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## Peter Singer, Drowning Children, and Pro Bono

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## PETER SINGER, DROWNING CHILDREN, AND PRO BONO

*John M.A. DiPippa\**

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### I. ABSTRACT

This Article uses the ethicist Peter Singer’s principles to examine and critique the legal profession’s pro bono efforts in the face of the persistent gap between the public’s legal needs and their ability to meet them. Singer argues that adults should jump into a pond to save a drowning child. Using the drowning child as an analogy, this Article argues that lawyers are morally obligated to (1) increase the amount of their pro bono efforts, (2) be more selective in the cases they take, and (3) be significantly more generous in their financial support for legal services providers. These obligations are especially acute for the largest, most profitable firms.

Specifically, this Article suggests that (1) pro bono be mandatory but at a lower yearly figure than is currently suggested, (2) law firms should sometimes eschew high profile pro bono cases in favor of less visible but more impactful

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work, and (3) extremely profitable law firms and their partners should donate significantly more money to effective legal services organizations.

## II. INTRODUCTION: PRO BONO—THE ONCE AND FUTURE KING

Pro bono work by lawyers has risen significantly in recent decades.<sup>1</sup> From 1998 to 2005, pro bono hours increased by 80% in large firms.<sup>2</sup> Lawyers in those firms averaged five more hours per year, while the total pro bono hours for all lawyers increased by 50%.<sup>3</sup> Depending on how it is measured, pro bono service now constitutes the largest component of free or subsidized legal services to people without financial means.<sup>4</sup> It is an accepted feature of modern law practice and lawyers take pro bono for granted now.<sup>5</sup>

Pro bono has become institutionalized.<sup>6</sup> The largest firms have pro bono coordinators, pro bono departments, and support staff to manage their pro bono cases.<sup>7</sup> Pro bono involvement is a point of pride with firms who compete for top rankings in the pro bono challenge<sup>8</sup> and proudly tout their pro bono records to new recruits.<sup>9</sup> Pro bono cases serve as training departments for new lawyers,

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<sup>1</sup> Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—And Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83 (2013) [hereinafter *Numbers*]; Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2359 (2010) [hereinafter *Managing*].

<sup>2</sup> *Numbers*, *supra* note 1, at 84; *Managing*, *supra* note 1, at 2376.

<sup>3</sup> *Numbers*, *supra* note 1, at 85; *Managing*, *supra* note 1, at 2376. Cummings and Sandefur point out that it is difficult to know exactly how much pro bono has been done and what kinds of legal matters it entails. *Numbers*, *supra* note 1, at 99. ABA surveys showed 66% and 73% participation rates, while academic studies ranged from 44.9% of moderately experienced lawyers, 83% of all lawyers to 18% participating in organized pro bono efforts. *Id.* at 99–100.

<sup>4</sup> Rebecca L. Sandefur, *Lawyers' Pro Bono Service and Market-Reliant Legal Aid*, in PRIVATE LAWYERS & THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 96–98 (Robert Granfield & Lynn Mather eds., 2009) [hereinafter PRIVATE LAWYERS & THE PUBLIC INTEREST]. Sandefur notes that pro bono hours amounted to between 25% and 33% of time devoted to legal services for the poor in 1997, the last time good nationwide data was available. *Id.* at 96. If pro bono contributions are measured in money, however, the proportion increases dramatically. Measured as lost revenue, pro bono's value amounts to almost twice Congress's annual allocation for the Legal Services Corporation. *Id.* at 97–98. The number comes in at about 74% of the LSC budget if it is measured by the value as donated services. *Id.*

<sup>5</sup> *Numbers*, *supra* note 1, at 86.

<sup>6</sup> Steven A. Boutcher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variations Across the AmLaw 200*, in PRIVATE LAWYERS & THE PUBLIC INTEREST, *supra* note 4, at 135; Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 6 (2004) [hereinafter *Politics*]; *Managing*, *supra* note 1, at 2359.

<sup>7</sup> Boutcher, *supra* note 6, at 148; *Politics*, *supra* note 6, at 56–62; *Managing*, *supra* note 1, at 2370–71.

<sup>8</sup> *Politics*, *supra* note 6, at 40–41; *Managing*, *supra* note 1, at 2369–72.

<sup>9</sup> *Managing*, *supra* note 1, at 2372.

offering them a chance to learn skills that they may not have been exposed to in their daily grind.<sup>10</sup> Pro bono may be recession proof, as pro bono hours increased even as the recession took hold.<sup>11</sup> Pro bono even correlates to economic well-being. Firms that do good seem to do well financially.<sup>12</sup>

All is not perfect in pro bono land, however. The percentage increase from 1995 was great because the baseline was so low.<sup>13</sup> Relatively few lawyers do the bulk of pro bono. About half of attorneys in a recent survey met the aspirational minimum of 50 hours per year.<sup>14</sup> More disturbing, 20% of respondents indicated that they did no pro bono service at all, while 18% said they did less than 20 hours per year.<sup>15</sup> Although the average annual amount of pro bono service was 56.5 hours, the median was only 30 hours.<sup>16</sup> At large law firms, only about 40% of lawyers do 20 or more hours of pro bono.<sup>17</sup> The numbers for lawyers outside the top firms are even less.<sup>18</sup> Pro bono participation is particularly low in the 5–50 member firms.<sup>19</sup> In addition, total pro bono hours

<sup>10</sup> DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 30–31 (2005) [hereinafter PRINCIPLE]; *Politics*, *supra* note 6, at 18, 110–11.

<sup>11</sup> *Managing*, *supra* note 1, at 2376 (at large firms, 50% increase in total hours and per lawyer average went up by 10 hours from 2005 to 2009).

<sup>12</sup> Boutcher, *supra* note 6, at 149 (finding average revenue per lawyer correlates with increased pro bono activity); *Managing*, *supra* note 1, at 2376; Rebecca L. Sandefur, *Lawyer's Pro Bono Service and American Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79, 98–100 (2007). Of course, the inverse is also true. Lawyers who do better financially do more pro bono. Still, there is little doubt that part of the reason large firms are so dogged in their pursuit of pro bono rankings is the advance to their reputation it brings leading to more clients and better lawyers. *Managing*, *supra* note 1, at 2374.

<sup>13</sup> Richard Abel, *The Paradoxes of Pro Bono*, 78 FORDHAM L. REV. 2443, 2444 (2010).

<sup>14</sup> THE ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 5 (2013) [hereinafter SUPPORTING JUSTICE],

[http://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/ls\\_pb\\_Supporting\\_Justice\\_III\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_Supporting_Justice_III_final.authcheckdam.pdf). This study distinguished between pro bono that went to low income individuals or organizations that provided service to those individuals ("Category 1") and all other uncompensated service ("Category II"). As expected, more lawyers reported doing more pro bono work when Category II services were included. *Id.* at vi–vii.

<sup>15</sup> *Id.* at vi. That number breaks down further. Fifty-two percent of respondents did less than 10 hours per year while 19% did between 11 and 20 hours. *Id.* at vii.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Managing*, *supra* note 1, at 2376.

<sup>18</sup> SUPPORTING JUSTICE, *supra* note 14, at 5 ("Within private practice, attorneys from large firms (101-plus attorneys) provided the highest number of Category 1 pro bono hours (77.7 hours). Lawyers in firms with 51-100 attorneys provided 39.9 hours of Category 1 pro bono; lawyers in firms of 11-50 provided 45.1 hours; lawyers in firms of 2-10 provided 58.5 hours; and solo practitioners provided 62.7 hours.")

<sup>19</sup> Leslie C. Levin, *Pro Bono and Low Bono in the Solo and Small Law Firm Context*, in PRIVATE LAWYERS & THE PUBLIC INTEREST, *supra* note 4, at 155. Solo practitioners and lawyers in

declined by 12% during the economic recession.<sup>20</sup> The AmLaw 200 firms did about 675,000 fewer pro bono hours in 2011 compared to 2008, equivalent to losing 340 full time lawyers doing pro bono work.<sup>21</sup>

Still, it cannot be denied that lawyers do more pro bono than in the past and that it is a permanent feature of the legal landscape. We can expect more of the same: more pro bono hours, more attorneys doing pro bono, and more cases being processed. It is now a mature movement with its own history and momentum and firmly institutionalized within modern practice.<sup>22</sup> New lawyers increasingly see pro bono as an essential component of their practice.<sup>23</sup>

The question for a lawyer inclined to do pro bono service should be how can pro bono work do the most good possible. The persistent level of unmet legal needs in spite of the increase in pro bono efforts in recent years and the unlikelihood that more public money will be spent on civil legal services means that pro bono must be seen as a fundamental strategy to close the justice gap. This means that lawyers must develop new, smarter, and stricter ways of doing pro bono work.

This requires rethinking how much pro bono lawyers should do, the kinds of cases lawyers take, and the sorts of remedies lawyers pursue. I will argue that lawyers should take those pro bono cases that will (1) make the most impact on the individual client's lives or (2) reform the law or the legal system for the benefit of a significant number of people without means. In addition, I will argue that lawyers need to abandon the current 50-hour limitation, restructure the professional norms at a lower, mandatory number, and increase monetary contributions to legal services organizations.

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small firms contribute the greatest amount of pro bono in numbers of lawyers and time. The varying definitions of pro bono complicate the analysis and meaning of these numbers. *Id.* at 156. Large law firms tend to provide service to organizations that serve low income clients, while solos and small firm lawyers do more individual work. *See* Boutcher, *supra* note 6, at 136. Large firms get their cases from referrals, while small firms and solos tend to take cases from friends, family, or other clients. *See* Levin; *supra* note 19, at 165.

<sup>20</sup> *Numbers*, *supra* note 1, at 110. *But see* SUPPORTING JUSTICE, *supra* note 14, at 31 (stating that the economic downturn did not seem to decrease pro bono hours and may have caused some lawyers to do more).

<sup>21</sup> *Numbers*, *supra* note 1, at 109–10.

<sup>22</sup> *Managing*, *supra* note 1, at 2364 (stating that pro bono “has become interwoven into the basic fabric of the profession, where it is governed by explicit rules, identifiable practices, and implicit norms promoting public service”). For the definitive history of the pro bono movement in the United States, see Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance to Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 96–102 (2002).

<sup>23</sup> SUPPORTING JUSTICE, *supra* note 14, at 33 (younger attorneys and women more likely to seek out pro bono cases); Ronit Dinovitzer & Bryant G. Garth, *Pro Bono as an Elite Strategy in Early Lawyer Careers*, in PRIVATE LAWYERS & THE PUBLIC INTEREST, *supra* note 4, at 126–27 (pro bono part of “game” that provides moral meaning, training, and career rewards); *Managing*, *supra* note 1, at 2364–65 (most lawyers take pro bono for granted).

I will first outline the philosopher Peter Singer's approach to effective altruism. Then I will review the history of the pro bono movement and how that history has shaped our understanding of the lawyer's moral obligation. Then I will apply some of the principles from Singer's ethics to examples of pro bono cases. Finally, I will outline some preliminary steps that lawyers and the legal profession should take to reframe and redirect pro bono services.

