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Authors

Cummings, Scott

Sandefur, Rebecca L

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Beyond the Numbers: What We Know—and Should Know—About American Pro Bono

Scott L. Cummings* & Rebecca L. Sandefur†

INTRODUCTION

Over the past decade, a growing body of research has focused on the significant role that pro bono service has come to play in the overall provision of civil legal aid and public interest law in the United States.¹ This literature has been powered by the recognition that legal services for poor and other marginalized clients are provided through a hybrid public-private system built upon three pillars: governmental support, institutional philanthropy, and private lawyer charity.² To understand this system as a whole requires understanding the constituent parts and their relation to one another. This tripartite relationship affects not just how much access to justice exists, but what type and who gets it.

Pro bono's ascending importance—once an object of controversy³—has now become an accepted fact of institutional design, embraced by legal services providers and nonprofit cause lawyers seeking to leverage private resources to advance their missions.⁴ In its just-released report, the Legal Services Corporation (LSC) Task Force on Pro Bono calls pro bono “an essential mechanism for narrowing the justice gap” during a legal services funding “crisis.”⁵ One study estimates that in 2005, pro bono's contribution to civil legal aid was worth at least \$246 million, an amount three-quarters the size of the sum the congressionally funded LSC gave out to its grantees (\$331 million) in the same year.⁶ As this suggests, the question is no longer

* Professor of Law, UCLA School of Law.

† Assistant Professor of Sociology and Law, University of Illinois; Faculty Fellow, American Bar Foundation.

¹ See, e.g., DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* (2004); Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 4 (2004); Robert Granfield & Lynn Mather, *Pro Bono, the Public Good, and the Legal Profession*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST* 1, 1 (Robert Granfield & Lynn Mather eds., 2009); Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79 (2007).

² Richard L. Abel, *State, Market, Philanthropy, and Self-Help as Legal Services Delivery Mechanisms*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST*, *supra* note 1, at 295, 295; see also Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 UCLA L. REV. 506, 509 (2012); Rebecca L. Sandefur, *Lawyers' Pro Bono Service and Market-Reliant Legal Aid*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST*, *supra* note 1, at 95, 101. For a discussion of the tradeoffs of public-private partnerships, see MARTHA MINOW, *PARTNERS NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* (2003).

³ Cummings, *supra* note 1, at 4.

⁴ See Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2070–75 (2008).

⁵ LEGAL SERVS. CORP., *REPORT OF THE PRO BONO TASK FORCE* 2 (2012).

⁶ Sandefur, *supra* note 2, at 96–98.

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whether pro bono should play a key role, but how—and how much. The organized bar has generally not attempted to impose mandatory pro bono service on its members—a requirement that exists in only a few renegade jurisdictions⁷—but has instead focused on increasing pro bono service by mobilizing, leveraging, and targeting volunteer services. In this regard, New York recently has charted a new and controversial direction:⁸ unwilling to directly force lawyers to provide mandatory services, the state's chief judge issued a rule targeting aspirants—requiring law students to perform fifty hours of unpaid work as a condition of bar admission.⁹

This push for increased quantity reflects the precarious state of U.S. civil justice, battered by a weak economy, fiscal austerity at the federal and state levels, low returns on Interest on Lawyers' Trust Accounts (IOLTA) funds that support legal services providers, and a general lack of political interest in returning to a more state-centered model. In this context, increasing the amount of “free” services from private lawyers is the path of least political resistance.

Pro bono is further promoted by a group of powerful and prestigious actors in legal services markets—large law firms—which have shown themselves adept at mobilizing vast quantities of pro bono labor and have become crucial drivers of the pro bono boom over the past twenty-five years. The recession caused a reversal, but the overall increase in pro bono hours provided by large law firms between 1993 and 2011 has been dramatic.¹⁰ Research on the nation's two hundred largest law firms “shows that the total pro bono hours produced by such firms increased by nearly eighty percent between 1998 and 2005, while the per-lawyer average increased by five

⁷ For example, the Orange County and El Paso Bar Associations require different versions of mandatory pro bono for its members. See generally Kendra E. Nitta, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909 (1996) (discussing the requirements in both jurisdictions and the resistance of the American Bar Association (ABA) to mandatory requirements).

⁸ For a discussion of the proposal, see *Sunday Dialogue: Public Service for Lawyers*, N.Y. TIMES, June 2, 2012, at SR2.

⁹ Mosi Secret, *Judge Details a Rule Requiring Pro Bono Work by Aspiring Lawyers*, N.Y. TIMES, Sept. 19, 2012, at A25.

¹⁰ *The American Lawyer* (Am Law) ranking system tracks the quantity of a firm's pro bono contributions in calculating its position on the Am Law Pro Bono Scorecard and factors in pro bono activity in determining which firms make its coveted “A-List.” Total hours for the top one hundred firms increased from 1,468,609 in FY 1993 to 4,221,477 in FY 2011. *Compare Pro Bono Survey*, AM. LAW., July/Aug. 1994 (on file with author), with *Pro Bono Survey*, AM. LAW., July 2012 (on file with author). For further discussion of periods of growth in law firms' pro bono hours, see Steven Butcher, *Rethinking Culture, Organized Pro Bono and the External Sources of Law Firm Culture*, 8 U. ST. THOMAS L.J. 108, 125–26 (2011); Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2370–72 (2010); Marc Galanter & Thomas Palay, *Public Service Implications of Evolving Law Firm Size and Structure*, in *THE LAW FIRM AND THE PUBLIC GOOD* 19, 41 (Robert A. Katzmann ed., 1995) (reporting increases in pro bono activity between 1990 and 1993).

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hours.”¹¹ Between 2005 and 2008, total pro bono hours increased nearly fifty percent and the average hours per attorney grew by ten hours.¹²

We know a great deal about how these vast numbers of pro bono hours are produced. But we know much less about *how good they are* and *what good they do*. As civil legal aid and public interest law undergo profound changes, including an increasing role for private sector delivery, we need to know whether growing reliance on private lawyer charity is sensible policy. Much of the extant research, both scholarly and field based, focuses on the amount of pro bono that lawyers generate. Yet, despite over a decade of study, we have little information to answer the question of whether pro bono is an effective or efficient way to provide legal aid or access to justice—how ever that may be defined.¹³

This paper seeks to deepen our understanding of both the content and the impact of pro bono. It is aligned with what we identify as a “New Measurement” movement within the field—one that seeks to evaluate the quality, cost, and social impact of civil legal services, as well as the quantity.¹⁴ Within the Access to Justice world, there are a number of New Measurement initiatives focused on pro bono service, including, for example, the formation of a Pro Bono Measurement Criteria subcommittee of the ABA Committee on Pro Bono and Public Service, an emphasis on measurement criteria at the 2012 ABA/National Legal Aid and Defender Association Equal Justice Conference, and the Pro Bono Institute’s best practice in measurement initiative. In addition, the LSC’s recent pro bono report calls specifically for a “plan for evaluating pro bono programs, including guidance on best practices in metrics and evaluation.”¹⁵ The New Measurement movement has encouraged the development of better metrics, and we applaud this. We seek to push this agenda to embrace, in addition, a new set of questions about contemporary pro bono that take our understanding *beyond the numbers*.

This paper advances the New Measurement agenda by canvassing both what we know and, more importantly, what we need to know about pro bono service delivery. Part I frames our inquiry in terms of fundamental socio-legal questions about the role of pro bono in the profession and in legal

¹¹ Cummings & Rhode, *supra* note 10, at 2376 & n.89 (providing these statistics and noting that “while the per-lawyer average has increased for the Am Law 200, it has increased more substantially . . . for the top one hundred, while the average for the bottom hundred firms actually declined” (citing 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, *supra* note 1, at 135, 145 & fig. 7.2)).

¹² *Id.* at 2376.

¹³ For two attempts at defining legal aid and access to justice, see generally, for example, Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913 (2009), and Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009).

¹⁴ For an important contribution to this literature, see D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012).

¹⁵ LEGAL SERVS. CORP., *supra* note 5, at iii.

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services delivery. Part II presents a brief and illustrative review of the empirical literature on the factors that shape pro bono service, how it is organized across for-profit and nonprofit spheres, and what its impacts are. The review points toward broad categories of unanswered questions. Existing research reveals much about various *inputs* to the pro bono system (e.g., policies and programs to spur pro bono service) and the resultant quantitative *outputs* such as hours and participation rates, but little about much else, including quality, distribution across cases and causes, impact on lawyers' ethics, and impact on social causes. Part III identifies what we see as crucial research needs that result as much from gaps in the questions the field has so far chosen to explore as from limitations of available data. Part IV outlines a path forward to a research agenda that produces information necessary for effective pro bono policy making.

