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Introduction

*What Good Are Lawyers?*

*Scott L. Cummings*

INTRODUCTION

What good are lawyers? It depends, of course, on whom you ask. Most Americans are ambivalent: When they are in need of help, they call a lawyer – and when they do, they are, more often than not, happy with the services that their lawyers provide.<sup>1</sup> Nonetheless, Americans generally hold lawyers as a group in low repute, suspecting that they are more concerned with collecting fees than serving the public good.<sup>2</sup>

This public cynicism reflects a fundamental paradox at the heart of the legal profession. The very notion that lawyers are members of a “profession” suggests a delicate balance of incentives and duties that pull in different directions. In the United States (as in most countries), lawyers are freely engaged in the commercial enterprise of rendering services for a fee. They are permitted – and indeed encouraged – to make money, often lots of it,<sup>3</sup> within the boundaries of broad rules, such as those limiting overly aggressive (or misleading) solicitation and advertising.<sup>4</sup> As professionals, they are accorded wide discretion to define their own standards for admission and rules of conduct in order to promote craft expertise and quality service. In exchange for this privilege, lawyers are expected to embrace a set of public values – a code of “professionalism” defined by a commitment to competence, independence, and public service – distinguishing them from “mere” commercial actors. They are asked, in short, to be “public citizens” with a special obligation to promote the “administration of justice.”<sup>5</sup> This dual status – in the market, but above it; diligent servants of clients, but also special guardians of the “public interest” – raises our

<sup>1</sup> LEO J. SHAPIRO & ASSOCIATES, PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS 19 (Am. Bar Ass’n 2002), *available at* <http://www.abanet.org/litigation/lawyers/publicperceptions.pdf>.

<sup>2</sup> *Id.* at 7.

<sup>3</sup> In 2009, the average profit per partner at the Am Law 100 firms was \$1.26 million.

<sup>4</sup> See MODEL RULES OF PROF’L CONDUCT R. 7.2, 7.3.

<sup>5</sup> MODEL RULES OF PROF’L CONDUCT, PREAMBLE: A LAWYER’S RESPONSIBILITIES.

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expectations of lawyer conduct. And it inevitably causes disappointment when our expectations are not met.<sup>6</sup>

Over the past half-century, scholars have struggled with the fundamental professional paradox and the disappointment that it has produced. A core debate within this literature focuses on which facet of legal practice – the public-regarding or the self-interested, the political or the commercial – constitutes the central aim of the professional project.<sup>7</sup> Put simply, is the professional project a political one – defined by the protection and extension of fundamental rights and equality under law – or is it instead a commercial one – determined by lawyers' material interest in maximizing the return on their services? Do lawyers stand for justice? Or are they an impediment to its full realization?

The answers to these questions are more complex than such simple dichotomies suggest. What we know is that different lawyers, at different times, in different places stand for different projects. This is true both within countries and across them. No one would mistake the central project of contemporary American lawyers with that of their Pakistani counterparts, many of whom so prominently took to the streets and risked their lives in 2007 to protest General Musharraf's disregard for judicial independence. Professional projects, therefore, vary based on political and economic conditions, and change over time: It matters whether lawyers operate in a less developed authoritarian state or in a highly developed liberal democratic one, whether they are part of a political epoch powered by the struggle for new democratic possibilities or mired in affluent complacency. Projects, like the profession itself, are also internally differentiated. Whereas we may speak of a plurality of legal professions, we may also identify a plurality of competing projects – some oriented toward more money and power, others toward more equality and empowerment. This does not mean that there are no commonalities or structural trends. Nor does it suggest the absence of a central professional logic operating under certain conditions – such as an advanced capitalist economy conjoined with a liberal democratic state. To the contrary, our recognition of competing projects implies that there are winners and losers, and that we may ultimately tally score.

