THE POLITICS OF PRO BONO

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Pro bono has undergone a profound transformation. Whereas for most of American legal history, pro bono was ad hoc and individualized, dispensed informally as professional charity, within the last twenty-five years it has become centralized and streamlined, distributed through an elaborate institutional structure by private lawyers acting out of professional duty. Pro bono has thus emerged as the dominant means of dispensing free representation to poor and underserved clients, eclipsing state-sponsored legal services and other nongovernmental mechanisms in importance. This Article examines the causes, features, and consequences of pro bono's institutionalization. It begins with an analysis of the forces behind pro bono's institutional rise, emphasizing the role of the organized bar, federal legal services, the nonprofit sector, and big law firms. This Article then maps the contours of pro bono's institutional architecture, analyzing the structures of organizational collaboration, mechanisms of efficiency, strategies for accountability, and processes of adaptation that define pro bono's operational identity. It concludes by probing the systemic consequences of pro bono's new institutional centrality, weighing the pragmatic benefits of leveraged law firm resources against the limitations imposed by the dependence on private lawyers beholden to commercial client interests.

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INTRODUCTION

The dominant narrative of pro bono over the past decade was one of a professional ideal under siege. Particularly as law firms experienced fantastic growth in the late 1990s, lawyers became subject to market pressures that placed strains on their capacity to engage in pro bono service.[1] The dot-com boom created a market bubble at the nation's biggest law firms, where spiraling profits were met by increasing billable-hour demands. Pro bono suffered under the new law firm economics, as lawyers sacrificed public service in the name of ballooning salaries and bigger year-end bonuses.[2] Even as the blistering pace of Internet dealmaking screeched to a halt and volunteerism was resurrected in the new millennium,[3] pro bono failed to regain its previous standing as associates fearful of looming layoffs were reluctant to appear too consumed with nonbillable work. The professional elite condemned pro bono's retrenchment in the face of law firm commercialization,[4] giving official sanction to the discourse of pro bono's decline.[5]

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1. *See, e.g.*, Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809, 817 (1998) (noting the bottom-line pressures of large-firm practice).

2. *See* Aric Press, *Eight Minutes*, AM. LAW., July 2000, at 13; Maria Shim, *Trickle-down Theory Not Hitting Pro Bono*, NAT'L L.J., Aug. 28, 2000, at C19; Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, N.Y. TIMES, Aug. 17, 2000, at A1.

3. *See* Thomas Adcock, *After Sept. 11, Record Number of Lawyers Answer the Call to Take on Pro Bono: Bar Challenged to Keep the "Golden Age" of Volunteerism Alive*, N.Y. L.J., July 23, 2002, at 1; Elizabeth Amon, *Experts See Lift in Pro Bono Work*, NAT'L L.J., Jan. 6, 2003, at A1; Harriet Chiang, *Lawyers Turn to Pro Bono Works*, S.F. CHRON., May 27, 2003, at A1; Susan Saulny, *Volunteerism by Lawyers is on the Rise*, N.Y. TIMES, Feb. 19, 2003, at B1.

4. *See, e.g.*, Stephen Breyer, *The Legal Profession and Public Service*, 57 N.Y.U. ANN. SURV. AM. L. 403, 405–06 (2000); Steven C. Krane, *Re-Focus on Pro Bono and Bar Activities*, N.Y. L.J., Apr. 10, 2001, at S7; *see also* Gerald L. Chaleff, *Our Commitment to Public Service: Los Angeles Lawyers Must Continue Their Long and Proud Tradition of Pro Bono Assistance*, L.A. LAW., Mar. 30, 2003, at 80.

5. The discourse of pro bono's decline reflected a broader anxiety about the direction of the profession, expressed by commentators who criticized the erosion of professional ideals under the weight of an increasingly business-centered model for providing legal services. *See, e.g.*, MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994); Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911 (1996); Ward Bower, *Law Firm Economics and Professionalism*, 100 DICK. L. REV. 515 (1996); Chief Justice Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949 (1995). The thesis of professional decline has a long lineage, dating back to the early days of the profession. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 48–68 (1988); *see also* Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549, 562 (1996); Marc Galanter & Thomas Palay, *Large Law Firms and Professional Responsibility*, *in* LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 189, 189–93 (Ross Cranston ed., 1995); Peter Margulies,

Yet all the fervor over pro bono's plight seemed disconnected from the bigger picture of professional service. Although American lawyers had always provided some services for free,[6] they were never generous in their gratuity,[7] which often simply involved helping out friends, relatives, and groups such as the local church, Little League, or opera.[8] In fact, the very concept of "pro bono"—understood as a professional duty, discharged outside the normal course of billable practice,[9] to provide free services to persons of limited means or to clients seeking to advance the public interest[10]—did not exist until quite recently. Service to the individual poor client had historically been treated as charity to be dispensed by organizations like legal aid,[11] while the free representation of public interest groups was sporadic and controversial. Indeed, it was not until the 1980s that the profession's ethical rules even referred to the term "pro bono" in discussing a lawyer's public service responsibility.[12]

Behind the headlines and hand-wringing over decreasing big-firm pro bono, a much more important story was in fact taking shape—one which was transforming the nation's system for delivering free legal services to poor and underserved clients. The defining feature of the 1990s' boom was not that private lawyers were prioritizing profit over pro bono service. This had, to some degree, always been the case. Instead, the real story was the radical change taking place in *how pro bono services were being dispensed*. Whereas pro bono had traditionally been provided *informally*—frequently by solo and small firm practitioners who conferred free services as a matter of individual largesse[13]—by the end of the 1990s pro bono was regimented and organized, distributed through a network of structures designed to facilitate the mass provision of free services by law firm volunteers acting out of professional duty.

Progressive Lawyering and Lost Traditions, 73 TEX. L. REV. 1139, 1179 (1995); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 410–15 (2001); Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 304 (1998).

6. *See* RICHARD L. ABEL, AMERICAN LAWYERS 129 (1989).

7. *See* Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 425 (2003).

8. *See id*.

9. *See* Lucie E. White, *Pro Bono or Partnership: Rethinking Lawyers' Public Service Obligations for a New Millennium*, 50 J. LEGAL EDUC. 134, 140 (2000).

10. *See* The Law Firm Pro Bono Challenge, Statement of Principles, *at* http://www.probonoinst.org/challenge.text.php.

11. *See* F. RAYMOND MARKS ET AL., THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY 18 (1972).

12. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

13. *See, e.g.*, Philip R. Lochner, Jr., *The No Fee and Low Fee Legal Practice of Private Attorneys*, 9 LAW & SOC'Y REV. 431, 434–42 (1975).

This transformation was apparent at multiple levels. The American Bar Association (ABA) campaigned to make "pro bono a priority,"[14] revising the ethical rules on pro bono service, challenging the nation's biggest law firms to step up their pro bono commitments, and supporting the development of a pro bono infrastructure in nonprofit groups, law firms, and law schools. Local bar associations, public interest organizations, and legal services groups expanded programs designed to link unrepresented clients with pro bono volunteers. Big law firms, in turn, augmented their own pro bono systems, creating new pro bono positions, developing innovative projects, and sending their associates to staff public interest organizations and poverty law clinics. Private foundations turned their attention to funding pro bono programs, new ranking systems emerged to track pro bono performance, and states experimented with pro bono reporting requirements. As pro bono infiltrated corporate legal departments and business law practice groups, penetrated small-town communities, and shot across national borders, its transformation could not be ignored. Once confined to the margins of professional practice, pro bono had become radically *institutionalized*, emerging as the dominant model of delivering free legal services. Viewed in this light, the loud outcry over declining pro bono in the 1990s did not miss the point of pro bono's institutional ascendance, but rather constituted its central expression—reflecting the power of newly formed pro bono constituencies to promote their agenda and protect their institutional investments.[15]

This Article examines the terrain of pro bono's institutionalization. It begins, in Part I, with an analysis of the causes of pro bono's institutional expansion, emphasizing the movement by the organized bar to connect professional service ideals and practice, the decline of state-sponsored legal services programs, the development of a robust nongovernmental pro bono infrastructure, and the rise of the big law firm. Part II then examines the features of pro bono's institutional structure, providing a detailed account of its core operational elements and key relationships. Its focus is on the structures of organizational collaboration, mechanisms of efficiency, strategies for accountability, and processes of adaptation that define pro bono's institutional identity. Finally, Part III probes the systemic consequences of pro bono's institutional rise. It explores the possibilities pro bono offers for political alliance, individual choice, flexible advocacy, and expanded services; evaluates

14. AM. BAR ASS'N CTR. FOR PRO BONO, MAKING PRO BONO A PRIORITY: A BAR LEADER'S HANDBOOK (2d ed. 1996).

15. *Cf.* Sarat, *supra* note 1, at 809–10 ("Crises in the profession do not just happen; they are 'created' and marketed by particular segments of the bar hoping to mobilize their colleagues to deal with what are perceived to be pressing problems.").

the professional tensions generated by pro bono's commodification; and considers the constraints imposed on pro bono cases, lawyers, and partnerships.

I. THE INSTITUTIONALIZATION OF PRO BONO

Pro bono has undergone a profound transformation from informal action to complex professional institution.[16] Whereas for most of American legal history, pro bono was ad hoc and individualized, dispensed irregularly as professional charity, within the last twenty-five years it has become centralized and streamlined, distributed through an elaborate organizational structure embedded in and cutting across professional associations, law firms, state-sponsored legal services programs, and nonprofit public interest groups. This network of organizations,[17] in turn, has developed a system of values and practices that have become deeply ingrained as part of the culture of legal professionalism,[18] defining how lawyers understand their role in making legal services available to poor and underrepresented groups. This part examines the causes of this transformation, tracing the roots of pro bono's institutionalization to developments within the profession, state, civil society, and market. Its focus is on the development of pro bono's organizational structures, emphasizing how they have arisen and become integrated within the larger public interest field.[19]

16. *See* Paul J. DiMaggio & Walter W. Powell, *Introduction* to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 9 (Walter W. Powell & Paul J. DiMaggio eds., 1991) [hereinafter THE NEW INSTITUTIONALISM]; *see also* Ronald L. Jepperson, *Institutions, Institutional Effects, and Institutionalism*, *in* THE NEW INSTITUTIONALISM, *supra*, at 143, 145 (defining "institutions" as "social patterns that, when chronically reproduced, owe their survival to relatively self-activating social processes").

17. Commentators also refer to such networks as "sectors." *See, e.g.*, W. Richard Scott & John W. Meyer, *The Organization of Societal Sectors: Propositions and Early Evidence*, *in* THE NEW INSTITUTIONALISM, *supra* note 16, at 108, 117 (defining a societal sector as "a collection of organizations operating in the same domain, as identified by the similarity of their services, products or functions"); *see also* DiMaggio & Powell, *supra* note 16, at 14.

18. *See* Julia Black, *New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making*, 19 L. & POL'Y 51, 54–55 (1997) (stating that institutions "have a behavioral dimension, providing norms or rules of behavior which relieve the need for individuals to 'reinvent the wheel' every time they are faced with a situation").

19. In explaining the development of institutions, scholars have emphasized the importance of organizational adaptation to environmental demands. *See* JOEL F. HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 20 (1996) ("Organizations depend on the environment for two types of resources: (1) legitimacy and power; and (2) productive resources."); DiMaggio & Powell, *supra* note 16, at 13 (noting that the focus of the "new institutionalism" in organizational sociology is on the interaction between organizations and "nonlocal environments, either organizational sectors or fields roughly coterminous with the boundaries of industries, professions, or national societies"); *see also* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational*

A. Profession

Within the legal profession, the rise of pro bono has occurred as part of a larger effort by the organized bar to translate the ideals of professionalism into concrete institutional forms. The concept of professionalism refers to a method of organizing work that revolves around claims of specialized knowledge, self-regulation, and ethical conduct.[20] A central feature of legal professionalism is the ideal of public service,[21] according to which a lawyer must not only represent client interests but also advance the broader public good. This service ideal has its roots in the political theory of civic republicanism,[22] which emphasizes the importance of lawyers "functioning as a balance wheel in political life."[23] It also resonates with functionalist sociology,[24]

Fields, *in* THE NEW INSTITUTIONALISM, *supra* note 16, at 63, 63–66; Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 L. & SOC. INQUIRY 903, 911 (1996).

20. *See* ELIOT FREIDSON, PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY 62, 173 (1994); *see also* Richard L. Abel, *The Decline of Professionalism?*, 49 MOD. L. REV. 1, 1 (1986); Michael Asimow, *Embodiment of Evil: Law Firms in the Movies*, 48 UCLA L. REV. 1339, 1361 (2001); Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 271 (1995); Colin Croft, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1266–67 (1992); William J. Goode, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194, 195 (1957); Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 424–31 (1992).

21. *See* Russell G. Pearce, *The Lawyer and Public Service*, 9 AM. U. J. GENDER SOC. POL'Y & L. 171, 171–72 (2001); *see also* Cynthia Fuchs Epstein, *Stricture and Structure: The Social and Cultural Context of Pro Bono Work in Wall Street Firms*, 70 FORDHAM L. REV. 1689, 1690 (2002); Croft, *supra* note 20, at 1270; William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 568 (1985).

22. *See* Pearce, *supra* note 5, at 385. *But see* Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1397 (2003) (assailing the republican dimension of professionalism as more mythical than real). The republic vision of lawyers as promoters of the public good was expounded by leading nineteenth century academics, *see* DAVID HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. 1836); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1884), and shaped initial efforts to codify ethical rules, *see* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992); *see also* Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1, 10–13 (1999).

23. *See* Gordon, *supra* note 5, at 14. In Alexis de Tocqueville's famous formulation, lawyers, by virtue of their moral independence, formed part of America's aristocracy. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 264–68 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1969) (1835). The civic republican conception viewed a lawyer's public duty as a matter of noblesse oblige. *See* David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 725 (1988); *see also* Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternative Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 307 (2000).

24. Talcott Parsons explicated this model of professionalism in a series of articles published during the 1930s through the 1950s. *See* TALCOTT PARSONS, *The Professions and Social Structure*, *in* ESSAYS IN SOCIOLOGICAL THEORY 34 (rev. ed. 1954); TALCOTT PARSONS, *The Motivation of*

which views the profession as an institutional reflection of the value of social justice and therefore sees lawyers as obligated by professional role to advance the public interest over narrow client desires.[25]

At the heart of the public service ideal is a fundamental professional dilemma. On one level, the service ideal complements the conventional view of lawyers' ethics, which rests upon the ideology of advocacy—the notion that lawyers are morally neutral technicians who deploy their expertise for the partisan ends of their clients.[26] This "hired-gun" ethos of client loyalty threatens the public-spiritedness of legal professionalism by confining the lawyer's role to the advancement of private client demands. The service ideal reconnects lawyering to the public good, reinforcing the view of the lawyer as guardian of the public interest—someone "whose contribution to society goes beyond the acquisition, aggregation, and deployment of technical skills."[27] Insofar as lawyers discharge their public service duty outside the scope of conventional client representation—by, for example, holding political office or handling pro bono cases—the ideology of advocacy is preserved.

However, the service ideal is also associated with the importation of public values into the domain of client relations—a notion that destabilizes the ideology of advocacy. Under this view, the lawyer's social role requires not simply that she promote justice in public life, but that she exercise moral

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Economic Activities, *in* ESSAYS IN SOCIOLOGICAL THEORY, *supra*, at 50; TALCOTT PARSONS, *An Analytical Approach to the Theory of Social Stratification*, *in* ESSAYS IN SOCIOLOGICAL THEORY, *supra*, at 69; TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, *in* ESSAYS IN SOCIOLOGICAL THEORY, *supra*, at 370. Functionalism, while most strongly associated with Parsons, can be traced back to Emile Durkheim. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (George Simpson trans., 1964) (1933).

25. *See* Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1, 15 (Robert L. Nelson et al. eds., 1992) [hereinafter LAWYERS' IDEALS/LAWYERS' PRACTICES]; *see also* ABEL, *supra* note 6, at 16; Simon, *supra* note 21, at 566; W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 S.C. L. REV. 557, 576 (2001).

26. *See* William H. Simon, *The Ideology of Advocacy, Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30. This ideology has been an important, albeit contested, part of professional identity as far back as the mid-1800s. *See* Normal W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 3 (2003). For a defense of the morally neutral view, see MONROE H. FREEMAN, UNDERSTANDING LAWYERS' ETHICS (1990); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

27. AUSTIN SARAT & STUART SCHEINGOLD, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (forthcoming 2004) (manuscript ch. 2, at 1, on file with author).

autonomy vis-à-vis private clients,[28] staking out positions that comport with the lawyer's own sense of the public good.[29] One version of this public service ideal places the lawyer in the role of mediating between client interests and public goals, advising clients to pursue the course of action that is not simply privately beneficial, but socially just.[30] The emphasis on moral autonomy also extends beyond private client counseling, resonating with the advocacy approach of public interest lawyers whose commitment to a political cause may transcend individual client service.[31] Indeed, it is in the arena of public interest lawyering—defined by political partisanship and the subservience of client to cause—that professional views of moral neutrality are most directly challenged.

The development of pro bono has been shaped by this central professional tension. Early versions of public service fit well with conventional ethical norms. The professional elite largely pursued the public good through engagement in public life, moving seamlessly between private practice and political office.[32] In this case, norms of client partisanship were not disrupted by public service, which was enacted in a distinct institutional arena.[33]

At the lower echelons of the profession, public service was conceptualized as a form of charity to the poor, which was generally provided through court appointment or professional courtesy. The system of court appointments varied by type of case and jurisdiction. On the criminal side, both the colonies and postrevolutionary states applied a wide variety of practices, some following the rules of England,[34] and others passing laws

28. *See* Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2015 (1990); *see also* Carle, *supra* note 22, at 5 (discussing the "morally activist" view of lawyering as one that rejects moral nonaccountability and posits that lawyers have a duty to promote justice).

29. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

30. Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 25, at 177, 181 ("If the lawyer lacks independence, and simply gives the client what he or she wants, the lawyer has failed to perform the mediating function and the society's normative system will fail to constrain behavior.").

31. *See* SARAT & SCHEINGOLD, *supra* note 27 (manuscript at 3) (defining "cause lawyering" as "about using legal skills to pursue ends and ideals that transcend client service").

32. *See id.* (manuscript at 10); *see also* KRONMAN, *supra* note 5, at 11–12.

33. *Cf.* Pearce, *supra* note 5, at 391 (noting that ethicist George Sharswood's view of public service "distinguished between public affairs and client matters," requiring the lawyer to always pursue the common good while acting on matters of public policy but stating that lawyers owed their private clients an obligation of zealous representation in defense of their legal rights).

34. In England, there was the tradition of granting dock briefs, under which a barrister in court at the time of a prisoner's indictment was required to accept appointment to represent the prisoner for a nominal fee. *See* David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*,

requiring appointments in cases involving serious crime or capital offenses.[35] On the civil side, state laws regarding civil appointments were more spare.[36] Federal courts did not have a procedure for requesting counsel for *in forma pauperis* litigants until 1892,[37] and even then it was restricted to poor people with meritorious claims.[38] The system of appointments, which relied on state coercion rather than professional volunteerism, rested on the notion that lawyers were officers of the court and therefore integral to the administration of justice.[39] Lawyers who accepted appointments therefore demonstrated the profession's commitment to standards of fairness while underscoring the centrality of client service—court-appointed attorneys owed the same duty of zealous representation to their indigent clients as to those who paid a fee.

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55 N.Y.U. L. REV. 735, 742 (1980) (citing the Report on the Committee on Legal Aid and Legal Advice in England and Wales, Cmd. No. 6641, at 6 (1945)); *see also* Joan Mahoney, *Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 ST. LOUIS U. PUB. L. REV. 223, 223 n.3 (1998).

35. *See* Shapiro, *supra* note 34, at 750.

36. Indeed, as late as 1923, only twelve states provided for appointment in civil cases. *See* Shapiro, *supra* note 34, at 752. In contrast, almost every state now has a statute requiring lawyers to accept appointment without compensation. *See* Steven B. Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255, 274 (1981). By comparison, in the English system, the *in forma pauperis* law enacted in 1495 allowed a poor person to sue without incurring court costs and specifically provided for the appointment of counsel "without any reward taking therefore." Shapiro, *supra* note 34, at 741 (citing 11 Hen. 7, c.12 (1495) (Eng.)); *see also* Mahoney, *supra* note 34, at 226; Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 42–48 (1990). This law was replaced in 1883 with the Rules of Court, which similarly permitted indigent litigants to be exempted from attorney's fees. *See* Mahoney, *supra* note 34, at 226. The prevalence of gratuitous appointments in civil matters was unclear, particularly since the standards for demonstrating pauper status were onerous and there is some indication that victorious plaintiff attorneys could recover costs from the defendant. *See* Shapiro, *supra* note 34, at 745; *see also The Pro Bono Debate and Suggestions for a Workable Program*, 38 CLEV. ST. L. REV. 617, 619 (1990). Other charitable efforts in England included the Poor Man's Lawyers program, which was established in the late 1800s by lawyers and charitable organizations to provide free legal services to the poor through volunteer lawyers, and the Poor Persons Procedure, which was created in 1914 by the state to connect indigent litigants, almost exclusively in divorce cases, with solicitors who signed up for service. *See* Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 501, 540–41 (1985); *see also* Jeremy Miller & Vallori Hard, *Pro Bono: Historical Analysis and a Case Study*, 21 W. ST. U. L. REV. 483, 484–86 (1994).

37. *See* Shapiro, *supra* note 34, at 752; *see also* John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 388 (1923).

38. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 53 (1976) ("In 1892 federal judges were authorized to assign attorneys to poor people with meritorious claims (an authorization expanded in 1910 from civil to criminal actions and from trial to appellate proceedings)."). The modern rule is that poor clients are entitled to free counsel in civil cases only when they may be deprived of their physical liberty. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981).

39. *See* Rosenfeld, *supra* note 36, at 273.

Outside of the system of court appointments, public service meant simply being "available" to the community.[40] This notion of professional courtesy was exemplified in the prototypical "country lawyer" who would do what he could to help his neighbors.[41] It was also embodied in the professional code of ethics, which exhorted lawyers to give "special and kindly consideration" to "reasonable requests of brother lawyers, and of their widows and orphans without ample means," providing them services for a reduced fee or "even none at all."[42] In contrast to the system of appointments, this form of service to the poor was voluntary, performed through the enactment of individual instances of professional charity.

The advent of the legal aid system in the early 1900s created a more formal institutional model for serving the poor, which nevertheless reinforced conventional views of professional ethics. Legal aid societies were structured as charitable organizations located in poor neighborhoods,[43] relied on staff attorneys to provide free services to specific categories of poor clients,[44] and were subsidized, usually very meagerly,[45] by philanthropic contributions.[46] The early relationship between legal aid and the organized bar was a distant one,[47] with no organized bar involved in establishing a legal aid society until

40. SARAT & SCHEINGOLD, *supra* note 27 (manuscript at 11–12).

41. AUERBACH, *supra* note 38, at 15.

42. CANONS OF PROF'L ETHICS CANON 12 (1936); *see also* Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 111 (2002). Canon 12 reflected the view of famous legal ethicist George Sharswood, who pronounced in his treatise that "it is to be hoped, that the time will never come . . . when a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel, in the prosecution or defense of his rights." *See* Pearce, *supra* note 5, at 419 n. 353 (quoting SHARSWOOD, *supra* note 22, at 151).

43. *See* Earl Johnson, Jr., *Justice and Reform: A Quarter Century Later*, *in* THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES 9, 15 (Francis Regan et al. eds., 1999).

44. *See* JOEL F. HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 18 (1978).

45. *See* AUERBACH, *supra* note 38, at 57.

46. *See* JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 38 (1982); *see also* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 11 (1993) (describing the funding sources of the New York Legal Aid Society as membership contributions, law firm donations, and retainer fees).

47. Early efforts to establish legal aid for the poor were undertaken without organized bar support. Preceded by the short-lived federal Freedman's Bureau, *see* William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation From the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241, 243–44 (1998), the first sustained experiment with free legal services was the New York Legal Aid Society, established in 1876 to "render legal aid and assistance, gratuitously, to those of German birth, who may appear worthy thereof, but who from poverty are unable to procure it," AUERBACH, *supra* note 38, at 53 (quoting the New York Legal Aid Society statement of purpose); *see also* DAVIS, *supra* note 46, at 11; SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING 18 (1990). Legal aid expanded modestly during the next few years, with legal aid societies opening in Chicago

1909.[48] Stung by the 1919 publication of Reginald Heber Smith's *Justice and the Poor*, which denounced the glaring inequality in legal services,[49] the bar took on a greater role in funding legal aid,[50] stimulating its notable expansion over the next forty years.[51] Yet bar support placed operational constraints on legal aid work: Controversial clients were generally avoided,[52] cases that could generate fees were rejected,[53] and client income eligibility was maintained at levels acceptable to private attorneys competing for lower-income clients.[54] These limitations, combined with those imposed by charitable and local business funders,[55] confined legal aid work within narrow professional

in 1886 and four other cities by the turn of the century. *See* AUERBACH, *supra* note 38, at 53. Some legal aid groups used their autonomy to press reform agendas that sought to address the economic exploitation of low-income immigrants and women. *See* KATZ, *supra* note 46, at 34–36 (describing the reform activities of the precursors of Chicago's Legal Aid Society, whose work included "publicizing outrageous conditions, drafting legislation, coordinating political support, and mounting lobbying campaigns"); Johnson, *supra* note 43, at 15 (noting that the New York Legal Aid Society was started by German-American businessmen who wanted to help immigrants from their homeland who suffered economic exploitation).

48. *See* AUERBACH, *supra* note 38, at 53, 57.

49. REGINALD HEBER SMITH, JUSTICE AND THE POOR 8 (1919) (asserting that "the rich and poor do not stand on an equality before the law").

50. *See* Abel, *supra* note 36, at 539; Johnson, *supra* note 43, at 16. Nevertheless, bar associations and private lawyers continued to contribute only a small portion of the total legal aid budget. *See* Abel, *supra* note 36, at 502 & n.163 (stating that as late as the 1950s and 1960s, "charitable contributions by lawyers accounted for only about ten percent of the total legal aid budget").

51. Whereas there were forty legal aid societies in 1919, the number rose to seventy in 1947. *See* HANDLER ET AL., *supra* note 44, at 19 (1978). Spurred by the threat of state regulation embodied in England's Legal Aid and Advice Scheme of 1950, the bar redoubled efforts to expand legal aid, which grew to 249 offices by 1963. *See* DAVIS, *supra* note 46, at 19; HANDLER ET AL., *supra* note 44, at 19; *see also* KATZ, *supra* note 46, at 65 ("There were 92 cities with Legal Aid societies in 1950, 209 in 1960."); Alan Houseman, *Legal Aid History*, *in* POVERTY LAW MANUAL FOR THE NEW LAWYER 18, 18 (Nat'l Ctr. on Poverty Law ed., 2002) ("By 1965 virtually every major city had some kind of program."), *available at* http://www.povertylaw.org/legalresearch/manual/index.cfm; Johnson, *supra* note 43, at 16 ("From 1920 to 1965 civil legal aid expanded several-fold, whether measured by funding level, number of salaried attorneys, or clients served.").

52. *See* KATZ, *supra* note 46, at 40.

53. *See* DAVIS, *supra* note 46, at 15.

54. *See* KATZ, *supra* note 46, at 40. Legal aid threatened the economic interests of local practitioners, who relied to some degree on low- to moderate-income clients and worried about the competitive consequences of free services. Thus, to promote legal aid, leaders emphasized the financial benefits of legal aid to private practitioners, touting its potential for keeping indigent clients out of private attorney offices, reducing welfare dependency, increasing awareness about the need for lawyers, and providing young attorneys with significant practical experience. *See* EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 9 (1974).

55. In Chicago, for instance, legal aid was subordinated to the United Charities, which was a professional social service agency that limited representation in divorce cases on the theory that they indicated "personal pathology" and restricted bankruptcy filings that constituted a "technical defense to just claims." KATZ, *supra* note 46, at 38, 44. Legal aid societies also became heavily dependent on local business contributions, which further constrained the scope of their legal work. *See* HOWARD J. CARLIN & S. MESSINGER, CIVIL JUSTICE AND THE POOR 50 (1966) ("Pressure from local

boundaries. Legal aid lawyers abjured reform-oriented advocacy and instead concentrated on resolving minor individual disputes.[56] Aggressive tactics were downplayed out of concern for the consequences of being perceived by outsiders as "too aggressive."[57]

From a professional standpoint, legal aid discharged the profession's public duty while reinforcing norms of client-centered service. In its attempt to provide the poor with equal access to lawyers,[58] legal aid sought to vindicate the fairness of the legal system. In doing so, legal aid compartmentalized the bar's public service obligation, assigning it to a cadre of full-time staff attorneys housed in separate offices. This lifted the direct onus of service from private lawyers, allowing them to take credit for advancing the public good, while continuing to devote themselves to the claims of their paying clients.[59] Within legal aid offices, the individual service orientation fit well with standard professional views: Legal aid lawyers operated as neutral partisans for the poor, advocating for client goals instead of advancing their own visions of systemic reform.

Legal aid therefore stood in sharp contrast with the emerging model of the public interest lawyer who cared about the political ends of legal representation and used the law as a vehicle to enact social change.[60] Louis

businessmen has . . . resulted in a reluctance to pursue claims against local merchants, landlords, and others whose interest would be threatened by more vigorous representation."); Johnson, *supra* note 43, at 18 (noting that legal aid societies were "threatened with loss of funding if they did seek to use their knowledge and skills as lawyers to attack exploitation at the hands of 'runners, boardinghouse keepers and a miscellaneous coterie of sharpen'" given that "the primary source of funding came from many of the same interests who were victimizing their clients").

56. *See* HANDLER ET AL., *supra* note 44, at 19; *see also* DAVIS, *supra* note 46, at 12 (reporting that legal aid cases involved mostly routine contract, real estate, family, and employment cases); KATZ, *supra* note 46, at 40 (noting that "[b]y the 1950s, Legal Aid had become largely a *defender of debtors* against retail creditors and a party of conflicts *among the poor*, largely in domestic-relations matter").

57. KATZ, *supra* note 46, at 41; *see also* DAVIS, *supra* note 46, at 13 (stating that attorneys at the New York Legal Aid Society pressed to settle most cases, irrespective of client wishes—the rationale being that it was the most efficient way of addressing the needs of large numbers of poor clients). The form of advocacy undertaken by legal aid lawyers also reflected a lack of resources and adverse practice environment, which constrained the scope of legal aid practice. *See* KATZ, *supra* note 46, at 17.

58. JOHNSON, *supra* note 54, at 10–14 (discussing the "equal access" rationale as the motivating philosophy of the legal aid movement).

59. *See* AUERBACH, *supra* note 38, at 61.

60. *See, e.g.*, Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter CAUSE LAWYERING]; *see also* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001).

Brandeis looms large here as a model of the public interest advocate,[61] valorized for his practice-based exploits as the "people's lawyer,"[62] who represented reform-oriented organizations to combat social injustice.[63] Unlike legal aid advocates,[64] the public interest lawyer represented clients in the pursuit of law reform and often engaged in aggressive tactics, viewing public interest advocacy as outside the bounds of traditional ethical proscriptions because it was rendered without a fee.[65] The success of the test case litigation strategy employed by the National Association for the Advancement of Colored People Legal Defense and Education Fund (NAACP) to upend segregation,[66] which culminated in *Brown v. Board of Education*,[67] focused national attention on law reform as a model to change unfair social structures, transforming the way a new generation of public interest lawyers understood their relation to social change. Law reform remained inscribed in the framework of legal

61. Moorfield Storey, who took on civil rights law reform cases for the NAACP Legal Defense Fund, Inc., is cited as another early example of a public interest lawyer. *See* Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97 (2002).

62. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 169–74 (1988); SIMON, *supra* note 29, at 127–32; Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1155 (1990); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 264–65 (1990); Luban, *supra* note 23, at 723–25; Simon, *supra* note 21, at 565–71. For an overview of Louis Brandeis' philosophy, see LOUIS D. BRANDEIS, *Business—A Profession*, *in* BUSINESS—A PROFESSION 1 (1914); LOUIS D. BRANDEIS, *The Opportunity in the Law*, *in* BUSINESS—A PROFESSION, *supra*, at 313; Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461 (1916).

63. *See* Susan D. Carle, *Re-envisioning Models for Pro Bono Lawyering: Some Historical Reflections*, 9 AM. U. J. GENDER SOC. POL'Y & L. 81, 82–85 (2001); Pearce, *supra* note 21, at 172–73. For instance, Louis Brandeis, at the request of settlement house leader and National Consumer League (NCL) director Florence Kelley, argued the 1908 Supreme Court case *Muller v. Oregon*, 208 U.S. 412 (1908), which upheld sex-specific labor regulations for women. *See* DAVIS, *supra* note 46, at 14. Brandeis' relationship with political reform and his status as a public interest lawyer, however, is complex. Clyde Spillenger has argued that, while Brandeis' work on behalf of groups like the NCL was significant, he often rejected fees precisely to free himself of the role obligations of the conventional legal representative and to abjure the entanglements of partisan political engagement. *See* Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1471–73 (1996); *see also* Carle, *supra*, at 94.

64. Highlighting legal aid's different approach to advocacy, the New York Legal Aid Society, intent on staying outside the political fray, declined to participate in the settlement house law reform activity. *See* DAVIS, *supra* note 46, at 14–15.

65. *See* Carle, *supra* note 63, at 85; *see also* Pearce, *supra* note 21, at 173.

66. Under the test case approach, the NAACP would seek out, and sometimes even create, a particular factual situation that would be used as the basis for a lawsuit designed to establish a specific legal principle. *See* Carle, *supra* note 61, at 100; *see also* JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 26–27 (1978). This strategy was first articulated in school desegregation in connection with the NAACP's Margold Plan in the early 1930s. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 133–37 (1977). For an excellent account of the civil rights period, see MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994).

67. 347 U.S. 483 (1954).

liberalism to the extent that it envisioned the courts as the central locus of social struggle and sought to vindicate individual rights.[68] Yet, in opposition to legal aid, law reform was self-conscious in its attempt to change or reinterpret law as a means to improve the status of disadvantaged groups.[69] Moreover, law reform suggested a fundamentally different professional role for the lawyer: Rather than embracing the view of advocacy as effectuating client desires, the model of law reform transgressed the norm of moral neutrality in the service of advancing the broader cause.[70]

The organized bar was never completely comfortable with the notion of law reform and the challenge it posed to professionalism. Indeed, in its 1958 Report of the Joint Conference, the ABA was at pains to emphasize the importance of client partisanship to the proper resolution of disputes,[71] championing "[p]rivate practice [as] a form of public service."[72] The ABA's support for law reform, in contrast, was grudging. Noting that "[t]he special obligation of the profession with respect to legal reform rests on considerations too obvious to require enumeration,"[73] the ABA revealed its ambivalence by validating law reform not simply as a means of pursuing justice, but rather as a way to avoid change from being "thrust from without upon an unwilling Bar."[74]

When change did come in the form of the federal legal services program in the 1960s, it not only confirmed the bar's fears by being imposed from the outside, it served to institutionalize the law reform approach within a newly created federal agency committed to aggressively attacking poverty.[75] The

68. *See* HANDLER, *supra* note 66, at 22; GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 4 (1991); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 14 (2d ed. 2004).

69. *See* HANDLER, *supra* note 66, at 4 ("[L]aw reformers choose to use the legal system to strengthen the position of weak, poorly organized, or unarticulated interests in society."). Handler states that law reformers seek to use litigation to provide "tangible benefits" to the disadvantaged, *id.* at 209, as well as to achieve some other type of "indirect" benefit such as mobilization, legitimacy, or consciousness-raising, *id.* at 222; *see also* Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, *in* PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 4, 20 (Burton A. Weisbrod et al. eds., 1978) (defining public interest law as that which bestows significant external efficiency or equity benefits).

70. *See* Sarat & Scheingold, *supra* note 60, at 4; Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT'L J. LEGAL PROF. 209, 212–13 (1998).

71. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

72. *Id.* at 1162.

73. *Id.* at 1217.

74. *Id.*

75. This approach resonated with the War on Poverty, which emphasized the need for a "massive movement of social services, facilities, education, guidance, jobs, and training to the front

location of legal services within the federal government allowed it to depart from the model of legal aid: Propelled forward by the power of the federal purse, the new program was freed of constraints that forced bar-funded legal aid societies to adopt an individualized equal access approach. Activism was promoted as legal services lawyers were urged to identify with the cause of the poor and to actively seek out ways to challenge injustice.[76] Not all legal services offices were activist; to the contrary, because the government administered legal services funding on a block-grant basis, many legal aid societies that received grants continued to provide individual services and avoid reform activities.[77] However, there was an undeniable shift in tone as well as strategy. As its first director stated: "The role of [the legal services program] is to provide the means within the democratic process for the law and lawyers to release the bonds which imprison people in poverty, to marshal the forces of law to combat the causes and effects of poverty."[78] Moreover, spurred by the new talent attracted by the program's prestige and the availability of fellowships,[79] legal services lawyers did in fact employ more aggressive legal tactics—taking a higher percentage of their cases to court than their legal aid counterparts, making over 1000 appeals every year, and

lines in the struggle against poverty." Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1317–18 (1964). The legal services program grew out of previous neighborhood-based models such as the Ford Foundation-sponsored Community Progress, Inc. in New Haven and the Neighborhood Legal Services Project in Washington, D.C., as well as New York's Mobilization for Youth, started with a grant from the President's Committee on Juvenile Delinquency. *See* DAVIS, *supra* note 46, at 28–33; JOHNSON, *supra* note 54, at 21–35; *see also* ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POL'Y, CAN LEGAL SERVICES ACHIEVE EQUAL JUSTICE? (1997), *at* http://www.clasp.org/DMS/Documents/1037134525.86/dialogue.htm.

76. *See* AUERBACH, *supra* note 38, at 270 ("Attorney General Katzenbach, perhaps galvanized by his civil rights experiences, urged lawyers 'to go out to the poor rather than to wait. . . . To be reduced to inaction by ethical prohibitions . . . is to let the canons of lawyers serve the cause of injustice."); Cahn & Cahn, *supra* note 75, at 1335 ("A lawyer need not be apologetic for being partisan, for identifying. That is his function."); *see also* MARKS ET AL., *supra* note 11, at 45.

77. *See* DAVIS, *supra* note 46, at 34; Abel, *supra* note 36, at 573–74; *see also* Anthony Champagne, *The Internal Operation of OEO Legal Services Projects*, 51 J. URB. L. 649, 653 (1974) (finding that only 14 percent of legal services offices were involved in substantial law reform). Moreover, the demands of legal services practice tended to relegate reform activity to the margin.

78. JOHNSON, *supra* note 54, at 75 (quoting speech by E. Clinton Bamberger, Jr., first director of the Legal Services Program).

79. In particular, the Reginald Heber Smith fellows—or "Reggies" as they were called—injected extraordinary new talent into legal services offices.

> The charter class of 50 Reginald Heber Smith Fellowships included several young associates already working in major corporate law firms, as well as many who were heavily recruited by such firms because of their academic credentials. . . . Most of these original 'Reggies' eventually left the legal services programme, going on to distinguished careers in academia (3 became law school deans and another 10 law school professors), the judiciary, or private law firms.

Johnson, *supra* note 43, at 19 n.16.

bringing 219 cases to the U.S. Supreme Court in the first five years of the program's existence.[80]

The organized bar was not swift to embrace the legal services program, which threatened its independence, and never completely warmed to its reform orientation, which clashed with professional norms. Local bar associations opposed the legal services program at the outset, fearing that federally subsidized competition would decimate their members' practices,[81] while national bar leaders expressed concern about the impact of federal intervention on professional autonomy.[82] Indeed, ABA support for the creation of legal services came only after the government agreed to a number of concessions, including a promise to direct funds to existing bar-sponsored programs.[83] Although the organized bar eventually became an ally of legal services,[84] its activist approach continued to strain their relationship. As the reform-oriented legal services model began to fan outward, informing the work of the "new public interest lawyers" in the late 1960s,[85] the ABA moved to contain legal services attorneys within conventional professional bounds by criticizing them for overly aggressive tactics.[86] While supportive of the broad public service goals of the legal services program, the organized bar thus bristled at its means.

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80. *See* JOHNSON, *supra* note 54, at 189; *see also* LAWRENCE, *supra* note 47, at 9, 99–121 (noting that 7 percent of the appeals to the United States Supreme Court from 1967–73 involved legal services lawyers, who won 62 percent of those appeals).

81. *See* AUERBACH, *supra* note 38, at 273 ("The most intense professional opposition to OEO erupted at the local level, where OEO community efforts triggered the animosity of solo and small-firm lawyers who feared intrusion upon their business."); Abel, *supra* note 36, at 499 ("When the Office of Economic Opportunity (OEO) Legal Services Program was first established, the professional organizations dominated by solo and small firm lawyers were the most uncompromising in their resistance.").

82. *See* AUERBACH, *supra* note 38, at 273. Indeed, the Supreme Court had only recently handed down its decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which established the constitutional right to counsel for felony defendants in state court and spurred the proliferation of government-funded public defender offices. *See* ABEL, *supra* note 6, at 131.

83. *See* AUERBACH, *supra* note 38, at 270; JOHNSON, *supra* note 54, at 82–102; MARKS ET AL., *supra* note 11, at 42. The government also agreed to establish a permanent advisory committee with ABA representatives assured a seat. *See* JOHNSON, *supra* note 54, at 58. The ABA's decision to support the legal services program was also driven by the American Medical Association's bruising and ultimately unsuccessful battle against Medicare, which reinforced ABA President Lewis Powell's view that it was better to put the bar out in front of the issue of legal services, thereby preempting more drastic federal intervention. *See id.* at 56–58.

84. The ABA and local bar groups lobbied to save the legal services program from elimination under the Reagan administration. *See* Quigley, *supra* note 47, at 256; *see also The Perils of L.S.C.*, 68 A.B.A. J. 236 (1982). Richard Abel suggests that this move was motivated in part by private lawyers' fear of being "called upon to render pro bono services in millions of cases if federal funds [were] terminated." *See* Abel, *supra* note 36, at 508.

85. *See* Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

86. *See* AUERBACH, *supra* note 38, at 273.

The system of pro bono, in contrast, offered a way for the organized bar to reassert its public service commitment while underscoring the centrality of conventional professional norms. As federal legal services declined in the 1980s and 1990s, pro bono emerged as the most significant source of free representation for the poor,[87] signaling the advent of a new institutional system of public service. The organized bar played a central role in building the institutional structures of pro bono during this time, investing heavily in organizing nonprofit pro bono programs and promoting private-sector volunteerism in large law firms. This constituted a dramatic shift in position: Whereas the organized bar had historically offered only meager support for pro bono practice, by the end of the millennium it had become pro bono's most stalwart supporter.

One reason for this shift was that pro bono presented professional advantages over the public service systems it had eclipsed. The main difference between pro bono and its legal aid and legal services predecessors, of course, was that pro bono defined a commitment by private-sector attorneys to *themselves engage in direct representation* to discharge their service obligations. Yet, even though pro bono shifted the onus of serving the poor to private lawyers themselves, it nevertheless reinforced standard professional norms by dividing the professional role between paying and nonpaying clients, each of whom were entitled to the lawyer's zealous representation. In this way, pro bono permitted public service to be enacted outside of the context of commercial representation,[88] allowing private lawyers to carve out space for discharging their professional duty without disrupting relations with paying clients. Pro bono therefore reconnected the public service ideal to professional norms of moral neutrality destabilized by legal services—as private lawyers moved back and forth between commercial and pro bono clients, they enacted the ideology of advocacy. Even reform-oriented cases were subordinated to the rationale of equal access, with reform organizations viewed as another client to be serviced by the firm. In this sense, the lawyer activism of legal services gave way to an ethic of structural neutrality,[89] with

87. *See* Rebecca L. Sandefur, Organization of Lawyers' Pro Bono Service and Poor People's Access to Lawyers for Civil Matters 6–7 (unpublished manuscript, on file with author) ("In terms of the number of legal personnel involved, *pro bono* service is the largest component of the nation's provision of civil legal aid.").

88. *See* Pearce, *supra* note 5, at 420 ("By defining a narrow sphere of public interest practice separate from the lawyer's remunerative representation of big business, pro bono permitted lawyers to compartmentalize their public service obligations and avoid the governing class tension of mediating between client interests and the public good.").

89. *See, e.g.*, Scheingold & Bloom, *supra* note 70, at 226 (stating that, for many lawyers within the firm, "[t]he goal of [pro bono] work is to provide competent legal representation for clients

each pro bono lawyer free to define the appropriate nature of her public service engagement.[90]

B. State

The story of pro bono's institutionalization is also bound up in the broader political movement away from the state as the locus of large-scale social service programs—a trend symbolized in the reaction against the welfare state apparent in President Ronald Reagan's commitment to shrinking "big government" in the 1980s and President Bill Clinton's sweeping welfare reform in 1996.[91] The backlash against the state has largely been articulated as a critique of the *federal* government, which has been faulted for wielding unresponsive centralized power and presiding over a bloated and inefficient bureaucracy.

Although this critique has cut across ideological lines,[92] over the last two decades it has become strongly associated with conservative political thought. While libertarians have long rejected governmental intrusion into the sphere of private life, beginning in the 1980s, the conservative aversion to the state began to be framed in terms of moral and efficiency-based critiques. The welfare state in particular was attacked as facilitating moral delinquency by subsidizing the idleness and promiscuity of the welfare queen.[93] The state also came under fire on efficiency grounds: The federal government was viewed as a large, inefficient bureaucracy that simply could not provide services with the same cost-effectiveness of private actors operating under the discipline of market forces.[94]

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who cannot afford lawyers—remaining essentially detached from the clients' objectives or problems").

90. *See, e.g.*, Krane, *supra* note 4. Krane states:

> Ultimately, it is up to the associate to follow through. You, associate, should set aside at least five hours a month, preferably ten, to devote to pro bono, bar association or community activities. . . . Don't want to work for the ACLU? There are plenty of organizations and causes that fall squarely within the definition of pro bono work, yet do not list markedly toward the left.

Id.

91. *See* HANDLER, *supra* note 19, at 5; *see also* JOEL F. HANDLER, SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE: THE PARADOX OF INCLUSION 25 (2004).

92. On the left, the disillusionment with federal power stemming from Vietnam and the Watergate scandal has been joined with a broader sense that the state is excessively corporatized—captured by powerful interests and unresponsive to the needs of vulnerable populations. *See* CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 208 (1995).

93. For a version of this critique, see CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950–1980 (1984).

94. *See* HANDLER, *supra* note 19, at 79. Another strain of this efficiency critique focused more specifically on top-down, command-and-control style government regulation, which was faulted for distorting the logic of market exchange and reducing business competitiveness.

The political response to these critiques has been to shrink the role of the federal government in service provision. One version of this has been decentralization—the devolution of administrative authority from the federal government to states and localities.[95] The major example of this is welfare reform, although many other antipoverty programs have been similarly delegated to local decision makers through block-grant funding.[96] In addition, as governmental functions have been pushed "downward" through decentralization, they have also been shifted "outward" into the market through privatization,[97] a move which charges private actors with responsibility for undertaking traditional government functions.

Pro bono's institutionalization bears important features of this reaction against centralized governmental power—a fact made clear by way of comparison with the federal legal services program, which symbolized both the promise and perils of the government-centered approach. Housed within the Office of Economic Opportunity (OEO), the program, launched in 1965, placed the federal government's imprimatur on a massive new system of civil legal services:[98] In the program's first two years, grants were made to 300 legal services organizations at a level that constituted an eightfold increase over the 1965 investment in legal aid.[99] By 1980, funding for legal services reached its peak at approximately $680 million,[100] up from an initial level of just over $235 million in 1967.[101]

While embedded in a politically supportive OEO, legal services lawyers won significant victories, largely in reforming and expanding federal entitle-

95. *See id*. at 6.

96. *See* Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 416 (2001) (discussing Community Development Block Grants).

97. *See* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1291–92; *see also* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000). Jody Freeman notes that privatization, although accelerating, is not necessarily new: "Virtually every service or function we now think of as 'traditionally' public, including tax collection, fire protection, welfare provision, education, and policing, has at one time or another been privately performed." Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 552–53 (2000) [hereinafter Freeman, *The Private Role*].

98. Of course, while the federal legal services program was centralized in its governance and funding structure, it was implemented at the local level both through the provision of funding to existing legal aid programs and the creation of new nonprofit groups. *See* JOHNSON, *supra* note 54, at 82–84.

99. *See id*. at 71. As a result, "[o]ver 800 new law offices and almost 2000 new lawyers were funded." *Id*. By 1972 there were 2660 staff attorneys housed in over 850 offices. *See id*. Whereas the caseload of legal aid was 426,457 in 1965, OEO-funded offices processed 1,237,275 cases in 1971. *See id*.

100. *See* Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1222 (2002) (figure adjusted to reflect 2004 dollars).

101. *See* JOHNSON, *supra* note 54, at 71 (figure adjusted to reflect 2004 dollars).

ment programs. Perhaps the biggest victory came in *Goldberg v. Kelley*,[102] which held that due process requires a pre-termination hearing before the termination of welfare benefits. State governments and big business were also advocacy targets. Lawyers at the California Rural Legal Assistance (CRLA) program, for example, successfully sued California to restore millions in Medi-Cal benefits,[103] expanded food stamps and school lunch programs, forced the adoption of a state minimum wage for farm workers,[104] and curtailed the importation of Mexican braceros.[105] In a blow to business interests, legal services lawyers prevailed in the case of *Fuentes v. Shevin*,[106] in which the Supreme Court struck down on due process grounds state statutes that allowed private parties to summarily repossess goods.

