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# Reframing Faculty Pro Bono

Ezra Ross

Soon after receiving accreditation, one regional law school considered whether to adopt a mandatory pro bono policy.<sup>1</sup> All members of the committee charged with studying the proposal supported it.<sup>2</sup> But the committee also knew that not all faculty members would approve it.<sup>3</sup> The committee members therefore avoided any suggestion that faculty, as opposed to just students, would need to do pro bono.<sup>4</sup> They feared that imposing the requirement on faculty would derail the entire proposal.<sup>5</sup>

At another law school, the faculty took a different tack. Segregating proposals, the faculty first approved a pro bono requirement for students.<sup>6</sup> Only “seconds later,” the faculty rejected a pro bono requirement for professors.<sup>7</sup>

And one top five law school, in describing its program to the ABA, affirmed its “dedicat[ion] to the principle that members of the legal profession and those aspiring to enter the legal profession have a professional obligation to assist in providing quality legal services to individuals, groups or causes that are under-represented in the legal system.”<sup>8</sup> In the same submission, however, it provided no response to a question about “Faculty and Administrative Pro Bono,” leaving only a blank space.<sup>9</sup>

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1 Richard F. Storrow & Patti Gearhart Turner, *Where Equal Justice Begins: Mandatory Pro Bono in American Legal Education*, 72 U.K.M.C. L. REV. 493, 499 (2003).

2 *Id.*

3 *Id.*

4 *Id.*

5 *See id.*

6 Rob Atkinson, *A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 AM. U. J. GENDER SOC. POL’Y & L. 129, 162 (2001).

7 *Id.*

8 *Directory of Law School Public Interest & Pro Bono Programs*, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/groups/center-pro-bono/resources/directory\\_of\\_law\\_school\\_public\\_interest\\_pro\\_bono\\_programs/](https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/) (last visited July 28, 2021) [hereinafter AMERICAN BAR ASSOCIATION, DIRECTORY OF LAW SCHOOL PUBLIC INTEREST & PRO BONO PROGRAMS].

9 *See id.*

A disconnect exists in law schools' treatment of pro bono. Law schools encourage or require students to do it. And they celebrate students' pro bono accomplishments. But this dedication to student pro bono masks an underlying ambivalence. Some of the same faculties that broadcast the pro bono credentials of students shrink from doing pro bono work themselves, a situation described by a leading commentator as "shameful."<sup>10</sup>

The larger debate about pro bono manifests a similar gap. The literature of pro bono reform, for example, addresses primarily full-time practitioners.<sup>11</sup> And although a cluster of papers years ago asserted a moral obligation for law professors to perform pro bono and proposed formal pro bono requirements for legal academics,<sup>12</sup> that conversation has since largely withered.<sup>13</sup> Nor does evidence exist that the limited exhortations in the literature have even minimally boosted faculty pro bono participation rates.<sup>14</sup>

This essay aims to resuscitate and reframe the discussion of faculty pro bono. Doing so has implications beyond mere academic gap-filling. Nearly a million indigent Americans seek legal assistance each year but receive none, solely for lack of resources.<sup>15</sup> Improving faculty pro bono participation can help address this breakdown in the operation of our justice system. It would simultaneously bolster law professors' real-world legal experience, helping answer the perennial criticism that legal academics are out of touch with the realities of practice.<sup>16</sup>

Why then, considering these benefits, have past efforts to launch a robust conversation about faculty pro bono not flourished? What explains, for example, why calls for a faculty pro bono mandate have flopped? Forging a new frame compels grappling with the challenges that have stifled previous approaches.

To that end, the literature of behavioral economics offers a powerful explanatory framework. Choice-reducing public policy "shoves," like

10 See Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 *CLINICAL L. REV.* 43, 54 (2009).

11 See, e.g., Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 *J. LEGAL EDUC.* 413 (2003); Scott L. Cummings, *The Politics of Pro Bono*, 52 *U.C.L.A. L. REV.* 1 (2004); Rebecca Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 *LAW & SOC'Y REV.* 79 (2007).

12 See David Luban, *Faculty Pro Bono and the Question of Identity*, 49 *J. LEGAL EDUC.* 58 (1999); Deborah L. Rhode, *The Professional Responsibilities of Professors*, 51 *J. LEGAL EDUC.* 158 (2001); Erwin Chemerinsky, *A Pro Bono Requirement for Faculty Members*, 37 *LOY. L.A. L. REV.* 1235 (2004).

13 See Rima Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, 78 *LA. L. REV.* 547, 549 (2018) (stating that the debate over faculty pro bono "has yet to materialize").

14 See *id.*; Rhode, *Legal Ethics*, *supra* note 10, at 54.

15 *The Unmet Need for Legal Aid*, LEGAL SERVICES CORPORATION, <https://www.lsc.gov/about-lsc/what-legal-aid/unmet-need-legal-aid> (last visited July 28, 2021).

16 See Richard E. Redding, "Where Did You Go to Law School?" *Gatekeeping for the Professoriate and its Implications for Legal Education*, 53 *J. LEGAL EDUC.* 594, 601 (2003); Paul Campos, *Shame*, 17 *J. CONTEMP. LEG. ISSUES* 15, 20–21 (2008).

proposed faculty pro bono mandates, can trigger intense resistance.<sup>17</sup> And applying proposed shoves to fiercely independent groups like law professors<sup>18</sup> can amplify pushback.

A “nudge”-based regime, rooted in the scholarship of choice architecture,<sup>19</sup> would better acknowledge unique characteristics of law professors. Low-cost, minimally intrusive strategies like mandated choice and priming<sup>20</sup> could help cajole, rather than shove, faculty toward greater pro bono participation. And to address the reality of cognitive inertia<sup>21</sup>—many law professors have gone years without practicing—law schools could curate listings of “compact” potential pro bono projects keyed to faculty interests. Put more generally, proposed solutions should meet faculty where they are, not where commentators might want them to be.

A reframed approach to faculty pro bono would also put moral reasoning in the back seat. A nascent strain of ethical philosophy suggests that morally loaded messaging can sometimes undermine, rather than promote, the behavior sought to be encouraged.<sup>22</sup> Underscoring the putative immorality of faculty failure to do pro bono may, for example, entrench faculty resistance and trigger “moral backfire.”<sup>23</sup> As an alternative, I propose emphasizing more affirmative messaging tethered to faculty commitments and values. For example, highlighting benefits to scholarship and teaching from pro bono, rather than framing pro bono as a condition to professional privilege, could help reduce the risk that advocacy efforts boomerang.

Finally, this essay eschews one-size-fits-all approaches and advocates more bespoke methods that recognize the different identities in play. Merely arguing that faculty should do pro bono for the same reasons that practitioners should do it disregards that faculty view their professional identities as significantly different from those of practitioners. Nor is the category of law faculty itself a monolith.<sup>24</sup> The conversations needed to spark pro bono participation by members of the lawyering skills community, for example, may differ

17 See Cass R. Sunstein, *Nudges vs. Shoves: The benefits of preserving choice*, 127 HARV. L. REV. F. 210, 211 (2014).

18 Chemerinsky, *supra* note 12, at 1236 (describing law professors as “fiercely independent”).

19 RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS II* (2009).

20 See *id.* at 182.

21 Matthew B. Lawrence, *Procedural Triage*, 84 FORDHAM L. REV. 79, 115 (2015) (describing role of inertia in decision-making).

22 See, e.g., David J. Franz, *Is Applied Ethics Morally Problematic?*, J. ACAD. ETHICS (2021), <https://doi.org/10.1007/s10805-021-09417-1>.

