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# Virtuous Billing

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# VIRTUOUS BILLING

Randy D. Gordon\* & Nancy B. Rapoport\*\*

*Aristotle tells us, in his Nicomachean Ethics, that we become ethical by building good habits and we become unethical by building bad habits: “excellence of character results from habit, whence it has acquired its name (êthikê) by a slight modification of the word ethos (habit).” Excellence of character comes from following the right habits.*

*Thinking of ethics as habit-forming may sound unusual to the modern mind, but not to Aristotle or the medieval thinkers who grew up in his long shadow. “Habit” in Greek is “ethos,” from which we get our modern word, “ethical.” In Latin, habits are moralis, which gives us the word, “moral.” Aristotle explains that we cannot alter nature by practice: we cannot teach or train a rock to roll up a hill no matter how often we throw it up. But we can alter ourselves by practice. We can train ourselves to be ethical by practice, just as we learn to play the harp by practice.<sup>1</sup>*

*It is a timeless adage that when analyzing the unacceptable behavior of others, one should never attribute to malice that which can be adequately explained by stupidity.<sup>2</sup>*

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<sup>1</sup> Ronald D. Rotunda, *Why Lawyers Are Different and Why We Are the Same: Creating Structural Incentives in Large Law Firms to Promote Ethical Behavior—In-House Ethics Counsel, Bill Padding, and In-House Ethics Training*, 44 AKRON L. REV. 679, 711–12 (2011) (footnote omitted).

<sup>2</sup> Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problem of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 82 (2008).

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## INTRODUCTION

During the Conference on Psychology and Lawyering that Professor Jean Sternlight hosted at the William S. Boyd School of Law,<sup>3</sup> the two of us spoke about the psychology of legal ethics. Drawing on the humanities background that one of us has<sup>4</sup> and the social science background of the other,<sup>5</sup> we dis-

<sup>3</sup> *Conference on Psychology and Lawyering: Coalescing the Field*, UNLV WILLIAM S. BOYD SCHOOL OF LAW, <http://www.law.unlv.edu/PsychologyLawyering2014> (last visited Feb. 22, 2015).

<sup>4</sup> *Randy D. Gordon*, GARDERE, <http://www.gardere.com/Professionals/Randy-D-Gordon/> (last visited June 10, 2015).

<sup>5</sup> *Nancy B. Rapoport*, UNLV WILLIAM S. BOYD SCHOOL OF LAW, <http://www.law.unlv.edu/faculty/nancy-raoport.html> (last visited Feb. 22, 2015); *see also* Curriculum Vitae, Nancy B. Rapoport, available at [http://www.law.unlv.edu/sites/default/files/faculty/resumes/raoport\\_cv\\_5\\_15\\_15.pdf](http://www.law.unlv.edu/sites/default/files/faculty/resumes/raoport_cv_5_15_15.pdf).

cussed the importance of understanding the incentives that encourage lawyers to behave in certain ways.<sup>6</sup> We still believe that the incentives that organizations develop—intentionally (through policies and procedures) or inadvertently (through the unintended consequences of those policies and procedures)—have profound effects on behavior, but we also believe that an understanding of how to use the classical concept of “virtue”<sup>7</sup>—as the development of habits that shape character—can help people interact with those incentives. In particular, we want to explore the concept of “virtue” as it relates to billable behavior: How should lawyers bill clients? Is it possible for lawyers to develop some billing habits that will make it easier for them to bill more ethically? And should law firms care?<sup>8</sup>

## I. “VIRTUE” IN THE LEGAL PROFESSION AND THE CULTURE(S) OF LAW FIRMS

Most everyone would agree, we think, that there are things about the practice of law that make it meaningfully different from other occupations and that there are things about law firms that—at least traditionally—make them meaningfully different from other organizational forms. These differences manifest in two ways that are important to our discussion. First, the practice of law both ethically and with skill requires lawyers to develop and maintain law-specific habits of mind. Second, law firms mature into unique cultures that—depending on the shape and substance of that culture—either impede or promote the virtues congenial to those salutary law-specific habits of mind.

### A. *The “Two Cultures” of Legal Education and Law Practice*

Over fifty years ago, C.P. Snow examined—and decried—the rise of what he called the “two cultures.”<sup>9</sup> Snow used this metaphor to capture what he saw as an inability to communicate between<sup>10</sup> communities of scientists and communities of literary intellectuals. His two-culture metaphor seems basically right to us,<sup>11</sup> and we think that it may be useful to frame our discussion of virtue with the notion of “culture” in the Snowian<sup>12</sup> sense of how groups of similar

<sup>6</sup> For a longer discussion of incentives and lawyer behavior, see, e.g., Nancy B. Rapoport, “Nudging” Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 42 (2014).

