

Mandatory Pro Bono: Comfort for the Poor or Welfare of the Rich

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MANDATORY *PRO BONO*: COMFORT FOR THE
POOR OR WELFARE FOR THE RICH?

Jonathan R. Macey†

INTRODUCTION

Lawyers have served indigent clients and worthwhile but impecunious causes without pay for centuries.¹ Unfortunately, this laudable tradition of public service has not done much for the legal profession's overall reputation, which continues to languish. The age-old debate about whether lawyers should be *compelled* to provide services to nonpaying clients as a condition for retaining their licenses to practice law resurfaced recently when a committee appointed by the Chief Judge of the New York Court of Appeals to study the legal needs of the poor concluded that lawyers should be compelled to donate 20 hours every year to serving the poor.²

Proposals to compel lawyers to provide free legal services to the indigent have been around for about as long as the world has been inhabited by lawyers and poor people. No less a philosophical luminary than St. Thomas Aquinas addressed the issue in Question 71 of the *Summa Theologica*, asking the question, "Whether an advocate is bound to defend the suits of the poor?"³ His answer, like mine, was a resounding no.⁴

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¹ David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 735 (1980).

² COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (1990).

³ THE SUMMA THEOLOGICA OF ST. THOMAS AQUINAS, LXXI Part II, Question, at 273 (Fathers of the English Dominican Province trans., R&T Washbourne, Ltd., 1918).

⁴ Essentially Aquinas takes the position that providing legal services for the poor is a corporal work of mercy that is very personal. The obligation to provide legal services

The reason lawyers ought not to be obliged to help the poor—indeed the reason forcing lawyers to serve the poor is odious and unethical—is that we can make both lawyers *and* the poor better off by abandoning mandatory pro bono and providing the poor with lump sum transfers of cash. In other words, if the rationale for mandatory pro bono is to help the poor, then it is a peculiarly bad way to provide assistance. Alternatively, mandatory pro bono may really be designed to serve some other purpose besides helping the poor. In fact, I will argue that the real effect of a mandatory pro bono system will be to transfer wealth from solo practitioners and lawyers in small- and medium-sized firms to lawyers in large firms.

I

MANDATORY PRO BONO AND THE POOR

Contrary to popular belief, mandatory pro bono will not help the poor. To understand why this is so, one must first understand that the real reason why the poor do not presently consume more legal services is because they are rational. Given their limited wealth, the poor simply would rather spend their money on other things. In other words, legal services are very, very low on a poor person's shopping list. Food is higher. Shelter is higher. Clothing is higher. And even after all of those expenses are covered, lawyers should not be surprised to learn that a poor person might choose to allocate his resources in ways other than hiring a lawyer—like buying a car or obtaining an education.

The low demand for lawyers' services by the poor and the middle class provides strong evidence that most people regard legal services as an expendable luxury rather than as a necessity:

Except for a narrow range of property-related matters—conveyances, wills, and marital separations—the middle class makes just about as little use of legal services as those who literally cannot afford them. Even prepaid legal insurance plans have proved surprisingly unpopular. Why? Because people do not want to give

for the poor depends on the individual circumstances of each particular case. Because no man has the resources or the capacity to provide help to all who need it, the obligation arises from the existence of a relationship between the person in need and the provider:

He that lacks food is no less in need than he that lacks an advocate. Yet he that is able to give food is not always bound to feed the needy. Therefore neither is an advocate always bound to defend the suits of the poor. . . .

. . . Now no man is sufficient to bestow a work of mercy on all those who need it. Wherefore, as Augustine says. . . , *since one cannot do good to all, we ought to consider those chiefly who by reason of place, time, or any other circumstance, by a kind of chance, are more closely united to us.*

Id. at 274 (citation omitted).

up what they would have to in order to buy a little more of our lawyer justice, except when the expected benefit is worth the cost. People's priorities are different.⁵

In other words, poor people do not hire lawyers because they use their limited resources to buy things that they value more than legal services.

Given a choice between \$2500 in cash and twenty billable hours of legal services provided by a partner at a Wall Street law firm (valued at around \$10,000), most people—middle class or poor—would take the \$2500 in cash.

