

OUR BETTER HALF: A PUBLIC INTEREST LAWYER REFLECTS ON PRO BONO LAWYERING AND SOCIAL CHANGE LITIGATION

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As the other commentators have noted, there is no set definition of pro bono. This lack of definition means that there are many types of practice, addressing a wide range of issues, that are considered to be pro bono. I will focus on two types of public interest representation that arise in a litigation context, providing a view of pro bono lawyering from the perspective of a full-time public interest lawyer.

I will call the first type of pro bono work “stop-gap” law. Stop-gap law reflects a reactive, uncoordinated model of providing legal services in response to an individual, isolated need. The stop-gap lawyer identifies a need for legal services and then steps in to satisfy it. Typically, the lawyer is representing a low income or otherwise marginalized plaintiff who cannot get representation.

A second type of pro bono work is that which assists legal organizations such as the NOW Legal Defense and Education Fund (“NOW LDEF”)¹ and the NAACP Legal Defense and Educational Fund (“NAACP LDF”)²—organizations that generally do not receive

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1. Members of the National Organization of Women (“NOW”) established the NOW Legal Defense and Education Fund (“LDEF”) as a separate organization in 1970 to advance gender equity issues through litigation, legislation, public policy, and education. *See About NOW LDEF* (visited July 2, 2000) at <http://www.nowldef.org/html/about/index.shtml>. Its central concerns include violence against women, welfare and poverty, child care, immigrant women, workplace discrimination, and reproductive rights and education. *Id.*

2. Founded in 1940, the first Director-Counsel of the NAACP Legal Defense Fund was Thurgood Marshall. Under his leadership, the NAACP Legal Defense Fund spearheaded the landmark 1954 Supreme Court decision, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), overturning the “separate but equal doctrine” and outlawing public school segregation. Legal

federal funding and rely on litigation as a tool for social change. Also known as “cause lawyering,” this type of pro bono work reflects an affirmative, coordinated agenda on behalf of clients, an interest group, or a movement.

Pro bono counsel can serve a number of common purposes regardless of the type of pro bono work. An example is the use of outside law firms or other counsel, under both the stop-gap model and cause lawyering, to help lend prestige and weight to a case or a cause. In addition, the involvement of a firm may make a case more politically palatable.

For example, in 1969, the Center on Social Welfare Policy and Law (“CSWPL,” now known as the Welfare Law Center) asked Archibald Cox to handle the reargument of *Shapiro v. Thompson*³ before the United States Supreme Court. This was the second welfare law case before the Court,⁴ and it involved the right of welfare recipients to travel.⁵ Cox, a former U.S. Solicitor General, was not involved in the case until shortly before the reargument.⁶ After spending the day being briefed by Legal Services lawyers who were familiar with the broad context of the case, the former U.S. Solicitor General was able to go into the Court and take command of the argument in a way that would be very hard for a Legal Services lawyer to do.⁷ Many considered Cox’s handling of *Shapiro* to be pivotal in the Court’s decision to overturn waiting period requirements in state welfare programs.⁸ In a more recent welfare travel case before the Supreme Court, *Anderson v. Green*,⁹ Kathleen Sullivan, presently the Dean of

Defense Fund staff attorneys and cooperating attorneys from across the country work in the areas of education, employment, criminal justice, voting rights, housing, healthcare, and environmental justice. *About the NAACP Legal Defense & Education Fund, Inc.* (visited July 2, 2000) at <http://www.ldfla.org/ldf.html>.

3. 394 U.S. 618, 627 (1969) (holding that a Connecticut Aid to Families with Dependent Children (“AFDC”) waiting-period requirement was an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution).

4. *King v. Smith*, 392 U.S. 309 (1968), which addressed an Alabama welfare regulation, was the first such case before the Court.

5. See *Shapiro*, 394 U.S. at 627-28 (explaining that certain states had denied AFDC benefits to plaintiffs because of residency requirements); see also MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973 77 (1993) (discussing the evolution of the welfare rights movement through case law).

6. See DAVIS, *supra* note 5, at 79 (explaining that Cox was solicited to argue the case after the Supreme Court granted *certiorari* a second time because of a deadlock following the first hearing).

7. See *id.* at 79 (“Cox’s presentation on October 23, 1968, was virtually seamless; for much of his argument, the justices sat rapt.”).

8. See *id.* at 106 (discussing the attorney’s efforts in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Wheeler v. Montgomery*, 397 U.S. 280 (1970), in swaying the justices as Cox did).

9. 513 U.S. 557 (1995) (considering a California statute that limited the amount of AFDC aid new residents could obtain to the amount they received in their previous state and

Stanford Law School, was asked to handle the oral argument for many of the same reasons that CSWPL invited Archibald Cox to argue *Shapiro* thirty years earlier, to lend prestige and weight to the issue.

