

Review Essay

FROM PARK PLACE TO COMMUNITY CHEST: RETHINKING LAWYERS' MONOPOLY[†]

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PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE
AND THE PROFESSIONS by Deborah L. Rhode (Stanford University
Press, Stanford 2005).

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INTRODUCTION

Deborah Rhode¹ is the nation's foremost expert on lawyers' ethical duty to perform pro bono service.² She is the "patron saint" of the move-

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² The term "pro bono" is shorthand for *pro bono publico*, a Latin phrase that means "for the public good." Various defined by scholars and bar officials, the term generally refers to services provided for

ment that insists on equal access to justice.³ Rhode has written several books and law review articles on lawyers' pro bono obligations.⁴ She directs the Stanford Center on Legal Ethics, the preeminent think tank for scholars examining altruism in the legal profession. A former president of the Association of American Law Schools (AALS), Rhode founded the AALS Commission on Pro Bono and Public Service Opportunities.⁵ She is both the recipient⁶ and the namesake⁷ of awards for pro bono service.

Rhode's three decades of advocacy and scholarship concerning lawyers' pro bono duties have culminated in the publication of a remarkable book, *Pro Bono in Principle and in Practice: Public Service and the Professions*.⁸ So important is Rhode's latest work that the National Law Journal published a summary by Rhode shortly after the release of the book.⁹ Stanford University Press simultaneously printed the book in both cloth and paperback, anticipating widespread demand.¹⁰

At the heart of Rhode's book is a Rawlsian critique of lawyers' monopoly.¹¹ She notes that most states have granted lawyers the exclusive

free or at a reduced rate to low-income clients or organizations serving the public interest. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 6.1 (2006), reprinted in John S. Dzienkowski, PROFESSIONAL RESPONSIBILITY: STANDARDS, RULES & STATUTES 81–82 (2005–06 ed. West 2005) [hereinafter ABA MODEL RULES].

³ Anthony V. Alfieri, *Teaching Ethics/Doing Justice*, 73 *FORDHAM L. REV.* 851 (2004).

⁴ A list of Rhode's publications appears in her curriculum vitae. Deborah L. Rhode, Curriculum Vitae, http://www.law.stanford.edu/display/images/dynamic/people_cv/rhode_cv.pdf (last visited on Sept. 15, 2006).

⁵ The Commission's work drew praise from President Bill Clinton. See <http://www.aals.org/probono/> (last visited on Sept. 15, 2006).

⁶ For example, Rhode received the American Bar Foundation's W.M. Keck Foundation Award for Distinguished Scholarship on Legal Ethics and Professional Responsibility, and the American Bar Association's Pro Bono Publico Award for her work on expanding public service opportunities in law schools. At the American Bar Association's annual conference on June 8, 2006, Rhode received the ABA's prestigious Michal Franck Professional Responsibility Award. *Professor Deborah Rhode named 2006 recipient of ABA Michael Franck Professional Responsibility Award*, LAW@STANFORD, June 2006, available at http://www.law.stanford.edu/publications/law_at_stanford/issues/200606.html.

⁷ Each year the AALS Section on Pro Bono and Public Service Opportunities confers the Deborah L. Rhode Award on "a full-time faculty member or Dean who has made an outstanding contribution to increasing pro bono and public service opportunities in law schools through scholarship, leadership, or service." The Deborah L. Rhode and Father Robert Drinian Awards, <http://www.aals.org/probono/awards.html> (last visited Sept. 15, 2006).

⁸ DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* (Stanford University Press 2005).

⁹ Deborah L. Rhode, *Survey Indicates Little Emphasis on Public Service*, NAT'L L.J., Sept. 12, 2005, at 18.

¹⁰ RHODE, *supra* note 8.

¹¹ John Rawls proposed a conception of justice that he called "justice as fairness." To the extent that government action causes or exacerbates the unequal distribution of resources, that action can only be just if it would "improve the lot of those who are worst-off." JOHN RAWLS, *A THEORY OF JUSTICE* 303 (1971). While Rhode never refers explicitly to Rawlsian theory, such concerns pervade her book.

right to practice law.¹² Statutes prohibiting the unauthorized practice of law (UPL) carry significant penalties.¹³ While a Benthamite utilitarian¹⁴ might see some aggregate societal benefit in the monopoly—it has arguably improved the quality of legal services for those who can afford them—a Rawlsian such as Rhode recognizes that these benefits come at a tremendous cost for low-income Americans. The monopoly “prices out” the poor in the market for legal services.¹⁵ According to Rhode, lawyers bear an ethical duty to mitigate the monopoly’s deleterious effects by voluntarily representing the poor. After all, the state-sanctioned scarcity of legal services is the very reason for lawyers’ affluence.¹⁶

Rhode’s methodology is novel in many respects. She is the first scholar to present a thorough comparative analysis of different professions’ ethical codes exhorting volunteer service.¹⁷ She is the first to compare different nations’ requirements for pro bono service by lawyers.¹⁸ Most significantly, Rhode is the first scholar to undertake a large-scale empirical study of lawyers’ attitudes concerning pro bono work. She has surveyed

¹² RHODE, *supra* note 8, at 36. Other authors have criticized lawyers’ monopoly to varying degrees. E.g., Margaret Rentz, Note, *Laying Down the Law: Bringing Down the Legal Cartel in Real Estate Settlement Services and Beyond*, 40 GA. L. REV. 293, 299–302 (2005) (arguing for the abolition or at least modification of UPL statutes to permit real estate conveyancing by laypersons); Suzanne Schmitz, *What’s the Harm? Rethinking the Role of Domestic Violence Advocates and the Unauthorized Practice of Law*, 10 WM. & MARY J. WOMEN & L. 295, 312–17 (2004) (urging more lenient rules allowing lay advocates to represent battered women in securing restraining orders); Kathleen Justice, Note, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 180 (1991) (“Lawyers love to compete, but only with each other.”).

¹³ See Erika Birg, *Lawyers on the Road: The Unauthorized Practice of Law and the 2004 Presidential Election*, 9 TEX. REV. L. & POL. 305, 318 (2005) (“Penalties for violating a state’s unauthorized practice of law rules (which vary from state-to-state) are generally (but not always) criminal. The penalties range, for example, from civil injunction, civil contempt citation, and restitution to criminal fine and prison time.”).

¹⁴ Jeremy Bentham, the founding father of utilitarian philosophy, argued that every proposal should be judged according to the extent to which it advances aggregate societal utility, with no preference for any particular constituency such as the poor. See Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11–13 (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1823).

¹⁵ RHODE, *supra* note 8, at 28–29.

¹⁶ See *id.* at 37, 176–77. To be sure, some scholars, such as Harvard Law Professor David Shapiro, dispute the notion that lawyers have a monopoly. David Shapiro, *The Enigma of Lawyers’ Duty to Serve*, 55 N.Y.U. L. REV. 735, 777 (1980) (“[T]o say . . . that lawyers have a monopoly, or even a powerful cartel, is to misrepresent the dynamics of the present day practice of law.”). Charles Silver and Frank Cross have argued that lawyers do not enjoy a monopoly in the strict economic sense of the term, because lawyers cannot control entry into the profession or manipulate prices at their whim. Charles Silver & Frank B. Cross, *What’s Not to Like About Being a Lawyer?*, 109 YALE L.J. 1443, 1490–91 (2000). On the other hand, scholars have noted that lawyers wield a collective power akin to monopoly in that they are able to erect barriers to market entry and enforce various anti-competitive rules. See e.g., Steven K. Berenson, *A Cloak for the Bare: In Support of Allowing Prospective Malpractice Liability*, 29 J. LEGAL PROF. 1, 21–22 (2004–05).

¹⁷ RHODE, *supra* note 8, at 73–99.

¹⁸ *Id.* at 100–24.

thousands of lawyers and assembled a data set with which she has explored correlations between high levels of pro bono service and variables that policymakers or employers might control.¹⁹

Rhode's book could not be more timely. In 2006 and 2007, state bars and state supreme courts are completing their revision of lawyers' ethical codes in response to the American Bar Association's decennial update of the Model Rules of Professional Conduct.²⁰ The states must determine whether to adopt, modify, or omit altogether a proposed ABA Model Rule that urges (but does not require) lawyers to perform fifty hours of pro bono service per year.²¹ Rhode's book casts doubt on the viability of such a precatory strategy, although Rhode seems resigned to exhortation rather than compulsion as the best means of increasing pro bono service.²²

This Book Review consists of three parts. Part I analyzes Rhode's argument, paying particular attention to her comparative study of pro bono requirements, her empirical research, and her concerns about a compulsory approach to pro bono service. Part II focuses on the shortcomings of Rhode's book, especially her proposals for reform. Part III identifies new frontiers for empirical research.

Like all good books, Rhode's raises more questions than it answers. To criticize Rhode's methodology and conclusions is not to discredit her achievement. To the contrary, a respectful debate may be the best adulation for this provocative work.

I. RHODE'S ARGUMENT

Rhode offers a nuanced analysis of lawyers' pro bono work and the unmet legal needs of the poor. The limited space in this Book Review does not permit a thorough recitation of Rhode's argument and evidence, but several highlights deserve examination in the subparts that follow: (A) Rhode's criticism of lawyers' monopoly; (B) her explanation of the need for pro bono work; (C) her comparative analysis of pro bono service in different countries and professions; (D) her surveys of U.S. lawyers; and (E) her reluctance to support a mandatory pro bono program.

¹⁹ *Id.* at 125–53.