In other words, if the lawyers compelled to provide pro bono legal services to poor clients were permitted to negotiate with their indigent clients, both the lawyers and the clients quickly would agree that the clients should accept cash in lieu of legal services. The lawyers could put the time they saved to more productive uses, and the clients could buy some of the virtually infinite array of goods and services they actually need. Everybody would be better off.

Thus, requiring lawyers to provide legal services to the poor is wasteful and inefficient. Both lawyers and their clients could improve their circumstances if lawyers could donate money directly to the poor. The poor could then decide for themselves how best to spend this largesse.

Ironically, the increased consumption of legal services by the poor may actually harm the indigent rather than help them. For example, among the primary justifications for a regime of mandatory pro bono is that poor people need representation in landlord-tenant and matrimonial disputes.

Lawyers forced to do pro bono work will spend much of their time representing people involved in matrimonial disputes who are unable or unwilling to pay for legal representation. People getting divorced may decline to hire lawyers to represent them for a variety of reasons. The most plausible explanation for the failure of indigent people to hire lawyers in matrimonial disputes is that there are not enough assets in the matrimonial estate to justify the expense. A recent study by Marsha Garrison shows that 31 percent of divorcing couples in New York State had a net worth of less than \$5000 and 18 percent of divorcing couples had a *negative* net worth.⁶ In light of these statistics, it is not hard to see why many couples ra-

⁵ John A. Humbach, *Serving the Public Interest: An Overstated Objective*, 65 A.B.A. J. 564, 564-65 (1979).

⁶ Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes* 34, tbl. 8 (1992) (unpublished manuscript, on file with author).

tionally decide that hiring a lawyer would not make sense. When there is simply no material estate to fight over, it does not make sense to hire lawyers as combatants. What is difficult to understand is why the supporters of mandatory pro bono think that anybody benefits by providing impecunious couples with free legal representation. With the possible exception of matrimonial work, lawsuits against landlords are expected to occupy the lion's share of the time that lawyers compelled to provide legal services for the poor would spend on mandatory pro bono. If more marginal lawsuits are brought against landlords because lawyers need something to do to fulfill their mandatory pro bono obligations, the landlords' costs of providing housing to the indigent inevitably will go up. As the cost of providing housing goes up, rents will increase, and the supply of housing for the poor will go down. The benefit that some poor people derive from having representation in landlord-tenant disputes must be weighed against the increased costs to tenants that will result from a regime of mandatory pro bono in which lawsuits are brought against landlords regardless of whether the expected benefits to the tenants outweigh the costs of the suit.⁷

Litigation often produces benefits for plaintiffs and for society as a whole because individuals who expect to pay damages for the harm they cause have an incentive to reduce their harmful activities. But pro bono litigation is different. When clients must incur costs to hire a lawyer, they will only bring lawsuits when the expected benefits from litigation outweigh the costs of bringing suit, including the costs of hiring a lawyer. In the case of pro bono lawyering, however, the cost of mounting litigation is reduced to zero, and clients will pursue litigation that produces little or no benefits.

Mandatory pro bono significantly exacerbates this problem because lawyers are forced to find client matters to fulfill their pro bono obligations:

[S]uppose that lawyers, looking for ways to fill their quota [of required pro bono legal work], start impeding debt collection or complicating evictions of nonrent-paying tenants. The immediate result is to increase the fees to the lawyers of landlords and merchants, thus increasing the costs of those suppliers [of goods and services to the poor]. The longer-run effect is likely worse: to increase the price or decrease the supply of housing and credit to the poor.⁸

⁷ Humbach, *supra* note 5, at 566.

⁸ *Id.*

II

MANDATORY PRO BONO AND TRANSFERS OF WEALTH
WITHIN THE LEGAL PROFESSION

If mandatory pro bono does not help the poor, then one must wonder why it receives such enthusiastic support from elite groups within the legal community. The basic reason stems from a lingering misconception among American lawyers that prosperity, virtue, and inequality simply can be legislated away. As a distinguished European journal of public affairs recently observed, “[t]o a lot of Americans, it now seems that prosperity can be bought like insurance.”⁹ The journal went on to point out that while social engineering has become unpopular in Eastern Europe, it seems to be flourishing in the United States.¹⁰

A second reason for the support given to mandatory pro bono programs is probably more psychological than philosophical. People generally, including lawyers, believe (or cause themselves to believe) that the work they do contributes to the good of mankind. Therefore, lawyers, like other people, desperately want to believe that society would benefit from *maximizing*, rather than merely *optimizing*, the total level of legal services provided.

