

# Washington University Journal of Law & Policy

---

Volume 7 *Access to Justice: The Social Responsibility of Lawyers*

---

January 2001

## In Pursuit of the Public Good: Access to Justice in the United States

Ruth Bader Ginsburg  
*Supreme Court of the United States*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy](https://openscholarship.wustl.edu/law_journal_law_policy)



Part of the [Law and Society Commons](#)

---

### Recommended Citation

Ruth Bader Ginsburg, *In Pursuit of the Public Good: Access to Justice in the United States*, 7 WASH. U. J. L. & POL'Y 1 (2001),  
[https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol7/iss1/2](https://openscholarship.wustl.edu/law_journal_law_policy/vol7/iss1/2)

This Essay is brought to you for free and open access by Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

# Washington University Journal of Law & Policy

## Access to Justice: The Social Responsibility of Lawyers

### In Pursuit of the Public Good: Access to Justice in the United States<sup>+</sup>

Ruth Bader Ginsburg<sup>\*</sup>

Law and lawyers, one cannot avoid acknowledging, have fared rather badly in many a song and story. In grand opera, for example, lawyers are barely there. In Johann Strauss's *Die Fledermaus*, a lawyer, Dr. Blind, has a bit part, but his assistance is so ineffective, he manages to get for his client a few extra days in jail. In Janáček's *Makropoulos Case*, an entire act takes place in a lawyer's office. But, performance attendees generally agree, it is the dullest act in the opera. Celebrated writers from Shakespeare to Sandburg have harbored a lingering distrust of the lawyers' trade. Charles Dickens, in *Bleak House*, put it this way:

The one great principle of the English law is to make business for itself. There is no other principle so distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme and not the

---

<sup>+</sup> Jurist-in-Residence Address Washington University School of Law April 4, 2001.

<sup>\*</sup> Associate Justice, Supreme Court of the United States. Justice Ginsburg acknowledges with appreciation the grand assistance of her 2000 Term law clerk, Robert Gordon, and her 1999 Term law clerks, Richard A. Primus and Deirdre D. von Dornum, in composing these remarks.

monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.<sup>1</sup>

But the legal profession has among its practitioners brave men and women who strive to change that perception, jurists devoted to, and at work for, the public good—people who are the best of lawyers and judges, the most dedicated, the least selfish. Public service lawyering in the United States spans a wide range. In these remarks, I will endeavor to survey the territory, to identify both its inspiring and its dispiriting aspects, and to describe some promising recent developments. I will address primarily, but not exclusively, lawyering for persons who lack the wherewithal to pay fees.

“Equal Justice Under Law” is etched about the U. S. Supreme Court’s grand entrance. It is an ideal that remains aspirational. Thanks in part to efforts by lawyers, race, gender, and other incidents of birth no longer bar access to justice as they once did. It remains true, however, that the poor, and even the middle class, encounter financial impediments to a day in court. They do not enjoy the secure access available to those with full purses or political muscle. In broad outline, less wealthy persons in the United States are able to engage attorneys in four ways.

First, assistance may be gained from the legal aid organization wholly dedicated to representing poor people. The idea for such aid traces to several late nineteenth century societies. The forerunner of New York’s Legal Aid Society,<sup>2</sup> for example, was a group of German-American merchants who joined together in 1876. The merchants engaged a lawyer, full-time (at \$1000 per year) to assist German immigrants with wage and family disputes, criminal entanglements, and a range of other problems.

A decade later, in 1886, the Chicago Women’s Club established the Protective Agency for Women and Children, with a lawyer on staff, to shield young women from sexual exploitation.<sup>3</sup> In time, the

---

1. CHARLES DICKENS, *BLEAK HOUSE* 509 (Bantam Books 1983) (1853).

2. On the Society’s formative years, see JOHN MACARTHUR MAGUIRE, *THE LANCE OF JUSTICE: A SEMI-CENTENNIAL HISTORY OF THE LEGAL AID SOCIETY* 22 (1928); *see also* HARRISON TWEED, *THE LEGAL AID SOCIETY, NEW YORK CITY: 1876-1951* (1954).

