

Creating a “Great Pro Bono Practice”

Malka Herman*

Pro bono at big law firms is often viewed as an altruistic way for attorneys to give back to society. But when big law firms partner with public interest law organizations (PILOs) to do pro bono work, conflicting interests among the parties involved may interfere with the aims of pro bono work. In this Note, I first review the history of PILOs and origins of the big law-PILO partnership model. I then use the lens of two sociological theories, functionalism and Weberian theory, to examine what motivates the actors involved—big law firms, big law attorneys, and PILOs—to engage in this model, highlighting conflicting interests among the parties. My look into these partnerships is informed by two original interviews I conducted, one with the executive director of a PILO and one with the pro bono counsel at a big law firm. Lastly, I explore the potential problems arising from these conflicts of interest and propose solutions to these problems, including how big law attorneys may be able to improve these partnerships and create a truly “great pro bono practice.”

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INTRODUCTION

When I first decided to apply to law school, my hope was to devote myself to a career fighting for justice. After I began school, several personal, professional, and financial factors led me to begin my career at a big law firm. To justify this decision in light of my lofty aspirations, I told my peers that I would make sure to choose a firm with a great pro bono practice. In other words, I could have it all: a six-figure salary, no debt, and still contribute to making the world a better place. In reality, I did not have any idea what a “great pro bono practice” looked like or how to go about finding one.

One evening, I was talking with my friend Sarah about her summer as an intern at a PILO and she mentioned some of the difficulties she and her supervisor experienced when big law firms partnered with them on pro bono matters.¹ She explained how challenging it was to train big law attorneys who did not practice in the public interest arena consistently. For the first time since arriving at law school, I was forced to think critically about big law pro bono and the ways it can harm the institutions it purports to help. I felt torn between my desire to engage in pro bono and my new awareness that, by doing so, I may be contributing to a larger problem.

After my conversation with Sarah, I decided to spend the semester researching the relationship between big law firms and PILOs in order to learn more about the potential problems surrounding the current big law pro bono system. This Note asks the following questions: What is desirable and what is

1. For confidentiality purposes, I have withheld Sarah's real name.

problematic about the current big law-PILO relationship? If there are more problems than benefits, can current and future big law attorneys navigate pro bono work in a more helpful way? Or is it better not to engage at all?

After defining the terms used throughout this piece and describing the mechanics of the big law-PILO relationship in Parts I and II, respectively, this Note proceeds to confront these questions. Part III looks to the history of PILOs and illuminates how the challenges they faced in the past gave rise to the big law-PILO partnership model. Part IV seeks to understand what motivates big law firms, big law attorneys, and PILOs to engage in pro bono. Part V examines the tension that can arise when those motives are not aligned—a tension which has led to three other problems: (1) lack of qualitative data about partnership effectiveness, (2) avoidance of certain causes by big law firms, and (3) lack of big law attorney expertise, which may drain PILO resources. Finally, Part VI proposes potential realistic solutions to these problems based on the actors’ differing motivations and interests.

I.

DEFINITIONS

For clarity, I offer the following definitions for terms used throughout this Note. “PILOs” refers to organizations that are part of the voluntary sector, employ legal tools, and engage primarily in public interest service work.² “Big law” is difficult to define because there is no agreed-upon definition. For the purposes of this Note, big law refers to high-revenue, private interest law firms that typically maintain offices in multiple cities, pay associates six-figure salaries, and often represent large corporations. I chose to analyze large law firms instead of small or mid-size firms because large law firms are most likely to partner with PILOs.³ “Pro bono” is defined as work performed free of charge for the benefit of “persons of limited means” or organizations that serve such persons.⁴ The term “persons of limited means” includes people who are

2. Joel F. Handler, Betsy Ginsberg & Arthur Snow, *The Public Interest Law Industry*, in *PUBLIC INTEREST LAW* 42, 49 (Burton A. Weisbrod, Joel F. Handler & Neil K. Komesar eds., 1978).

3. The 2016 data report from TrustLaw found that, when deciding between pro bono priorities, public interest litigation was selected more frequently by large firms (66.1 percent) than by small or medium-sized firms (31.8 percent and 30.8 percent, respectively). THOMSON REUTERS FOUND., TRUSTLAW INDEX OF PRO BONO C5 (2016), <http://www.trust.org/contentAsset/raw-data/d31d8b72-0f82-4241-88e1-71abc90e3d72/file> [<https://perma.cc/BDL6-2WAR>]. Although there is no consensus as to what constitutes a “large” firm, TrustLaw defines them as those with two hundred or more fee earners. *See, e.g., id.* That these large firms are more likely to partner with PILOs may be due to the amount of time and resources public interest litigation requires, which small and mid-size firms may lack or be reluctant to commit to providing. *See id.*

4. AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV. & CTR. FOR PRO BONO, SUPPORTING JUSTICE: A FOURTH REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 4 (2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.pdf [<https://perma.cc/XBV3-C4Y2>].

financially disadvantaged and unable to pay for legal services.⁵ Thus, pro bono does not include free services for family or friends of attorneys who are not “of limited means.”⁶ Although there are many forms of pro bono, this Note is specifically interested in exploring the ways that big law firms engage in pro bono through partnerships with PILOs. This excludes pro bono in small and mid-size law firms as well as forms of pro bono at big law firms that do not involve PILO partnerships.⁷

II.

MECHANICS OF BIG LAW-PILO PARTNERSHIPS

Before delving into the history, problems, and potential solutions regarding big law-PILO partnerships, it is important to first discuss what these partnerships look like in practice. While these partnerships can vary at different firms,⁸ I offer the below description, drawn primarily from an original interview I conducted with Christopher Herrling from WilmerHale, to provide a general understanding.⁹ Herrling has been pro bono counsel at WilmerHale since 1997 and served as the executive director of the Legal Aid Society of the District of Columbia prior to joining the firm.¹⁰

The first step in the process is to receive requests from PILOs.¹¹ These flow into the pro bono counsel’s office at WilmerHale either from PILOs with which WilmerHale has a preexisting relationship or via cold calls from PILOs seeking assistance.¹² The PILOs are generally national organizations or local legal service providers in cities where the firm has an office.¹³ Pro bono counsel like Herrling are faced with the challenging task of sifting through a constant stream of requests for assistance from these PILOs.¹⁴ Herrling screens the requests and determines whether the matter is appropriate for the firm.¹⁵

5. *Id.*

6. *Id.*

7. Other forms of big law pro bono include the “clinic model,” where volunteer lawyers provide legal assistance in a specific area of law for a fixed period of time, and the “externship model,” where firms send law firm attorneys to a specified PILO to work full time for a set period of time. Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 74, 77 (2004).

8. For a more comprehensive look at different big law-PILO partnerships, see *id.* at 42–49.

9. Telephone Interview with Christopher J. Herrling, Pro Bono Counsel, Wilmer Cutler Pickering Hale & Dorr LLP (October 16, 2020).

10. Christopher J. Herrling, WILMERHALE, <https://www.wilmerhale.com/en/people/christopher-herrling> [<https://perma.cc/AV7Z-YCN2>].

11. Telephone Interview with Christopher J. Herrling, *supra* note 9.

12. *Id.*

13. *Id.*

14. *Id.* Although not every firm has a pro bono counsel or coordinator, “a significant portion of the country’s most elite firms have established the position.” Cummings, *supra* note 7, at 59. According to Herrling, pro bono counsel are licensed attorneys while pro bono coordinators are not. Email from Christopher J. Herrling, Pro Bono Counsel, Wilmer Cutler Pickering Hale & Dorr LLP, to author (Feb. 22, 2021) (on file with author). The two terms are used interchangeably throughout this Note.

15. Telephone Interview with Christopher J. Herrling, *supra* note 9.

At this stage, many matters are turned down for reasons such as business sensitivity.¹⁶ For example, WilmerHale has a small labor and employment practice that prefers the firm not take cases in labor and employment that might establish law unfavorable to the firm’s corporate clients.¹⁷ Other reasons for turning down work might include lack of associate availability, the coordinator’s own preferences, or a firm’s existing relationship with other PILOs.

An alternative way for a matter to come to the firm is internally from partners or mid-level associates who have relationships with PILOs.¹⁸ These internal requests are often accepted, especially when they come from partners.¹⁹

Once a request has passed the screening stage, the next step is to assign the work.²⁰ Assignment processes vary and often depend on how the request came to the firm. If a law firm partner brought in a matter, that partner will usually choose associates to work on the case with the partner overseeing it.²¹ Otherwise, the pro bono counsel or coordinator will send an email out to a group of lawyers, or specific lawyers who have expressed an interest in that kind of matter, to see if anyone is interested in taking on the work.²²

From there, associates or partners—or both, depending on the matter’s need—execute the same tasks they perform for paying clients. They write briefs, meet with clients, and go to court when necessary. Some firms set a cap on the number of hours an attorney can bill pro bono, but others do not.²³ However, even firms like WilmerHale that allow unlimited pro bono hours can still have trouble persuading associates to work on pro bono cases. Herrling sometimes needs to use a “more persuasive approach” to “convince folks that they should volunteer.”²⁴ After the case is completed, some pro bono counsel and coordinators seek out informal feedback from PILOs while others do not follow up at all.²⁵

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *The 2020 Survey of Pro Bono Hours*, CHAMBERS ASSOC., <https://www.chambers-associate.com/law-firms/pro-bono-hours> [<https://perma.cc/YP4Z-HFZ2>].

24. Telephone Interview with Christopher J. Herrling, *supra* note 9.

25. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2401–02 (2010) (“Only forty-five percent of respondents . . . reported efforts to evaluate the satisfaction of nonprofit partner organizations, and these all involved informal conversations or meetings with collaborating organizations.”).

III.

