage volunteer assistance. As bystander intervention studies demonstrate, individuals are less likely to help someone in distress if others are present and fail to offer aid. Such indifference serves both to diffuse responsi-

---

*Volunteerism*, in *Prosocial Behavior*, *supra* note 70, at 119, 125 (discussing religious motivations).

75. See Jerzy Karylowski, *Two Types of Altruistic Behavior: Doing Good to Feel Good or to Make the Other Feel Good*, in *Cooperation and Helping Behavior: Theories and Research* 397, 410 (Valerian J. Derlega & Janusz Grzelak eds., 1982); cf. Janusz Reykowski, *Motivation of Prosocial Behavior*, in *Cooperation and Helping Behavior: Theories and Research*, *supra*, at 355, 358-62 (discussing the role of self-actualizing motivations).

76. See Robert M. Axelrod, *The Evolution of Cooperation* 88-97 (1984); James Q. Wilson, *The Moral Sense* 40-44 (1993); Edward O. Wilson, *The Genetic Evolution of Altruism*, in *Altruism, Sympathy, and Helping: Psychological and Sociological Principles* 11, 11-12 (Lauren Wispé ed., 1978).

77. See Grusec, *supra* note 70, at 13; Abraham Sagi & Martin L. Hoffman, *Empathic Distress in the Newborn*, 12 *Developmental Psychol.* 175, 175-76 (1976).

78. See Hodgkinson et al., *supra* note 67, at 12-13; Grusec, *supra* note 70, at 9, 13.

79. See Hodgkinson et al., *supra* note 67, at 12-13, 87-88; E. Gil Clary & Jude Miller, *Socialization and Situational Influences on Sustained Altruism*, 57 *Child Dev.* 1358, 1359, 1365-66 (1986); Rosenhan, *supra* note 66, at 260-63.

80. See Hodgkinson et al., *supra* note 67, at 87; Leonard Berkowitz, *Social Norms, Feelings and Other Factors Affecting Helping and Altruism*, in 6 *Advances Experimental Social Psychology* 63, 78 (Leonard Berkowitz ed., 1972); Jacqueline R. Macaulay, *A Skill for Charity*, in *Altruism and Helping Behavior: Social Psychological Studies of Some Antecedents and Consequences*, *supra* note 66, at 43, 43-44.

81. See Kohn, *supra* note 69, at 91; James H. Bryan et al., *Words and Deeds About Altruism and the Subsequent Reinforcement Power of the Model*, 42 *Child Dev.* 1501, 1505-07 (1971); Grusec, *supra* note 70, at 20-22.

bility for the failure to intervene and to suggest that intervention may not be necessary or appropriate.<sup>82</sup> Some evidence suggests, however, that a legal requirement to provide assistance may diminish the influence of bystanders' inaction; individuals perceive a failure to help as more reprehensible if it is also illegal.<sup>83</sup>

Other extrinsic factors also influence the likelihood of volunteer assistance. The rewards and costs of such involvement play the most obvious role. Volunteer work presents opportunities to gain knowledge, skills, and personal contacts. It may also enhance a person's reputation with peers and potential employers. Such possibilities generally increase the attractiveness of volunteering.<sup>84</sup> Conversely, participation is likely to decrease where costs are high in relation to benefits because of the time required, the controversial nature of the activity, and other disadvantages of involvement.<sup>85</sup>

The influence of these factors on voluntary assistance is not, however, quite as straightforward as simple cost-benefit analysis might suggest. Social science research often finds that individuals who receive praise or money for their assistance are less likely to help in other settings than individuals who believe that their actions reflect altruistic concerns.<sup>86</sup> As one study concluded, "extrinsic incentives can . . . decrease intrinsic motivation to help others. A person's kindness, it seems, cannot be bought."<sup>87</sup> So too, research on civil rights activists found that individuals motivated by internalized values were more likely to make substantial and sustained contributions than individuals responding to extrinsic rewards.<sup>88</sup>

Other situational factors apart from costs and benefits also affect volunteer assistance. Individuals are more likely to contribute if they

---

82. Over one-hundred studies have analyzed this effect since the classic study by Bibb Latané and John M. Darley, *The Unresponsive Bystander: Why Doesn't He Help?* 38, 41, 90 (1970). See Kohn, *supra* note 69, at 67-68.

83. See Harry Kaufmann, *Legality and Harmfulness of a Bystander's Failure to Intervene as Determinants of Moral Judgment*, in *Altruism and Helping Behavior: Social Psychological Studies of Some Antecedents and Consequences*, *supra* note 66, at 77, 81.

84. See Coles, *supra* note 68, at 93-94; Clary & Snyder, *supra* note 74, at 125; Menkel-Meadow, *supra* note 59, at 59 n.57; Smith, *supra* note 72, at 251-52.

85. See Mansbridge, *supra* note 64, at 137.

86. See Kohn, *supra* note 69, at 202-03; Clary & Miller, *supra* note 79, at 1367; Richard A. Fabes et al., *Effects of Rewards on Children's Prosocial Motivation: A Socialization Study*, 25 *Developmental Psychol.* 509, 509-15 (1989); Joan E. Grusec & Theodore Dix, *The Socialization of Prosocial Behavior: Theory and Reality*, in *Altruism and Aggression: Biological and Social Origins* 218, 221 (Carolyn Zahn-Waxler et al. eds., 1986); Joan E. Grusec & Erica W. Redler, *Attribution, Reinforcement, and Altruism: A Developmental Analysis*, 16 *Developmental Psychol.* 525, 526-29 (1980).

87. C. Daniel Batson et al., *Buying Kindness: Effect of an Extrinsic Incentive for Helping on Perceived Altruism*, 4 *Personality & Soc. Psychol. Bull.* 86, 90 (1978); see also Richard M. Titmuss, *The Gift Relationship: From Human Blood to Social Policy* 195-208 (1971) (finding that offering payment for giving blood reduces unpaid donations).