It may also be the case that the *same* lawyers simultaneously pursue different – and perhaps – competing projects. For instance, their actions may both enhance civil and political rights while undercutting economic and social ones; they may both promote access to justice through pro bono service while undermining it through practice restrictions. This duality also leaves open the possibility that individual lawyers may *believe* that they are advancing the cause of justice, when other observers would argue that they in fact are thwarting it. This disagreement could be a result of

<sup>6</sup> See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 1 (1998).

<sup>7</sup> RICHARD L. ABEL, *AMERICAN LAWYERS* 20 (1989).

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contested normative views – a liberal lawyer’s project clashes with her conservative counterpart’s. It could also be a product of false consciousness on the part of lawyers, whose subjective beliefs about the social value of their professional contributions could be falsified by objective measurement.

This book is about the role of lawyers in constructing a just society. Its central objective is to provide a deeper understanding of the relationship between lawyers’ commercial aims and public aspirations. Toward this end, it presents original theoretical and empirical research by some of the world’s leading scholars of the legal profession addressing the field’s fundamental question: whether lawyers can transcend self-interest to meaningfully contribute to systems of political accountability, ethical advocacy, and distributional fairness. Drawing on interdisciplinary and comparative perspectives, the book’s contributors offer evidence that although justice is possible, it is never complete. And in the ongoing struggle for justice, lawyers are complicated allies, often necessary – but never sufficient – for its achievement. As the essays demonstrate, lawyers take the most powerful stands for justice claims that are compatible with their collective interests, though episodically there are some who emerge as agents of transformative politics. Ultimately, how much – and what type of – justice prevails depends on how lawyers respond to, and reshape, the political and economic conditions in which they practice. The possibility of justice is diminished as lawyers pursue self-regulation in the service of power; it is enhanced when lawyers mobilize – in the political arena, workplace, and law school – to contest it.

#### PRACTICAL CONTEXT: PROFESSIONAL CRISIS AND THE POSSIBILITY OF JUSTICE

“You never want a serious crisis go to waste.”<sup>8</sup> As political pundits know, crises are useful because they can convey messages – in simple, powerful terms – that expose underlying vulnerabilities, highlight the urgency of reform, and mobilize outrage to effectuate change. Reformers of the U.S. legal profession have long followed this piece of political wisdom.<sup>9</sup> Watergate helped spawn the American Bar Association (ABA) Model Rules of Professional Conduct and the modern system of professional ethics training in law school.<sup>10</sup> Enron brought significant changes to the professional rules governing when lawyers can break corporate client confidences.<sup>11</sup>

<sup>8</sup> *In Crisis, Opportunity for Obama*, WALL ST. J., Nov. 21, 2008, at A2 (quoting Rahm Emanuel, White House Chief of Staff).

<sup>9</sup> Austin Sarat, *Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics and Civility in Litigation*, 67 FORDHAM L. REV. 809 (1998–1999).

<sup>10</sup> See Carrie Hempel & Carroll Seron, *An Innovative Approach to Legal Education and the Founding of the University of California, Irvine School of Law* (in this volume).

<sup>11</sup> MODEL RULES OF PROF’L CONDUCT R. 1.13.

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The idea for this volume came at a moment of “crisis” for the legal profession in the United States and many other countries around the world caused by the global financial meltdown of 2008. Crisis talk, of course, is as old as the profession itself, so one should not overstate the peril of the current moment or rush to proclaim the end of old paradigms.<sup>12</sup> However, crises should serve a purpose and not be allowed to quietly recede in the rush to return to business as usual. In particular, they should be evaluated not just for what they demonstrate about how systems respond to extreme shock, but for what they reveal about the underlying distortions and contradictions that allowed pressure to build and the shock to have such destabilizing consequences. In this spirit, I describe the evolution of the U.S. model of dispensing “equal justice,” not as a representative case, but a cautionary tale with important lessons about the impact of the professional project on the quantity and quality of legal services.

