

The Relational Costs of Free Legal Services

Atinuke O. Adediran*

At the same time that government funding for civil legal services has decreased, large law firms have increasingly invested substantial financial resources into pro bono legal services. Although these investments have expanded the availability of free legal representation, they have caused other problems that can be broadly grouped into two categories. The first is that nonprofit legal services organizations (“NLSOs”) face undue costs when they collaborate with law firms. The second is that the increasing involvement of law firms tends to produce a mismatch between the needs of the poor and the kinds of matters that receive free legal representation. Scholars have primarily explained these problems by examining law firm motivations for engaging in pro bono work but have yet to explore the structure of pro bono relationships between firms and NLSOs and its effects on legal services.

The literature posits that the core purpose of NLSOs is to provide quality legal services to the poor. It would follow that NLSOs only engage in pro bono relationships that do not compromise this purpose. However, NLSOs engage in pro bono relationships that appear to contravene their core purpose. This Article draws on qualitative empirical data to show how institutional relationships increase inequality in legal services, how this inequality is generated, and what can be done to alleviate it. Findings suggest that NLSOs respond to law firms’ strong interest in pro bono work and board seats virtually regardless of the quality of pro bono work or costs to NLSOs. This Article argues that this structure contributes to problems in the delivery of legal services. It also provides macro, meso, and micro analyses of the incentive structures of law firms and NLSOs, and makes corresponding proposals for reallocating power to increase competition. It uses the literature on power in organizational sociology to explain why NLSOs are generally unable to force law firms to compete.

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* Earl B. Dickerson Fellow and Lecturer in Law, University of Chicago Law School; J.D., Columbia Law School; Ph.D., M.A. (Sociology), Northwestern University. I am grateful to Guy-Uriel Charles and Kevin E. Davis for reading multiple drafts of this Article. I thank Emily Buss, Genevieve Lakier, Aziza Ahmed, Olatunde Johnson, William Hubbard, Aziz Huq, Martin Sybblis, Bert Huang, Bryant Garth, Jennifer Nou, Scott Cummings, and Adam Chilton, for helpful comments and suggestions. For helpful discussions, I thank John Rappaport, Cree Jones, Travis Crum, and Erin Meyer. The Article benefitted from presentations at the Legal Ethics Schmooze at the University of California, Irvine School of Law, Columbia Law School’s Moot Workshop, the Junior Scholars Workshop at the University of Chicago Law School, and the Faculty Work in Progress Workshop at the University of Chicago Law School. The research was supported by the Alumnae of Northwestern University Grant and the Ford Foundation.

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INTRODUCTION

Between the 1960s and 1980s, the federal government invested a significant amount of money in civil legal aid.¹ Although federal expenditure on civil legal services was only \$5 million in 1965, by 1980 it had grown to more than \$300 million.² In 1965, virtually every major city had some program to provide civil legal assistance to low-income individuals.³ Congress also passed the Legal Services Corporation Act of 1974, which established the Legal Services Corporation (“LSC”).⁴ The major accomplishment of the LSC was the expansion of federal legal services from a predominantly urban program to one providing legal assistance in virtually every county in the United States.⁵

However, congressional support for civil legal services began to decline in the 1980s during the Reagan administration. In 1982, Congress appointed a hostile LSC board and began to significantly reduce the LSC’s funding.⁶ Congress has continued to decrease the LSC’s funding ever since. For example, in 1996, Congress cut LSC’s funding to 50% of its 1980 level.⁷

¹ Richard L. Abel, *State, Market, Philanthropy, and Self-Help as Legal Services Delivery Mechanisms*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION* 295, 295–96 (Robert Granfield & Lynn Mather eds., 2009).

² *Id.*; see also Richard Abel, *The Paradoxes of Pro Bono*, 78 *FORDHAM L. REV.* 2443, 2443 (2010); Tigran W. Eldred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More Than Charity*, 96 *W. VA. L. REV.* 367, 370 (1993); EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM* 237 (1974); Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 *WM. & MARY L. REV.* 737, 754 (2002).

³ Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 *FORDHAM URB. L.J.* 1213, 1217 (2002).

⁴ Samuel D. Thurman, *The Legal Services Corporation*, 1976 *UTAH L. REV.* 103, 103 (1976).

⁵ Houseman, *supra* note 3, at 1220.

⁶ Eldred & Schoenherr, *supra* note 2, at 370; see also Abel, *supra* note 1, at 296.

⁷ Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1, 22 (2004).

Significant cuts to the LSC's funding and the imposition of various bans on the kinds of legal representation that LSC lawyers can provide have encouraged private lawyers to play an increasingly important role in the provision of legal services to the poor.⁸ Since 1998, the number of pro bono hours reported by large law firms has steadily increased.⁹ In 2017, 129 of the Am Law 200 firms reported a total of 4.99 million pro bono hours.¹⁰ Measured in terms of dollar value rather than hours, private contributions to civil legal services are also substantial.¹¹ In 2005, the LSC provided approximately \$331 million to its grantees.¹² In the same year, the value of pro bono work was estimated to be \$624 million, about double the amount of money that Congress appropriated for civil legal services.¹³

The increasingly important role that private law firms have assumed in the delivery of legal services to the poor has benefits, including increasing the capacity to deliver legal services to many clients and shielding the delivery of legal services from the whims of Congress. But, it has also created problems for poor clients and for the nonprofit legal services organizations ("NLSOs") with which private law firms partner. Some of the problems include the fact that NLSOs face undue costs when they collaborate with pro bono lawyers, and the increasing involvement of law firms in the provision of free legal services tends to produce a mismatch between the needs of the poor and the kinds of matters that receive free legal representation. To illustrate this mismatch, the legal needs of the poor are currently highest in housing and family law while law firm lawyers are largely interested in immigration law.¹⁴

Scholars have primarily explained these problems by focusing on the large law firm. The literature has examined factors such as the market demand for pro bono matters, corporate client conflicts, individual lawyer interests, the political climate, and the culture of billable time in law firms as

⁸ Cummings, *supra* note 7, at 23–24. By the poor, I mean individuals below the federal poverty line. In 2017, the federal poverty line was \$24,600 for a family of four. See U.S. DEP'T HEALTH & HUM. SER.V., 2017 POVERTY GUIDELINES (2017), <https://aspe.hhs.gov/2017-poverty-guidelines>, archived at <https://perma.cc/QA5N-KPXA>. However, NLSOs, and by extension the private bar, also advance the interests of the underprivileged and the civil and liberty rights of underrepresented individuals and groups in society.

⁹ See Atinuke Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. (forthcoming 2020).

¹⁰ THE PRO BONO INST., REPORT ON THE LAW FIRM PRO BONO CHALLENGE 3–4 (2017), <http://www.probonoinst.org/wpps/wp-content/uploads/2017-Challenge-Report.pdf>, archived at <https://perma.cc/H4WA-BMN8>. Viewed as a percentage of total paying client billable hours, pro bono hours increased to 3.9% in 2017 from 3.6% in 2016.

¹¹ Rebecca Sandefur, *Lawyers' Pro Bono Service and Market-Reliant Legal Aid*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 1, at 95, 96; see generally Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Strategic Philanthropy and the Bottom Line*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 1, at 251.

¹² Sandefur, *supra* note 11, at 96.

¹³ *Id.* at 98. This figure omits actual dollars donated to NLSOs.

¹⁴ See Adediran, *supra* note 9, at 9–10.

contributing to the documented problems in pro bono legal services.¹⁵ However, scholars have yet to explore how NLSOs are affected by their relationships with law firms, the structure of these relationships, and their secondary effects on the delivery of legal services.

This Article addresses these important but neglected areas. The literature posits that the core purpose or mission of NLSOs is to provide quality legal services to the poor.¹⁶ It therefore follows that NLSOs would only engage in pro bono relationships that would not compromise this core purpose. However, the literature has yet to explain the fact that NLSOs engage in pro bono relationships that appear to be suboptimal in ways that go against their missions.

This Article deploys qualitative empirical data to show how inequality (in this case, the inadequate provision of legal services to the poor) relates to the institutional relationships between law firms and NLSOs.¹⁷ Law firms have expressly connected providing monetary resources with receiving pro bono matters or board positions from NLSOs—conditions to which NLSOs readily acquiesce. NLSOs are unable to make demands of law firms or force firms to compete because they are dependent on law firms for resources to fulfill their core purpose of providing legal services to the poor. NLSOs are aware that the duration of the relationship with a given law firm can be limited if the law firm does not receive pro bono work or board positions.

The literature on power in organizational sociology explains that organizations can be in either mutually dependent relationships, where each organization is in a position to grant, deny, or facilitate, the other's gratification; or in power-imbalanced relationships, where one organization has significantly more influence over the other.¹⁸ In the current context, mutual dependence would mean that both law firms and NLSOs are able to grant, deny, or facilitate their relationships. This is not what the empirical data reflect. The data reflect that asymmetrical power dynamics play a major role in these relationships, because NLSOs are dependent on law firms for resources to meet their institutional missions. Put another way, asym-

¹⁵ Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 *FORDHAM L. REV.* 2279, 2279 (1999); see Adediran, *supra* note 9; John M.A. DiPippa, *Peter Singer, Drowning Children, and Pro Bono*, 119 *W. VA. L. REV.* 113, 129–30 (2016); Stephen Daniels & Joanna Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, in *ACCESS TO JUSTICE* 145, 162 (Rebecca L. Sandefur ed., 2009); Robert Granfield & Lynn M. Mather, *Pro Bono, The Public Good, and the Legal Profession*, in *PRIVATE LAWYERS AND THE PUBLIC INTEREST*, *supra* note 1, at 1, 11.

¹⁶ See *infra* note 46.

¹⁷ To protect participant confidentiality, names, affiliations, and locations are omitted from the data.

¹⁸ See Arthur L. Stinchcombe, *Social Structure and Organizations*, in *HANDBOOK OF ORGANIZATIONS* 142, 169 (James G. March ed., 1965); Richard M. Emerson, *Power-Dependence Relations*, 27 *AM. SOC. REV.* 31, 32 (1962).

metrical power dynamics describe which organization can forgo the relationship with minimal negative consequences.¹⁹

Law firms and NLSOs are motivated by different incentives in the pro bono relationship. For law firms, pro bono work fulfills opportunities for recruiting lawyers, retaining and training them, and improving law firm image and reputation.²⁰ For NLSOs, pro bono work provides avenues for critical resources, including labor, money, and prestige. Moreover, an NLSO must rely on multiple law firms for these resources because a single law firm or even a range of law firms cannot provide all the resources an NLSO needs. Pro bono relationships do not serve the same purpose for law firms. Thus, these asymmetries are connected to power imbalances in pro bono relationships, because one organization depends on the other for its core mission, whereas the other organization establishes the norms and expectations for how both organizations should behave in the relationship.²¹ Because law firms are not reliant on NLSOs to fulfill their core institutional purposes, law firms control the structure and functionality of the relationships in ways that prevent NLSOs and the poor from obtaining the full benefits of the relationship.²²

To better understand how to address the lack of competition among law firms, the Article examines a range of motivations and incentives on each of these levels. Specifically, it looks at how the incentives of law firm management and lawyer pro bono professionals on the macro level are distinguishable from the motivations of departments and individual lawyers in law firms. It further examines how, on the macro level, NLSOs are structured relative to their pro bono programs, and how their structures might shape their perceptions of the problems in the delivery of legal services. It notes three types of NLSOs: pro bono-driven, staff-driven with pro bono components, and a combination of pro bono and staff-focused organizations. These varied structures can create differing relationships with law firms and present previously unrealized possibilities for rectifying power imbalances, stimulating competition, and better addressing the needs of the poor.

Building on the organizational sociology literature, this Article suggests, on the macro level, a realignment of power between law firms and NLSOs using intermediaries. Intermediaries would not only help shift the power imbalance, but importantly, create conditions that would foster com-

¹⁹ Christine Oliver, *Determinants of Interorganizational Relationships: Integration and Future Directions*, 15 *ACAD. MGMT. REV.*, 241, 243 (1990).

²⁰ See Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2361 (2010). Pro bono work also provides individual law firm lawyers opportunities to give back to society.

²¹ Terry Connolly & Ken Koput, *Naturalistic Decision Making and the New Organizational Context in Organizational Decision Making*, in *ORGANIZATIONAL DECISION MAKING* 285, 291 (Zur Shapira ed., 1997).

²² Emerson, *supra* note 18, at 32.

petition. I illustrate two intermediaries that can be responsive to the problems.

The first is a pro bono certification program established by the National Association of Pro Bono Professionals (“NAPBPRO”). NAPBPRO’s certification program would be similar to the growing trend in corporate certifications for balancing profit-making with social concerns. NAPBPRO would create industry best practices that take the needs of the poor into account when certifying firms. The second intermediary is a new *American Lawyer* ranking system that would rank law firms not only based on hours, but also the quality of pro bono work and whether pro bono is responsive to the needs of poor clients. These intermediaries are valuable because they take advantage of the importance of prestige to large law firms and reallocate power to NLSOs to be positioned to structure pro bono legal services.

Both the certification and the new *American Lawyer* rankings would incorporate best practices that would serve as industry guidelines for law firms. The best practices on the macro level would make pro bono relationships more durable, using specific time commitments, including instituting funding commitments, and expanding law firm fellowship programs. Changes can also be made on the meso level by law firm departments. For instance, a repeat player guarantee can be implemented where whole departments commit to become repeat players in particular areas of law.

In relationships like these where asymmetrical power dynamics play a crucial role, less powerful organizations frequently use specific tactics to maintain their relationships with more powerful organizations.²³ NLSOs are already implementing a micro-level tactic—acculturation—whereby NLSOs socialize law firms and their lawyers into familiarity with their missions and the plight of the poor to secure the continuous flow of labor, money, and prestige resources.²⁴ Acculturation involves NLSOs formally and informally educating and training law firm lawyers to raise awareness in the private bar about poverty, and to draw them toward providing labor, money, and prestige resources for longer durations. In addition to acculturation, the empirical data in this study provide additional possible avenues of micro-level strategies, including establishing a pay-for-preference regime in law firms.

Finally, this Article notes an alternative approach to addressing the secondary effects of the power imbalance between law firms and NLSOs, which involves shifting NLSOs’ dependence from law firms to the government by increasing LSC funding and reducing some of the restrictions placed on LSC grantees.

²³ See Tixiana Casciaro & Mikolaj Jan Piskorski, *Power Imbalance, Mutual Dependence, and Constraint Absorption: A Closer Look at Resource Dependence Theory*, 50 ADMIN. SCI. Q. 167, 168 (2005); Jeffrey Pfeffer, *A Resource Dependence Perspective on Intercorporate Relations*, in INTERCORPORATE RELATIONS: THE STRUCTURAL ANALYSIS OF BUSINESS 25, 27 (Mark Mizruchi & Michael Schwartz eds., 1987). In the for-profit setting, tactics include mergers and acquisitions and long-term contracts, such as joint ventures.

²⁴ See Pfeffer, *supra* note 23, at 27–28.

The Article proceeds in four parts. Part I describes the use of qualitative empirical data and methods. Part II introduces the scholarship documenting problems in the delivery of legal services. It first highlights the empirical finding that the structure of pro bono work between law firms and NLSOs yields the documented problems in legal services. Pointedly, it shows how law firms' interest in pro bono work and board positions drives NLSO response with virtually no consideration of quality or costs to NLSOs. It then lays out three dangers of the current structure of pro bono work. Part II also provides empirical data on two specific problems that confirm the current literature: handholding, which creates costs for NLSOs, and the pro bono mismatch. Part II discusses why NLSOs are unable to force law firms to compete, although competition among law firms could spur changes to address the problems in the delivery of legal services. It introduces the literature on power in organizational sociology that sheds light on this lack of competition. Part III provides a nuanced understanding of the problems in legal services by examining the structures, relationships, incentives, and motivations on the macro, meso, and micro levels of the law firm and NLSO. Part IV then draws on organizational sociology to make policy recommendations to reallocate power between law firms and NLSOs on the macro level through intermediaries, the meso level by creating a repeat player guarantee, and the micro level through a pay-for-preference regime in law firms. It highlights the micro-level tactic of acculturation that NLSOs currently utilize to manage their relationships with law firms. Part IV also addresses the limitations of the proposals and explains why these limitations should not impede their adoption.