3. *See* JACK KATZ, *POOR PEOPLE’S LAWYERS IN TRANSITION* 34-35 (1982).

New York and Chicago societies broadened their missions to encompass all poor persons in need of representation, and similar legal services organizations sprouted in other cities.<sup>4</sup> Today, the fifty states are home to hundreds of legal services organizations. Some specialize in discrete areas—in family law, for example, or consumer rights. But most are generalists.

In criminal matters, the 1963 Supreme Court decision in *Gideon v. Wainwright* has effectively required the government to provide trial counsel for defendants.<sup>5</sup> On the civil side, there is no federal right to an attorney,<sup>6</sup> and the government supplies far less aid than it does in criminal cases. In 1974, Congress, with the support of the Nixon Administration, created the Legal Services Corporation (LSC) to serve poor people in civil matters. But the LSC has suffered repeated cutbacks in funding and in the scope of services it may render.<sup>7</sup> Just this term, in *Legal Services Corp. v. Velazquez*,<sup>8</sup> the Supreme Court struck down one such limitation. Congress had allowed Legal Services lawyers to represent persons denied welfare benefits, but only if counsel accepted the regulations and statutory provisions “as

---

4. See James F. Smurl, *In the Public Interest: The Precedents and Standards of a Lawyer's Public Responsibility*, 11 IND. L. REV. 797, 801-03 (1978).

5. 372 U.S. 335 (1963). *Gideon* recognized a right to counsel in felony prosecutions. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), held that absent a waiver, no person may be imprisoned for any offense, however classified, without counsel. Today, most states provide defense counsel mainly through public defender organizations, though many rely on private counsel selected by judges from approved lists or by the states through a lowest-bidder contracting process. See Department of Justice, Bureau of Justice Statistics, *Indigent Defense* 1-2 (1996).

6. A federal right to counsel has been recognized in a narrow class of civil cases. See, e.g., *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 31-32 (1973) (in an appropriate case, an individual facing the termination of parental rights may be entitled to appointed counsel). States, however, have often extended the right to counsel more broadly than the federal government. See, e.g., *id.* at 34 (noting that thirty-three states accord an absolute statutory right to counsel in termination of parental rights proceeding).

7. “Since 1996,” it was recently reported, LSC “has lost a quarter of its financing from the federal government—the source of the bulk of its budget—leading to hundreds of layoffs among its legal staff nationwide.” Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, N.Y. TIMES, Aug. 17, 2000, at A1. In 1996, Congress reduced LSC’s funding from \$400 million to \$278 million per year. For fiscal year 2000, funding is \$305 million. See LEGAL SERVICES CORPORATION, LSC BUDGET: FY00 APPROPRIATION, available at [http://www.lsc.gov/press/pr\\_00a.htm](http://www.lsc.gov/press/pr_00a.htm) (last visited Jan. 17, 2002). LSC has survived due, in considerable measure, to the vigilant efforts of the American Bar Association to prevent its demise.

8. 531 U.S. 533 (2001).

is,” steering clear of challenges to the validity—even the constitutionality—of the governing prescriptions. The First Amendment, the Court held, did not allow Congress to hem in lawyers that way.

While the legal services organizations aid clients in every day matters, a second type of *pro bono* organization selects test cases to advance cherished rights for groups long denied them. One pioneer of “test case” advocacy was Charles Hamilton Houston. During his 1917 to 1919 military service in a segregated unit of the American Expeditionary Forces, Hamilton experienced and witnessed virulent racial discrimination and harassment. He left military service determined, as he later wrote, to “study law and use [his] time fighting for men who could not strike back.” The first African-American editor of the *Harvard Law Review*, Hamilton became dean of Howard University Law School, then, simultaneously special counsel to the NAACP. In those roles, he trained and inspired scores of lawyers, Thurgood Marshall among them, to assist the NAACP in its long struggle against segregation.<sup>9</sup> Hamilton, Marshall, and their heroic colleagues crafted the NAACP’s strategy in the 1930s and 1940s, step-by-step to dislodge *Plessy v. Ferguson*<sup>10</sup> and end official apartheid in America.