I. THE INSTITUTIONALIZATION OF PRO BONO: FUNDAMENTAL QUESTIONS

This part relates the empirical literature on pro bono to the key theoretical issues underlying socio-legal research on professional service. In this work, the scholarly focus is on the *institutional* rather than the *ethical* dimensions of pro bono: rather than arguing about why lawyers *should* do pro bono as a matter of moral or professional duty, scholars in this tradition wish to understand how the concept of pro bono becomes institutionalized by achieving normatively privileged status within the professional field, becoming a taken-for-granted aspect of professional identity associated with a set of familiar practices and organizational structures that are widely replicated. From this institutional vantage point, the key theoretical questions are (1) why pro bono, rather than some other model of professional service, emerges and becomes embedded in day-to-day practice as a professional ideal of lawyering for the good;¹⁶ (2) how pro bono becomes organized within and across for-profit and nonprofit practice sites; and (3) what consequences follow for the profession, its clients, and society at large. This part briefly outlines these questions as a bridge to assessing the current state of empirical evidence bearing on each of them.

A. *Evolution: How Does Pro Bono Develop as Professional Norm and Practice?*

Although pro bono's prevalence in the U.S. legal profession is now taken for granted, it was not foreordained. Sociologists studying a range of professions have identified an element of "public service" as a central professional feature.¹⁷ Professions themselves generally claim self-regulatory

¹⁶ See generally Robert Granfield, *The Meaning of Pro Bono*, 41 LAW & SOC'Y REV. 113 (2007).

¹⁷ See, e.g., ELIOT FRIEDSON, PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY 200 (1994); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L.

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authority in exchange for performing a social role as guardian of the public good.¹⁸ Thus, in the United States and around the world, one sees various conceptions of “giving back” as integral to conceptions of lawyers, doctors, and other professionals.

From an institutional perspective, the interesting question is how the impulse to “give back” becomes expressed as a norm—or, more formally, a duty—of *pro bono publico* (literally “for the public good”), functionally understood as rendering legal service for free to individual poor clients or groups that work on poor individuals’ behalf. There are many different forms that the professional service ethic could take: from Kronman’s “lawyer-statesman” model of the lawyer who moves in and out of public office¹⁹ to the Brandeisian “people’s lawyer” who uses his or her influence with private clients to steer them toward the most socially just outcome.²⁰ In the United States, the service ethic has been channeled more narrowly into *pro bono* activity understood, according to the ABA Model Rules of Professional Conduct, as “legal services without fee or expectation of fee” to “persons of limited means” or organizations that address their needs.²¹ Though presently the dominant vision, this particular expression of professional service has elicited criticisms from some commentators who argue that it permits private lawyers to bifurcate their professional role into zealous advocate of powerful paying clients, on the one hand, and socially minded purveyor of *pro bono* services, on the other—and that doing so has displaced a professional role in which lawyers are duty-bound to check powerful clients from pursuing socially harmful ends.²²

Why lawyers’ public service comes to be equated with *pro bono* service is a question that depends on a range of complex and context-specific factors, including cultural norms, the existence and extent of state-sponsored legal services, client expectations and power, forms and regulation of legal practice, and the role and status of lawyers in society. In the United States, the story of *pro bono*’s growing institutionalization is one of interlocking trends: the decline of support for state-sponsored legal aid; increasing need; the growth in the number and size of large law firms, boosting the potential supply of *pro bono*; the recognition by private lawyers in various sectors of practice of the economic benefits of *pro bono* (the so-called “business case” for *pro bono*); an organized effort by the bar to promote *pro bono* as a form of professional virtue that serves the public and justifies the professional

REV. 717, 719–720 (1988); TALCOTT PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY* 34 (rev. ed. 1958).

¹⁸ FRIEDSON, *supra* note 17, at 200.

¹⁹ ANTHONY KRONMAN, *THE LOST LAWYER* 109–62 (1993).

²⁰ See Clyde Spillenger, *The Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445, 1460 (1996).

²¹ MODEL RULES OF PROF’L CONDUCT R. 6.1(a) (2004).

²² See, e.g., 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, 381 (2001).

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monopoly; and cultural shifts toward voluntarism and away from government service provision.²³

B. Organization: How Is Pro Bono Activity Distributed Across Lawyers and Practice Sites?

As pro bono achieves normative status and becomes embedded in professional ideals and practices, its ascendance points to a separate set of questions about what individual, organizational, and professional factors influence lawyers to do it. These factors are closely related to how the activity is organized across practice sites. One could imagine two poles. On one side is an *ad hoc*, *individual* approach, in which lawyers provide pro bono services on their own accord, either because they are moved into action by a sense of passion or duty, or because a client comes to them and makes a compelling case, or both. Within smaller-scale practice, such as solo and small firms, “pro bono” activity has frequently come in the form of lawyers writing off or writing down fees after the fact based on clients’ inability to pay.²⁴ Until the past few decades, pro bono activity in the United States was closer to this end of the spectrum, with individual lawyers making discrete decisions about accepting cases for free or for a reduced fee (so-called “low bono”). This ad hoc structure reflected the overall shape of the legal profession, which has historically been dominated by smaller-scale practice sites.²⁵

At the other pole is an *organized*, *systematic* approach to pro bono delivery. Such an approach is associated with an infrastructure for matching clients’ needs with volunteer lawyers, of the type that we have seen developed in the United States over the past twenty-five years.²⁶ In such a system, we are interested in discovering which professionals and which organizations do the work of organizing pro bono because how this organization is accomplished affects who sets the agendas, how resources are distributed,

²³ See Cummings, *supra* note 1, at 7–41.

²⁴ See generally LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* (2001); CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* (1996); Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 HOFSTRA L. REV. 699, 701 (2009); Philip R. Lochner, Jr., *The No Fee and Low Fee Legal Practice of Private Attorneys*, 9 LAW & SOC’Y REV. 431 (1975).

²⁵ Indeed, despite the growth of large law firms, most American private practice lawyers continue to work in small organizations. See ABA, *LAWYER DEMOGRAPHICS*, available at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/Lawyer_Demographics.authcheckdam.pdf (reporting that in 2000, 49% of all private practitioners were solos, while 15% worked in firms of between two and five lawyers); *Being a Lawyer*, LSAC, <http://www.lsac.org/jd/think/being-a-lawyer.asp> (last visited Dec. 23, 2012) (citing AM. BAR FOUND., 2005 LAWYER STATISTICAL REPORT 7–8 (2012)) (reporting that 62% of all private practice lawyers in 2005 were either in solo practice or in firms with under five lawyers).

²⁶ Cummings, *supra* note 1, at 4 (“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—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.”).

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how lawyers are trained and supervised, how clients are recruited and selected, and how lawyers collaborate across for-profit and nonprofit practice sites. A variety of different organized models for pro bono could emerge. For example, we might see a centralized clearinghouse develop to match needy clients with pro bono lawyers, its work guided by priorities that were set centrally or agreed upon by stakeholders after careful discussion. Alternatively, we might see something that looks a lot like a market for pro bono, with private practice law firms on the supply side hiring dedicated in-firm personnel to manage the production of their pro bono services, for example by doing outreach to client groups, assessing lawyer interest and availability, making matches, encouraging participation, providing oversight, and keeping track of time and outcomes. On the demand side of such a market, we might see nonprofit groups that serve particular causes or groups of clients develop in-house capacity to identify cases most amenable to pro bono representation and to develop private sector contacts to facilitate placements. Intermediary groups might also arise to reduce the transaction costs of this exchange system. How these matching activities are organized, how nonprofit groups develop, where they get their funding, and how they negotiate priorities are key empirical questions in an organized, systematic approach to pro bono delivery.

Whether pro bono is an ad hoc or an organized and systematic activity, we would be interested in understanding its relationships to legal aid and public interest legal services that are distributed through other mechanisms, such as federally sponsored legal aid offices or philanthropically supported public interest groups. We might, again, imagine two distinct patterns. On the one hand, we could imagine a model of *competition and displacement*, with pro bono activity supplanting staffed-office nonprofit legal services provision—that is, we would see private lawyers providing precisely those services nonprofit lawyers have offered with the result that the latter become redundant and unnecessary to support.²⁷ On the other hand, a situation of *complementarity and augmentation* could emerge, with pro bono lawyers doing what nonprofit staff cannot or do not want to do, or providing leverage in the form of resources or expertise to enhance the nonprofits' work. How pro bono is organized within either framework will shape which clients get served, what kinds of services they receive, when they receive them, and

²⁷ In the United States, debates over the role of pro bono in civil legal assistance have sometimes been carried out in the context of broader ideological struggles. Consider, for example, the LSC's rule on private attorney involvement in LSC-funded legal services offices, which has been used to promote pro bono contributions to these organizations. An important purpose of this rule was to reallocate resources from staffed legal services offices, which conservative critics believed were too radical and committed to ideologies of social transformation, to pro bono lawyers, whom these critics thought would be more likely to view representing the poor in terms of an ethic of individual client service. See John Kilwein, *The Decline of the Legal Services Corporation: 'It's Ideological, Stupid!'*, in *THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES* 41, 53–55 (Frances Regan et al. eds., 1999).

how much they get. Thus, understanding this organization is key to understanding the impacts of pro bono.

