

Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case

Rima Sirota

Repository Citation

Rima Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, 78 La. L. Rev. (2018)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol78/iss2/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case

*Rima Sirota**

TABLE OF CONTENTS

Introduction	548
I. Status Quo: Mandatory Continuing Legal Education	550
A. Rationale, Rules, and Numbers.....	550
B. Mandatory CLE Does Not Improve Attorney Competence	553
1. No Data Despite Opportunity and Incentive	554
a. Malpractice Insurance.....	558
b. Disciplinary Action.....	559
2. Mandatory CLE Structure	560
II. Status Quo: Voluntary Pro Bono.....	564
A. The Unmet Need for Legal Services.....	564
B. The Profession’s Insufficient Response.....	567
1. The Rules	567
2. The Results.....	568
C. A Mandatory Pro Bono Obligation.....	572
1. Constitutionality	574
2. Misdirected Resources	575
3. Second-Rate Representation	576
4. Current Volunteers	576
5. Insufficient Response	577
III. Rethinking the Status Quo.....	578
A. Counting Pro Bono Hours Toward CLE Requirements	578
B. A Full Switch Is Premature.....	579

Copyright 2017, by RIMA SIROTA.

* Professor of Legal Research & Writing, Georgetown University Law Center. I also serve as Ethics Counsel to an organization providing pro bono legal services and as a volunteer attorney for domestic violence survivors. I extend my thanks to Jeffrey Shulman, my Legal Practice colleagues, and other members of the Georgetown faculty for their thoughtful feedback; to Margot Benedict, Thanh Nguyen, Jeremy McCabe, and the staff of the Georgetown Law Library Research Service for their excellent research assistance; and to Georgetown University Law Center for the support that made this Article possible.

1. Political Impossibility	580
2. Dearth of Mandatory Pro Bono Experience	581
C. Shifting Responsibility to Aspiring Attorneys.....	584
IV. Law Faculty: The Right Fit for a Mandatory Pro Bono	
Test Case	587
Conclusion.....	595

INTRODUCTION

The vast majority of attorneys in this country are required to complete 10 to 15 hours of continuing legal education (“CLE”) every year, an experience well summarized by one attendee’s observation that “[k]nowledge is good, but coerced seat time is wasteful [and] insulting.”¹ The primary rationale for mandatory CLE is to help ensure competent client representation, but the mandatory system fails to achieve that goal. Instead, mandatory CLE has become a self-perpetuating industry that earns hundreds of millions of tuition dollars for course purveyors but demonstrates little, if any, connection to better serving the public.

By contrast, almost no attorney is required to complete a single hour of pro bono service. Although the American Bar Association (“ABA”) recognizes the “critical” need for free legal services for “persons of limited means,” attorneys simply are encouraged to volunteer their time.² This voluntary pro bono system has proven to be so woefully inadequate that Justice Sonia Sotomayor recently declared her support for a “forced labor” approach to attorneys’ pro bono responsibilities.³

Responding to this critical need, a current trend in the profession focuses on requiring pro bono service from law students and bar applicants—easy marks with little ability to protest.⁴ This effort, however, sidesteps the harder

1. James C. Mitchell, *MCLE—The Joke’s On Us*, 36 ARIZ. ATT’Y, Aug.–Sept. 1999, at 27. Similar sentiments abound in the literature. *See, e.g.*, Paul-Noel Chretien, *The Bar’s Back-to-School Scam*, WALL ST. J., Jan. 17, 1996, at A15 (describing bar member opposition to mandatory CLE in the District of Columbia); Walter C. Davison, David C. Farmer & Elizabeth A. Kane, *Taking the “M” out of MCLE*, HAW. B.J., Aug. 2008, at 9 (describing opposition in Hawaii).

2. *See* MODEL RULES OF PROF’L CONDUCT r. 6.1 & cmt. 2 (AM. BAR ASS’N 2016) [hereinafter MODEL RULES].

3. *See* Tony Mauro, *Sotomayor Pushes Mandatory Pro Bono*, NAT’L L.J., May 23, 2016, at 17.

4. *See* Tom Lininger, *Deregulating Public Interest Law*, 88 TULANE L. REV. 727, 738–39 (2014) (describing “shifted” focus of pro bono reform efforts to law students and bar applicants).

question of mandatory pro bono for licensed attorneys, including the law professors who may be an aspiring attorney's first professional role models.

More than a decade ago, Dean Erwin Chemerinsky argued in favor of mandatory pro bono service for law faculty, hoping to "at least induce debate and force examination of how to better engage law professors in using their talents to help those who need it."⁵ That debate has yet to materialize. Law professors have at least as much of an obligation as other attorneys to provide pro bono service, but their resistance to doing so has resulted in rates of participation that Professor Deborah Rhode has described as "shameful."⁶

This Article argues that the time is ripe to upend the status quo—to eliminate mandatory CLE and to explore replacing mandatory CLE hours with required pro bono service hours. Part I documents the enormous reach and substantial cost of mandatory CLE—all without any evidence of efficacy. Part II establishes that regulations protecting the legal profession both substantially contribute to the vast need for free legal representation and justify a pro bono requirement for attorneys. Part III explores obstacles to eliminating mandatory CLE and requiring pro bono, including political opposition and the absence of mandatory pro bono models. Part IV responds to this problem with a proposal: encouraging law faculties to impose pro bono requirements on themselves with the incentive of eliminating their mandatory CLE obligations. This faculty test case model offers enormous potential benefits for the indigent clients who would be served, the law students who would find role models for a lifetime of service, the professors whose teaching and scholarship would be enriched, and the profession, which would gain much-needed experience with various approaches to mandatory pro bono.

5. Erwin Chemerinsky, *A Pro Bono Requirement for Faculty Members*, 37 LOY. L.A. L. REV. 1235, 1236 (2004). Chemerinsky, recently named Dean of Berkeley Law, is "widely considered to be a giant in legal education." Austin Weinstein, *Erwin Chemerinsky Named Berkeley Law Dean*, DAILY CALIFORNIAN (May 17, 2017), <http://www.dailycal.org/2017/05/17/erwin-chemerinsky-named-berkeley-law-dean/> [https://perma.cc/3S2K-76MJ].

6. Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 CLINICAL L. REV. 43, 54 (2009). Rhode, a Stanford Law School professor, has been described as "the nation's foremost expert on lawyers' ethical duty to perform pro bono service." Tom Lininger, *From Park Place to Community Chest: Rethinking Lawyers' Monopoly*, 101 NW. U. L. REV. 1343, 1343 (2007) (reviewing DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* (2005)).

I. STATUS QUO: MANDATORY CONTINUING LEGAL EDUCATION

In the 1960s and 1970s, the organized bar promoted mandatory CLE as an answer to the concern that the rising number of new attorneys had led to a decrease in the quality of lawyering, a sentiment famously expressed by Chief Justice Warren Burger in his comments concerning the “inadequacies” of courtroom counsel.⁷ Mandatory CLE remains firmly entrenched in the legal profession, bringing a substantial windfall for the institutional interests that profit from the system but little, if any, demonstrable public benefit.

A. Rationale, Rules, and Numbers

The primary rationale for mandatory CLE hinges on the alleged value of these programs in helping to ensure attorney competence.⁸ To be sure, attorneys reap other benefits from CLE classes, such as opportunities for intellectual growth and professional advancement, but attorneys can make individual decisions as to whether personal benefits of this sort are worth the time and expense involved.⁹ These personal benefits do not justify a mandatory scheme.

7. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227, 238 (1973); see also Cheri A. Harris, *MCLE: The Perils, Pitfalls, and Promise of Regulation*, 40 *VAL. U. L. REV.* 359, 361 (2006); Deborah L. Rhode & Lucy Buford Ricca, *Revisiting MCLE: Is Compulsory Passive Learning Building Better Lawyers?*, 22 *PROF. LAW.* 2, 3 (2014).

8. “Competence” in this context broadly refers to the “legal knowledge, skill, thoroughness and preparation reasonably necessary” for client representation. MODEL RULES r. 1.1. All American jurisdictions require “competence” as a matter of professional conduct, and most put the “competence” rule before all others. Links to each jurisdiction’s rules of professional conduct, including each jurisdiction’s version of Model Rule 1.1, are collected at *Links of Interest*, AM. BAR ASS’N., http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html (last visited Sept. 30, 2017) [<https://perma.cc/7DFE-TKZU>].

9. For example, attorneys can expand their professional prospects by taking courses in potential new areas of practice and making new contacts at in-person trainings. The opportunity to make professional contacts is a particular marketing focus for organizations peddling extended CLE offerings in relaxed vacation settings. See generally Robert J. Derocher, *Combining Learning and Entertainment: The New CLE?*, *BAR LEADER*, May–June 2004, at 21. One CLE purveyor, for example, assembles a mutually beneficial combination of doctors, dentists, and attorneys through “Medical-Dental-Legal Update” courses offered “away from the distractions and tumult of your practice” in “34 premier destination

Improved attorney competence could justify a mandatory scheme if mandatory CLE actually resulted in better representation for clients.¹⁰ Leaving competence to an individual attorney's discretion is problematic because incompetent attorneys may be unlikely to seek out training or even realize that they need it.¹¹ Leaving competence to market forces also is problematic because most clients cannot easily discern attorney incompetence.¹²

The organized bar has assumed responsibility for maintaining profession-wide competence. The bar's efforts in this regard begin with entry-to-practice hurdles: graduation from an accredited law school; passing the bar exam; and satisfying character and fitness requirements. At the other end of the professional continuum is the disciplinary process, which retroactively assesses and punishes alleged incompetence in particular cases.¹³ Bridging the gap is CLE, which is designed to help new attorneys gain full competence as well as maintain and sharpen competence throughout attorneys' careers.¹⁴

resorts." See *About AEI*, AM. EDUC. INST., <https://www.aeiseminars.com/about-aei/about-aei/> (last visited Sept. 30, 2017) [<https://perma.cc/TVN3-NJE5>].

10. See, e.g., Joseph Faulhaber, *Mandatory Continuing Legal Education: For*, ALASKA B. RAG, Mar.–Apr. 1998, at 14 (arguing that “the burden of protecting those whom [the legal] profession serves” justifies mandatory CLE); Mary Frances Edwards, *Mandatory CLE: Shield or Sham?*, 3 J. PROF. LEGAL EDUC. 27, 30–31 (1985); Jordan W. Lorence, Alan E. Sears & Benjamin W. Bull, *No Official High or Petty: The Unnecessary, Unwise, And Unconstitutional Trend of Prescribing Viewpoint Orthodoxy in Mandatory Continuing Legal Education*, 44 S. TEX. L. REV. 263, 270–72 (2002); Alan Ogden, *Mandatory Continuing Legal Education: A Study of Its Effects*, 3 J. PROF. LEGAL EDUC. 3, 4 (1985–1986); Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1666–67 (2015); Colleen G. Segall, *Ethics in Mandatory CLE: An Overlooked Means for Improving the Standard of the Profession*, 6 J. PROF. LEGAL EDUC. 22, 25 (1988).

11. See Randall T. Shepard, *The “L” In “CLE” Stands For “Legal”*, 40 VAL. U. L. REV. 311, 317–18 (2006) (“We cannot assume that . . . the attorney will be able to recognize his own lack of competence.”).

12. See, e.g., Soha Turfler, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach To Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903, 1919–20 (2004) (explaining the “information asymmetry” that leaves clients “unable to evaluate the quality” of their attorney’s services).

13. See, e.g., William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. RICHMOND L. REV. 49, 54 (2002); Anthony J. Luppino, *Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating a Circus*, 35 SETON HALL L. REV. 109, 146 (2004).

14. See Shepard, *supra* note 11, at 324.

Rules of professional conduct reflect the bar's oversight and instruct attorneys to maintain competence, in part, through compliance with "all continuing legal education requirements to which the lawyer is subject."¹⁵ Minnesota and Iowa adopted the first mandatory CLE measures in 1975;¹⁶ now, 46 states impose mandatory CLE requirements.¹⁷ Almost all mandatory CLE jurisdictions require an average of between 10 and 15 CLE hours per year.¹⁸

No publicly available source quantifies the number of attorneys nationally who are subject to mandatory CLE. The ABA collects data on the total number of active attorneys by state,¹⁹ but each mandatory CLE jurisdiction exempts different groups of attorneys from the requirement. Such exemptions commonly include attorneys on active military duty, federal and state judges, various elected officials, and attorneys of retirement age.²⁰ No

15. MODEL RULES r. 1.1 cmt. 8. Furthermore, the ABA has adopted a separate "Model Rule for Minimum Continuing Legal Education," providing model guidance to the states regarding the particulars of mandatory CLE programs. See MODEL RULE FOR MINIMUM CONTINUING LEGAL EDUCATION (AM. BAR ASS'N 2017), <https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/106.pdf> [<https://perma.cc/PMJ6-8TFN>].

16. See Rocio T. Aliaga, *Framing the Debate On Mandatory Continuing Legal Education (MCLE): The District of Columbia Bar's Consideration of MCLE*, 8 GEO. J. LEGAL ETHICS 1145, 1150–51 (1995).

17. Links to each jurisdiction's mandatory CLE rules are available at *MCLE Information by Jurisdiction*, AM. BAR ASS'N, http://www.americanbar.org/cle/mandatory_cle/mcle_states.html (last visited Sept. 10, 2017) [<https://perma.cc/S7AQ-RV5U>]. The District of Columbia, Maryland, Massachusetts, Michigan, and South Dakota generally do not require CLE credits, although the District of Columbia and Massachusetts do require newly admitted attorneys to take specific courses on local practice and professional responsibility. See R. GOVERNING THE D.C. BAR II § 3; MASS. ANN. R. OF THE SUPREME JUD. CT. 3:16. Michigan rescinded a new-attorney CLE requirement in 1994. See *infra* notes 160–164 and accompanying text.

18. Some states spread the requirement over two or three years. See, e.g., SUP. CT. R. FOR THE GOV'T OF THE BAR OF OHIO R. X § 3 (requiring 24 CLE hours over two years); COLO. R. CIV. P. 260.2 (requiring 45 CLE hours over three years). Only two mandatory CLE states require fewer than ten hours per year. See ALASKA BAR R. 65(a) (requiring three hours per year); R. OF THE SUP. CT. OF HAW. 22(a) (same).

19. See *ABA National Lawyer Population Survey*, AM. BAR ASS'N (2016), http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2016.authcheckdam.pdf [<https://perma.cc/VJJ9-7QTA>].

20. The exemptions allowed by each jurisdiction can be found in that jurisdiction's mandatory CLE rules. See *MCLE Information by Jurisdiction*, *supra* note 17. By way of example, see CONN. SUPER. CT. R. § 2-27A(a)(3).

source, however, delineates by state the number of attorneys in the various exempted groups.

Projecting from the best data available, approximately 950,000 attorneys will fulfill approximately 11.5 million mandatory CLE hours in 2017. The 950,000 attorneys figure represents 83% of the number of active attorneys in each of the 46 mandatory CLE jurisdictions, with 83% approximating the number of attorneys who are not exempt from the requirement.²¹ The 11.5 million hours figure represents the number of non-exempt attorneys in each state multiplied by the number of CLE hours required by that state.²² These figures probably undercount both the number of attorneys and the number of hours;²³ even so, the figures demonstrate the enormity of the undertaking that mandatory CLE has become.