Putting self-deception aside, the ineluctable reality is that nobody really believes that mandatory pro bono programs will help the poor. Nonetheless, mandatory pro bono regimes find strong support in the upper strata of the legal profession. This is not surprising because these upper strata will be the real beneficiaries of mandatory pro bono programs.

It is no coincidence that the big push for mandatory pro bono is coming from big firm lawyers at a time when demand for the services of those firms is lagging appreciably behind the available supply.¹¹ This temporary disequilibrium is evidenced by layoffs of partners and associates at large law firms.

Mandatory pro bono programs will help large law firms by increasing the demand for lawyers to defend suits brought under such programs. Lawyers forced to bring cases on behalf of poor people will usually be bringing them against defendants who must pay to hire lawyers to defend those suits. In other words, mandatory pro bono programs artificially expand society's demand for paid legal services. In particular, the demand for the services of lawyers at large firms who specialize in representing defendants will increase. As one commentator presciently has observed, “[W]henver clients

⁹ *From There to Intolerance*, THE ECONOMIST, July 20, 1991, at 15.

¹⁰ *Id.*

¹¹ Sandra Torry, *Skadden's Layoffs Signal an Uneasy New Era for Lawyers*, WASH. POST, Oct. 7, 1991, at F5.

who cannot pay get more legal services, clients who can pay need more legal services. This results in new business for the bar."¹²

A mandatory pro bono requirement will increase the demand for lawyers in large law firms in other, subtler ways. First, under the New York plan, lawyers at large law firms could credit the excess pro bono hours of some lawyers in the firm to meet the obligation of other lawyers in the firm.¹³ This flexibility will benefit large firms far more than small firms, because large firms can more easily afford to hire lawyers to specialize in pro bono work. In large firms the pro bono activities of these lawyers can be amortized over a large number of lawyers. In addition, at any given time, large firms predictably will have excess capacity in certain practice areas and no room for additional work in others. These large firms can ameliorate this problem by shifting the burden of pro bono work onto the shoulders of the lawyers with extra time in their schedules. This is a luxury that smaller, more specialized firms lack because all of the lawyers in such firms are likely to have slack times and busy times simultaneously.

Even if lawyers in large law firms were prohibited from assigning the burden of their pro bono obligations to other, more junior lawyers in the firm, satisfying the burdens of a mandatory pro bono obligation would still be easier for a large firm. Suppose, for example, that a solo practitioner is scheduled to make a court appearance on a particular day for a pro bono client. During that day the solo practitioner will be unable to represent any of his paying clients. By contrast, a large law firm simply can reassign personnel (many of whom will have expertise in the relevant area of law) to handle the work of the absent lawyer.

In addition to the disproportionately heavy burden of reallocating caseloads on lawyers in smaller firms, solo practitioners and lawyers in small firms are less able to amortize the fixed costs of a mandatory pro bono program across the firm as a whole. Moreover, most pro bono plans, including the one being discussed in New York, allow lawyers in small firms (10 or fewer) and solo practitioners to buy their way out of their obligations for a flat fee.¹⁴ Thus the lawyer in the solo or small practice must pay retail to satisfy the pro bono requirement, while the lawyer in the large firm can satisfy the requirement by purchasing legal services wholesale by utilizing intra-firm talent. Despite the fact that lawyers in large firms cannot buy their way out of the proposed pro bono legal obligations, the

¹² Humbach, *supra* note 5, at 566.

¹³ Roger C. Cramton, *Mandatory Pro Bono*, Address Before the Tompkins County Bar Association (Nov. 16, 1989).

¹⁴ *Excerpts from the Recommendations*, N.Y.L.J., Dec. 8, 1989, at 1.

plan is still highly regressive. As a result, the plan is unpopular with the relatively impecunious lawyers who practice at small firms.