I. INTERVIEW-BASED EMPIRICAL DATA

The data in this study consist of transcripts from in-depth qualitative interviews with seventy-four participants: (1) thirty-eight executive directors or pro bono directors of NLSOs; and (2) thirty-six large law firm lawyer pro bono professionals across the United States.²⁵ I use the term "pro bono professional" to broadly describe large-law-firm lawyers in charge of the full-time management and organization of pro bono legal services within their firms, usually at the global level.²⁶ The pro bono professionals in this study are all members of Am Law 100 firms. I chose these firms because they have institutionalized pro bono and established formal processes to collaborate with NLSOs to provide legal services.²⁷ These firms have also been the

²⁵ These thirty-six individuals represent about half of all lawyer pro bono professionals in Am Law 100 firms. I also interviewed three foundations or funders of NLSOs for a deeper understanding of the role of funding in pro bono relationships. Interviews were conducted in 2017.

²⁶ While many pro bono professionals also represent pro bono clients in addition to their fulltime management roles, this category of persons differ from pro bono lawyers who provide representation to both low income and corporate clients.

²⁷ See generally Cummings, *supra* note 7.

focus of most research on pro bono legal services.²⁸ The pro bono professionals have the following titles: “Pro Bono Partner,” “Director of Pro Bono,” “Special Counsel of Pro Bono,” or “Pro Bono Counsel.”²⁹ They straddle the world of legal services and corporate firms. They serve as “brokers” bridging the gap between law firms and NLSOs.³⁰ Most of these individuals have backgrounds in nonprofit legal services, government legal practice, or law school clinics.³¹ Others started out in law firms as associates and, in some cases, were promoted to litigation or corporate partnerships before becoming pro bono professionals.

In NLSOs, I interviewed executive directors, pro bono directors, and coordinators.³² In some large organizations, I interviewed two individuals, usually the executive director and a pro bono director or coordinator. While this research includes five LSC-funded organizations, most of the NLSOs in this study are exclusively funded by private foundations, large law firms, and individual donations, and some receive grants from state and local governments. The LSC-funded organizations receive private funding and behave similarly to non-LSC-funded organizations.

I chose these research participants because they are the most knowledgeable about the processes and mechanisms involved in the pro bono system. The pro bono system involves law firm lawyers representing low-income individuals mostly through referrals from NLSOs. In addition to providing pro bono labor resources, firms also make monetary contributions in the form of actual checks to NLSOs. Contributions can range from about \$5,000 to up to \$75,000. In exceptional cases, some NLSOs receive \$100,000 or more from a single law firm annually.³³

In-depth interviews “enable researchers to engage in ‘process tracking,’ which helps to ‘discern how processes emerge and evolve.’”³⁴ Interviews are advantageous over surveys when researchers are trying to understand

²⁸ See, e.g., Cummings & Rhode, *supra* note 20; Cummings, *supra* note 7.

²⁹ Law firms also have lawyer pro bono managers. To the extent that those pro bono managers are subordinate to any other pro bono professional within their firms, they have been excluded from this sample. Firms also sometimes have nonlawyer coordinators who are usually subordinates to the individuals in this study. This study does not generally include managers and coordinators who are subordinates, because the focus is on individuals with managerial power within their firms.

³⁰ See David Obstfeldt, *Social Network, the Tertius Iungens Orientation and Involvement in Innovation*, 50 ADMIN. SCIENCE. Q. 100, 102 (2005); see also Atinuke Adediran, *Symbolic Professionalization in Elite Law Firms* (in progress) (on file with author).

³¹ Two of the thirty-six have backgrounds that differ from these.

³² Some large NLSOs have lawyer or non-lawyer pro bono coordinators, pro bono directors or managers. While they are not necessarily the decisionmakers within their organizations, these pro bono coordinators are knowledgeable about processes and relationships.

³³ See Interview with PI016 (May 24, 2017) (on file with author). For other discussions about monetary contributions, see, for example, Interview with PC021 (June 9, 2017) (on file with author). Firms also provide in-kind resources, such as space for meetings or training.

³⁴ Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1281 (2016) (quoting MICHÈLE LAMONT & PATRICIA WHITE, WORKSHOP ON INTERDISCIPLINARY STANDARDS FOR SYSTEMIC QUALITATIVE RESEARCH 10, http://www.nsf.gov/sbe/ses/soc/ISSQR_workshop_rpt.pdf, archived at <https://perma.cc/T9U6-ZFNN>).

experiences within social contexts.³⁵ Here, interviews provide the best form of data for understanding the structure of the relationships between law firms and NLSOs, how power impacts the flow of labor, money and prestige resources from law firms, and how pro bono relationships impact NLSOs.³⁶

I used a nonrandom sampling technique to capture a variety of NLSOs. Thus, I employed maximum variation sampling to reach NLSOs of varying sizes, ranging from very small (two lawyers) to very large (approximately 700 lawyers).³⁷ I also included organizations with varying legal practice areas, including general poverty law,³⁸ immigration, family law, housing, arts, nonprofit operations, consumer law, etc. This sampling approach allowed me to capture the principal outcomes that cut across a great deal of participant or program variation.³⁹

I recruited participants in several ways, constructed to increase the likelihood that I would reach individuals who are knowledgeable about the pro bono system and who can explain the relationship between law firms and NLSOs in the delivery of legal services to the poor. Using the 2017 *Vault Guide to Law Firm Pro Bono Programs* and the guidance of an informant, I first contacted every pro bono professional who is either a partner, director, counsel, or manager across the United States.⁴⁰

About fourteen individuals initially agreed to participate in the study. I contacted additional participants through referrals derived from the fourteen initial participants, and twenty-four additional pro bono professionals agreed to be part of the study.

I recruited participants in NLSOs in a few ways. I first constructed a list of large, medium, and small NLSOs in several cities. Then, I emailed some of them, and many responded favorably. I used the snowball method to reach other similar organizations through referrals. I also received referrals from law firm pro bono professionals with knowledge of NLSOs that might be strong candidates for the study.⁴¹

³⁵ See *id.* at 1282; see also Bruce L. Berg, *QUALITATIVE RESEARCH METHODS FOR THE SOCIAL SCIENCES* 2 (Jeff Lasser et al. eds., 4th ed. 2001).

³⁶ See George E. Mitchell, *Strategic Responses to Resource Dependence Among Transnational NGOs Registered in the United States*, 25 *VOLUNTAS* 67, 70 (2014).

³⁷ See MICHAEL QUINN PATTON, *QUALITATIVE EVALUATION AND RESEARCH METHODS* 174 (2d ed. 1990).

³⁸ General poverty law makes up about 70% of the sample. General poverty law organizations are usually large with a wide range of legal practice areas.

³⁹ See Patton, *supra* note 37, at 174.

⁴⁰ See generally VAULT CAREER INTELLIGENCE, *VAULT GUIDE TO LAW FIRM PRO BONO PROGRAMS* (Matthew J. Moody ed., 2017). The initial contact list included about seventy-five individuals.

⁴¹ I stopped at thirty-eight participants in NLSOs and thirty-six law firm pro bono professionals because I had reached saturation. In qualitative social science research, saturation is a marker of rigor, and occurs when a researcher no longer derives new information or themes. See Greg Guest et al., *How Many Interviews Are Enough? An Experiment with Data Saturation and Variability*, 18 *FIELD METHODS* 59, 60 (2007); Anthony J. Onwuegbuzie & Nancy L. Leech, *A Call for Qualitative Power Analyses*, 41 *QUALITY & QUANTITY* 105, 116 (2007).

Interviews were semi-structured, which entailed asking participants open-ended questions,⁴² and using a protocol to ensure that I pursued a consistent set of themes and questions, but also explored additional topics as they arose. The open-ended questions covered their daily activities, roles, and interactions with other individuals and organizations, including firms, NLSOs, funders, law schools, law students, and nonlegal community organizations. All but ten of the interviews were conducted in participants' offices; one of the ten exceptions was in person at a different location, and nine were conducted via video conferencing. I personally interviewed all participants.

Participants signed a consent form that I emailed a few days before each interview. The consent form summarized the study and potential risks and benefits to participants, detailed the confidentiality measures taken to protect participants' identities and those of their organizations, and allowed the interview to be audio recorded for verbatim transcription after data collection.⁴³

I hired a professional transcriber to transcribe the interviews verbatim, which I loaded into a standard qualitative data analysis program (AtlasTi). Finally, I manually coded and analyzed the data following a standard qualitative data coding and analysis procedure, including aggregating data into larger concepts and themes and checking to confirm that the themes accurately represented interview responses.⁴⁴

In line with the requirements of the Institutional Review Board and the confidentiality agreement signed by participants and myself, I have made every effort to protect the identity of participants and their organizations. Each participant was assigned a unique identification number included on transcripts and data files. Each identification number is also used in this Article whenever a quote comes from a participant. This Article does not use the names of individuals, organizations, or specific locations. The Article also omits proxies that could be traced back to specific people, organizations, or locations.

II. PROBLEMS IN LEGAL SERVICES

In the current system of legal services, notwithstanding the private bar's investments in and institutionalization of pro bono work, scholars have noted that NLSOs spend significant time and resources training pro bono lawyers and are often dissatisfied with the quality of work provided by law firm pro bono volunteers.⁴⁵ Further, the needs of the poor are not being adequately met, because the pro bono interests of law firms and their lawyers often

⁴² See Patton, *supra* note 37, at 174.

⁴³ This research was approved by Northwestern University's Institutional Review Board.

⁴⁴ See Greene, *supra* note 34, at 1287.

⁴⁵ See, e.g., Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2071 (2008).

differ from the needs of poor clients.⁴⁶ This Article argues that pro bono relationships between law firms and NLSOs are currently structured so that NLSOs respond to law firm interest in pro bono matters and board positions with virtually no consideration of quality and costs.

Scholars have explained that NLSOs are severely limited, both financially and in terms of the number of available lawyers, in their capacity to represent low-income clients.⁴⁷ Significant cuts to LSC funding instituted by the Reagan administration and the imposition of various bans on the kinds of legal representation that LSC lawyers can provide have contributed to this limitation.⁴⁸ The legal scholarship has shown that NLSOs make difficult decisions about who can receive scarce legal services because of these financial limitations.⁴⁹ Because of the lack of resources, NLSOs have come to rely on large law firms for pro bono legal services and financial support, and firms have become critical parts of the provision of legal services to the poor.⁵⁰ In turn, pro bono work has become institutionalized in large law

⁴⁶ See, e.g., Adediran, *supra* note 9, at 2.

⁴⁷ See generally Catherine 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 (2014); I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221 (2013).

⁴⁸ The LSC's Justice Gap Report documents that nationwide, "roughly *one-half* of the people who seek help from LSC-funded legal aid providers are being denied service because of insufficient program resources. *One million cases a year* must be rejected for this reason." LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: A REPORT OF THE LEGAL SERVICES CORPORATION 8 (2007).

⁴⁹ See generally Cohen, *supra* note 47. Rationing—that is, the allocation of scarce resources based on certain determinations—has been applied to the distribution of legal services in the civil and criminal contexts. For discussions of rationing in criminal cases, see David Luban, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 306 (Princeton Univ. Press ed., 1988); Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 246 (2017); Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 430 (2016); Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH. U. J. L. & POL'Y 205, 226 (2011); see also Rhode, *supra* note 45, at 2056–57 (studying NLSOs as sites of cause lawyering on key issues including their structures, strategies, funding sources, and challenges); see generally Albiston & Nielsen, *supra* note 47 (investigating how legal services organizations obtain funding to support their work and represent their clients); Catherine Albiston et al., *Public Interest Law Organizations and the Two-Tier System of Access to Justice in the United States*, 1 LAW & SOC. INQUIRY 33 (2016) (examining the variation of legal services organizations, in terms of services provided and geography in relation to the amount of poverty experienced within geographical locations); Jeffrey Kosbie, *Donor Preferences and the Crisis in Public Interest Law*, 57 SANTA CLARA L. REV. 43, 45 (2017) (researching donors to the National Center for Lesbian Rights); Rhode, *supra* note 45 (studying the evolution of work performed by legal services organizations, and the strategies and challenges these organizations experience in the provision of legal services).

⁵⁰ Daniels & Martin, *supra* note 15, at 147–49.

firms,⁵¹ further deepening firms' commitment to providing legal services to the poor.⁵²

Scholars have documented how this deepened commitment has increased the role of the private bar in pro bono work. In 2008, 80% of the NLSOs in Deborah Rhode's study reported moderate or extensive collaboration with the private bar.⁵³ Only 20% of the NLSOs in that study reported very little or no involvement, and those NLSOs tended to have small legal staffs.⁵⁴ Almost all the large national NLSOs relied heavily on pro bono work for impact litigation and involved law firms in at least half of their major cases.⁵⁵

Measured in terms of dollar value, private contributions to civil legal services are substantial.⁵⁶ In 2005, the LSC provided around \$331 million to its grantees.⁵⁷ In the same year, the value of pro bono work was estimated to be \$624 million—about double the amount Congress appropriated for civil legal services.⁵⁸ However, even this conservative estimate of the monetary value of pro bono services is approximately 74% of the money appropriated by Congress.⁵⁹

As the role of the private bar increased, and academic literature emerged to study these developments, most scholarship has focused on law firm motivations and incentives for engaging in pro bono work. Scholars have documented that pro bono provides an opportunity for the private bar to improve its prestige and bolster its failing public image, and for recruiting, retaining, and improving the job performance of lawyers.⁶⁰ Scholars

⁵¹ See Steven A. Boutcher, *Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the Am Law 200*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 1, at 137; Sandefur, *supra* note 11, at 107; DiPippa, *supra* note 15, at 114; see generally Steven A. Boutcher, *Private Law Firms in the Public Interest: The Organizational and Institutional Determinants of Pro Bono Participation, 1994–2005*, 42 LAW & SOC. INQUIRY 543 (2017) [hereinafter Boutcher, *Private Law Firms*]; Cummings, *supra* note 7. This institutionalization refers to the way pro bono work has become interwoven into the basic fabric of the firm, where it is governed by explicit rules, identifiable practices, and implicit norms promoting public service.

⁵² Cummings & Rhode, *supra* note 20, at 2364.

⁵³ Rhode, *supra* note 45, at 2070. "Moderate or extensive collaboration" means the private bar participated in 33% to 47% of the legal services provided by that NLSO.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Sandefur, *supra* note 11, at 96.

⁵⁷ *Id.*

⁵⁸ *Id.* at 98. To be sure, legal services purchased by individuals are usually much less expensive than those purchased by law firms' organizational clients. Valuing law firms' pro bono work at the individual services rate places firms' pro bono contributions at a much lower level of around \$246 million. *Id.*

⁵⁹ *Id.*

⁶⁰ See generally DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE (2005) [hereinafter RHODE, PRO BONO IN PRINCIPLE]; Deborah Rhode, *Profits and Professionalism*, 33 FORDHAM URB. L.J. 49, 79–80 (2005); Boutcher, *Private Law Firms*, *supra* note 51; Daniels & Martin, *supra* note 15; Robert Granfield, *The Meaning of Pro Bono: Institutional Variations in Professional Obligations among Lawyers*, 41 LAW & SOC'Y REV. 113 (2007); April Faith-Slaker, *What We Know and Need to Know about Pro Bono Service Delivery*, 67 S.C. L.

have also shown that pro bono work serves law firm incentives by providing training, litigation experience, client contact, intellectual challenge, and the opportunity to take responsibility beyond what is typically available to junior lawyers in law firms.⁶¹ Pro bono work is said to provide opportunities for marketing and client relations.⁶² It also raises lawyer morale⁶³ and allows lawyers to give back to society.⁶⁴

Scholars have written about law firm behaviors in these pro bono relationships, showing that law firm interests are driven by considerations regarding corporate client conflicts, business creation interests, or other market-focused factors, such as publicity.⁶⁵ Firms avoid matters in areas of law in which many NLSOs seek the help of volunteer lawyers, such as employment law, labor law, and foreclosures, to avoid conflict with their corporate clients' interests.⁶⁶ Firms also avoid matters in family law, except for domestic violence, because such matters seem to be time consuming⁶⁷ and can be stressful.⁶⁸ On the other hand, firms favor pro bono matters with

REV. (2016); Granfield & Mather, *supra* note 15; Jolie L. Justus, *Using Business Strategies and Innovative Practices to Institutionalize Pro Bono in Private Law Firms*, 72 UMKC L. REV. 365 (2003); Rhode, *supra* note 11; Deborah A. Schmedemann, *Pro Bono Publico as a Conscience Good*, 35 WM. MITCHELL L. REV. 977 (2009); Christopher Sclafani Rhee, *Pro Bono, Pro Se*, 105 YALE L.J. 1719 (1996); Steven Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT'L J. LEGAL PROF. 209 (1998). While it is beyond the scope of this Article, empirical work has shown that having legal representation benefits individuals, in that they are more likely to experience favorable legal outcomes in comparison to those who do not have legal representation. *See, e.g.*, Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter: The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 941–42 (2016); Rhode, *supra* note 60, at 58; Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOC. REV. 909, 924–25 (2015); Christopher Sclafani Rhee, *Pro Bono, Pro Se*, 105 YALE L.J. 1719, 1720 (1996); Nadine Strossen, *Pro Bono Legal Work: For the Good of Not Only the Public, But Also the Lawyer and the Legal Profession*, 91 MICH. L. REV. 2122, 2132 (1993); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC. REV. 419, 429 (2001).