B. Mandatory CLE Does Not Improve Attorney Competence

Do these 11.5 million hours render 950,000 attorneys more competent than their counterparts in non-mandatory CLE states? If the relevant measure

21. Attorneys in private practice and in private industry together comprise 83% of United States attorneys. *See Lawyer Demographics*, AM. BAR ASS'N (2016), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf [https://perma.cc/ZH4N-29JS]. Although these percentages are from 2005, they are the most recent figures available from the ABA. The author chose 83% for these calculations because attorneys in these two categories are unlikely to be exempt from CLE requirements. The ABA's 2016 data lists 1,142,906 active attorneys in the 46 mandatory CLE jurisdictions, *ABA National Lawyer Population Survey*, *supra* note 19; 83% of that number is 948,612. Calculations on file with author.

22. For example, the ABA reported that Alabama had 14,466 active attorneys in 2016. 83% of that number is 12,173 attorneys. Alabama requires 12 CLE hours per year, which—multiplied by 12,173—results in 146,073 mandatory CLE hours for Alabama. This process was repeated for each mandatory CLE jurisdiction. The mandatory CLE hours per state were added together for a total of 11,497,530 hours. Calculations on file with author.

23. For example, although these calculations include only “private practice” and “private industry” attorneys, *see supra* note 21, many government and other attorneys working outside of these sectors are subject to mandatory CLE requirements. *See, e.g.*, ARK. JUDICIARY R. FOR MINIMUM CONTINUING LEGAL EDUC. 2 (exempting only senior and inactive attorneys from mandatory CLE requirements). Moreover, the calculations here do not include the higher hourly requirements that may be imposed on particular groups of attorneys, such as newly admitted attorneys in certain states. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, §§ 1500.12(a), 1500.22 (requiring 16 hours for newly admitted attorneys “in each of the first two years of admission to the Bar” as opposed to the 24 hours per two years required for other attorneys).

is merely CLE *attendance*, then the answer is “yes.” Attorneys, like other professionals, avoid time-consuming and expensive activities like CLE unless attendance is required.²⁴ Not surprisingly, the literature readily documents a sharp increase in attendance once a jurisdiction changes from voluntary to mandatory CLE attendance.²⁵

Attendance as the measure of success, however, assumes that *competence*—the rationale for mandatory CLE—actually is enhanced by attending CLE courses.²⁶ With competence itself as the appropriate measure, the attorneys in mandatory CLE states appear to lack any advantage over their counterparts in non-mandatory states. As discussed below, no data supports the conclusion that mandatory CLE has any positive effect on attorney competence. Moreover, this lack of supportive data is consistent with what adult learning theory would predict: the structure of CLE courses and the mandatory system itself discourage substantial or lasting results.

1. No Data Despite Opportunity and Incentive

The 46 states that have adopted mandatory CLE measures since 1975 provide a ready-made source of empirical data to test the proposition that attorneys in these states have a competence advantage over attorneys in non-mandatory states. In 1997, Professor Colleen Graffy found “no statistics indicating a reduction in complaints, disciplinary measures or malpractice insurance premiums since [mandatory CLE’s] implementation,”²⁷ and none have materialized since.²⁸

24. See, e.g., Harris, *supra* note 7, at 370 (“One reason mandatory education is effective is because it reaches the significant number of people who do not take courses unless required.”); Rhode & Ricca, *supra* note 7, at 7.

25. See, e.g., Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 416–17 (2003); Ogden, *supra* note 10, at 10–11.

26. See, e.g., Martin P. Moltz, *Viewpoint: Debate Over MCLE Continues: Mandatory CLE—A Better Idea Now Than Ever Before*, 11 CBA REC. 44, 44 (1997) (“Sadly, only the spectre of mandatory CLE will likely result in the desirable goal of having every lawyer ‘keep up with the law’ in their respective fields.”).

27. Colleen Graffy, *Mandatory Continuing Legal Education*, 147 NEW L.J. 1650, 1651 (1997). Earlier writers similarly observed the lack of data supporting a link between mandatory CLE and competence. See Aliaga, *supra* note 16, at 1164; David A. Thomas, *Why Mandatory CLE Is a Mistake*, 6 UTAH B.J., Jan. 1993, at 14, 14.

28. See, e.g., Davison, Farmer & Kane, *supra* note 1, at 9; Donald S. Murphy & Thomas Schwen, *The Future: Transitioning from Training Lawyers to Improving Their Performance*, 40 VAL. U. L. REV. 521, 521 (2006); Rhode & Ricca, *supra*

Some mandatory CLE proponents acknowledge the absence of empirical data but respond that no data *disprove* mandatory CLE's impact on competence either.²⁹ This argument has an appealing even-handedness, but it is a superficial appeal. The fight between opponents and supporters of mandatory CLE occurs on a vastly unequal playing field, and the burden of proving the mandatory system's connection to competence should fall squarely on the latter group's shoulders.³⁰

Opposition to mandatory CLE comes primarily from individual attorneys, with some attorneys far more negatively impacted by the requirement than others. Many larger firms provide in-house CLE courses, cover their attorneys' CLE tuition costs, or at least provide salaries generous enough for their attorneys to cover CLE costs themselves with little trouble.³¹ Solo practitioners and others who work in smaller or less profitable offices, however, have little capacity to absorb the loss of hours and dollars that mandatory CLE demands.³²

Proponents of mandatory CLE, on the other hand, include a broad range of organized interests with substantial resources to assess the mandatory

note 7, at 8. See generally Holly B. Fisher & W. Franklin Spikes, *Examining the Relationship Between Learning, Continuing Legal Education, and the Improvement of the Practice of Law*, in TRAINING INITIATIVES AND STRATEGIES FOR THE MODERN WORKFORCE (Scott Frasad & Frederick Carl Prasuhn eds., 2017) (discussing the need for better data).

29. See, e.g., Edwards, *supra* note 10, at 31; Neil Gold, *Beyond Competence: The Case for Mandatory Continuing Learning in Law*, 4 J. PROF. LEGAL EDUC. 17, 19 (1986).

30. See, e.g., Jack Joseph, *Mandatory Continuing Legal Education—An Opponent's View*, 75 ILL. B.J. 256, 256 (1987).

31. See, e.g., Alex Rich, *5 Super Easy Tips for Finding Cheap CLE Credits*, ABOVE THE LAW (Jan. 8, 2014, 10:12 AM), <http://abovethelaw.com/2014/01/5-super-easy-tips-for-finding-cheap-cle-credits/> (noting CLE costs are a common benefit for “Biglaw” attorneys) [<https://perma.cc/XSH2-EP6R>].

32. See Carolyn Elefant, *Why Can't CLE Deliver Real Value to Solos By Teaching Real Skills?*, ABOVE THE LAW (Aug. 30, 2016, 6:02 PM), <http://abovethelaw.com/2016/08/why-cant-cle-deliver-real-value-to-solos-by-teaching-real-skills/?rf=1> (“CLE requirements disproportionately hurt solo lawyers who often lack the money for the pricier CLEs. Moreover, some CLE programs are priced in such a way that there's effectively a ‘solo tax,’ since the costs can't be spread across multiple participants. Finally, for a true solo, time spent at CLE displaces hours available for billing, so on top of the price tag for the program, solo attendance at CLE also has an opportunity cost.”) [<https://perma.cc/5QA9-CNL9>]; Faulhaber, *supra* note 10, at 14 (noting that mandatory CLE tends to drive “marginal” attorneys out of business); Thomas, *supra* note 27, at 14 (noting mandatory CLE's potentially discriminatory impact on less affluent attorneys).

system's impact on attorney competence. Private CLE purveyors are major players in the industry. So, too, are bar associations and law schools³³—both of which may be particularly dependent on CLE revenues as a result of the downturn in the legal market and law school admissions.³⁴ Various CLE trade groups further support the industry.³⁵

These organized interests rely on mandatory CLE to put bodies in the chairs and tuition dollars in the bank. Course providers generally do not make revenue data publicly available,³⁶ and few outside observers have attempted specific calculations.³⁷ But, taking again the conservative

33. See, e.g., Kenneth D. Dean, *Models for Organizing Law School CLE Programs*, 4 CLE J. 23, 24 (2001); Derocher, *supra* note 9, at 21; DEBORAH L. RHODE, *THE TROUBLE WITH LAWYERS* 106 (2015).

34. See, e.g., Gregg Toppo, *Why You Might Want to Think Twice Before Going to Law School*, USA TODAY (June 28, 2017), <https://www.usatoday.com/story/news/2017/06/28/law-schools-hunkering-down-enrollment-slips/430213001/> [<https://perma.cc/C24V-2GS5>].

35. Trade groups include the Continuing Legal Education Regulators Association (“CLEReg”), composed of mandatory CLE administrators and staff, see *About Us*, CLEREG, <https://www.clereg.org/about> (last visited Sept. 30, 2017) [<https://perma.cc/UXB4-EBJP>], and the Association for Continuing Legal Education (“ACLEA”), an international group, see *About ACLEA*, ASS'N FOR CONTINUING LEGAL EDUC., <http://www.aclea.org/?page=about> (last visited Sept. 30, 2017) [<https://perma.cc/WE4P-U8PR>].

36. For example, the ABA and many state bar associations provide no CLE revenue information at all. Others provide annual financial reports that include an expansive category like “Education” that presumably includes both mandatory CLE and other educational endeavors, though no particulars are provided. See, e.g., N.J. STATE BAR ASS'N, 2016-2017 ANNUAL REPORT 8 (2017), <https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Reports%20&%20Comments/AR2016.pdf> (reporting \$6.1 million in “Education” revenue) [<https://perma.cc/5J2J-WKAR>]. Among the few bar associations providing specific mandatory CLE course revenue figures is California. See STATE BAR OF CAL., 2015 FINANCIAL STATEMENT AND INDEPENDENT AUDITOR'S REPORT 12, 43 (2016), <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=JD00oHV0qJQ%3d&tabid=224&mid=1534> (reporting \$971,849 in revenue from CLE fees) [<https://perma.cc/DFL6-SFAN>].

37. See, e.g., *Cost-Effective Ways to Meet CLE Requirements*, WIS. L.J. (Mar. 30, 2009, 1:00 AM), <http://wislawjournal.com/2009/03/30/costeffective-ways-to-meet-cle-requirements> (referencing mandatory CLE's “substantial price tag” but providing no specific amounts) [<https://perma.cc/9ZAX-F8NZ>]. 20 years ago, one critic undertook a more specific calculation, albeit with little detail regarding his underlying data. See Chretien, *supra* note 1, at A15. Chretien estimated that 630,000 attorneys took an average of 12 mandatory CLE hours per year with each hour costing a minimum of \$20. See *id.* These 1996 figures would have totaled

estimate of 950,000 attorneys fulfilling 11.5 million mandatory course hours,³⁸ mandatory CLE tuition revenue for 2017 reasonably can be estimated at a minimum of \$345 million.³⁹ The magnitude of proponents' financial incentive to maintain the mandatory system renders the absence of correlative data at least suspicious.⁴⁰ Were there a correlation to be found, mandatory CLE proponents should have been able to demonstrate by now that the system actually achieves its competence-enhancing purposes.

To say that no data supports a correlation between mandatory CLE and competence is no exaggeration. Many surveys assess participants' positive and negative views about CLE programs.⁴¹ Mandatory CLE proponents, however, point to only two sources of data as broad evidence of a mandatory CLE-competence correlation: malpractice insurance premiums and disciplinary actions. Neither source supports the mandatory cause.

approximately \$151 million at that time; adding in the dollar value of time lost by participating lawyers brought Chretien's total estimate to \$360 million per year. *See id.*

38. *See supra* notes 21–24 and accompanying text.

39. To calculate this figure, the author assumed \$30 per credit hour. Thirty dollars per credit hour is one author's relatively recent low-end estimate of CLE tuition costs, an estimate that excluded both free courses and the most expensive options. *See* Claudine V. Pease-Wingenter, *Halting the Profession's Female Brain Drain While Increasing the Provision of Legal Services to the Poor: A Proposal to Revamp and Expand Emeritus Attorney Programs*, 37 OKLA. CITY U. L. REV. 433, 459 (2012) (estimating CLE tuition at \$30–\$50 per credit hour and noting that most attorneys cannot fulfill all required hours through free and low-cost options).

40. The financial incentive has been present from the industry's beginnings. *See* Marvin E. Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613, 614 (1977) (describing mandatory CLE as a "major growth industry" shortly after mandatory CLE rules were first adopted in 1975).

41. *Compare, e.g.,* David S. Caudill, *Sympathy for the Devil?: Reflections on the Crime-Fraud Exception to Client Confidentiality*, 8 J. OF CIV. RTS. AND ECON. DEV. 369, 371–72, 372 n.6 (1993) (describing a survey in which 89% of respondents stated that CLE programs do not "diminish incompetent or unethical lawyering"), *with* ILL. SUPREME COURT COMM'N ON PROF'LISM, 2012 LAWYER FEEDBACK ON CLE 3 (2012) (describing survey in which 61.6% of respondents reported participating "in a professional responsibility CLE course that resulted in my increased knowledge or capability"). Most respondents to a recent survey of Kansas CLE providers said that CLE was "effective" or "very effective" in improving attorney practice, but this conclusion was based more on belief than on measured practice improvement. *See* Fisher & Spikes, *supra* note 28, at 101–02.

a. Malpractice Insurance

First, proponents cite the lower malpractice premiums offered in some mandatory CLE jurisdictions as evidence of the mandatory system's positive impact on both competence and an attorney's bottom line.⁴² According to this line of reasoning, malpractice insurers—who lack any reason to favor mandatory CLE if it does not reduce the number of claims and the amounts paid out—must have determined that mandatory CLE correlates with lowered malpractice levels.⁴³

The malpractice insurance argument is without foundation. Some assertions of a correlation between mandatory CLE and lowered premiums simply rely on older, unsupported statements to this effect.⁴⁴ The only substantiated claims demonstrate lowered premiums for attorneys who *voluntarily* attend *specific* malpractice-reduction programs offered or approved by insurers.⁴⁵ In other words, the reduction does not derive from the existence of a mandatory CLE requirement that may be satisfied through a vast variety of courses. Indeed, Professor Mary Frances Edwards

42. See, e.g., Harris, *supra* note 7, at 367; Ogden, *supra* note 10, at 9; Chris Ziegler & Justin Kuhn, *Is MCLE a Good Thing? An Inquiry Into MCLE and Attorney Discipline*, CLEREG, at 7 & n.8, https://www.clereg.org/assets/pdf/Is_MCLE_A_Good_Thing.pdf (last visited Sept. 8, 2017) [<https://perma.cc/Q9BH-SVWZ>]. Although the Ziegler and Kuhn paper is undated, references within the paper suggest that it was likely written in 2013.

43. See, e.g., Faulhaber, *supra* note 10, at 14 (arguing that mandatory CLE adoption in Alaska will reduce premiums because mandatory CLE leads to fewer attorney mistakes, which in turn leads to fewer malpractice claims).

44. For example, Ziegler and Kuhn argue that lower malpractice insurance premiums in some mandatory CLE jurisdictions reflect its efficacy, but they rely solely on Cheri Harris's 2006 article. Ziegler & Kuhn, *supra* note 42, at 7 & n.48. Harris, in turn, relies solely on Alan Ogden's 1984 article, which itself relies solely on a 1983 ABA report that the best efforts of the author and the Georgetown Law Library Research Service were unable to locate. See Harris, *supra* note 7, at 367; Ogden, *supra* note 10, at 9; see also JUTTA KATH, CONTROLLING LEGAL MALPRACTICE INSURANCE COST AND AVAILABILITY IN A CHANGING MARKETPLACE 5 (2002) (providing no citation for a similar argument regarding insurance premiums); TASK FORCE ON CONTINUING LEGAL EDUC., REPORT TO THE BOARD OF GOVERNORS OF THE DISTRICT OF COLUMBIA BAR 114–15 (Jan. 1995) (noting the absence of data establishing malpractice differentials in mandatory versus non-mandatory CLE jurisdictions).

