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Scott Cummings

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# THE MARKET FOR PUBLIC INTEREST LAW SERVICES

SCOTT CUMMINGS\*

I want to thank Susan for inviting me to speak on this, my first American Association of Law Schools panel. I am here to discuss some early stage progress I'm making on a project I'm working on in connection with a program honoring one of my very great senior colleagues, Joel Handler. His mold-breaking empirical work on public interest law remains both field-defining and inspirational to all of us who care about access to justice.

When I look at his seminal 1978 empirical study of public interest law, one of the important contributions that stands out is that Handler and his collaborators conceptualized public interest law as an "activity" rather than an organizational objective—an activity that "involve[s] the use of legal tools and ha[s] a high ratio of potential external benefits to potential total benefits."<sup>1</sup> Putting aside the contested nature of the definition itself, the important insight was that public interest law was conduct—a service—provided across different practice sites by lawyers who may or may not be ideologically committed to the representation's ultimate objectives. As Handler noted, although public interest law activity occurred primarily in the voluntary sector, it had analogues in the for-profit and public sectors that invited careful study if one were to understand—in his terms—the complex and interconnected "public interest law industry."

The conception of my project is to take up Handler's invitation in the contemporary context. I do so with a similar approach to the definition of public interest law: as the provision of legal services broadly defined to advance some vision of the public good beyond mere client representation. I am trying to follow in the footsteps of scholars like Deborah Rhode and K.T. Albiston who have recently published important empirical work analyzing the contemporary public interest field. They compare it back in

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\* Professor of Law and Faculty Chair, Epstein Program in Public Interest and Law, UCLA Law School.

1. Joel F. Handler et al., *The Public Interest Law Industry*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 42 (Burton A. Weisbrod ed., 1978)

time to the way things were at the start of the public interest movement. I would just note that this comparative impulse is, in part, a product of a generational change that reflects a new generation of scholarly interest in public interest law. This interest expresses an urge to study a field at the end of its founding generation just as those who started 40 years ago are now at their careers' end. Rhode's wonderful title of her Stanford Law Review article, *The Movement at Midlife*, captures this.

To date, much of the research on the public interest law industry has focused on the organization and practice of public interest law in the NGO—or what Handler called the voluntary—sector, where legal aid organizations and groups like the ACLU and LDF reside. This includes the canonical critiques of public interest law, going back to Bell's *Serving Two Masters*, focusing on lawyers in these practice arenas.

Just to set the stage for a comparative framework, I put together what I think is the best available evidence on the size of the NGO sector as it has grown from the early public interest law movement to roughly the present. If these figures are accurate, you see that NGO lawyers remain a small fraction of all lawyers, but have grown in relative proportion rather significantly, nearly five times, since 1975. This is consistent with our general impressions that the NGO sector is becoming more developed and professionalized.

In this project, I am coming at the industry from a different angle, focusing specifically on the development of public interest law within the *for-profit private sector*. Following Heinz & Laumann, I depict public interest law as encompassing a corporate and non-corporate hemisphere (in terms of client base). A lot of great work has been conducted as of late on the institutional development of pro bono; I'm interested in building on that work in two ways. First, by viewing pro bono as part of a larger for-profit sector that also includes the fee-generating work of so-called private public interest firms; and, second, by attempting to make some historical comparisons. The questions I want to ask are, first, how has the for-profit sector changed, looking specifically at the *causes* of change, (what are the factors that have contributed to its development?) and the *nature* of change (how is for-profit public interest law different now than it was 40 years ago?)? Second, what are the consequences of these changes?

The consequences are important, not merely because they are intellectually interesting, but because they go to the fundamental question of what it means to have effective access to justice in our society. As you all know, the access debate is often framed in terms of the market for legal services, both as a cause of and a remedy for insufficient access. In terms of causality, the argument holds that certain types of clients and causes are underrepresented in the private market, causing a mismatch of supply and

demand that creates a “justice gap” that the NGO sector attempts to bridge. Because of resource constraints, these efforts never achieve ultimate success.

