Adversus Pro Bono

The seductive heresy of pro bono legal work

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Adversus Pro Bono: the seductive heresy of pro bono legal work[1]

In about 180 CE, Saint Irenaeus, the Bishop of Lyons in France, wrote and published a work whose long title was "*On the Detection and Overthrow of the So-Called Gnosis*". That treatise is more commonly known as *Adversus Haereses* and was written to refute the early, but extremely popular, system of thought known as Gnosticism.

The short title, *Adversus Haereses*, translates as *Against the Heresies*. While this may not have been the first time the word "heresy" had been used to describe ideas that had swayed from orthodox doctrine, Irenaeus is almost certainly the person who popularised the notion. Irenaeus, as it were, put heresy on the map.

Two things immediately stand out in relation to the notion of heresy that Irenaeus introduced.

First, at the time that he wrote *Against the Heresies* the system of thought, or "heresy", that he was addressing was extremely popular. Indeed, in many ways it remains popular today. One of the early proponents of Gnosticism, against whom Irenaeus preached, was Valentinus, who had a large following extending from Alexandria in Egypt to Rome. As with many ideas that have since been

[1] I gratefully acknowledge Dominique Hansen, the CEO of Law Access, for providing helpful feedback on an earlier draft of this paper. Law Access is a leading not-for-profit organisation that coordinates the giving of pro bono legal assistance by the Western Australian legal profession. Its work in matching applications for pro bono legal assistance from individuals and not for profit organisations to lawyers aims to address many of the issues discussed in this paper. All the opinions (and rhetorical flourishes) are, of course, my own.

characterised as heresies, Gnosticism was not a fringe movement. It competed with orthodoxy on fairly equal terms.

The other thing to recognise is that Gnosticism, in its original form, was a body of thought that had many things in common with orthodoxy. Many gnostic thinkers drew from the same sources as their orthodox brothers and sisters and it could sometimes be difficult to distinguish between them. So it wasn't always easy to tell which people were the heretics and which weren't.

This brings out an important feature of heresy generally.

Heresies are not, generally, bold refutations of orthodox thought. Very often, a heresy can be difficult to distinguish from the orthodoxy which seeks to suppress it. Indeed, as the first heresy attacked by Irenaeus demonstrated, the real danger of a heresy is **not** that it is false. The danger of a heresy can often be that it is mostly true, but that it exaggerates one aspect of the truth to the expense of the whole truth.

Consider this remark from Irenaeus himself:

> "Error, indeed is never set forth in its naked deformity, lest, being thus exposed, it should at once be detected. But it is craftily decked out in an attractive dress, so as, by its outward form, to make it appear to the inexperienced more true than truth itself."

This is why heresies can be so seductive. And why disputes about them seem to be, with the passage of time, so apparently abstruse.

The Heresy of Pro Bono

I commence with this little diversion into second century theological disputes, because I want to suggest this afternoon that we can detect the beginnings of a heresy developing within the legal profession - a heresy that has the potential to undermine the ethos of the profession as a whole.

I refer to the growing and increasing systemisation of "pro bono" legal work within the legal profession.

You will notice, I hope, that I have identified this as a heresy not because pro bono legal work is bad or is something to be discouraged. Far from it. The provision of legal services to all members of the community, including those who are least able to afford them, is an essential duty of the legal profession. And always has been.

Indeed, I have described this as a heresy precisely because there is so much that is true about our talk about pro bono legal services. What I want to suggest, however, is that the way we talk about the "good" of pro bono legal services, while true enough, has the potential to undermine the whole truth of the purpose of the legal profession generally.

What I propose to say this afternoon, then, is not intended to be some finger-waving sermon, or to suggest that those who have a commitment to access to justice are wrong. And to be sure, all of the heretical ideas I describe below, I have fallen prey to from time to time.

Rather, these remarks are intended to reflect, a little deeper, on how we perceive ourselves as participants in the justice system generally and how the rise, and rise, of pro bono legal work, while good in itself, might be adversely affecting that perception.