45. See, e.g., Fotios M. Burtzos, *Mandatory CLE: Knowledge is Good*, COLO. LAW., May 2005, at 39–40, 40 n.1 (describing small premium reduction for insureds who participate in certain CLE programs); Kevin R. Culhane & John E. Hurley, Jr., *Insurance Situation Not Quite Hopeless*, RECORDER, Apr. 5, 2002, at 5 (same).

found that not only does the data not support a correlation between mandatory CLE and lowered malpractice claims but also that the lowered premium rates probably were “more the result of tough negotiation by state bar associations with their official malpractice carriers than evidence of faith in CLE by the insurance carriers.”⁴⁶

b. Disciplinary Action

The only other effort to establish a data-driven link between mandatory CLE and improved competence is a recent paper whose title asks, “Is [Mandatory] CLE a Good Thing?”⁴⁷ This paper was published by a mandatory CLE trade organization, and—as might be expected given the interests of the publisher—the authors answer this question in the affirmative.⁴⁸ The authors’ own data and analysis, however, belie their conclusion.

The paper describes a study testing the hypothesis that mandatory CLE adoption improves attorney performance and that this improvement would be reflected in lowered attorney disciplinary rates.⁴⁹ The authors reviewed disciplinary statistics in five of the six jurisdictions that implemented mandatory CLE between 2000 and 2010.⁵⁰ Looking at disciplinary data from three years before and three years after mandatory CLE implementation,⁵¹ the authors determined that their hypothesis was correct, notwithstanding that most of the data pointed in the opposite direction.⁵²

The study focused on three distinct points in the disciplinary process: (1) disciplinary complaints filed; (2) cases docketed for further proceedings after preliminary investigation of the complaint; and (3) findings of misconduct.⁵³ The authors found *no* statistically significant correlations for categories (1) and (3); in other words, mandatory CLE did not decrease

46. Edwards, *supra* note 10, at 30–31 (relying on survey data from Colorado). Even if evidence demonstrated lower malpractice premiums in mandatory CLE states, various factors go into premium calculations, including law office size and area of practice. *See, e.g.*, Tom Baker & Rick Swedloff, *Liability Insurer Data as a Window on Lawyers’ Professional Liability*, 5 U.C. IRVINE L. REV. 1273, 1285 n.38 (2015). Any statistical analysis would need to account for state-by-state variations on these metrics.

47. *See* Ziegler & Kuhn, *supra* note 42.

48. *See id.* at 1.

49. *See id.*

50. The five states studied were Alaska, Hawaii, Illinois, Maine, and New Jersey. The sixth state, Nebraska, did not make disciplinary statistics available. *Id.* at 9–10.

51. *Id.* at 11–12.

52. *See id.* at 14.

53. *Id.* at 10.

complaints about attorney competence or the number of cases in which incompetent representation was found to have actually occurred.⁵⁴ Instead, the only significant correlation was for category (2), the least relevant measure: the number of complaints moved through the system for decision.⁵⁵

These authors took on a task long sidestepped in the mandatory CLE debate: attempting to fill in the persistent data gap. Their idea makes sense; a statistically significant reduction in attorney discipline after mandatory CLE adoption could indicate that mandatory CLE has a positive effect on attorney competence. Even taking the authors' statistical analysis at face value, however, their affirmative conclusion leaps well ahead of their data.⁵⁶

2. Mandatory CLE Structure

Faced with the absence of data, mandatory CLE proponents appeal to a commonsense assumption that mandatory CLE *must* positively impact attorney competence.⁵⁷ Even unwilling attorneys, the reasoning goes, are bound to learn something useful from attending CLE courses. As argued by one proponent of mandatory CLE, "Even if no statistics prove [that mandatory] CLE improves competence, there are numerous attorneys who

54. *See id.* at 13.

55. *See id.*

56. Ironically, the absence of data demonstrating any connection between mandatory CLE and competence also undermines clients' ability to claim ineffective assistance based on counsel's failure to comply with CLE requirements. *See, e.g.,* *People v. Ngo*, 924 P.2d 97, 101–02 (Cal. 1996) (citing lack of data in rejecting ineffective assistance claim that relied on attorney's failure to comply with mandatory CLE regulations); *State v. Lentz*, 844 So. 2d 837, 841–42 (La. 2003) (following *Ngo*); *cf.* *Commonwealth v. Grant*, 992 A.2d 152, 154–55, 160 & n.5 (Pa. Super. Ct. 2010) (finding ineffective assistance when attorney had drug convictions and numerous other disciplinary violations as well as failure to complete CLE requirements).

57. *See, e.g.,* D. Franklin Arey, III, *Competent Appellate Advocacy and Continuing Legal Education: Fitting the Means to the End*, 2 J. APP. PRAC. & PROCESS 27, 41 (2000) ("[T]his essay assumes the effectiveness of CLE programs in improving participant competence," notwithstanding the absence of evidence to this effect); Edwards, *supra* note 10, at 30 ("[A]lthough it cannot be proved, [mandatory] CLE probably has a positive effect on competence."); Harris, *supra* note 7, at 370–71 ("Even without statistical proof that [mandatory] CLE is effective, many in the profession seem to take for granted that [it] is key to maintaining attorney competence."); Ogden, *supra* note 10, at 9 (acknowledging author's own belief that mandatory CLE positively affects competence even though it cannot be proven by objective or scientific means).

are sued, suspended or disbarred for incompetence or unethical behavior in every state every year. Something must be done.”⁵⁸

That “something,” however, is not mandatory CLE. The structure of the mandatory system and of most CLE courses thwarts any positive connection to improved competence. Proponents’ absence of correlative data, in other words, is entirely consistent with what should be expected from the mandatory CLE status quo.

One reality of the mandatory system that undermines a connection to attorney competence is the fact that an attorney can satisfy CLE requirements with courses that have little or no bearing on that attorney’s actual law practice. For example, Alabama annually requires 12 hours of CLE courses, which can cover any topic as long as one hour addresses “ethics” issues.⁵⁹ Thus, an Alabama divorce lawyer can fulfill her CLE requirements through courses ranging from “Banking Law Update” to “The Legacy of To Kill a Mockingbird” to “Law and the Imagining of Difference”—a typical sampling of one vendor’s Alabama-approved offerings in early 2017.⁶⁰ The range of topics may be personally satisfying for the attorney and may reduce her resentment toward the requirement.⁶¹ The vast array of courses also may allow her to pick the lowest cost or most convenient option when the mandatory CLE certification deadline looms. This breadth of choice, however, belies the assertion that mandatory CLE better protects clients from incompetent representation.⁶²

Moreover, the assumption that productive learning will occur simply by putting CLE teachers and attendees in the same space is problematic

58. Lisa A. Grigg, Note, *The Mandatory Continuing Legal Education (MCLE) Debate: Is It Improving Lawyer Competence Or Just Busy Work?*, 12 *BYU J. PUB. L.* 417, 427 (1998).

59. See *Alabama: MCLE Requirements*, AM. BAR ASS’N, http://www.americanbar.org/cle/mandatory_cle/mcle_states/states_a-k/alabama.html (last visited Sept. 30, 2017) [<https://perma.cc/QP8C-JUNX>]. Links to similar descriptions of each state’s mandatory CLE requirements can be found at *MCLE Information by Jurisdiction*, *supra* note 17.

60. See CLE ALABAMA (Sept. 30, 2017), <http://www.clealabama.com/> [<https://perma.cc/QW56-QQAL>].

61. See Shepard, *supra* note 11, at 312.

62. See Frankel, *supra* note 40, at 628 (noting mandatory CLE’s “fungible” hours requirement, “during which everybody must be educated in something, no matter what”); Shepard, *supra* note 11, at 323 (arguing against mandatory CLE credit for courses with only “indirect” benefit to clients). Allowing a wide range of courses to meet mandatory CLE requirements may promote “good public citizen[ship]” generally, Jay Conison, *Law School Education and Liberal CLE*, 40 *VAL. U. L. REV.* 325, 340–41 (2006), but the connection to competence is too strained to justify a massive national CLE requirement.

even when attendance is voluntary. Widely accepted “best practices” for adult learning include substantial student-instructor interaction, interaction among students, high expectations for students, prompt feedback, and active learning rather than passive listening.⁶³ Most CLE courses, however, consist of nothing more than a lecture with some time set aside at the end for the lecturer to respond to questions or comments; the session requires no substantive preparation or follow-up and allows for little meaningful interactivity.⁶⁴ These common CLE characteristics are a model of how *not* to reach adult learners and help explain why so many CLE courses leave so little lasting impact.⁶⁵

A reasonable response to the overall lack of effective course design could be to design better courses—that is, create CLE offerings that more thoughtfully incorporate adult learning principles. Many commentators have proposed improvements in this regard.⁶⁶ This approach, however, is unlikely to improve substantially the overall experience of most mandatory attendees for two reasons.

First, requiring attendance implicitly emphasizes the value of simply showing up and “ignores contextual factors of the learning process, such

63. See, e.g., Barbara A. Bichelmeyer, *Best Practices in Adult Education and E-Learning: Leverage Points for Quality and Impact of CLE*, 40 VAL. U.L. REV. 509, 515–16 (2006).

64. See, e.g., *id.* at 511–12; Bruce A. Green, *Teaching Lawyers Ethics*, 51 ST. LOUIS U. L.J. 1091, 1097 (2007); Murphy & Schwen, *supra* note 28, at 521–22; Segall, *supra* note 10, at 29.

65. See, e.g., Rhode & Ricca, *supra* note 7, at 8 (“Almost never do CLE programs provide the kind of environment that experts find conducive to adult learning, which involves preparation, participation, evaluation, accountability, and opportunities to apply new information in a practice setting.”); T. Brett Dawson, *Judicial Education: Pedagogy for a Change*, 2015 J. DISP. RESOL. 175, 182 & n.29 (2015); Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL’Y REV. 193, 241 (1996). The quality of teaching provided by underpaid CLE instructors also may interfere with effective learning. See Elefant, *supra* note 32 (observing that lack of instructor pay results in “less-qualified speakers eager for ‘exposure,’ or speakers who will sell their firm or their product instead of imparting real value”).

66. See, e.g., Bichelmeyer, *supra* note 63, at 516–19 (suggesting that the inherent flexibility of courses provided through various distance learning platforms provides an opportunity to incorporate adult learning principles into CLE course offerings); Green, *supra* note 64 (proposing a problem method approach to CLE ethics offerings); Grigg, *supra* note 58 (proposing CLE programs that are adaptable, interactive, use hypotheticals, and are available in multiple settings); Harris, *supra* note 7, at 360 (proposing that CLE courses could better address a variety of learning styles).

as a person's ability and willingness to learn."⁶⁷ Not surprisingly, then, observations abound of inattention during mandatory CLE courses as attendees do crossword puzzles, catch up on emails, or just sit politely through the session, waiting to be dismissed.⁶⁸

Second, courses that emphasize active learning and intensive contact between instructor and student require a substantial investment of money and/or time. For example, Professors Rhode and Ricca cited the original version of a training program developed by the Indiana Public Defender Council as a "model" of incorporating adult learning principles into mandatory CLE offerings.⁶⁹ The program extended over 16 weeks and involved multiple meetings and intensive personal coaching on the participant's actual cases.⁷⁰ Subsequently, however, the Indiana program, which paid the instructors but was free to students, shrank from 16 weeks to 4 weeks and then became defunct.⁷¹ Although participating attorneys were enthusiastic about the experience, the multiple required meetings proved to be a logistical challenge, and the original outside funding for the program was not renewed.⁷²

Some mandatory CLE proponents argue that the system will right itself eventually; that is, the increase in attendees and oversight infrastructure that comes with a mandatory system eventually will increase the quality of the offerings.⁷³ As is evident from four decades of mandatory CLE experience, however, the system does not produce high quality programs with lasting results. CLE courses certainly would benefit from

67. Graffy, *supra* note 27, at 1651; *see also* Green, *supra* note 64, at 1097; Murphy & Schwen, *supra* note 28, at 524; Rhode & Ricca, *supra* note 7, at 8; Thomas, *supra* note 27, at 14.

68. *See, e.g.*, Graffy, *supra* note 27, at 1651; Mitchell, *supra* note 1, at 29; John M. Murtagh, *Mandatory Continuing Legal Education: Against*, ALASKA B. RAG, Mar.–Apr. 1998, at 14; Rhode & Ricca, *supra* note 7, at 8.

69. Rhode & Ricca, *supra* note 7, at 9 & n.87 (citing Murphy & Schwen, *supra* note 28, at 538). The Indiana training program was entitled, "Effective Representation of People Charged with Crimes Course." *See* Murphy & Schwen, *supra* note 28, at 522 n.5.

70. Murphy & Schwen, *supra* note 28, at 534–38.

71. Telephone Interviews with Donald Murphy, Co-developer of the Indiana program (Jan. 24 & June 19, 2017) (notes on file with author).

72. *Id.* Mr. Murphy is hopeful that the four-week version of the program may yet be revived. *Id.* The Indiana Public Defender Council still offers a coaching program specifically focused on preparation for trial. *Id.*

73. *See* Rhode & Ricca, *supra* note 7, at 7 (describing but not endorsing this argument).

incorporating better models of adult learner engagement, but there is little incentive for improvement when attendance is mandatory.⁷⁴

II. STATUS QUO: VOLUNTARY PRO BONO

The 1960s and 1970s witnessed a growing awareness of the power of the justice system to right many societal wrongs and the inability of indigent individuals to access that system effectively.⁷⁵ The ABA debated imposing a mandatory pro bono obligation during this time but ultimately opted for a voluntary approach, citing attorney opposition.⁷⁶ The voluntary system remains, apparently impervious to its failure to meet the ever-expanding need for free legal services.

A. *The Unmet Need for Legal Services*

The rationale for pro bono service—whether voluntary or mandatory—starts with need. Estimates vary as to the number of persons who need but cannot afford legal representation—a problem commonly referred to as “the justice gap.”⁷⁷ No credible estimation, however, would describe the gap as anything short of “vast.”⁷⁸

The continuing justice gap problem is reflected in the difficult circumstances facing the Legal Services Corporation (“LSC”), the nation’s

74. *See id.* at 9.

75. *E.g.*, SHELDON KRANTZ, *THE LEGAL PROFESSION: WHAT IS WRONG AND HOW TO FIX IT* 73 (2013).

76. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1, 29–33 (2004) (outlining history of mandatory pro bono proposals within the ABA); April Faith-Slaker, *What We Know and Need to Know About Pro Bono Service Delivery*, 67 *S.C. L. REV.* 267, 280–81 (2016) (same).

77. *E.g.*, *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., <http://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> (last visited Sept. 30, 2017) (defining “justice gap” as the “difference between the level of civil legal assistance available and the level that is necessary to meet the legal needs of low-income individuals and families”) [<https://perma.cc/M4HM-8ZY3>]. Inadequate funding for and availability of free representation in criminal matters is also a longstanding problem of enormous magnitude. *E.g.*, RHODE, *supra* note 33, at 30–35. This Article, however, concerns civil matters as pro bono efforts generally focus on matters in which the parties have no right to counsel.