Mandatory pro bono programs also benefit large firms at the expense of smaller firms because under some pro bono plans, large firms can fulfill their obligations by doing work for foundations and other low-pay/high-prestige clients that such firms normally represent. Similarly, unlike small firms and solo practitioners, large firms can use mandatory pro bono programs as vehicles for training associates because younger lawyers working for large firms that deal almost exclusively with very high stakes legal issues understandably do not get as much courtroom experience or contact with paying clients as lawyers at smaller firms that litigate smaller stakes issues.

III

THE GOOD OLD DAYS: THE LEGAL PROFESSION AS SOMETIME MONOPOLY

A final argument in favor of mandatory pro bono is that lawyers are professionals, and as such, their license to practice law comes with certain societal obligations. In less prosaic terms, the licensing requirements of the bar have created barriers to entry that permit lawyers to earn super-competitive profits. According to this argument, lawyers are under an obligation to perform legal services for the poor in order to compensate society for the social losses associated with their monopoly position. Since the legal profession's monopoly allows it to charge above-market prices, this monopoly status permits lawyers to transfer wealth from the rest of society to themselves. Mandatory pro bono requirements merely effectuate a re-transfer back to society of this initial wealth transfer. But this argument is completely flawed.

If at any time in history the legal profession was a monopoly, it is not any longer. If one hundred years ago lawyers erected barriers to entry that enabled them to obtain monopoly profits, those were short-term gains that are not presently being enjoyed by members of the profession. This is because nonlawyers, observing the economic rents earned by a cartelized legal profession, would begin expending the resources and developing the human capital necessary to enter the profession and obtain these rents. Thus any gains from cartelizing the legal profession were lost long ago by competition from new entrants.

Unfortunately, the disappearance of abnormal returns brought about by the increased competition for entry into a cartelized legal profession does not eliminate the lawyer's incentive to maintain the restrictions that led to the cartelization. Lifting entry restrictions on lawyers would increase the short-run supply of lawyers and deprive

those lawyers who were practicing before the restrictions were lifted of a normal return on the human capital investments they made in order to become lawyers.

Thus, as with most regulations, lawyer licensing requirements, once in place, create an incentive for the people subject to those requirements to lobby for keeping them in place even after the abnormal returns from the entry restrictions have disappeared. The point is not that licensing requirements for lawyers should be maintained, but rather that lawyers currently in practice are earning only normal—not super-competitive—returns on their investments in human capital. Consequently, the presence of entry restrictions in the form of state bar licensing rules does not justify imposing a mandatory pro bono requirement on lawyers currently in practice.

CONCLUSION

Perhaps the most disturbing aspects of the mandatory pro bono debate relate to what it implies about the legal profession's view of itself. Those who favor imposing a mandatory pro bono obligation on lawyers make two implicit assumptions that I wish both to expose and to dispute. First, the idea of a mandatory pro bono obligation implies that some work done by lawyers (like representing the indigent) furthers society's interests, while the rest (like representing corporations) hurts society. But corporate lawyers who represent corporations that are attempting to obtain capital for expansion also provide benefits for society. Lawyers who represent clients before regulatory agencies benefit society at least as much as lawyers who represent indigent clients in divorce actions or landlord-tenant disputes. In other words, imposing a mandatory pro bono regime perpetuates the public perception that lawyers are a net drag on the economy. The idea of mandatory pro bono also fuels the public's perception that legal services provided free to poor people further the public interest, while the provision of legal services to paying clients serves no purpose other than to transfer wealth from society as a whole to a few undeserving lawyers.

Similarly, a second unavoidable attribute of mandatory pro bono programs is that they inevitably will require some bureaucratic determination of what constitutes pro bono legal services. Making this determination will require either a substantial bureaucracy or some highly arbitrary determination that any lawsuit on behalf of an indigent person or other favored group is pro bono. Neither of these alternatives is particularly attractive.

Finally, the passionate embrace of mandatory pro bono schemes by certain elites within the legal profession reflects a misplaced and somewhat disturbing vision of the role of lawyers in soci-

ety. On the one hand, it seems uncontroversial that, despite their unpopularity, lawyers accomplish a great deal of good in society in a wide variety of ways. But this does not mean that increasing the general level of legal services in society by requiring lawyers to perform services they would not otherwise perform will benefit society. By requiring lawyers to subsidize litigation that society would not otherwise support, the legal profession will confirm suspicions that our society is too litigious and that lawyers take themselves way, way too seriously.