<sup>7</sup> At least one of us believes that it is less important that a person be ethical than it is that she behave as if she were ethical. See *infra* note 161.

<sup>8</sup> We think that law firms *do* care. For one thing, more and more of them are analyzing their bills to mine useful data about billing patterns. See, e.g., Aric Press, *What the Rise of Pricing Officers Says About Big Law’s Future*, AM. LAW. (July 3, 2014), <http://www.americanlawyer.com/id=1202661735831>.

<sup>9</sup> C.P. SNOW, *THE TWO CULTURES* vii–viii (1998).

<sup>10</sup> To comprehend across, really.

<sup>11</sup> Though subject to qualification and criticism (much of which he himself anticipated and conceded).

<sup>12</sup> If “Snowian” isn’t a word, it should be. And Paul Horwitz has suggested, in a Facebook post, that academics should consider using “-ish” instead of “-ian.” We’re cool with the non-

people almost instinctively respond alike to a problem, situation, or subject. By way of preview, we'll posit that two "cultural" obstacles stand in the way of "virtue" in the legal profession: first, separate cultures have grown up around legal education and legal practice; and second, legal practice itself has migrated from one culture (professionalism) to another (commerce). Each of these divergences is antithetical to the notion of virtue, for two reasons: first, because the legal education/legal practice divide has engendered mutual suspicion between enterprises that should operate in tandem, and second, because the profession/commerce migration has forced an attendant focus from the internal goods of legal practice (being a skilled lawyer) to the external goods of legal practice (making money and enhancing one's prestige). But before moving to specifics, we need to pause and consider what virtues *should* obtain in the context of law, and that means that we're about to get a little bit hoity-toity about the concept of virtue.

### B. "Virtue" in the Classical Sense

In heroic societies (think of the *Iliad*<sup>13</sup> or *Beowulf*<sup>14</sup>), virtues and people's roles were inseparable, and the concept of virtue coincided with the notion of excellence (e.g., a great runner displays excellence of the feet).<sup>15</sup> Not surprisingly, given the tribal and war-like nature of heroic societies, courage was considered to be a high virtue—one tangled up with notions of loyalty, kinship, and success. By the time of Aristotle, the concept of one's "role" in a culture gave way to the importance of the *polis* (i.e., the city-state form of social structure), the vestiges of which still exist in institutions dedicated to the common good (e.g., hospitals, philanthropic organizations, and we would submit, once upon a time, law firms).<sup>16</sup> Accordingly, values like judgment, friendship,<sup>17</sup> and justice emerged as important institutional virtues.<sup>18</sup> It's not surprising then, that we still find these virtues itemized in general discussions of virtues in all the professions. But law—if not quite an autonomous discipline—also has a particular *telos*,<sup>19</sup> and we must accordingly attend to law's own goals if we are to identify virtues that facilitate their attainment.

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word "Snowish," but we'll stick with the non-word "Snowian" for this article. Paul Horwitz, FACEBOOK, <https://www.facebook.com/paul.horwitz.3> (last visited Feb. 7, 2015).

<sup>13</sup> HOMER, *THE ILIAD* (Robert Fagles trans., 1991).

<sup>14</sup> *BEOWULF: A NEW VERSE TRANSLATION* (Seamus Heaney trans., 2000).

<sup>15</sup> ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 122 (2d ed. 1984).

<sup>16</sup> *See id.* at 155.

<sup>17</sup> *Id.* at 156. Defined back then as a shared recognition and pursuit of a good. *Id.*

<sup>18</sup> *Id.* at 155–56. We could, of course, look elsewhere for a catalogue of virtues, ranging from Ben Franklin's utility-derived aphorisms to Jane Austen's emphasis on amiability and constancy. *Id.* at 181–87, 239–43. But the *Law Journal's* editors gave us a page limit, and we promised to stick to it.

<sup>19</sup> A "telos" is an "end"—i.e., a purpose or goal. *THE DICTIONARY OF PHILOSOPHY* 557 (Dagobert D. Runes ed., 2001); *cf.* MACINTYRE, *supra* note 15, at 184–85.