78. *See, e.g.*, Tonya L. Brito et al., *What We Know and Need to Know About Civil Gideon*, 67 *S.C. L. REV.* 223, 223 (2016); Justin Hansford, *Lippman’s Law: Debating the Fifty-Hour Pro Bono Requirement for Bar Admission*, 41 *FORDHAM URBAN L.J.* 1141, 1173 (2014).

largest civil legal aid funder, and its clients.⁷⁹ Income eligibility for LSC services is capped at 125% of the federal poverty standard.⁸⁰ An estimated 20% of Americans meet this guideline at any given time and nearly 80% will experience significant economic hardship by age 60.⁸¹ Similarly bleak statistics are available from many sources.⁸²

Notwithstanding the enormity of these numbers, LSC has suffered deep funding cuts over the years,⁸³ a trend likely to continue at an even greater pace under President Donald Trump.⁸⁴ Even before the Trump presidency, 50% of financially eligible individuals seeking LSC-funded representation were turned away because of insufficient resources, amounting to “nearly a

79. See *Who We Are*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-lsc/who-we-are> (last visited Sept. 30, 2017) [<https://perma.cc/5NYZ-XP92>]. LSC distributes funds for civil legal assistance to hundreds of legal aid offices. *Id.*

80. *Id.*

81. Kathryn Alfisi, *Ensuring Justice for All: The White House Plan*, WASH. LAW., May 2016, at 28 (citing figures provided by Lisa Foster, Director of the U.S. Department of Justice Office for Access to Justice).

82. See, e.g., ELIZABETH KNEEBONE, BROOKINGS, *THE GREAT RECESSION AND POVERTY IN METROPOLITAN AMERICA 2* (2010), https://www.brookings.edu/wp-content/uploads/2016/06/1007_suburban_poverty_acs_kneebone.pdf (“[T]he latest data from the Census Bureau’s 2009 American Community Survey (ACS) confirm that the worst U.S. economic downturn in decades exacerbated trends set in motion years before, by multiplying the ranks of America’s poor. Between 2007 and 2009, the national poverty rate rose from 13 percent to 14.3 percent, and the number of people below the poverty line jumped by 4.9 million.”) [<https://perma.cc/F9CV-VZ4W>]; *Poverty in the United States, How many people were poor in 2015?*, NAT’L POVERTY CTR., UNIV. OF MICH., <http://poverty.umich.edu/about/poverty-facts/us-poverty/> (last visited Sept. 30, 2017) (“In 2015, 13.5% of all persons [in the United States] lived in poverty.”) [<https://perma.cc/C4AF-HV5F>].

83. See, e.g., Ronald S. Flagg, *Access to Civil Justice: Keeping America’s Promise*, 24 KAN. J. L. & PUB. POL’Y 571, 574–77 (2015); Patricia E. Roberts, *From the “War On Poverty” to Pro Bono: Access to Justice Remains Elusive for Too Many, Including Our Veterans*, 34 B.C. J.L. & SOC. JUST. 341, 347–48 (2014).

84. From the beginning, President Trump has advocated for LSC’s complete elimination. See, e.g., Alexander Bolton, *Trump Team Prepares Dramatic Cuts*, HILL (Jan. 19, 2017, 6:00 AM), <http://thehill.com/policy/finance/314991-trump-team-prepares-dramatic-cuts> (noting President Trump’s reliance on a Heritage Foundation budget-cutting proposal that would “eliminate” LSC) [<https://perma.cc/NRR8-N5MV>]; Debra Cassens Weiss, *Trump budget eliminates Legal Services Corp. funding*, A.B.A. J. (Mar. 16, 2017, 8:45 AM), http://www.abajournal.com/news/article/trump_budget_eliminating_funding_for_legal_services_corp (describing President Trump’s first federal budget, which included no funds for LSC, and attorney opposition thereto) [<https://perma.cc/LA2H-AD56>].

million” people every year.⁸⁵ The “nearly a million” figure does not include the many individuals who need and are financially eligible for an LSC-funded attorney but do not request legal representation. This group includes individuals who assume that representation would be impossible to procure or do not realize that the legal system could redress their problems.⁸⁶

Decreased funding to LSC also has resulted in restrictions on the types of matters handled, with various LSC-funded programs responding to budgetary constraints by eliminating representation in certain types of family law, domestic violence, housing, and consumer law cases.⁸⁷ These service cuts are in addition to politically motivated restrictions imposed by Congress, such as prohibitions on LSC-funded representation in class actions and representation of undocumented immigrants.⁸⁸

LSC representation cuts and restrictions have resulted in calls for other entities to “pick up the slack.”⁸⁹ Many organizations have responded, including law firms and state bar Interest on Lawyer Trust Accounts (“IOLTA”) programs.⁹⁰ Such efforts, however, do not make up the difference, and the justice gap remains stubbornly vast.⁹¹

85. See *The Unmet Need for Legal Aid*, *supra* note 77.

86. See Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 725–27 (2015).

87. Flagg, *supra* note 83, at 578.

88. See, e.g., Jota Borgmann & Brian Sullivan, *Demanding a Race to the Top: The 2015 Strike Against MFY Legal Services in Context*, 19 CUNY L. REV. 195, 203 (2016).

89. Jesse Newmark, *Legal Aid Affairs: Collaborating With Local Governments on the Side*, 21 B.U. PUB. INT. L.J. 195, 311–12 (2012).

90. See, e.g., Terry Carter, *Expressing Their Interest*, 93 A.B.A. J., June 2007, at 22, 23; Robert Granfield, *Institutionalizing Public Service in Law School: Results On the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1369–70 (2007). IOLTA programs operate in every state; in 2009, these programs generated more than \$124.7 million for civil legal aid providers. *What is IOLTA*, IOLTA, <http://www.iolta.org/what-is-iolta> (last visited Sept. 30, 2017) [<https://perma.cc/HLR9-DXF5>].

91. See BRENNAN CTR. FOR JUSTICE, *STRUGGLING TO MEET THE NEED: COMMUNITIES CONFRONT GAPS IN FEDERAL LEGAL AID* 4 (2003) (“Although supporters of the cuts and restrictions said that state, local and private funding would pick up the slack [in legal-services funding], and although bar leaders and legal aid supporters find broad support for legal services in many parts of the country, the bottom line is that these expectations have been largely unfulfilled.”); LEGAL SERVS. CORP., *RESOLUTION ADOPTING STRATEGIC DIRECTIONS FOR THE LEGAL SERVICES CORPORATION FOR 2000-2005*, at 1 (2000) (noting that contributions by state and local governments, private parties, charities, and pro bono organizations

B. The Profession's Insufficient Response

The ABA's model guidance to the profession always has incorporated an aspirational approach to pro bono obligations.⁹² As demonstrated below, that approach continues to be the norm throughout the United States, and insufficient pro bono participation is the result.

1. The Rules

In its current incarnation, ABA Model Rule 6.1 states that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.”⁹³ Fulfillment, however, remains voluntary: “A lawyer *should aspire* to render at least (50) hours of pro bono public legal services per year.”⁹⁴ Thus, unlike failure to comply with the other rules of professional conduct, an attorney's failure to fulfill her pro bono responsibilities is not punishable through the disciplinary process.⁹⁵

The aspirational nature of Rule 6.1 extends beyond the number of hours to the type of work encompassed under the “pro bono” label. The rule instructs that attorneys “should” fulfill “a substantial majority” of the 50 hours by providing direct legal services to people who cannot afford representation or to organizations engaged in such work.⁹⁶ But the hours also may be fulfilled in many other ways, including “participation in activities for improving the law, the legal system or the legal profession”—

“are not sufficient to meet the burden imposed by inadequate governmental investment”); David Luban, *Optimism, Skepticism, and Access to Justice*, 3 TEX. A&M L. REV. 495, 496 (2016) (“Of course, LSC is only part of the legal aid story, but other parts are no less grim.”).

92. See, e.g., Spencer Rand, *A Poverty of Representation: The Attorney's Role To Advocate for the Powerless*, 13 TEX. WESLEYAN L. REV. 545, 558–59 (2007) (describing 1969 ABA Model Code of Professional Responsibility, Ethical Consideration 2-25, which articulated attorneys' “responsibility” for providing free representation but dictated only that attorneys “should” find time to discharge that responsibility); Faith-Slaker, *supra* note 76, at 280–81 (describing opposition to ABA consideration of mandatory pro bono proposals).

93. MODEL RULES r. 6.1.

94. *Id.* (emphasis added).

95. See *id.* cmt. 12. Even calling Rule 6.1 a “rule” is somewhat misleading as it is the only Model Rule that does not actually prohibit, permit, or require anything. See Lawrence J. Fox, *Should We Mandate Doing Well By Doing Good?*, 33 FORDHAM URB. L.J. 249, 252–53 (2005).

96. MODEL RULES r. 6.1(a)(1)–(2).

a category that, depending on one's perspective, may include almost anything.⁹⁷

Most states follow the ABA's lead, with no state requiring any pro bono hours from its attorneys.⁹⁸ About half of the states have adopted the ABA goal of 50 voluntary hours per year, with the remainder setting a lesser goal—generally, 20 to 30 hours per year—or making no specific recommendation regarding the number of hours.⁹⁹ Moreover, all states with a pro bono rule follow the ABA's broad latitude in encouraging direct services for indigent clients but allowing service through many other avenues as well.¹⁰⁰

2. *The Results*

After almost 50 years of rules that encourage rather than require pro bono work, American attorneys do not come close to meeting the ABA's Rule 6.1 aspirations.¹⁰¹

Looking at pro bono reports provided by the ABA and state bar associations, however, one might conclude the opposite. The ABA in particular touts what seem like unrealistically high levels of pro bono

97. See MODEL RULES r. 6.1(b)(3); see also Rand, *supra* note 92, at 558 (“[A]n attorney representing a wealthy suburban athletic league could easily decide that he was meeting his pro bono obligation [under Rule 6.1].”).

98. Though no hours are required by New Jersey's version of Rule 6.1, see N.J. RULES OF PROF'L CONDUCT r. 6.1, New Jersey does have a statewide pro bono court appointment system that comes closer to requiring some degree of pro bono than any other statewide system, see *infra* notes 177–182 and accompanying text. At the other end of the spectrum, several states have no pro bono rule at all. See, e.g., ILL. RULES OF PROF'L CONDUCT, Preamble (noting that the absence of an Illinois version of Model Rule 6.1 is not intended to limit attorneys' pro bono responsibilities; rather, “this responsibility is not appropriate for disciplinary rules”); OHIO RULES OF PROF'L CONDUCT r. 6.1 (noting that the Supreme Court of Ohio has deferred consideration of Model Rule 6.1).

99. See, e.g., IOWA RULES OF PROF'L CONDUCT r. 32:6:1 (2013) (50 hours); MISS. RULES OF PROF'L CONDUCT r. 6.1(b) (20 hours); NEB. RULES OF PROF'L CONDUCT r. 3-506.1 (no specific number of hours).

100. By way of example, a broad “pro bono” definition can be found in any of the rules cited in the immediately preceding footnote.

101. See, e.g., Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 FORDHAM L. REV. 2761, 2785 (2014) (noting the lack of sufficient “voluntary movement” to meet the 50-hour goal); Deborah L. Rhode, *Squeezing the Public Good*, A.B.A. J., Nov. 2000, at 120, 120 (“Most practitioners make no pro bono contributions to the poor.”).

participation.¹⁰² One ABA study, for example, found that 89% of survey respondents performed at least one pro bono hour in 2011¹⁰³ and summed up its “key findings” as follows: “The results of this study reflect American lawyers’ continued awareness of pro bono as a professional responsibility and their strong ongoing commitment to volunteering their legal services to meet the legal needs of the poor.”¹⁰⁴

Certainly, thousands of attorneys do their part and more. This same ABA study, for example, found that responding attorneys provided an average of 56.5 pro bono hours in 2011; when attorneys who reported zero pro bono hours were removed from the calculation, the average contribution rose to 70.91 hours.¹⁰⁵

This impressive snapshot, however, is belied by the voluntary survey nature of the study.¹⁰⁶ Of the 379,755 attorneys receiving questionnaires, 2,876—approximately three-quarters of one percent—responded.¹⁰⁷ The ABA stated that this response rate was “consistent with industry expectations for a study of this nature,”¹⁰⁸ but it seems unlikely that attorneys who provided few or no pro bono hours would be inclined to complete the survey.¹⁰⁹ By contrast, a Virginia report that collected data from pro bono provider organizations in the state, rather than relying on individual attorney survey responses, suggests a less impressive picture.¹¹⁰ The Virginia report concluded that only nine percent of Virginia attorneys participated in organized pro bono programs.¹¹¹ Even factoring in the

102. See Rand, *supra* note 92, at 557 (describing ABA pro bono statistics as “straining credibility”).

103. See A.B.A. STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 9 (2013) [hereinafter SUPPORTING JUSTICE III].

104. *Id.* at vi.

105. *Id.* at vi & n.4.

106. See Luban, *supra* note 91, at 496–97.

107. See SUPPORTING JUSTICE III, *supra* note 103, at 2.

108. *Id.*

109. The ABA acknowledged this “possible” bias but concluded that “[i]t is also possible that those who are particularly interested in the issue—both supportive and unsupportive of pro bono—are more likely to self-select into the survey,” thus skewing the findings “not in favor of pro bono, but rather in favor of polarized views on this topic.” *Id.* at A-2. This Article leaves it to others to evaluate the soundness of these various “possibilities,” but it seems unlikely that the radically polarized survey respondents hypothesized by the ABA cancel out the bias toward respondents who are pro bono participants.

110. See Joanna L. Suyes & John Whitfield, *Is There a Pro Bono Gap in Virginia?*, VIRGINIA LAW., Feb. 2014, at 46.

111. See *id.* at 47.

likely number of pro bono hours provided outside of organized programs, the report projected that lawyers in the state provided only about eight percent of the pro bono hours envisioned by Rule 6.1.¹¹²

Survey results also vary considerably with how respondents define “pro bono.” Some survey respondents may count as “pro bono” almost any unpaid activity, including services provided to non-indigent friends or family.¹¹³ Not surprisingly, the closer a survey’s “pro bono” definition hews to the provision of direct legal services to individuals meeting LSC’s income restrictions, the lower the number of reported pro bono participants.¹¹⁴ For example, a Nebraska survey employing a strict definition found that approximately 58% of respondents had contributed at least one pro bono hour in 2014.¹¹⁵ The much lower percentage of participating Nebraska attorneys as compared to the ABA survey’s 89% probably reflected Nebraska’s “more detailed and specific definition of pro bono.”¹¹⁶ And, of course, even Nebraska’s 58% pro bono participation rate still reflects the mere 14% of attorneys who responded at all.¹¹⁷

Looking to minimize the confusion caused by the various methods and definitions employed in these and similar surveys, Professor Rhode examined a cross section of state-specific data and estimated that 15 to 18% of attorneys in most jurisdictions participate in pro bono work to some extent and that average per-attorney contributions ranged from 5 to 20 hours per year.¹¹⁸ Extrapolating from more recent law firm data, Sheldon Krantz estimated a national average of between three and six pro bono hours per attorney per year.¹¹⁹

112. *See id.* at 48.

113. *See* Rand, *supra* note 92, at 557–58.

114. *See* APRIL FAITH-SLAKER, LEGAL AID OF NEB., SUPPORTING JUSTICE IN NEBRASKA: A REPORT ON THE PRO BONO WORK OF NEBRASKA’S LAWYERS 13 (2015) (“[W]hen not restricted to an objective definition, attorneys’ subjective definitions of pro bono might be more expansive.”).