C. Impact: What Are the Consequences of Institutionalized Pro Bono for Lawyers, Clients, Causes, and Society?

The development and organization of pro bono raise crucial questions about its systemic consequences. Unleashing greater pro bono participation does not simply *increase* services to poor clients and other underrepresented groups; it *changes* the nature of those services in ways that may affect the professional identity of lawyers, the outcomes obtained for individual clients, the overall distribution of legal services, and the advancement of important social causes. If we wish to proactively shape those consequences and to ensure that they are in line with socially important goals—whatever those may be—we need both to document them and to understand how they work. Understanding pro bono's impacts requires deciding on which outcomes are worthy of study. A nonexhaustive list of possible outcomes of interest might include:

- *Overall quantity.* How much pro bono is produced overall and within specific practice sites? What is the “net” effect of pro bono: Does it produce an overall increase in legal services provision, or does it displace other sources of service?
- *Distributional effects.* Compared to other legal services delivery systems, such as nonprofits or judicare, which clients, cases, and causes are preferred in a system heavily dependent on pro bono? Does increasing reliance on pro bono expand the range of causes and clients served, or does it result in the distribution of services toward some kinds of causes and clients and away from others?
- *Quality.* How “good” are pro bono services, in terms of the quality of the legal work provided, the individual case outcomes produced, and clients' satisfaction?
- *Efficiency.* Compared to other means of delivering services, how cost-effective is using pro bono? How should the cost of pro bono delivery be computed? Should it include the opportunity cost of foregone paying work? The transaction costs associated with case referral, coordination, support, and monitoring? For each unit of legal service delivered, is it cheaper to use pro bono volunteers or some other resource?
- *Social impact.* In a pro bono system, what specific social goals are achieved, and what goals are failed or ignored?
- *Impact on lawyers themselves.* How does participating in pro bono work shape the service orientations and career trajectories of attorneys?

Selecting one or more of these impacts as worthy of study and understanding is not a straightforward task. Which outcomes we believe to be important depend crucially on the goals we have for pro bono. Is pro bono's

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purpose principally to increase access in a procedural sense, by connecting needy clients to lawyers? Is pro bono a desirable delivery model because we believe it is better suited to solving certain types of legal problems, and if so, what are they? Is pro bono's purpose to make lawyers better guardians of the public good by exposing them to the problems of poverty and marginalization? Is the opportunity to do pro bono a reward of legal work, like pay, or status, or vacation days? Some of these values may be compatible, but others may be in conflict.

As this suggests, if pro bono is a strategy for achieving a goal, as opposed to just an activity that some lawyers pursue, understanding pro bono's impact requires understanding the ends toward which this strategy intends. In the American context, pro bono is sometimes suggested as one solution to chronic and endemic challenges to the public's access to justice.²⁸ We might think of this position as *pro bono as a source of legal aid*. If expanding sources of legal aid is the goal, researchers should focus on gathering evidence about whether pro bono is, in fact, an effective way to achieve this. For instance, we might discover that pro bono is a cost-effective way for nonprofit lawyers to outsource cases that are too routinized, too complicated, or too resource-intensive for them to handle efficiently or effectively. As of now, there is little evidence on the questions of whether pro bono services are effective, whether lawyer charity is a cheaper way to provide them (because it does cost money to do pro bono²⁹), or whether it would in fact be more efficient and effective if firms and attorneys stopped giving their time and instead donated money to the organizations already specializing in these clients and causes. Pro bono may or may not be an efficient way of doing socially important work; at this point, we simply do not know.

Another end to which pro bono might be directed is the improvement of lawyers themselves. Mandatory or otherwise expanded pro bono participation by law students or lawyers is frequently suggested as a solution to a perceived weakness in attorneys' professional ethics and commitment to public service obligations. We might think of this position as *pro bono as a revitalizer of professional ethics*. If bettering lawyers is the purpose of pro bono, we would want researchers to investigate what kinds of pro bono experiences, if any, shape lawyers' subsequent ethical beliefs and behavior. If pro bono turns out to be ineffective for this purpose, we would want to shift resources to other ways of encouraging lawyers to be ethical. As with the first position, we currently have little firm evidence that doing pro bono has any effect whatsoever on lawyers' professional ethics. Pro bono may be a powerful tool for awakening attorneys' ethical commitments, or it may not; at this point, we know nothing definitive on the matter.

If pro bono is a means for achieving one or more ends, we would also want to know whether ends that might seem compatible in conception, such

²⁸ Abel, *supra* note 2, at 295.

²⁹ See Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1, 24 (2009) (discussing the costs of pro bono).

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as making better lawyers while expanding legal services, might turn out to conflict in practice. For example, does a focus on keeping private law firms and private lawyers engaged in pro bono and happy with their volunteer work encourage the development of a legal aid delivery system that is substantially *provider-driven*, such that services are produced and distributed not in response to public need but rather in response to provider tastes and interests? Or, as we discussed earlier, does cultivating private charity drive out public investment in access to justice, or does it supplement or encourage it?

II. WHAT DO WE KNOW?

In this part, we briefly review the findings of a decade of burgeoning empirical research into pro bono. Our review is necessarily illustrative rather than exhaustive. Much empirical work to date has focused either on documenting the rates and types of service that lawyers produce or on attempting to discover the factors that influence lawyers' participation. While the field's knowledge base is deepest on these two topics, most of the conclusions one can draw at this point are qualitative: we know much more about what constitutes the range of factors that shape lawyers' and law firms' participation in pro bono work than about the actual magnitude of any given factor's impact, its relative significance, or the likely consequences of directing policy toward one factor or another.

A. *Inputs: Factors Influencing Pro Bono at the Individual and Organizational Levels*

What we are terming the "inputs" literature focuses on factors that may encourage, support, discourage, or thwart lawyers' pro bono service activity. Most existing research on what we term "inputs" has focused on five potential sources of lawyers' pro bono activities: lawyers' own values or beliefs, law school training, initiatives of the organized bar, organizational climate and practices, and economic context. We consider these last two factors together, as they work together both in practice and in scholarly research.

1. *Motivations, Values, and Beliefs*

Existing research reveals that lawyers do pro bono for a variety of different reasons, some consistent with an ethic of public service or social transformation, others more consistent with a "business case," such as developing skills or cultivating clients.³⁰ It is as yet unclear how much lawyers' initial motivations and values shape their behavior and how much experiences with pro bono, whether in law school or in practice, shape their

³⁰ RHODE, *supra* note 1, at 131.

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motivations and subsequent pro bono commitments. A study of lawyers at a variety of career stages found that lawyers who believed that their pro bono work in law school had contributed to their development of good lawyering skills reported having served more pro bono hours during law school than did lawyers who valued their law school pro bono experiences because these experiences resonated with values of public service and social justice.³¹ A study drawing on a nationally representative sample of early-career attorneys found that private firm and in-house counsel lawyers who reported entering law for such reasons as making money or pursuing intellectually challenging work were more likely to do pro bono than were those who reported entering the profession because they wanted to help individuals or change or improve society.³² As we will show below, what pro bono means for attorneys is strongly shaped by the market conditions and organizational contexts in which they work, including aspects of that context that bear no explicit relationship to pro bono.

2. Law School Experiences

Because they are a central, common part of professional training, law schools are often suggested as important sites for learning norms of public service.³³ In particular, encouraging pro bono during law school—and sometimes requiring it—is suggested as a way to promote the development of a life-long habit of service.³⁴ Unfortunately, particularly given these programs' prominence in current debates, little research explores this question. A study of the graduates of three law schools compared the pro bono participation of lawyers who had entered legal education before and after each school's implementation of a mandatory pro bono requirement. Examining postgraduate pro bono by lawyers at a variety of career stages, the study author found no statistically significant differences in the numbers of pro bono hours reported by lawyers subject to and free from mandatory pro bono during law school.³⁵ Rhode's survey of lawyers' pro bono activity also found "no significant correlation between law school policies and subsequent pro bono work."³⁶ We know little about whether the effect of law school exper-

³¹ Robert Granfield & Philip Veliz, *Good Lawyering and Lawyer for the Good: Lawyers' Reflections on Mandatory Pro Bono in Law School*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 1, at 53, 62–63.

³² Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 73, 94 (2009).

³³ See Cynthia Adcock, *Shaped by Educational, Professional, and Social Crises: The History of Law Student Pro Bono*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 1, at 25, 25; Deborah A. Schmedemann, *Priming for Pro Bono: The Impact of Law School on Pro Bono Participation in Practice*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 1, at 73, 73.