88. See Rosenhan, *supra* note 66, at 267.

feel competent to help, if they have sufficient time and resources, and if the group they are assisting seems effective in its efforts.<sup>89</sup> Those who receive a specific request for aid have much higher rates of participation than those who do not.<sup>90</sup> The chances of involvement similarly increase when individuals are asked to focus on others' needs and their own ethical obligations, or when they are given some direct personal exposure to the misery of others.<sup>91</sup> Face-to-face experience with poverty-related problems is generally more effective in inspiring service than abstract appeals. As Arthur Koestler put it: "Statistics don't bleed."<sup>92</sup>

Taken together, these research findings offer some useful insights about pro bono programs for lawyers and law students. As a threshold matter, the capacities of even the best designed programs should not be overstated. By the time individuals launch a legal career, it is too late to alter certain personal traits and experiences that influence public-service motivations. Such factors include a willingness to empathize, a sense of civic or group responsibility, and childhood exposure to volunteers and volunteer work. If these formative influences are lacking, pro bono programs may have limited impact.

Yet while the potential effectiveness of such programs should not be overestimated, neither should it be undervalued. The preceding research suggests that well-designed strategies by law schools, bar associations, and law firms could significantly affect pro bono commitments. A request for involvement, coupled with an array of choices that match participants' interests with unmet needs, is likely to increase participation. Providing direct exposure to the human costs of social problems could prove similarly important. Pro bono commitments can be further reinforced by educational efforts that focus attention on the urgency of unmet needs and on the profession's obligation to respond. Enlisting well-respected practitioners and faculty as mentors and role models could assist those efforts. Adequate training can help ensure that individuals feel competent to offer services; it can also reward participation by providing skills that are of value in other practice settings. Other incentives could include awards, publicity, recognition on academic transcripts, and credit towards billable-hour requirements. The point of all these efforts should be to help participants see pro bono service as a crucial part of their professional education and identity.

---

89. See Nancy Eisenberg, *Altruistic Emotion, Cognition, and Behavior* 207-08 (1986); Pearl M. Oliner, *Legitimizing and Implementing Prosocial Education*, 13 *Humboldt J. Soc. Rel.* 389, 401 (1986); Smith, *supra* note 72, at 251.

90. See Hodgkinson et al., *supra* note 67, at 109-10; Oliner & Oliner, *supra* note 68, at 135-36; Smith, *supra* note 72, at 252.

91. See Kohn, *supra* note 69, at 71; Hoffman, *supra* note 71, at 82; Reykowski, *supra* note 75, at 358-63.

92. Arthur Koestler, *On Disbelieving Atrocities*, in *The Yogi and the Commissar* 92 (Danube ed. 1965).

A more complicated question is whether a mandatory or voluntary program would better serve this goal. On this point, social science research yields no clear answers, although it clarifies relevant tradeoffs. A pro bono requirement offers several advantages. Most obviously, such a requirement would make failure to contribute services morally illegitimate, and reinforce the message that such contributions are not only a philanthropic opportunity, but also a professional obligation. Institutionalizing that obligation could diminish the numbers and adverse effects of apathetic bystanders. So too, at least some individuals who would participate under a mandatory but not voluntary program are likely to become converts to the cause and provide assistance beyond what a minimum requirement would demand.

The potential disadvantages of compelling service are equally clear. By diminishing participants' sense that they are acting for altruistic reasons, a pro bono requirement could erode commitment and discourage some individuals from contributing above the prescribed minimum. If adequate programs are not in place to train participants, accommodate their interests, and monitor their performance, the results could be unsatisfying for clients as well as participants.

Tradeoffs also exist under voluntary pro bono initiatives. Their advantages are readily apparent. By reinforcing participants' sense that they are acting out of principle rather than obligation, such programs may foster deeper commitments than mandatory approaches. Those who volunteer also are likely to pick an area of practice where they are competent or wish to become so; those compelled to serve may lack adequate choices or motivation.

Yet, if purely elective programs fail to attract widespread participation, they undermine the message that pro bono service is a professional responsibility. Additionally, if programs respond by adding extrinsic rewards for public service, at some point they run the risk of undermining internal commitments. Moreover, the absence of a formal requirement may leave institutions without sufficient incentive to provide appropriate pro bono resources or credit. Finally, some individuals who might benefit most from direct exposure to unmet needs may be the least inclined to volunteer.

How these tradeoffs will balance out in particular contexts is difficult to predict. Any adequate assessment would require much more comparative data about mandatory and voluntary programs than is currently available. As prior discussion has indicated, however, our limited experience with small-scale pro bono requirements for practicing attorneys does not suggest that voluntary participation declines.<sup>93</sup> Nor does it appear that external reinforcement, such as awards and credit, has dampened enthusiasm for pro bono contributions. To the

---

93. See *supra* note 36 and accompanying text.

contrary, anecdotal evidence indicates that recognition of volunteer service by lawyers and law firms helps deepen commitment.<sup>94</sup>

Law school pro bono programs can both benefit from and shed further light on this body of research. The differences among these programs yield at least some basis for comparative evaluations. Moreover, the failure of most institutions to sustain widespread pro bono participation suggests the need for greater attention to the law school experience.

### III. THE RATIONALE FOR LAW SCHOOL PRO BONO PROGRAMS

The primary justifications for pro bono service by law students parallel the justifications for pro bono service by lawyers. Most leaders in legal education agree that such service is a professional responsibility and that their institutions should prepare future practitioners to assume it. Ninety-five percent of deans responding to the AALS survey agreed that “[i]t is an important goal of law schools to instill in students a sense of obligation to perform pro bono work during their later careers.”<sup>95</sup> During the formative stages of their professional identity, future lawyers need to develop the skills and values that will sustain commitments to public service.<sup>96</sup>

So too, many law faculties share the enthusiasm for school-based public-service programs that are gaining support among other educators. Such programs share a common premise: that students benefit in unique and valuable ways from community involvement, particularly if it is coordinated with their academic experience.<sup>97</sup> On that assumption, a growing number of secondary schools are requiring community service, and many colleges and graduate schools are expanding support for such service as part of their curricular and extra-

---

94. Profiles of the most generous firms generally indicate substantial recognition of their efforts by bar associations and public-interest organizations. See *Directory of Law Firm Pro Bono Programs*, Nat'l L.J., Aug. 24, 1998, at C17; see also Lardent, *Pro Bono Programs*, *supra* note 36, at 85 (noting the impact of *American Lawyer* pro bono rankings).