⁶¹ *See generally* Justus, *supra* note 60; Rhode, *supra* note 60, at 58. For instance, even “[t]he average landlord/tenant matter is likely to involve legal research, discovery, witness preparation, negotiation, client counseling, drafting pleadings, trial preparation, trial advocacy, and in some cases, appellate advocacy and brief preparation.” ESTHER F. LARDENT, MAKING THE BUSINESS CASE FOR PRO BONO 7 (2000), https://www2.nycbar.org/mp3/DoingWellByDoingGood/pbi_businesscase.pdf, archived at <https://perma.cc/2CSY-5HRM>. These are all important skills for litigators. Transactional pro bono matters, including securing 501(c)(3) status or reviewing a lease, offer training in statutory interpretation, negotiation, etc. *See id.*

⁶² Daniels & Martin, *supra* note 15, at 155; Justus, *supra* note 60, at 368.

⁶³ William C. Kelly, *Reflections on Lawyer Morale and Public Service in an Age of Diminishing Expectations*, in THE LAW FIRM AND THE PUBLIC GOOD 90, 91–101 (Robert A. Katzmann ed., 1995).

⁶⁴ RHODE, PRO BONO IN PRINCIPLE, *supra* note 60, at 29–32; Strossen, *supra* note 60, at 2131–32.

⁶⁵ Sandefur, *supra* note 11, at 95, 103; *see* Daniels & Martin, *supra* note 15; DiPippa, *supra* note 15, at 129–30; Rhode, *supra* note 45, at 270–75; Granfield & Mather, *supra* note 15, at 11; Lardent, *supra* note 15, at 2279.

⁶⁶ Sandefur, *supra* note 11, at 103; Rhode, *supra* note 11, at 256–57.

⁶⁷ Cummings & Rhode, *supra* note 20, at 2393–94, 2429.

⁶⁸ Adediran, *supra* note 9, at 3; Daniels & Martin, *supra* note 15.

“market appeal,” that is, those in which firms can enjoy favorable public relations.⁶⁹ Such matters are usually large-scale litigations rather than the representation of individual clients.⁷⁰ Firms also favor matters coherent with their internal culture of billable hours, such as pro bono matters that are discrete rather than deeply involved; and individual lawyers within firms engage in pro bono work based on their interests rather than the needs of the poor.⁷¹

These trends have created a number of problems that scholars have noted, including the fact that NLSOs spend significant time and resources training pro bono lawyers, and are often dissatisfied with the lack of time commitment and quality of work provided by law firm pro bono volunteers,⁷² the needs of the poor are not being adequately met because law firms and their lawyers choose to assume certain types of matters that are usually incongruent with the needs of poor clients,⁷³ and pro bono relationships can be costly for NLSOs.

However, scholars have yet to notice the larger problem of how the current structure of pro bono work—law firms’ strong interest in pro bono work and board positions along with NLSOs’ acquiescence—facilitates the other problems documented in the literature. This Article therefore does two things. It emphasizes the role of power and its secondary effects on the delivery of legal services. It also highlights the macro, meso, and micro processes in large firms and NLSOs that contribute to the problems in the provision of legal services.

A. *Structure of the Relationship Between Law Firms and NLSOs*

Legal scholars have overlooked that the structure of the relationship between law firms and NLSOs creates new problems in legal services. Structure is defined as how organizations order their relations with each other.⁷⁴ Particularly, in the current structure, law firms have a strong interest in engaging in pro bono work and having board positions, and NLSOs respond to law firm interest virtually regardless of the quality of pro bono work, and whether the relationship benefits NLSOs and poor clients. Interview data reveal that NLSOs comply with law firm interests because they are so dependent on law firms to secure mostly pecuniary, but also labor and prestige, resources.

⁶⁹ Cummings, *supra* note 7, at 123.

⁷⁰ *Id.* at 126.

⁷¹ Adediran, *supra* note 9, at 2, 19–21. Lawyer interests are also connected to law firm culture, such as how law firm associates are currently interested in immigration related work, which is connected to the culture of billable time in law firms. *Id.* at 19–22.

⁷² See, e.g., Rhode, *supra* note 45, at 2071.

⁷³ See, e.g., Adediran, *supra* note 9, at 8–9.

⁷⁴ HARRISON M. TRICE & JANICE M. BEYER, *THE CULTURES OF WORK ORGANIZATIONS* 20 (2002).

Law firms have communicated two ways in which NLSOs can obtain monetary contributions. The first is by NLSOs providing firms with pro bono work. The second is by allowing law firm partners to sit on NLSO boards.⁷⁵ Indeed, some law firms have refused to give money to NLSOs that do not provide them with pro bono matters, board opportunities, or both. Twenty-eight law firm pro bono professionals provided explicit and elaborate explanations of law firm interests connecting money to pro bono work as illustrated by the below two law firm pro bono professionals:

I find, and I think it's true of most firms now, that the activity drives the money. So, I would say to these organizations, if you want to get on our list to get money, first get our lawyers engaged in pro bono work.⁷⁶

Oh, it's really very connected with pro bono. You know we want to support the groups that we work with and a group may want a donation. Now, most organizations I think understand that they're going to be fairly out of luck for a contribution if you haven't done work with them.⁷⁷

In response, NLSOs provide firms with pro bono matters. All thirty-eight NLSOs provided some explanation about the relationship between pro bono work and charitable giving. Twelve NLSOs were explicit about how charitable giving drives pro bono programs. One NLSO explained that "law firms will only give to you if their attorneys have a good experience. If they're placing a number of cases, if they have a strong relationship with you, then that determines how much money they give."⁷⁸ Another NLSO expounded that "part of why we have our pro bono program is to facilitate the charitable giving. . . . Pro bono substantially enhances our charitable giving. Many firms will essentially say they won't give unless there's a pro bono component. You know, they actually link it expressly."⁷⁹ Another NLSO said that "a big benefit [of pro bono] is that law firms who volunteer with us tend to feel engaged and then donate to us too. And, the more a law firm is volunteering with us, the more they feel that relationship and give money."⁸⁰

A second way in which NLSOs respond to law firm interests is by providing firms with board positions.⁸¹ External pressures and demands for

⁷⁵ Law firms encourage their lawyers, especially partners, to sit on nonprofit boards. Board positions bring publicity to firms and allow lawyers to serve as advisors to nonprofits. Individual partners also value sitting on nonprofit boards because it makes them visible in the community and provides opportunities to give back.

⁷⁶ Interview with PC001 (Mar. 14, 2017) (on file with author).

⁷⁷ Interview with PC034 (Aug. 7, 2017) (on file with author).

⁷⁸ Interview with PI026 (June 5, 2017) (on file with author).

⁷⁹ Interview with PI031 (July 12, 2017) (on file with author).

⁸⁰ Interview with PI017 (May 25, 2017) (on file with author).

⁸¹ Nonprofit organizations use board positions for myriad reasons, including to obtain resources, information, and advice.

resources impact board compositions.⁸² In general, board members play a major role in the fundraising efforts of nonprofit organizations.⁸³ The executive director of an NLSO described the attributes and responsibilities of the organization's usual board member as typically:

[s]enior partners, not old people at all, but people at a higher level within their firms. We don't expect them to come to meetings more than once or twice a year. They're not going to have to go out and do fundraising or send letters. It's basically, use the prestige that you have for [the organization].⁸⁴

Thus, NLSOs' boards are mostly comprised of influential members of large law firms and, in some cases, corporate clients.⁸⁵

NLSOs also fulfill law firms' requirement of having board members to obtain monetary contributions. Without being asked directly about the connection between board positions and giving, twelve law firm pro bono professionals talked about the connection. For example, a pro bono professional explained the interconnectedness between board memberships and giving NLSOs money:

Another reason why we give is when we have a partner on a board. The organizations know, and that's why they always want people to be on their boards. It's for the money, largely. We just cut off an organization because the board member who was really the primary contact there moved to another firm and we actually don't do any work with them and haven't for years.⁸⁶

NLSOs are aware of this connection and understand that the duration of their relationship with a given law firm could be limited if it deviates from law firms' interests, so they readily comply. Again, without being prompted to speak about the connection between board positions and money, eleven NLSOs provided concrete explanations of the interrelationship between board positions and charitable giving.⁸⁷

For example, in explaining how law firms make decisions about giving, the director of an NLSO said that firms "have some factors that they look at. Number one, do you have a board member from their firm to the organization because it's the board member that's making the request for the

⁸² Brian Boyd, *Corporate Linkages and Organizational Environment: A Test of the Resource Dependence Model*, 11 STRATEGIC MGMT. J. 419, 420 (1990).

⁸³ See Mark Hager et al., *How Fundraising is Carried Out in US Nonprofit Organisations*, 7 INT. J. NONPROFIT & VOLUNTEER SECTION MKTG. 311, 318 (2002); see generally Jeffrey L. Callen et al., *Board Composition, Committees, and Organizational Efficiency: The Case of Nonprofits*, 32 NONPROFIT & VOLUNTARY SECTOR Q. 493 (2003).

⁸⁴ Interview with PI001 (Mar. 7, 2017) (on file with author). For similar discussion about the limited role of nonprofit organization board members, see Rhode, *supra* note 45, at 2051.

⁸⁵ Interview with PI009 (Apr. 27, 2017) (on file with author).

⁸⁶ Interview with PC014 (June 6, 2017) (on file with author).

⁸⁷ Board positions may also go to the corporate clients of law firms.

money.”⁸⁸ The pro bono director of another NLSO calls having board member support “the richer avenue” for obtaining funding from law firms, that is, richer than engaging them in pro bono work.⁸⁹ The executive director of another NLSO was direct about the influence of board members on money resources from law firms: “We’ve had firms who are hardly doing any pro bono work anymore, but for our fundraiser every [year], if a director on my board calls them, and says, okay, cough up \$10,000, they will give us \$10,000.”⁹⁰

Recognizing the importance of having influential board members in order to obtain resources, NLSOs strive to increase the number of board seats. For instance, the executive director of an NLSO has made efforts to increase the size of its board because, “[large law firms], they like to have a board member, and/or have pro bono stuff going on. But they really like that board member, so I tried recently to get another board member on from them.”⁹¹ Overall, NLSOs use board appointments to ensure the flow of resources from law firms.⁹²

There are three dangers that arise from the current structure of pro bono work where law firm interests in legal matters and board positions outweigh quality, need, or cost. The first danger is that NLSOs are incentivized to match the preferences of law firms regardless of mission identity or need. This is exactly what we observe from the NLSOs in this study, which are willing to accept lower quality pro bono work that can be costly to them in order to obtain and keep law firm resources. This structural problem therefore reinforces the other problems in the delivery of legal services, by making the doing of pro bono work both costly for NLSOs and mostly unresponsive to actual legal needs.

Another danger is that NLSOs can increase the probability of other attempts at influence by law firms.⁹³ In this context, for example, board positions can further cement low-quality pro bono relationships that do not meet

⁸⁸ Interview with PI026 (June 5, 2017) (on file with author).

⁸⁹ Interview with PI040 (Aug. 9, 2017) (on file with author).

⁹⁰ Interview with PI033 (July 21, 2017) (on file with author).

⁹¹ Interview with PI010 (May 1, 2017) (on file with author).

⁹² In addition to board members and firms, individual lawyers also give money to NLSOs. *See, e.g.*, Interview with PI006 (Apr. 14, 2017) (on file with author). While the division between law firm and individual lawyer giving is an empirical question, the literature on non-profit funding provides some general guidelines. Individual giving (85%) vastly exceeded donations from corporations and foundations (6% and 9%) per data collected in 1997. *Cf.* Karen A. Froelich, *Diversification of Revenue Strategies: Evolving Resource Dependence in Nonprofit Organizations*, 28 *NONPROFIT & VOLUNTARY SECTOR Q.* 246, 250 (1999) (describing resource dependence between non-profit organizations and private funding). While not systematically assessed or observed as part of this research, anecdotal evidence supports the conclusion that individual giving is the avenue by which many NLSOs receive donations, more so than from law firms. *See, e.g.*, Interview with PI006 (Apr. 14, 2017) (on file with author).

⁹³ *Cf.* Werner Nienhüser, *Resource Dependence Theory—How Well Does It Explain Behavior of Organizations?*, 19 *MGMT. REVUE* 9, 14–15 (2008) (explaining research on dependence and distribution of power).

the needs of poor clients. This can happen because board members also provide positive results for NLSOs by helping them to raise money and providing them with prestige, which means that NLSOs become even more beholden to their board members' law firms.⁹⁴ For instance, NLSOs' board members sometimes pressure them to respond to law firm interests. The below example is illustrative:

Every now and then, I'll get an email from a board director, or from the development director, and they'll say, "Look, I have a relationship with a partner at this firm, he has told me that they only give money to firms that do pro bono work with them, [so] I want you to start a pro bono relationship with them."⁹⁵

A third danger is that responding to law firm interests may not necessarily yield desirable results for NLSOs. For instance, what happens when NLSOs provide law firms with pro bono work and board positions, but firms do not give them money? Some NLSOs in this study have experienced this outcome. In general, NLSOs believe that it is bad form for a law firm not to give money despite having a pro bono relationship, because the pro bono relationship makes NLSOs "jump through hoops to try to create projects that are fitting to their constraints versus what the clients actually need."⁹⁶

Therefore, the current structure of pro bono relationships benefits law firms. The structure also reinforces other problems in legal services by, for instance, creating undue costs for NLSOs and generating pro bono work not tailored to addressing the actual legal needs of poor clients. Notably, unlike other donor/donee relationships where donations are often restricted to particular engagements, relationships between law firms and NLSOs are not often restricted but can cease to exist if law firm interests are ignored.

B. Handholding Without Repeat Players

The term "handholding" is used to describe the NLSO practice of systematically guiding law firm lawyers through the representation of poor clients. Handholding becomes problematic when NLSOs support law firm lawyers through legal representation without repeat players or experts that can allow NLSOs to gain some returns on their investments. A few legal scholars have mentioned the handholding problem in passing,⁹⁷ but scholars have yet to elaborate on why and how handholding is a problem by showing

⁹⁴ For instance, board members seek and obtain money on behalf of NLSOs.

⁹⁵ Interview with PI025 (June 8, 2017) (on file with author).

⁹⁶ Interview with PI009 (Apr. 27, 2017) (on file with author). When this happens, NLSOs' best recourse is to ask board members, assuming they have them, to advocate for money. This can create a cycle of dependence on law firms. For other discussions about not receiving money despite providing pro bono work, see Interview with PI019 (June 1, 2017) (on file with author); Interview with PI027 (July 6, 2017) (on file with author).

⁹⁷ See, e.g., Leonore F. Carpenter, "We're Not Running a Charity Here": Rethinking Public Interest Lawyers' Relationships with Bottom-Line-Driven Pro Bono Programs, 29 *BUFF.*

its impact on costs to NLSOs and its relationship with the lack of pro bono repeat players. Scholars also have not theorized how to address the problem. Therefore, the empirical data in this study further the current scholarship by showing how handholding can be unduly costly to NLSOs without the establishment of pro bono repeat player systems. Such systems would ensure that when NLSOs train law firm lawyers in particular areas of law, law firms would represent a sizable number of poor clients in those areas, so that NLSOs can receive returns on their investments.

There are two types of handholding problems. The first involves pro bono referrals to law firms that occur even though NLSO lawyers can provide speedier and probably cheaper legal services. I illustrate this problem concretely with the example of “the simple divorce”⁹⁸ as explained by an NLSO:

If I’m taking on, let’s say, a really simple divorce, it would probably take me maybe five hours to do it total . . . but if I’m partnering with a law firm lawyer, then I have to send them the stuff, and then they send it back to me, and I review it to make sure it’s clear, and then I send them the directions on, like, this is what you do next. And then, I check to make sure that it was actually done properly. It’s not that they entirely are a drain on our resources, it definitely takes a lot, and sometimes depending on the case, it can take more to supervise them than to just do it ourselves.⁹⁹

In the example of the simple divorce above, both the NLSO and the client may be better off not referring the matter to a law firm for representation,¹⁰⁰ but the NLSO makes the referral because keeping the pro bono relationship with the firm provides an avenue for labor as well as money resources.

