1999

Faculty Pro Bono and the Question of Identity

David Luban
Georgetown University Law Center, luband@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/1750

49 J. Legal Educ. 58

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

Part of the Legal Education Commons, and the Legal Ethics and Professional Responsibility Commons
My aim in this essay is to explain and defend a simple proposition, which I’ll call the *pro bono thesis*: law teachers and law schools have the same pro bono responsibilities as lawyers and law firms. By “pro bono” I mean something more particular than community service or civic involvement. I mean free or reduced-rate legal work for those who cannot afford to pay for it. The pro bono thesis is that law teachers and law schools have pro bono responsibilities in this sense.

What, exactly, are those responsibilities? In discussions of pro bono, four issues stand out, and I must begin by explaining where the pro bono thesis that I am defending comes out on these issues.

First is the question whether the pro bono standard should be mandatory. Early drafts of the ABA’s Model Rules of Professional Conduct imposed a mandatory requirement, but it was withdrawn in face of withering opposition and replaced with a rule (Model Rule 6.1) that is merely precatory—the only precatory rule in the document. Robert Kutak, the head of the ABA committee that drafted the Model Rules, recalled to me that during hearings on an early draft one lawyer stood up and denounced the mandatory pro bono rule as tantamount to slavery—adding that, as we all know, slavery has been outlawed since the Magna Carta.

The comment may have been farcical, and ever so revealing, but the sentiment was serious. Many lawyers and scholars, myself included, have argued over the years for mandatory pro bono. But mandatory proposals have always met with hostility, and in my view the prospects for mandatory pro bono are so dim that it is a waste of time to continue talking about it. It merely distracts from serious acknowledgment of the moral responsibility to perform pro bono service without an enforceable rule—and it is that I mean in the pro bono thesis.

No public service obligation that nearly every lawyer resents and objects to is likely to help the clients it is meant to serve. For that reason, I have come to think that critics are right who argue that the pro bono obligation is unsuit-
able to enforce by a rule. But they are wrong if they deny that pro bono is an obligation, merely because it is a moral rather than a legal obligation. In Kant's language, it is an imperfect duty—a duty that allows for exceptions based on our inclinations; it is also a wide duty, like the duty of charity, in the sense that it is up to each lawyer to decide the time, place, and manner of discharging it. But, as Kant cautions, "a wide duty is not to be taken as permission to make exceptions to the maxim of actions . . . ." An imperfect and wide duty is a duty nonetheless.

Lawyers sometimes describe unenforced duties as "aspirational," and I will accept this label, provided we understand that "aspirational" doesn't describe only unattainable perfectionist ideals, like leading a sin-free life, but also perfectly doable aspirations, like trying to get an hour of exercise a week. All it takes to fulfill aspirations like these is a minimally settled life and somewhat better than average organization and resolve. Pro bono is an achievable aspiration, not an unattainable ideal.

The second point of contention is how broadly the concept of pro bono should be understood. Many lawyers consider any reduced-cost law-related work, like service on bar committees, to be pro bono that discharges their responsibility. Others disagree, insisting that pro bono should be directed at the genuinely needy. The ABA rule originally declined to specify what counts as pro bono, in effect ratifying the inclusive conception. But after many years of vigorous debate the ABA in 1993 chose the second course, and the current version of Rule 6.1 asks lawyers to provide "a substantial majority" of their pro bono hours to persons of limited means or organizations designed primarily to address their needs.

I think this is as it should be. Donating legal expertise to any worthwhile cause or client is commendable, but it is hard to see why lawyers have a moral responsibility to provide free service to clients who could readily pay for it. The fact that there would surely be no pro bono obligation if everyone could afford a lawyer demonstrates that the pro bono obligation is predicated on need. It can no more be discharged by aiding the nonneedy than an obliga-

2. The distinction between wide and narrow duties comes from Immanuel Kant, The Metaphysics of Morals, trans. Mary Gregor, 194 (New York, 1991) (hereinafter Kant, Metaphysics), sec. 7 of the Doctrine of Virtue (Tugendlehre) page 390 of the standard Königliche Preussische Akademie der Wissenschaft Ausgabe—as does the argument that duties of virtue, unlike laws, are wide, and their obligation is imperfect. Kant explains that a duty is wide if "it leaves a latitude (latitudo) for free choice in following (complying with) the law, that is, that the law cannot specify precisely in what way one is to act and how much one is to do by the action for an end that is also a duty." The distinction between perfect and imperfect duties comes from Immanuel Kant, Foundations of the Metaphysics of Morals with Critical Essays, ed. Robert Paul Wolff, trans. Lewis White Beck, 45n. (Indianapolis, 1969)—page 421n. of the Akademie Ausgabe. There Kant writes, "By a perfect duty I here understand a duty which permits no exception in the interest of inclination . . . ." An imperfect duty, then, allows people to beg off sometimes because they don't want to carry it out.

3. Kant, Metaphysics, supra note 2, at 194, Akademie Ausgabe at 390.

4. Surveys estimate that only 10 to 20 percent of pro bono work is done to assist low-income clients. Deborah L. Rhode, The Professionalism Problem, 39 Wm. & Mary L. Rev. 283, 291 (1998).
tion to feed the hungry could be discharged by taking the prosperous and well fed out to dinner.