³⁴ Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1372 (2007).

³⁵ *Id.* at 1384.

³⁶ RHODE, *supra* note 1, at 159–60.

iences on lawyers' pro bono behavior may lie dormant until awakened at some later stage in their careers, or may atrophy over time.

3. *Initiatives of the Organized Bar*

Organized bar initiatives to support and encourage lawyers' service have been a prominent element of the pro bono project. Once again, however, we have little firm evidence on what their impacts may be. State professions often tout the effectiveness of pro bono reporting programs on service, but there has been little careful, controlled study of these requirements.³⁷ A recent academic study explored relationships between lawyers' participation in organized civil pro bono programs and state legal professions' attempts to encourage pro bono and lawyers' participation. The study revealed that state professions engaged in recruiting activities of two basic types: first, diffusely targeted attempts to recruit lawyers into pro bono service that reflected an aspirational approach to encouraging service and were directed at a wide audience; and second, specifically targeted initiatives that focused on cultivating concrete relationships between pro bono programs and specific lawyers or organizations.³⁸ Looking across states, the study found a positive relationship between specifically targeted initiatives and lawyers' rates of pro bono participation, net of revenues to the state legal services industry, legal aid funding, and the size of the state's legal profession.³⁹ By contrast, aspirational pro bono standards set forth in state professions' ethical codes, diffusely targeted recruitment efforts, and policies that requested or required lawyers to report their pro bono hours were not correlated with greater pro bono participation. We know little about the returns on investment of these recruitment efforts, such as, for example, how much it costs to induce each hour of lawyer pro bono service, and whether that money might have been more effectively donated to legal services nonprofits.

A lack of evidence for the effectiveness of law school experiences and organized bar initiatives may reflect limitations in the available data, but the finding is also unsurprising given what we know about the factors that shape lawyers' behavior. It is by now so well established as to be almost a truism that there are multiple "legal professions," divided notably by the kinds of

³⁷ For instance, Florida reported that the total annual pro bono service hours grew by roughly 80% a decade after it instituted a mandatory pro bono reporting program in 1994. *See Pro Bono Publico*, FLA. B., <https://www.floridabar.org/divcom/pi/bips2001.nsf/1119bd38ae090a748525676f0053b606/a8e811c59073e9f68525669e004d21f6!OpenDocument#IV.%20Facts%20and%20Statistics> (last visited Dec. 23, 2012) (reporting that in 1994, there were approximately 800,000 total hours of pro bono service rendered, and that by 2004, that number had risen to approximately 1,450,000). However, the report did not control for other variables. Many things may have changed in Florida over that decade that affected pro bono service, and thus the increase in hours may have been unrelated to the new requirement.

³⁸ Sandefur, *supra* note 1, at 91.

³⁹ *Id.* at 98–100.

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clients that they serve,⁴⁰ the organizational contexts in which they work,⁴¹ and the “communities of practice” in which they participate.⁴² As explained below, a signal finding of extant research is that the organizational and economic contexts of lawyers’ work are the central, if not the determinative, factors shaping their pro bono behavior.⁴³

4. *Organizational and Economic Context*

As this subpart reports, research reveals the organizational and economic contexts in which lawyers do their work to be clearly and consistently related to their pro bono activities.⁴⁴ Although we have evidence that these contexts are important, key questions remain about how they work together to shape lawyer behavior and how they may interact with lawyers’ own values and motivations. The disparate studies point to a shared conclusion: lawyers’ pro bono service is importantly related to conditions in legal services markets⁴⁵ and in the markets for lawyers.⁴⁶

Extant research reveals that attorneys do pro bono work when they feel they can afford to do it. A study of participation rates across states found that states in which lawyers did better financially had higher rates of lawyer participation in organized civil pro bono programs, controlling for other factors that might affect participation, such as ethical codes, reporting requirements, and recruiting initiatives of the organized bar.⁴⁷ A study comparing early-career lawyers’ pro bono participation rates across different geographic legal services markets found that early-career attorneys in more lucrative markets were no more likely to do pro bono than their peers in less lucrative markets, but, among those who did pro bono, greater revenues to the profession were associated with more hours of service.⁴⁸ Similarly, a study comparing pro bono participation across the nation’s largest law firms found that firms with higher profits per partner produced more pro bono, suggesting that higher profits permit firms to produce more pro bono labor.⁴⁹ Investments in pro bono appear to be inversely related to investments in paying work: the same study found that firms with higher billable hours per attorney produced less pro bono. Paid work and volunteer work may well be in com-

⁴⁰ See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 1–4 (1994).

⁴¹ See JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 98–139 (2005); Granfield, *supra* note 16.

⁴² MATHER ET AL., *supra* note 24, at 41–63 (2001).

⁴³ See Granfield, *supra* note 16, at 124, 131–39; *infra* Part II.A.4.

⁴⁴ See RHODE, *supra* note 1, at 137–50.

⁴⁵ Sandefur, *supra* note 2, at 107.

⁴⁶ Cummings & Rhode, *supra* note 10, at 2409–19.

⁴⁷ Sandefur, *supra* note 1, at 98–100.

⁴⁸ Sandefur, *supra* note 2, at 106–07.

⁴⁹ Boucher, *supra* note 11, at 148–49.

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petition,⁵⁰ suggesting, again, that lawyers do pro bono work when they believe they can afford to do it, given other pressures.

Developments in the markets for legal services shape lawyers' behavior in different ways depending on the kinds of organizations in which they work. One mechanism through which greater revenues are transformed into pro bono service is likely organizational cross-subsidy. Cross-subsidy works through what sociologists term organizational slack: "spare resources of funds, technology, skill and personnel that can be reserved until pressure of work requires them or can be deployed in other activities, such as pro bono service."⁵¹ For lawyers working in small private practice law firms, pro bono work often means foregone income: when these lawyers do work for which clients do not pay, they do not get paid themselves.⁵² When more money is coming in, solo practitioners and lawyers in smaller firms may be better able to afford taking on pro bono and "low bono" work. In some organizations, organizational slack may be employed in direct subsidy of lawyers' pro bono service, for example, by counting the pro bono service as part of the attorney's billable hours. Observational evidence is consistent with an account that holds that these subsidies increase lawyers' service.⁵³

Lawyers' positions in legal services markets affect their pro bono activity in yet another way—through conflicts of interest. Some conflicts that discourage a specific act of pro bono service are classical conflicts of interest, wherein an attorney or firm cannot take on a specific pro bono client because doing so would place participating lawyers in conflict with a party who has a pre-existing connection to the firm. Existing research does not tell us how often classic conflicts emerge, but it does suggest that an even more consequential kind of conflict may be positional or business conflicts, wherein representing an individual client or working for a specific cause might place the lawyer or the lawyer's organization in opposition to a class of existing or potential clients.⁵⁴ At present, though, research presents an unclear picture of exactly what impact positional conflicts have on the pro

⁵⁰ *Id.*

⁵¹ Sandefur, *supra* note 1, at 93–94.

⁵² Levin, *supra* note 24, at 701. See generally SERON, *supra* note 24; Lochner, *supra* note 24.

⁵³ See Ronit Dinovitzer & Bryant G. Garth, *Pro Bono as an Elite Strategy in Early Lawyer Careers*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 1, at 115, 132 (finding that early-career lawyers who could treat pro bono hours as billable did more of them than those given no subsidy, controlling for personal characteristics, practice setting, the number of hours they worked, their participation in pro bono during law school, and the extent to which lawyers believed that their entry into law was motivated by a desire to help individuals). For further discussion of how employers' treatment of pro bono hours affects participation, see generally Sandefur, *supra* note 2.

⁵⁴ See Cummings & Rhode, *supra* note 10, at 2393; Sandefur, *supra* note 1, at 87; Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1399 (1998); see also Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, in ACCESS TO JUSTICE 145 (Rebecca L. Sandefur ed., 2009) (reporting in the "Pro Bono Loses" section that lawyers at large firms are placed in opposition to pro bono clients whose interests conflict with the firms' paying institutional clients).

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bono activities of lawyer-employing organizations and the attorneys who work in them. For example, in their survey of law firm pro bono counsel, Cummings and Rhode asked these counsel about the areas of law in which they most often faced conflicts of interest. They found that “the greatest area of conflict involves employment and labor cases, which nearly half of the firms indicated they could not accept” at all.⁵⁵ Consistent with this concern about positional conflicts, research on pro bono in the nation’s largest private law firms finds that these firms’ participation in organized pro bono seldom involves partnerships with organizations engaged in causes allied with labor.⁵⁶ However, large law firms’ behavior is not always so consistent with their reports of perceived conflicts. Cummings and Rhode’s respondents also reported that conflicts rarely arise around issues concerning the environment or consumer matters; yet large firm pro bono seldom involves partnerships with organizations engaged in environmental or consumer causes.⁵⁷ As we will describe in the next part, we have little understanding of the complex interplay of interests among stakeholders in today’s institutionalized pro bono system.

