

A Thought Experiment About the Academic "Billable" Hour or Law Professors' Work Habits

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A THOUGHT EXPERIMENT ABOUT THE ACADEMIC “BILLABLE” HOUR OR LAW PROFESSORS’ WORK HABITS

ELI WALD*

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I. INTRODUCTION

We know little about what law professors do and how they spend their time.¹ While we know law professors’ teaching loads, we do not know how many hours they spend preparing for classes, interacting with students outside of the classroom, developing and grading assignments, updating their syllabi, or otherwise investing in their teaching skills, let alone how they spend their

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1. This dearth of knowledge is not unique to law professors. See John Ziker, *The Long, Lonely Job of Homo Academicus: Focusing the Research Lens on the Professor’s Own Schedule*, BLUE REVIEW (Mar. 31, 2014), <https://thebluereview.org/faculty-time-allocation/> [<https://perma.cc/7ZEG-GUFK>] (describing the first stage of a pioneering study of academics’ time allocation at Boise State University).

time pursuing all of these activities. Similarly, while we know quite a bit about how much law professors publish and about the quality and impact of their scholarship, we do not know how they identify topics for inquiry, research, write, and publish, or how much time they spend on these endeavors. Finally, while we know a fair amount about law professors' service commitment, such as their committee assignments and public speaking engagements, we do not know how much time and how they spend their time on service activities. In short, we know very little about law professors' work habits.

What we do not know matters. Law professors' work habits can inform the development of best practices and benchmarks in legal academia, as well as reveal aggregate patterns regarding how law professors spend their time. In turn, these insights can be used for mentoring and training junior faculty; informing individual and institutional decision-making about resource allocation; improving teaching, scholarship, and service work habits; and informing normative discussions about what law professors and law schools should be doing in the face of mounting criticisms of legal education. Yet the diagnostic virtues of timekeeping may be inherently intertwined with destructive time management qualities inconsistent with the intellectual and contemplative core mission and objectives of legal academia.

This Essay imagines a world in which law professors tracked their work hours, recording how much time they spent teaching, researching, and on service, as well as brief descriptions of their activities.² What would such a world look like? Part II identifies some of the diagnostic attributes of the academic "billable" hour, explores the potential destructive dark side of timekeeping, and examines the nature of the relationship between the diagnostic and destructive qualities of recording academic time. While foreign to academic lawyers, the billable hour has been a feature of law practice for a while now; Part III introduces some of the insights and lessons law professors might learn from lawyers, chief among these the need to separate the diagnostic virtues of timekeeping from adverse punitive compensation consequences and the wisdom of putting in place an apparatus of ethical time recording before purporting to implement academic timekeeping. Part IV imagines some of the political implications of recording academic time, and Part V briefly explores some of the normative discussions timekeeping might help inform.

2. See *infra* note 19 and accompanying text; *infra* Part III (comparing law professors recording their time to lawyers tracking the billable hour).

II. IMAGINING THE ACADEMIC "BILLABLE" HOUR: DIAGNOSTIC INSIGHTS AND DESTRUCTIVE QUALITIES

We know very little about law professors' work habits.³ Academic timekeeping is likely to generate ample data and knowledge about what law professors do, yielding significant diagnostic insights informing individual, institutional, and systemic decision-making in legal academia. At the same time, however, timekeeping's dark side may undermine the very mission and culture of the academic enterprise in law schools.

A. *The Diagnostic Virtues of Academic Timekeeping*

Imagining what legal academia would look like if law professors were to record their time, we might start with the world as we know it: one without timekeeping.

First, consider scholarship. We do have ample data about the quality of legal scholarship.⁴ At the hiring stage, law schools carefully scrutinize the quality of candidates' scholarship based on the expertise available on their appointments committee and faculty, increasingly a meaningful examination because entry-level candidates commonly have more than one published paper available.⁵ Similarly, promotion to tenure decisions entail a close examination of candidates' work informed by the insights of outside reviewers who are experts in the relevant fields of study.⁶ In addition, high quality published work tends to be recognized, discussed, engaged with, and cited by courts, policy makers, and peers with relevant subject-matter expertise. Next, in recent years, some preliminary limited evidence has emerged regarding the scholarly productivity of law professors.⁷ Admittedly, some of the productivity data is

3. See, e.g., Stephanie Davidson, *Way Beyond Legal Research: Understanding the Research Habits of Legal Scholars*, 102 L. LIBR. J. 561, 562–63 (2010) (documenting our scant knowledge of law professors' scholarly habits).

4. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1327–30 (2002) [hereinafter Rhode, *Legal Scholarship*]; DEBORAH L. RHODE, IN PURSUIT OF KNOWLEDGE: SCHOLARS, STATUS, AND ACADEMIC CULTURE 29–62 (2006) [hereinafter RHODE, IN PURSUIT OF KNOWLEDGE].

5. Emily Zimmerman, *Should Law Professors Have a Continuing Practice Experience (CPE) Requirement?*, 6 NE. U. L.J. 131, 137 (2013).

6. Devon W. Carbado & Mitu Gulati, *Tenure*, 53 J. LEGAL EDUC. 157, 160 (2003).

7. Orin Kerr, *Law Faculty Productivity Over Time*, WASH. POST (Feb. 18, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/18/law-faculty-productivity-over-time/?utm_term=.0498e581f3d8 [http://perma.cc/8WFN-WLRK] [hereinafter Kerr, *Law Faculty Productivity Over Time*]; Orin Kerr, *Law Faculty Productivity at Different Career Stages*, WASH. POST (Jan. 14, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/14/law-faculty-productivity-at-different-career-stages/?utm_term=.c00899e5dec1 [http://perma.cc/UNL2-Y44L] [hereinafter Kerr, *Law Faculty Productivity at Different Career Stages*]. Outside of law schools, some universities have sought to gather quantitative information about faculty productivity

rather crude, for example, excluding books, yet we are beginning to know more about quantitative productivity.⁸ Finally, impact indexes have recently become more popular, ranging from law professors' scholarly citation counts to Social Science Research Network (SSRN) downloads.⁹ Like their productivity counterparts, these measures are often quite inexact. Citation counts often do not exclude self-citations (a professor citing his own previous work will pick up citation counts), and do not distinguish between types of citations (ranging from a substantive engagement with the key arguments made in the paper, to brief substantive references, to a citation to an esoteric point made in the paper or a string citation). SSRN downloads are similarly subject to some manipulation.¹⁰ Nonetheless, we know quite a bit about the quality, productivity, and impact of legal scholars and legal scholarship.

In contrast, we virtually know nothing about law professors' habits of scholarship.¹¹ "How to" style guides purport to instruct new law professors about the scholarly craft, how to identify topics, research, write, and publish.¹² However, there is almost no empirical analysis examining whether this sage advice is followed by law professors. Consequently, we do not know how law professors select topics for research, how they research, how much time they dedicate to their research, how and when they write, how they publish, and what

with the help of private analytics companies. See Colleen Flaherty, *Refusing to be Evaluated by a Formula*, INSIDE HIGHER ED (Dec. 11, 2015), <https://www.insidehighered.com/news/2015/12/11/rutgers-professors-object-contract-academic-analytics> [<https://perma.cc/DM2E-RUY5>]. In response, the American Association of University Professors (AAUP) has cautioned universities against the adoption of alluring metrics that lack qualitative dimensions. See *Statement on "Academic Analytics" and Research Metrics*, AAUP (Mar. 22, 2016), https://www.aaup.org/sites/default/files/AcademicAnalytics_statement.pdf [<https://perma.cc/WL2K-M3D7>].

8. Kerr, *Law Faculty Productivity Over Time*, *supra* note 7; Kerr, *Law Faculty Productivity at Different Career Stages*, *supra* note 7.

9. Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 78 (2015); Robert Steinbuch, *On the Leiter Side: Developing a Universal Assessment Tool for Measuring Scholarly Output by Law Professors and Ranking Law Schools*, 45 LOY. L.A. L. REV. 87, 91 (2011).

10. Different users post different types of papers on the database, some short and light on substance.

11. Davidson, *supra* note 3, at 562–63; Rhode, *Legal Scholarship*, *supra* note 4, at 1327–30.

12. See, e.g., Robert H. Abrams, *Sing Muse: Legal Scholarship for New Law Teachers*, 37 J. LEGAL EDUC. 1, 1, 13 (1987); C. Steven Bradford, *As I Lay Writing: How to Write Law Review Articles for Fun and Profit*, 44 J. LEGAL EDUC. 13, 14 (1994); Richard Delgado, *How to Write a Law Review Article*, 20 U.S.F. L. REV. 445, 445 (1986); Mary Kay Kane, *Some Thoughts on Scholarship for Beginning Teachers*, 37 J. LEGAL EDUC. 14, 14 (1987); James Boyd White, *Why I Write*, 53 WASH. & LEE L. REV. 1021, 1035 (1996); Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 MERCER L. REV. 741, 741–42 (1998).

constitutes “best scholarly practices” (and for that matter, “worst practices” either).

In a historical context, knowing so little about the habits of legal scholarship is not surprising. Until recently we knew relatively little about law practice in general,¹³ rendering our ignorance about academic law practice par for the course. Since we did not know about what lawyers do, how they practice, and the challenges they face, it was hardly a surprise that we did not know what academic lawyers—that is, law professors—do. Appropriately, the practice of law is now the subject of robust empirical study and academic law practice ought not to be exempt from the very scrutiny lawyers are subjected to.¹⁴

Now imagine what we would learn if law professors were to record their scholarly time. To begin with, consider a productive law professor who produces high quality work. Timekeeping would reveal how much time she spends on her scholarship and how she spends it, and would help generate valuable best practices in terms of identifying topics of inquiry, habits, and strategies for conducting research, writing, and publishing. In addition, the data can help establish benchmarks for different types of scholarly projects ranging from short essays and book reviews to articles and book projects.

Next, consider a law professor who is not particularly productive but publishes high quality work. Timekeeping insights could equally contribute to generating valuable data and learning from the work habits of others. To the extent that one is unproductive because of investing insufficient time in her scholarship or pursuing ineffective scholarly habits, benchmarks generated by more productive colleagues who publish high quality work could inform the law professor’s habits and decisions regarding time allocation. As importantly, tracking the time of those who invest ample time to produce high quality work but publish infrequently may shed important light on work habits and help

13. David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach About the Profession*, 49 J. LEGAL EDUC. 76, 80 (1999).

14. Indeed, the body of empirical studies of the legal profession is vast. Notable scholarship includes *After the JD*, a comprehensive national empirical study designed to explore the careers of lawyers admitted to the bar in 2000 over the course of their professional lives. See RONIT DINOVTZER ET AL., AM. BAR FOUND. & NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 12 (2009); RONIT DINOVTZER ET AL., AM. BAR FOUND. & NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 14 (2014). Other scholarship includes studies of different practice settings and lawyers’ identities, ranging from Big Law to lawyers in the individual hemisphere. Compare MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991), with Leslie C. Levin, *Guardians at the Gate: The Backgrounds, Career Paths, and Professional Development of Private US Immigration Lawyers*, 34 L. & SOC. INQUIRY 399 (2009), and Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466 (2014) (discussing rural lawyers).

generate more nuanced best practices and benchmarks for an array of legal publications.

At the same time, we have a lot to learn from those who regularly publish mediocre work. Here too, timekeeping may reveal valuable information about work habits. It can help diagnose insufficient time commitments, assessed both given one's recorded scholarly hours and against the benchmarks generated by colleagues producing high quality work, and thus inform individual and institutional decisions regarding allocation of research and writing resources. Moreover, those who produce relatively poor-quality work notwithstanding committing long hours to their scholarship may help reveal insights about ineffective or "worst" work habits and may in turn learn from the best practices of productive high-quality colleagues. Finally, were those who produce comparatively little scholarship of relative low quality to record their time, the data generated could help us understand, identify, and avoid poor and unproductive work habits. All of this knowledge could be used to train and mentor new scholars as well as assist struggling law professors, improve scholarly habits, and inform individual and institutional decision-making about scholarship.

Second, consider teaching. As is the case with scholarship, we already know quite a bit about how much law professors teach, the quality of the instruction, and its impact. Specifically, we know law professors' course loads and how many students they teach; we know some about the quality of their teaching as assessed by colleagues during promotion processes and by student evaluations; and we have some information about the impact of law professors' teaching, if only anecdotally from former students.¹⁵

Yet there is so much we do not know and could find out if law professors were to record their teaching time. How much time and how do law professors prepare for their classes? Does the preparation time and manner of preparation vary across different types of classes (big required classes, small required classes, electives, seminars, etc.) and how so? Does it in turn impact quality of teaching and learning? How much time and how do law professors spend time with their students outside of the classroom explaining materials, advising, and mentoring? How much time and what strategies are deployed to develop and grade class exercises and exams? To keep current with class materials and to revise syllabi? Timekeeping would help answer all of these questions and more, generating best (and worst) practices, benchmarks, and knowledge about

15. RHODE, IN PURSUIT OF KNOWLEDGE, *supra* note 4, at 63–87; Gregory W. Bowman, *The Comparative and Absolute Advantages of Junior Law Faculty: Implications for Teaching and the Future of American Law Schools*, 2008 B.Y.U. EDUC. & L.J. 171, 195 (2008).

teaching. In turn, these insights can be used to improve law professors' teaching and students' learning.

Third, we know some about the visible aspects of law professors' service inside and outside of their law schools, from committee assignments and service to public speaking engagements to commenting on other colleagues' work.¹⁶ If law professors were to keep their time, however, we would know so much more about their service work habits. How much time and how do law professors serve on committees in and outside of law schools? Consult or offer pro bono legal services?¹⁷ Contribute to law reform efforts? Speak about their work or otherwise? Author or contribute to amicus briefs?

In sum, we know very little about what law professors do. We know practically nothing about law professors' habits of scholarship. We do not know how and why law professors identify possible topics for research, when and how often they research and write, how and to what extent they interact with others' work, how much time they dedicate to any particular scholarly project and to scholarship in general, what projects they are working on, and how they approach and decide where to publish. While teaching loads are easy to observe, we know little about how law professors prepare for classes and how much time and how they spend time with students outside of the classroom. We also know little about law professors' service. While certain service components are easily observable, like committee assignments, we generally do not know how much time and how law professors serve within and outside of their institutions.

What we do not know matters. This is not a generic argument about the benefits of "informational regulation," pursuant to which more data is always better than less data because additional information about work habits would allow law professors and other legal academia actors to be generally more informed and better positioned to make decisions regarding the allocation of time.¹⁸ Rather, if law professors were to learn from lawyers and record their time,¹⁹ keeping track of both how much time they spend on various tasks as well as of what they actually do when performing aspects of their job, we could, specifically, use the data to generate best scholarly, teaching, and service habits (and avoid worst habits) as well as establish benchmarks for various tasks.

16. RHODE, IN PURSUIT OF KNOWLEDGE, *supra* note 4, at 88–115.

17. See David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58 (1999).

18. See STEPHEN BREYER, REGULATION AND ITS REFORM 161–63 (1982) (discussing informational regulation); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613 (1999).

19. WILLIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS 17 (1996).

Notably, the diagnostic insights of timekeeping reach far beyond generating best practices and benchmarks that may inform individual decision-making by law professors regarding their work habits; they also reach into institutional and systemic decision-making by law schools and legal academia.

