

# **BETWEEN PROFIT AND PRINCIPLE: THE PRIVATE PUBLIC INTEREST FIRM**

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In **PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION**  
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## **INTRODUCTION**

“Pro bono publico”—which literally means “for the public good”—is at once a narrow duty and a broad aspiration. The narrow duty is codified in the American Bar Association’s Model Rules of Professional Conduct, which calls for “[e]very lawyer...to provide legal services to those unable to pay.”<sup>1</sup> The broad aspiration envisions private legal practice as a vehicle for advancing the public good (Katzmann 1995)—a notion rooted in a core ideal of legal professionalism (Scheingold & Sarat 2004:11). Efforts to fuse private practice and the public good produce different approaches and ideologies across practice sites (Granfield 2007). Some of them reinforce the conventional definition of pro bono, while others assert a distinct public role for private lawyers. The recent literature on pro bono has focused primarily on the provision of pro bono services by big firms (Cummings 2004; see also Boutcher 2009; Fuchs Epstein 2002), where lawyers fulfill their professional duty by taking a break from billable work to provide free legal services to persons of limited means or organizations that advocate for deserving causes

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<sup>1</sup> Model Rules of Prof’l Conduct, R. 6.1 (2004).

(White 2000:140). This conception differs from the notion of public service associated with lawyers in solo and small firm practice, who often view their acceptance of reduced fees from clients based on ability to pay as a means of promoting access to justice (Levin 2009; see also Lochner 1975:442-448; Seron 1996:132).

This chapter considers the relationship between private practice and the public good through the lens of a different organizational form: the “private public interest firm.” Although such firms have existed since the early days of the public interest law movement (Handler et al. 1978a:112), interest in them has increased as the field has become larger and more complex, and as law students seek alternative public interest careers. Yet private public interest firms remain under-examined in the contemporary scholarly literature (Sarat & Scheingold 2005:12). Since none of existing research (including our own) is designed to test propositions about private public interest firms,<sup>2</sup> we draw upon multiple sources to offer a preliminary assessment of opportunities for, and constraints on, the pursuit of public interest goals within these firms and to sketch an agenda for future research. Our sources include the secondary academic literature, as well as interview data we collected from a small number of firms in connection with other projects: Cummings’s research on Hadsell & Stormer and associated firms in the Los Angeles area (Cummings 2009) and Southworth’s study of lawyers in the conservative coalition (Southworth 2008). We also gathered data from two published directories of private public interest firms and from the websites of firms listed in those directories.

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<sup>2</sup> Granfield (2007) and Heinz et al. (2005), for example, present data on the attitudes of small firm lawyers toward pro bono, but they do not break out private public interest firms for separate analysis.

This chapter describes the evolution of private public interest firms and offers preliminary observations about the meaning and practice of public interest law within them. Our analysis of the trajectory of the private public interest sector suggests that it has grown in scale and complexity over the past quarter century. Its development has been influenced by “pull” and “push” factors: the advent of fee-shifting statutes has provided a significant financial incentive for private practice in areas associated with public interest law, while constraints on nonprofit public interest organizations have prodded some lawyers to enter the private sector in search of greater autonomy. The private public interest law firm has emerged as a practice site that attempts to marry “profit and principle” on very different economic and political different terms than the large commercial law firm—providing an alternative way for lawyers to pursue public ends through private means that challenges the conventional pro bono model. Focusing on the private public interest firm therefore reveals a distinctive public vision of private practice that allows us to reconceive “lawyering for the good” (Granfield 2007) as a spectrum of market-embedded activities (Sandefur 2009) that vary across practice sites.

## **THE PRIVATE PUBLIC INTEREST FIRM**

### *Definition*

The term “private public interest law firm” refers to a range of “hybrid” entities that fuse “private” and “public” goals. In its pursuit of a political mission beyond client service, the private public interest firm resembles its counterpart in the nonprofit sector. Indeed, such firms are sometimes founded by lawyers who previously worked in nonprofit organizations, and they sometimes share issue agendas with nonprofit legal groups and collaborate with them on cases (Cummings 2009). However, there are crucial

distinctions between private public interest law firms and their nonprofit counterparts, key among them the source of funding: private public interest firms generally rely on fees rather than charitable donations.

Distinguishing private public interest firms from their commercial counterparts is more challenging, since by their very nature, these firms blur the line between profit-making and advancing the public interest, which is itself a contested concept. Two different approaches to defining private public interest firms have emerged, each with its own tensions and ambiguities. One approach defines these firms by reference to the nature of the practice areas around which the firms are organized and the types of strategies they employ. In a classic study of public interest law in the 1970s, Handler and his colleagues identified the emergence of what they termed “mixed firms,” which were located in the “private, for-profit sector of the economy” but devoted “a significant portion of their resources to activities of the [public interest law] type” (Handler et al. 1978b:60). The researchers considered two factors: whether the firms devoted a significant part of their practice (at least twenty-five percent) to public interest “issue areas”—including civil liberties, the environment, consumer protection, employment, education, welfare, and housing—and whether their cases involved either law reform or impact class action strategies that would produce benefits beyond the parties to the litigation (Handler et al. 1978b:60-61). In short, the definition was designed to include firms with practice areas analogous to those of legal nonprofit groups like the ACLU or NAACP Legal Defense and Educational Fund, Inc. The problem with this definition related to the notion that “public interest” work was the representation of groups that

were “underrepresented” in the broader political process (Weisbrod 1978:22).<sup>3</sup> Critics charged that this definition did not fit some groups that bore the public interest label such as environmental organizations, which were increasingly well-funded and politically powerful. Moreover, as the conservative movement began developing a parallel infrastructure of legal advocacy organizations in the 1970s and 1980s, lawyers on the right laid their own claim to the “public interest” and challenged what they viewed as liberal bias in the traditional formulation (Southworth 2005a).

This “contest over the meaning of ‘public interest law’” (Southworth 2005a) led some scholars to search for another conceptual category to capture mission-driven legal work across the ideological spectrum. Sarat and Scheingold’s definition of “cause lawyering” has been the most influential alternative, premised on the deployment of legal skill to “pursue ends and ideals that transcend client service” (Scheingold & Sarat 2004:3). In contrast to public interest law, the cause lawyering concept emphasizes professional identity rather than areas of practice. This big tent approach avoids concerns about ideological bias and conceptual incoherence, but potentially yields an enormous number of firms: conceivably including personal injury firms (if the lawyers are motivated primarily by a desire to vindicate victims’ rights), securities litigation firms (if the lawyers view their function primarily in terms of holding corporations accountable to

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<sup>3</sup> Some law school job placement materials rely in part on the classic “underrepresented” rationale to define private public interest firms. For instance, USC breaks down private public interest firms into different categories: those that “provide legal services to the underrepresented,” those that represent unions, and those that represent public agencies (USC Law School 2002).

their shareholders rather than earning a living), and even corporate law firms (if the lawyers identify sufficiently with their clients' business objectives).

Contemporary efforts to stake out an alternative conception of the private public interest law firm sometimes blend the two previous approaches. For instance, some law school resource guides assert a broad notion of what qualifies as a public interest "cause," while nonetheless grounding the definition in specific practice categories commonly associated with the public interest sector. The "Private Public Interest and Plaintiff's Firm Guide" published by Columbia Law School and Harvard Law School (2007:2-3), for example, defines private public interest firms as for-profit businesses that bring cases to promote "a particular social, political, or economic vision that includes helping underrepresented groups and/or promoting change," but then identifies "common areas of practice," including employment discrimination, civil rights, immigration, consumer protection, disability rights, and environmental law. Yale Law School (2008:1) takes a similar approach, defining "public interest law firms" as those with a "primary mission...to assist underrepresented people or causes, rather than to make money," while suggesting that "typical" practice areas include "plaintiffs' employment discrimination, civil rights, criminal defense, environmental law, and disability rights."