### III. PETER SINGER: DOING THE MOST GOOD YOU CAN DO

Would you jump into a lake to save a drowning child if no harm would come to you? Would you jump in if you would ruin your brand new expensive suit and shoes? What if five other people also saw the child fall in but failed to respond?

Peter Singer, the famous ethicist, wants to know your answers.<sup>24</sup> He argues that people universally agree that saving the drowning child is the right thing to do.<sup>25</sup> Conversely, letting the child drown would be unethical. We do not hesitate to value the life of that child over that of our clothing or our convenience.<sup>26</sup> Yet, tens of thousands of children living in extreme poverty die every day around the world from conditions that could easily be prevented if we devoted sufficient resources to them.<sup>27</sup> Shouldn't the same moral principle that drives us to save the drowning child we see compel us to donate our time and money to save the lives of the millions of children we know are dying but can't see?<sup>28</sup> Why don't we treat their deaths with the same outrage we would rain down on a bystander who refused to help or the person who didn't want to ruin his expensive clothes?<sup>29</sup>

Singer notes that people seem to have an "intuitive belief that we ought to help others in need, at least when we can see them and when we are the only person in a position to save them."<sup>30</sup> This is not remarkable and it does not meet with much opposition. The problem for Singer is the principle's narrowness. It

<sup>24</sup> Singer first used this example in *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231–32 (1972). See also a similar discussion in PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* 156–57 (2nd ed. 2002) [hereinafter *ONE WORLD*].

<sup>25</sup> PETER SINGER, *THE LIFE YOU CAN SAVE* 4, 15 (2009) [hereinafter *LIFE*].

<sup>26</sup> *Id.* at 5.

<sup>27</sup> *Id.* at 8–9 ("10 million young children [die from] avoidable, poverty related" problems each year).

<sup>28</sup> *Id.* at 17; see also *ONE WORLD*, *supra* note 24, at 157 ("[N]o one has disputed this claim in respect of distance per se . . .").

<sup>29</sup> *LIFE*, *supra* note 25, at 3. Singer also discusses Peter Unger's variation of this hypothetical where a person must choose between destroying an expensive car that represents his entire retirement savings and saving a child. See *id.* at 14–15 (discussing PETER K. UNGER, *LIVING HIGH AND LETTING DIE: OUR ILLUSION OF INNOCENCE* (1996)).

<sup>30</sup> *LIFE*, *supra* note 25, at 15.

imposes moral responsibility only to prevent immediate, visible harm. Singer points out that one of the logical ramifications for the basic principle to help when we can is that “if it is in your power to prevent something bad from happening, without sacrificing anything nearly as important, it is wrong not to do so.”<sup>31</sup> If we know that other people are suffering and that we could prevent or alleviate their harm, we are morally obligated to act. If not, that is, if we only feel a moral obligation running to the child we see drowning, we fail to value every person’s life equally.<sup>32</sup> If we are only required to prevent immediate harm to those people we can see, then we implicitly value their life over the lives of others we cannot see but whom we can help.<sup>33</sup>

Singer concludes that “[l]iving a minimally acceptable ethical life involves using a substantial part of our spare resources to make the world a better place. Living a fully ethical life involves doing the most good we can.”<sup>34</sup>

Singer argues that people should donate significant sums to charities that can prevent suffering and death when doing so will not require a person to give up anything nearly so important.<sup>35</sup> Americans give a lot of money to charities every year and volunteer thousands of hours to similar causes but, as Singer explains, this, by itself, is not enough to satisfy this ethical commandment:

We tend to assume that if people do not harm others, keep their promises, do not lie or cheat, support their children and their elderly parents, and, perhaps contribute a little to needier members of their local community, they’ve done well. If we have money left over after meeting our [basic] needs and those of our dependents, we may spend it as we please. Giving to strangers, especially those beyond one’s community, may be good, but we don’t think of it as something that we have to do. But if the basic argument presented above is right, then what many of us consider acceptable behavior must be viewed in a more new, ominous light. When we spend our surplus on concerts or fashionable shoes, on fine dining and good wines, or on holidays in faraway lands, we are doing something wrong.<sup>36</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 16; see also PETER SINGER, *THE MOST GOOD YOU CAN DO* 8 (2015) [hereinafter *GOOD*]. But see LIFE, *supra* note 25, at 129–39 (where Singer accepts the moral validity of favoring one’s own children’s basic needs over those of strangers adding “[b]ut this doesn’t mean that parents are justified in providing luxuries for their children ahead of the basic needs of others”).

<sup>33</sup> LIFE, *supra* note 25, at 16–17.

<sup>34</sup> *GOOD*, *supra* note 32, at vii.

<sup>35</sup> LIFE, *supra* note 25, at 17.

<sup>36</sup> *Id.* at 18. Here, Singer parts company with other philosophers who posit a less demanding duty. See, e.g., KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* 164–65 (Henry Louis Gates Jr. ed., 2006).

Thus, Singer is asking us to take a deeper look at how we live our lives in an affluent society and what our obligations might be to those who have less than us.<sup>37</sup> He calls for people living in western societies to drastically increase their charitable giving to organizations that work to alleviate extreme poverty.<sup>38</sup> He argues that we are morally obligated to do so even if giving more reduces our standard of living somewhat.<sup>39</sup> In the end, a slightly reduced standard of living is not much to pay for saving the lives of tens of thousands of children each day.<sup>40</sup>

#### IV. A SHORT HISTORY OF PRO BONO

The idea that lawyers are obligated to perform free legal services in an organized and systematic way is relatively new.<sup>41</sup> Until the adoption of the Model Code of Professional Responsibility in the 1970's, only vague admonitions to render uncompensated service could be found.<sup>42</sup> The Canons of 1908 suggested "special and kindly consideration" for requests from members of the bar and their impoverished widows and orphans.<sup>43</sup> Reginald Heber Smith shamed the profession in 1919 when he wrote about the enormous unmet legal needs of the urban poor and the Bar's almost complete lack of response to it.<sup>44</sup>

The American Bar Association started using the term to refer to free legal services in the 1930's.<sup>45</sup> Indeed, the very term *pro bono publico* cannot be found in a case referring to free legal services prior to 1944.<sup>46</sup> Its use as a

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<sup>37</sup> LIFE, *supra* note 25, at 12.

<sup>38</sup> *Id.* at 152 (suggesting 5% of annual income for most people and more for the very rich).

<sup>39</sup> *Id.* at 39.

<sup>40</sup> *Id.*; GOOD, *supra* note 32, at 26 (person living near country's median income can donate to effective charities, save money for the future, "and still have enough to live comfortably and enjoyably").

<sup>41</sup> PRINCIPLE, *supra* note 10, at 12 (stating the legal profession historically provided little *pro bono* service or support for organizations doing such work); Maute, *supra* note 22, at 115–16.

<sup>42</sup> PRINCIPLE, *supra* note 10, at 13 (finding growing support for *pro bono* recognized in Model Code of Professional Responsibility); Maute, *supra* note 22, at 115–16 ("vague and non-specific" canons created more of an "ethical mood" than a set of enforceable rules).

<sup>43</sup> AM. BAR ASS'N, CANONS OF PROFESSIONAL ETHICS 12 (1908), [http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons\\_Ethics.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf) ("A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.").

<sup>44</sup> Abbe Smith, *For Tom Joad and Tom Robinson: The Moral Obligation to Defend the Poor*, 1997 ANN. SURV. AM. L. 869 (legal profession shirking its moral duty to provide access to the legal system).

<sup>45</sup> Maute, *supra* note 22, at 115 (ABA Legal Ethics opinions first used *pro bono* to refer to free legal services in 1930's).

<sup>46</sup> *Id.* at 113–14 (*pro bono publico* referring to free legal service first used by a court in 1944).

complete synonym for a lawyer's public service requirement did not come until much later, spurred on by the Model Code's inclusion of a statement about lawyers' need to make legal counsel available.<sup>47</sup> Finally, in the Model Rules of Professional Conduct adopted in 1985, the Bar first codified a requirement for pro bono service.<sup>48</sup> Rather than mandate a minimum level of pro bono service, the rules use the aspirational verb "should" instead of the mandatory "shall" to encourage at least 50 hours of pro bono service per year.<sup>49</sup> The original rule contained a capacious definition (or lack thereof) of what counted for pro bono work.

A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.<sup>50</sup>

Thus, a lawyer could discharge this duty by donating all of her time to organizations that could afford counsel, did not work to provide access to the legal system, or were not necessarily acting in the public interest.<sup>51</sup> Model Rule

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<sup>47</sup> See *id.* at 127 (new rule marked a "paradigmatic shift in normative standards, explicitly recognizing a proactive and affirmative expectation that each lawyer would help make legal services available to those in need"). This shift did not go unnoticed. See Eugene L. Smith, *Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available"*, 48 TEX. L. REV. 285, 286 (1970) (Code represents a "radical departure" from conventional ethical norms).

<sup>48</sup> Maute, *supra* note 22, at 135–36 ("Model Rule 6.1 squarely placed responsibility upon the individual. In the coherent progression towards articulating meaningful standards of conduct, Rule 6.1 inched away from the negative and reactive standards, moving towards a positive expectation that each lawyer would affirmatively volunteer to serve the public interest.").

<sup>49</sup> *Id.* at 135 (MRPC 6.1 one of two rules to depart from imperative language). Compare, e.g., MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM .BAR ASS'N 2016) ("A lawyer should aspire to render at least (50) hours of pro bono public legal services per year."), and MODEL RULES OF PROF'L CONDUCT r. 6.1 cmt. [12] (AM .BAR ASS'N 2016) ("The responsibility set forth in this rule is not intended to be enforced through disciplinary process."), with, MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM .BAR ASS'N 2016) ("A lawyer shall provide competent representation . . ."), and MODEL RULES OF PROF'L CONDUCT, Scope, cmt. [14] (AM .BAR ASS'N 2016) ("Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline.").

<sup>50</sup> Maute, *supra* note 22, at 134 (quoting AM .BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–1998, at 274 (1999)).

<sup>51</sup> *Id.*, at 135 ("Qualifying service was broadly defined and gave no quantitative standard to guide the amount of service. Almost any unpaid or reduced fee legal service for civic or professional groups arguably would suffice.").

6.1 now asks lawyers to donate 50 hours per year, a substantial majority of which should be to persons of limited means or to organizations designed primarily to address the needs of such persons.<sup>52</sup> Not every lawyer performs pro bono services, let alone approach the aspirational 50 hours per year.<sup>53</sup>

## V. THE OBLIGATION TO DO PRO BONO

Singer's provocative principle challenges lawyers to reconsider the legal profession's approach to providing pro bono service.<sup>54</sup> Lawyers donate thousands of hours to pro bono work.<sup>55</sup> Yet, while lawyers remain generous, a vast, well-documented "justice gap" still exists.<sup>56</sup> Just like our knowledge of extreme childhood poverty coupled with our ability to do something about it obligates lawyers to dramatically increase their help, so also are lawyers obligated to increase their efforts to bridge the justice gap once they learn about it.<sup>57</sup>

The obligation to do pro bono is not a simple application of the principle of the drowning swimmer, however. It is more accurately like the expert swimmer, a lifeguard, who sees the drowning child. Lawyers, like that lifeguard, are uniquely situated to do more good than anyone else in that situation. Not only do lawyers and lifeguards possess unique skills that can more efficiently perform the necessary task, those very skills form the core of their work. Just as lifeguards are trained to save people who are drowning, lawyers are trained to help people in legal trouble.