95. White, *supra* note 16, at 9.

96. See Stephen F. Befort & Eric S. Janus, *The Role of Legal Education in Instilling an Ethos of Public Service Among Law Students: Towards a Collaboration Between the Profession and the Academy on Professional Values*, 13 *Law & Ineq.: J. Theory & Prac.* 1, 7 (1994); David Hall, *Raising the Bar: A Campaign to Transform the Legal Profession*, 22 *J. Legal Prof.* 7, 9-10 (1998); Thomas J. Schoenherr et al., *The Fordham Model: Student Initiated Projects for the Public Interest* 1-4 (1998) (unpublished manuscript, on file with *Fordham Law Review*).

97. Some commentators distinguish between “community service learning” and “community service volunteering.” The former term refers to service that is directly integrated into students’ course work. The latter term refers to volunteer activity that is not part of the formal curriculum. See Daniel F. Perkins & Joyce Miller, *Why Community Service and Service-Learning? Providing Rationale and Research*, *Democracy & Educ.*, Fall 1994, at 11, 11-12. See generally 45 C.F.R. § 2510.20 (1997) (providing a definition of community service applicable to the National and Community Service Act of 1990).

curricular offerings.<sup>98</sup> Supporters of these requirements believe that public-interest experiences encourage future public service and that they have independent educational value.

Among law students, evidence for the first assertion is thin but consistent. At Tulane, the first school to impose pro bono requirements, two-thirds of graduates reported that participation in public service had increased their willingness to participate in the future, and about three-quarters agreed that they had gained confidence in their ability to represent indigent clients.<sup>99</sup> At other schools, between three-fourths and four-fifths of students who participated in mandatory pro bono programs also indicated that their experience had increased the likelihood that they would engage in similar work as practicing attorneys.<sup>100</sup> No systematic studies have attempted, however, to corroborate such claims by comparing the amount of pro bono work done by graduates who were subject to law school requirements and graduates who were not.<sup>101</sup>

Evidence concerning community-service programs outside of law schools is similarly limited. Surveys of participants generally find an increase in students' reported sense of social responsibility and their willingness to continue working for equal opportunity or helping those in need.<sup>102</sup> But no research has tested those claims by analyzing post-graduate public service. All we know is that youthful involvement in volunteer activity increases the likelihood of adult participation.<sup>103</sup> We lack information about the relative impact of various types of

---

98. See Jeremy Cohen, *Matching University Mission with Service Motivation: Do the Accomplishments of Community Service Match the Claims?*, 1 Mich. J. Community Service Learning 98, 98 (1994); Dennis D. Hirsh & Suzanne Goldsmith, *Community Service Builds Citizenship*, Nat'l L.J., Feb. 5, 1996, at A19; Dirk Johnson, *Volunteer: Now That's an Order*, N.Y. Times, Sept. 13, 1998, at E2; Ben Wildavsky, *Is There Harm in Having to do Good?: Mandatory Volunteerism*, Am. Enterprise, Sept./Oct. 1991, at 64, 67.

99. See John Kramer, *Mandatory Pro Bono at Tulane Law School*, NAPIL Connection Close-Up (National Ass'n for Public Interest Law), Sep. 30, 1991, at 1, 1-2 [hereinafter Kramer, *Mandatory Pro Bono*].

100. See Committee on Legal Assistance, *Mandatory Law School Pro Bono Programs: Preparing Students to Meet Their Ethical Obligations*, 50 Record 170, 176 (1995); Focus Group Interview Notes, *supra* note 14 (comments of Linda Speed in Chicago, June 24-25, 1998).

101. At this point, the only efforts along these lines have been surveys of Louisville University and University of Pennsylvania alumni who had taken part in mandatory public-service programs. Both had too small a number of returned questionnaires to provide generalized findings. Neither attempted to compare the work done by graduates who were subject to requirements and those who were not. See Kimberly M. Allen, University of Pa. Pub. Serv. Program, Alumni Survey 1-2 (1994) (unpublished manuscript, on file with author); Focus Group Interview Notes, *supra* note 14.

102. See Diane P. Hedin, *The Power of Community Service*, 37 Proc. Acad. Pol. Sci. 201, 209 (1989); Gregory B. Markus et al., *Integrating Community Service and Classroom Instruction Enhances Learning: Results from an Experiment*, 15 Service Learning 410, 413 (1993).

103. See *supra* text accompanying notes 78-80.

mandatory or voluntary community-service programs in and outside of schools.<sup>104</sup>

From the limited evidence available, the safest generalization seems to be that positive experience with pro bono work as a student will at least increase the likelihood of similar work later in life. Such experience can also break down the rigid distinctions that prevail in many law schools between students who are preparing for public-interest careers and those who are not. These "on-the-boat or off-the-boat" dichotomies send the wrong message about integrating private practice and public service.