Likewise, in a 1993 NOW LDEF case, *Bray v. Alexandria Women's Health Clinic*,¹⁰ involving a challenge to antichoice blockaders in front of abortion clinics, a partner in a prominent Washington, D.C. law firm represented the plaintiff in the original argument. In addition to his expertise, part of the reason for that choice was the idea that this attorney would give a face to the case that would be less frightening than a radical feminist who might otherwise argue the case.

Another factor that may play a role in the decision to involve pro bono counsel is experience. Particularly in the early days of Legal Services, the lawyers tended to be young and inexperienced. Legal Services was a new area of the law, and it generally attracted recent law school graduates who did not have established practices. Ed Sparer¹¹ was only four years out of law school when he began as head of the Mobilization for Youth ("MFY") Legal Unit in 1963.¹² Additionally, the then head of the Welfare Law Center, a backup center for Legal Services, was only three years out of school. In the early days of Legal Services, there were virtually no senior litigators. Public interest attorneys looked to law firms to provide some sage counsel and experience that otherwise would have been very lacking among those practitioners who had a lot of energy but little experience.

The same is true now. For a decade, NOW LDEF has been litigating a challenge to antichoice blockaders of abortion clinics. About ten years ago, there were a number of blockades in the Washington, D.C. metropolitan area as well as in New York that resulted in injunctions that antichoice demonstrators violated.¹³ For

remanding the decision as not being ripe). Following the remand in *Anderson*, the Court considered the same policy in *Saenz v. Roe* and invalidated it under the Constitutional right to travel. 526 U.S. 489 (1999).

10. 506 U.S. 263 (1993) (holding that the antichoice protesters did not deprive or interfere with a woman's constitutionally protected right to an abortion).

11. DAVIS, *supra* note 5, at 22-39. Ed Sparer was a leader in the early years of welfare rights and poverty litigation. *Id.* at 22. Sparer left the Mobilization for Youth ("MFY") in 1965 to found the Center on Social Welfare Policy and Law to coordinate welfare litigation nationwide and develop poverty law litigation services. *Id.* at 34-39.

12. *Id.* at 29. MFY was established in 1963 as a comprehensive anti-poverty organization in New York City. The MFY Legal Unit channeled its efforts into research and litigation to alter the institutional and community structure that maintained poverty. *Id.* at 28-29.

13. See *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd sub nom.* *Bray v. Alexandria Women's Health Clinic*, 506

the past decade, our client NOW has been pursuing contempt proceedings and trying to enforce fines against these individuals. Recently, many of the antichoice defendants have declared bankruptcy.¹⁴ So, after a decade, we find ourselves in bankruptcy court. Of course, the attorneys at NOW LDEF are not bankruptcy lawyers, they are civil rights lawyers. NOW LDEF has been fortunate enough to associate with bankruptcy counsel from one of the large law firms in New York who is helping us negotiate this unfamiliar practice area. This association allows NOW to do the best possible job for the client.

At the dawn of federally funded legal services, there was a clear intention to rely on pro bono work to fill the gaps in legal services. There was some debate about the direction federally funded Legal Services should take: whether it should be an effort to provide services to all, or whether it should be a more cause-lawyering model. The early concept of Legal Services, in many people's minds, was to provide foot soldiers for the war on poverty and address the needs one by one through the use of a massive army of social services workers that included lawyers. But as we knew then, and know now, the need for lawyers has been underestimated. Even if all the lawyers in the country met the fifty-hour a year rule for donating pro bono services recommended by the ABA's Model Rules of Professional Conduct, there would not be enough lawyers providing services on the ground for low-income people who need them.¹⁵

To illustrate this, one can look back to 1963 and the Mobilization for Youth ("MFY"). MFY was a large social service agency in Manhattan's Lower East Side, which developed a new legal services pilot program that the Ford Foundation initially funded and the federal government ultimately financed.¹⁶ The Vera Institute for Justice in New York prepared a blueprint for MFY's proposed legal services program, recommending that MFY enlist fifty lawyers in ten Democratic clubs in New York to handle cases as a type of pro bono referral panel. MFY would have a small group of lawyers on staff, and the fifty outside lawyers would take referrals from the staff. Clearly

U.S. 263 (1993) (holding the right to interstate travel does not support a federal cause of action against demonstrators under 42 U.S.C. § 1985(3)).

14. See generally *NOW LDEF: Recent Cases by Topic: 1998-99 Legal Docket Reproductive Rights* (visited July 20, 2000) at <http://www.nowldef.org/html/courts/reprod.htm> (reviewing the litigation history leading up to these bankruptcy actions). See, e.g., *In re Randall A. Terry*, No. 98-67080 (Bankr. N.D.N.Y. filed Nov. 5, 1998); *In re Clifford J. Gannett*, No. 99-1515 (Bankr. D. Md. filed Apr. 1999).

15. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1.

16. See DAVIS, *supra* note 5, at 28 (chronicling the funding history of MFY when the program was first developed).

MFY had political leanings, which is why it looked for Democratic clubs to help it, yet there was not any sense that social change would be part of a coordinated legal effort. Rather, this assistance was more like that which lawyers provided during Freedom Summer, when they did not participate in the organizing but assisted with the legal work that came out of students' organizing in the deep South.¹⁷ Lawyers would represent people who needed to set bail, for example, but they would not participate in the organizing. This same sort of idea was present in Legal Services. The fifty lawyers would be available to deal with legal problems, but not to set the political agenda or organize clients.

Yet MFY Legal Services never implemented this original idea because the program instead changed direction. Ed Sparer became the new legal director and brought with him the idea of modeling MFY Legal Services after the ACLU or the NAACP LDF as an impact litigation organization.¹⁸ This was a very different model for the role of lawyers than some people in the legal services community had. Sparer saw this paradigm shift¹⁹ as drawing on corporate law models. According to Sparer,

businessmen, individually and in their corporate capacities, use lawyers in a multitude of ways to advance their immediate and long-range interests. Lawyers are prime tacticians and strategists for advancing economic goals of corporations. Lawyers are lobbyists and propagandists. Lawyers are negotiators and advocates in the truest and broadest sense of the term, not solely when suit has been brought against the corporation . . . The new legal aid lawyer's role should be defined by the broadest reaches of advocacy, just as the role of the corporation lawyer and the labor lawyer and the real estate board lawyer.²⁰

Thus, Sparer had a very different idea than his MFY predecessors of what poverty lawyers could do. Clearly, the role of pro bono lawyers tracks, to some extent, the notions of what lawyers should be doing professionally on behalf of their paying clients.

At the same time that Ed Sparer was conceiving of poverty lawyers

17. See DOUG MCADAM, *FREEDOM SUMMER* (Oxford 1988) (providing a history of the Freedom Summer through the personal recollections of participating volunteers).

18. See DAVIS, *supra* note 5, at 29-30 (describing Sparer's efforts to adopt the ACLU and NAACP LDF model of research and directed litigation for the MFY Legal Services Unit).

19. See Edward V. Sparer, *The New Legal Aid as Instrument of Social Change*, 1965 U. ILL. L.F. 57, 59-60 [hereinafter Sparer, *New Legal Aid*] (arguing the importance of redefining legal aid to include more than litigating "test cases"); see also Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 UCLA L. REV. 361, 366 (1965) (discussing the lawyer's responsibility to address civil liberty issues related to welfare status).

20. Sparer, *New Legal Aid*, *supra* note 19, at 59-60.

as being more activist on behalf of their clients, it was also an innovation of Legal Services to have a cadre of lawyers in the community who were exposed to the full range of clients' experiences. Like business lawyers who work in the business world, they would be part of the community and know more generally what is happening, and they would provide neighborhood legal services. The idea was that the relationship between clients and full-time practicing poverty lawyers in the neighborhood would drive legal campaigns on behalf of their clients. Today, women's rights organizations like NOW LDEF organize themselves around the same model. NOW LDEF staff are full-time public interest lawyers who are working with women in a range of communities. We have our ears to the ground regarding the issues that confront women, and we attempt to provide activist and affirmative representation on their behalf.

Yet the same bright line does not exist between the lawyer and the client in women's legal issues as it does in the poverty area. While some poverty lawyers may come from backgrounds that include welfare, they are unlikely to be experiencing poverty by the time they are practicing law. However, in the women's area, there are many women in law firms who have the same or comparable personal experience as their clients. There is not always a bright line distinction between the lawyer's experiences of marginalization and the client's.

Nevertheless, NOW LDEF views pro bono lawyers as assisting women rather than driving a social change agenda. It is our expectation that the lawyers assisting us will not be saying, "well, this happened to me last week, and so this is what the women's movement should focus on." Instead, we hope that pro bono lawyers will take direction from NOW LDEF and from clients, and that they will provide strategic thinking and research in support of the clients' goals.

Not that lawyers can not drive social change in their own right, but is that pro bono work? One of the issues that arises when defining pro bono is that there are many lawyers who are active and outspoken, doing things on their own behalf. However worthy, I do not believe that these self serving efforts should be categorized as pro bono.