We define private public interest firms as for-profit legal practices structured around service to some vision of the public interest. They are organized as for-profit entities, but advancing the public interest is one of their primary purposes—a core mission rather than a secondary concern. For the purposes of the research, we are agnostic about what constitutes the public interest and thus view the category as potentially including firms with visions of the public good spanning the full range of the

political spectrum. This category marks a range on a continuum, including firms pursuing different mixes of work and articulating various visions of the public interest.

Whether any particular firm falls within the category is an empirical question requiring investigation into the firm's activities and the commitments of its lawyers. Evidence that one might use to evaluate whether a private firm "qualifies" would include the firm's practice areas (and how clients are billed), which may reflect a firm's commitments and suggest its underlying mission. In this sense, a relevant criterion is whether a firm devotes a significant part of its practice to areas that have analogues in the nonprofit public interest sector (Nelson & Albiston 2006; Rhode 2008). Other evidence might include the self-perceptions of firm lawyers, articulated directly or in firm mission statements. We do not undertake that categorization project here, but we anticipate that it would produce a large variety of firms with divergent practice specialties and cultures—some at the core of the private public interest firm category and others toward the periphery, where inevitable boundary disputes would crystallize the concept and permit a more searching exploration of its tensions.

### ***Development***

Transformations in the for-profit and nonprofit arenas have spurred the development of private public interest firms and promoted an alternative vision of private lawyering for the public good. Lawyers' ideas about professionalism have long reflected the economics of legal practice and social stratification within the bar (Marks et al. 1972). Even during the so-called "golden age of civic professionalism" (Galanter 1996), "lawyer-aristocrats" and "country lawyers" offered differing models of lawyers' contributions to society (Scheingold and Sarat 2004:30-32). Elite lawyers claimed to

discharge their public obligations by mediating between client and community: channeling client desires into socially beneficial outcomes (Simon 1998), and taking time away from private practice to serve in public office (Kronman 1993). The “country lawyer,” in contrast, served his community by representing clients at reduced rates or for no fee at all (Scheingold & Sarat 2004:31-32).

The economic transformation of the profession in the Twentieth Century revised conceptions of professional service while also reinforcing divisions between the elite and non-elite bars. The notion of “pro bono publico”—lawyering “for the public good”—grew out of strands of practice emanating from different strata of the profession. They included the early American practice of appointing counsel in criminal cases (Shapiro 1980), and efforts by elite white lawyers in the early 1900s to exempt their work on behalf of the NAACP LDF from ethical rules on the ground that no fees were charged (Carle 2002). The rise of the big law firm in the last half of the century (Abel 1989; Galanter & Palay 1991) transformed elite practice and contributed to the institutionalization of the pro bono ideal (Cummings 2004). Inside the big firm, where economic success rested on the zealous pursuit of corporate client interests, the “ideology of advocacy” prevailed (Simon 1978). There, the lawyer’s public role was divided from private client relations: public service came to be associated not with moderating the desires of paying clients but rather with volunteering on behalf of nonpaying ones (Pearce 2001). As the federal legal services program came under attack in the early 1980s (Houseman 2007)—thus threatening the provision of free legal services to the poor—the American Bar Association revised its ethical rules, for the first time identifying “pro bono



publico service” as an ethical duty.<sup>4</sup> Although efforts to make pro bono mandatory failed, voluntary pro bono was nonetheless codified as a professional aspiration, and the provision of “legal services without fee” by private lawyers to “persons of limited means”<sup>5</sup> grew to become a substantial component of the U.S. civil legal aid system (Sandefur 2007). In contrast to the image of legal aid and public interest lawyers as ideologically committed activists, pro bono evolved in a way that fits comfortably with conventional practice norms, since private lawyers who move back and forth between paying and pro bono clients can disclaim moral responsibility for either (Cummings 2004). Moreover, the conception of pro bono as unpaid services to the poor has reinforced an association between professional virtue and large law firms because lawyers in these practices are financially best situated to provide free services (Cummings 2004:33-41; Mather et al. 2001:156).

The conventional vision of pro bono has diverged from the realities of solo and small firm practice, where lawyers have been less able to forgo payment in the name of public service (Lochner 1975; Mather et al. 2001:139). Accordingly, at the lower end of the legal profession’s status hierarchy, a distinct conception of the relationship between the private firm and the public good has emerged. While solo and small-firm lawyers do, in fact, take on conventional pro bono cases without the expectation of payment (Levin 2009), many equate public service with reduced-cost, or “low bono,” work (Seron

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<sup>4</sup> Model Rules of Prof’l Conduct, R. 6.1 (1983).

<sup>5</sup> Id.

1996:127-136; Landon 1990)<sup>6</sup>—an updated version of the “country lawyer” ideal. Under this model, lawyers either negotiate reduced fees in advance or write them down after the representation ends and it becomes apparent that the client cannot pay the contract price (Levin 2009). Solo and small-firm lawyers do not neatly separate paid from unpaid work and often view service to a working class clientele as a form of public service (Levin 2009).

Private public interest firms have developed as a subset of small-firm practice—one defined by an organizational commitment to the public interest that transcends the occasional provision of no-fee or reduced-fee client services. This distinctive type of private practice is not new (Berlin et al. 1970). Rather, some version has existed since at least the early part of the Twentieth Century, forged through the entrepreneurial efforts of prominent lawyers (see Fuchs Epstein 2009). In Los Angeles, for example, the firm of Margolis & McTernan was founded in 1943 by legendary radical lawyers Ben Margolis and John McTernan, both of whom were charter members of the Los Angeles chapter of the National Lawyers Guild (Cummings 2009). Margolis was an ardent Communist best known for his representation of the “Hollywood Ten” before the House Un-American Activities Committee in 1947 and his Supreme Court advocacy to reverse the convictions of Communist leaders charged with advocating the overthrow of the government.<sup>7</sup> For nearly fifty years, Margolis was in partnership with John McTernan, who also had a

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<sup>6</sup> Garth (2004) and Heinz et al (2005) have shown that opportunities for pro bono and public service are stratified, with the most desirable work disproportionately available to lawyers in the sectors of the profession that hold the highest social status.

<sup>7</sup> *Yates v. United States*, 354 U.S. 298 (1957).

distinguished career, winning cases striking down racially restrictive housing covenants and segregated unions, and establishing the right of defendants to examine evidence gained from informers (Cummings 2009). When they began in 1943, the firm specialized in civil rights and civil liberties cases, while also representing Southern California chapters of the Congress of Industrial Organizations. However, after they were blacklisted for their representation of Communists, most of the union clients left, fearful that their association would expose them to government persecution. Going forward, the firm subsidized its political cases with fee-generating work on personal injury and products liability matters, and also built a maritime practice through its representation of the International Longshore & Warehouse Union (Cummings 2000). While Margolis & McTernan grew out of the post-war radical left, the Philadelphia-based Norris, Schmidt, Green, Harris, Higginbotham & Associates emerged in the 1950s as an effort by prominent African American attorneys, excluded from the white legal establishment, to build their own professional capital and serve their communities (Porter 1998). The Norris firm initially focused on criminal defense but expanded into civil rights after *Brown v. Board of Education*. It used its connections with the black community to carve out practice areas supporting black businesses and churches (Porter 1998:164). In addition to advancing civil rights through its case work, the firms' lawyers also adopted a more conventional model of public service, with many moving into prominent government service and gaining state and federal judicial appointments. Most prominently, partner Leon Higginbotham became the Chief Judge of the Third Circuit Court of Appeals (Porter 1998:151).