Lawyers also appear motivated to do pro bono work by market competition. One prominent argument advanced to explain the rise of pro bono in large law firms focuses on how pro bono work affects these firms’ positions in the Am Law and vault.com firm rankings, and thus their attractiveness both to clients and to attorneys they might try to recruit. We know of no study that empirically tests the hypothesis that firms’ behavioral changes were caused by the advent of the rankings; this is clearly a topic for further research. However, existing research does suggest that the lawyers who work in large law firms certainly believe that this is the case.⁵⁸ Cummings and Rhode’s study of how pro bono is managed in large law firms finds that pro bono management staff report that pro bono performs important recruitment and training functions for their firm.⁵⁹ Firms believe that they are able to attract better talent, retain that talent, and develop that talent more effectively because of the pro bono opportunities their firms provide to early-career attorneys.

Pressures to compete with other occupations, as well as other lawyers, may spur pro bono. A state-by-state analysis found that in states in which the legal profession felt under greater pressure from nonlawyer competitors, lawyers had higher rates of participation in organized civil pro bono programs, net of revenues, ethics codes, reporting requirements, and organized bar recruitment initiatives.⁶⁰ Pro bono service may be a strategy by which lawyers police the boundaries of the profession, preventing other occupa-

⁵⁵ Cummings & Rhode, *supra* note 10, at 2393.

⁵⁶ See Steven A. Boutcher, *Lawyerling For Social Change: Pro Bono Publico, Cause Lawyering, and the Social Movement Society*, in *MOBILIZATION* (forthcoming 2013) (tbl.2).

⁵⁷ *Id.*

⁵⁸ Cummings & Rhode, *supra* note 10, at 2370–71.

⁵⁹ See also Daniels & Martin, *supra* note 54, at 160.

⁶⁰ See generally Sandefur, *supra* note 1.

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tions from encroaching on lawyers' professional turf.⁶¹ And pro bono is a strategy not only for keeping business, but for getting it in the first place: for lawyers working in small firms and solo practice, scholars have long noted that doing pro bono work can be an important strategy in recruiting clients.⁶²

As pro bono has become institutionalized, particularly in the large-firm sector, private firms have changed the way they manage pro bono work, and these changes may affect lawyer behavior. Recent years have seen a dramatic increase in the number of large firms that have explicit pro bono policies and that have established paid positions whose incumbents' job descriptions include managing the firm's pro bono work.⁶³ Studies that compare lawyers' pro bono activities across large law firms find that the presence of these specific, concrete mechanisms of encouraging and facilitating pro bono is associated with more pro bono service.⁶⁴

Lawyers' workplaces shape not only how much pro bono lawyers do but their understandings of why they do it. A recent study demonstrates that the kind of organization lawyers work in is associated with the extent to which lawyers believe that pro bono service enhances their legal skills, aids their career mobility, is a duty, or gives them opportunities to experience autonomy in their work.⁶⁵ Lawyers' degree of support for policies that would make pro bono mandatory also differed substantially across practice settings in this study, with attorneys working in large law firms more likely to endorse mandatory pro bono than lawyers working in smaller firms, as solo practitioners, or as in-house counsel.⁶⁶ A recent study of early-career associates in large firms suggests that pro bono work may be part of a broader career development strategy, providing aspirants to partnership with interesting and satisfying work that compensates for some of the many unsatisfying aspects of large law firm practice.⁶⁷

⁶¹ *Id.* at 88.

⁶² See generally MATHER ET AL., *supra* note 24; Lochner, *supra* note 24.

⁶³ See Cummings & Rhode, *supra* note 10, at 2373.

⁶⁴ See, e.g., Steven A. Boutcher, *From Policy to Practice: Assessing the Effect of Large Firm Pro Bono Structure on Pro Bono Commitment*, 52 *STUD. L. POL. & SOC'Y* 145, 160 (2010) (finding that the existence of formal written policies about pro bono and the presence of pro bono coordinators are both associated with greater pro bono output by firm attorneys, and that these relationships persist net of other factors shown to be related to pro bono output, including firm profits and policies allowing attorneys to count pro bono service toward their billable hours).

⁶⁵ See Granfield, *supra* note 16, at 117–21 (finding that institutional variations have impact on lawyers' attitudes toward pro bono work).

⁶⁶ *Id.* at 129.

⁶⁷ See Dinovitzer & Garth, *supra* note 53, at 131; 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 (2004).

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*B. Outputs: Quantity, Distribution, and Quality**1. Quantity: The Volume of Services Produced*

Every state in the nation boasts at least one organized civil pro bono program that provides legal services to a vulnerable population, be it poor people, veterans, people with disabilities, people with HIV/AIDS, the elderly, or immigrants.⁶⁸ The LSC, which funds grantees in every state, requires funded programs to incorporate lawyers' pro bono work into their delivery of legal services through a Private Attorney Involvement program.

But while pro bono appears to be everywhere, participants and observers disagree considerably about what it is and how much occurs.⁶⁹ Since the 1990s, various projects of the legal profession have attempted to document the scope of participation and the number of hours,⁷⁰ often defining pro bono according to the tiered scheme developed by the ABA.⁷¹ The ABA's most recent surveys find that 73% (in 2007) and 66% (in 2004) of lawyers nationally reported performing at least some "Tier 1" pro bono during the twelve months preceding the survey. Recent surveys of lawyers mounted by academics use a variety of other definitions, including allowing respondents to define as pro bono whatever activity they understand as pro bono. Academic surveys find rates of participation that vary widely, from 44.9% nationally in 2007 among lawyers who were six or seven years into their careers,⁷² to 83% nationally among lawyers at all career stages in the mid-1980s,⁷³ to an estimated 18% of lawyers nationally participating in organized

⁶⁸ See REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT 31-132 (2011) (detailing pro bono services in each state).

⁶⁹ See, e.g., Cynthia Feathers, *Bar Politics and Pro Bono Definitions: The New York Experience*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 1, at 267, 267; Levin, *supra* note 24, at 155; Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1438-41 (2009).

⁷⁰ See, e.g., ABA CTR. FOR PRO BONO, PRO BONO DELIVERY AND SUPPORT: A DIRECTORY OF STATEWIDE MODELS (1998); ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS (2005) [hereinafter SUPPORTING JUSTICE I]; ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS (2011) [hereinafter SUPPORTING JUSTICE II]; KELLY CARMODY & ROBERT GROSS, PRO BONO: LOOKING BACK, MOVING FORWARD (2008); PRO BONO INST., 2010 LAW FIRM PRO BONO CHALLENGE REPORT (2011).

⁷¹ The ABA defines "Tier 1" pro bono service as service that is "given the highest priority by the ABA's Model Rule 6.1." Tier 1 service involves providing "free legal services to people of limited means" or to "organizations that address the needs of the poor." Tier 2 service includes working to improve the legal profession or legal system and free service provided to civic, religious, cultural, charitable and other nonprofit organizations or provided in support of civil rights, civil liberties, or public rights. SUPPORTING JUSTICE I, *supra* note 70, at 10.

⁷² See RONIT DINOVTZER ET AL., AFTER THE JD: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 36 (2009).

⁷³ Sandefur, *supra* note 1, at 97.

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civil pro bono programs in the late 1990s.⁷⁴ As we suggest in Part IV, standardized reporting schemes would be helpful in understanding some of these discrepancies.

As we described above in the discussion of “inputs,” a signal finding of extant research is that the organizational context of lawyers’ work is the central, if not the determinative, factor shaping their pro bono behavior. It is not surprising, then, that pro bono participation rates vary substantially across practice settings. Existing evidence suggests that, at least before the Great Recession, pro bono participation rates among young lawyers in the largest and the smallest private practice law firms were higher than those of other groups of lawyers. In 2007, for example, a nationally representative survey of early-career lawyers found that 74.1% of solo practitioners and 85% of those in firms of two to twenty lawyers reported some pro bono work, while 62.7% of lawyers in the largest firms, those of more than 250 attorneys, reported doing pro bono. By comparison, 55–56% of early-career lawyers in mid-sized firms reported pro bono, as did about 40% of in-house counsel, 28% of attorneys in state and local government, and about 16% of attorneys working for the federal government.⁷⁵ The number of pro bono hours that these early-career lawyers reported followed a similar pattern: highest among lawyers in the largest and smallest firms (an average of about seventy-nine hours per attorney) and lowest among in-house counsel and government attorneys (an average of thirty to forty hours per attorney).⁷⁶

Though we may be reasonably confident that pro bono has increased among the largest law firms, there is actually little evidence available to answer the questions of whether, in what ways, and how much pro bono has increased overall. The American legal profession has grown substantially since the 1980s, so there are more lawyers to produce pro bono work, but we have little information that would allow us to assess trends in lawyers’ rates or hours of pro bono activity. Reported rates of pro bono work were quite high thirty years ago, as demonstrated above in the national survey finding that four-fifths of lawyers reported at least some pro bono in the mid-1980s.⁷⁷ Understanding how those rates compare to today’s rates would require research designs that paid close attention to producing information that was comparable over time and across regions and practice settings; this work has not yet been done.