Yet the lesson of legal services was precisely that a progressive law reform agenda that asserted the rights of the poor against government bureaucracies and private businesses was vulnerable to political backlash.[107] And, in fact, the very success of legal services in pressing a liberal agenda to expand entitlements and reform business practices turned into a liability as the political current shifted in the direction of increasing conservatism. An early indication of this backlash came in 1974 when President Richard Nixon agreed to create an independent Legal Services Corporation (LSC), but placed restrictions on legal services activities and de-funded national back-up centers, which were critical to law reform litigation.[108] Once Ronald Reagan

102. 397 U.S. 254 (1970). Legal services lawyers also won Supreme Court victories in *Shapiro v. Thompson*, 394 U.S. 316 (1969), striking down welfare residency requirements on equal protection grounds, and *Boddie v. Connecticut*, 401 U.S. 371 (1971), holding filing fees in divorce cases unconstitutional.

103. Morris v. Williams, 433 P.2d 697 (Cal. 1967).

104. *See* Quigley, *supra* note 47, at 248–50. On CRLA, see Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1 (1972); J. Falk & S. Pollard, *Political Interference With Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services*, 24 HASTINGS L.J. 599 (1973).

105. *See* Johnson, *supra* note 43, at 22 (citing Ortiz v. Wirtz, No. 47830 (ND Cal., dismissed without prejudice, 21 Sept. 1967)).

106. 407 U.S. 67 (1972).

107. *See* Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1995); *see also* John Kilwein, *The Decline of the Legal Services Corporation: 'It's Ideological, Stupid!,'* in THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES, *supra* note 43, at 41, 55 ("Politically, the creators of legal services failed to consider, or chose to ignore, the ramifications of federally funding a programme that had as its principal goal the restructuring of the legal system, including state and local courts and administrative agencies.").

108. *See* Quigley, *supra* note 47, at 252–53 ("The restrictions imposed included prohibition on litigation involving abortion, school desegregation, and selective service, and also placed some limitations on class actions and some types of juvenile representation."). On LSC, see generally M.R. Buck, *The Legal Services Corporation: Finally Separate but Not Quite Equal*, 27 SYRACUSE L. REV. 611 (1976); Note, *Special Project: The Legal Services Corporation: Past, Present and Future*, 28 N.Y.U. L. REV. 593 (1983).

became president, he moved aggressively against legal services,[109] proposing the termination of LSC in 1982.[110] Although this drastic measure was unsuccessful, Reagan undermined LSC in other ways, appointing a hostile board and reducing its funding.[111] Congress continued to decrease LSC funding after Reagan, cutting it in 1996 to a level 50 percent below its peak in 1980.[112] The final blow came with the imposition of congressional restrictions in 1996 banning LSC-funded organizations from redistricting challenges,[113] lobbying,[114] class action lawsuits,[115] representing most aliens,[116] political advocacy,[117] collecting attorney's fees,[118] abortion litigation,[119] prisoner representation,[120] welfare reform activities,[121] and defending public housing tenants evicted for drugs.[122] Most drastically, this legislation prohibited lawyers in LSC-funded organizations from using non-LSC funds to engage in any of the banned activities.[123] As legal services lawyers were thus forced to turn from systemic challenges to "unbundling" legal services,[124]

109. President Reagan's antipathy toward legal services traced back to his days as Governor of California, when he attempted to prohibit legal services suits against the government and block OEO grants in response to CRLA's advocacy. Johnson, *supra* note 43, at 22.

110. *See* Quigley, *supra* note 47, at 256.

111. *See id.* at 256–58; *see also* Robert J. Rhudy, *Comparing Legal Services to the Poor in the United States With Other Western Countries: Some Preliminary Lessons*, 5 MD. J. CONTEMP. LEGAL ISSUES 223, 235 (1994).

112. *See* Houseman, *supra* note 100, at 1222; *see also* Houseman, *supra* note 51, at 23 ("Final 1996 statistics revealed the cost of the funding cuts: the number of cases closed fell from 1.7 million in 1995 to 1.4 million in 1996; the number of LSC-funded attorneys fell by 900; and 300 local offices closed."). As Rebecca Sandefur notes: "This 50% decline in funding occurred over a period when the number of people eligible for federal legal aid rose by 16%, from 40,658,000 in 1980 to 47,084,000 in 2002." Sandefur, *supra* note 87, at 28.

113. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(1), 110 Stat. 1321; *see also* BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER 7 (2000).

114. Omnibus Consolidated Rescissions and Appropriations Act § 504(a)(2), (3), (4).

115. *Id.* § 504(a)(7).

116. *Id.* § 504(a)(11).

117. *Id.* § 504(a)(12).

118. *Id.* § 504(a)(13).

119. *Id.* § 504(a)(14).

120. *Id.* § 504(a)(15).

121. *Id.* § 504(a)(16). This provision was subsequently held to be unconstitutional. *See* Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 549 (2001). The constitutionality of the restrictions on non-LSC funds, class actions, and attorney's fees is currently being litigated in *Dobbins v. Legal Services Corporation*. *See* Complaint, Dobbins v. Legal Servs. Corp., (E.D.N.Y.) (filed 2001), *available at* http://www.brennancenter.org/programs/pov/dobbins/dobbins_complaint.pdf.

122. Omnibus Consolidated Rescissions and Appropriation Act § 504(a)(17).

123. *See* BRENNAN CTR. FOR JUSTICE, *supra* note 113, at 7.

124. "Under this approach, a lawyer and client agree to divide up tasks and each is responsible for handling discrete parts of the case." STATE BAR OF CAL., AND JUSTICE FOR ALL: FULFILLING THE PROMISE OF ACCESS TO CIVIL JUSTICE IN CALIFORNIA 34 (1996).

running pro se clinics,[125] and setting up telephone hotlines,[126] the era of legal services-led law reform came to a close.

It was, in the end, the force of the right's ideological attack on the liberal reform orientation of federal legal services that led to its decline. It was not simply that the program constituted the excesses of big government. Although the conservative critique was often couched in those terms,[127] the core of the right's objection stemmed from its distaste for the causes that federal legal services championed: expanded entitlements, greater labor protections, and broader consumer rights. However, while the big government backlash was not the sole driving force behind legal services' contraction, it has nevertheless left deep imprints on what remains of the program.

Although there has not been formal decentralization, federal cutbacks have effectively shifted the burden of funding legal services programs to lower-level governmental and nongovernmental actors.[128] While the federal government still heavily subsidizes the system of civil legal services, state and local governments have become the second most important source of funds, accounting for just over $230 million in 2003, compared with nearly $305 million contributed by LSC.[129] State bar associations also have taken on a critical funding role through Interest on Lawyer Trust Account (IOLTA) programs,[130] which use the value created on interest-bearing client trust

125. *See, e.g.*, Tina L. Rasnow, *Traveling Justice: Providing Court Based Pro Se Assistance to Limited Access Communities*, 29 FORDHAM URB. L.J. 1281 (2002).

126. *See* HOUSEMAN, *supra* note 75 (emphasizing the shift toward hotlines, pro se assistance, alternative dispute resolution and community development); *see also* STATE BAR OF CAL., *supra* note 124, at 28–36 (identifying alternative delivery methods, including prepaid legal services, court-affiliated ADR, community-based dispute resolution centers, delegalization, the use of paraprofessionals, small claims court, pro per coaching, peer counseling, community education, and unbundled services).

127. *See, e.g.*, David E. Rovella, *Can the Bar Fill the LSC's Shoes? Law Firms Find Meeting the ABA Pro Bono Goal for Billable Hours is Tough*, NAT'L L.J., Aug. 5, 1996, at A1 ("Many critics [of federal legal services] feel . . . that . . . a shift in responsibility [toward the pro bono system] would work, resulting in adequate indigent representation and taxpayer savings.").

128. Thus, despite federal funding cuts, total funding for LSC programs has remained at a relatively constant level, cobbled together from a variety of public and private sources. For instance, in 1999, although federal funding to LSC was at about $345 million, private grants, other federal grants, state and local grants, state bar program funds, and charitable contributions raised total funding to almost $680 million. *See* LEGAL SERVS. CORP., SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2000), *available at* http://www.lsc.gov/FOIA/other/exsum.pdf (figures adjusted to 2004 dollars).

129. *See* ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POL'Y, CIVIL LEGAL AID IN THE UNITED STATES: AN OVERVIEW OF THE PROGRAM IN 2003, at 4 (2003), *available at* http://www.clasp.org/DMS/Documents/1064583480.94 (figures adjusted to 2004 dollars). The total amount of funding in the fifty states and the District of Columbia was just under $925 million. *See id.* (figure adjusted to 2004 dollars)

130. Alan Houseman notes that in 2003, IOLTA programs contributed just over $135 million to the national civil legal services system. *Id.* (figure adjusted to 2004 dollars). Since 1985, the

accounts to fund legal services programs.[131] Private philanthropy, both from foundations and lawyers, has further filled in gaps.[132]

Federal legal services has also undergone its own version of privatization to the extent that the federal government has contracted out a portion of its legal work to private attorneys.[133] The official impetus came in 1981 when, against the backdrop of threatened termination by the Reagan administration, LSC mandated that its grantees make a "substantial amount" of funds available for private attorney involvement (PAI).[134] Although the PAI program has resulted in the direct payment of private practitioners under a form of Judicare, its major effect has been to stimulate the expansion of programs designed to recruit, train, and connect pro bono volunteers with low-income clients.[135] Indeed, the advent of PAI has corresponded with the dramatic expansion of organized pro bono groups,[136] which have emerged as central to the new civil legal services regime. Although some LSC organizations have used PAI funds to set up their own pro bono referral organizations, much of the money has gone to support programs launched by local bar associations, which have taken advantage of PAI funds to build a significant pro bono infrastructure.[137] In this way, the decline of the state-

California IOLTA program "has come to be the second largest source of funding for legal services in California, a crucial supplement for 114 legal services programs." STATE BAR OF CAL., *supra* note 124, at 11.

131. Florida was the first state to establish an IOLTA program in 1981; all states, as well as the District of Columbia, now have IOLTA programs. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 221 (2003) (upholding IOLTA programs against a Fifth Amendment Challenge brought by the conservative Legal Foundation of Washington).

132. *See* HOUSEMAN, *supra* note 129, at 4 (reporting that the contributions to the civil legal services system from foundations, private lawyer contributions, and United Ways equaled approximately $125 million in 2003 (figure adjusted to 2004 dollars)).

133. On "contracting out," see JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 215 (1989); *see also* HANDLER, *supra* note 19, at 6–7; MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 6 (2002).

134. *See* Angela McCaffrey, *Pro Bono in Minnesota: A History of Volunteerism in the Delivery of Civil Legal Services to Low Income Clients*, 13 LAW & INEQ. 77, 87 (1994). Under the program, LSC grantees are now required to use 12.5 percent of their LSC funds to support PAI. 45 C.F.R. § 1614.2 (2003).

135. *See* Telephone Interview with Steven Scudder, Counsel to ABA Standing Committee on Pro Bono and Public Service (Jan. 30, 2004). This was often accompanied by a great deal of hostility given that LSC programs were forced to subsidize private attorneys out of their own severely restricted budgets. *See id.*

136. *See* Johnson, *supra* note 43, at 38 (stating that the 1980s "also gave birth to a new national movement—*organised* pro bono legal services. . . . Encouraged and co-ordinated by the American Bar Association, many local bar associations or local legal services agencies, and sometimes both, took the lead.").

137. *See* MEREDITH MCBURNEY, THE IMPACT OF LEGAL SERVICES PROGRAM RECONFIGURATION ON PRO BONO 1 (2003), *available at* http://www.abanet.org/legalservices/probono/impact_reconfiguration.pdf. The rise of bar-sponsored pro bono organizations thus relied on

sponsored, staffed-office legal services model has directly contributed to the rise of its successor: a decentralized network of local organizations designed to meet the needs of the poor through private-sector volunteerism.

C. Civil Society

An important feature of the move away from state programs has been the integration of nonprofit organizational actors into the arena of service provision. Indeed, nonprofit organizations have become critical "partners" in the public-private partnerships that have come to dominate a wide range of social service delivery.[138] This is certainly the case in the pro bono system, which is heavily dependent on nonprofit programs to mediate between clients and private lawyer volunteers.

Of course, legal aid and legal services groups have long been structured as nonprofit organizations[139]—the presence of nonprofit actors in the system of free service delivery, by itself, is not new. What has changed in the last twenty-five years, however, is the scope of nonprofit participation and the range of different organizational actors involved in the delivery of legal services through pro bono volunteers. The rise of "pro bono programs"—those involved in delivering free legal services through the use of the private bar—underscores this trend. Spurred by the PAI mandate, the number of pro bono programs rose from about fifty in 1980 to over 500 in 1985.[140] By

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the presence of entrepreneurs who used the opportunity presented by PAI to adopt new pro bono organizational forms. *See, e.g.*, Hayagreeva Rao, *Caveat Emptor: The Construction of Nonprofit Consumer Watchdog Organizations*, 103 AM. J. SOC. 912, 916 (1998) (discussing the importance of entrepreneurs in charting organizational solutions to problems).

138. *See, e.g.*, BURTON A. WEISBROD, THE NONPROFIT ECONOMY 62–67 (1988) (noting that nonprofit organizations had grown rapidly in terms of absolute numbers, total revenues, relative asset size vis-à-vis the government, and employment); *see also* LESTER SALAMON & HELMUT K. ANHEIER, THE EMERGING NONPROFIT SECTOR: AN OVERVIEW (1996).

139. *See* JOHNSON, *supra* note 54, at 82–84.

140. *See* MCBURNEY, *supra* note 137, at 1; Ester F. Lardent, *Structuring Law Firm Pro Bono Programs: A Community Service Typology*, *in* THE LAW FIRM AND THE PUBLIC GOOD 59, 75 (Robert A. Katzmann ed., 1995). There have been a handful of pro bono programs dating back to the first half of the 1900s. *See* HANDLER ET AL., *supra* note 44, at 18–19, 111–31 (discussing lawyer referral programs established during the first half of the 1900s, as well as later groups such as the Beverly Hills Bar Association Law Foundation, the Chicago Volunteer Legal Services Foundation, and the Council of New York Lawyers); MARKS ET AL., *supra* note 11, at 121–26 (describing Community Law Offices in East Harlem, started in 1968 as a clearinghouse for pro bono legal services); ESTHER F. LARDENT, PRO BONO IN THE 1990'S: THE UNCERTAIN FUTURE OF ATTORNEY VOLUNTEERISM 1 (1999), at http://www.probonoinst.org/pub5/ ("In the first half of this century, pro bono programs sponsored by bar associations were encouraged as an integral part of the movement to expand legal aid programs.").

the early 1990s, there were approximately 900 pro bono programs,[141] and there are now nearly 1000.[142] Most are either legal services organizations that use pro bono to supplement their direct advocacy or bar-sponsored organizations that serve primarily to facilitate pro bono placements.[143] As the number of pro bono programs has risen, more attorneys have taken advantage of them: By 1995, over 17 percent of attorneys had participated in pro bono programs (up from 10 percent in 1985), handling almost 250,000 matters.[144]

The rise of nonprofit public interest groups that use law to promote particular social reform agendas has also had a significant influence on the growth of the pro bono system. Building on the success of long-standing groups like the American Civil Liberties Union (ACLU) and NAACP, the 1970s witnessed a surge in public interest organizations advocating on behalf of civil rights, the environment, women, consumers, the disabled, and children.[145] Because of their focus on law reform, public interest organizations have had to depend heavily on law firm pro bono support in order to bring resource-intensive impact litigation cases. While public interest advocacy has been largely associated with liberal law reform groups, there has also been an expansion in conservative legal advocacy organizations since the 1970s, with groups such as the Pacific Legal Foundation, Americans United for Life Legal Defense Foundation, and the Center for Individual Rights gaining prominence.[146] While liberal public interest groups continue to

141. *See* Lardent, *supra* note 140, at 75; Johnson, *supra* note 43, at 38; *see also* ABA CTR. FOR PRO BONO, 1997/98 DIRECTORY OF PRO BONO PROGRAMS (1998).

142. *See* ABA CTR. FOR PRO BONO, DIRECTORY OF PRO BONO PROGRAMS (2004), *at* http://www.abanet.org/legalservices/probono/directory.html.

143. *See id.*

144. *See* ABA CTR. FOR PRO BONO, *supra* note 141 ("Pro Bono Activity through Organized Programs"); *see also* Rhudy, *supra* note 111, at 236 ("Following the lead of the ABA to expand voluntary private attorney pro bono services, an estimated 135,000 attorneys currently participate in state and local programs cooperating with LSC grantees to provide civil legal services to indigents."). Through PAI, LSC organizations themselves closed 163,000 cases using 47,638 private volunteers in 1997, and closed 138,937 cases with 44,600 volunteers in 1998. *See* LEGAL SERVS. CORP., LSC STATISTICS, PRIVATE ATTORNEY INVOLVEMENT—ALL PROGRAMS, *at* http://www.lsc.gov/pressr/pr_pai.htm. This is compared to 924,000 total cases closed in 1999. *See* LEGAL SERVS. CORP., *supra* note 128.

145. *See* NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 27 (1989) ("Up to 1969, there were only 23 public interest law centers, staffed by fewer than 50 full-time attorneys. By the end of 1975, the number of centers had increased to 108, with almost 600 staff attorneys. In 1984, there were 158 groups employing a total of 906 lawyers."). *Id.* This growth was supported by an increase in foundation support, *see id.* at 11, particularly from the Ford Foundation, which funded several new organizations. *See* David R. Esquivel, *The Identity Crisis in Public Interest Law*, 46 DUKE L.J. 327, 340 (1996).

146. *See* Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. (forthcoming 2005) (manuscript at 20–29, on file with author).

receive the bulk of big-firm pro bono support, law firms have become receptive to the pro bono demands of conservative organizations.[147]

The increased attention focused on nonprofit organizations corresponds with a broader resurgence of interest in civil society.[148] Commentators on both the left and right have turned to civil society as an arena of associational life conducted outside the market and the state,[149] one that offers an opportunity to reconstruct the "social capital" of interpersonal trust and mutual reciprocity undermined by the forces of modern society.[150] For those on the left, civil society provides a chance to build democracy from the ground up,[151] while those on the right are attracted to its anti-government tone.[152]

147. *See* THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES, PRO BONO ACTIVITY AT THE AMLAW 100 (2003), *at* http://www.fed-soc.org/Publications/Pro%20Bono/probonosurvey.htm (finding that major law firms disproportionately do pro bono work for left-leaning organizations).

148. *See, e.g.*, AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY (1996); Peter L. Berger & Richard John Neuhas, *To Empower People*, *in* TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY (Michael Novak ed., 1996); Theda Skocpol, *Advocates Without Members: The Recent Transformation of American Civic Life*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY 1, 4 (Theda Skocpol & Morris P. Fiorina eds., 1999); Michael Walzer, *The Idea of Civil Society: A Path to Social Reconstruction*, *in* COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA 123, 141 (E.J. Dionne, Jr., ed., 1998); *see also* Orly Lobel, The Paradox of Extra-Legal Activism: Critical Legal Consciousness and Transformative Politics 21 (unpublished manuscript, on file with author).

149. *See* BENJAMIN R. BARBER, A PLACE FOR US: HOW TO MAKE SOCIETY CIVIL AND DEMOCRACY STRONG (1998) (calling civil society is "an independent domain of free social life where neither governments nor private markets are sovereign"); TAYLOR, *supra* note 92, at 215–23 (discussing the Lockean tradition of civil society as prepolitical and self-organizing).

150. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (detailing the decline of social capital, measured in terms of civic participation, political participation, religious participation, informal connections, and altruism, and attributing it to pressures of time and money, suburbanization, and the privatization of leisure time).

151. *See* Theda Skocpol & Morris P. Fiorina, *Making Sense of the Civic Engagement Debate*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY, *supra* note 148, at 1, 4 ("Liberals are likely to think of civic group activities *in relation to government* and as the groundwork for widespread and meaningful participation in politics. . . . Many on the left also hope for a revival of populist organizations and social movements 'from below,' viewing the revitalization of civil society as a possible way to energize democratic politics and empower ordinary people.").

152. *See* MICHAEL TANNER, THE END OF WELFARE: FIGHTING POVERTY IN THE CIVIL SOCIETY 2–3 (1996) ("While stressing self-reliance and individual initiative, [civil society] would also provide a vigorous network of private, localized, nonbureaucratic charities that are far more capable than is government of helping those people who need temporary assistance."); *see also* E.J. Dionne, Jr., *Introduction: Why Civil Society? Why Now?*, *in* COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA, *supra* note 148, at 1, 2; Lobel, *supra* note 148, at 30. The right's view has elicited a debate about whether civil society is in fact compatible with big government. *See* William A. Schambra, *All Community is Local: The Key to America's Civil Renewal*, *in* COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA, *supra* note 148, at 44, 46; Theda Skocpol,

Key to both accounts is an emphasis on volunteerism as a model of active citizenship.[153] Indeed, there been a recent movement to enshrine volunteer activity as a response to social ills and economic inequality. The call to volunteerism, often tinged with religious overtones,[154] has dovetailed with privatization, manifesting itself in political programs that shift the burden for providing social services to private actors motivated by altruism. In the United States,[155] a strong voluntarist agenda has developed over the past two decades. In 1988, President George H.W. Bush's made his call for a "thousand points of light"—a national army of volunteers to help America's poor—in his acceptance speech at the Republican National Convention.[156] President Bill Clinton also stressed volunteerism, convening a national Summit for America's Future, which called on citizens, rather than government, to tackle pressing social problems.[157] President Clinton also was responsible for creating the AmeriCorps program, which was designed to encourage community service.[158] President George W. Bush has carried on this voluntarist tradition, calling for the expansion of AmeriCorps and attempting to subsidize faith-based efforts rooted in volunteerism to meet the needs of distressed communities.[159] Volunteerism has also proven attractive in the corporate arena, as business executives have promoted the value of volunteerism as a way of

Don't Blame Big Government: America's Voluntary Groups Thrive in National Network, *in* COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA, *supra* note 148, at 37, 39.

153. *See* PUTNAM, *supra* note 150, at 404–06 (arguing for greater community service and participation in extracurricular activities).

154. *See* John J. DiIulio, Jr., *The Lord's Work: The Church and Civil Society*, *in* COMMUNITY WORKS: THE REVIVAL OF CIVIL SOCIETY IN AMERICA, *supra* note 148, at 50.

155. There has been a parallel move in England, where Prime Minister Tony Blair has made volunteerism a key aspect of his Third Way politics, which seeks to create a robust civil society by fostering partnerships between government, business, and the voluntary sector. *See* Andrew Boon & Avis Whyte, *"Charity and Beating Begins at Home": The Aetiology of the New Culture of Pro Bono Publico*, LEGAL ETHICS, Winter 1999, at 169, 186.

156. President Bush followed this up by creating the Thousand Points of Light Foundation to promote volunteer efforts. *See* Heather Gottry, *Profit or Perish: Non-profit Social Service Organizations and Social Entrepreneurship*, 6 GEO. J. POVERTY L. & POL'Y 249, 253 n.20 (1999); Jason DeParle, *"Thousand Points" as a Cottage Industry*, N.Y. TIMES, May 29, 1991, at A1.

157. *See* James Bennet, *Presidents Call for Big Citizenship, Not Big Government*, N.Y. TIMES, Apr. 29, 1997, at A12. At the summit, Clinton signed into law the Volunteer Protection Act, which "provides certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities." 42 U.S.C. § 14501(b) (2000).

158. *See* National and Community Service Trust Act of 1993, Pub. L. No. 103-82, 107 Stat. 785 (codified at 42 U.S.C. §§ 12501–12656 (2000)).

159. *See Bush Lauds Volunteerism*, CNN.COM, June 1, 2002, *at* http://www.cnn.com/2002/ALLPOLITICS/06/01/bush.radio/.

giving back to the community, building camaraderie among employees, and gaining publicity that enhances marketability.[160]

The institutionalization of pro bono reflects the vitality of the volunteerism movement. From a political standpoint, pro bono volunteerism has long been invoked as an alternative to the staffed-office direct legal services model, dating back to the Reagan administration, when Attorney General Ed Meese suggested that LSC could be replaced by law school volunteerism.[161] Reagan's PAI program codified this volunteer impulse. More recently, President George W. Bush has reoriented the AmeriCorps program, which under Clinton had been used to support attorneys providing direct legal services to the poor. The new focus of the program is on generating volunteerism through such means as faith-based initiatives.[162]

Of course, for the organized bar, volunteerism has become the defining vision of professional service, reflected in the ABA's codification of voluntary pro bono and its rejection of calls for mandatory service.[163] The notion of pro bono as a universal service obligation was first articulated in Canon 2 of the 1969 Code of Professional Responsibility, which provided that "[e]very

160. *See* MINOW, *supra* note 133, at 8; *see, e.g.*, Christopher Marquis, *Timberland Chief's Do-Good Philosophy*, INT'L HERALD TRIB., July 14, 2003, at 10 (describing Timberland chief Jeffrey Swartz, who believes that "community work is ultimately good for business" and "travels the world, preaching the power of volunteerism among the 200 Timberland stores").

161. *See Law Deans Challenge Meese on Legal Services Remarks*, POVERTY L. TODAY, Summer 1981, at 4.

162. Under the auspices of this new AmeriCorps directive, Equal Justice Works, which supports public interest law through training and post-graduate fellowships, has initiated a Pro Bono Legal Corps, which funds lawyers placed in legal services and pro bono organizations to help build the organizations' pro bono capacity. *See* Equal Justice Works, Pro Bono Legal Corps, *at* http://www.equaljusticeworks.org/find/faopblc.php. As part of the new Pro Bono Legal Corps positions, attorneys spend a majority of their time creating volunteer opportunities for law students. *See* Telephone Interview with Karen Lash, Vice President of Programs, Equal Justice Works (Jan. 29, 2004).

163. For a variety of positions on this debate, see generally Debra D. Burke et al., *Mandatory Pro Bono: Cui Bono?*, 25 STETSON L. REV. 983 (1996); Mary Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3 B.U. PUB. INT. L.J. 215 (1993); Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113 (1991); Donald Patrick Harris, *Let's Make Lawyers Happy: Advocating Mandatory Pro Bono*, 19 N. ILL. U. L. REV. 287 (1999); Michelle S. Jacobs, *Pro Bono Work and Access to Justice for the Poor: Real Change or Imagined Change?*, 48 FLA. L. REV. 509 (1996); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78 (1990); Jonathan R. Macey, *Mandatory* Pro Bono*: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115 (1992); Millemann, *supra* note 36; Douglas W. Salvesen, *The Mandatory Pro Bono Service Dilemma: A Way Out of the Thicket*, 82 MASS. L. REV. 197 (1997); Ronald H. Silverman, *Mandatory Pro Bono: Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885 (1991); Jennifer Murray, Comment, *Lawyers Do It for Free?: An Examination of Mandatory Pro Bono*, 29 TEX. TECH L. REV. 1141 (1998); Kendra Emi Nitta, Note, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909 (1996).

lawyer . . . should find time to participate in serving the disadvantaged."[164] While Canon 2 acknowledged the necessity of the newly minted legal services program as a vehicle for serving the poor, it made it clear that the main responsibility for providing free services rested squarely on individual private lawyer volunteers.[165]

Although the ABA attempted to steer clear of the issue of mandatory pro bono after the adoption of Canon 2,[166] it could not be suppressed when the Kutak Commission convened in 1977 to reexamine "all facets of legal ethics."[167] The Commission's early draft on pro bono mandated forty hours of legal services, or its cash equivalent, to "improving the legal system or providing legal services to the poor."[168] Faced with heavy opposition by members of the bar, the Commission quickly retreated and in 1980 dropped the strict hourly requirement and the buy-out option, but maintained the mandatory nature of the rule and added an annual reporting requirement.[169] A stream of objections by rank-and-file members to the mandatory service

164. CODE OF PROF'L RESPONSIBILITY EC 2-25 (1969) (emphasis added). Commentators have suggested that the ABA's support of pro bono was driven as much by its resistance to state-sponsored legal services and prepaid group legal services plans as by its commitment to serving the public good. *See* Maute, *supra* note 42, at 126–27; *see also* AUERBACH, *supra* note 38, at 285–86; Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 25, at 101; Marna S. Tucker, Pro Bono *ABA?*, *in* VERDICTS ON LAWYERS 20, 27–28 (Ralph Nader & Mark Green eds., 1976).

165. *See* CODE OF PROF'L RESPONSIBILITY EC 2-25 (stating that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer").

166. For instance, in 1975, the ABA House of Delegates strengthened the language of professional duty, resolving that it was the "basic professional responsibility" of every lawyer to provide no-fee or reduced-fee "public interest legal service." ABA Standing Comm. on Pro Bono & Pub. Serv., Policies—State Pro Bono Ethics Rules app. B (2003), *at* http://www.abanet.org/legalservices/probono/stateethicsrules.html. The ABA deliberately avoided the question of mandatory pro bono, instead issuing a follow-up report in 1976 that encouraged state and local bar associations to quantify pro bono obligations and enact regulations guiding lawyers as to how the obligations could be discharged. ABA SPECIAL COMM'N ON PUB. INTEREST PRACTICE, IMPLEMENTING THE LAWYER'S PUBLIC INTEREST PRACTICE OBLIGATION 3–7 (1977). The City Bar Association of New York responded to this call by proposing a mandatory obligation of thirty to fifty hours of no-fee or low-fee public service practice per year, but this proposal was ultimately rejected. *See* Shapiro, *supra* note 34, at 736 n.5; *see also* SPECIAL COMM. ON THE LAWYER'S PRO BONO OBLIGATIONS, ASS'N OF THE BAR OF THE CITY OF NEW YORK, REPORT: TOWARD A MANDATORY CONTRIBUTION OF PUBLIC SERVICE PRACTICE BY EVERY LAWYER (1979).

167. Maute, *supra* note 42, at 129.

168. *Id.* at 131; *see also* Steven Lubet & Cathryn Stewart, *A "Public Assets" Theory of Lawyers' Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1250–51 (1997).

169. Maute, *supra* note 42, at 132–33; *see also* Rosenfeld, *supra* note 36, at 261 (citing features of the proposed rule); Shapiro, *supra* note 34, at 736 ("In January 1980 the Commission issued a revised draft that broadened the definition of public service, dropped the specification of hours, made the requirement one of service alone (eliminating the financial alternative), and imposed a new obligation to 'make an annual report of such service to appropriate regulatory authority.'").

and reporting requirements led to their excision.[170] The result was Model Rule 6.1, which for the first time used the term "pro bono" to define a lawyer's obligation to the public.[171] However, aside from this rhetorical shift, little of substance changed. Indeed, Model Rule 6.1 adopted a purely voluntary standard that essentially reverted to the language of the 1969 Code,[172] asserting that "[a] lawyer should render public interest legal service."[173] Moreover, the Rule's breadth watered down its usefulness as a means for providing services to poor and underserved groups. In fact, a lawyer could discharge his pro bono duty by representing "public service or charitable groups," and "by service in activities for improving the law, the legal system or the legal profession"[174]—an open invitation to do "pro bono" by helping traditional community organizations and sitting on bar committees.

Although there was little evidence that the bar's voluntary approach was producing significant results,[175] the ABA held steadfastly to its opposition to mandatory pro bono, opting instead for moral exhortation. In its 1986 Stanley Commission report, *". . . In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism*,[176] the ABA averred that pro bono was "a moral obligation on the part of the individual attorney," which emanates from the "lawyer's exclusive franchise to practice law and his vital role in the administration of justice."[177] The ABA continued to disclaim the need for mandatory pro bono, stating that "it would be antithetical to the tenets of public service to have to conscript lawyers."[178]

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170. Maute, *supra* note 42, at 133–34. State bar proposals to institute mandatory pro bono have met with similar defeat. In 1989, the New York State Bar Association proposed imposing a twenty-hour mandatory pro bono obligation, only to see it recrafted as a voluntary regime. *See* Vincent Martin Bonventre, *Professional Responsibility*, 42 SYRACUSE L. REV. 697, 702 (1991). Other state bars have uniformly balked at mandatory pro bono. *See* ABA Standing Comm. on Pro Bono & Pub. Serv., *supra* note 166, *at* http://www.abanet.org/legalservices/probono/stateethicsrules.html. A few local bar associations imposed mandatory pro bono obligations, but these affected only a very small percentage of the legal profession. *See* Silverman, *supra* note 163, at 893 n.17 (noting that Orange, Leon and Palm Beach Counties in Florida; Bryan and Athens Counties in Texas; DuPage County in Illinois; and Eau Claire County in Wisconsin have mandatory pro bono requirements).

171. The title of the 1983 version of Model Rule 6.1 was "Pro Bono Publico Service."

172. *See* Shapiro, *supra* note 34, at 736–37.

173. MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

174. *Id.*

175. One 1985 ABA survey showed that over half of the respondents donated less than fifty hours per year in pro bono services. *See* ABEL, *supra* note 6, at 130 (citing Myrna Oliver, *Pro Bono: Renaissance in Legal Aid*, L.A. TIMES, Apr. 7, 1987, at A1).

176. *See* Report of the Comm. on Professionalism to the Board of Governors and the House of Delegates of the Am. Bar Ass'n, *". . . In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243 (1986).

177. *Id.* at 298–99.

178. *Id.* at 298. The ABA's 1988 "Toronto Resolution" urged lawyers to devote "a reasonable amount of time to pro bono and other public service activities, to persons in need or to organizations

As pro bono came to be increasingly viewed as a supplement to the beleaguered legal services program, the ABA sought to narrow its definition to emphasize the significance of legal services delivery to the poor, while maintaining the commitment to volunteerism. In 1993, the ABA amended Model Rule 6.1, adopting a fixed numerical pro bono goal and tightening the definition of pro bono service. In particular, the revised rule provided that each lawyer "should aspire to render at least (50) hours of pro bono publico legal services per year," a "substantial majority" of which targeted to "persons of limited means" or organizations that advocate on their behalf.[179] Underscoring the non-obligatory nature of the rule, the word "voluntary" was added to the title, while the text emphasized that the rule was "not intended to be enforced through disciplinary process"[180] since pro bono was "the individual ethical commitment of each lawyer."[181]

The ABA's Ethics 2000 Commission revisions to the pro bono rule did little to alter its voluntary and individualistic approach. The Commission's first draft, which proposed a mandatory rule of fifty hours per year that could be bought out or transferred to other members within a firm,[182] was defeated after strong objections by a chorus of prominent sectors of the bar,[183] including the legal services community, which argued that a mandatory requirement would engender significant resistance and ultimately undermine the definition of pro bono as service targeted primarily to persons of limited means.[184] As a result, the mandatory proposal was dropped and the text of Rule 6.1 was amended to state merely that: "Every lawyer has a professional responsibility to provide legal services to those unable to pay."[185] The new

serving individuals of limited means, or on activities which improve the law, the legal system, or the legal profession." Maute, *supra* note 42, at 136.

179. MODEL RULES OF PROF'L CONDUCT R. 6.1 (1993).

180. *Id.* R. 6.1 cmt. 12.

181. *Id.* R. 6.1 cmt. 9.

182. The initial buyout amount was $100 per hour. Subsequent drafts kept the mandatory nature of the rule, but extended the buyout period and reduced the amount of repurchase. *See* Maute, *supra* note 42, at 139–40.

183. For instance, Robert Hirshon, President-elect of the ABA, and John Pickering, founding partner of Wilmer Cutler & Pickering, opposed a mandatory rule. *See id.* at 142.

184. *See id.* at 140–41; *see also* ABA Center for Professional Responsibility Comm'n on Evaluation of the Rules of Prof'l Conduct, Minutes from Dec. 10–12, 1999, Meeting in Amelia Island, Fla., *at* http://www.abanet.org/cpr/121099mtg.html; Written Testimony of Doreen D. Dodson Regarding Model Rule 6.1 (June 21, 2000), *available at* http://www.abanet.org/cpr/dodson10.html.

185. Maute, *supra* note 42, at 145 (quoting the ABA Ctr. for Prof'l Responsibility, Comm. on Evaluation of the Rules of Prof'l Conduct, Teleconference Minutes from Sept. 26, 2000, Meeting, *at* http://www.abanet.org/cpr/e2k-09-26tele.html. The Preamble to the Model Rules was amended to urge "all lawyers" to work to "ensure equal access to our system of justice," MODEL RULES OF PROF'L CONDUCT pmbl. para. 6 (2004), while a comment to Rule 6.1 was added stating

rule, in the end, looked quite similar to the old, affirming the ethical centrality of pro bono without providing any external sanctions for noncompliance.[186] It therefore underscored the potency of the voluntarist ideal, which reinforced claims of professional altruism while ultimately avoiding the thorny question of how actually to ensure equal access to justice.

D. Market

Pro bono's institutionalization has depended critically on the rise of the big corporate law firm. Although small-scale practitioners have been important actors in the pro bono system, it has been big firms that have provided the resources and prestige to promote pro bono as a central professional goal. At one level, the big firm's organizational structure provides very practical advantages over smaller practice sites in delivering pro bono services. Since the pro bono model seeks to deploy large numbers of lawyers to provide free services, it relies heavily on the big firm as a mass supplier of pro bono personnel. In addition, because big firms are highly leveraged, they can generally absorb the costs associated with pro bono more readily than their smaller counterparts, which cannot afford to forgo significant amounts of billable work. Finally, big firms have the administrative capacity to coordinate large-scale pro bono efforts that small firms cannot match.

Yet the relationship between pro bono and big firms has not been one-sided, with pro bono programs merely the lucky recipients of big-firm largesse. Pro bono has also provided critical organizational benefits to big firms themselves. Law firms, like other organizational structures, adapt to the demands of their environments in order to gain economic resources.[187] A key resource for big firms is talented lawyers. As part of the intense market competition to attract elite law school graduates, many of whom care deeply about pro bono opportunities, big firms have therefore designed pro bono programs to complement broader recruitment and retention plans.

Big firms are also highly attuned to professional status. Indeed, lawyers' standing as self-regulating professionals relies heavily on the legitimacy

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that "[l]aw firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule," *id.* R. 6.1 cmt. 11.

186. As it now stands, fifteen states have a rule that is the same as or similar to the revised version of Model Rule 6.1, while twenty-seven states still have a rule that is the same as or similar to the original 1983 version. *See* ABA Standing Comm. on Pro Bono & Pub. Serv., *supra* note 166, *at* http://www.abanet.org/legalservices/probono/stateethicsrules.html. The remaining states have different rules. *See id.*

187. *See* HANDLER, *supra* note 19, at 20.

of their enterprise in the public eye.[188] The ideology of professionalism has provided this legitimacy, as lawyers' claims of expertise, ethical responsibility, and altruism have been invoked to justify professional efforts to assert market control.[189] Particularly for big firms, whose bottom-line focus has long elicited public cries of commercialism,[190] the ability to define organizational activity in terms of professional ideology becomes an important goal. In this way, big-firm pro bono serves not merely as a vehicle to advance the public good, but also as a source of professional legitimation.[191]

The dramatic growth of big firms beginning in the 1960s laid the groundwork for pro bono's institutionalization. Whereas in the late 1950s there were thirty-eight law firms with over fifty lawyers, by 1985 the number had grown to 508.[192] By 1990, over 600 firms had more than sixty lawyers and several had more than 1000.[193] Not only did large firms grow in number

188. For an analysis of the role of legitimacy in organizational behavior, see W. Richard Scott, *Unpacking Institutional Arguments, in The New Institutionalism and Organizational Analysis*, at 164, 169–70 (defining legitimacy as the social acceptance of organizational goals).

189. *See* ABEL, *supra* note 6, at 20 (arguing that professionalism has been deployed in pursuit of the professional project of "social closure," which involves exerting market control and promoting social prestige); RICHARD A. POSNER, OVERCOMING LAW 48 (1995) (emphasizing the role of professional ideology in "securing a high economic and social position for a profession"); *see also* RICHARD L. ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM (2003); Richard L. Abel, *Between the Market and State: The Legal Profession in Turmoil*, 52 MOD. L. REV. 285 (1989); Richard L. Abel, *The Rise of Professionalism*, 6 BRIT. J.L. & SOC'Y 82 (1979) (reviewing MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977)); Richard L. Abel, *Toward a Political Economy of Lawyers*, 1981 WIS. L. REV. 1117.

190. *See* AUERBACH, *supra* note 38, at 33, 40 (discussing the criticisms of professional commercialization leveled in the early 1900s by notables such as John Dos Passos, Woodrow Wilson, Louis Brandeis, and Theodore Roosevelt). In 1933, A.A. Berle famously decried the expansion of the large law firm, arguing that "the complete commercialization of the American bar has stripped it of any social functions it might have performed for individuals without wealth." A.A. Berle, Jr., *Modern Legal Profession*, *in* 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 340, 344 (Edwin R.A. Seligman ed., 1933). The following year, Chief Justice Harlan Fiske Stone excoriated the commercial nature of big-firm practice, charging that it had "made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the marketplace in its most anti-social manifestations." Harlan Fiske Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 6 (1934).

191. *See* ABEL, *supra* note 6, at 38.

192. *See* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 46 (1991); *see also* ABEL, *supra* note 6, at 9 ("Between 1975 and 1987 the number of firms with at least 100 lawyers multiplied more than fivefold (from 47 to 245) . . . ."). The percentage of private practitioners working in big firms (over fifty lawyers) also increased, doubling from 7.3 percent in 1980 to 14.6 percent in 1988. *See* Robert L. Nelson, *The Future of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 392 (1994). By 1995, 16.1 percent of private practitioners worked in firms with over fifty lawyers. *See* CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. PROFESSION IN 1995, at 25 (1999).

193. *See* Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 629–30 (1994).

during this time, they also grew in size.[194] While the fifty largest firms in 1950 averaged just 49 lawyers, by 1979 the average had increased to just over 321,[195] and by 1991 it stood at 475.[196]

It was against this backdrop that pro bono began to take on institutional shape within large law firms. The first wave of institutionalization occurred in the late 1960s, as rapid law firm growth increased demand for new associates at a time when the lure of exciting new opportunities within the public interest field was drawing the attention of elite law students away from commercial work.[197] There was a widespread perception that elite graduates would not opt for big firms unless they developed programs that provided opportunities to engage in pro bono.[198] As a result, the number of formalized pro bono programs expanded.[199] Some firms assigned partners and committees

194. Scholars have attributed this growth to a number of factors. Robert Nelson argues for a "transaction-costs" approach, which emphasizes the need to minimize "costs associated with gaining information about the market, monitoring the performance of contracts, and enforcing contracts" as the most significant growth factors. *See* ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 67 (1988). Ronald Gilson and Robert Mnookin, in contrast, contend that expansion results from the need to combine legal specialties into a diverse portfolio that minimizes the risk that any particular specialty area will not produce significant returns. *See* Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 321–29 (1985). Marc Galanter and Thomas Palay adopt an agency cost explanation, suggesting that law firms install promotion-to-partner tournament structures that promise deferred a "super-bonus" to the most hard-working associates and commit firms to a pattern of exponential growth. *See* GALANTER & PALAY, *supra* note 192, at 98–110; *see also* Marc S. Galanter & Thomas M. Palay, *Large Law Firm Misery: It's the Tournaments, not the Money*, 52 VAND. L. REV. 953 (1999). Richard Sander and E. Douglass Williams, however, have suggested that firms are not strictly wedded to the tournament structure and instead grow in an "adaptive" manner characterized by imperfect guesses about underlying demand. *See* Richard H. Sander & E. Douglass Williams, *A Little Theorizing About the Big Law Firm: Galanter, Palay, and the Economics of Growth*, 17 LAW & SOC. INQUIRY 391, 409 (1992).

195. ABEL, *supra* note 6, at 311.

196. *See* AmLaw 100 Size Database (compiled from data published in *The American Lawyer* and provided by American Lawyer Media, Inc.) (on file with author).

197. Jerold Auerbach notes that the "percentage of graduates entering private firms declined from 54 to 38 at Harvard between 1964 and 1968" while there was "a decline of 10 percent at Yale; 9 percent at Virginia; and nearly two-thirds at Michigan within a single year." AUERBACH, *supra* note 38, at 278–79. These statistics must be viewed with some skepticism since there were not enough public interest jobs for all the top graduates of elite law schools and many students who did not go to firms simply went to clerkships first. It is true, however, that for a brief period in the late 1960s and early 1970s, when there was an imbalance between supply and demand, elite graduates felt supremely confident that they could do whatever they wished for a while without forgoing any opportunities.

198. *See* HANDLER ET AL., *supra* note 44, at 45.

199. *See id.* at 123 ("There seemed to be a rise in organized pro bono departments during the 1960s, but there is no way of tabulating accurately how many firms organized programs or of what size."); *see also* Comment, *supra* note 85, at 1106–07 ("In response primarily to agitation by associates and law students, some major commercial law firms have systematically undertaken to provide legal services to non-paying clients.").

to screen and coordinate pro bono cases,[200] while others provided attorneys to staff legal services clinics.[201] Particularly in the Washington, D.C. area, the ethos of public service was translated into a number of innovative pro bono programs. A few firms, notably Hogan & Hartson, established full-fledged public interest departments with dedicated staff devoted full-time to pro bono work.[202] Other firms, like Covington & Burling, participated in "release-time" programs which provided full-time lawyers and support staff to maintain a local legal services office.[203] Taking this model one step further, Baltimore-based Piper & Marbury established a branch office in a low-income community to provide pro bono services.[204] Thus, at the height of the federal legal services era, pro bono emerged as an institutionally viable, if still underdeveloped, feature of big-firm practice.[205]

It was not until the 1990s that pro bono became deeply embedded within the large law firm structure. Pro bono's assimilation to big-firm practice came at a time of heightened anxiety about the direction of the profession, which was undergoing a dramatic economic expansion. Indeed, the biggest and most profitable law firms grew even bigger and more profitable during the 1990s. In 1991, the average size of *The American Lawyer* top 100 law firms (*AmLaw* 100) was 375; by 1999 the average size

200. MARKS ET AL., *supra* note 11, at 65–74.

201. *See id.* at 74–75.

202. *See* Lardent, *supra* note 140, at 60 (noting that Hogan & Hartson started its Community Services Department in 1969 with one partner and several associates); William J. Dean, *Pro Bono Digest; Projects Outside of New York*, N.Y. L.J., July 16, 1990, at 3; *see also* MARKS ET AL., *supra* note 11, at 88–100 (citing Arnold & Porter of Washington, D.C.; Foley, Hoag & Eliot of Boston; and Hill & Barlow of Boston as other examples of firms with public interest departments).

203. *See* MARKS ET AL., *supra* note 11, at 114–16 (describing Covington & Burling's practice of lending two associates to Neighborhood Legal Services for six-month periods); *see also* Al Kamen & Ed Bruske, *Critics See Lawyers Losing Interest in Public-Service Cases*, WASH. POST, Dec. 27, 1983, at C1. Covington & Burling's rotation program was initiated in 1969. *See* COVINGTON & BURLING, PUBLIC SERVICE ACTIVITIES 58 (2002).

204. *See* ALLAN ASHMAN, THE NEW PRIVATE PRACTICE: A STUDY OF PIPER & MARBURY'S NEIGHBORHOOD LAW OFFICE, at xiii (1972) (stating that Piper & Marbury established the branch office in 1969); *see also* Note, *Structuring the Public Service Efforts of Private Law Firms*, 84 HARV. L. REV. 410, 417 n.20 (1970). What was Piper & Marbury is now known as Piper Rudnick LLP.

205. The overall picture of private-sector pro bono during this period was mixed, with the average lawyer devoting about 6 percent of billable hours to pro bono, hardly any of which was undertaken on behalf of "change-oriented" or indigent clients. *See* HANDLER ET AL., *supra* note 44, at 93, 97. While over 60 percent of private attorneys indicated that they engaged in pro bono in their nonbillable time, the average time spent per year was only 27 hours, most of which was done for family and friends. *See id.* at 93–94, 98. Although large firm lawyers generally posted lower than average pro bono numbers, *see id.* at 105, those who worked in large firms with structured pro bono programs did about three times more pro bono work than average for the private bar and approximately four times as much work for change-oriented organizations and indigent clients, *see id.* at 124. For another evaluation of pro bono, see D.W. Darby, Jr., *It's About Time: A Survey of Lawyers' Timekeeping Practices*, LEGAL ECON., Fall 1978, at 39.

had increased to 508; and it was 621 in 2001.[206] Firms achieved growth through aggressive entry-level and lateral hiring, significant merger activity, and satellite office expansion.[207] As the big firms grew bigger, aggregate economic performance indicators showed they were also doing better. Between 1990 and 1999, *AmLaw* 100 firm revenue figures grew by more than 50 percent while profits per partner increased by one-third.[208]

This growth corresponded to several changes in the internal structure of big firms. The rising volume of business meant that firms needed to hire aggressively. The result was a widening of the base of law firm pyramid structures, as law firm leverage figures rose.[209] To lure new associates in an environment where increasing numbers of lawyers were defecting to take positions in start-up businesses, investment banks, and venture capital companies, firms significantly raised starting salaries.[210] The 1999 decision by the Menlo Park, California firm of Gunderson Dettmer Stough Villeneuve Frankin & Hachigian to raise first-year associate salaries to $125,000 created a ripple effect, prompting firms nationwide to meet or exceed the $125,000 threshold, with some firms offering salary packages to first-year associates upward of $160,000 per year including bonuses.[211] In order to pay for six-figure starting salaries, law firms raised billable rates[212] and ratcheted up

206. *See* AmLaw 100 Size Database, *supra* note 196; *cf.* Marc Galanter, *"Old and In the Way": The Coming Demographic Transformation of the Legal Profession and its Implication for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1093 ("In 1983, the average size of the [*National Law Journal*] 250 firms was 138 lawyers. By 1991 that average size almost doubled to 273. After a dip in the early 1990s, the average size continued to increase, but at a much slower rate, to 305 in 1998.").

207. *See* Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 9 (1999).

208. Average gross revenues among the *AmLaw* 100 grew from just over $190 million in 1990 to about $300 million in 1999. *See* AmLaw 100: 1990–1999 The Way We Were, *at* http://www.law.com/special/professionals/amlaw/amlaw100/amlaw100_the_way.html (figures adjusted to 2004 dollars). Increased revenues translated into increased average profits per partner, which rose from an average of $635,000 in 1990 to nearly $850,000 in 1999. *See id.* (figures adjusted to 2004 dollars).