Poor training and mentoring, an increasingly well-documented phenomenon in the practice of law,²⁰ has been a familiar theme in legal academia in part because law schools have little in the way of accumulated knowledge to impart on newcomers to the practice of academic law.²¹ Indeed, while teaching, scholarship, and service have long defined the essence of what law professors do, we know so little about what academic lawyers do:

It's as if by virtue of having gone to law school and having attended a few lectures over three years and having read a few excerpts in law review articles, one is supposed to know when one becomes a law professor what to do, how to teach, how to write, what is scholarship, what is teaching, and what is service. There's a significant gap there.²²

Timekeeping resulting in robust insights about what law professors do and how they do it well would constitute the very body of knowledge law schools could use to train and mentor junior faculty members, providing guidance into the core practices of teaching, scholarship, and service. Best practices, the avoidance of bad practices, and benchmarks for effective teaching, scholarship, and service are exactly the kind of knowledge-based advice junior colleagues need in order to make informed decisions about how to allocate their time and resources for becoming great law professors.

Within and across law schools, aggregated findings regarding scholarship, teaching, and service hours may generate valuable institutional data. For example, do men and women faculty members shoulder equal burdens of service and teaching in terms of hours spent at work?²³ Do they invest equally in their scholarship? Do junior and senior faculty members shoulder equal

20. See Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 281–82 (2000) [hereinafter Fortney, *Soul for Sale*]; Susan Saab Fortney, *I Don't Have Time to be Ethical: Addressing the Effects of Billable Hour Pressure*, 39 IDAHO L. REV. 305, 310 (2003) [hereinafter Fortney, *I Don't Have Time to be Ethical*]; Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 179 (2005) [hereinafter Fortney, *The Billable Hours Derby*].

21. See *supra* note 12.

22. *Transcript—Conference on the Ethics of Legal Scholarship*, 101 MARQ. L. REV. 1083, 1093 (2018) (Eli Wald).

23. Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2511 (2015) (discussing the disproportionate service burden on women lawyers at large law firms).

burdens? In a world in which law professors were to record their time, law schools would be able to answer these questions and use the information—along with existing data about quality, quantity, and impact of scholarship, teaching, and service—to make informed decisions about the allocation of resources in legal academia.

If it turns out, for example, that tenure-track junior faculty dedicate disproportionate time to teaching, law schools would be able to better assess how time is spent, direct resources to those who might need assistance, and consider granting pre-tenure leaves to allow junior colleagues to focus on their scholarship. If aggregated timekeeping data revealed that women faculty disproportionately shoulder administrative and service burdens at law schools compared with their male counterparts, law schools could take measures to ensure that all faculty members have more equal opportunities to invest in their teaching and writing, thus protecting some from over-service. Or, if recorded time established that women faculty disproportionately perform emotional labor at law schools,²⁴ managing the displayed feelings and emotions of students, faculty, and staff inherent in the stressful environment of law schools, the institutions could either pay for this labor or spread it more equally among all law professors.

Imagining legal academia informed by the insights of law professors' timekeeping, however, should not exaggerate its benefits. While the diagnostic virtues of timekeeping—learning about law professors' work habits, generating best practices and benchmarks, establishing a body of knowledge for purposes of training and mentoring, and revealing patterns of work allocation among faculty members—would be significant, they ought not distract us or belittle the inherent importance of quality, productivity, impact, talent, and skill. Developing solid work habits is important and likely to improve law professors' scholarship, teaching, and service, yet it is no substitute and no guarantee of quality, productivity, and impact.²⁵ Put differently, adhering to effective work habits is a necessary but insufficient condition for being a good law professor. In addition to putting in effort measured in terms of hours worked, one has to be a quality, productive, and impactful law professor. What we do not know about law professors' work habits ought to supplement but not replace what we do know about the quality, quantity, and impact of law professors' teaching, scholarship, and service.

24. See generally Amy S. Wharton, *The Psychosocial Consequences of Emotional Labor*, 561 ANNALS AM. ACAD. POL. & SOC. SCI. 158, 159–60 (1999).

25. Eli Wald, *Success, Merit, and Capital in America*, 101 MARQ. L. REV. 1, 42 (2017).

B. *The Destructive Qualities of Academic Timekeeping*

Timekeeping's dark side is its managerial quality, part and parcel of the "new public management" attitude, an organizational style sweeping through public agencies calling for "doing more with less" by adopting private industries' techniques of "doing business."²⁶ For universities and law schools the move is from trusting "professional standards and expertise,"²⁷ namely a shift from quality as determined by objective standards of scholarship, teaching, and service to "more explicit and measurable (or at least checkable) standards of performance,"²⁸ for example, measurable "billable" academic hours.²⁹

The potentially destructive quality of timekeeping is its slippery slope, unleashing a monster within legal academia which begins with informing teaching, scholarship, and service, but may end up replacing substantive assessment of work with increased documentation requirements (such as detailed breakdown of academic hours) and an intensified organizational hierarchy and unintended bureaucracy.³⁰ As Chad Oldfather explains, means of informational regulation can directly affect the regulated actor's conduct, that is, "the very process of complying with a disclosure requirement can . . . lead to changes in the underlying activity."³¹ Here, mandating timekeeping can affect the very work law professors do and abstain from doing, known as the "you manage what you measure" effect.³² Imagine a world in which law professors, instead of engaging in contemplative intellectual work, are reduced to the role of near-clerks who are supervised by a technocratic manager or efficiency expert,³³ otherwise known as an Associate Dean for Work Habits.

26. Marianne Constable, *Law and Language as Information Systems: Perish the Thought!*, in SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 155, 166–67 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

27. *Id.* at 168 (quoting ALISON I. GRIFFITH & DOROTHY E. SMITH, UNDER NEW PUBLIC MANAGEMENT: INSTITUTIONAL ETHNOGRAPHERS OF CHANGING FRONT-LINE WORK 7 (Allison I. Griffith & Dorothy E. Smith eds., 2014)).

28. *Id.*

29. See Margaret Thornton, *Legal Education in the Corporate University*, 10 ANN. REV. L. & SOC. SCI. 19, 26 (2014) (reviewing the culture of academia and its intersection with recording time).

30. *Id.* at 29.

31. Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 783 (2006).

32. Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 299 (2001) (quoting Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1342 (1996)).

33. See generally William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1199 (1983) (exploring the impact of increased formalized hierarchical structures,

Timekeeping may impact the very nature and culture of the academic enterprise, legal academia included.³⁴ When law professors teach, research, and serve, the argument goes, they ought to be thinking about teaching, scholarship, and service, and not be concerned with, or even mindful of, the passage of time. For example, when a law professor is mentoring a student or serving on a committee, her entire mental capacity ought to be devoted to the undertaking, whereas being mindful of the time might constitute a distraction negatively affecting the very underlying activity. Quality-thoughtful research takes time, and timekeeping, with its implied message of push for efficiency and “doing more with less time,” is inherently inconsistent with its contemplative time-consuming nature.

The argument—sometimes referred to as the Slow Professor movement³⁵—is that what law professors need to do (especially in the current day and age of calls for greater productivity and impact) is slow down and take the time to do their jobs well. Quality teaching, researching, and service are inherently and constitutively contemplative, and timekeeping is inherently inconsistent with acting slowly, deliberately, and thoughtfully. The very exercise of timekeeping quantifies and commodifies the academic undertaking, making law professors more likely to impose artificial timelines and time restraints on tasks that ought not be so constrained.