A second type of handholding involves close supervision of pro bono matters and amounts to a costly step-by-step guidance through the representation of poor clients. The pro bono director of an NLSO explained:

Most of the attorneys that we work with do not have subject matter expertise in the area of law that we work in, so we’re providing expertise in the area of law and the civil procedure. I’m making air quotes, “civil procedure” that exists in that particular area or those courtrooms.¹⁰¹

PUB. INT. L.J. 37, 69–76 (2010); Cummings, *supra* note 7, at 20, 43 n.242; Rhode, *supra* note 65, at 2072.

⁹⁸ It is important to note that law firms typically disfavor family law matters, except for domestic violence. See Adediran, *supra* note 9, at 9. While some law firms and lawyers take on divorce matters, they do not do so on a large scale. *Id.*

⁹⁹ Interview with PI009 (Apr. 27, 2017) (on file with author).

¹⁰⁰ See Rhode, *supra* note 45, at 2072.

¹⁰¹ Interview with PI006 (Apr. 14, 2017) (on file with author).

Other examples show that NLSOs “teach” law firm lawyers what to do as detailed in the below examples:

We’d probably be teaching them what to do, so we would be in very close contact: okay, this is the next pleading you have to file, here’s a model document. We are not going to be on the phone for every single call, but we would go to court with them, things like that.¹⁰²

If someone takes a case, we assign it to them, and we do let them know that we’re here for any questions. So, if someone takes a family law case and has questions while they’re handling it, they can call my co-worker . . . and ask her. And it’s really [her] job to be available to our volunteers and she is on the phone usually all day long with people calling her and she’ll say, “Well, you know, in this case, it would be best to file this kind of motion.” So they do have that support.¹⁰³

We have about three hundred pro bono attorneys with the cases that are active right now, and they’re more of our typical pro bono matters. And so, I spend a lot of my time following up with the pro bono attorneys just to see where they are in the cases, making sure that they’re moving along as they should, and I also spend a lot of time connecting them to our staff who provide technical assistance and mentorship.¹⁰⁴

As one can glean from the examples provided above, the current pro bono structure is such that both the law firm and the NLSO can essentially represent a single client at the same time, where co-counseling is neither necessary nor efficient. The labor and money resources may be better utilized by spreading them out to other clients.

However, the expensive nature of the pro bono relationship is not problematic if NLSOs can reap the benefits of handholding. In other words, handholding is not necessarily a waste of resources if it creates experts who are equipped and willing to represent clients with similar legal problems on future matters. If the process creates repeat players, NLSOs can reap some returns on their investments. An executive director explained, “We’re holding their hand, but it’s less work for us if they’ve already done a case like that

¹⁰² Interview with PI009 (Apr. 27, 2017) (on file with author).

¹⁰³ Interview with PI017 (May 25, 2017) (on file with author).

¹⁰⁴ Interview with PI019 (June 1, 2017) (on file with author). This particular example may not appear to be costly, because 300 pro bono lawyers are representing this NLSO’s clients. However, this example comes from a very large NLSO, which is not entirely representative of most NLSOs in this study and in the United States in general.

before, and then they could do it again.”¹⁰⁵ The pro bono directors of two NLSOs provide further examples:

What happens when it works out well is, yes, I had to invest a lot on this attorney on the first project they did, but then they took the second and the third and the fourth and they do it more on their own, and I could not get all this work done without them.¹⁰⁶

When we are creating our pro bono projects, we try to make sure that even if we put a large investment of time in the beginning of a project to set it up, to provide the training, to really think through how that pro bono client will go through our process, I think if we had the return of the pro bono firm or attorneys taking on the matters, really enjoying the work, enjoying working with the clients and enjoying working with our staff and coming back to do more, then I think that that goal and that time expenditure is worth it.¹⁰⁷

Many NLSOs in this study spoke about the importance of having pro bono repeat players. However, repeat players are not widespread.¹⁰⁸ The reasons for the general lack of repeat players are complicated. One possible explanation is that law firms tend to struggle with associate attrition and retention, which means that associates with expertise in any particular area of law are at a risk of exiting their law firms at any given time.¹⁰⁹ As a result, creating a system where associates with expertise remain in their firms to take on more than one legal matter in the same or a similar area of law, and with the same NLSO, or train future experts in particular areas of law, could be challenging. Another reason for the lack of repeat players which is driven largely by NLSOs, is that there are certain complicated legal matters that may not be worth passing along to law firms as pro bono matters.

In Part IV below, I advocate for a repeat player system that could potentially provide a workable avenue to address handholding costs, while considering the nuanced way in which it plays out both within firms and NLSOs.

¹⁰⁵ Interview with PI010 (May 1, 2017) (on file with author).

¹⁰⁶ Interview with PI040 (Aug. 9, 2017) (on file with author).

¹⁰⁷ Interview with PI019 (June 1, 2017) (on file with author).

¹⁰⁸ *See id.*

¹⁰⁹ *See generally* Seth Camahan et al., *When Does Corporate Social Responsibility Reduce Employee Turnover? Evidence from Attorneys Before and After 9/11*, 60 *ACAD. MGMT. J.* 1932 (2017). There are likely other reasons for the lack of repeat players, including internal politics about which areas of law ought to have repeat players and the ways in which a system of repeat players can be established. A handful of law firms have established pro bono practice areas, where the firms establish areas of law in which lawyers should take pro bono matters. *See, e.g.*, Interview with PC015 (June 6, 2017) (on file with author); Interview with PC034 (Aug. 7, 2017) (on file with author). Pro bono practice areas are a step toward the repeat player system, which would ensure that law firms take on matters where NLSOs have invested time and resources.

C. *The Pro Bono Mismatch*

There is clear recognition in the legal scholarship that, despite law firm investments in pro bono work, the actual legal needs of the poor are not being met.¹¹⁰ The pro bono manager of an NLSO described the mismatch as “the big problem in pro bono” using the below example:

The big issue in pro bono and has been for a couple of years, is are the resources matching the problem? So, you might have fifty attorneys that want to write criminal appeals but where are those fifty attorneys when you have to go to deportation hearings? That’s where the need is, so you can do as much pro bono as you say you’re doing, but are you really meeting the justice gap? Are you really putting those resources [to match] where the need is?¹¹¹

I have covered the pro bono mismatch in great depth in previous work.¹¹² In addition to the oft-discussed drivers of law firm pro bono interests, including client conflict and market appeal, law firm interests are also driven by the political climate, individual interests of lawyers, and the culture of billable time.¹¹³ While it is subject to change, today the pro bono mismatch has resulted in law firm lawyers’ strong interest in immigration law matters, while current legal needs are greatest in housing and family law.¹¹⁴ The result is that clients with the greatest legal needs are often left without legal representation.

Empirical evidence shows how individual lawyer interests contribute to the pro bono mismatch.¹¹⁵ Law firm pro bono professionals, who serve as pro bono brokers between NLSOs and their firms, often focus on lawyer satisfaction rather than the legal needs of the poor. A firm pro bono professional explained the process by which pro bono matters are selected by the law firm:

I want to know what my lawyers want to do, what cases interest them, what clients interest them, what things don’t interest them, because I want to serve up to them something that they’ll feel comfortable doing . . . so what we find is that the bulk of what we do

¹¹⁰ See, e.g., Cummings, *supra* note 7, at 129–30; Cummings & Rhode, *supra* note 20, at 2391; Scheingold & Bloom, *supra* note 60, at 222; see generally Adediran, *supra* note 9. As I have discussed extensively both in this Article and *Solving the Pro Bono Mismatch*, law firm lawyers’ interest is actually strongest in immigration law today. However, the pro bono manager’s point still resonates.

¹¹¹ Interview with PI040 (Aug. 9, 2017) (on file with author).

¹¹² See generally Adediran, *supra* note 9.

¹¹³ See generally *id.*

¹¹⁴ See *id.* at 1041–42.

¹¹⁵ *Id.* at 1048–51.

tends to be driven by two things: a) what our lawyers want to do in terms of what attracts them; and b) what fits into their schedule.¹¹⁶

In short, firms tend to select pro bono matters with limited consideration of the legal needs of poor clients.

Empirical evidence also reveals how the culture of billable time contributes to the pro bono mismatch.¹¹⁷ Large law firm lawyers tend to bill clients in rigid time increments.¹¹⁸ Beyond billing time alone, large law firm lawyers have different cultural constraints depending on their practice areas—transactional or litigation. Unlike firms, NLSOs do not have the same time constraints as they need not bill their time to clients. Therefore, large law firm pro bono professionals manage time constraints within the parameters of the practice areas of law firm volunteer lawyers.¹¹⁹ The impact of the culture of billable time on law firm pro bono choice is so significant that associates tend to favor the timeframe of immigration matters over and above other legal matters. One pro bono professional explained that “[t]hey’re really good cases because of the backlogs . . . in [the] immigration system, [associates] can really work them on their own schedule. That’s a huge benefit to associates.”¹²⁰ Another pro bono professional explained how the culture of billable time contributes to the pro bono mismatch by drawing associates towards immigration matters:

As an aggregate whole, asylum work has to probably [be the] number one practice area among the top 100 law firms. I say, you’re going to meet with the client, you’re going to have six months to file this set of documents. We’re going to give you samples, we’re going to give you training, and you have one deadline and six months to complete it, so when you’re hot, set it down, when you’re cold, would you pick it up? They say, “Awesome, I’m in.” And so, we do that stuff by the truckload. And other firms do—I’ve got to believe for the same reasons. It just fits.¹²¹

Therefore, the pro bono mismatch is a problem because the needs of poor clients differ from law firms’ pro bono interests, which are determined by factors such as individual lawyer interests and the culture of billable time, without consideration of the legal needs of poor clients.¹²²

¹¹⁶ Interview with PC002 (Mar. 15, 2017) (on file with author).

¹¹⁷ Culture is defined sociologically as “systems of abstract, unseen, emotionally charged meaning that organize and maintain beliefs about how to manage physical and social needs.” TRICE & BEYER, *supra* note 74, at 20.

¹¹⁸ Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problem of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 79–80 (2008).

¹¹⁹ See Adediran, *supra* note 9, at 19.

¹²⁰ Interview with PC027 (July 11, 2017) (on file with author).

¹²¹ Interview with PC002 (Mar. 15, 2017) (on file with author).

¹²² Adediran, *supra* note 9, at 2, 19.

D. Why Can't NLSOs Force Law Firms to Compete?

In law firm-NLSO relationships, law firms can force NLSOs to compete. In other words, a single NLSO is in multiple relationships with law firms, and other NLSOs are also in those same relationships vying for law firm resources. Therefore, law firms can leverage the fact that NLSOs are aware of these multiple law firm relationships. This is because NLSOs need as many law firms as possible to provide them with labor, money, and prestige resources to realize their missions of providing legal services to those unable to afford it.

Even though law firms also have multiple NLSO relationships and are motivated to establish and retain relationships with NLSOs that would provide their lawyers with the most desirable pro bono matters that can afford them the best training and professional development opportunities, NLSOs are unable to drive competition among firms. Further, as discussed in the next section, NLSOs have structural and personal relationships with law firms and their individual members that can theoretically be leveraged to force law firms to compete, but they are unable to do so because of dependence on law firms for resources.

Competition is useful because the ability of an NLSO to influence law firm behavior depends on the level of competition among law firms vying for pro bono work from NLSOs.¹²³ The literature in organizational sociology helps to show that the lack of competition rests on the fact that law firms and NLSOs are in extremely power-imbalanced relationships.

As a broad theoretical matter, organizations form relationships with other organizations out of necessity, asymmetry, reciprocity, efficiency, stability, or legitimacy.¹²⁴ There are three core ideas from organizational sociology that situate these broad principles in the context of relationships between law firms and NLSOs. The first is that social context matters.¹²⁵ The second is that organizations use strategies to enhance their autonomy and pursue their interests.¹²⁶ The third is that power—not just rationality or efficiency—is important for understanding the internal and external actions of organizations.¹²⁷

The current structure of the relationship between law firms and NLSOs is such that NLSOs are dependent on law firms for an array of resources, especially pecuniary, but also prestige and labor, to provide quality legal services to the poor. NLSOs need these resources to meet the demand for

¹²³ See D.J. Hickson et al., *A Strategic Contingencies' Theory of Intraorganizational Power*, in ORGANIZATIONAL SOCIOLOGY 216, 220 (W. Richard Scott ed., 1994).

¹²⁴ Christine Oliver, *Determinants of Interorganizational Relationships: Integration and Future Directions*, 15 ACAD. MGMT. REV. 241, 242 (1990).

¹²⁵ Gerald F. Davis & J. Adam Cobb, *Resource Dependence Theory: Past and Future*, 28 RES. SOC. ORGS. 21, 22–23 (2010).

¹²⁶ *Id.*

¹²⁷ *Id.*

legal services, which is often high and driven by poor clients. Therefore, the loss of a single law firm relationship could mean that a sizable number of clients have no access to justice.

Law firms, on the other hand, use pro bono legal services to recruit, retain, and provide training for their lawyers, and to boost their own reputations. Thus, law firms and NLSOs are in severely asymmetrical relationships because NLSOs need a multiplicity of law firm resources. The relationship is so asymmetrical that it is insufficient for an NLSO to rely on a single law firm for these critical resources. Instead, an NLSO must rely on multiple law firms for resources because a single NLSO requires markedly more resources than a single law firm, or even a range of law firms, can provide to meet the demands of the poor. Power imbalance between law firms and NLSOs can therefore be accounted for in two asymmetries: the need for multiple types of resources, and the need for multiple sources to obtain those resources. Therefore, any understanding of the structure of law firm-NLSO relationships must consider their power positions in the broader context of their relationships.¹²⁸

More specifically, there are two types of interorganizational relationships: mutually dependent and power-imbalanced.¹²⁹ It would be reasonable to conclude that mutual dependence means that both sides are gaining from the relationship. However, the organizational sociology literature defines mutual dependence in consideration of the nuance of power differentials be-

¹²⁸ See JEFFREY PFEFFER & GERALD SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE* 1 (1978); Oliver, *supra* note 124, at 242. Oliver explains how each of these factors influence interorganizational relationships. *Id.* The concept of power in organizational sociology may be conceived as similar to the concept of bargaining power in economics. While bargaining power in economics is often used to assert some lack of equality between buyers and sellers in the market, its meaning varies by the context in which it is used. For instance, economists have defined bargaining power as “the share of the joint surplus which a party gains in a bargain.” Samuel Bowles & Herbert Gintis, *Power*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* 565, 569 (S. Durlauf & L. Blume eds., 2008). In this context, “bargaining power refers to outcomes—to how much advantage one may gain—rather than to any particular means of attaining it.” *Id.*; see generally ABHINAV MUTHOO, *THE ECONOMICS OF BARGAINING* (Nov. 2001), <https://warwick.ac.uk/fac/soc/economics/staff/amuthoo/publications/unesco.pdf>, archived at <https://perma.cc/P9XM-6N37> (explaining the theory of bargaining power in economics). Bargaining power has also been defined as “the cost to A of imposing a loss upon B,” “the power to set aside competitive determination of prices or wage rates,” or the ability to “develop and administer successfully a coercive or persuasive device to bring adversary to terms.” Charles E. Lindblom, “*Bargaining Power*” in *Price and Wage Determination*, 62 Q. J. ECON. 396, 397–98, 414 (1948). It is also defined as a “skill in negotiation,” “a monopoly power,” or a “single factor among others in wage or price determination.” *Id.* at 398. Economists also define bargaining power as “the power to withhold from making a transaction.” John T. Dunlop & Benjamin Higgins, “*Bargaining Power*” and *Market Structure*, 50 J. POL. ECON. 1, 2 (1942). In addition to the numerous definitions that make it difficult to make a precise or close-to-precise judgment of what bargaining power means, other concerns with how bargaining power is defined in economics abound. Some of those concerns include the lack of understanding about the precise character of the inequality between buyers and sellers, the measure for inequality, and the fact that the conditions for determining equality are seldom made explicit. *Id.*

¹²⁹ See generally Stinchcombe, *supra* note 18; Emerson, *supra* note 18.

tween organizations. Mutual dependence means that each organization is able to grant, deny, or facilitate the other's gratification.¹³⁰ Law firms have significantly more influence over NLSOs because of the marked difference in the need for resources and how those resources can be fulfilled, so the relationship between the two is power-imbalanced rather than mutually dependent.¹³¹

There are two ways in which one organization can wield power over another.¹³² The first is by impeding the other organization's access to the resources it needs,¹³³ an organization can achieve this through the presumption of enforcement of negative sanctions.¹³⁴ The second is by restricting how the other organization uses resources in the manner it wants.¹³⁵ In the current context, the negative sanction is the threat of losing pecuniary, labor, or prestige resources that would necessarily impact the organizational missions of NLSOs. This is why the empirical data show that NLSOs are unable to structure the pro bono relationship with law firms despite the fact that the actual legal needs of the poor are not being met and pro bono relationships can be costly to maintain. The NLSOs in this study confirmed that they are even unable to attempt to inform law firms about their dissatisfaction with the structure of their relationships. As one director explained, "I would never say that to the firm. That would be horribly destructive and rude. But if you're telling me that this is confidential, I'll say it to you."¹³⁶ The executive director of another NLSO echoed this opinion: "I think those are things you tend not to say . . . because you're trying to make the relationship work. I don't think I've ever been in a conversation about that except internally at [this NLSO] where I tell people [that] those expectations are not realistic."¹³⁷

As discussed above, law firms often state the conditions under which they will give resources to NLSOs, while NLSOs are unable to make demands of law firms.¹³⁸ Law firms control incentives tied up with NLSOs'

¹³⁰ Emerson, *supra* note 18, at 32.