HISTORY OF THE BIG LAW-PILO RELATIONSHIP

Although pro bono at big law firms has a reputation of being firmly established,²⁶ the institutionalization of big law pro bono began in the 1980s and 1990s.²⁷ Before big law pro bono, many PILOs depended on federal funds to operate. In fact, the proliferation of PILOs beginning in the mid-60s was largely a result of government action. The Johnson administration's "War on Poverty" and the establishment of the legal services program in the Office of Economic Opportunity (OEO) provided millions of dollars to 130 legal aid providers across the country.²⁸ In the '70s, the OEO was largely dismantled and, instead, Congress created an independent Legal Services Corporation (LSC).²⁹

The federal government also encouraged organizations to work to reform the legal system and thereby contributed to the shift in PILOs' focus from "legal aid," which provides help to individual clients, to "legal services," which includes impact litigation aimed at making wider policy changes.³⁰ Thus, from the very beginning, the organizations that contributed funding and resources for PILOs also influenced their litigation strategies. Class actions were one development that enabled PILOs to engage in such legal services and create broader, more sweeping change.³¹

26. For example, pro bono at big law firms is frequently portrayed in legal TV shows and movies. In the first episode of *Suits*, a partner reluctantly accepts a pro bono assignment and immediately passes it off to a new associate. *Suits: Pilot* (USA Network television broadcast June 23, 2011). The first episode of *The Deep End* also begins with a first-year associate being assigned to a pro bono case. *The Deep End: Pilot* (ABC television broadcast Jan. 21, 2010). And the first episode of *The Good Wife* features a first-year associate getting assigned to a pro bono case as well. *The Good Wife: Pilot* (CBS television broadcast Sept. 22, 2009).

27. Cummings, *supra* note 7, at 18 ("As federal legal services declined in the 1980s and 1990s, pro bono emerged as the most significant source of free representation for the poor.").

28. See Kenneth W. Mentor & Richard D. Schwartz, *A Tale of Two Offices: Adaptation Strategies of Selected LSC Agencies*, 21 JUST. SYS. J. 143, 143–44 (2000); Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 LAW & SOC. INQUIRY 62, 64–65 (2014); History, LEGAL SERVS. CORP., <https://www.lsc.gov/about-lsc/who-we-are/history> [<https://perma.cc/ZG78-7L92>].

29. *History of Civil Legal Aid*, NAT'L LEGAL AID & DEF. ASS'N, <http://www.nlada.org/tools-technical-assistance/civil-resources/history-civil-legal-aid> [<https://perma.cc/SB5D-N7Z5>].

30. Steven A. Boutcher, *Lawyering for Social Change: Pro Bono Publico, Cause Lawyering, and the Social Movement Society*, 18 MOBILIZATION 179, 181 (2013) ("President Johnson's 'War on Poverty[]' . . . shifted pro bono from a form of *noblesse oblige* to a focus on 'access to justice'—targeting direct legal services for the poor through the mobilization of government and legal services lawyers.").

31. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 143 (1974). Marc Galanter coined the terms "one-shotter" (OS) and "repeat player" (RP) to describe how the court system favors those who engage in similar litigation over time—RPs—over those who only occasionally engage in litigation—OSs. *Id.* at 97. Litigation tends to favor RPs who have more experience, resources, and expertise compared to OSs. *Id.* at 103. But Galanter found that class actions could even the playing field by "reducing [a typical RP's] strategic position to that of an OS by making the stakes more than [the RP] can afford to play the odds on, while moving the claimants into a position in which they enjoy the RP advantages without having to undergo the outlay for organizing." *Id.* at 143 (footnote omitted).

The 1990 U.S. Supreme Court case *Sullivan v. Zebley* provides an example of success stemming from an LSC-funded class action suit.³² In *Sullivan*, the Supreme Court held that the Social Security Administration had to consider “the effect of multiple disabilities that were disabling when combined” when determining benefits for children with disabilities.³³ This case resulted in the provision of Social Security benefits for hundreds of thousands of children who had previously been denied them.³⁴ Without the class action device, the LSC-funded attorneys could have only assisted children individually instead of creating widespread change through a single case.³⁵

Despite successes like the one in *Sullivan*, federal funding that enabled sweeping change screeched to a halt in the 1980s when the Reagan administration came to power and aggressively cut LSC funding.³⁶ President Reagan even tried to eliminate the LSC entirely in 1982, but when that effort failed, he “undermined [the] LSC in other ways, [including by] appointing a hostile board.”³⁷ Conservatives viewed the LSC as a “\$300 million subsidy for liberal causes.”³⁸

In 1996, PILOs were dealt another blow by the Republican-controlled Congress, which cut LSC funding by nearly one-third,³⁹ and prohibited LSC-funded organizations from many facilitative activities like pursuing class action lawsuits.⁴⁰ Congress also restricted LSC-funded organizations from pursuing cases involving controversial issues like “abortion, alien representation, legislative redistricting, prisoners’ rights, public-housing evictions for alleged drug crimes, or any other restricted activity.”⁴¹ These restrictions sometimes even applied to situations where the grantee used other funds, such as private funds or charitable donations, for those restricted issues.⁴² Congress also prohibited attorneys who received LSC funds from requesting attorneys’ fees from the opposing party even when this tool was statutorily available.⁴³ As a

32. 493 U.S. 521 (1990).

33. BRENNAN CTR. FOR JUST., RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER 10 (2000), https://www.brennancenter.org/sites/default/files/2019-07/Report_How%20Congress%20Left%20the%20Poor%20with%20Half%20a%20Lawyer.pdf [<https://perma.cc/4ZG6-XRS8>].

34. *Id.*

35. For more examples of pre-1996 successes, see *id.* at 13.

36. Cummings, *supra* note 7, at 21–22.

37. *Id.* at 22.

38. Jerome L. Himmelstein & Mayer Zald, *American Conservatism and Government Funding of the Social Sciences and the Arts*, 54 SOCIO. INQUIRY 171, 177 (1984) (citation omitted).

39. Kenneth Jost, *Legal Initiatives Stall: Shareholder Law Passes, but Tort and Crime Bills Fail*, 82 ABA J., Mar. 1996, at 20, 20 (“Lawmakers approved only \$278 million for the [Legal Services Corporation, nearly one-third less than the previous year’s funding.”).

40. BRENNAN CTR. FOR JUST., *supra* note 33, at 5–8.

41. Mentor & Schwartz, *supra* note 28, at 144–45.

42. *LSC Restrictions and Other Funding Sources*, LEGAL SERVS. CORP., <https://www.lsc.gov/lsc-restrictions-and-funding-sources> [<https://perma.cc/JYS7-RR8Z>].

43. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1996, Pub. L. No. 104-134, § 504(a)(13), 110 Stat. 1321, 1321-55 (amended 2010).

result, LSC-funded attorneys could not benefit from “an otherwise viable way to supplement inadequate funding and thus expand their organization’s range of services” and were deprived of an important bargaining tool available to other plaintiffs.⁴⁴

Congress’s decision to restrict LSC-funded organizations from taking on certain kinds of cases, eliminating class actions, and prohibiting attorneys’ fees reduced the effectiveness of LSC-funded organizations, which then had to tackle a narrower range of issues on an individual basis.⁴⁵ The even playing field disappeared as defendants found it “far easier . . . to thwart individual suits” than to oppose class actions.⁴⁶

As legal services struggled to survive in the ’90s, help came from an unexpected source: big law pro bono.⁴⁷ Although individual attorneys have provided legal representation for disadvantaged people as far back as the nineteenth century, it is only in the last few decades that big law firms have established institutionalized pro bono practices that often include pro bono coordinators and billable pro bono hours.⁴⁸ Some firms even *require* new attorneys to engage in pro bono. For example, O’Melveny & Myers requires its attorneys to engage in “at least one pro bono matter during their first year at the Firm.”⁴⁹ Similarly, although it is not mandatory to follow these rules, the American Bar Association’s Model Rule 6.1 says, “A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.”⁵⁰ And reports indicate a dramatic increase of big law pro bono hours in the last twenty years. For example, according to the Pro Bono Institute, the total number of pro bono hours by year has more than tripled from 1.5 million hours in 1997 to almost 5 million hours in 2017,⁵¹ and the *American Lawyer* reported that the top-200 grossing law firms contributed more than 5 million hours of pro bono work

44. Lisa Q. Wirtz, Note, *The Ethical Bar and the LSC: Wrestling with Restrictions on Federally Funded Legal Services*, 59 VAND. L. REV. 971, 1009 (2006).

45. BRENNAN CTR. FOR JUST., *supra* note 33, at 12 (“Since attorneys do not have the leverage that comes from the ability to threaten a big lawsuit, it is more difficult to get results for individual clients.”).

46. *Id.* at 13.

47. Cummings, *supra* note 7, at 18 (“Pro bono emerged as the most significant source of free representation for the poor, signaling the advent of a new institutional system of public service.” (footnote omitted)).

48. See Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1439 (1984) (discussing the roots of legal aid from at least as early as 1876).

49. See, e.g., *Pro Bono*, O’MELVENY, <https://www.omm.com/pro-bono/> [<https://perma.cc/WJZ3-7A93>].

50. MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS’N 2019).

51. *Report on the Law Firm Pro Bono Challenge*, PRO BONO INST. (2018) <http://www.probonoinst.org/wp-content/uploads/2017-Challenge-Report.pdf> [<https://perma.cc/B7W7-V255>].

in 2017.⁵² But what accounts for this increased focus on pro bono at big law firms?

IV.

THE RISE OF BIG LAW PRO BONO: WHAT MOTIVATES BIG LAW FIRMS, BIG LAW ATTORNEYS, AND PILOs TO ENGAGE IN THESE PARTNERSHIPS?

In order to understand the rise of pro bono at big law firms, this Note focuses on the motivations of the three key players in this partnership: big law firms, big law attorneys, and PILOs. I rely on two sociological theories—functionalist theory and Weberian theory—to explore these actors’ motivations. Although sociologists often view the two theories as competing,⁵³ this Note uses them to provide two different avenues for understanding why law firms, attorneys, and PILOs are all drawn to pro bono. Rather than make the case for one theory over the other, I lay them both out for the reader in order to explore potential motives of each of the actors. Questions about which theory is more accurate in this context are ripe for future research but go beyond the scope of this Note. Before describing the two theories, it is important to note that these theories have not been widely applied to the motivations underlying pro bono. Therefore, my application of these theories is based on my understanding of how scholars have applied these theories in other contexts.

From the 1930s through the 1950s, American sociologist Talcott Parsons developed functionalist theory by building on earlier work of scholars like Émile Durkheim and Sigmund Freud.⁵⁴ In its simplest form, functionalism proposes that institutions exist and persist because they promote general stability and integration in society.⁵⁵ This Note relies on John Sutton’s book *Law/Society*, in which Sutton critiques functionalist theory as it applies to the legal profession.⁵⁶

According to functionalist theory, institutions “arise to meet some distinctive need of the social system as a whole.”⁵⁷ Therefore, a functionalist may explain the rise of big law pro bono as a phenomenon born out of an increasing need for a different funding structure following cuts to federal funding. The history described in the prior Section supports this argument. Institutionalized pro bono at big law firms developed and increased at the same

52. Ben Seal, *The 2018 Pro Bono Scorecard*, AM. LAW. (June 27, 2018), <https://plus.lexis.com/api/permalink/809b8402-b5a8-4132-a625-520fbfb07ad7/?context=1530671>.