²⁰ According to a database maintained by the American Bar Association and updated on April 5, 2006, twenty-seven state supreme courts have approved revisions to the states' ethical rules in response to the most recent recommendations by the ABA; review is underway in twenty-three other states. *See* Status of State Review of Professional Conduct Rules, http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf (last visited Sept. 15, 2006).

²¹ ABA MODEL RULES, *supra* note 2, at 81–82.

²² *See* Alfieri, *supra* note 3, at 856–57.

A. *Indictment of Lawyers' Monopoly*

Rhode explains the inverse relationship between the enforcement of lawyers' monopoly power and the affordability of legal services.²³ State bars originally proposed the UPL statutes for the ostensible purpose of protecting clients from incompetent advocates. Since the passage of these laws, however, UPL complaints filed by the bar far outnumber those filed by clients—a disparity suggesting that the primary function of the UPL statutes is to preserve lawyers' market share rather than to disqualify lay advocates who have actually harmed their clients.²⁴ Lawyers recognize that the natural operation of market forces would not support their high salaries if the government permitted competition by lay practitioners.²⁵ Lawyers have resisted efforts to erode the monopoly, and Arizona is the only state that has relaxed its UPL law.²⁶ No other country in the world protects lawyers' monopoly as zealously as does the United States.²⁷

While attorneys in the United States reap great benefits from their monopoly, they contribute little to defray its adverse effects. The success of the American legal profession in restricting lay competition has “price[d] services beyond the reach of millions of consumers.”²⁸ The United States has the greatest concentration of lawyers in the world, but over 80% of the estimated legal needs of the poor remain unmet.²⁹ The proportion of the nation's legal expenditures that goes to legal aid and public interest legal organizations is under 1%.³⁰ The average amount of volunteer service by lawyers is less than a half hour per week.³¹ Among those lawyers who donate their services, only 10 to 20% are actually assisting low-income clients.³² Rhode's findings parallel those of a recent survey that investigated pro bono service by lawyers at the 200 highest-grossing firms in the United States: only one-third of these lawyers perform at least twenty hours of pro bono work per year.³³

²³ RHODE, *supra* note 8, at 28–29.

²⁴ Rhode developed this argument in her early articles. See generally Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990) (criticizing the self-interested nature of UPL statutes); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) (noting that the bar is generally more concerned than the public about enforcing the UPL statutes).

²⁵ See George Leef, *Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes*, 20 REGULATION 33 (1997), available at <http://www.cato.org/pubs/regulation/reg20n1c.html>.

²⁶ See RHODE, *supra* note 8, at 36; see Leef, *supra* note 25, at 34 (describing Arizona's experience with its UPL statute, which expired in 1986 and has not been reenacted).

²⁷ See RHODE, *supra* note 8, at 28 (U.S. attorneys “have a much more extensive monopoly over the provision of most legal assistance than attorneys in other countries.”).

²⁸ *Id.* at 28–29.

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ *Id.* at 1.

³² DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 763 (3d ed. 2001).

³³ Aric Press, *Brother, Can You Spare 20 Hours?*, 27 AM. LAW. 116 (2005).

B. Rationale for Pro Bono Service

Rhode insists that lawyers should help to ameliorate the unaffordability of legal services by increasing their volunteer work on behalf of poor clients. She offers several cogent reasons for such service. First and foremost is the great need for legal services among the poor. Lawyers are the gatekeepers of the justice system. The lack of legal services is a more urgent crisis than the lack of many other services offered by professionals in our economy. When a large segment of the population lacks recourse to the justice system, the most fundamental rights are in jeopardy.³⁴

Second, lawyers “owe” volunteer service to the poor as the “price” for lawyers’ lucrative monopoly power. Lawyers’ high salaries are predicated on the very scarcity of legal services that denies the poor access to justice. Indeed, part of what lawyers sell is a “public asset” in the sense that its value has been created by the state.³⁵ For example, the protection afforded by the attorney-client privilege is a marketable commodity, but its value derives from legislative fiat, not lawyers’ talents or labor.³⁶

Third, lawyers benefit from pro bono service.³⁷ Junior lawyers can hone their skills while representing indigent clients. Senior lawyers can experiment with new practice areas and add variety to their dockets. Some research suggests that philanthropic work lowers stress and enhances mental health.³⁸ Law firms find that pro bono work improves their public relations, and in particular, curries favor from prospective public employers such as municipal and state agencies.³⁹ Collectively, the entire bar benefits from pro bono service because it increases the public’s esteem for lawyers and may thereby prolong the public’s acquiescence in the legal monopoly and in lawyers’ self-governance.⁴⁰

³⁴ RHODE, *supra* note 8, at 29.

³⁵ *Id.* at 37; see Steven Lubet & Cathryn Stewart, *A “Public Assets” Theory of Lawyers’ Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1262–84 (1997) (listing “ethics-based” public assets such as confidentiality and protection from conflicts of interest, as well “evidence-based” public assets such as privileges and the work product doctrine; all of these assets have been created by legislative pronouncements, so the public arguably deserves some compensation for the great value it has conferred upon lawyers).

³⁶ David Luban, the co-author of Rhode’s textbook, *LEGAL ETHICS*, *supra* note 32, has written about the duty that attends lawyers’ monopoly power. “This is the difference between the lawyer and the grocer: the 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.” DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 286 (1988), *quoted in* RHODE, *supra* note 8, at 37.

³⁷ RHODE, *supra* note 8, at 29–30.

³⁸ *Id.* at 58–59.

³⁹ *Id.* at 30–31; see Esther Lardent, *Pro Bono Work is Good for Business*, NAT’L L.J., Feb. 19, 2001, at B24.

⁴⁰ RHODE, *supra* note 8, at 31. State bars generally regulate the ethics of lawyers, and the government has generally indulged this independence, except in limited instances. See Sarbanes-Oxley Act § 307, 15 U.S.C. § 7245 (2002).

C. Comparative Analysis

In evaluating whether lawyers perform enough pro bono service, it is instructive to consider the extent of altruism in other professions, and even in other countries. The inverse relationship between professional licensure and accessibility of services is, of course, not unique to the American legal profession. Other professionals struggle with the ethical question of how to “pay society back” for the lucrative exclusivity of their right to practice. If American lawyers lag behind other professions—both domestically and internationally—in pro bono service, that fact might provide the impetus for reform measures.

Rhode examines the service ethic in many different professions. She notes that the American Medical Association’s Code of Ethics recognizes a “basic right to have available adequate health care.”⁴¹ The AMA Code urges doctors to provide free care for patients who cannot afford it. The available data reveal higher levels of volunteer service in the medical profession than in the legal profession. In fact, it appears that two-thirds of doctors provide some form of volunteer service. Among these doctors, the average weekly volunteer service is about nine hours—14% of the total time they spend on patient care.⁴² Studies indicate that doctors’ volunteer service exceeds that of lawyers’ by a ratio of ten to one.⁴³

Other professions also recognize an obligation to perform public service. For example, the ethical code for engineers includes language urging community service.⁴⁴ The philanthropic work by business executives is increasing.⁴⁵ Media executives provide pro bono service as well: in order to obtain exclusive broadcast licenses, they must agree to broadcast a minimum level of unpaid public service programming.⁴⁶

Rhode’s analysis of legal aid programs in other countries is even more compelling. She observes that several Western European countries recognize a right to legal aid in both civil and criminal cases.⁴⁷ These countries

⁴¹ RHODE, *supra* note 8, at 76 (quoting AMA, Council on Ethical and Judicial Affairs, *Fundamental Elements of the Patient-Physician Relationship*, 264 J. AM. MED. ASS’N 3133 (1990), available at AMA’s Code of Ethics, <http://www.ama-assn.org/ama/pub/category/8313.html>).

⁴² *Id.* at 37.

⁴³ *Id.* at 97.

⁴⁴ *Id.* at 83.

⁴⁵ *Id.* at 88–91.

⁴⁶ *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 335(b)(1) (2000) (requiring noncommercial set-aside as a condition for licensure of direct broadcasting satellite systems).

⁴⁷ *See* RHODE, *supra* note 8, at 101. Resolution 78 of the Ministers of the Council of Europe provides that a “right to necessary legal aid” and a “right of access to justice and to a fair hearing” both constitute “an essential feature of any democratic society.” Such rights extend to “the assistance of a person professionally qualified to practice law.” *Id.* (quoting Legal Affairs, Council of Europe, Legal Aid and Advice: Resolution 78(8) adopted by the Committee of Ministers of the Council of Europe on 2 March 1978 and Explanatory Memorandum, 5–6); *see generally*, Earl Johnson, Jr., *Right to Counsel in*

devote more public funding to the representation of the indigent than does the United States. For example, Great Britain spends seventeen times more per capita on legal aid than the United States.⁴⁸ Western European countries do not restrict the lay practice of law to the same extent that the United States does; lay advocates in Europe are able to assist the poor in several categories of legal matters.⁴⁹ In fact, European countries do not rely so heavily on the legal system to meet social welfare needs or resolve social problems as does the United States, so the urgency of providing legal representation to the poor is perhaps not as great in Europe as it is here.⁵⁰

The public service ethic in the international legal profession extends beyond Europe. In Australia, roughly two-thirds of law practices report some contribution of pro bono services, and on average Australian attorneys report forty-two hours of pro bono work annually.⁵¹ In China, laws require lawyers to provide pro bono representation to the poor or risk losing their right to practice law.⁵² Chinese lawyers assist low-income clients by staffing legal aid programs for a specified period or by receiving case assignments from these programs or from local courts. Some local governments in China require a lawyer to accept any referral of an indigent client's case.⁵³

In summary, Rhode's comparative analysis paints an unflattering picture of American lawyers' altruism. She indicates that some other professionals in the United States give more volunteer service than lawyers. She also shows that legal aid in many other countries puts the American bar to shame. This contrast sets the stage for a detailed empirical analysis of American lawyers' attitudes about performing pro bono service.

