# FORCED *PRO BONO* FOR LAW STUDENTS IS A BAD IDEA

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We lawyers, it is said, are in a noble profession because our duties, our professional obligations (such as providing free legal services), go beyond what the law demands.[1] Nowadays, it is proposed that law students render free or *pro bono* legal service to certain designated causes not out of duty or professional obligation, but because of the coercion of graduation requirements.[2]

This proposal, called mandatory or forced *pro bono*, is an unnecessarily extreme, and possibly unconstitutional, approach. Mandatory *pro bono* is objectionable because it is coercive. With "choice" a political byword of the 1990s, mandatory *pro bono* is inherently anti-choice, for it uniquely targets for forced *pro bono* participation those students who would not otherwise choose clinical or other school public-interest law programs. These students would be reluctant draftees who would have no choice to refrain from participating in these programs. For some students at public universities, mandatory *pro bono* will amount to compelled speech — long suspect under First Amendment jurisprudence.[3]

Instead of encouraging thinking for one's self, mandatory *pro bono* tells people what you must do and in effect imposes a moral code, robbing students of the opportunity to think for themselves. This is inconsistent with the educational mission. A moral code implies "political correctness" about what should

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[1] Mallard v. U.S. District Court for the Southern District of Iowa, 490 U.S. 296, 310, 109 S.Ct. 1814, 1823 (1989) (Kennedy, J., concurring).

[2] Even some proponents of mandatory *pro bono* for lawyers shy away from a similar scheme for law students. Last year, a committee of attorneys and legal experts convened to study the perceived "crisis of unmet civil legal needs" of the poor in New York. The committee, including Cyrus Vance (President Carter's Secretary of State), Robert Fiske, Jr. (formerly of the ABA's Standing Committee on the Federal Judiciary), and Professor Norman Redlich, recommended that a mandatory pro bono requirement be imposed on lawyers. However, the committee also concluded that "while law schools should be exhorted to contribute more than they do now to improve legal services to the poor, it would be inadvisable to impose such institutional requirements on the law schools of this State." Committee to Improve the Availability of Legal Services, Final Report to the Chief Judge of the State of New York (April 1990) at 115-116.

[3] *See* Keller v. State Bar of California, 110 S.Ct. 2228 (1990) (unified state bar's use of members' compulsory dues to finance political and ideological activities with which members disagree violates First Amendment right of free speech).

be thought regarding *pro bono* activities. Moreover, coercion is not conducive to students making their best and enthusiastic effort,[4] but actually risks increasing student resentment toward *pro bono*.[5]

Notwithstanding these civil liberties issues, an aggressive campaign is getting organized to institute mandatory *pro bono* in the law schools. Underlying this campaign for mandatory *pro bono* for law students are several notions: (1) the legal needs of many poor and disadvantaged people are overwhelming the legal system and not being adequately met; (2) an insufficient number of graduating students are entering "public interest law," or providing *pro bono* assistance to public interest law groups when they become lawyers, because they are either uneducated about the problems of the poor, or forced by the exigencies of social pressure and money to forgo public interest law careers; (3) clinical education, other law school-sponsored public interest programs, and legal education have largely failed to educate law students about the poor or encourage public service; (4) forced *pro bono* (even a mere 10 hours per year) will confer educational benefits to students as well as inculcate the desirability of providing *pro bono* services as a lawyer; (5) mandatory *pro bono* is not political. Most of these notions do not withstand critical analysis as justifications for mandatory *pro bono*.

I will not take issue with the notion that many Americans have unmet legal needs. Indeed, the poor and disadvantaged are by no means alone in lacking legal help — many lower and middle-class Americans cannot afford an attorney. Many Americans also have unmet medical and housing needs. But other students of professions such as medicine and architecture are not required to perform *pro bono* work. The singling out of law students is based on the argument that lawyers are singularly important in our society because they are officers of the court. However, law students are not yet officers of the court and, in any event, *pro bono* legal services have traditionally not been coerced.[6]

Moreover, it is questionable whether mandatory *pro bono* really meets the need asserted or only creates new ones. First, the mandatory *pro bono* schemes include activities that are debatably related to trying to aid the poor. For example, one can fulfill the *pro bono* requirement at Tulane by simply attending a two-day death penalty seminar with a death penalty resource center in

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[4] Chicago Daily Law Bulletin, October 26, 1990 at 2, col. 3 ("Ellen Cosgrove, a third-year U[niversity] of C[hicago] student and president of the school's student association, said that by requiring students to do *pro bono* work, 'you almost start to lose the enthusiasm people have for doing it.'")

[5] "There's at least the chance that some people being made to do it will rebel against it." (Peter Edelman, associate dean of the Georgetown University Law Center.) In a poll run by Georgetown Law School, 55 percent of students opposed mandatory *pro bono*. Legal Times, Oct. 29, 1990.

[6] "To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there." Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U.L.REV. 735, 753 (1980).

New Orleans. At the University of Pennsylvania one can perform research for a law professor to fulfill the requirement.

Second, for some law schools in certain areas of the country, the legal needs of the community will not be enough to support mandatory *pro bono* programs. The Tulane Law School program, highly touted by proponents of mandatory *pro bono*, is a case in point. Dean John Kramer found that the New Orleans area did not have enough natural outlets for students to fulfill the *pro bono* requirement. So Kramer hired lawyers to create additional programs. The entire program cost $125,000, about half of which came from a grant from the Legal Services Corporation.[7] The Tulane experience demonstrates at best that mandatory *pro bono*'s cost[8] and limited outlets make it far from universally applicable to any school and is, in fact, highly dependent on the size and character of the school's local community. In addition, the number of *pro bono* outlets will be dependent on what programs qualify for assistance. Finally, how 10-20 hours of free student assistance through mandatory *pro bono* will stimulate more *pro bono* involvement from the Bar is not apparent.