Third is the question of how much pro bono is enough. Early drafts of the ABA Model Rule specified a minimum of forty hours per year, but the version of Rule 1.6 that the ABA House of Delegates finally adopted declined to specify, stating merely that every lawyer should perform some pro bono. Eventually the rule was amended back in the direction of the early drafts, and it now recommends at least fifty hours of pro bono a year. Plainly, any number you choose is arbitrary, and inserting an arbitrary number into the rule makes the rule harder to defend as a moral obligation. But to revert to a rule that specifies no minimum amount provides insufficient guidance; it comes close to no obligation at all. Fifty hours, which amounts to an hour a week, seems like a feasible request.

Fourth, and last, is the question whether pro bono must be provided personally. Rule 6.1 answers yes. In its comment, however, it recognizes that “there may be times when it is not feasible for a lawyer to engage in pro bono services” and states that at such times a lawyer may discharge the obligation by contributing a reasonable financial equivalent of the pro bono hours to legal aid organizations. The comment also adds that law firms may provide their pro bono services collectively, without each lawyer’s personally contributing fifty hours—a point that will figure in my discussion of the pro bono thesis for law schools.

I part company with the rigorist text of Rule 6.1 and opt for the policies in the commentary. In line with the idea that pro bono is an imperfect duty, I accept that lawyers who find it too inconvenient to discharge personally can substitute a financial contribution; and in line with the idea that pro bono is a wide duty, which leaves the means for discharging it up to the lawyer, I accept that law firms (and law schools) can organize to discharge their members’ responsibilities collectively, without every member’s personally performing pro bono service.

Individual jurisdictions often part company with the Model Rule on one or more of these four issues, and I don’t for a moment suggest that the ABA rule represents the dominant view of the practicing bar. But I propose to take the ABA rule as my point of departure, and as we think about law teachers and law schools, let the record reflect the official view of the practicing bar’s most influential organization: that every lawyer should devote at least fifty hours a year to pro bono service, mostly on behalf of low-income clients, or otherwise ensure that fifty hours a year of legal service to the needy gets performed. That is the standard I believe law teachers should meet.

Why should law teachers meet it? In one sense, the answer is trivially straightforward. Law teachers are, by and large, lawyers, and Rule 6.1 sets out the pro bono responsibilities of lawyers. The rule contains no exception for lawyers who happen to be academics. To many colleagues who do pro bono, this syllogism is so obvious that it hardly needs to be stated.

To others, however, nothing about it is obvious. It is not obvious that academic lawyers are lawyers in the sense contemplated by the rule, and one
might argue that the nonapplicability of the rule to professors is so firmly entrenched that the exception for academic lawyers should be read into the rule even without explicit language. Furthermore, until we understand the ground of the obligation that Rule 6.1 formulates, it is unclear whether the obligation is genuine. If it is genuine, its rationale may turn out to apply only to private practitioners of law, not to law teachers.\footnote{Some might also argue that institutional recognition of a pro bono obligation is inconsistent with individual teachers' academic freedom. It may also be inconsistent with the academy's implicit social contract: the academy possesses freedom of thought, to a level unusual in human history, but in return it withdraws from the world of practical affairs. As the current controversy over Louisiana's Tulane rule demonstrates, a law school breaks that contract at its peril.}

Deep down, these concerns turn on what I will call the "question of identity." Who are we as law teachers? What is our professional identity? Is a lawyer-scholar more like a lawyer, or more like a scholar?

We will have to address all these questions, but the one I will start with is the question why \textit{any} lawyers have pro bono responsibilities. That is, suppose we ask a question other than whether pro bono should be mandatory. Why should it even be aspirational? Is there any reason beyond personal inclination why lawyers should perform pro bono service?

\textbf{Lawyers' Pro Bono Obligation}

Start with the unsuccessful arguments for pro bono. The fact that the bar has enacted an aspirational pro bono rule is at best a weak reason, and perhaps no reason at all, for the duty. ABA rules have no force of law; in any event, fewer than half of all lawyers belong to the ABA, and the current ABA rule was controversial even within this quite unrepresentative body (it passed in the House of Delegates by a slim 228/215 margin). It is true that most state ethics codes have adopted variants of the ABA rule, but that proves very little. State ethics codes are court rules, and the court-appointed bar committees that draft them and make recommendations are by no means representative of either the bar as a whole or the public at large. A purely hortatory rule drafted by an unrepresentative committee and promulgated by appellate judges represents nothing more than the opinion of the committee members and the judges of what it would be good for lawyers to do. Because it is an opinion that courts do not think it appropriate to enforce, it lacks the normative force of law or even of other court rules. It is nothing more than something that a handful of lawyers and judges think is a nice idea.

Supporters of pro bono usually offer two additional reasons why lawyers should perform it. The first is that pro bono service is a tradition of the bar;
the second is that there is a tremendous need for pro bono. Unfortunately, neither of these is more than a half-argument in search of its other half.

Appeals to tradition are never more than half-arguments, because some traditions are bad ideas overdue to be replaced. Pro bono is not a bad idea, but it carries dubious credentials as a genuine tradition. There is a longstanding tradition of lawyers' accepting uncompensated court appointments, particularly in criminal cases, but accepting occasional court appointments is a far cry from universal pro bono.6 The 1908 ABA Canons of Ethics make no mention of pro bono as a professional obligation. Half a century later, the famous ABA/AALS Joint Conference Report, the closest thing we have to an official philosophy of legal ethics (as the organized bar of the 1950s viewed it), argues that the legal profession bears a responsibility to make legal services, both in litigation and in preventive advice, available to all.7 Apparently the tradition came into existence between 1908 and 1958. Before the 1960s there was no trace of the idea that every lawyer should perform pro bono.