Pushing this analogy further, pro bono work is like the lifeguard who notices a child drowning in the stream that runs alongside the pool that he is

<sup>52</sup> MODEL RULES OF PROF'L CONDUCT r. 6.1 (2016).

<sup>53</sup> SUPPORTING JUSTICE, *supra* note 14, at 5–6; *see also* Deborah A. Schmedemann, *Pro Bono Publico as a Conscience Good*, 35 WM. MITCHELL L. REV. 977, 987 (2009) ("Almost all lawyers now see pro bono as a professional obligation. Yet a sizeable number do little or no pro bono.").

<sup>54</sup> For an application of this principle to the question of which jobs law graduates should take, *see* Note, *Never Again Should a People Starve in a World of Plenty*, 121 HARV. L. REV. 1886, 1907 (2008) [hereinafter *Never Again*] ("If you sincerely choose a job because you believe it is the best way to help people, then more power to you. Just make sure you are actually doing it because you honestly believe that it is the right thing to do.").

<sup>55</sup> *See Numbers*, *supra* note 1, at 109–10.

<sup>56</sup> There is no doubt that a gap exists between the legal needs of individuals and the satisfaction of such need. *See, e.g.*, LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP 13 (2007) [hereinafter DOCUMENTING], <http://www.lsc.gov/sites/default/files/LSC/images/justicegap.pdf> (discussing various assessments that determined that upwards of 80% of the legal needs of the poor are not being met).

<sup>57</sup> Russell Pearce, *How Law Firms Can Do Good While Doing Well (and the Answer is Not Pro Bono)*, 33 FORDHAM URB. L.J. 211, 214–15 (2005) ("As for pro bono, like other forms of charity, it is a good deed. But unless you place it within the context of broad moral obligation, it serves to relegate the public good to the margins of legal practice.").

being paid to protect. The lifeguard has a moral duty to rescue the child assuming that the other swimmers will not be put at risk. Moreover, the legal profession is analogous to a professional association of lifeguards who not only train, certify, and supervise lifeguards, but also hold a monopoly on becoming one.<sup>58</sup> Lawyers, like that lifeguard, must use their legal skills to alleviate the harm from lack of access to justice. The legal profession, like the lifeguards' association, must use its power and position to create institutions that will alleviate the justice gap. Thus, a lawyer's personal moral duty to do the most good she can do, the lawyer's status as an expert, and the legal profession's monopoly on the legal system all point toward a powerful duty to do pro bono.<sup>59</sup>

The pro bono duty starts with the moral obligation we all share to help people in need when we can do so.<sup>60</sup> This personal duty takes on special force for the lawyer.<sup>61</sup> The lawyer possesses special and unique skills that can do more good for someone than a person without those skills.<sup>62</sup> A lawyer's unique vantage point on the legal system imposes the obligation to go beyond the

<sup>58</sup> I am grateful to St. Mary's Law School Dean Steve Sheppard for this analogy. See STEVEN SHEPPARD, *I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS* 150 (2009) (noting Singer's claim that charity should be extended beyond humans to other sentient beings); see also *id.* at 141–56 (discussing the personal moral obligation of charity).

<sup>59</sup> See, e.g., Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1157 (1990) (cannot be indifferent to the intertwining of an individual's moral identity and the profession's); see also Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 402 (1993); Maute, *supra* note 23, at 153–54; Deborah L. Rhode, *Essay: The Pro Bono Responsibilities of Lawyers and Law Students*, 27 WM. MITCHELL L. REV. 1201, 1203 (2000) (Rationale for pro bono rests on two premises: “access to legal services is a fundamental need and, second, that lawyers have some responsibility to help make those services available”); Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1439–40 (2009) (lack of consensus in justification for pro bono leaving most lawyers to do so from a variety of motives).

<sup>60</sup> GOOD, *supra* note 32, at vii.; see also *Never Again*, *supra* note 54, at 1903.

<sup>61</sup> Edwards, *supra* note 59, at 1157 (cannot be indifferent to the intertwining of an individual's moral identity and the profession's).

<sup>62</sup> See *Never Again*, *supra* note 54, at 1903 (“Lawyers, like other institutional actors, are in a special position in society because they are bound both by the rules of morality and by the principles of justice. While morality binds all individuals, justice applies to institutions. As a result, individuals who also serve an institutional role are bound by both morality and justice. Because lawyers clearly have an institutional role—their actions affect how people are treated relative to one another in the legal system—they are obligated to pursue justice. But because lawyers are also human beings, they are obligated to follow morality.”). But 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) (questioning whether legal representation affects the outcome of unemployment compensation appeals).

immediately discernible harm.<sup>63</sup> This obligation scales up, if you will, from the individual to the law firm to the profession.<sup>64</sup>

Justice is a public good and lawyers are obligated to provide access to that system either because of our unique skills or our monopoly over it.<sup>65</sup> Not only do lawyers hold a monopoly on access to the system at every level,<sup>66</sup> but lawyers also possess unique skills needed to successfully navigate that system.<sup>67</sup> Lawyers enjoy a privileged position because the legal system is a public good or asset.<sup>68</sup> Most states require law students to graduate from ABA accredited law schools.<sup>69</sup> Lawyers also stringently define what services non-lawyers may provide.<sup>70</sup> In return for this control, many argue that the legal profession owes

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<sup>63</sup> *Never Again*, *supra* note 54, at 1903.

<sup>64</sup> *See* Smith, *supra* note 44, at 876 (“Individual lawyers, [law schools, and the legal profession] have a moral duty to address needs of the poor.”).

<sup>65</sup> *See* DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 286 (1988) (“[T]he lawyer’s lucrative monopoly would not exist without the community and its state; the monopoly and indeed the product it monopolizes is an artifact of the community. The community has shaped the lawyer’s retail product with her in mind; it has made the law to make the lawyer indispensable. The community, as a consequence, has the right to condition its handiwork on the recipients of the monopoly fulfilling the monopoly’s legitimate purpose.”); Robert A. Katzmann, *Themes in Context*, in *THE LAW FIRM AND THE PUBLIC GOOD* 7 (Robert A. Katzmann ed., 1995) (“A lawyer’s duty to serve those unable to pay is thus not an act of charity or benevolence, but rather one of professional responsibility, reinforced by the terms under which the state has granted to the profession effective control of the legal system.”).

<sup>66</sup> *See. e.g.*, LUBAN, *supra* note 65, at 286 (lawyer’s connection to justice systems makes them different from other service providers).

<sup>67</sup> *See* Reena N. Glazer, *Revisiting the Business Case for Law Firm Pro Bono*, 51 S. TEX. L. REV. 563, 568 (2010) (“A complex, adversarial system simply cannot function properly if all parties do not have access to competent legal services. That dynamic is at the heart of what makes the legal profession different from other professions.”).

<sup>68</sup> Steven Lubet & Cathryn Stewart, *A “Public Assets” Theory of Lawyers’ Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1248–49 (1997) (“In brief, the public assets theory is based upon the concept that every lawyer profits from the sale to clients of certain publicly created assets. A mandatory pro bono plan, therefore, should be regarded as comparable to an in-kind user fee, severance or commission, returned to the public in exchange for the right to exploit a public resource.”).

<sup>69</sup> *See* 2016–2017 *Standards and Rules of Procedure for Approval of Law Schools*, AM. BAR ASS’N, [http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html) (last visited Oct. 6, 2016).

<sup>70</sup> *See* Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 *FORDHAM L. REV.* 2587, 2588 (2014) (law broadly and vaguely defines unauthorized practice of law); *see also* Andrew M. Perlman, *Towards the Law of Legal Services*, 37 *CARDOZO L. REV.* 49, 54 (2015) (arguing that authorizing and regulating non-lawyer legal service providers will encourage innovation); Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 *U. ARK. LITTLE ROCK L. REV.* 1 (1989).

something back to the society to ensure that people with worthy cases have access to the legal system.<sup>71</sup> As Steven Lubet and Cathryn Stewart argued

Attorneys are granted exclusive access to certain publicly created commodities which they subsequently provide (at a price) to clients. Thus, a portion of lawyers' income is directly attributable to their ability to market "lawyer-commodities" that have been provided to them, at no charge, by the public. The exaction of a pro bono obligation can therefore be seen as a simple recapture of some of the profit derived from access to this asset.<sup>72</sup>

Pro bono attempts to reduce or eliminate the unmet legal needs of the public so as to provide access to this public good. Studies show that perhaps 80% of the legal needs of the poor go unserved.<sup>73</sup> Although middle class households also report a large number of civil legal needs, the poor and minority groups are more likely to have civil legal issues.<sup>74</sup> Nearly 67% of respondents to a recent survey indicated that they had a legal issue but rarely sought help from lawyers.<sup>75</sup> Respondents relied on self-help most often followed by asking advice from a person in their social network like a friend or pastor.<sup>76</sup> In about 16% of cases, people did nothing.<sup>77</sup> Extrapolating these results to the nation as a whole, Sandefur concludes that "these rates represent a tremendous amount of civil justice activity—tens of millions of civil justice situations."<sup>78</sup> Left unresolved, these situations cause significant harm "that affects not only those who experience them but can ripple out to their families, their communities, and society at large."<sup>79</sup> As Deborah Rhode notes, "Domestic violence victims cannot

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<sup>71</sup> See, e.g., F. RAYMOND MARKS ET AL., *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* 290 (1972) (comparing the legal profession to a public utility).

<sup>72</sup> Lubet & Stewart, *supra* note 68, at 1246.

<sup>73</sup> See DOCUMENTING, *supra* note 56.

<sup>74</sup> REBECCA L. SANDEFUR, AM. BAR ASS'N, *ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 8* (2014) [hereinafter *ACCESSING JUSTICE*],

[http://www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_usa\\_aug\\_2014.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf) ("[P]oor people were significantly more likely to report civil justice situations than people in high or middle income households, and African Americans and Hispanics were more likely to report civil justice situations than were Whites.").

<sup>75</sup> *Id.* at 11.

<sup>76</sup> *Id.* (46% of respondents used self-help, 23% sought advice from a person in their social network).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 7.