Moreover, arguably the diagnostic virtues of academic timekeeping are inherently connected to, and cannot be separated from, the dark side of recording time and its potentially destructive qualities. Consider Annelise Riles’ law professor amateur.³⁶ Professor Riles begins her account by observing that the American legal academy is amateuristic, home to law professors who “d[o] not read[,] . . . d[o] not take an interest in the details[,] . . . [and who] seem[] more engaged by acts of self-promotion than by the furthering of knowledge about the law.”³⁷ Yet, rather than critique the law professor amateur,³⁸ Riles celebrates her: “[T]he law professor’s ability to pontificate on just about anything without knowing much about the subject—a trait admired by students and vilified by academics in other fields—corresponds

technocratic managerialism, and efficiency incentives on the operation and performance of complex organizations).

34. See generally RHODE, IN PURSUIT OF KNOWLEDGE, *supra* note 4, at 1–28 (discussing the academic mission in principle and practice).

35. MAGGIE BERG & BARBARA K. SEEGER, THE SLOW PROFESSOR: CHALLENGING THE CULTURE OF SPEED IN THE ACADEMY, at ix–x (2016).

36. Annelise Riles, *Legal Amateurism*, in SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 499, 499–516 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

37. *Id.* at 499.

38. *Id.* at 511.

to a practical legal skill of lawyering.”³⁹ Moreover, “what law professors do, when they behave amateuristically, is actually at the core of practical legal expertise.”⁴⁰ Riles concludes that “[l]egal amateurism as practiced by legal academics is not a second-class version of philosophy or political science or economics in this view, but a virtuoso performance of professionalism,”⁴¹ a pedagogical game of aesthetic performance designed to help law students, judges, and policy makers master the skill of moving quickly from problem to problem and advising clients based on relative little knowledge of the particulars.

Is Professor Riles right that law professors “d[o] not read” and “d[o] not take an interest in the details”? Are U.S. law professors professional amateurs? We do not know because we do not know what law professors actually do. Yet, if law professors were to record their time, we might find out. But, cautions Riles, the very act of keeping time might undercut and ruin law professors’ amateurism. “What legal amateurism achieves,” she writes, “is something at once miraculous and entirely mundane—it is simply a pause, a space to think.”⁴² Furthermore, “what lawyers or legal scholars really are doing is creating ‘open moments’ for their client, or students, or interlocutors to think.”⁴³ This *is* the essence, according to Riles, of legal academia.

Timekeeping, however, is part of the “crisis around the nature and management of time,” the problem of not being able to secure the time to think.⁴⁴ The dark side of timekeeping is that it threatens thinking and ushers in a managerial culture that looks suspiciously at “open moments,” creating incentives to spend time in more *productive* ways.⁴⁵ In sum, and at the risk of overdoing the Star Wars metaphor, the very diagnostic virtues and force of timekeeping—allowing us to find out whether law professors are professional amateurs—carries with it a dark side of time management that undercuts thinking and time pauses—the very essence of legal amateurism. Trying to document and study what law professors do may end up destroying the best of what law professors do.

Is academic timekeeping a paradox? Will trying to reap its diagnostic virtues likely unleash destructive forces that will ruin legal academia as we know it? Perhaps not, given the different time horizons of the diagnostic and

39. *Id.* at 505.

40. *Id.*

41. *Id.* at 505–06.

42. *Id.* at 513.

43. *Id.*

44. *Id.* at 512.

45. *Id.* at 512–13.

destructive qualities of timekeeping. Generating diagnostic insights does not require making time recording a permanent feature of legal academia. While developing best practices and benchmarks, building a knowledgebase for training and mentoring, and documenting work habit patterns across legal academia does entail a comprehensive exercise of timekeeping, the diagnostic insights can be generated by a time-limited grand experiment, say over a year's time. In contrast, the destructive forces of timekeeping, undermining the intellectual and contemplative culture of legal academia and undercutting spaces to think, are likely to take time, years, to play out. One can imagine successfully navigating the diagnostic and destructive sides of academic timekeeping by simply casting it as a one-time, year-long experiment.

On the other hand, the thought experiment about the academic "billable" hour is far from a straightforward proposition because both its diagnostic and destructive attributes depend on complex assumptions about legal academia and law professors. The destructive dark side of timekeeping assumes that legal academia is an intellectual contemplative paradise of sorts, inhibited by law professors who spend their time thinking big thoughts about teaching, scholarship, and service. What we know, however, about the quality, productivity, and impact of teaching, scholarship, and service suggests it is not so. At the same time, the diagnostic virtues of timekeeping depend on assumptions about law professors, for example, that they will not cheat when recording their time.

How does timekeeping affect professional enterprises? Are law professors likely to cheat? For clues and answers we might turn next to law practice and learn from the experience of lawyers with the billable hour.

III. LESSONS FROM THE BILLABLE HOUR IN LAW PRACTICE

While the lure of finding out what law professors do may be compelling, requiring law professors to record their time ought to take account of the many critiques of the billable hour in law practice. The billable hour has been characterized as a disincentive to efficient practice; a cause of over-lawyering and even fraudulent billing practices; a reason for work-life concerns, and even outright lawyer unhappiness; a reason for decreased mentorships and reduced investments in junior lawyers and public service; and a negative factor souring the legal profession's culture.⁴⁶ If these ills are true and if they would equally

46. Professor Susan Fortney has been a thoughtful vocal critic of the billable hour. See Fortney, *Soul for Sale*, *supra* note 20, at 281–82; Fortney, *I Don't Have Time to be Ethical*, *supra* note 20, at 310; Fortney, *The Billable Hours Derby*, *supra* note 20, at 179; see also Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 889 (1999) [hereinafter Schiltz, *Unethical Profession*]. Douglas Richmond, in contrast,

apply to legal academia, perhaps timekeeping should not be imported by law professors.

The billable hour became increasingly common between the 1950s and 1970s,⁴⁷ introduced by lawyers seeking higher compensation who wanted to replace gentlemanly understandings about the value of legal services with fees calculated as the product of lucrative hourly rates and hours spent serving clients.⁴⁸ Notwithstanding its self-serving nature, the billable hour changed the landscape of the attorney-client relationship in terms of transparency: instead of obscure bills for “services rendered,” billable hours allowed clients a window into what their lawyers were doing.⁴⁹ As between clients and lawyers, the innovation of the billable hour effectively married market incentives and transparency, quickly becoming an accepted standard.

At law firms, the billable hour served additional functions. Not only was it used to charge clients for partners’ and associates’ time, but it served as an internal monitoring and governance procedure. Partners could use associates’ recorded time not only to bill clients, but also to assess the performance and progress of associates. Similarly, partners could observe and monitor their counterparts’ time to ensure against shirking.⁵⁰ Yet, the benefits of timekeeping—an effective and transparent means of billing, and serving as an internal monitoring mechanism within firms—did not come without disadvantages.

First, the billable hour constitutes a disincentive for being efficient: a smart, fast lawyer who can complete a task in thirty minutes can only bill a client for half an hour, whereas a slower, less efficient lawyer who takes twice the time is able to bill double, seemingly punishing the faster lawyer for her efficiency. The efficiency disincentive is less pronounced when lawyers are busy: the more efficient lawyer will bill as many hours as she’d like, whereas the inefficient attorney will fall behind; it is more troubling when lawyers are not fully

has been an astute defender of the billable hour, or more accurately, a skeptic observer of critiques of it. See Douglas R. Richmond, *In Defense of the Billable Hour*, PROF. LAW., Winter 2003, at 1, 1 [hereinafter Richmond, *In Defense of the Billable Hour*]; Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 210 (2000).

47. ROSS, *supra* note 19, at 17.

48. *Id.* at 16–17.