The evolution of private public interest law firms is part of a broader story about the trajectory of the plaintiffs' bar. As Yeazell (2001b) details in his study of civil litigation, plaintiffs' firms in the post-war era reorganized and became better capitalized due to the spread of liability insurance (increasing of the pool of solvent defendants), the doctrinal expansion of defective products liability (raising the prospect of large-scale recovery against corporations), the erosion of governmental immunity (exposing governments to tort liability), changes in discovery rules and settlement practices (enhancing the role of lawyers), and the increased availability of law firm credit (permitting the financing of large-scale litigation over time). In response to these improved circumstances, plaintiffs' lawyers restructured their practices, using contingent fees to "justify their investment of time" (Yeazell 2006:704) and diversifying their portfolio of cases across substantive areas in order to balance low-risk, low-paying cases with high-risk, high-paying ones in profitable combinations (Kritzer 2004:12; Kritzer 2002:754). These changes transformed the plaintiffs' bar. Although the social status of solo and small-firm lawyers has remained low relative to their corporate firm counterparts (Carlin 1994:xxiii; Heinz & Laumann 1994; Heinz et al. 2005), over the past 50 years, the plaintiffs' bar as a whole has become "more deeply capitalized, specialized, and expert" (Yeazell 2001b:200; see also Dinovitzer et al. 2004).

Private public interest firms have benefited from some of the same trends that improved the fortunes of the plaintiffs' bar (Yeazell 2001a). Indeed, some of these firms emerged from plaintiff-side tort practices (Handler et al. 1978a:113),<sup>8</sup> and some continue

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<sup>8</sup> The government practice of paying private attorneys for taking on indigent defendants in certain cases also contributed to the development of small-firm criminal defense

to use tort practice to subsidize mission-driven work. Yet private public interest firm lawyers have sought to distinguish themselves from the profit-orientation associated with the plaintiffs' bar by organizing their practices not only to make money but also to promote the public interest. Thus, in contrast to the profit-maximizing approach of contingency fee lawyers more generally, private public interest firm lawyers have sought to pursue a "double bottom-line"—measuring practice outcomes in terms of economic return and the advancement of public interest goals. These firms therefore adopted the ethos—and often the substantive legal objectives—of the public interest law movement as it emerged in the 1960s and 1970s. Other firms grew out of earlier models associated with African-American lawyers who pursued civil rights cases for modest fees (Carle 2001). And still others combined public interest goals with private forms in innovative new configurations (Trubek & Kransberger 1998).

The evolution of private public interest law firms has also been shaped by a set of structural opportunities and constraints peculiar to this field. On the opportunity side, the availability of fee-shifting statutes has permitted cause-oriented lawyers to build their own practices and firms around issues such as employment discrimination and police abuse (Bagenstos 2007). The Civil Rights Act of 1964 carried its own attorney's fee provision in employment discrimination cases under Title VII and public

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practices. See, e.g., Criminal Justice Act of 1964, Pub. L. No. 88-455, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. § 3006A (2006)) (providing for the appointment of criminal attorneys for a fee).

accommodations cases under Title II.<sup>9</sup> After the Supreme Court held that federal courts could not award fees to prevailing parties in other public interest suits without statutory authorization,<sup>10</sup> Congress passed the Civil Rights Attorney's Fees Awards Act in 1976, which provided for attorney's fees in cases brought under section 1983, Title IX, and other federal statutes,<sup>11</sup> thus opening the door to a broader range of potentially remunerative civil rights lawsuits against governmental and private actors. Some states crafted their own private attorney general statutes (Rubenstein 2004), which expanded opportunities to recover fees under state law. For example, California passed its private attorney general fee provision in 1977 (McDermott & Rothschild 1978:138), allowing fee awards in cases where "a significant benefit...has been conferred on the general public or a large class of persons."<sup>12</sup> The era of fee-shifting ushered in by these statutes contributed to an explosion of public interest litigation and provoked a countermovement to curtail fee awards (Luban 2003:241-245). Although court decisions have complicated attorneys' efforts to recover fees in statutory fee cases, private public interest lawyers have been able to adapt their fee arrangements and reorganize their practices to maintain financial viability. Thus, in the face of defense "sacrifice offers" that condition damage settlements on the waiver of statutory attorney's fees,<sup>13</sup> some private public interest lawyers have

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<sup>9</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, Title II, § 204(b), Title VII, § 706(k) (codified as amended at 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (2006)).

<sup>10</sup> *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

<sup>11</sup> Pub. L. No. 94-556, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988 (2006)).

<sup>12</sup> Cal. Civ. Proc. Code § 1021.5 (West Supp. 1978).

<sup>13</sup> *Evans v. Jeff D.*, 475 U.S. 717 (1986).

structured their retainer agreements to provide for a contingency fee in the absence of a statutory fee award. After the Supreme Court's elimination of fee awards under the "catalyst theory,"<sup>14</sup> this alternative contingency fee structure has also protected private public interest lawyers against strategic settlement by defendants in cases seeking damages (Albiston & Nielsen 2007).<sup>15</sup>

While the availability of fees has made public interest law firms economically feasible, a variety of constraints associated with nonprofit practice have encouraged lawyers to move into the private sector. Lawyers' complaints about the nonprofit sector focus on its lower pay, the scarcity of jobs, limited training opportunities, and insufficient resources for large-scale litigation. These generalized limitations have been compounded by specific funding and substantive restrictions imposed on the federal legal services program over the last 25 years (Cummings 2004:21-22). Accordingly, the nongovernmental sector has become an increasingly uncongenial arena for litigators: groups have found it difficult to raise foundation funds to sustain ongoing litigation operations, while restrictions on federal legal services programs have eliminated the ability to pursue class actions, attorney's fees, and cases involving most undocumented immigrants (Houseman 2007). Against this backdrop, private public interest firms have offered lawyers the chance to pursue public goals (Trubek 2007:1137), while enjoying

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<sup>14</sup> *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001).

<sup>15</sup> However, Albiston and Nielsen (2007:1133) note that civil rights lawyers are more hesitant to take on cases that only seek injunctive relief, since there is no possibility of a contingent fee and strategic settlement may negate a statutory fee award.

some of the advantages associated with private practice, such as greater freedom to shift agendas, more autonomy from funding sources, and better facilities (Katz & Bernabei 1994). In so doing, they have rejected the prevalent view of the public interest as a kind of practice specialty best left to government programs, legal services organizations, and nonprofit public interest law groups (Gordon 2003:1209).

Private public interest firms have thus prompted “a reconsideration of the now assumed separation between socially conscious lawyering and private practice” (Trubek and Kransberger 1998), while importing a more ambitious conception of professionalism into the private sector (Scheingold & Bloom 1998). The conventional paradigm of public interest practice has centered on the work of nonprofit organizations as the vanguard of legal reform. This focus has reflected the public-private divide within the field, where nonprofit groups have grown into a major advocacy force sustained by governmental funding and private philanthropy (see Aron 1989; Nielsen & Albiston 2006; Rhode 2008), while for-profit firms have often been viewed suspiciously as driven more by the pursuit of fees than social justice (Trubek & Kransberger 1998:202).<sup>16</sup> Yet as the domain of private public interest law has gained prominence,<sup>17</sup> fueled by the economic

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<sup>16</sup> Indeed, although many plaintiff’s lawyers view themselves as fighting on behalf of the “little guy,” they have not been closely identified with social movements. See Seron (1996).