The rationale for pro bono programs in law school does not, however, rest solely on these benefits. Whatever their effects on later public service, such programs have independent educational value. Like other forms of clinical and experiential learning, participation in public service helps bridge the gap between theory and practice, and enriches understanding of how law relates to life. For students as well as beginning lawyers, pro bono work often provides valuable training in interviewing, negotiating, drafting, problem solving, and working with individuals from diverse backgrounds.<sup>105</sup> Aid to clients of limited means exposes students to the urgency of unmet needs and the law's capacity to cope with social problems. As former Tulane Law School Dean John Kramer notes, pro bono work can help "sensitize professionals to worlds they usually ignore."<sup>106</sup> It also can increase their awareness of ethical issues and the human costs of professional inattention or incompetence.<sup>107</sup>

So too, pro bono programs can provide other practical benefits to law students and law schools. For many participants, public service offers valuable career information and contacts. Students can get a better sense of their interests and talents, as well as a focus for further coursework and placement efforts. Pro bono experience also may encourage more individuals to press potential employers for information about their public-interest opportunities. Too many students who re-

---

104. Cohen, *supra* note 98, at 103; Jerry Miller, *Linking Traditional and Service Learning Model Courses: Outcome Evaluations Utilizing Two Pedagogically Distinct Models*, 1 Mich. J. Community Service Learning 29, 29-35 (1994).

105. See Law Sch. Affinity Group, *From the Classroom to the Community: Enhancing Legal Education Through Public Service and Service Learning* 5 (n.d.); Howard S. Erlanger & Gabrielle Lessard, *Mobilizing Law Schools in Response to Poverty: A Report on Experiments in Progress*, 43 J. Legal Educ. 199, 224 (1993); Focus Group Interview Notes, *supra* note 14 (San Francisco Interviews).

106. Kramer, *Mandatory Pro Bono*, *supra* note 99, at 1.

107. See Law Sch. Affinity Group, *supra* note 105, at 5; Erlanger & Lessard, *supra* note 105, at 219. For an argument that professional responsibility is best taught in settings involving direct client contact, see David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 Geo. J. Legal Ethics 31, 64-85 (1995).

port interest in such opportunities now lack an adequate basis for comparison.<sup>108</sup>

For law schools, pro bono programs can prove beneficial in several respects apart from their educational value. Most obviously, such programs demonstrate a tangible commitment to the community. Each year, at schools with well-developed programs, students provide as much as 16,000 hours of free legal assistance to underserved groups.<sup>109</sup> Such assistance offers opportunities for cooperation with local bar organizations and for outreach to alumni who can become sources, sponsors, and supervisors for student projects. Successful projects can contribute to law school efforts in student recruitment, public relations, and development. In the AALS survey, over ninety percent of deans agreed that pro bono activities had provided valuable goodwill in the community, and two-thirds felt that such work had proven similarly valuable with alumni.<sup>110</sup>

Given this range of benefits, it is hard to find anyone who opposes law school pro bono programs, at least in principle. In practice, however, considerable disagreement centers on the form these programs should take and on the priority they should assume in a world of scarce institutional resources.

#### IV. THE STRUCTURE OF LAW SCHOOL PRO BONO PROGRAMS

Law schools support a broad variety of pro bono activities. To gain information about current programs, the AALS Commission asked deans whether their schools offered any opportunities, apart from in-house faculty-staffed clinics, for students to "provide uncompensated legal or other services to individuals or groups or participate in public policy matters or initiatives."<sup>111</sup> By that definition, ninety-two percent of law schools had pro bono programs.<sup>112</sup>

Such programs vary considerably in scope and structure. As noted earlier, about ten percent of schools make pro bono service mandatory, although they differ widely in what counts as service and how much is required. At one end of the spectrum are schools with

---

108. See Focus Group Interview Notes, *supra* note 14 (San Francisco Interviews). At Stanford, although over a majority of third-year students reported interest in pro bono opportunities, only half knew anything about their future employer's pro bono policies and much of their information was inadequate. See Eric J. Lassen, *Public Good, Private Practice: A Study of Pro Bono in American Law Firms* 19 (May 1998) (unpublished manuscript, on file with author).

109. See Committee on Legal Assistance, *supra* note 100, at 174-75, 177; Neta Ziv, *Law Schools Fostering a Commitment to Public Service—What More Can Be Done?* 15 n.52 (1997) (unpublished manuscript, on file with author).

110. See Law Sch. Affinity Group, *supra* note 105, at 3-4; White, *supra* note 16, at 5-6.

111. White, *supra* note 16, at 1.

112. See *id.* at 2-3. The ABA's 1994 survey found that 59% of schools reported pro bono programs, but that others offered opportunities apart from a formal program. See Powers, *supra* note 12, at 1-2.



fairly minimal demands, such as ten or twenty hours, which can include nonlegal as well as legal assistance. At the other end are schools that demand about forty to sixty hours of law-related service.<sup>113</sup>

Schools also have different policies toward allowing externships or clinical courses to help satisfy the pro bono requirement. Some policies exclude any work done for academic credit on the theory that pro bono means uncompensated assistance. Other policies define all public-service placements as pro bono on the theory that no work done to meet a graduation requirement is uncompensated in a pure sense and that students should not be deterred from activities that are integrated with academic coursework.<sup>114</sup>

Schools also differ in the kinds of substantive work that complies with mandatory pro bono policies. Some use an expansive definition, and include any services for nonprofit, public-interest, or government organizations. Other policies are more restrictive and require that the work assist indigent individuals.<sup>115</sup> A third group of mandatory programs fall somewhere in between, and specify a variety of public-service placements from which students can choose.<sup>116</sup>

Voluntary pro bono programs are equally varied. Some are highly structured, generously financed, and relatively well subscribed. Schools with these programs typically have a broad array of clinical courses and externships, as well as an active public-service office. Fordham Law School is an example. Its Public Interest Resource Center assists eleven student-run organizations providing legal and nonlegal services.<sup>117</sup> Clinics and externships offer community-service placements, and a fellowship program assists students who are preparing for public-service careers.<sup>118</sup> By contrast, other schools provide relatively little support for pro bono work. Student involvement is often limited to traditional charitable activities requiring fairly minimal time commitments and few legal skills. Common examples include blood or food drives, tutoring programs, food kitchens, and fundraising events for local community organizations or for the school's own summer public-interest fellowships.<sup>119</sup>

Most schools fall somewhere in the middle. Even where administrative support is limited, many students display extraordinary initiative and commitment. Despite heavy demands from school, work, and

---

113. See *Comparison Chart of Pro Bono Programs*, NAPIL Connection Close-Up (National Association for Public Interest Law), Sept. 30, 1991, at 7, 7-8 [hereinafter *Comparison Chart*]; Ziv, *supra* note 109, at 15 n.52.

