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The Pro Bono Responsibilities of Lawyers and Law Students

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I. INTRODUCTION

Mark Twain once reminded us that "to do right is noble; to advise others to do right is also noble and much less trouble for yourself." Pro bono too often falls into that category of advice. A wide gap persists between professional rhetoric and professional practice. Bar ethical codes have long maintained that all lawyers have obligations to assist individuals who cannot afford counsel. Yet the percentage of lawyers who actually do so has remained dispiritingly small. Recent estimates suggest that most attorneys do not perform significant pro bono work, and that only between ten and twenty percent of those who do are assisting low-income clients. The average for the profession as a whole is less than a half an hour per week. Few lawyers come close to satisfying the American Bar Association's Model Rules, which provide that "a lawyer should aspire to render at least 50 hours of pro bono public legal services per year," primarily to "persons of limited means or to organizations assisting..."
such persons."¹

The bar's failure to secure broader participation in pro bono work is all the more disappointing when measured against the extraordinary successes that such work has yielded. Many of the nation's landmark public interest cases have grown out of lawyers' voluntary contributions, and for low income clients, pro bono programs are crucial in meeting basic survival needs. For lawyers themselves, such work is similarly important in giving purpose and meaning to their professional lives. Our inability to enlist more attorneys in public service represents a significant lost opportunity for them as well as for the public.

We have missed similar opportunities with law students. In 1996, the American Bar Association amended its accreditation standards to call on schools to "encourage students to participate in pro bono activities and to provide opportunities for them to do so." These revised ABA standards also encourage schools to address faculty pro bono obligations.²

Despite such initiatives, pro bono still occupies a relatively marginal place in legal education. Although most law schools support pro bono in principle, only about 10 percent require any service by students and only a handful impose specific requirements on faculty. At some of these schools, the amounts demanded are quite minimal: less than twenty hours by the time of graduation. While almost all institutions offer voluntary programs, their scope and quality varies considerably. About a third of schools have no law-related pro bono projects or projects involving fewer than 50 participants. In others, only a small minority of each class is involved. In short, most students do not have public service in law as part of their educational experience.³

It is partly for that reason that my initiative as president of the Association of American Law School [AALS] was to create a Commission on Pro Bono and Public Service opportunities. That Commission, which released a preliminary report, Learning to Serve,

at the AALS January 1999 annual meeting, has provided the Association’s first systematic research on what schools are and should be doing to foster cultures of commitment. The hope, which I know is shared by this audience, is that such commitment will trickle up to a broader group of practitioners.4

With that end in view, let me take this opportunity to provide some thoughts about how best to narrow the gap between professional ideals and professional practice. My hope is to provide a brief overview of the rationale for pro bono involvement, the characteristics and experiences that foster such participation, and the strategies most likely to increase it.

II. THE RATIONALE FOR PRO BONO SERVICES

The primary rationale for pro bono contributions rests on two premises: first, that access to legal services is a fundamental need, and second, that lawyers have some responsibility to help make those services available. In this company, it seems unnecessary to belabor the importance of either point. Access to law is the right that protects all other rights. It is particularly critical for the poor, who often depend on legal entitlements to meet basic needs such as food, housing, and medical care. Moreover, social science research confirms that public confidence in the legitimacy of legal processes depends heavily on opportunities for direct participation.5

In most circumstances, those opportunities are meaningless without access to legal assistance. Our justice system is designed by and for lawyers, and lay participants who attempt to navigate without counsel are generally at a disadvantage. Those disadvantages are particularly great among the poor, who typically lack the skills for effective self-representation. Inequalities in legal access compound other social inequalities and undermine our commitments to procedural fairness and social justice.

While most lawyers acknowledge that access to legal assistance is a fundamental interest, they are divided over whether the profession has some special responsibility to help provide that assistance, and if so, whether the responsibility should be mandatory. One

4. AALS Commission, supra note 3.
contested issue is whether attorneys have obligations to meet fundamental needs that other occupations do not share. According to some lawyers, if equal justice under law is a societal value, society as a whole should bear its cost. The poor have fundamental needs for food and medical care, but we do not require grocers or physicians to donate their help in meeting those needs. Why should lawyers' responsibilities be greater?