49. Joseph T. Bernstein, *In Defense of the Billable Hour*, COLO. LAW., Dec. 2007, at 67, 68.

50. GALANTER & PALAY, *supra* note 14, at 100; Russell G. Pearce & Eli Wald, *The Relational Infrastructure of the Law Firm Culture and Regulation: The Exaggerated Death of Big Law*, 42 HOFSTRA L. REV. 109, 131 (2013); Stephen Lilley, *The Hard Work of “Hard Work”: The Legal Elite’s Rhetoric of Diligence and the Professionalization of the Law, 1850–1920*, 17 WIDENER L.J. 145, 154 (2007) (describing the billable hour as an instrument used by law firms to monitor the performance of their lawyers).

employed because the more efficient lawyer will work less and bill less.⁵¹ Some fee policies can mitigate the effects of the efficiency disincentive. For example, more efficient lawyers can charge a higher hourly rate than less efficient lawyers,⁵² but only if clients and partners can observe the faster or better quality of the more efficient lawyer.

Second and relatedly, the billable hour provides a reason to over-lawyer assignments. A lawyer paid by the hour or having to meet billable targets has an incentive to explore every aspect of every issue, leaving no stone unturned, whereas an attorney not compensated hourly is better positioned to make professional judgment calls about concluding work on a matter when the marginal benefit to the client is negligible.⁵³ This incentive could be mitigated by helping lawyers acquire professional skills and hone professional judgment,⁵⁴ which would allow them to make reasonable and informed judgments about how much time to spend on a matter by investing in the formation of their professional identity as ethical lawyers who act consistent with clients' best interests.

Third, the billable hour triggers a concern about fraud, creating an incentive for lawyers to over-state their time to increase their compensation (or to meet their billable targets) when the client (or the partner) cannot directly observe their time.⁵⁵ As is the case with over-lawyering, the incentive to over-bill can be mitigated by investments in the professional identity of individual lawyers and in the ethical culture and infrastructure of law firms.⁵⁶ Market controls, such as lawyers' reputations for integrity, as well as statutory controls, like rules

51. See Richmond, *In Defense of the Billable Hour*, *supra* note 46, at 5.

52. MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (AM. BAR ASS'N 2018).

53. Richmond, *In Defense of the Billable Hour*, *supra* note 46, at 1.

54. Professor Neil Hamilton has been a leader in the study of the formation of professional identity and its impact on lawyers' conduct. See generally Neil Hamilton & Sarah Schaefer, *What Legal Education Can Learn from Medical Education about Competency-Based Learning Outcomes Including Those Related to Professional Formation and Professionalism*, 29 GEO. J. LEGAL ETHICS 399 (2016); Neil Hamilton & Jerome M. Organ, *Thirty Reflection Questions to Help Each Student Find Meaningful Employment and Develop an Integrated Professional Identity (Professional Formation)*, 83 TENN. L. REV. 843 (2016); Neil W. Hamilton, *Changing Markets Create Opportunities: Emphasizing the Competencies Legal Employers Use in Hiring New Lawyers (Including Professional Formation/Professionalism)*, 65 S.C. L. REV. 547 (2014).

55. Richmond, *In Defense of the Billable Hour*, *supra* note 46, at 1.

56. See Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 559, 566 (2002); Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 692 (2002); Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 342-43 (2003).

of professional conduct and regulatory enforcement (for example, discipline) also alleviate concerns about cheating.

Two developments have aggravated the disadvantages of the billable hour: the increasingly direct linkage between the billable hour and compensation and escalating billable targets. For some lawyers, there has always been a direct link between the billable hour and compensation. Solo practitioners, for example, have long had their compensation tied to the billable hour in the sense that additional billed hours led to higher compensation and lower hours resulted in lower pay. For others, however, the relationship has been less direct. Large law firm associates—indeed, associates in general—usually receive a set salary irrespective of billable hours. Of course, law firms big and small often set explicit or implicit billable targets and those who fail to meet their expectancies may experience pressures to bill more or be at risk of losing their jobs, but compensation itself was not directly linked to billable hours. Similarly, partners often had hard or soft billable targets and failure to meet them may have led, over time, to adjustment in compensation, but generally there was no direct link between billable hours and compensation. Indeed, the relationship may have been counterintuitive: rainmakers or “finders” who spent considerable amount of time on business development may have ended up billing less for actual legal work but experienced no decline in compensation, quite the contrary.⁵⁷

Yet, as law firms have begun to more explicitly focus on the financial bottom line, the relationship between billable hours and compensation has grown increasingly more direct.⁵⁸ Not only have bonuses at some firms become directly linked to billable hour targets for both associates and partners, but failure to meet billable targets has led to more immediate and direct consequences in terms of compensation. Relatedly, as the “eat what you kill” culture became more widespread, law firms concerned with profitability and its perception began to increase the billable targets for associates and sometimes for partners as well.⁵⁹

The combined effect of these two trends has led to several well documented negative consequences. Commentators argue that increased billable targets more directly connected to compensation have led to an unhealthy and unsustainable work-life balance at BigLaw and outside of it.⁶⁰ Lawyers

57. Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1898 (2008); William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691, 1694–95 (2006).

58. Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 44, 70 (2011).

59. MILTON C. REGAN, JR., EAT WHAT YOU KILL 7 (2006).

60. *Id.* at 287.

incentivized to work longer and longer hours have found themselves with fewer personal hours and a professional life increasingly crowding out the personal. This, in turn, has led to purported increased unhappiness and dissatisfaction among lawyers that is attributed to the billable hour.⁶¹

Increased billable targets informing compensation also lead to negative incentives to mentor and train junior associates because every hour of mentoring and training is an hour not billed to a client.⁶² Finally, the trends fuel concerns about inequities and reduced diversity in the legal profession: the decline of training and mentorship and emphasis on the billable hour mean that those who can fend for themselves, for example, those endowed with ample relationships and know how about the firm—historically, white heterosexual men—are more likely to succeed than those who have smaller endowments of social and cultural capital and are disproportionately affected by diminished training and mentorship.⁶³

Importantly, for lawyers, the negative consequences associated with the billable hour and aggravated by a heightened focus on the financial bottom line and increased billable targets are all grounded in and are the result of the inherent connection between keeping time and billing it to clients. That is, none of these negative consequences follow from lawyers' timekeeping. Rather, they follow from the tie between recording time and billing it, leading to compensation consequences. For law professors, and this is key, there is no such inherent relationship between recording time and compensation, and no reason to tie timekeeping with monetary consequences. As opposed to practicing lawyers, law professors can have all the benefits associated with timekeeping—generating data about work habits—without any of the negative consequences associated with billing the time—inefficiencies, over-lawyering, over-billing, work-life challenges, decreased training and mentorship, and diminished equality and diversity.

*A. Cheating and Time Padding⁶⁴:
Separating the Diagnostic from the Punitive*

To begin with, there is some irony in worrying about law professors' cheating and time padding. Law professors spend their time training and

61. Schiltz, *Unethical Profession*, *supra* note 46, at 889–90; Richmond, *In Defense of the Billable Hour*, *supra* note 46, at 5.

62. Fortney, *Soul for Sale*, *supra* note 20, at 281–82; Fortney, *I Don't Have Time to be Ethical*, *supra* note 20, at 310; Fortney, *The Billable Hours Derby*, *supra* note 20, at 179.

63. Wald, *supra* note 23, at 2509; Wald, *supra* note 25, at 21.

64. See generally DEBORAH L. RHODE, CHEATING: ETHICS IN EVERYDAY LIFE 75–91 (2017) (analyzing cheating in the academic setting).

preparing lawyers, many of whom will regularly keep their time, to practice, on the fundamental assumption that lawyers can and should act honestly and avoid over-billing clients, the contrary pressures and incentives notwithstanding. If law professors believe that most or even many lawyers cannot and do not keep time honestly because such practice is not possible, they should not be teaching at law schools and should not be sending their students to an unavoidable and inevitable corrupting profession. Law professors, as a condition for acting morally in their role as law professors, must therefore believe that ethical timekeeping is possible for lawyers.