A moment's thought reveals the reason. It was not until the 1960s, with the advent of consumer law, tenants' rights, and Great Society entitlement programs, that poor people had legal recourse against the ills that beset them. Before that, they had very little use for lawyers, because they had very few legal rights. Only when they had the rights did they acquire the need.8 Societal changes, ranging from the civil rights revolution to the divorce revolution, generated additional legal need. Talk of a pro bono obligation emerged more or less at the same time that talk of federally funded legal services emerged, and for much the same reason: to address the obvious injustice of promising new rights that provided no remedies without legal representation. Tradition, never the strongest argument, in this case may be less than forty years old.

Legal need, at any rate, is genuine. At present about 3,500 legal services lawyers serve the needs of 36,000,000 poor people—about one lawyer per 10,000 poor people, in contrast to the national average of one lawyer per 270 Americans. Surveys of legal needs indicate that approximately half of poor families confront a noncriminal legal problem each year. The result is a mountain of unmet legal need among those too poor to pay market rates for lawyers.

Need is only a half-argument, however, because need by itself cannot impose obligation. The universe of human need is vast and expanding; it

6. Moreover, there is no scholarly consensus that lawyers were always compelled to accept court appointments, or that this was recognized as a duty of the profession. Compare David L. Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U. L. Rev. 735 (1980) (duty to accept uncompensated court appointments has always been controversial) with Michael Millemann, Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question, 49 Md. L. Rev. 18 (1990) (duty to accept uncompensated court appointments is firmly rooted in the common law).


8. Some of these legal reforms were themselves the handiwork of pro bono public interest lawyers, so it is possible that more pro bono might have led to more and quicker social progress for the poor; but social demand for law-reform litigators is inelastic, and it hardly justifies a call for 50 hours per year per lawyer.
could absorb all the energies and resources of everyone not in need without coming near to being eradicated. Only the most fervent of the utilitarian faithful argue that we all lie under an obligation to help those in need up to the point where additional effort would harm us more than it would help them. And the utilitarian faithful are wrong.

To the argument that denying necessary legal services to the poor undermines the promise of equality under the law, the most plausible response is to agree but to conclude that society as a whole should shoulder the responsibility of paying for legal services out of tax revenues, rather than expecting the legal profession to make up for the effects of across-the-board economic inequality. Viewed in this light, the call on lawyers to make up the shortfall in taxpayer-funded legal aid through pro bono is nothing more than an unfunded mandate.

The argument from need, after all, applies to other things besides legal services, and to other people besides lawyers, and this shows that the argument proves too much. We recognize no pro bono obligation on those with extra bedrooms in their houses to shelter the homeless, or on pharmacists to give medicine away to the ailing poor, or on grocers to feed the hungry at their own expense. Indeed, one striking fact about the legal profession is that it is the only profession to impose even an aspirational pro bono requirement on itself. This cannot be because of need alone; the argument must appeal to something that makes lawyers and law unique.

The Lawyer as Trustee

What makes lawyers unique is the law itself. Lawyers, unlike pharmacists or grocers, earn their living by, in effect, vending the law, and in a democracy law is a product of the community, operating through the mechanism of the state. That relationship differentiates law from pharmaceuticals or food or, indeed, any other commodity. In principle, pharmaceuticals and food could be produced and marketed without the intervention or even the existence of the state, which confines its role to regulating and policing markets. In the case of lawyers, the relationship is entirely different: the community, acting through the state, produces a good (law) and entrusts lawyers to dispense and distribute its benefits. Rather than a relationship between private producer and private consumer, with the state looking on from outside, the "law economy" (the system by which the benefits of law are produced, distributed, and consumed) should be modeled differently—as a relationship between the state as producer, its citizens as beneficiaries, and lawyers who act as trustees administering the actual distribution of law. Commandeering Kantian lan-

10. In most contexts it is extremely dangerous to identify the community with the state: this is the characteristic trope of fascists and authoritarians, who invoke the name of the community for what is in reality the will of those who control the state apparatus. As a normative proposition about democratic regimes, however, it is no fallacy to identify the community with the state to the extent that the state fails to represent the community, law violates the legitimating principle of democracy; it loses its character as law and becomes instead what H. L. A. Hart called the "gunman writ large."
guage, I will say that the community, acting through the state, plays a constitutive role in the law economy, rather than the merely regulative role it plays in the economies of other goods and professions.

In describing lawyers I use the language of trustee because it seems to me that it provides the best legal metaphor for a relationship in which one party creates a good for the benefit of someone the party wishes to care for, and the two parties jointly compensate a third person to administer the good and ensure that the second party enjoys its benefits. The community acting through its state creates law for the benefit of the community's members—if it doesn’t, the law lacks legitimacy—and the state as well as individual clients compensates lawyers for administering the law and ensuring that the community's members enjoy its benefits. Clients compensate lawyers individually by paying fees, and the state compensates lawyers collectively by granting oligopoly privileges akin to those of a medieval craft guild, which eliminate competition from outside the guild and boost guild members' status and incomes. The state also grants lawyers various public assets, such as the attorney-client privilege, which make their services more valuable.