23 See *id.*

24 Cf. Scott L. Cummings & Rebecca Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POLY REV. 83, 94–95 (2013) (describing “communities of practice” among law practitioners).

significantly from the discussions that will work to do the same for consumer law faculty or scholars researching social justice issues. I therefore advocate tailored, rather than blanket, strategies to promote faculty pro bono.

This essay proceeds in four parts. Part I provides an overview of the literature on pro bono reform generally. Crossing scholarly boundaries, part I also integrates critical work raising concerns about lack of practical experience in the modern law professoriate. Part II introduces the proposed reframing of faculty pro bono issues. It diagnoses potential problems with past approaches and canvasses alternative strategies inspired by behavioral economics, the psychology of choice, and scholarly work on ethical reasoning and communities of practice.

Part III tackles objections. For example, does this proposed reframing do enough to counter pressure by law schools to publish, not practice? Does it collapse in the face of many law professors' identification as scholars, not public interest practitioners? In any event, might abandoning proposed pro bono mandates just cement the status quo? And could soft-pedaling law professors' moral obligation compromise the most forceful argument for faculty pro bono?

After evaluating these concerns, this essay concludes in part IV with a concession and a plea. Faculty pro bono is a hard problem. No essay will solve it. A new frame, however, might make space for experimentation and a new phase of the conversation.

## I. Background

Issues of faculty pro bono arise at the intersection of several broader debates: the literature of attorney pro bono generally, and scholarship discussing the identity and experience of law faculty.

### *General Pro Bono Scholarship*

The justice gap casts a long shadow over the American legal system: Nearly a million poor people who sought legal help in a recent year received no or inadequate assistance for lack of adequate resources.<sup>25</sup> To address the problem, commentators have advocated a raft of potential solutions, including required practitioner pro bono.<sup>26</sup> Proponents of a mandate argue that lawyers benefit from a state-created monopoly on legal services.<sup>27</sup> Therefore, attorneys owe a moral obligation to help promote equal access to legal services through pro bono work.<sup>28</sup> Critics challenge mandatory pro bono proposals on variety of

25 See THE UNMET NEED FOR LEGAL AID, *supra* note 15.

26 See DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS 144 (2015).

27 See *id.*

28 See *id.* Although the Model Rules of Professional Conduct do not require pro bono, they too describe pro bono services as “a professional responsibility.” MODEL RULES OF PRO. CONDUCT r. 6.1 cmt. 8 (AM. BAR ASS’N 2020).

grounds. For example, lawyers are not responsible for solving problems of poverty,<sup>29</sup> according to some observers, and “conscripts make poor lawyers.”<sup>30</sup>

Some authors, however, acknowledge that not all practitioners are similarly situated with respect to pro bono. For example, some commentators have discussed how pro bono participation by certain types of attorneys can raise concerns, like the potentially damaging role of positional conflicts for large-firm lawyers.<sup>31</sup> Other scholars have debated whether all lawyers, both large-firm attorneys and solo practitioners alike, should be subject to the same pro bono expectations.<sup>32</sup>

### *Law Professors’ Experience and Scholarship*

A distinct literature explores the practical experience of law faculty.

According to critics, law faculty consistently fail to prepare students for practice.<sup>33</sup> Some commentators have also assailed legal academics for producing scholarship that has little bearing on actual attorneys.<sup>34</sup>

One thread of scholarship has linked these concerns to legal academics’ lack of substantial practice experience.<sup>35</sup> According to this work, even professors with significant past practice experience can rapidly become out of touch with the quickly changing realities of practice.<sup>36</sup> This has led to some debate whether professors should need to meet a continued practice requirement.<sup>37</sup> The arguments in this vein of scholarship, however, generally do not focus on pro bono work.<sup>38</sup>

29 See Atkinson, *supra* note 6, at 152–54.

30 R. Lawrence Dessem, *Emeritus Attorney Pro Bono: From Rules, to Programs, to Law School Clinics*, 44 J. LEG. PRO. 83, 89 (2019).

31 See Cummings, *supra* note 11, at 116–18; Sandefur, *supra* note 11.

32 See Leslie C. Levin, *Pro Bono and Low Bono in the Solo and Small Firm Context*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION (Robert Granfield & Lynn Mather eds., 2009). Surveys have also explored patterns of practitioner pro bono work by gender and race. See Ronit Dinovitzer & Bryant G. Garth, *Pro Bono as an Elite Strategy in Early Lawyer Careers*, in PRIVATE LAWYERS, *supra* note 32.

33 See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 18 (2007); BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 172 (2012); Alex M. Johnson, *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1233 (1991).

34 See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992); Seth P. Waxman, *Rebuilding Bridges: The Bar, the Bench, and the Academy*, 150 U. PA. L. REV. 1905, 1906–07 (2002).

35 See Redding, *supra* note 16, at 601; Campos, *supra* note 16, at 20–21.

36 See, e.g., Emily Zimmerman, *Should Law Professors Have a Continuing Practice Experience (CPE) Requirement?*, 6 NE. U. L.J. 131, 138 (2013).

37 See *id.* at 144, 154–55.

38 See *id.*; Redding, *supra* note 16, at 601; Campos, *supra* note 16, at 20–21. *But see* Michael Mogill,

*Limited Literature Addressing Law Professor Pro Bono*

The scholarship on pro bono reform and the literature on law professors' practice experience conceptually overlap at the issue of law professors' pro bono practice. Yet few commentators have analyzed law professor pro bono in detail. Nor have the handful of papers written on the topic more than a decade ago generated a robust, ongoing conversation.<sup>39</sup>

The articles that have closely examined faculty pro bono have tended to showcase professors' "moral responsibility" or "duty."<sup>40</sup> The argument that faculty have a duty to do pro bono rests on the premise that law faculty benefit from attorneys' monopoly on delivering legal services the same way that practitioners do.<sup>41</sup> For example, law professors' salaries outstrip those in comparable departments because they are pegged to salaries in the legal market.<sup>42</sup> Thus, although many law faculty view themselves as scholars, rather than lawyers, law professors reap the rewards associated with private practice.<sup>43</sup> Accordingly, they have the same obligations as practitioners to improve access to justice.<sup>44</sup> In making these arguments, one leading commentator described law professors' failure to do pro bono when they require students to do so as a form of "hypocrisy."<sup>45</sup>

Scholars have also contended that faculty have as an empirical matter failed to meet this pro bono obligation.<sup>46</sup> One essay, for example, describes law professors' pro bono participation levels as "shameful."<sup>47</sup> Comprehensive data on faculty pro bono hours, however, does not exist because most law schools do not even attempt to track faculty pro bono.<sup>48</sup>

On those grounds, some commentators have advocated mandatory pro bono by law professors.<sup>49</sup> These proposals have relied on the duty-based

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*Professing Pro Bono: To Walk the Walk*, 15 NOTRE DAME J. L. ETH. & PUB. POL'Y 5, 30-31 (2001) (discussing faculty disdain for practice and the role of pro bono work).

39 See Sirota, *supra* note 13, at 549.

40 See Luban, *supra* note 12, at 58-59 ("But they are wrong if they deny that pro bono is an obligation, merely because it is a moral rather than a legal obligation"); Rhode, *supra* note 12, at 162 ("Some public service is an appropriate condition of professional privilege"); Chemerinsky, *supra* note 12, at 1238 (discussing "duty to help those who are less well off").

