Pro Bono, Pro Se

The Law Firm and the Public Good. Edited by Robert A. Katzmann.* *Washington, D.C.: The Brookings Institution,* 1995. Pp. xiv, 189. $36.95 (hbk.), $16.95 (pbk.).

I

The legal profession has been a target of public disparagement since well before the *New Yorker* began publishing cartoons.[1] Recently, however, a spate of commentaries from within the legal community has announced that contemporary practice is distinctly troubled—today's lawyer is a "rascal,"[2] a "lost"[3] member of a "betrayed profession."[4] There are external signals that confidence in the legal process has plummeted. Applications to law schools are declining in number,[5] and the serious consideration that Congress has devoted to tort reform is propelled in part by public frustration with the perceived excesses of legal practice.[6] Today's caricature of a lawyer is unflattering from at least two angles: as a "hired gun" willing to advocate any position to advance client goals;[7] and as an advisor only to the economically privileged.[8]

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1. Shakespeare's *King Henry VI, Part II,* of course, contains perhaps the paradigm of lawyer bashing: "The first thing we do, let's kill all the lawyers." WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2. For a more contemporary and (slightly) more lighthearted view of the legal profession, see THE NEW YORKER BOOK OF LAWYER CARTOONS (1993).

2. Outlining several examples of particularly pernicious corruption in the legal profession over the last few years, Peter Megargee Brown argues that business considerations have come to dominate the practice of law and overshadow the commitment to professionalism. *See* PETER MEGARGEE BROWN, RASCALS: THE SELLING OF THE LEGAL PROFESSION (1989); *see also* Warren E. Burger, *Preface* to *id.* at 9, 9 ("The legal profession during the past twelve years reveals disquieting evidence of decline . . . .").

3. Yale Law School Dean Anthony Kronman traces the decline of the legal profession to a larger historical trend discrediting the once-vaunted ideal of a "lawyer-statesman": "The outstanding lawyer, as this ideal presents him, is, to begin with, a devoted citizen. He cares about the public good and is prepared to sacrifice his own well-being for it, unlike those who use the law merely to advance their private ends." ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 14 (1993).

4. Attorney Sol Linowitz argues that several trends peculiar to large law firms—e.g., their increased size, the more tenuous nature of client relationships, the diminution of associate loyalty and firm collegiality—account for the present crisis in the profession, although "[m]oney is, of course, at the heart of the problem." SOL M. LINOWITZ WITH MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 31 (1994).

5. *See, e.g.,* Dirk Johnson, *More Scorn and Less Money Dim Law's Lure,* N.Y. TIMES, Sept. 22, 1995, at A1 (noting 17% decline in law school applications since peak of 94,000 in 1991).

6. Speaking of efforts to reform punitive damage awards, Professor of Ethics Steven Gillers reportedly said: "'[T]he public is always ready to vote for anything that is bad for lawyers.'" Benjamin Weiser, *Tort Reform's Promise, Peril; Legislation Could Mean Tight Limits on Liability,* WASH. POST, Sept. 14, 1995, at A1, A19.

7. *See, e.g.,* LINOWITZ WITH MAYER, *supra* note 4, at 24 (observing that respect for lawyers depends upon "the public's sense that they are independent professionals"); Harry T. Edwards, *A Lawyer's Duty to*

That the private bar might bolster its failing public image by reaffirming its commitment to public service is hardly a novel insight.[9] This belief nonetheless was the impetus for an extensive study of the role large law firms play in public interest pursuits, undertaken by the Governance Institute, a nascent think tank concerned primarily with federalism issues. "Much time is spent attacking lawyers for the high cost of justice and for the excessive litigiousness in society generally" (p. vii) begins the product of the four-year study, *The Law Firm and the Public Good.* Such public skepticism about lawyers and their contributions to the common good "provides both a spur and an opportunity for law firms to demonstrate their commitment to ensuring access to the legal system," according to Robert Katzmann, the book's editor and president of the Institute (Katzmann, p. 1). And, arguably, the Institute's response is particularly well timed: As the federal Legal Services Corporation faces the prospect of debilitating budget cuts and potential elimination, more poor Americans may soon bear the brunt of a different "spur," inadequate legal representation.[10] The opportunity for private practitioners to assume a greater pro bono burden is correspondingly great.[11]

II

The seven essays constituting *The Law Firm and the Public Good*, which otherwise vary widely in topic, tone, and quality, are unified around one common theme: It is in the self-interest of the private bar to promote and pursue pro bono opportunities.[12] Since legal commentators typically rely on

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Serve the Public Good, 65 N.Y.U. L. REV. 1148, 1154 (1990) (examining "[t]he seductive vision of the 'hired gun'"). For an interesting discussion of the extent to which a lawyer ideally should adhere to his or her clients' wishes, however ill-advised, see generally KRONMAN, *supra* note 3, at 128–34.