Another “test case” innovator in the 1920s was Roger Baldwin, founder of the American Civil Liberties Union (ACLU). Baldwin was not himself a lawyer (his field was anthropology), but he enlisted the aid of lawyers, first in defense of World War I draft resisters, then for a wide range of First Amendment causes.<sup>11</sup> The ACLU took on cases—for example, the Scopes Trial about the teaching of evolution in Tennessee public schools,<sup>12</sup> and in 1978, the neo-Nazis’ suit for

---

9. See Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 20 (1998).

10. 163 U.S. 537 (1896).

11. See SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990).

12. The Tennessee statute prohibiting the teaching of evolution in state-supported schools, pursuant to which John Scopes, defended by the ACLU and Clarence Darrow, was convicted in a Dayton, Tennessee trial court in 1925, was upheld as constitutional by the Tennessee Supreme Court. But Scopes’s conviction was reversed on technical grounds. *Scopes v. State*, 154 Tenn. (1 Smith) 105, 289 S.W. 363 (1927). For a recent work on the Scopes trial, see EDWARD J.

permission to march in Skokie, Illinois<sup>13</sup>—not simply to secure free speech for particular individuals in isolated instances, but to advance for all people freedom of thought, expression, and association. In the second half of the twentieth century, the ACLU's mission broadened to include vigorous advocacy for the equal protection of the laws.

The NAACP Legal Defense and Education Fund and the ACLU set a pattern for myriad other public interest legal organizations—for example, the Mexican-American Legal Defense and Educational Fund, the National Organization for Women Legal Defense and Education Fund, the National Women's Law Center, and the National Partnership for Women and Families (formerly, the Women's Legal Defense Fund).

I turn now from legal aid organizations with paid staff, and cause-oriented associations like the NAACP and the ACLU, to the private bar and its endeavors to provide lawyers when needed. I will describe two main ways by which the private bar renders assistance to those without means to pay up front, one way without any monetary compensation from the client to the service providers, the other way, making large fees possible.

A notable proponent of the private bar's unpaid effort was Reginald Heber Smith, a partner, in early twentieth century decades, at one of Boston's leading law firms, Hale and Dorr. In 1919, Smith published *Justice and the Poor*, a groundbreaking study of how the economically disadvantaged fare in U.S. legal systems. Smith exposed vast differences in the quality of justice available to the rich and the poor. His exposé led to endeavors to narrow the wide gap, including the first confederation of legal aid providers (National Association of Legal Aid Organizations).<sup>14</sup>

Reginald Smith galvanized a national movement to provide

---

LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION (1997).

13. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978); see also ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979). For a view critical of the ACLU's position in this case, see DONALD A. DOWNS, NAZIS IN SKOKIE (1985).

14. For biographical information on Reginald Heber Smith, see Henry Weinstein, *Legal Aid for Poor Survives Cyclical Attempts to Kill It*, L.A. TIMES, Dec. 30, 1995, at A1; Erwin N. Griswold, *The Changing Legal Scene*, NAT'L L.J., Dec. 30, 1991, at 17.

lawyers for those who could not afford to pay counsel fees. But he did not neglect the remunerative side of work in the law. Among his other distinctions, Smith is credited with inaugurating the practice of calculating lawyers' fees by "billable hours." Yet he fully perceived—as most lawyers even today do not—the need for devoting part of a lawyer's working time to the pursuit of justice for people who could not be billed.

The nation's firms currently advance Smith's *pro bono* initiative through a variety of endeavors. One example is the Lawyers' Committee for Civil Rights Under Law. Its creation was sparked when President John F. Kennedy invited leading lawyers to aid in assuring that civil rights guarantees would be effectively enforced.<sup>15</sup> The lawyers' response was the nonprofit, nonpartisan Lawyers' Committee.