In terms of responses to the justice gap, I think the private market is generally viewed warily as a potential source of leverage, as a *supplement*, but ultimately as an unworthy *substitute*. The private market is viewed as an unsatisfactory alternative for good-old-fashioned staffed public interest law offices with committed, full-time attorneys whose job it is to advocate for their designated causes and clients. Why? There are generally two reasons that are given. One relates to the *expertise* or, to put in another way, *quality*. Here, the notion is that full-time lawyers dedicated to particular causes or clients will be qualitatively better than private lawyers who engage in such work part-time and ad hoc either through pro bono service or via a voucher system like Judicare. The second argument against market-based public interest law delivery relates to what I would call *substantive access*, referring to the types of cases or matters that may be brought from within a particular practice location. More directly, the concern is that market-based public interest law delivery will likely insufficiently attend to, or even ignore altogether, certain categories of cases that just don’t make economic sense for for-profit firms to undertake. These cases cannot be pursued satisfactorily either because they invite objections from paying clients or because they don’t promise enough attorney’s fees. It is the concern about substantive access, for instance, that is raised when people talk about the impact of “positional conflicts” on large-firm pro bono work. The important question, I would suggest, is whether those cases and matters “left out” of the pro bono system get picked up elsewhere and, if not, where the industry-wide gaps are.

It is important to emphasize that categorical limitations on advocacy are not the sole province of the private sector. As we all know, Legal Services Corporation (LSC) funded groups are restricted from many areas deemed politically volatile or unpopular. In contrast to market-based delivery, LSC’s limitation is a *political constraint* that in theory can be undone, rather than a *fundamental structural feature intrinsic to the very nature of for-profit practice*. It is perhaps for this reason that opponents of federal support for legal aid have at times sought to channel resources out of staffed offices and into for-profit firms where it is sometimes presumed that representation would take on a less radical—or politically liberal—cast. The premise that pro bono is less politically threatening, of course, is not entirely true, as evidenced by the fact that large law firms have in fact done quite radical and consequential pro bono work. However, the focus on different delivery systems crystallizes the key point here: that the funding mechanism for public interest law influences the nature of the services rendered, perhaps profoundly so. Thus, where the distributional balance is

ultimately struck across the private, for-profit, voluntary, and public sectors—that is, how much and what type of public interest law activity is located in each—decisively affects the nature and quality of legal representation. In the access debate, I don't think it is enough to say "we need more" services—we of course do, but that formulation begs the question of what type of "more" we need as well as where it should be targeted.

At least in theory, recognizing that there may be insurmountable empirical limitations, we should be able to figure out and compare public interest law service provisions in different parts of the industry, and create a distribution showing how much gets done and where.

From there, we should be able to make assessments about the appropriate balance. Ultimately, if we want to get the balance "right", even if we might disagree about what that optimal balance may be, we need to know three empirical facts about the entire public interest law industry that we currently do not: (1) how much public interest law is currently dispensed *across sectors*, (2) how does it vary by type or substantive area, and (3) how good is it, specifically, how does quality vary by sector?

I cannot answer these questions, but my project aims to move the ball forward by trying to assemble the best available current evidence to shed light on at least some of them. Let me tell you what I think we know so far, starting with a very general observation, an "untested empirical hunch," and a hypothesis.

The observation is that there is a lot of public interest law activity going on in the for-profit private sector. The hunch is that it has grown over time, not only in absolute terms but relative to the size of the profession.

There is some corroboration for this hunch: just with respect to pro bono service, for example, recent research on Am Law 200 firms shows that the total pro bono hours produced by such firms increased by nearly eighty percent between 1998 and 2005, while the per-lawyer average increased by five hours. Through 2008, total pro bono hours increased nearly fifty percent again and the average hours per attorney grew by another ten hours.

This leads to my hypothesis, which is that as we move from one type of delivery system to another, we would expect to see changes in the quantity and quality of services provided, depending on the distributional mix. The basic idea is that the system of payment affects public interest law along at least three dimensions: (1) the cases or matters that are brought, (2) the degree to which lawyers feel accountable to clients, and (3) the nature of the lawyer's role (along the neutrality/non-neutrality spectrum) and tactics (along the legal/non-legal advocacy spectrum). We could empirically test whether this is true.

Let me now say a few things about what we know about the nature of

market-based delivery in the United States. I'll start with the pro bono sector, which you'll note, includes on the corporate side, large law firms which have gotten the most attention, but also on the non-corporate side small firms and even solo practitioners, who are motivated by very different economic considerations.