The 2008 recession posed a fundamental challenge to both the private and public interest sectors in the United States – and highlighted potential new synergies between them. The large law firm – the pinnacle of professional wealth and power – underwent a major restructuring characterized by partner terminations, salary reductions, and associate layoffs and deferrals. In the face of this upheaval, many large firms turned to temporary public interest placements as a way station for incoming or currently underemployed associates.<sup>13</sup> Large firms also increased their pro bono contributions, in part as a way to train underutilized associates. Yet, despite this short-term infusion of resources, legal aid and public interest organizations struggled to respond to low-income and underserved community needs, which were exacerbated by the recession. Public interest groups confronted their own deep staff and infrastructure cuts caused by a decline in law firm donations, foundation grants, and federal and state funding. At this moment of crisis, the contours – and vulnerabilities – of the U.S. public interest law system were thrown into sharp relief: Dependent on the monetary and volunteer resources of the private bar, nonprofit public interest groups rode their wave of support in good times and braced against their retrenchment in bad. How did this come to pass?

The seeds of this dilemma were sown in the previous decades by important changes in the structure of the American legal profession that expanded the role of the private sector in the delivery of public interest law services – both legal aid and

<sup>12</sup> Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK L. REV. 549 (1996).

<sup>13</sup> See Susan Dominus, *\$80,000 for Year Off from Law? She'll Take It!*, N.Y. TIMES, Apr. 13, 2009, at A1; Jonathan D. Glater, *The Lawyer Squeeze: Layoffs and Closings in a Field Thought to Resist Downturns*, N.Y. TIMES, Nov. 12, 2008, at B1; Karen Sloan, *Trying to Make Deferrals into Something Positive*, NAT'L L.J., Apr. 13, 2009, at 6.

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cause-oriented. One trend has been the relative growth in private practice. In the United States – as in many other countries around the world<sup>14</sup> – the number of lawyers has increased significantly since mid-century: more than fourfold, from 221,605 in 1951 to 1,066,328 in 2000,<sup>15</sup> and then to 1,180,386 in 2008.<sup>16</sup> This increase, which is more than double the rate of population growth, has rested on a fragile foundation. First, there has been an increase in entry to the profession. Law school enrollment – powered by the dramatic rise in the admission of women<sup>17</sup> – has grown from slightly more than 17,000 in 1951 to roughly 43,500 in 2000; by 2008, enrollment was just less than 50,000.<sup>18</sup> As student enrollment increased, so did tuition and, as a result, debt: increasing by 2005 to an average of over \$50,000 for graduates of public law schools and nearly \$80,000 for graduates of private ones.<sup>19</sup> Saddled with more debt after graduation, greater numbers entered private practice, which grew relative to the nonprofit and government sphere. And within private practice, the large firm, powered by its tournament model of growth,<sup>20</sup> expanded in relation to other private practice sites – from housing 7 percent of private sector lawyers in 1980 to 28 percent in 2000.<sup>21</sup>

During this time, law firms have become larger and more profitable. In the late 1950s, there were thirty-eight law firms with over fifty lawyers.<sup>22</sup> By 1990, over 600 firms had more than sixty lawyers and several had more than 1,000.<sup>23</sup> Not only did

<sup>14</sup> See Marc Galanter, *More Lawyers than People: The Global Multiplication of Legal Professionals* (in this volume).

<sup>15</sup> CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 1 (2004). The success of supply control in the first half of the twentieth century artificially constrained the number of lawyers per capita; as this control eroded in the second half of the century, it helped unleash dramatic growth. See ABEL, *supra* note 7, at 280 tbl. 22.

<sup>16</sup> Am. Bar Ass'n, Lawyer Demographics, available at [http://new.abanet.org/marketresearch/PublicDocuments/Lawyer\\_Demographics.pdf](http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf).

<sup>17</sup> CARSON, *supra* note 15, at 3.