<sup>79</sup> *Id.* at 10–11 (stating that people attribute a wide range of negative impacts to their civil justice situations, including verbal and physical violence, lost confidence, loss of income, and negative impacts on physical or mental health).

obtain protective orders, elderly medical patients cannot collect health benefits, disabled children are denied educational services, defrauded consumers lack affordable remedies . . . [t]he list is long and the costs incalculable.”<sup>80</sup>

People in other countries are more likely to seek legal help for a legal problem than in the United States.<sup>81</sup> Americans received legal advice in about 37% of potential cases compared to 60–65% in the United Kingdom.<sup>82</sup> This may be due to the paltry sums devoted to legal aid societies and other organizations in the United States.<sup>83</sup> The United States allocates about \$1 of federal money per person on providing civil legal services to people of limited means.<sup>84</sup> Federal funding for the legal services program has declined roughly two-thirds in real dollars since 1980.<sup>85</sup>

Pro bono is also justified by the role of lawyers, the rule of law, and the legal system in a democracy. The proper operation of the rule of law is essential to our system of government and our society.<sup>86</sup> If people are shut out of the legal system, they may lose faith in it and, correspondingly, in the rule of law and in democracy.<sup>87</sup> This alienates them and they will isolate themselves from society

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<sup>80</sup> DEBORAH L. RHODE, ACCESS TO JUSTICE 5 (2004) [hereinafter ACCESS].

<sup>81</sup> Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 136 (2010).

<sup>82</sup> *Id.* at 136. Interestingly, people reported seeking third party assistance with a legal problem in very high numbers in countries like the Netherlands where non-lawyers can provide assistance. *Id.* at 138.

<sup>83</sup> DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 30 (2015) [hereinafter TROUBLE] (citing MARK DAVID AGRAS ET AL., WORLD JUSTICE PROJECT: RULE OF LAW INDEX 175 (2013) (ranking the United States 67th out of 97 countries in the amount spent on access to justice)).

<sup>84</sup> *Id.* at 38. If we include the total amount of money spent from all sources—federal, state, local, and private—the number goes up to about \$3.00 per person. This is not to say that Western European systems are without problems. See Lua Kamál Yuille, *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863, 913 (2004) (stating high costs have caused Western European countries to cut back on subsidized legal services by limiting kinds of cases).

<sup>85</sup> Richard L. Abel, *State, Market, Philanthropy, Legal and Self-Help as Services Delivery Mechanisms*, in PRIVATE LAWYERS & THE PUBLIC INTEREST, *supra* note 4.

<sup>86</sup> No discussion of this issue would be complete without a de Tocqueville reference. Here it is: ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 277–84 (Francis Bowen ed., Henry Reeve trans., Universal Press ed. 1900) (arguing that lawyers and the rule of law would temper democracy's more urgent impulses). See also Justin Hansford, *Lippman's Law: Debating the Fifty-Hour Pro Bono Requirement for Bar Admission*, 41 FORDHAM URB. L.J. 1141, 1181 (2014) (discussing the recent emphasis on hired gun lawyering obscures importance of lawyers to democracy).

<sup>87</sup> See, e.g., LUBAN, *supra* note 65, at 244 (stating how unequal access to justice causes government to lose legitimacy and gives rise to a right of resistance). A recent survey suggests that many people do not believe that the legal system will help them with their legal problems. See ACCESSING JUSTICE, *supra* note 74, at 12–13 (detailing how 24% of respondents with a civil legal need did not seek legal help because they did not believe it would make any difference).

or take action to undermine or overthrow it.<sup>88</sup> That interplay requires an analysis, not only of what an individual lawyer should do to provide access, but also how that system can be improved.<sup>89</sup> If justice is a public good, then simple access to the system has little moral worth unless the legal principles and procedures are fair.<sup>90</sup> Otherwise, pro bono legitimizes an illegitimate system.<sup>91</sup>

Pro bono work can also benefit individual lawyers by providing training, experience, contacts, and exposure.<sup>92</sup> Lawyers become better people, too.<sup>93</sup> Law firms benefit by enhancing their recruiting efforts and, perhaps, improving their

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<sup>88</sup> See REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 10 (1919) (explaining how the denial of justice leads to “contempt for law, disloyalty to the government, and plants the seeds of anarchy”).

<sup>89</sup> See, e.g., ACCESS, *supra* note 80, at 5 (describing the system built by and for lawyers with little attention to making it fair or understandable to participants); Irma S. Russell, *The Lawyer As Public Citizen: Meeting the Pro Bono Challenge*, 72 U.M.K.C. L. REV. 439, 442 (2003) (“Clearly the existence of the legal system benefits society, providing an orderly and peaceful means for resolving disputes. It also benefits lawyers by providing their livelihood. The system does not help members unable to pay their way, however, and arguably may even disadvantage the poor within the system by creating a forum that they cannot effectively access.”).

<sup>90</sup> Martha F. Davis, *Access and Justice: The Transformative Potential of Pro Bono Work*, 73 FORDHAM L. REV. 903, 925 (2004) (“Pro bono work that begins and ends with providing access alone is little more than a band-aid that masks larger social problems. If instead, pro bono representation meant a meaningful increase in both access and justice, you can be sure that clients would clamor for more lawyers, and the legal profession would be both transformative and transformed.”).

<sup>91</sup> See also Hansford, *supra* note 86, at 1182 (“Today we need lawyers to serve as not only as a check on unfettered democracy and majoritarianism, but also as a check on unfettered capitalism. Doing so would help to abate the inequality that systematically excludes many from having access to either the justice system or the democratic process.”); Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 813 (2002) (“[T]he debate about the pro bono obligations of lawyers has diverted the profession’s attention away from the challenges of demanding and implementing an adequate and stable publicly funded legal services program. It has construed the controversy about law for the poor as a private, moral, or professional obligation as opposed to a public responsibility.”).

<sup>92</sup> *Numbers*, *supra* note 1, at 96; *Managing*, *supra* note 1, at 2384; see also Nadine Strossen, *Pro Bono Legal Work: For the Good of Not Only the Public, But Also the Lawyer and the Legal Profession*, 91 MICH. L. REV. 2122, 2123 (1993) (“By serving the public, lawyers can simultaneously do well and do good. In other words, by doing *pro bono publico* work, lawyers benefit not only the public, but also themselves.”); Melissa H. Weresh, *The Chicken or the Egg? Public Service Orientation and Lawyer Well-Being*, 36 U. ARK. LITTLE ROCK L. REV. 463, 485 (2014) (“[W]hile seemingly paradoxical, a renewed emphasis on the public service orientation of the profession might be one way to combat the declining well-being of lawyers.”).

<sup>93</sup> Edwards, *supra* note 59, at 1158 (“By any account, we will be better persons if we define ourselves and are defined by others with reference to a commitment to promote the public good rather than with reference to a conviction that we enjoy some vocational exemption from ordinary norms of morality.”); Reed Elizabeth Loder, *Tending the Generous Heart: Mandatory Pro Bono and Moral Development*, 14 GEO. J. LEGAL ETHICS 459, 508 (2001) (stating how altruistic behavior builds moral character).

retention.<sup>94</sup> And our society benefits by offering people a chance to resolve their disputes in a dignified and fair way.<sup>95</sup>

## VI. SOME PRO BONO PROBLEMS

Figuring out the rate of pro bono participation is difficult because few jurisdictions require lawyers to report the time spent on pro bono activities and other studies have not always surveyed a broad swath of the lawyer population.<sup>96</sup> The ABA's 2013 Supporting Justice Survey found that 80% of respondents reported doing some pro bono in 2011.<sup>97</sup> The best state studies show that between 20% and 40% of attorneys report some pro bono activities, with Florida and Maryland having the best-reported participation rate at 90% and 95% respectively.<sup>98</sup> It is likely that a fair amount of uncollectable fee cases get reported as pro bono under this system.<sup>99</sup>

If justice is a public good, then the initial responsibility for access to the system rests with the legal profession.<sup>100</sup> Simple access to the system has little moral worth unless the legal principles and procedures are fair.<sup>101</sup> Otherwise, pro

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<sup>94</sup> *Managing*, *supra* note 1, at 2374 (“Pro Bono participation became a positional good: reputation and recruitment partly depended on how firms stacked up against competitors.”).

<sup>95</sup> Russell, *supra* note 89, at 442 (“Clearly the existence of the legal system benefits society, providing an orderly and peaceful means for resolving disputes.”).

<sup>96</sup> *Numbers*, *supra* note 1, at 99–100.

<sup>97</sup> SUPPORTING JUSTICE, *supra* note 14, at vi. This is less impressive than it looks. When asked about their most recent pro bono service, 63% of respondents said that they provided the types of services that address legal problems of people who can't afford lawyers. *Id.* at vii. Barely more than half of these lawyers (52%) provided between 1 and 10 hours. *Id.* The average in 2011 was 27 hours, while the median was 10 hours. *Id.*

<sup>98</sup> Leslie Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 425–26 (2007).

<sup>99</sup> *Numbers*, *supra* note 1, at 88; 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) [hereinafter *Parallel Universe*].

<sup>100</sup> Eldred & Schoenherr, *supra* note 59, at 402 (“[T]he basic tenets of the system of justice require that each lawyer accept, as a matter of professional responsibility, the duty to help assure that the poor have access to needed legal services.”); Smith, *supra* note 47, at 237; see also Rob Atkinson, *A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 AM. U.J. GENDER SOC. POL'Y & L. 129, 130–31 (2001) (stating that pro bono necessary to supplement lack of governmental commitment).

<sup>101</sup> Davis, *supra* note 90, at 925 (“Pro bono work that begins and ends with providing access alone is little more than a band-aid that masks larger social problems. If instead, pro bono representation meant a meaningful increase in both access and justice, you can be sure that clients would clamor for more lawyers, and the legal profession would be both transformative and transformed.”).

bono legitimizes an illegitimate system.<sup>102</sup> Most calls for reform urge more pro bono: mandatory minimums,<sup>103</sup> financial buyouts,<sup>104</sup> and reward and recognition programs.<sup>105</sup> In addition, some proponents suggest more significant reforms by overhauling in the structure of legal practice to allow unbundled service,<sup>106</sup> emeriti programs,<sup>107</sup> de-professionalization,<sup>108</sup> etc.

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<sup>102</sup> See Dinovitzer & Garth, *supra* note 23, at 117 (“[P]ro bono generally helps to legitimate a system whereby the overwhelming amount of resources work to sustain corporate power and clients with substantial economic means.”).

<sup>103</sup> See *Voluntary Pro Bono Publico Service*, AM. BAR ASS’N, [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_rule61.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule61.html) (last visited Oct. 7, 2016) (recommending amendment to Model Rule of Professional Conduct 6.1 to make pro bono mandatory); see also LUBAN, *supra* note 65, at 277; PRINCIPLE, *supra* note 10, at 171–72; Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1126 (1991); Loder, *supra* note 93, at 508 (careful mandatory plan could lead to habit of giving); David Luban, *Mandatory Pro Bono: A Workable (and Moral) Plan*, 1985 MICH. B.J. 280, 283 (1985); Jennifer Murray, *Lawyers Do It for Free?: An Examination of Mandatory Pro Bono*, 29 TEX. TECH L. REV. 1141, 1186 (1998) (noting the “circular nature” of debate about mandatory pro bono prevents movement toward reducing justice gap). *But see, e.g.*, Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 CORNELL L. REV. 1115, 1116 (1991–1992) (discussing how cash transfers are a better way to meet needs of poor than free legal services); John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 HOFSTRA L. REV. 1229 (1991) (arguing that mandatory pro bono violates a lawyer’s free speech, due process, and equal protection rights as well as potentially being an involuntary servitude in violation of the 13th Amendment); Dennis G. Jacobs, Judge 2d Circuit, Speech for Roch. Chapter Federalist Soc’y: Pro Bono for Fun and Profit (Oct. 6, 2008) (transcript available at <http://www.fed-soc.org/publications/detail/speech-by-judge-dennis-g-jacobs>) (last visited Oct. 7, 2016) (most so-called public interest work promotes lawyers social and political agendas).