11. On the similarities between the legal profession and the medieval guilds, see Richard A. Posner, Overcoming Law 39-60, 92-93 (Cambridge, Mass., 1995). The guild metaphor, and the language of oligopoly, both serve to dispel a misunderstanding that has clouded some discussions of pro bono. Many writers (including me) have described the legal profession’s “monopoly” over legal services. But, other writers object, the legal profession is bitterly competitive, and few if any lawyers enjoy monopoly power. Roger Cramton, Mandatory Pro Bono, 19 Hofstra L. Rev. 1113, 1135-36 (1991); Steven Lubet & Cathryn Stewart, A “Public Assets” Theory of Lawyers’ Pro Bono Obligations, 145 U. Penn. L. Rev. 1245, 1259-60 (1997). This objection takes the term “monopoly” too literally. The critics are right that lawyers compete vigorously with each other, so that no lawyer enjoys monopoly power. But the profession as a whole is an oligopoly, and oligopoly has similar anticompetitive effects to monopoly, boosting the collective base-rate enjoyed by the competitors in the profession by excluding potential competitors from outside the profession. Anyone who doubts that the professional oligopoly benefits lawyers should compare lawyers to architects—a profession at least as demanding in skill and training as law, but with no oligopoly and with much lower average compensation.

12. Lubet & Stewart, supra note 11, argue that lawyers' pro bono obligations arise as a quid pro quo for the public assets, including confidentiality and conflict of interest rules, the attorney-client privilege, and the work-product doctrine. They summarize the argument as follows:

In addition to the lawyer's self-generated assets, attorneys also sell certain publicly created assets. Chief among these are certain rights of confidentiality and enforceable duties of loyalty. Unlike the lawyer's human capital, these assets were created by the public, either through statutes, judicial codes of conduct, or the operation of common law.... Because the lawyers themselves did nothing to create the assets, but are nonetheless able to sell them at a profit, economists would refer to this as the extraction of rents or quasi-rents. Our argument for a mandatory pro bono obligation is that the public, having created the assets and assigned them to lawyers, is entitled to recapture some portion of the rent in the form of in-kind services.

Id. at 1249 (footnotes omitted). While I agree that the public assets Lubet and Stewart focus on are part of the story of pro bono responsibilities, I find their ingenious theory unsatisfactory as the whole story. For one thing, it suggests that lawyers in jurisdictions with relatively weak confidentiality protections, like Maryland or New Jersey, owe less by way of pro bono than lawyers in jurisdictions with strong confidentiality protections, like California or the District of Columbia. The latter, after all, have been assigned more valuable public assets. The theory likewise suggests that pro bono obligations would diminish if the work-product
The state grants lawyers oligopoly privileges in the form of unauthorized practice rules, and it does so in a less formal but more fundamental way as well. From the earliest days of the common law, when knowledge of the law began to include knowledge of past judicial decisions, the law has developed on the assumption that it would be administered by lawyers trained in its "artificial reason"; law has been molded around the skills and education of lawyers. Law and the legal profession coevolve; they are mutually path-dependent, so that no nonlawyer can expect to thrive or even survive in the legal system unaided by a lawyer.

That is true even when "law" includes private orderings as well as public statutes and decisions. Not only does state-made law affect the terms of private orderings, it permeates our cultural imagination and colors the way we think about just orderings. That is why lawyers are helpful, even essential, in their role as "architects of social structure" (to use Lon Fuller's metaphor). Whether one understands the law on statist or pluralist terms, access to law requires access to lawyers. As I wrote almost fifteen years ago, the community has shaped the lawyer's retail product with her in mind; it has made the law to make the lawyer indispensable.

As a normative matter, this cannot be because the community wants to do lawyers a favor, just as the creator of a trust is not trying to do the trustee a favor. The point is to ensure that the benefits of law are distributed fairly, and that requires that no members of the community be excluded from the law. Other professions are not trustees in this way, because the community isn't the source of their stock in trade; the community's role in other economies is merely regulative. The community plays a constitutive role in creating the substance of the lawyer's livelihood. Hence the pro bono responsibility: it arises because the community creates the law and entrusts its benefits to lawyers and lawyers alone for purposes of distribution.

The argument I have just sketched may sound like a defense of mandatory rather than aspirational pro bono. In one sense, it is: it demonstrates that in principle the community could impose a mandatory pro bono requirement on lawyers without violating lawyers' moral right to be left alone. But the community is under no obligation to impose a pro bono requirement, and if a doctrine, or the corporate attorney-client privilege, were done away with. These implications seems implausible, and that should tip us off that the connection between these legal doctrines and lawyers' pro bono obligations cannot be as direct as Lubet and Stewart believe. Moreover, their exclusive focus on the handful of "public asset" legal doctrines seems to me somewhat misplaced, because it overlooks the point that in important ways the entire body of law is a public asset that lawyers sell. The latter emphasis, unlike the public assets theory, makes plain why the appropriate quid pro quo for the lawyers' oligopoly on the law is pro bono service designed to make the public product more readily available to all members of the public who created it.


15. As I put it elsewhere, these arguments are the moral sources "of the community's right to impose a pro bono obligation on lawyers when it is necessary." Luban, supra note 14, at 287.
workable mandatory requirement eludes the art of the possible, there is no reason to impose it. In that case, pro bono remains an aspirational duty.

The Question of Identity

What does the trusteeship theory imply about law teachers? Most law schools take seriously the goal of teaching their students “professionalism”—a word I am not fond of due to its vagueness and euphemism and air of mystique, but which I will use nonetheless. Professionalism consists at a minimum of knowing and following the rules of professional conduct, but it also includes assuming the attitude of trusteeship toward the law. Professionalism includes the aspirational commitment to pro bono.

In recent years law schools have aimed to make legal ethics teaching more pervasive, that is, to include it in all of the curriculum as well as the professional responsibility course. And law schools have tried to make the other aspects of professionalism more pervasive as well, by sponsoring charitable activities and fostering pro bono programs. The recently published AALS-sponsored survey of law school pro bono activities found that 87 percent of the 111 law schools who responded have law-related pro bono programs. Several law schools have imposed public-service or pro bono requirements on their students, with the stated goal of accustoming and encouraging students in the pro bono responsibilities they will assume when they become lawyers.