41 See Luban, *supra* note 12.

42 See *id.*

43 See *id.*

44 See *id.*

45 See *id.* at 66.

46 See Sirota, *supra* note 13, at 549; Rhode, *Legal Ethics*, *supra* note 10, at 54.

47 Rhode, *Legal Ethics*, *supra* note 10, at 54.

48 See Rhode, *supra* note 12, at 162 ("Comprehensive data on faculty pro bono involvement are unavailable since few schools even monitor, let alone require it.").

49 See Chemerinsky, *supra* note 12; Sirota, *supra* note 13, at 549.

reasoning described above, as well as benefits from faculty pro bono such as modeling for students and improved classroom teaching.<sup>50</sup> Some authors have argued for at least fifty hours of faculty pro bono per year.<sup>51</sup> Others have contended that a pro bono mandate should replace continuing legal education requirements for law professors.<sup>52</sup>

The core cluster of articles closely examining faculty pro bono, written by David Luban, Deborah Rhode, and Erwin Chemerinsky, was published in 1999 and 2004.<sup>53</sup> In the intervening years, few scholars have continued the conversation about faculty pro bono.<sup>54</sup> Those who have written more recently on this issue have largely repeated calls for a mandate.<sup>55</sup> Nor does evidence suggest faculty have intensified their pro bono participation since the publication of articles about law professor pro bono.<sup>56</sup> Indeed, even law schools' own pro bono coordinators have said many faculty do not act as good pro bono role models for their students.<sup>57</sup>

## II. Reframing

With the conversation about faculty pro bono at this point largely stalled, little evidence of increases in faculty pro bono participation, and continually growing need for pro bono legal services, this essay proposes a reframing.

This part begins with relinquishment of calls for a faculty pro bono mandate. Building on work from behavioral economics, I advocate a nudge-based approach to promote faculty pro bono. Second, I argue for a deemphasis of the narrative of moral obligation and a refocusing on more affirmative messaging. Third, I contend that forms of persuasion more tailored to specific professional identities of different groups of law professors could outperform a one-size-fits-all approach to framing the stakes of faculty pro bono.

50 See Chemerinsky, *supra* note 12, at 1238-40.

51 See *id.* at 1243.

52 See Sirota, *supra* note 13.

53 See Luban, *supra* note 12; Rhode, *supra* note 12; Chemerinsky, *supra* note 12.

54 See Sirota, *supra* note 13, at 549.

55 See *id.* Some other papers address law professors' use of sabbaticals to gain additional practice experience. Martin H. Pritikin, *The Experiential Sabbatical*, 64 J. LEGAL EDUC. 33 (2014). Some of these papers did describe pro bono work for the poor and associated benefits. Suzanne Rabe & Stephen A. Rosenbaum, *A "Sending Down" Sabbatical: The Benefits of Lawyering in the Legal Services Trenches*, 60 J. LEGAL EDUC. 296 (2010). But more of the leading works involved representations undertaken not for indigent clients, but for government prosecutors' offices. Pritikin, *supra* note 55; Bobby Marzine Harges, *Law Professor's Sabbatical in District Attorney's Office*, 17 *TOURO L. REV.* 383 (2001); Stacy Caplow, *A Year in Practice: The Journal of a Reflective Clinician*, 3 *CLINICAL L. REV.* 1 (1996).

56 See Sirota, *supra* note 13, at 549.

57 Rhode, *supra* note 12, at 161-62.



*A. From Mandate to Nudges*

## Problems with Mandates

Proposed faculty pro bono mandates have gone nowhere.<sup>58</sup> Even their advocates have acknowledged that the prospects for a mandate are “dim” and that believing otherwise is “naïve.”<sup>59</sup> Part of the explanation: “No one likes to be regulated, and *law professors in particular are fiercely independent.*”<sup>60</sup>

But commentators favoring a mandate have nevertheless argued that advocating a mandate could “induce debate and force examination” of the faculty pro bono issue.<sup>61</sup> Even debate, however, has for the most part not occurred.<sup>62</sup>

Moreover, even could a mandate succeed, it would impose a host of costs. For example, mandates—or “shoves,” as some authors describe them—can inflict harms caused by grafting one-size-fits-all solutions on differing individual circumstances.<sup>63</sup> They can also cause welfare losses resulting from deprivation of the right to choose.<sup>64</sup> Mandates requiring charitable action might also undermine the goal they seek to achieve: “By diminishing participants’ sense that they are acting for altruistic reasons,” mandates “could erode commitment and discourage some individuals from contributing above the prescribed minimum.”<sup>65</sup>

## The Nudging Alternative

In San Marcos, California, nearly 300 families participated in a study of energy usage.<sup>66</sup> Researchers informed the families of their energy usage and provided a comparison to average consumption.<sup>67</sup> Thereafter, above-average energy users significantly decreased their energy usage.<sup>68</sup> When big energy

58 See Sirota, *supra* note 13, at 549. *But see* Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J. L. & PUB. POL’Y 571, 620 (2011) (stating that two law schools had imposed faculty pro bono requirements, although one had no hours requirement).

59 Luban, *supra* note 12, at 58; Chemerinsky, *supra* note 12, at 1236.

60 Chemerinsky, *supra* note 12, at 1236 (emphasis added).

61 *Id.*

62 See Sirota, *supra* note 13, at 549.

63 Sunstein, *supra* note 17, at 211.

64 *Id.*

65 Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2432 (1999).

66 THALER & SUNSTEIN, *supra* note 19, at 69–70.

67 *Id.*

68 *Id.*

users also received an unhappy emoticon with their disclosures, they reduced their energy usage even more.<sup>69</sup>

A nudge, like those energy disclosures, “is any aspect of □ choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.”<sup>70</sup> Nudges can gently move people to do things that improve people’s lives, without sacrificing the freedom to choose.<sup>71</sup> Nudges exist for situations, like the state of faculty pro bono, in which mandates are either undesirable or unavailable.<sup>72</sup>

A range of possible tweaks to the choice architecture of faculty pro bono exists. For example, a low-impact nudge could utilize priming. Priming rests on the finding that when researchers ask subjects what the subjects plan to do, the mere asking of the question influences what the subjects end up doing.<sup>73</sup> For example, asking people the day before an election whether they intend to vote can increase the probability of their voting by up to 25%.<sup>74</sup>

Here, law school administrators could prime faculty members by simply asking them whether they plan to do pro bono work each year. This could come in the form of a simple email to the faculty. And administrators could magnify the impact by asking faculty what sort of pro bono they plan to do. Research indicates that eliciting such details can potentially intensify the priming effect.<sup>75</sup>

A slightly more aggressive nudge could deploy mandated choice. Mandated choice involves not merely presenting a question but requiring an answer to move forward in a process.<sup>76</sup> For example, the state of Illinois required driver’s license applicants to check a box consenting to or declining organ donation, and recorded “encouraging results.”<sup>77</sup> Here, a question to faculty about their pro bono plans could form part of a mandatory survey, rather than a simple email. Requiring faculty to answer the question, in addition to raising the issue through an email, could amplify the priming impact of the question.

Even more forcefully, law schools could request pro bono hours data from professors and then report the information to the faculty.<sup>78</sup> Specifically, schools

69 *Id.*

70 *Id.* at 5.

71 *Id.* at 8. *But see* Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593 (2014) (identifying limitations of nudges and benefits of mandates in some circumstances).

72 *See* THALER & SUNSTEIN, *supra* note 19, at 5.

73 *See id.* at 71.

74 *Id.*

75 *See id.* at 70–71.

76 *Id.* at 182.