2. *Distribution: Pro Bono for Which Causes and Cases*

Existing research has focused mostly on the pro bono practices of large law firms, and it is consequently for this sector of practice about which we have the most information concerning what causes pro bono serves. A study of the pro bono activities of the nation’s two hundred largest law firms found

⁷⁴ *Id.* at 96.

⁷⁵ DINOVITZER ET AL., *supra* note 72, at 36.

⁷⁶ *Id.*

⁷⁷ *See* Sandefur, *supra* note 1, at 97.

that such firms are more likely to partner with “cause-oriented” organizations (rather than cultural, community, or legal services organizations),⁷⁸ with the most common causes including civil rights and liberties and issues related to children. Far fewer partnerships involve organizations pursuing causes like labor, poverty, or assistance to veterans and the elderly.⁷⁹

Outside the large law firm setting, much less attention has been directed to the content of lawyers’ pro bono service. Existing research reveals little about the causes and cases to which pro bono work is directed outside the large-firm sector. Studies of small firm and solo practice attorneys suggest that much of their pro bono likely involves direct services to individuals and some involves services provided to local community, civic, and religious organizations.⁸⁰ However, work on cause-lawyering reveals that some small firm practitioners with public interest practices may also do more impact-oriented pro bono work as part of their overall mission.⁸¹ Though there are efforts to encourage the pro bono activity of in-house counsel⁸² and government attorneys,⁸³ we know little empirically about these lawyers’ participation in pro bono work, beyond the fact that they do less pro bono service than attorneys in private practice. Both groups of attorneys face potential positional conflicts of interest that may discourage their work on certain kinds of matters. Government attorneys, in addition, may face work rules that hinder providing legal services outside their paid practice.⁸⁴ But, again, we know little of the pro bono work that these considerations may affect.

3. *Quality*

We also have little reliable information about the quality of pro bono services. In theory, the quality of private lawyer representation is supposed to be the same for paying and nonpaying clients. However, the structure of private practice, which is organized around commercial goals, creates pressures on pro bono service that can affect the nature of the lawyer-client relationship. We know that economic conditions and organizational context

⁷⁸ See Boutcher, *supra* note 56 (tbl.1).

⁷⁹ See *id.* (tbl.2).

⁸⁰ Lochner, *supra* note 24, at 448–55.

⁸¹ See Scott L. Cummings & Ann Southworth, *Between Profit and Principle*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 1, at 183, 200–04; see also Scott L. Cummings, *Privatizing Public Interest Law*, 25 GEO. J. LEGAL ETHICS 1 (2012); John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in CAUSE LAWYERING: POLITICAL COMMENTS AND PROFESSIONAL RESPONSIBILITIES 181, 186–91 (Austin Sarat & Stuart Scheingold eds., 1998).

⁸² See generally PRO BONO SERVICE BY IN-HOUSE COUNSEL: STRATEGIES AND PERSPECTIVES (David P. Hackett ed., 2010) (discussing ways to support pro bono services within legal departments and amongst in-house counsel across companies).

⁸³ See, e.g., Kathryn Alfisi, *Government Attorneys and Pro Bono: An Untapped Resource*, WASHINGTON LAW., Dec. 2005, at 23 (discussing efforts to promote pro bono work amongst government lawyers).

⁸⁴ See *id.* at 28–29.

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shape the amount of pro bono work lawyers do, but we know little of how these factors shape its quality.

Economic pressures on lawyers mean that sometimes, despite their best intentions, pro bono clients may receive less attention. In one widely reported incident, a court found that an associate from Skadden, Arps, Slate, Meagher & Flom made “careless and inaccurate” statements to her pro bono divorce client, “including informing her that Skadden could withdraw from the case if [the client] raised the issue of her relocation or pursued an equitable distribution claim.”⁸⁵ As a result, the court set aside a settlement stipulation because the lawyer “made serious errors and was inadequately supervised.”⁸⁶ In another case that reached the United States Supreme Court, two pro bono attorneys from Sullivan & Cromwell represented a death row defendant, Cory Maples, in seeking postconviction relief in the Alabama state courts. When those attorneys left the firm, they failed to tell their client or the court. When the Alabama trial court denied Maples’s petition, the notice was sent to the pro bono attorneys at Sullivan & Cromwell. Because they were no longer at the firm, the notice was returned to the state court clerk unopened. As a result, Maples never learned of and therefore missed the deadline to file an appeal in state court. Because of this state default, Maples then had his federal habeas petition denied by the federal district court. He appealed, and the Supreme Court reversed, holding that the pro bono attorneys’ abandonment of Maples constituted sufficient “cause” justifying his procedural default.⁸⁷

Although such extreme cases are atypical, quality concerns are not. As Rhode reports, “About three fifths of [surveyed public interest law] organizations experienced some quality concerns; fourteen percent . . . reported extensive problems, 33% reported moderate problems, and 8% reported limited problems.”⁸⁸ Partner supervision of pro bono cases poses particular challenges.

Despite efforts to guarantee partner supervision, many [pro bono] counsel nonetheless conceded that “monitoring cases is a large challenge.” At times, it is simply difficult to get overcommitted partners to pay attention to unpaid matters under their supervision. As one counsel put it, “I strongly believe that most partners are not focused on pro bono, so someone else has to catch trips and falls.” For this counsel, the lack of partner oversight caused “a great deal of headaches. Getting more partner involvement is critical.” Supervision breaks down not simply because partners are “too busy,” but also because associates may be too “intimidated” to ask for help. Partner expertise can also be a problem. Although

⁸⁵ Noeleen G. Walder, *Failure to Supervise Pro Bono Attorney Dooms Divorce Pact*, N.Y. L.J., June 18, 2009, at 1.

⁸⁶ *Id.*

⁸⁷ *Maples v. Thomas*, 132 S. Ct. 912, 927 (2012).

⁸⁸ Rhode, *supra* note 4, at 2071.

one counsel noted that “every matter has a supervising partner,” she acknowledged that “in some areas the associate knows more than the partner.”⁸⁹

Despite these concerns, large law firms do little to track the quality of their services. In Cummings and Rhode’s survey of large firm pro bono counsel, none reported using surveys or other systematic methods to assess nonprofit partners’ views on the quality of representation, nor did any report systematic efforts to gain feedback directly from clients other than informal discussions with referral groups.⁹⁰ With respect to social impact, while respondents disagreed about its meaning, they were all in accord in their failure to make any efforts to systematically evaluate it. Understanding how the organization of pro bono shapes the quality of the legal services produced, and their broader impact on social problems, is a central task in evaluating whether our current delivery model is one we want to solidify and expand, or whether we are in need of institutional redesign.

III. WHAT WE DON’T KNOW—BUT SHOULD

Our review of “what we know” reveals important gaps in empirical knowledge. Past work has identified a range of factors that shape the pro bono work of America’s lawyers, but to date, our knowledge is imprecise about their relative influence or how these factors interact to affect behavior. In this part, we turn to questions that researchers have largely left unexplored, and ask what information we need to be able to develop a deeper understanding of the professional and policy tradeoffs involved in a legal profession that embraces pro bono and a legal aid system that relies on it. These questions are the true *terra incognita* of contemporary pro bono.

A. *Inputs: Agenda Setting and Resources*

As we have seen, the design of pro bono systems influences their function, both in terms of how they do their work and the ends to which that work becomes directed. We know little about how priorities are set within pro bono systems, how those priorities are enacted, and how the relationship between resources and pro bono activity affects this agenda setting. It is clear that the identification, selection, referral, and completion of pro bono cases is a process that is shaped by the interaction of multiple system stakeholders: lawyers who own and manage organizations, lawyers who work in them, pro bono counsel inside law firms and legal departments, and nonprofit legal groups and their clients on the outside. As in any process of stakeholder negotiation, the parties involved in setting priorities and agendas are not equally endowed, and power differentials can affect the outcomes.

⁸⁹ Cummings & Rhode, *supra* note 10, at 2395 (footnotes omitted).

⁹⁰ *Id.* at 2401–05.