C. “Practice” as a Synonym of Sorts of “Profession”

To help us sort out what virtues should obtain in the practice of law, we think it’s helpful to consider the concept of a “practice” that Alasdair MacIntyre develops in his book *After Virtue*.<sup>20</sup> There, MacIntyre proposes this mouthful:

[A practice is] any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.<sup>21</sup>

Once an activity becomes “institutionalized” (in Neil MacCormick’s sense of the word),<sup>22</sup> it qualifies as a “practice” (in MacIntyre’s sense of that word).<sup>23</sup> Here are a few of the contrasting examples that MacIntyre suggests should sharpen the understanding of a “practice”: tic-tac-toe is not a practice, chess is; throwing a ball—even with skill—is not a practice, football is; bricklaying is not a practice, architecture is.<sup>24</sup> By these lights, we think that we can safely categorize “lawyer-work” as a practice.<sup>25</sup>

What, then, are the virtues associated with practices? To get us started down this path, MacIntyre suggests a tentative definition of a virtue: “A virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods.”<sup>26</sup> He goes on to name “justice, courage and truthfulness” as common virtues.<sup>27</sup> Not surprisingly, these virtues show up in most discussions of legal virtue, with “justice” occupying the place of preeminence and rising to the level of the *telos* for the whole enterprise.<sup>28</sup> To this list, legal commentators often add things like prudence, compassion, and wisdom.<sup>29</sup>

<sup>20</sup> MACINTYRE, *supra* note 15, at 187.

<sup>21</sup> *Id.* Yes, we too had to read that quote over about thirty times to understand it.

<sup>22</sup> NEIL MACCORMICK, INSTITUTIONS OF LAW: AN ESSAY IN LEGAL THEORY 21 (2007).

<sup>23</sup> MACINTYRE, *supra* note 15, at 187.

<sup>24</sup> If you were thinking of *Jacobellis v. Ohio* while reading this sentence, we wouldn’t blame you. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating that he knows pornography “when [he] see[s] it”).

<sup>25</sup> Judge Posner makes a similar point in identifying law as a “profession” in a way that business is not. For him, the distinguishing mark of a profession is its requirement that a person “master[] a body of formal knowledge.” Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L. J. 1, 5 (1993). He further compartmentalizes law as a *restricted* profession in that entry into it requires satisfaction of numerous prerequisites (education, licensing, etc.). *Id.* at 6.

<sup>26</sup> MACINTYRE, *supra* note 15, at 191.

<sup>27</sup> *Id.* at 194.

<sup>28</sup> One of us can’t resist this quote from Deuteronomy 16:18–21:9:

Judges and officers shall you appoint in all your gates, which the Lord your G[-]d gives you, throughout your tribes; and they shall judge the people with just judgment. You shall not

*D. The Cultures of Legal Education and Legal Practice*

With this backcloth stitched into place, we want to return to the twin cultural obstacles to identifying virtue in law: the divide between legal education and law practice, on the one hand, and within legal practice, on the other. Judge Richard Posner has suggested that the legal system in the United States has developed along the lines of a cartel.<sup>30</sup> That cartel formed, in large part, first because of changes in the training of lawyers<sup>31</sup> and then because of resulting changes in the licensing of lawyers.

*1. The Development of Formal Legal Education*

Throughout the Nineteenth Century, educational standards rose, and by the time that the Twentieth Century was starting to appear on the horizon, a movement to make the practice of law<sup>32</sup> a restricted occupation started to develop. Posner and others date the beginnings of this movement to 1870, when Christopher Columbus Langdell—the then-dean of Harvard Law School—revolutionized legal education.<sup>33</sup> Langdell believed that law was a science and that opinions written by appellate judges were the raw materials of this branch of science.<sup>34</sup> So, in Langdell’s view, just as geologists study rocks and zoologists study animals, lawyers should study published case opinions through a lengthy curriculum. As Posner somewhat wryly observes,<sup>35</sup> this curriculum became mandatory for those wanting to enter the profession.<sup>36</sup> And for the new system to jell completely, it required the abolition of the centuries-old practice

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pervert judgment; you shall not respect persons, nor take a bribe; for a bribe blinds the eyes of the wise, and perverts the words of the righteous. Justice, justice shall you pursue, that you may live, and inherit the land which the Lord your Gf[-]d gives you.

1 SOLOMON SIMON & MORRISON DAVID BIAL, *THE RABBI’S BIBLE*, TORAH 201 (1966). This whole idea of justice as law’s goal goes back a long way.

<sup>29</sup> Prudence, compassion, and wisdom, by the way, happen to overlap in good part with the list of physician virtues that people like Jennifer Radden and John Sadler have proposed in another professional context. See JENNIFER RADDEN AND JOHN Z. SADLER, *THE VIRTUOUS PSYCHIATRIST: CHARACTER ETHICS IN PSYCHIATRIC PRACTICE* 14 (2010). And just as an aside, we think that this substantial overlap between physician and lawyer virtues gives at least slight evidential weight to the credibility of MacIntyre’s posited link between virtues and practices.