¹³¹ *See id.*

¹³² Jeff Frooman, *Stakeholder Influence Strategies*, 24 ACAD. MGMT. REV. 191, 196 (1999).

¹³³ *Id.*

¹³⁴ *See* Samuel Bowles & Herbert Gintis, *Power and Wealth in a Competitive Capitalist Economy*, 21 PHIL. & PUB. AFF. 324, 324 (1992).

¹³⁵ Frooman, *supra* note 132, at 196.

¹³⁶ Interview with PI009 (Apr. 27, 2017) (on file with author).

¹³⁷ Interview with PI008 (Apr. 20, 2017) (on file with author).

¹³⁸ Economic theory provides a useful starting point for understanding why NLSOs engage in pro bono relationships that may compromise their goals. Economics takes the position that organizations exist to mediate transactions both inside and outside organizations, and successful organizations can manage their transactions efficiently. Private entities enter voluntary agreements that govern the economic exchange between them in a free market, and "under many conditions, markets are efficient mediators of economic transactions." Benjamin E. Hermalin et al., *The Law and Economics of Contracts* 7 (Colum. L. & Econ., Working Paper No. 296, 2006); David Ulrich & Jay B. Barney, *Perspectives in Organizations: Resource Dependence, Efficiency, and Population*, 9 ACAD. MGMT. 471, 473 (1984); *see generally* Eleanor

missions, while NLSOs do not control resources that are directly related to the core organizational purpose of law firms.

In relationships with asymmetrical power dynamics such as these, less powerful organizations tend to employ an array of tactics to manage their relationships with more powerful organizations.¹³⁹ Tactics can be unilateral,

Brown & Al Slivinski, *Nonprofit Organizations and the Market*, in *THE NONPROFIT SECTOR: A RES. HANDBOOK* 140 (Walter W. Powell & Richard Steinberg eds., 2nd ed. 2006); Keith G. Provan & Steven J. Skinner, *Interorganizational Dependence and Control as Predictors of Opportunism in Dealer-Supplier Relations*, 32 *ACAD. MGMT. J.* 202 (1989). Transaction cost economics studies how organizations protect themselves from hazards associated with exchange relationships. In economics, for-profit firms are assumed to behave in ways that would maximize profit. The consumers and producers within the market are modeled as rational agents who assess their circumstances and act to advance their own interests. Economics also often views nonprofit organizations as rational optimizers responding to the incentives of the marketplace. As rational optimizers, nonprofit organizations pursue objectives or missions related to the economic activities they undertake, and in which their public purpose lies. Brown & Slivinski, *supra* note 138, at 143. However, economics recognizes an important limitation of using rational choice as the basis of the relationship between for-profit firms and nonprofit organizations. Economists identify that when the services exchanged are complex, or when services are exchanged in noncompetitive settings, fair prices are difficult and costly to set, and the market might fail to govern the exchange efficiently. In other words, examining organizational relationships as rationally bargained transactions generally has greater relevance for studying commercial rather than noncommercial organizations. See Richard Steinberg, *Economic Theories of Nonprofit Organizations*, in *THE NONPROFIT SECTOR: A RES. HANDBOOK*, 117 (Walter W. Powell & Richard Steinberg eds., 2nd ed. 2006); Oliver E. Williamson, *The Economics of Organization: The Transaction Cost Approach*, 87 *AM. J. SOC.* 548, 573 (1981). Economics also uses “bounded rationality” in cases where interorganizational behavior is not fully explained by rational choice. Bounded rationality is an analytical framework influenced by sociology and institutional theory that can explain, for example, noncommercial interorganizational relationships. With bounded rationality, economic actors are described in workably realistic terms, and, therefore, expressly adopt the “proposition that human cognition is subject to bounded rationality—behavior that is intendedly rational, but also limitedly so.” Oliver E. Williamson, *Transaction Cost Economics and Organization Theory*, in *DEBATING RATIONALITY: NONRATIONAL ASPECTS OF ORGANIZATIONAL DECISION MAKING* 155, 161 (Jennifer J. Halpern & Robert C. Stern eds., 2018). An increasing number of economists have become persuaded of the need to deal with the economic organization “as it is, warts and all.” See Oliver E. Williamson, *Transaction Cost Economics: The Natural Progression*, 86 *J. RETAILING* 215, 222 (2010). The idea is that structural arrangements cannot be completely explained by an internal logic of efficient production, because organizations must depend on others for the tools of their production. Connolly & Koput, *supra* note 21, at 292. Nevertheless, even in noncommercial relationships, organizations must depend on others for the tools of their production. See Bowles & Gintis, *supra* note 128, at 565. In this sense, economics would predict that law firms and NLSOs are in mutually beneficial relationships. In economics, “mutuality of advantage from voluntary exchange is . . . the most fundamental of all understandings.” James Buchanan, *Game Theory, Mathematics, and Economics*, 8 *J. ECON. METHODOLOGY* 27, 29 (2001). Mutual benefit means that both sides are better off with the relationship than without. Because law firms are receiving pro bono matters and NLSOs are receiving what appears to be free labor and money, both sides seem to be benefitting. *Cf. id.* at 29.

¹³⁹ See Glenn R. Carroll et al., *Transaction Cost Economics: Its Influence on Organizational Theory, Strategic Management and Political Economy*, in *FIRMS, MARKETS AND HIERARCHIES: THE TRANSACTION COST ECONOMICS PERSPECTIVE* 65 (Glenn R. Carroll & David J. Teece eds., 1999); Pfeffer, *supra* note 23, at 27; Davis & Cobb, *supra* note 125, at 23. The ability to successfully use tactics, however, hinges on the power dynamics between organizations because organizations tend to comply with the demands of their counterparts with more power. Pfeffer, *supra* note 23, at 27.

bypassing more powerful organizations (e.g. complying with the demands of the powerful organization, reducing the weaker organization's interest in valued resources, cultivating alternative sources of supply, or forming coalitions).¹⁴⁰ Less powerful organizations can also manage their relationships with resource providers by engaging intermediaries or allies who can reallocate power between less powerful organizations and more powerful resource providers.¹⁴¹ Intermediaries are actors that intervene directly or indirectly in the patterns of dependence, primarily to mitigate power imbalances and manipulate the flow of resources in favor of weaker organizations.¹⁴² The actions of these third parties can have important effects on the value ascribed to an organization, particularly if those actors wield some power.¹⁴³ Other tactics restructure dependencies by aiming directly at the more powerful organization.¹⁴⁴ For instance, by acculturating members of a constraining organization or exchanging other valuable goods, such as status, friendship, or information, a dependent organization can stabilize the flow of valued resources.¹⁴⁵ In Part IV, I discuss the role of intermediaries in reallocating power between law firms and NLSOs, and how NLSOs are utilizing acculturation as a micro-level tactic to manage their relationships with firms.

¹⁴⁰ Casciaro & Jan Piskorski, *supra* note 23, at 167; Froelich, *supra* note 92, at 248.

¹⁴¹ PFEFFER & SALANCIK, *supra* note 128, at 182 (explaining that intermediaries help firms to manage interdependence and uncertainty); Finn Frandsen & Winni Johansen, *Organizations, Stakeholders, and Intermediaries: Towards a General Theory*, 9 INT. J. STRATEGIC COMM. 253, 253 (2015); Frooman, *supra* note 132, at 198.

¹⁴² Frandsen & Johansen, *supra* note 141, at 261.

¹⁴³ Intermediaries include, but are not limited to, trade associations, consulting firms, the media, activist groups, professional associations, governments, government organizations, human rights organizations, consumer rights groups, distributors, matchmakers, consultants, and evaluators. Christian Bessy & Pierre-Marie Chauvin, *The Power of Market Intermediaries: From Information to Valuation Processes*, 1 VALUATION STUDIES 83, 83–84 (2013) (“Sociology and economics tend to focus more and more on the intermediaries involved in economic and social relations.”); Frandsen & Johansen, *supra* note 141, at 262. The role and impact of intermediaries has been studied in other spheres, including in media, see generally Joseph P. Bailey & Yannis Bakos, *An Exploratory Study of the Emerging Role of Electronic Intermediaries*, 1 INT. J. ELECTRONIC COM. 7 (2015); Howard S. Rasheed & Scott W. Geiger, *Determinants of Governance Structure for the Electronic Value Chain: Resource Dependency and Transaction Costs Perspectives*, 18 J. BUS. STRATEGIES 159 (2001); Kleis Nielsen Rasmus & Sarah Anne Ganter, *Dealing with Digital Intermediaries: A Case Study of the Relations Between Publishers and Platforms*, 20 NEW MEDIA & SOCIETY 1600 (2018); environmental research, see generally Paula Kivimaa et al., *Passing the Baton: How Intermediaries Advance Sustainability Transitions in Different Phases*, 31 ENVTL. INNOVATION & SOCIETAL TRANSITIONS 110 (2019); and innovation, see generally Jeremy Howells, *Intermediation and the Role of Intermediaries in Innovation*, 35 RES. POL'Y 715 (2006).

¹⁴⁴ Casciaro & Piskorski, *supra* note 23, at 167.

¹⁴⁵ *Id.* at 168. In for-profit organizational relationships, tactics used include mergers, joint ventures, and officer and director interlocks. These linkages with resource providers reduce dependency by providing explicit, long-term coordination between an organization and its resource providers. Connolly & Koput, *supra* note 21, at 291.

III. INSTITUTIONAL MOTIVATIONS AND INCENTIVES

Until this point, this Article has examined law firms and NLSOs as macro institutions by looking at large-scale social processes. While the focus of the study was to examine macro processes in law firms and NLSOs, it is important to also examine these institutions on meso and micro levels. A meso analysis focuses on group level interactions within institutions.¹⁴⁶ The micro level is interested in individual interactions.¹⁴⁷ Therefore, put together, meso and micro analyses provide a more nuanced assessment of smaller scale motivations, incentives, and interests among groups and individuals within these organizations. This examination is particularly useful in relation to the dependent structure of the relationship between law firms and NLSOs, and for evaluating how to achieve law firm competition because law firms, NLSOs, groups, and individuals within them have their own sets of motivations and incentives for engaging in pro bono relationships.

A. *The Law Firm*

The law firm can be divided into macro, meso, and micro levels. On the macro level is the firm itself, which broadly captures the interests of its leaders or firm management.¹⁴⁸ The macro level also includes lawyer pro bono professionals who oversee their law firm's global pro bono programs. On the meso level are departments and pro bono committees within the firm, who also influence the delivery of legal services. Finally, the micro level is the most expansive, as it contains many individual interests, including those of associates and partners with interests that can vary from department level interests.

FIGURE 1

| Macro | Meso | Micro |
|------------------------|--------------------|--------------|
| Firm Management | Departments | Associates |
| Pro Bono Professionals | Pro Bono Committee | Partners |

Most scholarship on the delivery of legal services to the poor has focused on macro-level firm management motivations and incentives for engaging in pro bono work. This research is consistent with prior scholarship that shows that on the macro level, incentives for engaging NLSOs in pro bono work are largely focused on the firm's image and reputation, particularly in terms of the influence of *American Lawyer*

¹⁴⁶ Sandro Serpa & Carlos Miguel Ferreira, *Micro, Meso and Macro Levels of Social Analysis*, 7 INT'L J. SOC. SCI. STUD. 120, 122 (2019).

¹⁴⁷ *Id.*

¹⁴⁸ Cummings, *supra* note 7, at 110–11; Cummings & Rhode, *supra* note 20, at 2361.

rankings on how the firm is perceived by law students, corporate clients, and other law firms.¹⁴⁹ Law firm management is often motivated to invest resources in pro bono work to attract law students in their recruiting efforts and to retain them upon arrival at the firm.¹⁵⁰ Management's public relations concerns impact not only the choice to devote resources to pro bono work but also the kinds of legal matters law firms choose to do. For instance, large law firms are often attracted to largescale impact litigation and high-profile matters that are more likely to be visible to their stakeholders.¹⁵¹

Furthermore, the macro level also includes lawyer pro bono professionals who have personal backgrounds, incentives, and role parameters that influence how they direct the flow of pro bono work in relation to fee-charging legal services in law firms. In terms of personal backgrounds, pro bono professionals who transition from NLSOs have uniquely informed experiences with the problems in the delivery of legal services that pro bono professionals who started their careers in law firms may not have. In general, and regardless of their personal backgrounds, the pro bono professionals in this study see their roles as “promoters of their law firm’s pro bono policies and strengths,”¹⁵² “matchmakers”¹⁵³ who facilitate the interests of the lawyers in their firms in engaging in particular pro bono matters, and “charitable contributors” who provide financial and in-kind contributions to NLSOs.¹⁵⁴ Some pro bono professionals see themselves as having two sets of clients: the lawyers inside their firms and the poor clients their lawyers represent. They therefore balance the interests of these two sets of clients in conducting and organizing pro bono programs in law firms. The below statement from a pro bono professional illustrates this point:

I feel like I have two sets of clients. One is our attorneys, and the other are our ultimate clients. And so, I get the pleasure, every

¹⁴⁹ See *supra*.

¹⁵⁰ See generally Boutcher, *Private Law Firms*, *supra* note 51; Daniels & Martin, *supra* note 15; Rhode, *supra* note 11; Faith-Slaker, *supra* note 60, at 268–69; Granfield, *supra* note 60; Robert Granfield & Lynn Mather, *supra* note 15; Justus, *supra* note 60; Rhode, PRO BONO IN PRINCIPLE, *supra* note 60; Rhode, *supra* note 60, at 60; Rhee, *supra* note 60; Scheingold & Bloom, *supra* note 60; Schmedemann, *supra* note 60. While it is beyond the scope of this Article, empirical work has shown that having legal representation benefits individuals, in that they are more likely to experience favorable legal outcomes in comparison to those who do not have legal representation. See, e.g., Cummings, *supra* note 7, at 33, 110–11, 125; Cummings & Rhode, *supra* note 20, at 2374; Poppe & Rachlinski, *supra* note 60, at 944; Rhode, *supra* note 60, at 58; Sandefur, *supra* note 60, at 924–25; Rhee, *supra* note 150, at 1720; Seron et al., *supra* note 60, at 429; Strossen, *supra* note 60, at 2132.

¹⁵¹ Cummings, *supra* note 7, at 126.

¹⁵² See, e.g., Interview with PC002 (Mar. 28, 2017) (on file with author); Interview with PC021 (June 9, 2017) (on file with author).

¹⁵³ See, e.g., Interview with PC001 (Mar. 14, 2017) (on file with author); Interview with PC010 (May 18, 2017) (on file with author).

¹⁵⁴ See, e.g., Interview with PC005 (Mar. 31, 2017) (on file with author).

time we take on a case, I am helping out a client in need. And I am helping out our lawyers to sort of get to them.¹⁵⁵

On the meso level are two groups whose interests can determine the quantity, quality, and kinds of pro bono legal services firms choose to do: departments and pro bono committees. Law firm departments are often organized under the broad umbrella of litigation and transactional practices. These broad departments are then typically broken down into smaller groups, such as real estate, capital markets, finance, mergers and acquisitions, health care, and intellectual property. These departments have incentives for wanting their lawyers to engage in pro bono work. While this study was not focused on whole departments, a limited amount of data point to department influence on the legal matters taken up by lawyers.

In the main, department heads want their lawyers engaged in pro bono work as training opportunities to then take up fee-charging matters upon gaining skills from pro bono work. Because of their interest in training, department heads often set the agenda for the types of pro bono matters that are considered favorable for that purpose. For example, a pro bono professional encountered resistance from the real estate department of a law firm where the professional was told not to “bring house closings, because we don’t do that, [it] doesn’t train our young lawyers.”¹⁵⁶ Therefore, the pro bono professional was restricted to providing real estate lawyers with pro bono matters only for sufficient training opportunities. These constraints can possibly contribute to the pro bono mismatch problem.