Nonprofit groups are on the frontlines of client problems and are able to make initial screening decisions; these are informed by internal assessments of community need, but also by perceptions of what cases can be effectively “placed” with private volunteers. On the other side, lawyers supply labor as volunteers and cannot be forced to take on unpopular matters. How potential volunteer lawyers perceive certain types of cases can affect whether those clients make it into the pro bono system in the first instance and, when they do, how and where they are served. “Clients who might be perceived as difficult or not mainstream are discouraged, while ‘deserving’ clients are promoted.”⁹¹

Within this process there are important unknowns. We know little of who has input into what cases nonprofit organizations select and steer toward firms or of how sensitive nonprofit agendas are to law firm preferences or community need. We know little of how pro bono is marketed, or to whom. We know little of how law firms make decisions about which substantive areas to invest in. And, of course, we know virtually nothing about the participation of lawyers outside the large firm context in setting these priorities.

Questions about agenda setting and system priorities are intimately related to the question of whether pro bono displaces, complements, or augments other sources of public interest and legal aid services. Pro bono is one of a set of contributions that actors both inside and outside the legal profession make to nonprofit groups. We do not know whether financial contributions follow volunteer hours or substitute for them. We do not know how, if, or when nonprofit groups use pro bono as an entry point for fundraising and how this purpose of pro bono shapes their pro bono docket. Understanding whether or how nonprofits participating in the pro bono system orient their priorities to attract pro bono resources would provide another important lens on the question of displacement versus complementarity.

B. Outputs: Quality and Impact

As we discussed, current research reveals little about either the quality of pro bono legal services or pro bono’s broader impact on lawyers, client groups, or social causes. We earlier observed that pro bono is often viewed as a means to two different ends: improving the legal profession and expanding civil legal aid. If we have the first end in mind, we need to examine pro bono’s impact on lawyers themselves. If we have the second end in mind, we need to examine pro bono’s impact not only on lawyers but also on clients, nonprofit providers, and society.

If the primary purpose of pro bono service is improving the profession, we must better understand the impacts of pro bono on the lawyers who do it: how it shapes their careers, whether they find it satisfying, and whether pro bono leads them to more positive views of public service as a part of their

⁹¹ Cummings, *supra* note 1, at 141.

professional role. Much of this research agenda is already charted in the work reviewed in the previous part. Indeed, this is central to the study of how “inputs” are created. Moving forward on understanding how pro bono affects lawyers requires more research, better data, and better research methods, but it does not require a radical rethinking of the study of pro bono.

If, on the other hand, expanding civil legal aid is our goal, the territory is largely uncharted and we need new questions as well as new data. Understanding whether pro bono complements, augments, or displaces other services is crucial to evaluating its effectiveness at achieving the goal of expanding civil legal aid. As we have suggested, essential missing knowledge includes what kinds of clients get what kinds of services within the pro bono system and how the distribution of pro bono clients and cases compares to that of other legal services providers. This knowledge would provide an important lens on the question of whether pro bono displaces other providers or fills gaps in provision.

Pro bono’s effectiveness in facilitating access to justice is also dependent upon the quality of the legal services received by clients and the non-profits who work on their behalf and may themselves be clients. In this context, quality is best broadly construed to include not only the competence of the legal work actually produced but also pro bono lawyers’ judgments about what legal work to provide. For example, understanding when and how pro bono lawyers effectively serve causes and when they miss opportunities to turn individual cases into law reform efforts provides information to evaluate the pro bono system’s effectiveness. If pro bono lawyers routinely miss law reform opportunities, perhaps their work should be given back to lawyers who specialize in this work, or perhaps pro bono system architects should devise new means for lawyers to coordinate with issue-specific non-profit groups. How effective a pro bono system is at delivering on these quality goals also has implications for whether a pro bono system expands system-challenging work or restricts it.

IV. TOWARD BETTER PRO BONO INTELLIGENCE

We need not only better data but also data about new aspects of the pro bono system. We reserve for the moment the question of who will do this intelligence work. The greater understanding sought by the New Measurement agenda that we foresee would rest on information gained through the following proposals:

(1) *Standardized Data Collection About the Work Pro Bono Lawyers Do*

Our first proposal is to develop a uniform and standardized system of case tracking that includes information about substantive field (housing, immigration, etc.), types of services provided (brief service, counseling, transactional, hearing, etc.), and outcomes obtained (settlement, success after trial, penalty avoided, etc.). Categories could be synchronized with those

used by LSC or other funders of legal aid to track their grantees' activities, thus permitting comparisons across different types of providers and basic analyses of which types of cases are done in the different sectors and what the outcomes are. This information would be an enormous advance over that currently available, but such a standardized system would of course also involve challenges of comparison, as no set of categories could capture every detail that one might need to control for the many different factors that might affect outcomes. All data collection schemes have their flaws. However, let not the perfect be the enemy of the good. Broad information about the distribution of cases, types of lawyering activities, and outcomes across provider sites is essential for answering very basic questions about what the pro bono system at present does and whether it is providing complementary services.

(2) *Standardized Client and Lawyer Satisfaction Evaluations*

We further recommend producing a concise, standardized satisfaction survey that all lawyers who accept pro bono clients administer at the close of each pro bono matter they work on. Such a survey would ask pro bono clients to rate their experiences on a variety of dimensions, including:

- Quality and frequency of lawyer communication
- Lawyer responsiveness to client questions and concerns
- Degree to which clients believed they were able to provide meaningful input into defining the goals and strategies of their cases
- Satisfaction with outcomes

Similar surveys could be given to nonprofit providers that referred cases to pro bono lawyers or with whom pro bono lawyers collaborated. For nonprofit providers, questions would gather information about their experience referring, supporting, and troubleshooting pro bono cases with private lawyers. Nonprofit providers could also be asked to assess the outcomes relative to their expectations. In each case, forms would be collected in a central repository that would enter and compile the data. The identity of any respondent or attorney would be confidential, but aggregate information would be available to lawyers, to nonprofit groups, and to the public whose tax revenues support the civil legal aid system of which pro bono has become an integral part.

(3) *Enhanced Cost Tracking*

To determine how much pro bono cases cost to conduct, pro bono lawyers and programs that they work with could collect standardized information about the work done, resources used, and time spent on pro bono cases. At a minimum, this type of information would include:

- Pro bono lawyer time invested in each case
- Support staff time in each case
- Internal organizational costs assigned to each pro bono matter

- Referral agency staff time and costs in referral and support

In addition to tracking costs, systemic evaluation would be served by transparent data collection of firm revenue associated with pro bono activity. Many firms collect attorney's fees in cases that provide for fee shifting. How such money is distributed—whether it is put into a firm's general fund, assigned to a firm's pro bono budget, or donated to partner organizations—goes directly to the issue of how “free” pro bono services are.

(4) *Social Impact Metrics*

Measuring “social impact” would likely be the most complex and contested issue on our New Measurement agenda, as stakeholders will differ in their notions of the public good. Existing projects provide promising examples of ways of defining outcomes and gathering data. None is perfect, but each provides useful building blocks for more ambitious and sophisticated efforts at devising “social impact” metrics.

There is a well-established and sophisticated field of social investment metrics focused on “double-bottom line” analyses that look at how businesses may advance profit objectives while also making a positive social impact. In one of the most well known formulas, the “social return on investment” (SROI) metric, social impact is measured in part by looking at impacts on the public sector in terms of projected social program savings and new tax revenue.⁹² The SROI focus on how social investment affects the public sector in terms of cost avoidance and new revenue is a useful starting point, though it is obviously limited in terms of measuring other goals that might matter, such as the achievement of specific types of social reforms, enhanced political power, and other less quantifiable outcomes. And, as Rhode and other analysts have pointed out, there is no consensus about what is considered a positive outcome, and even if there were, some outcomes are not amenable to easy measurement. Nonetheless, some basic steps forward are imaginable.

Rhode's research on strategic philanthropy offers a number of different models for evaluating returns on social investments, like pro bono.⁹³ In her view, a strategic approach to pro bono investments would include four critical elements: (1) “A process for identifying objectives and establishing priorities among them,” (2) “A process for selecting projects that will best advance those objectives,” (3) “Policies that encourage widespread participation,” and (4) “A system for overseeing performance and evaluating how well objectives are being met.”⁹⁴ While most groups already define objectives and set priorities, they are less systematic in actually measuring

⁹² See REDF, REDF's SROI APPROACH: KEY CONCEPTS AND FINANCIAL TOOLS 7 (2001), available at <http://www.redf.org/system/files/%285%29+SROI+Methodology+Paper+-+Chap+2+-+REDF%27s+SROI+Approach.pdf>.

⁹³ See generally Rhode, *supra* note 69 (discussing pro bono as a matter of the “bottom line” for modern lawyers).

⁹⁴ *Id.* at 1447.

whether they are meeting their own stated goals. And, in an environment in which nonprofit groups in particular are constantly forced to justify their entitlement to more funding—and often their very existence—there is pressure to shape the facts to demonstrate success.