One answer is that the legal profession has a monopoly on the provision of essential services. Lawyers have special privileges that entail special obligations. In the United States, attorneys have a much more extensive and exclusive right to provide legal assistance than attorneys in other countries, and the American bar has closely guarded that prerogative. Restrictions on lay competition have helped to price services out of the reach of many consumers. Under these circumstances, it is not unreasonable to expect lawyers to make some pro bono contributions in return for their privileged status. Nor would it be inappropriate to expect comparable contributions from other professionals who have similar monopolies over provision of critical services.6

An alternative justification for imposing special obligations on lawyers stems from their special role in our governance structure. As a New York bar commission report explained, lawyers provide "justice [which is]...nearer to the heart of our way of life...than services provided by other professionals. The legal profession serves as indispensable guardians of our lives, liberties and governing principles."7 Because lawyers occupy such a central role in our justice system, there is also particular value in exposing them to how that system functions, or fails to function, for the have nots. Pro bono work offers many attorneys their only direct contact with what passes for justice among the poor. To give broad segments of the bar some experience with poverty-related problems and public interest causes may lay critical foundations for change.

A final justification for pro bono work involves its benefits to lawyers individually and collectively. Those benefits extend beyond the enormous personal satisfaction that can accompany such work. Particularly for young attorneys, pro bono activities also can pro-


pro bono responsibilities

pro bono responsibilities

provide valuable training, trial experience, and professional contacts. Through such activities, lawyers can develop capacities to communicate with diverse audiences and build problem solving skills. Involvement with community groups, charitable organizations, and public interest causes is a way for attorneys to expand their perspectives, enhance their reputations, and attract paying clients. It also is a way for the bar to improve the public standing of lawyers as a group. In one representative ABA poll, nearly half of Americans believed that providing free legal services would improve the profession's image.8

For all these reasons, the vast majority of surveyed lawyers believe that the bar should provide pro bono services. However, as noted earlier, only a minority in fact offer such assistance and few of their efforts aid low income clients. The reasons do not involve a lack of need. Studies of low-income groups find that well over three-quarters of their legal problems remain unaddressed. Studies cutting across income groups estimate that individuals do not obtain lawyers' help for between 30 and 40 percent of their personal legal needs. Moreover, these studies do not include many collective problems where attorneys' services are often crucial, such as environmental risks or consumer product safety.9

Although many lawyers acknowledge the problem, they oppose requirements to address it. Opponents to mandatory pro bono raise both moral and practical objections. As a matter of principle, some lawyers insist that compulsory charity is a contradiction in terms. From their perspective, requiring service would undermine its moral significance and compromise altruistic commitments.

There are several problems with this claim, beginning with its assumption that pro bono service is "charity." As the preceding discussion suggested, pro bono work is not simply a philanthropic exercise; it is also a professional responsibility. Moreover, in the small number of jurisdictions where courts now appoint lawyers to provide uncompensated representation, no evidence indicates that voluntary assistance has declined as a result. Nor is it self-evident that most lawyers who currently make public service contributions


would cease to do so simply because others were required to join them. As to lawyers who do not volunteer but claim that required service would lack moral value, David Luban has it right. "You can't appeal to the moral significance of a gift you have no intention of giving."  

Opponents' other moral objection to mandatory pro bono contributions involves the violation of lawyers' own rights. From critics' vantage, conscripting attorneys is a form of "involuntary servitude" and a taking of property without just compensation.

Neither the legal nor the moral basis for such objections is convincing. A well-established line of precedent holds that thirteenth amendment prohibitions extend only to physical restraint or a threat of legal confinement, and that uncompensated public service requirements are permissible as long as the amounts are not unreasonable. From a moral perspective, requiring the equivalent of an hour a week of uncompensated assistance hardly seems like slavery. Michael Millemann puts the point directly:

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

The stronger arguments against pro bono obligations involve pragmatic rather than moral concerns. Many opponents who support such obligations in principle worry that they would prove ineffective in practice. A threshold problem involves defining the services that would satisfy a pro bono requirement. If the definition is broad, and encompasses any charitable work for a nonprofit organization or needy individual, then experience suggests that poor people will not be the major beneficiaries. Most lawyers have targeted their pro bono efforts to friends, relatives, or matters de-


12. Millemann, supra note 10, at 70.
signed to attract or accommodate paying clients, such as hospitals, museums, and churches. By contrast, if a pro bono requirement is limited to the low-income clients given preferred status in the ABA's current rule, then that definition would exclude many crucial public interest contributions, such as work for environmental, women's rights, or civil rights organizations. Any compromise effort to permit some but not all charitable groups to qualify for pro bono credit would bump up against charges of political bias.¹³