D. Empirical Evidence

Rhode has undertaken a comprehensive empirical study of lawyers' pro bono work. According to Professor Geoffrey Hazard, the nation's pre-eminent scholar on legal ethics,⁵⁴ Rhode's empirical research is unprece-

Civil Cases: An International Perspective, 19 LOY. L.A. L. REV. 341, 351-55 (1985) (describing the approach taken by European nations, in contrast to the U.S. approach).

⁴⁸ RHODE, *supra* note 8, at 102.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 110.

⁵² *Id.* at 118.

⁵³ *Id.* at 117.

⁵⁴ Professor Hazard has been cited more often than any other scholar in the field of legal ethics, according to a citation analysis by Professor Brian Leiter of the University of Texas School of Law. Brian Leiter, Top 10 Most Cited Faculty By Areas, 2002-2003, http://www.leiterrankings.com/faculty/2002faculty_impact_areas.shtml (last visited on April 17, 2006). Deborah Rhode ranks second in this list.

dented.⁵⁵ Her findings have illuminated matters as to which prior commentators had speculated without empirical data.

Rhode sent thousands of detailed questionnaires to three groups of recipients: 1) lawyers who were graduates of six law schools with different approaches to pro bono work;⁵⁶ 2) recent individual and law firm winners of the ABA's annual Pro Bono Publico Award;⁵⁷ and 3) firms for which annual pro bono data are available.⁵⁸ Rhode conceded that she did not design her survey to provide a random sample. Rather, her point was "to identify groups that could yield useful information about factors most likely to influence pro bono contributions."⁵⁹ The overall response rate was 28%, a fairly typical response rate for mailed surveys.⁶⁰

The survey posed more than seventy questions to respondents.⁶¹ Rhode sought demographic information including age, sex, income, race, political affiliation, religion, and income. She inquired about the nature of each respondent's practice and the respondent's position in any hierarchy of authority. Rhode asked respondents to indicate the number of pro bono hours they had worked in the prior year. She queried whether the respondents' employers had established policies for pro bono service, whether the employers had hired pro bono coordinators, and whether the employers credited pro bono work in tallying the respondents' billable hours. Rhode asked about impediments to pro bono work, including time pressure, family obligations, workload demands, lack of expertise, lack of information about op-

⁵⁵ In praising Rhode's book, Professor Hazard commented that "[n]o other work combines thoroughness, currency, and such an empirical base." Geoffrey Hazard, Stanford University Press, <http://www.sup.org/book.cgi?isbn=0804751064> (follow the "Reviews" hyperlink) (last visited Sept. 18, 2006).

⁵⁶ RHODE, *supra* note 8, at 125–6. These schools are Yale, the University of Pennsylvania, Fordham, Tulane, Northwestern, and the University of Chicago. The schools vary in their approaches to pro bono activities. Tulane and the University of Pennsylvania require pro bono work by students, and these schools invest substantial resources in their pro bono programs. Yale and Fordham strongly encourage pro bono work, and these schools have designated administrators to coordinate such work. Chicago and Northwestern lacked a formal pro bono program or a pro bono coordinator at the time of Rhode's survey. *Id.* at 125. Both Chicago and Northwestern appear to have assigned administrators to coordinate pro bono work since the time of Rhode's survey. For information about various law schools' pro bono programs, see Law School Public Interest and Pro Bono Programs, <http://www.abanet.org/legal-services/probono/lawschools/> (last visited on Sept 16, 2006).

⁵⁷ Rhode surveyed recipients of the award from 1993 to 2000. In the case of law firm winners, she sent the questionnaire to pro bono coordinators or equivalent officials. RHODE, *supra* note 8, at 126.

⁵⁸ Rhode focused on firms identified by the American Lawyer "as among the nation's 100 top law firms in terms of gross revenue during the period 1993 to 2000." These are the only firms for which pro bono data are readily available. *Id.*

⁵⁹ *Id.* at 127.

⁶⁰ *Id.*

⁶¹ The survey that Rhode sent to individual respondents appears in Appendix 1 of her book. The survey that she sent to legal employers appears in Appendix 2. There were fewer than seventy separately numbered questions, but several of these were compound questions seeking multiple answers. *See id.* at 181–88.

portunities, lack of resources, and disinterest in the particular types of pro bono work that appeared to be available. She asked several questions about the respondents' experience in law school, especially concerning the law schools' attempts to encourage pro bono work. Rhode inquired whether respondents were satisfied with their pro bono work and whether they had fulfilled their expectations about the public service they had hoped to accomplish during their careers. More than half of her questions probed volitional issues—i.e., considerations that made attorneys more or less enthusiastic about pro bono work—and only a small fraction of her questions focused on mandates or requirements.

The data set that Rhode collected through her surveys allowed her to draw some generalizations about lawyers' attitudes toward pro bono service. According to Rhode, the factors most likely to encourage pro bono work are "the personal satisfaction that it brings and a sense of personal obligation to pursue it."⁶² Additional factors that drew Rhode's respondents to pro bono service included the following: support and encouragement by employers; career benefits such as contacts, training, and trial experience; and previous service experiences, including those in law school.⁶³ Respondents also identified some disincentives: workload pressures, family obligations, billable hour requirements, employer attitudes, a lack of rewarding pro bono opportunities in the surrounding area, and a perceived disjunction between pro bono work and client interests.⁶⁴ Only 10% of respondents felt that their organizations valued pro bono contributions equally to paid work; over half felt that their supervisors viewed pro bono work negatively.⁶⁵ Only about a third of surveyed lawyers' employers had formal pro bono policies, and only a quarter treated pro bono work as equivalent to billable hours.⁶⁶ The percentage of respondents who expressed dissatisfaction with their pro bono work far exceeded the percentage indicating satisfaction.⁶⁷

Rhode's survey allowed her to focus on the effectiveness of law schools' pro bono programs. Respondents reported that their alma maters generally did not emphasize pro bono in the classroom: in fact, only 1% of the sample reported that pro bono issues received attention in professional responsibility courses.⁶⁸ Only 3% of respondents observed substantial faculty support for pro bono service.⁶⁹ Law schools have begun to stress pro bono in their extracurricular programs, and approximately one-fifth of American law schools now require some pro bono service as a condition for

⁶² *Id.* at 151.

⁶³ *Id.*

⁶⁴ *Id.* at 152.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 162.

⁶⁹ *Id.*

graduation.⁷⁰ Rhode's survey found that law schools with mandatory programs, or with strong investments in resources to support pro bono, generally recorded higher rates of volunteer service by students. Some of her respondents conjectured that strong pro bono programs in law school would correlate with an enduring commitment to pro bono service after graduation, but Rhode's data found no statistically significant correlation.⁷¹ In other words, once the mandatory pro bono program ended, the graduates' volunteer service to the poor generally ended.

E. Rhode's Reluctance to Support Mandatory Requirements

It is hard to read Rhode's survey results without concluding that the bar's present pro bono program, which relies almost entirely on volunteer service, is doomed to fail. Firm culture exerts powerful influences that generally override the service ethic. The presently anemic levels of pro bono service (an average of under a half hour per week) cannot possibly meet the legal needs of the poor. Rhode acknowledges that her data have shown the toothlessness of the ABA's Model Rule 6.1, which urges, but does not require, lawyers to provide at least fifty volunteer hours per year.

Yet Rhode is surprisingly reluctant to advocate mandatory pro bono service. She notes that compulsory programs might offer some advantages, but because they would be unpopular with lawyers, "the prudent alternative would be to focus on strengthening voluntary initiatives or on requiring lawyers to report their contributions."⁷² She notes several possible objections to mandatory pro bono programs, all of which deserve attention here. It is important to stress that Rhode does not necessarily embrace these objections herself; she simply itemizes them to assess the viability of a mandatory pro bono regime. The next Part of this Book Review will present a counterpoint to the various objections listed by Rhode.

To begin with, Rhode acknowledges a number of conceptual objections to a mandatory pro bono program. The term "pro bono" has a connotation of voluntariness, whereas "mandatory charity" seems to be a contradiction in terms.⁷³ Lawyers who assist the poor due to a mandatory

⁷⁰ Rhode, *supra* note 9, at 18.

⁷¹ RHODE, *supra* note 8, at 159–60.

⁷² *Id.* at 172. To be sure, Rhode sees some merit in a mandatory regime, but she appreciates the difficulties that a pro bono requirement might create. It would not be fair to treat Rhode as a "straw person" who favors the status quo and sees no value in compulsory pro bono. A more accurate characterization is that she sees both benefits and drawbacks in a mandatory approach to pro bono service. *See id.* at 26–54, 166–77.

⁷³ *Id.* at 37–38. Some courts and commentators have taken a similar position. *E.g., In re Emergency Delivery of Legal Services*, 432 So. 2d 39, 41 (Fla. 1983) (disapproving of mandatory pro bono programs because "a person's voluntary service . . . has to come from within the soul of that person"); Timothy Terell & James Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 430–31 (1992) (arguing that the best way to foster a spirit of professionalism is for the bar to facilitate pro bono efforts, but not to mandate them).

obligation are unlikely to enjoy the experience or to gain a sense of self-fulfillment.⁷⁴ According to the critics, the experience of assisting the poor in compliance with a bar requirement is no more likely to promote personal moral growth than the experience of paying one's taxes.