209. Whereas the average leverage (defined as the ratio of lawyers to partners) for the *AmLaw* 100 in 1992 was 3.1, it had risen to 3.8 by 2000. *See* AmLaw100 Leverage Database (compiled from data published in *The American Lawyer*) (on file with author). These figures reflect the average for *AmLaw* 100 firms that were also cross-listed on *The American Lawyer*'s pro bono survey.

210. In 1992, the starting salaries for associates at firms listed among *The National Law Journal* top 250 (*NLJ* 250) was $88,817; by 2000, salaries had risen to $112,487. *See* NLJ 250 Salary Database (compiled from data published in *The National Law Journal* and provided by American Lawyer Media, Inc.) (on file with author). These numbers reflect the average of firms listing salary figures.

211. *See* Vanessa Blum, *100 Days: A Diary of Rising Salaries*, LEGAL TIMES, Sept. 11, 2000, at 45.

212. The average billable rate for partners in the *NLJ* 250 firms grew from $320 in 1992 to $362 in 2000; the rate for associates grew from $187 in 1992 to $216 in 2000. *See* NLJ 250 Billing Database (compiled from data published in *The National Law Journal* and provided by American

billable-hours expectations for firm associates.[213] Whereas one survey placed the average yearly billable hours of associates in all firms at just over 1800 in the mid-1990s,[214] by 1999, another survey reported that the average had climbed to over 2000.[215]

At the height of the boom, these changes appeared to be taking their toll on big-firm pro bono. In 2000, a front-page article in the *New York Times* reported that law firms were "cutting back on free services for poor,"[216] noting that only eighteen of 100 firms surveyed in 1999 had met the ABA guideline of fifty hours of pro bono per attorney.[217] *AmLaw*'s headline in its 2000 survey was "Eight Minutes," which was the number of minutes per day that the average attorney spent on pro bono work.[218] *The National Law Journal*

Lawyer Media, Inc.) (on file with author) (figures adjusted to 2004 dollars). These figures reflect the average of firms listing billable rate information.

213. *See* Rhode, *supra* note 5, at 308–09; *see also* Krane, *supra* note 4 ("The firms reasoned that if first-year associates were going to expect compensation packages that exceed that of nearly every federal and state court judge in the country, they were going to have to produce."). Some firms—such as Palo Alto's Wilson Sonsini Goodrich & Rosati and San Francisco's Brobeck, Phleger & Harrison—took out equity positions in their clients as a way to pay for increasing salaries and partner profits. *See* Cameron Stracher, *Manager's Journal: Beyond Billable Hours*, WALL ST. J., Feb. 12, 2001, at A26; *see also* Jodi Brandenburg & David Coher, *Going for the Gold: Equity Stakes in Corporate Clients*, 14 GEO. J. LEGAL ETHICS 1179 (2001). While successful during the stock market surge, this model proved disastrous once the market crashed, symbolized by Brobeck's 2003 dissolution. *See* Susan Beck, *Brobeck's Final Days*, AM. LAW., Mar. 2003, at 13.

214. The survey showed the average yearly billable hours for associates in all firms was 1823, with 25 percent of associates billing 1999 hours or more and 10 percent billing over 2166. *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 892 (1999). Of course, "[a]t the biggest firms in the biggest cities, associates commonly bill 2000 to 2500 hours per year." *Id.* at 893.

215. *See* Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 251 (2000) ("The average number of hours respondents reported billing during the first half of 1999 was 1030 (2060 hours if calculated on an annual basis)."). "[A]verage annual hours billed by those respondents in Medium Firms was 2120, compared to 2079 hours reported by respondents in Large Firms." *Id.*

216. *See* Winter, *supra* note 2.

217. *See id.*; *cf.* William J. Dean, *The 2000 Survey of Pro Bono Activity by New York Law Firms*, N.Y. L.J., May 7, 2001, at 3 ("In the just-completed year 2000 survey by Volunteers of Legal Service (VOLS) of the New York City law firms that have taken the VOLS Pro Bono Pledge, 27 of 29 firms reported that they had met, or exceeded, the VOLS annual goal of providing at least an average of 30 hours of qualifying pro bono work per attorney.").

218. *See* Press, *supra* note 2, at 13. *AmLaw* reported that the average pro bono hours per attorney had declined from fifty-six hours a year in 1991 to thirty-six hours in 1999. *See* AmLaw 100: 1990–1999: The Way We Were, *supra* note 208, *at* http://www.law.com/special/professionals/amlaw/amlaw100/amlaw100_the_way.html. Another report stated that there was a 63 percent drop in hours spent by big firms on pro bono cases between 1992 and 1999. *See* Joseph C. Zengerle, *Everybody Loses Without Pro Bono*, NAT'L L.J., Oct. 30, 2000, at A20. There are some methodological problems with the evidence of pro bono's decline. For one, the *AmLaw* definition of pro bono changed in 1994, *see* Karen Dillon, *A New Era Begins*, AM. LAW., Aug. 1994, at 9, narrowing the scope of what constituted pro bono work and thus making it difficult to directly

reported that pro bono work in big law firms declined from 2.6 percent of billable hours in 1999 to 2.5 percent in 2000,[219] emphasizing that "based on a 2,000-billable-hour year and a billable rate of $175, the drop represents a thousand pro bono hours at a firm of 300 lawyers, the median number of attorneys at the 250 largest U.S. firms."[220] In addition to decreasing numbers, there was evidence that some firms were also pulling back from pro bono in other ways. For example, San Francisco's Pillsbury Madison & Sutro revised its pro bono policy in response to associate pay increases. Under the newly instituted policy, the first twenty hours of pro bono work did not count toward an associate's required minimum of 1950 billable hours.[221] Many other top firms followed suit, changing their policies to give less credit to pro bono work.[222]

Yet this period of economic growth and competitive pressure, which made pro bono more difficult to perform, also had the effect of deepening its institutional structure within big firms, which moved to shore up their public image and gain a competitive edge in the recruiting wars. As the National Association for Law Placement (NALP)—which distributes a Directory of Legal Employers that is widely read by prospective firm associates—and law schools began publishing information about law firm pro bono activity,[223] firms were forced to take seriously the importance of pro bono as a recruitment device. As a result, big firms began tracking their own pro bono activity, factoring pro bono into firm budgets, and marketing pro bono as part of their recruitment efforts.

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compare pro bono activity over the course of the decade. There was also conflicting data on pro bono's trajectory. While *AmLaw* reported a consistent drop throughout the decade, other research indicated that pro bono was again on the rise by 1998. *See* Elizabeth Amon, *Pro Bono in 2000: Some Critics Think Pro Bono Work is Down, But There's Much to Be Proud of*, NAT'L L.J., Jan. 1, 2001, at A10 (noting that the Pro Bono Institute, which tracks pro bono work at firms with more than fifty lawyers, reported a decline in 1996 and 1997, but a rise in 1998 and 1999).

219. *See* Amon, *supra* note 218.

220. *Id.*

221. *See id.*

222. *See* Bryan Rund, *As Salaries and Billables Rose, Firms Reduced, Retooled Volunteer Work*, LEGAL TIMES, Dec. 18, 2000, at 32. Another example was Chicago's Jenner & Block, which in 2000 upped its billable-hour requirement from 1900 to 2000 and did away with its policy of allowing 300 hours to be devoted to community service. *See* Stephanie Francis Cahill, *High Starting Salaries Costing Pro Bono Cause*, CHI. DAILY L. BULL., Aug. 9, 2000, at 1. Among the firms represented in one 1999–2000 survey, 65 percent did not treat pro bono hours equally to billable hours. *See* Fortney, *supra* note 215, at 290.

223. *See, e.g.*, STACY M. DEBROFF, NALP PRO BONO GUIDE FOR LAW STUDENTS: EVALUATING PRO BONO WORK IN A LAW FIRM (1991).

The advent of pro bono reporting in the legal trade press accelerated this trend.[224] *The American Lawyer* began reporting data on the pro bono activity of *AmLaw* 100 firms in 1992, which transformed the way big firms viewed their pro bono programs.[225] Whereas previous discussions of pro bono mostly relied on impressionistic evidence, now fluctuations in pro bono among the elite firms could be tracked on a yearly basis. More importantly, firms were actually ranked based on pro bono performance, which meant not just that recruits could compare pro bono among firms with more precision, but also that firms could make up for weaknesses in other areas by scoring high on pro bono.

The "Law Firm *Pro Bono* Challenge," launched in 1993 by the ABA-sponsored Law Firm Pro Bono Project,[226] raised the stakes by calling on big firms to contribute 3 to 5 percent of their billable hours to pro bono, and publicizing which firms succeeded in meeting the Challenge and which failed.[227] The Challenge was designed to promote pro bono programs in large firms, requiring signatories to demonstrate their "institutional obligation to encourage and support" pro bono by "promulgat[ing] and maintain[ing] a clearly articulated and understood firm policy" and using their "best efforts" to ensure compliance with the 3 to 5 percent goal.[228] In its first two years, there were over 170 signatories to the Challenge, which included many of the nation's elite firms.[229] By requiring specific pro bono commitments and tracking compliance, the Challenge established another public benchmark that became a means to evaluate the relative merits of different firms on the basis of pro bono activity.

The combination of these developments prompted many large firms to augment their pro bono programs as a way to appeal to interested law students, improve their rankings, and facilitate compliance with the

224. This reflected a broader interest in rankings, exemplified by the *U.S. News and World Report* rankings of undergraduate and professional schools. *See, e.g.*, U.S. News.com, America's Best Colleges 2005, *available at* http://www.usnews.com/usnews/edu/college/rankings/rankindex_brief.php. More recently, on-line ranking systems have emerged in the legal arena, such as vault.com, which ranks the "top 100 most prestigious firms." *See* Vault, Homepage, *at* http://vault.com.

225. *See* AmLaw 100: 1990–1999: The Way We Were, *supra* note 208, *at* http://www.law.com/special/professionals/amlaw/amlaw100/amlaw100_the_way.html. Pro bono has also been a factor considered in *AmLaw*'s Midlevel Associate Survey, which began in 1982. *See* James B. Stewart, Jr., *3rd and 4th year Associates Rate Their Firms (Parts I–III)*, AM. LAW., Mar. 1982, at 37, 38, 57.

226. *See* THE LAW FIRM PRO BONO PROJECT, 1995 LAW FIRM PRO BONO CHALLENGE REPORT 2 (1995). The Law Firm Pro Bono Project now operates under the aegis of the Pro Bono Institute, which has received support from the ABA. *See id.*

227. *See* Galanter & Palay, *supra* note 5, at 199–200.

228. Lardent, *supra* note 140, at 79.

229. *See id.* at 81.

Challenge. Firms increased their reliance on pro bono committees, hired full-time coordinators to expand pro bono dockets, formalized pro bono policies, and undertook large-scale pro bono projects. They also cemented relationships with legal services and public interest groups, launched new externship programs, and publicized pro bono achievements on web sites and in annual reports. The end result was striking: Institutionalized pro bono, virtually nonexistent only two decades before, now occupied a central place in the big firm.

II. THE NEW ARCHITECTURE OF PRO BONO

The operational features of the new pro bono system bear the imprint of the competing forces that led to its institutional rise. Forged at the intersection of debates about professionalism, privatization, volunteerism, and commercialization, pro bono has emerged as a system with multiple centers and competing goals. Its structure has been defined in reaction to the older forms of legal services and legal aid, which continue to exist, albeit in diminished form. The result is a terrain of institutionalized pro bono that combines elements of old and new—overlaying preexisting organizations, seeping in to fill in systemic gaps, and mediating between the interests of client populations and private volunteers. Yet pro bono is not merely supplementary. It also constitutes its own institutional system with independent organizational entities, leaders, practices, and goals.

This part examines the contours of this new institutional architecture, revealing a picture of pro bono as fluid and decentralized, linked together by a complex matrix of organizational relationships, and reflecting the influence of its central stakeholders. The hallmarks of the pro bono system are *collaboration* in service delivery, *efficiency* as defined by reduced transaction costs and resource targeting, *accountability* measured in terms of negotiated benchmarks and institutional commitments, and *adaptation* to local context.

A. Collaboration

"Collaboration" has become the buzzword of the pro bono system, which operates by establishing relationships between private lawyers and the bar-sponsored programs, legal services groups, and public interest organizations that link them with clients. These relationships rely on an infrastructure to connect firms with opportunities, a network of organizations that support and facilitate pro bono programs, and an intrafirm coordinating system to take in and distribute cases to firm lawyers.

1. Connectivity

For this collaborative network to succeed, it is critical that there are organizations external to law firms that operate to connect firm lawyers with pro bono clients. This function is undertaken by two distinct types of pro bono programs: *referral* organizations and *strategic* organizations.[230] The referral organizations tend to be organized in connection with and subsidized by local bar associations, and exist primarily to serve as a conduit between low-income clients and law firm volunteers. Thus, on the community-based side, they set service priorities, make triage decisions, engage in client education and outreach, and conduct initial client screening. On the law firm side, referral organizations establish contacts with firm liaisons, conduct outreach to private lawyers, package cases for volunteers, broker initial meetings between clients and private counsel, provide training to firm lawyers, and troubleshoot difficult lawyer-client relationships. Referral organizations exist in every state,[231] and range in scope from one-person operations to large, multiproject groups.

An example of the large referral organization is Public Counsel, which was established in 1970. Jointly sponsored by the Los Angeles and Beverly Hills Bar Associations,[232] Public Counsel is now the nation's largest pro bono organization, with twenty-seven attorneys and a significant support staff.[233] Public Counsel is organized into six project areas—child care, homelessness prevention, children's rights, immigration, community development, and consumer law—[234]with staff attorneys and paralegals who prescreen cases, determine whether cases are appropriate for placement with private volunteers, and distribute case listings to firm liaisons. Public Counsel operates a "mixed" program, referring a majority of cases to pro bono volunteers, but also retaining a portion of cases for in-house representation by staff attorneys.[235]

The Volunteer Legal Services Program (VLSP) of the Bar Association of San Francisco is another example of a mixed program, albeit one that moves closer to a pure referral model. Organized in 1982, VLSP coordinates

230. *See* MARKS ET AL., *supra* note 11, at 117–50.

231. *See* ABA CTR. FOR PRO BONO, *supra* note 142.

232. Public Counsel grew out of the Beverly Hills Bar Association Law Foundation, see Telephone Interview with Dan Grunfeld, President/CEO of Public Counsel (Aug. 13, 2003), which was the first bar-funded public interest law firm, *see* HANDLER ET AL., *supra* note 44, at 111–12.

233. *See* Public Counsel, Who We Are, *at* http://www.publiccounsel.org.

234. *See id*.

235. Public Counsel estimates that between 10 and 15 percent of cases are handled by in-house staff attorneys. *See* Telephone Interview with Dan Grunfeld, *supra* note 232.

pro bono services in a broad range of areas, including homeless assistance, family law, eviction defense, debt collection defense, guardianships, and home equity fraud.[236] VLSP's homelessness attorneys, who constitute almost half of the staff, regularly represent homeless clients, particularly when emergencies arise or when cases are inappropriate for placement.[237] Outside of the homeless project, however, VLSP lawyers refer almost every case to pro bono volunteers.[238] These core staff attorneys have expertise in different substantive areas and are involved in cases primarily at the level of case selection, volunteer recruitment and training, and case management.[239] For instance, the VLSP family law attorney does not represent any clients, instead providing trainings to pro bono volunteers and acting as a mentor during the representation.[240] She is also responsible for maintaining relationships with client-generating organizations such as battered women's shelters and hospitals, and working with these organizations to assure the quality of service delivery. Other core staff have similar duties and generally do not act as attorneys of record in cases.[241] Similar multi-issue referral projects exist in major cities around the country.[242]

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236. *See* The Bar Ass'n of San Francisco, Free Legal Assistance, *at* http://www.sfbar.org/vlsp/free.html. It is organized into special projects, which include the AIDS Legal Referral Panel, Children with Disabilities Project, Homeless Clinic, Cancer Legal Services Project, Cooperative Restraining Order Clinic, Legal Advice and Referral Clinic, Landlord Tenant Project, Family Law Project, Consumer Project, and Community Organization Representation Project. *See* The Bar Ass'n of San Francisco, Volunteer Legal Services Program, *at* http://www.sfbar.org/vlsp/general.html.

237. *See* Telephone Interview with Tanya Neiman, Director, Volunteer Legal Services Program of the Bar Association of San Francisco (Mar. 5, 2004).

238. *See id*.

239. *See id*.

240. *See id*.

241. *See id*.

242. For instance, as Kevin Lapp and Alexa Shabecoff note:

> [The] Volunteer Lawyers Project (VLP) of the Boston Bar Association was established in 1977 to facilitate the delivery of pro bono services by linking eligible clients with representation. VLP screens clients and then recruits lawyers to handle the cases. VLP uses mailings to lawyers, presentations at law firms and diligent communication with pro bono coordinators to make the links. . . . In addition to these services, VLP also offers training and mentoring to lawyers, makes its resources and facilities available for lawyers working on a pro bono case, and runs a popular Housing Court Attorney of the Day program that provides two to four volunteer lawyers every Thursday at the Housing Court.

KEVIN LAPP & ALEXA SHABECOFF, PRO BONO GUIDE: AN INTRODUCTION TO PRO BONO OPPORTUNITIES IN THE LAW FIRM SETTING 15 (2d ed. n/d), *available at* http://www.law.harvard.edu/students/opia/docs/guide-pro-bono.pdf. New York's program is VOLS, and is also operated on a pure referral basis—their staff attorneys do not practice law. *See* Telephone Interview with Bill Dean, Executive Director, Volunteers of Legal Service (Mar. 24, 2004). In Washington, D.C., there is the Pro Bono Program of the D.C. Bar. *See* Telephone Interview with Maureen Thornton Syracuse,

In addition, there are referral programs that are issue-specific. The Harriet Buhai Center for Family Law in Los Angeles is a prime example of this type of group. The Center's mission is to provide legal assistance to low-income clients in the areas of family law and domestic violence through the volunteer efforts of private attorneys, paralegals, and law students.[243] It was opened in 1981 under the auspices of the Women Lawyers Association of Los Angeles, after the Legal Aid Foundation of Los Angeles (LAFLA) closed its family law unit in the wake of the federal cutbacks.[244] It now operates with a small staff that performs client intake, recruits volunteers from the family law bar, and conducts trainings to facilitate pro bono service to over 1000 clients annually.[245] Services are provided primarily through a pro per assistance program, which uses volunteers to train clients to represent themselves in divorce and other family law cases, and a pro bono panel that deploys volunteers to represent clients on more complicated matters.[246]

Referral organizations focused on linking transactional business lawyers with nonprofit and small for-profit organizational clients have gained increased attention within the pro bono system.[247] This is the result of the convergence of two trends: The expansion of corporate practices within large law firms during the high-tech boom of the 1990s increased the supply of transactional attorneys,[248] who have traditionally done little pro bono work, while the growth of community economic development as an antipoverty field increased the demand for corporate, real estate, and tax law assistance from community-based organizational clients.[249] The Lawyers Alliance for New York, founded in 1969, is the most prominent referral organization linking pro bono business attorneys

Pro Bono Program Director of the D.C. Bar (Feb. 5, 2004); *see also* D.C. Bar, Pro Bono Program, *at* http://www.dcbar.org/for_lawyers/pro_bono/.

243. *See* Harriett Buhai Ctr. for Family Law, Homepage, *at* http://www.hbcfl.org/.

244. *See* Harriett Buhai Ctr. for Family Law, About the Center, *at* http://www.hbcfl.org/about_center.htm#Inception.

245. *See id*.

246. Harriett Buhai Ctr. for Family Law, Programs, *at* http://www.hbcfl.org/programs.htm; *see also* Ingrid V. Eagly, *The Harriett Buhai Center for Family Law: An Innovative Approach to Pro Per Assistance*, UPDATE (Judicial Council of Cal.), Dec. 2002, at 1, *available at* http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/newsDec02.pdf.

247. *See, e.g.*, AM. BAR ASS'N, THE ABC MANUAL: STARTING AND OPERATING A BUSINESS LAW PRO BONO PROJECT (2001), *available at* http://www.abanet.org/buslaw.committees/CL600000/abc/abc.pdf; JEFFREY R. PANKRATZ, MEETING THE LEGAL NEEDS OF COMMUNITY-BASED DEVELOPMENT ORGANIZATIONS: THE ROLE OF THE PRIVATE BAR (1992).

248. *See* Sean Delany, *Biz Law Is Future of Pro Bono Growth*, NAT'L L.J., Aug. 28, 2000, at C18.

249. *See* Cummings, *supra* note 96, at 401–04.

and community organizations,[250] although others have developed more recently in response to the surge in interest.[251]

Strategic pro bono organizations, in turn, tend to be independent nonprofit groups that have a substantive mandate to pursue a specified advocacy agenda. These organizations have staff attorneys who pursue case representation, leveraging pro bono resources pragmatically to support their advocacy work. This is distinct from the referral organizations, which have as their primary mission the promotion of pro bono volunteerism.

Legal services programs are one type of strategic organization in that their primary mission is direct service. Because of the federal PAI mandate for LSC-funded groups, and frequently out of the need for greater attorney resources, legal services programs rely on a significant base of private-sector volunteers.[252] In Los Angeles, LAFLA is an example of an LSC-funded organization that has begun to develop significant pro bono ties. In the past, LAFLA primarily complied with PAI requirements by paying pro bono organizations, like Public Counsel and the Harriett Buhai Center for Family Law, to facilitate client placements with pro bono attorneys.[253] Recently, LAFLA has started to focus on establishing its own pro bono volunteer network by making efforts to recruit at large firms.[254] It has also devoted more resources internally to identifying, packaging, and marketing cases for pro bono volunteer representation, which has resulted in the expansion of pro bono service.[255] An example in the rural context is Legal Services of Eastern Missouri (LSEM), which has established a Volunteer Lawyers Program, through which "pro bono lawyers can handle their own cases, serve as

250. *See* Lawyers Alliance for New York, Homepage, *at* http://www.lany.org.

251. For one example, see Pro Bono Partnership, About Pro Bono Partnership, *at* http://www.probonopartnership.org/whatispbp.htm. The web site states:

> The *Pro Bono Partnership* was founded in November 1997 by members of The Corporate Bar Association as a tax-exempt public charity, whose mission is to make it as easy and enjoyable as possible for in-house and transactional counsel to provide valuable *pro bono* services for nonprofit agencies serving our poor and disadvantaged communities. The Partnership works with community-based nonprofit organizations serving the poor and disadvantaged populations in Westchester County, New York, Fairfield County, Connecticut, and northern New Jersey.

Id.

252. *See* MARKS ET AL., *supra* note 11, at 137–38; *see, e.g.*, William D. McGrath, *Pro Bono Myths and Realities*, 83 ILL. B.J. 30, 33–34 (1995) (describing efforts in Illinois by LSC-funded organizations and local bar associations to use pro bono to meet the legal needs of the poor).

253. *See* Telephone Interview with Bruce Iwasaki, Executive Director, Legal Aid Foundation of Los Angeles (Sept. 3, 2003).

254. *See id.*

255. *See id.* LAFLA counted over 6000 pro bono hours in 2002, including lawyers, law students, and paralegals. *See id.*

co-counsel with LSEM staff in cases, participate in outreach programs and make community education presentations."[256]

A notable trend in the legal services area is for faith-based organizations to rely more heavily on volunteer attorneys to serve poor clients.[257] For instance, the Christian Legal Aid Society in Virginia has approximately 700 volunteers who last year provided 4000 individuals and families with free legal services.[258] Baltimore's Jewish Legal Services has approximately 180 volunteers.[259]

Traditional public interest groups constitute the other major type of strategic organization. These range from very large groups with multiple affiliate offices—such as national organizations like the Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee), ACLU, NAACP, and National Resources Defense Counsel (NRDC)—to smaller, single-office agencies—Los Angeles' Asian Pacific American Legal Center (APALC), San Francisco's Equal Rights Advocates, and New York's Brennan Center for Justice being examples. Since these groups, even at their largest, tend to have small staffs and modest budgets,[260] they have developed ways to strategically use an array of pro bono relationships—from active co-counseling to more passive pro bono placement—to lessen the burden of large-scale litigation. These public interest groups tend to be concentrated in large cities—particularly Washington, D.C., New York, Boston, Los Angeles, and San Francisco—[261] and rely significantly on volunteer counsel from these areas.[262]

On one end of the spectrum is the co-counseling model adopted by the Lawyers' Committee, which was established in 1963,[263] and now has a national office in Washington, D.C., and a number of field offices around

256. LAPP & SHABECOFF, *supra* note 242, at 16.
257. *See* Mary Medland, *Religious Counsel*, A.B.A. J., Dec. 2003, at 20.
258. *See id*.
259. *See id*.
260. *See* ARON, *supra* note 145, at 32–33 (detailing information from 1984).
261. *See id*. at 31
262. *See id*. at 33 ("Over three-fourths of the groups [surveyed in 1983 and 1984] called upon outside counsel to handle some of their litigation, with more than half of these attorneys working on a voluntary basis.").
263. *See* MARKS ET AL., *supra* note 11, at 127. In recounting the story of the formation of the Lawyers' Committee, the authors state:

> In 1963, several acknowledged leaders of the private bar were summoned to the White House by President Kennedy and asked to find ways of providing legal counsel to civil rights workers in the South, who were unable to secure local counsel even for a price. The formation of the LCCRUL was their response, and the 1964 Mississippi Project was their immediate program.

Id.

the country focused on race discrimination lawsuits.[264] Every case the Lawyers' Committee brings is handled in connection with volunteer counsel, a model that is rooted in the organization's original mission of involving the private bar to address racial discrimination during the civil rights era.[265] This means that staff attorneys do not independently handle cases; it also means that pro bono volunteers are not simply handed over the cases and considered counsel of record. Instead, the co-counseling model typically involves one or two staff attorneys who develop a joint litigation plan in connection with law firm volunteers. The volunteers generally take on the bulk of the litigation responsibility, such as discovery and court hearings, although staff attorneys will assist in brief writing and conduct depositions.[266] Staff attorneys are viewed as lending substantive legal and policy expertise, focusing volunteers on the larger picture and ensuring that the positions taken in any given lawsuit are consistent with the Lawyers' Committee's policy goals.[267] In addition, staff attorneys also serve as a bridge between the firms and the clients, who are sometimes skeptical of law firm lawyers.[268] The timing of firm involvement varies: Often, firm lawyers will come in at the beginning of the case and play a critical role in developing litigation strategy; other times, they come in later to perform more defined tasks.[269] All decisions regarding litigation strategy, such as whether to appeal, are made jointly by the firm and staff attorneys.[270]

At the national office, the Lawyers' Committee employs a pro bono coordinator who is responsible for cultivating relationships with law firms, facilitating the placement of cases with volunteer co-counsel, and monitoring ongoing cases.[271] Outreach to firm lawyers is conducted in part through the organization's massive board of directors, which is composed of 244 lawyers who provide access to the country's major firms.[272] The pro

264. The national office, for instance, is divided into five project areas: employment discrimination, housing and community development, environmental justice, education, and voting rights. *See* Telephone Interview with Nancy Anderson, Pro Bono Counsel, Lawyers' Committee for Civil Rights Under Law (Feb. 3, 2004).

265. *See* Lawyers' Comm. for Civil Rights Under Law, Mission Statement, *at* http://www.lawyerscomm.org/aboutus/mission.html.

266. *See* Telephone Interview with Nancy Anderson, *supra* note 264.

267. *See id*.

268. *See id*.

269. *See id*.

270. *See id*.

271. *See id*.

272. *See* Lawyers Comm. for Civil Rights Under Law, Board of Directors, *at* http://www.lawyerscomm.org/aboutus/directors.html. The 244 figure is meant to mirror the original number of lawyers who came to the White House in 1963 at the behest of President Kennedy. *See* Telephone Interview with Nancy Anderson, *supra* note 264.

bono coordinator at the Lawyers' Committee also develops separate law firm contacts, largely in areas where there is not a Lawyers' Committee local affiliate, by making connections with law firms and keeping lists of other lawyers who have expressed interest in volunteer opportunities.[273] Cases come to the Lawyers' Committee through direct client contacts, as well as referrals from other public interest organizations. Once they are accepted internally, the staff produces a lengthy descriptive memo, which includes a discussion of the case, an evaluation of legal theories, estimates of costs, and a conflicts analysis.[274] This information is condensed into a shorter memo that is then circulated via e-mail to law firm contacts. Once a firm expresses interest and the matter clears conflicts checks, then the full case information is shared.[275] Upon case acceptance, a co-counseling letter is executed that details the allocation of responsibilities, and the case is then assigned within the Lawyers' Committee to a staff attorney to co-counsel with the firm.[276]

Other public interest groups depart from the Lawyers' Committee model, instead adopting a more flexible approach that calibrates pro bono involvement depending on the type of case involved. The ACLU of Southern California is an example of this approach.[277] Most of the cases conducted by the office are handled exclusively by staff attorneys.[278] However, pro bono volunteers are brought in for two different types of cases. One type involves relatively small cases that present discrete issues that the ACLU would like to support but does not have the staff attorney resources to take on.[279] These are referred to pro bono counsel, although the ACLU remains on the briefs as attorney of record.[280] The other type of case is the large-scale class action lawsuit in which the ACLU needs the resources of the firms to carry the discovery load and bring expertise in

273. *See id*.
274. *See id*.
275. *See id*.
276. *See id*.
277. The Brennan Center for Justice also employs a fluid approach to pro bono. This ranges from having firm counsel do most of the heavy litigation work—discovery, brief writing, and oral arguments—while Brennan Center staff attorneys provide back-up support as constitutional experts, to having firm lawyers play only a minimal local counsel role while staff attorneys conduct the bulk of the litigation. *See* Hallie Goldblatt, Doing Good and Doing Well: Pro Bono Programs, Practices and Policies of Large Private Law Firms 28 n.114 (unpublished manuscript, on file with author).
278. *See* Telephone Interview with Peter Eliasberg, Managing Attorney, ACLU of Southern California (Feb. 5, 2004). This is, in part, a function of the office's size. As the largest ACLU affiliate in the country, it can afford to take on full cases. In many other offices, however, where there are fewer (or even no) staff attorneys, pro bono plays a much larger role. *See id*.
279. *See id*.
280. *See id*.

complex litigation.[281] In these situations, the ACLU actively co-counsels along the lines of the Lawyers' Committee model. To access pro bono volunteers, ACLU lawyers use informal networks, rely on law firms with a proven pro bono record, and recruit new lawyers through firm presentations.[282] In this way, strategic organizations like the ACLU employ processes for pro bono recruitment and case placement that are similar to those used in the referral context, even though their reliance on pro bono is motivated by different organizational goals.

2. Facilitation

Although the pro bono system is not centrally coordinated, it is facilitated and financially supported by a number of important nongovernmental actors. Most significant is the organized bar, which serves as a critical transmission vehicle for pro bono initiatives. The ABA, in particular, is an active participant in the movement to establish formal pro bono policies and structures.[283] For example, the ABA Standing Committee on Pro Bono and Public Service focuses on developing broad policy initiatives to facilitate pro bono,[284] such as pro bono resolutions, Model Rule provisions,[285] pro bono reporting strategies, and continuing legal education credit programs.[286] In addition, it has published handbooks defining standardized policies for pro bono programs and promoting pro bono among government and public sector lawyers.[287] The Committee also sponsors an annual awards program,

281. *See id*.

282. *See id*.

283. *See, e.g.*, Michael A. Mogill, *Professing Pro Bono: To Walk the Talk*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5, 16 (2001) ("At an institutional level, the American Bar Association offers various clearinghouse services, publications, and technical aid to support more than 1,000 *pro bono* programs and other organizations." (citations omitted)).

284. *See* Telephone Interview with Debbie Segal, Chair, ABA Standing Comm. on Pro Bono & Pub. Serv., and Pro Bono Partner, Kilpatrick & Stockton LLP, Atlanta, Ga. (July 25, 2003). The Committee itself, with ten members, is authorized under the ABA bylaws, which provides the Committee with broad discretion in meeting its mandate of promoting pro bono and public service. *See* Telephone Interview with Steven Scudder, *supra* note 135.

285. The Committee led a successful effort to amend Model Rule 6.1 in 1993 to establish a more concrete standard. *See* THE LAW FIRM PRO BONO PROJECT, *supra* note 226, at 2.

286. *See* Telephone Interview with Steven Scudder, *supra* note 135. The Committee has also turned its attention to the judiciary, drafting a resolution to call on every chief justice to support pro bono, and law schools, supporting opportunities for pro bono by faculty, students, and staff. *See id*.

287. *See* ABA STANDING COMM. ON LAWYERS' PUBL. SERV. RESPONSIBILITY, STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS (1996); ABA GOV'T & PUB. SECTOR LAWYERS DIV. & STANDING COMM. ON PRO BONO & PUB. SERV., PRO BONO PROJECT DEVELOPMENT: A DESKBOOK FOR GOVERNMENT AND PUBLIC SECTOR LAWYERS (1998).

the ABA Pro Bono Publico Awards,[288] to raise publicity and foster pro bono as part of the professional culture, as well as the Equal Justice Conference, which focuses on different legal services and pro bono themes.[289] Programmatically, the Committee identifies and promotes projects that have national policy implications, such as the Children's Supplemental Security Income Project implemented in the wake of welfare reform, the Child Custody Project,[290] and the Rural Pro Bono Delivery Initiative.[291] The Committee's operational project, the Center for Pro Bono, concentrates more specifically on pro bono program implementation, publishing pro bono manuals,[292] providing technical assistance, engaging in outreach, and coordinating informational exchange to support pro bono programs around the country.[293]

State bars are also involved in organizing and supporting pro bono programs.[294] All but six states have established a state-wide pro bono agency, and almost all of these operate with state bar support.[295] These

288. *See* Am. Bar Ass'n, ABA Pro Bono Publico Award, *at* http://www.abanet.org/legalservices/probono/probonopublicoaward.html.

289. *See* Telephone Interview with Steven Scudder, *supra* note 135.

290. This Project was started with a one million dollar private donation. *See id*.

291. *See* ABA STANDING COMM. ON PRO BONO & PUBLIC SERV. & CTR. FOR PRO BONO, RURAL PRO BONO DELIVERY: A GUIDE TO PRO BONO LEGAL SERVICES IN RURAL AREAS (2003). The Committee has also studied and made recommendations on family law pro bono and the impact of LSC's reconfiguration. *See* Telephone Interview with Steven Scudder, *supra* note 135.

292. *See* ABA CTR. FOR PRO BONO, BLUEPRINT FOR CONSTRUCTING A PRO BONO PROJECT IN A MID-SIZE LAW FIRM (1997) [hereinafter ABA CTR. FOR PRO BONO, BLUEPRINT]; ABA CTR. FOR PRO BONO, *supra* note 14; ABA CTR. FOR PRO BONO, SENIOR LAWYERS ORGANIZING & VOLUNTEERING: A NATIONAL PROFILE (1996).

293. *See* ABA Ctr. for Pro Bono, News and Events, *at* http://www.abanet.org/legalservices/probono/home.html. The Center for Pro Bono is a major project of the Committee and its implementation arm. The Center provides technical assistance and planning advice to a wide range of constituents in the field, including bar associations, pro bono programs, legal services offices, bar leaders, law schools, corporate counsel, judges and government attorneys.

294. *See, e.g.*, Mogill, *supra* note 283, at 20–21. In addition, states themselves have sometimes gotten involved in promoting pro bono. *See, e.g.*, State Bar of Cal., *Did You Know?*, LEGAL SERVICES UPDATE, Aug. 2002, at 1, *available at* http:/www.pic.org/BulletinPDF/StateBarInsertAugust2002.pdf ("Governor Gray Davis has officially proclaimed October 7–14, 2002 as 'California Pro Bono Week.'").

295. *See* ABA Ctr. for Pro Bono, Pro Bono Delivery and Support: A Directory of Statewide Models, *at* http:/www.abanet.org/legalservices/probono/statewide.html (noting that all states except Arkansas, Indiana, Louisiana, South Dakota, Tennessee and Wyoming have state-wide programs); Sandefur, *supra* note 87, at 9–10 ("In all cases, with the exception of Ohio, Oklahoma, and Vermont, the state bar association and/or the state bar foundation provided some level of financial, staffing, or in-kind support to the program.").

programs are generally involved in recruiting pro bono attorneys,[296] training pro bono volunteers,[297] and connecting clients with volunteer lawyers.[298]

The State Bar of California's pro bono program highlights many of these features.[299] In the late 1970s, the State Bar established an Office of Legal Services, Access & Fairness to promote voluntary pro bono initiatives state-wide.[300] The Office, which staffs and supports the State Bar's Standing Committee on the Delivery of Legal Services, helps "local bar associations, legal services organizations and other groups develop pro bono programs and train lawyers to provide free and low-cost legal services to people who cannot afford to pay for counsel."[301] Specifically, the Office supports local pro bono organizational development and volunteer recruitment, organizes a pro bono awards program to recognize outstanding volunteers,[302] administers an emeritus attorney program that waives the State Bar active membership fee for otherwise retired attorneys to provide pro bono service, and convenes a state-wide conference for legal services and pro bono providers.[303] The State Bar also provides critical funding for pro bono through its IOLTA program,

296. *See* Sandefur, *supra* note 87, at 12 (finding that 86 percent of states had at least one "diffusely targeted recruitment and/or recognition initiative" (including advertisements in bar publications, mass mailings, live presentations at bar events, media publicity, and newsletters), while 67 percent of states reported a "specifically targeted initiative" (including phone-a-thons, targeted mailings, recruiting through personal contacts, work with individual firms, and personal letters in recognition of service).

297. *See id.* (reporting that "73% of state *pro bono* organizations either sponsor substantive legal training or coordinate its acquisition with legal aid providers").

298. *See id.* at 21 ("In a majority of states (61%), a state-wide program pursues at least one initiative that works to link clients with lawyers.").

299. For instance, the State Bar of California has a Six-Point Pro Bono Plan, which includes renewing the State Bar's pro bono resolution and large law firm pledge, reconfiguring pro bono awards, working with the judiciary to educate judges about the importance of pro bono, expanding the emeritus attorney pro bono program, and publicizing pro bono more effectively. *See* CAL. LEGAL SERVS. COORDINATING COMM., CALIFORNIA STATE JUSTICE PLAN 2001, *available at* http://www.pic.org/StatePlan/plan.pdf.

300. *See* Telephone Interview with Sharon Ngim, Program Developer and Staff Liaison to the Standing Comm. on the Delivery of Legal Services, The State Bar of California, Office of Legal Services, Access & Fairness Programs (Mar. 12, 2004).

301. STATE BAR OF CAL., THE STATE BAR OF CALIFORNIA: WHAT DOES IT DO? HOW DOES IT WORK? 7 (2003), *available at* http://www.calbar.ca.gov/calbar/pdfs/whowhat1.pdf. The State Bar of Wisconsin has a similar program, labeled Team Pro Bono, which is staffed by full-time pro bono coordinator and a half-time administrative assistant, and overseen by the Bar's Legal Assistance Committee. *See* State Bar of Wis., Team Pro Bono, *at* http://www.wisbar.org/bar/probono.html.

302. *See* STATE BAR OF CAL., 2004 PRESIDENT'S PRO BONO SERVICE AWARDS, *available at* http://www.calbar.ca.gov/calbar/pdfs/awards/2004-Pres-Pro-Bono-Award.pdf.

303. *See* Telephone Interview with Sharon Ngim, *supra* note 300. A number of other states also have emeritus pro bono programs. *See* ABA Ctr. for Pro Bono, Senior Lawyers, *at* http://www.abanet.org/legalservices/probono/senior_lawyers.html.

which sets aside 10 percent of each county's IOLTA allocation for organizations that primarily use volunteer attorneys.[304]

Other nongovernmental actors have also recently come into the pro bono field. In 1999, after President Bill Clinton issued a "Call to Action to the Legal Profession,"[305] the ABA and other prominent legal organizations formed Lawyers for One America, a nonprofit organization dedicated to promoting equal access through, among other initiatives, greater law firm pro bono.[306] The Pro Bono Institute, spun off from the ABA in 1996 and now run independently in connection with Georgetown University Law Center,[307] has taken the lead in providing educational programs, consulting services, and technical support to institutionalize pro bono in both large firms and in-house legal departments.[308] The National Association of Pro Bono Professionals was established in 1987 to support the professional development of pro bono personnel.[309]

The role of philanthropic foundations in promoting pro bono has been significant.[310] The Ford Foundation, which was critical to funding the demonstration projects that were the model for the federal legal services program, has become a major supporter of pro bono, providing over $1.7 million to the ABA to expand pro bono services since 1989, much of it going to support immigration-related pro bono programs and to increase pro

304. *See* State Bar of Cal., Interest on Lawyer Trust Accounts (IOLTA) FAQs, *at* http://www.calbar.ca.gov/. Most of the IOLTA money goes to support direct services organizations. *See* CAL. LEGAL SERVS. COORDINATING COMM., *supra* note 299 (noting that of the 102 programs funded by the California Legal Services Trust Fund Program, 18 were free-standing pro bono organizations). Organizations that provide both direct and volunteer services, like Los Angeles' Public Counsel and Bet Tzedek Legal Services, can qualify for both direct services and pro bono IOLTA funds. *See* Telephone Interview with David Lash, Managing Counsel for Pro Bono and Public Interest Services, O'Melveny & Myers LLP (Dec. 2, 2003).

305. *See, e.g.*, Harvey Berkman, *Past Struggles Echo as Clinton Makes a Pitch for Pro Bono Work*, NAT'L L.J., Aug. 2, 1999, at A8.

306. *See* Lawyers for One America, The Collaboration, *at* http://www.lfoa.org/barnone/barnone_collaboration.html.

307. *See* Telephone Interview with Esther Lardent, Executive Director, Pro Bono Institute (July 15, 2003).

308. *See id.* For instance, the Pro Bono Institute's Reinventing Pro Bono project works to advise public interest organizations on how to ask for pro bono from big firms. The Pro Bono Institute also works with firms to try to use their resources efficiently in implementing pro bono projects. In addition, it is involved in producing resources, such as *The Law Firm Pro Bono Resource Guide*, and coordinating business law transactional assistance. *See id.*

309. *See* ABA Ctr. for Pro Bono, NAPBProf—National Association of Pro Bono Professionals, *at* http://www.abanet.org/legalservices/probono/napbpro/home.html. Pro bono coordinators are also organizing their own section within the ABA to coordinate the exchange on issues like engagement letters, pro bono targets, tracking hours, and other administrative and policy issues. *See* Telephone Interview with Kathi J. Pugh, Pro Bono Program Counsel, Morrison & Foerster LLP (July 15, 2003).

310. *See* Telephone Interview with Sharon Ngim, *supra* note 300.

bono involvement by large law firms.[311] Ford has also given generously to the Pro Bono Institute,[312] as well as numerous one-time grants to promote pro bono by groups such as Lawyers for Human Rights, the Florida Immigrant Advocacy Center, Alliance for Justice, and the National Immigration Project of the National Lawyers Guild.[313] Many Ford-sponsored initiatives have involved international pro bono efforts.[314] More recently, George Soros' Open Society Institute (OSI) has been very active in funding pro bono initiatives. It has given over $1 million to the ABA in support of such projects as the ABA's Rural Pro Bono Delivery Initiative, the Immigration Pro Bono Development Project, the Death Penalty Representation Project, and the Children's Supplemental Security Income Project.[315] OSI has also funded the Association of American Law Schools (AALS) Pro Bono Project,[316] supported the creation of *probono.net*, a national web site devoted to pro bono coordination,[317] helped the American Corporate Counsel Association to develop a web site, and provided significant funds to the Lawyers' Committee to expand pro bono capabilities. In addition to Ford and OSI, a small foundation, Power of Attorney, was established in 1999 to provide resources and technical assistance to transactional pro bono projects.[318]

Finally, beginning in 1987 when Tulane instituted the first law school pro bono requirement,[319] law schools have increasingly become more prominent pro bono actors.[320] Although some law schools have sought to enlist

311. *See* Ford Foundation, Grants Database (2003), at http://www.fordfound.org/grants_db/view_grant_detail1.cfm; *see also* Telephone Interview with Debbie Segal, *supra* note 284 (noting that Ford supported much of the ABA's early work promoting pro bono in large firms).

312. *See* Ford Foundation, *supra* note 311, *at* http://www.fordfound.org/grants_db/view_grant_detail1.cfm.

313. *See id.*

314. For instance, in 2002, the Ford Foundation gave the Federation of Women Lawyers in Kenya $150,000 to provide pro bono services to poor women. *Id. at* http://www.fordfound.org/grants_db/view_grant_detail.cfm?grant_id=164237.

315. *See* Open Soc'y Inst., Initiatives, *at* http://www.soros.org/initiatives.

316. *See* Ass'n of Am. Law Schools Pro Bono Project, *at* http://www.aals.org/probono/; *see also* AM. ASS'N OF LAW SCHOOLS EQUAL JUSTICE PROJECT, PURSUING EQUAL JUSTICE: LAW SCHOOLS AND THE PROVISION OF LEGAL SERVICES 1 (2002) ("Funded by a grant from the Program on Law and Society of the Open Society Institute, the AALS created the Equal Justice Project in December 1999.").

317. *See* Michael Joe, *Site Tries to Net Pro Bono Volunteers*, RECORDER, Nov. 27, 2000, at 5.

318. *See* Power of Attorney, Welcome to Power of Attorney, *at* http://www.powerofattorney.org.

319. *See* Rhode, *supra* note 7, at 436.

320. *See, e.g.*, Howard Lesnick, *Why Pro Bono in Law Schools*, 13 LAW & INEQ. 25 (1994). This trend has elicited a counterattack. *See* Marcia Coyle, *"We Can't Even Give It Away": Professors, Students Sue for the Right to Donate Legal Services*, NAT'L L.J., May 3, 1999, at A4.

faculty participation,[321] the focus has been on fostering pro bono among students. Most law schools now have some type of formal pro bono program: According to a 2003 survey of ABA accredited law schools, "about a fifth had instituted pro bono/public service requirements; about half had developed formal, administratively supported voluntary programs; and about a quarter were relying on student groups to provide opportunities."[322] This trend has been promoted by the ABA, which in 1996 revised its accreditation standards to encourage student pro bono.[323] The AALS has also played a key role, forming its Commission on Pro Bono and Public Service Opportunities in 1997 to evaluate law school pro bono and launching its Pro Bono Project in 2001 to directly support the development of law school programs.[324]

Of the schools with mandatory pro bono requirements, about one-half require students to spend some fixed amount of time in field placements for which they receive no or only limited academic credit; the other half accepts "for-credit course work, internships, and externships as a form of service."[325] For those schools with voluntary pro bono programs, almost all have devised some type of referral system that is administratively supported by coordinators that link students with placement organizations.[326] Law

321. *See* Rhode, *supra* note 7, at 438.

322. *See id.* at 436–37.

323. *See id.* at 436; *see also* AM. BAR ASS'N, DIRECTORY OF LAW SCHOOL PUBLIC INTEREST AND PRO BONO PROGRAMS (2003), *at* http://www.abanet.org/legalservices/probono/lawschools/. The ABA has recently proposed changes to section 302(b) of the Standards for Approval of Law Schools that would direct law schools to provide "substantial opportunities" for "student participation in pro bono activities." *See* Memorandum from John A. Sebert, Consultant on Legal Education, to Deans of ABA-Approved Law Schools et al. (June 4, 2004), *available at* http://www.abanet.org/legaled/standards/standardsreview302305commentmemo.doc.

324. *See* David L. Chambers & Cynthia F. Adcock, *Access to Justice—Pro Bono Learning and Serving: Pro Bono Legal Services by Law Students*, 79 MICH. B.J. 1056, 1056 (2000); *see also* AALS COMM'N ON PRO BONO & PUBLIC SERV. OPPORTUNITIES, THE REPORT: LEARNING TO SERVE (n/d), *available at* http://www.aals.org/probono/report2.html ("The Commission's overall goal is that, within a few years . . . law schools will find ways to increase dramatically the numbers of law students and law faculty involved in pro bono work.").

325. *See* Rhode, *supra* note 7, at 437; *see also Harvard Enhances Public Interest Law Program*, CONNECTION & FELLOWS ON FRONT (Equal Justice Works, Wash., D.C.), Summer/Fall 2003, at 5 (noting a new requirement at Harvard Law School that each student do "40 hours of public interest related pro bono work in order to graduate"), *available at* http://www.equaljusticeworks.org/publications/summer_03_newsletter.pdf. The problem of matching students with clients is very acute in mandatory pro bono programs, since the law school becomes responsible for finding volunteer work for every student.

326. *See* Rhode, *supra* note 7, at 437. One example of such a system exists at Oklahoma Law School. *See* Brennan Center for Justice, With Launch of Oklahoma Law School's Pro Bono Referral Program, Low-Income People Obtain Greater Access to Legal Services, While Law Students Gain Legal Aid Experience, *at* http://www.brennancenter.org/programs/lsc/pages/view_elerts.php (May 7, 2004). The Public Service Law Network Worldwide (PSLawNet),

schools have also played a role in informing students of law firm pro bono records and prepping students to raise pro bono as a salient issue during interviews.[327] As an example, Harvard Law School recently held its first ever "Law Firm Pro Bono Career Fair" to "provide a forum for law firms to promote their pro bono activities and give . . . students the opportunity to consider law firm pro bono work as they evaluate which firm they might want to work for."[328]

3. Coordination

Although solo and small-firm practitioners play important roles in the pro bono system, the focus is on large law firms, which have been targeted as those in the best position to make significant pro bono investments.[329] As a result, a parallel organizational structure has been built inside big firms that provides the link between nonprofit pro bono programs and law firm lawyers. Two features of pro bono's intrafirm structure stand out: differentiated personnel roles and formalized procedures.

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a web site hosted by NALP, supports law school coordinators by facilitating information exchange and sponsoring a national conference. *See* PSLawNet, Our Mission, *at* http://www.pslawnet.org/PSLawNetWeb/mission.html. The PSLawNet web site also posts a list of law school public service coordinators. PSLawNet, Coordinators, *at* http://www.pslawnet.org/coordinator.asp.