77 *Id.*

78 Another option would *require* faculty to report their hours to law school administrations.

could disclose to the entire faculty average hours contributed by reporting faculty members and could report to each individual professor whether that person is doing less pro bono than average. Such a social nudge, like the energy usage scenario above, could encourage faculty members to try to at least match peer contributions.<sup>79</sup>

Ultimately, which combination of nudges would have the greatest impact cannot be resolved without some school-to-school experimentation and assessment. Nevertheless, one default approach could be for a law school to begin with the lowest-cost, least aggressive nudges, e.g., simple priming or mandated choice, and then ratchet up to more forceful nudges, such as reporting and public disclosure of faculty pro bono hours, as needed.

### Making Choice and Performance Easier

In addition to nudging faculty toward pro bono, administrators can also take the closely related action of removing obstacles to choosing pro bono projects. Providing curated lists of pro bono projects could potentially help: As studies show, presenting limited options can help spur action in some circumstances.<sup>80</sup> Of course law school personnel who prepare those lists, such as pro bono coordinators, would need some criteria to whittle down options.

Most easily, listings could feature projects from organizations that have previously provided reliable or popular opportunities. Or the coordinator and pro bono staff, resources permitting, could tailor listings of projects to faculty research interests. For example, schools could offer projects raising consumer or immigration law issues to professors who write in those areas.<sup>81</sup>

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Of course, this would constitute a mandate, not a nudge. That alone does not disqualify required reporting as a potential approach. In fact, mandatory reporting might provide a variety of benefits. But, for some of the same reasons that faculty have resisted general pro bono mandates, faculty may well oppose any required reporting, particularly if schools would publicize results.

- 79 *See id.* at 66-67. It might also backfire, however, if average contributions are low, which might cement under-contribution. Alternatively, if disclosures identify all faculty members by name along with their pro bono hours, a public shaming effect might boomerang—causing resentment and resistance. A potential solution might involve disclosures that simply tell each faculty member how many hours that professor contributed in the preceding year. The disclosures could then provide a notification if the professor contributed fewer hours than in preceding years or contributed fewer hours than average at the law school. Whether such a solution would effectively nudge more pro bono from faculty—without reinforcing low hours or triggering a shaming problem—needs experimentation and assessment.
- 80 In a classic study on choice, for example, a local food market on one day displayed twenty-four different kinds of jams. On another day, the food market provided only six different jam choices. Researchers found that people were almost ten times more likely to buy jam from the table with just 6 jams. The larger display of jams also led to lower customer satisfaction than the smaller display. BARRY SCHWARTZ, *THE PARADOX OF CHOICE* 123-25 (2004).
- 81 *Cf. Cummings & Sandefur, supra* note 24, at 94 (describing the benefits of “specifically targeted initiatives” in stimulating practitioner pro bono).

Potentially even more promising, law schools could highlight short, discrete pro bono projects as options for faculty. Many law professors spent little time in practice and many have gone years or decades without practicing at all.<sup>82</sup> Attempting to steer such professors toward pro bono might trigger resistance in the form of psychological inertia or status quo bias.<sup>83</sup> “Compact” pro bono projects could help combat that inertia. For example, organizations such as the NAACP or the ACLU sometimes need only discrete research assistance. Likewise, local public interest organizations often solicit volunteers for expungement clinics or even simple intake interviews.

To be sure, these simple projects do not sound like the sort of pro bono work professors would do. But faculty long out of practice may not feel ready to jump into more involved litigation or transactional matters. Shorter projects may also help counter the objection that law faculty lack time to devote to pro bono work.<sup>84</sup> Finally, shorter initial projects could help faculty members build pro bono momentum. Even minimal exposure to poverty-related problems can help inspire more service.<sup>85</sup>

### B. Reframing the Moral Case

This section advocates a second reframing related to faculty pro bono: demoting the moral justification. As described above, commentators have relied on a putative moral duty to justify faculty pro bono.<sup>86</sup> This essay does not dispute the logic undergirding this moral duty.<sup>87</sup> Instead, it surfaces the practical risks of relying on such an argument. Take, for example, “moral backfire.”<sup>88</sup> People strongly resist “the thought of [their] own wrongdoing, and

82 See Redding, *supra* note 16, at 601; Campos, *supra* note 16, at 20–21.

83 Inertia can occur when people choose not to waste mental resources if the status quo appears adequate. See Lawrence, *supra* note 21, at 115.

84 See *infra* text accompanying notes 130–38 for a more detailed discussion of time-related concerns.

85 Rhode, *Cultures of Commitment*, *supra* note 65, at 2431.

86 Luban, *supra* note 12, at 58–59; Rhode, *supra* note 12, at 162; Chemerinsky, *supra* note 12, at 1238.

87 See *supra* text accompanying notes 40–45 for condensed version of the argument; see also Luban, *supra* note 12, at 58–59 for detailed elaboration. But see Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 *YALE L. J.* 1443, 1481–82 (2000) (challenging argument that moral principles compel practitioner pro bono).

88 See Franz, *supra* note 22 (describing ways that moral arguments can backfire by causing strong resistance). A critic might contend, however, that commentators have couched the duty-based argument in a way unlikely to cause serious backfire. For example, although David Luban argues that faculty have an obligation to do pro bono, he also calls it an “imperfect duty” and “aspirational.” Luban, *supra* note 12, at 59 (1999). Other authors, such as Erwin Chemerinsky and Deborah Rhode, discuss lawyers’ pro bono responsibilities but do not rely heavily on morally charged language to make the point. See Rhode, *supra* note 12; Chemerinsky, *supra* note 12. The restrained phrasing of these authors arguably might pose little threat of law professors’ becoming defensive in response.

the result is that [they] will bend [their] moral beliefs and even [their] perceptions to fight off the harsh judgment of [their] own behavior.”<sup>89</sup> Indeed, when confronted with “ethical criticism,” people “engage in motivated reasoning to protect their worldviews and identities, which can in some cases result in a bolstering of those attitudes that have been called into question.”<sup>90</sup>

Law faculty may particularly resist the view that moral principles require them to do pro bono. Law faculty may already see themselves as good, ethical public servants, whether performing pro bono work or not.<sup>91</sup> Thus, professors may bridle fiercely at the view that years of law teaching without pro bono has failed the test of moral duty.<sup>92</sup>

Moreover, publicly highlighting failure to take moral action by a large group can inadvertently normalize that failure.<sup>93</sup> For example, people in studies have increased energy usage when they learned that their usage was below average.<sup>94</sup> Thus, featuring mass moral failure or detailing low average pro bono contributions could boomerang on the goal of increasing pro bono participation.<sup>95</sup>

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However, these commentators also use language with a strong moral emphasis. For example, David Luban expressly asserts a “moral obligation” and indicates that law professors’ failure to do pro bono when they require it of students is a form of “hypocrisy.” Luban, *supra* note 12, at 66, 75. Similarly, Deborah Rhode states that pro bono is a “condition of professional privilege.” Rhode, *supra* note 12, at 162. Moreover, these authors tend to make “duty” the centerpiece or the leading point in their arguments for faculty pro bono. See Luban, *supra* note 12, at 66, 75; Rhode, *supra* note 12, at 162; Chemerinsky, *supra* note 12, at 1238.

This emphasis on professors’ unsatisfied duties to do pro bono, and the inclusion of language related to moral obligations, could cause a backfire effect. In a more affirmative framing, the moral argument would take a back seat rather than a prominent position. See *infra* notes 97–102 and accompanying text.