115. *Id.*

116. *Id.* Even in the ABA survey, the percentage of respondents who reported at least one pro bono hour fell nine points when the “pro bono” definition excluded, among other activities, “law-related” services provided at reduced cost to organizations “that support[] legal services for . . . the general public.” *See* SUPPORTING JUSTICE III, *supra* note 103, at 3–5, 9.

117. *See* FAITH-SLAKER, *supra* note 114, at 11.

118. RHODE, *supra* note 6, at 327–28. This estimate of average hours per attorney factored in those attorneys who do no pro bono work at all. *See id.*

119. *See* KRANTZ, *supra* note 75, at 80. Krantz relied on data finding that only 44% of attorneys in the nation’s largest law firms—who likely contribute a “sizeable” share of total pro bono hours—performed even 20 hours per year. *Id.* at 79–80.

Acknowledging, if tacitly, that the documented level of pro bono service demonstrates much room for improvement, the profession has focused on “mobilizing, leveraging, and targeting” more volunteer attorneys.¹²⁰ For example, bar associations and other non-profit organizations have implemented extensive pro bono outreach and training programs, with certificates and awards to recognize and incentivize pro bono service.¹²¹ Although decades of such initiatives undoubtedly have contributed to the pro bono pool, little evidence shows that such programs affect long-term increases in pro bono participation rates.¹²²

A more ambitious incentive implemented in nine states requires attorneys to report the extent of their pro bono work on an annual basis, even if the report simply states that the attorney did no pro bono work that year.¹²³ Mandatory reporting both reminds attorneys of the expectation imposed by Rule 6.1 and incorporates a shaming element, assuming that attorneys will not want to report zero pro bono hours.¹²⁴

In 2013, pro bono participation in the nine mandatory reporting states ranged from 33% of attorneys in Nevada to 57% in New Mexico.¹²⁵ The average number of hours per attorney in these states ranged from 15 hours in Mississippi to 47 hours in Nevada.¹²⁶ These numbers are fairly high, and it seems logical that mandatory reporting might at least nudge participation rates and hours upward. No reliable basis of comparison to

120. Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—And Should Know—About American Pro Bono*, 7 HARV. L. & POL’Y REV. 83, 84 (2013); see also RHODE, *supra* note 6, at 72 (“Unless and until we can build a broader base of support for obligations that substantially benefit the most underserved groups, the prudent alternative would be to focus on strengthening voluntary initiatives . . .”).

121. See, e.g., Ann Juergens & Diane Galatowitsch, *A Call to Cultivate the Public Interest: Beyond Pro Bono*, 51 WASH. U. J.L. & POL’Y 95, 109 (2016).

122. See, e.g., Cummings & Sandefur, *supra* note 120, at 94–95 (finding that far more significant to pro bono behavior are workplace factors, such as attorneys feeling financially comfortable enough to take the time to volunteer their services).

123. Florida, Hawaii, Illinois, Indiana, Maryland, Mississippi, Nevada, New Mexico, and New York require pro bono reporting. *Pro Bono Reporting*, AM. BAR ASS’N, http://www.americanbar.org/groups/probono_public_service/ts/pbreporting.html (last visited Sept. 30, 2017) [<https://perma.cc/EP3E-RAB2>]. Thirteen additional states provide a vehicle for attorneys to *voluntarily* report their pro bono work. See *id.*

124. See RHODE, *supra* note 6, at 167–68. Mandatory reporting also provides a source of data presumably more reliable than voluntary response surveys. See *id.*

125. The most recent data available from the ABA is from 2013. See *Pro Bono Reporting*, *supra* note 123.

126. These calculations included the attorneys who provided zero pro bono hours. See *id.*

states without such a requirement exists, however, and studies conducted thus far have yet to establish a positive effect from mandatory reporting.¹²⁷

C. A Mandatory Pro Bono Obligation

The inadequacy of voluntary pro bono efforts logically leads to the consideration of a mandatory system. At least conceptually, mandatory pro bono is justified by “unauthorized practice of law” (“UPL”) restrictions that both privilege the legal profession and exacerbate the need for free legal services.¹²⁸

Like anyone else with a legal problem, an indigent person is far more likely to win her case—to avoid eviction from her home, avoid losing custody of her children, avoid deportation, and so on—if she is represented.¹²⁹ With few exceptions, however, UPL restrictions limit representation in such matters to licensed attorneys.¹³⁰ The bar has made a priority of preserving such restrictions.¹³¹

127. See Cummings & Sandefur, *supra* note 120, at 94 n.37 (noting that although Florida reported substantially increased pro bono rates after instituting mandatory reporting, many other factors may have influenced the increase); Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC’Y REV. 79, 100 (2007) (finding no relationship between state reporting requirements and rates of pro bono participation).

128. See, e.g., Fox, *supra* note 95, at 252 (“[I]f we lawyers want to maintain our monopoly on legal services, we clearly have an obligation individually to meet the legal needs of the poor.”); Lininger, *supra* note 6, at 1343.

129. See, e.g., Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers’ Impact*, 80 AM. SOC. REV. 909, 924 (2015) (finding “spectacular” outcome differences between legal matters handled by an attorney and legal matters handled on a pro se basis).

130. The ABA collects and describes the various states’ UPL provisions. See *Task Force on the Model Definition of the Practice of Law*, AM. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html (last visited Sept. 30, 2017) [<https://perma.cc/M44U-98E6>]. UPL restrictions may be ripe for legal challenge in the wake of the Supreme Court’s 2015 decision that the Federal Trade Commission could hold a state board of dental examiners accountable for its anticompetitive efforts to drive non-dentist teeth whitening practitioners out of the state. See *N. C. State Bd. of Dental Exam’ers v. Fed. Trade Comm’n*, 135 S. Ct. 1101 (2015). UPL restrictions, however, have resisted such challenges before as seen in the wake of a 1970s flurry of antitrust enforcement efforts against the organized bar, which eventually gave way to today’s vigorously enforced UPL rules. Cf. Anya E.R. Prince & Arlene M. Davis, *Navigating Professional Norms in an Inter-Professional Environment: The “practice” of Healthcare Ethics Committees*, 15 CONN. PUB. INT. L.J. 115, 140 (2016).

131. See, e.g., Johnstone, *supra* note 65, at 218–20; Lininger, *supra* note 6, at 1347.

UPL restrictions protect attorneys from competition and often may protect clients, but they also limit the pool of competent individuals available to represent indigent persons without violating the law themselves.¹³² Professor Rhode explains the “straightforward” justification for mandatory pro bono under these market conditions: “Because access to law so often requires access to lawyers, they bear a particular responsibility to help make legal services available. As courts and bar ethical codes have long noted, the state grants lawyers special monopoly privileges that impose special obligations” for “fundamental fairness” in the legal system.¹³³

Mandatory pro bono opponents protest that the legal profession is not particularly responsible for poverty and that attorneys, therefore, are not particularly responsible for solving the poverty-driven justice gap.¹³⁴ Responsibility for circumstances underlying the gap of course extends well beyond attorneys. But this acknowledgement does not obviate attorneys’ obligation to provide assistance when—because of UPL restrictions—no other individuals are permitted to do so and when the limitation on supply so directly benefits the group—attorneys—who are called upon to help.

Beyond the complaint that attorneys should not be singled out for service, mandatory pro bono opponents advance a host of other objections.¹³⁵ Some of the most common objections are outlined below, and all of them raise important considerations suggesting a cautious path forward. None, however, establish a significant enough concern to derail the mandatory concept.

132. See Selina Thomas, *Rethinking Unauthorized Practice of Law in Light of the Access to Justice Crisis*, 23 PROF. LAW. 17 (2016).

133. RHODE, *supra* note 33, at 54; see also Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 69 (1990). In earlier writings, Professor Rhode stopped short of endorsing a broad pro bono requirement, a choice criticized as inconsistent with her evaluation of the inadequacies of voluntary pro bono. See Lininger, *supra* note 6, at 1353–55. Rhode’s more recent work evinces a change of position. See RHODE, *supra* note 33, at 54 (advocating a 50 hour-per-year pro bono requirement).

134. See, e.g., 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, 152–54 (2001); Michael A. Mogill, *Professing Pro Bono: To Walk the Talk*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 5, 22 (2001).

135. See, e.g., Kellie Isbell & Sarah Sawle, *Pro Bono Publico: Voluntary Service and Mandatory Reporting*, 15 GEO. J. LEGAL ETHICS 845, 850–52 (2002).

1. *Constitutionality*

Justice Sonia Sotomayor's recent comment that she believes in "forced labor" for pro bono obligations brought a flurry of criticism, including the argument that mandatory pro bono would violate the Thirteenth Amendment's prohibition on "involuntary servitude."¹³⁶ Other constitutional arguments against mandatory pro bono include the First Amendment's prohibition on forced association, the Fifth Amendment's prohibition on uncompensated takings, and the Fourteenth Amendment's equal protection guarantee.¹³⁷

No state employs a mandatory pro bono scheme, so these constitutional theories have yet to be tested directly. Similar arguments, however, have been widely rejected in analogous contexts, including cases in which attorneys have challenged uncompensated court appointments.¹³⁸ Mandatory pro bono requirements might be found unconstitutional even if court appointments are not.¹³⁹ The current legal landscape, however,

136. See *supra* note 3 and accompanying text; Ilya Somin, *Justice Sotomayor's Misguided Advocacy of "Forced Labor" for Lawyers [Updated With a Response to Steve Lubet]*, WASH. POST (May 20, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/20/justice-sotomayors-misguided-advocacy-of-forced-labor-for-lawyers/?utm_term=.6c544914d86d [<https://perma.cc/KD3J-SFCK>].

137. See, e.g., Reed Elizabeth Loder, *Tending The Generous Heart: Mandatory Pro Bono and Moral Development*, 14 GEO. J. LEGAL ETHICS 459, 464–65 (2001).

138. See, e.g., Family Div. Trial Lawyers of Superior Court, Inc. v. Moultrie, 725 F.2d 695, 704–07 (D.C. Cir. 1984) (rejecting involuntary servitude and takings arguments, though noting that particularly burdensome appointments could be unconstitutional takings if they deprived attorneys of the ability to make a living); Madden v. Twp. of Delran, 601 A.2d 211, 215–16 (N.J. 1992) (rejecting takings argument against municipal court assignments system). See generally Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1131–32 (1991); Lininger, *supra* note 6, at 1357; Millemann, *supra* note 133, at 49–55. In the one reported challenge to required pro bono reporting, see *supra* notes 123–127 and accompanying text, the Eleventh Circuit rejected the plaintiffs' due process and equal protection arguments. See Schwartz v. Kogan, 132 F.3d 1387, 1392 (11th Cir. 1998).

139. See John C. Scully, *Mandatory Pro Bono: An Attack on the Constitution*, 19 HOFSTRA L. REV. 1229, 1243 (1991) (arguing that mandatory pro bono would lack the "careful balancing of interests" that might justify court appointment in a particular matter). *But see* Cramton, *supra* note 138, at 1132 ("A mandatory pro bono program requiring 20 hours a year of work for poor clients in civil matters raises fewer constitutional questions than does the court appointment practice.").

provides little reason to believe that such a reversal of course is imminent or likely.¹⁴⁰

2. *Misdirected Resources*

Some mandatory pro bono opponents argue that the substantial energy and resources required to enact, implement, and administer mandatory measures would be better directed toward fighting for the superior solution: increased government funding for LSC and other professional civil legal aid providers.¹⁴¹

This argument begins with the clearly correct proposition that professional legal aid attorneys generally provide the best legal aid representation. The argument falters, however, with the assumption that moving from voluntary to mandatory measures would leech energy and funding from that goal. Decades of voluntary pro bono have seen nothing but decreased funding for LSC and similar organizations.¹⁴² Although moving to a mandatory system might accelerate LSC's funding decline at an even more alarming rate, it cannot be said that remaining in a voluntary system is likely to bring improved resources to professional legal aid providers.

Indeed, if, as seems certain, mandatory pro bono measures would be unpopular among various segments of the attorney population, such resistance might actually spark a drive for *increased* legal aid funding. Such funding might come from local governments, as happened when the Chief Justice of the New Jersey Supreme Court ordered pro bono appointments to represent indigent sex offenders challenging their obligation to register with local police. Attorney pushback was swift and vociferous and resulted in the governor allocating new funds to hire additional public defenders to handle

140. See Somin, *supra* note 136 (arguing that although mandatory pro bono *should* be considered unconstitutional, “such a program might well be permissible under existing Supreme Court precedent”).

141. See, e.g., Atkinson, *supra* note 134, at 131 (arguing that a push for mandatory pro bono would put increased funding for professional legal services “farther out of reach”); Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. 1459, 1467 (2007) (arguing that mandatory pro bono “will likely make it harder to obtain political support” for increased legal services funding); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 99–100 (1990) (arguing that the substantial funds necessary for mandatory program administration would be better spent on client services).

142. See *supra* notes 83–84 and accompanying text.

these cases.¹⁴³ Additional funding also might come from attorneys themselves, as mandatory pro bono measures likely would come with a buy-out option for attorneys who are unable or unwilling to provide direct services in any given year, with proceeds going to legal aid providers.¹⁴⁴

3. *Second-Rate Representation*

Another related argument against mandatory pro bono is that the quality of conscripted representation by resentful attorneys will be especially low.¹⁴⁵ Some attorneys may work less diligently on unpaid matters, and pro bono clients may be less likely to take action against inattentive or otherwise incompetent counsel.¹⁴⁶ Competence, however, is no less an obligation in pro bono representation than it is in paid representation, and the vast majority of attorneys will provide competent legal representation, at the very least to protect their bar licenses and reputations.¹⁴⁷

4. *Current Volunteers*

Yet another objection to mandatory pro bono concerns the potentially negative impact on current pro bono volunteers. Mandating pro bono for all attorneys might diminish the enthusiasm and commitment of current participants—precisely those attorneys who might serve as models and

143. See Michael P. Ambrosio & Denis F. McLaughlin, *The Redefining of Professional Ethics in New Jersey Under Chief Justice Robert Wilentz: A Legacy of Reform*, 7 SETON HALL CONST. L.J. 351, 409–10 (1997).

144. The current version of Model Rule 6.1 allows attorneys unable to fulfill the recommended 50 voluntary hours per year to “discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means” in an amount “reasonably equivalent to the value of the hours of service that would have otherwise been provided.” MODEL RULES r. 6.1 cmt. 9. A similar buy-out provision presumably would be seen as even more necessary in a mandatory system. See, e.g., Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL’Y 571, 607 (2011) (arguing for a mandatory system with a buy-out option equivalent to legal aid attorneys’ average two-week salary).

145. See, e.g., Somin, *supra* note 136.

146. See Barbara Graves-Poller, *Is Pro Bono Practice in Legal “Backwaters” Beyond the Scope of the Model Rules?*, 13 U.N.H. L. REV. 1, 4–5, 24 (2015).

147. Competence is required of all attorneys in all matters. See MODEL RULES r. 1.1; see also Ann Fenton, *The Pro Bono Paradox*, DRI FOR DEF., March 2011, at 75 (“Lawyers should provide pro bono services, [but] must do so competently.”).

mentors for those new to pro bono work.¹⁴⁸ Such a mandate might even cause current volunteers to decrease their hours to the bare minimum requirement.¹⁴⁹ Any mandatory scheme should incorporate formal recognition and other incentives for volunteers who remain willing to exceed minimum expectations.