327. *See* LAPP & SHABECOFF, *supra* note 242, at 17–21. The involvement of law schools in helping students assess pro bono programs has also been supported by the ABA. ABA STANDING COMM. ON PRO BONO & PUBL. SERV., THE PATH TO PRO BONO: AN INTERVIEWING TOOL FOR LAW STUDENTS (2001) (listing "sample interview questions to evaluate a law firm's commitment to pro bono"), *available at* http://www.abanet.org/legalservices/downloads/probono/path.pdf.

328. Pro Bono Inst., Harvard Law School Holds Inaugural Law Firm Pro Bono Career Fair, *at* http://www.probonoinst.org/whats.php.

329. *See* Michael Hertz, *Large Law Firms: A Larger Role to Play*, PROBONO.NET NEWS, Oct. 2003, *at* http://www.news.probono.net/e_article000188673.cfm ("The silver lining of increased concentration of lawyers in large firms is that efforts targeted at these firms to increase pro bono (if successful) will have a significant impact on the overall contribution of volunteer lawyers to increasing access to justice in this country."). Galanter and Palay's study of pro bono and law firm economic performance offered "confirmation of the widespread impression that large firms can readily institutionalize a commitment to systematic provision of pro bono legal services." Marc Galanter & Thomas Palay, *Public Service Implications of Evolving Law Firm Size and Structure*, *in* THE LAW FIRM AND THE PUBLIC GOOD, *supra* note 140, at 46. A forthcoming study of new lawyers provides further evidence of the relative capacity of big firms to engage in pro bono, noting that among new lawyers who report engaging in pro bono work, those in offices with 100 or more attorneys reported an average of 75 hours of pro bono work, as compared to an average of 58 hours for lawyers in all practice settings. *See* Ronit Dinovitzer et al., After the JD: First Results of a National Study of Legal Careers 35 (unpublished manuscript, on file with author).

a. Differentiation

Large law firms have become characterized by increasing numbers of departments, specialized subgroups, and distinct functional roles.[330] To coordinate across this fragmented organizational structure, firm management systems have become more centralized and bureaucratic,[331] controlled by a narrow group of decisionmakers who operate within a hierarchical chain of command.[332] The notion of the relatively flat and collectivist decisionmaking model associated with law partnerships has given way to a management structure within which those who have major responsibility for generating client business also have primary decisionmaking power.[333] The day-to-day management of the firm is left to an administrative stratum that is responsible for coordinating diverse practice areas and promoting efficiency.[334] Although many within the management structure of the firm are partners, nonlawyer

330. *See* NELSON, *supra* note 194, at 172–80; *see also* Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, *in* THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS 155 (Robert Dingwall & Philip Lewis eds., 1983). For a discussion of the structure of the modern firm, see generally GALANTER & PALAY, *supra* note 192; NELSON, *supra* note 194; MICHAEL H. TROTTER, PROFIT AND THE PRACTICE OF LAW (1997); James F. Fitzpatrick, *Legal Future Shock: The Role of Large Law Firms by the End of the Century*, 64 IND. L.J. 461 (1989); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869 (1990); Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567 (1989); Deborah K. Holmes, *Learning From Corporate America: Addressing Dysfunction in the Large Law Firm*, 31 GONZ. L. REV. 373 (1995–1996); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985); Milton C. Regan, Jr., *Corporate Norms and Contemporary Law Firm Practice*, 70 GEO. WASH. L. REV. 931, 934–35 (2002); Symposium, *The Law and Economics of Lawyering*, 84 VA. L. REV. 1411 (1998); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996).

331. *See* Richard L. Abel, *United States: The Contradictions of Professionalism*, *in* 1 LAWYERS IN SOCIETY: THE COMMON LAW WORLD 188 (Richard L. Abel & Philip S.C. Lewis eds., 1988) ("[A]s law firms have expanded, many independent practitioners have become employers of numerous subordinates and members of large bureaucratic organizations.").

332. *See* NELSON, *supra* note 194, at 273–76; *see also* Galanter, *supra* note 330, at 156 ("Although the partnership form is retained, these are modern firms with central direction and rationalized management presided over by full-time professional office managers.").

333. NELSON, *supra* note 194, at 70 ("Most entrepreneurs of the large firm sit on the relatively small governing committee of the firm."); *see also* Frederick L. Trilling, *The Strategic Application of Business Methods to the Practice of Law*, 38 WASHBURN L.J. 13, 75 (1998) ("Law firms are generally flatter organizations in comparison with other businesses, yet the legal profession still exhibits hierarchical problems." (citation omitted)). This is analogous to the separation of ownership and control in corporations. *See generally* ADOLPH BERLE & GARDNER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

334. *See* NELSON, *supra* note 194, at 73 ("The managerial role in the large firm arises from the necessity of decentralizing control over a large professional staff working on highly specialized matters.").

professionals also hold important positions.[335] In addition, managerial work is frequently delegated to committees composed of lawyers and staff who make key decisions operationalizing firm policies.

Intrafirm pro bono programs reflect this management structure. For one, rather than adopting a laissez-faire approach to pro bono activities, many firms now have pro bono committees that oversee the intake of pro bono matters, assign cases to lawyers, develop firm-wide policies, and track data on performance.[336] Of the fifty firms on *AmLaw*'s "A-List," which is the list of the nation's most "elite" firms,[337] at least forty have formal committee structures.[338] Committees vary in structure and practice. Some, such as Washington, D.C.-based Dickstein Shapiro Morin & Oshinsky have committees of as few as three attorneys, while others, like Los Angeles' Latham & Watkins, have firm-wide committees of thirty.[339] Some firms have committees composed solely of partners, while others include associates, of counsel, and paralegals. Although some committees have been in existence for many years, there has been a recent surge, triggered in part by the increased pressure to produce higher pro bono numbers brought about by pro bono reporting systems.[340] Moreover, over the past decade, there has been a shift toward broader firm representation on the committees, with many firms now including lawyers from all domestic offices and incorporating a higher proportion of transactional attorneys, who have historically been only marginally involved.[341]

Committee responsibilities vary from firm-to-firm, but they generally include developing pro bono policies and procedures, coordinating intake with referring organizations, assessing attorney interests, supervising case representation, evaluating pro bono activity, and publicizing results.[342] For instance, San Francisco's Morrison & Foerster has a firm-wide pro bono committee that approves all pro bono requests and deals with policy issues.

335. *See* ABEL, *supra* note 6, at 10 ("Many firms have diversified their services by hiring a variety of nonlawyer professionals (e.g., accountants, economists, scientists, and psychologists). The size, internal differentiation, and stratification of these service enterprises demands more bureaucratic structures, often headed by nonlawyer managers.").

336. *See, e.g.*, Lardent, *supra* note 140, at 61–62.

337. Aric Press, *The A-List*, AM. LAW., Sept. 2003, at 84. As part of the ranking, firms receive a "pro bono score," which is determined by a "formula that includes both per capita hours and the number of firm lawyers who performed at least 20 hours of service annually." *Id.* at 84.

338. *See* Pro Bono Structure at A-List Firms (compiled from interviews, periodical sources, and the National Association of Law Placement Directory of Legal Employers) (on file with author).

339. *See* Telephone Interview with David Kahn, Partner, Latham & Watkins LLP (Jan. 27, 2004).

340. PRO BONO INST., *supra* note 226, at 19.

341. *See id.*

342. *See id.*

Each individual office also has a committee that is responsible for recruiting volunteers, responding to requests by legal services groups, and monitoring pro bono case representation.[343] Similarly, at Latham & Watkins, a firm-wide pro bono committee composed of representatives from each office sets broad policy mandates, while members from individual offices are more intimately involved with implementation issues such as outreach, intake, and supervision.[344] At Washington D.C.-based Arnold & Porter, a firm-wide committee reviews each case request and coordinates intrafirm pro bono communications.[345]

In addition to the committee structures, most of the major firms have also devoted resources to dedicated pro bono staff.[346] Although many firms have designated partners who oversee pro bono programs in addition to their regular work assignments, firms have increasingly hired lawyers and nonlawyers to work as full-time pro bono coordinators.[347] This has been driven in part by a recognition that, as firms have continued to grow, their pro bono programs have reached a scale that makes it difficult for committee members to effectively manage, particularly for those partners who devote only a fraction of their time to pro bono matters.[348] In this sense, the rise of coordinators reflects the benefits of specialization: Firms create functionally differentiated positions to facilitate the achievement of institutional pro bono goals while freeing up other firm lawyers play their own specialized roles—developing clients, consummating business deals, and litigating fee-generating cases.[349] Particularly as firms have sought to compete in the rankings game, coordinators have been viewed as useful in increasing pro

343. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309.

344. *See* Telephone Interview with David Kahn, *supra* note 339.

345. *See* Telephone Interview with Brian Condon, Partner, Arnold & Porter LLP (Feb. 2, 2004).

346. *See* Terry Carter, *Building a Pro Bono Base: Dedicating Resources Proves to Be Good for Firms and Clients*, A.B.A. J., June 2003, at 30.

347. *See* PRO BONO INST., *supra* note 226, at 19. The report states:

> One other result of the Challenge's delineation of the role of the firm in pro bono . . . is the growth of full-time or part-time firm staff to assist the committees in administering the pro bono program. Increasingly, firms have selected knowledgeable individuals to serve as non-attorney pro bono coordinators, pro bono counsel, or—the latest trend—pro bono partners, i.e., equity partners who devote all of their time to pro bono matters and to the administration of pro bono service by others at the firm.

Id.

348. *See* Telephone Interview with John Kiernan, Partner, Debevoise & Plimpton LLP (Feb. 6, 2004). John Kiernan notes that his firm has resisted this move because he believes it is critical for the firm's pro bono culture to have active partner involvement. *See id.*

349. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309.

bono output,[350] or, at least, in adequately tracking existing efforts for reporting purposes.[351] Like committees, coordinator positions are also seen as lending institutional legitimacy and creating an internal constituency within firms to advocate for strong pro bono efforts.[352]

As it now stands, a significant proportion of the country's most elite firms have established the position of pro bono coordinator.[353] Of the A-List firms, thirty-eight have pro bono coordinator positions.[354] At least sixteen of these positions were either created or converted from part-time to full-time in the last ten years.[355] In addition, several other top firms have also recently hired coordinators, including Steptoe & Johnson in Washington, D.C.;[356] Shearman & Sterling in New York;[357] Patton Boggs in Washington D.C.,[358] Goodwin Procter in Boston;[359] Baker & McKenzie in Washington,

350. *See* Telephone Interview with Debbie Segal, *supra* note 284; *see also* Tatiana Boncompagni, *Rebuilding a Reputation*, AM. LAW., Dec. 2002, at 85 ("In the firm's 137-lawyer London office, lawyers logged 1,100 hours of pro bono work in 2001, compared to 72 in 2000. In part, the increase is attributable to better record-keeping, but it also coincides with White & Case's hiring of a full-time pro bono coordinator, Felicity Kirk.").

351. *See* Telephone Interview with Ronald Tabak, Special Counsel, Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates (Mar. 26, 2004). Tabak also notes that organizations like the Pro Bono Institute have championed coordinators and law firms that have created positions have received favorable press coverage. *Id.*

352. *See* Telephone Interview with Esther Lardent, *supra* note 307.

353. Exact figures are hard to come by because definitions of the position vary. One indication of the number of firms that have established the position can be seen in the Pro Bono Institute's Update on the 2001 Law Firm Staffing Survey, which reports that 90 of 92 firms that responded to surveys indicated that they had at least one individual assigned to administer or oversee the firm's pro bono program. *See* PRO BONO INST., UPDATE ON THE 2001 LAW FIRM STAFFING SURVEY 1 (2003).

354. *See* Pro Bono Structure at A-List Firms, *supra* note 338.

355. The A-List firms that created new coordinator positions within the last ten years include: New York's Cleary, Gottlieb, Steen & Hamilton; Washington, D.C.'s Wilmer Cutler & Pickering; Boston's Hale and Dorr; New York's Fried, Frank, Harris, Shriver & Jacobson; Washington, D.C.'s Covington & Burling; New York's Chadbourne & Park; Los Angeles' O'Melveny & Myers; New York's Stroock & Stroock & Lavan; San Francisco's Morrison & Foerster; Palo Alto's Cooley Goodward; Greenberg Traurig; Chicago's Winston & Strawn; New York's Cadwalader, Wickersham & Taft; Washington, D.C.'s Dickstein Shapiro Morin & Oshinsky; and Chicago's Sidley Austin Brown & Wood. *See id.*; *see also* Thomas Adcock, *Pro Bono Directors: Doing Good Full-Time*, N.Y. L.J. Apr. 20, 2001, at 16; Harvey Berkman, *New Job: Overseeing Pro Bono at Big Firm*, NAT'L L.J., Mar. 10, 1997, at A5; Wendy R. Liebowitz, *Full-Time Do-Gooders a Rarity But on the Rise*, NAT'L L.J., Aug. 19, 1996, at B9; Telephone Interview with Jan LeMessurier Flack, Public Service Co-Coordinator, Covington & Burling (Jan. 27 & 29, 2004). New York's Davis Polk & Wardwell converted its pro bono coordinator position to full-time in 2000. *See* Goldblatt, *supra* note 277.

356. *See* Berkman, *supra* note 355.

357. *See* Goldblatt, *supra* note 277.

358. *See* Carrie Johnson, *When Pro Bono Is Not Just an Afterthought*, LEGAL TIMES, June 30, 1997, at S44.

359. *See* Denise Magnell, *The Changing Face of Pro Bono*, NAT'L L.J., July 17, 2000, at M1 (noting that Goodwin Procter appointed a full-time pro bono coordinator in 2000); *see also Goodwin Procter: Offering the Highest Quality Pro Bono Services*, METROPOLITAN CORP. COUNS., Aug. 2002, at

D.C.;[360] Shook, Hardy & Bacon in Kansas City;[361] Kilpatrick & Stockton in Atlanta;[362] Mayer, Brown, Rowe & Maw in Chicago;[363] Dechert in Washington, D.C.;[364] Crowell & Moring in Washington, D.C.;[365] and White & Case in New York.[366]

Pro bono coordinators are responsible for conducting the administrative, outreach, and policy work necessary to facilitate their firms' pro bono activities. What emerges from an examination of their positions is a picture of significant discretion to influence the contours of a firm's pro bono program. This discretion is apparent primarily in the outreach and intake process. Many coordinators affirmatively engage in outreach to solicit cases from legal services and public interest groups, and actively screen requests for pro bono volunteers.[367] With this responsibility, they are able to influence which cases are presented to attorneys as volunteer opportunities: The external contacts they make shape the intake stream, while their decisions about whether to pursue or reject individual requests as a threshold matter is not closely reviewed.

Pro bono coordinators are also heavily involved in developing firm pro bono policies, soliciting firm volunteers, monitoring levels of pro bono participation, and evaluating firm performance.[368] In addition, they publicize

43 (stating that Goodwin Procter has a pro bono coordinator, a lawyer and member of administrative staff, who works at least half-time on pro bono initiatives).

360. *See* Carter, *supra* note 346, at 30.

361. *See* Telephone Interview with Jolie Justus, Of Counsel, Director of Pro Bono Services, Shook, Hardy & Bacon LLP, Kansas City, Mo. (May 21, 2004).

362. *See* Telephone Interview with Debbie Segal, *supra* note 284.

363. *See* Arian Campo-Flores, *The Pro Bono Prince*, AM. LAW., June 1999, at 30.

364. *See* Wheatly Aycock, *Pro Bono Bulletin Board*, LEGAL TIMES, July 1, 2002, at 19 ("In the past year, [Dechert] created a full-time pro bono coordinator position out of its London office, and a firmwide pro bono committee to monitor and shape pro bono work across offices.").

365. *See* Johnson, *supra* note 358.

366. *See* Boncompagni, *supra* note 350, at 86.

367. The Pro Bono Institute's Update on the 2001 Law Firm Staffing Survey reports that "[e]ighty-nine percent (80) of the respondents cited the screening and approval for new pro bono matters. . . . Eighty percent (72) identified the design or solicitation of new pro bono projects." *See* PRO BONO INST., *supra* note 353, at 3; *see also* Ronald J. Tabak, *How Law Firms Can Act to Increase the Pro Bono Representation of the Poor*, 1989 ANN. SURV. AM. L. 87, 91 (detailing the steps a pro bono coordinator should take to secure clearance for pro bono cases, including making sure that the case is within the firm's substantive guidelines, that there are sufficient experienced attorneys to supervise, that the project clears conflicts, and the assignment partner takes the pro bono case into account when future assignments are handed out).

368. *See, e.g.*, PRO BONO INST., *supra* note 353, at 3–4 (stating that 80 percent of respondents to the Update on the 2001 Law Firm Staffing Survey "reported reviewing, revising and developing policies regarding pro bono;" 74 percent "said they prepared an assessment of the firm's pro bono performance on an annual or periodic basis;" 63 percent indicated that they monitored "individual attorney levels of *pro bono* participation"; and 81 percent listed "[a]dvertising pro bono opportunities and soliciting volunteers").

firm pro bono activity,[369] report on pro bono to firm management,[370] provide supervision to attorneys,[371] survey firm lawyers on their pro bono interests,[372] and check conflicts of interests both within and across offices.[373] Other tasks include convening brown-bag lunches and other firm pro bono events,[374] reassigning cases when an attorney leaves the firm,[375] approving cases and out-of-pocket costs, maintaining relationships with community groups that serve as a source of clients, and running summer pro bono programs.[376] Coordinators can also serve as an important check on other firm lawyers who may want to reject controversial cases on business grounds,[377] and can intercede when lawyers are criticized for engaging in too much pro bono work.[378]

For coordinators, integration into the firm management structure does not necessarily confer full status within the firm.[379] At the A-list firms, the coordinator positions vary widely in status level: some are nonlawyer administrators,[380] others are lawyers not on the partnership track,[381] while

369. *See id.* at 4–5.
370. *See id.* at 4.
371. *See id.* at 3.
372. *See id.* at 4; *see also* Tabak, *supra* note 367, at 93.
373. *See* Telephone Interview with Ronald Tabak, *supra* note 351.
374. *See, e.g.*, Telephone Interview with Jan LeMessurier Flack, *supra* note 355.
375. *See* Tabak, *supra* note 367, at 100.
376. *See* PRO BONO INST., *supra* note 353, at 3–5.
377. *See* Telephone Interview with Ronald Tabak, *supra* note 351.
378. *See* Tabak, *supra* note 367, at 100.
379. For instance, the Pro Bono Institute's Update on the 2001 Law Firm Staffing Survey found that of the firms that indicated they had appointed one person to oversee their pro bono programs, "two indicated that the individual was an associate not on partnership track; one indicated that the individual was an associate on partnership track; five indicated the individual was a paralegal; eight appointed an of counsel attorney; six appointed other staff members; five appointed an associate who also maintains a full or near-full commercial caseload; and thirty-six appointed a partner who also maintains a full or near-full commercial caseload." PRO BONO INST., *supra* note 353, at 2. Seventy-eight percent of survey respondents reported that the pro bono coordinator worked only part-time on program. *See id.* at 6. "Actual reported salaries [for coordinators] ranged from a low of $32,500 to a high of $400,000. . . . The largest number of respondents (7) to this question reported paying between $121,000–$150,000." *Id.* at 7.
380. The following A-List firms have nonlawyer pro bono coordinators: Arnold & Porter; Cadwalader, Wickersham & Taft; Cleary, Gottlieb, Steen & Hamilton; Covington & Burling (although in 2002 the firm hired an attorney to co-coordinate the firm's pro bono program); Hale and Dorr; Jenner & Block; and Sullivan & Cromwell. *See* Pro Bono Structure at A-List Firms, *supra* note 338.
381. The following A-List firms have coordinators who are lawyers not on the partnership track: Davis Polk & Wardwell; Skadden, Arps, Slate, Meagher & Flom (Special Counsel); Wilmer Cutler & Pickering (Pro Bono Counsel); Fried, Frank, Harris, Shriver & Jacobson (Public Service Counsel); Howrey Simon Arnold & White (Pro Bono Counsel); O'Melveny & Myers (Managing Counsel for Pro Bono and Public Interest); Morrison & Foerster (Pro Bono Program Counsel); Winston & Strawn (attorney on administrative track); and Dickstein Shapiro Morin & Oshinsky (Diversity/Pro Bono Counsel). *See id.* In addition, the following firms not on the A-List also report

others are full-equity partners or associates on the partnership track.[382] There are debates within firms about the appropriateness of the different formats. One issue is whether the coordinator should be a lawyer at all. Although a number of big firms have nonlawyer coordinators, some believe that this sends the wrong institutional signal by not throwing the weight of a respected firm attorney behind the program. And, indeed, the institutional status of coordinators affects the scope of their duties and their relative influence within the firms. Those with greater prestige and institutional security within their firms can avoid more administrative duties and exert greater influence over policy and client selection decisions. Another issue is whether the coordinator should come from the law firm or public interest world. There is a concern that public interest lawyers will not understand the business constraints that firms face, although several firms have recently hired lawyers away from the public interest sector to successfully run firm pro bono programs.[383]

b. Formality

Pro bono, like other firm activities, has also become highly formalized in its procedural implementation.[384] In addition to the codification of billable-hour credit policies, firms have formalized more mundane rules and practices, creating distinct procedural guidelines for case acceptance, conflicts checks, supervision, and closure.[385] There is some convergence in terms of formal policies, although the details are difficult to compare. Most firms now have a written pro bono policy that specifies what constitutes pro

this type of coordinator: Cozen O'Connor, *see Cozen O'Connor: Embracing Pro Bono with Enthusiasm*, METROPOLITAN CORP. COUNS., Aug. 2002, at 41; Goodwin Procter (lawyer on administrative track), *see* Magnell, *supra* note 359; Shook, Hardy & Bacon (associate hired as Director of Pro Bono Services), *see* Carter, *supra* note 346; and Mayer, Brown, Rowe & Maw (Director of Pro Bono Activities and Clinical Legal Education), *see* Campo-Flores, *supra* note 363.

382. The following A-List firms indicate that their coordinators are partners or associates on the partnership track: Bingham McCutchen (partner); Chadbourne & Parke (partner); Cooley Goodward (associate); Stroock & Stroock & Lavan (Attorney Director of Public Service (partnership track position)); Greenberg Traurig (partner who spends 15 to 20 percent of time on pro bono); Hughes Hubbard & Reed (partner); and Milbank, Tweed, Hadley & McCloy (partner). *See* Pro Bono Structure at A-List Firms, *supra* note 338. Atlanta's Kilpatrick & Stockton, which is not on the A-List, also reported having a partner acting as coordinator. *See* Telephone Interview with Debbie Segal, *supra* note 284.

383. O'Melveny & Myer's David Lash came from Bet Tzedek Legal Services. *See* Carter, *supra* note 346, at 30. Mayer, Brown, Rowe & Maw hired Marc Kadish, a clinical law professor at Chicago-Kent College of Law. *See* Campo-Flores, *supra* note 363, at 30.

384. *See* Telephone Interview with Esther Lardent, *supra* note 307.

385. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309.

bono service, what type of billable credit is given, and how pro bono is evaluated for the purposes of bonuses and promotion.[386]

Pro bono programs are also formalized as part of the firms' overarching financial planning process. Thus, many firms conceptualize their pro bono programs in terms of a budgetary line item.[387] This is not new,[388] but does reflect an effort to "establish a target amount of pro bono work that the firm should generate annually, based on past performance and the firm's assessment of its current caseload and capacity to increase its activity level."[389] While budgetary goals are designed to stimulate pro bono activity, they can also be set too low or operate as ceilings not to be exceeded.[390]

From the standpoint of formality, big-firm pro bono stands in sharp contrast to its in-house counterpart.[391] One recent study indicated that only one-third of in-house departments that did pro bono had formal pro bono programs, while only 3 percent had a written pro bono policy and less than

386. *See* LAPP & SHABECOFF, *supra* note 242, at 7. For an example of one such policy, see Stephen F. Hanlon, *Making a Commitment*, 73 FLA. B.J. 38 (1999) (discussing Atlanta-based Holland & Knight's policy).

387. *See* Lardent, *supra* note 140, at 63. Lardent notes:

> While attorney time is clearly the major component of the budget, other expenditures, such as firm resources (for example, support staff, messengers, long-distance telephone tolls, and copying and printing charges) as well as litigation-related expenses (for example, filing fees, expert witnesses, stenographers, travel, discovery costs) are often included as line items in the overall pro bono budget.

Id.

388. *See id.* at 62–64; *see also* Telephone Interview with Lowell Sachnoff, Partner, Sachnoff & Weaver, Ltd. (July 23, 2003) (noting Sachnoff & Weaver's long-standing practice of factoring pro bono into the firm's budget).

389. *See* Lardent, *supra* note 140, at 63.

390. *See id.*

391. In-house legal departments have gained attention as sites of pro bono. According to the American Corporate Counsel Association, there are over 65,000 in-house counsel working in over 21,000 corporations nationally. *See* Am. Corporate Counsel Ass'n, American Corporate Counsel Association's Census of U.S. In-House Counsel, Executive Summary, *at* http://www.acca.com/Surveys/census01/. However, they do relatively little pro bono work: A survey conducted on behalf of CorporateProBono.Org indicated that only two-fifths of respondents said that their law departments did pro bono work. CORPORATEPROBONO.ORG, CORPORATEPROBONO.ORG IN-HOUSE PRO BONO RESEARCH STUDY EXECUTIVE SUMMARY 2 (2001), *at* http://corporateprobono.org/resources/displayResource.cfm?resourceID=1291. Moreover, "[o]n average, respondents indicated that attorneys and support staff work on twenty-five pro bono cases annually. In a year's time they spend approximately eighty-three hours on these cases, or approximately seven and one-half hours per legal department employee (attorneys, paralegals, and other staff)." *Id.* at 3. A study of new lawyers indicates that only 47 percent of new in-house lawyers engage in pro bono and the average for those who report some pro bono activity is only 24.1 hours per year, compared to 58 hours for lawyers in all practice sites. *See* Dinovitzer et al., *supra* note 329, at 37. One reason for this might be the less rigorous demands of in-house work. Because in-house attorneys generally work less than their big-firm counterparts, there may be pressures not to engage in pro bono work on the corporate clock.

6 percent had a pro bono committee.[392] The same study found that very few in-house departments set specific pro bono goals, track pro bono activity, and factor pro bono into attorney evaluations.[393]

The lack of formality within corporate in-house departments is related to issues of both culture and size. Culturally, in-house departments are shaped by their relationship with their corporate parents. They are often physically located in corporate campuses where their primary interaction is with corporate managers, who are not acculturated into the legal profession's public service norms. Moreover, the nature of in-house practice means that most of the attorneys are not litigators; instead, they focus on corporate transactions, intellectual property, contracts, and human resources.[394] Although there is a push to connect in-house attorneys with transactional pro bono opportunities, pro bono participation among transactional attorneys traditionally has been considered weak,[395] cutting against the establishment of formal pro bono programs.

The absence of formalized pro bono within in-house departments is also a function of size. Although some companies have several hundred members of their in-house legal staff, almost 85 percent of in-house departments have twenty or fewer attorneys.[396] This small scale makes it difficult to build the type of pro bono infrastructure that has emerged within large law firms. Indeed, in-house departments that do not participate in pro bono work cite inadequate pro bono staffing as one of the

392. *See* CORPORATEPROBONO.ORG, *supra* note 391, at 4.

393. *See id.* at 5. The study states:

> The vast majority of respondents (98.3%) said that their company does not set goals or limits for total dollars or number of hours spent on pro bono work. Almost as many (92%) indicated that their law department does not track or report pro bono time and/or the number of pro bono cases.
>
> Fewer than 14% indicated that pro bono work is considered in law department evaluations and fewer (5%) said it's a factor in compensation.

Id.

394. *See* Am. Corporate Counsel Ass'n, *supra* note 391 (reporting that "the top five responses identified by respondents as their current primary discipline" are as follows: 15.2 percent corporate transactions; 14.4 percent generalist; 12.9 percent intellectual property; 10.9 percent general commercial/contracts, and 5.6 percent employment/human resources).

395. Those in-house attorneys who are engaged in pro bono focus on counseling nonprofit organizations. *See* CORPORATEPROBONO.ORG, *supra* note 391, at 3 (indicating that 53.3 percent of respondents reported counseling nonprofit organizations).

396. *See* Am. Corporate Counsel Ass'n, In-House Corporate Attorneys: A Profile of the Profession, *at* http://www.acca.com/news/press/survey.html; *see also* Telephone Interview with Esther Lardent, *supra* note 307 (noting that the average in-house departments has seven attorneys).

primary impediments.[397] Those companies with large in-house departments do, in fact, tend to have more formalized programs. Coca-Cola, for example, has a pro bono committee, a training program, and a pro bono policy that explicitly encourages attorneys to do pro bono work.[398] Similarly, McDonald's pro bono policy establishes a pro bono committee, lays out a process for case approval, and sets a pro bono goal of 2 percent of working hours.[399] There is, moreover, an effort underway to promote formalized programs throughout in-house departments, spearheaded by the Pro Bono Institute and the American Corporate Counsel Association.[400] A key part of this effort is the development of the *CorporateProBono.Org* web site, which contains detailed information on corporate best practices,[401] sample pro bono surveys,[402] in-house pro bono policies,[403] and other pro bono resources.

B. Efficiency

Another key feature of institutionalized pro bono is the emphasis on efficiency. In the pro bono context, efficiency is associated with two primary ideas: transaction cost reduction and carefully targeted resource commitments.

1. Transaction Costs

One reason that institutions emerge is to economize on transaction costs involved in coordinating exchanges.[404] Although pro bono does not

397. *See* CORPORATEPROBONO.ORG, *supra* note 391, at 2 (reporting that 65.6 percent of respondents stated that inadequate staffing was the primary reason that their departments did not engage in pro bono).

398. *See* Pro Bono and Community Service Policy of the Coca-Cola Company's Legal Division (2002), *at* http://corporateprobono.org/archive/resources/resource1363.html. The policy, however, emphasizes that pro bono is permissible "*so long as that work does not interfere with other assigned responsibilities*." *Id.* (emphasis in original).

399. *See* McDonald's Legal Department Pro Bono Policy, at http://corporateprobono.org/archive/resources/resource1209.html.

400. *See* Am. Corporate Counsel Ass'n Pro Bono, at http://www.acca.com/v1/probono/; Pro Bono Inst., CorporateProBono.Org, *at* http://www.probonoinst.org/cpbo.php.

401. *See* CorporateProBono.Org, Corporate Best Practices, *at* http://corporateprobono.org/resources/bestPractices.cfm.

402. *See* CorporateProBono.Org, Model Internal Pro Bono Survey for Legal Departments, *at* http://corporateprobono.org/archive/resources/resource1358.html.

403. *See* CorporateProBono.Org, Answers to Your Questions, *at* http://corporateprobono.org/resources/obstacles.cfm.

404. Rosa Mulé, *New Institutionalism: Distilling Some 'Hard Core' Propositions in the Works of Williamson and March and Olsen*, 19 POLITICS 145, 147 (1999) ("Institutions evolve and develop to economise on transaction costs, thereby increasing the number of mutually beneficial exchanges that can take place." (citation omitted)).

involve market exchanges as such, attorney time spent attempting to access pro bono cases, getting up to speed on entirely new areas of law, or trying to figure out arcane practice techniques is an economic loss from the law firm perspective. Law firms therefore try to economize on these costs by overcoming informational deficits and streamlining pro bono implementation. On the other side, nonprofit pro bono programs seek to conserve scare resources by minimizing the costs associated with conducting client intake, developing organizational infrastructure, and recruiting and supervising pro bono volunteers.

a. Exchange

Key to the pro bono scheme is information exchange.[405] Low-income clients must be connected with private attorneys, typically across wide geographic and cultural chasms. This process is mediated by nonprofit organizations that provide the point of entry for the clients, package the cases for dissemination to volunteers, and coordinate the firm-client interface. On the firm side, this information must be received, vetted, and routed to volunteers, who must then coordinate direct contact with the client.

Technology is viewed as critical to the efficient exchange of this pro bono information, easing the matchmaking between cases and lawyers.[406] On the nonprofit organization side, staff attorneys look for ways to pick through the large volume of service requests to find cases appropriate for law firm placement. Technology-based screening mechanisms such as hotline systems that provide substantive legal information or provide referrals are used to redirect clients who do not meet triage priorities.[407] For clients who make it through the initial screening, cases are summarized and sent via e-mail to thousands of volunteers instantaneously. Los Angeles' Public Counsel, for instance, sends out a "top ten" list via e-mail that sets out its most urgent matters for pro bono assistance.

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405. *Cf.* Richard Moorhead, *Legal Aid in the Eye of a Storm: Rationing, Contracting, and a New Institutionalism*, 25 J.L. & SOC'Y 365, 386 (1998) (describing the shift in English Legal Aid toward information exchange).

406. Technology has been promoted more broadly as a means of increasing the effectiveness of legal services delivery. *See, e.g.*, Hugh Calkins et al., *Can Technology Transform Legal Services From a 100-Pound Weakling Into a Comprehensive and Integrated 3,000-Attorney Force for the Poor?*, 35 CLEARINGHOUSE REV. 731 (2002).

407. *See* Telephone Interview with Steven Scudder, *supra* note 135; *see also* Telephone Interview with Maureen Thornton Syracuse, *supra* note 242 (noting that the D.C. Bar Pro Bono Program has set up a twenty-four-hour voicemail system with recorded messages in English and Spanish on forty different areas of law as well as information on legal services referrals).

On the law firm side, technology is deployed to reduce the transaction costs associated with the logistics of pro bono case acceptance. Whereas cases would have previously been disseminated by phone calls or individual visits, now an e-mail reaches the entire roster of firm lawyers instantly.[408] Coordinators tailor the case information to the frenetic pace of law firm life: They pare down case descriptions, sharpen headings, and add emphasis on key terms.[409] Busy associates can in this way waste little time in determining their interest in a particular case.

In addition, technology permits more precise case targeting. E-mail practice group lists allow cases to be sent to the right areas. Computer programs monitor practice group work levels, permitting pro bono coordinators to identify lawyers who have the time to take on pro bono cases.[410] Computer programs also compile data about what type of pro bono cases attorneys have done in the past, and coordinators can use this information to target specific cases to those attorneys most likely to be interested.[411] E-mail listservs notify attorneys of trainings and allow volunteers to communicate about standard case questions. Law firm databases store pro bono form pleadings and other exemplars.[412]

A major innovation has been the advent of web-based client referral. *Probono.net*, started in 1999 by a Michael Hertz, a partner from Latham & Watkins, is the most important example.[413] Set up to be "an efficient matchmaker between lawyers and cases,"[414] "stitch[ing] together a decentralized army of public-spirited lawyers,"[415] *probono.net* creates a virtual volunteer referral system. Organized into different practice areas, which are hosted by public interest organizations and supported by private firms,[416] the site

408. *See* Telephone Interview with David Lash, *supra* note 304; *see also* Telephone Interview with Julie Orr, Pro Bono Coordinator, Davis Wright Tremaine LLP (July 12, 2004) (stating that the firm's Seattle office utilizes a listserv created by the Seattle Area Pro Bono Coordinators that contains cases for attorneys to choose). In-house departments also rely on e-mail to disseminate pro bono cases. *See* CORPORATEPROBONO.ORG, *supra* note 391, at 5 (noting that 20 percent of in-house departments responding to survey used e-mail to communicate about pro bono cases).

409. *See* Telephone Interview with Ronald Tabak, *supra* note 351.

410. *See id.*

411. *See id.*

412. *See id.*

413. The site is currently available to lawyers in Washington, D.C., Georgia, Louisiana, Minnesota, Montana, New York, San Francisco, and Washington state. *See* Probono.net, Homepage, *at* http://www.probono.net/.

414. Carl S. Kaplan, *A Virtual Firm for Lawyers Who Volunteer*, N.Y. TIMES ON WEB, Apr. 16, 1999, *at* http://www.nytimes.com/library/tech/99/04/cyber/cyberlaw/16law.html.

415. *Id.*

416. One of the public interest organizational hosts is San Francisco's VLSP, which relies on *probono.net* for recruiting: "Recently I, as a Client Advocate at VLSP, circulated an e-mail (see

requires attorneys to register (often by attending substantive trainings) before receiving a password that allows access to the site.[417] Once in a practice area, an attorney can browse available pro bono cases, visit an on-line library of case materials, and post questions to experienced attorneys on a message board.[418] The goal of *probono.net* is to promote seamless information exchange in order to entice reluctant law firm lawyers to try pro bono.[419] The site has spawned similar efforts, like *CorporateProBono.Org*,[420] which offers transactional attorneys a "no-stress" introduction to pro bono volunteering.[421]

Technology is not the only medium for efficient information exchange. Indeed, much of the pro bono system is about compiling, categorizing, and storing information to facilitate sharing both across the range of pro bono programs and within law firms themselves. One example of this is the explosion of ranking systems, such as the *AmLaw* pro bono survey, which provide comparative data on law firm pro bono activity and signal important market information to firm leaders, law students, and legal services groups. Pro bono conferences—such as the annual ABA Equal Justice Conference and the State Bar of California legal services and pro bono conference[422]—also provide a means for information exchange about best practices, innovations, and

below) with two complex pro bono cases in immediate need of volunteers. Within hours, both cases were placed with experienced volunteer attorneys! In fact, probono.net serves as a powerful recruiting tool. VLSP now recruits 35% of their volunteers through the Internet, including our probono.net/sf site." Sandra Zuniga, *Faster Placement of Pro Bono Cases*, PROBONO.NET NEWS, Mar. 2004, *at* http://www.news.probono.net/e_article000216544.cfm.

417. *See id*.

418. *See id*.; *see also* Wendy R. Leibowitz, *Pro Bono Hits the Net*, NAT'L L.J., June 21, 1999, at A19 (describing volunteers who use *probono.net* to post questions, access training materials, draft pleadings, and link up with clients).

419. Kaplan, *supra* note 414 ("[There are firm lawyers who] will do [pro bono] if they are convinced that the task will be convenient and easy, and that they will have support from experienced lawyers. . . . 'I wanted to create a site that would make it as simple as possible for lawyers in [this] group to get involved in pro bono.'"); *see also Probono.net: Building a Virtual Pro Bono Partnership*, METROPOLITAN CORP. COUNS., Oct. 2000, at 54; Hertz, *supra* note 329.

420. *See* CorporateProBono.Org, About CPBO, *at* http://www.cpbo.org/aboutus/ ("Through online services, technical assistance to the in-house community, and educational outreach, we encourage and support the participation of in-house counsel in pro bono legal services.").

421. *See* Telephone Interview with Esther Lardent, *supra* note 307. Some state bars also have web sites to coordinate pro bono. *See, e.g.*, N.C. State Bar, Pro Bono Project, *at* http://www.ncbar.org/public/proBonoPublicService/probono.aspx. Other web-based fora for exchange among pro bono practitioners facilitate the diffusion of best practices and allow start-up programs to benefit from the work done by more seasoned groups. In addition to PSLawNet, which provides a "clearinghouse of public interest opportunities for lawyers and law students," PSLawNet, Our Mission, *at* http://www.pslawnet.org/PSLawNetWeb/mission.html, the ABA Standing Committee on Pro Bono and Public Service also operates a web site with a vast amount of pro bono information, *see* ABA Ctr. for Pro Bono, Clearinghouse Library, *at* http://www.abanet.org/legalservices/probono/clearinghouselibrary.html.

422. *See* Telephone Interview with Sharon Ngim, *supra* note 300; Telephone Interview with Steven Scudder, *supra* note 135.

trends. Within firms, coordinators develop in-house substantive expertise, catalogue pro bono library resources, and set up databanks of pro bono forms.[423] Some firm lawyers develop ongoing relationships with legal services and public interest groups that facilitate pro bono placements. Nonprofit pro bono programs create easy-to-read manuals on substantive pro bono areas, conduct extensive trainings, and provide back-up technical support.[424] And law school public interest offices compile information on law firm pro bono activity to prepare law students to be more informed candidates on the job market.[425]

b. Menus

In coordinating between clients and volunteers, there arises the problem of interest convergence: Volunteers must be *attracted* to a pro bono opportunity. This means that it must not only be substantively interesting to the volunteer, but that it also must be feasible in the context of the volunteer's other obligations. In a large firm with differently situated lawyers, the problem is multiplied: Some attorneys will be interested in taking on a large antidiscrimination suit while others will only have time for a smaller engagement, like a legal clinic. For organizations that are seeking to access pro bono resources, it becomes critical to try to match opportunities with the range of possible interests and commitment levels.[426] Organizations have therefore moved in the direction of providing "menus" of cases that span across a range of substantive interests and involve variable time investments.[427] By providing information in a menu format, organizations attempt to more closely coordinate with their volunteer constituency.

The most typical fashion in which menus are provided are detailed case listings sent by referring organizations to law firms that provide a range of pro bono options, from volunteering one evening to staff a legal clinic to complex litigation cases or transactional deals. Another example of the menu approach, which is used only sparingly for logistical reasons, is the pro bono "fair" conducted within a specific law firm. A fair is typically organized as a "one-stop" shopping venue for lawyers interested in pro bono, where

423. *See* Telephone Interview with Ronald Tabak, *supra* note 351.
424. *See id*.
425. *See id*.
426. *See* Telephone Interview with Esther Lardent, *supra* note 307 (noting that one goal of pro bono programs was to make pro bono available to everyone within the firm).
427. *See* Telephone Interview with Bruce Iwasaki, *supra* note 253; Telephone Interview with Esther Lardent, *supra* note 307.

representatives from a broad range of pro bono, legal services, and public interest groups gather to provide information on types of cases, time commitments, training, and support.[428] "[A] fair provides a low-pressure environment for attorneys to explore a wide variety of organizations in different subject areas, all without leaving the building."[429] It is a way for busy attorneys to pursue pro bono options when they have a moment to spare from billable work—a form of "pro bono to go."[430] A less formal version of this model is a brown-bag lunch where several organizational representatives give presentations to attorneys about different pro bono options and typically ask interested attorneys to fill out contact sheets so they may be referred cases.

c. Scripts

Transaction costs are also attributable to hardened patterns of behavior that make it difficult and costly for law firm lawyers to shift from billable to pro bono work. Lawyers must find pro bono cases that interest them, obtain firm approval, fend off the pressures of billable work, and learn new areas of law, often with little supervision. The process can be daunting and often uncomfortable.[431] It is easier to adhere closely to the standard big-firm script,[432] in which the diligent lawyer eagerly takes on additional paying client work. Institutionalized pro bono attempts to create counterscripts, providing organizational incentives to promote volunteer activity (firm-wide awards, well-publicized examples of high-profile cases handled by prestigious partners) and organizational programs that make accessing pro bono work quick and routine. A premium is therefore placed on devising easily replicated pro bono systems that minimize the amount of effort lawyers have to expend to do pro bono and that mitigate the negative stigma attached to nonbillable activity. The goal, in other words, is to make pro bono as easy as possible so that lawyers do not have to "think" about whether they should do pro bono or billable work.[433]

428. *See* Laren Spirer, *I'll Take Pro Bono to Go*, PROBONO.NET NEWS, Mar. 2004, *at* http://www.news.probono.net/e_article000232037.cfm.

429. *Id.*

430. *Id.*

431. *See* Telephone Interview with Ronald Tabak, *supra* note 351 (noting that the main reason that lawyers do not do pro bono is fear of the unknown).

432. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) (noting how employers provide incentives to promote certain types of behaviors, and how employees signal adherence to valued workplace norms through the active negotiation of their identities).

433. *See* Telephone Interview with Esther Lardent, *supra* note 307.

An important cost associated with pro bono is the human capital investment. Firm lawyers are trained in substantive areas that generally are not applicable to legal services or public interest work. Moreover, they may be deficient in precisely the types of skills that pro bono practice demands—counseling clients, taking depositions, conducting administrative hearings, and negotiating settlements. As a result, pro bono attorneys require a great deal of training and other back-up support. For this reason, pro bono organizations stress training components as part of their organizational missions. Much of the work of these organizations consists of developing manuals, compiling forms, and conducting substantive trainings in order to facilitate volunteer lawyer efforts.[434]

An example of this aspect of pro bono is Public Counsel's General Relief Advocacy Project (GRAP), which trains hundreds of lawyers and law students each year to engage in on-site advocacy for homeless clients seeking to access benefits through the Los Angeles Department of Public Social Services (DPSS).[435] The GRAP model is to provide an intensive several hour training to volunteer associates from Los Angeles law firms, as well as area law students, on the range of homeless services and entitlements provided through DPSS and the types of advocacy techniques that the volunteers should employ.[436] Armed with this information, volunteers descend upon designated DPSS offices that same day to work with DPSS staff to ensure that homeless clients receive the benefits to which they are entitled. In this way, attorneys and law students who otherwise are unfamiliar with homeless issues and eligibility requirements for public aid are given detailed scripts that they then follow to advocate on behalf of the poor.

d. Signals

Another way that the pro bono system attempts to reduce the costs of information exchange is through signaling. Law firms have multiple demands on their pro bono resources. They receive requests for services from referring

434. *See* Telephone Interview with Bill Dean, *supra* note 242; *see also* Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 430 (2001) (reporting that staff of the Legal Aid Society and bar-sponsored Pro Bono Project against Homelessness in New York's Housing Court spent a significant amount of time helping volunteer lawyers to prepare cases); Telephone Interview with Ted Fillette, Legal Aid of North Carolina (July 7, 2004) (reporting that Legal Aid of North Carolina often trains volunteers through continuing legal education courses).

435. *See* Public Counsel, Homelessness Prevention Law Project, *at* http://publiccounsel.org/overview/hap.html.

436. *See Law Student Leaders Emerge in General Relief Program*, PUB. COUNS. L. CENTER UPDATE, Summer 2002, at 3, *available at* http://publiccounsel.org/news/2002.pdf.

pro bono groups, as well as individual client inquiries.[437] It is costly and time-consuming for firms to thoroughly vet these requests, a process which includes ensuring that they are consistent with law firm policy and do not pose any conflicts of interest. One way of minimizing this cost is by relying on the case screening capacity of referring organizations. Some firms thus prefer cases referred from trusted organizations, deeming them "pre-approved" and thereby subject to only a bare conflicts check. Morrison & Foerster, for example, accepts a category of pre-approved cases from designated referral organizations.[438] It also prefers referrals from established legal services groups, which are viewed as better able to screen cases and make triage decisions that comport with firm goals.[439] In a similar vein, the Los Angeles office of Latham & Watkins also as a matter of practice accepts large numbers of cases from trusted pro bono referral organizations, namely Public Counsel and Bet Tzedek Legal Services. Cases referred from these organizations are assumed to be properly vetted such that firm lawyers do not have to overinvest in case evaluation.[440] Referrals from trusted organizations thereby signal important information to firm pro bono liaisons about the acceptability of particular cases, thereby reducing the firm resources expended on close scrutiny.

2. Calibration

Efficiency in the pro bono system is also promoted by targeting law firm resources in a way that maximizes pro bono output measured in terms of clients served or volunteer hours provided.

a. Scale

The coordination problems inherent in moving large numbers of firm lawyers into volunteer opportunities taxes the resources of law firms and nonprofit pro bono groups. One way institutionalized pro bono addresses these costs is by promoting efforts designed to achieve significant economies of scale.

Law firms have experimented with different approaches to achieving greater scale. One is the adoption of large "signature" pro bono projects that focus firm resources on a particular issue, client group, or geographic area.[441] Signature projects are designed to coordinate firm resources around a

437. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309.
438. *See id*.
439. *See id*.
440. *See* Telephone Interview with David Kahn, *supra* note 339.
441. *See* LAPP & SHABECOFF, *supra* note 242, at 12.

well-defined goal, create synergies between different practice groups, and build institutional knowledge and resources.[442] By marshaling the firm's resources in this way, firms seek to "maximize[ ] efficiency, allowing the firm and its attorneys to make a larger impact."[443] Signature projects also have the benefit of serving as useful marketing vehicles. Latham & Watkins is a prominent example in this regard, recently initiating a well-publicized firm-wide project to represent unaccompanied refugee children detained by the government.[444] Similarly, San Francisco-based Heller Ehrman White & McAuliffe has focused on assisting individuals with HIV/AIDS.[445]

From the perspective of pro bono organizations, signature projects have the benefit of providing stable institutional commitments by firms that can be counted on and therefore easily planned around. Thus, a pro bono organization can move large numbers of clients to a firm in connection with a signature project, reducing the costs associated with coordinating among multiple firms. There is also a reduction in uncertainty to the extent that organizations can more confidently take on cases knowing that pro bono resources will be available.

Signature project relationships are structured in different ways. A firm can agree to take cases from multiple pro bono organizations that relate to a specific issue, along the lines of the Latham & Watkins model. Another arrangement involves a firm agreeing to partner with a single pro bono organization, taking on a large number of cases from that referral source.[446] This is the model adopted by New York's Stroock & Stroock & Lavan,

442. *See id.*; *see also* Telephone Interview with Esther Lardent, *supra* note 307 (suggesting that through signature projects firms can develop specialized expertise that allows them to have a greater impact).

443. *Id.*

444. *See* Renee Deger, *Latham's Pro Bono Figures Show It's Not All About Money*, RECORDER, Feb. 12, 2001, at 5; *Lawyers Try to Improve Lot of Young Refugees*, N.Y. TIMES, June 9, 2002, at 26. Other firms have initiated firm-wide pro bono projects. *See* Lardent, *supra* note 140, at 69–70 (discussing Morrison & Foerster and other prominent firms); *see also* Carter, *supra* note 346, at 32 (discussing Tampa's Shook, Hardy & Bacon, which has initiated specialized projects to assist unaccompanied minors in immigration matters and help parents of disabled children deal with educational issues).

445. *See* LAPP & SHABECOFF, *supra* note 242, at 12.

446. *See* William J. Dean, *The Role of the Private Bar*, 25 FORDHAM URB. L.J. 865, 868–69 (1998) Dean describes a "matching program where a law firm agrees to accept pro bono cases on a continuing basis from the entity with which it has been matched." He further states:

> There are many advantages to a matching arrangement. Pre-screened pro bono cases come to the law firm on a regular, continuing basis; the law firm and entity with which it is matched develop close and productive working relations; the firm develops areas of pro bono expertise and so can handle a large number of cases expeditiously. In addition, lawyers at the firm work as a team on the project, sharing experience and information.