One interesting example comes from Australia, where the Public Interest Law Clearing House (Pilch), in collaboration with Deloitte Access Economics, has developed a report assessing the “economic contribution” of its pro bono intermediary program, called “PilchConnect,” which matches needy clients and organizations with pro bono lawyers.⁹⁵ The report evaluates PilchConnect’s impact through three lenses. First, it measures the economic value of services rendered by pro bono and in-house attorneys; second, it looks at cost savings achieved by the program’s intermediation function, what it calls its “efficiency dividend”; and third, it aims to “capture the broader envelope of the social impacts arising from PilchConnect” by measuring

benefits to productivity and workforce participation (measured as additional employment on a full time equivalence basis); improving the health of the community (measured via avoided health care costs); savings to the justice system (measured via avoided costs); and lower social service payments by government (measured on the basis of standard welfare payments).⁹⁶

To generate the metrics, PilchConnect established goals in collaboration with community stakeholders, public officials, and experts in social enterprise valuation. These figures do not tell the entire story and raise questions about relative cost savings since the public costs avoided are not counterbalanced by the costs of providing pro bono services (even if these are opportunity costs of not providing fee-generating services). But they do represent a serious attempt to think about and evaluate the costs and benefits of pro bono delivery.

Offering these proposals begs the important political question of how they could be achieved. As it stands, data collection is largely powered by the quantity-driven rankings and mandatory reporting systems. The ABA’s periodic survey has offered a more expansive view of pro bono activity, but it has asked different questions at different points, and still lacks much of the information on organization and impact that would illuminate the tradeoffs of pro bono service provision. There are two questions for policy makers and bar leaders to consider on this score. The first question, which we have already addressed, is what information that could be readily accessed would we like to see collected on a regular basis. The second, perhaps more challenging, question is who is going to collect it. In particular, how could

⁹⁵ See DELOITTE ACCESS ECON., THE ECONOMIC CONTRIBUTION OF THE PILCHCONNECT PROGRAM 23–31 (2011), available at http://www.pilch.org.au/Assets/Files/PILCH_Stage%20%20Report_29%20August%202011-Final.pdf (presenting findings surrounding the PilchConnect Program to the Public Interest Law Clearing House).

⁹⁶ *Id.* at ii–iii.

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firms—and potentially other lawyers—be enlisted in the data collection project?

A small advance would be for pro bono providers to conduct client and nonprofit partner satisfaction evaluations, as the ABA Standards for Programs Providing Civil Legal Services to Persons of Limited Means recommend.⁹⁷ There are obvious shortcomings to satisfaction surveys, but they would give us some insight into how clients and nonprofit staff understand and assess their experience with private volunteers along a range of important axes, including communication, respect, the quality of advice, and perceptions of the fairness or adequacy of outcomes. As it stands, law firms do very little satisfaction research, and when they do, they tend to gauge the satisfaction of their *own lawyers* with their pro bono experience rather than to inquire about the reactions of those receiving services.⁹⁸

Of course, the ABA or state bars could propose to require these types of data collection and reporting, but that seems unlikely under a voluntary service regime. A more promising route is to consider how to either tap into existing ranking/reporting systems or to create alternatives that would rank firms on alternative criteria. For example, the National Legal Aid and Defender Association could take a collective position that all member organizations will ask law firms with which they work to administer satisfaction surveys in connection with referred matters. Similarly, the Pro Bono Institute could ask for case type and cost information as part of its Pro Bono Challenge. An alternative ranking scheme could be created that incorporates more data about quality, and if some pioneering firms could be convinced to participate, others might have incentives to join and standardize in order to compete for status. Linking data collection to firms' self-interest may be an effective tool for creating a more transparent and sustainable system of evaluation. Nonetheless, it does exclude smaller firms and other kinds of lawyer-employing organizations that may do pro bono but are outside the big firm ranking system.

CONCLUSION

For those who care about access to justice, it is an uncertain time. The mixed system of legal services and public interest law delivery that has grown over the past three decades confronts a new post-recession economic reality. At the large firm level, and likely elsewhere, the pro bono bubble has burst with the economy. According to *The American Lawyer*, the total pro bono hours of Am Law 200 firms in fiscal year 2008 was 5,567,231; last

⁹⁷ See ABA, STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS (1996), available at <http://apps.americanbar.org/legalservices/probono/standards.pdf#pagemode=bookmarks>.

⁹⁸ Cummings & Rhode, *supra* note 10, at 2399–2405.

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fiscal year (2011), it was 4,892,937—a decrease of over twelve percent.⁹⁹ The drop in total hours is tantamount to losing roughly 340 full-time lawyers dedicated to pro bono service. In a legal aid system with roughly 7900 lawyers total,¹⁰⁰ that is a significant loss.¹⁰¹ Perhaps this is a temporary reversal, but, as *The American Lawyer* suggests, it may also signal a structural reordering: “While a recovering economy could lift pro bono work back to boomtime levels, it’s just as likely that changes in law firm staffing and an increasing fixation on cost control could depress pro bono hours for years.”¹⁰²

Even if the decline is transient, it raises a fundamental question of institutional design: When times are toughest for poor Americans, why does our legal services system hinge on a resource, pro bono, that contracts with the economy? Given this apparent reality, what should we ask from private lawyers to help serve those most in need?

In the wake of the recession, some have suggested that our response should be: not much. Lawyers, they tell us, are suffering too, particularly junior lawyers—those who have been the engine of pro bono’s growth—vast numbers of whom find themselves un- or under-employed and burdened with staggering debt. Even those who have jobs in large firms confront a “new model” in which what it means to do pro bono has shifted. In an environment in which corporate clients are aggressively limiting legal costs, particularly for associate training, there is more pressure than ever for firms to tie their pro bono programs to the goal of producing “skills-ready” associates. And there is some evidence that this closer connection between pro bono and professional development is occurring, at least at some firms. In Cummings and Rhode’s 2010 study of pro bono counsel, one firm had restructured its first- and second-year associate program to focus on skills development through pro bono representation, which constituted one-third of the associates’ caseload.¹⁰³ Firm lawyers were selecting pro bono cases not only for their social impact but also for their pedagogical value in enhancing the “skills we want [associates] to get.”¹⁰⁴ Echoing this idea, another counsel predicted that pro bono service would “grow to be more specifically

⁹⁹ Compare *Pro Bono Report 2009: Ranking the Firms*, AM. LAW. (on file with author), with *2012 Pro Bono Survey*, AM. LAW. (on file with author). Each survey reports pro bono data for the preceding fiscal year, thus 2008 and 2011, respectively.

¹⁰⁰ See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 20 (2009) (reporting approximately 7931 lawyers in federally and non-federally funded legal services programs).

¹⁰¹ Over the same period, average pro bono hours per attorney and the percentage of lawyers doing more than twenty hours of pro bono per year also declined notably. See *By the Numbers: The Pro Bono Survey in Data Points*, AM. LAW., <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202560984622> (last visited Dec. 23, 2012). This suggests that it is not simply staffing that is reducing pro bono hours but also a reallocation of work responsibilities.

¹⁰² *Pro Bono Report 2012: Under Construction*, AM. LAW. (June 27, 2012), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202498700455&Pro_Bono_Report_2012_Under_Construction.

¹⁰³ Cummings & Rhode, *supra* note 10, at 2426.

¹⁰⁴ *Id.*

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tailored to individual professional development needs.”¹⁰⁵ Thus, at least within large firms, there is reason to be concerned that the well of pro bono resources will shrink and the resources that remain will be further targeted to the needs of firms for associate development rather than the needs of the public for justice. Moreover, as law firms, influenced by corporate clients, come to view pro bono activity as one element of their broader corporate social responsibilities, it seems plausible that the nature and scope of pro bono activity will be evaluated through the lens of advancing corporate objectives.

Against these pressures, there are possibilities. Underemployed new lawyers have devoted significant effort to helping nonprofit groups through law firm furlough and deferral programs and law school postgraduate employment support schemes. A great deal of attention has focused on how to utilize the large cohort of retiring baby boom lawyers, who remain active and eager to put their talents to good use. And real efforts to support small-scale practitioners—who remain the majority of private practitioners—to augment their pro and low bono activity are being carried out. Yet, as we have suggested, how all these initiatives will play out and interact with existing efforts within large firms and in the nonprofit sector remains uninformed by substantial evidence and insight. Not knowing how pro bono operates in different contexts and under different pressures—and why we value it in the first instance—risks making efforts to tap different sources of potential pro bono service feel a lot like lurching in the dark. For those Americans suffering the ravages of poverty and marginalization, the professional duty of lawyers should include a commitment to illuminate the way forward on pro bono with investigation and evidence, so that their efforts to “do good” are ultimately done better.

¹⁰⁵ *Id.*