A related objection to mandatory pro bono requirements is that lawyers who lack expertise or motivation to serve underrepresented groups will not provide cost-effective services. In opponents' view, having corporate lawyers dabble in poverty cases is an unduly expensive way of providing what may be incompetent or insensitive assistance. The performance of attorneys required to accept uncompensated appointments in criminal cases does not inspire confidence that unwillingly conscripted practitioners would provide adequate representation.¹⁴

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

Those arguments have considerable force, but they are not as conclusive as critics often assume. It is certainly true that some practitioners lack skills and motivation to serve those most in need of assistance. But the current alternative is scarcely preferable. If a matter is too complex for a non-specialist lawyer, then those who cannot afford any attorney are unlikely to do better on their own. To be sure, providing additional government subsidized legal aid by poverty lawyers would be a more efficient way of increasing services than relying on reluctant dilettantes. But the budget increase


that would be necessary to meet existing demands does not seem plausible in this political climate. Nor is it likely, as critics claim, that requiring pro bono contributions would divert attention from the problem of unmet needs. Whose attention? Conservatives who have succeeded in curtailing legal aid funds do not appear much interested in increasing representation for poor people, whether through pro bono service or government-subsidized programs. And as earlier discussion suggested, exposing more lawyers to the needs of poverty communities might well increase support for crucial reform efforts.

Moreover, mandatory pro bono programs could address concerns of cost-effectiveness through various strategies. One option is to allow lawyers to buy out of their required service by making a specified financial contribution to a legal aid program. Another possibility is to give credit for time spent in training. Many voluntary pro bono projects have effectively equipped participants to provide limited poverty-law services through relatively brief educational workshops, materials, and accessible backup assistance. 15

To make adequate judgments about mandatory pro bono, we need more experimentation and more research on the few local programs now being administered. But in the absence of further data, there is strong argument for trying pro bono requirements, even if they cannot be fully enforced. At the very least, such requirements would support lawyers who want to participate in public interest projects but work in organizations that have failed to provide adequate resources or credit for these efforts. As to lawyers who have no interest in such work, a rule that allowed financial contributions to substitute for direct service could materially assist underfunded legal aid organizations.

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

III. THE ORIGINS OF PRO BONO COMMITMENTS

Despite the substantial scholarly literature and bar resources focusing on pro bono contributions, surprisingly little attention centers on their origins. Few systematic attempts have been made to explore the roots of commitment among public-interest or pro bono lawyers, and virtually none have addressed law students. Nor have there been significant efforts to draw on research concerning altruism and volunteer activity among the general public for insights relevant to the legal profession.16

My own contributions toward filling that void are detailed elsewhere in a recent symposium on the delivery of legal services.17 For present purposes, let me briefly summarize a few key points about the motivations and characteristics of volunteers. The limited evidence available indicates that attorneys' public service contributions are influenced by the same range of intrinsic and extrinsic factors that account for voluntary assistance by other individuals. Intrinsic factors include the personal characteristics, values, and attitudes that influence decisions to help others. Extrinsic factors involve the social rewards, reinforcement, costs, and other situational characteristics that affect voluntary assistance.18

Of the intrinsic factors linked to volunteer activity, two personal characteristics appear most significant: a capacity for empathy and a sense of human or group solidarity. Socialization of children and young adults clearly plays an important role in encouraging these characteristics. Students who participate in volunteer activities and observe such participation by parents or other admired role models are much more likely to volunteer later in life than individuals who lack these experiences. And those who observe others' failure to assist people in need similarly tend to replicate such behavior. In this, as in other contexts, actions speak louder than

16. For the most comprehensive effort, and discussion of the absence of such research, see Carrie Menkel-Meadow, Causes of Cause Lawyering, in CAUSE LAWYERING 31, 38 (Austin Sarat & Stuart Scheingold eds., 1998).
words and example works better than exhortation. 19

Other extrinsic factors also influence the likelihood of volunteer assistance. Such work presents obvious benefits, including opportunities to gain knowledge, skills, and personal contacts. Those who receive a specific request for aid or direct personal exposure to the needs of others have much higher rates of assistance than those who do not. Conversely, responsiveness is likely to decrease where costs are high in relation to benefits because of the time required or the controversial nature of the activity. 20

Taken together, these research findings offer some useful insights about pro bono programs for lawyers and law students. As a threshold matter, the capacities of even the best designed programs should not be overstated. By the time individuals launch a legal career, it is too late to alter certain personal traits and experiences that affect public service motivations. If these formative influences are lacking, pro bono programs may have limited impact.