Id.

which has developed a partnership with the New York Lawyers for the Public Interest's Disability Law Center.[447] A final model has a law firm "adopting" a community-based organization working in a particular low-income neighborhood, handling all types of legal issues that arise in the course of the organization's work.[448]

Another way that scale is achieved in the pro bono system is through the coordination of volunteer lawyers to engage in structured pro bono legal clinics. The clinic model has developed in many areas, including AIDS law,[449] family law,[450] homelessness prevention,[451] landlord-tenant law, public benefits, and wage-and-hour law.[452] Structured clinic projects are designed so that pro bono lawyers, typically after completing training, provide discrete assistance to multiple clients during a time limited session. There are different variations. Under an "open access" model, volunteer lawyers agree to be on call at a designated venue for a fixed time period, providing limited assistance to whomever shows up, provided the clients meet income threshold eligibility guidelines and present problems that are within the substantive purview of the clinic. For instance, a law firm might send several lawyers to staff a court-based pro se domestic violence clinic that assists victims in filing restraining orders.[453] Under this model, a pro bono organization typically publicizes to the community that lawyers will be stationed at a fixed site for a specified time period and the lawyers wait for the clients to come to them. There are other examples of clinics in which the lawyers go to where the clients are. Public Counsel's GRAP is an illustration of this type of "roaming" clinic, where volunteers are assigned to different social service offices around Los Angeles County and assist whichever homeless adults happen to be present

447. *See* LAPP & SHABECOFF, *supra* note 242, at 13.

448. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309 (indicating that the Morrison & Foerster offices in San Francisco, Palo Alto, and Walnut Creek each have adopted community organization clients).

449. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309 (noting that Morrison & Foerster in San Diego staffs an AIDS legal clinic).

450. Los Angeles' Harriet Buhai Center for Family Law is an example of an organization that operates family law clinics. *See* Harriet Buhai Ctr. for Family Law, Our Programs, *at* http://www.hbcfl.org/programs.htm.

451. Public Counsel's Homelessness Prevention Law Project offers "regular legal clinics, including joint clinics with the Barristers organization of the Los Angeles County Bar Association. In addition, [the project] conducts clinics at veterans' facilities to assist homeless veterans who are trying to overcome legal difficulties that prevent them from finding work and housing." Public Counsel, *supra* note 435, *at* http://publiccounsel.org/overview/hap.html.

452. *See* Telephone Interview with Maureen Thornton Syracuse, *supra* note 242; *see also* The Pro Bono Project, Volunteer Opportunities, *at* http://www.probono-no.org/clinic.html (publicizing elderly, homelessness, and succession clinics).

453. *See* Telephone Interview with Steven Scudder, *supra* note 135.

in the offices. The clients, therefore, have no expectation that they will receive services until the volunteers actually show up. One issue that organizations must address under either model is whether clients are able to retain volunteers beyond the brief clinic period.[454]

Under a "closed access" model, clients are rigorously pre-screened by a pro bono organization, which does preliminary paperwork and then sets up multiple back-to-back client meetings with volunteer lawyers, who answer legal questions and finalize legal documentation. An example of this is the bankruptcy clinic at Greater Dayton Volunteer Lawyers Project (VLP) in Dayton, Ohio, where VLP screens clients and prepares initial documentation so that volunteers can then meet with the clients to review the paperwork, make necessary changes, and prepare for any scheduled hearings.[455] Public Counsel's Adoptions Day, in which volunteer lawyers represent multiple prescreened low-income families in adoption proceedings,[456] provides another illustration of the closed access model.

The D.C. Bar Pro Bono Program has a sophisticated clinic program that developed in the mid-1990s as large Washington, D.C. firms sought to step up their pro bono activity in response to the new *AmLaw* rankings and the Law Firm *Pro Bono* Challenge.[457] At that point, there was a strong pro bono tradition among big D.C. firms, although they tended to engage in large civil rights and death penalty cases, rather than more routine family law or landlord-tenant matters.[458] The concept of the D.C. Bar clinic model was to aggregate a large number of small cases—mostly child custody, landlord-tenant, public benefits, wage-and-hour, consumer, and personal injury matters—to make the scale attractive to firms.[459] The initial goal was to institute one clinic every two weeks, with firms committing to staff two clinics per year.[460]

The first step was instituting a rigorous client screening procedure and providing pre-clinic training modules. To generate cases, the clinic accepted referrals of all the matters that the local legal services organization

454. Legal Aid Services of Oregon, for instance, runs a family law clinic that does not allow clients to retain volunteers outside of the clinic, although clients may retain the volunteers in its bankruptcy, domestic violence, and senior clinics. *See* Telephone Interview with Maya Crawford, Pro Bono Coordinator, Legal Aid Services of Oregon (July 21, 2004).

455. *See* Telephone Interview with Helenka Marculewicz, Executive Director, Greater Dayton Volunteer Lawyers Project, Inc. (July 2, 2004).

456. *See* Public Counsel, Children's Rights Project, *at* http://publiccounsel.org/overview/crp.html.

457. *See* Telephone Interview with Maureen Thornton Syracuse, *supra* note 242.

458. *See id*.

459. *See id*.

460. *See id*.

was unable to handle.[461] It then screened the cases to determine whether they were meritorious and, if so, ran the cases through a conflicts check at the firm that was assigned to staff the clinic on any given night.[462] Cases that passed conflicts were then given to volunteers at the designated clinic, which was held at the D.C. Bar office.[463] Volunteers provided assistance to resolve simple matters during the clinic session and agreed to accept more complicated cases for full representation.[464] To help the volunteers provide assistance in areas that they often knew little about, the D.C. Bar staff conducted pre-clinic lunchtime presentations at firms explaining how the clinic operated and designated mentors to be available during the clinic session to consult with the volunteers on substantive issues.[465] The D.C. Bar also prepared a thick manual of background materials, outlines, form pleadings, and other necessary documents to facilitate the representation.[466] Once the cases were placed, the staff engaged in frequent monitoring to ensure that they were progressing appropriately.[467] In 1993, the first year the clinics were launched, there were eighteen participating law firms; there are now thirty firms of various sizes and two federal agencies that conduct the clinics.[468]

The D.C. Bar Pro Bono Program underscores the mutual benefits to law firms and pro bono organizations derived from the clinic model. On the law firm side, clinics provide high volume pro bono within a controlled environment. Law firm attorneys carve out well-defined time slots within which to do pro bono cases; gain pro bono credit for minimal advice and referral activities, as well as more traditional case representation on routine matters;[469] and take advantage of extensive training and heavy back-up support. For the pro bono organization, clinics represent a chance to maximize client service by leveraging firm attorneys. Moreover, to the extent that clinics boost pro bono representation, they can also provide financial advantages for pro bono organizations that rely on funding sources that tie contributions to the number of clients served.

461. *See id.*
462. *See id.*
463. *See id.*
464. *See id.*
465. *See id.*
466. *See id.*
467. *See id.*
468. *See id.*
469. *See* Telephone Interview with Steven Scudder, *supra* note 135.

b. Specialization

While law firms focus on generating efficiencies from scale, they also pursue efficiency gains from specialization. The addition of pro bono coordinators to law firm staff reflects this impulse: By investing in a coordinator position, the pro bono payoff can be high since the coordinator removes many of the institutional impediments that dissuade lawyers from taking on pro bono cases.[470]

Law firms have adopted other pro bono practices as a way of tapping the benefits of specialization. The most notable trend is the increasing use of externships as a means of designating individual attorneys to engage full-time in pro bono work.[471] Externship programs allow "law firm attorneys (generally associates) to spend a set period of time (usually two to six months) working exclusively for a specified legal services or public interest organization."[472] The idea is that firm attorneys receive a sabbatical from billable work—"rotating" out of the billable world and into the protected arena of their pro bono placement for the duration of the externship period.[473] These programs tend to be self-replenishing: Once one attorney's rotation is over, another's commences so that there is always someone from the firm participating in the program.[474]

Firm leaders view externship programs as providing benefits to underfunded legal services groups, which gain free staffing, and to the firms themselves, which raise their visibility, provide training to their younger associates, and increase their overall pro bono hours.[475] In addition, the programs are seen as increasing the efficiency of service delivery: "An associate working at a legal services offices acquires the necessary expertise and can then apply it to a large number of legal matters."[476] These perceived benefits have driven an expansion of externship programs by major law firms. While the origin of externships can be traced back thirty-five years to

470. *See* LAPP & SHABECOFF, *supra* note 242, at 9; Tabak, *supra* note 367, at 91; *see also* Ronald J. Tabak, *Integration of Pro Bono Into Law Firm Practice*, 9 GEO. J. LEGAL ETHICS 931 (1996).

471. *See* Lardent, *supra* note 140, at 67–68; Note, *supra* note 204, at 415–19.

472. PRO BONO INST., ROTATION/EXTERNSHIP PROGRAMS: ENHANCING YOUR FIRM'S PRO BONO EFFORTS 1 (2000).

473. It is for this reason that externships are also referred to as "rotation" programs. *See id*. They are also referred to as "release-time" programs.

474. *See id*.

475. *See id*. at 1–2; *see also* PRO BONO & PUB. INTEREST COMM., N.Y. STATE BAR ASS'N, PRO BONO INNOVATIONS: A REPORT ON ASSOCIATE EXTERNSHIP AND FELLOWSHIPS 2–3 (1999), *at* http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Pro_Bono/Reports/Pro_Bono_Innovation.htm.

476. *See* Dean, *supra* note 446, at 870.

Covington & Burling's program with Washington, D.C.'s Neighborhood Legal Services,[477] most externships have been instituted within the last several years.[478]

Of the fifty *AmLaw* A-List firms, at least sixteen now have some type of externship program. In New York, Debevoise & Plimpton has instituted a five-month externship program with the Queens County District Attorney's office;[479] Cleary, Gottlieb, Steen & Hamilton has a long-standing externship arrangement with Mobilization for Youth Legal Services, as well as a four-month program with the Lawyers Alliance of New York and a three-month program at the city Corporation Counsel;[480] Skadden, Arps, Slate, Meagher & Flom loans associates to the Legal Aid Society and the Lawyers Alliance;[481] Fried, Frank, Harris, Shriver & Jacobson recently launched a new four-month externship with the Community Development Project at the Legal Aid Society;[482] and Chadbourne & Parke places associates on eight to twelve-week externships with The Door legal services center.[483] Arnold & Porter has an externship program in Washington, D.C.,[484] while Atlanta's Alston & Bird and Richmond, Virginia's Hunton & Williams also report having programs.[485]

477. *See* COVINGTON & BURLING, *supra* note 203, at 58. This program persists as the firm assigns two lawyers, a paralegal, and a secretary to work at the Neighborhood Legal Services Program full-time for six months. A lawyer and paralegal are also assigned to the Children's Law Center. In addition, attorneys spend a portion of their time at Bread for the City. *See id.*

478. *See* PRO BONO INST., *supra* note 472, at 1.

479. *See* Telephone Interview with John Kiernan, *supra* note 348.

480. *See* CLEARY, GOTTLIEB, STEEN & HAMILTON, PRO BONO YEAR IN REVIEW 11–12 (2003), *available at* http://www.cgsh.com/files/tbl_s47Details/FileUpload265/74/Pro Bono 2003 Year in Review.pdf.

481. *See* Dean, *supra* note 446, at 870.

482. *See* Fried, Frank, Harris, Shriver & Jacobsen LLP, Fried Frank Launches Pro Bono Program to Assist Community Economic Development in Upper Manhattan, *at* http://www.ffhsj.com/pressreleases/probono.htm.

483. *See* Chadbourne & Parke LLP, Pro Bono, *at* http://www.chadbourne.com/about/s_probono.html. Kramer Levin Naftalis & Frankel started a four-month externship in 1998 at South Brooklyn Legal Services. *See* LAPP & SHABECOFF, *supra* note 242, at 11. Cadwalader, Wickersham & Taft has a six-month externship with the New York City Corporation Counsel. CADWALADER, WICKERSHAM & TAFT LLP, CADWALADER, EXTENDING OUR COMMITMENT, PRO BONO SUPPLEMENT: FALL 2003, at 3, *available at* http://www.cadwalader.com/assets/pro_bono_pdf/ProBono_supplm_03.pdf. Other New York firms with externship programs include: Weil, Gotshal & Manges; LeBoeuf, Lamb, Greene & MacRae; Milbank, Tweed, Hadley & McCloy; and Willkie Farr & Gallagher, *see* PRO BONO & PUB. INTEREST COMM., *supra* note 475. Dewey Ballantine reports a pro bono externship at the Brooklyn District Attorney's Office. *See* NALP Directory of Legal Employers, Dewey Ballantine, *at* http://nalpdirectory.com/employerdetails.asp?fscid=F3711&id=1&yr=2004.

484. *See* NALP Directory of Legal Employers, Arnold & Porter, *at* http://nalpdirectory.com/employerdetails.asp?fscid=F3695&id=1&yr=2004.

485. *See* NALP Directory of Legal Employers, Alston & Bird, *at* http://nalpdirectory.com/employerdetails.asp?fscid=F0264&id=1&yr=2004; Hunton & Williams LLP, Pro Bono, at

All of these programs allow firms to count time devoted by externship attorneys as pro bono service under the standards set forth by the Law Firm Pro Bono Challenge.[486]

A variation on the externship model, which involves attorneys staffing external legal services or public interest offices, is the pro bono department, which is typically structured as an internal practice group with designated legal and administrative staff. Hogan & Hartson is the standard-bearer, staffing its Community Services Department with one permanent full-time partner, four full-time associates who rotate in for varying periods, and two full-time legal assistants.[487] Another example is Atlanta-based Holland & Knight's Community Services Team, which is staffed by two attorneys and several fellows. Some firms have opted for a more modest approach, simply hiring individual attorneys to focus on pro bono. Shook, Hardy & Bacon in Kansas City, for instance, has a staff attorney who handles juvenile delinquency and custody cases assigned to the firm by the local family court.[488] Other firms have created "split-time" positions in which attorneys are hired who divide their time between billable and pro bono work.[489] In addition, some firms have developed split-time summer programs that allow summer associates to spend part of their summer working for a legal services or public interest group while receiving firm pay. For instance, Morgan, Lewis & Bockius recently initiated a Public Interest and Community Service program, in which summer associates work at the firm for the first half of the summer and then "in a full-time assignment with a nonprofit organization for the second half of the summer, while receiving full compensation from the

http://www.hunton.com/probono/neighborhood_offices.html (describing its neighborhood legal office in the Church Hill neighborhood of Richmond, which is staffed by a full-time pro bono attorney). Other firms that report externship programs include Dechert in Washington D.C., which has two rotation programs "for six-month stints at the Legal Aid Society of the District of Columbia and the Washington Lawyers' Committee for Civil Rights and Urban Affairs," Wheatly Aycock, *Pro Bono Bulletin Board*, LEGAL TIMES, July 1, 2002, at 19, and White & Case, which in 2000 started a four-month program at the Lawyers Alliance of New York, *see* Boncompagni, *supra* note 350.

486. *See* PRO BONO INST., WHAT COUNTS?: A COMPILATION OF QUERIES AND ANSWERS 16 (2003), *available at* http://www.probonoinst.org/pdfs/whatcounts.pdf.

487. *See* Hogan & Hartson LLP, Community Services Department, *at* http://www.hhlaw.com/site/index.asp?file=/probono/content.html.

488. *See* Telephone Interview with Jolie Justus, *supra* note 361.

489. Chicago's Winston & Strawn is an example of a firm that has adopted this type of part-time pro bono position. Beth Slater, *A New Firm Niche: Part-Time Pro Bono*, NAT'L L.J., Aug. 2, 1999, at A13 ("In 1996, the firm decided to employ an associate to spend about 50% of his or her time on pro bono work and the other half on billable cases.").

firm regardless of which program is selected."[490] Los Angeles' Munger, Tolles & Olsen gives summer associates the option of spending the final four weeks of the summer program at a public interest organization at reduced pay.[491]

Firms have also moved to start fellowship programs to support legal services and public interest work. Two distinct types of fellowships have developed. One is the "pure" fellowship, exemplified by Skadden, Arps, Slate, Meagher & Flom's program, which funds twenty-five public interest fellows nationally each year to work at nonprofit organizations for a two-year period.[492] There is no expectation that fellows will join the firm upon the completion of their fellowship term. Other firms have established smaller-scale programs, including Pillsbury Winthrop, which funds the Sutro Public Service Fellowship;[493] Paul, Weiss, Rifkind, Wharton & Garrison, which endowed Yale's Arthur Liman Public Interest Fellowship;[494] and the Kirkland & Ellis New York City Public Service Fellowship, which provides annual one-year fellowships to one Columbia and one New York University law student to work at a public interest organization in New York City.[495] A slightly different version is the fellowship program operated by Fried, Frank, Harris, Shriver & Jacobson, in which fellows spend two years as firm associates and then work for two years at either the NAACP Legal Defense and Education Fund or the Mexican American Legal Defense and Education Fund.[496] Although fellows may return to the firm with full seniority, they are not required to do so.[497] In addition, many of the major firms sponsor fellows through the Equal Justice Works Fellowship Program, which matches firm contributions with funds donated by OSI to support approximately fifty fellows each year to work at nonprofit organizations

490. *See* Morgan, Lewis & Bockius LLP, Pro Bono, *at* http://www.morganlewis.com. There are many other firms with similar programs. *See* Yale Law Sch. Career Dev. Office, Firms Sponsoring Split Public Interest Summers (on file with author).

491. *See* Interview with Cathy Mayorkas, Director, Program in Public Interest Law and Policy, UCLA School of Law (May 6, 2004).

492. *See* Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, Skadden Fellowship Program, *at* http://www.skadden.com/SkaddenFellowshipIndex.cfm?contentID=23.

493. *See* Pillsbury Winthrop LLP, Pro Bono, *at* http://www.pillsburywinthrop.com/about/about.asp?AbtTypeID=380.

494. *See* Paul, Weiss, Rifkind, Wharton & Garrison, NALP Directory of Legal Employers, *at* http://www.nalpdirectory.com/employerdetails.asp?fscid=F0249&id=1&yr=2004.

495. *See* Kirkland & Ellis LLP, Pro Bono: Fellowships, *at* http://kirklandnet.alpha.hubbardone.com/careers/fellowship.aspx?schoolid=.

496. *See* Fried, Frank, Harris, Shriver & Jacobson LLP, Fellowship Program, *at* http://www.ffhsj.com/recruitment/ny_fellowships.htm

497. *See id.*

around the country.[498] Firms also sponsor summer fellowships, which allow law students to spend all or part of their summers at legal services or public interest groups.[499] These fellowships do not serve as vehicles to increase pro bono efficiency, since the firms themselves are not able to capture the fellows' time as law firm pro bono hours. They are, instead, a way for firms to give back to the community while generating favorable publicity for their practices that is used for recruitment purposes.

Another type of fellowship program has emerged that is more akin to an externship in that it operates as a vehicle for firm attorneys to take time off to devote to legal services or public interest work, while still maintaining their status as associates. The difference is that these types of fellowships are typically offered to incoming associates before they begin their tenure with the firm, with the understanding that they will come to the firm once the fellowship has concluded. In this way, these fellowships are specifically structured as firm recruitment devices. Sullivan & Cromwell has a program that allows associates entering the firm from clerkships to spend one year representing indigent plaintiffs in the pro se office of the Southern District of New York at full firm-level pay.[500] In 2001, Holland & Knight started the Chesterfield Smith Fellowship program, in which fellows work at full pay for two years within the firm's Community Services Team and then enter

498. *See* Equal Justice Works, Equal Justice Works Fellowships, *at* http://www.napil.org/fellowsmainpage.php.

499. For instance, Davis Polk & Wardwell sponsors the Davis Polk/Equal Justice America Internship Program, which provides three summer internships for Columbia law students to work at legal services organizations, as well as a summer internship at Sanctuary for Families Center for Battered Women's Legal Services, *see* Davis Polk & Wardwell, Pro Bono, *at* http://www.dpw.com/careers/probono.htm, Covington & Burling funds the Westwood Fellowships for graduates of Washington, D.C.-area law schools to work for one year at Neighborhood Legal Services Program, *see* COVINGTON & BURLING, *supra* note 203, at 59. Jenner & Block supports fellows through the Public Interest Law Initiative, *see* NALP Directory of Legal Employers, Jenner & Block, *at* http://nalpdirectory.com/Firm12.pdf. Howrey Simon Arnold & White has developed its HELPS (Howrey Externs for Legal Pro Bono Service) which funds seven students after their first year of law school to work for ten weeks in a public interest organization, *see* HOWREY SIMON ARNOLD & WHITE LLP, 2003 PRO BONO AND PUBLIC SERVICE ANNUAL REPORT 1 (2003), *available at* http://www.howrey.com/docs/probonoannual2003.pdf. Hughes Hubbard & Reed sponsors a summer fellowship at the Schell Center for International Human Rights at Yale Law School, *see* Hughes Hubbard & Reed LLP, Notable Alumni, *at* http://www.hugheshubbard.com/careers/alumni.asp. Sidley Austin Brown & Wood has started to fund fellows in Los Angeles, *see* Interview with Cathy Mayorkas, *supra* note 491. King & Spaulding sponsors fellows at the Southern Center for Human Rights, *see* NALP Directory of Legal Employers, King & Spaulding, *at* http://nalpdirectory.com/employerdetails.asp?fscid=F3361&id=1&yr=2004.

500. *See* Sullivan & Cromwell LLP, Pro Bono Fellowship, *at* http://www.sandc.net/display.asp?section_id=920. Under the fellowship program, the fellow is "expected to remain at Sullivan & Cromwell at the conclusion of the fellowship as a regular associate." *Id.*

the firm as third-year associates.[501] Pillsbury Winthrop offers a one-year public interest fellowship to first-year associates at half pay.[502] An important feature of these programs is that, like traditional externships, they allow the sponsoring law firms to count the fellows' pro bono hours.[503]

C. Accountability

The institutional system of pro bono relies on voluntary participation. Accountability mechanisms are therefore important as a means of ensuring adequate volunteer levels. They are also necessary to target services to low-income clients and underrepresented causes, rather than bar activities or charitable organizations that do not serve the interests of marginalized groups.[504]

A number of flexible arrangements instituted by pro bono programs and law firms have evolved to give teeth to the private bar's pro bono commitment. These arrangements set benchmarks defined through stakeholder negotiation,[505] and seek to extend accountability through

501. *See* Holland & Knight LLP, Chesterfield Smith Fellowship Program, *at* http://www.hklaw.com/CST/SmithFellowship/.

502. *See* Pillsbury Winthrop LLP, *supra* note 493, *at* http://www.pillsburywinthrop.com/about/about.asp?AbtTypeID=380; *see also* Eric Adler, *Law Grads Stay Loyal While Flexing Pro Bono Wings*, NAT'L L.J., Aug. 28, 2000, at C18. Another variation is the John J. Gibbons Fellowship in Public Interest and Constitutional Law, a two-year fellowship with the New Jersey law firm Gibbons, Del Deo, Dolan, Griffinger & Vecchione, in which the fellow is a paid $75,000 per year as an associate of the firm while engaging exclusively in public interest and constitutional law projects. Upon completion of the fellowship, fellows are given the opportunity to stay on at the firm with full seniority. *See* Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., John J. Gibbons Fellowship in Public Interest and Constitutional Law, *at* http://www.gibbonslaw.com/gibbons/community/fellowship.cfm.

503. *See* PRO BONO INST., *supra* note 486, at 20. Sullivan & Cromwell counts fellows hours toward its pro bono total, *see* Telephone Interview with Caroline Flintoft, Associate, Sullivan & Cromwell LLP (July 9, 2004), as does Holland & Knight, *see* Telephone Interview with Elvin Ramos, Managing Attorney, Holland & Knight LLP (July 9, 2004). An interesting variation on the fellowship idea is White & Case's Pro Bono Bonus Program, which gives $15,000 to recent law school graduates who work for one year at an approved pro bono legal services program prior to joining the firm. *See* NALP Directory of Legal Employers, White & Case, *at* http://nalpdirectory.com/employerdetails.asp?fscid=F1257&id=1&yr=2004. White & Case does not count the hours worked in the approved program as firm pro bono hours, since the attorney is not yet considered an employee of the firm (although she is given second-year associate status upon joining the firm). *See* Telephone Interview with Byrne Harrison, Coordinator of Pro Bono Affairs, White & Case LLP (July 8, 2004).

504. As it stands, "[o]nly one state limits the definition of pro bono work to legal services for the poor; other jurisdictions have more inclusive definitions, typically along the lines of the 1993 Model Rule version," which allows for bar committee service and the representation of organizations that do not serve the poor. Rhode, *supra* note 7, at 427.

505. The analogy here is to so-called "cooperative regulation" characterized by private and informal systems of conciliation that seek to negotiate "future conformity." HANDLER, *supra* note 19, at 56.

private commitments and public pressure. In this way, accountability mechanisms within the pro bono system resonate with aspects of what commentators have called "new governance," which departs from rigid command-and-control regulatory structures. This governance system, which cuts across different arenas of law,[506] is fashioned as a Third Way,[507] marrying the rigors of market discipline with the logic of fairness and accountability. Governance promotes law-making that is interactive and participatory, generated by the affected stakeholders rather resting within the exclusive domain of the government.[508] It values revision and experimentation. Rules are negotiated rather than imposed; they are continuously reviewed and changed rather than etched in regulatory stone; and they relatively open-ended, leaving significant discretion to local actors.[509] Governance thus privileges "soft" over "hard" law: Instead of defined standards of conduct and rigid sanctions for violations, governance prefers revisable benchmarks and disclosure regimes.[510]

The pro bono accountability system bears important features of this governance regime. This can be seen in the Law Firm *Pro Bono* Challenge, which has emerged as central to the effort to monitor pro bono compliance.[511] Its method of gaining commitments from firms to contribute 3 to 5 percent of their billable hours to pro bono work reflects the

506. For some of the most influential governance scholarship, see IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); ARCHON FUNG & ERIK OLIN WRIGHT, DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (2003); MINOW, *supra* note 133; ROBERTO MANGABEIRA UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE (1998); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1988); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Experimentalist Government*, 53 VAND. L. REV. 831 (2000); Daniel A. Farber, *Revitalizing Regulation*, 91 MICH. L. REV. 1278 (1993); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 88 MINN. L. REV. (forthcoming 2004); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); Joanne Scott & David Trubek, *Mind the Gap: New Approaches to Governance in the European Union*, 8 EUROPEAN L.J. 1 (2002); William H. Simon, *Solving Problems v. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. (forthcoming 2004); Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 1986); Susan Strum, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

507. *See* ANTHONY GIDDENS, THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY (1998).

508. *See* Simon, *supra* note 506, at 54.

509. *See* Lobel, *supra* note 506 (manuscript at 62–66); Simon, *supra* note 506 (manuscript at 59–64).

510. *See* Lobel, *supra* note 506 (manuscript at 54–62); Simon, *supra* note 506 (manuscript at 59–64).

511. *See* Telephone Interview with Debbie Segal, *supra* note 284.

importance of stakeholder participation and flexible standards.[512] The challenge is a form of soft law—there are no sanctions for failing to comply and indeed only about 60 percent of the approximately 160 signatories met the goal last year.[513] In lieu of sanctions, the concept of the Challenge is to use the spotlight of public pressure to motivate greater pro bono activity.[514] Disclosure of firms' pro bono activity is therefore key. To the extent that a firm can claim compliance with the Challenge's goals, it becomes a ready-made promotional tool. And when firms fall short of the Challenge goal, the public disclosure of failure casts a negative light on recruiting and community outreach efforts. Moreover, by narrowing the definition of pro bono,[515] the Challenge attempts to discourage the types of bar activities permitted by the ethical rules.[516]

The Challenge's approach has been replicated by state and local bar associations, which have also gained commitments from firms to meet clearly articulated numerical targets. In the wake of the 1990s' salary wars, the State Bar of California, for instance, instituted the large law firm challenge, in

512. For a discussion of different types of regulatory techniques in the legal context, see Geoffrey C. Hazard, Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 ARIZ. L. REV. 593 (2002); Ted Schneyer, *Introduction: The Future Structure and Regulation of Law Practice*, 44 ARIZ. L. REV. 521 (2002).

513. Telephone Interview with Esther Lardent, *supra* note 307. In 1995, 135 firms reported on their compliance with the Challenge:

> Forty-three firms, or 31.9% of those reporting, either met or exceeded their selected Challenge Goal. An additional four firms (3%) came within 0.25% of meeting their goal, while 14 firms (10.4%) came within 0.5% of their selected goal. In summary 45.3% of Challenge firms who filed reports on their 1995 activities either met their Challenge goal, exceeded it, or came within one-half percent of meeting their goal.

PRO BONO INST., *supra* note 340, at 11. In 1996, forty-three firms met or exceeded their Challenge goal; in 1997, that number was thirty-five. PRO BONO INST., THE LAW FIRM PRO BONO CHALLENGE: LAW FIRM PERFORMANCE IN 1996 AND 1997, at 4 (1999).

514. *See* Telephone Interview with Esther Lardent, *supra* note 307 (noting that the goal of the Law Firm Pro Bono Challenge is to raise expectations for firms and foster competition over pro bono activities). A common example of a firm that has turned around its pro bono program is Los Angeles' Latham & Watkins, which came late to the Law Firm *Pro Bono* Challenge, but has been driven to outperform the competition. *Id.*; *see also* Deger, *supra* note 444, at 5; Steven Schulman, *2002 in Review: Latham Solidifies Its Place Among the Pro Bono Elite*, PRO BONO ANN. REP. (Latham & Watkins LLP, 2002), at 1–2 (noting that the firm recorded 106 hours of pro bono per attorney in 2002, up from only 36 hours in 1998), *available at* http://www.lw.com/upload/docs/doc44.pdf.

515. Under the Challenge, pro bono "refers to activities of the firm undertaken normally without expectation of fee and not in the course of ordinary commercial practice and consisting of" the provision of legal services to: (i) "persons of limited means" or organizations advocating on their behalf; (ii) individuals or organizations "seeking to secure or protect civil rights, civil liberties or public rights"; and (iii) organizations "where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate." Lardent, *supra* note 140, at 80–81.

516. *See* MODEL RULES OF PROF'L CONDUCT R. 6.1 (2004).

partnership with the California Supreme Court Chief Justice, VLSP, the Lawyers' Committee of the San Francisco Bay Area, and other groups. Nineteen firms signed onto the challenge, which essentially mirrors its ABA counterpart in its requirement of a 3 to 5 percent billable-hour pro bono contribution.[517] After the same salary increases roiled Washington, D.C.'s pro bono establishment,[518] the D.C. Bar President launched the Pro Bono Initiative Working Group, which sought commitments from fifty law firms to meet a 3 to 5 percent billable-hour target.[519]

Individual pro bono programs have also sought defined pro bono commitments from specific law firms. For example, New York's Volunteers of Legal Service (VOLS) has obtained a commitment from several large firms to be matched with six New York City hospitals. Under this arrangement, the firms agree to represent child patients from the hospitals on a full range of legal issues.[520] Cravath, Swaine & Moore participates in this program, contributing thirty attorneys and ten legal assistants to work on seventy cases involving children at New York Presbyterian Hospital.[521] The cases relate to the children's health or family situation, and include

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517. *See* CAL. LEGAL SERVS. COORDINATING COMM., *supra* note 299. Fourteen firms signed onto a similar pledge drafted by the Bar Association of San Francisco. *See* Kirsten Andelman, *Firms Pledge to Do More Pro Bono Work*, RECORDER, Dec. 15, 2000, at 1.

518. For instance, after the salary hikes, Akin Gump Strauss Hauer & Feld changed their policy away from full credit for pro bono:

> [M]anagement informed D.C. associates that they'd be eligible for the increased salary levels only if they hit 2,000 billable hours—and pro bono hours would not be counted toward that requirement. To earn bonuses, associates were told, they'd have to book at least 2,100 hours, of which 100 could be pro bono.

Otis Bilodeau, *D.C. Bar Leaders Devise Program to Increase the Amount of Pro Bono Work in the City*, LEGAL TIMES, June 25, 2001, at 41. Other firms, like Arnold & Porter, stood firm on their pro bono policies:

> The firm would continue its practice of encouraging lawyers to devote up to 15 percent of their time to pro bono and would also continue to credit that amount toward billable time . . . . No target billable would be set, but a "pain alleviation bonus" would be implemented. The bonus, which ranges from $25,000 to $55,000, depending on tenure, would kick in at 2,400 hours—up to 15 percent of which could be pro bono.

Id.

519. *See id.* at 41. The policy "also will require firms to incorporate those targets into their budgets, credit pro bono hours toward billable requirements, and create 'programs in which firm management and leading partners visibly do pro bono work.'" *Id.* In addition, in 1999, leaders from the D.C. Bar Pro Bono Program and the Pro Bono Institute met with the managing partners from the twenty-five largest law firms and asked for institutional commitments of pro bono services. *See* Telephone Interview with Maureen Thornton Syracuse, *supra* note 242. The Lawyers' Committee also circulated a pledge to lawyers to boost their commitment to performing pro bono work. *See* Bryan Rund, *Pro Bono Crunch: As Salaries and Billables Rise, Firms Reduced, Retooled Volunteer Work*, LEGAL TIMES, Dec. 18, 2000, at 32.

520. *See* Telephone Interview with Bill Dean, *supra* note 242.

521. *See id.*

matters such as gaining immigration visas for organ donors, redressing dangerous health conditions within apartments, dealing with special education needs, and protecting access to public benefits.[522] This type of arrangement provides institutional leverage for pro bono organizations to press law firm pro bono participation: If firm pro bono lags, the commitments can be used as a basis for motivating revived volunteer efforts.

Bar-sponsored pro bono reporting requirements have served a similar accountability function as the Challenge and its progeny, although only fourteen states currently have reporting programs and only two—Florida and Maryland—make reporting mandatory.[523] Although the evidence thus far does not suggest a link between reporting and pro bono participation,[524] these programs have been promoted as a potential strategy for leveraging greater pro bono activity. By disclosing aggregate pro bono data, reporting schemes shine the spotlight of public scrutiny on state-wide pro bono participation and could be used by bar leaders to advocate for increased pro bono participation.

Finally, there are more informal accountability methods embedded in the relationships between law firms, pro bono programs, clients, and other stakeholders.[525] Firm partners have deep relationships with pro bono organizations, primarily as members of their boards of directors.[526] These lawyers create a constituency within their law firms for supporting pro bono goals and provide a conduit for dissatisfaction expressed by pro bono organizational partners and clients. The focus on pro bono in law schools also provides a check on law firm pro bono activity. Law students are primed by

522. *See id.* Another example of a firm that has taken on an institutional commitment is Sidley Austin Brown & Wood, which has an agreement with the federal public defender training branch to assist on all cases that go up to the United States Supreme Court. *See* Telephone Interview with Mark Haddad, Partner, Sidley Austin Brown & Wood LLP (Feb. 3, 2004).

523. *See* ABA Standing Comm. on Pro Bono & Pub. Serv., State Pro Bono Reporting, *at* http://www.abanet.org/legalservices/probono/reportingguide.html; *see also* The Fla. Bar, Pro Bono Publico (For the Good of the Public) Jan. 2003, *at* http://www.flabar.org/DIVCOM/PI/BIPS2001.nsf/0/a8e811c59073e9f68525669e004d21f6?OpenDocument. For the states that have voluntary regimes, see *id.*; *see also Pro Bono Publico: Voluntary Service and Mandatory Reporting*, 15 GEO. J. LEGAL ETHICS 845 (2002). Some local programs, like New York's VOLS, also publish yearly reports on law firm pro bono activity. *See, e.g.*, Dean, *supra* note 217.

524. *See* Sandefur, *supra* note 87, at 14.

525. *Cf.* Freeman, *The Private Role*, *supra* note 97, at 665 ("Even in the absence of tight government control, a public/private regime characterized by multiple overlapping checks might produce enough aggregate accountability to assure us of its legitimacy.").

526. For example, Public Counsel's board of directors is composed of partners from Los Angeles' major law firms. The Lawyers' Committee also has a board dominated by big-firm partners. *See* Telephone Interview with Nancy Anderson, *supra* note 264.

law school counselors on firm policies,[527] and demand to know about firm pro bono efforts during the law firm interview process.[528] The availability of resources like the NALP Directory of Legal Employers, which prospective firm lawyers turn to for details on law firm characteristics and policies, places further pressure on law firms to establish pro bono policies that are consistent with the market norm. The rankings system employed by legal periodicals like *The American Lawyer* also create incentives for firms to bring their pro bono practice in line with higher-achieving competitors. Finally, there is direct monitoring of volunteer representation by the pro bono organizations themselves. Disaffected clients call pro bono organization attorneys with complaints, which are often communicated to the offending volunteers and their supervising partners. Nonprofit staff co-counsel interact with pro bono volunteers regularly and monitor their work. All of these microinteractions serve to create enhance systemic accountability.

However, there are limitations to these accountability approaches. The lack of enforceability of self-policing efforts like the Law Firm *Pro Bono* Challenge underscores their status as compromise measures,[529] allowing big firms to respond to pressures to increase pro bono commitments while resisting more onerous mandatory requirements. Moreover, the vagueness of the standards—requiring that firms use their "best efforts" to meet pro bono goals of either 3 *or* 5 percent of billable hours—diminishes their effectiveness by allowing firms to aim low while still claiming compliance.[530] Reporting is useful, but it is still underutilized and largely voluntary. More informal mechanisms are important but are also constrained. In particular, the dependence of pro bono organizations on the large law firms that they seek to hold accountable—both for volunteers and donations—places them in a weak position to demand more intensive pro bono efforts.

There are, in addition, accountability mechanisms that operate inside law firms, although these have their own drawbacks. Policies that give credit for pro bono work with respect to meeting billable-hour requirements,

527. *See* ABA STANDING COMM. ON PRO BONO & PUB. SERV., *supra* note 327; LAPP & SHABECOFF, *supra* note 242; YALE LAW SCH. CAREER DEV. OFFICE, CHOOSING A LAW FIRM: CRITICALLY EVALUATING PRO BONO POLICIES AND PROGRAMS (n/d), *available at* http://www.law.yale.edu/outside/pdf/Career_Development/cdoevalprobono.pdf.

528. *See* Telephone Interview with David Lash, *supra* note 304 (noting that at a recent recruiting trip to Stanford Law School, every student asked about the firm's pro bono practice).

529. *See, e.g.*, Andelman, *supra* note 517 (noting that the Bar Association of San Francisco's pro bono pledge was "almost" like a contract since it lacked an "institutional structure to hold firms to their pledge.").

530. A variation on this approach is seen in California, where law firms contracting with the state for more than $50,000 are required to make good faith efforts to provide a specified amount of pro bono services. *See* CAL. BUS. & PROF. CODE § 6072 (West 2004).

winning bonuses, and gaining promotion create obvious incentives for greater pro bono participation. However, only about 25 percent of firms have policies that count pro bono as fully equivalent to billable work.[531] Even where such policies exist it is often not clear how much pro bono counts in bonus determination and the partnership promotion process. Some large firms, like Skadden, Arps, Meagher, Slate & Flom, have rigorous pro bono evaluation policies that severely downgrade associates who treat their pro bono cases lightly.[532] At Greenberg Traurig, associates are required to submit a memo detailing how they plan to complete twenty hours of service.[533] Failure to either develop a plan or meet the twenty-hour goal carries a $350 fine that is put into the firm's pro bono fund.[534] Both of these programs, however, appear to be fairly unique, underscoring the obstacles to self-policing measures.

Accountability mechanisms are also built into the structure of intrafirm pro bono coordination. At large firms that channel pro bono requests through pro bono coordinators or committees, the distribution of pro bono cases is centrally controlled.[535] In some firms, this simply means that pro bono opportunities are conveyed via firm-wide distribution mechanisms and that cases are assigned only when individual lawyers voluntarily respond.[536] At other firms, however, there is a greater degree of intervention into the pro bono assignment process. It is not uncommon for pro bono coordinators to actively encourage lawyers to take on particular cases and mediate between different departments' staffing needs.[537] Firms that keep a close eye on their pro bono figures urge underperforming lawyers and departments to take on pro bono cases in order to meet pro bono reporting standards.[538] In this sense, pro bono coordinators play the role of firm-wide compliance

531. *See* Rhode, *supra* note 7, at 450; *see also* AM. BAR ASS'N, ABA COMMISSION ON BILLABLE HOURS REPORT 52 (2002), *available at* http://www.abanet.org/careercounsel/billable/toolkit/bhcomplete.pdf.

532. *See* Telephone Interview with Ronald Tabak, *supra* note 351.

533. *See* A.J. Nobel, *Greenberg's Pro Bono Patrol*, AM. LAW., May 1999, at 20.

534. *See id*.

535. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309.

536. A version of this laissez faire system prevails at Debevoise & Plimpton. *See* Telephone Interview with John Kiernan, *supra* note 348.

537. *See* Telephone Interview with Brian Condon, *supra* note 345 (noting that at Arnold & Porter, the firm tracks its pro bono numbers on a monthly basis and makes efforts to get more lawyers involved in pro bono work); Telephone Interview with Jan LeMessurier Flack, *supra* note 355 (indicating that Covington & Burling's pro bono co-coordinators track all attorney pro bono activities and use a range of tactics to encourage greater participation, from general firm-wide emails to individualized phone calls or personal visits); *see also* PRO BONO INST., *supra* note 353, at 3–4.

538. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309 (indicating that Morrison & Foerster seeks to have each department in the office meet the 5 percent pro bono threshold).

counselors,[539] ensuring that the firm meets its professional obligations.[540] Moreover, some coordinators provide close supervision in pro bono cases, which enhances quality control, particularly when partners are not available to oversee associate work.[541] Although these accountability mechanisms provide some checks and balances on pro bono within the firm structure, they are limited by pressures to meet paying client obligations.

D. Adaptation

As organizations within the pro bono system compete for resources, adapt to professional demands, and share information, they are increasingly characterized by a convergent set of practices and goals.[542] However, distinctions persist. There is often talk of multiple pro bono "cultures," with cities such as Washington, D.C. praised for deeply ingrained pro bono traditions while others struggle to find their pro bono identities.[543] Strong regional distinctions exist, with the northeast and California home to the vast majority of high-achieving pro bono firms.[544] Pro bono looks different in large metropolitan areas with strong traditions of law firm pro bono and extensive public interest infrastructures than in smaller cities or rural areas, where there are few, if any, large firms and only a handful of underresourced legal services providers. As pro bono becomes increasingly internationalized, distinctions are also emerging across territorial borders. This variation highlights the final feature of institutionalized pro bono: adaptation.

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539. *See* Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 559 (2002).

540. This system challenges the notion of traditional volunteerism by highlighting the reality of intra-organizational pressure as a means of achieving institutional pro bono benchmarks. *See, e.g.*, Andrew Boon & Robert Abbey, *Moral Agendas?* Pro Bono Publico *in Large Law Firms in the United Kingdom*, 60 MOD. L. REV. 630, 649 (1997).

541. *See* Goldblatt, *supra* note 277, at 25.

542. *See* DiMaggio & Powell, *supra* note 19, at 65 ("Once disparate organizations in the same line of business are structured into an actual field (as we argue, by competition, the state, or the professions), powerful forces emerge that lead them to become more similar to one another."); *see also* Julia Black, *New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making*, 19 LAW & POL'Y 51, 57 (1997). Paul DiMaggio and Walter Powell call this process of convergence "isomorphism." DiMaggio & Powell, *supra* note 19, at 66.

543. *See* Telephone Interview with Esther Lardent, *supra* note 307.

544. *See A Tale of Three Cities*, AM. LAW., July 2002, at 173.

1. Local

Adaptation at the local level is driven by the nature of the local bar, the scope and complexity of existing legal services and public interest resources, and the unique needs of local communities. It is not surprising that the cities with the best pro bono reputations—Washington, D.C., New York, and San Francisco[545]—are large urban areas with concentrated populations, extensive nonprofit organizational networks, and vast law firm resources.[546] In these environments, clients have ready access to a matrix of legal service providers, which, in turn, can easily tap into large law firm volunteers. Variations do exist. For example, the high concentration of impact-oriented feeder organizations, combined with the historic connection between elite firm lawyers and government service, makes Washington, D.C.'s pro bono culture quite different than that of Los Angeles, which has developed in a professional arena with relatively fewer impact groups and a traditionally less pronounced ethos of public service.

The more significant distinctions, however, emerge when one compares big cities and smaller markets. Indeed, smaller legal markets face unique challenges to implementing pro bono programs. For one, they must rely heavily on small-scale practitioners—both solos and lawyers working in very small firms—since they do not always have big firms to draw upon for pro bono reserves.[547] For instance, there are only twelve firms that employ

545. *See id.* ("Our pro bono charts continue to be dominated by firms in New York; San Francisco; and Washington, D.C.").

546. For instance, each of these cities is located in a jurisdiction with a relatively high percentage of lawyers practicing in law firms with more than fifty lawyers. In Washington, D.C., 46.2 percent of private practitioners are in such firms; in New York state, the figure is 22.3 percent; and in California, it is 17.1 percent—all of which are well above the national average of 12.1 percent. *See* CARSON, *supra* note 192, at 25, 47, 63, 159.

547. Of course, big city pro bono organizations also rely to some degree on smaller-scale practitioners, who constitute the majority of private lawyers nationwide. *See* CARSON, *supra* note 192, at 25 (stating that almost 60 percent of private practitioners are either solos or work in firms of less than five attorneys). For example, at Los Angeles' Bet Tzedek Legal Services, there is a significant group of solo practitioners—some of whom are retired, working part-time, recently admitted to the bar, and between jobs—who come into the office to conduct client interviews, follow up on cases, or take on their own small matters. While large-scale cases are placed with big firms, the solos take on smaller cases in the areas of eviction defense, public benefits, and employment rights. *See* Telephone Interview with David Lash, *supra* note 304. In Charlotte, North Carolina, Legal Aid of North Carolina reports that approximately 20 percent of pro bono cases are handled by attorneys at firms with twenty-five or fewer members. *See* Telephone Interview with Ted Fillette, *supra* note 434.

over ten attorneys in Alaska.[548] As a result, Anchorage-based Alaska Legal Services Corporation, the only LSC-funded organization in the state of Alaska, draws primarily upon solo and very small-firm practitioners to handle about 200 pro bono cases per year.[549] Similarly, in Dayton, Ohio, where there are only twelve firms with more than ten lawyers, the Greater Dayton Volunteer Lawyers Project relies mostly on lawyers in very small practice settings to take on pro bono cases and staff legal clinics.[550] The same is true in Las Vegas, where Clark County Legal Services reports that 80 percent of pro bono cases are taken by attorneys in firms with fifteen or fewer members.[551] Outreach to small-scale practitioners is conducted by attending bar-sponsored social events, sending mass mailings, canvassing networking functions, and making contact with court-based personnel.[552] There is, moreover, a more personal element to the outreach efforts: In a state like Alaska, for instance, where there are only 2500 licensed attorneys, personal contacts form the basis for many pro bono referrals.[553]

Reliance on small-scale practitioners poses obstacles to pro bono implementation. The world of small-scale practice is notoriously cut-throat, and solo and small-firm attorneys are forced to prioritize economic survival over professional altruism.[554] Unlike their big-firm counterparts

548. *See* Telephone Interview with Erick Cordero, Pro Bono Coordinator, Alaska Legal Services Corporation (July 6, 2004); *cf*. CARSON, *supra* note 192, at 35 (reporting that in the state of Alaska 80 percent of private-sector lawyers work in firms with ten or fewer lawyers).

549. *See* Telephone Interview with Erick Cordero, *supra* note 548. Alaska Legal Services Corporation still does traditional pro bono outreach to firms, but funding, rather than volunteer participation, is the more typical result. *See id*.

550. *See* Telephone Interview with Helenka Marculewicz, *supra* note 455; *cf*. CARSON, *supra* note 192, at 171 (reporting that in the state of Ohio just over 70 percent of private-sector lawyers work in firms with ten or fewer lawyers).

551. *See* Telephone Interview with Lynn Etkins, Clark County Legal Services (June 25, 2004); *cf*. CARSON, *supra* note 192, at 141 (reporting that over 80 percent of private practitioners in Nevada work in firms of twenty or less). Similarly, Legal Action of Wisconsin, Inc., an LSC-funded group in Milwaukee, reports that of the 1500 attorneys it has signed up to volunteer, approximately 70 are from large firms, 300 are solo practitioners, and the rest practice at firms with less than ten attorneys. *See* Telephone Interview with Donald Tolbert, Legal Action of Wisconsin, Inc. (June 29, 2004); *cf*. CARSON, *supra* note 192 (reporting that almost 70 percent of private practitioners in Wisconsin work in firms of ten or fewer).

552. *See* Telephone Interview with Erick Cordero, *supra* note 548.

553. *See id*.

554. *See, e.g.*, David E. Rovella, *Can the Bar Fill the LSC's Shoes?*, NAT'L L.J., Aug. 5, 1996, at A1 (The executive director of Bexar County Legal Aid says "San Antonio firms aren't rising to the pro bono challenge because they face 'a very bitter, risky environment. These firms don't have time to think about pro bono. They're thinking about survival.'"). Indeed, new lawyers who practice as solos or in firms of twenty or fewer lawyers report doing less pro bono than the average for lawyers in all practice sites. *See* Dinovitzer et al., *supra* note 329, at 37 (reporting a yearly average of 49.8 hours for new solos who engaged in pro bono and 31.9 hours for lawyers in firms of twenty or less, as compared to the overall average of 58 hours).

they do not have the luxury of assigning pro bono work to highly leveraged associates. Moreover, there is sense in which many small-scale lawyers believe that their practice already encompasses significant pro bono to the extent that they work under contingency fee arrangements and often reduce hourly rates or write off charges for clients who cannot afford to pay.[555] Additional pro bono demands are seen as an unfair imposition. In response, the organized bar and pro bono programs have therefore looked for ways to motivate greater pro bono activity by small-scale lawyers. One tactic has been to emphasize the financial virtues of volunteering: Particularly for solos who are seeking to enter a new area of practice, pro bono is promoted as a vehicle for building substantive expertise and making important contacts.[556] Another strategy has been to offer continuing legal education credits for pro bono work.[557] Structurally, pro bono programs attempt to organize programs for small-scale lawyers that minimize the time commitment. Clinics are therefore a popular vehicle for enlisting small-scale lawyer involvement,[558] as are court-based mediation programs and other time-limited pro bono experiences.[559]

Smaller markets also have a less sophisticated and well-developed nonprofit infrastructure. In contrast to places like Washington, D.C. and

555. *See* CARROLL SERON, THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS 133 (1996).