53. See JOHN R. SUTTON, *LAW/SOCIETY* 227 (2001) (“Critics of the functionalist approach (Abbott 1988; Bourdieu and Passeron 1977; Friedson 1970; Larson 1977) have most often echoed the more skeptical views of Max Weber.”).

54. John R. Sutton, *Rethinking Social Control*, 21 LAW & SOC. INQUIRY 943, 943 (1996) (book review). Talcott Parsons began to develop his theory in *THE STRUCTURE OF SOCIAL ACTION* (1937), which was subsequently refined in *THE SOCIAL SYSTEM* (1951) and *TOWARD A GENERAL THEORY OF ACTION* (1951). For more information on Parsons’ scholarship and career, see *Talcott Parsons*, AM. SOCIO. ASS’N, <https://www.asanet.org/talcott-parsons> [<https://perma.cc/7RPV-ESP6>].

55. See, e.g., JOHN. J. MACIONIS, *SOCIOLOGY* 42 (16th ed. 2018).

56. See generally SUTTON, *supra* note 53.

57. SUTTON, *supra* note 53, at 225.

time the government cut LSC funding.⁵⁸ Functionalists, like Parsons, who view the growing influence of private professions as a positive “counterweight” to government power, might view the growth of big law pro bono with similar enthusiasm.⁵⁹ Since law is a profession, big law pro bono could be seen as a way to move public interest work away from control by the government through financing and towards the functionalist ideals of professionalism, which include autonomy, community, and self-regulation.⁶⁰

Weberian theory, on the other hand, is based on the works of Max Weber, a German sociologist of the late nineteenth and early twentieth centuries.⁶¹ Weber is considered one of the founding theorists of modern social science.⁶² While functionalists posit a rosy picture of institutions rising to fulfill unmet needs, Weberian theorists argue that workers are motivated by a desire to “maximize their prestige, incomes, and practical autonomy.”⁶³ In order to achieve this, workers collectively try to create “a monopoly over the work they do.”⁶⁴

These professional monopolies can be achieved in two ways. First, the profession may create difficult entry requirements that are often expensive and competitive in order to limit the number of people who join the profession.⁶⁵ Examples in the legal profession include the LSAT, the bar exam, the limited sizes of law school graduating classes, and competitive legal internships.⁶⁶ Second, the profession may establish exclusive control over a service by maintaining rigid boundaries between it and other professions.⁶⁷ In the legal profession, this often takes the form of limiting the ways non-lawyers like paralegals, real estate agents, and accountants may encroach on traditional legal activities.⁶⁸ In order to control who enters the field, these professions must maintain a sense of prestige and legitimacy in the eyes of society.⁶⁹ Consequently, a Weberian would likely see the rise of big law pro bono as a law firm’s way to retain a monopoly over the profession by doing what society views as good and thus “legitimizing the profession in the eyes of the public.”⁷⁰ Further, by practicing pro bono, law firms can exclude non-lawyers who might

58. Cummings, *supra* note 7, at 18.

59. See SUTTON, *supra* note 53, at 225.

60. See *id.* at 225–26.

61. Sung Ho Kim, *Max Weber*, STAN. ENCYCL. PHIL. (Aug. 24, 2007), <https://plato.stanford.edu/entries/weber/> [<https://perma.cc/B64L-7KLH>].

62. *Id.*

63. SUTTON, *supra* note 53, at 227.

64. *Id.*

65. *Id.* at 228–29.

66. See *id.* at 228–29, 231–37.

67. See *id.* at 229.

68. *Id.* at 229–30, 247.

69. See generally *id.* at 228–29.

70. See *id.* at 249.

use the otherwise unmet needs of pro bono clients to encroach on fields that traditionally belong to the legal profession.⁷¹

The next Section uses these two theories to understand the possible motives of big law firms, big law firm attorneys, and PILOs that engage in big law-PILO partnerships.

A. The Interests and Motives of Big Law Firms and Big Law Attorneys

In a telling answer at a panel, a senior associate at a big law firm summarized various factors that motivate big law firms to engage in pro bono:

*Pro bono aligns with the interests of our paid clients, many of whom themselves volunteer in the community. It can be not only good marketing for the firm, but also helps with the retention of staff, as it keeps attorneys engaged, excited and energized. Pro bono is important for lawyer recruitment, as a strong pro bono program serves as a powerful enticement for prospective associates who wish to work in an environment that embraces pro bono service, and members of today’s millennial generation want to make an impact and drive change.*⁷²

The associate went on to say that pro bono ultimately “promotes our nation’s rule of law and ensures a more civil and just society.”⁷³ By comparing big law interests—attorney recruitment and retention, paid client interests, and the promotion of a “more civil and just society”—to PILO goals,⁷⁴ we can assess whether these interests are fundamentally at odds with each other. This assessment provides context for this Note’s later analysis of whether the big law-PILO relationship can function to the actors’ mutual benefit.

1. Creating a “More Civil and Just Society”?

As explained above, big law firms or big law attorneys may claim that they engage in pro bono for altruistic reasons: to contribute to a more just society. Both functionalist and Weberian theorists would most likely dispute such claim, albeit in their own ways. A functionalist might agree that law firms engage in pro bono to help create a more just society, but would still view pro bono as problematic because it allows lawyers to compartmentalize corporate work and pro bono work.⁷⁵ As one lawyer put it, “you take pro bono and kind of use that as an outlet to reclaim at least a small area . . . where you’re doing what you want

71. See Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC’Y REV. 79, 100 (2007) (finding that lawyers participate in pro bono at higher rates in states where the legal profession perceives non-lawyers’ unauthorized practice as a threat to the profession).

72. Nicholas Gaffney, *Pro Bono Carries Benefits Beyond Any One Case*, LAW PRAC. TODAY (Jan. 13, 2017) (emphasis added), <https://www.lawpracticetoday.org/article/pro-bono-benefits/> [<https://perma.cc/4S65-RJM5>].

73. *Id.*

74. See *supra* Part IV.B.

75. Cummings, *supra* note 7, at 13; see *infra* notes 115–118 and accompanying text.

to do.”⁷⁶ Thus, law firms may promote pro bono because it allows lawyers to feel like they are doing good in the world. By creating a pro bono outlet, law firms can ensure that fewer attorneys leave because they are tired of corporate work. The problem with compartmentalizing is that lawyers who engage in pro bono may not feel the need to think as critically about the ethics of their corporate practice as they might if they could not consider their pro bono work in the balance. This is not to say that every big law attorney practices law in a way that is morally problematic. Rather, engaging in a pro bono practice creates an opportunity for big law attorneys to avoid critically facing and owning their choices and any qualms that may arise in so doing.

A Weberian theorist, on the other hand, would likely critique the very notion that law firms engage in pro bono to create a more just society. Such a theorist would likely argue that the true goal of pro bono is monopolization of the legal industry. By engaging in pro bono, law firms facilitate their monopoly by “legitimizing the[ir] profession in the eyes of the public” and by attracting clients who want to be associated with socially conscious law firms.⁷⁷ In other words, Weberians might theorize that the law firm engages in pro bono for symbolic or other self-interested reasons that have little to do with the public good.

2. *Marketing to Potential Commercial Clients*

Pro bono is often viewed as a way for law firms to attract commercial clients by showing that they share social values. In the past, clients had long-standing relationships with a few firms, whereas today, clients often work with a variety of firms.⁷⁸ This competition incentivizes law firms to think of new ways to compete with each other to draw clients in, such as through publicizing their pro bono practices.⁷⁹

3. *Recruitment and Retention*

Another important interest for big law firms is the recruitment and retention of quality law students, attorneys, and staff. Law firms expanded rapidly in the 1960s, which led to an increasing need for young attorneys in the 1970s.⁸⁰ But many law students during that period of time were attracted to public interest

76. Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT’L J. LEGAL PRO. 209, 220 (1998).

77. SUTTON, *supra* note 53, at 249.

78. Steven A. Boutcher, *Rethinking Culture: Organized Pro Bono and the External Sources of Law Firm Culture*, 8 U. ST. THOMAS L.J. 108, 124–25 (2011).

79. *Id.* at 125.

80. See Cummings, *supra* note 7, at 35 (“The first wave of institutionalization occurred in the late 1960s, as rapid law firm growth increased demand for new associates at a time when the lure of exciting new opportunities within the public interest field was drawing the attention of elite law students away from commercial work.”).

organizations that spoke to progressive student ideals.⁸¹ Thus, "[a]n important impetus for the formation of these early [pro bono] programs was a desire to compete with public interest and legal services organizations, which were attracting graduates of elite law schools during a wave of progressive student activism."⁸² The rise of big law pro bono pulled law students away from PILOs and pushed them towards law firms, all while appearing to serve the interests of the community and the progressive causes that attracted law students to PILOs in the first place.⁸³ Recall the Weberian theory that professions seek to establish "a monopoly over the work they do."⁸⁴ Although this Weberian theory is often employed to explain how professions act to protect their "jurisdiction" from outside occupations, here the theory can be extended to law firms responding to a threat coming from within their own profession.⁸⁵

Law student and young attorney interest in public interest work continues today. In a 2006 study of law school graduates, Robert Granfield and Philip Veliz found that 73 percent of respondents endorsed their law schools' efforts to implement mandatory pro bono into the curriculum.⁸⁶ The study suggested two primary reasons why law students want to engage in pro bono work while in school. First, some respondents demonstrated being motivated by "good lawyering."⁸⁷ They support pro bono for its instrumental value in developing their skills, creating contacts, and allowing for a more hands-on legal experience.⁸⁸ Other scholars have similarly described how young attorneys may also seek out pro bono opportunities to get practical experience with, presumably, lower stakes for the company's commercial clients.⁸⁹ These students' and young attorneys' primary motivation for engaging in pro bono, then, is self-interest. Second, Granfield and Veliz proposed that other respondents were motivated by "lawyering for the good."⁹⁰ They view pro bono as "intrinsically beneficial" and a way to understand "the needs of the less fortunate."⁹¹ These students' and young attorneys' primary motivation for engaging in pro bono is altruistic.