<sup>17</sup> As one indication of the interest in private public interest law firms, the Law School Consortium Project was launched in 1997 (initially including Maryland, CUNY, and Northeastern law schools), with funding from the Open Society Institute, to provide



opportunities presented by for-profit practice and disillusionment with the constraints of nonprofit organizations, this division (which was never complete) has increasingly come under stress. Particularly as the deregulatory thrust of social policy over the past quarter-century has foregrounded corporate accountability as a target of public interest advocacy (Ashar 2007), private firms have gained importance as practice sites with the resources, expertise, and financial incentives to litigate against corporate legal violations—in contrast to classic public interest law firms, which have focused on challenging government actors (Trubek 2005). On the right, as the conservative movement has increasingly relied on legal strategies to advance its diverse missions, small firm practitioners have come to play significant supporting roles (Southworth 2005b). In this context, the private public interest law firm has become an alternative site for “doing well” and “doing good” (Wilkins 2004; Erichson 2004), allowing lawyers to take on large-scale social change litigation that nonprofit groups cannot pursue because of resource limits—and big-firm pro bono programs will not because of business conflicts—while also addressing other deficits associated with nonprofit practice, such as low salaries, lack of training, and high turnover. By organizing practice around a cause to believe in (Scheingold & Sarat 2004), these firms destabilize the ideology of advocacy associated with private practice and challenge the conventional noblesse oblige vision of professional service.

### *Design*

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support to law schools promoting community-based solo and small-firm lawyers working to enhance access to justice (Blom 2006).

Although the private public interest firm sector has emerged as an important “arena of professionalism” (Nelson & Trubek 2002) and “community of practice” (Mather et al. 2001), we know relatively little about it. The quantitative evidence is dated and the qualitative case study research, though rich, provides only snapshots of a small number of firms. Nevertheless, in this section, we draw upon the existing data, supplemented with preliminary findings from our own research, to sketch a tentative portrait of the private public interest field.

In the mid-1970s, the existence of a handful of private public interest firms prompted scholarly inquiry into their form and function. The Council for Public Interest Law (1976:136) identified 44 firms that devoted over half of their work to public interest practice and it found that these firms employed 160 lawyers. Nearly all were established after 1969, suggesting the influence of the public interest movement and the advent of attorney’s fee statutes. About two-thirds of these firms employed four or fewer attorneys (Council for Public Interest Law 1976:137). Low pay was standard, with 60% of lawyers in these firms earning no more than \$20,000—then the starting salary for first-year law firm associates (Council for Public Interest Law 1976:137).<sup>18</sup> The study also found that the firms relied on different economic arrangements to achieve stability, including establishing ongoing cooperative relationships with nonprofit public interest groups, taking advantage of federal programs subsidizing the cost of public participation in regulatory agencies, participating in prepaid legal services plans, and relying on non-public interest cases to supplement their income (Council for Public Interest Law

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<sup>18</sup> Adjusted for inflation based on the Consumer Price Index, \$20,000 was worth approximately \$77,000 dollars in 2007.

1976:138-140). This picture looked quite similar to the one painted by Handler and his colleagues, whose study of “mixed firms” identified 100 public interest lawyers practicing in approximately 20 private firms during the early 1970s (Handler et al. 1978a). The Handler study attributed the scarcity of such firms to the inherent limits of the model, which required clients to pay and lawyers to subsidize their mission-driven work with commercial cases (Handler et al. 1978a:112-113). It also found that most mixed firms were located in the Northeast and were quite small, with an average size of 5 lawyers. The most common areas of public interest practice were consumer protection, environmental law, employment discrimination, housing, criminal, and civil rights work (Handler et al. 1978a:113). The study also concluded that the firms’ “regular work” focused on individuals and small businesses that could not pay sizeable fees. Personal injury law was the most common area of non-public interest practice, followed by labor and general commercial law (Handler et al. 1978a:114). Salaries were relatively low, with mixed-firm lawyers earning about half the incomes of their big firm counterparts (Handler et al. 1978a:116).

Although there are no current systematic data on private public interest firms, there is some evidence that the field has grown since these early studies. Both of the two main databases on the private public interest law sector suffer from methodological limitations that substantially restrict their usefulness as sources of systematic information about the field. Harvard and Columbia Law Schools’ “Private Public Interest and Plaintiff’s Firm Guide” (2007) provides a list of firms, with contact information, office size and summer job openings, areas of specialization, and types of advocacy. The Guide does not purport

to be comprehensive,<sup>19</sup> and it does not disaggregate private public interest and general plaintiff's firms. PSLawNet, an online database administered by the National Association for Law Placement, allows subscribers to search for information on public interest job opportunities and employer profiles.<sup>20</sup> The site is essentially a bulletin board: firms appear in the database if they either create their own employer profiles or post job opportunities on one of the many public interest list serves that PSLawNet staff monitors.<sup>21</sup> NALP does not claim that the site is comprehensive and law firms can unilaterally choose to be listed as a public interest law firm. Therefore, the list is likely to be both under- and over-inclusive.

Despite the limitations of these databases, they may nevertheless indicate trends regarding firm location, size, and practice areas. Both databases suggest that the field has grown since its early days, both in terms of size and geographic diversity. The Columbia and Harvard Guide, for instance, lists 329 firms, a large portion of which are located outside the Northeast (69 of the listed firms (21%), for instance, are based in California). Searching the "Law Firm—Public Interest Focus/Practice" database on the PSLawNet site generates a list of 464 firms nationwide, with 187 in California, and only 117 in New York, Massachusetts, and Washington, D.C. collectively. Looking just at the firms based

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<sup>19</sup> The Guide's list is generated by compiling firms that submit job postings to Columbia and Harvard Law Schools, firms that Columbia and Harvard students work at, postings on list serves and other reports, and recommendations from colleagues at other institutions.

<sup>20</sup> PSLawNet, About Us, <http://pslawnet.org/aboutpslawnet>.

<sup>21</sup> See About PSLawNet, at <http://pslawnet.org/aboutpslawnet>.

in California, and after eliminating 18 firms that appeared to have been improperly included in the list, we found that the mean size was 8 (with a median of 3), which is consistent with prior studies finding that private public interest firms are generally small.<sup>22</sup> Employment law and civil rights were the most commonly cited practice areas of these firms.

A handful of qualitative studies also provide important insights into the nature of private public interest law firms and the tradeoffs involved in pursuing public goals through for-profit entities. Consistent with the earlier quantitative findings, these studies suggest that private public interest law firms are typically small: usually fewer than ten lawyers. Many of them struggle financially (see Trubek & Kramsberger 1998; Katz & Bernabei 1994), although some generate substantial incomes. Firm size appears to be constrained by the lack of predictability in revenue streams. The firms' financing models vary, but many depend upon fee-shifting statutes, contingency fee arrangements, and other private attorney general models of law enforcement. Other firms build practices primarily on paid service to nonprofit organizations devoted to causes they endorse. Some firms combine these approaches.