5. *Insufficient Response*

Finally, many have observed that requiring every attorney to contribute 50 or more pro bono hours per year still would not close the justice gap.¹⁵⁰ Rather than undermining the case for a mandatory system, however, this argument underscores the need for multi-faceted solutions. In addition to increased funding for LSC and similar organizations, such solutions could include less-restrictive UPL regulations, allowing non-attorneys to provide certain legal services,¹⁵¹ and “low-bono” initiatives, allowing greater access to representation for clients who cannot afford market-rate attorneys but earn too much to qualify for LSC services.¹⁵²

148. See, e.g., Loder, *supra* note 137, at 474 (discussing potential “undermining effect” on current volunteers).

149. *Id.* at 477–78.

150. See, e.g., Granfield, *supra* note 90, at 1410 (finding it “extremely doubtful” that private pro bono “will ever adequately provide for the legal needs of the poor”); Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM URB. L.J.* 129, 152 (2010) (“[E]ven if every lawyer in the country did 100 more hours a year of pro bono work, this would amount to an extra thirty minutes per U.S. person a year, or about an hour per dispute-related (potentially litigation-related) problem per household.”).

151. See, e.g., Lininger, *supra* note 6, at 1364 (arguing that, if efforts to increase pro bono are insufficient, “state legislatures should begin to roll back the legal monopoly that is responsible for the inaccessibility of legal services”); Sandefur, *supra* note 12, at 910 (finding that non-attorney representatives can have a “powerful impact” in many “civil matters that can lead to bankruptcy, penury, homelessness, and lost custody”); Thomas, *supra* note 132, at 22 (encouraging reassessment of UPL restrictions in light of “the public’s need for access to the civil justice system and the public’s right to have meaningful choices in civil legal representation”). A related initiative might support increased resources to promote effective *pro se* representation. See, e.g., Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 *FORDHAM L. REV.* 1573, 1581 (2002).

152. See Hadfield, *supra* note 150, at 148 (documenting “average” households’ lack of access to legal services).

Although requiring mandatory pro bono hours is not a complete solution, the requirement would mean that many more indigent individuals would have access to sorely needed legal representation.¹⁵³ To accept the voluntary pro bono status quo is to forego an enormous potential resource.

III. RETHINKING THE STATUS QUO

Mandatory CLE does not serve its purpose of increasing attorney competence. Voluntary pro bono does not come close to meeting the public need created, in part, by monopolistic UPL restrictions. These observations lead to more than one potential conclusion, including simply eliminating mandatory CLE. But the possibility of trading an unjustified requirement for one with promise should be explored and leveraged.

A. Counting Pro Bono Hours Toward CLE Requirements

One currently promoted alternative implicitly recognizes the potential for a status quo shift. Beginning with Wyoming in 2003, 11 states now allow attorneys to count a small number of qualifying pro bono hours toward mandatory CLE requirements.¹⁵⁴ This arrangement is justified both as providing a significant learning experience for the attorney, thus fitting within mandatory CLE's educational mandate, and as encouraging additional pro bono work, thus making a dent in the justice gap not filled through traditional pro bono incentives.¹⁵⁵

153. See, e.g., Tom Lininger, *Volition and Voltaire: A Response to Professor Bagenstos*, 101 NW. U. L. REV. COLLOQUY 192, 194 (2007) ("Hoping for a surge in voluntary pro bono work (which I'll admit would be the perfect solution) could delay the improvement that a mandatory regime could bring."); Steven Wechsler, *Attorneys' Attitudes Toward Mandatory Pro Bono*, 41 SYRACUSE L. REV. 909, 924 (1990) ("Perhaps the single most compelling argument in favor of making pro bono service mandatory is the tremendous unmet legal needs of the poor in our society and the fact that mandatory pro bono appears to be one of the most viable ways for beginning to meet those needs.").

154. The 11 states are Arizona, Colorado, Delaware, Louisiana, Minnesota, New York, North Dakota, Ohio, Tennessee, Washington, and Wyoming. *CLE Rules*, AM. BAR ASS'N, http://www.americanbar.org/groups/probono_public_service/policy/cle_rules.html (last updated Oct. 2017) [<https://perma.cc/Q46B-TX2A>].

155. See John Caher, *State Board Adopts CLE Rules Allowing for Pro Bono Credit*, N.Y.L.J., Mar. 6, 2000, at 1; Melissa H. Weresh, *Service: A Prescription for the Lost Lawyer*, 2014 J. PROF. LAW. 45, 77–78 (2014); Jason B. Wesoky, *Credit Where Credit Is Due*, COLO. LAW., Aug. 2012, at 115.

The impact of this seemingly win-win arrangement on pro bono service has yet to be determined. As a large-scale solution, however, it presents problems both in practice and in theory. As a practical matter, state rules protect the profitable mandatory CLE industry. Although the rules vary somewhat among the 11 states, most allow three or fewer yearly mandatory CLE credit hours to be fulfilled by pro bono work, and most require 15 hours of pro bono work to earn those three hours of CLE credit.¹⁵⁶ Although the nod to pro bono work is undoubtedly a welcome gesture,¹⁵⁷ the math undermines its value as a pro bono incentive.

One option is to change the math, allowing attorneys to fully discharge their mandatory CLE obligations through pro bono hours and allowing one pro bono hour to count for one mandatory CLE hour.¹⁵⁸ The typical 10 to 15 mandatory CLE hours required in most states might not encourage the most meaningful pro bono contributions, but that problem could be alleviated somewhat if participants could discharge, say, 45 hours once every three years rather than 15 hours every year.

A more fundamental issue, however, is that CLE and pro bono work are intended to serve different purposes.¹⁵⁹ If completing the full complement of mandatory CLE hours does not enhance attorney competence, then such hours should not be required. If, on the other hand, more pro bono service is needed, then the bar should consider making pro bono mandatory without tying the hours to an ill-fitting mandatory CLE structure.

B. A Full Switch Is Premature

Although counting pro bono hours toward CLE requirements is an unsatisfying solution, substantial reasons still favor a limited approach rather than a full-scale switch to voluntary CLE and mandatory pro bono. First, opposition on both fronts would be formidable and probably insurmountable. Second, although the absence of data justifies eliminating mandatory CLE, far better data is needed regarding mandatory pro bono before it could be justified as an effective approach to addressing the justice gap.

156. See Weresh, *supra* note 155, at 77–78.

157. See Rhode & Ricca, *supra* note 7, at 10 (noting popularity of such programs notwithstanding their limitations, especially among attorneys who view mandatory CLE as “mindless busywork”).

158. See Lininger, *supra* note 6, at 1363.

159. See Christopher D. Bryan, *Why Lawyers Should Just Say No*, COLO. LAW., Aug. 2012, at 115; Shepard, *supra* note 11, at 322–23.

1. Political Impossibility

As a practical matter, a status quo switch is politically impossible at this juncture. From the CLE side, Michigan is the only state to have rescinded a CLE requirement, and that requirement was limited to ten hours per year for the first three years of bar admission with courses provided by the state bar association for free.¹⁶⁰ The hope was that Michigan attorneys would develop an appreciation for CLE and would voluntarily pay for CLE courses after the three-year mandatory CLE period expired.¹⁶¹ That hope did not materialize, and new Michigan attorneys resented mandatory attendance at the admittedly sub-par offerings.¹⁶² Thus, the program was of no financial value to providers, and its elimination in 1994, five years after adoption, was accomplished apparently with little resistance.¹⁶³ Eliminating mandatory CLE in other jurisdictions—where courses, for the most part, are not free and where the requirement extends throughout attorneys' professional lives—would undoubtedly meet fierce resistance from bar associations and other providers.

From the pro bono side, imposing a new requirement would also encounter widespread resistance. As observed by Professor David Luban, “[M]andatory 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.”¹⁶⁴ In addition to the anti-mandatory

160. See Michael Franck, *Michigan's MCLE—An Idea Whose Time Has Not Yet Come?*, 72 MICH. B.J. 1132, 1132 (1993).

161. *Id.*

162. *Id.*

163. See Davison, Farmer & Kane, *supra* note 1, at 10 (“The [Michigan] experiment was widely viewed as a disaster.”); Cynthia McLoughlin, *Michigan Lawyers Reject Mandatory Continuing Legislation*, MICH. SOC’Y FOR PSYCHOANALYTIC PSYCHOL. (Oct. 2002), <http://www.mspp.net/mcloughlin2.htm> (“[The Michigan rule] was universally detested by the young lawyers (who found the requirements irrelevant to their professional educational needs), and no one else liked it, either.”) [<https://perma.cc/8548-V6EJ>]; TASK FORCE ON CONTINUING LEGAL EDUC., *supra* note 44, at 26–27, 27 n.11 (“The Michigan Bar’s recommendation to rescind the rule was based on . . . its conclusion that the MCLE system . . . was not achieving its intended result of ensuring that attorneys newly admitted to the practice of law acquire the values and skills that are necessary to discharge their professional duties Course evaluations and comments from new attorneys about the MCLE system were overwhelmingly negative.”).

164. David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58, 58 (1999); see also Lardent, *supra* note 141, at 78–79 (noting the “ultimate futility” of mandatory pro bono proposals given “political realities”).

arguments discussed above,¹⁶⁵ attorneys as a practical matter are unlikely to support imposing a new obligation on themselves. The resistance might be particularly fierce—and understandably so—from attorneys practicing in settings with fewer resources to absorb the cost of the added obligation. Removing the CLE requirement at the same time might blunt some of the opposition. Effective pro bono, however, probably requires more hours than are currently imposed by CLE requirements.¹⁶⁶ Just as the relative burden from mandatory CLE is greater for solo practitioners and other attorneys with fewer resources,¹⁶⁷ so too would be the pro bono burden.

2. Dearth of Mandatory Pro Bono Experience

In addition to the political hurdles, adding a broad pro bono requirement would be unjustified from an evidentiary perspective. At this point, scholars' understanding of even *voluntary* pro bono efforts is limited. Sociologist Rebecca Sandefur and others have identified the urgent need for better research in the pro bono arena.¹⁶⁸ For example, what types of pro bono training and oversight are most useful for attorneys who come from a variety of backgrounds? Are certain types of legal matters more amenable than others to pro bono representation? How many hours are required realistically for effective representation in different types of matters?¹⁶⁹

As little as is known about the efficacy of voluntary pro bono models, even less is understood about mandatory models because, as discussed below, so few jurisdictions have experimented with mandatory programs. Data is needed to discern, for example, the extent to which mandatory programs increase the net number of pro bono hours and whether they improve the quality of pro bono representation. Without such data, the two

165. See *supra* notes 134–151 and accompanying text.

166. See, e.g., Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS 63, 87 (2016) (observing that even 30 hours of pro bono service is “insufficient to resolve all but uncomplicated matters”).

167. See *supra* notes 31–32 and accompanying text.

168. See Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WISC. L. REV. 101, 103–04 (2013); Cummings & Sandefur, *supra* note 120, at 103–05; Sandefur, *supra* note 129, at 927; see also Faith-Slaker, *supra* note 76, at 284 (“Without more information, . . . programs and policies meant to increase pro bono participation and ultimately provide better access to justice for the impoverished population rest on little more than speculation.”).

169. The authorities referenced in the immediately preceding footnote raise these questions, among others.

sides to the mandatory debate can continue their arguments only in the hypothetical realm.¹⁷⁰

Various bar association committees occasionally have proposed mandatory programs, but almost none have been implemented.¹⁷¹ One “renegade jurisdiction” that did adopt such a mandate is Orange County, Florida.¹⁷² The Orange County Bar Association requires all members to accept two Legal Aid case referrals per year, contribute \$350 to Legal Aid, or participate in an alternative approved project.¹⁷³ Members credit the program’s continuing success to its 50-year duration, which has instilled acceptance of pro bono as the norm of practice, and to its even-handed structure, which includes no exemptions.¹⁷⁴ Still, bar membership itself is voluntary,¹⁷⁵ and an initiative to implement the Orange County plan on a statewide basis was unsuccessful.¹⁷⁶

170. Cf. Loder, *supra* note 137, at 474–75 (“[I]t is surely premature to rule out a pro bono requirement by relying on limited research.”).

171. See, e.g., Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 425–26 (2003) (describing the ABA’s rejection of mandatory pro bono initiatives in 1983, 1993, and 2001).

172. Cummings & Sandefur, *supra* note 120, at 84 & n.7; see also Wechsler, *supra* note 153, at 920–21, 921 n.77 (identifying seven counties with mandatory pro bono programs in 1987). El Paso County, Texas, another “renegade jurisdiction,” see Cummings & Sandefur, *supra* note 120, at 84 & n.7, required county bar members to accept pro bono criminal defense work; that program, however, was suspended in 2014 for reasons that are unclear. See Kendra Emi Nitta, Comment, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909, 934 (1996) (describing the El Paso program); Email correspondence with Nancy Gallego, Executive Director, El Paso Bar Association (Apr. 27, 2016) (on file with author) (confirming discontinuance of program, but providing no reason).

173. See *Pro Bono Policy of the Legal Aid Society Board of Trustees*, LEGAL AID SOC’Y OF THE ORANGE CTY. BAR ASS’N, <http://www.legalaidocba.org/pro-bono-policy> (last visited Sept. 30, 2017) [<https://perma.cc/YTA2-KTK8>]; Catherine A. Tucker, *Celebrating 50 Years: History of the Pro Bono Program of the Legal Aid Society of the Orange County Bar Association, Inc.*, THE BRIEFS, Oct. 2010, at 13.

174. See Wechsler, *supra* note 153, at 935–37 (describing Orange County attorney survey results); Tucker, *supra* note 173, at 13.

175. See Lardent, *supra* note 141, at 80 (“Voluntary bar programs which condition membership on the commitment to provide service or funds, like the program in Orange County, Florida, certainly are not mandatory since the only ‘sanction’—the inability to join the local bar—has no direct economic or professional impact on the attorney.”).

176. See *History of Pro Bono Legal Assistance in Florida*, FLORIDAPROBONO, http://www.floridaprobono.org/about/item.3304-History_of_Pro_Bono_Legal

The closest analogy to a statewide pro bono requirement is found in New Jersey, where most bar members must register with the Superior Court's pro bono appointment system.¹⁷⁷ If assigned a case, the attorney is required to accept it, though the system exempts various categories of attorneys, including those who performed 25 qualifying pro bono hours in the preceding year.¹⁷⁸ The New Jersey system is a substantial step short of mandatory pro bono, as attorneys are not assigned cases on a yearly, biannual, or other regular basis.¹⁷⁹ Still, New Jersey attorneys tend to perceive themselves as being under a pro bono requirement, and many resent the imposition.¹⁸⁰

The literature reveals no current assessments of the New Jersey system's effectiveness in addressing that state's justice gap. In 2015, the

¹⁷⁷ *Assistance in Florida* (last visited Sept. 30, 2017) [https://perma.cc/H868-JUZ9].

¹⁷⁷. See *New Jersey Pro Bono Information*, N.J. COURTS, <http://www.njcourts.gov/attorneys/probono.html> (last visited Sept. 30, 2017) (“Attorneys are assigned *pro bono* cases through the Administrative Office of the Court’s *pro bono* computer system, which maintains an alphabetical list of attorneys eligible for *pro bono* assignment for each county.”) [https://perma.cc/DL4T-VRSB]. The obligation stems from *Madden v. Twp. of Delran*, 601 A.2d 211, 222 (N.J. 1992), which held that New Jersey attorneys must accept, without pay, judicial assignment to represent indigent defendants.