89 David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 281 (2003).

90 Franz, *supra* note 22.

91 Luban, *supra* note 12, at 71.

92 This problem may be particularly acute for law faculty who have gone long periods without doing pro bono. This is because cognitive dissonance can, over time, form a feedback loop: “Once I act, my beliefs will rationalize the action and therefore impel me to further action of the same sort—which, in turn, calls for renewed rationalization, and further action.” *Id.* at 281. In other words, long pro bono inactivity may deeply entrench faculty in a view that lack of pro bono is not immoral; this in turn could engender strong resistance to any argument for a moral duty to do pro bono.

93 See THALER & SUNSTEIN, *supra* note 19, at 69.

94 *Id.*

95 Admittedly, tension exists in this essay on this very issue. Parts of the argument here highlight the mass failure of law professors to do pro bono. Therefore, arguably those facets of the essay could undermine the cause by making law professors feel more comfortable about not doing pro bono. But working toward a solution requires at least naming the problem. This essay attempts to minimize that risk by championing nudges and emphasizing pro bono benefits, rather than lingering on the scope and moral culpability of the failure.

Even framing praise for faculty pro bono in moral terms could backfire. When people do something good—such as donating to a charitable cause—they may feel subsequently licensed to act in a more negative or morally ambiguous way.<sup>96</sup> Thus, casting the discussion of faculty pro bono in primarily moral terms—whether commending or criticizing—could inadvertently retard progress.

Rather than framing faculty pro bono primarily in terms of moral arguments, couching the position more positively could avoid some of these pitfalls.<sup>97</sup> For example, faculty engaging in pro bono can model for students and thus potentially stoke additional student pro bono.<sup>98</sup> In addition, faculty pro bono can potentially improve professors' teaching by bringing real-world lessons and legal issues to the classroom.<sup>99</sup> Further, faculty pro bono could potentially inspire or influence scholarship.<sup>100</sup> Scholarship rooted in insights from recent practice experience could help address the criticism that too much legal scholarship disregards the realities of the legal profession.<sup>101</sup>

None of this compels full retirement of the moral obligation argument. In some instances, ethical reasoning can help spur altruistic conduct.<sup>102</sup> Here, the argument may serve well as a potential response to faculty objections. Placing the moral point in a responsive role could help avoid alienation effects while preserving the approach to persuade those open to a morally focused dialogue.

96 See Maryam Kouchaki & Ata Jami, *Praising Customers for Ethical Purchases Can Backfire*, HARV. BUS. REV. (Oct. 14, 2016), <https://hbr.org/2016/10/praising-customers-for-ethical-purchases-can-backfire>.

97 The potential power of positively reframing moral arguments gleans support from strategies used by some effective altruists. Effective altruism seeks to “answer[] one simple question: how can we use our resources to help others the most?” EFFECTIVE ALTRUISM, <https://www.effectivealtruism.org/> (last visited August 3, 2021). Effective altruists claim to “use evidence and careful analysis to find the very best causes to work on.” *Id.* One of the leading thinkers in effective altruism movement attributed its contemporary appeal to a change in messaging. Whereas other philosophers “emphasized the really strong obligation to feel guilty of not helping those in poor countries, our messaging was more positive and optimistic.” Edouard Mathieu, *The Books on Effective Altruism Recommended by William MacAskill*, FIVE BOOKS, <https://fivebooks.com/best-books/effective-altruism-will-macaskill/> (last visited August 3, 2021). None of this means the proposed reframing here endorses or relies on effective altruism. Rather, my limited point is simply that the type of change in messaging used by some effective altruists could work in the faculty pro bono context too.

98 Chemerinsky, *supra* note 12, at 1238–39.

99 *Id.* at 1239–40.

100 See Pritikin, *supra* note 55, at 52–54 (describing benefits to scholarship from recent practice experience).

101 See Edwards, *supra* note 34, at 35, and Waxman, *supra* note 34, at 1906–07, for prominent examples of such criticism.

102 Rhode, *Cultures of Commitment*, *supra* note 65, at 2431.

### C. Reframing One-Size-Fits-All Approaches

In addition to morally oriented approaches potentially backfiring, so could disregarding or disputing professors' conceptions of their own identities. Although commentators have argued that faculty are subject to the same moral obligation as practitioners, faculty do not necessarily view themselves as practitioners.<sup>103</sup> Thus, persuasion aimed at reasons law professors *in particular* should do pro bono could meet less resistance.<sup>104</sup> This suggests that arguments about pro bono helping scholarship, modeling, and teaching may work even better than generally describing the need for more attorney pro bono to fill the justice gap.

This approach can go further.

The law professoriate is not a monolith. Different segments within legal academia do not necessarily share interests. This differentiation invites an even more tailored approach to making the case for faculty pro bono. As described below, this more bespoke form of persuasion can address faculty segments at different law schools, rather than merely asserting generalized arguments about why all faculty should engage in more pro bono.

Differentiation in legal academia implicates research on “communities of practice” among attorneys.<sup>105</sup> According to this literature, “communities of practice” can have a large impact on attorney identity and behavior.<sup>106</sup> Indeed, communities of practice can particularly influence pro bono participation, including understandings of why practitioners should do pro bono.<sup>107</sup>

Different segments of law professors also arguably operate as different academic communities. For example, legal writing instructors may prioritize different facets of their work and face different status-related concerns than doctrinal faculty.<sup>108</sup> Faculty committed to community lawyering may cohere

103 See Luban, *supra* note 12.

104 Cf. Cummings & Sandefur, *supra* note 24, at 94 (discussing how targeted campaigns ostensibly worked better than more generalized efforts to spur greater pro bono participation).

105 See, e.g., *id.* at 94-95; JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 1-4 (1994).

106 See, e.g., Cummings & Sandefur, *supra* note 24, at 94-95; HEINZ & LAUMANN, *supra* note 105, at 1-4.

107 See Cummings & Sandefur, *supra* note 24, at 98 (citing Robert Granfield, *The Meaning of Pro Bono*, 41 LAW & SOC'Y REV. 113 (2007)) (“the kind of organization lawyers work in is associated with the extent to which lawyers believe that pro bono service enhances their legal skills, aids their career mobility, is a duty, or gives them opportunities to experience autonomy in their work.”).

108 See Amy H. Soled, *Legal Writing Professors, Salary Disparities, and the Impossibility of “Improved Status,”* 24 LEGAL WRITING: J. LEGAL WRITING INST. 47 (2020) (describing status struggles and pay disparities particular to legal writing instructors); Mitchell Nathanson, *Dismantling the “Other”: Understanding the Nature and Malleability of Groups in the Legal Writing Professorate’s Quest for Equality*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 79, 80 (2007) (“by being considered something other (or less) than tenured or tenure-track doctrinal professors in the overwhelming majority of American law schools, it receives significantly smaller salaries, less job security, and a muted voice in faculty governance.”).

via interests that differ from those of lawyering skills or corporate law faculty.<sup>109</sup> More generally, law professors may view their professional identities as tethered to the particular areas of the law they research and write about.<sup>110</sup>

Reasoning targeted toward the identities within different communities of law faculty might help puncture resistance to pro bono. Research suggests such tailored approaches can work better than generalized strategies.<sup>111</sup> For example, one study found that “specifically targeted initiatives” correlated with improved practitioner pro bono participation rates, whereas generalized or “diffusely targeted recruitment efforts” did not.<sup>112</sup>

Below I provide some examples of targeted reasoning for pro bono. I focus primarily on lawyering skills teachers but also touch on several other groups to illustrate contrasting approaches.<sup>113</sup>

### Examples of Tailored Advocacy

Historically, some observers have viewed lawyering skills as a backwater or, at best, a steppingstone.<sup>114</sup>

Contrary to that impression, lawyering skills faculty have helped pioneer key aspects of legal pedagogy.<sup>115</sup> For example, they have devised cutting-edge forms of professionalism instruction and have deployed best practices in student skills acquisition.<sup>116</sup>

109 See Karen Tokarz et al., *Conversations on “Community Lawyering”: The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J. L. & POL’Y 359, 363–64 (2008) (describing principles that “bind” community lawyering clinicians together, including goal of empowering communities through collaborative practice).