8. *See, e.g.*, Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 571 (1983) ("There is far too much law for those who can afford it and far too little for those who cannot."); Howard A. Matalon, Note, *The Civil Indigent's Last Chance for Meaningful Access to the Federal Courts: The Inherent Power to Mandate Pro Bono Publico*, 71 B.U. L. REV. 545, 545 (1991) ("[L]egal assistance . . . has inevitably become too expensive for all but a select few because society has permitted the practice of law to become a 'legal market.'").

9. For instance, Professor Nadine Strossen encourages pro bono work because, inter alia, it "counters the disturbingly negative attitudes toward the legal profession that are widely held both by the general public and by lawyers themselves." Nadine Strossen, *Pro Bono Legal Work: For the Good of Not Only the Public, but Also the Lawyer and the Legal Profession*, 91 MICH. L. REV. 2122, 2132 (1993); *see also* Debra Burke et al., *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61, 62 (1994) (citing survey in which 43% of respondents suggested that lawyers could boost their reputation by serving indigents).

10. *E.g.*, Peter T. Kilborn, *For Legal Aid, Tough Times Get Tougher*, N.Y. TIMES, Oct. 7, 1995, at 6.

11. *See, e.g.*, Mike Austin, *Legal Assistance Foundation Looks to Volunteers to Fill Expected Gaps As Funding Dries Up*, CHI. DAILY L. BULL., Nov. 20, 1995, at 1 ("The private bar will have to pick up the slack expected when . . . federal monies are slashed next year . . . ."); *see also* Gary L. Bauer, *Should Congress Pull the Plug on the Legal Services Corp.?; Yes*, L.A. TIMES, Nov. 29, 1995, at B9 (arguing that Legal Services relieves "one of the most lucrative professions . . . of some of its responsibility to do pro bono work").

12. The Afterword observes: "Perhaps this group's most persuasive contribution to the pro bono debate is its illumining the nature and extent of enlightened individual and firm self-interest served by appropriate pro bono activity" (Coffin, p. 174).

more predictable justifications for pro bono work—fulfilling moral responsibilities,[13] upholding the standards of the legal profession[14]—this book stakes out important territory. And it is intended not as propaganda for a skeptical public, but as "a practical primer for large law firms" (Katzmann, p. 15).[15] The book's contributors are "insiders, mostly key partners of large firms living through the trauma of the slide from the high-flying 1980s to the slower and lower 1990s, . . . [who are] going back to basics, engaging in fresh thinking about their profession, and combining in all their explorations both idealism and realism" (Coffin, p. 172). While many of the essays offer rationales for pro bono work that are equally compelling for individual attorneys, the authors in a variety of subtle and not-so-subtle ways communicate that theirs is a project to challenge and change firm culture from within, not especially to inspire greater personal commitment.[16] The contributors, boasts Judge Frank M. Coffin in the Afterword, "were not loath to say that [a firm's] paper claims often gilded a frail lily, and that in many firms what passed for a pro bono program were the unsupported, unguided, uncredited, and often maladroit efforts of junior associates" (Coffin, p. 173).

As a "practical primer" on pro bono law, *The Law Firm and the Public Good* offers some useful information for private firms sympathetic to public interest commitments but strained in their resources. The opening chapter offers historical perspective and statistical analysis about the growth of large law firms and the development of pro bono practice within them (Galanter &

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13. *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 67 (1992) ("[T]he lawyer has an ethical obligation to practice public interest law—to represent some poor clients; to advance some causes that he or she believes to be just; to deploy his or her talents pro bono rather than pro se, at least in part."). *See generally* Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 368 (1993–94) (including "unequivocal[]" duty to provide legal aid to poor in lawyer's societal obligation).

14. *See, e.g.*, Edwards, *supra* note 13, at 66 ("A person who deploys his or her doctrinal skill without concern for the public interest is merely a good legal technician—not a good lawyer."); Matalon, *supra* note 8, at 571 ("The Professional Responsibility Argument is based on the principle that the purpose and traditions of the legal profession require the lawyer to bear the burden of involuntary representation.").

15. The Governance Institute chose to focus its discussion on private firms employing at least 100 lawyers because "those typically are more likely to have resources at hand," they stand to gain most from effective implementation, and "as leaders of the profession" they establish industry standards (Katzmann, p. 8). While the majority of lawyers in America do not practice at such firms, *see, e.g.*, KRONMAN, *supra* note 3, at 273, many contemporary critiques of the legal professional also take aim at large-firm practice for reasons similar to Katzmann's, *see, e.g.*, *id.* at 272 ("Any basic change in the culture of the corporate firm . . . is . . . certain to have repercussions far beyond these firms themselves and to be felt in some measure by all those that stand below them in the hierarchy of power and prestige."); LINOWITZ WITH MAYER, *supra* note 4, at 110 (noting that crisis is "most prevalent in the great metropolitan firms that are presumably the leaders of the profession").