Yet how can law faculties teach professionalism successfully if our own approach to pro bono is that we wouldn’t touch it with a ten-foot pole? Most law schools have no policy encouraging pro bono by the faculty. A recent AALS study found that only about half the administrators of law school pro bono programs believe that their own faculty set a good example for students.

If law teachers seem oblivious to the hypocrisy in encouraging students to do something that, in both thought and action, they regard as irrelevant to their own lives, it must be that at bottom they simply don’t see themselves as lawyers. Some teachers are quite explicit about this: a professor whose faculty voted down a pro bono proposal reports that many of his colleagues said at the meeting, “I’m not a lawyer. I’m an academic.” This takes us to what I earlier called the question of identity.

The genesis of the we’re-scholars-not-lawyers view is easy to understand. The one thing that all nonclinical teachers have in common is that all have chosen teaching over law practice. For most teachers who come from practice, that career choice signifies a watershed transformation of profes-

18. Even the few at each school who maintain a paying law practice at least have the good taste to tell the dean that it is only a sideline, and those who devote too much time and energy to paying clients at the expense of scholarship are viewed by their colleagues as cheats and featherbedders. The handful of famous professors doing high-profile trials are not regarded as cheats and featherbedders. Instead, they attract from their colleagues a mixture of
sional identity, a commitment to the life of the academy over the world of practical affairs.\textsuperscript{19}

I believe this choice leads a great many law teachers to hold the world of law practice at arm’s length. Like other professional schools, law schools aspire to full intellectual parity with the traditional academic departments and fight against the demeaning label of “trade school.” Legal scholarship always peers over its shoulder at the strictly academic disciplines and aims to emulate their style of achievement. I don’t mean to suggest that academic law is one of the “unconfident departments,” as Ronald Dworkin calls the contemporary humanities\textsuperscript{20}—no sane person would call law professors unconfident—but for more than a century law schools have battled to keep their distance from vocational schools and maintain their rightful place in the university. We warn our students that we are not offering a bar review course. We tell them that they can read rules on their own, while we teach them to think like lawyers. And we shake our heads at colleagues who build their classes around war stories or snazzy lectures on black letter. We dismiss them as insufficiently analytical, and when, semester after semester, they get perfect scores on their evaluations, we feel for a few moments very remote from our practice-oriented students.

In short, many of us define our professional identities not only by what we do but also by what we don’t do, namely practice law. Small wonder, then, that some law teachers insist that their university colleagues in economics and history, not lawyers, are their rightful peer group. To the world of the private practice of law, with its attendant rewards and responsibilities, their attitude is Robert Graves’s: Goodbye to all that.

The Law School Economy

I want to suggest that this attitude is a form of self-deception and false consciousness. Let us consider briefly the material conditions of university life. Law schools are fantastically prosperous in comparison with the humanities and most of the social sciences. Philologists and art historians will retire at a salary no higher than an untenured law teacher’s. In their departments even full professors share offices, pay their own way to the annual convention, and curse their 100-page-a-semester photocopying allowance while they get toner on their neckties clearing the paper paths by themselves.\textsuperscript{21} We law teachers are

\begin{itemize}
  \item grudging acknowledgment that they are good for the school, admiration for their skills, and suspicion of their scholarly bona fides—in other words, the standard professorial reaction to the football team. The teacher-practitioners reinforce, rather than undermining, the norm of commitment to academia rather than practice.
\end{itemize}

19. This is not to suggest that academics in other disciplines do no pro bono. I recently spoke with an entomologist whose department members staff a community hotline on their own time. “Mostly,” she said, “it’s people calling in to find out if the spider in their toilet is going to bite them on the butt. It’s not a big deal, but people are grateful we do it.”


21. As J. Peter Byrne has written, “To academic colleagues pinched by the penury of the humanities or in thrall to the labyrinthine bureaucracy of the sciences, law professors feast on wealth and autonomy. . . . We law professors should begin by acknowledging the clover in which we cavort.” Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education, 43 J. Legal Educ. 315, 315 (1993).
the prosperous ones, and our prosperity affects more than just the size of our offices and salaries. The fact that law schools subsidize hundreds of student-run law reviews means that when tenure time rolls around, we submit our papers simultaneously to many journals and fret only about where they will be published, not whether. Our colleagues in other disciplines sweat out the tenure clock while their papers languish for six months at a time on some referee’s desk before being rejected, returned, and mailed off for another prolonged holiday. They live on the edge, while our good fortune translates into job security.

What accounts for our prosperity? The answer is, quite simply, that we owe it entirely to the private practice of law. Our salaries, which are large compared with those paid in the other liberal arts, are pegged to the law market. If law firm partners earned what philologists earn, then so would we. Furthermore, we raise our revenue almost entirely from tuition and contributions. Students are willing to borrow the tuition money only because they expect to make an excellent living as practitioners; and alumni mail in their checks because they are doing well. If the law economy collapsed, we would quickly find ourselves in exactly the same straitened circumstances as our colleagues in comparative literature.