110 Cf. Luban, *supra* note 12, at 66–67 (describing the “we’re-scholars-not-lawyers” view of many law professors).

111 See Cummings & Sandefur, *supra* note 24, at 94.

112 *Id.*

113 I showcase arguments tailored to lawyering skills teachers mainly because, as a lawyering skills teacher, I have firsthand experience within the community.

114 See Susan P. Liemer & Hollee S. Temple, *Did Your Legal Writing Professor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. LOUISVILLE L. REV. 383, 384–85 (2008) (noting that some have viewed legal writing positions as “stepping-stone jobs” and that some lawyering skill teachers have been “relegated to low positions within [the law school] hierarch[y]”).

115 See Alison Donahue Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57, 67 (2012) (“legal writing professors are often on the cutting edge of professionalism education”).

116 See *id.* Cf. STUCKEY ET AL., *supra* note 33, at 69 (“Legal writing teachers at many institutions and collectively through their national organization are encouraging and engaging in the kinds of coordination, sharing, and collaboration that would benefit all components of legal education.”). Additionally, lawyering skills teams have been involved in innovations that bring real practice experience to first year law students. For example, lawyering skills instructors have played a role in projects requiring first-year students to conduct intake



The disconnect in perceptions favors lawyering skills teachers' taking a frontline role in pro bono practice.

For example, increasing lawyering skills faculty's participation in pro bono could help lawyering skills professors burnish their image as legal pedagogy leaders. Community leadership can require doing hard, important work first.<sup>117</sup> Improved pro bono participation can bolster the claim that lawyering skills instructors represent the leading edge in legal education.

Engaging in pro bono could also help lawyering skills professors model the unique professionalism expectations they have for their students. Many lawyering skills faculty teach professionalism and hold their students accountable for conducting themselves with it.<sup>118</sup> Modeling is key to impressing professional conduct on others: "Actions speak louder than words and examples work better than exhortation."<sup>119</sup> Pertinent here, "professionalism includes the aspirational commitment to pro bono."<sup>120</sup> Thus, pro bono for lawyering skills instructors supports their pedagogical emphasis on professionalism.

The risk of skill decay also favors pro bono work in the lawyering skills community. As commentators have argued, law teachers should typically "know their subject extremely well."<sup>121</sup> But extended periods of disuse can lead to the decay or loss of trained skills.<sup>122</sup> Admittedly, law professors can and do teach skills that they have not exercised in years. But fresh practice with the way attorneys use skills in the evolving legal market could help ensure lawyering skills teachers can model and impart the skills their students need.<sup>123</sup>

Critics, however, could raise status and bandwidth concerns facing lawyering skills instructors. Some doctrinal faculty or law school administrations view lawyering skills instructors as lower on the law school hierarchy than doctrinal faculty.<sup>124</sup> Doing pro bono work could fortify the misperception of lawyering skills faculty as nonscholarly "trade school" instructors. This could impede

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interviews with local public interest organizations. Rachel Croskery-Roberts & Ezra Ross, *Creating and Administering a Live Interviewing Project for 1Ls: Benefits, Challenges, and Lessons Learned from COVID-19*, 29 PERSPS. 9 (2021).

117 See Lisa Bruttel & Urs Fischbacher, *Taking the Initiative. What Characterizes Leaders?*, 64 EUROPEAN ECON. REV. 147 (2013) ("Taking the initiative is a crucial element of leadership").

118 See Kehner & Robinson, *supra* note 115, at 87 ("it is becoming more common in the legal writing classroom to articulate specific professionalism expectations and assess mastery of these expectations through "professionalism points" that comprise part of the final grade").

119 Rhode, *Cultures of Commitment*, *supra* note 65, at 2429.

120 Luban, *supra* note 12, at 66.

121 STUCKEY ET AL., *supra* note 33, at 77.

122 See WINFRED ARTHUR JR. ET AL., *INDIVIDUAL AND TEAM SKILL DECAY: THE SCIENCE AND IMPLICATIONS FOR PRACTICE* (2013).

123 See Zimmerman, *supra* note 36, at 138 (noting importance of up-to-date practice experience given "evolving nature of law practice").

124 Liemer & Temple, *supra* note 114, at 384-85.

lawyering skills professors' efforts to attain equal status in law schools. At the least, pro bono would deplete time that could go toward work more appreciated by doctrinal faculty and research universities.

But pro bono work *can* generate scholarship. In fact, lawyering skills professors have in the past written scholarly work on their pro bono.<sup>125</sup> Further, pro bono work is not necessarily wedded to low status. To the contrary, high-profile law professors like Dean Erwin Chemerinsky engage in significant pro bono.<sup>126</sup> Moreover, as described above, I advocate providing law faculty with compact pro bono options to help encourage uptake. Such projects, undertaken periodically, would not necessarily disrupt lawyering skills faculty's commitment to other professional activity.

Tailored reasoning also applies to pro bono by faculty segments besides lawyering skills. Take business law faculty, whose expertise could play a gap-filling role in pro bono work. Large law firms, which donate a significant share of pro bono, may not take certain cases against businesses based on positional conflicts.<sup>127</sup> As a result, "lawyers with the greatest expertise in particular areas—such as employment, consumer credit, or land use law—are the ones least likely to bring their expertise to bear on pro bono projects."<sup>128</sup> Thus, law faculty with expertise in business, employment, or consumer credit law could play a special part by filling key holes in pro bono work done by others.

Further, commentators have called for a broadened scholarly perspective that explores how business law relates to public interest considerations.<sup>129</sup> Performing pro bono work may enrich business law scholars' conception of how their areas of study intertwine with ideas of social justice and service of the public interest. This could lead to more scholarship that makes such connections.

Ultimately, this essay provides just an initial sketch of a bespoke approach to arguments for faculty pro bono. But it suggests that such an approach could apply to a variety of different segments of legal academia.

### III. Objections and Responses

By abandoning proposed mandates and downplaying moral reasons for faculty pro bono, does this proposal deflate its own strongest argument?

<sup>125</sup> See Rabe & Rosenbaum, *supra* note 55 (co-authored by former legal writing director Suzanne Rabe).

<sup>126</sup> See Chemerinsky, *supra* note 12, at 1239–40 (describing pro bono representations).

<sup>127</sup> See Cummings, *supra* note 11, at 116–18.

<sup>128</sup> ANN SOUTHWORTH & CATHERINE L. FISK, *THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE* 886 (2d ed. 2019).

<sup>129</sup> See Shauhin Talesh, *Insurance Law as Public Interest Law*, 2 U.C. IRVINE L. REV. 985, 988 (2012) ("rather than focusing on defining tight boundaries for what is public interest law and advancing the concept of social justice, public interest scholars may want to broaden their conceptualization and evaluate how many areas of law, including business law, promote and advance the public welfare").