The Lawyers' Committee maintains a small permanent staff, but relies dominantly on volunteers to accomplish its aims. Headquartered in D.C. and with offices in several other cities, the Lawyers Committee has endeavored to promote legal reform on issues affecting the urban poor, including employment opportunities, voting rights, fair access to housing. It pursues litigation in these areas as well as out-of-court efforts to improve the public schools, increase the stock of affordable housing, and foster business opportunities in disadvantaged communities.<sup>16</sup>

The private lawyer who serves the public good in the United States does so by choice. None of the fifty states requires *pro bono* service as a condition of practice. The American Bar Association's *Model Code of Professional Responsibility* identifies at least fifty hours of *pro bono* service annually as a goal to which a lawyer "should aspire," not a duty enforceable through disciplinary

---

15. See Carl McGowan, *Private Lawyers and Public Responsibilities*, 80 MICH. L. REV. 183, 186-87 (1981).

16. More recently, President Clinton has encouraged lawyers to step up their volunteer service. Spurred by the President's plea, a new collaboration modeled on the Lawyers' Committee has emerged. Called Lawyers for One America, the group is composed of law firms, law schools, bar associations, and civil rights organizations. It seeks to encourage *pro bono* service aimed at ending discrimination and expanding opportunity, and at the same time to promote diversity within the legal profession and the nation's law firms.

process.<sup>17</sup> Bar committees have sometimes sought to require *pro bono* service, but their proposals, encountering the U. S. A.'s historic libertarian streak, have been notably unsuccessful.<sup>18</sup>

Resisting forced representation, U. S. lawyers have nonetheless shown themselves entirely willing to assist the poor, for profit. This fourth mode of serving those without means to pay retainers is the contingent fee contract. The United States at first followed the British rule that such arrangements are champertous and void. And in civil law systems, even today, contingent fee arrangements are regarded as unethical. But the young United States soon permitted contingency fees, displaying the combination of philanthropy and self-interest at which foreign observers since de Tocqueville have marveled. Lawyers who thrive on contingent fees sometimes describe themselves as the true “people’s lawyers.”<sup>19</sup>

---

17. See MODEL RULES OF PROF'L CONDUCT Rule 6.1 (1993). A comment on this provision adds that this “responsibility . . . is not intended to be enforced through disciplinary process.” *Id.* The older *Model Code of Professional Responsibility* (1969), to which some states still adhere, similarly provides among its “ethical considerations” that “[e]very lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.” MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1969). This “ethical consideration,” like all others in the Code, is “aspirational” in character.

18. See *Mandatory Pro Bono Idea Loses Steam at Ethics 2000 Commission's Final Hearing*, 59 U. S. L. W. 2062 (Aug. 1, 2000) (“Bowling to unanimous criticism of a mandatory pro bono rule, the reporter for the American Bar Association’s Ethics 2000 Commission has recommended that the commission not follow through on its tentative proposal to require pro bono service under Model Rule of Professional Conduct 6.1 . . . .”); DEBORAH RHODE & DAVID LUBAN, *LEGAL ETHICS* 791-92 (1995).

In contrast, some twenty law schools have made student *pro bono* service a requirement for graduation. For example, in 1996, in response to a student initiative, Columbia Law School adopted a requirement that each student do at least forty hours of *pro bono* service, with *pro bono* defined broadly and non-ideologically to include work for not-for-profits, small businesses, legal service providers, and all three branches of government. Tulane, which requires students to do twenty hours of work related specifically to the provision of legal services to the poor, was the first law school to adopt such a requirement. The University of Pennsylvania mandates a greater number of hours than most of the programs—seventy during the course of a student’s second and third years—but allows students a broad choice of *pro bono* projects. A few schools, such as Stetson University College of Law, have extended this requirement to their faculty members. See Memorandum from Donna Alleyne, *Pro Bono Coordinator*, Columbia Law School Center for Public Interest Law, to Chambers of Justice Ginsburg (Aug. 17, 1999) (on file with author); *Law School Public Service Graduation Requirements*, NAPIL Briefs (NAPIL, Washington, D. C.), Winter 1996 (on file with author).