The case studies reveal that private public interest law firms pursue a variety of different substantive agendas—including progressive causes, such as racial justice, environmental protection, civil liberties, and gender equity—and causes associated with conservative and libertarian philosophies—for example, reversing *Roe v. Wade*, promoting “family values,” and restricting governmental regulation (Southworth 2005b). The Los Angeles

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<sup>22</sup> The false positives included firms that were: (1) double-listed; (2) defunct; (3) mischaracterized as for-profit; or (4) mischaracterized as legal.

civil rights firm of Hadsell & Stormer asserts that it is committed to “fight[ing] injustice, no matter what form it takes,”<sup>23</sup> while Traber & Vorhees, a civil rights firm focused on employment and housing that operates out of the same building as Hadsell & Stormer (Cummings 2009), asserts that it is “dedicated to upholding and advancing the civil and human rights of all people.”<sup>24</sup> Porter’s profile of Norris, Schmidt, Green, Harris, Higginbotham & Associates, a Philadelphia practice established in the early 1950s, describes the firm’s “overall objective” as “social justice and equality of opportunity” (Porter 1998:173-74). One of the founders of a Detroit-based firm, pseudonymously called Marks, Feinberg, Fried & Burch in Kelly’s study of the relationship between practice context and conceptions of professionalism (2007:31), said that his practice was built to serve “the little guy battling the giant. That’s what we’ve always done.” Scheingold and Bloom found that the small firm lawyers in their Seattle sample operated along a continuum, with “radical lawyers” espousing clear progressive missions, while “critical lawyers”—those whose emphasis was on client empowerment—tended to eschew overarching mission statements in favor of focusing on “discrete, short-term gains for clients” (1998:239). Even further along the spectrum, lawyers associated with civil rights and civil liberties firms adopted less transformative missions, resolving instead to “uphold[] constitutional principles or defend[] the legal ‘system’” (1998:239).

Although lawyers in private public interest law firms are motivated by a variety of substantive causes (Menkel-Meadow 1998), the existing research suggests that one attraction of such firms is that they afford lawyers autonomy to structure practices to

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<sup>23</sup> Hadsell & Stormer, Inc., <http://hadsellstormer.com/> (last visited Aug. 29, 2007).

<sup>24</sup> Traber & Voorhees, <http://tvlegal.com> (last visited January 30, 2009).

match political commitments (Scheingold & Sarat 2004:88). Lawyers profiled in the literature emphasize flexibility in case selection as a strong advantage of private public interest firms. For instance, the lawyers at the Washington, D.C.-based Bernabei & Katz started their civil rights firm in order to “maximize discretion to select cases” consistent with their own political goals (Katz & Bernabei 1994: 196-97). When Hadsell & Stormer formed its partnership in 1992, the lawyers asserted that “we wanted to be as unfettered as possible and we knew that the closer you get to a grant-funded organization the more restrictions there’s [sic] going to be. And we really, literally, wanted to be able to take any case we wanted” (Cummings 2009). The desire for such autonomy in case selection seems true of lawyers on the left and the right. Southworth’s study on conservative and libertarian lawyers similarly found that small firm practice accommodated lawyers “who seek to develop practices reflecting their political commitments” (Southworth 2005b:96). Other studies highlight the attraction of private public interest firms for lawyers seeking to experiment with nontraditional client relationships and advocacy tactics. For instance, the lawyers in Trubek and Kransberger’s study “stressed the importance of creating a more collaborative and less traditionally hierarchical relationship with the client, and insisted on the importance of client empowerment, personal agency, and autonomy” (1998:211). Similarly, Kilwein (1998) found that small-firm Pittsburgh lawyers pursued a range of radical goals, such as client empowerment and political mobilization. Bernabei & Katz, reported that in addition to litigation, it advanced civil rights causes through “counseling, lobbying, research and investigation, the use of the press, mobilizing community demonstrations, and organizing and educating grassroots groups” (Katz & Bernabei 1994:294).

But the autonomy of lawyers in private public interest firms is limited by financial imperatives (Scheingold & Sarat 2004:88), forcing tradeoffs to balance mission and monetary reward. The literature reveals that private public interest firms adopt a variety of economic models. Some firms pursue *only* work that the principals believe in—and sacrifice income to do so. The Pasadena-based civil rights firm of Traber & Voorhees, for instance, reports that it has never taken a case outside its core practice of civil rights, housing, and human rights law (Cummings 2009). Similarly, Bernabei & Katz—which accepted civil rights, civil liberties, employment and AIDS discrimination, whistleblower, and prisoners rights cases—declined to supplement its caseload with cases taken purely for financial reasons (though they did receive a small amount of foundation funding) and paid its attorneys on a nonprofit scale (Katz & Bernabei 1994). The community-based El Centro practice, studied by Trubek & Kramsberger (1998:218), also combined foundation grants with client fees, which were limited based on ability to pay. Many firms, however, supplement their mission-driven work with other matters that are consistent with their commitments but not especially dear to them. Other firms take cases that do not further their political ideals at all, in order to subsidize the work they deem to be in the public interest. Hadsell & Stormer, for instance, represented wealthy executives in employment contract disputes in what one lawyer calls its “white male cases” (Cummings 2009). Scheingold and Bloom’s research (1998:246) similarly found that attorneys in small firms, whose financial status tended to be “precarious,” subsidized “transgressive” work with “paying non-political clients.”

## **THE MARKETPLACE OF IDEALS: LAWYERING FOR THE GOOD ACROSS PRIVATE PRACTICE**



By rejecting the conventional professional dichotomy that severs paid work from the public good, the private public interest firm model reflects an alternative vision of market-driven practice that attempts to unify profit and principle on terms that diverge significantly from the big firm. It therefore allows us to rethink “lawyering for the good” as a spectrum of market-embedded practices that require different tradeoffs across practice sites to accommodate public ideals and private economic realities. Big firm attorneys render unpaid services to deserving clients as a way of “giving back.” Solo and small firm attorneys argue that their “low bono” work for lower-income clients discharges their professional duties. Private public interest firm lawyers suggest that their fee-generating cases advance important public purposes. From this perspective, the question is not which type of private practice best promotes the public interest, but rather how market-dependence shapes opportunities and constraints across sectors of the private bar—and how different organizational structures influence the meaning and practice of lawyering for the good (see Sarat & Scheingold 2005:11). This section begins such an analysis, offering a preliminary comparison of the private public interest firm and the big pro bono model across the dimensions of lawyer ideology, case selection practices, and approaches to unpaid pro bono work.

### ***Lawyer Ideology***

Lawyers in large law firms and private public interest law firms offer starkly different conceptions of how their practices relate to the professional ideal of “lawyering for the good” (Granfield 2007). In large law firms, lawyers generally espouse the conventional view of professional service as sporadic volunteerism via pro bono (Scheingold & Bloom 1998: 245).

In private public interest firms, in contrast, lawyers tend to emphasize commitment to particular social and political goals as the *sine qua non* of public service. They generally view their mission-driven work as all of a piece with their paid work and tend to see pro bono, as conventionally defined, as a modest public-spirited gesture promoted by lawyers whose practice model is much less consistent with the public interest than their own. Thus, while big firm lawyers tend to regard pro bono (along with civic involvement) as a primary outlet for professionalism, lawyers in private public interest firms sometimes appear skeptical about (and sometimes even hostile toward) the notion that lawyers' altruistic impulses should find primary expression through the provision of unpaid legal services. At Hadsell & Stormer, for instance, the lawyers' self-conception as advocates for the "underdog" means that they view all their work—including routine civil rights cases—through the lens of social activism and do not bracket specific cases as pro bono matters that are qualitatively distinct from the cases that comprise the rest of their docket. The Hadsell & Stormer lawyers thus view public service as an inherent part of their overall practice. As firm partner Dan Stormer puts it: "I don't believe in pro bono" (Cummings 2008).