Many law professors feel disdain for the world of the large law firm; they hope that their prize students will do something else with their lives, perhaps public interest law, perhaps teaching, perhaps government service. Sometimes this attitude arises from a Bloomsburyish aestheticism, sometimes from political objections to what large law firms do or who they do it for. But, regardless of the grounds, professors who hold the attitude should never forget that without law firms and their business clients, the law school economy would crumble. Noticing this should not stop anyone from continuing to express disapproval of law firms who has legitimate reason to do so; but, disapproving or not, we owe it to ourselves to be completely honest about how utterly dependent we are on the continued success of law firms. Moreover, those who disapprove of large law firms should also remember that many of the firms they criticize devote millions of hours to pro bono each year; in 1996, for example, the 93 large firms for which data exist averaged 42.9 hours of pro bono per lawyer, for a total of more than 16,000,000 hours.

By now, the direction of my argument should be clear: I mean to argue that because law teachers reap rewards from the private practice of law, we have pro bono responsibilities similar to those of private practitioners, for similar reasons.

22. It is hardly necessary to point out that legal scholarship is not better paid than other disciplines because it is intrinsically more difficult or requires more training. It is not more difficult, and it requires less training. A classical philologist needs to master five or six foreign languages, including dead ones, as well as a good deal of anthropology and history in addition to her own intellectually demanding field; an art historian learns the same five languages, along with the chemical and microsurgical techniques needed to study, without damaging the canvas, how Van der Weyden mixed and applied his pigments. And these are two of the worst-paid disciplines in the College of Humanities.

Economic dependence does not by itself prove that law teachers have the same pro bono responsibilities as practicing lawyers. The employees in Arnold & Porter's mailroom are economically dependent on the private practice of law, and they have no pro bono responsibilities. But there are additional facts about law schools and their connection with law firms that, in my judgment, justify the view that both belong to the same law economy, the same system of maldistributed legal services, and consequently the same network of pro bono responsibilities.

Recall that pro bono responsibilities derive from three propositions about the law economy.

1. Lawyers play a unique and fundamental role in distributing law among members of the community.
2. Economic advantages accrue to the legal profession by virtue of its oligopoly on the provision of legal services.
3. The community, acting through its state, plays a constitutive, not merely regulative, role in producing the goods that lawyers vend.

I believe that all three propositions are true of law schools as well.

1. Our role in distributing legal services. Within the larger law economy, law schools exist primarily as conduits to practice. This includes all forms of practice, public as well as private, criminal as well as civil, transactional as well as litigational, defense bar as well as plaintiffs' bar. Conceptually, then, law teaching and scholarship have no special ties to private practice. But our role in the distribution of legal services is determined by the job market our graduates enter; and, whether we wish it to be or not, it is largely a market for private practitioners. Our role in the distribution of legal services mirrors rather than shapes the status quo. And so our efforts, regardless of individual teachers' scholarly interests or political orientation or intellectual intentions, go largely to screening, training, and evaluating law students for the benefit of private law firms and their clients.

As a thought experiment, suppose all these functions were carried out within law offices themselves. It is clear that the work of screening, training, and evaluating candidates for legal employment would be performed almost entirely by lawyers; it is now, in the case of screening, training, and evaluating law firm associates. This shows that law teachers do work that is inseparable both conceptually and practically from tasks that lawyers in law firms already perform. It is distinctively lawyers' work—lawyers' work that is essential for maintaining the existing system for the distribution of legal services. That distinguishes the efforts of law teachers from those of other economic dependents on private law practice, like the law firm's mailroom staff.

2. Economic benefits and oligopoly. Second, as we have seen, law teachers and law schools benefit economically from the oligopoly that private practitioners of law enjoy. In addition, ever since university law schools displaced apprenticeship as a route into the legal profession after World War II (probably due to the ready availability of G.I. Bill money, which made it economical to go to school rather than articling in a law office), law schools have enjoyed an oligopoly in the preparation of lawyers for practice. Law schools have become
the indispensable gatekeepers of the legal profession. These facts give us responsibilities analogous to those of practicing lawyers, to rectify the infirmities of a system that the community has entrusted to us, that we maintain, and that benefits us.

3. The community's constitutive role in producing the good we dispense. What about the third condition of pro bono responsibilities, the fact that the community plays a constitutive rather than a merely regulative role in producing the good that lawyers vend? This seems less plausible when we turn from law firms to law schools, because legal scholars do not vend law—we study it and teach the results of our study. By way of analogy, notice that the political science department also studies something that the community creates, namely government. But no one suggests that political scientists have pro bono responsibilities merely because if there were no government there would be no political science. Why isn't exactly the same thing true of law schools?

The difference is that law schools are professional schools. We train lawyers, not scholars. This is not an accidental fact, as though it is mere happenstance that the students who attend our classes plan on practicing law after they graduate. The needs of practicing lawyers influence the form in which we teach (Socratically, rather than through lectures), but also the content of what we teach (theory for its own sake only in upper-level seminars; U.C.C. as a large part of the contracts course; civil procedure in the first year). It is not mere coincidence that we offer many sections of corporation law and tax, and at most one or two sections of poverty law. In a deep sense, the needs of practicing lawyers dictate the intellectual style with which we approach law: following Holmes's advice, we study the law "as a bad man, who cares only for the material consequences which such knowledge enables him to predict."24 This is an intellectual attitude tailored entirely to the requirements of a practitioner confronting an anxious client. At the same time that we teach from within a practice-oriented realist attitude, broadly speaking, we marginalize the most intellectually rigorous form of realism, law-and-society studies, precisely because they are of little use to practicing lawyers.

These facts place us willy-nilly in a position somewhat different from pure scholars. We do not merely teach how the law works, we teach how to work the law. We are purveyors of law as well as students of it. And the community produces the good we purvey.