Second, Rhode points out that several commentators have raised constitutional objections to compulsory pro bono regimes.⁷⁵ For example, they contend that the appointment of lawyers without compensation constitutes a "taking" in violation of the Fifth Amendment, or even involuntary servitude in violation of the Thirteenth Amendment.⁷⁶ Furthermore, claim the critics of mandatory programs, the requirement that lawyers must represent clients whose views the lawyers do not necessarily share amounts to a violation of the First Amendment's guarantees of free speech and free association. Some commentators believe that the imposition of service requirements on lawyers, but not on other professionals, violates the lawyers' rights to equal protection under the Fourteenth Amendment.⁷⁷

Third, Rhode sees practical problems with a mandatory pro bono program. Defining "pro bono" might prove to be the undoing of the program: some lawyers might stretch the term so broadly that it would encompass work the lawyers were already doing, with little benefit to the poor.⁷⁸ Lawyers who resent mandatory pro bono work might end up doing less than they would if they had participated voluntarily.⁷⁹ The bar would have difficulty administering such a program: bar officials would need to match lawyers to pro bono clients, monitor the lawyers' work, investigate dubious claims of pro bono work, and bring disciplinary action against those lawyers who fail to comply with their obligations. Another practical difficulty would be training the pro bono lawyers. Lacking expertise in poverty law, most of these lawyers would need to spend a substantial portion of their annual pro bono hours learning background law before actually assisting clients. The inefficiency of training a large number of lawyers for short stints in public interest work makes a mandatory pro bono program less sensible than a well-funded legal aid office staffed with full-time attorneys.⁸⁰

⁷⁴ RHODE, *supra* note 8, at 37–38. Rhode finds some of these objections to be dubious or to lack moral weight. *Id.* at 38.

⁷⁵ For more on the constitutionality of mandatory pro bono, see Debra Burke, et al., *Mandatory Pro Bono: Cui Bono?*, 25 STET. L. REV. 983, 999–1006 (1996); John Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 HOFSTRA L. REV. 1229, 1244–61 (1991).

⁷⁶ RHODE, *supra* note 8, at 7–10.

⁷⁷ *Id.* at 10–12. Rhode points out that many of these arguments are fallacious. *Id.*

⁷⁸ *Id.* at 39.

⁷⁹ *Id.* at 37, 172.

⁸⁰ On the other hand, Rhode cautions that critics of mandatory pro bono should not overstate the logistical challenges. There is scant evidence from which to judge the effectiveness of mandatory regimes in jurisdictions that have experimented with them. Rhode recommends further research to study the viability of mandatory pro bono. She suggests that some of the hurdles identified by critics may be surmountable. *Id.* at 41–45.

Rather than insist on mandatory pro bono work, Rhode proposes more modest reforms. She suggests that bars could require lawyers to report their pro bono service, without actually requiring pro bono service itself.⁸¹ She recommends that firms draft written pro bono policies.⁸² She offers a plan to strengthen pro bono programs at law schools.⁸³ She urges public agencies to give their legal work only to law firms that demonstrate a strong commitment to pro bono.⁸⁴ She proposes to relax conflict of interest rules that might limit the ability of lawyers to do pro bono service.⁸⁵ She suggests that state bars should provide free malpractice insurance to lawyers who do pro bono work.⁸⁶ Courts could give preferential treatment to pro bono lawyers: these lawyers might have priority in court dockets, for example.⁸⁷ Rhode urges that bar officials attempt to organize more pro bono work by senior lawyers who have recently retired.⁸⁸ The state bars should make better use of the internet, posting information about local opportunities for pro bono work.⁸⁹ Bar officials and employers should do more to publicize the successes achieved by pro bono attorneys.⁹⁰ Through all these strategies, as well as others, Rhode hopes to increase lawyers' volunteer service without resorting to a strict pro bono requirement.

II. CRITICISM OF RHODE'S ARGUMENT

Criticizing the "patron saint" of public-minded lawyers⁹¹ is a daunting task indeed. No reader who understands Rhode's compassion for the less fortunate, and her history of leadership in this movement, could ever doubt her resolve to increase lawyers' pro bono service. At most, one might express disappointment that Rhode's compelling evidence of inadequate pro bono service did not lead her to propose more sweeping reforms, or that her empirical study failed to address matters meriting further inquiry.

A. Preoccupation with Lawyers' Preferences

Rhode shows repeatedly that American lawyers give little pro bono service to the poor, even though the need for this service is plainly evident, and even though virtually all state ethical codes include language imploring lawyers to help the less fortunate. So why persist with a precatory strategy?

⁸¹ *Id.* at 167–68.

⁸² *Id.* at 169.

⁸³ *Id.* at 169–70.

⁸⁴ *Id.* at 168.

⁸⁵ *Id.* at 173.

⁸⁶ *Id.* at 174.

⁸⁷ *Id.*

⁸⁸ *Id.* at 173.

⁸⁹ *Id.* at 173–74.

⁹⁰ *Id.* at 167, 169.

⁹¹ Alfieri, *supra* note 3, at 851.

There is an odd asymmetry in the strict enforcement of lawyers' monopoly and the entirely noncoercive appeal for lawyers to assist the poor. Until laypeople have the option of ignoring the UPL statutes, lawyers should not have the option of ignoring their pro bono obligations. Lawyers are already accustomed to strict enforcement of continuing legal education (CLE) rules that necessitate annual or biannual reporting. The lax approach to pro bono duties is incongruous with the compulsory CLE regime.

Rhode's preoccupation with lawyer's volition limited her methodology. She surveyed lawyers who are most predisposed to help the poor, including lawyers who have won awards for their pro bono service. She asked them questions about the considerations that sustained their motivation. Rather than focusing on the attitudes of lawyers who elect to do pro bono service, she should have given more attention to the inveterate majority that shuns pro bono service.⁹² How would this group respond to questions about voluntary options and mandatory programs? What pressures are necessary to prod these lawyers into pro bono service? The bar's greatest challenge is to mobilize unwilling lawyers, not to entice greater service from those who already assist the needy.

Rhode should not be dissuaded by the objections that opponents of mandatory pro bono have raised. Some of these objections cannot withstand close scrutiny. For example, Rhode repeats the oft-heard argument that reluctant pro bono lawyers will do a shoddy job representing the poor.⁹³ The reality is that lawyers have no choice but to represent all their clients competently and zealously. If appointed to represent a poor client, a lawyer must obey the same ethical strictures that apply to for-profit representation.⁹⁴ An attorney who represents poor clients half-heartedly runs the risk of both a malpractice action and a bar complaint. Of course, critics who express doubts about the zeal of appointed counsel need to remember the point of comparison: a grumbling lawyer is better than no lawyer at all.

Similarly, there is no merit in critics' objection that mandatory pro bono programs "cheapen" the moral significance of helping the poor. This

⁹² For example, researchers could present a survey to a random sampling of attorneys, and this survey could begin with a question asking respondents to indicate how much pro bono service they provided in the past year. Then researchers could isolate the subset of respondents who did not do any pro bono work. A section of the survey could include questions such as, "If you indicated that you did not perform any pro bono service in the past year, which of the following considerations (if any) is the primary reason?" Respondents could choose among the listed alternatives or write in their own reasons.

⁹³ Rhode herself challenges this argument. She points out that there is no evidence of poor performance by lawyers whose pro bono service is compulsory. She also notes that the same problems could arise in the context of voluntary pro bono work. RHODE, *supra* note 8, at 42.

⁹⁴ See ABA MODEL RULE 1.1 (requiring competent representation), ABA MODEL RULE 1.2 (requiring the lawyer to follow the client's directions as to the object of the representation), ABA MODEL RULE 1.3 (requiring diligence), ABA MODEL RULE 1.4 (requiring frequent communication with the client), ABA MODEL RULE 1.6 (requiring confidentiality of information relating to the representation), and ABA MODEL RULES 1.7–1.12 (requiring undivided loyalty to the client). ABA MODEL RULES, *supra* note 2, at 10–15, 18–41.

argument rings hollow when the majority of lawyers presently give no pro bono service whatsoever. The legal philosopher David Luban saw the irony in the critics' argument. "One hesitates to state the obvious, but here it is: You can't appeal to the moral significance of a gift you have no intention of giving.⁹⁵ Even if mandates somehow diminish the value of pro bono programs in nurturing virtue among attorneys, the practical value of this service to indigent clients more than offsets such esoteric concerns. Lawyers offended that the pro bono requirement denies them an opportunity to take initiative will still have many opportunities to show their initiative in other contexts—for example, by exceeding the minimum number of pro bono hours.

The constitutional objections to mandatory pro bono programs are also meritless. A pro bono requirement does not violate the Fifth Amendment by taking property without just compensation, because the requirement is merely a condition for licensure, just as a minimum number of CLE hours is a condition for licensure. In any event, lawyers are officers of the court and are therefore bound to render service when required.⁹⁶ The critics' arguments under the Thirteenth Amendment are simply specious: comparing the duty of occasional pro bono service to the plight of slaves in the antebellum South strains credulity.⁹⁷ Nor are critics' concerns about free speech and free association cognizable under the First Amendment, because an appointment to represent an indigent client does not compel the appointed attorney to adopt that client's views.⁹⁸ Finally, a mandatory pro bono program would not violate the Fourteenth Amendment by denying lawyers equal protection of the laws, because professionals are not a suspect class, and the state may impose requirements upon professionals that are rationally related to a state objective.⁹⁹

⁹⁵ David Luban, *Mandatory Pro Bono: A Workable (and Moral) Plan*, 64 MICH. BAR J. 280, 283 (1985), quoted in RHODE, *supra* note 8, at 38.