114. See Jane Easter Bahls, *Doing Good Time: Should Pro Bono Be Mandatory in Law School*, *Student Law.*, Oct. 1992, at 15, 18.

115. *Comparison Chart*, *supra* note 113, at 7-8.

116. See Ziv, *supra* note 109, at 17.

117. See Schoenherr et al., *supra* note 96, at 4-5.

118. See *id.* at 6.

119. See Commission on Pro Bono and Pub. Serv. Opportunities in Law Schs., *Questionnaires* (n.d.) (on file with author).

family, law students devote thousands of unpaid hours to a wide range of projects. They assist low-income clients on issues including immigration, domestic violence, capital punishment, unemployment compensation, welfare, bankruptcy, wills, health care, social security, and juvenile justice. Law schools contribute to virtually all of the leading public-interest organizations in areas such as civil rights, civil liberties, environmental law, women's rights, and gay/lesbian rights.

Yet, considerable talent remains untapped. Although few schools appear to collect data on the amount of voluntary service or the percentage of students who make significant contributions, impressionistic accounts from knowledgeable sources suggest ample room for improvement.<sup>120</sup> Administrators who participated in the AALS Commission interviews estimated that only about one-quarter to one-third of the law students at their schools volunteered for service, and average time commitments were quite modest. Some student involvement remains at token levels and seems intended primarily as resume padding.<sup>121</sup>

Not all faculty seem interested in setting a better example. In the AALS law school survey, only about half of the administrators of pro bono programs agreed that "[m]any of the faculty [at their] school provide good role models to the students by engaging in uncompensated public-service work themselves."<sup>122</sup> About one-fifth disagreed and one-third were unsure.<sup>123</sup> As some administrators added in followup interviews, if *they* were ignorant about professors' involvement, most students probably were as well. Even administrators who had reported that "many" faculty were good role models also believed that many faculty were not.<sup>124</sup> This should come as no surprise in light of the limited institutional incentives for pro bono service, particularly for clients of limited means. Most law schools do not even have a policy requiring or encouraging faculty to engage in such work.<sup>125</sup>

Nor does expanding pro bono participation appear to be a priority at most institutions. About two-thirds of the deans responding to the

---

120. My own efforts to find such information proved unsuccessful and the few published references do not quantify the amount of pro bono service contributions provided. See Bahls, *supra* note 114, at 19 (noting that almost two-thirds of students at University of South Carolina Law School engaged in voluntary service, but failing to disclose exactly for how much time). Some administrators believe that such quantitative information is not a good measure of a program's value. See Pamela DeFanti Robinson, *Insurmountable Opportunities or Innovative Choices: The Pro Bono Experience at the University of South Carolina School of Law*, 42 S.C. L. Rev. 959, 971 (1991).

121. See Focus Group Interview Notes, *supra* note 14 (Chicago and Los Angeles Interviews).

122. See White, *supra* note 16, at 42.

123. See *id.*

124. See Focus Group Interview Notes, *supra* note 14 (Chicago and San Francisco Interviews).

125. See White, *supra* note 16, at 10.

AALS survey were satisfied with the level of pro bono participation by faculty and students at their schools.<sup>126</sup> Given the absence of involvement among most students and the absence of data concerning faculty, that level of satisfaction is itself somewhat unsatisfying. It is, however, scarcely surprising. Why should deans see a problem if no one else does?

And at most institutions, no one is complaining. Nor is the extent of any problem plainly visible. Neither ABA accreditators nor AALS membership-review teams ask for specific information on pro bono contributions by students and faculty. As noted earlier, there appears little institutional interest in collecting it. The absence of data on non-participation makes it easy to draw unduly positive generalizations from examples of involvement that are easily visible and especially vivid. High-profile cases by faculty or student clinics, or widespread participation in fundraising events for public-interest activities are likely to skew perceptions in positive directions. That tendency is reinforced by natural cognitive biases. When an event is particularly vivid, individuals generally overestimate its frequency, especially when it reflects well on themselves.<sup>127</sup> Memorable pro bono work may lead faculty and students to magnify their involvement, particularly if they are not asked to keep records of the time spent.

Moreover, good pro bono programs require substantial administrative resources. In a world of significant funding constraints, such programs simply may not rank high enough in any constituency's pecking order to become an institutional priority. Professors have their own research and teaching needs to consider, and while many are deeply committed to personal pro bono work, few have been similarly concerned about creating cultures of commitment. According to a recent survey of 172 of the 177 law schools approved by the ABA, only three have imposed a pro bono requirement on professors, and the hours demanded have been minimal.<sup>128</sup>

For most students, the tradeoffs have been similar. Although many might like to see additional administrative support for pro bono work, their resource priorities are likely to involve more pressing concerns, such as financial aid or loan forgiveness. Few student bodies have voted in favor of pro bono requirements, and one that did, Columbia,

---

126. See *id.* at 15-16.

127. See Richard Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* 54 (1980); Shelley E. Taylor & Susan T. Fiske, *Saliency, Attention, and Attribution: Top of the Head Phenomena*, 11 *Advances Experimental Soc. Psychol.* 249, 269, 282-83 (Leonard Berkowitz ed., 1978); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *Cognitive Psychol.* 207, 208, 229-30 (1973). For discussion of individuals' self-serving illusions, see David C. Meyers, *The Pursuit of Happiness* 110-11 (1992).

128. See Powers, *supra* note 12, at 2, 5.

opted to exclude itself and to bind only future classes.<sup>129</sup> Because little comparative information on pro bono programs is available to law school applicants, schools lack pressure to improve their offerings as recruitment strategies.