16. For instance, one contributor, while arguing on behalf of the tangible benefits that lawyers derive from pro bono work, proposes that firms with high billable hour targets "should take a hard look at their priorities" (Hoagland, p. 109) because increased personal commitment should not come at the expense of family life (Hoagland, p. 108). Another author aims "to press law firms for greater flexibility to encourage and accommodate [pro bono] opportunities" to counter the already debilitating demands of modern practice on the individual attorney (Kelly, p. 101).

Palay, pp. 19–58).[17] Esther Lardent's chapter outlining the present permutations of firm pro bono programs borrows at times the prose of a mail-order catalog, but a new pro bono coordinator is likely to appreciate its exhaustive study (Lardent, pp. 59–89). And William Bradford's *Private Enforcement of Public Rights* offers an insightful, although not entirely novel,[18] suggestion to circumvent contentious debate within firms over what should qualify as pro bono work. He proposes that firms litigate cases under public interest fee-shifting statutes (such as the Civil Rights Act of 1964) while not keeping consequent fee awards, because the political process has predefined the "public interest" (Bradford, pp. 125–37).

III

Yet the Afterword unwittingly provides perhaps the clearest sign of *The Law Firm and the Public Good*'s own significant shortcomings as a battle plan to mobilize the private bar. "[C]oping constructively with a pro bono commitment is no longer a matter of doing what comes naturally," Judge Coffin writes. "Hard analysis of strengths and weaknesses, a rigorous search for opportunities, creative thinking and planning, and painstaking follow-through are indispensable" (Coffin, p. 173). Ironically, the qualities that Coffin emphasizes as essential to a critique of modern practice in the public interest are present only sporadically in the book. While numerous examples underscore the book's failure truly to challenge existing law firm culture,[19] the final essay on *Monitoring Compliance with the ABA Law Firm Pro Bono Challenge* is paradigmatic. The ABA Challenge, establishing a pro bono minimum of five percent of billable hours for its signatories, does not hold firms publicly accountable for falling short, a concession that Barrington Parker, Jr., laments as "controversial" but "perhaps unavoidable." In the place of even mild criticism of the absence of compliance mechanisms, he offers instead a "softer approach[]," the meek alternative that the ABA simply try harder to secure cooperation (Parker, p. 167). The reader meanwhile waits in

17. For another empirical study of pro bono work in large firms, see Burke et al., *supra* note 9, at 78–86, app. at 89–97.

18. *Cf.* Peter E. Sitkin & J. Anthony Kline, *Financing Public Interest Litigation*, 13 ARIZ. L. REV. 823 (1971) (proposing that lawyers finance public interest litigation through fee-shifting statutes).

19. William Kelly's essay lists as one advantage of pro bono work that "[c]ompensation and promotion decisions can be seen for what they are: the law firm's view of the lawyer's contribution to its profitability, not a judgment on the lawyer's contribution to society," yet avoids considering the propriety of basing compensation and promotion exclusively on such priorities (Kelly, p. 101). Another chapter proposes that firms broaden the scope of work they credit as pro bono, but "eschew[s] any rigid formulas regarding counting pro bono" (Noel et al., p. 152) and thus lacks the forcefulness and utility of a specific proposal. Moreover, one could easily imagine an even graver problem that the authors overlook: that firms might use the authors' argument for a broader definition of pro bono activity as a pretext simply to increase the total number of pro bono hours reported.

vain for *The Law Firm and the Public Good* to expose the gilding that conceals the wilted pro bono programs of many firms.

That the authors steer clear of stridently criticizing the public interest commitment of their peers is, of course, ultimately consistent with the book's very delicate task: to persuade firms to revolutionize from within.[20] Far more troubling is the degree to which *The Law Firm and the Public Good* avoids engaging the lively academic and professional debate over pro bono policy recommendations—a debate essential to even voluntary efforts toward change. The private bar currently grapples with controversial proposals to mandate minimum pro bono requirements;[21] the book remains essentially indifferent to "[w]hether pro bono service remains an aspirational goal or becomes mandatory" (Noel et al., p. 141).[22] Esther Lardent's empirical study of actual pro bono programs, which should lend itself to a discussion of their relative merits and an endorsement of those most effective, is instead a disappointment. There exists "a strong pro bono culture within many firms," she concludes, that may be subject to erosion under "economic pressures" (Lardent, p. 86). When the book does weigh in on contentious issues, such as which pursuits are truly in the "public interest" and how competent lawyers are to make such determinations (Bradford, pp. 125–37; Noel et al., pp. 138–57), it cautiously avoids confronting the long-raging scholarly debates.[23] In a remarkable feat, its contributors manage to locate *The Law Firm and the Public Good* squarely within the eye of the storm.[24]

In the end, the book's major selling point—its insider account of private firm practice—is also its primary weakness. "It is," as Katzmann reminds us,

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20. The work cautiously avoids invoking a moral imperative in its call to arms. The editor does assure his audience that "considerations of ethical responsibility are sufficient to support an intensified commitment to pro bono work" (Katzmann, p. 7). Yet, by consigning articulations of a moral rationale for pro bono lawyering to the introductory essay and the Afterword, the Governance Institute has made clear that this issue is tangential to its project.