There is another way in which pro bono contributes to NOW LDEF's work, which may not be so obvious. It serves as an organizing tool for the women's movement. This is very much like the idea behind law school clinics working on poverty issues, *e.g.*, while the

clinics are helping to meet the legal needs of the poor, they are also educating and indoctrinating students on issues pertinent to the poor in order to encourage students to continue working in these areas throughout their professional lives. In this same way, pro bono work helps public interest organizations train a group of lawyers about these issues and connect them to the movement with the hopes of enlisting them as political allies. We get calls every day from associates at big law firms who want to take part in something meaningful. They are tired of doing document production or due diligence. If NOW LDEF can enlist them, then it has engaged the lawyers in a much more productive manner than just requesting contributions through direct mail or inviting them to our annual dinner. In fact, I started my public interest career as a pro bono lawyer at a large firm.

Along with benefiting organizations like NOW LDEF, pro bono work benefits firms. It provides training for attorneys, and it is a perk for the associates who get to work on constitutional issues or other matters that do not normally arise in firm practice. If NOW LDEF works with a pro bono lawyer, there are additional benefits in terms of establishing relationships, building long-term support for women's rights issues, and educating people about the issues.

Cause lawyering has been so successful in recent years that it is now prevalent on the political right as well. The Center for Individual Rights,²¹ the Institute for Justice,²² Pacific Legal Foundation,²³ and a dozen or so right-wing legal organizations also modeled themselves on the NAACP LDF. The political right is also enlisting pro bono attorneys, and some of them are the very same attorneys with whom NOW LDEF works. For example, a large New York law firm filed an amicus brief challenging the constitutionality of the Violence Against Women Act ("VAWA") Civil Rights Remedy²⁴ in the case of *United States v. Morrison*²⁵ on behalf of the Women's Freedom Network.²⁶ This same New York law firm was actually advising NOW LDEF on

21. See *The Center for Individual Rights Home Page* (visited July 2, 2000) at <http://www.cir-usa.org>.

22. See *Institute for Justice: Litigating Liberty* (visited July 2, 2000) at <http://www.ij.org>.

23. See *Pacific Legal Foundation Home Page* (visited July 2, 2000) at <http://www.pacificlegal.org>.

24. The Violence Against Women Act of 1994 sought to protect the rights of women who suffered from domestic violence. 42 U.S.C. § 13981.

25. 529 U.S. 598 (2000) (holding that the enactment of the Violence Against Women Act was unconstitutional because the Commerce Clause of the United States Constitution did not grant Congress the authority to enact such a statute).

26. See *The Women's Freedom Network—Main Page* (visited July 2, 2000) at <http://www.womensfreedom.org>.

another matter. When we raised this with them, the firm immediately built a zone of separation between the attorneys working on the amicus brief and those doing work for NOW LDEF.

In short, there are clearly multiple definitions and uses of pro bono. The fact that there are pro bono attorneys on both sides of cases taking opposite sides of the issues highlights this. The problem is that the definition of pro bono is murky when one is not talking about access to justice for marginalized groups, or about filling in the gaps in legal services, but when one is discussing cause lawyering.

NOW LDEF would argue that in *Morrison* we represented a real woman who was using VAWA's civil rights remedy on her own behalf, and not to further political ends. However, there is no pro bono definition that makes the distinction between our position and the opposing side's argument that VAWA was not an appropriate exercise of federal authority. Indeed, the law firm on the other side asserted that it also was doing pro bono work in representing the opposite view.

Finally, there are many reasons why public interest firms rely on pro bono counsel. I am a little disturbed by Professor Susan Carle's²⁷ suggestion that pro bono should not necessarily mean that attorneys are doing work for free because that is one of the things that we depend on when we contact pro bono counsel. However, it is not as free as some people may think. Pro bono counsel often ask NOW LDEF to pay costs, and as people know, at thirty cents a copy, those costs can be quite significant. Some firms, however, will contribute their costs, which is wonderful for NOW LDEF. Some firms will seek their own fees if NOW LDEF is working with them on a fee shifting case, and others donate the fees to NOW LDEF or possibly another group about which they care.

Regardless of the money, what is clear is that public interest attorneys could not do their jobs without this help. The public interest law organizations will never be large enough to handle the most complex matters by themselves. NOW LDEF has one dozen attorneys at its office. We do not have any international offices, nor do we have hundreds of lawyers around the country or the world. NOW LDEF and other public interest organizations need the depth and breadth of assistance that the pro bono attorneys can bring. And as a practitioner, I am proud that our profession takes on these issues, whether it is access to justice or broader social issues, and takes these matters seriously enough to contribute time and resources to

27. See Susan Carle, *Re-envisioning Models for Pro Bono Lawyering: Some Historical Reflections* 9 AM. U.J. GENDER, SOC. POL'Y & L. 81 (2001).

2001]

OUR BETTER HALF

127

fully air the concerns on both sides of the debate.