⁹⁶ The U.S. Supreme Court has specifically affirmed the authority of a trial court to appoint counsel without compensation in a capital case. *Powell v. Alabama*, 287 U.S. 45, 73 (1932) ("[T]he duty of the trial court to appoint counsel under such circumstances is clear . . . ; and its power to do so, even in the absence of a statute, can not be questioned. Attorneys are officers of the court, and are bound to render service when required by such an appointment."). See also *United States v. Accetturo*, 842 F.2d 1408, 1412 (3d Cir. 1988) ("[C]ourts have upheld their inherent power to appoint counsel, sometimes even over counsel's objection, to represent defendants in need of such representation.").

⁹⁷ See *Butler v. Perry*, 240 U.S. 328, 332 (1915) (noting that the "term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery").

⁹⁸ The current version of ABA MODEL RULE 1.2(b) makes this point clear: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." See ABA MODEL RULES, *supra* note 2, at 11.

⁹⁹ See generally *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (upholding, against a Fourteenth Amendment challenge, a statute prohibiting the sale of certain items on Sundays); *Williams v. Lee Optical, Inc.*, 348 U.S. 483 (1955) (rejecting a Fourteenth Amendment challenge to a statute regulating activities of opticians); *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608 (1935) (rejecting a Fourteenth Amendment challenge to an act regulating advertising by dentists). For further elucidation

Rhode correctly points out a number of practical impediments to a compulsory pro bono program, but these impediments are surmountable. Delineating the scope of the term “pro bono” is admittedly difficult. Yet bar officials will need to make such calls anyway in a voluntary system with mandatory reporting requirements, as Rhode urges. The bar has managed to interpret ambiguous definitions in other contexts, such as attorney discipline and moral character certification. The administrative task of recording attorneys’ pro bono hours and auditing compliance will present challenges for the bar, but these challenges cannot be much more worrisome than in the context of CLE requirements. In fact, the bar may realize some benefit from its investment of resources in implementing the new pro bono regime: if a higher proportion of the bar’s staff were involved in work that benefited the public as opposed to merely lawyers, perhaps the image of the bar would improve, and state legislatures would interfere less with lawyers’ self-regulation and dues collection.¹⁰⁰

Interestingly, Rhode herself has pointed out the weaknesses in the above-listed criticisms of mandatory pro bono programs,¹⁰¹ but she remains daunted nonetheless—not so much by the validity of the opposition, perhaps, as by the fact of the opposition.¹⁰² She recognizes that a large portion of the bar would resent a stricter pro bono requirement. Whether the resentment is justifiable, Rhode treats it as a major obstacle to a compulsory program.

Yet the opposite conclusion would be equally reasonable. Lawyers’ intransigence necessitates a tougher mandate. The bar cannot be heard to argue for continuation of a voluntary pro bono program when lawyers simply refuse to volunteer. The evidence that Rhode has collected does not support a “carrot and stick” approach. We need less carrot and more stick.

B. *Unrealistic Proposals for Reform*

Rhode’s suggestions for encouraging pro bono work without imposing mandates seem unlikely to succeed. For example, she contends that a reporting requirement would spur lawyers to do more pro bono service. Yet

on the constitutional issues, see Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 65–71 (1990); Steven Rosenfeld, *Mandatory Pro Bono: Historical and Constitutional Perspectives*, 2 CARDOZO L. REV. 255, 286–96 (1981).

¹⁰⁰ In the 1990s, the California legislature sharply criticized the bar’s programs, and the legislature used its power over dues collection to slash the bar’s revenue. Nancy McCarthy, *Bar Operations Pared to Barest Essentials: Services Shut Down As Staff Cut by 400+*, CAL. BAR J., July 1998, at 1.

¹⁰¹ RHODE, *supra* note 8, at 7–10 (refuting constitutional arguments that mandatory pro bono is unconstitutional), 37–39 (challenging the claim that mandatory pro bono work would lose its moral meaning), 42 (refuting the claim that lawyers compelled to do pro bono service would not give competent service).

¹⁰² “Unless and until we can build a broader base of support for obligations that substantially benefit the most underserved groups, the prudent alternative would be to focus on strengthening voluntary initiatives” *Id.* at 172.

there is scant evidence that the reporting requirements enacted in jurisdictions such as Florida have made an appreciable difference in the aggregate level of pro bono work by lawyers.¹⁰³ The advocates of reporting requirements overlook the frailty of their premise—that the private market for legal services will reward lawyers who report significant pro bono work. In fact, it is likely that many businesses would prefer to be represented by lawyers who resist the distraction of philanthropy. One survey found that only 3% of corporations request information about pro bono work when determining which firms to hire.¹⁰⁴

Rhode encourages firms to prepare formal policies regarding pro bono service.¹⁰⁵ Of course, the value of this exercise depends on the substance of the policies. Memorializing a lukewarm commitment does not necessarily advance the cause. To the contrary, firms' wariness about overextending themselves on a long-term basis might lead them to frame formal policies more cautiously than informal ones. It seems unlikely that firms will word their pro bono policies with any more precision or accountability than ABA Model Rule 6.1, which is entirely aspirational. In any event, policymaking is not customary in the small firms where most lawyers practice, so reformers should not place too much stock in law firm policies as a solution for the pro bono crisis.

Another one of Rhode's proposals would strengthen law schools' pro bono programs. In particular, she suggests that law school administrators should keep track of total pro bono work by students in a given year.¹⁰⁶ This information could be used to calculate the rankings of law schools by U.S. News and World Report,¹⁰⁷ and Rhode speculates that the new attention would increase students' (and ultimately lawyers') esteem for pro bono work. Observers familiar with the gamesmanship surrounding law school

¹⁰³ In Florida, the Supreme Court imposed a reporting obligation in 1993, but did not set any minimum number of pro bono hours. The total number of pro bono hours reported by Florida attorneys increased over the next decade. This statistic is somewhat dubious, however, because the Florida Bar simply required lawyers to write their annual total of pro bono hours on their bar membership dues statement at the end of the year. The bar did not require a breakdown based on clients, dates, or even categories of pro bono work. The bar did not investigate the validity of lawyers' reports about their pro bono work. See Kelli Isbell, *Pro Bono Publico: Voluntary Service and Mandatory Reporting*, 15 *GEO. J. LEGAL ETHICS* 845, 859–61 (2002).

¹⁰⁴ CorporateProBono.Org, an internet-based think tank that studies corporate lawyers' pro bono work, retained Association Publishers, Inc. to conduct a study of in-house counsel in 2001. A total of 1,000 prospective respondents were culled from the list of attorneys at Fortune 500 companies or from the American Corporate Counsel Association's membership list. Only 15.6% of the recipients actually returned the survey. Among respondents, "[o]nly 3% said that their law department requests information about the pro bono efforts of law firms bidding for their business or retained by their company." *CorporateProBono.Org In-House Pro Bono Research Study: Executive Summary*, Fall 2001, at 5, <http://www.cpbo.org/resources/displayResource.cfm?resourceID=1291>.

¹⁰⁵ RHODE, *supra* note 8, at 169.

¹⁰⁶ *Id.* at 169–70.

¹⁰⁷ *Id.* at 170.

rankings will not take much heart in this suggestion. The subjectivity in defining pro bono at the law school level will allow schools to manipulate numbers in order to pad their totals. If “pro bono” simply means working without compensation for the government or a not-for-profit employer, the ranking might ironically reward schools where students are incapable of securing paid employment. Furthermore, it is important to bear in mind Rhode’s own findings about strong pro bono programs in law schools: they may increase pro bono service by students, but they do not necessarily inculcate a commitment that continues after graduation.¹⁰⁸

Rhode applauds recent initiatives that require public agencies to take account of law firms’ pro bono work when deciding which firms to hire.¹⁰⁹ Once again, such a strategy will be of little avail if the employers can simply report aggregate numbers without any precise breakdown or auditing, as in Florida. A pro bono reporting requirement that is unique to firms serving the public sector might lead to greater segregation of the legal market; conceivably many firms would “reduce their overhead” by avoiding public sector work and the extra commitments such work entails. Those firms that continue to serve government clients would just raise their rates and pass along the cost to the government—a far less efficient system than for the government simply to provide direct subsidies to legal aid groups.

Rhode advocates the relaxation of conflicts rules for government lawyers who do pro bono service.¹¹⁰ This proposal is surprising. Rhode has presented no hard evidence indicating the conflicts rules are the limiting factor that dissuades these lawyers from assisting the poor. The notion that lawyers should somehow lower their duty of loyalty when serving the neediest clients seems highly problematic. Playing fast and loose with the conflicts rules might cause injury to both the indigent client and the government agency where the lawyer normally works. The Model Rules of Professional Conduct already have made several concessions that soften the conflicts rules for lawyers doing pro bono service;¹¹¹ further erosion of these rules seems unwarranted unless proponents can present more compelling evidence that the conflicts rules are to blame for lawyers’ lackluster pro bono service.

Rhode’s heart is in the right place, but the time has come for a more abrupt break from the era of noblesse oblige. State legislatures and bar officials should take more aggressive strategies to enlist lawyers’ aid in meet-

¹⁰⁸ *Id.* at 159–60.

¹⁰⁹ *Id.* at 168; see Richard Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 726–28 (2001) (considering viability of such a strategy).

