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## The Paradoxes of Pro Bono

### Cover Page Footnote

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## THE PARADOXES OF PRO BONO

*Richard Abel\**

Pro bono is a puzzle. It provides high quality legal services to large numbers of clients who would otherwise go unrepresented, thereby helping to fulfill our legal system's promise of "Equal Justice under Law." But what a bizarre way to address a foundational element of liberal legalism. Could we imagine relying on volunteerism to perform other core governmental functions: police (the deputy sheriffs of the frontier are a distant memory), national security (privateers), foreign relations (honorary consuls), education (volunteer parents as the *only* teachers), or transportation (hitchhiking)?<sup>1</sup> There is something very strange about having privileged lawyers—who earn huge incomes by acting for large corporations and wealthy individuals—constitute a major source of legal representation for the poor and subordinated. The excellent article by Scott Cummings and Deborah Rhode offers an opportunity to reflect on the significance of this striking manifestation of American exceptionalism.

Like other services to the poor—poor houses, orphanages, soup kitchens, and hospitals—legal aid began as a charitable activity, performed initially by religious groups (indeed, such representation is still called "Pro Deo" in civil law countries) and then by voluntary associations (often motivated by solicitude for fellow immigrants).<sup>2</sup> In 1965, however, the U.S. Office of Economic Opportunity (OEO) launched the Legal Services Program, expanding the nation's annual expenditure on civil legal aid from less than \$5 million to more than \$300 million in fifteen years.<sup>3</sup> U.S. Supreme Court decisions in 1963 and 1972 gave accused indigent criminals a constitutional right to free representation.<sup>4</sup> In other countries—notably England, Canada, and Australia in the common-law world, and the Netherlands, Germany, and the Scandinavian countries in the civil-law world—the state accepted responsibility for legal aid earlier and more comprehensively.<sup>5</sup> In the United States, pro bono persisted in the form of noninstitutionalized acts of

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1. Richard L. Abel, *State, Market, Philanthropy, and Self-Help as Legal Services Delivery Mechanisms*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION* 295, 297–99 (Robert Granfield & Lynn Mather eds., 2009).

2. See Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 *UCLA L. REV.* 474, 492–94 (1985).

3. Abel, *supra* note 1, at 296.

4. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

5. See Abel, *supra* note 2, at 475.

individual generosity (and sometimes self-interest), largely by solo and small-firm practitioners.<sup>6</sup>

Recent decades have seen a striking and surprising reversal of this social democratic trend. In the United States, conservative political attacks on legal aid succeeded in cutting real dollar expenditures by one-third from the 1980 highpoint—and expenditures per poor person by much more—while drastically restricting who could be represented in what kinds of matters using what strategies.<sup>7</sup> At the same time, large firms have greatly increased and rationalized their pro bono activities, whose value now exceeds that of the federal program.<sup>8</sup> Indeed, the two trends may be related: Australian governments have pointed to the growth of pro bono as a justification for cutting the legal aid budget.<sup>9</sup> By contrast, civil-law countries with fewer large firms and much less robust pro bono programs generally have sustained levels of legal aid.<sup>10</sup>

I want to use the rich data and analysis presented by Cummings and Rhode to reflect on the consequences of relying on private philanthropy to serve more than half the interests that cannot obtain representation through the private market. The dramatic expansion of pro bono reflects the very low baseline from which it began. Although I do not want to deprecate or discourage the contributions of large firms, it is important to place them in perspective. Only forty percent of lawyers in the 200 most profitable firms contribute twenty or more hours a year.<sup>11</sup> Assuming (realistically) that large-firm lawyers bill 2000 hours annually, even this civic-minded minority is contributing just one percent of its labor. Despite Americans' strong antitax sentiments, the marginal tax rate at the higher brackets is a quarter to a third of income. Would we not obtain a larger and more reliable stream of resources for legal representation through taxation?

Some law firm donations to public interest entities seem related to the latter's willingness to refer pro bono cases to the firms; is this the best way

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6. See JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 104–07 (1978); Abel, *supra* note 1, at 296; cf. Philip R. Lochner, Jr., *The No Fee and Low Fee Legal Practice of Private Attorneys*, 9 *LAW & SOC'Y REV.* 431, 442–48 (1975).

7. Abel, *supra* note 2, at 532–33. See generally BRENNAN CTR. FOR JUSTICE, *RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER* (2000).

8. See Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1, 18–25 (2004).

9. See NAT'L PRO BONO RES. CENTRE, *SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE INQUIRY INTO LEGAL AID AND ACCESS TO JUSTICE* 3 (2003), available at <http://www.nationalprobono.org.au/ssl/CMS/files/cms/senateinquiry.pdf>.