So too, although most alumni and central university administrators undoubtedly support public service in principle, they have not translated rhetorical support into resource commitments.<sup>130</sup> In the AALS survey, a majority of law school deans indicated that they would like to expand pro bono programs but lacked the necessary funds.<sup>131</sup> For many law school and central university administrators, public-service initiatives seem less pressing than other budget items more directly linked to daily needs and national reputations. For example, *U.S. News & World Report* rankings of law schools have become increasingly important.<sup>132</sup> Not only are pro bono opportunities excluded from the factors that determine a school's rank, they compete for resources with programs that do affect its position.

Part of the rationale for creating an AALS Commission was to attract the attention for pro bono issues that other constituencies have not demanded. Another part of that rationale was to share strategies for improvement. Although most law school administrators have not made pro bono service a priority, most support the concept and appear open to such strategies. Commission research, coupled with other commentary in the field, provides insights about the costs and benefits of various approaches. While this work suggests no single answer that will be right for all institutions, it does identify the relevant considerations.

One key point emerges clearly from Commission surveys: Pro bono programs serve multiple goals that have different educational and resource implications. To identify an appropriate pro bono strategy, schools need to determine which goals have priority and how they fit with other institutional capacities and constraints.

For most law schools, the primary objectives of pro bono programs are to encourage future public service and to provide an effective educational experience for students. The difficulties in designing programs arise from the absence of consensus on how to achieve the first

---

129. Interview with Lance Liebman, former Dean of Columbia Law School, in New York, N.Y. (Apr. 1997) (notes on file with author). For student efforts, see Bahls, *supra* note 114, at 15 (noting student rejection of mandatory pro bono at American University Law School); Rex Bossert, *Students Push for Pro Bono at Law Schools*, L.A. Daily J., Oct. 23, 1990, at 1 (discussing a student campaign for a mandatory pro bono program); Ken Myers, *Students Try to Press the Issue of Mandatory Pro Bono Work*, Nat'l L.J., Feb. 18, 1991, at 4 (discussing the debate over mandatory pro bono programs).

130. An exception is the donor who provided a million dollars for Fordham's program. See Ken Myers, *Contributing*, Nat'l L.J., Nov. 19, 1990, at 4.

131. See White, *supra* note 16, at 7.

132. See Focus Group Interview Notes, *supra* note 14 (San Francisco Interviews).

of these objectives, and from the conflicts involved in trying to achieve both.

If the principal goal of law school pro bono programs is to maximize future contributions by lawyers, it makes sense to maximize current contributions by students. The obvious way to accomplish that is to require service. Such a requirement sends the message that pro bono work is a professional obligation. A mandatory program generally increases resources for public-service programs and reaches individuals who would not voluntarily participate. By their own accounts, some of these individuals become converts to the cause, and most students report a greater interest in future pro bono service as a result of required participation.<sup>133</sup> Virtually all administrators of mandatory programs can point to individual success stories. For example, a Loyola student specializing in corporate tax insisted that he had no skills relevant to poverty communities and objected to being forced into service. After gaining a tax refund for his first low-income client, though, the student became one of the pro bono program's strongest supporters.<sup>134</sup> Some of these supporters maintain continued involvement after graduation by supervising students and providing financial support.<sup>135</sup>

Yet, as noted earlier, current research is insufficient to determine whether mandatory programs yield greater pro bono contributions than well-supported optional alternatives. Some law school administrators are concerned that requiring participation will undermine the voluntary commitment that is necessary to sustain involvement after graduation.<sup>136</sup> Such concerns are consistent with research indicating that intrinsic commitment is more likely to encourage public-service contributions than external rewards or sanctions.<sup>137</sup> Students who see pro bono work simply as one more graduation requirement are missing the message that program supporters intend.

When participants are unmotivated or end up in unsuitable placements, the results can be counterproductive for all concerned. Program administrators do not lack for examples of students who feel ignored, bored, and unchallenged by routine tasks.<sup>138</sup> For these reluctant participants, client contact often served to confirm adverse stereotypes of poverty communities. For example, one Pennsylvania student's work on welfare appeals left him with disgust for undeserving "able bodied" claimants who were abusing the system.<sup>139</sup> Experi-

---

133. See *supra* text accompanying notes 99-100, 134.

134. See Focus Group Interview Notes, *supra* note 14 (San Francisco Interviews).

135. See Millemann, *supra* note 36, at 76-77 (discussing constitutional, philosophical, and historical arguments for mandatory pro bono); Focus Group Interview Notes, *supra* note 14 (San Francisco Interviews).

136. See Robinson, *supra* note 120, at 969.

137. See *supra* text accompanying notes 86-88.

138. See Allen, *supra* note 101, at 3-4.

139. See *id.* at 4.

ence with such participants can, in turn, discourage overburdened supervising lawyers from accepting further placements or from spending the time necessary to structure and monitor assignments. They prefer working with motivated pro bono volunteers and students doing externships or clinical coursework.<sup>140</sup>

Supervisors' preferences compound the challenges of finding appropriate placements for mandatory service. Some administrators report difficulties identifying sufficient positions to accommodate students' time constraints, academic schedules, and skill levels. The extent of these difficulties depends primarily on the school's definition of pro bono work and its local network of service providers. Some schools, like Tulane, have solved their placement problems only by hiring supervising lawyers, which adds significantly to program costs.<sup>141</sup>

Pro bono requirements pose other challenges apart from expense. One involves the definition of public service. Should it include only legal work or assistance targeted to the poor? Expansive definitions pose fewest problems in securing student placements, and provide many participants with a broader perspective on their legal work. On the other hand, inclusive programs also offer fewest opportunities for training students to meet the legal needs of underserved communities. Restrictive definitions serve that goal but bump up against shortages in supervised positions and accusations of ideological bias. Groups such as the Washington Legal Foundation have criticized law schools' public-interest placements for being skewed in favor of liberal causes.<sup>142</sup> Related problems involve enforcing pro bono requirements and assuring the quality of client service provided. The difficulties of monitoring students and their supervisors have led some experts to prefer voluntary over mandatory programs, and others to advocate faculty-run clinics.<sup>143</sup>