A functionalist might argue that this latter motivation exemplifies how professions offer "an important source of community" and that community

81. See Cummings & Rhode, *supra* note 25, at 2370–71.

82. *Id.* at 2370.

83. *See id.*

84. *Supra* note 64 and accompanying text.

85. SUTTON, *supra* note 53, at 228–31.

86. Robert Granfield & Philip Veliz, *Good Lawyering and Lawyering for the Good: Lawyers' Reflections on Mandatory Pro Bono in Law School*, in PRIVATE LAWYERS & THE PUBLIC INTEREST, 53, 67 (Robert Granfield & Lynn Mather eds., 2009).

87. *Id.* at 59.

88. *Id.* at 67.

89. See Cummings, *supra* note 7, at 111.

90. Granfield & Veliz, *supra* note 86, at 59.

91. *Id.* at 67.

creates a “moral orientation toward service.”⁹² Either way, many schools provide ample opportunity for students to expose themselves to pro bono work. For example, many law schools provide an option for law students to engage in pro bono services in a variety of subject matter areas.⁹³ As law student and young attorney interest in pro bono work remains prevalent, it will continue to influence big law recruitment efforts.

Another important development that links big law pro bono with law student recruitment is the genesis of including pro bono work as a criterion in law firm rankings. Law students often rely on the *American Lawyer* (known colloquially as “AmLaw”) and Vault rankings when choosing an employer, and law firms know this.⁹⁴ Consequently, by including pro bono hours in their rankings, AmLaw and Vault “changed the phenomenon they claimed to measure.”⁹⁵ The rankings encouraged firms to both increase their pro bono hours and create an organized pro bono program to help them stand out to recruits.⁹⁶ Firms that wanted to rise in these ranking systems hired pro bono counsel and supervising attorneys to make sure the quantity of pro bono matched or exceeded that of other firms.⁹⁷

Law firms also began marketing their pro bono practices by listing popular PILO partners on their websites and in surveys to attract attorneys and bolster their reputations.⁹⁸ PILO partnerships make it easier to market pro bono by providing a steady source of public interest work for law firms.⁹⁹

4. *Young Attorney Training*

A final factor that motivates big law firms to partner with PILOs is that firms see pro bono as a way to train attorneys before letting them work with

92. SUTTON, *supra* note 53, at 225–26.

93. See, e.g., *Clinical Program*, BERKELEY LAW, <https://www.law.berkeley.edu/experiential/clinics/> [https://perma.cc/A9ET-SZTY]. Berkeley Law’s clinical program includes fourteen clinics, including the Death Penalty Clinic, the International Human Rights Law Clinic, and the East Bay Community Law Center.

94. Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL’Y REV. 83, 97 (2013) (“One prominent argument advanced to explain the rise of pro bono in large law firms focuses on how pro bono work affects these firms’ positions in the Am Law and vault.com firm rankings, and thus their attractiveness both to clients and to attorneys they might try to recruit. . . . [E]xisting research does suggest that the lawyers who work in large law firms certainly believe that this is the case.”).

95. Cummings & Rhode, *supra* note 25, at 2372.

96. *Id.* at 2372–74.

97. *Id.* at 2374.

98. See Cummings, *supra* note 7, at 125.

99. See William J. Dean, *The Role of the Private Bar*, 25 FORDHAM URB. L.J. 865, 868–69 (1998).

commercial clients.¹⁰⁰ As a former pro bono chairman at Jenner & Block explained in an interview with Chambers Associate:

A very big factor in a firm's decision to do pro bono is that it's a great training tool for younger associates Sometimes the stakes are so high [at Jenner & Block] that the youngest associates don't get the participation they might want [with the bigger clients]. . . . The program allows younger attorneys to make decisions about strategy, and learn how to conduct themselves in court under our supervision. They learn all those essential elements of litigation that young attorneys need in order to develop into successful older attorneys and partners.¹⁰¹

B. PILOs' Interests and Goals

As the history of pro bono demonstrates, PILOs are motivated to partner with big law firms because they need funding and resources. For some PILOs, partnering with big law firms has been a huge success. For example, as Walter Smith, the Executive Director of DC Appleseed Center for Law & Justice, put it, "I have nothing but good experiences [with big law firms]."¹⁰² This may be because Smith spent sixteen years at the law firm Hogan Lovells, where he also served as the director of the firm's pro bono practice.¹⁰³ This background gives him a deep understanding of how to partner successfully with law firms and develop relationships with a number of important contacts.¹⁰⁴ In fact, his entire nonprofit model is based on big law firm partnerships. DC Appleseed only employs about six people but manages to work on ten to fifteen projects at any given time.¹⁰⁵ How is this possible? Smith recruits law firm partners to staff projects, and if it goes well, they often end up serving on the board, joining committees, and becoming sponsors at his annual gala.¹⁰⁶ As discussed in Part II, when a big law partner wants their firm to take on a case, the pro bono coordinator usually defers to the partner.¹⁰⁷ Thus, good relationships with law firm partners are just as important as good relationships with the law firm itself. PILOs that partner with law firms often want to create what Walter Smith says

100. Leslie C. Levin, *Pro Bono Publico in a Parallel Universe: The Meaning of Pro Bono in Solo and Small Law Firms*, 37 HOFSTRA L. REV. 699, 708 (2009) ("For large law firms, pro bono work is important for associate hiring, retention of lawyers, training, improved client relationships, and business development.").

101. *Pro Bono*, CHAMBERS ASSOC., <https://www.chambers-associate.com/where-to-start/pro-bono> [<https://perma.cc/R72R-D5KR>].

102. Telephone Interview with Walter Smith, Executive Director, DC Appleseed Center for Law & Justice (Oct. 20, 2020).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. See *supra* note 19 and accompanying text.

DC Appleseed has achieved: long-lasting relationships with big law attorneys and increased engagement, resources, funding, and donations.¹⁰⁸

V.

PROBLEMS WITH BIG LAW-PILO PARTNERSHIPS

This Note assumes that—in the context of their partnership—law firms should prioritize PILOs’ interests over their own interests because the definitive nature of pro bono is for those with more abundant resources to help those with more limited resources.¹⁰⁹ This Note also assumes that PILO autonomy should be maintained throughout the partnership. In the existing big law pro bono system, these two goals are not always met, and this dilemma may be attributed to a variety of problems. This Section begins by exploring the nonalignment of big law firm and attorney motivations with PILO interests. The tension here leads to three more problems: (1) lack of qualitative data about partnership effectiveness, (2) avoidance of certain causes by big law firms, and (3) lack of big law attorney expertise, which may drain PILO resources. Each of these problems can deteriorate the partnerships, and sometimes even harm the PILOs’ interests. It is important to note that the lack of qualitative data regarding big law-PILO partnerships makes it difficult to know the extent of each of the problems listed in this Section.

A. The Motivations of Big Law Firms and Big Law Attorneys Do Not Always Align with PILO Interests

An essential problem arises from the fact that the interests of big law attorneys are not always aligned with the interests of the PILOs they work with. For example, some young big law attorneys engage in pro bono for “good lawyering.”¹¹⁰ As described in Part IV, these attorneys’ primary motivation is to improve their own skills—not to provide the best possible service to the PILO and its clients.¹¹¹ This divergence in motivation can potentially create problems like less thoughtful work product or lower commitment levels. Likewise, when big law firms see pro bono primarily as a tool to train young associates to better serve commercial-client interests, PILO interests may take a back seat.

108. Telephone Interview with Walter Smith, *supra* note 102. DC Appleseed exemplifies what Cummings referred to as the “co-counseling model”:

[O]ne or two [PILO] staff attorneys . . . develop a joint litigation plan in connection with law firm volunteers. The volunteers generally take on the bulk of the litigation responsibility, such as discovery and court hearings, although staff attorneys will assist in brief writing and conduct depositions. Staff attorneys are viewed as lending substantive legal and policy expertise . . .

Cummings, *supra* note 7, at 46–47 (footnote omitted).

109. See *supra* note 4 and accompanying text.

110. See *supra* notes 87–88 and accompanying text.

111. See *supra* notes 87–88 and accompanying text.

But even if attorneys engage in pro bono as a means of “lawyering for the good,”¹¹² both functionalists and Weberians would recognize that there are inherent problems in the framework. Functionalist theory suggests that attorneys may be motivated by altruism.¹¹³ But functionalists might still view pro bono as problematic because it allows attorneys and law firms to compartmentalize the public-duty side of the legal profession.¹¹⁴ This compartmentalizing is necessary because the legal profession is built around two legal obligations that are often at odds with each other.¹¹⁵ On the one hand, lawyers are expected to act as “morally neutral technicians” who use their expertise to achieve their clients’ goals.¹¹⁶ On the other hand, lawyers are expected to maintain “moral autonomy” by advising clients to act in ethical ways and taking positions that “advance the broader public good.”¹¹⁷ This leaves lawyers with a dilemma: are they morally neutral or morally autonomous? Instead of choosing between the two, pro bono allows attorneys at large law firms to satisfy both obligations in separate contexts: They can feel good about serving their commercial clients in a morally neutral manner because they do pro bono to fulfill their obligation to “advance the broader public good.”¹¹⁸ In sum, the functionalist critique of pro bono may be that big law attorneys’ potential use of pro bono to satisfy their expected “moral autonomy,” freeing them up to serve corporate clients in a “morally neutral” way, is problematic because it may cause them to overlook potential personal qualms with corporate work.

Conversely, a Weberian theorist would be more skeptical of altruistic motives overall.¹¹⁹ Thus, a Weberian would view lawyers who engage in pro bono as motivated by a desire to achieve moral justification and “symbolic capital.”¹²⁰ Weberian theory suggests that pro bono, like other systems of professional ethics, serves to protect the legal profession’s “jurisdiction” by “legitimizing the profession in the eyes of the public and by defending individual practitioners from criticism.”¹²¹ This theory finds support in a study where lawyers who engaged in some pro bono work reported more job satisfaction than lawyers who did not, but where *increasing* pro bono hours either decreased or had no effect on attorney satisfaction.¹²² One explanation for this finding is that

112. See *supra* note 90 and accompanying text.

113. See *supra* note 75 and accompanying text.

114. See *supra* note 75 and accompanying text.

115. See Cummings, *supra* note 7, at 8–9.

116. *Id.* at 8.

117. *Id.* at 8–9.

118. See *id.* at 18 (“[P]ro bono . . . allow[ed] private lawyers to carve out space for discharging their professional duty without disrupting relations with paying clients.”).