10. See Richard L. Abel, *Lawyers in the Civil Law World*, in 2 *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 1, 18–20 (Richard L. Abel & Phillip S. C. Lewis eds., Beard Books 2005) (1988) (describing the divergence in practice structure between the common-law world and the civil-law world).

11. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2376 (2010) (citing Aric Press, *In-House at The American Lawyer*, *AM. LAW.*, July 2008, at 13).

to fund public interest organizations, and should charitable donations be able to influence who handles which cases? The business cycle—whose wide swings were recently exemplified by the dot-com boom and bust and the current recession—dramatically influences the willingness and ability of large firms to do pro bono. (Tax revenues also fluctuate with economic activity, but governments can cushion that effect through rainy-day funds and by borrowing.) Sometimes an economic contraction has improbable effects: because large law firms constantly must replenish their pool of associates, particularly following the departures of those ineligible for or uninterested in partnership, they have paid law graduates to work in public interest for a year while waiting for an economic recovery. This creates its own problems: rich firms using underresourced public interest entities to train future associates at the expense of poor clients; newly minted graduates in public interest entities earning more than experienced career employees, only to leave at the end of a year and more than double their salaries; associates entering firms at the end of their public interest year with political beliefs and competences shaped by that experience, rather than as *tabulae rasae* law graduates. At the same time, firms have become increasingly reluctant to commit resources to large in-house pro bono projects.

Although the United States rightly boasts of having the strongest commitment to the “free” market of any nation, it also exhibits a surprising amount of charitable activity—perhaps reflecting the equally fierce antipathy to government. Alexis de Tocqueville’s often repeated observation of American enthusiasm for voluntary associations remains true,<sup>12</sup> despite Robert Putnam’s overblown claim that we are now “bowling alone.”<sup>13</sup> Fraternal organizations raise money and do good works. Boy Scouts do good deeds. The Church of the Latter Day Saints expects men to do missionary service and families to tithe. Other churches circulate collection boxes at Sabbath services. The Peace Corps and Teach For America (to name just two examples) have sustained a strong tradition of public service, especially among recent college graduates. Museums, music, dance, theatre, and individual creative artists depend heavily on charity. “High society” is defined by its lavish fundraisers. Kol Nidre is an occasion for competition in conspicuous donation. Donors to secular beneficiaries are encouraged by “naming opportunities” in cultural, medical, and academic institutions—even benches and trees in parks. Universities court alumni. NGOs solicit contributions through direct mail, over the Internet, and at annual award dinners, where donors can buy tables and advertise in programs. Public radio and television have pledge drives. The Salvation Army collects at Christmas. Employers encourage employees to donate to the Community Chest. Students at every American

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12. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 215–23 (Arthur Goldhammer trans., Library of America 2004) (1835); 2 *id.* at 604–09.

13. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

law school raise money for summer public interest fellowships; those with law firm jobs often pledge a portion of their earnings.

In light of this, it is less surprising that large firms have emulated their corporate clients by institutionalizing giving. How have nonmaterial incentives shaped pro bono activity? Let me start with those outside the firm. Public interest entities (which receive money and pro bono services) and bar associations make awards to firms and individuals.<sup>14</sup> The American Bar Association publishes the names of firms that meet its pro bono challenge.<sup>15</sup> But the most influential, by far, has been *The American Lawyer* ranking.<sup>16</sup> This reflects our passion for lists.<sup>17</sup> The *U.S. News & World Report* ranking of law schools, as well as undergraduate programs and graduate schools, has powerfully affected (many would say distorted) their behavior.<sup>18</sup> The emergence of a relatively small number of large law firms, known to each other and their corporate clients, has facilitated the emergence of a prestige hierarchy, as in London's "Magic Circle" firms. Globalization may, paradoxically, inhibit pro bono activity, which is much less well institutionalized outside the common-law world.<sup>19</sup> We could use more research on why firms care where they rank, whether some care more than others, and if a firm's rank influences decisions by corporations to retain it and law students to work for it.

The second set of influences operates within the firm. Partners can encourage or discourage pro bono activity by associates, who perform almost all of it and depend on partners for advancement within the firm or placement outside it. We need a better understanding of law firm economics: how the interplay between associate salaries (and benefits) and billable hours and rates affects the firm's short-term bottom line (and partnership draws), and the long-term payoff from investments in human capital. I have never seen a convincing answer to the critical question: when do associates begin to generate the surplus value that accounts for much of partners' income? As firms have grown dramatically in size and dispersed across the world, they have inevitably become more bureaucratized, creating specialized departments to handle a multitude of functions: recruitment, training, benefits, publicity, information technology—and pro bono. The same differentiation is visible in law school administrations. Emulation and competition have rapidly disseminated the coordinator role. Cummings and Rhode demonstrate that

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14. See Cummings & Rhode, *supra* note 11, at 2369–70.