A final concern with pro bono requirements involves the appropriateness of exempting professors. "Do as I say, not as I do" is the position of faculty at all but a few schools, and its limitations have not gone unnoticed. As one *Washington Post* reporter noted, mandatory pro bono programs confront professors with the expectation that they should "take on the same responsibilities as, God forbid, the practicing bar and even their own students."<sup>144</sup> Of course, pro bono require-

---

140. See Robinson, *supra* note 120, at 969.

141. See Alan M. Slobodin, *Forced Pro Bono for Law Students Is a Bad Idea*, 1 B.U. Pub. Int. L.J. 199, 201 (1991).

142. See Paul Craig Roberts, *Forward* [sic] to Washington Legal Found., In Whose Interest? Public Interest Law Activism in the Law Schools at i, i-ii (1990); Slobodin, *supra* note 141, at 202-03.

143. See New York Report, *supra* note 20, reprinted in 19 Hofstra L. Rev. 755, 834-35 (1991); Commission on the Future of the Legal Profession and the State Bar of Cal., State Bar of Cal., *The Future of the California Bar* 67 (1995).

144. Sandra Torrey, *On Public Service Issue, Professors Urged to Teach by Example*, Wash. Post, Jan. 7, 1991, (Business) at 5.

ments serve educational values apart from reinforcing a service ethic and these provide some basis for including only students. However, if the primary goal of a mandatory program is to create a culture of commitment to public service, then exempting faculty role models is counterproductive. As research on giving behavior makes clear, individuals learn more by example than exhortation. Unless and until faculty are willing to include themselves in any mandatory program, a voluntary alternative has obvious advantages.

Other benefits of an elective system involve its reinforcement of student initiative and altruistic commitment. At schools like Fordham, students do not simply participate in public service; they also learn how to run a public-service program. Participants develop the fundraising, recruitment, and community-outreach skills necessary to sustain pro bono involvement.<sup>145</sup> They also experience the personal satisfaction that accompanies voluntary service. Because an elective program involves only committed participants, it generally is cheaper and easier to administer than a mandatory system.

Yet, some of these advantages are double-edged. Voluntary approaches fail to reach some individuals who might benefit most, and are especially likely to lack adequate resources and quality control. Also, insufficient clinical opportunities may seriously compromise students' educational experience. Unless and until more institutions make support for voluntary service a priority, a mandatory alternative has much to commend it.

In short, the single most important insight from law school pro bono efforts is that no single model is clearly preferable. Different approaches create different tradeoffs, which vary from institution to institution. Designing an appropriate program requires schools to assess their own priorities, resources, community networks, faculty support, and student culture. Whatever structure schools choose, they can benefit from the experiences of other institutions. Recent efforts to encourage pro bono service suggest the following strategies, which are likely to prove beneficial no matter what kind of program is in place.

## V. STRATEGIES FOR CHANGE

Support for law school pro bono programs can take a wide variety of forms and involve an equally wide range of groups both within and outside legal education. The most obvious and essential support strategies come from law school administrations. They need to provide adequate resources, recognition, and rewards for public service. At a minimum, as the Association of American Law Schools' Commission has recommended, "law schools should seek to make available for every law student at least [one] well supervised law-related pro bono

---

145. See Schoenherr et al., *supra* note 96, at 19-20.

opportunity and either require student participation or find ways to attract the great majority of students to volunteer.”<sup>146</sup>

The resources necessary for effective pro bono programs will, of course, vary depending on the forms and amount of service that a school aims to promote. Ideally, every institution would have a pro bono director and a central office to coordinate efforts. A director's role differs in mandatory and voluntary programs, but at a minimum should include responsibility for facilitating placements, monitoring quality, and promoting the value of public service throughout the law school community.

Program directors should work with other administrators to insure adequate recognition of pro bono contributions. To that end, schools can note students' public service on transcripts, diplomas, or honor rolls.<sup>147</sup> Special awards, receptions, or other ceremonial occasions can honor outstanding pro bono service by students, faculty, and alumni.<sup>148</sup> These contributions can also be showcased in school publications such as brochures, alumni magazines, student newspapers, deans' annual reports, and first-year orientation materials. Faculty can discuss their cases at brown-bag lunches or alumni gatherings, and distinguished practitioners can do the same on panels or in an endowed lecture series.

Discussion of public service can be particularly valuable during students' orientation and in their first year in law school, when understandings about professional identities and responsibilities are formed. Some law schools have had considerable success with pledge drives that ask first-year students to commit themselves to specified levels of pro bono work.

Law schools should provide similar encouragement for faculty public service by developing appropriate policies and incentive structures. Those policies could require professors to report on their annual pro bono activities, and make clear that such work will count affirmatively in promotion and tenure decisions. Schools could also provide research assistance and curricular-development funds for courses that include public-service case histories and placements.

Law school pro bono programs should also reach out to other parts of the university, other academic institutions, and other community networks. For example, successful community-development projects can include partnerships with business schools and urban studies de-

---

146. Commission on Pro Bono and Pub. Serv. Opportunities, *supra* note 15 (manuscript at 4).

147. See The Appleseed Foundation, *Sowing the Seeds of Justice: Law Schools and the Public Interest* 17 (1997).

148. See Robinson, *supra* note 120, at 964; Schoenherr et al., *supra* note 96, at 14; Focus Group Interview Notes, *supra* note 14.



partments.<sup>149</sup> Joint tutoring programs can recruit law, education, and undergraduate students. Cooperative regional efforts can forge groups like the Public Interest Law Consortium, which links the University of Minnesota and William Mitchell law schools with the Minnesota Justice Foundation. That consortium provides voluntary pro bono and clinical placements in a variety of public-interest and legal-aid positions. Law schools can also house regional public-interest projects, which provide supervision for students in return for office space.<sup>150</sup> Partnerships with local bar associations and community groups can also help identify appropriate placements, as well as staff cases that legal-aid programs are unable to handle.<sup>151</sup>