19. See generally Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231, 238-42 (1998).



Contingency fee arrangements have an enduring prominence in part because U.S. law (again unlike Europe's) generally requires each side to bear its own costs in litigation. As an exception to the so-called "American rule," under which each side—winners as well as losers—pays its own costs, Congress has provided for the shifting of fees in a slim catalog of cases where the private suit is deemed to have a compelling public purpose—dominantly, suits involving civil rights, consumer protection, employment, and environmental protection.<sup>20</sup> Fee-shifting permits lawyers, acting as private attorneys-general, to gain compensation for suits that serve the public but generally yield only injunctive relief or money judgments modest in size.

I move now from description to evaluation, in other words, to a report card on how the four strands of service just described have fared.

Among the triumphs of *pro bono* practice in the United States, the work of the NAACP and kindred groups holds prime place. The NAACP was at the forefront of the nation's civil rights revolution, and, together with other cause-oriented organizations, remains a force for equality today. One measure of such groups' success has been the imitation they have inspired among those with different ends.

In 1971, Lewis F. Powell, Jr., a private practitioner who later became a highly respected Supreme Court Justice, urged volunteer advocacy by and in defense of business interests.<sup>21</sup> Powell's idea took hold as an array of public interest legal foundations were established to represent "conservative" or business groups, for example, the Washington Legal Foundation, the Pacific Legal Foundation, the Mountain States Legal Foundation. Our system of justice works best when opposing positions are well represented and fully aired. I therefore greet the expansion of responsible public-interest lawyering on the "conservative" side as something good for the system, not a development to be deplored.

---

20. See William A. Bradford, *Public Enforcement of Public Rights: The Role of Fee-Shifting Statutes in Pro Bono Lawyering*, in *THE LAW FIRM AND THE PUBLIC GOOD* 125, 129-30 (Robert A. Katzmann ed., 1995).

21. See Lewis F. Powell, Jr., *The Powell Memorandum: Attack on American Free Enterprise System* 7 (Aug. 23, 1971) (on file with U.S. Chamber of Commerce).

Public interest lawyers have also garnered gains by recognizing the limits of the courts as agents of social change. In various settings, lawyers have sought enduring change from the Legislature, not the generally restrained, precedent-bound judiciary. Burnita Shelton Matthews, counsel to the National Woman's Party in the 1920s, and the first woman to be appointed to the federal trial bench (she was appointed to the District Court for the District of Columbia by President Truman in 1949) fits that description.<sup>22</sup>

Matthews, a gentle woman from Mississippi, aided National Woman's Party leader Alice Paul in urging passage of an equal rights amendment. Although that endeavor, launched in 1923, has not yet succeeded, Matthews made much headway on many measures. She successfully worked for passage of a 1927 law that allowed women to serve on juries in the District of Columbia. She framed a 1935 statute revising the District of Columbia law on descent and distribution to eliminate preferences for males. She had a hand in writing laws for Maryland and New Jersey that gained for women teachers pay equal to that received by their male colleagues. Matthews also assisted in changing South Carolina's law so that married women could sue and be sued without their husbands' permission. And she helped to achieve 1931 and 1934 federal nationality law changes that, in large but not total measure, evened out citizenship rights for women and men.

The local (D.C.) bar knew Burnita Matthews less for her feminist activities than for her expertise in the field of eminent domain. When the federal government condemned the headquarters building of the National Woman's Party near the Capitol, Matthews' skilled representation led to the largest condemnation award the United States had yet paid. (The condemnation had, from my vantage point, a worthy purpose. The property on which the Woman's Party headquarters once stood is today occupied by the U.S. Supreme Court. The Woman's Party remains on the scene, housed on

---

22. See J.Y. Smith, *Burnita S. Matthews Dies*, WASH. POST, Apr. 27, 1988, at B6; Kathanne W. Greene, *Torts Over Tempo: The Life and Career of Judge Burnita Shelton Matthews* (on file with author); see also Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281, 284-86 (1995).

Constitution Avenue just a block from the Court, in the historic Sewall-Belmont House.)