15. See *id.* at 2369–72.

16. See *id.* at 2371–72.

17. DAVID WALLECHINSKY & AMY WALLACE, *THE NEW BOOK OF LISTS*, at xix (2005).

18. Wendy Nelson Espeland & Michael Sauder, *Rankings and Reactivity: How Public Measures Recreate Social Worlds*, 113 AM. J. SOC. 1, 24–33 (2007); Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205, 210–12 (2006); Michael Sauder & Wendy Nelson Espeland, *The Discipline of Rankings: Tight Coupling and Organizational Change*, 74 AM. SOC. REV. 63 (2009).

19. See Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 749–50 (1994).

pro bono coordinators wield significant influence, whether or not they are partners, although nonlawyers exercise much less.<sup>20</sup> Large firms obtain pro bono cases through symbiotic relationships with the larger, more established public interest law organizations, which lack the resources to handle their agendas alone (especially larger projects).<sup>21</sup> This mutual dependence privileges public interest entities in the few major cities where large firms are concentrated, at the expense of those in smaller cities and rural areas.

The third set of influences is individual. It may not be coincidental that pro bono expanded at the same time that women grew to constitute half of new associates, since women are greatly overrepresented in public interest lawyering generally.<sup>22</sup> The interest of lawyers in particular pro bono causes waxes and wanes. The Lawyers Committee for Civil Rights Under Law attracted hundreds to work in the South in the 1960s;<sup>23</sup> young British barristers were eager to take death penalty appeals to the Privy Counsel from Commonwealth countries starting in the 1990s;<sup>24</sup> large firms have represented hundreds of Guantánamo Bay detainees in the last decade.<sup>25</sup>

The historical and organizational factors that have produced the dramatic expansion of American large-firm pro bono activity are likely to persist. What are the consequences? A half century ago, when governments first became concerned about addressing “unmet [legal] need,”<sup>26</sup> many studies compared the variety of newly emerging legal services delivery mechanisms.<sup>27</sup> What do Cummings and Rhode tell us about how pro bono

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20. See Cummings & Rhode, *supra* note 11, at 2377–79 & tbl.2.

21. See Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2070 (2008).

22. CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 120–29 (2d ed., Univ. of Ill. Press 1993) (1981); Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923, 932 (2002); cf. 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, 44–45 (Austin Sarat & Stuart Scheingold eds., 1998) (describing research on the motivation of women who become cause lawyers).

23. Thomas Miguel Hilbink, *Constructing Cause Lawyering: Professionalism, Politics, and Social Change in 1960s America* 69–157 (May 2006) (unpublished Ph.D. dissertation, New York University) (on file with the Fordham Law Review).

24. The Death Penalty Project, <http://www.deathpenaltyproject.org> (last visited Mar. 19, 2010).

25. See generally THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW (Mark P. Denbeaux & Jonathan Hafetz eds., 2009).

26. BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 9 (1977).

27. E.g., 1 ACCESS TO JUSTICE (Mauro Cappelletti & Bryant Garth eds., 1978); JEREMY COOPER, PUBLIC LEGAL SERVICES: A COMPARATIVE STUDY OF POLICY, POLITICS AND PRACTICE (1983); LEGAL SERVS. CORP., DELIVERY SYSTEMS STUDY: A RESEARCH PROJECT ON THE DELIVERY OF LEGAL SERVICES TO THE POOR (1977); G. G. MEREDITH, LEGAL AID: COST COMPARISON—SALARIED AND PRIVATE LAWYERS (1983); DOUGLAS E. ROSENTHAL, ROBERT A. KAGAN & DEBRA QUATRONE, VOLUNTEER ATTORNEYS AND LEGAL SERVICES FOR THE POOR: NEW YORK’S CLO PROGRAM (1971); Michael McConville & Chester L. Mirsky,