Pro Bono Publico

First, let me set some context.

The expression "pro bono" is of course shorthand for the Latin phrase *pro bono publico*, which translates as "for the public good".

In the context of legal services, this can be defined as the provision of legal services on a free or substantially reduced fee basis, with no expectation of commercial return. This is the short form definition given by the Australian Pro Bono Centre and it is a good definition for our purposes.

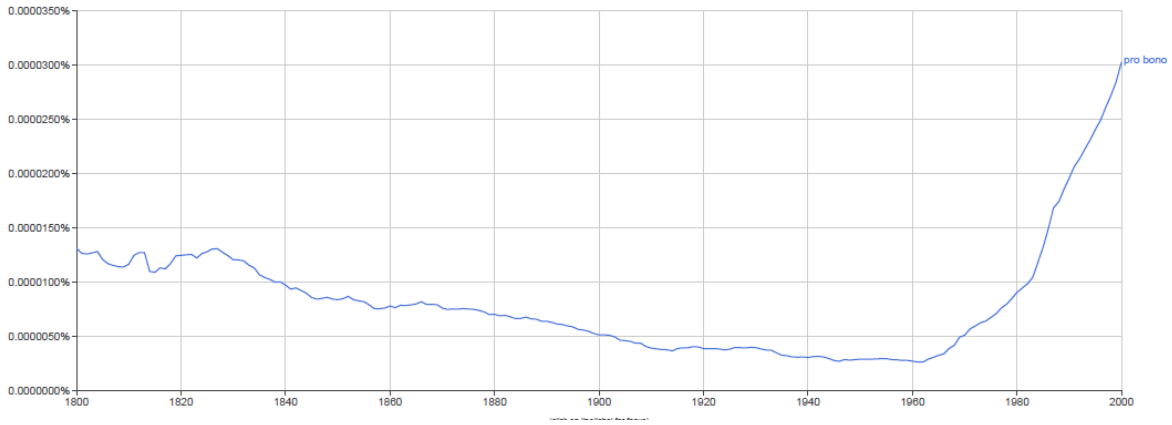
The Australian Pro Bono Centre has a more expansive definition that it uses for the purposes of its National Pro Bono Target and its survey activities. The Centre

does great work and I invite you to look up that definition on its website, a very useful collection of resources in relation to the issue generally.

The Centre's website also has a page which sets out a "History of Pro Bono in Australia". It notes that "lawyers have been providing pro bono legal services for a very long time. However, the growth of a structured approach to pro bono by law firms is a relatively recent occurrence".

That history is said to have commenced in 1967. A mere 52 years ago.

Interestingly, this history dovetails nicely with another trend. According to the Google Books Ngram Viewer, which charts the frequency of the appearance of words or phrases within Google's corpus of books, the change in the rate of frequency of the appearance of the phrase "pro bono" from the year 1800 to 2000 looks something like this:[2]



[2] https://books.google.com/ngrams/graph?content=pro+bono&year_start=1800&year_end=2000&corpus=15&smoothing=10&share=&direct_url=t1%3B%2Cpro%20bono%3B%2Cc0 (accessed 18 February 2019)

As you can see, the phrase "pro bono" was in fairly constant, albeit declining, use throughout the 20th century, until about the late 1960s – early 1970s when it rapidly increased, with a seemingly exponential growth that continues to this day.

What does this tell us?

Well, I am going to go out on a limb here, and suggest that it doesn't tell us that the legal profession today is more virtuous than it was in the past. Or that a commitment to the administration of justice within the legal profession magically appeared in 1967 alongside the release of *Sgt Pepper's Lonely Hearts Club Band*. And in particular, it doesn't mean that lawyers only commenced providing legal services to people in need in the 1960s.

What this trend shows us, rather, is that we talk about pro bono more than we used to. A lot more. And it is, in part, the way we talk about it that is my concern. And where, I want to suggest, the heresy lies.