In this spirit, private public interest lawyers fault the bar for devoting such attention to promoting pro bono rather than reexamining its support for "the ideology of advocacy" (Simon 1978), which holds lawyers unaccountable for their choices of clients and goals. They suggest that the bar's emphasis on pro bono service diverts attention from the question that drives their own practice choice—whether the firm's daily work serves or undermines the public interest (Cummings 2009). Some of them stake out stronger positions; they view pro bono as a way to salve large firm lawyers' consciences about the

moral unworthiness of their daily work and to put a kind face on such practice for the public. According to these critics, even if pro bono accomplishes some good, it does not compensate for the mischief caused by the conventional model's allocation of services without regard for the merits of clients and their goals. Lawyers in private public interest firms see their own paid work as valuable and consistent with the public good. They do not feel obliged to participate in pro bono service in order to vindicate their sense of professional virtue.

### ***Case Selection***

The dockets of large firms and private public interest law firms also differ substantially. While the big firm is organized around fee-generating service to commercial (largely corporate) clients, with unpaid pro bono constituting a small fraction of the overall docket,<sup>25</sup> the private public interest firm is organized around service to some vision of the public good, which requires building a practice that is consistent with the firm's political aims even if it generates less financial security. Case selection in the private public interest firm is driven by the desire to unify mission and monetary reward, although these firms must sometimes supplement mission-driven matters with work undertaken for purely economic reasons.

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<sup>25</sup> Even firms with the highest number of pro bono hours devote a relatively small percentage of their time to pro bono work. For example, at Jenner & Block, the top ranked firm in *The American Lawyer's* 2008 Pro Bono Scorecard, the average lawyer did 175 hours of pro bono per year—about 9% of total billable hours based on a 2000 hour billable year (Pro Bono Scorecard 2008).

The portfolio of pro bono cases in big firms is shaped by competitive pressures and political realities, as well as lawyers' professional commitments. For lawyer recruitment purposes, big firms find it useful to accept a manageable number of high-profile impact cases, typically against public agencies, where the risk of positional conflicts is low. Smaller direct services cases meet training needs, and death penalty cases, legal clinics, rotation programs, and certain types of fellowships boost pro bono hours.<sup>26</sup> Big firm pro bono reinforces the federal legal services program by providing more attorneys for direct service representation and handling the cases that the program is prohibited from undertaking. It also augments the nonprofit public interest sector by contributing firm resources to support large-scale law reform efforts that nonprofit organizations cannot manage alone (Rhode 2008:2070). However, there are also systemic gaps, particularly as to cases involving major challenges to corporate practices—which big-firm pro bono shuns.

Although most big firms state that they give lawyers wide latitude to accept pro bono matters, informal law firm practices exclude many pro bono cases (Spaulding 1998). There is no systematic evidence of the impact of positional conflicts, but anecdotal accounts suggest that they strongly influence large firm pro bono dockets. The most noticeable effect is to exclude pro bono cases that strike at the heart of corporate clients' interests, particularly employment, environmental, and consumer cases against major companies.

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<sup>26</sup> Some firms, including Sullivan & Cromwell and Holland & Knight, have offered short-term public interest fellowships to incoming associates who enter the firm after the fellowship term ends; the firms count fellows' hours toward their pro bono total (Cummings 2004:81-82).

For instance, the pro bono coordinator at Skadden, Arps, Slate, Meagher & Flom indicated that the firm rarely accepted employment-related civil rights cases because of conflicts with labor clients, whereas it more readily took voting rights and housing cases (Cummings 2004:119). Similarly, nonprofit environmental advocacy organizations complain that big firms will not touch certain types of environmental cases, such as challenges to placing environmental hazards in low-income neighborhoods. In those cases, environmental groups rely on small private public interest law firms for support (Cummings 2004:119). Cases involving the preservation of endangered species or particular natural habitats fare better in large firm pro bono programs, although they can be perceived as anti-development and therefore are risky for developer-side firms.

Big firms sometimes take consumer cases against private companies, but the defendants in these cases tend to be small-time scam artists who have defrauded home owners of their equity, predatory lenders who charge usurious interest, or document preparers who pose as lawyers. Big firms generally do not bring impact suits against major corporations for finance discrimination or sue major banks for credit fraud. Requests for pro bono assistance for plaintiffs bringing products liability suits also typically elicit swift rejection (Cummings 2004:120).

Positional conflicts also operate in a less categorical fashion, precluding individual law firms from accepting cases that conflict with practice specialties. Firms that represent housing developers shy away from landlord-tenant matters; firms that represent biomedical clients engaged in animal testing avoid animal rights cases; and firms that do municipal bond work decline to sue local jurisdictions. One lawyer recounted how his firm prohibited him from representing an elderly African American resident shot by local police because

the firm represented the city in other types of matters and would not sue an important client (Wilkins 2004:77). Firms also consider how politically controversial pro bono matters will play with their client constituency. Thus, even when positional conflicts are not technically at issue, firms sometimes take a dim view of “pro bono activities that might merely *offend* the firm’s regular clients or its prospective clients” (Scheingold & Sarat 2004:77). Some firms therefore decline to take pro bono cases on either side of the abortion debate, while others shy away from cases involving hate speech, gun control, or religion.

Private public interest firms often take on cases that big firms do not want and nonprofit organizations cannot afford. That means, on the left, that such firms have dockets consisting of “corporate accountability” cases, in which they represent individual or classes of plaintiffs in suits against companies to redress labor, employment, environmental, or consumer violations. On the right, cause-oriented firms take on cases that are too politically sensitive or that require a particular substantive expertise that small-firm lawyers possess.

Since private public interest firms fill some of the gaps left by big firm pro bono, they sometimes find themselves on the opposite side of the table from big firms. Contingency fee arrangements, combined with the opportunity for attorney’s fees, provide small firms with an economic incentive to aggressively pursue claims against deep-pocket companies. As a result, employment discrimination cases on the basis of race, sex, age, and disability, are staples of some private public interest practices. For instance, Chicago’s Miner, Barnhill & Galland—the former firm of President Barack Obama—built its success on its employment discrimination practice. Other common practice specialties include employment law (wage-and-hour enforcement and worker’s compensation) and consumer

protection. The availability of private attorney general statutes has also enabled some private public interest firms to develop niche environmental practices. For example, Chatten-Brown & Associates in Los Angeles handles land use and environmental protection with potentially broad public impact. In one prominent case, it represented a coalition of community organizations seeking to block an initiative that would have allowed Wal-Mart to open a Supercenter store in Inglewood, California. In that matter, the firm was paid by a local union opposing Wal-Mart, illustrating another common financing model used by private public interest firms: alliance with repeat-player organizational clients. In addition to union affiliation, some firms develop relationships with organizational clients in the community development and affordable housing sector. One of the most notable firms in this area is Bocarsly Emden Cowan Esmail & Arndt LLP, an affordable housing firm with offices in Los Angeles and Bethesda, Maryland that represents developers and investors in complex federally subsidized real estate deals. Because private public interest firms focus on practice areas that promise consistent returns against economically viable targets, some of them also regularly sue government agencies, particularly in the discrimination context. In addition, some firms take on the representation of criminal defendants, particularly when subsidized by the state.