The notion of low student interest in *pro bono* activities is based in part on trends showing that for the past decade the number of graduating law students entering public interest law careers has remained relatively stable and at a level below that of the halycon days of the 1970s.[9] The judgment that this level of public interest law graduates is intolerably low is a subjective one and embodies a certain opinion about public interest law and the legal profession. It is an opinion not necessarily shared by today's law students. The resort to mandatory *pro bono* would seem to bear this out as it is an admission by proponents that not enough students are being converted to *pro bono* activity voluntarily. Mandatory *pro bono* is thus viewed as the only effective approach to increasing student *pro bono* involvement.

Nevertheless, it is not at all clear that mandatory *pro bono* even uniquely increases student *pro bono* involvement. Voluntary *pro bono* programs can and do work. At the University of South Carolina, more than 60 percent of the students perform community service. There is no reason to believe that the South Carolina program did not adequately meet legal needs in the local community. Indeed, the Tulane experience of finding an insufficient number of *pro*

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[7] Kornhauser, *Mandatory Pro Bono Sought For Law Schools*, Legal Times, Oct. 29, 1990 at 6 col. 4.

[8] Mandatory *pro bono* is not cost-free and threatens through increased administrative costs to raise law school tuition rates. The hours of *pro bono* service also take away from student opportunity to earn money to pay for tuition. Given the kingly sums already paid for law school tuitions, mandatory *pro bono* threatens to increase financial pressures on law graduates. To the extent that notion (2) is correct about financial reasons keeping graduates out of public-interest law, mandatory *pro bono* makes it even less likely they will go into public-interest law.

[9] About three percent of law-school graduates take jobs in non-government, public-interest law. Legal Times, Oct. 29, 1990.

*bono* outlets to support a mandatory program suggests that a voluntary program can meet existing needs as well as a mandatory program can.

The educational benefits of mandatory *pro bono* are not at all clear. Here the proponents' arguments are long on assertion, but short on detail. Many of the programs included in mandatory *pro bono* schemes could be easily fulfilled through a voluntary externship program. There is nothing unique about the kinds of programs available in the mandatory *pro bono* schemes. And to the extent the activities are similar to other law school-sponsored public-interest law programs, there is no reason mandatory *pro bono* will be any more successful in achieving attitude adjustment from students. Proponents fail to explain why simply making a program "mandatory" would transform its appeal and effectiveness. Further, proponents have not detailed what particular legal skills students gain from programs such as Tulane's as opposed to skills developed in clinical and other voluntary public-interest law programs involving outside groups.

Moreover, there are reasons to question the educational benefits of mandatory *pro bono*. In New York, the Committee to Improve the Availability of Legal Services rejected mandatory *pro bono* for students. The Committee was swayed "by the practical difficulties of providing adequate supervision for the *pro bono* work of substantial numbers of law students and of responding to the new administrative burdens that would be imposed on legal services organizations. A vastly higher number of law students providing legal services without adequate supervision would raise issues of unauthorized practice of law."[10]

As to the benefit of the law school's imprimatur on *pro bono* activity, one wonders if the message has been confused by the hypocrisy of the law schools that adopted mandatory *pro bono* for students but not for professors. At Tulane, proponents dumped the idea of a faculty requirement for fear that it would sink the whole proposal. At the University of Pennsylvania, the faculty approved mandatory *pro bono*, but were split on mandating *pro bono* for themselves. "That part of the proposal died."[11]

Finally, proponents claim that mandatory *pro bono* is not political. This is a myth. The press conference publicizing the student campaign for mandatory *pro bono* featured Ralph Nader, a polarizing and controversial public figure. Moreover, political advocacy groups have well-documented influence and domination in law school-sponsored public-interest law programs and figure to be the major beneficiaries and constituencies of mandatory *pro bono*.[12] The politicization of mandatory *pro bono* programs is further revealed by what the law schools include or exclude as programs eligible to meet the *pro bono*

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[10] Final Report at 118.

[11] Washington Post, Business Section, Jan. 7, 1991 at 5 col. 2.

[12] *See, In Whose Interest? Public Interest Law Activism In The Law Schools*, Washington Legal Foundation Report (1990) (focus of findings were responses from 113 ABA-accredited law schools to questionnaires about their public-interest law programs).

requirement. Florida State's program emphasizes class action work and does not list government work. On its original list, Florida State included the public defender's office, but failed to include the prosecutor's office. When its listing was criticized for this omission, Florida State dropped all criminal work rather than include work for prosecutors. Tulane's program seems equally unbalanced, allowing work for legal service and public defender programs as well as for non-profit interest groups, but not for prosecutors or other government employers. To their credit, Valparaiso and the University of Pennsylvania have made efforts to make their programs more balanced. The University of Pennsylvania specifically states that public interest organizations may be eligible regardless of their political affiliation.[13] These actions demonstrate the school administration's sensitivity to this issue and the reality that political groups are some of the eligible organizations in mandatory *pro bono* programs.

In sum, the desirability and satisfaction of *pro bono* service should be sufficient to sell itself. To those concerned that the message isn't getting out, alternatives such as improving public relations or expanding the range of *pro bono* activities should be examined. Resorting to mandatory *pro bono* is antithetical to academic freedom.

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[13] Washington Legal Foundation has been included as an eligible public interest law organization in this program.