This is data that I put together from two sources, the Handler study, and a study of law firm time keeping practices done by a consulting firm and published in an ABF journal. I am not quite sure what to make of the Handler data, presented in his book with some palpable sense of outrage that lawyers are only devoting 6% of their billable time to pro bono, which by contemporary standards is quite large. Assuming a 2000 hour year, the pro bono work would translate into an annual average of 120 hours. If you multiply that by all private lawyers you get a huge amount of hours, a significant number of full time equivalent (FTE) pro bono lawyers, and a huge ratio of FTE pro bono lawyers to lawyers in the NGO sector: eight and a half to one. Just compare the Darby data, which asked a slightly different question (how many hours lawyers devoted to charitable, community, or civic endeavor) and got a much lower number 30 hours per lawyer.

The contemporary data is more solid and presented here. I break it down between AmLaw data for the largest firms, in the first row, and American Bar Association (ABA) data for all private lawyers, in the second. If you compare to the size of the entire profession, you would see that FTE pro bono lawyers are about one and half percent of all lawyers now. In the early period, they were only about one percent, if you take the Darby data.

Part of the pro bono story relates to quantity (there is more), but part also relates to location—there appears to be more done at the big firm level. This is because there are more lawyers in the big firm (100+ lawyers) sector, which increased 7 times between 1980 and 2000, and as the Am Law data reveals, and they are doing more pro bono on average.

The relative change in the location of pro bono might affect the type and quality of those pro bono services. In Handler's study, he asked surveyed lawyers to identify the types of organizations for which they did pro bono—a high proportion indicated churches and nonpolitical community groups.

What are the factors that drive the distribution of pro bono services at large law firms now? Deborah Rhode and I tried to get at that question with a study that we published last year based on a survey of pro bono counsel at major law firms. These pro bono counsel positions have grown significantly since the advent of AmLaw rankings in 1994.

In surveying counsel, one of the things we found, of course, is that pro bono was limited by economic considerations. The distribution of cases

was not just about economics; in addition, it reflected a sort of negotiation among pro bono stakeholders. This negotiation is mediated by pro bono counsel, who act as advocates for both increased quantitative investments in pro bono as well as for certain type of cases. Ultimately, those with the most power in the firms, the partners then the associates, dictate the ultimate pro bono agenda, shaping pro bono around the economic needs of the firm.

These needs include, as I have already mentioned, a sensitivity to client interests (“do not sue clients”), but also to the recruitment and professional development of firm lawyers. Indeed, when asked what was important in determining the objectives and types of pro bono cases firms selected, recruitment and professional development loomed large. How does this affect the distribution of cases? We do not have good data to answer this question, which remains a critical one for understanding the overall impact of organized pro bono programs.

Let me try, in the short time I have left, to give you a sense of the other part of the for-profit sector: so-called private public interest law firms. When Handler did his study, he included “mixed firms,” “self-proclaimed public interest law firms that provide legal services to private clients for profit and use those earnings to finance legal activities of the public interest law type.”<sup>2</sup> He found: “Most of these firms are in the nation’s largest cities, in the Northeast and in Washington, D.C.; but there are mixed public interest firms in all parts of the country. Our data indicate that the firms are usually small; the average is 5 full-time lawyers. No firm had more than 10 lawyers, and most are staffed entirely by full-time lawyers.”<sup>3</sup> I set out to find resources that would get me as close as possible to the Handler conception, i.e., those firms in the for-profit private sector that self-identify as firms working in the public interest. My pursuit led to one important, albeit still partial, data source: the directory of the National Lawyers Guild, which holds itself out as the oldest public interest/human rights bar in the US. The Guild directory is imperfect since it is likely to be both over and under-inclusive. But it provides one window on firms that hold themselves out as pursuing objectives related to the public interest. My preliminary data shows some differences from the Handler study. The geographic mix of firms is different: 60 firms in California, 9 in the District of Columbia, 30 in Massachusetts, 36 in New York. And the most popular practice areas appear to be slightly different—with civil rights, criminal law, and employment law topping the list—perhaps reflecting the importance of fee-shifting statutes, as well as subsidies for public defense.

So this is the information we have so far, but it is far from adequate. I

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2. *Id.* at 42.

3. *Id.* at 113.

am going to end with questions and would invite you to help me think through some of the issues I've raised to move toward a better understanding of how organizational form affects the distribution of public interest law. These include:

On quantity: How can we get the best picture of how much public interest law the for-profit sector provides?

On substance: What gets left out of market-based delivery and why?

On quality: How do we figure out what the private lawyers do well and what they do poorly in terms of service provision?

Thank you.