Yet while the potential effectiveness of such programs should not be overestimated, neither should it be undervalued. The preceding research suggests that well-designed strategies by law schools, bar associations, the law firms could significantly affect pro bono commitments. A request for involvement, coupled with an array of choices that match participants' interests with unmet needs, is likely to increase participation. Providing face-to-face exposure to the human costs of social problems could prove similarly


20. E. Gil Clary & Mark Snyder, A Functional Analysis of Altruism and Prosocial Behavior: The Case of Volunteerism in PROSOCIAL BEHAVIOR, supra note 19, at 119, 125; Smith, supra note 19, at 251-52; Robert Coles, THE CALL OF SERVICE 93-94 (1995); Menkel-Meadow, supra note 16, at 59, n.57; Mansbridge, supra note 18, at 35; Oliner and Oliner, supra note 19, at 135-36. For exposure to need, see Alfie Kohn, THE BRIGHTER SIDE OF HUMAN NATURE 68 (1990); Hoffman, supra note 19, at 82; Janusz Reykowski, Motivation of Prosocial Behavior, in COOPERATION AND HELPING BEHAVIOR: THEORIES AND RESEARCH 358-63 (Valerian J. Derlega & Janusz Grzelak eds., 1982).
important. As Arthur Koestler put it: “Statistics don’t bleed.”21 Pro bono commitments can be further reinforced by educational efforts that focus attention on the urgency of unmet needs and on the profession’s obligation to respond. Other incentives could include awards, publicity, recognition on academic transcripts and credit towards billable hour requirements. The point of all these efforts should be to help participants see pro bono service as a crucial part of their professional identity.

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

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

Similar tradeoffs are likely under voluntary pro bono initiatives. Their advantages are readily apparent. By reinforcing participants’ sense of altruism, such programs may foster deeper moral commitments than mandatory approaches. Those who volunteer also are likely to pick an area of practice where they are competent or wish to become so. Those compelled to serve may lack adequate choices or motivation. On the other hand, if purely elective programs fail to attract widespread participation, they undermine the message that pro bono service is a professional responsibility. In the absence of a formal requirement, some law firms and law schools may remain unwilling to provide appropriate pro bono re-

sources or credit. And individuals who might learn most from direct exposure to unmet needs may be least inclined to volunteer.

How these tradeoffs will balance out in particular contexts is difficult to predict. Any adequate assessment would require much more comparative review about mandatory and voluntary programs than is currently available. However, the experience of law school pro bono programs yields at least some basis for comparative evaluation.

IV. THE RATIONALE FOR LAW SCHOOL PRO BONO PROGRAMS

The primary justifications for pro bono service by law students parallel the justifications for pro bono service by lawyers. Most leaders in legal education agree that such service is a professional responsibility and that their institutions should prepare future practitioners to assume it. Advocates of pro bono programs believe that public service experiences encourage future involvement, and that they have independent educational value. What limited evidence is available supports those views. Schools with pro bono requirements have found that between two-thirds and four-fifths of students report that their experience has increased the likelihood that they will engage in similar work as practicing attorneys. However, no systematic studies have attempted to corroborate such claims by comparing the amount of pro bono work done by graduates who were subject to law school requirements and graduates who were not. Nor do we have research comparing the effectiveness of such required programs with well-run volunteer opportunities.22

Yet there are reasons to support pro bono initiatives whatever their effects on later public service. These initiatives have independent educational value. Like other forms of clinical and experiential learning, participation in public service helps bridge the gap between theory and practice, and enriches understanding of how law relates to life. For students as well as beginning lawyers, pro bono work often provides valuable training in interviewing, ne-