In short, the same arguments that justify practicing lawyers' pro bono responsibilities apply to law teachers as well. The law school economy and the law economy are all one single economy—a system of delivering legal services that fails those who lack money.

Is Law Teaching Already Public Service?

The most common reaction when I propose to colleagues that law teachers have pro bono responsibilities like other lawyers is that the thought has never

Faculty Pro Bono and the Question of Identity

really occurred to them. Their response dramatically illustrates that law teachers do not think of themselves as sharing the professional identity of lawyers. Another response, which I have heard from several colleagues, is that law teaching is itself a kind of public service comparable to pro bono.

I think this conclusion is wrong, for at least two reasons. First of all, law teaching in and of itself does nothing to address the problem that many people and organizations cannot afford the legal services they need; for that reason, whatever its public-oriented virtues, law teaching is in no way a substitute for the kind of service that the pro bono thesis requires. One colleague, who practiced in both law firm and public interest settings, remarked to me that teaching feels like public service. That feeling, I believe, comes not from what teaching is, but what it is not, namely the partisan pursuit of private interests. True, teaching is detached from the world of partisan combat and selfish pursuits; but that does not make it public service. After all (and this is the second problem with the public service argument), law teaching is paid work, and it is hard to see why work for which one is paid, and paid comfortably, is the moral equivalent of service at no cost or reduced cost.

One of my colleagues rejoins that law teaching counts as reduced-cost legal service because of the opportunity costs to professors of going into teaching—a reference to the fact that law teachers at all ranks make less money than large-firm lawyers of comparable seniority. The opportunity-cost argument certainly sounds plausible whenever a law firm partner contemplates abandoning a half-million-dollar annual income to join a law faculty at a fraction of that amount.

But notice one central feature of the argument: it sets the price of law teaching by taking private practitioners as the relevant peer group. Implicitly, then, it rejects the underlying premise of the argument that at bottom we are scholars, not lawyers. As we have seen, if the latter argument is valid, the relevant peer group is not private practitioners in law firms, but our university colleagues in the classics and history departments. From their point of view, the claim that law teaching is a form of self-sacrificing public service is ludicrous. In the eyes of those beholders, becoming a law teacher creates no opportunity costs, only opportunities.25

I am arguing that the opportunity-cost argument works, if at all, only when we assimilate law teachers to the peer group of practicing lawyers—the folks with pro bono responsibilities. It presupposes the opposite answer to the question of identity from the we're-scholars-not-lawyers argument; the two arguments, far from reinforcing each other, are at war with each other. And, once the opportunity-cost argument assimilates law teachers to practicing lawyers, its sole basis for rejecting practitioners' pro bono responsibilities is the claim that forgone income already counts as pro bono in the relevant sense.

I cannot agree with this argument. Even accepting the doubtful premise that law teachers could all be doing better financially in private practice, their

25. On the flip side, I think that as a group law teachers work harder and more conscientiously at their pedagogical responsibilities than their colleagues in the arts and sciences.
forgone income is more than compensated for by nonpecuniary benefits: shorter and more flexible hours, greater personal autonomy, tenure, leisurely summers, the luxury of writing and thinking whatever we want, freedom from the anxiety of always having clients' interests in our care, and the notable pleasure of working with appealing, enthusiastic young people rather than stressed-out and often abrasive clients. As one colleague objects to the opportunity-cost argument, "Nobody leaves practice for teaching unless they want to." And there are plenty of selfish reasons why lawyers might want to.

In the end, the opportunity-cost argument fails to convince. It argues against law teachers' pro bono responsibilities only by assimilating law teachers to practicing lawyers, the one group that has pro bono responsibilities. This compels those offering the argument to acknowledge that they too have pro bono responsibilities. They must then claim, very implausibly, that they have discharged those responsibilities merely by making the lifestyle choice of comfortably compensated professorial over stress-ridden riches.

What Should Law Teachers Do?

One colleague wrinkles her nose and asks rhetorically, "Do you really mean that I'm supposed to go out and litigate cases? I don't want to litigate cases, and I don't think I would be very good at it." Other friends adopt an amused tone when they opine that they have tenured colleagues they would be afraid to lose on a hapless client.

Perhaps they are right, although I find myself less amused when I recall that in our clinics we send second-year law students out with three weeks' training to represent clients in matters as important as civil protective orders and political asylum. We expect the students to do a superb job, and by and large a superb job is exactly what they do. What does it say about a tenured law professor whose colleagues judge him incapable of doing even a competent job?

Be that as it may, there is really no need for anyone to litigate cases who doesn't wish to. There is plenty of opportunity for important pro bono work that doesn't involve trying cases. Law teachers can write or assist in writing amicus briefs; we can moot lawyers arguing appellate cases important to low-income clients, who might otherwise have no such opportunities. We can serve as expert witnesses for no fee or reduced fee. We can assist public interest lawyers with research and help in refining novel legal theories.

We can also take cues from law firms, which often engage in innovative pro bono work. Real estate lawyers have partnered with the corporation counsel of the financially strapped District of Columbia to negotiate terms for office space; others have worked to retire or restructure liens on abandoned housing to make it available for refurbishing to house low-income tenants. Sometimes law firms adopt a low-income neighborhood, surveying, analyzing, and trying to solve some of its most prominent legal problems. One Minneapolis law firm opened a storefront legal advice office, strategically located next to a laundromat in a low-income neighborhood. Volunteer lawyers rotate into the office one or two nights a month; other lawyers in the firm put out a plain-English newsletter on issues of consumer law important to low-income people.
Lawyers from several New York law firms have joined in partnership with the Open Society Institute to construct Pro Bono Net, a resource for pro bono lawyers working on political asylum cases; plans are in the works to add other legal specialties. These are all activities that law schools and law teachers would be well equipped to undertake, perhaps in partnership with law firms.