The second meso level group is pro bono committees.¹⁵⁷ Virtually every Am Law 100 firm now has a pro bono committee. Committee roles have changed since law firms began hiring lawyers as pro bono professionals. Whereas a decade and a half ago, the roles of pro bono committees included the development of pro bono policies and procedures, coordinating intake with referring organizations, assessing attorney interests, supervising case representation, evaluating pro bono activity, and publicizing pro bono results;¹⁵⁸ today, most of these roles have shifted to the pro bono professional. Pro bono committees in the largest law firms now have three broad roles: middle men between management and pro bono professionals in approving pro bono matters, liaisons with pro bono professionals, or ad hoc consultants on pro bono management decisions.

Regardless of their roles, pro bono committees influence pro bono processes in law firms. For instance, pro bono committees that serve as middle men between the pro bono professional and management can influence management priorities in the patterns in which they approve pro bono matters. Committees that serve as liaisons for the pro bono professional are less

¹⁵⁵ Interview with PC002 (Mar. 28, 2017) (on file with author).

¹⁵⁶ Interview with PC003 (Mar. 28, 2017) (on file with author).

¹⁵⁷ Cummings, *supra* note 7, at 36.

¹⁵⁸ *Id.* at 57–62.

likely to influence management but are more likely to influence the pro bono professional's interests in particular legal matters. Pro bono professionals that are consulted ad hoc are the least likely to influence decisionmaking, but are still usually consulted on policy matters, issues involving crises, or in cases of major litigation that involve a big commitment of the firm's resources.¹⁵⁹

On the micro level are a range of individual interests whose motivations influence the relationships between law firms and NLSOs. These individuals include associates and partners.

Today, most law firm associates begin their careers in large law firms with an expectation that pro bono work will be part of their professional development as new lawyers.¹⁶⁰ Associates' choices of pro bono matters are often influenced by factors such as individual interests, law firm culture, the political climate, and meso level factors, such as the motivations of their departments.¹⁶¹ Influences such as law firm culture and department interests are usually much more salient at the beginning stages of their careers, but become less so over time. I conducted a small preliminary study of law firm associates, which suggests that as associates become more senior in large law firms, they begin to develop what is equivalent to pro bono practices.¹⁶² Associates' pro bono practices can solidify their personal interests in particular pro bono matters. A senior associate at a large law firm in the Northeast provides an example:

What interested me was I was doing stuff for children with special needs. I have two cousins who are autistic and that's always been like such a big part of my family and the issues that they deal with. So, I knew I wanted to do something with that. And so [the firm] works with [an NLSO]. [The firm] has someone on the board there and so I started out by taking a case for [the NLSO] where I represented a child and her family to get special needs education suing the department of education for placement in a private school.¹⁶³

The above associate's experience is not unique. An LGBTQ senior associate in another large Northeastern law firm told me about having an LGBTQ-focused practice because of his personal experiences, while an associate who is an immigrant mostly takes on immigration matters.¹⁶⁴

¹⁵⁹ Interview with PC022 (June 9, 2017) (on file with author).

¹⁶⁰ RONIT DINOVITZER ET AL., NALP FOUND. FOR L. CAREER RES. & EDUC. AND AM. BAR FOUND., *AFTER THE JD: THE FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 35 (2004).

¹⁶¹ See generally Adediran, *supra* note 9.

¹⁶² Interviews with Law Firm Associates (2017) (on file with author).

¹⁶³ Interview with AS006 (Oct. 25, 2017) (on file with author).

¹⁶⁴ See Interviews with Law Firm Associates, *supra* note 162.

These seasoned associates with established pro bono practices are less likely to be influenced by other groups and policies within their law firms that can steer them towards particular legal matters. During one of my interviews with a seventh-year associate at a law firm in the Northeast, I asked whether associates' pro bono choices matter to law firms. This question came up because the interview until then had focused exclusively on the lawyer's individual interests in human rights law in Africa. The associate had this to say: "Yeah. I think it definitely matters to them. It matters to them because it brings them more notoriety and it does not mean that [the firm] has not done [high profile] cases, it just means I have not done them."¹⁶⁵ However, senior associates with pro bono practices are not completely influence-free. For instance, heads of departments' individual partners can influence what seasoned associates choose to do because associates may have reputational concerns about being labelled as uninterested in fee-charging legal matters.¹⁶⁶ This label would matter even more if these associates are striving to become partners.

Law firm partners are a third micro-level influence on law firm pro bono work in terms of quantity, quality, and choice of matters. Some partners are members of NLSO boards and may want associates to work for particular NLSOs. Partners also have personal interests that influence what they choose and encourage associates to do.

Therefore, a range of interests, groups, and individuals complicate the problems in the delivery of legal services through pro bono work. These varied interests also complicate how to address the problems.

B. *The NLSO*

Similar to the large law firm, it is also important to provide a nuanced account of the NLSO. Here, I conduct macro and micro analyses. Macro-level factors that influence the delivery of legal services to the poor include general funding constraints and organizational structure. Micro-level factors are individual lawyers within NLSOs who bring their prior and current experiences to bear on the quality and mechanisms by which pro bono work is administrated to the poor.

Funding constraints are one of the most fundamental challenges that NLSOs experience.¹⁶⁷ Virtually all NLSOs have difficulties obtaining secure sources of funding.¹⁶⁸ Most NLSOs—even those with relatively stable funding sources—experience "bone crushing pressure to make their budgets."¹⁶⁹ The executive director of an NLSO explained the organization's budget situation in these terms: "We have a deficit budget this year, and we will proba-

¹⁶⁵ Interview with AS003 (Oct. 24, 2017) (on file with author).

¹⁶⁶ Cummings, *supra* note 7, at 136.

¹⁶⁷ Rhode, *supra* note 45, at 2056.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

bly have a deficit budget next year. We're starting to plan for that. We don't want to fire those three people . . . so we are very strictly reviewing our finances."¹⁷⁰ That NLSO's budget deficits would necessarily influence factors such as the value they place on losing a single law firm's support for that year or whether to have additional board members from law firms.

There is currently no scholarship addressing the resource motivations of NLSOs for engaging law firms in pro bono legal services. The empirical data in this Article reveal that NLSOs are dependent on law firms for labor, money, and prestige resources. Each of these resources serves a different purpose.

Labor, which is the resource that NLSOs receive in the greatest quantities from law firms, allows NLSOs to provide legal services to many clients that would otherwise be unrepresented. NLSOs spoke about the importance of reaching many more poor people than they would have the capacity to reach without law firm labor because they have a limited number of staff.¹⁷¹

Second, money allows NLSOs to provide quality legal services through in-house experts on poverty law. Many NLSOs in this study reported that money is the most important resource from law firms. For example, an executive director explained that "firms . . . think that pro bono is very important, which it is, but, honestly, it's more important for them to fund us, and we can just do it."¹⁷² Another executive director said that "instead of volunteering, if law firms just gave us more money to hire staff lawyers, we could do more work faster. . . . You're not going to increase capacity the same as if you had another staff person because this is not a pro bono attorney's full time job. It's not their sole expertise."¹⁷³

Third, NLSOs obtain prestige for their organizations by associating with law firms and their lawyers. Prestige can be beneficial for raising money and influencing legislation or policy. NLSOs detail the value of associating with law firms for prestige, which "helps legitimize what we're doing . . . having large law firms be a part of that. It makes people not second-guess that this is something that we need to be doing in this society. It treats it as an accepted legal services program."¹⁷⁴ An executive director explained:

If the senior partner at some big international law firm thinks highly of your program and speaks highly of your program, it helps you build your ability to market yourself, your ability to get

¹⁷⁰ Interview with PI001 (Mar. 7, 2017) (on file with author).

¹⁷¹ See, e.g., Interview with PI007 (Apr. 19, 2017) (on file with author); Interview with PI009 (Apr. 27, 2017) (on file with author).

¹⁷² Interview with PI009 (Apr. 27, 2017) (on file with author).

¹⁷³ Interview with PI040 (Aug. 9, 2017) (on file with author).

¹⁷⁴ Interview with PI010 (May 1, 2017) (on file with author).

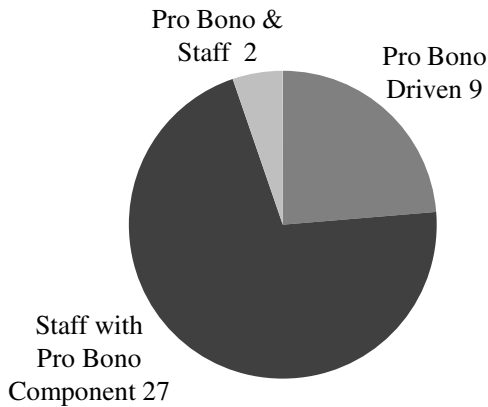
respect, and trust in sort of the broader legal professional community, maybe even the bigger benevolent giving community.¹⁷⁵

Another organization described prestige as follows:

The aura of someone from Latham, or Kirkland, or Jenner, or Dentons—their voice should not be heard differently than ours is, but it is. And it amplifies our voice on policy issues when we are able to say, “The way that this court is operating, or the judge’s decisions about this, are impacting clients in this particular way.” It amplifies [it for them] to come in and say the exact thing we said, but we’ll take it.¹⁷⁶

Another macro-level consideration is the structure and organization of an NLSO, which can impact how it conducts its pro bono relationships with law firms. While this research did not involve a systematic study of the influence of the structure of NLSOs on their pro bono relationships with law firms, it revealed distinct structures of NLSOs that can influence approaches to organizing pro bono work: (1) pro bono-driven; (2) staff-driven with pro bono components; and (3) a combination of staff and pro bono. Figure 2 provides a breakdown of these organizational structures among the thirty-eight NLSOs in this study.

FIGURE 2: NLSO STRUCTURES



■ Pro Bono Driven ■ Staff with Pro Bono Component ■ Pro Bono & Staff

Pro bono-driven organizations are sometimes established in collaboration with large law firms. Thus, the pro bono-driven NLSO model focuses on

¹⁷⁵ Interview with PI016 (May 24, 2017) (on file with author).

¹⁷⁶ Interview with PI007 (Apr. 19, 2017) (on file with author).

providing law firms with legal matters. These NLSOs do not typically represent poor clients in-house except in exceptional cases, such as when law firms have conflicts with corporate clients that cannot be overcome, or when there is a belief that pro bono lawyers are ill-equipped to represent some clients, such as in the case of individuals with mental illnesses.

Staff-driven NLSOs with pro bono components are at the other end of the structural spectrum. These organizations are often large and represent most of their clients in-house. They usually refer clients to pro bono lawyers, in part to maintain relationships for resources: labor, money, and prestige. Thus, pro bono matters in these organizations can be as small as 5% of all legal matters.

The third type of NLSO is both staff and pro bono-focused. These NLSOs represent clients in-house, but also refer a sizable number of clients to pro bono lawyers, which can range between about 20% to approximately 50% of all legal matters.

Whether an NLSO is pro bono-driven, staff based, or a combination of these two institutional structures complicates the dependence structure and the manifestation of the problems in the delivery of legal services. Take, for instance, a pro bono-driven NLSO that is extremely accustomed to working with law firms because it has had relationships with firms since its inception. This NLSO may potentially be better connected to macro-level law firm management and may be better able to address these problems. Contrast this with a staff-based NLSO with a minuscule pro bono component that only began developing pro bono relationships with law firms in the 1990s because government support for civil legal services declined. The individual lawyers at the staff-based NLSOs may lack the institutional networks that can alleviate the handholding problem without repeat players that a pro bono-focused NLSO may have because of its institutional history.

Relatedly, one can intuit that the force of law firm interests may be perceived differently depending on whether an NLSO is pro bono or staff-driven. In other words, a pro bono-driven NLSO is probably less likely to be in a position of noncompliance with meeting law firm interests. In contrast, a staff-driven organization may consider law firms' strong interests in pro bono work and board positions to be much more impactful on its mission of providing quality legal services to individuals and groups who are unable to afford legal representation. Also, while a pro bono-driven NLSO is more likely to engage in handholding without repeat players, it is also more likely to have policies and processes in place to offset the lack of quality provided by some junior law firm lawyers.¹⁷⁷ To be sure, further research is necessary to clarify whether these different structures certainly impact the problems in the delivery of legal services, but this mapping out process suggests that they probably matter.

¹⁷⁷ For a discussion about the quality of law firm lawyers' work product, see Rhode, *supra* note 45, at 2071.

Finally, the individual experiences of NLSO lawyers are also relevant for the overall understanding of the problems in the delivery of legal services. NLSO lawyers come from different backgrounds. Some have large firm experience, while others do not. Indeed, some NLSO executive directors were associates, and sometimes fee-charging partners in law firms. These backgrounds may impact how NLSO lawyers perceive law firm lawyers and their motivations for doing pro bono work. One can imagine how NLSO lawyers' personal experiences could influence how they engage in handholding, and how they marshal their backgrounds to influence law firm lawyers to become repeat players upon gaining expertise in particular areas of law. These micro-level experiences are relevant and further research can tease out how they might influence pro bono relationships.

Therefore, in addition to macro analysis and examination of law firms and NLSOs, meso and micro understanding of these institutions is also relevant in thinking about how to change the power structure of pro bono relationships.

IV. CHANGING THE POWER STRUCTURE OF PRO BONO RELATIONSHIPS

A central argument in this Article is that although law firm pro bono collaborations have expanded the availability of free legal representation to the poor, they have also caused other problems, including making pro bono work costly to NLSOs and creating a mismatch between law firms' interests and the needs of poor clients. I have elaborated on how power asymmetry explains these perverse outcomes. Because NLSOs depend on law firms to fulfill their missions, law firms control how the relationship is structured and the incentives that govern the structure. Law firms are therefore able to influence the structure of pro bono work, while NLSOs are unable to force law firms to compete.

Because the ability to force law firms to compete is a laudable and important goal for addressing the problems in the delivery of legal services, it is worth exploring how to achieve this. The literature in organizational sociology provides useful approaches for shifting power between law firms and NLSOs, so that NLSOs can be better positioned to force law firms to compete, allowing NLSOs to structure pro bono work to address the actual legal needs of the poor in less costly ways. It is also important to explore solutions using micro, meso, and macro level interventions.

Thus, the policy considerations here aim to address the structural relationships between law firms and NLSOs by reallocating power between law firms and NLSOs on the macro level to equalize their mutual influence. Power parity would be reached when each organizational type is unable to impose its incentives on the other. The Article highlights a number of ways in which this could be done. The first is by instituting two macro-level changes: intermediaries and pro bono best practices. The second is on the meso level by establishing a repeat player guarantee through departments in

law firms. The third is micro-level interventions, such as acculturation—a strategy currently used by NLSOs to expose private lawyers to their missions and the plight of poor clients to increase the stability of resources—and the micro pay-for-preference regime. A final proposal is an alternative that involves shifting NLSOs' dependence from law firms to other sources, such as the LSC.

A. Macro Level: Reallocating Power through Intermediaries and Establishing Best Practices

As the empirical data show, law firms and NLSOs are in extremely power-imbalanced relationships and NLSOs are dependent on multiple types of law firm resources for their missions. The literature on organizational power provides guidelines for how intermediaries can help to address power asymmetry by shifting the balance of power between law firms and NLSOs.¹⁷⁸ In the current context, it is important to note that prestige is a key driver of law firm commitment to pro bono work, and can be an important mechanism for achieving power parity. Thus, any intermediary that can shift the balance of power between law firms and NLSOs should serve as a source of prestige to law firms. I propose two intermediaries that can potentially address this power imbalance: pro bono certification programs established by the National Association of Pro Bono Professionals (“NAPBPRO”), and *American Lawyer* rankings.

NAPBPRO is an independent and inclusive organization comprised mostly of pro bono professionals in NLSOs.¹⁷⁹ NAPBPRO can set the standards for what should constitute optimal pro bono work through a best practices certification program to prioritize the needs of the poor, to which law firms can voluntarily adhere.¹⁸⁰ The content of the certification would draw upon the substantive proposals developed in section B below. Certifications

¹⁷⁸ See Jolanda Hessels & Siri Terjesen, *Resource Dependency and Institutional Theory Perspectives on Direct and Indirect Export Choices*, 34 *SMALL BUS. ECON.* 203, 204 (2010) (addressing the role of intermediaries in for-profit organizations); Frooman, *supra* note 132, at 198.