Next, two lessons emerge from the analysis of lawyers' billable hour. First, if ethical timekeeping is possible for practicing lawyers,⁶⁵ it is surely possible for law professors who do not experience nearly the pressures and incentives lawyers face to over-bill. In any event, the same professional training, policies, procedures, and mechanisms used to combat the threat of over-billing in the practice of law, from the development of ethical professional identity to oversight and monitoring, could be deployed in legal academia. Yet, learning from law practice suggests that academic timekeeping should not be put in place, permanently or even as an experiment, before appropriate training in ethical timekeeping is offered and an oversight apparatus (for example, spot checking), is conceived of to reduce the probability of cheating.⁶⁶

Second, if lawyers over-bill, they do so to enhance their compensation, meet billable targets, or because they are greedy, none of which apply to law professors whose compensation is not (and should not be) tied to the billable hour. If academic timekeeping was to be detached from compensation, law professors would simply have little financial reason to over-bill. The lesson from law practice here is the importance of separating the diagnostic aspects of timekeeping from its potential punitive consequences, such as adverse effects on compensation. If law professors knew that their timekeeping data would not affect their compensation in any way, the incentive to cheat would be greatly reduced.

Moreover, even if in the long run—after law professors' aggregate time recording was used to generate benchmarks for effective academic practice and best practices—timekeeping was to be used to inform law professors' compensation decisions at some law schools, it would still not generate the kind of negative incentives practicing lawyers routinely experience because law

65. Schiltz, *Unethical Profession*, *supra* note 46, at 950.

66. *See supra* note 56. In terms of informational regulation, thinking about training and investing in timekeeping infrastructure before rushing to implement any specific program would be a form of informational design. *See generally* William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1781–83 (1999).

schools would also have additional data points to assess the performance of their faculty members like number of classes taught, student evaluations, contact hours, committee service, number of scholarly publications and their quality, etc. The combined effect of putting in place an apparatus to ensure ethical timekeeping and divorcing the diagnostic insights from punitive compensation consequences might go a long way toward reducing concerns about the academic "billable" hour.

B. The Cost of Timekeeping

In the short run, during the aggregate data gathering stage generating collective benchmarks and best policies regarding work habits, individual law professors will not benefit from timekeeping. Only once the aggregate data has been collected and mined will individual faculty members benefit from the insights generated to assess, inform, and improve their work habits.

Admittedly, in the short run, while they are not benefiting from the undertaking, law professors will incur a cost related to timekeeping, namely, lost timekeeping time. Notably, while lawyers routinely keep time, they do so out of necessity and in return get paid such that the cost of timekeeping is more than offset by the benefits of it, especially given that no cheaper alternatives for billing clients have emerged as an effective substitute for the billable hour.⁶⁷

For law professors, in contrast, time lost to recording time is in the short run a net cost, time taken away from other more productive tasks, such as teaching, service, and scholarship. Once again, however, learning from the experience of practicing lawyers can benefit law professors. Practically speaking, there are many timekeeping programs available in the marketplace to allow law professors to begin recording their time immediately and conveniently. Just as lawyers and law firms have developed conventions about timekeeping categories and matters, so can law professors. Indeed, given that the main objective of academic timekeeping is generating aggregate data, it is imperative to develop, in advance, agreed-upon categories such that all law professors can keep time consistently and universally.⁶⁸

For purposes of this Essay, it is unnecessary to spell out the final details of academic timekeeping. No doubt, law professors will track time for at least the three major components of their job: teaching, service, and scholarship. Teaching may include categories such as classroom instruction, classroom preparation, student contact hours, and supervision. Service may include

67. See David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *FORDHAM L. REV.* 2067, 2112 (2010).

68. Devising in advance universal categories of timekeeping for all law professors to record constitutes a form of informational design. See Sage, *supra* note 66.

categories such as committee service, university service, administrative tasks, student mentoring, collegial mentoring, pro bono work, Continuing Legal Education and community talks, intellectual exchanges (such as commenting on others' work), and public service. Scholarship categories may include researching, writing, participating in conferences, and presenting one's work. Additional categories may include consulting, expert work, etc.

Regular daily timekeeping will take some time getting used to, especially given how foreign it is to academic work, and law professors will be able to benefit from training materials readily available in law practice. Over time, however, the imposition on law professors' time and thus the cost of timekeeping is likely minimal. Lawyers do not report the actual time spent keeping time as a significant imposition, and law professors, even those who have not practiced law and have no previous experience keeping time, will easily adjust to the commitment. To further reduce the cost of recording academic time, law professors could keep their time in thirty-minute units as opposed to the customary six-minute units observed by lawyers. While the latter divide each hour into ten parts to efficiently bill clients, law professors could collectively gain ample knowledge about work habits in two hourly increments.

C. Mandatory Versus Voluntary Timekeeping

The only "agenda" of timekeeping is to generate work habit aggregate data to inform and improve the professional lives of law professors and inform institutional decisions by law schools about time allocation of their faculties. The "billable" hour thought experiment does not assume that some law professors are not working hard enough. It does not aim to expose such a contingent or incentivize it to work harder.⁶⁹ In fact, diagnostic timekeeping entails no normative assumptions about how hard law professors ought or ought not work.

Rather than assuming a problem, time recording is motivated by a desire to generate aggregate data about what law professors do and how they do it, such that best practices and benchmarks can be developed to allow both individual law professors and institutional actors—law schools—to make more informed decisions about how to spend time and how to assess it, alongside the existing measures of quality, productivity, and impact.

69. See generally Colleen Flaherty, *So Much to Do, So Little Time*, INSIDE HIGHER ED (April 9, 2014), <https://www.insidehighered.com/news/2014/04/09/research-shows-professors-work-long-hours-and-spend-much-day-meetings> [https://perma.cc/FLW2-QMB6] (reporting on research that finds that professors work increasingly long and longer hours).

While it is the most successful law professors, the best teachers, the best institutional actors, and the best scholars that we have the most to learn from in terms of how they spend their time, exactly because we do not know how much time law professors spend at work or how they spend it, we have a lot to learn from collecting data about the work habits of *all* law professors, generating data about best practices to follow, worst practices to avoid, and benchmarks for particular tasks. Accordingly, academic time recording must be mandatory and collected pursuant to universal standards, even if it is put in place as a time-limited experiment.

Because we know so little about what law professors do and how they do it, voluntary time recording will be better than having no data at all. Voluntary and sporadic timekeeping, however, will not allow us to generate the aggregate data we need to produce insights regarding best practices and effective work habits. We need all law professors to record their time so we can have an understanding of how time is spent, and in turn, how to spend it more effectively and equally.

D. Autonomy and Academic Freedom

Many professors value professional autonomy and academic freedom as defining and fundamental values of academic life. Law professors often do not have control over what classes they teach, but they do have control over what and how they teach their courses (academic freedom), and they generally exercise near full control over their scholarship and service roles. Timekeeping, while not directly infringing on professors' autonomy and academic freedom, may nonetheless inform and shape these values. For example, if law professors were to keep time, some might shy away from teaching innovative time-consuming classes for fear of being perceived as inefficient teachers who spend too many hours preparing for class, or might shy away from complex and time-consuming research projects for fear of being perceived as under-productive scholars.

The concern that timekeeping might impact law professors' choices regarding their time is an important one. Indeed, the objective of timekeeping is to generate insights meant to inform and empower law professors' choices regarding their time and not to impede them, but at the same time concerns about autonomy and academic freedom should not be over-stated.