¹¹⁰ RHODE, *supra* note 8, at 173.

¹¹¹ ABA MODEL RULE 6.3 relaxes the conflicts rules for lawyers serving as directors of legal organizations, and ABA MODEL RULE 6.4 liberalizes the conflicts rules for lawyers serving on the boards of law reform organizations. ABA MODEL RULE 6.5 allows lawyers involved in short-term pro bono representation to escape accountability for some of their own conflicts and imputed conflicts, provided that the lawyers have no actual knowledge of the conflicts. ABA MODEL RULES, *supra* note 2, at 84–85.

ing the legal needs of the poor—a crisis that lawyers themselves exacerbate every time they fortify their monopoly in order to drive up their salaries. The evidence collected Rhode has collected justifies a more ambitious reform agenda than she herself has proposed.

Bar officials should explore the possibility of establishing a mandatory pro bono program, although they should avoid some of the pitfalls that Rhode has identified. Rhode is correct that a mandatory version of Rule 6.1's fifty-hour-per-year benchmark would not be ideal. Lawyers cannot accomplish much in a fifty-hour representation, except in the simplest cases.¹¹² A more flexible temporal requirement would be preferable. Perhaps the bar could require a cumulative total of 120 pro bono hours over three years, enabling lawyers to complete all their service in a single three-week block. Legal aid offices would likely enlist pro bono lawyers to work full-time on a three-week rotation. Lawyers could plan for their “pro bono sabbatical” as if it were a vacation. As an additional measure to reduce the burden of pro bono service, the bar should allow firms to meet the requirement collectively;¹¹³ firms might prefer to hire pro bono specialists whose work would satisfy all lawyers' obligations, and this arrangement might prove to be more efficient for both the firms and their indigent clients. Perhaps the mandatory pro bono program could include a “pay or play” provision, allowing lawyers to satisfy their obligations by paying a sum equal to half the lawyers' hourly billing rate multiplied by the shortfall of pro bono hours.¹¹⁴

A second viable option would be to increase the fines levied against lawyers for ethical violations, devoting the proceeds to fund a full-time “pro bono corps” of recent law school graduates. Rhode has noted elsewhere that state bars are extremely reluctant to fine lawyers.¹¹⁵ The spectrum of lawyer discipline seems to consist of censure at one pole and suspension or disbarment at the other. There is a vast distance between these two sanctions, and it brings to mind the words of Benjamin Franklin: “Laws too gentle are seldom obeyed; too severe, seldom imposed.”¹¹⁶ State bars should bridge the gap between censure and suspension with a graduated schedule of fines, calibrating the amount based on the gravity of the viola-

¹¹² Indeed, the preliminary tasks of training, background research, creation of files, and initial meetings with clients consume so much of the 50-hour period that little time remains in which to represent the client.

¹¹³ The firm as a whole would need to report a total amount of pro bono hours equal to the number of attorneys times the annual or triennial benchmark.

¹¹⁴ This payment would go to a fund that subsidizes legal aid groups.

¹¹⁵ RHODE & LUBAN, *supra* note 32, at 840 n.46 (“Only a few states explicitly permit fines, such as California and Nevada; and less than a dozen a year are reported to the ABA’s National Lawyer Regulatory Data Bank.”).

¹¹⁶ BENJAMIN FRANKLIN, POOR RICHARD’S ALMANACK 546 (J. A. Leo Lemay ed., Library Classics of the United States 1997) (1756).

tion and on the offending lawyer's ability to pay.¹¹⁷ Lawyers, a risk-averse group, would take note of the new cost-benefit calculus, and deterrence of ethical violations would likely increase. Lawyers who violate the ethical rules ought to pay disproportionately for the bar's programs that remediate social ills, just as drivers who speed on the roadway pay disproportionately for the police and the court system.

A third option that state bars should consider is eliminating CLE requirements for lawyers who perform pro bono work. Continuing legal education has become a lucrative business for state bars,¹¹⁸ which sponsor the lion's share of CLE programs.¹¹⁹ By charging exorbitant fees for educational programs, bar officials have essentially increased the membership dues of lawyers.¹²⁰ These programs require a substantial time commitment from lawyers and reduce the hours in which lawyers might do pro bono work. One especially egregious example of a CLE program is "Ethics in 18 Holes," sponsored by the Oregon Bar in 2003. Participants paid \$175 to play golf for half a day and discuss ethics briefly at each hole.¹²¹ CLE programs in other states involve watching movies,¹²² riding motorcycles,¹²³ or

¹¹⁷ See Steven Bené, *Why Not Fine Attorneys? An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907, 937-38 (1991).

¹¹⁸ The organized bar created the demand for CLE by its own fiat, and then the bar itself became the primary provider of CLE programs. The bar exploits its position as a quasi-governmental, quasi-private entity: it mandates consumption of the very services it sells.

¹¹⁹ Bar officials expressly refer to the CLE industry as a cash cow. For example, a candidate for the Arizona Bar's Board of Governors made this comment on the campaign trail: "Principally the Bar is funded through dues and CLE revenues. In order to keep the pressure of increasing dues low we must increase CLE revenues." Statement by Steven Pitt, candidate for Arizona Bar Board of Governors, reprinted in *Board of Governors Candidates*, 41 AZ. ATTY., May 2005, at 46. See also *State Bar Now Offers Catalog of Online CLEs*, MONT. LAWYER, Sept. 2003, at 6 (noting that "[a]ll but 4 percent of the revenue goes to the State Bar").

¹²⁰ The need for a continuing legal education requirement is questionable when the ethics rules require lawyers to remain abreast of recent developments in their field in order to provide competent legal services. See ABA MODEL RULE 1.1, *supra* note 2, at 10 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). The comments to Model Rule 1.1 counsel that lawyers must "engage in continuing study and education" in order to maintain their competence. ABA MODEL RULE 1.1 cmt. 6, *id.* This authority would require self-directed study in the absence of state bars' self-serving CLE requirements.

¹²¹ A brochure for this event gave the following description: "Eighteen ethics scenarios and a set of multiple-choice answers are your course materials. Three other players complete your team. As you play each hole discuss a scenario and your answers. At the conclusion of the game, head to the '19th Hole' for a panel discussion of the scenarios and answers by legal ethics specialists." Oregon State Bar Continuing Legal Education, *Ethics in 18 Holes*, Friday, Apr. 11, 2003, The Resort at the Mountain, Welches, Oregon (copy on file with author).

¹²² See Gary Gildin, *Reality Programming Lessons for Twenty-First Century Trial Lawyering*, 31 STETSON L. REV. 61, 64 n.8 (2001) (listing bar-sponsored CLE programs that consist in large part of showing Hollywood movies about lawyers).

¹²³ See Marie Fallinger, *Is Tom Shaffer a Covenantal Lawyer?*, 77 NOTRE DAME L. REV. 705, 777 n.317 (2002) (describing a CLE event that takes place as part of "the annual motorcycle bash" at Sturgis, South Dakota every summer).

attending concerts featuring “Ethics Rock.”¹²⁴ Some CLE programs are surely worthwhile, but a conspicuous number seem to be frivolous. Given the inconsistent quality of CLE offerings, it would be preferable if state bars urged, but did not require, lawyers to take CLE classes.¹²⁵ State bars should allow lawyers to substitute pro bono hours for CLE hours on a one-for-one basis. If states allowed lawyers to discharge their CLE requirements by performing pro bono service, or if states required lawyers to meet half of their CLE target with pro bono service, the poor would benefit and lawyers would learn a great deal about in-the-trenches lawyering, not to mention professional responsibility.

In addition, law students interested in helping the poor should have the option of foregoing their third year of classroom instruction in order to work for credit at legal aid organizations. Judge Richard Posner has pointed out that the market for law graduates does not necessarily require a third year of law school, at least for many categories of legal work.¹²⁶ Some law schools have already moved to a two-year model.¹²⁷ Students who spend a year in a legal aid organization in lieu of their third year of law school would gain tremendous practical skills, and low-income clients would receive energetic assistance. Law schools could provide supervision just as they do in clinical programs. This reform would harmonize legal education with medical education, which places students in a full-time clinical setting after their second year.¹²⁸

¹²⁴ The Virginia Law Foundation, an organization in which the Virginia Bar is a partner, has staged a CLE program called “Ethics Rock!” The online description offers no less than four CLE credits for “A Live Legal Ethics Program Performed to the Tunes of ‘60s Rock and Roll.” Somehow the presenters manage to weave in songs by the Who, the Beatles, and James Taylor, among others. Virginia Continuing Legal Education, http://www.vacle.org/php-bin/ecomm4/products.php?product_id=939 (last visited on April 17, 2006). One of the performers insists that “in continuing legal education, rock and roll is here to stay.” ProEthics, *Lawyers Get Ethics Credits to Classic Rock ‘n’ Roll in “Ethics Rock,”* http://www.proethics.com/er_0804.html (last visited Oct. 13, 2006).

¹²⁵ State bars that favor a hortatory approach to pro bono work, and defend the efficacy of aspirational standards in general, should not object to adopting the same approach in the context of continuing legal education.

¹²⁶ Richard Posner, *Let Employers Insist if Three Years of Law School is Necessary*, SAN FRANCISCO DAILY J., Dec. 15, 1999, at A4; see Stefanie Shaffer, *The First Question on Third Year: Why? Bad Attendance, Debt Levels Fuel Debate*, NAT’L L.J., Aug. 22, 2005, at 6 (quoting UCLA Law Professor Richard Sander, who commented that “[l]aw schools generally weaken in the third year The courses reflect teachers’ research interests instead of students’ professional development”); John Sexton, *“Out of the Box”: Thinking About the Training of Lawyers in the Next Millennium*, 43 S. TEX. L. REV. 623, 624 (2002) (noting that virtually all third year courses are elective, and that some scholars have reasoned that perhaps “the burden is on educators to justify the expense imposed by the third year of study”).