<sup>30</sup> Posner, *supra* note 25, at 1–2.

<sup>31</sup> For a discussion of the development of one early law school, along with a bit of shameless self-promotion on the part of one of us, see Nancy B. Rapoport, *Plus Ça Change, Plus C’est La Même Chose*, 17 *GREEN BAG* 2D 55, 56–57 (2013).

<sup>32</sup> And, coincidentally, medicine. See, e.g., *supra* note 29.

<sup>33</sup> See Posner, *supra* note 25, at 15. We wouldn’t blame current law students for resenting Langdell.

<sup>34</sup> *Id.*

<sup>35</sup> He’s good at that sort of thing.

<sup>36</sup> Posner, *supra* note 25, at 15. One can contrast, then, the study of law with that of the sciences—one doesn’t have to have a degree in a particular scientific discipline in order to “do” science or to invent something.

of prospective lawyers entering the profession through a process of apprenticeship combined with self-study (“reading the law”).

It took some time for the Langdellian law school system to attain a monopoly over lawyer training.<sup>37</sup> But, as Posner notes, “by 1960, four years of college . . . plus three years at an accredited law school,” plus things like bar examinations and good character requirements, “formed a series of hoops through which almost everyone who wanted to become a licensed practitioner of law in this country had to jump.”<sup>38</sup> At the same time, state prohibitions against the unauthorized practice of law put teeth into these new educational requirements and thereby created what antitrust lawyers call a “bottleneck” at the law school level. So what are the consequences of the near-complete ascendancy of the Langdellian system?

That system has created a number of economic incentives for universities, because consumers (prospective lawyers) have to buy the product at cartel prices, and the product is relatively cheap to deliver (large lecture classes capped by a single examination at the end of the semester). Simply put, law schools can be relatively profitable<sup>39</sup> (compared to typical humanities departments, with low student-to-faculty ratios and relatively lower tuition), and they can be started with a relatively low capital investment (compared to medical or engineering schools, which need labs). Second, as Philip Kissam has argued,<sup>40</sup> the Langdellian<sup>41</sup> system propagates itself across every aspect of law schools in a manner that he likens to a Foucaultian<sup>42</sup> discipline, by which he means a “subterranean and habitual system of routine practices and tacit lessons” that serve to resist change and blunt any institutional development.<sup>43</sup> The chain of Kissam’s argument is too long to follow here,<sup>44</sup> but one of its segments is worth pausing to consider, especially since it pretty much squares with two of the most discussed recent critiques of legal education,<sup>45</sup> *Educating Lawyers* (popu-

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<sup>37</sup> *Id.* at 15 (“As late as 1951, twenty percent of American lawyers had not graduated from law school, and fifty percent had not graduated from college.”); *see also* Rapoport, *supra* note 31, at 55 (describing the history of New York University’s first law school).

<sup>38</sup> Posner, *supra* note 25, at 15.

<sup>39</sup> Although one of us wants to point out that, at least for state law schools, that profitability can be destroyed by the way that the state decides to fund legal education.

<sup>40</sup> PHILIP C. KISSAM, *THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS* 7 (2003).

<sup>41</sup> *Cf. supra* note 12; *see also* Aside, *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1474 nn. 1 & 4 (1975).

<sup>42</sup> Want to know about Michel Foucault? *See Michel Foucault*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 22, 2013), <http://plato.stanford.edu/entries/foucault/>.

<sup>43</sup> KISSAM, *supra* note 40, at 4.

<sup>44</sup> Trust us.

<sup>45</sup> Brian Tamanaha’s book, *Failing Law Schools*, is a third. BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012). For a partial list of reviews of that book, *see* Paul Caron, *More Reviews of Tamanaha’s Failing Law Schools*, TAXPROF BLOG (Feb. 13, 2014), [http://taxprof.typepad.com/taxprof\\_blog/2014/02/more-reviews.html](http://taxprof.typepad.com/taxprof_blog/2014/02/more-reviews.html).

larly known as the *Carnegie Report*)<sup>46</sup> and Roy Stuckey's *Best Practices*.<sup>47</sup> Kissam, Stuckey, and the authors of the *Carnegie Report* all make the same point when they contend that the Langdellian system doesn't produce "practice-ready" graduates of the sort that come out of trade schools, or even out of university-level programs in education, pharmacy, or medicine.

Of course, until fairly recently, most law firms didn't complain all that much about the lack of practical training in their new hires. The recent change of heart is one worth exploring because we'll find that it's emblematic of the other cultural change that we want to emphasize: the migration of law practice from a professional culture to a commercial culture. There's a straight line from the liminal moment between law practice as a profession and law practice as commerce directly to the billing issue that is our principal focus in this article.