556. *See* Victoria Rivkin, *Pro Bono Offers Real Benefits for Solo Practitioners*, N.Y. L.J., Feb. 28, 2000, at 1.

557. *See id*. In New York, for instance, the bar adopted a policy permitting attorneys to earn continuing education credits for pro bono work, which provides "that a maximum of six credit hours per reporting cycle can be earned in this manner, with every six hours of pro bono work equaling one credit hour." Am. Bar Ass'n, Pro Bono Legal Services (on file with author). *But see* Anthony J. Fiorella, Jr., *Making Pro Bono Pay Off*, N.Y. L.J., May 1, 2002, at 4 (arguing for tightening the system for awarding continuing education credit). Arizona and Tennessee also provide continuing legal education credit for pro bono work. *See* ABA Ctr. for Pro Bono, Policies—State CLE/Pro Bono Rules, *at* http://aba.net.org/legalservices/probono/clerules.html. The California State Bar is currently considering a similar rule. A proposal to amend the California Minimum Continuing Legal Education (MCLE) Rules and Regulations to provide one MCLE credit hour for every six hours of qualified pro bono service, up to four hours, is currently under review by the State Bar Board of Governors. *See* Resolution 2-13-03 (on file with author).

558. *See* Telephone Interview with Helenka Marculewicz, *supra* note 455 (noting that 60 percent of the pro bono work conducted through the Greater Dayton Volunteer Lawyers Project occurs through clinics).

559. *See* Magnell, *supra* note 359, at M1. The article states:

> Often, solo practitioners find an established outlet in the court system—a mediation program in one of the district courts, for example—rather than do pro bono work by seeking individual cases on a nonfee or reduced-fee basis. The 'Lawyer for a Day' program in the Essex County Probate and Family Court is one such program. Attorneys volunteer to meet briefly with members of the public who need advice on what forms to file or the route to take in resolving legal matters.

Id.

New York, which have a rich network of legal services and public interest organizations that feed pro bono cases to volunteers, small cities and rural areas often rely exclusively on thinly staffed local legal services organizations and pro bono programs for access to free services.[560] There are many reasons for this disparity: most of the nation's lawyers work in urban areas,[561] while groups benefit from proximity to centers of legal and political decision making. There is also an important issue of funding: Although federal legal services and state IOLTA funds are distributed on a per capita basis,[562] smaller markets receive much less private funding for legal services and public interest activities.[563] The result of infrastructure disparities is that smaller markets are forced to rely heavily on a handful of thinly staffed groups to process and refer pro bono requests.[564] The Volunteer Lawyer Program of Northeast Indiana, for instance, has one staff member who coordinates pro bono referral for nine counties.[565] In addition, pro bono cases in underresourced areas tend to be smaller and less substantively diverse because there are fewer feeder organizations for more complex lawsuits.[566] Even when pro bono organizations attempt to place complex cases with small-market firms, they are often rebuffed by firms that are unfamiliar with handling such cases or concerned about the economic burdens of doing so.[567]

Outside of major cities, there is the critical problem of geographical access. Particularly in rural areas, populations are widely dispersed, which

560. For a listing of groups outside of New York City, see New York State Bar Association, 2001–2002 Pro Bono Opportunities: A Guide for Lawyers Outside of New York City (on file with author); *see also* Probono.net, New York State Pro Bono Opportunities, *at* http://www.probono.net/ny/oppsguide.cfm.

561. *See* Elizabeth Amon, *Reaching Out to Rural Communities*, NAT'L L.J., Feb. 19, 2001, at B20.

562. *See* Legal Servs. Corp., LSC Press Kit, *at* http://www.lsc.gov/pressr/pr_qa.htm; State Bar of Cal., Homepage, *at* http://www.calbar.ca.gov.

563. *See* Houseman, *supra* note 100, at 1228; *see also* Jeffery Anderson, *Shriveling Rural Legal Services—Oppressive Conditions for Migrant Farmworkers Spur Need—Needs of Farmworkers Spur Rural Legal Aid*, L.A. DAILY J., Aug. 27, 2002, *available at* http://publiccounsel.org/news/2002/aug2702.htm.

564. For example, in Alaska, there are only four pro bono programs in the entire state: the Alaska Legal Services program, which employs one full-time pro bono coordinator; the Alaska Pro Bono Program, which employs an executive director and a part-time administrator; and two smaller programs, one of which focuses exclusively on asylum and the other working only in the area of domestic violence. *See* Telephone Interview with Erick Cordero, *supra* note 548.

565. *See* Telephone Interview with Judith Whitelock, Executive Director, Volunteer Lawyer Program of Northeast Indiana (July 8, 2004).

566. *See* Telephone Interview with Esther Lardent, *supra* note 307.

567. *See* Telephone Interview with Nancy Anderson, *supra* note 264 (noting that the Lawyers' Committee has been unsuccessful in placing civil rights cases in smaller cities like St. Louis and New Orleans).

poses significant logistical challenges to coordinating legal services delivery.[568] Information about legal services is often hard to acquire and transportation barriers make it difficult for clients to access lawyers' offices.[569] Private lawyers working in these areas interested in pro bono are often hampered by multijurisdictional registration requirements and conflict of interests.[570]

California's Riverside County, the second largest county in the United States, highlights these issues. Its 240,000 low-income residents—including 35,000 agricultural workers—are spread across over 7000 square miles.[571] This population is served by branch offices of Inland Counties Legal Services in Indio and Riverside,[572] and a small field office of California Rural Legal Assistance in Coachella.[573] There are a number of collaborations with private lawyers that have been established: Inland Counties Legal Services uses its federal PAI funds to support pro bono programs sponsored by the Riverside County Bar Association and the Inland Empire Latino Lawyers Association, which primarily operate legal clinics in the areas of landlord-tenant and family law.[574] The Riverside-area Desert Bar Association also has a pro bono attorney referral system.[575] These programs, however, strain to meet the legal needs of the area's expanding poor population. Transportation is a major barrier to accessing services since clients are often forced to traverse vast desert expanses to find programs, which are located in larger cities.[576] Because many residents are recent immigrants, limited English language and literacy skills make them more difficult to reach.[577] Moreover, since many attorneys in the area repre-

568. This problem is exacerbated by the fact that rural areas generally have higher poverty rates than their metropolitan counterparts. *See* KATHLEEN K. MILLER & THOMAS D. ROWLEY, RURAL POVERTY AND RURAL-URBAN INCOME GAPS: A TROUBLING SNAPSHOT OF THE "PROSPEROUS" 1990s, at 1 (n/d) (noting that the poverty rate in non-metro counties is 13.4 percent compared to 10.8 percent in metro counties), *available at* http://www.rupri.org/ruralPolicy/publications/p2002-5.pdf.

569. *See* Claire L. Parins, *Presence and Partnerships: Delivering Pro Bono Legal Services in Rural Communities*, 35 CLEARINGHOUSE REV. 743, 743 (2002).

570. *See* ABA STANDING COMM. ON PRO BONO & PUB. SERV. & CTR. FOR PRO BONO, *supra* note 291, at 12.

571. *See* Anderson, *supra* note 563.

572. *See* Telephone Interview with Irene Morales, Executive Director, Inland Counties Legal Servs. (July 9, 2004).

573. *See* Anderson, *supra* note 563; *see also* CAL. RURAL LEGAL ASSISTANCE, INC., 2002 ANNUAL REPORT, *available at* http://www.crla.org/Downloads/CRLA-Annual031.pdf.

574. *See* Telephone Interview with Irene Morales, *supra* note 572; *see also* Inland Counties Legal Servs., 2004 Private Attorney Involvement Plan (on file with author).

575. *See* Anderson, *supra* note 563.

576. *See* Telephone Interview with Irene Morales, *supra* note 572.

577. *See id.*

sent local governments and farm owners, they are reluctant to take on pro bono employment and public benefits matters because of conflicts issues.[578]

In response to the difficulties of rural legal services delivery,[579] there are efforts underway to strengthen rural pro bono partnerships. The most prominent is the ABA's Rural Pro Bono Project,[580] which awards grants to organizations around the country working to establish rural pro bono initiatives.[581] A major focus of the ABA is on fostering innovative local collaboratives. Along these lines, Southeastern Ohio Legal Services has established a series of free, drop-in clinics in rural Ohio counties with the support of Interfaith Legal Services and an alliance of local attorneys, church leaders, bar representatives, and public officials.[582] Similarly, the Rural Law Center of New York partners with local judges to coordinate rural "best practices" seminars that provide continuing legal education credit to attorneys who commit to accepting pro bono cases.[583] The ABA also supports the creation of new urban-rural pro bono partnerships. For example, one grant has allowed Central California Legal Services to model the intake forms and case acceptance protocols of San Francisco's VLSP, while gaining access to urban volunteer lawyers.[584] Another grant has gone to the Law Firm Pro Bono Roundtable in Minnesota, which was established by the State Bar of Minnesota to facilitate the placement of rural pro bono cases with large law firm lawyers.[585]

An additional focus of the ABA's rural initiative is on overcoming the problems of scale and distance. Clinics and hotlines are emphasized as a means of reaching larger numbers of clients. In one example, grantee Montana Legal Services Association used its pro se Family Law Advice Clinic in urban Missoula as a model for a similar clinic in rural Ravalli

578. *See* Anderson, *supra* note 563.

579. *See generally* LEGAL SERVS. CORP., A REPORT ON RURAL ISSUES AND DELIVERY AND THE LSC-SPONSORED SYMPOSIUM (2003), *available at* http://www.lri.lsc.gov/abstracts/030096/RIDS_rprt042403.pdf; Legal Servs. Corp., Rural Delivery, *at* http://www.lri.lsc.gov/sitepages/spa/spa_rural.htm.

580. *See* ABA STANDING COMM. ON PRO BONO & PUB. SERV. & CTR. FOR PRO BONO, *supra* note 291.

581. *See* Press Release, Am. Bar Ass'n, ABA Rural Pro Bono Project Mini-Grants Help Extend Pro Bono Legal Services to Rural America (Nov. 20, 2001), *at* http://www.abanet.org/media/nov01/probonoproject.html.

582. *See* ABA STANDING COMM. ON PRO BONO & PUB. SERV. & CTR. FOR PRO BONO, *supra* note 291, at 48.

583. *See id.* at 28.

584. *See id.* at 36.

585. *See id.* at 38.

County.[586] West Tennessee Legal Services and Memphis Area Legal Services joined to create a Rural/Urban Telephone Advice Clinic to connect rural clients with urban pro bono lawyers.[587] To gain access to remote clients, the Volunteer Lawyers Project of Maine established a branch office in Bangor, while the Ventura County Superior Court purchased a motor home—dubbing it the Mobile Self-Help Legal Access Center—to drive volunteers to outlying communities to provide pro se assistance.[588] Technology is also an important aspect of long-distance pro bono. For instance, Nebraska Appleseed has developed a web site to provide basic legal information to pro bono lawyers, while Montana Legal Services Association and Pine Tree Legal Assistance have launched pilot projects that use video conferencing to connect lawyers and rural clients.[589]

2. Global

As rural initiatives adapt pro bono to the ground-level dynamics of legal service delivery in remote areas, the international pro bono movement responds to the macro-level forces of globalization. Driven by the internationalization of law firm practice and the different constraints faced by legal services infrastructures in countries around the world, pro bono initiatives have recently begun to emerge more vigorously outside of the United States' borders, cropping up in places like Paris, China, Latin America, and Eastern Europe.[590]

Although the contours of international pro bono are highly context-specific and still in the early stages of development, a few broad observations can be made. One is that, as in the United States, countries have focused increased attention on pro bono as state-sponsored legal aid schemes have been cut back under the banner of fiscal austerity.[591] Australia, for example, has begun promoting pro bono, through national

586. In establishing its twice monthly clinic in Ravalli, Montana Legal Services Association project staff adapted existing forms and procedures, set up client referrals through a local domestic violence organization and other county agencies, and produced context-specific educational materials and sample forms. *See id.* at 24.

587. *See id.* at 34.

588. *See id.* at 22, 26.

589. *See id.* at 50, 52. For another example of a pro bono web site, see AlaskaLawHelp.org.

590. *See* Nathan Koppel, *American Export*, AM. LAW., Sept. 2003, at 92.

591. *See* Francis Regan, *Legal Aid Without the State: Assessing the Rise of* Pro Bono *Schemes*, 33 U.B.C. L. Rev. 383 (2000).

conferences and other measures,[592] after drastic cuts to its legal aid budget.[593] Similarly, in England, the resurgence in pro bono has occurred against the backdrop of efforts to contain the costs of legal aid.[594]

Another important feature of the adaptation of pro bono models internationally is that it has been promoted by many of the same players involved in the United States pro bono expansion. For example, the Ford Foundation has been a key financial supporter of pro bono initiatives in Australia, Chile, South Africa, and Russia.[595] The Pro Bono Institute has provided technical assistance to programs in Chile, Argentina, Brazil, and Australia.[596] In Canada, *probono.net* has licensed its code to allow for the development of *ProBonoNet BC*, which was created in 2002 to facilitate pro bono in British Columbia.[597] Australia has a similar web site.[598] Of course, new actors have entered the pro bono field;[599] however, many of the transmission lines for pro bono programs internationally have been established by prominent United States pro bono organizations.

Finally, the role of elite firms and professional associations have been significant in the development of an international pro bono infrastructure. United States firms with international offices have been involved in expanding pro bono overseas as a means of responding to local legal services needs and discharging American professional obligations.[600] International firm White & Case has promoted pro bono in its Mexico City office, taking on cases for nonprofit organizations involved in assisting low-income

592. *See* NAT'L PRO BONO RES. CTR., PRO BONO NEWS 6/2003, (NPBRC eNewsletter) (2003) (Austl.) (describing pilot projects to promote pro bono in rural areas, the national pro bono conference, efforts to map pro bono delivery services, the Australian Pro Bono Manual, and *probono.net* Australia).

593. *See* Frederick H. Zemans & Aneurin Thomas, *Can Community Clinics Survive? A Comparative Study of Law Centres in Australia, Ontario and England*, *in* THE TRANSFORMATION OF LEGAL AID, *supra* note 43, at 65, 70.

594. *See* Andrew Boon, *Cause Lawyers in a Cold Climate: The Impact(s) of Globalization on the United Kingdom*, *in* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 60, at 143, 159.

595. *See* Ford Foundation, FFGrants, *at* http://www.fordfound.org/search/results_section.cfm?section=FF#grants&searchstring=pro#bono. The Second National Pro Bono Conference in Australia was also sponsored by Ford. *See* Nat'l Pro Bono Res. Ctr., *supra* note 592, at 2.

596. *See* Pro Bono Inst., Global Pro Bono, *at* http://www.probonoinst.org/globalist.php.

597. *See* ProBonoNet BC, Homepage *at* http://starscream.netnation.com/probononet/probono2/BC/index.cfm.

598. *See* Probono.net, Homepage, *at* http://www.probono.net/au (Austl.).

599. For example, the Cyrus R. Vance Center for International Justice Initiatives has worked to promote pro bono initiatives in Latin America, particularly in Argentina, Brazil, and Chile. *See* The Cyrus R. Vance Center for International Justice Initiatives, Contact Us, *at* http://www.abcny.org/cyrus_center/contact_us.htm.

600. These international firms have experienced obstacles to pro bono participation to the extent that their American attorneys are not always licensed in their adopted countries and the pro bono infrastructure in many foreign countries is still undeveloped. *See* Koppel, *supra* note 590.

women, financing low-income housing, and preserving cultural institutions.[601] United States firms have also been involved in cross-border collaborations to promote pro bono in foreign law firms. New York's Paul, Weiss, Rifkind, Wharton & Garrison and Simpson Thacher & Bartlett, for instance, have consulted with law firms in Santiago, Chile interested in setting up pro bono programs.[602]

Other countries have witnessed the expansion of a pro bono infrastructure within elite firms. In England, for example, elite firms have become more active pro bono participants within the last several years, spurred by Labour Party threats to force solicitors to do more pro bono work and influenced by American pro bono models.[603] In 1997, the Law Society, which is the counterpart to the ABA in England and Wales, established the Solicitors *Pro Bono* Group as a vehicle to develop pro bono partnerships between solicitors and legal services organizations.[604] By 1999, the Group had obtained commitments from 40 percent of the top fifty firms to participate in pro bono programs.[605] Several elite firms, including London's Clifford Chance and Freshfields Bruckhaus Deringer, have created full-time coordinator positions to facilitate pro bono activity.[606]

These developments underscore how the adaptation of pro bono in the international context bears the imprint of local interests and needs. However, they also suggest that pro bono's internationalization is being shaped along the lines of the key institutional features forged in the United States experience. As the process of internationalization evolves, moved forward by American intermediaries and influenced by preexisting American models, one must therefore expect public-private collaboration, efficient service delivery, accountability, and local flexibility to emerge as important themes.

601. *See* Boncompagni, *supra* note 350; *see also* WHITE & CASE LLP, PRO BONO PUBLICO REPORT (1999), *at* http://www.whitecase.com/pro_bono_newsletter_5_99.html.

602. *See* Koppel, *supra* note 590.

603. *See* Boon, *supra* note 594, at 162; Boon & Whyte, *supra* note 155, at 181.

604. *See* Solicitors *Pro Bono* Group, Homepage, *at* http://www.probonogroup.org.uk/spbg/. The Group has recently published an International Pro Bono Directory, which is a compilation of contact information for legal groups all over the world designed to facilitate pro bono by solicitors in international firms. *See* THE SOLICITORS PRO BONO GROUP, INTERNATIONAL PRO BONO DIRECTORY 2002, *available at* http://www.abanet.org/legalservices/probono/international_probono_directory_2002.pdf.

605. *See* Boon, *supra* note 594, at 169.

606. *See* Koppel, *supra* note 590.

III. PRO BONO AND THE PUBLIC GOOD

In many ways, the system of institutionalized pro bono reflects what is best about the legal profession: Private-sector lawyers marshalling their resources to advance the interests of the poor and underserved. Yet the relationship between pro bono and the public good is more subtle and complex. As a system of multiparty collaborations, the shape of pro bono is influenced by actors with distinct, and sometimes conflicting, interests. Its identity is therefore constantly in flux, contested by the private lawyers, nonprofit staff, bar officials, government bureaucrats, and client groups who constitute its central stakeholders.

Within this fluid system, there are possibilities that actors exploit to advance the public good:[607] Pro bono offers opportunities for pragmatic service provision and flexible advocacy, while providing a mechanism for leveraging private-sector resources. Tensions also arise as ideals of professionalism become explicitly linked to law firm economic interests. And, as with other systems for providing free services, constraints are imposed: corporate client interests limit the range of pro bono cases; law firm practice conditions influence the nature of lawyers' commitments; and financial and organizational demands shape the priorities of pro bono partnerships.

A. Possibility

By forging new relationships between public and private actors, the advent of institutionalized pro bono holds out the promise of a "Third Way" solution to the dilemma of equal access to justice that emphasizes pragmatic approaches, fosters programmatic flexibility, and capitalizes upon leveraged resources.

1. Pragmatism

The pro bono system places a premium on devising pragmatic responses to the complexities of service delivery. The theme of pragmatism is apparent in terms of pro bono's structural commitment to collaboration and adaptation,[608] as well as its sensitivity to the need to balance instru-

607. *See* Nelson & Trubek, *supra* note 25, at 180 (arguing that lawyers exploit conflicts and ambiguity within professional institutions to shape and transform their organizational contexts).

608. *See* Simon, *supra* note 506 (manuscript at 4); *see also* JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927).

mental political considerations and community priorities. There are, in fact, significant advantages to pro bono when viewed in pragmatic terms. From a political perspective, pro bono offers a way of building diverse coalitions in favor of legal services and public interest goals. And from a personal perspective, pro bono allows individual lawyers unwilling or unable to forgo the perquisites of law firm employment to forge a meaningful career path that integrates a commitment to public service.

A major advantage of pro bono is that it attracts a broad spectrum of political supporters. This is, in part, a function of its collaborative structure: By relying on multiparty relationships to deliver free legal services, pro bono requires the development of strategic alliances with professional, business, nonprofit, and governmental actors. These alliances, in turn, empower constituencies and reinforce linkages that strengthen the political support for pro bono.

Within large firms, for example, the development of pro bono programs creates an intrafirm constituency of firm lawyers and other personnel dedicated to promoting pro bono. This takes shape as pro bono committees and coordinators become more prominent within elite law firms, forging long-standing relationships with external pro bono organizations and pushing firm leadership to meet pro bono commitments. Firm lawyers who directly engage in volunteer work also form a base of intrafirm support, developing ties and experiences that make them prone to be more sympathetic to pro bono goals.[609] Indeed, pro bono advocates view it as a great systemic virtue that the volunteer experience often serves to reinforce a law firm lawyer's commitment to pro bono programs. Volunteerism is thus not just valued for its own sake, but is also seen as a way of sensitizing elite lawyers to the situation of marginalized groups,[610] which makes the lawyers more inclined to become stronger political and financial supporters of pro bono organizations that champion client cases.[611] For instance, NOW Legal Defense and Education Fund uses pro bono as an organizing tool for women's rights, educating lawyers about women's issues "with the hopes of

609. Of course, this is not always true, as lawyers who have bad experiences with pro bono clients may form negative attitudes about volunteering and drop out of pro bono activities. *See, e.g.*, Scheingold & Bloom, *supra* note 70, at 226–27.

610. *See* Telephone Interview with Esther Lardent, *supra* note 307.

611. *See* Telephone Interview with John Kiernan, *supra* note 348 (noting that pro bono organizations recognize that expanding their volunteer base in firms helps in their fundraising efforts); *see also* Telephone Interview with David Lash, *supra* note 304 (stating that volunteering services and donating money to a pro bono organization are inextricably intertwined).

enlisting them as political allies."[612] Similarly, pro bono advocates promote rotation programs, in which firm lawyers are released from their billable obligations to spend time working at a nonprofit group, as a way of solidifying support for pro bono within the firms.[613] The notion is that as lawyers return from their rotation placements, they bring with them relevant substantive knowledge, personal contacts with the host organization, and the experience of working with marginalized clients that translate into deep long-term support for pro bono.[614]

The cultivation of pro bono partnerships outside the context of the big firm extends the sphere of political alliance. As large companies shape their in-house pro bono programs to complement broader corporate philanthropic goals, they become integrated into the broader network of pro bono supporters.[615] Judges and other court personnel advocate pro bono as a way of drawing in volunteers to staff court-sponsored pro se programs designed to reduce the fiscal and administrative burdens imposed by low-income litigants.[616] State bar representatives eager to promote professional service team up with labor unions concerned with their members' access to counsel, government officials interested in cost-effective service delivery, and faith-based groups committed to community welfare to press for expanded pro bono programs.[617] Savvy pro bono advocates deliberately cultivate these

612. Martha F. Davis, *Our Better Half: A Public Interest Lawyer Reflects on Pro Bono Lawyering and Social Change Litigation*, 9 AM. U. J. GENDER SOC. POL'Y & L. 119, 125 (2001).

613. *See* Telephone Interview with Esther Lardent, *supra* note 307.

614. *See id*.

615. *See, e.g.*, JOAN STEINBERG, BREAKING THE CORPORATE PHILANTHROPY CODE: HOW TO LEVERAGE YOUR IN-HOUSE PRO BONO WORK THROUGH YOUR COMPANY'S CHARITABLE GIVING PROGRAMS (2001), *at* http://corporateprobono.org/archive/resources/resource1218.html.

616. *See* Telephone Interview with Sharon Ngim, *supra* note 300; *see also* CALIFORNIA LEGAL SERVS. COORDINATING COMM., *supra* note 299 (noting that "the [California] Judicial Council, led by the Chief Justice, has become a powerful ally" in the push to expand legal services).

617. In California, an example of a successful coalition is the California Access to Justice Commission, which was created under the auspices of the State Bar in 1997 in response to a study on the deficiency of legal services in meeting state-wide needs. *See* Legal Aid Found. of L.A., From the Executive Director (Dec. 6, 2002), *at* http://www.lafla.org/news/ed7.asp; *see also* STATE BAR OF CAL., *supra* note 124. The goal of the Commission is to enlist the support of powerful political allies in the pursuit of equal access to free legal services, with pro bono forming a key part of its agenda. *See* Telephone Interview with Sharon Ngim, *supra* note 300. Commission members are appointed by a range of distinct "appointing entities," which include the Governor, President Pro Tem of the Senate, Speaker of the Assembly, the Judicial Counsel, the California Council of Churches, the California Chamber of Commerce, and the California Labor Federation. *See* CAL. COMM'N ON ACCESS TO JUSTICE, THE PATH TO EQUAL JUSTICE: A FIVE-YEAR STATUS REPORT ON ACCESS TO JUSTICE IN CALIFORNIA 72–73 (2002), *available at* http://www.calbar.ca.gov/|calbar/pdfs/accessjustice/2002-Access-Justice-Report.pdf. The Commission's political diversity is credited in its successful lobbying effort in 1999 to create the Equal Access Fund, *see* Telephone Interview with Karen Lash, *supra* note 162, a state program that appropriates $10 million annually

broad alliances, recognizing the importance of mainstream political support in expanding the scope of free legal service.

The political advantages of pro bono are mirrored by its personal benefits. Indeed, its promise of doing well by doing good resonates with individual lawyers seeking to chart a meaningful career path that includes a dimension of public service work. Particularly given the shortage of public interest jobs, stagnant salaries, and increasing law school debt burdens,[618] lawyers interested in pursuing public interest careers face a difficult road. By permitting lawyers to engage in socially significant work while enjoying the prestige and economic rewards of private practice, pro bono allows for a career trajectory that does not impose the difficult tradeoffs inherent in the decision to pursue a public interest job.

Pro bono thus enlarges the structure of opportunity for public-spirited lawyers, who use pro bono pragmatically to advance different career objectives. Some lawyers use pro bono to craft life-long careers inside private firms that include significant contributions to public interest causes. Others engage in pro bono as a means of enhancing job opportunities, building a public service persona that allows them to move back and forth between private sector, governmental, academic, and nonprofit posts.[619] Lawyers also use pro bono as a way to maintain contacts with public interest groups while they cycle through the private sector for a short stint in order to pay off debt, build skills, or develop professional relationships. Pro bono can

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to California legal services and pro bono programs, *see* CAL. LEGAL SERVS. COORDINATING COMM., *supra* note 299.

618. *See* Jonathan D. Glater, *High Tuition Debts and Low Pay Drain Public Interest Law*, N.Y. TIMES, Sept. 12, 2003, at A1 ("[Law students] are leaving school with an average debt of $77,300, more than twice the sum they borrowed 10 years ago. Since 1985, tuition at law schools has tripled and in some cases quadrupled. In the same period, public interest salaries have not even doubled."); *see also* ABA COMM'N ON LOAN REPAYMENT & FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 17–18 (2003) (reporting that the average amount borrowed for law school exceeded $80,000 in 2001 and that, while the median starting salary in private practice has increased from $31,700 in 1985 to $90,000 in 2002, the median public interest salary has risen from $18,800 to just $36,000), *available at* http://www.abanet.org/legalservices/downloads/lrap/lrapfinalreport.pdf. There are eighty-one law schools that offer loan repayment assistant programs (LRAPs) to assist graduates who pursue public interest jobs. *See* EQUAL JUSTICE WORKS, FINANCING THE FUTURE: EQUAL JUSTICE WORKS 2004 REPORT ON LAW SCHOOL LOAN REPAYMENT ASSISTANCE AND PUBLIC INTEREST SCHOLARSHIP PROGRAMS 10 (2004), *available at* http://www.equaljusticeworks.org/finance/FTF_FINAL.pdf. However, this amounts to less than half of all ABA-accredited law schools. *See id.* at 9. Moreover, at many schools that do have LRAPs, eligibility requirements are so stringent that only a small number of graduates qualify. *See id.*

619. *See* David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 73–80 (2004); *see also* Bryant G. Garth, *Noblesse Oblige as an Alternative Career Strategy*, 41 HOUS. L. REV. 93 (2004).

also provide firm lawyers with an exit strategy to the extent that contacts made with public interest organizations through pro bono can develop into full-time jobs. In all of these ways, lawyers who—by choice or necessity—opt out of the public interest arena, even if only temporarily, are not foreclosed from contributing to public interest causes, although they must do so on a limited basis and in a manner that is subservient to the law firm's primary activity of serving corporate clients.[620]

2. Flexibility

Because of its fluid structure, the pro bono system offers significant opportunities for lawyers to deploy different types of advocacy strategies. Although formal rules and practices have developed, there is considerable latitude within the system for practitioners to bring a range of legal cases using a variety of lawyering techniques. The clearest illustration of this is by way of comparison with the federal legal services program, which now operates under a web of restrictions. While LSC-funded organizations cannot bring class actions, engage in abortion or prisoner litigation, or represent most undocumented immigrants, big firms can—and do—through pro bono.[621] While legal services has drawn political fire as a government-sponsored organization that turns around and sues the government, big firms are generally free to aggressively pursue cases against government agencies.

The flexibility of the pro bono system also makes room for programs to develop creative problem-solving approaches to issues facing low-income and underserved client communities,[622] taking advantage of the absence of institutional traditions shaped by a particular law reform or individual service imperative to craft programmatic approaches that depart from conventional models.[623] San Francisco's VLSP, for instance, promotes a

620. *See* Scheingold & Bloom, *supra* note 70, at 222.

621. Of course, volunteers who accept cases directly through LSC-funded groups operate under the same constraints as LSC lawyers. In addition, pro bono programs that receive transfers of LSC funds to support their work must use those funds subject to LSC prohibitions. *See* 45 C.F.R. § 1610.7(c) (2004). However, in contrast to the rules governing direct service, *see id.* § 1610.7(a), pro bono programs that receive LSC funds for the purpose of funding PAI may still use their non-LSC funds to engage in activities prohibited by LSC regulations, *see* § 1610.7(c).

622. To be sure, creativity is not exclusively within the domain of pro bono programs. There are examples of traditional legal services organizations that have innovative community-building programs, *see, e.g.*, Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433, 446–72 (1998), as well as impact-oriented groups that employ policy researchers and community organizers to design comprehensive social change strategies, *see, e.g.*, ACLU, Job Opportunities, at http://www.aclu-sc.org/Home/Employment/.

623. *Cf.* Simon, *supra* note 506 (manuscript at 32) (critiquing traditional legal aid organizations for their entrenchment in the individual client service model).

"holistic" approach that emphasizes client problem-solving over discrete case representation.[624] Instead of simply responding to identified legal concerns, VLSP works to gain a more complete picture of the multiple legal and nonlegal issues that confront clients. On the basis of a careful screening process, VLSP staff attorneys attempt to devise comprehensive solutions to the problems clients face—linking them with legal resources, while also helping them apply for government benefits, secure an affordable place to stay, and obtain necessary health services.[625] Another example of this problem-solving approach is Public Counsel's Homeless Court Project, which operates in connection with the Los Angeles Superior Court, City Attorney, and Public Defender to resolve minor quality of life and traffic offenses for homeless clients who connect with residential and rehabilitative service programs.[626] By emphasizing informal dispute resolution and prioritizing social service provision, these programs underscore the range of nontraditional advocacy strategies that pro bono programs deploy.

3. Leverage

A final advantage of pro bono is that it offers the opportunity to enlarge the scope of free service delivery through leveraging private-sector resources. Pro bono now constitutes an integral part of the overall legal services system. Although there are no precise measurements of pro bono's effectiveness as a tool for expanding services, a number of figures are suggestive of its importance. One recent study estimates that organized pro bono programs account for approximately 40 percent of the personnel available to provide free services to the poor, as compared with LSC-funded programs, which account for only about one-quarter.[627] Within LSC-funded programs themselves, pro bono plays an important supplementary role. In 1998, there were 3590 full-time attorneys in LSC-funded programs,[628] while 44,600 pro bono attorneys worked on referral from LSC programs to volunteer services to low-income clients.[629] Assuming the average LSC program

624. *See* Telephone Interview with Tanya Neiman, *supra* note 237.

625. *See id.*; *see also* Robert Lennon, *The Big Picture*, AM. LAW., Dec. 2002, at 87 (stating that holistic delivery can mean both responding to the totality of a client's legal issues and "going beyond legal needs, by pairing with social service, medical, and psychological care providers who can address clients' nonlegal concerns").

626. Public Counsel, *supra* note 435, *at* http://www.publiccounsel.org/overview/hap.html.

627. *See* Sandefur, *supra* note 87, at 7.

628. *See* Legal Servs. Corp., 1997–98 Staffing Levels—All Programs, *at* http://www.lsc.gov/pressr/pr_sl.htm.

629. *See* Sandefur, *supra* note 87, at 6.

attorney worked 1800 hours per year on client matters and the average volunteer donated forty hours per year of free services,[630] there would have been nearly 6.5 million staff hours augmented by almost 1.8 million pro bono hours.

Free standing pro bono programs are also able to leverage significant amounts of pro bono hours. For example, aggregate figures in California indicate that nearly 350,000 hours of free services were provided by private attorneys working through pro bono programs in 2000.[631] In 2002, Los Angeles' Public Counsel alone reported over 128,000 volunteer hours,[632] while San Diego's Volunteer Lawyer Program reported more than 27,000 volunteer hours.[633] Of course, resource deficiencies remain, as the legal needs of the poor still go underserved;[634] however, pro bono does move in the direction of closing the services gap.

In addition to providing a means of expanding the volume of free services provided, pro bono also extends the range of cases that can be undertaken by leveraging firm resources. For instance, without the assistance of large law firms, with their thickly staffed litigation departments supported by paralegals and other administrative personnel, most nonprofit organizations would be unable to handle complex, discovery-intensive lawsuits.[635] Pro bono also leverages private-sector attorney expertise. For

630. The forty-hour estimate corresponds to the average amount of free services per attorney provided by the AmLaw 100 firms in 1998. *See* AmLaw 100 Pro Bono Database (compiled from data published in *The American Lawyer*) (on file with author).

631. *See* CAL. LEGAL SERVS. COORDINATING COMM., *supra* note 299.

632. *See* Telephone Interview with Dan Grunfeld, *supra* note 232 (noting that this figure includes work by volunteer attorneys, law students, paralegals, and social workers). In contrast, Public Counsel staff attorneys devoted just over 52,000 hours to client services in 2002. *See id.*

633. *See* Mark Cromer, *Pro Bono Caseloads Grow as Funds Shrink*, L.A. DAILY J., Oct. 13, 2003, *available at* http://publiccounsel.org/news/2003/oct1303.htm.

634. *See* ROY W. REESE & CAROLYN A. ELDRED, INSTITUTE FOR SURVEY RESEARCH, TEMPLE UNIVERSITY, LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS (1994); STATE BAR OF CAL., *supra* note 124, at 38; *see also* LEGAL SERVS. CORP., *supra* note 128, at 38. The gap between available services and need is a long-standing problem. *See* BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC (1977). This gap persists even when one accounts for the additional representation provided by private lawyers who operate on a contingency basis or recover court-awarded fees. *See* Johnson, *supra* note 43, at 37–39 (stating that at best, the contingency fee system offers "free representation to poor people in discrete, although admittedly important, segment of their universe of legal needs," while in 1994 "court-awarded attorneys fees accounted for less than 3 per cent of the total universe of legal services provided to the poor" in California); Sandefur, *supra* note 87, at 6 (estimating that less than 10 percent of the legal problems of the poor are eligible for contingency fee service, while 3 percent comes from attorneys who recover court-awarded fees).

635. *See, e.g.*, Telephone Interview with Nancy Anderson, *supra* note 264 (indicating that the Lawyers' Committee's small staff and modest budget would make it difficult to independently take on large class action lawsuits); *see also* William J. Wernz, *The Ethics of Large Law Firms—Responses and*

instance, volunteer bankruptcy attorneys represent low-income debtors filing bankruptcy petitions,[636] as well as public interest groups seeking to enforce judgments against bankrupt defendants.[637] Community-based organizational clients engaged in affordable housing and economic development activities rely heavily on the expertise of law firm corporate, real estate, and tax lawyers. In the litigation arena, low-income clients benefit from big-firm volunteers who import aggressive styles and technical skills honed in the commercial context.[638] Public interest organizations use seasoned firm litigators to handle oral arguments in important impact cases.[639] By strategically leveraging this law firm expertise—using it to complement the substantive knowledge and client connections possessed by full-time attorneys for poor and underserved clients—pro bono provides the opportunity to develop an integrated delivery system that draws upon the best aspects of the private and public interest bars.[640]

B. Tension

As pro bono's institutionalization opens important pathways to public service, it also generates significant professional tensions. In particular, the professional ideal of pro bono as an act of individual kindness clashes with the image of institutionalized pro bono as an instrument to promote large firm commercial interests.[641] At one level, the association of professional altruism with private gain is unremarkable. There are multiple determinants of altruism, which include both the push of internal ethical obligation, as well as the inducement of external incentives such as economic and social

Reflections, 16 GEO. J. LEGAL ETHICS 175, 199 (2002) ("In recent years, many large firms have undertaken pro bono cases that are on a scale that is prohibitive for most small firms . . . ."). An example from Los Angeles illustrates the importance of large firm resources in litigating complex lawsuits. In the 1980s, powerhouse Irell & Manella formed a critical part of the Homeless Litigation Team that represented the plaintiffs in *Paris v. Board of Supervisors*, a case which sought to ensure that the homeless in Los Angeles County received adequate shelter. Frank Clancy, *Lawyers Team Up to Fight for the Homeless*, L.A. TIMES, Sept. 18, 1986, at A1 (noting that Irell & Manella devoted thirty attorneys and dozens of secretaries to writing a key brief in the case).

636. *See* Telephone Interview with Bruce Iwasaki, *supra* note 253.

637. *See* Davis, *supra* note 612, at 122 (describing pro bono bankruptcy lawyers who assisted the NOW Legal Defense and Education Fund in enforcing fines against bankrupt antichoice defendants).

638. *See* Telephone Interview with Esther Lardent, *supra* note 307.

639. *See* Davis, *supra* note 612, at 119, 120–21 (describing the Center on Social Welfare Policy and Law's decision to use Archibald Cox to handle the Supreme Court reargument in *Shapiro v. Thompson* in 1969, and NOW Legal Defense and Education Fund's more recent decision to use a partner in a prominent Washington, D.C. firm to argue a challenge to antichoice blockaders in front of abortion clinics).

640. *See, e.g.*, CAL. LEGAL SERVS. COORDINATING COMM., *supra* note 299.

641. *See, e.g.*, Boon & Whyte, *supra* note 155, at 184.

rewards.[642] Moreover, as a historical matter, lawyers have long provided free services to people with the expectation that they would become paying clients in the future or with the hope that an intermediary would refer fee-generating work as a quid pro quo for pro bono.[643] Similarly, lawyers have strategically engaged in pro bono as a means of advancing their own career objectives.[644]

Yet there is something new in the sense of openness with which large firms and the organized bar have turned to the project of connecting professional ideals with commercial gain. Law firm leaders have strongly advocated the economic benefits of pro bono work to the firm,[645] while the organized bar, traditionally the arbiter of the boundary between the law-as-profession and the law-as-business,[646] has taken a leading role in touting the economic benefits of pro bono service.[647] The Pro Bono Institute has also moved

642. *See id.* at 172–74; Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, *in* CAUSE LAWYERING, *supra* note 60, at 31, 31; Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2426–33 (1999); *see also* Lynn A. Stout, *On the Proper Motives of Corporate Directors (Or, Why You Don't Want to Invite* Homo Economicus *to Join Your Board)*, 28 DEL. J. CORP. L. 1, 13–23 (2003) (describing the influence of social context, personal cost, and character on altruistic behavior). Deborah Rhode's recent survey found that "the most commonly emphasized forces driving pro bono participation were the intrinsic satisfactions that come with the work"; a sense of obligation; employer policies or encouragement; professional contacts, referrals, and training; trial experience; and involvement with clients—in that order. Rhode, *supra* note 7, at 446.

643. *See* ABEL, *supra* note 6, at 129 (stating that "[l]awyers assist those they expect to become paying clients in the future, at the behest of intermediaries who can perform reciprocal favors, such as referring paying clients"); Lochner, *supra* note 13, at 444 (asserting that, for solo practitioners, the "primary reasons for taking [no-fee/low-fee] cases developed out of the need to get and keep paying clients"); *see also* Boon & Abbey, *supra* note 540, at 652 ("The difficulty of disentangling professional promotion from ethical commitment is illustrated by the fact that, while some commentators argue that the use of *pro bono publico* for promoting firms may be unethical, others have recognised that 'the legal profession has always been an alloy of lucre and magnanimity.'" (citation omitted)).

644. *See* Wilkins, *supra* note 619, at 73–80.

645. William W. Horne, *Making Pro Bono Pay*, AM. LAW., July–Aug. 1996, at 20; Jack Londen, *The Economics of Pro Bono Work*, LAW FIRM PRO BONO CHALLENGE SIGNATORIES UPDATE (Pro Bono Inst.), Summer 1997, at 1. These arguments resonate with the parallel move to use economic justifications to support increasing racial diversity within firms. *See, e.g.*, Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004).

646. The organized bar has long viewed the aspirational tradition of legal professionalism—"that lawyers care about the rightness of their conduct . . . [and] seek satisfaction and respect in the performance of a socially valuable role," SIMON, *supra* note 29, at 11, as under pressure from the "demoralizing influence of those who are controlled by graft, greed and gain," AM. BAR ASS'N, REPORT OF THE COMMITTEE ON [THE] CODE OF PROFESSIONAL ETHICS (1906), *reprinted in* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 65, 66 (3d ed. 2001).

647. *See Doing Well by Doing Good*, A.B.A. J., Dec. 2000, at 60; *see also* ABA CTR. FOR PRO BONO, BLUEPRINT, *supra* note 292, at 4–5; Esther F. Lardent, *Pro Bono Service: Doing Well by*

vigorously to make the "business case" for pro bono.[648] The notion that professionalism constitutes a normative check on the lawyer's basest motives to act as mere profit-maximizer has therefore given way to the view that one need not sacrifice profit for professional principles—indeed, the two go hand-in-hand.[649] Hence, law firms encourage pro bono as a means of "doing well by doing good" or out of a sense of "enlightened self-interest."[650]

The depth of the connection between volunteer service and bottom-line goals emerges through an examination of the economic justifications that are sounded in support of institutionalized pro bono. One set of justifications emphasizes the importance of pro bono in marketing to clients. Law firm leaders have thus promoted pro bono as a way of generating positive firm publicity that enhances a firm's reputation and status in the community, thereby creating opportunities to bring in new paying clients.[651] As one managing partner put it: "[Pro bono has] been a distinguishing feature for us that has helped us increase our paying client base."[652] One way that pro bono advances this end is by simply raising a firm's visibility among the client community. Pro bono leaders report that corporate clients concerned with public image look favorably upon outside counsel that renders significant pro bono services:[653] "We get tons of cases on referral because

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Doing Good, *in* PERSPECTIVES (American Bar Ass'n), Spring 2004, at 8, *available at* http://www.probonoinst.org/pdfs/Doing Well by Doing Good.pdf.

648. ESTHER F. LARDENT, PRO BONO INSTITUTE, MAKING THE BUSINESS CASE FOR PRO BONO (2000), *available at* http://www.probonoinst.org/pdfs/businesscase.pdf; *see also* Esther F. Lardent, *Pro Bono Work Is Good for Business*, NAT'L L.J., Feb. 19, 2001, at 1320.

649. *See, e.g.*, Roger Parloff, *Too Rich to Give*, AM. LAW., Apr. 2000, at 15 ("Firms have sound economic motives to preserve their pro bono commitments.").

650. *See* Robert A. Katzmann, *Themes in Context*, *in* THE LAW FIRM AND THE PUBLIC GOOD, *supra* note 140, at 7; *see also* ANDREW BOON & JENNIFER LEVIN, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES 233 (1999).

651. *See* Carolyn Elefant, *Can Law Firms Do* Pro Bono*? A Skeptical View of Law Firms' Pro Bono Programs*, 16 J. LEGAL PROF. 95, 102 (1991) (quoting a Winston & Strawn attorney that "at large firms, there has been a trend to do more [*pro bono*] and be more visible"); Epstein, *supra* note 21, at 1693 ("Firms may hope to make money indirectly through pro bono work as a marketing and networking tool."); *see also* Horne, *supra* note 645, at 20. In a parallel vein, there is also a marketing dimension to law firm sponsorship of public interest fellowships, with firms interested in the potential payoff in terms of community goodwill. *See* Equal Justice Works, Become a Sponsor, *at* http://www.equaljusticeworks.org/fellowsponsors.php.

652. Horne, *supra* note 645, at 20 (quoting Bill McBride, Jr., managing partner at Holland & Knight in Tampa).

653. *See* Telephone Interview with Jolie Justus, *supra* note 361. In this sense, pro bono becomes part of broader corporate marketing campaigns that seek to generate positive public relations. *See* MINOW, *supra* note 133, at 9 (stating that "[c]ause-related marketing—through which a company encourages sale of an item by pledging to donate a portion of proceeds to a charity or social agency—can raise visibility and resources for the cause while also benefiting the for-profit entity with revenues and positive public relations").

people see us as the white knights. I've often said that pro bono firms are the last firms to go bankrupt because people want to support you."[654]

Developing and maintaining relationships with in-house counsel is an important aspect of firms' pro bono programs. Pro bono can help firms to score points with in-house counsel searching for outside assistance. For instance, the Director of Pro Bono Services at Shook Hardy & Bacon in Kansas City, Missouri recounted how her firm pitched its services to a large restaurant client whose general counsel refused to talk to anyone from the firm until he was satisfied with the firm's pro bono commitment.[655] Pro bono can also be a way for outside counsel to curry favor and cement ties to existing corporate clients. The pro bono coordinator at Skadden, Arps, Slate, Meagher & Flom tells the story of a practice group leader who asked if the firm could do pro bono work for a nonprofit organization whose board chair was the general counsel of major client.[656] Indeed, the coordination of pro bono to align with the charitable priorities of major clients is an increasingly salient feature of law firm volunteer activities. One example of this trend is the emergence of consultant companies that craft "programs designed to help law firms get better returns on their community outreach and charitable investments."[657]

The move to conform pro bono to corporate charitable priorities corresponds to a parallel development within in-house corporate legal departments, which have also begun to view pro bono in market-based terms. There, the marketing concern is how to use pro bono to reinforce the corporation's image as a good citizen that gives back to the community. Although pro bono is still underdeveloped in-house, a significant portion of those companies that do pro bono emphasize a particular theme in their pro bono work—be it children's issues, domestic violence, or elder law—that intersects with the "good corporate citizenship" efforts of the company as a whole.[658] This effort to mesh pro bono with broader corporate volunteer

654. Talcott J. Franklin, *Practical Pro Bono: How Public Service Can Enhance Your Practice*, S.C. LAW., Jan./Feb. 1999, at 17.

655. *See* Telephone Interview with Jolie Justus, *supra* note 361.

656. *See* Tabak, *supra* note 470, at 931.

657. *Law Firms Can Do Well by Doing Good—Encourage It!*, METROPOLITAN CORP. COUNS., Sept. 2001, at 59.

658. *See* CORPORATEPROBONO.ORG, *supra* note 391, at 3 (noting that one-fifth of legal departments that do pro bono emphasize a particular theme or issue; of these, almost all emphasize a theme that reflects volunteerism effort of company as a whole, such as children's issues, domestic violence, and elderly issues).

efforts is viewed as a way of guaranteeing "management buy-in" and lending the program "stability and endurance."[659]

Networking with potential clients is also touted as a virtue of pro bono from a marketing perspective.[660] For example, pro bono can be a way for firm partners to develop relationships with the board members of local community organizations, who may be corporate leaders or have important contacts with potential commercial clients.[661] Pro bono, in this sense, is not just about what lawyers do, but also who they meet: By working with charitable organizations, firm lawyers cultivate relationships with in-house counsel and nonlawyer businesspeople who are also participating in the same charitable group.

Firm leaders are also highly conscious of pro bono's importance as a vehicle for lawyer recruitment.[662] Although the lure of an established pro bono program has long been considered an effective recruiting tool for young lawyers seeking to reconcile their decisions to pursue private firm careers with ideals of socially meaningful professional work, law firms over the past decade have moved more aggressively to capitalize on their pro bono reputations in the recruiting wars.[663]

Indeed, pro bono has become an essential part of the high-stakes competition for star law school graduates.[664] Firm leaders routinely discuss their

659. *See* Steinberg, *supra* note 615, *at* http://corporateprobono.org/archive/resources/resource1218.html. "Additionally, a coordinated effort will ensure that [lawyers] chose projects and partners that are appropriate for [the company's] philanthropic strategies." *Id.*

660. In this vein, one commentator has recounted the extraordinary story of a number of law firms in the early 1990s that provided pro bono assistance to Eastern European countries in writing constitutions and trade regulations in order to promote potentially remunerative business contacts. *See* Elefant, *supra* note 651, at 102.

661. *See* LAPP & SHABECOFF, *supra* note 242, at 5–6.

662. *See* Debra Burke et al., *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61, 78 (1994); Carter, *supra* note 346, at 30; *see also* Telephone Interview with Brian Condon, *supra* note 345 (noting the impact of pro bono at Arnold & Porter on recruitment efforts).