Some Dangers in our current approach to Pro Bono Work

But before talking about the heresy, which is subtle, it is worthwhile pausing and reflecting on some more of the more obvious dangers associated with our, seemingly new, "pro bono culture".

In drawing out these dangers, again, I should not be understood as criticising pro bono programs within firms or the legal profession generally, or suggesting that all of the dangers I identify are present everywhere, or indeed are present anywhere at all times.

What I want to do is raise some questions for us to think about when reflecting on our pro bono work and whether it is effective in achieving its ultimate purpose.

To do that, we have to identify that ultimate purpose.

So what is the purpose of pro bono work?

For present purposes, I hope we can agree on the following: the purpose of pro bono legal work is to provide access to justice to all members of the community.

Notice that when we say that pro bono legal work has this purpose we are implicitly saying that it is not an end in and of itself. It is a means to an end: greater access to justice.

This, in turn, means two things.

First, because "access to justice" is the end (and pro bono, only the means), it should be obvious that pro bono legal work is not the only means of providing

access to justice. Indeed, in many respects, it may not even be the most important one. The lawyers that I have had the good fortune to know, and who I would regard as having provided the most "access to justice" (that is, to have delivered the most justice to the greatest numbers of people), would rarely, if ever, have provided pro bono legal services, as that term is commonly defined.

Many practitioners for example, spend their entire careers providing efficient, inexpensive legal advice to members of the community, whose access to justice is ensured by the modest fees charged by those practitioners. I have in mind, in particular, practitioners who specialise in personal injury matters, or criminal lawyers, whose standard rates are equivalent to that remuneration provided by legal aid.

Applying our definition of pro bono, these practitioners don't provide legal services at "on a substantially reduced fee basis", because their standard fees are already at a level that delivers access to justice to a significant part of the community. And yet, by the measure of the ultimate end, access to justice, their contribution may be the most significant.

Secondly, the fact that pro bono services are the means, rather than the end, means that the converse is also true. That is, unless it meaningfully contributes to access to justice, the provision of legal services on a "free or substantially reduced fee basis" (our definition of pro bono) has no value at all. Or at the very least, it does not serve the purpose or end of pro bono legal services. Indeed, it may create the appearance of value, or contribution to the community, that in the final analysis is illusory.

In light of these observations, it is worth saying something about pro bono "targets". The Australian Pro Bono Centre has a National Pro Bono Target, which law firms and individuals are encouraged to sign.

Two features of the National Pro Bono Target are noteworthy.

First, the Target's statement of principles describes the "professional responsibility of all lawyers to provide pro bono legal services". Secondly, the target itself is, for each lawyer, an "average of a minimum of 35 hours of pro bono legal services" per year.

As to the first matter, notice how the provision of pro bono services is itself identified as being part of lawyers' professional responsibility. This seems obvious. After all, shouldn't all lawyers be doing some form of free or reduced fee work?

And yet, is it true?

What about the salaried lawyer who works for legal aid or as a State prosecutor? Is she failing in her professional duty because her workload doesn't enable her to carry out additional legal work for no fee? The very notion seems absurd.

Or the suburban solicitor, who works tirelessly delivering affordable legal services to hundreds of clients each year, making a modest profit – if she is lucky. Is she somehow less professional or less responsible than the equity partner in a national practice who is able to provide (or have their junior staff provide) 35 hours per year of free legal advice? Ironically, of course, it is often modestly remunerated suburban solicitors who carry the burden of much pro bono work.

Or, to take a cinematic reference, was Lawrence Hammill QC, the wealthy silk who in *The Castle* offered to argue Darryl Kerrigan's case in the High Court pro bono, more professionally responsible than Dennis Denuto, eeking out a living from his meagre suburban office?

So, while I understand the sentiment behind the Pro Bono Target's statement of principles, perhaps it would be preferable, and more accurate, to describe this professional responsibility as every lawyer's professional responsibility to "provide access to justice" or, perhaps more prosaically, to simply "provide justice".