¹⁷⁹ By “inclusive,” I mean that NAPBPRO opens its membership to a broad range of individuals and groups. “We welcome pro bono professionals from all aspects of the legal community to join us. Our members include professionals from law schools, law firms, LSC-funded legal services programs, independent legal aid organizations, bar associations, state-wide access to justice organizations and stand-alone pro bono programs.” NAT’L ASSOC. OF PRO BONO PROF’LS, <http://napbpro.org>, archived at <https://perma.cc/KJE2-N8RB>. While its membership is open, law firm pro bono professionals do not typically join NAPBPRO, as the Association of Pro Bono Counsel (“APBCO”) provides a professional membership platform for law firm pro bono professionals.

¹⁸⁰ Voluntariness is important so as not to violate section one of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq., which prohibits restraint on trade or commerce even for nonprofit organizations. See *United States v. Brown Univ. in Providence*, 5 F.3d 658, 666, 668 (3d Cir. 1993) (explaining that nonprofit organizations are subject to antitrust violations under the Sherman Act even if their activities are public-service oriented or provide important social welfare goals).

are a recent and growing practice that corporations use to signal their commitments to certain social values. Certification is a way to signal that an organization is socially responsible to its stakeholders and society and is a marker of prestige and social responsibility for subscribers.¹⁸¹ There are a number of certifications for specific types of corporate social responsibility (“CSR”), such as Fair Trade, LEED, Sustainable Forestry Initiative, and B Corporation.¹⁸² For instance, B Lab is a 501(c)(3) nonprofit organization established in 2006 that is an intermediary organization and “serves a global movement of people using business as a force for good” by certifying B Corps.¹⁸³ A law firm pro bono best practices certification would be similar to the B-Corp certification, in that it would signal to stakeholders—law students and corporate clients—that certified law firms engage in pro bono work that meets the needs of poor clients without being unduly costly for NLSOs. It would also serve as a marker of prestige for law firms that choose to adopt it.

The second important intermediary is *American Lawyer* through its rankings, which are another avenue for leveraging prestige. I propose a modification of *American Lawyer*’s law firm pro bono rankings. *American*

¹⁸¹ See Xiujuan Chen & Thomas F. Kelly, *B-Corps—A Growing Form of Social Enterprise: Tracing Their Progress and Assessing Their Performance*, 22 J. LEADERSHIP & ORG. STUD. 102, 104 (2015).

¹⁸² *Id.* For examples of third-party certifications for specific initiatives, see Maki Hatanaki, Carmen Bain & Lawrence Busch, *The Practice of Third-Party Certification: Enhancing Environmental Sustainability and Social Justice in the Global South?* 30 FOOD POL’Y 354, 354, 357–58 (2005) (discussing certifications for safety and ethical trade in the food industry); Laura T. Reynolds, *Fairtrade Labour Certification: The Contested Incorporation of Plantations and Workers*, 38 THIRD WORLD Q. 1473, 1478–85 (2017) (addressing the contested growth and configuration of Fairtrade International labor certifications).

¹⁸³ B Lab is the only organization that provides a comprehensive certification encompassing all aspects of social and environmental performance in addition to financial performance. B Lab started certifying B Corps in 2007. B Corps are mostly privately held firms, although some are publicly traded. Chen & Kelly, *supra* note 181, at 105. As of February 2017, B Lab was headquartered in Berwyn, Pennsylvania (a suburb of Philadelphia), with additional offices in New York, San Francisco, and Denver. Its strategy is to drive systemic change through four interrelated initiatives: (a) building a community of certified B Corporations; (b) promoting legislation creating a new corporate form that meets higher standards of purpose, accountability, and transparency; (c) accelerating the growth of “impact investing” through the use of B Lab’s impact investment rating system; and (d) galvanizing support for the movement by sharing the stories of certified B Corporations. Ke Cao, Joel Gehman & Matthew Grimes, *Standing Out and Fitting In: Charting the Emergence of Certified B Corporations by Industry and Region*, in ENTREPRENEURSHIP, FIRM EMERGENCE AND GROWTH IN HYBRID VENTURES 1, 3 (Andrew C. Corbett & Jerome A. Katz eds., 2018). It is important to note that certified B Corps are distinct from benefit corporations, which are much like the traditional C corporations. Benefit Corporation is a legal status conferred by state law, as is currently recognized by 30 states, including Delaware and the District of Columbia. *Id.* at 14, 15. As benefit corporations, entities adhere to a firm-level certification standard, a state-level legislative template authorizing a new legal form of organization, a market-level investment rating system, and consumer outreach through brand building and storytelling. *Id.* at 2. First introduced in 2006, prospective benefit corporations undergo a certification process and amend their corporate charters to stipulate their devotion of a significant part of their missions and resources to social and environmental commitments, in addition to making profit. *Id.* at 9. B Lab certification, on the other hand, is issued by a private organization and has no legislative framework.

Lawyer currently ranks and scores the nation's 200 highest-grossing firms (Am Law 200) for work performed by U.S.-based lawyers.¹⁸⁴ Half of the score comes from the average number of pro bono hours per lawyer, while the other half represents the percentage of lawyers who performed more than twenty hours of pro bono work per firm.¹⁸⁵ The *American Lawyer* pro bono rankings offer a readily accessible and ostensibly objective method of evaluating pro bono work, and an easy way for the entire legal community to identify high performers."¹⁸⁶

The new rankings should incorporate pro bono best practices into its ranking criteria, by either only including certified law firms, or ranking certified law firms higher than uncertified firms. This means that law firms that do not adhere to the best practices proposed below would be ranked lower than those that do, ensuring that pro bono rankings focus on quality rather than quantity. Scholars have noted that "[r]ankings are a compelling example of accountability measures both because they are so common in contemporary society and because their precise comparisons generate intense competition among those being evaluated."¹⁸⁷

The scholarship has shown, and the research in this study confirms, that law firms respond strongly to *American Lawyer* rankings; firms are concerned about their *American Lawyer* numbers as a marker of prestige.¹⁸⁸ A law firm pro bono professional explained that law firms are "very much in tune to the [*American Lawyer*] rankings. . . . It plays a prominent role in what we do."¹⁸⁹ Another pro bono professional explained how critical *American Lawyer* rankings are to the firm:

It is both the bane of this area and the benefit of this area. Every firm wants to be thought of as not only a successful firm, but a

¹⁸⁴ See, e.g., Ben Seal, *The American Lawyer's National Pro Bono Rankings: A Closer Look at the Firms that Outperformed their Peers in the Pro Bono Realm*, AM. LAW. (June 27, 2018), <https://www.law.com/americanlawyer/2018/06/27/the-american-lawyers-national-pro-bono-rankings/?tokenvalue=4D3C9ECE-0D20-42F2-8CF0-818011438703>, archived at <https://perma.cc/X92C-EDWJ>; Ben Seal, *The American Lawyer's 2019 National Pro Bono Rankings*, AM. LAW. (June 26, 2019), <https://www.law.com/americanlawyer/2019/06/26/the-american-lawyers-2019-national-pro-bono-rankings>, archived at <https://perma.cc/UA64-UZ22>.

¹⁸⁵ Seal, *The American Lawyer's 2019 National Pro Bono Rankings*, *supra* note 184.

¹⁸⁶ Cummings & Rhode, *supra* note 20, at 2371.

¹⁸⁷ WENDY NELSON ESPELAND & MICHAEL SAUDER, ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY 4 (2016).

¹⁸⁸ There are other organizations and media outlets that rank law firm pro bono programs, including Vault, Chambers, and Law360. However, *American Lawyer* rankings seem to be the best motivator of law firm pro bono investments. See Cummings, *supra* note 7, at 40 ("The *American Lawyer* began reporting data on the pro bono activity of Am Law 100 firms in 1992, which transformed the way big firms viewed their pro bono programs."); Cummings & Rhode, *supra* note 20, at 2371 ("The *American Lawyer*'s 1994 decision to begin publicly ranking firms based on the depth and breadth of their pro bono performance dramatically altered firm behavior. . . . The stakes escalated in 2003 when *The American Lawyer* began publishing its 'A-List' of the top twenty firms based on a combined score."). Law schools also encourage students to utilize *American Lawyer* rankings to determine the best law firms for pro bono work.

¹⁸⁹ Interview with PC002 (Mar. 15, 2017) (on file with author).

firm involved in the community. That's a traditional notion of who a lawyer is . . . and in the beginning of my career, every time the *American Lawyer* rankings would come out, I would feel [very upset] because [the firm] was never top ten.¹⁹⁰

The pro bono best practices would provide a new set of guidelines for what constitutes a highly ranked law firm pro bono program, while ensuring that pro bono work is responsive to clients' needs.¹⁹¹ Thus, *The American Lawyer* would serve as a third-party oversight that ensures that law firms comply with the terms of the certifications, or otherwise suffer in terms of their pro bono rankings.

Using ranking systems as tools for motivating organizations to comply with certain standards is a controversial move.¹⁹² Critics are concerned about potential unintended consequences when actors "play to the test," focusing on whether they fit specified items in a checkbox rather than meeting the quality measures the rankings are designed to evaluate.¹⁹³ For example, research has powerfully shown how law schools across the country react to and change their activities in response to *US News and World Report* rankings.¹⁹⁴ However, the best practices rankings are not likely to fall into the checkbox problem because they would be designed to address substantive rather than numerical inadequacies in the pro bono system.

An important limitation of the certification and *American Lawyer* intermediary proposals is that several stakeholders must be motivated to ensure their creation and successful application, including NAPBPRO, law firms and especially their pro bono professionals, and ranking organizations like *American Lawyer*. However, if all stakeholders can come to the table and implement a certification system, it would complement the pro bono incentive structures already in place, including rankings and internal pro bono hours granted by law firms.

To establish a certification program and modify *American Lawyer* rankings, it is important to consider the best practices that would constitute industry standards. To become pro bono certified and receive favorable

¹⁹⁰ Interview with PC003 (Mar. 28, 2017) (on file with author).

¹⁹¹ For a discussion on creating new ranking systems to effect change, see HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 5–6 (2009) (advocating for the creation of a democracy index to rank states and localities based on election performance focusing on issues such as wait times, functionality of voting machines, whether votes are counted properly etc.; the index would compare states and localities to incentivize them to improve voting conditions).

¹⁹² Wendy Nelson Espeland & Michael Sauder, *Rankings and Reactivity: How Public Measures Recreate Social Worlds*, 113 AM. J. SOC. 1, 2 (2007).

¹⁹³ *Id.* at 2; see generally Cass R. Sunstein, *Ranking Law Schools: A Market Test?* 81 IND. L.J. 25, 27 (2006).

¹⁹⁴ See Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383, 397–98 (2006); Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of the U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC'Y REV. 105, 109–10 (2006); see generally Espeland & Sauder, *supra* note 192, at 2.

American Lawyer rankings therefore, law firms would need to satisfactorily implement these best practices. I propose four specific best practices, but NLSOs through NAPBPRO can establish others. I propose best practices that would be implemented on the macro level (term funding commitments and the expansion of law firm fellowship programs); meso level (a repeat player guarantee); and micro level (what NLSOs are already doing: acculturation).

The first best practice involves the establishment of funding commitments that are more stable and less dependent on law firm incentives. Law firms and NLSOs can enter into term funding commitments for, say, five years at a time, which may reduce the likelihood of law firm cooptation.¹⁹⁵ Funding time commitments would ensure that money is no longer connected to compliance with law firm pro bono or board positions as intimately as it is in the current system. Once a law firm commits to funding an NLSO, which would initially rest on some sort of relationship with the NLSO, the law firm would be prevented from backing out of the funding commitment should either pro bono or board compositions change during the commitment period.

There are potential costs to this best practice. The most obvious is that law firms may balk at the idea of entering into short- or long-term commitments to fund NLSOs. After all, for financial reasons, a firm may be precluded from entering into other funding commitments until term commitments with current sponsored NLSOs expire. This may then prevent the firm from collaborating with other desirable NLSOs. Another concern is whether funding amounts would increase during the term of the commitment, or whether they would stay the same. These details must be specified upfront between firms and NLSOs, which would be aware of the best way to manage funding commitments. Certain law firms may reduce the number of NLSOs they are engaged with at any given point in time. This would impact the firms' abilities to tap into those organizations' pro bono resources for their lawyers. It would also impact NLSOs, which may have fewer law firms making funding commitments. However, the advantage of term commitments is the partial or total elimination of financial insecurity for NLSOs, which is directly related to fulfilling their missions. Thus, concerns regarding term commitments alone should not serve as an impediment to establishing a funding best practice.

The second macro level best practice is the expansion of legal services fellowship programs across all Am Law 100 firms.¹⁹⁶ Two types of fellowships are relevant here. The first are firm-sponsored fellowships where pro-

¹⁹⁵ See Mitchell, *supra* note 36, at 71.

¹⁹⁶ See Adediran, *supra* note 9, at 33–34. Law firms outside the Am Law 100 can also implement this and other proposals. However, because this research and most other studies on pro bono are often limited to Am Law 100 firms, I am unaware of how generalizations outside of the Am Law 100 would work. An important area for further research is to examine the relational aspects of the delivery of legal services outside of Am Law 100 firms.

spective or current associates become fellows at NLSOs for specified periods.¹⁹⁷ With firm-sponsored fellowships, the goal is for an associate or prospective associate both to provide labor resources for the benefit of an NLSO and to gain hands-on experience that can be brought back to the sponsoring firm.¹⁹⁸ The second are public interest fellowships. The two most notable ones are the Skadden and Equal Justice Works (“EJW”) fellowships.¹⁹⁹ With these fellowships, law firms and corporations sponsor new lawyers to pursue public interest careers full-time in NLSOs for about two years. While the public interest fellowships are geared toward future NLSO employees,²⁰⁰ the firm-sponsored approach puts the relational incentives on both sides into consideration. Either one of these fellowship approaches can be adopted by firms.

The fellowship expansion approach would retain the pro bono system as it currently is, except that law firms would fund lawyers who choose to spend six months to two years at an NLSO to represent poor clients on an ongoing basis. Admittedly, at least half of the Am Law 100 already sponsor public interest fellows through EJW, so the expansion may be limited.²⁰¹ However, combined with the other proposed approaches, fellowship programs would be a compelling and responsive solution to the current problems in the pro bono relationship, especially in terms of the mismatch problem. With an expansion of fellowship programs across Am Law 100 firms, NLSOs would have additional staff members that could provide quality and speedier legal services.

B. Meso Level: Repeat Player Guarantee

A meso-level approach examines law firm departments as potential avenues for addressing the problems in the delivery of legal services. The repeat player guarantee should also be a best practice. Incorporating it into the certifications and *American Lawyer* rankings would encourage firm management support.

The lack of established repeat players is one of the reasons why NLSOs do not gain appropriate returns on their time investments to train and mentor

¹⁹⁷ An example of a firm-sponsored fellowship is the Sidley Austin Fellowship. See *Sidley Pro Bono Fellowships & Externships*, SIDLEY, <https://www.sidley.com/en/sidley-pages/pro-bono-fellowships>, archived at <https://perma.cc/9W36-YQ2M>.

¹⁹⁸ Firm-sponsored fellowships were prevalent during the Great Recession. See Atinuke O. Adediran, John Hagan, Patricia Parker & Gabriele Plickert, *Making the Best of a Bad Beginning: Young New York Lawyers Confronting the Great Recession*, 9 NE. U. L.J. 259, 282–84 (2017).

¹⁹⁹ See Albiston & Nielsen, *supra* note 47, at 74.

²⁰⁰ According to the Skadden Foundation’s website, 90% of Skadden fellows remain in the nonprofit sector. *Skadden Fellows Share the Impact of the Program after 30 Years*, SKADDEN FOUND., <https://www.skaddenfellowships.org>, archived at <https://perma.cc/SRC3-AT2L>.

²⁰¹ See *2019 Annual Dinner*, EQUAL JUST. WORKS, <https://www.equaljusticeworks.org/annual-dinner/sponsors>, archived at <https://perma.cc/W9SM-TLLT> (for a list of Equal Justice Works 2018 sponsors).

law firm pro bono lawyers. Once a law firm takes pro bono matters in a particular area of law (e.g. housing), it should commit to representing a specific range of cases in that area of law. NAPBPRO can come up with the appropriate range based on the know-how of its members. The important factor is to ensure that NLSOs' resources used in mentoring law firm lawyers do not go to waste.

Departments can encourage their seasoned associates with established pro bono practices to become NLSO repeat players. Indeed, departments are in the best position to encourage junior associates to begin to develop pro bono practices early on in their careers so that becoming a repeat player becomes second nature. Departments can do this by choosing to become repeat players in particular areas of pro bono work that are also responsive to the needs of poor clients. To incentivize department heads, it is important that these areas of law are also not antithetical to training motivations.

The repeat player guarantee can make law firms and departments uneasy because the interests of law firm lawyers change based on market demand and the political climate; and, departments may not want to feel locked into a certain line of legal matters. In addition, it may be more challenging to satisfy both the needs of poor clients and the interests of law firm lawyers in some departments relative to others. For example, there is often a limited amount of transactional pro bono work that departments are interested in for training purposes. In transactional departments particularly, NLSOs who do transactional pro bono work would be advantaged over others.