<sup>104</sup> See, e.g., Debra D. Burke et. al., *Mandatory Pro Bono: Cui Bono?*, 25 STETSON L. REV. 983, 997 (1996); Mary Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3 B.U. PUB. INT. L.J. 215, 220 (1993); Cummings, *supra* note 6, at 144; Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 435 (2003); see also Marc Galanter & Thomas Palay, *Let Firms Buy and Sell Credit for Pro Bono*, NAT’L L.J. 17 (1993) (describing a kind of “cap and trade” market for pro bono).

<sup>105</sup> See, e.g., *Pro Bono Publico Award*, AM. BAR ASS’N, [http://www.americanbar.org/groups/probono\\_public\\_service/projects\\_awards/pro\\_bono\\_publico\\_award.html](http://www.americanbar.org/groups/probono_public_service/projects_awards/pro_bono_publico_award.html) (last visited Oct. 7, 2016).

<sup>106</sup> TROUBLE, *supra* note 83, at 56.

<sup>107</sup> Kelly S. Terry, *Do Not Go Gentle: Using Emeritus Pro Bono Attorneys to Achieve the Promise of Justice*, 19 GEO. J. POVERTY L. & POL’Y 75, 76 (2012) (discussing regulatory changes to make emeritus pro bono practice more available); see Jonathan Lippman, *New York’s Template to Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL’Y REV. 13, 25 (2013) (discussing New York’s “Attorney Emeritus Program” that enlists retired attorneys to help indigent civil clients).

<sup>108</sup> TROUBLE, *supra* note 83, at 47; Jeanne Charn, *Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2233–34 (2013) (arguing to forego fight to create a “Civil Gideon” and to create self-help legal centers to create consumer centered delivery methods); Rebecca L. Sandefur, *The Fulcrum Point of Equal Access*

Simply urging more hours will not solve the fundamental problem with the lack of access to justice. Even if every lawyer devoted 50 hours per year to pro bono services, there would still be a significant amount of unmet legal needs available.<sup>109</sup> There is a bigger problem, however: not every case has the same value.<sup>110</sup> While all legal needs have some importance to the individual, some are clearly more important than others. A person who needs to be rid of her abusive husband needs a lawyer more than the person who wants to change his name to better reflect his true identity.<sup>111</sup> Yet the language of Rule 6.1 and Bar rhetoric treats them the same. In addition, large law firms have a disincentive to choose certain types of cases.<sup>112</sup> Often these cases hold greater potential to reform the law for large numbers of people or the failure to resolve them will cause significant, long-term harm.<sup>113</sup>

Following Singer, if the goal is to do the most good that can be done, then lawyers and the legal profession need to dramatically increase the number of lawyers performing pro bono and their hours, be more strategic in the kinds of pro bono cases taken, and increase charitable giving to organizations that provide legal services to the poor.

This section raises two issues with pro bono that need to be addressed to increase the effectiveness of pro bono services and provides solutions to these issues. First, lawyers must be more selective in the pro bono cases they select.

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*to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A.L. REV. 949, 976–977 (2009) (urging redesign of legal institutions to make access easier).

<sup>109</sup> TROUBLE, *supra* note 83, at 46–47; Murray, *supra* note 103, at 1143 (mandatory pro bono would only “scratch the surface” of the justice gap).

<sup>110</sup> See, e.g., Norah Rexer, *A Professional Responsibility: The Role of Lawyers in Closing the Justice Gap*, 22 GEO. J. ON POVERTY L. & POL’Y 585, 595 (2015) (“Even if the rule were to require mandatory service for all attorneys, it is unlikely that this would close the justice gap. The pro bono system that has evolved in the American bar fails to incentivize high-quality legal assistance.”).

<sup>111</sup> See, e.g., *In re Mokiligon*, 106 P.3d 584, 587 (N.M. 2004) (holding that a person is entitled to change his name to “variable”).

<sup>112</sup> *Politics*, *supra* note 6, at 120. So called positional conflicts are a barrier. *Id.* Firms are reluctant to take cases for parties in which they might have to take a legal position contrary to that taken for other, paying clients. *Id.* at 16; see, e.g., Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, in PRIVATE LAWYERS & THE PUBLIC INTEREST, *supra* note 4, at 199. In addition, firms are more likely to take cases that either are easier to handle and dispose of or, paradoxically, more difficult cases for “sexy” clients or causes that will require a significant investment of time and money. *Politics*, *supra* note 6, at 16; see Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395 (1998) (positional conflicts deter lawyers from taking pro bono cases); Mark D. Yochum & Jeffrey Fromknecht, *Positional Conflicts and Pro Bono Publico*, 16 FLA. COASTAL L. REV. 231, 242–44 (2015).

<sup>113</sup> Spaulding, *supra* note 112, at 1414 (firms refuse employment, landlord/tenant, and environmental cases); *Politics*, *supra* note 6, at 118–20 (firms reluctant to take employment, environmental, and consumer cases).

Second, lawyers should assess the needs of the community and gauge the societal impact of potential cases before selecting pro bono cases.

#### A. Case Selection

To do the most good, lawyers must more carefully select cases. Consider the thousands of hours of pro bono work by 80 private law firms representing detainees at the Guantanamo detention center.<sup>114</sup> Initially, firms were reluctant to take pro bono detainee cases.<sup>115</sup> After the Supreme Court's decision in *Rasul v. Bush*,<sup>116</sup> establishing the right of detainees to judicial review of their detention, law firms rushed to handle habeas corpus cases for the detainees.<sup>117</sup> Indeed taking a pro bono detainee case acquired a certain status:

[L]arge firms sought out habeas clients . . . representation of Guantanamo detainees became part of law firms' recruitment efforts for new associates . . . . Detainee representation was high-profile legal work, and the firms staffed these matters with senior partners, signaling to attorneys within the firm, as well as to clients, the value the firm placed on the work.<sup>118</sup>

Several of these cases went all the way to the Supreme Court resulting in significant victories for the detainees.<sup>119</sup> It was not without cost. The lawyers and their firms were attacked for their work when an official in the Bush Administration called on their clients to fire the firm because of their pro bono work on the Guantanamo cases.<sup>120</sup> In addition, an advocacy group published a video that urged the Justice Department to release the names of current employees who did pro bono detainee cases and suggested that they shared the values of their clients.<sup>121</sup> The organized Bar rushed to their defense.<sup>122</sup>

<sup>114</sup> Laurel E. Fletcher et. al., *Defending the Rule of Law: Reconceptualizing Guantanamo Habeas Attorneys*, 44 CONN. L. REV. 617, 648–650 (2012) (900 attorneys joined network of lawyers working on detainee cases for 430 detainees).

<sup>115</sup> *Id.* at 650.

<sup>116</sup> 542 U.S. 466 (2004).

<sup>117</sup> Fletcher et. al., *supra* note 114, at 630–31.

<sup>118</sup> *Id.* at 650.

<sup>119</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008) (constitutionalizing detainees' right to habeas corpus review); Fletcher et. al., *supra* note 114, at 629–36.

<sup>120</sup> Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES (Jan. 13, 2007), [http://www.nytimes.com/2007/01/13/washington/13gitmo.html?\\_r=0](http://www.nytimes.com/2007/01/13/washington/13gitmo.html?_r=0); see also Fletcher et. al., *supra* note 114, at 627 n.35.

<sup>121</sup> See *Keep America Safe: Who Are The Al Qaeda Seven?*, YOUTUBE (Mar. 1, 2010), [http://www.youtube.com/watch?v=ZIXg7LmlEQg&feature=youtube\\_gdata](http://www.youtube.com/watch?v=ZIXg7LmlEQg&feature=youtube_gdata); Fletcher et. al., *supra* note 114, at 619.

<sup>122</sup> Fletcher et. al., *supra* note 114, at 626–27.

Considered from the standpoint of doing the most good they could, however, their work may have had more ethical weight if they spent the same amount of time handling more routine pro bono cases. The firms could have turned down the detainee cases in favor of cases that had more practical and meaningful impact on poor people like, for example, expungements.<sup>123</sup>

Upholding the rule of law has systemic and societal benefits that are real but hard to measure.<sup>124</sup> Still, if the primary justification for pro bono work is to ensure access to the system of justice, then, given the choice, law firms should choose to provide more people more access to the system and stay away from some high profile cases that provide a handful of people limited access to the system of justice. Of course, the law firm gets a bigger public relations bang for its pro bono buck by doing the high profile case, but that motive undermines the moral value of the work in the first place.<sup>125</sup> The business case for pro bono often crowds out the more fundamental moral arguments in favor of pro bono.<sup>126</sup> Concerns of the law firms can supplant the needs of the clients.<sup>127</sup> When a selfish motive overcomes the overwhelming moral calculus pointing to a different conclusion, there is little of pro bono's primary moral justification left standing. As Leonore Carpenter noted

One might wonder if it is possible to simultaneously appeal to altruistic and materialistic motivations and find success in both appeals. And in fact, it appears that the large firms may not be grasping the shaded, complex message that materialistic concerns should be viewed as a beneficial by-product, but not a

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<sup>123</sup> Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 334–35 (2015) (expunging criminal records offers chance for economic security and self-validation); see, e.g., Christopher Gowen & Anne Geraghty Helms, *The Legal Community's Collaborative Effort to Address Collateral Consequences for Youth*, HUM. RTS. MAGAZINE, Summer 2011, at 20, 21 (describing successful pro bono expungement handled by large law firm but noting that this was the exception); Jeffrey Selbin & Justin McCrary, *Got Clean Slate? New Study Suggests That Criminal Record Clearing May Increase Earnings*, <http://papers.ssrn.com/sol3/papers.cfm?abstractid=2486867> (last visited Oct. 6, 2016).

<sup>124</sup> See TROUBLE, *supra* note 83, at 17–18 (discussing the research that shows that people are happiest when, among other things, they are “contributing to socially valued ends that bring meaning and purpose”); see also, Loder, *supra* note 93, at 461.

<sup>125</sup> Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1452 (2009) [hereinafter *Rethinking*].