I will return to this later, but I imagine one objection to this suggestion would be that it has no metric: how would we measure a lawyer's provision of "justice"?

Which brings me to the second aspect of the target: the metric of providing "a minimum of 35 hours per year". Just as the provision of pro bono legal services is deployed as a stand-in for the real task of providing access to justice, so too the metric of *number of hours per year* is obviously a stand in for the attainment of that task.

As Allsop CJ recently observed, however, in the context of time based metrics for the performance of Courts:

> the use of metrics or measurements of things related to these things of real importance, is only ever a surrogate or default way of re-conceptualising or re-presenting the reality of these things of real importance; it is not, and never can be, the reality itself.

This observation applies equally to pro bono targets.

How much does 35 hours a year really tell us? Does it tell us anything at all?

As a surrogate for re-presenting the provision of justice (or access to justice) it seems woefully inadequate. As a measure of performance or value it seems to tell us very little. It certainly tells us nothing about the quality of justice attained, if any.

Indeed, one of the striking features of using numbers of hours to measure the value of pro bono service is that it employs the same metric as that which has come to dominate the valuation of all legal work in recent decades: time costing.

Now is not the occasion to rehearse all of the various criticisms that have been made of time costing in recent years: that it favours quantity over quality, that it

encourages ever increasing billable targets and that it brings into conflict the client's interest in speedy and efficient resolution with the lawyer's interest in maximising hours (and thereby profit). The extent to which those criticisms are valid, and how they might be remedied, are a matter of ongoing debate and for another time.

For present purposes it is simply worth noting that, at the very point in time when the valuation of paid legal services by reference to minutes and hours is up for debate, we seem to have (unquestioningly) adopted the same metric for valuing our "good" legal work. What does this tell us about the interests that such a metric serves?

Again, please notice what I am not saying. I am not saying that pro bono targets are of no use or value. I am, for example, reliably informed (by those who understand these things better than I) that targets have been of real use in driving increases in participation in pro bono work. What I am saying, however, is that we need to interrogate those targets and ask ourselves the messier question of whether meeting those targets is advancing the cause of justice.

This brings me, with some trepidation, to ask a number of uncomfortable questions about pro bono programs and the extent to which they add to the attainment of justice.

If none of these questions apply to you, or your firm, well done. You can just ignore the questions I am about to ask. But if you, like me, have wondered

whether your pro bono work really was for "the public good", some or all of these questions might resonate with you.

First, to what extent have pro bono programs become simply another form of marketing exercise; another tool in an armoury in the service of commercial activity and increasing profitability? How does this affect the pro bono work that is selected and how it is carried out?

Secondly, to what extent does pro bono work involve picking "winners", often after the result is in the wind, so as to maximise the public relations benefit, as opposed to addressing a more pressing, but less popular, need in the community? To what extent are our pro bono activities focussed only on those we regard as "worthy" of our largesse?

Finally, does pro bono work, measured by the same metric that governs modern billing practices (minutes and hours) suffer from the same over-serving that besets some corners of the legal profession? How meaningful is it to say that a firm delivered $1 million worth of pro bono legal work, if it was expended on one client whose needs could just as effectively been met in far fewer hours?

These, and other, difficult questions have to be asked about pro bono legal services if they are really make inroads in the need for access to justice.

But even these questions are just questions of effectiveness.

They don't quite capture what I think is the real hidden, but emerging, danger of a pro bono culture. They don't capture what, I want to suggest, is its seductive heresy.

It is to that I now turn.

Instrumental and Intrinsic Goods

To try to capture what I mean, it is useful to call in aid the distinction (for which we are indebted to Aristotle) between those things in life that are "intrinsically good" and those that are "instrumentally good". We hinted at this distinction earlier in distinguishing between *means* and *ends*.

Let's develop the idea a little further.