First, as Stanley Fish compellingly argues, "Independence from external impositions cannot mean that faculty members are unconstrained by a standard, and the standard that constrains them is not something faculty members should be free to nominate. . . . Freedom to teach . . . does not mean the freedom to say

anything and call it teaching.”⁷⁰ Similarly, the freedom to do scholarship does not mean the freedom to do nothing or anything and call it scholarship. Moreover, academic freedom properly understood, that is, the independence from external impositions, cannot mean that faculty members are unconstrained by a scholarly standard, and the standard that constrains them is not something faculty members should be free to nominate. Thus, to the extent that timekeeping constitutes a constraint on law professors’ autonomy and academic freedom, the concern ought to be taken seriously while remembering that autonomy and academic freedom are not absolute values and that not every imposition on them is by definition unreasonable or undesirable.

Second, timekeeping is not a direct imposition on autonomy and academic freedom. It does not tell law professors how much time to work and how to spend it. Rather, it may indirectly shape and inform law professors’ allocation of time in terms of what projects they may undertake or eschew. Indirect incentives in academia are not uncommon: some professors choose to teach overloads, either for additional pay or so they can bank credits and take some time off to pursue other academic tasks. Others who work in schools that provide financial incentives for publishing articles in top journals might eschew book projects, instead preferring to write articles and collect the bounties or attempt to write articles that are more likely to place in highly ranked journals.

Still, were law professors to record their time, it would be important to design timekeeping categories in a manner that would be unlikely to chill certain academic tasks and choices. Practicing lawyers experience pressure to bill their time to clients, chilling time spent on pro bono work, administrative tasks, training and mentoring, and service activities. While as long as academic timekeeping would be divorced from compensation consequences there would be no directly analogous reason to deter law professors from “billing” time to activities such as thinking about their research or developing new teaching techniques; recognizing such tasks as legitimate categories of timekeeping on par with activities such as “writing” and “teaching” could counteract the indirect incentive of timekeeping to avoid “thinking” as an unproductive activity and minimize its impact on autonomy and academic freedom.

Finally, as far as timekeeping may adversely affect autonomy and academic freedom, it should be noted that relative loss of autonomy and academic freedom by individual professors is already an ongoing phenomenon.⁷¹ The

70. Stanley Fish, *A Simple Moral: Know Your Job and Do It*, 36 J.C. & U.L. 313, 317 (2009).

71. Pat Schneider, *Regents Proposal: UW Will Track Professors’ Teaching Hours Starting in January*, CAP TIMES (Dec. 7, 2017), <http://host.madison.com/ct/news/local/education/university/regents-proposal-uw-will-track->

corporatization of both academia in general and legal education in particular impacts the role and work of law professors.⁷² Nor is the phenomenon unique to academic lawyers: attorneys, for example, partners at large law firms, have long experienced the relative decline of individual autonomy and corresponding rise in the power of centralized decision-making by the firm and of administrators within it, as well as by increasingly powerful clients and their in-house lawyers.⁷³

IV. THE POLITICS OF ACADEMIC TIMEKEEPING

Not too much imagination is needed to recognize that academic timekeeping might be used by enemies of the academy, such as hostile legislators, to criticize professors and advance political agendas. For example, in December of 2017, a proposal pending before the University of Wisconsin's Board of Regents called for the adoption of a policy monitoring the number of hours faculty spend teaching and rewarding professors who teach more than a standard academic load,⁷⁴ arguably motivated in part by opponents of ("liberal") scholarship seeking to curtail it.

The proposal appears to suffer from several significant flaws. To begin with, it does not purport to measure teaching work habits but scrutinizes only one aspect of teaching in isolation, namely in-class instruction.⁷⁵ Yet, as this Essay explains, we already know professors' teaching loads. What we do not know and ought to find out more about is exactly what the proposal excludes: how much time and how professors prepare for class, how much time and how they spend time with students outside of the classroom, and how much time and how they spend time preparing, grading, and providing feedback to students.

professors-teaching-hours-starting-in/article_6113739b-6627-565b-a5f0-53b89e3147de.html [https://perma.cc/K3HT-MZF5].

72. BERG & SEEBER, *supra* note 35, at x.

73. See ANTHONY T. KRONMAN, *THE LOST LAWYER* 378–79 (1993) (discussing the decline in lawyers' autonomy); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 494 (1989) (exploring the rise of in-house lawyers and their increased prestige and power); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 760 (2010); Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407, 415 (2012) (examining the loss of power and autonomy of outside counsel to in-house lawyers and their corporate entity clients).

74. Schneider, *supra* note 71. While uncommon, Wisconsin is not the first state to attempt to impose timekeeping requirements on academics. Pursuant to a 2003 Illinois statute titled State Officials and Employees Ethics Act, all state employees, including university faculty, have to "periodically submit time sheets documenting the time spent each day on official state business." Enforcement of this mandate has reportedly been inconsistent. See Amien Essif, *Told to Clock Their Hours, Some Illinois Professors Protest*, IN THESE TIMES (Jan. 30, 2014, 12:50 PM), http://inthesetimes.com/working/entry/16202/told_to_clock_their_hours_some_illinois_professors_p_rotest [https://perma.cc/E28J-GNBP].

75. Schneider, *supra* note 71.

As one faculty member noted colorfully in response to the proposal, “The Packers don’t just work three hours on Sunday.”⁷⁶

Next, the proposal focuses on one component of teaching to the exclusion of assessing time committed to scholarship and service.⁷⁷ As such, it risks generating partial and misleading information about what professors at the University of Wisconsin do.

Finally, and perhaps most alarmingly, by purporting to reward professors who teach more than a standard academic load, the proposal introduces the very tie between recorded time and compensation⁷⁸ that this Essay cautions against: the evil of the billable hour. Worse, the proposal introduces the tie in a manner that is likely to undermine quality teaching and undercut scholarship and service. One rewarded solely based on course loads faces an incentive to spend more time teaching and less time preparing classes and interacting with students, let alone researching and serving.

The shortcomings of the proposal notwithstanding, one can easily imagine that legislators supporting it or other measures like it might seize on this Essay and its thought experiment and mischaracterize it as supportive of their agenda of imposing in-class teaching targets at the expense of research, service, and other valuable aspects of teaching.

The likely political consequences of academic timekeeping, its possible manipulation and abuse included, certainly constitute a legitimate part of our thought experiment about the academic “billable” hour. If one thought, for example, that the costs associated with keeping time, namely increased political scrutiny that may result in pressure on research and service and the undermining of quality teaching, were likely to outweigh the benefits of enhanced knowledge about law professors’ work habits and improved scholarship, teaching, and service, one might reasonably conclude that the world we live in now would be superior to an imaginary world in which timekeeping was the norm.

More generally, should a legal scholar abstain from even suggesting a thought experiment that might be used to undercut legal scholarship? “Our thoughts are ours; their ends, none of our own,” Stanley Fish reminds us.⁷⁹ “[A]s we work things out, we are responsible for the product of that activity. What then happens, when and if the fruits of our labors are put out into the world, is not something that we can control”⁸⁰ Fish adds that “when I’m

76. *Id.*

77. *Id.*

78. *Id.*

79. *Transcript*, *supra* note 22, at 1098 (Stanley Fish) (quoting WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2).