¹⁷⁸. Also exempted are government attorneys, legal services attorneys, and retired attorneys. Memorandum from Glenn A. Grant, J.A.D. to Members of the N.J. Bar (Dec. 29, 2015), <http://www.njcourts.gov/attorneys/assets/probono/memotothebaron exemptions.pdf> [https://perma.cc/S2Z8-K2PB]. The pro bono exemption—similar to the broad “pro bono” definition in Model Rule 6.1—includes work not only for direct service providers, but also for other “nonprofit charitable, religious, civic, community, or educational organizations or governmental entities . . . where payment of standard legal fees would significantly deplete the organization’s or entity’s economic resources or would otherwise be inappropriate.” 1 N.J. PRAC., CT. R. ANN 1:21-11(a)(iv).

¹⁷⁹. See *Frequently Asked Questions—Pro Bono Assignments*, N.J. COURTS, <http://www.njcourts.gov/attorneys/assets/probono/probonofaq.pdf> (last visited Nov. 9, 2017) (“Attorneys are called upon whenever their name reaches the top of the list. For example, depending on the county, an attorney may be required to complete two cases a year or one case every two years.”) [https://perma.cc/E6GA-2SLR].

¹⁸⁰. See, e.g., John M. Covaleski, *More Pro Bono? A Case with Legs*, N.J.L.: WKLY. NEWSPAPER, July 4, 2005, at 1 (“New Jersey is believed the only state with mandatory pro bono, a fact that has long infuriated private practitioners here.”); MichaelAnn Knotts, *More Mandatory Pro Bono Likely?*, N.J.L.: WKLY. NEWSPAPER, July 21, 2003, at 1 (“The mandatory pro bono system has long infuriated many lawyers in New Jersey, the only state in the nation in which attorneys are forced to take on cases for free.”).

Superior Court assigned 1,546 pro bono cases, but the judiciary does not keep track of how often each individual attorney is assigned to a case, how many hours are spent handling such cases, or how well such cases are handled.¹⁸¹ The literature also does not reveal why the New Jersey system apparently is the subject of widespread resentment, when Orange County attorneys do not seem to share that feeling about their system.¹⁸² The difference could stem from the fact that Orange County bar membership is optional, that its pro bono requirements apply to all bar members without exception, or that its system is administered through Legal Aid rather than through the court system. Determining the cause of the difference could shine a much-needed light on more and less effective mandatory models.

C. Shifting Responsibility to Aspiring Attorneys

With pro bono participation rates far below 50 hours per year and with little support from attorneys for imposing a pro bono requirement on themselves, the profession has turned its gaze to a group with little ability to protest: aspiring attorneys—a group that includes both recent law school graduates applying for bar admission and current law students.¹⁸³ The bar applicant effort seems to have stalled after a successful push in New York, and the law student effort—although fairly widespread—has yet to demonstrate the anticipated benefits.

Beginning in 2015, New York has required applicants to complete 50 pro bono hours as a condition of admission to the bar.¹⁸⁴ Supporters believed that the new requirement would both help address New York's justice gap and “ensure that all lawyers who practice in New York

181. Email from Julie A. Higg, Chief of Judicial Services (May 18, 2016) (on file with author). The 1,546 attorneys to whom these cases were assigned represent approximately 3.5% of the 41,569 lawyers active in New Jersey in 2015. See *ABA National Lawyer Population Survey*, *supra* note 19.

182. See *supra* note 174 and accompanying text.

183. See, e.g., Atkinson, *supra* note 134, at 162 (arguing that mandatory student pro bono is unfair for a variety of reasons, including that law students “have the least say in their professional obligations”); Cummings & Sandefur, *supra* note 120, at 84 (“[U]nwilling to directly force lawyers to provide mandatory services, [New York]’s chief judge issued a rule targeting aspirants—requiring law students to perform fifty hours of unpaid work as a condition of bar admission.”).

184. See N.Y. Ct. R. § 520.16. A 1997 effort to mandate pro bono service for all New York attorneys was widely and successfully resisted by rank-and-file bar members. Granfield, *supra* note 90, at 1362–64.

understand that a culture of service is a core value of our profession.”¹⁸⁵ Initial reports attest to the ready availability of pro bono opportunities for all New York applicants who require them,¹⁸⁶ but it is premature to assess the program’s overall efficacy.¹⁸⁷

No other state has followed New York’s lead.¹⁸⁸ In 2016, California Governor Jerry Brown vetoed a similar measure, citing the unfair extra burden that the pro bono requirement would foist on new law graduates, many of whom already were burdened with enormous debt.¹⁸⁹ Governor Brown suggested that lowering the cost of law school would more effectively expand new graduates’ pro bono opportunities.¹⁹⁰ Measures also stalled in Connecticut and New Jersey, with court-sponsored study groups opining that law schools in those states already had undertaken measures to instill in students a sense of the importance of pro bono work.¹⁹¹

Indeed, law schools have implemented programs to promote student pro bono, an effort that has taken on additional urgency with recent

185. Jonathan Lippmann, *New York’s Template to Address the Crisis in Civil Legal Services*, 7 HARV. L. & POL’Y REV. 13, 26 (2013).

186. See Stephen Ceasar, *State Bar Considers Requiring All Law Students to Do Free Legal Work*, L.A. TIMES (Mar. 12, 2015, 4:00 AM), <http://www.latimes.com/local/california/la-me-adv-legal-aid-students-20150312-story.html> [<https://perma.cc/2YM3-R8BC>]; Cheryl Miller, *Would-Be Lawyers May Have to Give It Away*, RECORDER (Mar. 4, 2016), <http://www.therecorder.com/id=1202751484819/WouldBe-Lawyers-May-Have-to-Give-It-Away?slreturn=20170103223624> [<https://perma.cc/GB3Q-62YQ>].

187. See Andrew Denney, *Q&A: Helaine Barnett*, N.Y.L.J. (Mar. 4, 2016), <http://www.newyorklawjournal.com/id=1202751284803/QA-Helaine-Barnett?slreturn=20170029113736> [<https://perma.cc/95BV-G4VA>]; Miller, *supra* note 186.

188. See *Bar Pre-Admission Pro Bono*, AM. BAR ASS’N, http://www.americanbar.org/groups/probono_public_service/policy/bar_pre_admission_pro_bono.html (last visited Sept. 30, 2017) (listing states considering pre-admission pro bono requirements) [<https://perma.cc/TDR2-R5Q3>].

189. David Siders, *Pro Bono Rule for New California Lawyers? Not So Fast, Jerry Brown Says*, SACRAMENTO BEE (Aug. 29, 2016, 6:16 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article98734647.html> [<https://perma.cc/BRX6-NTZT>].

190. *Id.*

191. See Karen Sloan, *Pro Bono Mandate Gains Steam*, NAT’L L.J. (Apr. 23, 2013), <http://www.nationallawjournal.com/id=1202596770850/Pro-Bono-Mandate-Gains-Steam?slreturn=20170029114151> (describing California’s then-ascendant proposal as well as the stalled Connecticut and New Jersey proposals) [<https://perma.cc/2AT3-GHLF>].

pressures to produce “practice ready” graduates.¹⁹² The ABA requires law schools to provide “substantial” pro bono opportunities for all students.¹⁹³ More specifically, the American Association of Law Schools (“AALS”) requires schools to offer students a “well-supervised pro bono opportunity” that is either required or made attractive enough to encourage “the great majority of students” to participate.¹⁹⁴ As of August 2017, 42 accredited law schools required student pro bono or other public or community service as a condition of graduation, and another 124 had formal programs in place to encourage student pro bono, with paid coordinators or other administrative support.¹⁹⁵

In addition to developing professional skills, the hope is that student pro bono programs will instill a “life-long habit of service” that endures throughout an attorney’s career.¹⁹⁶ Law schools have experimented with a variety of innovative student pro bono programs to meet this goal.¹⁹⁷ The existing data on student pro bono efforts, however, demonstrates that no student pro bono model—neither mandatory programs nor strongly supported voluntary programs—increases participants’ post-graduation pro bono rates.¹⁹⁸

192. See ALLIANCE FOR EXPERIENTIAL LEARNING IN LAW, *Experience the Future: Papers from the Second National Symposium on Experiential Education in Law*, 7 ELON L. REV. 1, 78 (2015).

193. See AM. BAR ASS’N, A.B.A. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015-2016, at 16 (2016).

194. See ASS’N OF AM. LAW SCHOOLS, LEARNING TO SERVE: THE FINDINGS AND PROPOSALS OF THE AALS COMMISSION ON PRO BONO AND PUBLIC SERVICE OPPORTUNITIES 359 (Oct. 1999).

195. See *Pro Bono Programs Chart*, AM. BAR ASS’N, http://www.americanbar.org/groups/probono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/pb_programs__chart.html (last updated Sept. 21, 2017) [<https://perma.cc/6ATV-XZQA>]. Most of the mandatory programs require 20–70 hours of law-related pro bono service before graduation. *Id.*

196. See, e.g., Cummings & Sandefur, *supra* note 120, at 93.

197. See, e.g., Lisa A. Kloppenberg & Lori E. Shaw, *Pro Bono: Assessing Aims and Achievement*, 40 U. TOL. L. REV. 357 (2009) (describing a voluntary student pro bono program at University of Dayton Law School); Richard F. Storrow & Patti Gearhart Turner, *Where Equal Justice Begins: Mandatory Pro Bono in American Legal Education*, 72 UMKC L. REV. 493 (2003) (describing a mandatory student pro bono program at Texas Wesleyan University School of Law).

198. See Faith-Slaker, *supra* note 76, at 279–80. A study by Professor Rhode found that a “positive experience” with law school pro bono “may increase participants’ desire for future opportunities [and] their understanding of pro bono service as a professional obligation.” That interest, however, did not translate into increased pro bono service after graduation, regardless of whether respondents

One reason why law student pro bono programs do not achieve the desired “pro bono habit” may stem from law professors’ failures to model any such “habit” themselves, conveying the impression that pro bono obligations are appropriately shouldered by those lowest on the professional totem pole.¹⁹⁹ Students seem to recognize the distinction in pro bono expectations for themselves and their teachers.²⁰⁰ Respondents to a survey of recent law graduates, for example, expressed dissatisfaction with faculty indifference to pro bono, perceiving that professors neither undertake such work themselves nor emphasize pro bono themes in their classrooms.²⁰¹ As addressed below, students’ perceptions in this regard are well-founded.

IV. LAW FACULTY: THE RIGHT FIT FOR A MANDATORY PRO BONO TEST CASE

Dean Chemerinsky’s 2004 call for mandatory faculty pro bono, or at least a serious discussion of the topic, has yet to materialize.²⁰² Every indication is that law professors’ view of their own pro bono obligations remains now as he observed it then: a worthwhile activity, perhaps, but not an integral facet of legal academic life.²⁰³ A reconsideration of law faculties’ self-awarded pro bono pass is long overdue. A mandatory pro bono test case focused on law faculty would respond to the intersection of the three current problems discussed above: (1) the insufficient pro bono hours provided to those in need; (2) the dearth of mandatory pro bono initiatives to study and learn from; and (3) the widely shared but unachieved goal of instilling a “pro bono habit” in those who aspire to enter the profession.

participated in mandatory or voluntary programs while in school. RHODE, *supra* note 6, at 160–64; *see also* Granfield, *supra* note 90, at 1372–73, 1380–94 (finding no relationship between type of law school pro bono program and subsequent pro bono work).

199. *See* Atkinson, *supra* note 134, at 161–65.

200. *See* RHODE, *supra* note 6, at 170.

201. *Id.*

202. *See supra* note 5 and accompanying text.

203. *See* Chemerinsky, *supra* note 5, at 1238 (“[M]y sense in most law schools is that a faculty member’s pro bono work is looked on about the same as if he or she likes to hike on weekends.”).

The rationale for mandatory pro bono applies at least as strongly to law professors as it does to other attorneys.²⁰⁴ As is true for other sectors of the profession, law faculty benefit handsomely from the monopolistic conditions that contribute to the continuing justice gap.²⁰⁵ Almost all states require law school graduation as a condition of bar admission,²⁰⁶ which keeps tuition dollars flowing. UPL rules protect attorney incomes, some part of which find their way back to law schools through alumni donations. These law school and UPL requirements contribute substantially to law faculty salaries, the highest in academia,²⁰⁷ and depress the availability of free and affordable representation.²⁰⁸

Nonetheless, many law professors strenuously object to participating in pro bono work, partly due to practical concerns, such as lack of ability and time, and partly due to self-identification more as scholars than as attorneys.²⁰⁹ Faculty at one school rejected a pro bono requirement for professors mere “seconds” after approving such a requirement for students.²¹⁰ At another school, the committee proposing mandatory student pro bono declined to even suggest such a requirement for faculty, fearing that doing so might derail the entire proposal.²¹¹

With so little support for mandatory pro bono generally and faculty resistance to engaging even voluntarily in pro bono work, adoption of a widespread faculty pro bono requirement is—realistically—nowhere on the horizon. Certainly, no such change appears forthcoming from the profession itself, which takes such broad and vague positions on faculty

204. See *supra* notes 128–133 and accompanying text; cf. Luban, *supra* note 164, at 58–59 (arguing that law faculty, like other attorneys, have a moral obligation to voluntarily participate in pro bono work).

205. See Chemerinsky, *supra* note 5, at 1238; Luban, *supra* note 164, at 64–68; Deborah L. Rhode, *The Professional Responsibilities of Professors*, 51 J. LEGAL EDUC. 158, 162 (2001).

206. A small number of states allow multi-year apprenticeships in lieu of law school, but few aspiring attorneys take this route, and even fewer succeed. See, e.g., Sean Patrick Farrell, *The Lawyer’s Apprentice*, N.Y. TIMES, July 30, 2014, at ED22 (reporting that only 60 of 83,986 people who took a bar exam in 2013 had not attended law school; of these, 17 passed the exam).

207. See Akane Otani, *The Highest-Paid Professors in the U.S.*, BLOOMBERG (Mar. 17, 2015, 10:18 AM), <http://www.bloomberg.com/news/articles/2015-03-17/the-highest-paid-professors-in-the-u-s-> [<https://perma.cc/EXL9-FQC2>].

208. See *supra* note 128 and accompanying text.

209. See Luban, *supra* note 164, at 66–67; Mogill, *supra* note 134, at 30–31; see also Rhode, *supra* note 6, at 54 (noting law professors’ “sanctimonious” resistance and insistence that “[e]verything [they] do is pro bono”).

210. Atkinson, *supra* note 134, at 161; see also Luban, *supra* note 164, at 66.

211. Storrow & Turner, *supra* note 197, at 499.

pro bono that it is difficult to discern what, if anything, is expected.²¹² Moreover, given the legal profession's lack of experience with mandatory pro bono generally, adoption of a nationwide requirement for faculty would be premature at best—there is simply too little information regarding what an effective and fair program would entail.