<sup>18</sup> BETTE H. SIKES, CLARA N. CARSON & PATRICIA GORAL, THE 1971 LAWYER STATISTICAL REPORT 20 (1972); Am. Bar Ass'n, Enrollment and Degrees Awarded, 1963–2008 Academic Years, available at <http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf>. On the other end of the career cycle, more lawyers are living and working longer, leading to the growth of lawyers 65 or older. Leigh Jones, *Law Firm Retirement Policies Expected to Be Hot Issue at Annual ABA Meeting*, NAT'L L.J., Aug. 7, 2007 (“By some estimates, a full quarter of the country’s 1 million attorneys – or 250,000 – will be at least 65 by 2011.”); see also Marc Galanter, “Old and in the Way”: *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081 (1999).

<sup>19</sup> EQUAL JUSTICE WORKS, FINANCING THE FUTURE: RESPONSES TO THE RISING DEBT OF LAW STUDENTS 3 (2006).

<sup>20</sup> MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1994).

<sup>21</sup> CARSON, *supra* note 15, at 8.

<sup>22</sup> See GALANTER & PALAY, *supra* note 20, at 46.

<sup>23</sup> 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).

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large firms grow in number, they also grew in size through mergers, satellite offices, and aggressive entry-level and lateral hiring.<sup>24</sup> In 1991, the average size of the Am Law 100 law firms was 375; by 2001, it was 621 and by 2008, 820.<sup>25</sup> As the big firms grew bigger, they also performed better, evident in increasing gross revenues and profits per partner.<sup>26</sup> Associate salaries also rose dramatically; in turn, billable hours increased.<sup>27</sup>

As large firms grew larger and more influential, they also came to play a greater role in the public interest law system. Indeed, one of the most significant trends over the past two decades has been the rise of pro bono activity, powered by the institutionalization of large-firm pro bono programs.<sup>28</sup> At the large-firm level, recent research on Am Law 200 firms shows that the total pro bono hours produced by such firms increased by nearly 80 percent between 1998 and 2005, while the per-lawyer average increased by five hours.<sup>29</sup> Between 2005 and 2008, total pro bono hours increased nearly 50 percent and the average hours per attorney grew by ten hours.<sup>30</sup> Among large firms, economic performance is positively correlated with pro bono service.<sup>31</sup> Firms that “do well” generally are better at “doing good.”

The rise of pro bono has resulted from interlocking trends. First, law firm growth itself laid the groundwork for an institutionalized structure of pro bono activity. As firms grew bigger and more bureaucratic, it became harder to maintain decentralized systems with lawyer-initiated volunteer work, in part because of the difficulties it posed for tracking cases.<sup>32</sup> Such systems were ill-suited to prevent potential conflicts

<sup>24</sup> See Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 9 (1999).

<sup>25</sup> 2009 Am Law 200 Data (on file with author); 2002 Am Law 200 Data (on file with author); 1992 Am Law 200 Data (on file with author).

<sup>26</sup> Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 37 (2004).

<sup>27</sup> *Id.*

<sup>28</sup> See *id.*

<sup>29</sup> Steven A. Boutcher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw 200*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 145 & fig. 7.2 (Robert Granfield & Lynn Mather eds., 2009).

<sup>30</sup> Total hours increased from 3,768,510 to 5,567,231; average hours grew from 38.25 to 48.77. The average hour-per-lawyer figure includes those firms that are in the ranking but did not report data and therefore are included as reporting 0 hours. If the average is taken based only on firms that reported data, the increase is 12 hours, from 40.48 in 2005 to 52.73 in 2008. Compare 2009 Am Law Pro Bono Survey (on file with author), with 2006 Am Law Pro Bono Survey (on file with author).