Does it fail to seriously tackle law professors' identification as scholars, not public interest practitioners? Does it ignore foundational questions about the definition of pro bono in the context of legal academics?

This part discusses these and other potential objections. They fall loosely into two categories: arguments that the proposal does too little, and arguments that the proposal goes too far.

*Objections that the Proposed Reframing is Too Limited*

Critics could contend that dropping the argument for a faculty pro bono mandate would undermine progress toward greater faculty pro bono participation. Many faculty members might do pro bono only if required to do so. Relinquishing any claim to a mandate could also send the message that faculty pro bono is unimportant.

But arguments for a faculty mandate have fizzled. Experimenting with a research-based nudge approach might work better with resistant law faculty and would not preclude reverting to proposed mandates if it fails. By doing little to promote faculty pro bono, law schools already signal its lack of importance. By adopting nudges and supporting conversation about pro bono benefits, law schools could start to signal the opposite.

Arguably, this proposal also fails adequately to address the biggest obstacle to faculty pro bono: that many law professors view themselves as academics, not practitioners. But insisting to law faculty that they misunderstand their professional identity appears counterproductive. By contrast, the proposal here aims to meet faculty where they are. Advocating short, discrete pro bono projects acknowledges that many professors will worry about pro bono work displacing other professional obligations. And these proposals *do* attempt to address professors' conceptions of professional identity. I advocate training arguments on law professors' particularized interests, rather than importing the same arguments used to urge practitioner pro bono.

Relatedly, detractors could argue that law faculty lack the time for pro bono practice. Particularly with the ever-expanding email inboxes of the last few decades, law professors have arguably become inundated with their research, teaching, and administrative duties. The COVID pandemic exacerbated the problem, making pro bono practice, along with almost everything else, much harder than before.

No compelling data, however, substantiate that faculty have become objectively busier. To the contrary, faculty classroom hours, particularly at top law schools, have decreased.<sup>130</sup> At top twenty-five schools, faculty typically spend five hours per week or less teaching, zero when on sabbatical.<sup>131</sup> Although

<sup>130</sup> See William J. Carney, *Curricular Change in Legal Education*, 53 IND. L. REV. 245, 254 (2020); TAMANAHA, *supra* note 33, at 42-44.

<sup>131</sup> See Carney, *supra* note 130, at 254 (reporting less than eight hours of teaching per year at top ten schools); TAMANAHA, *supra* note 33, at 42-44 (describing research indicating ten or fewer hours of teaching per year at top twenty-five law schools).

faculty might argue they make up for lightened teaching responsibilities with additional research, the data don't bear that out either. Reduced teaching loads show "surprisingly little" association with increased scholarly output.<sup>132</sup> To be sure, people do *feel* busier, potentially in part from the stress of media multitasking.<sup>133</sup> But data don't necessarily bear out that subjective impression.<sup>134</sup> Moreover, Big Law attorneys, who typically work more than legal academics<sup>135</sup> and have less flexible schedules, often do regular pro bono work.<sup>136</sup> Even busy professionals can manage some pro bono in their schedules.

In any event, this proposal attempts to accommodate law professors' schedules—objectively busy or not—in several ways. For example, it advocates providing faculty with curated lists of pro bono projects to reduce the time needed to search for suitable assignments. Further, it promotes short, discrete pro bono projects to cabin the time spent working on each project.

Moreover, although COVID has posed severe challenges for clients, lawyers, and teachers, some of the workarounds adopted in response to COVID may help facilitate certain pro bono representations.<sup>137</sup> For example, one law school found that Zoom intake interviews could help improve access for more members of the community and made attending and conducting interviews more practicable for interviewers.<sup>138</sup>

Another objection is that deemphasizing the moral duty argument for faculty pro bono would relinquish much of the position's persuasive force. And as an empirical matter, some evidence does indicate that people volunteer more when they focus on their ethical obligations.<sup>139</sup> But the moral duty argument has problems on the merits. Donating money, for example, might

<sup>132</sup> TAMANAHA, *supra* note 33, at 45.

<sup>133</sup> See Helen Pearson, *The Lab that knows where your time really goes*, 526 NATURE 492, 496 (2015).

<sup>134</sup> See Oliver Burkman, *Why You Feel Busy All the Time (When You're Actually Not)*, BBC (Sept. 11, 2016), <https://www.bbc.com/future/article/20160909-why-you-feel-busy-all-the-time-when-youre-actually-not>.

<sup>135</sup> See TAMANAHA, *supra* note 33, at 47 ("Associates in corporate law firms bill above two thousand hours a year, routinely working six or seven days in excess of sixty hours a week, with limited vacations. If we compare earnings per hours worked, law professor earn *far* more than do associates.").

<sup>136</sup> See Dinovitzer & Garth, *supra* note 32 (reporting that about 70% of Big Law attorneys surveyed did pro bono work and averaged more than seventy-three hours in a twelve-month period).

<sup>137</sup> COVID also increased the need for pro bono services, particularly in housing matters. See Vivian Ho, *What happened when California tried to fix its homelessness crisis as the pandemic arrived*, THE GUARDIAN (Dec. 31, 2020), <https://www.theguardian.com/us-news/2020/dec/31/california-homelessness-initiative-filtered-project-roomkey-pandemic> (describing increased homelessness as a result of pandemic).

<sup>138</sup> See Croskery-Roberts & Ross, *supra* note 116.

<sup>139</sup> Rhode, *Cultures of Commitment*, *supra* note 65 at 2431.

under some circumstances do more good than pro bono work.<sup>140</sup> Further, as described above, even if the moral argument possesses logical power, it may as a practical matter backfire with faculty members. Given the apparent lack of faculty pro bono progress, good justification exists for at least trying approaches not rooted in moral duty.

Another arguably missing piece in this project: incentives. Schools potentially need to provide incentives for pro bono work by rewarding faculty who do it and considering pro bono work in tenure and promotion decisions. Doing so could radically change the conversation; not doing so could paralyze it. Either way, this pivotal issue should arguably figure more prominently in this analysis of faculty pro bono.

Rewards and promotional consideration could certainly play a role in encouraging faculty pro bono. But some law schools already do these things.<sup>141</sup> It is unclear they have any impact. This may be because law schools often say only that pro bono may receive consideration at promotion.<sup>142</sup> Faculty might reasonably assume, based on such lukewarm representations, that pro bono cannot substitute for scholarly accomplishment or teaching evaluations. Thus, these policies might not motivate faculty members to alter their current mix of scholarship, teaching, and service. Nor would law schools likely change such policies in a way that would significantly modify incentives, e.g., by allowing pro bono to offset scholarly output for tenure-track faculty. In any event, this essay showcases research-based nudges, rather than incentives that some law schools already employ, to try to bring fresh perspectives to the conversation about pro bono.

Concerns about faculty qualifications also form a cluster of objections. Arguably, law professors without significant practice experience cannot competently represent clients. Some law professors lack even bar admission or a law degree. The proposal here to increase faculty pro bono arguably disregards these important limitations.

Like other commentators, however, “I find it hard to believe . . . that a person teaching law cannot find some area of the law in which he or she is competent.”<sup>143</sup> In any event, professors’ inexperience does not justify avoiding pro bono. To the contrary, it warrants pro bono participation just to acquire that experience, for the sake of improving both teaching and scholarship.<sup>144</sup> Unlicensed professors pose a different issue, but not an insurmountable one.

140 See Silver & Cross, *supra* note 87, at 1481–82 (“We know of no data showing that pro bono legal assistance offers the same return as contributions of cash or other services.”).