An intrinsic good is that which is good in and of itself. Intrinsic goods are goods that exist for their own sake. Happiness or human flourishing (*Eudaimonia*, to use Aristotle's expression) is an intrinsic good. We value it for its own sake.

Instrumental goods, on the other hand are those things that are good because they get us to some other good. They are not good in, and of, themselves. They are a means to some other good. Money is a good example of an instrumental good. Despite what we might be led to believe, money has no intrinsic value apart from its use. It is only instrumentally good.

Justice, or the doing of justice, is, I suggest, an intrinsic good. Doing justice is good for its own sake. It is an end in and of itself; not a means to an end.

Legal Work as an Intrinsic Good

Fundamentally, the work of a lawyer is, or ought to be seen as, an intrinsic good. It involves the doing of, or the provision of, *justice* and should be valued as being good, in and of itself.

It requires no justification beyond itself.

Or at least it shouldn't.

And this holds true regardless of the outcome of a particular dispute or transaction; whether the client "wins" or not. It is one of the unique, and satisfying, aspects of legal work that it can be regarded as having fulfilled its purpose, even where the outcome is not that which was contended for by the lawyer: because (at least formally) justice has been done as a consequence of the lawyer's work.

Notice, from this, that justice is not simply a private good. It is a public good. As an ultimate value, justice is an objective state of affairs that exists *between* people; a matter of right proportion. It is what the classical Greeks called *dikaion*.

So legal work, all legal work, is, or should be, intrinsically directed to a good (justice) that is a public good.

"For the public good".

If only there was a neat little Latin phrase that expressed this idea.

The Heresy of Legal Work as an Instrumental Good

This is where, I suggest, the heresy has crept in.

When we use the phrase *pro bono publico* (for the public good) we exclusively refer to a particular kind of legal work which, for most lawyers, constitutes a very small proportion of the work that they do.

Pro bono legal work is something we see as intrinsically good. And so it is. The problem is the tendency to see that work, and only that work, as intrinsically good.

And what does that say about the other 51 weeks of the year? When the lawyer meeting their target of 35 hours a year, is not doing work explicitly defined as "for the public good".

It says that legal work *per se*, is an instrumental good. Sometimes it serves the good of the public. But sometimes it doesn't. And it doesn't necessarily have to.

Sometimes, perhaps most of the time, it can serve whatever good we want it to serve: profit, status or any other purely private good.

And at least as a matter of theory, if that includes a business model that excludes all but the very wealthy, so be it.

Again, I am not suggesting that this is how most lawyers think. Or that this is an explicit philosophy. That is not how heresies generally work. They don't, as Irenaeus said, "stand forth in their naked deformity". They are subtle, and gradual, and sometimes have their effect without us fully recognising it.

Let me give an example. It was something said to me not long ago by a partner in a large law firm. To be clear, the person who said this I regard as an ethical practitioner. And no doubt a very good person. But when discussing the firm's pro bono work, he had this to say:

> "Our pro bono program gives us the social licence to operate our profitable business."

May I suggest that if you have ever said something along these lines, you have lapsed into heresy?

The heresy is not in how we regard the pro bono work that we do. The heresy is how we conceptualise the work *per se*, including the work we do for reward.

Consistent with the fundamental obligation of the profession to serve the administration of justice, **all** legal work should be conceptualised as serving the intrinsic good of justice and providing access to justice. It does not begin, and end, with a pro bono program.

A commitment to access to justice must be an inherent part of everything a lawyer does. If legal work doesn't serve that intrinsic good; if it is simply seen as an instrumental good to serve purely private ends, it has failed the client and it has failed the community it exists to serve. It has ceased to be good at all.

Put another way: fundamentally, we must remind ourselves that **all** legal work is for the good of the public (*pro bono publico*). It's just that some of it makes money and some of it doesn't. The work is the same. It has the same end. And we need to constantly remind ourselves that that work, all of it, has an end that is no less than justice itself.

If we can do that then we will truly be able to say that it is "the professional responsibility of all lawyers to provide pro bono legal services".

And mean it.