80. *Id.*

doing scholarship, . . . I'm trying to get it right. I don't know what 'it' is and it varies in complexities of it certainly, but I'm trying to get it right."⁸¹ Yet, while the impact of scholarship and thought experiments is in this sense always contingent and outside the control of the scholar, "there are, of course, many ways in which you [as a scholar] try desperately to control [the uses of your scholarship]."⁸²

In thinking about what law professors do, how little we know about their work habits, and how important and valuable it would be to learn more about how legal academia is practiced, getting "it" right includes imagining the possibility of academic timekeeping, exploring both its likely benefits and costs. The quite real possibility that such a thought experiment might be used by enemies of legal academia to ridicule and denounce academic work, and in particular, to curtail and challenge the value and quality of academic research, does not mean it ought not be pursued. It does mean, however, that one might attempt to prevent the manipulation or abuse of the thought experiment, for example, by pointing out how particular timekeeping proposals are inconsistent with it.⁸³

Another way of responding to likely political consequences is to limit the thought exercise to law professors as opposed to academics working in other disciplines. Law schools and their professors tend to be relatively insulated from pressures affecting other parts of the university. For example, whereas many professors outside of law schools experience increased pressures to teach,⁸⁴ at some law schools professors have recently been teaching less, with typical teaching loads decreasing from a standard annual load of twelve to eleven, ten, or even nine credits.⁸⁵ This is not to suggest, of course, that law schools are immune to political pressures, such as attacks on legal clinics and the types of clients and cases they represent,⁸⁶ but rather to point out that law schools and their faculties may be better positioned to withstand political pressures compared to their university counterparts.

81. *Id.*

82. *Id.*

83. *See supra* notes 71, 75–78 and accompanying text.

84. BERG & SEEGER, *supra* note 35, at 28.

85. *See Faculty Teaching Loads*, PRAWFSBLAWG (Dec. 9, 2014), <http://prawfsblawg.blogs.com/prawfsblawg/2014/12/faculty-teaching-loads.html> [<https://perma.cc/58UE-R3HN>].

86. Steven Bender, *Legal Clinics Under Attack*, SALT (April 5, 2010), <https://www.saltlaw.org/legal-clinics-under-attack/> [<https://perma.cc/5LH7-W8Z4>]; Ian Urbina, *School Law Clinics Face a Backlash*, N.Y. TIMES (April 3, 2010), <http://www.nytimes.com/2010/04/04/us/04lawschool.html?emc=eta1> [<http://perma.cc/AD8B-DYT7>].

V. THE NORMATIVE INSIGHTS OF TIMEKEEPING

What should law professors be doing?⁸⁷ Should law professors spend most of their time researching and publishing? Or teaching and interacting with students as mentors?⁸⁸ Or serving the public interest?⁸⁹ Should law teaching be a one-size-fits-all, in which all law professors are held to the same expectations in terms of teaching, scholarship, and service, or should different standards apply to different categories of professors?⁹⁰ Should law professors stay involved in law practice, or at least engage in consulting or pursue expert work, pro bono or for profit, to stay current? Should law professors focus on training students to become lawyers?⁹¹ Or leaders?⁹² Or assume “JD-advantage” roles alongside or instead of those of traditional lawyers? Should all law professors work similar hours? Should law schools offer part-time arrangements to their full-time faculty?⁹³ Should all law professors dedicate time to scholarship?⁹⁴ Should different role contributions weigh equally at law schools?

Legal education is at a crossroads, and disagreement abounds regarding many of these questions.⁹⁵ These and similar decisions, however, would be better made if they were based on actual timekeeping data, documenting law professors’ teaching, service, and scholarly habits and time commitments. Diagnostic descriptive insights of timekeeping, to be sure, ought to inform and empower the discourse rather than decide normative choices, both individually

87. See, e.g., Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 369–70 (1990) (questioning the assumption and costs of having law professors teach and write).

88. BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 59 (John M. Conley & Lynn Mather eds., 2012).

89. Luban, *supra* note 17, at 58.

90. Rhode, *Legal Scholarship*, *supra* note 4, at 1357–58.

91. Zimmerman, *supra* note 5, at 135.

92. See generally DEBORAH L. RHODE, LAWYERS AS LEADERS 1 (2013).

93. See generally CYNTHIA FUCHS EPSTEIN ET AL., THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER 3–5 (1999) (discussing time norms, professional lives, family, and gender and the how these aspects change in the context of part-time professional employment); SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS 29–30 (2007) (discussing the role that part-time employment can play in the context of a professional woman’s life).

94. Rhode, *Legal Scholarship*, *supra* note 4, at 1331.

95. See generally, e.g., ROBIN L. WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM 1–42 (2014); TAMANAHA, *supra* note 88; Deborah L. Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437 (2013); Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 403–07 (2011); Eli Wald, *The Contextual Problem of Law Schools*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y (forthcoming Jan. 2018).

and institutionally. Yet finding out what law professors actually do and how they do it should certainly inform these important ongoing normative discussions. The challenges law schools face are complex enough and there is little reason to compound them by having decisions made under conditions of empirical uncertainty as to what law professors are actually doing. Additional data, especially if gathered by means of a timekeeping national experiment as opposed to a permanent arrangement,⁹⁶ may inform and improve the quality of the normative decisions law schools are facing.

As the preceding discussion suggests, it is critical to the effectiveness of any timekeeping scheme that it be grounded in thoughtful informational design, including universal categories of recorded time and training meant to minimize instances of cheating. The normative uncertainty clouding the future of legal academia introduces a chicken and an egg design problem: a lack of consensus concerning the normative objectives of law schools can thus thwart the development of a scheme of informational regulation by preventing agreement on what time categories law professors should record or by inducing compromises that may result in either incomplete or inapposite timekeeping.⁹⁷ Yet normative uncertainty notwithstanding, and even in the face of divergent models of legal education emerging, we have a core conceptual understanding of what it is that law professors do. We just do not know whether and how law professors go about doing their job, and timekeeping will reveal invaluable diagnostic data that in turn may inform normative choices.

VI. CONCLUSION

Academic timekeeping by law professors can generate useful insights about work habits that may inform and improve legal academia. If all law professors were to record their time teaching, serving, and researching based on agreed-upon time categories, we would know more about what law professors do and how they do it and would be able to generate benchmarks and best practices, which may inform individual decision-making by faculty members regarding how to allocate their time, as well as institutional decision-making by law schools about how to assess and allocate their human capital resources and how to effectively train and mentor junior colleagues.

Timekeeping, however, also has a dark, destructive side, as it may undercut the intellectual and contemplative culture of legal academia and may help create disincentives for thinking, unintentionally triggering and contributing to a process of replacing standards of quality and professional excellence with

96. See *supra* notes 44–45 and accompanying text explaining the different time horizons of the diagnostic and destructive qualities of timekeeping.

97. Oldfather, *supra* note 31, at 786–87.

managerial reporting of hours. Indeed, the two sides of timekeeping, the diagnostic and destructive, may be inherently intertwined such that the very act of keeping academic time may undercut the core mission and objectives of legal academia.

Law practice and lawyers' experience with the billable hour suggests some valuable lessons in terms of thinking about academic timekeeping. Scrutiny of the disadvantages of the billable hour in law practice reveals that they result to a significant degree from the tie between recorded time and compensation—a necessary and inherent relationship in law practice, which is unnecessary in legal academia. Law professors' timekeeping does not and should not play a significant role in compensation decisions; rather, it should inform work habit decisions of individual law professors and law schools. Divorcing the diagnostic from the punitive—that is, mandating academic timekeeping while liberating law professors from any compensation consequences attached to recorded time—may help address some of the concerns regarding the dark side of timekeeping by reducing the incentives of law professors to cheat. Moreover, the experience of lawyers with the formation of professional identity as well as the development of policies and procedures meant to encourage ethical timekeeping could be used in legal academia to render the diagnostic virtues of timekeeping more likely. Thus, a time-limited, mandatory national experiment with academic timekeeping based on universally agreed-upon time categories, supported by an apparatus of ethical timekeeping, and divorced from compensation consequences may avail legal academia of the diagnostic virtues of timekeeping while keeping its destructive qualities at bay.

Admittedly, recording time may provide enemies of the academia with powerful ammunition. It may, for example, be used by critics to demand increased teaching loads and restrict investment in research. Yet continued ignorance about what law professors do may be too high a price to pay for a false sense of security. Moreover, robust knowledge about law professors' work habits may inform normative discussions about what law professors should be doing, an important contribution given that such normative discussions are upon us.