21. For a sample of the lively discussion, see generally Carolyn Elefant, *Can Law Firms Do* Pro Bono*? A Skeptical View of Law Firms'* Pro Bono *Programs*, 16 J. LEGAL PROF. 95, 120–22 (1991); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78 (1990); *Symposium on Mandatory Pro Bono*, 19 HOFSTRA L. REV. 739, 739–1270 (1991).

22. Esther Lardent notes that mandatory pro bono work for attorneys within individual firms "in theory" avoids many of the procedural obstacles of state bar requirements, but she is unwilling to extend "the apparent logic of a mandatory approach" into a substantive policy recommendation (Lardent, p. 84).

23. Many scholars adhere to an essentially pluralistic conception of the "public good," placing a premium on providing legal advocates for underrepresented and disenfranchised parties. *See, e.g.*, Michael E. McLachlan, *Democratizing the Administrative Process: Toward Increased Responsiveness*, 13 ARIZ. L. REV. 835, 839 (1971) ("The public interest is best served when competing interest groups and individuals ably press their demands for redress."). *See generally* Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1070 n.3 (1970) (defining "public interest lawyer"). Others have argued for a more substantive view of public interest law, beyond equal access to the procedures of the legal system in the pursuit of goals such as community organizing. *See, e.g.*, Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970) ("Traditional practice hurts poor people by isolating them from each other . . . .").

24. The collection's ability to circumvent controversy is especially disappointing because two of the contributors held academic posts at the time it was published and a third had participated previously in important scholarly debate related to pro bono work, *see* Lardent, *supra* note 21.

written "by those who must *live* with all the challenges as they endeavor to give new impetus to law firms' work for the public good" (Katzmann, p. 8) (emphasis added). It is ultimately not surprising that insiders steeped in firm culture avoid the controversies that are so divisive in it. *The Law Firm and the Public Good* downplays the cost, financial and otherwise, of pro bono activity to the point of ignoring the inevitable conflicts such work poses for lawyers who must make a living on fee-paying clients. For instance, the contributors fail to resolve how young associates can gain vast new opportunities for client responsibility in pro bono work (Kelly, pp. 98–99), if firms also remain committed to ensuring "[t]he same careful screening and supervision" for all their clients (Noel et al., p. 145). Nor do the essays explain how pro bono can promise "that the faceless lawyer develop[] some notoriety, opening new options in building a law practice or embarking on other careers" (Kelly, p. 101), while not confirming criticism that firms target "their pro bono efforts at high profile charities and high impact cause-oriented cases which bear no direct correlation to improving the plight of the impoverished."[25] Doing good and doing well are not always readily compatible, as the contemporary legal profession attests. In fact, at least one commentator has suggested that pursuing pro bono work to promote residual business goals—the *raison d'etre* of the Governance Institute's study itself—may conflict with the ABA's Code of Professional Responsibility.[26] Yet the Institute's standard reply is "no comment."

"Lawyers can make their profession a calling of the highest order, a way to pursue our society's highest ideals: liberty, equality, and justice for all," notes ACLU President Nadine Strossen. "Or they can make it something very different: the deserved target of every nightclub comedian and political demagogue."[27] Anthony Kronman, for one, has expressed great skepticism that large law firms will ever reawaken the lost ideals of an earlier era.[28] That firms have the capacity to recapture some commitment to civic virtues through stronger pro bono programs is clear; whether they should have the resolve in a time of resource constraints is a question left largely unanswered by *The Law Firm and the Public Good.* It remains to be seen if and how the private bar will redeem itself.

—Christopher Sclafani Rhee

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25. Burke et al., *supra* note 9, at 79.

26. *See* Elefant, *supra* note 21, at 101–08.

27. Strossen, *supra* note 9, at 2135.

28. *See* KRONMAN, *supra* note 3, at 380 ("[T]he likelihood that the profession as a whole will awaken to the emptiness of its condition and that there will be a great resurgence of support, at an institutional level, for the vanishing ideal of the lawyer-statesman seems to me quite low."); *see also* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 288 (1990) ("I do not for a minute think that private corporate practice is by any means the most promising place from which to work to build a more decent, equal, solidary society."). Kronman does think that it is possible for the legal profession to revive a more narrow commitment to public service, however. *See* KRONMAN, *supra* note 3, at 365.