663. *See, e.g.*, William J. Dean, *A Firm's Bottom Line*, N.Y. L.J., Oct. 28, 1991, at 3 (quoting Jack Londen, a prominent partner at San Francisco-based Morrison & Foerster, as underscoring the importance of pro bono in the recruitment of new lawyers—"the most important part of the making of a law firm"); *see also* Yael Schacher, *Experts Predict Re-Evaluation of Firm Pro Bono Programs*, N.Y. L.J., Mar. 24, 2000, at 1 ("According to David Stern, executive director of the National Association for Public Interest Law (NAPIL), pro bono opportunities also serve as an indispensable recruiting tool.").

664. *See* Bryant Garth, *A Competition to Do Good: Big Firms Are Getting Into Pro Bono for Business, Recruiting Reasons*, A.B.A. J., Oct. 1995, at 99. Law firms also market themselves to law students by sponsoring public interest events, funding fellowships, and searching for other branding opportunities. In one example of the branding phenomenon, the public interest office at the University of Pennsylvania Law School is named the Wachtell Lipton & Rose Public Service Office, after the powerful New York law firm.

pro bono performance during interviews and the recruitment process.[665] Summer associates are offered pro bono opportunities and split-summers as inducements. In an effort to reach interested law students, firms post pro bono policies and achievements in the NALP Directory of Legal Employers and on their web sites.[666]

Another key economic justification for pro bono is that it offers a way of training young associates,[667] providing them with invaluable experiences taking depositions,[668] writing briefs, and, in some cases, arguing motions or even conducting full-blown trials.[669] Particularly as the opportunities for civil trial work are shrinking,[670] one thing that pro bono offers young associates is the chance to stand up in court and conduct a trial or trial-like proceeding in a pro bono case.[671] Similarly, pro bono in the area of affordable

665. *See* Adler, *supra* note 502 (quoting Abel Montez, coordinator of the Public Interest Law Center at NYU School of Law); Telephone Interview with David Lash, *supra* note 304 (noting that at a recent Stanford recruiting event, every student that interviewed with O'Melveny & Myers asked about the firm's pro bono program).

666. *See* PRO BONO INST., HIGHLIGHTING PRO BONO ON LAW FIRM WEB SITES 2 (2003) (stating that, of 509 firm web sites surveyed, 256 included centralized pro bono information).

667. *See* Epstein, *supra* note 21, at 1694 ("Pro bono work can provide young attorneys with valuable experience they might not get in the course of ordinary work on the firm's cases."); Rhode, *supra* note 642, at 2420 ("Particularly for young attorneys, [pro bono] 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."); *see also* Telephone Interview with David Lash, *supra* note 304 (noting that pro bono provides an excellent way for young attorneys to get training that is not available in large cases); Scheingold & Bloom, *supra* note 70, at 227 ("[Through pro bono, y]oung litigators can also get valuable experience, substantial notoriety, and a sense of professional efficacy that is not otherwise available to them.").

668. *See* Telephone Interview with Brian Condon, *supra* note 345 (recounting the story of junior associates who took ten depositions in a pro bono case).

669. *See* LAPP & SHABECOFF, *supra* note 242, at 5; *see also* Franklin, *supra* note 654, at 15 ("Pro bono work can give associates in large firms exposure to courtroom practice. A domestic violence or child custody case will result in courtroom appearances, generally with short exposure and controlled hours."); Robert W. Gordon, *Private Career-Building and Public Benefits: Reflections on "Doing Well by Doing Good,"* 41 HOUS. L. REV. 113, 115 (2004) ("[Y]oung lawyers would take on criminal defense pro bono—the more spectacular the crime, the better, because it gave them a great opportunity to gain trial experience and to show off their stuff in front of juries and the larger public audience."); *Stephen Hudspeth: The Benefits of Pro Bono Work Are Many*, METROPOLITAN CORP. COUNS., Aug. 2002, at 5 ("On the practical side, the work provides invaluable training for junior associates, particularly in areas where they might not otherwise have the opportunity to gain experience in their mostly corporate practice."); Indraneel Sur, *More Lawyers Find Benefits Beyond Fees in Volunteer Cases*, L.A. TIMES, June 14, 2000, at C2 (noting that young associates get "more advanced and more challenging work" through pro bono).

670. *See* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 142 (2002) ("As settlement and like dispositions have blossomed, the civil trial has all but disappeared.").

671. *See* Telephone Interview with John Kiernan, *supra* note 348. Indeed, landlord-tenant cases, wage claims, domestic violence hearings, immigration proceedings, and public benefits

housing or economic development can give associates the experience of handling a transactional deal by themselves.[672]

Pro bono leaders emphasize how these cases give associates the chance to have close client contact,[673] build substantive expertise,[674] and gain confidence in their legal skills,[675] all of which ultimately accrues to the firm's economic benefit.[676] As Bill Von Hoene, a partner at Chicago's Jenner & Block, notes: "A young lawyer with training [via pro bono experiences] obviously contributes to the bottom line in a greater degree than one without that training."[677] This argument, although based largely on anecdotal accounts, can prove persuasive to firm management. The Director of Pro Bono Services at Shook, Hardy & Bacon, for example, explained how she successfully "made the business case" for a formal pro bono program to firm leaders, emphasizing that pro bono was one of the best ways to give associates

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hearings all offer fairly expedited procedures that involve courtroom or administrative hearing practice.

672. *See* Telephone Interview with Debbie Segal, *supra* note 284. Transactional pro bono, however, does have some drawbacks from a training perspective. Because training in the transactional arena involves developing a familiarity with the way deals operate within a particular marketplace, the more routine transactional pro bono cases—such as incorporating nonprofits or drafting simple contracts—may not viewed by firms as particularly relevant for training purposes. *See* Telephone Interview with Kyle Arndt, Partner, Bingham McCutchen LLP (July 22, 2004). Moreover, because the more sophisticated transactions, such as an affordable housing development, involve a complex range of substantive issues and skill sets, firms are reluctant to turn them over to younger associates without making significant investments at the partner level in supervision. *See id.*

673. *Cf.* James Regan, Note, *How About a Firm Where People Actually Want to Work? A "Professional" Law Firm for the Twenty-First Century*, 69 FORDHAM L. REV. 2693, 2709 (2001) ("The insulation of big firm practice often means that lawyers 'don't see the human aspect of the major business deals their clients face.'" (quoting Jim Puga, a young associate in a community legal services program, *quoted in* Donald W. Hoagland, *Community Service Makes Better Lawyers*, *in* THE LAW FIRM AND THE PUBLIC GOOD, *supra* note 140, at 104, 109)). The exposure to diverse clients can improve a lawyer's ability to deal with a broad cross-section of community members, enhancing the lawyer's capacity to "manage a team effort, select a jury, interrogate a witness, negotiate a transaction, or interview a prospective client or colleague." Hoagland, *supra*, at 114; *see also* Maren Robinson, *The Benefits of Volunteerism in the Law*, 42 BOSTON B.J. 8, 8 (1998) ("The other benefit of this early-career volunteerism is the opportunity to work directly with a client. This is an ideal opportunity for the new lawyer to get exposure to the delights and difficulties of attorney-client relationships.").

674. *See* Regan, *supra* note 673, at 401 (noting that pro bono can provide "opportunities for professional development by improving legal skills in areas demanding unusual knowledge or in esoteric areas of law"); Robinson, *supra* note 673, at 8 ("The training and mentoring available through organized legal aid offices are major benefits by providing training vehicles for learning the basics of substantive law and procedure.").

675. *See* Franklin, *supra* note 654, at 16.

676. *See* Hoagland, *supra* note 673, at 116 ("[Through pro bono l]aw firms would find that their younger lawyers would become more productive, more skillful negotiators, more sensitive interrogators, and more creative problem-solvers.").

677. Dean, *supra* note 663, at 5 (quoting Bill Von Hoene).

trial experience, which they were unlikely to receive in the context of representing the firm's large food and drug manufacturing clients.[678]

Law firm leaders have also offered pro bono as a way of counteracting lawyer dissatisfaction by providing meaningful work experiences in an environment otherwise bereft of opportunities for personal fulfillment.[679] Pro bono, it is argued, can have an ameliorative effect on the psychological well-being of lawyers that enhances job satisfaction and diminishes lawyer turnover.[680] It can be a powerful rush both for the greenest associate and most jaded senior partner[681]—a way for attorneys to enact their ideals of lawyering as social justice, or at least experience the law as a mechanism for serving underrepresented interests. Pro bono thus makes lawyers feel good about themselves and the firm, providing an antidote to the disillusionment experienced by associates caught in the rut of routine billable work.[682] Notably, one need not engage personally in pro bono to receive its benefits.[683] For example, newsletters can serve the purpose of spreading pro bono goodwill broadly among law firm personnel.[684]

In some cases, lawyers speak of pro bono as a personally transformative experience, one that connects them to issues of profound personal and social significance, and provides the sort of psychological sustenance that allows them to re-engage with their commercial work.[685] More basically, pro bono can simply provide a respite from the monotony of the day-to-day routine—something to look forward to in a day otherwise spent on the

678. *See* Telephone Interview with Jolie Justus, *supra* note 361.

679. *See, e.g.*, Regan, *supra* note 673, at 2710 ("Equally important to the external professional benefits is the personal and professional fulfillment generated by pro bono work."). Patrick Schiltz, in a review of the empirical data on lawyer satisfaction, concludes "that lawyers are indeed unhappy," and attributes the cause of that unhappiness to the fact of being of lawyer. *See* Schiltz, *supra* note 214, at 881. Big-firm lawyers, both associates and partners, consistently rank among the least happy members of a generally discontent profession. *See id.* at 886–88.

680. *See, e.g.*, William C. Kelly, Jr., *Reflections on Lawyer Morale and Public Service in an Age of Diminishing Expectations*, *in* THE LAW FIRM AND THE PUBLIC GOOD, *supra* note 140, at 90, 98–101 (describing the beneficial effects of direct pro bono work on the morale of law firm lawyers); *see also* Franklin, *supra* note 654, at 19 ("These days, everything is measured by external yardsticks, like money or a promotion at work. Pro bono work gives you a feeling of really helping someone.").

681. *See* Telephone Interview with Debbie Segal, *supra* note 284.

682. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309.

683. *See, e.g.*, Franklin, *supra* note 654, at 19 (stating that pro bono cases can be "bonding experiences for the entire firm").

684. As the pro bono coordinator at Skadden, Arps, Slate, Meagher & Flom notes: "The morale of both lawyers and nonlawyers increases when they read newsletter stories about our many pro bono successes." Tabak, *supra* note 470, at 932.

685. *See* Kenneth Frazier, *How Pro Bono Changed My Life*, CORPORATE COUNSEL, Dec. 18, 2000; *see also* Zengerle, *supra* note 218 ("The opportunity for private lawyers to represent disadvantaged members of their own community is a potentially precious enrichment of their professional lives and their personal characters.").

billable-hour treadmill.[686] All of this, of course, is said not only to enrich the professional lives of individual lawyers, but also to contribute to the firm's bottom line by stemming the costly exodus of firm lawyers: "The added variety and satisfaction obtained from a pro bono component in an individual lawyer's practice can keep that lawyer in the firm."[687]

Although there is no hard evidence of the extent to which the economic benefits of pro bono are actually realized by firms, the belief that pro bono can be used to generate a commercial return has nevertheless proven to be an important factor driving its institutionalization.[688] Yet it is precisely the vigor with which this belief is asserted that places strains on traditional conceptions of public service. Indeed, the "business case" for pro bono challenges the ideal of public service by laying bare the nexus between professionalism and the commercial interests of the bar. To the extent that law firms explicitly assimilate pro bono to their bottom line concerns, it begins to look more like pro bono is undertaken for opportunistic rather than legitimate professional reasons.[689] Of course, economic arguments are often used by well-meaning pro bono advocates in order to convince more bottom-line oriented colleagues to embrace pro bono programs. In this sense, the profession might view the economic arguments for pro bono pragmatically—using them to motivate skeptical firm leaders while maintaining a normative commitment to public service. Moreover, as the privatization movement lends credibility to the idea that public goals can be advanced by private actors pursuing private gain, the image of elite

686. *See* Kelly, *supra* note 680, at 99 (describing some pro bono projects as "an antidote to a series of similar projects for a large client that keeps the lawyer in his or her office, library, or conference room and is connected only indirectly to the public welfare"); Liza Mundy, *The Pro Bono Hustle*, WASH. MONTHLY, Sept. 1989, at 12 ("For a lot of first-, second-, and third-year associates, one key thing that pro bono offers is relief from the stunning tedium of their paying work."); *see also* Robinson, *supra* note 673, at 8 (stating that pro bono provides benefits to the more experience attorney, which include offering "a perspective and intellectual reach beyond one's own narrow practice focus, both of which serve to make the individual and his life more interesting").

687. Dean, *supra* note 202, at 3 (quoting Jack Londen of Morrison & Foerster).

688. *See* Epstein, *supra* note 21, at 1693–95 (reporting evidence from interviews with corporate firm lawyers in the United States suggesting that economic factors motivate firms to encourage pro bono work); Rhode, *supra* note 7, at 434 (reporting that "professional benefits such as contacts, referrals, and training" were found to motivate pro bono work); *cf.* BOON & LEVIN, *supra* note 650, at 233 (reporting that 68 percent of lawyers surveyed in England and Wales agreed that pro bono enhances the firm's reputation; 58 percent agreed that it promotes the loyalty and goodwill of clients; 57 percent agreed that it leads to referrals and work for the firm; and 32 percent agreed that it provided training opportunities). Of course, the intensity of the movement to make the business case for pro bono highlights the fact that many law firm leaders continue to reject the notion that pro bono has any positive economic benefits for firms.

689. *See* ABEL, *supra* note 189, at 495.

lawyers doing pro bono both to serve the public good *and* to make more money might be viewed as acceptable.

However, the promotion of pro bono as a market strategy also carries risks. Lawyers have always sought to set themselves apart from market pressures, offering their commitment to public service as a way of justifying professional privilege. Embracing the commercial benefits of pro bono may weaken claims to professional status,[690] reinforcing the already low public opinion of lawyers as greedy and dishonest.[691] In addition, law students may come to view pro bono with a jaundiced eye as firms lure them in with rosy promises of pro bono participation that are not matched by reality. Pro bono clients and organizations may also grow frustrated if economic considerations are seen to be impinging too much on firms' willingness to follow through on their volunteer obligations. Law firms are therefore placed in the position of having to carefully manage their pro bono commitments in order to negotiate the competing demands of profitability and professional duty.

C. Constraint

The network of alliances that characterizes institutionalized pro bono pairs commercial law firms with pro bono organizations and matches private lawyers with low-income clients. This network has provided critical sustenance to legal services and public interest groups, which have relied heavily upon pro bono resources to advance their agendas. However, a full accounting of pro bono must consider the tradeoffs made in exchange for this pragmatic alliance. These tradeoffs are a consequence of the dependence of pro bono upon the patronage of private-sector lawyers, particularly those in large commercial firms. This dependence influences the nature of pro bono cases, shapes opportunities for lawyer activism, and defines the content of pro bono partnerships.

690. *See, e.g.*, Boon & Abbey, *supra* note 540, at 653. Boon and Abbey state:

> Concern that firms may be more interested in promotion and marketing than public service must be carefully managed because, if the profession wishes to stimulate more *pro bono publico* work in the interests of the profession, it may need to emphasise to lawyers the positive benefits which flow from public service work rather than cast it as an altruistic sacrifice.

Id.

691. *See* Lynn A. Baker & Charles Silver, *Introduction: Civil Justice Fact and Fiction*, 80 TEX. L. REV. 1537, 1539 (2002).

1. Cases

Competitive pressures impact both the types of cases law firms undertake and the amount of resources they are willing to invest in pro bono work.

a. Conflicts

The chief consideration for law firms is cultivating their paying client base. Decisions about pro bono are therefore always filtered through the lens of how they will affect the interests of commercial clients.[692] Conflict of interest analyses are of central concern within law firms, where pro bono committees and coordinators are charged with vigilantly monitoring pro bono requests for conflicts problems. As a threshold matter, pro bono requests are subject to the same screening process that applies to fee-generating cases. Under the Model Rules of Professional Conduct, a private lawyer is generally not permitted to take on a pro bono matter that is directly adverse to another client or materially limits the lawyer's ability to represent another client.[693] In specific cases, these conflict rules can operate to preclude pro bono representation, particularly by large firms enmeshed in a complex web of client relations; however, the obstacles imposed by the existence of actual client conflicts can often be circumvented by shopping pro bono cases among a number of different firms.

Even when actual conflicts do not bar pro bono representation, the specter of so-called positional conflicts presents an additional hurdle.[694] Positional conflicts arise when a lawyer advances an argument on behalf of one client that "is directly contrary to, or has a detrimental impact on, the position advanced on behalf of a second client in a different case or matter."[695] Existing

692. *Cf.* Neil K. Komesar & Burton A. Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, *in* PUBLIC INTEREST LAW, *supra* note 69, at 80, 99–100 ("Many [public interest law] cases will probably involve conflicts between the pursuance of the interest of the underrepresented client group and the interests, or at least the sensitivities, of a private client.").

693. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7. An attorney may, however, take on case in spite of such conflicts if certain requirements are met, including the written consent of the affected client. *See id.* An attorney's ability to accept cases is also limited by duties to former clients. *See id.* R. 1.9.

694. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309.

695. Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279, 2279 (1999). *See generally* John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457 (1993). Positional conflicts can affect simultaneous representation—when a lawyer pursues diametrically opposed positions for two different existing clients—as well as successive representation—when a lawyer pursues a position for a current client that is opposed to that of a former client. *See* Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1401, 1406 (1998); *see also*

ethical rules generally permit representation despite the existence of positional conflicts, stating that a conflict exists only "if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case."[696] This creates a fairly high standard for refusing oppositional work, precluding a lawyer or her firm from asserting antagonistic positions for different clients "when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client."[697]

Large commercial law firms generally do not adopt formal positional conflicts policies for pro bono cases[698] and in theory treat positional conflicts the same in the pro bono and billable context.[699] However, despite the latitude for accepting oppositional cases under the ethical rules, positional conflicts pose unique barriers for pro bono cases. One reason is that pro bono cases frequently involve claims asserted against businesses, which constitute the economic lifeblood of the big commercial firm.[700] Thus, as a class, pro bono cases are likely to raise positional issues. Particularly as corporate clients become more aggressive about ensuring that law firms do not switch sides on important business matters,[701] law firms are reluctant to accept pro bono cases that even appear to adopt antagonistic positions. Moreover, when a positional conflict does emerge, law firms are generally unwilling to sacrifice fee-generating cases for those undertaken for free. Firms therefore tend to take an expansive view of positional conflicts in the pro bono context,[702]

Susan P. Shaprio, *Bushwacking the Ethical High Road: Conflict of Interest in the Practice of Law in Real Life*, 28 LAW & SOC. INQUIRY 87 (2003).

696. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 24 (2004); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-377 (1993).

697. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 24. The comments to Model Rule 1.7 list the factors to be considered by a lawyer in determining whether to proceed in the face of a positional conflict. They include: "where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer." *Id.* A lawyer may continue to represent parties despite a significant positional conflict after obtaining each party's informed consent. *See id*.

698. *See* Spaulding, *supra* note 695, at 1412.

699. *See, e.g.*, Telephone Interview with David Lash, *supra* note 304 (stating that the policy at O'Melveny & Myers is the same with respect to positional conflicts in billable and nonbillable cases).

700. *See* SUSAN SHAPIRO, TANGLED LOYALTIES 168 (2002).

701. *See* Spaulding, *supra* note 695, at 1416 (noting that prospective clients often inquire about a firm's position on important issues to determine whether to proceed with the representation).

702. *See* Gordon, *supra* note 669, at 133 ("Fear of losing business leads firms to take a broad view of 'positional conflicts' and to forbid members of the firm from taking on work on behalf of pro bono or public interest clients whose causes might offend or annoy business clients of the firm."). Note that this caution operates primarily to deny representation to pro bono clients when there is a conflict with paying clients' interests. There is not the same pressure to proceed cautiously when the positional conflict arises as between two pro bono clients. Thus, Martha Davis recounts how the

making cautious case selection decisions that screen out potentially troublesome pro bono work.[703]

Although most big firms state that they give lawyers' wide latitude to take on pro bono matters and that positional conflicts rarely prevent representation, informal law firm practices exclude many pro bono cases.[704] While some firms presumptively exclude cases in sensitive areas,[705] others take a less categorical approach, reviewing incoming requests on a case-by-case basis with careful attention paid to whether the firm will be forced to take positions adverse to paying clients.[706] Some firms report vetting sensitive pro bono cases with practice group leaders, who can object to representation on positional grounds.[707] If pro bono coordinators or committee members feel a case warrants further consideration, it may be referred up the firm management ladder and given to a firm's conflict review committee to resolve.[708] Firms also have mechanisms for dealing with positional conflicts that arise after a case has already been accepted, which include transferring a problematic case to a firm that is conflict-free.[709]

Although there is no systematic evidence of the impact of positional conflicts, anecdotal accounts are suggestive of the obstacles positional issues impose in the large firm context. The most noticeable effect is to exclude pro bono cases that strike at the heart of corporate client interests, particularly employment, environmental, and consumer cases in which

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same big New York law firm filed an amicus brief on behalf of The Women's Freedom Network challenging the constitutionality of the Violence Against Women Act, while simultaneously representing the NOW Legal Defense Fund, which supported the Act, on another matter. *See* Davis, *supra* note 612, at 125–26.

703. *See* Lardent, *supra* note 695, at 2290 (stating that the problems innate to pro bono service are "greatly and unnecessarily exacerbated by current law firm practices with respect to positional conflicts: practices that handle positional conflicts on an *ad hoc* basis, ignore existing legal standards, and underutilize a solution—disclosure and consent—that could maximize pro bono resources"). Even when firms do not expressly decline matters on positional conflicts grounds, the fact that lawyers are aware of their firms' concerns about positional issues "can create a substantial chilling effect on their willingness to take on pro bono matters and other related activities." Wilkins, *supra* note 619, at 77.

704. *See* Spaulding, *supra* note 695, at 1413–14.

705. *See id.* at 1414.

706. *See id.* at 1415.

707. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309; Telephone Interview with Debbie Segal, *supra* note 284.

708. *See* Telephone Interview with Kathi J. Pugh, *supra* note 309.

709. A firm's confidence in its ability to get out of pro bono cases if positional conflicts emerge can affect the nature of its screening process when cases are presented as new matters. As the pro bono coordinator at Skadden, Arps, Slate, Meagher & Flom explained, if the firm was concerned that it would be stuck with positional conflicts that emerged during the course of representation, it would be more conservative in accepting pro bono cases as an initial matter. *See* Telephone Interview with Ronald Tabak, *supra* note 351.

plaintiffs seek pro bono counsel to sue major companies.[710] Thus, pro bono employment discrimination suits, particularly impact cases against major corporate employers, are regularly rejected by big firms.[711] For instance, the pro bono coordinator at Skadden, Arps, Slate, Meagher & Flom indicated that it was difficult to get the firm to take on employment-related civil rights cases because of conflicts with labor clients—in contrast to cases in the voting rights or housing areas that were much easier to place.[712] Similarly, the pro bono coordinator at Kilpatrick Stockton in Atlanta stated that the firm did not sue employers.[713]

In a similar vein, environmental lawyers complain that big firms will not touch many environmental issues, forcing their organizations to rely on smaller boutique environmental firms for support.[714] Again, the key is that big firms avoid environmental issues that directly impact corporate client interests. They do not, therefore, accept pro bono environmental justice cases, in which community groups challenge the location of environmental hazards in low-income neighborhoods.[715] Nor do they take on cases seeking to enforce emissions standards against corporate actors. In California, for instance, big firms will not represent plaintiffs in suits to enforce Proposition 65,[716] which prohibits businesses from releasing chemicals known to cause cancer or reproductive toxicity.[717] Cases involving the preservation of endangered species or particular natural habitats fare better on the pro bono front, although they can be perceived as anti-development and therefore are risky for developer-side firms.

Big firms do take on cases in the area of consumer law against private companies, but the defendants in these cases tend to be small-time scam

710. *See* Spaulding, *supra* note 695, at 1414.

711. *See id.* at 1418, 1420; *see also* Telephone Interview with Nancy Anderson, *supra* note 264.

712. *See* Telephone Interview with Ronald Tabak, *supra* note 351.

713. *See* Telephone Interview with Debbie Segal, *supra* note 284. In another example, Best Best & Krieger, the only sizeable law firm in California's Riverside County, counts farm companies among their most valued clients and categorically rejects cases on behalf of farm workers or their unions. *See* Anderson, *supra* note 563.

714. *See* Spaulding, *supra* note 695, at 1419–20.

715. *See* Telephone Interview with Maria Hall, Staff Attorney, Communities for a Better Environment (July 23, 2004). In California, although these types of environmental justice lawsuits are typically brought against public agencies to enforce their obligations to conduct environmental reviews, *see generally* California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000–21189 (West 2004), the "real party in interest" is the company seeking to site the hazardous facility, *see* Telephone Interview with Maria Hall, *supra*.

716. *See* Telephone Interview with Gail Ruderman Feuer, Senior Attorney, Natural Resources Defense Council (July 27, 2004).

717. *See* Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE § 25249.5.

artists who have defrauded home owners of their equity, predatory lenders who charge usurious interest, or document preparers who pose as lawyers. Big firms are not, in contrast, interested in bringing impact suits against major corporations for finance discrimination,[718] or suing major banks for credit fraud.[719] Requests for pro bono assistance for plaintiffs bringing products liability suits are also likely to elicit a swift rejection.[720]

In California, positional conflicts have emerged as a major issue in pro bono cases involving the state unfair competition statute,[721] which has incurred the ire of the business community by allowing ordinary citizens to sue businesses for a broad range of "unlawful" practices even when they cannot show that they have been directly harmed.[722] This statute has been used by plaintiffs seeking to enforce federal environmental laws when federal standing requirements have not been met,[723] and is a favorite of consumer advocates. It has also been used by groups like Los Angeles' APALC in representing plaintiffs seeking to impose liability on garment retailers

718. For instance, none of the examples of autofinance discrimination suits listed on the National Consumer Law Center's web site involve big-firm pro bono counsel. *See* Nat'l Consumer Law Ctr., Inc., Examples of NCLC's Litigation, *at* http://www.consumerlaw.org/initiatives/cocounseling/examples_litigation.shtml#settl.

719. For example, the National Consumer Law Center has a class suit pending against Washington Mutual Bank for violating credit laws in signing up customers for overdraft protection that it is co-counseling with Dallas-based plaintiff-side firm, Stanley, Mandel & Iola. *See* Complaint, *In re* Wash. Mut. Overdraft Protection Litig. (No. 03-2566 ABC (RCs), *available at* http://www.consumerlaw.org/initiatives/cocounseling/content/WM_ConsolidatedAmendedComplaint.pdf.

720. *See* Telephone Interview with Brian Condon, *supra* note 345. There are other examples in the consumer context. In one case, Baltimore's Piper Marbury blocked a challenge by its pro bono branch office against the billing practices of Baltimore Gas and Electric Company because a firm partner represented a number of other utility companies where similar billing practices were employed. *See* ASHMAN, *supra* note 204, at 43–44. Another firm declined to represent an AIDS group seeking to sue a hospital or pharmaceutical company for positional reasons. *See* Shapiro, *supra* note 700, at 168.

721. CAL. BUS. & PROF. CODE § 17200 (West 2004) (prohibiting "unfair competition," which includes "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising").

722. The statute has been construed as conferring standing on "any person acting for the interest of itself, its members or the general public" and creating a private right of action to enforce other statutes even when those statutes themselves do not provide for such a private right of action. Youth Addiction v. Lucky Stores, Inc., 950 P.2d 1086 (Cal. 1988). The California Chamber of Commerce and other pro-business lobbying groups have succeeded in placing an initiative on the state ballot for the November 2004 election cycle that would amend the unfair competition law to require plaintiffs to meet conventional standing requirements. *See* Ballot Initiative to Reform California's Unfair Competition Law (filed Oct. 22, 2003), *available at* http://www.stopshakedownlawsuits.com/pdf/initiative.pdf.

723. *See* James R. Wheaton, Bus. & Prof. Code 17200: The Biggest Hammer in the Toolbox?, *at* http://www.envirolaw.org/Library/17200tools.html.

and manufacturers for the labor violations of their subcontractors.[724] Because of strong opposition by the business community to unfair competition claims, these types of cases are virtually impossible to place with law firms on a pro bono basis.[725] In one recent example, APALC filed an impact suit under the state unfair competition law against a major clothing retailer on behalf of several workers who alleged that the retailer's manufacturing subcontractor had violated labor standards. Because the suit seeks to hold the retailer liable for using garment factories that violated labor laws—and thus takes an expansive position on the scope of the unfair competition law—APALC has been unable to find any large commercial firm to handle the case on a pro bono basis, instead relying on the assistance of a small boutique litigation firm that can only devote limited resources to the suit.[726]

Positional conflicts also operate in a less categorical fashion, precluding individual law firms from accepting cases that conflict with practice specialties. Firms that represent housing developers shy away from landlord-tenant matters; firms that represent biomedical clients engaged in animal testing avoid cases involving animal rights issues;[727] and firms that do municipal bond work steer clear of suing local jurisdictions.[728] One lawyer recounted how he was prohibited from taking on a pro bono case representing an elderly African American resident shot by local police because the firm represented the city in other types of matters and would not sue an important client.[729] Although these types of firm-specific conflicts can frequently be overcome by diligent litigants who request assistance elsewhere, they highlight the obstacles facing pro bono seekers and suggest the potential for greater difficulties as the diversity of practice areas in big firms increases through mergers and other expansion activities.[730]

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724. *See, e.g.*, Bureerong v. Uvawas, 922 F. Supp. 1450 (C.D. Cal. 1996) (alleging that garment manufacturers engaged in a joint enterprise with sweatshop operator that violated the California unfair competition law).

725. In contrast, firms are willing to provide pro bono representation to defend against such suits. *See, e.g.*, GIBSON, DUNN & CRUTCHER LLP, PRO BONO AT GIBSON DUNN, *available at* http://www.gdclaw.com/fstore/documents/PressRoom/ProBono.pdf (describing pro bono case in which firm defended against unfair competition suits brought against San Francisco Bay Area ethnic grocery stores).

726. *See* Telephone Interview with Christina Chung, Staff Attorney/Project Director, Workers' Rights Unit, Asian Pacific American Legal Center (July 23, 2004). When APALC approached other small firms to take on the case, many declined because they were concerned that it would be prohibitively expensive to litigate against the large firm representing the retailer. *See id*.

727. *See* Spaulding, *supra* note 695, at 1416.

728. *See* Telephone Interview with Debbie Segal, *supra* note 284.

729. *See* Wilkins, *supra* note 619, at 77.

730. *See, e.g.*, Nathan Koppel, *Merger Mania*, AM. LAW., July 2001, at 117; *see also* Wilkins, *supra* note 619, at 81 ("Even profitable firms committed to public service may find themselves

b. Market Risk

For big firms, business concerns go beyond the existence of positional conflicts, shading into more tentative evaluations of how pro bono representation impacts a firm's market position. Firms assess the suitability of pro bono cases not simply in the context of current practice areas, but also in light of future business plans. In one example of this, the pro bono coordinator at the Lawyers' Committee described a firm that declined a pro bono case against a local governmental agency out of concern that it might injure its ability to set up a municipal bond practice in the future.[731] Pressure from clients that are not directly affected by pro bono representation, but that do business with companies that are, also influences case selection decisions. For example, one environmental group reported that firms that represented banks with timber industry ties would refuse to take on pro bono environmental cases.[732]

Firms also consider how politically controversial pro bono matters will play with their client constituency. Thus, even when positional conflicts are not technically at issue, firms can take a dim view of "pro bono activities that might merely *offend* the firm's regular clients or its prospective clients."[733] Some firms therefore decline to take pro bono cases on either side of the abortion debate,[734] while others shy away from cases involving hate speech, gun control, or religion.[735] One lawyer recounted how she was

gobbled up by larger firms that do not share their goals."). Pro bono positional conflicts do arise outside of the context of big-firm practice. In-house counsel, of course, cannot take positions antagonistic to the corporate parent. Solo practitioners or small firms that rely on a handful of major clients can also experience positional pressures that impact their ability to handle pro bono cases. However, because many solo and small firm lawyers in the civil arena have plaintiff-side practices and view pro bono as an extension of their regular legal work—providing free services to clients within their practice areas that cannot afford to pay—positional concerns can be less salient.

731. *See* Telephone Interview with Nancy Anderson, *supra* note 264.

732. *See* Spaulding, *supra* note 695, at 1419. In a similar vein, firms that sponsor public interest fellowships make decisions about which fellowship projects to fund based on assessments of how the projects might impact client interests. Firms that defend businesses in environmental matters are thus loathe to fund an environmental justice fellow, while firms with labor practices are unlikely to support a project promoting union organizing. Firms deal with business concerns by excluding certain areas from eligibility for fellowships or designating acceptable organizations for fellowship placements. Skadden, Arps, Slate, Meagher & Flom, for instance, will not sponsor fellows to engage in environmental work. In Los Angeles, Howrey Simon Arnold & White funds a summer public interest fellowship that provides stipends for fellows to work in nonprofit organizations designated by the firm. *See* Telephone Interview with Cathy Mayorkas, *supra* note 491.

733. SARAT & SCHEINGOLD, *supra* note 27 (manuscript at 8).

734. *See, e.g.*, Scheingold & Bloom, *supra* note 70, at 224 (describing an attorney who was prohibited by her firm from representing an organization against Operation Rescue on a pro bono basis).

735. *See* SHAPIRO, *supra* note 700, at 167.

forced to stop representing the Queer Nation when her pro bono work drew rousing criticism from other lawyers in her firm, one of whom went so far as to try to amend the firm's pro bono policy to bar the Queer Nation as a client.[736]

c. Market Appeal

On the other side of the coin, big firms are more likely to support pro bono in areas where the potential for positional conflicts is slim and where the firm can expect positive public relations. Thus, firms are attracted to pro bono cases outside the scope of their core practice areas that are politically safe and easy to exit should a conflict arise. Domestic violence, probate, divorce, adoption, and bankruptcy are popular types of pro bono cases precisely because they pose little threat to paying client interests.[737] Immigrant asylum and refugee cases also tend to be favored. When firms do take on employment cases, they are typically claims by individuals seeking to enforce minimum wage and overtime laws against small-scale employers—claims that usually proceed through administrative channels and result in settlements. In addition, firm participation in domestic violence, elder law, homelessness, bankruptcy, and similar types of legal clinics is particularly attractive in that it allows law firm lawyers to spend a discrete amount of time dispensing limited advice without being bound by normal conflicts rules.[738]

Firms have also focused increasing attention on transactional pro bono,[739] in which lawyers handle matters for organizations engaged in community economic development efforts.[740] Lawyers representing community

736. *See* Wilkins, *supra* note 619, at 76–77. ("Faced with such a stark choice, [the lawyer] dramatically reduced her pro bono commitments, dropped her representation of controversial causes, and ended her criticism of the firm. . . . 'Pro bono is bullshit,' she declares with a sigh.").

737. *See* Spaulding, *supra* note 695, at 1418.

738. *See* MODEL RULES OF PROF'L CONDUCT R. 6.5(a) (2004) (providing that a "lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter" is not subject to conflicts rules unless "the lawyer knows that the representation of the clients involves a conflict of interest" or "knows that another lawyer associated with the lawyer in a law firm is disqualified"); *see also* Rachel Brill & Rochelle Sparko, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest*, 16 GEO. J.L. ETHICS 553 (2003).

739. *See* Delany, *supra* note 248.

740. *See* James L. Baillie, *Fulfilling the Promise of Business Law Pro Bono*, 28 WM. MITCHELL L. REV. 1543 (2002) (providing comprehensive analysis of transactional pro bono); Cummings, *supra* note 96, at 438–46 (2001) (describing the outlines of traditional community economic development advocacy); Susan R. Jones, *Pro Bono in Action*, BUS. L. TODAY, Jan./Feb. 2004, at 64 (discussing pro bono opportunities in the area of community economic development and highlighting the role of the ABA Business Law Section in facilitating community economic development pro bono). On community economic development, see generally NAT'L ECON. DEV. & LAW CTR., COUNSELING

development organizations use basic transactional skills—structuring corporate entities, gaining tax exemption for nonprofit groups, and negotiating commercial and residential real estate deals. Transactional pro bono thus appeals to law firms as a mechanism for connecting corporate, tax, and real estate lawyers to meaningful pro bono opportunities.[741] In addition, as it involves counseling, drafting, and negotiation, it is less likely to produce the type of conflicts of interest that plague litigation.[742] Another attraction of transactional pro bono is that it resonates with the priorities of corporate clients. As a strategy for helping community groups develop their own businesses and housing, the ethos of community economic development fits well with the pro-market culture of large law firms and their clients.[743] Firms

ORGANIZATIONS IN COMMUNITY ECONOMIC DEVELOPMENT (1996); WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY (2001); Susan D. Bennett, *On Long-Haul Lawyering*, 25 FORDHAM URB. L.J. 771, 784–85 (1998); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000); Brian Glick & Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience*, 23 N.Y.U. REV. L. & SOC. CHANGE 105 (1997); Jeffrey S. Lehman & Rochelle E. Lento, *Law School Support for Community-Based Economic Development in Low-Income Urban Neighborhoods*, 42 J. URB. & CONTEMP. L. 65 (1992); Maribeth Perry, *The Role of Transactional Attorneys in Providing* Pro Bono *Legal Services*, BOSTON B.J., May–June 1998, at 16; Peter Pitegoff, *Law School Initiatives in Housing and Community Development*, 4 B.U. PUB. INT. L.J. 275 (1995); Ben Quinones, *CED on the Job*, 27 CLEARINGHOUSE REV. 773 (1993); Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689 (1994); Michael H. Schill, *Assessing the Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753 (1997); Janine Sisak, *If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 FORDHAM URB. L.J. 873 (1998); Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121; Lucie E. White, *Feminist Microenterprise: Vindicating the Rights of Women in the New Global Order?*, 50 ME. L. REV. 327 (1998).

741. There is a tension, however, inherent in transactional pro bono programs to the extent that many clients are organizational entities with some financial resources. Some firms, for example, have been reluctant to represent small business owners with assets, which although not substantial, are enough to disqualify the owners under conventional legal services income eligibility guidelines. Similarly, many firms are unwilling to provide free representation to nonprofit organizations engaged in tax credit housing deals that produce legal fees, although the nonprofit clients often argue that the money earmarked for fees could be better used to finance additional community projects.

742. Conflicts do arise in the transactional context. For instance, a firm may represent a nonprofit housing developer that seeks a loan from a bank that the firm represents on other matters. However, because the nature of transactional deals is less directly adversarial and clients often see business advantages to dealing with lawyers who have established client relationships with repeat industry players, waivers are readily obtained.

743. *Cf.* Boon & Whyte, *supra* note 155, at 170 ("Large firms are . . . transforming *pro bono publico* in their own image. It was once individualised, ad hoc and focused on litigation. There is a perceptible shift towards corporate activity, which is bureaucratised and, driven by a desire for inclusiveness, embraces transaction work and non-legal staff."). Moreover, many transactional clients are not oriented toward poverty or civil rights issues. For example, Covington & Burling's

therefore are typically eager to help a nonprofit group structure a microenterprise loan fund, set up a business incubator, or structure a business deal using federal tax credits.[744]

For firms selecting pro bono cases with an eye toward generating favorable publicity, however, the types of small-scale litigation, clinic-based, or transactional matters that are safest from a conflicts perspective do not necessarily provide sufficient visibility. This is an issue for firms evaluating pro bono opportunities, since marketing is a critical factor: Firms are attracted to cases that can be promoted in the community as exemplars of public spiritedness and targeted to potential recruits as indicia of strong pro bono cultures. From this perspective, pro bono is not simply a gift, but an investment that law firms are making in their own reputations.[745]

One way that firms generate publicity is through the use of signature projects. Latham & Watkins' child refugee project is a model in this regard,[746] providing favorable publicity for the firm while avoiding conflicts of interest. High-profile death penalty cases are another example of pro bono matters that promise not to trammel paying client interests while offering significant

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nonprofit clients include: Cathedral Choral Society; The Choral Arts Society of Washington; Cleveland Park Congregational Church; Cleveland Park Historical Society; Coordinating Council for International Universities; Friends of Mitchell Park, Inc.; Historical Society of the District of Columbia Circuit; International Law Institute; Laura Moss Theater Company; Marin Cricket Club; Metamorphosen Chamber Orchestra; Protestant Episcopal Cathedral Foundation of the District of Columbia; Russian American Institute for Law and Economics; Society of the Cincinnati; Society of Women Geographers; St. Albans School; The Walden School; Washington Humane Society. *See* COVINGTON & BURLING, *supra* note 203, at 43–56.

744. Transactional work also crosses over into the environmental arena. Boston's Goodwin Procter, for instance, provides pro bono assistance to Environmental Resources Trust, Inc., a group that seeks to promote renewable energy and reduce greenhouse gas emissions by engaging "in marketplace transactions involving natural resources and environmentally related goods and services." *See* GOODWIN PROCTER LLP, PRO BONO ANNUAL REPORT 20 (2000), *available at* http://www.goodwinprocter.com/pdfs/pbannualrpt_00.pdf.

745. Marketing plays a much different role in the use of pro bono by small-scale practitioners, which do not have the resources to handle large cases. Unlike big firms that use large cases to recruit new attorneys, small-scale practitioners often view pro bono as a way to develop the skills and contacts necessary to build a practice in a new area of law. For instance, some small-scale practitioners take on pro bono divorce cases with the plan of gaining the technical competence necessary to market themselves as family law practitioners to paying clients. *See, e.g.*, Franklin, *supra* note 654, at 15–16. There are also reports of lawyers handling pro bono bankruptcy cases as a way of building a debtor-creditor practice. *See id.* at 15 (describing the winner of the South Carolina Bar's 1995 Pro Bono Lawyer of the Year award, who "cites pro bono Chapter 7 bankruptcies as a way to build a foundation for debtor-creditor practice"). In addition, through pro bono trainings and clinics, small-scale lawyers are afforded opportunities to meet bar representatives and other lawyers who might be sources of client referrals.

746. *See* LATHAM & WATKINS LLP, PRO BONO REPORT 17 (2003), *available at* http://www.lw.com/upload/docs/doc89.pdf.

press coverage.[747] Law firms eager for favorable press also participate in events like Public Counsel's Adoptions Day, which organizes pro bono lawyers to represent parents adopting children in the foster care system,[748] and typically receives local trade press coverage.

Big firms are also attracted to large-scale impact cases for publicity reasons, although these cases create their own tensions. The classic example here is the firm that co-counsels a complex class action lawsuit with a group like the ACLU or Lawyers' Committee. A prominent recent example is the case of *Williams v. California*, in which Morrison & Foerster, in conjunction with the ACLU and Public Advocates, represents a class of California public school children suing the state on equal protection grounds for having to attend schools that lack basic resources such as books and trained teachers.[749] From a marketing perspective, the case presents strong advantages for the firm. It is the type of case that is attractive to law student recruits committed to pro bono: It offers a chance to be involved in a high-profile suit with challenging constitutional issues and the potential to have a sweeping impact by reforming the public school system. It also generates favorable publicity for the firm, which is viewed in the community as taking the side of poor public school students deprived of the basic opportunity to learn. Moreover, the case generates substantial pro bono hours, which helps the firm meet its reporting commitments.

Conflicts do arise in the context of this type of public law litigation. Most obviously, firms that generate significant fees representing or building relationships with government agencies are reluctant to jeopardize their business by suing them. Municipal bond counsel would not want to be in the position of suing the city redevelopment agency or filing a school desegregation suit. Similarly, a firm that has a major lobbying practice would be expected to steer clear of large-scale suits against the government agencies it hoped to favorably influence.[750] There are other potential risks. For example,

747. This is not to suggest that death penalty pro bono always receives a warm reception at law firms. To the contrary, because of their controversial nature, some firms are reluctant to take on death penalty matters out of concern that it would signal a political stand against the death penalty itself. *See* E-mail from Ronald Tabak, Special Counsel, Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates (Aug. 24, 2004) (on file with author).

748. *See* Public Counsel, *supra* note 456, *at* http://www.publiccounsel.org/overview/crp.html.

749. *See* ACLU, DOCKET SUMMARY 2 (Oct. 2003), *at* http://www.aclu-sc.org/attachments/9101/ACLU_Docket.pdf (providing case description); Morrison & Foerster LLP, Pro Bono, *at* http://mofo.com/about/probono.cfm (discussing Morrison & Foerster's involvement); *see also* Nanette Asimov, *Bitter Battle Over Class Standards: State Spends Millions to Defeat Students' Suit*, S.F. CHRON., May 5, 2003, at A1.

750. As an example, Washington, D.C.'s Patton Boggs, one of the nation's top lobbying law firms, *see* Opensecrets.org, Lobbying Firms and Lobbyists, *at* http://www.opensecrets.org/pubs/

a firm that aggressively pursued class certification for plaintiff groups might rankle business clients that associate certification with large damage awards.

However, in the absence of these conflicts, firms are willing to handle pro bono suits against public agencies that do not threaten the core interests of their business clients. Public law suits challenging local governmental service provision, particularly in the areas of housing and education, are routine. For instance, in conjunction with the Lawyers' Committee, big-firm pro bono counsel is suing a town accused of discrimination for failing to include affordable housing in a local development,[751] a city charged with the discriminatory provision of municipal services to African American residents,[752] and a local housing authority for allegedly segregating public housing projects.[753] Minneapolis firm Dorsey & Whitney, along with the NAACP, is representing a class challenging a racially segregated school district in Georgia.[754] Voting rights is another arena in which firms engage in pro bono work. One prominent example is Morrison & Foerster's participation in the lawsuit challenging the State of Florida's permanent disenfranchisement of ex-felons.[755] O'Melveny & Myers, in concert with the Brennan Center in New York, filed an amicus brief challenging the Colorado legislature's redistricting effort.[756]

When big firms do take on environmental cases, they tend to fit into the mode of public agency litigation, challenging governmental action in a way that does not intrude too much on corporate client activity. San Francisco's

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lobby00/lobby.asp (reporting that Patton Boggs received nearly $18,000,000 in receipts from lobbying in 1999), does not report any lawsuits pending against federal agencies in its 2004 pro bono newsletter, although it does not purport to be an exhaustive list of pro bono cases, *see* Patton Boggs LLP, Pro Bono Newsletter: 2004 Report Edition, *available at* http://www.pattonboggs.com/newsletters/probono/release/2003_report_edition.htm. A review of the firm's newsletters from 1997 to 2001 reveals one case involving a suit against the federal government filed by Job Corp participants in Colorado subject to strip searches. *See* Patton Boggs LLP, Welcome to (PB)2, *at* http://www.pattonboggs.com/newsletters/probono/index.htm.

751. *See* Complaint, Fair Housing in Huntington Comm. v. Town of Huntington (E.D.N.Y.) (No. 02 CV2787) (filed 2002), *available at* http://www.lawyerscomm.org/projects/housing/greenscomp.pdf.

752. *See* Complaint, Steele v. City of Port Wentworth, (S.D. Ga.) (No. CV403-211) (filed 2003), *available at* http://www.lawyerscomm.org/projects/housing/complaintpga.pdf.

753. *See* Complaint, King v. City of Blakely Hous. Auth., (M.D. Ga.) (filed 2000), *available at* http://www.lawyerscomm.org/projects/pdf/blakelycomplaint.pdf.

754. *See* Complaint, NAACP v. City of Thomasville Sch. Dist., (M.D. Ga.) (No. 6:98-CV-63) (filed 1998), *available at* http://www.lawyerscomm.org/projects/thomascomplaint.pdf.

755. *See* Complaint, Johnson v. Bush, (S.D. Fla.) (No. 00-3542-CIV-KING) (filed 2001), *available at* http://www.brennancenter.org/programs/dem_vr_lit_johnson.html.

756. *See* Brief of Amicus Curiae Brennan Ctr. for Justice, Colorado *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (No. 0.5A133), *available at* http://www.brennancenter.org/programs/dem_vr_lit_salazar.html.

Heller Ehrman White & McAuliffe, for instance, reports representing pro bono clients suing the federal Department of Interior to protect an estuary's fish and wildlife resources, challenging the State Department to protect endangered sea turtles from fishing practices, and attacking the Federal Highway Administration and Fish and Wildlife services for their approval of a toll road.[757]

Prison conditions cases also attract pro bono counsel. For instance, Bingham McCutchen has litigated a number of prison conditions matters, including cases holding unconstitutional the California prison system's delivery of mental health services, striking down the use of the gas chamber as cruel and unusual punishment, and finding that disabled prisoners in California were consistently denied rights under federal disability law.[758]

In other examples of cases targeting state and local agencies, Pillsbury Winthop is involved in a suit against the California Department of Corrections prohibiting prisoners from receiving mailed copies of material printed from the Internet,[759] while Wilson Sonsini Goodrich & Rosati is assisting in a lawsuit against Contra Costa County challenging its public contracting program as racially discriminatory.[760] At the federal agency level, Morrison & Foerster is handling a suit challenging the Immigration and Naturalization Service's mandatory detention policy,[761] San Francisco Bay Area-based Cooley Goodward unsuccessfully challenged the Department of Housing and Urban Development's policy of evicting tenants for drug offenses,[762] and New York's Kaye Scholer is currently litigating against the Legal Services Corporation over its policy of prohibiting LSC-funded organizations from using non-LSC money to engage in certain restricted activities.[763]

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757. *See* Heller Ehrman White & McAuliffe LLP, Pro Bono and Public Interest Work: Environmental Law, *available at* http://www.hewm.com/aboutus/probono.asp?ID=6. Not all of Heller Ehrman's work falls into the public agency litigation category, however. In one case, the firm successfully defended the Oregon Natural Resources Council against a counterclaim filed by a timber company seeking to deter the group from pursuing its suit to require further environmental review on timber sales. *See id.*

758. *See* Bingham McCutchen LLP, Pro Bono, *at* http://www.bingham.com/Bingham/ourfirm_probono.asp.