<sup>31</sup> See Boutcher, *supra* note 29, at 149; see also Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79 (2007). For other discussions of the relationship between profitability and pro bono contributions, see Debra Burke et al., *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61, 82–83 (1994); Marc Galanter & Thomas Palay, *Public Service Implications of Evolving Law Firm Size and Structure*, in THE LAW FIRM AND THE PUBLIC GOOD 19, 44 tbl.2–3, 45 tbl.2–4, 46 (Robert A. Katzmann ed., 1995).

<sup>32</sup> See Cynthia Fuchs Epstein, *Stricture and Structure: The Social and Cultural Context of Pro Bono Work in Wall Street Firms*, 70 FORDHAM L. REV. 1689, 1695 (2002) (suggesting that a “laissez faire” approach to pro bono activity works against substantial commitment).

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of interest. As large firms became increasingly organized around departments, specialties, and functional roles, the institutionalization of formal, centralized pro bono programs seemed less of a leap.<sup>33</sup> Firm growth also created more revenue and “organizational slack,” which could be used to subsidize additional unpaid work.<sup>34</sup> Finally, increases in size, particularly at the bottom of the firm pyramid, created new challenges for professional development. Large numbers of associates required opportunities for training and significant responsibility. Pro bono work was a way to provide them.

The rise of organized pro bono was also linked to a rise in demand. Although direct historical comparisons are not possible, the available data point to growth in both the number and size of public interest law groups over the movement’s lifespan. In the mid-1970s, there were roughly 100 public interest law groups (excluding legal aid organizations) with approximately 6 attorneys per group;<sup>35</sup> in addition, there were over 850 legal aid offices with 3 attorneys per office.<sup>36</sup> According to Nielsen and Albiston’s most recent figures, the number of public interest law organizations, including legal aid groups, has surpassed 1,000, and the average number of lawyers per group has nearly doubled since 1974, from 7 to 13.<sup>37</sup> Based on the early data, a rough estimate of the total size of the public interest bar in the mid-1970s was 3,600; in contrast, projecting from the 2004 data places the total figure at 13,000. During this period, the proportion of public interest lawyers in the total lawyer population has remained relatively constant at about 1 percent.

As the public interest law sector has developed, it has confronted economic challenges that have heightened the importance of private sector alliances. In Rhode’s study of public interest law groups, almost all reported major challenges raising revenue, particularly for general operating expenses and litigation.<sup>38</sup> The strain on resources has created challenges in recruiting and retaining talented public interest lawyers whose salaries are low (at \$38,500, average entry-level salaries of public interest lawyers are the lowest of any practice setting according to the *After the JD*

<sup>33</sup> For a general overview of the transformation of large firms, see ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 172–80 (1988).

<sup>34</sup> Sandefur, *supra* note 31, at 93 (quoting RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 37 [1963]).

<sup>35</sup> NAN AARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* (1989) (reporting as of 1975).

<sup>36</sup> EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* 188 (1978) (reporting as of 1972).

<sup>37</sup> Laura Beth Nielsen & Catherine Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591 (2006).

<sup>38</sup> Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2056–57 (2008).



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research<sup>39</sup>) and whose debt loads have increased.<sup>40</sup> In the face of economic constraints, public interest lawyers have relied heavily on pro bono support for their work. Rhode's study showed that about four-fifths of leading public interest groups reported extensive or moderate collaboration with the private bar.<sup>41</sup>

Constraints on federally funded legal aid have also contributed to greater demand for pro bono services. The erosion in legal aid for the poor has resulted from reductions in federal funding and restrictions on advocacy. By 1996, congressional authorization for legal services had fallen to a level 50 percent below its peak in 1980.<sup>42</sup> That same year, Congress banned federally funded programs from engaging in a range of activities including litigation involving class actions, the representation of aliens, and recovery of court-awarded attorney's fees.<sup>43</sup> Legal services programs receiving federal subsidies were also prohibited from using nonfederal funds to engage in any of the banned activities.<sup>44</sup> Such limitations forced poverty lawyers to seek other revenue sources.<sup>45</sup> Despite successful efforts to diversify funding, the current civil legal aid system has remained chronically underfunded and, as a result, unable to adequately serve its client constituency.<sup>46</sup>