Entirely feasible and appropriate, however, would be a school-by-school approach, with the faculty at individual law schools voting to impose pro bono requirements on themselves.²¹³ Many schools support faculty pro bono by various means, including the consideration of pro bono work in salary raise determinations.²¹⁴ A few law schools require “public service” by faculty, which may be fulfilled by the type of work that non-attorneys equally are able to perform.²¹⁵ As a general matter, however, law schools have not taken the further step of requiring faculty to engage in legal pro bono work.²¹⁶

212. See AM. BAR ASS'N, *supra* note 193, at 28 (identifying “[s]ervice to the public, including participation in pro bono activities” as a “core” responsibility to be fulfilled by the full-time faculty “as a collective body” in Standard 404(a)(6)); *Bylaws*, ASS'N OF AM. LAW SCHOOLS, <http://www.aals.org/about/handbook/bylaws/> (last updated Jan. 2016) (stating in Section 6-1(b)(1) that “the Association values and expects its member schools to value . . . a faculty . . . devoted to fostering justice and public service”) [<https://perma.cc/ZB52-K5XW>]; *Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities*, in ASS'N OF AM. LAW SCHOOLS, 2016 HANDBOOK 119, 125 (2016) (stating that law professors share the profession's “traditional obligation[]” to “engage in uncompensated public service or pro bono legal activities”).

213. Cf. Emily Zimmerman, *Should Law Professors Have a Continuing Practice Experience (CPE) Requirement?*, 6 NE. U. L.J. 131, 164–65 (2013) (arguing that the most realistic option for instituting a law faculty “continuing practice experience” requirement would be to leave the decision up to individual law schools).

214. An ABA webpage listing faculty pro bono programs at many law schools provides a good sense of these incentives. See *Law School Pro Bono Programs: Faculty and Administrative Pro Bono*, AM. BAR ASS'N, https://www.americanbar.org/groups/probono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pb_faculty.html (last updated Aug. 23, 2016) [<https://perma.cc/778U-E97S>].

215. See *id.*; see also Communications with law faculty at Lincoln Memorial University and Stetson University (Dec. 2016 & Jan. 2017) (notes on file with author).

216. The ABA webpage listing faculty pro bono programs identifies two schools as requiring faculty pro bono, but efforts to confirm this information were unsuccessful. See notes on file with author. Although this page was updated in August 2016, the information is not fully up to date—it does not, for example,

Western New England University School of Law (“WNE”) is an exception. When WNE adopted a student pro bono requirement in 2012, it adopted a similar requirement for faculty, amounting to 20 hours of legal pro bono work per professor per year.²¹⁷ WNE has yet to assess formally the impact of its faculty requirement, but anecdotal reports suggest that WNE professors—having voted the requirement on themselves—accept it as part of the norm of their academic life, and many exceed the 20-hour requirement.²¹⁸

Other law schools should follow suit. The benefits of individual school adoption would be substantial for the additional clients who would obtain needed legal representation. In the bigger picture, adding test case schools to the mandatory pro bono roster would increase the profession’s understanding of such programs’ potential to make a more significant dent in the justice gap—both by better inculcating the “pro bono habit” in students and by adding more attorneys to the pro bono rolls.²¹⁹ Researchers likely would gain a variety of models to study because schools would adopt programs best suited to their individual needs.

Benefits also would inure to participating schools. Student pro bono programs no longer would suffer the inconsistency of faculty disengagement, and classroom impacts could be significant as well. Law schools train students who overwhelmingly attend with the goal of becoming practicing attorneys, but most of their teachers have little exposure to practice.²²⁰ Even those who practiced law before academia become ever further removed from the practicing world. A pro bono requirement would help bridge that gap, enriching professors’ classrooms and scholarship with a greater understanding of the territory into which they send their students.²²¹

include Western New England’s mandatory program. *See Law School Pro Bono Programs: Faculty and Administrative Pro Bono*, *supra* note 214.

217. *Cultivating a Service Ethos: The Pro Bono Requirement*, PERSPECTIVES: W. NEW ENGLAND UNIV. SCH. OF LAW, Spring 2013, at 7. By requiring “law-related” work for both students and faculty, WNE excludes charitable community service projects such as building homes and delivering food. *See Frequently Asked Questions*, W. NEW ENGLAND UNIV. SCH. OF LAW, <http://www1.wne.edu/law/registrar/pro-bono-Frequently%20Asked%20Questions.cfm> (last visited Sept. 30, 2017) [<https://perma.cc/CD8P-K2GS>].

218. Communications with WNE law faculty (December 2016) (notes on file with author).

219. *See* Mogill, *supra* note 134, at 29.

220. *See, e.g.*, Zimmerman, *supra* note 213, at 137–38.

221. *See* Chemerinsky, *supra* note 5, at 1240; Mogill, *supra* note 134, at 31–32; *cf.* Zimmerman, *supra* note 213, at 160–62, 176–77 (arguing that law professors

Communications teams at participating schools could ensure positive press attention. The headlines suggest themselves: benefit to clients and community, benefit to students, and benefit to the institution as one of the few law schools where professors truly “walk the walk.” The payoff in newsworthiness certainly would be welcome in a time of shrinking enrollments and fierce competition for tuition dollars and alumni contributions.²²²

The profession should undertake incentives to encourage mandatory pro bono initiatives for faculty. In particular, a mandatory CLE exemption for faculty at participating schools is a feasible option worth pursuing. California already exempts full-time law faculty from mandatory CLE requirements.²²³ In determining that the California faculty exemption was not unconstitutional on equal protection grounds, the California Supreme Court observed that faculty representing clients were more likely than other attorneys to practice within their fields of expertise and also more likely to stay abreast of current developments in all areas of the law.²²⁴ This reasoning from California provides a solid argument for law faculty elsewhere, particularly as part of a mandatory pro bono package.

Such an exemption from state-mandated CLE requirements would be a modest and logical extension of the movement toward granting mandatory CLE credit for pro bono hours.²²⁵ The exemption proposal could be bolstered with a provision detailing the obligation of faculty at participating schools to undertake any instruction necessary for successful pro bono representation. Thus, any continuing education required under this scheme actually would serve the competence purpose in stark contrast to current mandatory CLE requirements.²²⁶

should have a “continuing practice experience” requirement for these reasons, though the requirement need not be fulfilled only through pro bono projects).

222. Many observers have documented law schools’ declining fortunes. *See, e.g.,* Victor Marrero, Essay, *The Cost of Rules, The Rule of Costs*, 37 CARDOZO L. REV. 1599, 1620 (2016); Donald J. Polden, *Leading Institutional Change: Law Schools and Legal Education in a Time of Crisis*, 83 TENN. L. REV. 949, 950–51 (2016).

223. *See* CAL. BUS. & PROF. CODE § 6070(c) (West 2017). Following the ABA MODEL RULE FOR MINIMUM CONTINUING LEGAL EDUCATION, *supra* note 15, at § 3(B)(4), the mandatory CLE rules in North Carolina and Tennessee exempt full-time law professors so long as they do not engage in the practice of law, thus creating a perverse incentive for law faculty *not* to engage in pro bono work. *See* 27 N.C.A.C. ch. 1D, § .1517(e); TENN. SUP. CT. R. 21 § 2.04(e).

224. *See* *Warden v. State Bar of Cal.*, 982 P.2d 154, 166 (Cal. 1999).

225. *See supra* note 154 and accompanying text.

226. Some pro bono organizations already offer CLE programs to volunteers. Harris, *supra* note 7, at 364; *see also* Megan Cooley, Shauna Wright & Philip

Acknowledging the potential need for training also would address a primary practical concern—law faculty are among the least qualified attorneys to handle pro bono matters given their removal from actual practice. As with any other unfamiliar professional endeavor, however, a pro bono attorney must take whatever steps as are necessary to render competent representation, and no reason supports the contention that law professors would be derelict in that duty.²²⁷ Moreover, the substantive competency necessary for effective representation might be less daunting than some faculty fear. The positive impact of attorney representation in many civil matters flows less from the attorney's deep understanding of the relevant law than from the attorney's ability to navigate simple procedures and courthouse relationships.²²⁸

The qualifying pro bono work for faculty would not have to involve courtroom representation of individual clients. Because faculty would impose the requirement on themselves, they could determine the parameters of the program, including what qualifies as pro bono work. For example, the legal needs of indigent persons span an enormous range of subject areas, including tax, civil rights, bankruptcy, domestic relations, and estate planning—areas with which many faculty have substantial expertise that could be useful to organizations providing direct representation or that advocate for broader change.²²⁹

Vickers, *For the Good of Your City: How Law Firm Pro Bono Can Impact Clients and the Community*, 79 TEX. B.J. 364, 365 (2016) (describing Tarrant County Volunteer Attorney Services program providing free CLE hours to volunteers who are then assigned uncomplicated family law cases); Phong Wong, *MCLE Opportunities Through Nonprofit Legal Services Organizations*, L.A. LAW., Mar. 2016, at 10 (describing free CLE courses provided by California legal services offices “in an effort to increase pro bono participation”).

227. See Luban, *supra* note 164, at 72. Indeed, the academic calendar and access to sabbatical and other leaves may provide more training opportunities than exist for other attorneys.

228. See Sandefur, *supra* note 129, at 911, 926–27. Sandefur's conclusion from this data is that although universal attorney representation is impractical, alternatives should be developed that give clients and non-attorney assistants the tools necessary for similarly improved outcomes. See *id.*

229. See Luban, *supra* note 164, at 72–73 (describing the wide variety of pro bono matters in which law faculty could become involved). On the other hand, schools should be mindful of not defining qualifying “pro bono” work so broadly that individuals unable to afford legal representation are poorly served by the increased hours. Cf. Chemerinsky, *supra* note 5, at 1244 (arguing that faculty pro bono “must be for causes or clients that otherwise would not have legal representation”).

Another practical objection may be that some professors are not admitted to the state bar where the school is situated or, indeed, any bar at all. The easiest scenario for adoption would be at a school where all faculty are admitted to the local bar.²³⁰ Professors admitted elsewhere, however, still may be able to represent clients locally through reciprocal admission agreements or court-approved admission for a particular matter.²³¹ Additionally, some jurisdictions make exceptions to unauthorized practice restrictions for certain types of pro bono representation.²³² Faculty who are not members of any bar might provide research or other assistance to legal services organizations in a manner that would not violate unauthorized practice restrictions. At a minimum, faculty should provide the same law-related assistance required or encouraged of their students, who, of course, also are not admitted to the bar.²³³

Designing a program with an appropriate degree of flexibility would require faculties to consider a host of questions:

(1) Should particular pro bono experiences be encouraged, and should such experiences occur in the law school's own clinics?²³⁴ A related issue concerns the extent to which clinical faculty are expected to provide training and oversight. For non-clinical faculty, the convenience and comfort of training by trusted colleagues may be attractive. From the perspective of clinical faculty, however, the added burden may interfere substantially with other responsibilities.²³⁵

230. See, e.g., *Elon Law Faculty: Committed to Teaching, Scholarship & Service*, ELON LAW, <https://www.elon.edu/e/law/faculty/index.html> (last visited Sept. 30, 2017) (“All Elon Law professors are members of the North Carolina Bar Association.”) [<https://perma.cc/B76U-JHDR>].

231. See, e.g., Pamela A. McManus, *Have Law License; Will Travel*, 15 GEO. J. LEGAL ETHICS 527, 533–34 (2002).

232. The District of Columbia, for example, permits inactive D.C. bar members to provide pro bono representation through affiliation with legal services providers, D.C. CT. APP. R. 49(c)(9)(b), and allows non-members to provide representation in connection with specifically authorized court programs, R. 49(c)(10).

233. See RHODE, *supra* note 33, at 461 (proposing various law school reforms, including “pro bono contributions by faculty at levels comparable to those expected of students”).

234. See generally Laura Rovner, *Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 U. CIN. L. REV. 1113 (2007) (analyzing pros and cons of non-clinical faculty participation in law school clinics).

235. Moreover, clinical professors tend to be of lower status than their “podium” colleagues. See, e.g., Todd A. Berger, *Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for “Practice-Ready” Graduates Will Impact the Faculty Status of Clinical Law Professors*, 43 WASH. U.

(2) Should the obligation fall on each professor individually or could the faculty fulfill the obligation collectively? If the objective primarily is to provide more hours of service, collective fulfillment might be attractive. Such an arrangement, however, would forego full-faculty pro bono modeling for students, and, again, the temptation may be to foist the obligation disproportionately on clinical faculty.

(3) Should the school provide concrete institutional support for faculty pro bono efforts? Such support might include administrative assistance, pro bono leaves of absence, and stipends to support and reward particularly intensive pro bono work.²³⁶ A school's willingness to provide such support would need to be balanced against the school's need for adequate teaching coverage and funds for faculty scholarship.

(4) Should the school require the ABA's recommended 50 annual hours or a different number, and over what time span?²³⁷ One way to avoid the inevitable conflicts that will arise for some professors in any given year is to require the desired number of hours over the course of three years rather than requiring one-third of that amount in each year. Such an arrangement also would have the potential advantage of encouraging a deeper commitment to a single matter rather than superficial assistance in several. Another option for greater flexibility would be to permit a financial contribution to a legal services program in lieu of personal work, at least on an occasional basis.

The list of program design questions continues. Could the malpractice policy that covers a school's clinic participants be expanded to cover other faculty? How would faculty compliance be monitored and enforced? Would service exceeding the expected minimum be a part of salary considerations? Law schools should not be daunted by the long list of open questions; rather, they should embrace the uncertainty as an opportunity for innovation, study, and service.

J.L. & POL'Y 129, 135–36 (2013). This imbalance may make it difficult for a clinician to refuse or even to voice her concerns regarding additional responsibilities stemming from a faculty pro bono requirement.

236. By way of example, Georgetown University Law Center provides summer pro bono grants that are equal in amount to summer scholarship grants. Grants are available to support a "substantial" public service project, "particularly where it furthers a faculty member's teaching and scholarship." GEO. UNIV. LAW CTR., FACULTY PRO BONO PROPOSAL (Nov. 1, 2000, rev. March 2003) (on file with author).

237. Both Dean Chemerinsky and Professor Luban proposed 50 hours per year as reasonable for law faculty. See Chemerinsky, *supra* note 5, at 1244; Luban, *supra* note 164, at 60.

CONCLUSION

Almost a half century of experience and debate demonstrates that the status quo has not served its purposes. Mandatory CLE does not impact attorney competence, and voluntary pro bono has made an insufficient dent in the need for free legal services. The profession has responded with little more than tinkering around the edges—tweaking mandatory CLE courses here and there and exhorting attorneys to voluntarily contribute more pro bono hours.

The lack of data connecting mandatory CLE with improved competence justifies eliminating the requirement. Mandatory CLE earns hundreds of millions of dollars in tuition revenues for course purveyors but provides no discernible public benefit. Although many attorneys undoubtedly gain some measure of improved competence from particular CLE courses, no evidence supports the efficacy of a broad requirement.

The substantial need for increased free legal representation cannot be disputed, and the bar has long recognized attorneys' general responsibility for providing pro bono hours. Imposing a pro bono requirement, however, is both impracticable and unjustified at this time. The legal profession evinces no willingness to impose or accept a mandatory pro bono system. Moreover, the profession's lack of experience with mandatory pro bono programs leaves researchers with little data to determine whether and how mandatory pro bono might help close the vast justice gap.

Under these circumstances, a test case approach to mandatory pro bono is warranted with law faculty as its focus. Law professors benefit substantially from law practice restrictions that exacerbate the justice gap. Law professors also produce the future attorneys who hopefully will expand the profession's pro bono commitment. Law professors themselves, however, are poor pro bono contributors. The negative ramifications of this imbalance affect students, law schools, clients, and the profession. On a school-by-school basis, law professors should pick up the gauntlet thrown down by Dean Chemerinsky in 2004²³⁸ and impose mandatory pro bono on themselves.

238. See *supra* note 5 and accompanying text.