Among contemporary lawyers working in the political arena for legislative reforms, Marian Wright Edelman is a stellar example. Marian Wright entered law school in 1960 anticipating that she would help fill the large need for civil rights lawyers. She did yeoman service in that capacity, but eventually changed tack and, in 1973, founded an organization called the Children's Defense Fund (CDF). CDF studies and documents conditions affecting children, particularly the one in five children in the United States living below the poverty level. Edelman and CDF can be as persuasive in the corridors of Congress as Marshall and the NAACP were in the courts.

Apart from test case litigation and public advocacy, the U. S. record of legal assistance for the less wealthy is decidedly mixed. On the criminal side, most notably, the often meager provision for capital defense has been carefully chronicled.<sup>23</sup> (I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial.) And on the civil side, the nation with the highest concentration of lawyers in the world meets less than 20% of the legal needs of its poor citizens, and not two-thirds of the needs of its middle-class.<sup>24</sup>

Greater public funding for legal representation could improve this

---

23. See generally *An Updated Analysis of the Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases* (A.B.A. Postconviction Death Penalty Representation Project) (June 1996) (on file with author). The need for representation on collateral review has become more acute since the 1996 termination of federal funding once available to assist Postconviction Defender Organizations. See Brad Snyder, *Disparate Impact on Death Row: M.L.B. and the Indigent's Right to Counsel at Capital State Postconviction Hearings*, 107 YALE L.J. 2211, 2233-34 n.179 (1998); Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 865-66 (1996).

Professor James S. Liebman of Columbia Law School, diligent counsel for defendants subject to the death penalty and co-author with Randy Hertz of the treatise *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (3d ed. 1998), has recently published a comprehensive empirical study of several hundred capital case direct appeals and collateral review proceedings. See JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000), available at <http://justice.policy.net/jreport> (last visited Jan. 18, 2002). The study, funded in large part by the Open Society Institute, shows that the overall rate of prejudicial error in the capital punishment system is 68%. See *id.*

24. See Deborah L. Rhode, *Pro Bono Can't Fill the Gap*, NAT'L L.J., Sept. 6, 1999, at A22.

situation, for current governmental outlays are hardly generous. The combined legal services spending of U.S. local, state, and federal government agencies in civil cases is, per capita, far below that of the governments of other democracies. In the 1990s, U. S. per capita government spending on civil legal services for poor people ranged around \$2.25. New Zealand spent three times as much, per capita, funding legal aid in civil matters; the Netherlands, four times as much; and England, with a per capita outlay of \$26, exceeded U. S. spending more than elevenfold.<sup>25</sup>

As in the worlds of music and art in the United States, the government's unimpressive contribution for legal services has prompted the private sector to provide the lion's share of funding.<sup>26</sup> In the aggregate, the private bar makes a vast contribution: the top 500 firms set aside about two million *pro bono* hours annually.<sup>27</sup> Yet the median attorney's offering is nothing to cheer. "A majority of the bar does [no *pro bono* work] at all; the average for the profession as a whole is less than a half hour a week."<sup>28</sup> Since 1990, when the American Bar Association challenged the nation's 500 largest firms to contribute three percent of their billable hours each year to *pro bono* work, only a third have agreed.<sup>29</sup>

Most troubling, after growth in *pro bono* activity during the 1980s, the trend in the last years of the twentieth century was backward: The average attorney at the wealthiest 100 firms in the United States dedicated one-third less time to *pro bono* work in 1999 than in 1992.<sup>30</sup> Seeking to prevent defections to Internet start-ups, many large firms have rapidly increased lawyers' salaries so that their post-clerkship first year associates now earn as much as, or even

---

25. Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *FORDHAM INT'L L.J.* S83, S95 tbl. 3 (2000). According to Johnson's article, each Australian province has its own legal services program, and no national data are available. The one province reporting statistics—New South Wales—provides about \$5 of legal services funding per capita, more than twice the U. S. figure. *Id.*

26. See *From Europe, Invasion of the Donor Snatchers*, N.Y. TIMES, Dec. 9, 1997, at G2.

27. See Winter, *supra* note 7.

28. See Rhode, *supra* note 24.

29. See *id.*

30. See John Turrettini & Keith Cunningham, *1990-1999: The Way We Were*, AM. LAW., July 2000, at 96, 97. In response to an *American Lawyer* survey, only 18 of the 100 highest-grossing firms reported that their lawyers averaged at least 50 hours of *pro bono* work in 1999, "less than half the number seven years earlier." Winter, *supra* note 7.

more than, federal court of appeals judges. To pay for these salaries, the firms have increased their billable hour requirements. *Pro bono* has suffered correspondingly.