<sup>39</sup> RONIT DINOVTIZER ET AL., AM. BAR FOUND. & NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 43 (2004). Public interest salaries have declined in relation to law firm salaries. In the early 1970s, the ratio of private firm to public interest salaries was 1.5:1. In 2004, the ratio of private firm (more than 20 lawyers) to public interest salaries was roughly 3:1; the ratio of big firm (more than 250) to public interest salaries was 3.6:1. Compare Neil K. Komisar & Burton A. Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 80, 83 (Burton A. Weisbrod et al. eds., 1978), and DINOVTIZER ET AL., *supra*, at 43.

<sup>40</sup> EQUAL JUSTICE WORKS, *supra* note 19, at 1.

<sup>41</sup> Rhode, *supra* note 38, at 2070.

<sup>42</sup> See Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1222 (2002). As of 2008, federal funding was nearly fifty-three percent below what it was in 1980 when adjusted for inflation. ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, *CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009*, at 13 (2009), available at <http://www.clasp.org/admin/site/publications/files/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-2.pdf>.

<sup>43</sup> Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a) (7), (11), (13), 110 Stat. 1321, 1321-53 to -55.

<sup>44</sup> See BRENNAN CTR. FOR JUSTICE, *RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER* 7 (2000), available at [http://brennan.3cdn.net/3cbbeedd52806583b1\\_0sm6blo8g.pdf](http://brennan.3cdn.net/3cbbeedd52806583b1_0sm6blo8g.pdf).

<sup>45</sup> Primary sources include grants from state and local governments, interest on lawyers' trust fund accounts, and private donors. See ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, *CIVIL LEGAL AID IN THE UNITED STATES: AN OVERVIEW OF THE PROGRAM IN 2003*, at 4 (2003), available at [www.clasp.org/admin/site/publications/files/0153.pdf](http://www.clasp.org/admin/site/publications/files/0153.pdf); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 908 (2009).

<sup>46</sup> LEGAL SERVS. CORP., *DOCUMENTING THE JUSTICE GAP IN AMERICA* 1-4 (2d ed. 2007), available at <http://www.lsc.gov/justicegap.pdf>.



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America's pro bono system has evolved against this backdrop. In 1981, the Legal Services Corporation required that its grantees make a "substantial amount" of funds available for private attorney involvement.<sup>47</sup> This requirement encouraged the expansion of programs designed to recruit, train, and connect pro bono volunteers with low-income clients. In 1980, about ninety such programs existed.<sup>48</sup> Today there are approximately 900.<sup>49</sup> Pro bono contributions to these programs constitute a significant part of the nation's civil legal aid structure, accounting for between one-quarter and one-third of overall legal aid services.<sup>50</sup> Large-firm lawyers play an increasingly prominent role in this pro bono system overall and provide crucial representation in matters that federally supported programs are barred from accepting.

The organized bar has actively promoted pro bono as a way to shore up gaps in legal aid and public interest representation, focusing special attention on large law firms. The ABA's Model Rule of Professional Conduct 6.1 provides that every lawyer "should aspire to render at least (50) hours of pro bono publico legal services per year," and that a "substantial majority" should assist "persons of limited means" or organizations that help them.<sup>51</sup> Additional assistance should go to activities that improve the law, legal profession or legal system, or that support "civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations" if payment of fees would "significantly deplete the organization's economic resources or would be otherwise inappropriate."<sup>52</sup> By giving preference to low-income and other underserved clients, the Rule seeks to channel pro bono work toward those who need help most. To encourage compliance with this aspirational standard, the organized bar has relied most heavily on recruitment and recognition initiatives. Professional initiatives have interacted with powerful market-based incentives for public service, particularly law firm rankings by major legal publications. In particular, *The American Lawyer's* 1994 decision to begin publicly ranking firms based on the depth and breadth of their pro bono performance

<sup>47</sup> LEGAL SERVS. CORP., ADOPTION OF PRINCIPLES ON PRIVATE BAR INVOLVEMENT (1981). Under the program, Legal Services Corporation grantees are required to use 12.5% of their federal funds to support private attorney involvement. 45 C.F.R. § 1614.2 (2009).