differs from state-supported legal aid and philanthropically supported public interest organizations? Decision making in legal aid is highly centralized: the Legal Services Corporation sets priorities, constrained by Congress; individual programs—many of them very large—refine these.<sup>28</sup> By contrast, pro bono case selection is decentralized, shaped by referrals from legal aid and public interest entities and the preferences of pro bono coordinators and individual large-firm partners and associates.<sup>29</sup> The original OEO Legal Services Program gave equal emphasis to serving individual clients, law reform (impact cases), and community organizing. By contrast, the highest priority of pro bono programs is individual legal service.<sup>30</sup> The list of substantive areas handled by large-firm pro bono lawyers, in descending order of frequency, is consistent with this: immigration, children and family, economic development, criminal defense, veterans, human rights, and special education.<sup>31</sup> With the exception of economic development (transactional work resembling other corporate practice), these share a focus on individual matters, which can be completed expeditiously and do not threaten the firm's paying clients. This bias is confirmed by the areas avoided because they are likeliest to create conflicts of interest: employment/labor and mortgage foreclosure.<sup>32</sup> Environmental matters also are rare.<sup>33</sup> Others have noted that positional conflicts—e.g., between representing a poor client seeking to heat a home and a utility company that wants to cut off deadbeat subscribers—can constrain pro bono activity.<sup>34</sup>

Training associates is the second reason for doing any pro bono and the strongest reason for selecting particular cases. Training became even more significant when the recession forced firms to pay greater attention to their balance sheets. Criminal defense and asylum work are valued for offering trial experience otherwise unavailable to large-firm associates. Law school clinics, like hospital residencies, must balance the tension between training and service.<sup>35</sup> Just as solo and small-firm practitioners tended to prefer pro bono clients who resembled their paying clientele,<sup>36</sup> so large firms reject individual clients who might present challenges, e.g., the mentally ill homeless. The economic contraction increased pressures to choose matters that could be resolved with predictable and limited resources. Efforts by

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*Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1987).

28. See Cummings & Rhode, *supra* note 11, at 2367–68.

29. See *id.* at 2391–92.

30. See *id.* at 2385–86 & tbl.5.

31. *Id.* at 2385.

32. See *id.* at 2393.

33. See *id.*

34. See ALLAN ASHMAN, *THE NEW PRIVATE PRACTICE: A STUDY OF PIPER & MARBURY'S NEIGHBORHOOD LAW OFFICE* 42–47 (1972); SUSAN P. SHAPIRO, *TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE* 166–68 (2002).

35. See ATUL GAWANDE, *COMPLICATIONS: A SURGEON'S NOTES ON AN IMPERFECT SCIENCE* 22–25 (2002).

36. See Lochner, *supra* note 6, at 456.

law firms to monitor pro bono activities seemed to focus on controlling the number of hours invested, perhaps because the inexperienced young associates handling these cases often performed inefficiently. *None* of the pro bono coordinators sought to evaluate the social change consequences of their programs. In its early days, all OEO projects, including the Legal Services Program, were directed by Congress to seek “maximum feasible participation” by the constituencies they served—something Senator Daniel Patrick Moynihan ridiculed as “maximum feasible misunderstanding.”<sup>37</sup> Representatives of the poor served on governing boards of legal services programs, sometimes constituting a majority. But clients played *no* role in evaluating the work of their pro bono lawyers; even the public interest referral sources were not asked for feedback. By contrast, corporate clients, assisted by in-house counsel, closely scrutinize the work of their large-firm lawyers, often mandating beauty contests and competitive bids for new work.

Cummings and Rhode end their article by calling for further research on the advantages and disadvantages of large-firm pro bono services.<sup>38</sup> I would second that and add two observations. This research should explicitly compare pro bono with legal services offices and public interest law firms. And it also should address the following questions:

1. Lawyer career paths. What kinds of expertise in the problems of poor and other underserved clients do lawyers accumulate over time: not just technical legal information but also knowledge about the needs of those clients, the identity and behavior of their adversaries, the courts and other fora in which the lawyers appear, means of publicizing the issues, and the larger political environment in which these struggles occur?

2. Strategizing. Are the lawyers proactive or reactive?<sup>39</sup> When are they first seized of the problem? Do they engage in long-term planning, linking cases together?

3. What political influences shape these lawyers’ activities? For large-firm pro bono, these are primarily the (political and economic) interests of partners and paying clients. For legal services lawyers, these are the constraints already imposed by Congress and the threat of additional limitations. For public interest lawyers, these are the priorities of their donors, primarily foundations but also individuals.

4. Who are the lawyers? How does their gender, race, and class background—especially in relation to the clients—affect their performance?

Large-firm pro bono has played an essential role in realizing the promise of “Equal Justice under Law” and will continue to do so. Given severely limited public and private resources, it is important to understand the

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37. DANIEL P. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY* (1969).

38. See Cummings & Rhode, *supra* note 11, at 2431–33.

39. See JACK KATZ, *POOR PEOPLE’S LAWYERS IN TRANSITION* 26–33 (1982).

relative strengths of different delivery mechanisms in order to deploy them most efficiently and effectively.