In general, private public interest firms pursue a “double bottom line,” in which case selection attempts to balance financial reward and social impact. For instance, Detroit’s Marks, Feinberg, Fried & Burch reports that in selecting cases it routinely weighs out-of-pocket costs against the (public and private) benefits of cases and the possibility of recovering fees (Kelly 2007:51). As this suggests, lawyers in private public interest firms, like their counterparts in other types of private practice, must attend to financial

considerations. At a minimum, they must generate enough income to cover costs and keep their practices afloat. Even the most successful of these firms sometimes accept work that the firms' lawyers do not find particularly compelling—a concession that is in tension with the goal of building a practice around worthy causes. But lawyers in private public interest firms view such bread-and-butter work as the exception rather than the rule, just as public service work is the exception rather than the rule for most large law firms.

### ***Pro Bono***

The conventional typology of public service in the private firm has big-firm commercial lawyers engaging in pro bono as an act “outside” of their market-driven practice, while private public interest lawyers select cause-advancing cases “within” the framework of fee generation. Yet this dichotomy is problematic since big-firm pro bono and small-firm public interest work intersect and diverge in more complex ways. In particular, there is evidence to suggest that the selection and prosecution of big-firm pro bono cases is sometimes tied to bottom-line calculations, while private public interest firms take on what are, in effect, pro bono cases with no (or very little) expectation of recovering fees.

Big firm pro bono is typically understood as a check on the crass economic view of legal professionalism—an elevation of private legal practice above the morals of the marketplace. But recent scholarship suggests a number of ways in which pro bono is also a product of economic concerns. For individual lawyers, there is a well-documented history of elite lawyers devoting portions of their careers to government service and leveraging their prominence in the public sector to attract business after returning to



private practice (Smigel 1969). Wilkins (2004) has shown that black corporate lawyers have pursued public service, in part, to generate career assets that they find difficult to acquire through insider strategies: “experience, visibility, and contacts” (see also Garth & Dinovitzer 2009). Firms, too, sometimes claim to benefit economically from pro bono. Law firm leaders acknowledge using pro bono as a marketing tool to recruit idealistic associates and as a vehicle to train young lawyers who would otherwise lack the experience necessary to conduct meaningful work on complex paying cases (Cummings 2004; Rhode 2005). Pro bono has also been promoted as a strategy for retaining mid-level lawyers who are burned out on corporate client service and who see pro bono as a way to reconnect to the profession’s ideals. Big law firms compete for recognition as top pro bono performers, with high-profile “signature projects” and pro bono success stories generating publicity that may attract new clients interested in burnishing their image for public service with their customer base (Abel 1989:38; Cummings 2004:40-41, 72-73). Though the “business case” for pro bono has not been empirically tested, it is often treated as an article of faith among pro bono proponents, which suggests that at least some firm leaders expect investments in pro bono to pay tangible economic dividends: more productive associates and an edge in the competition for talent and clients.

In addition to these perceived economic rewards of pro bono, some big firms reap even more concrete benefits “beyond the heart” (Rubin 2006). Under the Pro Bono Institute’s Law Firm Challenge, pro bono “refers to activities of the firm undertaken normally without expectation of fee and not in the course of ordinary commercial practice” (Pro Bono Institute 2004:6). Accordingly, when firms accept cases that might generate attorney’s fees, whether or not the case “counts” as pro bono hinges on the

firm's *ex ante* intention to collect fees. In practice, however, it is not unusual for firms to accept cases on a pro bono basis but later collect fees. According to a 2007-2008 survey of law firms conducted by the Pro Bono Institute, 14% of firms reported keeping all of the fees awarded in pro bono matters, while 45% said that their firms retained a portion of the fees and donated the rest (Pro Bono Institute 2008:5). Of those firms that retained some portion of the attorney's fee awards, one-third said that the retained fees were placed in the firms' general revenue, while the rest used the awards to fund pro bono programs and support other charitable groups (Pro Bono Institute 2008:5). Although pro bono advocates urge firms to donate legal fees in pro bono cases to the nonprofit organizations with which firms co-counsel (Rubin 2006), the study suggests that firms retain some fees in a majority of cases. And while firms do not keep fees to remunerate lawyers directly, they sometimes use them to cover litigation costs and the expenses of running pro bono departments (Kolker 2006). Well-known firms like Los Angeles-based O'Melveny & Myers evaluate fee awards on a case-by-case basis, depending "on how much the fees are and how much time the firm put into it and what the needs of the nonprofit are" (Rubin 2006). While lawyers in nonprofits privately complain about firms that keep fees, they view this practice as the price of persuading firms to accept future pro bono representation (Rubin 2006). When big firms keep all or part of an attorney's fees award, the matter still "counts" as pro bono as long as it was undertaken "without expectation" of the award at the outset, leading critics to accuse firms of having it both ways (Kolker 2006; see also Pro Bono Institute 2004:8).<sup>27</sup> Thus, the ideal of pro bono as

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<sup>27</sup> The issue of "what counts" has practical implications. For one, it confers professional legitimacy on particular types of "public service" activity and withdraws it from others.

volunteerism often gives way to the reality of big firms “getting paid” for pro bono work, undercutting the notion of pro bono as an “extra-market” activity.

By contrast, although private public interest firm lawyers reject the conventional distinction between paid and unpaid work, they sometimes find themselves doing pro bono conventionally defined—either by choice (waiving fees *ex ante* in cases that advance the core mission) or necessity (reducing fees *post hoc* in cases in which clients become unable to pay). When private public interest firms select cases for pro bono representation, the choice tends to be intimately bound up with the firms’ political identity. This is different than the choice of cases in the big firm setting, where advancing a cause (beyond client service) is not the *organization’s* mission, even if it may be highly

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In addition, the question of whether a case qualifies as “pro bono” has made its way into court discussions of whether to award attorney’s fees in the first instance, with some courts holding that fee awards should be reduced or eliminated in successful cases taken on a pro bono basis. See *Cruz v. Ayromloo*, 155 Cal.App.4<sup>th</sup> 1270, 1278 (Cal. App. 2<sup>nd</sup> Dist. 2007) (criticizing such a holding by a lower court); *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, 484 F.3d 162 (2<sup>nd</sup> Cir. 2007) (suggesting that a court, in awarding attorney’s fees, may look at “whether the attorney was initially acting pro bono (such that a client might be aware that the attorney expected low or non-existing remuneration)”), *opinion amended and superceded by* *Arbor Hill Concerned Citizens Ass’n v. County of Albany*, 522 F.3d 182, 184 n.2 (2<sup>nd</sup> Cir. 2008) (“Our decision today in no way suggests that attorneys from non-profit organizations or attorneys from private law firms engaged in *pro bono* work are excluded from the usual approach to determining attorneys’ fees.”).

valued by individual lawyers working in those firms and even if the organization's reputation for encouraging its lawyers to pursue such work burnishes the firm's reputation. Thus, for private public interest lawyers, the choice of pro bono cases is a constitutive act. For big-firm lawyers, it is better understood in terms of its satisfaction of broader professional service obligations.

In addition, while big-firm lawyers often view pro bono in terms of its ancillary economic impact (recruiting, retention, and marketing), there is a more immediate connection between pro bono and paying work for lawyers in mission-driven public interest firms. Pro bono matters are typically compelling cases that would advance the firm's core mission—but where there are no clients with a direct and immediate financial stake in the outcome, or where such clients exist but are unable to pay. Alternatively, they are matters in which lawyers hope to recover fees but ultimately fail to do so. Sometimes high profile pro bono work is undertaken with the expectation that it might help deliver fee-generating work later. There is, then, a tighter nexus between pro bono and paid work in terms of practice areas, goals, and strategies employed.