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22. Ninety-five percent of deans responding to the AALS survey agreed that instilling pro bono obligations is an important educational goal. AALS, supra note 3. For surveys, see John Kramer, Mandatory Pro Bono at Tulane Law School, National Association for Public Interest Law, CONNECTION CLOSEUP 1 Newsletter, Sept. 30, 1991, 1-2; Committee on Legal Assistance, Mandatory Law School Pro Bono Programs: Preparing Students to Meet their Ethical Obligations, 50 THE RECORD, 170, 176 (1995); AALS Focus Group Interview, Chicago, June 24-25, 1998.
gотiating, drafting, problem solving and working with individuals from diverse backgrounds. Aid to clients of limited means provides exposure to the urgency of unmet needs and to the law's capacity to cope with social problems. Students also can get a better sense of their interests and talents, as well as a focus for further coursework and placement efforts. And as this audience knows, pro bono programs offer crucial opportunities for cooperation with local bar organizations and for outreach to alumni who can serve as sources, sponsors, and supervisors for student projects. Successful projects can contribute to law school efforts in development, recruitment, and community relations. 23

Yet too many law schools have failed to realize the benefits. Only about a quarter to a third of their students participate in law-related pro bono programs. Average time commitments are quite modest and some seem intended primarily as resume padding. 24

Not all faculty or administrators seem interested in setting a better example. Most law schools do not even have a policy requiring or encouraging professors to engage in such work. Nor does expanding pro bono participation appear to be a priority at most institutions. About two-thirds of law school deans report satisfaction with the level of pro bono participation at their schools. Given the absence of involvement among most students and the absence of data concerning faculty, that level of satisfaction is itself somewhat unsatisfying. But it is scarcely surprising. Why should deans see a problem if no one else does? And at most institutions, no one is complaining. Nor is the extent of any problem plainly visible. Neither ABA accreditators nor AALS membership review teams ask for specific information on pro bono contributions by students and faculty. The absence of such information makes it easy for administrators to draw unduly positive generalizations from involvement that is easily visible and especially vivid. High profile cases by faculty or student clinics, or widespread participation in public interest fundraising events are likely to skew perceptions in positive directions. 25

23. Law School Affinity Group, FROM THE CLASSROOM TO THE COMMUNITY: ENHANCING LEGAL EDUCATION THROUGH PUBLIC SERVICE AND SERVICE LEARNING 5 (Corporation for National Service, n.d.). In the AALS survey, over 90 percent of deans agreed that pro bono activities had provided valuable good will in the community, and two-thirds felt that such work had proven similarly valuable with alumni, AALS, supra note 3.

24. AALS, supra note 3.

25. Id.
So too, although most alumni and central university administrators undoubtedly support public service in principle, they have not translated rhetorical support into resource commitments. Public service initiatives generally seem less pressing than other budget items more directly linked to daily needs and national reputations. National rankings, such as those by *U.S. News and World Report* have become increasingly important. And not only are pro bono opportunities excluded from the factors that determine a school's rank, they compete for resources with programs that do affect its position.

Meeting these challenges is no small task, and appropriate strategies will vary across institutions. Designing an appropriate program requires schools to assess their own priorities, resources, community networks, faculty support, and student culture. But certain strategies are likely to prove beneficial no matter what kind of program is in place.

The most obvious and essential initiatives must come from law school administrations. They need to provide adequate resources, recognition, and rewards for public service. At a minimum, as the Association of American Law Schools’ Commission has recommended, law schools should seek to make available for every student at least one well-supervised pro bono opportunity and insure that the great majority of students participate. The AALS and ABA should also require specific information about pro bono participation as part of law school accreditation and membership processes.  

Moreover, pro bono strategies need to be part of a broader effort to increase professional responsibility for public interests. As research on legal education has long noted, the “latent curriculum” at most law schools works against that sense of responsibility. Concerns regarding legal ethics and access to justice are not well integrated in core courses. Traditional teaching methods offer a steady succession of hard cases and doctrinal ambiguities that leave many students skeptical at best and cynical at worst; “there is always an argument the other way and the devil often has a very good case.”

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26. *Id.*

Legal coursework too often seems largely a matter of technical craft, divorced from the broader concerns of social justice that led many students to law school.

Countering these forces will require a substantial commitment; public services initiatives are only part of the reform agenda necessary in legal education. So, too increases in lawyers' pro bono work are only part of the answer to the nation's unmet legal needs. Yet while we should not overstate the value of public service initiatives, neither should we overlook their potential. As CUNY Law School Dean Kristin Glen notes, exposing individuals to pro bono and public interest opportunities "reinforces their best instincts and highest aspirations." By making those opportunities a priority, lawyers and legal educators can reinforce the same aspirations in themselves.