<sup>126</sup> *Id.*

<sup>127</sup> Leonore F. Carpenter, “*We're Not Running a Charity Here*”: *Rethinking Public Interest Lawyers' Relationships with Bottom-Line-Driven Pro Bono Programs*, 29 BUFF. PUB. INT. L.J. 37, 38 (2011); *Politics*, *supra* note 6, at 120.

driver, of pro bono programs. Instead, they appear to have seized bottom-line motivations for pro bono with both hands.<sup>128</sup>

If we justify this kind of extravagant pro bono by the extent the case reforms the law, then we have to conclude that the lawyers may have come up short.<sup>129</sup> The cases may not have had any significant impact on the scope of presidential or congressional power.<sup>130</sup> They did not address the question whether or not the President has unilateral authority to detain enemy combatants nor did they address the issue of compliance with international law.<sup>131</sup> In sum, they tantalizingly suggested some answers, but left the law pretty much where they found it.<sup>132</sup>

Instead of focusing on the number of people served, we could look at the number of people potentially served by the legal change brought about by the case.<sup>133</sup> Of course, a lawyer will not know in advance if the case will be successful but that should be part of the ethical calculus in deciding whether or not to take the case. If the chances of success are slim and the amount of effort is great, perhaps the law firm should decline the high profile case and devote its time and money to less visible but more impactful cases.<sup>134</sup> Perhaps the real lesson is that the good work on high profile cases does not excuse law firms from turning down other, more mundane cases. We should applaud these law firms for upholding the rule of law, but their moral obligation is not satisfied if they could do more without doing real harm to their practices. Using these cases to burnish the firms' reputation, when other needy cases go wanting, is not ethical.

Internal case selection priorities can also prevent maximal pro bono efforts. Firms that use their pro bono departments to recruit and retain lawyers want to ensure a positive pro bono experience. As Deborah Rhode notes, "pro bono activities enhance career development; they are a way to build skills, reputation, and contacts while advancing causes to which these individuals are committed."<sup>135</sup>

This creates a "triage conflict" where case selection standards of the referring agency and the firm may conflict.<sup>136</sup> They may look for the interesting

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<sup>128</sup> See Carpenter, *supra* note 127, at 54.

<sup>129</sup> *Rethinking*, *supra* note 125, at 1452.

<sup>130</sup> Fletcher et. al., *supra* note 114, at 670–71 (describing the Guantanamo Bay case victories as "fragile and contingent, in particular with respect to altering political consensus about the relationship of law and the state").

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Numbers*, *supra* note 1, at 109–11.

<sup>134</sup> See generally LUBAN, *supra* note 65, at 242–43 (European countries with a long history of subsidizing civil legal services use various triage criteria).

<sup>135</sup> TROUBLE, *supra* note 83, at 17.

<sup>136</sup> Carpenter, *supra* note 127, at 57–58.

or “sexy” case at the expense of more basic matters.<sup>137</sup> Leonore Carpenter described a conversation with a pro bono coordinator. The coordinator first indicated that her firm would never take a plaintiff’s employment discrimination case.<sup>138</sup> Carpenter then suggested that her same sex couples’ needed help with adoptions and the then coordinator replied:

“Look”, she began. “Our associates would find those sorts of cases boring. What we’re looking for are cases that we can put in our newsletter, like Guantanamo cases, or death penalty cases. Or asylum. Do you have any asylum cases?” I did not, and the conversation ended awkwardly with the exchange of business cards that we both knew would end up in the bottom of a drawer, unused.<sup>139</sup>

At the other extreme, overly cautious firms may take only easy cases for likeable clients filtering out significant cases for more needy clients.<sup>140</sup> Referral agencies will market the cases to the firms with these considerations in mind.<sup>141</sup> “Cherry picking” pro bono cases this way “may ill serve broader societal interests.”<sup>142</sup>

The focus on the self-interest of the profession creates problems in the quality of service, the need for recognition, and the criteria for selection.<sup>143</sup> There is little oversight of the quality of the work, and pro bono recipients, like many clients, don’t have the knowledge to assess the efficacy of the legal work.<sup>144</sup> Moreover, because they are receiving a free service, they may lack the confidence to complain and, even if they did, their complaint may not be heard.<sup>145</sup>

Associates may be forced to take a case for a partner’s pet organization, or the firm may reject cases because of feared positional conflicts.<sup>146</sup> Other lawyers may lack the specific skills—legal or cultural—to do effective work.<sup>147</sup> Finally, pro bono lawyers may be at odds with the legal services organization by

<sup>137</sup> *Id.* at 60–61.

<sup>138</sup> *Id.* at 60.

<sup>139</sup> *Id.* at 61.

<sup>140</sup> *Rethinking*, *supra* note 125, at 1445–46.

<sup>141</sup> *Id.* (stating that it makes sense to market cases this way but it excludes the neediest persons).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1440–42.

<sup>144</sup> *Id.*

<sup>145</sup> *See, e.g.*, ACCESSING JUSTICE, *supra* note 74, at 12–13.

<sup>146</sup> *Rethinking*, *supra* note 125, at 1443–44.

<sup>147</sup> *Id.* at 1444.

asserting control over litigation or pursuing strategies in conflict with the organization's strategies.<sup>148</sup>

*B. Lack of Strategic Planning*

The lack of strategic planning also makes it more difficult to better focus pro bono efforts. Deborah Rhode urges pro bono programs to take their cues from the strategic philanthropy movement.<sup>149</sup> As she says: “[t]he full potential of pro bono work is more likely to emerge under a framework ground in strategic philanthropy. In essence, that framework demands clarity in goals and specific measurements of achievement. Its premise is that those who make philanthropic contributions want the maximum social return on their investment.”<sup>150</sup>

As Rhode points out, the most effective approach is to be systematic in identifying goals, designing cost effective strategies to address them, and developing criteria to measure their achievement.<sup>151</sup> By this standard, most lawyers' pro bono work falls short. Relatively few firms engage in any systematic assessment of community needs or of the most cost effective use of resources.<sup>152</sup> Seldom do they even survey their own members about giving priorities or attempt to monitor the satisfaction of clients or the social impact of particular initiatives.<sup>153</sup> Few attempt to gauge the social impact of their cases.<sup>154</sup> This leads to a mismatch between client needs and lawyer resources. For example, in Maryland, clients ranked family matters as the most important legal need but it came in seventh or eighth among lawyers.<sup>155</sup>

Rather than offer a program that tries to be all things to all people, law firms should decide what the program's goal is and then focus their efforts on achieving those goals.<sup>156</sup> If a law firm wants to provide skill training for its associates, then it should not only choose cases that will help develop those skills, but also ensure adequate training and supervision for those associates.<sup>157</sup> In addition, it should build in a way to assess whether or not the associates successfully developed the hoped for skills. Similarly, if the goal is to achieve

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<sup>148</sup> Carpenter, *supra* note 127, at 63–64.

<sup>149</sup> *Rethinking*, *supra* note 125, at 1446–47.

<sup>150</sup> *Id.* at 1437–38.

<sup>151</sup> *Id.* at 1444. See generally *Numbers*, *supra* note 1 (describing the “New Measurement” movement taking hold within the pro bono community).

<sup>152</sup> *Managing*, *supra* note 1, at 2404.

<sup>153</sup> *Id.* at 2403.

<sup>154</sup> *Id.* at 2405 (noting that no firms responded that they sought client feedback).

<sup>155</sup> *Rethinking*, *supra* note 125, at 1445–46.

<sup>156</sup> *Id.* at 1447–48.

<sup>157</sup> *Id.* at 1447.

significant social impact, then the firm must identify the relevant community's needs, focus its efforts there, and attempt to measure its success.

Although Rhode provides a helpful antidote to the feel good version of pro bono, she may not go far enough. Her prescriptions are aimed at the large scale programs because individual lawyers should choose their legal charity using the same considerations they use for their other charitable choices. Singer points out that fails to make the action fully ethical.<sup>158</sup> If the moral foundation for any pro bono work rests on providing access to the system of justice, then it makes little sense to only ask the large providers to be the most effective. Solo and small firm lawyers provide an enormous amount of pro bono services.<sup>159</sup> Letting them choose their case without regard to their impact undermines the goal of asking large firms to be more strategic. A large proportion of pro bono work will be carried out without regard to its effectiveness or impact.

Rhode lets firms off the ethical hook. She argues for a strategic focus on the goals of the program, but would allow law firms to choose whatever goals they wanted.<sup>160</sup> They would be successful as long as they accomplished these goals. This is only slightly better than spray and pray. Not only is that self-fulfilling, it is also self-defeating.

Too many people have too many legal problems for which they cannot afford legal help. These unmet legal needs cause untold harm—legal, financial, and social.<sup>161</sup> At the same time, the legal system works well for those with means but not so well for those without means.<sup>162</sup> This is not simply a function of lack of access. It also results from the way that the substantive law is skewed in favor of those with means. Thus, a fully ethical pro bono program must primarily address one or both of these issues and only secondarily fulfill other, professional, self-interested functions. Pro bono programs and individual lawyers should ensure that the cases taken are those that are not only among the most numerous but also among the most significant. Surveying the community and seeking expert advice provides the information to make the difficult choices to pursue only those cases that make the most impact numerically and legally.

Thus, law firms should not seek only the easy winnable cases for the most likeable clients. Rather, based on the survey and expert data, they select cases that advance neither social justice or have the most impact on their client's lives. For example, no fault, no asset divorces may be easy but they can be handled pro se. Perhaps the pro bono project can teach pro se divorce litigants

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<sup>158</sup> LIFE, *supra* note 25, at 152–53.

<sup>159</sup> *Parallel Universe*, *supra* note 99, at 699.

<sup>160</sup> *Rethinking*, *supra* note 125, at 1447.

<sup>161</sup> ACCESSING JUSTICE, *supra* note 74, at 12–13.

<sup>162</sup> See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

how to process their cases and allow lawyers to pursue the more meaningful custody, support, or visitation cases.

While individual lawyers are not exempt from this calculus, it may play itself out in different ways in different practice contexts. Small and solo do a lot of “loss leader” or unpaid bill pro bono.<sup>163</sup> The economics of their own practice drive that decision and constrain their ability to make fully autonomous choices.<sup>164</sup> Large firms, on the other hand, have the economic flexibility to be more particular about the pro bono cases they take.<sup>165</sup> Thus, there are fewer excuses for the large firms to forgo a meaningful ethical choice than for the small firm or solo lawyer.

## VII. REFORMING PRO BONO TO DO THE MOST GOOD IT CAN DO

This section outlines three preliminary steps that lawyers and the legal system should take, in addition to addressing the issues raised above, to reform pro bono services. First, every lawyer should be required to render 30 hours of pro bono services each year. Second, large law firms should donate more money to organizations that have the greatest impact on the justice gap. Finally, individual buy-out provisions must be increased.

### A. Increase the Amount by Decreasing the Hours

Currently, Model Rule 6.1 suggests, but does not require, each lawyer to render at least 50 hours of pro bono service per year.<sup>166</sup> Even 50 hours would not eliminate the justice gap.<sup>167</sup> Obviously, making pro bono mandatory would increase the number of hours, but such proposals have run into a firestorm of criticism.<sup>168</sup> Nevertheless, requiring an hour a week of donated service is hardly onerous. As Deborah Rhode notes, asking lawyers to devote “between half an

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<sup>163</sup> *Parallel Universe*, *supra* note 99, at 724.

<sup>164</sup> *Id.* (lawyers continue to work on cases for non-paying clients due to combination of ethical rules, social norms, and inertia).