Much more could and should be done through collaboration with organizations like Pro Bono Students America, the National Association for Public Interest Law, and the Appleseed Foundation, all of which support opportunities for student public-interest work. Such organizations could help expand those opportunities by encouraging law schools to improve their pro bono programs. To that end, one useful strategy could be to collect information on current programs and make comparative data available to law school applicants.<sup>152</sup>

The Association of American Law Schools should also do more to promote pro bono activities. By creating a section on public service, the AALS could encourage sharing of information through newsletters, workshops, and annual meetings. The Association could also require schools to include specific information on pro bono efforts as part of their membership review process, and could provide consultants for institutions interested in improving their programs. An AALS Statement of Good Practices on public service could draw attention to areas needing improvement. Such a statement could also encourage common action in areas of shared concern. For example, one appropriate practice might be to require employers who use law school placement facilities to provide detailed information on their pro bono programs.<sup>153</sup> In addition, the AALS could help establish a

149. See Jeffrey S. Lehman & Rochelle E. Lento, *Law School Support for Community-Based Economic Development in Low-Income Urban Neighborhoods*, 42 Wash. U. J. Urb. & Contemp. L. 65, 74, 83 (1992).

150. See Kristin Booth Glen, *Pro Bono and Public Interest Opportunities in Legal Education*, N.Y. St. B.J., May/June 1998, at 20, 22.

151. Statutory restrictions and budget reductions have severely curtailed the assistance that federally-funded programs can provide. See 42 U.S.C. § 2996f(b) (1994); 45 C.F.R. § 1612.2-6 (1997).

152. A 1997 *National Jurist* study gave two-thirds of 168 surveyed schools a poor evaluation for their support of public-interest efforts. See Brett S. Martin, *Why Most Law Schools Are Failing at Public Interest Law*, Nat'l Jurist, Oct. 1997, at 16, 16. If such survey findings were accurate and widely available, they could provide a helpful catalyst for change.

153. See Barrington D. Parker, Jr., *Monitoring Compliance with the ABA Law Firm Pro Bono Challenge*, in *The Law Firm and the Public Good*, *supra* note 27, at 158, 168. The American Bar Association and the California State Bar have adopted resolutions urging all law schools to require employers who wish to use on-campus inter-

clearinghouse and electronic database that would assist law schools in developing and evaluating public-service initiatives. Such centralized information could also aid individual law professors in finding pro bono opportunities related to their interests and expertise.

Finally, and most important, pro bono strategies need to be part of a broader effort to deepen professional responsibility for public interests. As research on legal education has long noted, the "latent curriculum" at most law schools tends to erode these efforts.<sup>154</sup> Concerns regarding legal ethics and access to justice are not well integrated in core courses.<sup>155</sup> Nor are such concerns reinforced by other aspects of law school culture. The low pay and tight market for public-interest work, coupled with high debt burdens, discourage many students from pursuing such careers and from focusing on issues of social justice during their legal education.

Traditional teaching methods can further erode professional ideals. Faced with a steady succession of hard cases and doctrinal ambiguities, students often conclude that there are no right answers: "There is always an argument the other way and the devil often has a very good case."<sup>156</sup> The result is to leave many future lawyers "skeptical at best, cynical at worst."<sup>157</sup> Legal work seems largely a matter of technical craft, divorced from the broader concerns of social justice that led many students to law school.

Countering these forces is no modest enterprise; it is a central challenge of modern legal education. To create true cultures of commitment in law school will require a broad range of initiatives. As the AALS Commission recognized, a pro bono program is unlikely to shape behavior unless it is part of a broader effort.<sup>158</sup> Issues involving professional responsibility and unmet legal needs must become higher

---

view facilities to submit written information on their pro bono policies. See Christopher J. Herrera, *The Pro Bono Difference*, in *Law Firms and Pro Bono: Profiles of the Pro Bono Activities of Law Firms Supporting Student Public Service Efforts* at i, iii-v (National Ass'n for Pub. Interest Law ed., 1991).

154. See Rhode & Luban, *Legal Ethics*, *supra* note 8, at 906-08; Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 *Stan. L. Rev.* 1695, 1699-1703 (1993). See generally Robert Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* 178-83 (1992) (highlighting students' conflict of interest in pursuing public-interest law or elite law practice); Robert V. Stover, *Making It and Breaking It: The Fate of Public Interest Commitment During Law School* 43-67 (1989) (noting curricular and other student distractions in the first and second years of law school).

155. See Deborah L. Rhode, *Ethics By the Pervasive Method*, 42 *J. Legal Educ.* 31, 33-42 (1992); Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 *Law & Contemp. Probs.* 139, 148 (1995).

156. Stewart Macaulay, *Law Schools and the World Outside the Doors II* at 25 (1982); see Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 *J. Legal Educ.* 247, 253-59 (1978).

157. Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 *Geo. L.J.* 875, 878 (1985).

158. Commission on Pro Bono and Pub. Serv. Opportunities, *supra* note 15 (manuscript at 3).

curricular priorities. Support for clinical placements and loan-forgiveness programs should similarly assume greater significance. Additionally, legal scholars should give more attention to the structural forces that undermine public-interest commitments in legal practice. No educational program, whatever its strengths, can adequately counteract the situational pressures that too often erode those commitments.

Improvements in law school pro bono efforts are only a modest part of the reform agenda facing legal education. Increases in lawyers' pro bono work are an equally modest part of the answer to the nation's unmet legal needs. Yet while we should not overstate the value of public-service initiatives, neither should we overlook their potential. As CUNY Law School Dean Kristin Glen notes, "exposing students to pro bono and public-interest opportunities reinforces their best instincts and highest aspirations."<sup>159</sup> By making those opportunities a priority, lawyers and legal educators can reinforce the same aspirations in themselves.

---

159. Glen, *supra* note 150, at 21.

*Notes & Observations*