It is perhaps some solace that the plaintiffs' bar has made gains. Contingency litigation garnering big fees has vindicated important interests. But the success of such litigation has a down side. Serious questions have been raised, most pointedly about mass tort cases. Are lawyers involved in contingency litigation sometimes serving themselves at the expense of their clients and the public? Are they using the courts to address matters that legislatures might better tackle? (I hasten to add that it is not at all clear that the legislatures' inaction can be laid heavily at the litigators' feet.)

If this synopsis of *pro bono* service at the dawn of a century is cause for concern, as I think it is, there are also hopeful signs brightening the picture. In my remaining remarks, I will describe two of those signs.

The first is the effort of some law firms to deepen and broaden their bonds to poor communities. In their private practice, firms recognize their responsibility not only to litigate for clients in dire distress, but perhaps foremost to advise clients in everyday affairs, to help them avoid problems that might land in court. On the *pro bono* side, however, the private bar has offered assistance largely in litigation, not in dispute prevention.

Happily, this concentration on post-damage complaints is changing as more firms sponsor legal clinics operating as full-time, full-service law firms for poor communities. In a good week at such a legal clinic, one might find not only a litigator helping a foster parent to adopt a child, but also a real estate attorney helping a family close on a first home, a corporate lawyer enabling some small business owners to establish a new economic development program, and a tax expert explaining to a storeowner how to keep her liability low.

Neighborhood-based clinics now exist nationwide: for example, in Richmond, Virginia, in a partnership between the local legal aid office and Justice Powell's former firm;<sup>31</sup> in Minneapolis, Minnesota, in a venture joining a venerable partnership and a new health clinic;<sup>32</sup>

---

31. See William J. Dean, *Law Firm Neighborhood Offices*, N.Y. L.J., Mar. 7, 1997, at 3.

32. See Esther F. Lardent, *Law Firms Outside the 'Big Three' Cities Are Establishing* [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol7/iss1/2](https://openscholarship.wustl.edu/law_journal_law_policy/vol7/iss1/2)

and in Silicon Valley, in a coalition of firms assisting low-income entrepreneurs under the auspices of the local Lawyers Committee for Civil Rights.

Firms that contribute to such efforts engage all of their lawyers' talents, not only their litigators'. They remind their members, accustomed to shuttling between boardrooms and courtrooms, of the struggles and suffering down the block and around the corner. And they involve lawyers as long-term partners in communities' efforts to gain control of their destiny. I see cause for optimism as well in the capacity of law schools to engage the aspirations and facilitate the service of their students. In my days at Columbia Law School, from 1972 to 1980, I conducted a clinical program in which students assisted in the sex equality cases I litigated under the auspices of the American Civil Liberties Union. And I recall vividly from those years the efforts of Harriet Rabb, co-founder and director of the Columbia Law School Employment Rights Project. Harriet mounted arduous and ultimately victorious challenges to sex discrimination then rampant in business and commerce. She propelled overdue change in hiring and promotion practices, notably in leading New York law firms, the *New York Times*, and AT&T. Washington University has been a frontrunner in this regard, teaching justice so that lawyers may practice justice, for example, through the social problems tackled in the Law School's Civil Justice Clinic, and by maintaining a Public Service Project that pairs students with various opportunities to serve the community.