119. See *supra* note 63 and accompanying text.

120. See Ronit Dinovitzer & Bryant G. Garth, *Pro Bono as an Elite Strategy in Early Lawyer Careers*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 86, at 115, 127.

121. SUTTON, *supra* note 53, at 248–49.

122. Dinovitzer & Garth, *supra* note 120, at 128.

attorneys who engage in pro bono work receive joy from the symbolic capital only—and once that goal has been achieved, the motivation is satisfied.¹²³

Weberian theory suggests that lawyers in both the “good lawyering” and the “lawyering for the good” camps have little reason to change the current big law pro bono system. The status quo allows “good lawyering” attorneys to improve their legal skills and “lawyering for the good” attorneys to receive symbolic capital. On the other hand, attorneys who exemplify the functionalist version of “lawyering for the good” are theoretically more motivated to improve the big law pro bono system.

It is difficult to know how many “lawyering for the good” and “good lawyering” attorneys exist in the world and further, how many exist in big law. I hypothesize that many of the attorneys who are motivated by an altruistic desire to serve the needs of the “less fortunate” are more likely to be found at PILOs than at big law firms. However, it is commonplace for some attorneys to join big law firms for a few years in order to pay back loans before transitioning to a job in government, in-house, or in the public interest sector.¹²⁴ In fact, at 20 percent attrition, law firm turnover is almost ten times that of Fortune 100 Best Companies.¹²⁵ Attorneys may also work at big law firms for other reasons, despite their being public interest-minded. Some of those may be like the attorneys described in Part IV who think they are fulfilling their public duty by completing pro bono hours at their firms and can have it all. And perhaps some attorneys engage in pro bono for multiple reasons. Regardless of attorneys’ current motives, Part VI of this Note suggests that increased education and data may change how attorneys view pro bono, thus triggering their more altruistic side, and helping to resolve some of the problems caused by the conflicting interests of big law actors and PILOs.

B. Gaps in Data

Another problem is the lack of available data measuring the qualitative effectiveness of big law-PILO partnerships. For example, the *American Lawyer* survey only evaluates the “average number of pro bono hours per lawyer and the percentage of lawyers with more than 20 hours of pro bono work” per year.¹²⁶ There is no metric regarding qualitative aspects like the quality of pro bono work big law attorneys produce or whether the law firm prioritizes pro bono hours.

123. There are many other potential explanations for this finding. For example, attorneys might experience a decrease in happiness because they might feel pressure from their law firm to concentrate on commercial clients.

124. See, e.g., *The Three Years and Out Plan*, BIGLAW INVESTOR, <https://www.biglawinvestor.com/the-three-years-and-out-plan/> [https://perma.cc/465K-UASV].

125. *Lawyers Quitting Big Law Firms in Droves: Why Lawyers Are Quitting BigLaw*, LAWCROSSING (Sep. 19, 2019), <https://medium.com/@LawCrossing/lawyers-quitting-big-law-firms-in-droves-why-lawyers-are-quitting-biglaw-7526b1a27dd6> [https://perma.cc/36YE-BKAA].

126. See *The 2019 Pro Bono Report*, AM. LAW., <https://www.law.com/americanlawyer/rankings/pro-bono/> [https://perma.cc/JPR2-9CXE].

While law students may want to work for a firm with a “great pro bono practice,” law firms are able to attract students without addressing the more qualitative aspects of their pro bono work. Students are given little information other than the average number of pro bono hours per attorney, whether pro bono hours count as billable hours, and whether billable pro bono hours are “capped.”¹²⁷ Without more data, law students in the market for big law employers may have a hard time differentiating between pro bono programs. Further, without data on the qualitative success of a partnership, PILOs may have a difficult time making an informed decision about which firms they want to partner with. Thus, collecting qualitative pro bono data can help PILOs and law students make more informed choices. Further, this data may also encourage law firms to make sure that PILOs and PILO clients are satisfied with the firm’s work.

C. *Avoidance of Certain Cases and Causes*

Another problem arises where a big law firm’s interest in pursuing or avoiding certain causes and cases conflicts with the cases that their PILO partners would otherwise wish to pursue. This phenomenon harms PILO autonomy because they may not be able to serve clients of their own choosing. A TrustLaw survey found evidence of some categorical trends in big law pro bono.¹²⁸ The survey found that large law firms spent the most time on organizations and initiatives targeting access to justice (72.4 percent of firms surveyed), followed by human rights (67.2 percent), followed by immigration, refugees, and asylum projects (58.6 percent).¹²⁹ Sectors like land and water rights (10 percent), and sexual and reproductive rights (11 percent) received the least attention from firms of all sizes.¹³⁰ There are several explanations, discussed below, for why law firms might avoid particular causes, including (1) the firm’s direct positional conflicts of interest, (2) the firm’s desire to avoid controversial cases and causes that may harm its image (indirect positional conflicts of interest), and (3) the firm’s desire (and its attorneys’ desires) to participate in high-profile cases that attract attention and support its marketing and recruitment efforts.

Through interviews with pro bono coordinators and pro bono counsel at big law firms, Professor Scott L. Cummings explains why big law firms select or avoid certain causes based on direct and indirect positional conflicts.¹³¹ In general, big law firms tend to exclude employment, environmental, and consumer cases,¹³² in part because they are reluctant to take on causes that may

127. See *id.*; *The 2020 Survey of Pro Bono Hours*, *supra* note 23.

128. THOMSON REUTERS FOUND., *supra* note 3, at C3.

129. *Id.*

130. *Id.* at C4.

131. See Cummings, *supra* note 7, at 116–35.

132. *Id.* at 118–19.

present them with a conflict of interest.¹³³ Employment, environmental, and consumer causes often involve cases against the same corporations that big law firms regularly represent.¹³⁴ The pro bono coordinator at Skadden and Kilpatrick Townsend confirmed that firms rarely take on employment-related civil rights cases due to positional conflicts.¹³⁵ Similarly, environmental litigation often involves challenges against corporate emissions or the site of hazardous facilities, which can raise conflicts between these pro bono cases and law firm corporate clients.¹³⁶ Firms that do accept consumer law cases tend to focus on “small-time scam artists,” predatory lenders, or fraudulent document preparers rather than large-impact discrimination or fraud suits against corporations or major banks.¹³⁷

Some scholars suggest that firms also turn down pro bono work that their commercial clients might not approve of even if those clients are not directly impacted.¹³⁸ For example, a firm without an environmental litigation practice may still refuse to take on environmental pro bono cases because the firm has a banking client who does business with the timber industry.¹³⁹ Thus, even though firms often tout pro bono as “equal” to their commercial work,¹⁴⁰ a hierarchy of interests exists.

Also, since big law firms often use pro bono to train attorneys, firms may choose cases or causes they think will be attractive to their associates. In selecting pro bono projects, individual attorneys gravitate towards “likable” clients and cases that are “likely to be winnable or to achieve some sort of feel-good result.”¹⁴¹ In interviews, with pro bono coordinators expressed frustration about the fact that lawyers often focus on their own preferences instead of areas

133. *Id.* at 117–18 (“Firms . . . tend to take an expansive view of positional conflicts in the pro bono context, making cautious case selection decisions that screen out potentially troublesome pro bono work.” (footnote omitted)).

134. *Id.* at 118–19 (“The most noticeable effect is to exclude pro bono cases that strike at the heart of corporate client interests, particularly employment, environmental, and consumer cases in which plaintiffs seek pro bono counsel to sue major companies.”).

135. *Id.* at 119.

136. *See id.*

137. *Id.* at 119–20.

138. *See, e.g., id.* at 116, 122 (“[E]ven when positional conflicts are not technically at issue, firms can take a dim view of ‘pro bono activities that might merely *offend* the firm’s regular clients or its prospective clients.” (quoting STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* 77 (2004))); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1414–15 (1998) (“On issue conflicts what we ask is whether we have a client base that would care if we take this particular matter on.” (quoting interview with pro bono coordinator for a large San Francisco law firm)).

139. Spaulding, *supra* note 138, at 1419.

140. *See, e.g.,* Pro Bono Net, *Fiona Finlay-Hunt, Davis Polk & Wardwell LLP*, PROBONO.NET, https://www.probono.net/celebrate/item.6595-Fiona_FinlayHunt_Davis_Polk_Wardwell_LLP [<https://perma.cc/33HA-FT26>] (“We consider pro bono work to be of equal stature to billable matters, and our lawyers offer the same caliber of service to our pro bono clients as we do to our paying clients.”).

141. Karen A. Lash, *Pitching Pro Bono: Getting to First Base with the “Big Firm,”* 2 DEPAUL J. SOC. JUST. 141, 148–49 (2008).

with a “huge legal need.”¹⁴² For example, it is difficult for pro bono coordinators at big law firms to find attorneys willing to take on homelessness issues, perhaps because homeless clients are seen as less sympathetic,¹⁴³ even though there is a substantial need for legal aid and services for homeless communities.¹⁴⁴

This cause avoidance hinders PILO autonomy. PILOs dependent on their big law partnerships may evaluate whether to pursue cases through a big law “lens,” selecting only cases that will attract big law firms and attorneys, thus harming their autonomy and their clients, whom they cannot afford to serve without big law aid.¹⁴⁵ While PILOs can try to “shop” unpopular causes to different firms, doing so is increasingly difficult. As big law firms expand and merge, they grow more similar to each other and therefore become interested in and resistant to similar pro bono cases and causes.¹⁴⁶

D. Lack of Big Law Attorney Expertise, Which Drains PILO Resources

Though big law firms have extensive experience in the commercial-client context, some big law advantages fade when it comes to pro bono matters.¹⁴⁷ For example, one important big law advantage is attorney expertise in particular practice areas.¹⁴⁸ But big law attorneys are often unfamiliar with pro bono case subject matter, in part because attorneys often choose pro bono cases outside of their law firm area of expertise. This happens due to positional conflicts at times, but also because pro bono provides attorneys with a respite from the big law “grind.”¹⁴⁹ Attorneys may, therefore, gravitate toward work that feels different from the work they typically do at the firm—work they are not experts in. In fact, the opportunity to work outside of a big law attorney’s area of expertise is often a selling point that pro bono organizations use to convince attorneys to volunteer

142. Cummings & Rhode, *supra* note 25, at 2422.

143. *Id.* (“Homeless issues—it is difficult to sell those matters.” (quoting interview with pro bono coordinator)).