<sup>165</sup> *Politics*, *supra* note 6, at 40 (law firms use pro bono to recruit talent and improve their reputation).

<sup>166</sup> MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR. ASS'N 1983).

<sup>167</sup> *See Trouble*, *supra* note 83, at 38. This Article only discusses a lawyer's pro bono obligation. A complete solution would require increased government assistance, however. The U.S. ranks 67 out of 97 countries in the affordability of legal services according to the World Justice Report. The federal government spends about \$1.00 per year per person on civil legal assistance, far less than most other western countries on a per capita basis. A complete discussion of the role and size of government involvement is beyond the scope of this Article, however.

<sup>168</sup> *See, e.g., Scully*, *supra* note 103, at 1115.

hour to an hour a week, hardly constitutes ‘servitude.’ And those who find it unduly burdensome could substitute a financial contribution.”<sup>169</sup>

We could encourage lawyers who already do pro bono to do more, but they might ask why they should do more than their “fair share.” The obligation to do pro bono is an individual one, but it only arises in the context of the lawyer’s membership in a profession. Singer quotes philosopher Kwame Anthony Appiah on this subject: “If so many people in the world are not doing their share—and they clearly are not—it seems to me I cannot be required to derail my life to take up the slack.”<sup>170</sup> Singer argues, however, that our moral obligations do not change because others fail in discharging theirs.<sup>171</sup> He states that we must do as much as we can until we would lose something nearly as important as the life we are saving.<sup>172</sup>

Singer suggests taking a “moderately demanding stance” for charitable giving.<sup>173</sup> He does not agree that we must adopt a standard so demanding that no one will follow it.<sup>174</sup> Rather, “we should advocate a level of giving that will lead to a positive response.”<sup>175</sup> We should demand a more rigorous standard for ourselves personally but a less rigorous standard for others.<sup>176</sup>

[T]he appropriate standard must be relative to what we can reasonably expect most people to do. Hence [public] praise and blame. . . should follow the standard we publicly advocate, not the higher standard that we might apply to our own conduct. We should praise people for doing significantly better than most people in their circumstances would do, and blame them for doing significantly worse. If you have done more than your fair share, that must at least lessen the blame. If you have complied with the public moral code, we should praise you for doing that, rather than blame you for not doing more.<sup>177</sup>

<sup>169</sup> *Access*, *supra* note 80, at 149.

<sup>170</sup> *LIFE*, *supra* note 25, at 141 (quoting *APPIAH*, *supra* note 36, at 164–65).

<sup>171</sup> *Id.* at 144–45. Singer revises the drowning child hypo to include other adult bystanders who do nothing.

<sup>172</sup> *Id.* at 146.

<sup>173</sup> *Id.* at 149.

<sup>174</sup> *Id.* at 151; *see also Never Again*, *supra* note 54, at 1892 (“This moral principle is quite modest. It obligates us only to prevent extreme harm when we are in a position to do so without making a comparable sacrifice.”).

<sup>175</sup> *LIFE*, *supra* note 25, at 151.

<sup>176</sup> *Id.* at 152. For example, even though he believes that individuals are morally obligated to donate a significant portion of their wealth to combat extreme poverty (perhaps as much as 33%), he urges a public standard of 5%.

<sup>177</sup> *Id.* at 154.

The legal profession should amend Rule 6.1 to require lawyers to produce 30 hours of pro bono legal services per year for people who cannot afford lawyers or organizations that provide legal services to those people. According to the most recent survey, the median for 2011 was about 30 hours while the average was nearly 57 hours.<sup>178</sup> Setting the standard around the median number of pro bono hours—instead of the average—would make a mandatory program less onerous while allowing lawyers to build up a habit of giving.<sup>179</sup> This should be combined with mandatory reporting for all lawyers in all states.<sup>180</sup> This shows everyone who is doing their “fair share” while also allowing the profession to praise those who did more. Perhaps, lawyers who fall below the median will feel shamed and do more the next year.

If lawyers across the country did at least 30 hours of pro bono per year, it would greatly increase the legal services available to people of low and moderate means.<sup>181</sup> Of course, 30 hours seems low for the many lawyers who already do more pro bono than that. Nothing would stop them from continuing to contribute a larger number of hours. At the same time, the 30-hour figure would be an easier target for most lawyers to meet, regardless of economic circumstances. Additionally, some lawyers may hit their 30 hours and creep above that in the following years, thereby slowly but steadily cutting into the justice gap.

### *B. Large Law Firms Must Donate More Money*

The largest law firms, especially the super-rich firms, have a heightened moral duty to provide assistance to the poor.<sup>182</sup> There is a real economic and moral difference between the small firm and solo lawyers and large firm lawyers. For the most part, large firm lawyers continue to receive their salaries while doing pro bono work. The law firm fully staffs their efforts as well. They only

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<sup>178</sup> SUPPORTING JUSTICE, *supra* note 14, at vi. The average includes lawyers who did no pro bono during that year. Excluding them brings the average up to approximately 71 hours. This suggests that high producing pro bono lawyers are doing much more than their fair share and driving the average up. Asking them to do more would be futile.

<sup>179</sup> See, e.g., LIFE, *supra* note 25, at 172 (helping stimulates the reward centers of the brain).

<sup>180</sup> Nine states require lawyers to report their pro bono hours while 12 states allow lawyers to voluntarily report their hours. See *Pro Bono Reporting*, ABA, [http://www.americanbar.org/groups/probono\\_public\\_service/ts/pbreporting.html](http://www.americanbar.org/groups/probono_public_service/ts/pbreporting.html) (last visited Oct. 6, 2016); see also, *Managing*, *supra* note 1, at 2370 (jurisdictions with mandatory reporting show significant increase in pro bono participation in hours worked and money given); Kellie Isbell & Sarah Sawle, *Pro Bono Publico: Voluntary Service and Mandatory Reporting*, 15 GEO. J. LEGAL ETHICS 845 (2002).

<sup>181</sup> Rebecca Sandefur estimated that in 2007 it took around 59 pro bono attorneys to equal one lawyer providing civil legal assistance in a full time capacity. See Rebecca L. Sandefur, *Lawyer's Pro Bono Service and American-Style Civil Legal Assistance*, 41 L. & SOC'Y REV. 79, 97 (2007).

<sup>182</sup> LIFE, *supra* note 25, at 162–63.

lose time, not money. On the other hand, small and solos forego income when they do a case for free. They are out both time and money. In addition, solo practitioner income has declined since 1967, while law firm lawyer income has skyrocketed. The average salary in 1967 adjusted for inflation was \$173,000 for law firm partners and \$74,580 for solo practitioners.<sup>183</sup> In 2012, solo practitioners averaged \$49,130 while partners took in \$349,000.<sup>184</sup> This amounted to a 34% decrease for solo practitioners and a 100% increase for partners.<sup>185</sup>

Even taking into account the effects of the recent recession, large law firms are enormously profitable. Partner profits at the AmLaw 100 went up an average of 5.3% in 2014 with the top ten firms in this category each taking in more than \$3 million per partner.<sup>186</sup> In 2014, the top five highest grossing firms on the AmLaw 100 list each took in more than \$2 billion in revenue.<sup>187</sup> That amounts to 10 times the total federal, state, and local expenditures on civil legal services.<sup>188</sup> These firms have the primary moral obligation to address the justice gap by doing much more pro bono work or donating a significant share of their profit to legal services organizations.

We should expect that large law firms would not only provide a considerable amount of pro bono hours, but also donate considerable sums to legal services organizations. In light of the great unmet legal needs and the ability to make a significant impact on those needs, large law firms should forgo much of their charitable giving unrelated to access to justice and focus their donations on organizations that deliver legal services to the poor.<sup>189</sup> Similar to the AmLaw

<sup>183</sup> See Benjamin H. Barton, *Middle Class Lawyers Are a Dying Breed*, BUSINESSINSIDER, INDIA (June 24, 2015), <http://www.businessinsider.in/Middle-class-lawyers-are-a-dying-breed/articleshow/47805796.cms>.

<sup>184</sup> See *id.*

<sup>185</sup> See *id.*

<sup>186</sup> David Lat, *The 2015 Am Law 100: Revenues Rising, Profits Popping, and a New #1 Firm*, ABOVE THE LAW (Apr. 27, 2015), <http://abovethelaw.com/2015/04/the-2015-am-law-100-revenues-rising-profits-popping-and-a-new-1-firm/>. There appears to be a segmentation going on among the wealthiest firms: the rich keep getting richer. Chris Johnson, *Am Law 100 Analysis: The Superrich Firms Pull Away*, THE AMERICAN LAWYER (Apr. 27, 2015), <https://advance.lexis.com/api/permalink/ed5e11d9-0fdd-41be-aaeb-a242a44d6ac4/?context=1000516>. The top law firms are not only taking in more revenue and generating more profit per partner, they are also taking market share from the firms just below them.

<sup>187</sup> Lat, *supra* note 186.

<sup>188</sup> *2014 LSC By The Numbers: The Data Underlying Legal Aid Programs*, LEGAL SERVS. CORP. (Aug. 2015), <http://www.lsc.gov/media-center/publications/2014-lsc-numbers> (approximately \$1 billion dollars spent by Legal Services programs in 2014 on civil legal assistance counting federal appropriations and all other sources of revenue) [hereinafter *2014 LSC By The Numbers*].

<sup>189</sup> *Never Again*, *supra* note 54, at 1899–900 (“When deciding whether to provide a benefit to a person who is better off or a person who is worse off, we ought to give that benefit to the person who is worse off. Because this principle is about the relative status of people, it is fundamentally

Pro Bono challenge, large law firms should engage in a “Pro Bono Dollar Donation Challenge” whereby they are publically recognized and ranked for the amount they give to effective access to justice organizations. Although I do not know at what level the expected donation should be, it must be significantly higher than now. Giving away more of their profit would not significantly hinder their effectiveness or their standard of living. In any event, a firm that takes in \$2 billion in revenue will feel an extra donation much less than the small firm operating on the margins of profitability.<sup>190</sup>

These donations should be focused to do the most good. Large firm donations should go to the organizations that have the biggest impact on the justice gap. This could be measured by the number of cases handled or the legal impact those cases have. There is no doubt that measuring social impact is very difficult.<sup>191</sup> It is hard to quantify social impact and it is virtually impossible to run a good experiment with true random samples, control groups, etc.<sup>192</sup> Nevertheless, law firms conduct “evaluations from participants, clients, referring organizations, and peer review teams.”<sup>193</sup> At the same time, providers must become better at assessing their outcomes and effectiveness.<sup>194</sup>

### C. Individual Buy Out Provisions Must be Much Higher

Finding the right amount will require balancing the need for access to justice with the profitability of law firms. Rob Atkinson has suggested that law firms pay a “Good Samaritan Tax” on their revenues.<sup>195</sup> This tax would be

designated as such, to pay for lawyers for the poor. The tax would be noticeably—preferably, steeply—progressive; lawyers who earn more would have to pay a higher percentage of their earnings. Not, to return to the basic rationale of the tax,

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about justice. Justice, in its focus on relative status, tells us that once we have decided to give help, our help should go to those who need it most.”).