Recent years have seen new clinical programs blossom at law faculties nationwide, at once educating in law and involving student participants in needed work. Dozens of law school clinics now provide, for example, representation for children either already in foster care or at risk of entering such surrogate supervision.<sup>33</sup> The joint law and social work program at Washington University fosters better understanding of family systems and of the law as it bears on

---

*Clinics and Projects that Could Serve as Models to Attorneys Everywhere*, NAT'L L.J., Mar. 10, 1997, at A23.

33. In 1999, there were thirty-eight law schools with legal clinics providing representation to children. See A.B.A. SEC. LITIG., CHILDREN'S LAW COMMITTEE, A DIRECTORY OF PRO BONO CHILDREN'S LAW PROGRAMS, Part II (4th ed. 1999).

children.

Another area of expanded effort is international human rights. Columbia's Jack Greenberg, who succeeded Thurgood Marshall at the helm of the NAACP Legal Defense and Education Fund, launched one model initiative in 1995, Columbia's Human Rights Internship program. The program places about sixty students annually in human and civil rights organizations at home and abroad. Washington University's summer stipend fund, though chiefly supporting scores of student placements in the States, has also sustained student human rights work in Kathmandu, Nepal. Just this fall, this Law School hosted a conference joining top clinical faculty round the world to exchange thoughts on delivering justice through clinical programs.

And law schools, in recent years, have stepped up their financial support for public service by their graduates. In a nation without free post-graduate education, most students finance law school with loans, and the average student at many schools needs a staggering \$70,000 in loans to graduate.<sup>34</sup> Such debt can make a low-paying public interest job a distant dream for even the purest of heart (and never mind those less pure, once offered the going rate at major firms).

Today forty-seven law schools, more than twice the number a decade ago, offer help with debt to students who take low paying jobs.<sup>35</sup> Five states—Arizona, Maryland, Minnesota, New Hampshire, and North Carolina—do the same.<sup>36</sup> In Minnesota, for example, when the bookstore at that state's leading public law school found itself with a small surplus, the student body voted to dedicate the funds to loan repayment. That generous impulse contributed to a program now available to all who graduate from Minnesota's three law schools or serve the public good in that state.<sup>37</sup> With the prodding of the impressive, student-organized National Association for Public

---

34. NATIONAL ASS'N FOR PUBLIC INTEREST LAW, FINANCING THE FUTURE: NAPIL'S 2000 REPORT ON LAW SCHOOL LOAN REPAYMENT ASSISTANCE AND PUBLIC INTEREST SCHOLARSHIP PROGRAMS 9 (2000).

35. *Id.* at 10, 13.

36. *See* NATIONAL ASSOCIATION OF PUBLIC INTEREST LAWYERS, STATE LOAN REPAYMENT PROGRAMS, *available at* <http://www.napil.org/sub-so/Lrap/so-state1rap-fm.html> (last visited Jan. 17, 2002).

37. Interview with Sheila Siegel, Esq., NAPIL (July 24, 2000) (on file with author).

Interest Law,<sup>38</sup> more schools and states may see their way to similar efforts.

Performing public service, lawyers young and old rediscover that lawyering is not just a trade, but a responsible profession. One can be cynical about that characterization in a world where public figures inveigh against lawyers as parasites, distinguished scholars write books about *The Lost Lawyer* and *The Betrayed Profession*,<sup>39</sup> and Reginald Smith's other invention, billable hours, shackles many lawyers like a pair of golden handcuffs.<sup>40</sup> Recent commentary features studies purporting to show that the legal profession is "one of the most unhappy and unhealthy on the face of the earth."<sup>41</sup> But the satisfactions of public service hold potential to unlock the iron cage modern practice has become for many lawyers. In the words of the Talmudic sage Rabbi Tarfon, "The day is short, and the task is much; the workers are [sometimes] lazy, but the reward is great . . . ."<sup>42</sup>

---

38. NAPIL is a nationwide coalition of law student groups dedicated to enlisting and training students and recent law school graduates for the rendition of legal assistance to low-income and other underserved people and communities.

39. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1995); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1996).

40. See Winter, *supra* note 7.

41. Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 872 (1999).

42. *Ethics of Our Fathers*, MISHNAH, 2:18.