144. Cummings, *supra* note 7, at 141 (“Clients who are less sympathetic are kept at a greater distance.”).

145. *See id.* at 140 (“Nonprofit organizations are acutely aware of the need to market pro bono cases that appeal to volunteers, whose satisfaction is critical to generating repeat pro bono participation and whose goodwill can be tapped for financial contributions.”).

146. *Id.* at 121 (discussing how firm-specific conflicts “suggest the potential for greater difficulties as the diversity of practice areas in big firms increases through mergers and other expansion activities”).

147. *See Galanter, supra* note 31, at 98–100 (discussing the advantages of being a repeat player in litigation, which include “expertise and . . . ready access to specialists”; the ability to “play for rules as well as immediate gains”; and “the resources to pursue . . . long-run interests”).

148. *See, e.g., Attorney Specialization: Have We Gone Too Far?*, LEXIS LEGAL ADVANTAGE (June 21, 2019), <https://www.lexisnexis.com/community/lexis-legal-advantage/b/trends/posts/attorney-specialization-have-we-gone-too-far> [<https://perma.cc/GTX6-R7TP>].

149. *See Cummings, supra* note 7, at 113.

their time.¹⁵⁰ Because big law attorneys work on pro bono matters outside of their expertise and often on a less-consistent basis, PILOs must use more of their own resources to train and monitor big law attorneys' pro bono work.¹⁵¹

Another problem for PILOs that depend on big law pro bono is quality control.¹⁵² Attorneys who engage in pro bono are often inexperienced and do not prioritize their pro bono work.¹⁵³ Further, big law attorneys spend less time on pro bono matters than on their regular work.¹⁵⁴ As a result, PILO attorneys may be left with tasks like rewriting subpar briefs, monitoring issues that arise, and making up for other deficiencies.¹⁵⁵

Despite these problems, PILOs still rely on big law partnerships for resources, funding, and donations. To attract and retain big law attorneys, PILOs often offer them the most "exciting" parts of a case, like key depositions, leaving administrative tasks for PILO attorneys who are experts in the field.¹⁵⁶ By sacrificing the most interesting work, PILOs may struggle to train and retain their own attorneys.¹⁵⁷ Consequently, even though PILOs are motivated to partner with big law firms for resources, the partnership can drain PILO resources and increase employee turnover.

E. Attorneys and Firms May Choose Impact Litigation Cases They Do Not Have the Capacity to See Through

One key category of cases that can drain resources is impact litigation. A pro bono coordinator from Morrison & Foerster offered the following tip to PILOs looking to partner with a big law firm: "Don't expect me to do your individual client cases that you are trying to get off your desk and then go to

150. See, e.g., *Volunteering*, PRO BONO PROJECT, <https://www.probonoproject.org/volunteering/> [<https://perma.cc/V5AC-JR8B>] ("Young attorneys or experienced attorneys working outside their area of expertise receive the additional benefit of mentoring from seasoned attorneys when they take on these pro bono cases.").

151. See Cummings, *supra* note 7, at 143.

152. *Id.* ("The D.C. Bar Pro Bono Program, for instance, reports that one of the main difficulties with pro bono placement is monitoring the quality of work by pro bono volunteers, many of whom are younger associates operating without a great deal of partner supervision.").

153. See *id.* at 135 ("Pro bono permits only episodic involvement in public service activities since lawyers must devote themselves primarily to the representation of corporate clients.").

154. See, e.g., *The 2020 Pro Bono Scorecard: The National Rankings*, AM. LAW. (July 6, 2020), <https://plus.lexis.com/api/permalink/61f40c94-879b-4478-bfdb-3231ec241b2e/?context=1530671>; Kathryn Rubino, *The Best Biglaw Firm for Pro Bono*, ABOVE THE L. (July 21, 2020), <https://abovethelaw.com/2020/07/the-best-biglaw-firm-for-pro-bono/> [<https://perma.cc/S7LH-5AP2>] (stating that lawyers at the highest-ranked firm for pro bono work averaged 175.4 hours in 2019, citing the *American Lawyer's* rankings).

155. See Cummings, *supra* note 7, at 143 ("One ACLU attorney noted that the organization at times receives briefs authored by pro bono volunteers that are of insufficient quality, requiring significant staff input to prepare them for filing.").

156. See *id.* at 144.

157. *Id.* ("This can generate burnout and foster turnover as staff lawyers tire of the heavy administrative role they have to play to allow their private firm counterparts to engage in meaningful pro bono lawyering.").

another firm with your juicy impact cases.”¹⁵⁸ The pro bono coordinator from Manatt expressed a similar sentiment: “It nearly goes without saying: firms LOVE impact work. If there is some huge, oppressive issue looming out there that makes you sick to your stomach . . . that is EXACTLY the kind of issue I want to hear about.”¹⁵⁹ These statements are bolstered by Professors Cummings and Rebecca Sandefur’s findings that the nation’s largest law firms are “more likely to partner with ‘cause-oriented’ organizations (rather than cultural, community, or legal services organizations).”¹⁶⁰

There are numerous examples of successful impact litigation and class action cases that involve big law-PILO partnerships. For example, attorneys from White & Case partnered with the American Civil Liberties Union (ACLU) of Michigan and the Education Law Center to file a class action complaint on behalf of thirty thousand school-age children from Flint, Michigan, who were exposed to lead in the water.¹⁶¹ Akin Gump’s website declares, “Impact litigation is a particularly important part of our pro bono practice.”¹⁶² It then goes on to provide a few examples of impact cases the firm has filed, including a lawsuit “on behalf of two taxi organizations against the government of the District of Columbia [that] yielded rate and other favorable changes.”¹⁶³

While impact litigation cases involving PILOs and big law firms may end in a “win,” it is difficult to know whether the means was also a success. A number of obstacles makes it challenging for PILOs to work with big law firms on these large impact litigation cases. First, big law attorneys who engage in pro bono sporadically may be less likely to think about impact litigation through a long-term lens.¹⁶⁴ Therefore, PILOs might have to spend effort and resources educating firms about how to approach these cases. Second, it can be difficult to find impact cases that do not involve positional conflicts, especially in the environmental or corporation context.¹⁶⁵ Big law attorneys and firms may consider impact litigation “juicier,” but if they cannot afford the time and resources needed, PILOs must shoulder the extra responsibility.¹⁶⁶ This is especially true for young big law associates who may approach pro bono with the best of intentions but end up placing this work on the back burner when

158. Lash, *supra* note 141, at 158.

159. *Id.*

160. Cummings & Sandefur, *supra* note 94, at 100–01 (quoting Boutcher, *supra* note 30, at 185 tbl.1).

161. *Flint’s Future*, WHITE & CASE (Mar. 24, 2017), <https://www.whitecase.com/publications/story/flints-future> [<https://perma.cc/A8EW-YTQA>].

162. *Impact Litigation*, AKIN GUMP STRAUS HAUER & FELD LLP, <https://www.akingump.com/en/experience/practices/pro-bono/impact-litigation-1.html> [<https://perma.cc/YGQ5-9CPP>].

163. *Id.*

164. *See supra* note 154.

165. *See* Cummings, *supra* note 7, at 119.

166. *See id.* at 143 (describing how referral organizations must train volunteers, provide back-up advice, troubleshoot cases, and monitor the quality of work).

commercial clients or big law partners demand their attention.¹⁶⁷ There is some evidence that big law attorneys can successfully partner with PILOs on impact litigation cases, as demonstrated by Walter Smith at DC Appleseed.¹⁶⁸ But in order for these cases to run successfully, it is critical to find law firm partners who want to take on this responsibility. Not every PILO has the kind of connections that allow it to attract motivated partners to lead these cases.

VI. SOLUTIONS

In sum, big law-PILO partnerships can create a number of problems for PILO autonomy and success. While some of the problems can only be fully remedied by institutional changes, some of the conditions of the big law-PILO partnership may be improved through individual attorney actions. This Section first explores these solutions, considering the benefits and limitations of each. A single solution will not remedy all problems that arise in big law-PILO partnerships. Instead, these solutions may be used in different contexts and inspire others to consider creative solutions as problems arise. Finally, this Section ends with a few suggestions for future research and improved data, which will ultimately allow law students and attorneys to make more informed career choices and allow PILOs to clearly understand the potential pitfalls of partnering with law firms.

A. Institutional Solutions

In this Section, I explore alternative funding models at an institutional level that may allow for more PILO autonomy. It is important to note that each of these models comes with its own sets of issues, and many of the actors involved may also have interests and motives that differ from PILOs'. My goal is to show that (1) all of these models have flaws, which may explain the continued success of big law-PILO partnerships; and (2) despite these flaws, PILOs' best chance of autonomy is to *diversify* their funding with a combination of all these models. The more types of funding utilized, the less control any one group has over PILOs.

Private funding from foundations, businesses, or individual donors is one example of an alternative funding model. Although this funding model might circumvent big law firm control, it comes with its own set of issues. First, PILOs would still need to take on causes that are popular and align with the interests of these donors and foundations.¹⁶⁹ “[F]oundation support brings a subtle coercion of its own: to the extent that foundations develop their own funding priorities, then seek worthy programs to fund, public interest organizations may find

167. *See id.* (“[S]taff are often called upon to troubleshoot cases when volunteers fail to treat them with the same attention devoted to billable matters.”).

168. *See* Telephone Interview with Walter Smith, *supra* note 102.

169. Albiston & Nielsen, *supra* note 28, at 90.

themselves adjusting their agendas to chase resources.”¹⁷⁰ However, it might be easier for PILOs to “shop around” to find private donors who favor PILO causes instead of relying on big law firms that largely have the same interests.¹⁷¹ For example, PILOs that want to work on employment cases can attract donations from endowment funds, foundations, and trusts that support this kind of work instead of trying to secure a big law partnership.¹⁷²

Another source of alternative funding is the government. In December 2019, the federal government provided \$440 million to the LSC, a \$25 million increase from the year before.¹⁷³ Although funding has increased over the years, the need is still great and growing. Further, the increase in funding over the years may be misleading, especially after adjusting for inflation and other cost increases.¹⁷⁴

The government could also improve PILO autonomy by removing more of the LSC restrictions imposed in 1996. Current restrictions severely limit the autonomy of PILOs that receive LSC funding. For example, current LSC restrictions prohibit LSC-funded organizations from engaging with certain causes or practices even if they do not use any LSC money when working on these cases.¹⁷⁵ There have already been some successful attempts to lighten these restrictions. In 2009, the Obama administration called for increased LSC funding and the elimination of the three major legal services restrictions: those prohibiting LSC-funded organizations from accepting attorneys’ fee awards, banning certain types of litigation, and forbidding class action lawsuits.¹⁷⁶ In 2010, Congress lifted the attorneys’ fees restriction,¹⁷⁷ but the other restrictions remain.¹⁷⁸

170. *Id.*

171. *See* Cummings, *supra* note 7, at 121.