Some lawyers in the private public interest firms suggest that pro bono is a practice that must be used cautiously, with due consideration for how it affects the firm's financial viability. This financial concern also is heard in big firms, but the scale of cause-oriented practice gives it a different salience. Private public interest firms often limit their own profitability by insisting that their work should be compatible with the firm's mission.<sup>28</sup>

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<sup>28</sup> In most of the private public interest firms that we have identified so far, the missions are not particularly conducive to developing highly lucrative law practices, but several of the civil rights and property rights firms appeared to be doing rather well.

Lawyers in private public interest firms feel pressure to generate fees in order to fulfill the institutions' public purposes. For example, Trubek and Kramsberger said of the lawyers in the practices they studied that "the struggle to maintain their practice often seems overwhelming" and that there is "'constant financial tension' and financial insecurity" (1998, 219). A property rights lawyer said of the firm's pro bono work "that it's always a balance. . . . [it is] a constant subject of discussion, and should be, because it's a business. If we can't keep enough coming in to keep the doors open, then we can't do any of [the cause] stuff" (Confidential Interview September 2002). A lawyer in a firm devoted to social conservative causes reacted somewhat defensively to a question about whether his work for a large nonprofit pro-life group was pro bono: "there [is] a lot of pro-bono associated with my practice but you cannot take on the chunk of business that they had for me without being paid." He noted, however, that he charged this client—and all his nonprofit clients—much less than he charged clients whose causes he cared about less (Confidential Interview, January 2002). This is entirely consistent with other research finding that lawyers in small firms generally do not support mandatory pro bono (e.g., Mather 2001; Powell 1988),<sup>29</sup> but it suggests an additional basis for the objection by lawyers in private public interest firms.<sup>30</sup>

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<sup>29</sup> Heinz et al. (2005) found that small firm lawyers were less likely than their counterparts in other practice settings to support mandatory pro bono. They did not distinguish between private public interest firms and other types of small firms.

<sup>30</sup> Bagenstos suggests that private public interest firm lawyers may also resist mandatory pro bono on the ground that it might encourage "federal courts to be even stingier in their attorneys' fee awards" (Bagenstos 2007).

As in solo and small firms more generally (Levin 2009), private public interest law firms vary in how explicit they are about taking on pro bono cases for no fee. Some firms do so openly and in advance. In an example from the right, a small-firm property rights lawyer reported that his firm does “a lot of amicus work that we don’t get paid for, that we take on simply in an effort to try to push the law in some direction” (Confidential Interview, September 10, 2002). Other firms formally accept cases on a contingency basis but have little faith in their chances of recovery. As another property rights lawyer said of many cases that he handled on a contingency basis, “I knew I wouldn’t get paid because they involved the kind of appeal where we asked the court to change the law in order to win. I won a few of those, but most of the time we lost those” (Confidential Interview, September 26, 2002).

Some private public interest firms that accept such high-risk, politically significant cases refuse to associate the practice with the conventional model of pro bono, which they oppose on principle. Hadsell & Stormer is again a case in point. For its attorneys, the firm’s *raison d’être* is the “righteous” case—one that presents a compelling injustice, where there is the possibility of legal redress (or, at least, the possibility that litigation may create leverage for a political solution). The righteous case is one that stirs passion in the firm attorneys, who believe that their legal intervention helps to right a manifest wrong. There are two distinguishing features of the righteous case: (1) that the client is from a social group deemed less powerful; and (2) the financial outcome of the case for the firm is uncertain. These cases comprise a minority of those on the docket, but there is the sense in which they are the firm’s lifeblood, providing the moral and political authority that sustains the firm’s collective mission (Cummings 2009).

The South Central Farmers typifies one of Hadsell & Stormer's righteous cases. In 2006, the firm sued to protect a community garden located south of downtown Los Angeles and at one point every one of its 10 lawyers was working on the litigation even though "financially it made no sense at all" (Cummings 2008). In what it sees as another righteous case, the firm is representing a class of Nigerian villagers in a case that challenges Chevron for human rights abuses related to its alleged support of the Nigerian military in the shooting of protestors on a Chevron oil platform and the destruction of two villages in the Niger Delta.<sup>31</sup> Significantly, righteous cases are not uniformly financial losers—thus, the firm always holds out hope for a recovery. In *Doe v. Unocal*, a human rights suit against the oil company for supporting the Burmese military in committing abuses against workers on Unocal's oil pipeline, the firm initially viewed the case as a financial long-shot given the completely untested nature of the international human rights claims against a corporate defendant under the Alien Tort Statute. But after some favorable court rulings, the firm ended up settling the case for an undisclosed (but presumably large) amount.

## **CONCLUSION**

This sketch of private public interest firms highlights some ways in which practice settings and cultures shape professional norms and behavior with respect to public service. It shows that the bar's definition of pro bono, as unpaid service to clients who are

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<sup>31</sup> *Bowoto v. Chevron Corp*, Sixth Amended Complaint for Damages and Injunctive and Declaratory Relief, Case No. C-99-02506 SI (N.D. Cal., July 23, 2004), available at <http://www.earthrights.org/files/Legal%20Docs/Chevron/6th.am.cmpt.FINAL.pdf>. The firm recently lost at the trial court; the case is currently under appeal.

unable to pay, is not a “singular ideology of professionalism operating across the legal profession” (Granfield 2007: 120) but rather a particular view of professionalism that is more congenial to lawyers in some practice settings than others. Specifically, for lawyers in private public interest firms dedicated to a particular social mission, pro bono seems almost beside the point—a distraction from what they see as a more important inquiry about whether the firm’s core function is consistent with the public interest. Recognizing why the prevailing view rankles these lawyers may help to open the conversation about what is at stake in debates about pro bono service. It might discourage an excessive focus on pro bono as the measure of the private bar’s commitment to the public weal and challenge the conventional wisdom that lawyers in private practice contribute most when they charge least. Our analysis suggests that private public interest lawyers tend to have a very different stake in the fight over how lawyers should serve the public good. While big firms, by necessity, generally protect corporate client interests, private public interest firm lawyers take cases that directly challenge those interests or promote political agendas too far to the left or right for big firms to mesh with their mainstream professional images.

Our conclusions are limited by the sparse data available at this stage. This chapter provides an overview of the state of the current research, but it also charts a future research agenda. We plan to pursue a series of case studies of private public interest law firms that will explore how these organizations work and what professional values their lawyers hold. This research will address the following questions: What organizational models do private public interest firms employ and why? When and how do the lawyers in these firms engage in pro bono and how do they define it? What is the relationship



between “voluntary” pro bono (work as to which the firm expects no compensation when it undertakes the work) and “involuntary” pro bono (for which the firm initially expects to recover fees but ultimately fails to do so)? To what extent do firms pursue pro bono work to advance or control the issue agenda in their field and to protect it from competitors or incompetent lawyers who might make bad law? Do private public interest firms use pro bono as an opportunity for lawyer training? How do they view proposals to institute mandatory pro bono? Do private public interest law firms differ with respect to any of these questions by the ideological content of their missions? The answers to these questions will provide more systematic information about this hybrid institutional form, while also illuminating the evolving relationship between private practice and the public good.

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