Consider as well a couple of nonstandard pro bono activities that law teachers have already undertaken:

- A tax teacher enlists students from his courses to join him in obtaining earned income tax credit refunds for low-income clients.
- Another colleague teaches groups of inner-city high school students how to do legal and economic research in order to prepare an economic map of their own neighborhood. The map will list the ownership of every property and every business; it will identify problem landlords, and determine which businesses are taking care to deal with local suppliers. Once the high-schoolers have prepared the map, they go to local neighborhood leaders to help plan action around problems they have identified.
- A well-known law professor uses legal materials to teach adult literacy—and at the same time makes her pupils far better able to navigate a legal system that poses constant threats to their well-being.

In addition to activities like these, law schools offer one relatively straightforward venue by which faculty—even those like me who are not members of the bar—can assist in delivering legal services to people of limited means. That, of course, is the clinical program. It is entirely possible for nonclinical faculty to cosupervise clinical cases with a clinician partner. If a nonclinical teacher cosupervised a case or two during a semester when she is already teaching a full load, she would undoubtedly meet her fifty-hour-per-year pro bono commitment. She would also send a highly visible signal about professionalism from faculty to students: The faculty care about helping students help low-income clients.

**Pro Bono as an Imperfect Duty**

Obviously, some semesters, some years, some stretches of five years, it may prove too difficult to do pro bono. You have preschoolers, or you’re running the fundraiser, or you’re finishing up a book, and you still have only twenty-four hours in a day. Observations like these confirm what practicing lawyers know: that pro bono is in many cases a life-cycle event, performed some years but neglected in others. In large law firms, it is predominantly younger lawyers, with boundless energy and idealism and fewer commitments, who are most eager to do pro bono work. Although many of their older partners will do pro bono as well, the role of the partners may be more indirect—for example, by agreeing to subsidize associates' pro bono by counting pro bono hours as billables or collectibles, or by creating a pro bono department which offers one- or two-year rotations, or by subduing their own anti-pro bono partners who would create an environment hostile to associates' pro bono if left unchecked.
Law teachers who cannot do pro bono for life-cycle reasons can still do what Rule 6.1 recommends: make an equivalent financial contribution to a legal services provider. Recall that the pro bono thesis holds only that pro bono is an imperfect duty—a duty that can at times yield to inclination or, as Kant preferred, to other important duties. The pro bono thesis insists only that pro bono responsibilities always function as a magnetic north, to which the compass needle eventually returns.

What Should Law Schools Do?

The comments to ABA Rule 6.1 indicate that a law firm may discharge its pro bono responsibilities collectively, without every lawyer’s doing pro bono personally—for example, by subsidizing a pro bono department. The same thing is possible for law schools. Indeed, it should be clear that many of the innovative forms of pro bono I described earlier will require considerable institutional and organizational support, which the law school can provide. The AALS Commission on Pro Bono has recommended that every law school create a staff position for a pro bono coordinator, and it would be helpful if the office of the pro bono coordinator included staff who would help organize faculty efforts as well as efforts by students, perhaps by negotiating cooperative arrangements with law firms already active in pro bono.

Another way faculty can help discharge their pro bono responsibilities through the institution of the law school is by supporting enhanced clinical programs. The rationale for law school clinics has always been pedagogical, of course. But it is important to realize that law school clinics are not only an effective and indispensable part of legal education, they are also an invaluable source of legal services for the community. We live in an era when federally funded legal services labor under embattled budgets and draconian statutory restrictions. Now state IOLTA programs are under serious legal attack in the wake of Phillips. In this environment, the capacity of law school clinics to deliver thousands of hours of desperately needed legal services looms larger in the legal services universe. In the clinic in which I sometimes teach, students deliver 400 to 500 hours of legal services per student per semester—the equivalent of over $50,000 of legal services calculated at a first-year urban associate’s billing rates. Professional schools should regard themselves as citizens of their geographical communities as well as their university and intellectual communities, and one way to do that is to commit additional resources to the clinics. Just as law firm partners directly subsidize associates’ pro bono efforts by counting them toward collectible hour totals, nonclinical faculty can “subsidize” the clinics’ role by supporting additional clinical appointments.

Steps like these require a culture of faculty pro bono in law schools, and that will take time to develop. Law schools can work to develop that culture gradually, beginning with largely symbolic steps. For example:

- incorporating Rule 6.1 into the policies of the institution, perhaps adding it to the faculty handbook
- surveying faculty about their pro bono activities, and publicizing the positive achievements of faculty (which, of course, also publi-
cizes by negative inference those faculty who engage in no pro bono)

- giving service awards to faculty members for excellence in their pro bono efforts
- encouraging students and faculty to work together on pro bono projects

At some point, law schools should consider formulating their own version of the ABA's Pro Bono Challenge—a pledge of pro bono somewhat more rigorous and demanding than Model Rule 6.1, to which hundreds of law firms have become signatories.26 That, however, will require coordination on the national level. So will other things, for example formulating standards for faculty pro bono programs that recognize the diversity of outlooks among law faculty, or coordinating efforts to fend off the predictable assaults on law school clinics along the lines of Louisiana's Tulane rule. But the national level is not the place for faculty members to start. As with other moral obligations, the place to begin is at home.