172. *See* Albiston & Nielsen, *Funding the Cause: supra* note 28, at 90 (“When organizations have diverse sources of support, and missions that closely track those of their foundation supporters, they will be less likely to be drawn away from their initial goals.”).

173. *Legal Services Corporation: Latest Developments*, AM. BAR ASS’N, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/access_to_legal_services/legal_services_corporation/ [<https://perma.cc/QDY3-GLTV>].

174. *See* John G. Levi, *On Legal Services for the Poor*, AM. ACAD. OF ARTS & SCI. (Summer 2015), <https://www.amacad.org/news/legal-services-poor> [<https://perma.cc/XNK2-WESP>] (“In 1976—our first year of full congressional funding—when 12 percent of the U.S. population was eligible for LSC-funded legal assistance, the fledgling LSC was allocated (in inflation-adjusted terms) more than \$468 million. Three years later, Congress increased funding to an all-time high of what today would be more than \$880 million.”)

175. *LSC Restrictions and Other Funding Sources, supra* note 42.

176. *Timeline of FY 2010 Appropriations Process and Efforts to Repeal Key LSC Restrictions*, BRENNAN CTR. FOR JUST. (Apr. 26, 2010), <https://www.brennancenter.org/our-work/research-reports/timeline-fy-2010-appropriations-process-and-efforts-repeal-key-lsc> [<https://perma.cc/F7LE-SRD8>]. For more information on the prohibition against certain types of litigation, like abortion, see *LSC Restrictions and Other Funding Sources, supra* note 42. For more information on banning attorneys’ fees, see Wirtz, *supra* note 44, at 1009–10.

177. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 533, 123 Stat. 3034, 3157.

178. *Timeline of FY 2010 Appropriations Process and Efforts to Repeal Key LSC Restrictions, supra* note 176.

While this progress is encouraging, more work needs to be done. President Trump sought to cut all LSC funds in 2018 and pushed for defunding in his budget plan for 2019, but he was unable to persuade Congress.¹⁷⁹ Although conservatives often approach LSC funding with suspicion,¹⁸⁰ bipartisan support is possible. Late Supreme Court Justice Antonin Scalia described the LSC as an organization that “pursues the most fundamental of American ideals.”¹⁸¹ In 2017, a few Republican members in the House signed a letter requesting continued funding for the LSC.¹⁸² And in 2020, a bipartisan Congress passed the CARES Act, which included \$50 million for the LSC.¹⁸³ Although the Biden administration may be more supportive of funding PILOs, the federal government continues to be an unreliable source of funding, and PILOs can perform prohibited work only by refusing all LSC funds.

A final source of alternative funding could be donations from big law firms and attorneys. Encouraging law firms and attorneys to donate money instead of (or together with) time could solve some of the problems regarding big law-PILO partnerships. Currently, law firms donate a relatively small amount of money to PILOs. In 2015, the *American Lawyer* found that, despite the fact that the top-200 grossing firms reported all-time highs in revenues, “the most generous firms contribute little more than one-tenth of 1 percent of their gross revenue to groups that provide basic legal services for the poor, and many fall far below that amount.”¹⁸⁴ Federal appeals court Judge David Tatel explained that if twelve of the largest DC law firms donated one quarter of 1 percent of their revenues, legal aid groups in DC could serve more than double the number of clients they currently help.¹⁸⁵ Law firm partner Mark Cunha from Simpson Thacher agreed that there should be just as much discussion about financial contributions of law

179. See Debra Cassens Weiss, *ABA President Says Trump’s Plan to Defund the Legal Services Corp. ‘Should be Dead on Arrival,’* ABA J. (Feb. 13, 2018), https://www.abajournal.com/news/article/trumps_budget_plan_would_once_again_eliminate_funding_for_the_legal_service [<https://perma.cc/22M2-YX9P>]; *Support LSC Funding – During Emergencies and Always*, WASHINGTON LETTER (Am. Bar Ass’n Governmental Affs. Off., Chicago, Ill.), Mar. 2020, at 3, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/march20-wl-pdf-final.pdf [<https://perma.cc/G4EG-GU4Y>].

180. See *supra* notes 36–38 and accompanying text.

181. *Legal Services Corporation Confident of Bipartisan Support in Congress Despite President Trump’s Call to Defund*, LEGAL SERVS. CORP. (Mar. 16, 2017), <https://www.lsc.gov/media-center/press-releases/2017/legal-services-corporation-confident-bipartisan-support-congress> [<https://perma.cc/4RSM-QLXG>].

182. Letter from Members of the U.S. House of Reps. to John Culberson, Chairman, and José Seranno, Ranking Member, Subcomm. on Com., Just., Sci. & Related Agencies, Comm. on Appropriations (Mar. 29, 2017), <https://assets.documentcloud.org/documents/3729009/3-29-17-House-LSC.pdf> [<https://perma.cc/MHQ7-YJJE>] (requesting support for funding for the LSC, with signatures from 148 members of the U.S. House of Representatives).

183. Pub. L. No. 116-136, div. B, sec. 2, tit. 2, 134 Stat. 281, 515 (2020).

184. Susan Beck, *The Justice Gap: How Big Law is Failing Legal Aid*, AM. LAW. (June 29, 2015), <https://plus.lexis.com/api/permalink/6964e691-5f2a-44f6-b33e-40bb582ee349/?context=1530671>.

185. *Id.*

firms as pro bono work,¹⁸⁶ but no one seems to know how to make this happen. If law firm rankings included individual donations in their calculus, perhaps law firms might take it more seriously, like they did with the inclusion of pro bono hours.¹⁸⁷ Through increased donations, PILOs could achieve their goals of effective advocacy by independently funding cases, and law firms could achieve their interest in higher rankings and associated benefits.

B. Individual Attorney and Law Student Solutions

This Section is meant to provide guidance for attorneys and law students who are interested in finding ways to navigate some of the problems that can develop in the big law-PILO partnership. In offering solutions, I recognize that there is no one-size-fits-all solution that can address every problem in every context. Therefore, I provide a few ideas for attorneys to consider depending on the specific situation they face. Providing multiple solutions has the additional benefit of finding solutions that may appeal to lawyers with differing motivations as described in Part V.A.

Before addressing the ways that attorneys can improve big law-PILO partnerships, I want to acknowledge that there are certain problems that cannot be solved on an individual level. First of all, it is unreasonable to expect law firms to engage in pro bono in a way that hurts their own interests. PILOs and law firms will likely always have some fundamental differences in interests and motivations. Furthermore, when it comes to case selection, big law attorneys probably cannot convince firms to take on cases that involve positional conflicts or controversial causes. Although attorney retention and recruitment played a role in the institutionalization of pro bono, there is little evidence to suggest that law firms will favor big law attorney interest over commercial-client interests. In addition, law firms institutionalized pro bono to rise in rankings in order to increase attorney recruitment and retention and attract clients. However, law firms are no longer competing for attorneys in the same way. Recall that the rise in big law pro bono occurred at a time when big law firms were competing with PILOs to attract more applicants. This is no longer the case. Big law firms are now highly sought after by students due to growing law school debt and shrinking law firm summer class sizes.¹⁸⁸ Ultimately, individual attorneys lack leverage when it comes to convincing law firms to take on causes that involve positional conflicts.

186. *See id.*

187. *See supra* note 94–97 and accompanying text.

188. *See, e.g., The Three Years and Out Plan*, *supra* note 124; Staci Zaretsky, *Biglaw Summer Programs Continue to Shrink, with 43 Percent of Firms Making Fewer Offers*, ABOVE THE L. (Feb. 22, 2018), <https://abovethelaw.com/2018/02/biglaw-summer-programs-continue-to-shrink-with-43-percent-of-firms-making-fewer-offers/> [<https://perma.cc/3KEU-QQXZ>]; Rob Bertman, *Lawyers Graduate with More Student Debt and Less Income than Expected*, STUDENT LOAN PLANNER (Feb. 6, 2021), <https://www.studentloanplanner.com/lawyers-graduate-with-more-school-debt-less-expected-income/> [<https://perma.cc/MK2F-7FTS>].

However, there are a number of other problems that individual attorneys can address by changing certain behaviors. For example, there are a few ways attorneys may combat the issue of draining PILO resources. First, attorneys might consider creating a pro bono specialty instead of engaging with a wide range of issues, thus offering consistency.¹⁸⁹ As an example, my friend Sarah who worked at a PILO last summer described how one big law attorney decided to focus all of his pro bono work on sexual harassment claims. By engaging in a focused pro bono practice, the attorney did not drain the PILO's resources since he developed an area of expertise and did not need as much training as a new attorney. By choosing to consistently partner with the same PILO, he additionally created relationships with attorneys who worked there, began to better understand their mission, and recognized how each of his cases fit into their long-term strategies. Attorneys who want to try out a wide range of pro bono practice areas might consider volunteering for a legal clinic, which entails a lower time and resource commitment, instead of engaging in full-time cases.

Second, and relatedly, attorneys should stay mindful of their other commitments and only take on pro bono work that they can see from beginning to end. Although impact litigation cases might seem more exciting, they come at a price: time and resources. Attorneys at law firms, especially young associates, are overworked by commercial clients and big law partners they want to impress.¹⁹⁰ Therefore, attorneys should be upfront with PILOs about what kind of time commitment they can offer a project and whether they feel comfortable setting boundaries with partners who may want them to prioritize other work.

Law students can also improve the big law-PILO partnership model, even before they work at law firms, by educating themselves on what it means to do quality pro bono work. Students can try to research firms' qualitative pro bono reputations instead of relying on quantitative rankings alone. Unfortunately, students have limited information to rely on at this time. Students who receive more than one offer from a law firm may use this brief window of time to ask questions about the inner workings of pro bono practices at law firms, but they may not receive an honest answer. This is also a difficult topic to ask firms about at the interview stage, when students are focused on trying to impress firms and appear committed to the firm's primary mission—serving paying customers. But with more widely available data, law firms might feel pressure to improve the

189. See Cummings, *supra* note 7, at 144 (“[T]he transient nature of pro bono work—with lawyers moving in and out of pro bono participation—makes it difficult to deeply embed knowledge within private-sector settings.”).