759. *See* ACLU FOUND. OF N. CAL., LEGAL DOCKET 6 (2002), *available at* http://www.aclunc.org/docket/docket02.pdf.

760. *See id.* at 15.

761. *See id.* at 22.

762. *See* HUD v. Rucker, 535 U.S. 125.

763. *See* Complaint, Dobbins v. Legal Servs. Corp. v. Velasquez (E.D.N.Y.) (No. 01 Civ. 8371 (FB)) (filed 2001), *available at* http://www.brennancenter.org/programs/pov/dobbins/index.html.

For firms, there are tradeoffs involved in taking on big pro bono cases. Complex pro bono suits tend not to be good vehicles for lawyer training since they are not the type of manageable cases that allow young associates to take depositions or conduct hearings. Cost is a major issue. Whereas a firm can easily absorb the expense of filing motions, taking depositions, serving documents, and ordering transcripts in small cases, for large class actions the costs can be $200,000 or higher.[764] Staffing is another concern, as firms are reluctant to place too many high-priced associates on any one case. Firms interested in complex pro bono lawsuits therefore carefully scrutinize the merits of taking on particular cases and limit the number of their major commitments. In an effort to mitigate their expenses, some firms seek to set cost ceilings in co-counsel agreements, shifting costs in excess of the ceilings to their nonprofit co-counsel.[765] Firms representing successful plaintiffs may be able to recover attorney's fees and costs. While public interest groups encourage firms to retain cost awards, they urge firms to donate any attorney's fees to the groups themselves.[766] However, due to economic concerns, some big firms insist on keeping a significant portion of any attorney's fee award.[767] Notably, cases in which firms receive attorney's fees awards still qualify as pro bono matters under the Law Firm *Pro Bono* Challenge guidelines so long as they were originally accepted on a pro bono basis.[768]

d. Comparison

Competitive pressures cause big law firms to strike a balance between different varieties of pro bono cases. Marketing concerns drive firms to take on a manageable number of impact cases, typically against public agencies; training needs are met by smaller direct services cases in areas where the risk of conflicts is low; and pro bono hours are boosted by death penalty cases, legal clinics, and creative measures like rotation programs and fellowships.

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764. *See* Telephone Interview with Nancy Anderson, *supra* note 264.

765. *See id.*; *see also* Davis, *supra* note 612, at 126 ("Pro bono counsel often ask NOW LDEF to pay costs, and as people know, at thirty cents a copy, those costs can be quite significant.").

766. *See* Telephone Interview with Nancy Anderson, *supra* note 264.

767. *See* Telephone Interview with Peter Eliasberg, *supra* note 278.

768. *See* PRO BONO INST., *supra* note 486, at 8. The Pro Bono Institute states:

> If the firm originally accepted the matter in question on a pro bono basis, then an award of attorneys' fees will not "change" it from a pro bono matter. . . . However, accepting a matter on a contingency fee basis (even where the chance of recovery is remote) does not make it a *pro bono* matter under the Challenge definition of *pro bono*.

Id.

That certain cases are privileged while others are marginalized is not a unique feature of pro bono. Legal aid had its own case selection biases shaped by its financial dependence on charities, local businesses, and the bar. Law reform was discouraged while individual case representation was steered toward family disputes and other cases that promised not to challenge local business benefactors or take paying business away from private lawyers. The legal services program has seen its docket influenced by its relationship with the federal government, which has swung from supporting left-leaning law reform to restricting cases within a narrow range of individual service categories. Public interest organizations must take care to bring cases that comport with the goals of philanthropic foundations and other private donors. Private lawyers, in turn, choose pro bono cases based on the business interests of clients. In each context, the economic logic is clear: Patronage shapes case selection.

There are important systemic complementarities. Pro bono reinforces the federal legal services program by providing more attorneys for direct service representation and handling the cases that the program is prohibited from undertaking. Pro bono also augments the public interest sector by contributing firm resources to support large-scale law reform efforts constrained by nonprofit organizational capacities. However, there are also systemic gaps, particularly when it comes to cases involving major challenges to corporate practices, which big-firm pro bono shuns.

The federal legal services program, while permitted to sue corporate actors on behalf of low-income clients, operates under restrictions that diminish its effectiveness: The restriction on class actions prevents legal services from taking on large-scale cases against corporate defendants,[769] while the prohibition against attorney's fees awards withdraws an important bargaining chip against corporate defendants, which can litigate without the threat of a large fee payout. Low-income clients can turn to non-LSC legal services organizations and other nonprofit groups for representation. However, although there are notable examples of organizations that handle large-scale corporate challenges on behalf of low-income litigants,[770] program priorities and resource limitations severely constrain the available options.

769. Therefore, legal services can no longer handle a case like the class action brought by the LSC-funded Central Virginia Leal Aid Society, which sued a large interstate financial services company for charging low-income customers higher interest rates and undisclosed fees, resulting in a settlement reimbursing the borrowers. *See* BRENNAN CTR. FOR JUSTICE, LEFT OUT IN THE COLD: HOW CLIENTS ARE AFFECTED BY RESTRICTIONS ON THEIR LEGAL SERVICES LAWYERS 14–15 (2000), *available at* http://www.brennancenter.org/resources/atj/atj6.pdf.

770. For instance, APALC represents garment workers against manufacturers and retailers, while CRLA handles cases for farm workers suing agribusiness defendants. New York's National

Outside the arena of poverty law, underrepresented plaintiffs face similar limitations in pressing resource-intensive suits against corporate defendants. There are, to be sure, a number of prominent public interest organizations involved in bringing corporate challenges. The Boston-based National Consumer Law Center, for instance, handles large-scale cases against corporate defendants in areas involving credit discrimination and mortgage finance abuse.[771] The NRDC brings impact environmental cases against companies alleged to have violated clean air or water regulations,[772] while traditional civil rights organizations like the NAACP and the Mexican American Legal Defense and Education Fund (MALDEF) routinely handle complex employment discrimination suits.[773]

Yet, despite relatively stable funding bases, these organizations still confront tight budgets that cannot typically support the large outlays associated with major litigation. This is true even when cases present the possibility of attorney's fees and costs awards, which may not be recovered for many years, if at all.[774] Resource constraints therefore force public interest groups to seek out co-counsel or simply pass on cases that do not directly advance the most pressing organizational goals.[775] Because corporate challenges are shut out of big-firm pro bono, public interest groups bringing such suits must rely for litigation support on smaller plaintiff-side firms, which face their own resource limitations and typically require a cut of any fee or damage award to participate. Moreover, even when corporate challenges make it onto the public interest docket, nonprofit groups and their small-firm co-counsel usually find themselves vastly underresourced vis-à-vis their big-firm opponents.

Within the private market, the existence of a well-capitalized plaintiff's bar offers another alternative for clients aggrieved by corporate

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Employment Law Project takes on impact suits on behalf of low-wage workers, *see* National Employment Law Project, Homepage, *at* http://www.nelp.org/, San Francisco's Equal Rights Advocates has a special project focusing on low-wage women workers in the service sector, *see* Equal Rights Advocates, Legal Advocacy Projects, *at* http://www.equalrights.org/professional/prof_main.asp; and the Brennan Center represents low-income community groups in living wage enforcement suits, *see* Amanda Cooper & Jobina Jones, City of Buffalo Sued for Failure to Enforce Living Wage Law, *at* http://www.brennancenter.org/presscenter/releases_2001/pressrelease_2001_0717.html.

771. *See* Nat'l Consumer Law Ctr., Inc., Initiatives for Consumer Justice, *at* http://www.nclc.org/.

772. *See* Telephone Interview with Gail Ruderman Feuer, *supra* note 716.

773. One example here is the current class action against Abercrombie & Fitch, which the NAACP and MALDEF are co-counseling with a San Francisco plaintiff-side law firm. *See* Complaint, Gonzalez v. Abercrombie & Fitch Co., (N.D. Cal.) (filed 2003), *available at* http://www.naacpldf.org/content/pdf/abercrombie/Abercrombie_Complaint.pdf.

774. This explains why public interest groups routinely retain pro bono counsel in civil rights suits against government agencies that present the possibility of attorney's fees and costs awards.

775. *See* Telephone Interview with Gail Ruderman Feuer, *supra* note 716.

actors.[776] Contingency fee arrangements,[777] combined with the opportunity for attorney's fees,[778] provide smaller-scale private firms with an economic incentive to aggressively pursue claims against deep-pocket companies.[779] Indeed, small private practitioners are attracted to the potential for large damages promised by class actions.[780] Particularly in the employment and environmental contexts, where there are a number of fee-shifting statutes,[781] small public interest firms have developed niche practices focused on corporate accountability. For instance, Hadsell & Stormer in Pasadena, California

776. *See* Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001) (attributing the rise of plaintiff's bar to a mix of legal, economic, political, and social factors).

777. *See, e.g.*, Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998).

778. *See* AWARDS OF ATTORNEYS FEES BY FEDERAL COURTS, FEDERAL AGENCIES AND SELECTED FOREIGN COUNTRIES (Mary V. Capisio ed., 2002); *see also* RICHARD M. PEARL, CONTINUING EDUCATION OF THE BAR, CALIFORNIA ATTORNEY FEE AWARDS (rev. ed. 2002).

779. This incentive has contributed to the increase in civil rights filings over the last thirty years. *See* Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 203 (1997); *see also* THEODORE EISENBERG, CIVIL RIGHTS LITIGATION, CASES AND MATERIALS 9 (4th ed. 1996) (reporting an increase in civil rights filings to over 35 percent of the federal docket in 1994).

780. For example, *Dukes v. Wal-Mart Stores*—which recently was certified as the largest class action suit ever, with over one million women alleging that Wal-Mart committed sex discrimination in hiring, pay, and promotion, *see* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004)—is being handled by a small team of private lawyers headed by Brad Seligman, a well-known civil rights attorney who started the Impact Fund, a foundation dedicated to funding public interest litigation based in Berkeley, California, *see* David Streitfeld, *It's Berkeley v. Bentonville as Lawyers Take on Wal-Mart*, L.A. TIMES, June 28, 2004, at A1. Prior to starting the Impact Fund, Seligman was a partner at Saperstein, Seligman, Mayeda & Larkin, a well-respected civil rights firm in Oakland, California. *See* Impact of Fund, Brad Seligman, *at* http://www.impactfund.org/seligman_bio.html.

781. Examples of fee-shifting statutes relevant in the employment context include: Fair Labor Standards Act, 29 U.S.C. § 216(b) (2000); Age Discrimination in Employment Act, 29 U.S.C. § 626(b); Family and Medical Leave Act, 29 U.S.C. § 2617(a)(3); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b); Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g)(2)(B), 2000e-5(k); Age Discrimination Act of 1975, 42 U.S.C. § 6104(e)(1); Americans With Disabilities Act, 42 U.S.C. § 12205. Environmental fee-shifting statues include: Toxic Substances Control Act, 15 U.S.C. § 2618(d); Endangered Species Act, 16 U.S.C. § 1540(g)(4); Water Pollution Prevention and Control Act, 33 U.S.C. § 1319(g)(9); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g)(4); Safe Drinking Water Act, 42 U.S.C. § 300h-2(c)(7); Solid Waste Disposal Act, 42 U.S.C. § 6971(c); Clean Air Act, 42 U.S.C. 7413(b); Clean Water Act, 33 U.S.C. § 1365(d); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9606(b)(2)(E). The Equal Access to Justice Act is also relevant in the environmental context, allowing prevailing parties in agency adjudications to receive attorney's fees. 5 U.S.C. § 504(a)(1). At the state level, there are additional statutes that permit recovery of fees. In California, one of the most important is the state's private attorney general fee provision, which provides for fee awards in cases enforcing an important right affecting the public interest. CAL. CIV. PROC. CODE § 1021.5 (West 2004) (authorizing court-awarded attorney's fees where a "a significant benefit . . . has been conferred on the general public or a large class of persons" and "the necessity and financial burden of private enforcement are such as to make the award appropriate").

is an eight-person civil rights firm that specializes in traditional employment discrimination suits,[782] while also handling cases on behalf of low-wage workers.[783] On the environmental front, Chatten-Brown & Associates in Los Angeles handles land use and environmental protection matters designed to have a broad public benefit,[784] recently representing a coalition of community organizations seeking to block an initiative that would have allowed Wal-Mart to open a Supercenter store in Inglewood, California.[785] These small firms often receive referrals of cases that do not meet the law-reform priorities of impact groups.

However, small firms operate under their own constraints. There are relatively few small firms, which must survive without a steady base of paying clients and require a great deal of risk-taking.[786] In California, for instance, there are only a handful of plaintiff-side public interest firms that provide representation in the areas of employment, environmental and consumer law—all but a few located either in Los Angeles or the San Francisco Bay Area.[787] In addition, the nature of small-firm practice militates against serving low-income clients. Civil rights cases for high net worth plaintiffs are the bread-and-butter of public interest firm practice, promising both high damages and the potential for attorney's fees.[788] Small firms do hedge financially riskier cases against ones that promise a stronger likelihood of recovery, leaving room for cases on behalf of low-income plaintiffs.[789]

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782. *See* Telephone Interview with Dan Stormer, Hadsell & Stormer, Inc. (July 27, 2004); *see also* Hadsell & Stormer, Areas of Practice, *at* http://www.hadsellstormer.com/areas of practice.htm. Pasadena-based Rothner, Segall, Bahan & Greenstone is an example of a small firm that combines a labor practice representing unions with an employment practice. *See* JustAdvocates, Rothner, Segall, Bahan & Greenstone, *at* http://www.just-advocates.com/firms/firm.cfm?ID=61.

783. The firm handled a recent class action against major Southern California supermarket chains for contracting with companies for janitorial services that hired immigrant workers in violation of wage and hour laws. *See* Flores v. Albertsons, Inc., No. CV0100515AHM (5 HX) 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002).

784. *See* Telephone Interview with Jan Chatten-Brown, Chatten-Brown & Associates (July 26, 2004); *see also* Chatten-Brown & Associates, Homepage, *at* http://cbaearthlaw.com/.

785. *See* Gene C. Johnson, *Wal-Mart Supercenters Are Targeted on Two Fronts*, *at* http://www.laane.org/pressroom/stories/walmart/031225Wave.html (Dec. 25, 2003).

786. *See* Telephone Interview with Dan Stormer, *supra* note 782.

787. A search of firms that engage in civil rights enforcement, consumer protection, employment, environmental law/toxic torts, union/labor law, and products liability work revealed forty-five firms in California. *See* JustAdvocates, Search Firms, *at* http://www.just-advocates.com/firms/search.cfm. Of these, twenty-nine were located in the Bay Area and twelve were in the Los Angeles area. *See id.*

788. *See* Davies, *supra* note 779, at 259.

789. In a dramatic example of this, Hadsell & Stormer is currently handling the case of *Doe v. Unocal*, in which villagers in Myanmar allege that Unocal committed human rights violations by aiding the Myanmar military in committing forced labor, rape, and murder. *See* Doe v. Unocal,

However, restrictions on fee awards in the civil rights and environmental context,[790] combined with the high incidence of settlements for which attorneys are not entitled to statutory fees,[791] create incentives to screen out meritorious but low-value cases.[792] And even when cases are brought, resource disparities shape the course of litigation. Small firm attorneys report being extraordinarily outmatched against their big-firm opposing counsel, leaving little margin for error and placing enormous pressures on them to be efficient.[793]

Pro bono, then, plays a role in setting the boundaries of legal services and public interest litigation.[794] Because it shuns corporate challenges, pro bono is not a complete substitute for the legal services program it eclipses. Without access to government-funded legal services lawyers empowered to bring major corporate challenges, poor clients are forced to rely on a patchwork of private and nonprofit legal groups to confront corporate defendants and their big-firm counsel. Outside the arena of poverty law, public interest groups pressing claims against corporate defendants also face the constraints of pro bono. Dependent upon big firms for volunteer assistance in their suits against governmental entities, public interest groups are put in the position of litigating against their big-firm benefactors when their sights are set on corporate defendants. The result is to reinforce resource disparities between categories

No. 00-56603, 2002 WL 31063976 (9th Cir. Sept. 18, 2002) *rehearing en banc granted*, *opinion vacated by* No. 00-56603, 2003 WL 359787 (9th Cir. Feb 14, 2003).

790. *See* City of Burlington v. Dague, 502 U.S. 1071 (1992) (limiting the discretion of judges to award "risk multipliers" to prevailing attorneys under some environmental statutes); Farrar v. Hobby, 506 U.S. 103 (1992) (holding that a prevailing party that wins only nominal damages may not be entitled to attorney's fees); Evans v. Jeff D., 475 U.S. 717 (1986) (holding that there is no barrier to so-called "sacrifice" settlement offers in which defendants offer full monetary relief to plaintiffs on the condition that statutory attorney's fees are waived); Marek v. Chesny, 473 U.S. 1 (1985) (holding that a plaintiff who prevails at trial but wins less than a settlement offer is not entitled to recover attorney's fees under the Civil Rights Attorneys' Fees Awards Act of 1976); *see also* David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 241–45 (2003).

791. *See* Buckhannon v. W. Va. Dep't of Health & Hum. Servs., 532 U.S. 598 (2001) (limiting fee-shifting in "prevailing party" fee-shifting statutes to cases in which the plaintiff either wins a judgment or receives the court's approval for a settlement).

792. *See* Davies, *supra* 779, at 197.

793. *See* Telephone Interview with Lauren Teukolsky, Associate, Hadsell & Stormer, Inc. (July 25, 2004).

794. Also worth noting are the limitations on the ability of low-income and underserved groups to be heard through the legislative process on issues of corporate reform. Because legal services cannot lobby, and charitable nonprofit organizations are limited in their ability to do so, *see* JAMES J. FISHMAN & STEPHEN SCHWARZ, TAXATION OF NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 285–87 (2003), legislative efforts are severely constrained without access to private-sector resources.

of cases:[795] Suits against the government are fortified by law firm largesse, while corporate challenges are confined to nonprofit and small firm practitioners.[796]

2. Lawyers

Conditions within law firms not only shape pro bono dockets, they also impact the nature of lawyering for poor and underserved clients—luring attorneys into firm practice sites where the promise of "doing well by doing good" exacts professional and political accommodations.[797]

a. Time

The most obvious constraint imposed by the firm environment is on lawyer time. Pro bono permits only episodic involvement in public service activities since lawyers must devote themselves primarily to the representation of corporate clients. How firms structure their pro bono programs does influence levels of pro bono participation within the narrow band of acceptable activity: Lawyers report that supportive employer policies and

795. *See* Spaulding, *supra* note 695, at 1420 ("Popular clients and causes are allocated what little pro bono assistance firms offer, while unpopular clients and causes simply go without when [legal services organizations] are unable to meet their needs.").

796. Other resources bear mentioning, although these have their own limitations. A few law school clinics have been active in asserting corporate challenges in the environmental and employment arenas, representing community groups attempting to block the location of hazardous facilities in poor neighborhoods, *see* Peter A. Joy, *Political Interference With Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235 (1999) (describing how Tulane Law School's environmental law clinic successfully blocked a polyvinylchloride factory from locating in a low-income African American neighborhood), and suing businesses for unfair labor practices against low-wage immigrant workers, *see* NYU Sch. of Law, Immigrant Rights Clinic, *at* http://www.law.nyu.edu/clinics/year/immigrant/. Yet the number of clinics with reform-oriented practices are small and increasingly under political pressure to tone down more aggressive advocacy against corporate targets. *See* Luban, *supra* note 790, at 237–40 (describing the Louisiana Supreme Court's promulgation of student-practice Rule XX [making] it harder for clinics to represent environmental groups, passed in response to the Tulane Law School environmental clinic's successful advocacy). In addition, governmental agencies such as the federal Department of Justice, and state Attorney General and civil rights offices are active in enforcing employment, environmental, and consumer standards against corporate actors. However, these agencies are subject to different political pressures and jurisdictional mandates, which limit the scope of their advocacy for low-income and underserved constituencies.

797. *See, e.g.*, Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1672 (2002) (noting that the structures of legal practice influence "the substance of the values and principles to which one is committed"); Menkel-Meadow, *supra* note 642, at 42–48 (underscoring the importance of situational factors in influencing the nature of cause lawyering); Ronen Shamir & Sara Shinski, *Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts*, *in* CAUSE LAWYERING, *supra* note 60, at 227 (discussing how practice sites construct cause lawyering).

encouragement by senior partners are significant factors in their decisions to engage in pro bono work.[798] However, the demands of billable work place limits on the extent of pro bono participation. Workload demands and billable-hour requirements squeeze out time for extracurricular activities.[799] As a result, lawyers report experiencing "time famine"—the feeling that they have insufficient time for outside pursuits and family activities, to say nothing of pro bono.[800]

Particularly for the young lawyers who carry much of the volunteer burden, pro bono carries risks. Reputational concerns militate against robust pro bono involvement by younger lawyers conscious of doing "too much" and thus appearing disinterested in the main work of the firm.[801] In addition, because pro bono tends not to be as closely supervised by partners as billable work, associates may receive little attention for a job well done, while shouldering all of the blame if something goes wrong.[802] Moreover, although there are some exceptions, most lawyers do not enhance their status within the firm by handling high-profile pro bono cases and therefore must weigh the costs of spending time away from billable work against the personal and professional benefits that it confers. The incentives within firms therefore operate to constrict the possibilities for public service, causing committed lawyers to piece together moments of volunteer activity amid the rigorous demands of commercial client work.

b. Commitment

Environmental factors also influence the extent to which lawyers within law firms identify themselves with social causes.[803] There are indeed opportunities for lawyers to express commitment to cause through their pro

798. *See* Epstein, *supra* note 21; Rhode, *supra* note 7, at 446.

799. *See* Susan Saab Fortney, *I Don't Have Time to Be Ethical: Addressing the Effects of Billable Hour Pressure*, 39 IDAHO L. REV. 305, 308 (2003) (stating that law firm associates in a Texas survey report not having "enough time for themselves and their families"); *see also* Gordon, *supra* note 669, at 133; Rhode, *supra* note 7, at 447–48.

800. *See* Fortney, *supra* note 215, at 264; *see also* Deborah L. Rhode, *The Profession and Its Discontents*, 61 OHIO ST. L.J. 1335, 1345 (2000); Kate Ackley & Bryan Rund, *Pro Bono: Casualty of Salary Wars?*, LEGAL TIMES, Apr. 10, 2000, at 1; Denise Magnell, *Law Firm Economics Are Pro Bono Threat*, NAT'L L.J., July 10, 2000, at M1; Putsata Reang, *Large Law Firms Vow to Assist Poor: Free Legal Services to be Encouraged*, SAN JOSE MERCURY NEWS, Dec. 15, 2000, at B1; Winter, *supra* note 2.

801. *See* Epstein, *supra* note 21, at 1695; Wilkins, *supra* note 619, at 78.

802. *See* Wilkins, *supra* note 619, at 78.

803. Austin Sarat and Stuart Scheingold have been the leading scholars on cause lawyers and the influence of practice sites on their political commitments. *See generally* Sarat & Scheingold, *supra* note 60; *see also* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 60.

bono lawyering,[804] yet organizational norms shape what types of causes receive institutional support, providing incentives for lawyers to conform political ideals to law firm expectations. Lawyers who adopt causes that are consistent with firm values are most comfortable in their role as pro bono advocates. For lawyers who view justice in terms of equal access for the poor, pro bono provides an ideal opportunity to discharge their ideological commitment by handling individual cases for low-income clients.[805] This type of pro bono activity comports with the norm of professional neutrality: The pro bono lawyer, by taking on a mix of paying and nonpaying clients without regard to the political ends of the representation, enacts the ideology of advocacy. Because an equal access orientation privileges service provision over social reform, it fits well with big-firm values—emphasizing technical lawyering skill while steering clear of any challenges to the legitimacy of corporate client activity.

Opportunities to advance more well-defined causes through pro bono advocacy are heavily dependent on situational factors. The easiest case for a politically committed lawyer is when the firm itself is identified with the cause that the lawyer supports. For instance, when a firm adopts a "signature project"—representing immigrant youth, defendants on death row, or individuals with HIV/AIDS—a lawyer who shares a commitment to the firm-sanctioned cause has a strong incentive to engage in pro bono activity around that issue, potentially gaining attention within the firm for noteworthy performance. These types of projects, however, tend to be those carefully selected by firms as politically safe and nonthreatening to client interests.

For lawyers whose ideological convictions run toward the more politically transformative—valuing structural change designed to benefit socially marginalized groups[806]—negotiating commitment within the firm context becomes more difficult. Opportunities for advancing transformative causes are limited by business considerations that preclude corporate challenges and militate against representation in controversial matters. There are law reform cases, particularly in the areas of civil rights and civil liberties, but even here lawyers generally must take what comes in the door and do not affirmatively shape the firm's case docket to conform to their commitments.

804. *See* SARAT & SCHEINGOLD, *supra* note 27 (manuscript at 11–12).

805. *See* Scheingold & Bloom, *supra* note 70, at 226 ("For a lawyer whose preference is to respond to unmet legal needs and who thinks primarily in terms of an ethical responsibility to engage in pro bono activity, the corporate firm is a place to do well while doing a bit of good.").

806. *See id.* at 214–15 (describing a spectrum of cause lawyering that runs from the least transgressive—serving unmet legal needs—toward more transgressive forms, such as civil liberties and civil rights, public policy, and radical cause lawyering).

Organizational norms also operate to stifle the expression of more transformative political views. In an environment where the focus on money-making is intense,[807] there are pressures on lawyers not to "rock the boat" by adopting positions outside the mainstream that could jeopardize the common enterprise.[808] Moreover, the emphasis within firms on lawyer expertise means that forms of lawyering designed to foster client empowerment through nontraditional legal means, such as community organizing or education,[809] are disfavored.

Lawyers with transformative political commitments may accommodate themselves to firm life by shifting allegiances to favored causes,[810] supporting their own causes outside of work,[811] or simply forgoing active involvement.[812] Those who cannot make such compromises leave the firm, entering other practice sites that provide more supportive environments for their commitments.[813] Lawyers who remain adjust to the environmental constraints, approaching pro bono with a degree of ideological flexibility. "They seem to operate on the principle that there is no shortage of good causes and if they cannot work on behalf of one, they are prepared to shift to another."[814]

This sense of flexibility distinguishes pro bono lawyers from their staff attorney counterparts in legal services and public interest organizations, who identify strongly with the righteousness of their political cause.[815] Thus, whereas pro bono lawyers are by necessity part-time advocates of client interests—often taking on pro bono cases for their own professional development—staff attorneys at nonprofit organizations generally view

807. *See* Schiltz, *supra* note 214, at 913.

808. This is true for lawyers on both sides of the political spectrum. *See* SARAT & SCHEINGOLD, *supra* note 27 (manuscript at 8–9) (describing a Christian cause lawyer who complained that his partners "viewed him as 'one of those wild-eyed evangelicals'"); Wilkins, *supra* note 619, at 76 (describing attorney chastised for representing militant gay rights group by partner who emphasized "I'm here to make money").

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

810. *See* Sheingold & Bloom, *supra* note 70, at 228.

811. *See* SARAT & SCHEINGOLD, *supra* note 27 (manuscript at 11).

812. *See id.*; *see also* Wilkins, *supra* note 619, at 77 (recounting story of lawyer who cut off controversial pro bono representation after coming under criticism).

813. Stuart Scheingold and Anne Bloom note that "transgressive cause lawyering is least likely to be found in corporate firms, more likely to be found in small firms, and most likely to be found in salaried practice." Scheingold & Bloom, *supra* note 70, at 217.

814. *See id.* at 245.

815. *See id.* at 230.

themselves as full-time political activists.[816] One consequence of the pro bono system is therefore to place more responsibility for representing poor and underserved constituencies on lawyers who lack a strong ideological commitment to their causes—or, at least, have less room to express those commitments within the firm environment. While this arrangement can radicalize firm lawyers, it can also domesticate the causes. Whereas nonprofit staff attorneys can plan a campaign of multiple cases, pro bono attorneys typically do not, instead taking whatever cases come in the door. Less committed pro bono lawyers may miss opportunities for connecting cases to broader law reform or political organizing efforts, and may be less likely to take risks to advance larger-scale social change agendas.[817] Oftentimes pro bono lawyers are without any substantive expertise and have little or no experience as litigators. In the worse case, lack of commitment may translate into

816. There are parallels here to the system of criminal defense: While court-appointed attorneys take on cases in the context of their broader private practices, state-sponsored public defenders represent the accused full-time with an ideological commitment to the cause of criminal justice. However, whereas court-appointed criminal attorneys are usually criminal practitioners, civil pro bono work is typically done outside of the attorneys' areas of expertise. On the distinctions between the court-appointed and public defense systems, see Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986–1987); Charles J. Ogletree & Yoav Sapir, *Keeping Gideon's Promise: A Comparison of the American and Israeli Public Defender Experiences*, 29 N.Y.U. REV. L. & SOC. CHANGE 203, 209–10 (2004); Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & CONTEMP. PROBS. 31, 32 (1995); *see also* R. HERMANN ET AL., COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICAN (1977); LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT (1965). Like their legal services counterparts, public defenders, at least after *Gideon v. Wainwright*, have been aggressive in their advocacy of client interests, *see* Ogletree & Sapir, *supra*, at 208, raising claims of constitutional violations as necessary to protect defendants' rights, *see* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2426 (1996). Because public defense is constitutionally mandated, it has been protected from the advocacy restrictions that have characterized federal legal services, although courts have cut back on the substantive rights of criminal defendants, while governments have significantly reduced funding. *See* Taylor-Thompson, *supra*, at 2429–31. Another parallel can be drawn between pro bono and the system of Judicare, under which private lawyers are reimbursed by the government to provide free legal services to low-income clients. *See* SAMUEL J. BRAKEL, JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS, AND POOR PEOPLE 3 (1974); LEGAL SERVS. CORP., THE DELIVERY SYSTEMS STUDY: A POLICY REPORT TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES 23–24 (1980). Like pro bono, Judicare involves clients who are represented by private attorneys who are not generally ideologically motivated and whose indigent legal services work constitutes only a small fraction of the attorneys' overall practice. *See* BRACKEL, *supra*, at 9. Unlike pro bono volunteers, however, Judicare attorneys take cases with the expectation of government subsidy rather than out of the pull of professional obligation.

817. Legal services and public interest groups can attempt to minimize these risks by carefully screening matters for law reform issues and working closely with pro bono lawyers to make sure that their advocacy is consistent with broader organizational goals. However, resource constraints make such coordination impossible in every instance.

outright inattention as time-pressured volunteers cut corners on pro bono cases, shortchanging client interests and undermining broader political goals.

3. Partnerships

The collaborative partnerships established through pro bono make the nonprofit organizations that serve marginalized clients dependent on private-sector lawyers for key operating resources. This does not render the nonprofit partners impotent, merely responding to the interests of their private-sector benefactors without attention to the needs of their client constituencies. But nonprofit pro bono organizations are in fact keenly attuned to the constraints imposed by their relationships with the private bar, which influence the nature of their organizational priorities, while placing unique burdens on their capacity to serve client interests.

a. Priorities

Nonprofit organizations are acutely aware of the need to market pro bono cases that appeal to volunteers, whose satisfaction is critical to generating repeat pro bono participation and whose goodwill can be tapped for financial contributions. Although volunteer preferences are themselves shaped by the case opportunities presented, they nevertheless influence nonprofit organizational priorities to the extent that pro bono programs must consider how cases will play with volunteer attorneys, whose values may diverge from those of front-line pro bono staff. This is significant because nonprofit organizations provide the point of contact with the larger community, screening cases for referral to volunteers. They are therefore the gatekeepers for the types of cases that become eligible to receive private-sector largesse.

This dynamic plays out in different ways depending on the type of pro bono organization involved. Referral organizations dedicated to linking low-income clients with volunteer attorneys bear the clear imprint of their relationship with the private bar. These are organizations whose mandate is both to provide free services to poor clients and to promote lawyer volunteerism.[818] Often these goals mesh well, but there are tensions. The business considerations of private practitioners tilt the caseload of referral organizations in favor of family law, bankruptcy, immigration, homelessness assistance, and

818. *See, e.g.*, Public Counsel, Mission Statement and Goals, *at* http://publiccounsel.org/mission.htm.

transactional matters—areas in which there are few possibilities for commercial client conflicts.

In addition, because the organizational imperative is to increase volunteerism, there is an emphasis on developing programs that can be mass marketed to a broad pro bono audience, including lawyers with varying degrees of interest and professional commitment. Projects are frequently designed to generate easily packaged, time-limited, and emotionally warm cases. Substantive legal skills are often unimportant. Legal clinics or other structured pro bono events that involve brief client interactions are popular,[819] as are matters that pull on volunteers' heartstrings. Public Counsel's Adoptions Day, at which law firm volunteers help create a new family by completing adoptions for children in the foster care system, is an example of a project that combines a limited time commitment with a highly rewarding pro bono experience. Clients who might be perceived as difficult or not mainstream are discouraged, while "deserving" clients are promoted.[820] Clients at San Francisco's VLSP, for instance, include children with disabilities and special needs, battered women, people with cancer, low-income people with credit problems, abused immigrant children, disabled and elderly immigrants, people who are HIV positive or have AIDS, women on welfare seeking to reenter the workforce, and nonprofit organizations.[821] Clients who are less sympathetic are kept at a greater distance. Homeless clients, for instance, are generally served outside the offices of law firm volunteers at legal clinics or public agencies.

Public interest organizations that are more strategic users of pro bono face different issues with respect to navigating their relationships with private-sector partners. For these groups, the question is typically how to persuade law firms to take on resource-intensive impact cases. Groups must therefore view incoming cases through the lens of how likely they are to be placed with big-firm lawyers. Cases that present complex legal issues, provide training opportunities, and avoid business conflicts are preferred—the classic example being a civil rights case against a public agency. Other types of cases can be taken on, but particularly when they raise a business conflict for large firms,

819. The pro bono work of attorneys operating through referral organizations in California's Riverside and San Bernardino Counties suggests the importance of brief encounters. Of an estimated 5200 cases to be closed in 2004 by the pro bono subgrantees of Inland Counties Legal Services, 4859 involve either advice or brief services, while 280 involve extended services and only 61 are cases where attorneys accepted clients for representation. *See* Inland Counties Legal Servs., *supra* note 574, at 2.

820. *Cf.* JOEL F. HANDLER & ELLEN JANE HOLLINGSWORTH, THE DESERVING POOR: A STUDY OF WELFARE ADMINISTRATION (1971).

821. *See* Bar Ass'n of San Francisco, Volunteer Opportunities, *at* http://www.sfbar.org/vlsp/general2.html

they must either be handled either by internal staff attorneys or in collaboration with private public interest law firms. Because this places more strain on internal resources or on small firm co-counsel, public interest groups are forced to be selective in accepting cases that deviate too far from those that fall squarely within the big-firm pro bono model.

b. Complexity

The collaborative nature of pro bono imposes system-wide costs, which fall heavily upon the nonprofit organizations faced with the complex logistical challenge of matching needy clients with volunteer lawyers. The difficulty lies not just in transferring case files, but in finding interested attorneys and ensuring that volunteers approach their part-time charge with the zeal and sensitivity of a full-time advocate.

Because of the dependence on volunteers, organizations must devote significant staff time to recruiting private lawyers to take on pro bono cases.[822] Volunteers do not just come forward—they must be persuaded. As a result, pro bono organizational directors report the constant pressure to be out in the legal community "proselytizing" new recruits.[823] To cultivate a volunteer base, organizations routinely set up meetings with law firm lawyers, bar association groups, and in-house counsel in which they describe pro bono opportunities, tout the benefits of volunteering, and recount the impact of volunteerism on the lives of vulnerable clients. Some organizations, such as Los Angeles' Public Counsel and Bet Tzedek Legal Services, produce videos highlighting the rewards of volunteerism[824] and show them to prospective volunteer groups. Volunteer recognition events are scheduled regularly to recognize significant contributions and rally support for ongoing pro bono efforts. Other tactics are employed. In New York, the VOLS program publishes a guide on pro bono opportunities for lawyers, and its director pens periodic columns for the National Law Journal on pro bono.[825] Pressures to reach new volunteers in different practice sites and to maintain existing relationships in the face of lawyer turnover mean that recruiting efforts place a consistent demand on organizational resources.

The coordinating role also places a number of strains on pro bono organizations. Cases that come into organizations must be vetted, summarized, and packaged for volunteer consumption—work that staff attorneys

822. *See* Telephone Interview with Bill Dean, *supra* note 242.
823. *See id*.
824. *See* Telephone Interview with David Lash, *supra* note 304.
825. *See* Telephone Interview with Bill Dean, *supra* note 242.

can view as distractions from their main advocacy work. While this type of case packaging can facilitate the rapid placement of pro bono cases, it is often only the opening gambit in a more intensive effort. Particularly at referral organizations where the volume of cases is large, initial requests for pro bono volunteers are frequently met with no response. Follow-up efforts are therefore critical to successful placement, putting the burden on pro bono staff to monitor which cases have not been picked up and to target specific firms or lawyers for more focused appeals. For any individual case, this process can take months, leaving to pro bono staff the delicate task of juggling competing case demands and making sure that important deadlines are not missed.

Monitoring exacts an additional resource toll. At referral organizations, placing cases with pro bono volunteers does not end the organization's involvement. Training volunteers and providing back-up advice are common staff responsibilities. In addition, staff are often called upon to troubleshoot cases when volunteers fail to treat them with the same attention devoted to billable matters. The D.C. Bar Pro Bono Program, for instance, reports that one of the main difficulties with pro bono placement is monitoring the quality of work by pro bono volunteers, many of whom are younger associates operating without a great deal of partner supervision.[826] In order to head off problems, the program staff engages in early intervention to make sure that appropriate services are provided, but resource constraints limit the organization's capacity to be vigilant in every case.[827] For impact organizations that co-counsel with pro bono lawyers, similar issues arise. One ACLU attorney noted that the organization at times receives briefs authored by pro bono volunteers that are of insufficient quality, requiring significant staff input to prepare them for filing.[828] Thus, because of the incentives for shirking pro bono work, quality control becomes a major concern for pro bono organizations, which must dedicate resources to shoring up deficient pro bono performance.

The demands on staff to recruit, coordinate, train, and monitor pro bono activity constrains the time that can be dedicated to advocacy. For this reason, staff lawyers at some pro bono organizations abjure case responsibilities altogether, focusing exclusively on consulting to pro bono volunteers.[829] Even where lawyers do handle their own cases, opportunities for

826. *See* Telephone Interview with Maureen Thornton Syracuse, *supra* note 242.
827. *See id.*
828. *See* Telephone Interview with Peter Eliasberg, *supra* note 278.
829. *See, e.g.*, Telephone Interview with Maureen Thornton Syracuse, *supra* note 242 (stating that lawyers at D.C. Bar Pro Bono Program do not have their own cases, but instead devise programs, mentor volunteers, and help with recruiting).

professionally challenging experiences are constrained. Key arguments or depositions in large cases are often given to firm lawyers as inducements to volunteer. Complex cases are farmed out to firms with greater resources and expertise. One consequence is that staff lawyers have fewer options for professional development. This can generate burnout and foster turnover as staff lawyers tire of the heavy administrative role they have to play to allow their private firm counterparts to engage in meaningful pro bono lawyering.[830]

In the end, the costs of institutionalized pro bono arise from the structure of multiparty collaboration. Clients must be referred from the initial point of contact with a pro bono organization to the ultimate point of service at a private attorney's office, which typically means that two bureaucracies have to be navigated—the nonprofit and the law firm. Specialized knowledge must be transferred from staff attorneys with familiarity about client populations and issues to part-time pro bono volunteers, who possess varying degrees of sensitivity to client interests and commitment to client representation. Trainings, informational manuals, and experience allow volunteers to accumulate their own store of specialized knowledge, but the transient nature of pro bono work—with lawyers moving in and out of pro bono participation—makes it difficult to deeply embed knowledge within private-sector settings.

This is in contrast to a system of direct representation by staffed-office attorneys, in which free services can be provided without the additional burdens imposed by pro bono coordination. A system of subsidized staffed-office programs, financed either by allowing law firms to buy out their pro bono obligations with a cash contribution or instituting full public financing,[831] therefore holds appeal from an efficiency perspective. But such a system, as has been seen in the movement away from federal legal services, is vulnerable on other grounds—underscoring the politics of pro bono.

830. It can also feed into stereotypes of public interest lawyers as less competent than those in the private sector. *See* Telephone Interview with Nancy Anderson, *supra* note 264 (noting that this stereotype sometimes complicates co-counseling relationships between pro bono volunteers and staff attorneys at the Lawyers' Committee).

831. For a description of a system permitting lawyers to buy out pro bono obligations, see Marc Galanter & Thomas Palay, *Let Firms Buy and Sell Credit for Pro Bono*, NAT'L L.J. Sept. 6, 2003, at 17; *see also* Vicki Metz, *Lawyers Pondering Pro Bono Legal Aid*, N.Y. TIMES, May 7, 1989, at 12 (describing proposal where lawyers contribute $1000 in lieu of twenty hours pro bono). On the benefits of publicly financed legal services, see Rob Atkinson, *A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 AM. U.J. GENDER SOC. POL'Y & L. 129, 142–43 (2001).

PRO BONO: A POSTSCRIPT

This Article has mapped pro bono's vast institutionalization over the past two decades. Whereas free legal services have historically been dispensed through institutional structures like legal services, supplemented by the occasional act of individual kindness, private-sector lawyers—particularly those in large firms—are now thoroughly integrated into an extensive web of institutions designed to foster pro bono activity. This pro bono infrastructure is striking in its scope, composed of nonprofit pro bono intermediaries, bar-sponsored coordinating groups, philanthropic foundations, law schools, monitoring organizations, and referral web sites. Within law firms, institutionalization appears in centralized pro bono decision-making structures and dedicated pro bono personnel. Pro bono has, as a result, become the dominant means of dispensing free services to the poor and underserved, eclipsing other state-sponsored and nongovernmental mechanisms in importance.

Assessing the consequences of this dramatic shift is a difficult task and depends to some degree on one's vantage point. The power of pro bono as a way of mobilizing large amounts of resources to help those in need is undeniable. The response of the New York City bar in the aftermath of 9/11 is a case in point, providing a microcosm of the vitality and flexibility of the new pro bono system. In its report on the legal community's response to the 9/11 attacks, the Association of the Bar of the City of New York (City Bar) described the huge need for help as over 4000 individuals and families struggled to arrange funerals and burials, apply for aid, administer estates, find new homes and jobs, and deal with a range of other issues stemming from the disaster.[832] To respond to the crisis, the City Bar convened a meeting with leaders from pro bono programs such as VOLS and the Lawyers Alliance, public interest and legal services groups, *probono.net*, and other legal organizations.[833] The outcome of the meeting was the development of a "coordinated and collaborative [response] among all [the legal community's] elements, including the courts, bar associations, legal service organizations, the private bar, in-house counsel, government attorneys, and law schools."[834]

832. *See* ASS'N OF THE BAR OF THE CITY OF NEW YORK FUND, INC. ET AL., PUBLIC SERVICE IN A TIME OF CRISIS: A REPORT AND RETROSPECTIVE ON THE LEGAL COMMUNITY'S RESPONSE TO THE EVENTS OF SEPTEMBER 11, 2001, at 7, 12 (2004) [hereinafter 9/11 REPORT].

833. *See id.* at 12.

834. *Id.* at 9; *see also* Robert Lennon, *Pro Bono Triage*, AM. LAW., Nov. 2001, at 24 (discussing coordinated effort of New York firms and the Association of the Bar of the City of New York to staff legal clinics to assist small businesses at "Ground Zero" after September 11).

The centerpiece was the creation of the "Facilitator Project," which provided clients with an individual lawyer to give comprehensive, ongoing representation on all legal issues arising from 9/11.[835] To launch this project, a meeting was arranged by the City Bar at the law office of Chadbourne & Park, which was attended by major partners from all the city's big firms, as well as prominent in-house counsel.[836] All agreed to designate a "September 11 Coordinator" to organize attorneys within their firms and corporations, and to serve as a liaison with the City Bar.[837] Two firm attorneys were assigned as "case managers" at the City Bar to implement the Facilitator Project, which commenced a comprehensive training program on topics such as death certificates, probate, public aid, unemployment assistance, life insurance, retirement benefits, family law, personal finance, tax, immigration, and landlord-tenant issues.[838] More than 800 lawyers took the facilitator training course, in which they learned how to "conduct a legal inventory, prioritize the client/family's needs, act as a problem solver to represent or refer the client in an exemplary and expeditious manner, and find other experts to assist with special legal needs."[839] In meeting the needs, law firms provided the most volunteers, drawing upon preexisting pro bono structures and combining their resources to develop "economies and efficiencies in their representations."[840] Technology was key, as *probono.net* provided document storage and interactive messaging, while the City Bar used a web-based case referral system.[841] In addition, firms developed a range of written material like the "Helping Handbook—Legal Resources for Families of Victims of the World Trade Center Disaster," to assist Facilitators in their charge.[842] The City Bar trumpeted the spirit of stakeholder collaboration and deemed the project an extraordinary success, providing "a comprehensive textbook on how best to deliver pro bono services!"[843]

However, the reach of pro bono only goes so far. Indeed, what is striking about the 9/11 example is not just the power of professional service, but also the narrowness of its scope. There, the focus was on brief service, referrals, and individual representation in areas where firms had little at stake from a

835. *See* 9/11 REPORT, *supra* note 832, at 11.
836. *See id.* at 14.
837. *See id.*
838. *See id.* at 14, 16.
839. *See id.* at 11.
840. *Id.* at 10.
841. *See id.* at 19–20.
842. *See id.* at 17–18.
843. *Id.* at 4.

business perspective. To underscore this, the City Bar crafted an engagement letter for the Facilitator Project "that defined the scope of the representation to allow law firms to represent 9/11 clients on a range of issues, while simultaneously limiting representation for tort claims and giving the individual client fair notice of that limitation."[844] Thus, while law firms diligently assisted individuals and families probating estates and applying for public benefits, they ruled out the prospect of litigation against possible business targets.

A similar story emerged more recently in New York City's civil lawsuit against the gun industry alleging that its marketing and distribution practices fostered an illegal market in firearms. To match the gun industry's muscle, the City retained New York heavyweight firm Weil, Gotshal & Manges to represent it on a pro bono basis.[845] However, after more than two years of work, the law firm withdrew on the eve of trial, citing "positional conflicts."[846] Apparently, a Smith & Wesson lawyer contacted a corporate client of Weil, Gotshal, & Manges, who immediately "raised questions . . . about whether the gun case might lead to precedents that could later be used against them. With the gun case heating up in later March, the Weil, Gotshal lawyers privately told the city's lawyers that they could no longer continue to work on the case."[847]

Of course, most pro bono cases are not so dramatic. Outside of this type of conflict, private lawyers do a tremendous service representing individual poor clients in routine matters and lending their institutional resources to support the reform agendas of public interest groups. Their volunteer work ranges from the mundane to the transformative and includes matters of intense personal interest and immense social import. But the central dilemma of pro bono remains: A system that depends on private lawyers is ultimately beholden to their interests. This means not just that private lawyers will avoid categories of cases that threaten client interests, but also that they will take on pro bono cases for institutional reasons that are disconnected from the interests of the poor and underserved—and often contrary to them. This is most apparent in the use of pro bono for law firm associate training: Associates who gain skills in the volunteer context spend most of their time using them to vigorously advocate against the interests served through pro bono representation. In so doing, they become zealous

844. *Id.* at 15.
845. *See* William Glaberson, *New York Loses a Top Legal Ally in Suit Over Guns*, N.Y. TIMES, Apr. 17, 2004, at A1.
846. *Id.*
847. *Id.*

partisans for corporate clients—defending them from tort claims, consumer suits, employment and labor grievances, and environmental challenges. The time they spend engaged in pro bono work provides a respite from this world, but does not change it.

There are other drawbacks to the pro bono system. Pro bono lawyers do not invest heavily in gaining substantive expertise, getting to know the broader public interest field, or understanding the long-range goals of client groups. Particularly in contrast to the way big-firm lawyers seek to understand and vigorously advance the goals of their client community, the partiality and narrowness of pro bono representation is striking. And the disparity of the resources devoted to billable versus pro bono work—which, even at the most generous firm, rarely constitutes more than 5 percent of total hours—underscores the vast inequality in legal services that persists. Indeed, there are no parallel resources available to press the interests of marginalized social groups. Legal services is too restricted and nonprofit groups are too financially constrained. This is not accidental. Opponents of the reformist agenda of legal services have championed pro bono as an acceptable alternative,[848] knowing that it does not pose the threat to business interests that an unrestricted legal services would. Marginalized groups, then, are left to depend heavily on volunteer efforts to respond to their needs—a fact that distinguishes them from all of their adversaries, who spend lavishly to purchase the best legal counsel money can buy.

The story of pro bono is still being written. As trends of privatization, volunteerism, and globalization press forward, one can expect pro bono to be a growth industry in the years to come, not simply shaping the American system of free legal services, but informing the discussion about equal access to justice around the world. Questions about pro bono's effectiveness as a model for meeting the legal needs of poor and underserved groups will therefore take center stage. It is important that the advantages of pro bono—its decentralized structure, collaborative relationships, pragmatic alliances, and flexible approaches—receive full attention. Yet these advantages must be carefully weighed against the systemic challenges that pro bono poses: its refusal to take on corporate practice and its dilettantish approach to advancing the interests of marginalized groups. Instead of professional platitudes about the virtues of volunteerism, robust debate is therefore in order—debate that includes a full airing of both the promise and perils of pro bono, and provides a rigorous account of what equal access to justice looks like in practice. To avoid this

848. *See, e.g.*, Kenneth F. Roehn & Peter T. Flaherty, *Legal Disservices Corp.: There Are Better Ways to Provide Legal Aid to the Poor*, 74 POL'Y REV. 1994, *available at* http://www.policyreview.org/fall95/thflah.html.

debate invites the uncritical expansion of pro bono as a stop-gap measure rather than a thoughtful response to the dilemma of unequal legal representation. More fundamentally, the failure to confront pro bono's limitations risks privileging professional interests over concerns of social justice—promoting the image of equal access without the reality.