<sup>190</sup> *Parallel Universe*, *supra* note 99, at 702 (“Cash flow is also a constant concern.”).

<sup>191</sup> *Rethinking*, *supra* note 125, at 1451.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1450.

<sup>194</sup> See *Managing*, *supra* note 1, at 2433 (suggesting that, although difficult methods of assessing “social impact” need to be developed); *Rethinking*, *supra* note 125, at 1445 (lack of strategic focus results in “mismatch between public needs, partner priorities, and associate satisfaction”).

<sup>195</sup> Atkinson, *supra* note 100, at 132. See generally, W. Edward Afield, *A Market for Tax Compliance*, 62 CLEV. ST. L. REV. 315, 341 (2014) (financial contributions may be more efficient to produce socially beneficial services).

because they have done more harm, or received more benefit, but simply because they are the most able to pay.<sup>196</sup>

Atkinson's tax would go to support government subsidized legal services but the concept—that lawyers should be one of the primary sources of funds to address the justice gap—applies more generally.

The original draft of Model Rule 6.1 required 40 hours of service or the payment of its financial equivalent.<sup>197</sup> The current rule does not mandate pro bono service but retains the choice to give service or money.<sup>198</sup> The average lawyer makes about \$130,000.<sup>199</sup> Two weeks of that lawyer's gross salary amounts to \$5,000. That would generate \$2.5 billion for legal services programs compared to the approximately \$1 billion spent by all sources currently.<sup>200</sup>

Quinton Johnstone suggests a fee equal to two weeks salary for legal aid lawyers.<sup>201</sup> But, this seems less than generous. For example, according to the latest data, the median starting salary for legal aid lawyers is \$44,600, the median for legal aid attorneys with at least five years of experience is \$51,000 with the median salary for those with 11–15 years experience is \$64,000.<sup>202</sup> Johnstone's suggested contribution works out to about \$1700, \$2000, or \$2500 depending on which benchmark is used. Compare this to the average fifth year associates salary which ranges from \$100,000 to \$200,000.<sup>203</sup> That's 1.7% of salary at the low end of both ranges, while that \$1700 contribution represents .008% of salary at the upper end. These fall some distance from Singer's modest 5% recommendation. The numbers look even more pitiful when we compare them to partner profits. In 2015, the AmLaw 100 firms totaled \$80.96 billion in revenue, which rose by 4.6% representing a new record. The average revenue per lawyer was up 3.7% to \$872,000, while the average profits per partner went up 5.3% to \$1.55 million.<sup>204</sup> Thus, a \$1700 contribution amounts to .0011% of the average AmLaw 100 partner's profit. To be sure, not all law firm partners

<sup>196</sup> Atkinson, *supra* note 100, at 170.

<sup>197</sup> See Maute, *supra* note 22, at 92.

<sup>198</sup> MODEL RULES OF PROF'L CONDUCT r. 6.1 (AM. BAR. ASS'N 1983).

<sup>199</sup> Debra Cassens Weiss, *Lawyers Ranked No. 5 for Best Pay; Doctors Top List*, ABA JOURNAL (July 2012), [http://www.abajournal.com/news/article/lawyers\\_ranked\\_no\\_5\\_for\\_best\\_pay\\_doctors\\_top\\_list/](http://www.abajournal.com/news/article/lawyers_ranked_no_5_for_best_pay_doctors_top_list/) (average salary in 2012 about \$130,000).

<sup>200</sup> *2014 LSC By The Numbers*, *supra* note 188.

<sup>201</sup> Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J. L. & PUB. POL'Y 571, 607 (2011) (proposing pro bono fee equal to the average two week salary of full time legal aid lawyers).

<sup>202</sup> See NALP's *Public Sector & Public Interest Salary Report Turns Ten!*, NALP (July 2014), <http://www.nalp.org/july14research> (average legal aid starting salary is \$44,000).

<sup>203</sup> Lat, *supra* note 186 (citing Johnson, *supra* note 186).

<sup>204</sup> *Id.*

make these salaries. Still, asking for more than two week's salary for an underpaid legal aid attorney will neither bankrupt the firms nor these partners.

Peter Singer would go even further. Singer says that one should give until one will be harmed in a substantially similar way.<sup>205</sup> He suggests a sliding scale for charitable giving that would rise, in progressive steps, from 5% of income for most people to 33% for the wealthiest.<sup>206</sup> If we apply Singer's table to the top ten AmLaw100 firms' partners' average profit, it would equal a donation of \$597,500 per partner.<sup>207</sup> That would amount to almost \$379,000,000 from only the partners at Latham & Watkins, the firm at the top of the AmLaw100 list.<sup>208</sup> Add in all the other partners at the top firms and now we are talking about real money.<sup>209</sup>

Ethical discussion in the classroom is one thing, but, for these discussions to be meaningful, they must work in the real world. Singer may be correct, but if his regime is too demanding to real people in the real world, it will remain in the classroom and fail. His Princeton colleague, Kwame Anthony Appiah, critiques the practicality of Singer's position and offers a modification that works especially well with the suggestions in this Article.

Appiah suggests a more modest and, in my view, more realistic, approach by providing a framework that takes into account the human who is being asked to make important ethical choices. Whereas Singer and the other "Shallow Pond" theorists,<sup>210</sup> posit that "[i]f you can prevent something bad from happening at the cost of something less bad, you ought to do it,"<sup>211</sup> Appiah says that "[i]f you are the person in the best position to prevent something really awful, and it won't cost you much to do it, do it."<sup>212</sup> This is because these "Shallow Pond" theorists get several things wrong. First, a small donation to an

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<sup>205</sup> LIFE, *supra* note 25, at 146.

<sup>206</sup> *Id.* at 164–65.

<sup>207</sup> See Lat, *supra* note 186. The average profit per partner for the top 10 firms on the list was \$3.85 million dollars. I reduced it to an even \$3 million dollars for this calculation.

<sup>208</sup> *America's Largest 350 Law Firms*, ILRG, <https://www.ilrg.com/nlj250/> (last visited Oct. 6, 2016) (Latham & Watkins had 634 partners 2015). Latham & Watkins is a good example. The firm reports that it contributed over \$1 billion dollars in pro bono attorney time since 2000 and over 30,000 hours in 2015 alone. Yet that dollar amount would be reached in only three years under Singer's formula. This is not to say that firms like Latham are stingy. Rather, it shows how much more they, and others, could do.

<sup>209</sup> The famous Senator Everett Dirksen supposedly said, "A billion here, a billion there, pretty soon, you're talking real money." There is no evidence, however, that he ever uttered that phrase and he indicated that the quote was attributed to him by mistake. See THE DIRKSEN CENTER, [http://www.everettdirksen.name/print\\_emd\\_billionhere.htm](http://www.everettdirksen.name/print_emd_billionhere.htm) (last visited Oct. 6, 2016) (exhaustively detailing the mostly futile search for the quote's source but also a few anecdotal reports verifying Dirksen's use of the quote).

<sup>210</sup> APPIAH, *supra* note 36, at 160–61. Here, Appiah refers primarily to Singer and Peter Unger.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 160.

organization fighting extreme poverty may save 30 children this year, but 30 more children, perhaps the same ones, will need to be saved next year unless the conditions that created their poverty are changed.<sup>213</sup> Second, the “Shallow Pond” analysis reduces disparate values to the same measurement.<sup>214</sup> People are asked to compare the life of a distant child to that of a child around the corner to that of a civic organization. Third, even taking Singer *et al.* at face value, a person could always find a better way to use a donation to do more good.<sup>215</sup> For example, I may decide not to save the drowning child because I plan to sell my expensive suit and donate the money to an organization which will use that money to save many children.<sup>216</sup>

Each of these objections to the Singer principle applies to our analysis of pro bono. Simply having more lawyers do more pro bono doesn’t solve the justice gap crisis. At least the same number of people will need pro bono lawyers the following year unless systemic procedural and substantive changes are made. It is especially difficult to compare the benefit from preserving the rule of law to the benefit of handling an expungement. And lawyers can always find better or efficient organizations to give money to.

Appiah’s modest reformulation supports the suggestions in this Article, however. Lawyers are in the best position to help people who have legal problems, especially if those problems involve complex administrative and statutory issues. That sounds obvious, but it is actually a powerful moral statement. Lawyers, by virtue of their legal expertise and proximity to the system of justice, have the primary moral obligation to address the justice gap. This means not only must lawyers provide their time and money, but they must also use this expertise and proximity to seek additional government funding to address the justice gap. Similarly, lawyers are in the best situation to advocate for the kind of structural changes— administrative, procedural and substantive— that might alleviate the chronic need for a lawyer’s services.

Appiah’s reformulation focuses on preventing “really bad” things when it won’t cost a person too much. Thus, lawyer pro bono efforts must use triage methods to focus first on the matters that, if not resolved, will cause real, lasting harm. But, it also means that lawyers do not have to abandon their current clients or bankrupt their law firms to do so. Of course, lawyers will disagree over how much cost is “too much,” but if we have learned anything from the Shallow Pond theorists, it is that what people think is too much is often too little.

In the end, Appiah’s reformulation neither takes away from the force of Singer’s principle nor undermines the suggestions in this Article. Rather, it confirms the basic thrust of Singer’s argument: that we have moral obligations

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<sup>213</sup> *Id.* at 159.

<sup>214</sup> *Id.* at 162.

<sup>215</sup> *Id.* at 160–61.

<sup>216</sup> *Id.*

to others and that we can almost always do more. In addition, it supports the recommendations in this Article for more effective pro bono and more generous financial contributions to legal services providers.

### VIII. CONCLUSION

Lawyers should be praised for increasing the visibility and the amount of pro bono services in the last 20 years. Applying Singer's principle to its fullest shows that, in spite of these generous efforts, more could and must be done.

In this Article, I argued that in spite of the increase in the amount of pro bono services being provided by lawyers, it still falls short of the ethical ideal set out by ethicists like Peter Singer. I suggested lawyers are morally obligated to 1) increase the amount of their pro bono efforts, 2) be more selective in the cases they take, and 3) be more generous in their financial support for legal services providers. These obligations are especially acute for the largest, most profitable firms.

I have deliberately stated this argument in a provocative fashion. I wanted to make concrete the gap between the ideal and the reality and to provoke self-examination. I hoped that by challenging the ethical basis for lawyers' current levels of pro bono and the way lawyers chose those cases might shake off self-congratulation and complacency. I wanted there to be "sticker shock" over the size of my suggested buy out or financial contribution number. Realistically, I recognize that it is doomed to fail as a policy prescription. Still, seeing how much more can be done might shame profitable law firms and their partners to do much more. As Appiah notes, he is less certain of the arguments why he should jump in the pond than that he "should save the child."<sup>217</sup> For the same reason, when lawyers discover people drowning in a sea of legal troubles, they must come to the rescue even if they don't agree on why.

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<sup>217</sup> *Id.* at 162.