¹²⁷ For example, the University of Dayton School of Law now allows students to earn a law degree in a span of five semesters over two years. Shaffer, *supra* note 126, at 6.

¹²⁸ Dena Rifkin, *A Third-Year Student in Clinical Clerkships*, YALE J. FOR HUMAN. IN MED., <http://yjhm.yale.edu/archives/careers/drifkin.htm> (last visited Feb. 25, 2007) (“The third year in medical school is known as the first ‘clinical year’, which means that for the first time in our book-bound lives

Finally, if none of the foregoing measures improve legal services to the poor, state legislatures should begin to roll back the legal monopoly that is responsible for the inaccessibility of legal services. The inclusion of lay practitioners should occur incrementally on a subject-by-subject basis,¹²⁹ and only on the condition that the lay practitioners would contract to provide five free hours of service to the poor for every 100 hours that they provide to paying clients. For example, state legislatures might allow realtors to handle conveyancing and other simple property transactions,¹³⁰ as long as the realtors agreed to assist low-income clients with housing matters such as landlord-tenant disputes. Counselors and therapists could be allowed to handle simple divorce cases, provided that they would help the poor with domestic relations matters and restraining orders.¹³¹ Social workers could handle cases involving claims for government benefits, representing both paying and indigent clients. The consideration of whether to open a new field of law to lay practitioners would depend in part on a particularized review of lawyers' pro bono commitments in that field. There are many precedents for "contingent monopolies" in American history, such as the reforms that allowed denturists to install false teeth when dentists charged too much.¹³² Monopolies owing to state-enforced exclusivity, rather than to private collusion, are much more susceptible to reform when they outlive their public benefit.

my classmates and I will learn on the job instead of in the classroom. We spend the year caring for patients . . .").

¹²⁹ See Deborah Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 *FORDHAM L. REV.* 883, 885–94 (2004) (criticizing UPL statutes and collecting evidence that laypeople are competent to handle several categories of legal work); see also Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 *N.Y.U. L. REV.* 1229, 1269 (1995) (discussing an arrangement whereby "the bar could provide its members with a certificate establishing certain credentials, . . . but only those admitted to the bar would be able to call themselves 'lawyers'").

¹³⁰ See Margaret Onys Rentz, Note, *Laying Down the Law: Bringing Down the Legal Cartel in Real Estate Settlement Services and Beyond*, 40 *GA. L. REV.* 293, 299–302 (2005) (arguing for modification of UPL statutes to permit conveyancing by laypersons).

¹³¹ See Schmitz, *supra* note 12, at 312–17 (urging rules allowing lay advocates to represent battered women in securing restraining orders).

¹³² Oregon Ballot Measure 5, passed by the voters through the initiative process in 1978, wrested away from dentists the exclusive right to install dentures, and shared this business with a less expensive tier of professionals who became known as denturists. See M. Dane Waters, *INITIATIVE AND REFERENDUM ALMANAC* 359, 366 (Carolina Academic Press 2003). In 2002, Oregon voters also gave denturists the right to install partial dentures, another area of business that dentists had previously monopolized. For more information about the 2002 measure, see Board of Denture Technology, Position Statement Regarding the Implementation of Ballot Measure 24 Related to Partial Dentures (Feb. 24, 2003), <http://egov.oregon.gov/OHLA/DT/docs/measure24.pdf> (discussing passage of Measure 24 by Oregon voters in 2002). In both instances, the primary motivation was to reduce the costs borne by consumers. This argument was explicit in the text of Ballot Measure 24, which stated that "Oregon seniors and other denture consumers have paid a far greater price to purchase dentures from a dentist than [sic] from a denturist." Text of Ballot Measure 24 (Nov. 5, 2002) available at <http://www.sos.state.or.us/elections/nov52002/guide/measures/m24.htm>.

C. *Avoidance of Fundamental Normative Questions*

Rhode's book should have confronted more basic questions about instruction at American law schools. The ascendancy of moral relativism in our current pedagogy¹³³ bears some of the blame for lawyers' low rates of pro bono service. For decades, law professors have eschewed normative considerations in favor of a teaching style that stresses procedural and technical matters while welcoming diverse—and often conflicting—perspectives on what is right and wrong.¹³⁴ As a result, students leave American law schools with well-honed skills of legal reasoning, but without a full understanding of their deontological duties, including their duty to assist the poor.¹³⁵

In her empirical study, Rhode focused on extracurricular pro bono programs at law schools. To be sure, the extent to which law schools encourage, facilitate and even require pro bono service by students can have a significant effect on that service. Yet Rhode herself found that the most rigorous extracurricular pro bono requirements did not ensure that students would continue to do pro bono work after law school.¹³⁶ In the absence of a pro bono requirement for practicing lawyers, these graduates lost their incentive to help the poor. The missing component for these students is an internalization of the rationale for pro bono service. A more normative approach to ethics courses in law school might hold better promise of inculcating the values that sustain a commitment to pro bono after graduation.¹³⁷ Put a different way, a law school does not make its students virtuous simply

¹³³ Charles J. Ogletree, Jr., *Personal and Professional Integrity in the Legal Profession: Lessons from President Clinton and Kenneth Starr*, 56 WASH. & LEE L. REV. 851, 865 (1999) (“[L]aw schools and the dominant case method ultimately teach the incommensurability of values and a moral relativism”) (citing ANTHONY T. KRONMAN, *THE LOST LAWYER: THE FAILING IDEALS OF THE LEGAL PROFESSION* 113 (1993)); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 73–74 (1993) (decrying law schools’ failure to stress ethical principles); Paul T. Wangerin, *Objective, Multiplistic and Relative Truth in Developmental Psychology and Legal Education*, 62 TUL. L. REV. 1237, 1249–50 (1988) (noting that law schools encourage and reward relativistic thinking).

¹³⁴ See Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271, 1274 (1998) (“Cynicism and Sophism, in the classical Greek sense, are alive and well in American law schools today. Moral relativism and its corollary—a theory of ‘professional’ teaching that equips each future lawyer to pursue whatever ends she or her client may choose—may be found everywhere.”).

¹³⁵ Rhode notes research indicating that socialization during early childhood can instill a service ethic. RHODE, *supra* note 8, at 63. A similar analysis of normative education during college and law school would be helpful.

¹³⁶ *Id.* at 159–60.

¹³⁷ Coquillette, *supra* note 134, at 1275–77. “Self-respect demands that we get away from the intellectual tyranny of instrumentalism,” whereby the lawyer has no ethical responsibilities other than to pursue the goals announced by paying clients. A devotee of Kant, Coquillette insisted that “[w]e are not just means to someone else’s ends. We have a far prouder heritage, which, unfortunately, has been obscured in the classroom. This heritage is founded on our ancient duties: to protect the rule of law as an ideal, to serve the system of justice on which our democracy is based, and to study and promote humanism—the mutual bonds of our humanity on which peace itself ultimately depends.” *Id.* at 1277.

by hiring a pro bono coordinator and requiring a minimum number of pro bono hours for graduation.

The contrast with medical school is instructive. Virtually all medical students learn the Hippocratic Oath.¹³⁸ Far from a technical rulebook, the Hippocratic Oath is a set of values that animate doctors' ethical reasoning throughout their careers.¹³⁹ With only a few exceptions,¹⁴⁰ medical school professors generally embrace the normative conception of ethics that the Hippocratic Oath embodies.¹⁴¹ Perhaps this broader pedagogical approach to ethics is one of the reasons why doctors' volunteer service persists beyond medical school. Indeed, the volunteer service by practicing doctors exceeds lawyers' volunteer service by a ratio of ten to one, even though the AMA's ethical code does not compel doctors to assist the poor.¹⁴²

In the 1970s, law schools scrambled to add legal ethics to the curriculum. What evolved, however, was a course that provides a level of technical instruction sufficient for law students to pass the Multistate Professional Responsibility Exam (MPRE). Because the rules that students must master for the MPRE are largely regulatory rather than normative, the typical legal ethics class devotes little attention to normative ethical analysis.¹⁴³ Of course, there are some instructors of professional responsibility who try to impart a more nuanced understanding of ethics that fills some of the interstices in the ABA's regulatory scheme, but to a large degree, the legal ethics class focuses on the ABA Model Rules. Professional responsibility is more of a "code" course than a "theory" course.

To be fair, Rhode is not insensitive to these concerns. Her textbook, co-authored with noted legal philosopher David Luban, integrates political

¹³⁸ Robert D. Orr, Norman Pang, Edmund D. Pellegrino & Mark Siegler, *Use of the Hippocratic Oath: A Review of Twentieth Century Practice and a Content Analysis of Oaths Administered in Medical Schools in the U.S. and Canada in 1993*, 8 J. CLINICAL ETHICS 377, 379 (1997) (noting the widespread use of the Hippocratic Oath in medical schools). According to the web page for NOVA, a PBS television show that focuses on science-related issues, "oath-taking in recent decades has risen to near uniformity, with just 24 percent of U.S. medical schools administering the oath in 1928 to nearly 100 percent today." Peter Tyson, *The Hippocratic Oath Today: Meaningless Relic or Invaluable Moral Guide?*, NOVA ONLINE, http://www.pbs.org/wgbh/nova/doctors/oath_today.html (last visited on Apr. 4, 2007).