141 See AMERICAN BAR ASSOCIATION DIRECTORY OF LAW SCHOOL PUBLIC INTEREST & PRO BONO PROGRAMS, *supra* note 8 (including a number of schools that describe recognizing faculty for public service during faculty evaluations).

142 *Id.* (including a number of schools that describe recognizing faculty for public service during faculty evaluations).

143 Chemerinsky, *supra* note 12, at 1242.

144 See *id.*

Although faculty without licenses cannot alone handle legal matters, they can contribute to pro bono matters under the supervision of a licensed attorney.<sup>145</sup> Unlicensed students may do this when they do pro bono. No reason prevents law professors from doing likewise.

Critics could also assert that this essay ignores a foundational question—how to define pro bono in the first instance. What counts and what doesn't for faculty? Does membership on boards of public interest organizations? What about political advocacy for marginalized groups? Or testimony before Congress?

These are important questions—but ones, I argue, that do not need definitive answers to advocate increased faculty pro bono. Wading into long-staledated debates<sup>146</sup> could hamstring discussion of faculty pro bono. For now, this proposal seeks merely to try to jump-start the conversation. It therefore reasonably tables the issue of what—beyond unpaid legal work for the indigent—could qualify as pro bono.

#### *Objections that the Proposal Goes Too Far*

Critics could also object that the proposal misconstrues when choice architects can effectively use nudges. Experts on nudges have stated that nudges should be used “to influence choices in a way that will make choosers better off, *as judged by themselves*.”<sup>147</sup> But the proposal here would use nudges to push law professors to do work not to make *them* better off, but to make *others* better off. Moreover, many law professors simply do not want to do pro bono because they view themselves as academics, not practitioners. They don't lack information and their preferences are clear. No justification for a paternalistic intervention exists.

This objection interprets nudges too narrowly. Authorities on nudges have endorsed nudges to promote charitable giving.<sup>148</sup> The justification: “[M]ost people have charitable impulses, and we suspected that because of inertia they give far less than they actually want to give.”<sup>149</sup> As discussed above, inertia likely plays a role here too.<sup>150</sup> Moreover, some law schools have adopted written

<sup>145</sup> See MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 2020); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 (AM. L. INST. 1995) (“... a nonlawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice. Those activities are permissible and do not constitute unauthorized practice, so long as the responsible lawyer or law firm provides appropriate supervision ...”).

<sup>146</sup> See, e.g., Daniel M. Taubman, *Has the Time Come to Revise Our Pro Bono Rules?*, 97 DENVER L. REV. 395, 422–23 (2020) (describing struggles and debate over definition of pro bono).

<sup>147</sup> THALER & SUNSTEIN, *supra* note 19, at 5 (emphasis in original).

<sup>148</sup> See *id.* at 231–32.

<sup>149</sup> *Id.*

<sup>150</sup> See *infra* text accompanying notes 82–84.

policies at least generally encouraging faculty pro bono.<sup>151</sup> Thus, nudging law faculty toward pro bono could help make law professors better off according to the values expressed by their own law schools.

Critics could also challenge the proposal to tailor advocacy for faculty pro bono to particular communities within legal academia. Arguably, the proposal overstates differences in faculty segments and could play into outmoded ideas about divisions among doctrinal, clinical, and lawyering skills faculty.<sup>152</sup> Alternatively, assuming important differences do exist in how faculty view pro bono, those differences may be far too individualized for this proposal to realistically address them.

However, despite aspirations to faculty arrangements in which doctrinal, clinical, and lawyering skills instructors all share the same footing, that is not the case at many law schools.<sup>153</sup> Status issues often separate the treatment of these groups, and research and pedagogical interests diverge as well.<sup>154</sup> Acknowledging that reality strengthens, rather than weakens, the proposal. And although no arguments or approaches tailored to groups will precisely target individual professors' interests or concerns, that is no reason to deploy only generalized advocacy for faculty pro bono. Some tailoring of arguments for faculty pro bono could work better than none, even if imperfect.

Opponents may also object that law faculty should not need to do pro bono because law teaching and scholarship already constitute public service work. Other commentators have dispatched this misconception.<sup>155</sup> Teaching and scholarship do not ameliorate the problem of unmet legal services need.<sup>156</sup> And giving up higher pay in private practice does not equal pro bono work for those in need.<sup>157</sup> It merely represents a trade-off of salary for freedom from billable hours, freedom to choose what to research, and freedom from the burden of stressed-out clients and abrasive opponents.<sup>158</sup>

Another objection asserts that proposals to increase faculty pro bono are premature because adequate data about faculty pro bono contributions does not exist. But no one seriously suggests that law faculty as a group consistently do significant pro bono work. To the contrary, commentators have said the

151 See AMERICAN BAR ASSOCIATION DIRECTORY OF LAW SCHOOL PUBLIC INTEREST & PRO BONO PROGRAMS, *supra* note 8.

152 Melissa J. Marlow, *Law Faculties: Moving Beyond Operating as Independent Contractors to Form Communities of Teachers*, 38 OHIO N.U. L. REV. 243, 247 (2011) (arguing against silos in legal academia).

153 See Soled, *supra* note 108, at 47; Nathanson, *supra* note 108, at 80.

154 See *id.*

155 See Luban, *supra* note 12, at 71-72.

156 *Id.*

157 *Id.*

158 *Id.*

situation appears shameful.<sup>159</sup> Schools may decline to record faculty pro bono hours just to avoid disclosure of embarrassingly low figures. In any event, encouraging more faculty pro bono does not exclude *also* trying to pinpoint where the figures precisely stand. Research and surveys related to that question deserve attention. But requiring precision before taking action in this context would hobble reform efforts.

Finally, critics could argue that I have overstated the contribution this proposal makes to the literature. For example, others have written on faculty pro bono and, in any event, much of the analysis in the substantial scholarship on practitioner pro bono applies to the subcase of faculty pro bono. Thus, this essay arguably exaggerates the gap it purports to fill.

But few authors have accepted the invitations from fifteen to twenty years ago to take part in a robust conversation about faculty pro bono.<sup>160</sup> And scholarship on pro bono generally, or practitioner pro bono in particular, *doesn't* automatically apply here. As this essay argues, transplanting arguments from other contexts that don't address the unique self-conception of legal academics may undermine progress.

#### IV. Conclusion

Both at law schools and in scholarship, conversations about law faculty pro bono have largely wilted from view. The problem is easy to name, but hard to solve.

Mandates may sound promising. But realistically faculty won't regulate themselves that way. Ethics-based persuasion appears on point. But it risks alienating the audience and further entrenching the behaviors at issue. Arguing that faculty pro bono duties should track those of practitioners seems uncontroversial. But doing so may disregard faculty's strongly held beliefs about their academic identity.

Reframing some of the terms of the conversation represents an initial step. It doesn't solve persistent problems, like what counts as pro bono in the first instance. And how well it might work hinges on speculation. Some of the approaches in this essay are backed by behavioral research. And implementing them would not impose prohibitive costs, on law school administrations or faculty. But maybe softening the messaging to faculty would backfire. Or cause little impact at all.

Ultimately, a revised frame is only as good as what happens within the window it attempts to open. This project does not purport to provide a complete solution. Instead, it invites a new chapter: experimentation in how law schools think about and encourage faculty pro bono.

159 See Rhode, *Legal Ethics*, *supra* note 10, at 54.

160 See Sirota, *supra* note 13, at 549 (stating that the debate over faculty pro bono "has yet to materialize").