190. See Jaliz Maldonado, *The First-Year Associate's Guide to Managing Billable Hours*, PRACTICE PANTHER, <https://www.practicepanther.com/blog/first-year-associates-billable-hours/> [https://perma.cc/SXE8-MGMM] (“According to the National Association for Law Placement, the average number of billable hours required from a first-year associate is 1,892 hours for the latest year listed, which is 2016. But the average number of billable hours required for first-year associates at firms with more than 700 attorneys is 1,930 hours.”).

quality of their PILO partnerships, and students could perhaps have more success finding a firm with a “great pro bono practice.”

C. Future Research and Data Collection

How can big law attorneys feel empowered and encouraged to implement these solutions? Although many attorneys who engage in pro bono at big law firms may see it as a form of tool-building or symbolic justification, that does not necessarily mean they have no interest in improving the big law pro bono system. Some scholars explain that it is not that the “good lawyering” and “lawyering for the good” narratives are mutually exclusive, but that one narrative is usually more dominant than the other.¹⁹¹ If this theory is true, then it is possible that altruistic, tool-based, and symbolic justifications can all play into an attorney’s decision to engage in pro bono. One area that is ripe for future research is whether a lawyer in one camp can change motivations over time and, if so, what factors play a role in making this happen. The findings could then be implemented to help shift big law attorneys’ dominant motivation to engage in pro bono from self-interest to altruism.

Based on my personal experience, I hypothesize that educating students and attorneys about big law pro bono issues and offering practical solutions will help students and attorneys develop a more altruistic approach. When I decided to work at a law firm, I learned about pro bono from law firm websites and used pro bono as symbolic justification for my decision. During the big law interview process, I interviewed with big law attorneys who told me about how pro bono allowed them to see the inside of the courtroom and argue in front of a judge. Learning about these experiences added a tool-based motivation for pro bono. After learning about potential pro bono problems from my friend Sarah, I developed an altruistic approach to pro bono, which increased through writing this Note and thinking about how to improve the overall pro bono system. Therefore, my prediction is that greater exposure and awareness can change individual attorneys’ motivations.

There are a number of gaps in current data and research regarding big law pro bono that, if filled, could help educate law students on the issues that exist and potential solutions. As Cummings and Sandefur noted: “We know a great deal about how these vast numbers of pro bono hours are produced. But we know much less about *how good they are* and *what good they do*.”¹⁹² Cummings and Sandefur offered a number of proposals for researchers who want to study big law pro bono and its impacts.¹⁹³ Their proposals, as a useful starting point, can be adapted and expanded further. Some recommendations that would improve

191. Granfield & Veliz, *supra* note 86, at 67.

192. Cummings & Sandefur, *supra* note 94, at 85.

193. *Id.* at 105–09.

individual attorney awareness include standardized data collection, enhanced cost tracking, and standardized client and lawyer satisfaction evaluations.¹⁹⁴

Standardized data collection involves a “uniform and standardized system of case tracking” that provides information about the substance of the cases, types of services provided, and outcomes obtained.¹⁹⁵ A standardized system would make it easier for researchers to compare data and build upon prior findings.¹⁹⁶ This would result in more specific and concrete solutions to big law pro bono issues. Current data lacks standardization at even the most basic levels. It is difficult to chart pro bono hours over time, since studies disagree over which firms are considered “big law.”¹⁹⁷ Surveys on pro bono work also lack internal consistency. For example, the 2009 survey published by the American Bar Association (ABA) measured pro bono hours at firms with varying sizes but consolidated the hours of law firms with 101 or more attorneys.¹⁹⁸ In contrast, the 2018 version of this survey split that category into two groups: firms with 101 to 300 attorneys and firms with more than 300 attorneys.¹⁹⁹ The 2016 study also used a larger sample size than prior ABA studies, which may make it difficult to compare ABA studies over time.²⁰⁰ The standardized system should also include information about the big law attorneys and whether they worked on similar cases in the past or whether they partnered with the same organizations.

Although this uniform and standardized system offers benefits, law students and attorneys should approach its findings with caution in the big law-PILO pro bono context. Measuring outcomes must account for the fact that pro bono coordinators at big law firms encourage PILOs to choose cases that are “winnable” and, therefore, high success rates do not necessarily demonstrate that the current big law system enhances the chances of winning a case.²⁰¹

Better cost tracking is another opportunity for future research and data collection. Cummings and Sandefur explained that enhanced cost tracking should include information about the time that big law pro bono lawyers, support

194. *Id.* at 106.

195. *Id.* at 105.

196. *See id.* at 106.

197. Compare THOMSON REUTERS FOUND., *supra* note 3 (defining large firms as firms with two hundred or more fee earners), with AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV. & CTR. FOR PRO BONO, *supra* note 4 (distinguishing firms with 101 to 300 attorneys from firms with more than 300 attorneys).

198. AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 13 (2009), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/as/report2.pdf [<https://perma.cc/JUK7-265P>].

199. AM. BAR ASS’N STANDING COMM. ON PRO BONO & PUB. SERV., *supra* note 4, at 33.

200. *See id.* at 4 (“The 2016 study, however, utilized a slightly modified version of the survey instrument that was used for the prior national studies, but with a new data collection methodology that yielded a significantly larger sample than previous studies.”).

201. *See* Lash, *supra* note 141, at 146–48 (advising PILOs pitching pro bono to law firms to “[e]nsure a good chance of ‘winning’”).

staff, and referral agencies invested in each case.²⁰² I would add that researchers should also track costs of training new big law pro bono attorneys versus returning big law pro bono attorneys. Once we have more concrete data showing how much easier it is for PILOs to work with returning big law attorneys, it will also be easier to make the case for this solution.

Finally, Cummings and Sandefur also recommended pro bono clients and PILOs fill out standardized evaluations about the quality of big law attorney communication, responsiveness, meaningful input, and satisfaction with outcomes of a case.²⁰³ This information would do more than just help researchers identify common problems across the big law pro bono board; it may also incentivize firms and attorneys to prioritize the interests of pro bono clients and PILOs, especially if it were incorporated into big law rankings. Currently, most big law firms do not ask PILOs for feedback on their attorneys’ work, and those that do rely on informal methods.²⁰⁴ One pro bono counsel explained that informal channels are sufficient because “[w]e’d hear about it if there was dissatisfaction.”²⁰⁵ On the other hand, another counsel noted that it may be difficult for PILOs to be honest with firms who provide much-needed support.²⁰⁶ She explained, “I’d be grateful to hear if one of our attorneys didn’t step up, but I can see that [the nonprofit groups] would be reluctant to raise an issue that would ruin the relationship.”²⁰⁷ Thus, while informal methods may alert firms to issues with their work, they are not a suitable replacement for a formalized feedback system.

As Sandefur and Cummings suggested, the identity of the respondent or attorney should be kept from the public, but the identity of the big law firm should not.²⁰⁸ Gathering overall satisfaction reports and making them publicly available might motivate big law firms to focus on improving their pro bono in ways that serve pro bono clients and improve PILO satisfaction. Just like Airbnb employs a mutual host-guest rating system,²⁰⁹ and rideshare apps like Lyft and Uber use a passenger-driver rating system,²¹⁰ a big law-PILO rating system would allow for greater accountability.²¹¹ Of course, it is still possible that even

202. Cummings & Sandefur, *supra* note 94, at 106–07.

203. *Id.* at 106.

204. *See supra* note 25 and accompanying text.

205. Cummings & Rhode, *supra* note 25, at 2402–03.

206. *Id.* at 2403.

207. *Id.* (alteration in original).

208. Cummings & Sandefur, *supra* note 94, at 106.

209. *How Do Reviews Work for Stays?*, AIRBNB, <https://www.airbnb.com/help/article/13/how-do-reviews-work-for-stays> [<https://perma.cc/768C-87GT>].

210. *Driver and Passenger Ratings*, LYFT, <https://help.lyft.com/hc/en-us/articles/115013079948-Driver-and-passenger-ratings> [<https://perma.cc/6AH9-EABD>]; *How Is My Rating Determined?*, UBER, <https://help.uber.com/riders/article/how-is-my-rating-determined---?nodeId=bfea011b-3fde-4647-8b4a-5cc1bbc37899> [<https://perma.cc/XGT7-J57H>].

211. *See How Is My Rating Determined?*, *supra* note 210 (“Providing a rating fosters mutual respect between riders and drivers. This strengthens our community and help everyone get the most from Uber.”).

anonymous formalized feedback may not be enough to encourage honest feedback from PILOs who may feel pressure to maintain good relationships with big law firms. If such a system is employed, researchers should investigate the reliability of reviews. If formalized review does work, it will also provide law students with a method to differentiate between big law pro bono practices. Furthermore, although the identity of the respondent or attorney may not be made public, big law firms and pro bono coordinators should receive this information in order to monitor and improve individual attorney work. Big law firms and PILOs alike benefit from a positive experience.

CONCLUSION

I began this Note with a single goal: to show young attorneys the problems that arise when law firms partner with PILOs and help them navigate pro bono in a less problematic way. However, by the time I finished this Note I realized that my audience had expanded. I hope that pro bono coordinators at law firms read this Note and reflect on ways to improve their law firm's pro bono practice through tools like more formalized feedback from PILOs. I hope that PILOs read this Note and come away with a better understanding of the limits of law firm partnerships and the benefits of diverse funding sources. I hope that law students read this Note and start asking themselves what a "great pro bono practice" really looks like. And, consistent with my original goal, I hope that attorneys read this Note and think critically about how they have approached pro bono in the past and ways they can improve their pro bono practice in the future.

Despite the system's flaws, I want to be clear: big law pro bono is not doomed to fail. Yes, there is a misalignment in motives that can lead to big law firms' consistently favoring certain causes over others and draining PILO resources. But many of these problems also have potential solutions. The biggest issue when it comes to pro bono is the lack of awareness regarding these problems. Therefore, I feel the need to add another audience member to my growing list: researchers. At the end of the day, the most challenging aspect in writing this paper was confronting the shortage of standardized data and searching for qualitative information regarding big law-PILO partnerships. I hope that researchers read this Note and are inspired to pick up where I left off. By investigating what pro bono looks like in practice and sharing these findings, researchers can shed light on a topic that is still very much in the dark.