¹³⁹ See generally STEVEN H. MILES, *THE HIPPOCRATIC OATH AND THE ETHICS OF MEDICINE* (Oxford University Press 2004) (examining the medical ethics of the Hippocratic Oath, which was originated by the Greek physician Hippocrates, and exhorts doctors to heal any sick person, to involve patients in decisions concerning their care, to use discretion in speech, etc.).

¹⁴⁰ For example, the Cornell Medical College recently approved substantial revisions to its version of the Hippocratic Oath. David Wittenberg, *Cornellians Modernize Hippocratic Oath*, CORNELL DAILY SUN, Jan. 26, 2006, at 5–6.

¹⁴¹ See, e.g., Tyson, *supra* note 138 (noting that nearly 100% of medical schools administer the Hippocratic Oath today).

¹⁴² RHODE, *supra* note 8, at 97.

¹⁴³ See W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 10 (1999) (noting that law school professional responsibility courses have focused primarily on a regulatory approach rather than one that tries to inculcate moral values).

and moral theory.¹⁴⁴ Whether this material makes the cut in any professor's syllabus is another question. Rhode should insist, as part of her blueprint for the improvement of lawyers' pro bono service, that law schools bolster normative and deontological theory as an element of the required legal ethics course. A professor of legal ethics should not simply teach boundaries; he or she should instill aspirations.

Relativism has its place in many—indeed, probably most—areas of legal education. There simply cannot be dispute, however, that lawyers must render a certain amount of volunteer service in order to merit the lucrative monopoly that the state has conferred upon our profession, especially when the monopoly is so harmful to the lowest economic strata. Law professors should not present the service ethic as yet another theoretical framework that students can take or leave, like critical legal studies or law and economics. An understanding of pro bono duties must be central to legal education, just as notions of altruism are fundamental in medical education.

III. FRONTIERS FOR ADDITIONAL EMPIRICAL RESEARCH

Rhode's empirical research is commendable, and it has definitely advanced our understanding of the reasons why some lawyers chose to do pro bono work. But there are many areas where additional empirical research would complement Rhode's findings and give the bar a fuller understanding of the policy reforms necessary for a meaningful response to the unmet legal needs of the poor.

First, researchers should survey the attitudes of lawyers who do *not* give any volunteer service.¹⁴⁵ Rhode's focus on firms and individuals who take active part in pro bono programs (many of whom have won awards for pro bono service) may leave the reader with an unjustifiably sanguine impression about the correlation between certain incentives and high levels of pro bono work. If Rhode has disproportionately emphasized the experiences of highly altruistic lawyers who were predisposed to engage in pro bono service without incentives, then her attribution of causation to certain incentives may be suspect. A more balanced study would incorporate data from lawyers who inveterately refuse to do pro bono work, or whose services are far below the targets set by Model Rule 6.1. If these lawyers identify circumstances that dissuade them from giving more volunteer service, researchers could make a valuable contribution to bar officials and employers who are seeking to restructure incentives.

Second, empirical research should test the proposition that reluctant lawyers give bad pro bono service.¹⁴⁶ ABA advocates have invoked this ar-

¹⁴⁴ DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (Foundation Press 4th ed. 2004).

¹⁴⁵ Rhode's survey appears to have netted a limited number of such respondents incidentally. RHODE, *supra* note 8, at 134–35. A more thorough sampling of these lawyers would yield more reliable insights.

¹⁴⁶ *Id.* at 41.

gument to oppose mandatory pro bono programs.¹⁴⁷ Perhaps researchers could conduct an empirical study of the few jurisdictions where courts make compulsory appointments for indigent representation. Alternatively, researchers could focus on the work of lawyers who self-report that they took on pro bono work reluctantly due to pressure from employers or bar officials. Ineffective advocacy is easy enough to quantify through such gauges as bar complaints, filings of malpractice actions, or motions for new appointment of counsel. Perhaps the researchers could use a survey to assess clients' satisfaction with lawyers who described themselves as reluctant. A finding that the reluctance of pro bono counsel did not correlate with ineffective legal service would bolster the argument for compulsory service rules.

Third, researchers should assess the extent to which mandatory pro bono requirements affect the aggregate number of hours devoted to pro bono work. Some commentators have conjectured that in a mandatory regime, lawyers who might otherwise exceed the minimum requirement would lose their zeal and stop at the required amount of hours.¹⁴⁸ On the other hand, this adverse effect would need to be extensive in order to offset the increase in pro bono service by less idealistic lawyers would only help the poor when compelled to do so. A careful study of pro bono service in jurisdictions that are transitioning from precatory to mandatory regimes would help to show which strategy offers the best inducement.

Fourth, a survey instrument could help to explore the feasibility of relaxing UPL statutes with respect to particular areas of the law. One possibility would be to allow realtors to practice certain types of law, such as conveyancing and other simple transaction work,¹⁴⁹ in exchange for the promise that the realtors will donate a certain percentage of their time to representing indigent clients in housing-related matters. Similarly, counselors and social workers might be allowed to handle simple divorce cases if they agreed to do a minimum amount of family law-related work for free,

¹⁴⁷ Rhode reported that "the ABA's Standing Committee on Legal Aid and Indigent Defendants testified against a proposed ABA ethical rule mandating pro bono assistance on the ground that 'poor clients . . . deserve lawyers who want to represent them and will do it with vigor.'" *Id.* (citing Scott Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 50 (2004)).

¹⁴⁸ RHODE, *supra* note 8, at 37–38, 172. For example, Esther Lardent, the President of the Pro Bono Institute at the Georgetown University Law Center, has cited such concerns in protesting a pro bono requirement. "What kind of service will pro bono clients receive [if pro bono is mandatory]? The argument can be made that attorneys, forced to provide service, may do so in a grudging manner that discourages clients from continuing to press their legal claims. Lawyers doing pro bono against their will are less likely to seek out the training and support they need to handle specialized poverty law cases." Esther Lardent, *The Case Against: "Just Say No . . . To Mandatory Pro Bono,"* available at <http://www.probonoinst.org/pdfs/justsayno.pdf>. See also Esther Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 100 (1990) (predicting that under a mandatory pro bono regime, "[a]ll lawyers will be in compliance, yet no additional service to address unmet legal needs will be provided").

¹⁴⁹ See *supra* note 130 and accompanying text.

such as divorces or applications for civil protection orders.¹⁵⁰ Surveys exploring the willingness of these groups to do pro bono work could help to advise state legislatures on the wisdom of rolling back the UPL statutes.

Fifth, researchers should survey a broad range of lawyers and law students to determine whether any of the other proposed reforms in this book review would entice greater pro bono service. If pro bono activity counted toward CLE requirements on an hour-for-hour basis, would more lawyers choose to do pro bono service? If students could avoid the third year of law school by signing up for a volunteer apprenticeship in a low-income neighborhood, how many students would take this option? Do bar members support a more aggressive approach to fining unethical conduct, with the proceeds subsidizing a full-time corps of legal aid attorneys? How many recent graduates of law school would agree to move to Appalachia or Compton and practice as legal aid lawyers in exchange for substantial debt relief (a program that already exists for new doctors)?

Finally, an empirical study would aid in evaluating the feasibility of administering mandatory pro bono programs. How much administrative overhead is necessary per hour of pro bono service? In a mandatory pro bono program that permits lawyers to choose the category of law they will practice, which categories of cases are chosen the most, and which categories of clients are underserved? On an hourly basis, how does the administrative expense of a mandatory pro bono program compare with a conventional legal aid program? Is it cost-effective for administrators to audit lawyers randomly and impose fines for noncompliance? Do “buy-out” provisions actually improve efficiency by subsidizing full-time legal aid lawyers who are better able to assist the poor?

CONCLUSION

The fundamental flaw of Rhode’s book is its preoccupation with lawyers’ self-interest. She seeks to create incentives that would entice more volunteering. A strategy that depends on persuading lawyers of their self-interest in pro bono work has bleak prospects for success. It has not worked yet, and there is little likelihood that it will work in the future.

When the *Hamline Journal of Public Policy* published an excerpt from Rhode’s book in 2005, the editors somehow misspelled one of the words in Rhode’s title. Rather than “Pro Bono in Principle and in Practice,” the Hamline piece was titled “Pro Bono in Principal and in Practice.”¹⁵¹ The homophone was likely an innocent mistake, but it betrays the central shortcoming of Rhode’s book. Firms are more concerned with principal than

¹⁵⁰ See *supra* note 131 and accompanying text.

¹⁵¹ Deborah L. Rhode, *Pro Bono in Principal [sic] and in Practice*, 26 HAMLINE J. PUB. L. & POL’Y 315, 315 (2005). As of April 17, 2006, the word “principal” appears in the title of both the Westlaw version (26 HAMJPLP 315) and the version on the journal’s website (www.hamline.edu/law/journals/law_policy/Old_Articles/Rhodes%20article%20formatted.pdf).

with principle. As long as the ABA continues to exhort, rather than require, lawyers to provide pro bono service, law firms will spend less time pursuing the principle of equal access and more time pursuing the principal owed to them by their paying clients.

A more enlightened approach would not presume lawyers' commitment to public service, but would require it. Lawyers have so neglected their pro bono duties that a voluntary system is completely untenable. Rhode's book makes a valuable contribution by exposing the shortcomings of the present system, but by clinging to the hope that a hortatory regime could ever succeed, she forestalls the transition to the mandatory program that is essential for equal access to justice.