Moreover, while NLSOs spoke about the importance of having repeat players, one can argue that even NLSOs may be hesitant to implement this best practice because their needs may change based on the needs of the poor in their communities.²⁰² The way to ensure that this best practice is implemented correctly is to evaluate the needs in the community as frequently as possible and change matter commitments accordingly. Of course, this can cause some challenges too, especially if a department becomes a repeat player in an area of law and legal need subsequently increases in another area of law warranting the department to switch gears. This is certainly a valid concern. Therefore, it is important to highlight that the repeat player guarantee is not meant to be static but dynamic. NLSOs have the best information regarding the volume of poor individuals who need certain legal services at any given time²⁰³ and would need to provide continuous information to law firms. Balancing power between law firms and NLSOs through the

²⁰² Indeed, resource allocation ought to change based on occurrences and changes happening in society. For instance, natural disasters and certain political climates can change the legal needs for both poor and nonpoor individuals.

²⁰³ I do not mean to suggest that NLSOs have accurate estimates of the legal needs of the poor. However, NLSOs can provide the best guidance for that information, at least on the basis of the number of referrals they receive and individual clients that walk through their doors.

aforementioned intermediaries is critical for implementing the repeat player guarantee.

C. *Micro Level: Acculturation Plus*

As the empirical data show, because of the power imbalance that typifies law firm-NLSO relationships, NLSOs have resorted to acculturation as the tactic of choice in managing their relationships with law firms.²⁰⁴ The empirical data reveal that NLSOs acculturate law firms and their lawyers for two purposes. The first is that acculturation creates durable and potentially time-committed relationships with law firms and individual lawyers as an avenue to obtain monetary contributions and labor resources. The second is that acculturation allows NLSOs to socialize or train law firms and their lawyers about their missions and the plight of poor clients. Twenty-eight of the NLSO participants in this study talked about the role of acculturation in their relationships with law firms.

In addition to the goal of resource generation, acculturation is a positive aspect of the relationship between law firms and NLSOs. NLSOs believe that acculturating private lawyers is particularly important because differences in professional and educational exposure often lead pro bono lawyers to lack direct knowledge about the pro bono matters they are handling, which prevents social class mixing, as discussed below by the directors of two NLSOs and echoed by several other participants in the study:

I believe that people are much more likely to be involved in the access-to-justice movement if they've done some pro bono, and met with some of our clients, because we have such a segregated—not just racially, but economically segregated—city, that you could be in north . . . and spend your entire time in . . . west, and basically never go to . . . east.²⁰⁵

I was telling you how far away these schools were, so many powerful folks in law firms who may or may not be our city leaders. . . . They'll certainly fund those city leaders and be just like civic-engaged. They would rarely, if ever, go to the neighborhoods where we have programs, and they wouldn't necessarily have some of the awareness, by little fault of their own, that they get through their first eviction case with us, or conditions case. I

²⁰⁴ NLSOs may use other tactics that are not particularly salient in the empirical data, such as differentiation, which organizations use when competing with similar organizations. See Emily A. Barman, *Asserting Difference: The Strategic Response of Nonprofit Organizations to Competition*, 80 Soc. F. 1191, 1193 (2002).

²⁰⁵ Interview with PI031 (July 12, 2017) (on file with author).

like to think that there's some benefit to the community that we're bridging that awareness gap.²⁰⁶

Lawyers in NLSOs have experience, expertise, and familiarity with representing poor clients.²⁰⁷ NLSOs consider both formal training and engaging in pro bono work as avenues to acculturate law firm lawyers to poverty and the plight of the poor, because some private lawyers are oblivious to the experiences of the poor and need to be "trained in how to work with [certain] populations. Because if you're white and talking to someone from a different . . . population, you need to have a little bit of cultural competency training, or how to interview somebody who has been traumatized."²⁰⁸

Before law firm lawyers represent poor clients, NLSOs usually provide them with some formal training. These trainings take place in law firms or at NLSOs. During trainings, NLSO lawyers talk "about [their organizations] in general, all the different things you can do, [the] philosophy, and how we treat clients."²⁰⁹ Trainings are set up "in the legal community to recruit and train volunteer attorneys."²¹⁰ To illustrate how informal acculturation works through the actual doing of pro bono work, I provide two examples below from the executive directors of two NLSOs. They explained that engaging private lawyers in pro bono work serves to acculturate private lawyers, which benefits their organizations by securing labor resources. The first spoke in the context of homelessness, while the second described a case of prison conditions:

I think the larger benefit that runs both ways is that people don't really understand the plight of poor people in this country. You walk up and down [the street] and people can just not look. And they don't understand that not only does it suck to be poor, but when you're living in a society that says, we value the rule of law, everybody is equal under the law, all kinds of things to not have imposed on you, but you have to go to law and poor people have no way in the world of doing that. So, it's really about giving a poor person the tools they need to succeed in that environment.²¹¹

Almost every lawyer who's taken one of these cases on has been absolutely horrified at the way we treat prisoners, and ends up, on some level, wanting to do something about it beyond the individual case they're doing. I had one [big law partner] who did a medical case and said, "I need to figure out a way to bring a class

²⁰⁶ Interview with PI035 (July 28, 2017) (on file with author).

²⁰⁷ See Albiston & Nielsen, *supra* note 47, at 62–63.

²⁰⁸ Interview with PI026 (June 5, 2017) (on file with author).

²⁰⁹ Interview with PI001 (Mar. 7, 2017) (on file with author).

²¹⁰ Interview with PI006 (Apr. 14, 2017) (on file with author).

²¹¹ Interview with PI008 (Apr. 20, 2017) (on file with author). For a discussion about the plight of the poor, see Leonard J. Long, *Optimum Poverty, Character, and the Non-Relevance of Poverty Law*, 47 RUTGERS L. REV. 693, 702 (1995).

action case about this; I'm going to sue the whole state, it's terrible, nobody should be able to get away with this." I think that it has been a real educational experience for lots of lawyers. I am thrilled that they're getting an education by my clients.²¹²

The two above examples detail how doing pro bono work exposes private lawyers to the experiences of poor clients. While the statements may not appear to be geared toward obtaining resources, the experiences they describe can create empathy toward the organizations' clients in a way that can draw support from both volunteer lawyers and firms. NLSOs believe that acculturation extends to whole firms and the broader legal community, as expressed by an executive director:

We are educating law firms on the issues that are important to our organization. Just by taking a case, law firms are now exposed to it, and many of them have made it their mission because of the case that they worked on. And then, they talk to not only people in their firm, but people in their everyday lives. So, we're increasing our manpower in our message by volunteers taking the case.²¹³

Therefore, NLSOs acculturate law firm lawyers to cultivate resource flows from both firms and individual lawyers, and to sensitize the private bar to their missions and the plight of the poor.

While acculturation appears to be somewhat successful for obtaining and keeping resources, it is not without limitations. On the whole, it cannot address the macro-level power imbalance between law firms and NLSOs. With acculturation, NLSOs are attempting to solve a structural problem with interpersonal relationships. However, in conjunction with the macro- and meso-level proposals, acculturation has many benefits.

In addition to acculturation, and after power imbalances have been addressed, NLSOs can leverage other micro level relationships, including relationships with individual associates and partners in law firms. One avenue is by establishing a best practice around what I have termed the "micro pay for preference" regime in previous work.²¹⁴ With micro pay for preference, each law firm would incentivize its lawyers to take pro bono matters that address actual needs of the poor, by giving more credit to pro bono hours in legal areas of the highest need.²¹⁵ Legal areas of high need can best be determined by a clearinghouse that would oversee the distribution and provision of pro bono work in each jurisdiction.²¹⁶ To implement pay for preference,

²¹² Interview with PI027 (July 6, 2017) (on file with author).

²¹³ Interview with PI026 (June 5, 2017) (on file with author).

²¹⁴ See Adediran, *supra* note 198. The micro pay for preference has a macro component to it. Law firm management must change internal policy to encourage it.

²¹⁵ For an in-depth discussion of choosing areas of the highest need, see *id.*

²¹⁶ The applicable jurisdiction would be determined on a state-by-state basis. In some states, because of size and other factors, it would be judicious to create categories by districts, cities, or even towns. In other places, a state-wide approach would best capture legal need.

firms should allow lawyers to bill pro bono hours in areas of the highest need as time and a half.²¹⁷ For instance, an associate can bill one and a half hours for every hour spent representing a client in a family law matter, if it is an area of high need in that community.²¹⁸ This would incentivize lawyers to take on more matters in areas of law that would yield more hours, thereby potentially increasing the duration of the relationship of the law firm with the NLSO. A potential limitation of the pay for preference proposal is how to incentivize law firms to implement it.²¹⁹ However, certifying it as a best practice should encourage law firms toward implementation.

D. *Alternative Model: Shift Dependence*

Another way that organizations can reduce their dependencies on powerful organizations is by increasing their resources from other sources.²²⁰ Therefore, the final proposal for addressing the power imbalance between law firms and NLSOs is to increase other sources of resources.²²¹ I propose a shift to more LSC funding here.

In general, government funding is thought to be the most stable revenue source for nonprofit organizations.²²² This has been true for NLSOs in the past, but has become less so in recent years, starting with the Reagan administration, when Congress began to cut the LSC's funding.²²³ Then in 1996, Congress imposed restrictions banning LSC-funded NLSOs from a number of legal matters, including redistricting challenges, class action lawsuits, political advocacy, abortion litigation, and welfare reform activities.²²⁴ The legislation prohibited lawyers in LSC-funded organizations from using non-LSC funds to engage in any of the prohibited activities.²²⁵

Each jurisdiction, as determined by the state, would establish an organization that gathers information based on the number of people seeking particular legal services during a particular time. Of course, this approach could also be costly, as I have discussed in previous work. *See id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See Nienhüser, *supra* note 93, at 13 (“What can actor A do now to reduce his dependence? He can first of all try to reduce his need . . . for resources that B controls. Secondly, A can acquire alternative sources of resources.”).

²²¹ This proposal is not new. See JOHNSON, JR., *supra* note 2, at 237 (calling for increased federal financing of legal services because “the Federal level has proven least susceptible to pressures from offended merchants, landlords, welfare administrators and government officials”). It is important to acknowledge that LSC funding also constrains NLSOs. However, unlike the pro bono relationship with law firms, NLSOs would be able to provide legal representation that addresses the actual legal needs of the poor and would not need to expend their own resources (outside of grant writing) to obtain those resources.

²²² See Matthew M. Hodge & Ronald F. Piccolo, *Funding Source, Board Involvement Techniques, and Financial Vulnerability in Nonprofit Organizations: A Test of Resource Dependence*, 16 NONPROFIT MGMT. & LEADERSHIP 171, 174 (2005).

²²³ See Cummings, *supra* note 7, at 22.

²²⁴ *Id.*; Houseman, *supra* note 3, at 1214.

²²⁵ Cummings, *supra* note 7, at 22; Houseman, *supra* note 3, at 1214.

Thus, federal funding for legal services has declined since the Reagan administration and, because of limited federal aid,²²⁶ NLSOs have come to rely on other avenues for money and other resources, including law firms, private foundation grants, contributions or gifts from private individuals, membership dues, attorney fees, state and local governments, and state bar associations.²²⁷ Also, in 1981, the LSC mandated its grantees to use 12.5% of LSC funds to engage private attorney involvement, leading to the expansion of pro bono programs.²²⁸ The 12.5% mandate suggests that the goal was for the private bar to be a cost saver for NLSOs by filling the gap in the provision of legal services. This assumption turned out to be incorrect, as this Article demonstrates. While law firms have become intimately connected with the provision of legal services, pro bono work has been an expensive endeavor for NLSOs.

Therefore, a Congressional expansion of government support and a loosening of funding restrictions on the kinds of matters that LSC grantees can take, and possibly the elimination of the 12.5% restriction, can, in theory, reduce the dependence of NLSOs on law firms for funding. At a minimum, it can put NLSOs in less subordinate power positions with firms to be able to structure the relationship to meet their own needs and those of the poor.

There are obvious limitations to this proposal, including the problem of gaining bipartisan support in Congress, especially in light of recent plans to defund the LSC.²²⁹ But perhaps the knowledge that LSC funding of civil legal services can reduce government spending in other social welfare areas in which the government expends millions of dollars annually can provide some support for this proposal.²³⁰ For instance, a 2016 report by the New York City Bar Association found that an investment of \$199 million to provide legal representation in eviction and foreclosure proceedings would produce a net cost savings to New York City of \$320 million annually.²³¹ Civil legal services for eviction and foreclosure would prevent families from seek-

²²⁶ Daniels & Martin, *supra* note 15, at 162; Jerome E. Carlin et al., *Civil Justice and the Poor: Issues for Sociological Research*, 1 LAW & SOC'Y REV. 9 (1966); Scott L. Cummings & Deborah L. Rhode, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485, 488 (2017).

²²⁷ Cummings, *supra* note 7, at 11 n.46, 23–24.

²²⁸ See *id.* at 24 n.134; Houseman, *supra* note 3, at 1217.

²²⁹ There have been several threats to the LSC's survival, including under the Trump administration. See, e.g., Lincoln Caplan, *The Justice Gap: America's Unfulfilled Promise of "Equal Justice Under Law"*, HARV. MAG., NOV.–DEC. 2017, at 62–63; Am. Bar Ass'n, *Senate Appropriations Committee Okays \$385 Million for LSC in Fiscal Year 2018*, ABA WASHINGTON LETTER, July 31, 2017, https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/july2017/LSC, archived at <https://perma.cc/G3WD-VKQG>.

²³⁰ STOUT RISIUS ROSS, INC., *THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A 5* (2016), https://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf, archived at <https://perma.cc/B5FL-64NZ>.

²³¹ *Id.*

ing emergency shelter and lowering law enforcement and medical costs related to homelessness.²³²

It is important to note that this proposal does not advocate for an end to pro bono relationships, where NLSOs would represent clients without the involvement of law firms. This would be a mistake. Eliminating pro bono work would negatively impact the capacity and reach of legal services, and most NLSOs cannot afford to do so. Indeed, even the five LSC-funded organizations in this study have maintained pro bono relationships with law firms and behave similarly to non-LSC-funded organizations.²³³ Law firms spend thousands of hours representing a large number of individuals that may not receive legal services if pro bono work is eliminated. However, more funding from the LSC could both provide more money to NLSOs and potentially reallocate power dynamics.

CONCLUSION

As government funding for civil legal aid through the Legal Services Corporation declined starting during the Reagan administration, large law firms began to take an increasingly important role in providing resources for civil legal services for the poor by partnering with nonprofit legal services organizations (“NLSOs”). Over time, NLSOs have become dependent on law firms for labor, money, and prestige resources to represent needy clients.

While the involvement of large law firms in civil legal services has some benefits, including increasing the capacity of those who receive civil legal services, it has also created many problems. These problems include the fact that pro bono partnerships with law firms can be costly for NLSOs and the actual legal needs of the poor are often neglected.

NLSOs’ dependence on law firms for resources has created a problematic structure where law firm interests in pro bono work and board positions from NLSOs substantially outweigh NLSOs’ consideration of quality or cost. This problematic structure contributes to other problems in the delivery of legal services, as shown in the literature.

The literature in organizational sociology helps to show that NLSOs comply and are unable to force law firms to compete because law firms and NLSOs are in extremely power-imbalanced relationships. Power is not about organizational size or who has the most resources. Instead law firms have power because (1) a single NLSO must rely on multiple law firms to obtain the resources it needs to fulfill its mission to provide legal services to

²³² *Id.*

²³³ For example, in 2014, LSC-funded organizations closed a total of 757,983 cases, of which 80,953 were completed with the involvement of pro bono lawyers. Legal Services Corporation, *2014 Legal Services Corporation by the Numbers: The Data Underlying Legal Aid Programs*, LSC BY THE NUMBERS (Legal Servs. Corp., Washington, D.C.), Aug. 2014, at 1, <https://www.lsc.gov/sites/default/files/attach/2015/08/LSC2014FactBook.pdf>, archived at <https://perma.cc/H53F-LNU6>.

poor clients; and (2) a single NLSO requires a multiplicity of resources: labor, money, and prestige. Thus, NLSOs feel completely beholden to law firms.

I offer possible solutions to encourage law firm competition, including the introduction of intermediaries such as certifications and modifying *American Lawyer* rankings. These solutions would reallocate power between law firms and NLSOs, so that NLSOs can be better positioned to structure pro bono legal services to address the actual legal needs of the poor.