<sup>48</sup> See MEREDITH MCBURNEY, THE IMPACT OF LEGAL SERVICES PROGRAM RECONFIGURATION ON PRO BONO 1 (2003); see also Esther F. Lardent, *Structuring Law Firm Pro Bono Programs: A Community Service Typology*, in THE LAW FIRM AND THE PUBLIC GOOD, *supra* note 31, at 59, 75 (putting the number of pro bono programs at about fifty).

<sup>49</sup> The American Bar Association's current directory of pro bono programs lists approximately 900 groups; there are 96 in California and 66 in New York. American Bar Association, Standing Committee on Pro Bono & Public Service and the Center for Pro Bono, Directory of Pro Bono Programs, <http://www.abanet.org/legalservices/probono/directory.html> (last visited Oct. 12, 2010).

<sup>50</sup> Sandefur, *supra* note 31, at 102.

<sup>51</sup> MODEL RULES OF PROF'L CONDUCT R. 6.1 (2009).

<sup>52</sup> *Id.*

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dramatically altered firm behavior and contributed to a rise in organized pro bono programs at law firms and an increase in pro bono hours.

The rise of pro bono programs at large firms has not just contributed to a more “market-reliant” system of legal services delivery in the United States;<sup>53</sup> it has also reframed the professional project by underscoring new linkages between private lawyers’ commercial and professional aims. A recent study I conducted with Deborah Rhode on the challenges faced by large-firm pro bono programs in the economic recession illuminated these connections.<sup>54</sup> In the face of the worst economic downturn since the Great Depression, law firms initiated a wave of deferrals, furloughs, and layoffs. As part of this restructuring, in 2009 more than fifty Am Law 200 firms offered incoming associates subsidies of up to \$80,000 to spend a year working for nonprofits or government agencies.<sup>55</sup> The primary impetus for the placements was economic: Each deferred associate was estimated to save the firm up to \$100,000 because the firms’ costs in terms of salary and support would exceed revenue at junior billing rates. The deferrals would allow firms to quickly restock their associate ranks once the recession passed, with placed associates returning to the firms with relevant skills acquired while working in the public interest. These placement programs therefore underscored the increasing overlap between commercial and professional projects.

In general, the pro bono counsel we surveyed saw temporary placements as opportunities to reinforce commitment to pro bono work and to build a constituency for its support within the firm.<sup>56</sup> They believed that a stint in public service could make associates “more likely to think of it as a natural part of their practice.” These lawyers could “at the very least be mentors to other lawyers here and . . . continue to do, as part of our pro bono program, the types of work they did during [their placement] year.” Counsel were eager to take advantage of the knowledge accumulated during the year away from the firm: “My hope is that I have all these [associates] with areas of expertise [who] will come back knowing what it is to be a [public interest] advocate, [and who will] . . . continue to have deeper connections with groups that they went to work with.” Other counsel hoped that the placements would influence associate attitudes concerning not only pro bono practice, but also professional life more broadly. At a minimum, the experience might “put to rest” the notion that “public interest lawyers are lazy and not effective.” It might also reduce “feelings of entitlement” and provide skills that would give associates a competitive career advantage.

<sup>53</sup> See Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and Market-Reliant Legal Aid*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 29, at 95.

<sup>54</sup> Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010).

<sup>55</sup> Rachel Breitman, *Time Well Spent*, AM. LAW., July 2009, at 15, 15.

<sup>56</sup> Cummings & Rhode, *supra* note 54, at 2418.