## 2. *Law Practice and the Changes in Training New Lawyers After Graduation*

That straight line is intersected by a change in how new lawyers actually learn how to practice. There never was, of course, a "golden age" of law practice in which lawyers toiled harmoniously in the Garden of Justice.<sup>48</sup> But it's fair to say that law practice has become less professionally focused and more commercially focused over the past few decades.<sup>49</sup> As a consequence, yet another impediment has been placed in the lawyer's road to virtue. And all this bottom-line commercialism has exacerbated the legal education/law practice divide, because practicing lawyers have diminished the important role that they once played in both legal scholarship and new lawyer training.<sup>50</sup>

If a lawyer from 1950 were parachuted into the present, we suspect that the most startling change that he<sup>51</sup> would notice in the legal landscape would be the overall number of lawyers and the size (both in terms of number of lawyers and geographic scope) of law firms. Two statistical examples can illustrate this point: in 1951, there were about 220,000 lawyers; in 2000, this number was well over a million. In the late 1950s, fewer than forty firms in the U.S. had fifty lawyers or more; now there are around two dozen that number close to or

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<sup>46</sup> WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

<sup>47</sup> ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007).

<sup>48</sup> Cf. *Iron Butterfly—In A Gadda Da Vida*, YOUTUBE (June 19, 2008), [https://www.youtube.com/watch?v=2bQZ6l\\_cq5Y](https://www.youtube.com/watch?v=2bQZ6l_cq5Y).

<sup>49</sup> See, e.g., 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, 92; Rapoport, *supra* note 6.

<sup>50</sup> Hence, the present attempt to push more experiential and practical training back into the law schools.

<sup>51</sup> And it would almost inevitably have been a "he" back then.

over one thousand lawyers.<sup>52</sup> Lots of factors caused that explosion in the number of lawyers, but our point is that the explosion is a real phenomenon.<sup>53</sup> Until relatively recently, when various pressures caused law firms to rethink their business models, there was a lot of money to be made in law by those who could grab it. And one way to “grab it” was to create very large, highly leveraged firms (i.e., lots of associates and few equity partners) that could siphon off “premium” work at premium rates.<sup>54</sup>

With the rise of large, highly leveraged law firms came the transition from profession to business—and with that transition came the transition to metrics that created disincentives for lawyers to spend any non-billable time training new lawyers.<sup>55</sup> Reward systems reflect a firm’s values far more accurately than do “mission statements,” “value statements,” and letterhead slogans. When the reward systems involve only factors that relate to billable time, then value-maximizing lawyers will focus on billable time to the exclusion of any other things that might inure to their firm’s benefit.<sup>56</sup>

Most firms keep two types of statistics from which nearly all promotion and compensation decisions are made: “originations,” which tracks who brought the work into the firm, and *paid* billable hours.<sup>57</sup> Consequently, as William Henderson observes, none of this statistical myopia is lost on law firm partners, who often valorize these metrics, rank them well above other values, and slip into the short-term thinking that those metrics represent:

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<sup>52</sup> Jake Simpson, *Law360 Reveals 400 Largest US Law Firms*, LAW360 (Mar. 23, 2014, 9:45 PM), <http://www.law360.com/articles/518950/law360-reveals-400-largest-us-law-firms>.

<sup>53</sup> Why the explosion in the number of lawyers? There are many reasons, among them the breakdown of the cartel that had restricted membership by race, class, and gender, the growing propensity of corporations to move work from firm to firm (or to parcel work out to different firms), a surge in government regulations, and an explosion in litigation fueled in part by relaxed class-action rules, a judicial receptiveness to punitive damages awards, and a willingness by courts to wander into areas that had once been marked off as “political.”

<sup>54</sup> This leverage came at a cost in terms of the older “partnership” model in which the partners actually knew one another, socialized together, and made decisions as a group. One of the now-retired members of Randy’s firm used to talk about how all the lawyers at Gardere, Porter & DeHay (an earlier incarnation of his firm) would sit around a table on Saturday morning and open the mail together. Now, large firms are impersonal—they’re bureaucracies, really—and, according to Abe Krash, a retired Arnold & Porter partner,

Decisions . . . that were once influenced in significant part by tradition, loyalty, and regard for past contributions to the firm are determined by bottom-line, objective factors. The lock-step system of compensation has been replaced by an “eat-what-you-kill” system geared toward business generation. The relations among partners, and between partners and associates, are shaped to a great extent by considerations of profitability.

Abe Krash, *The Changing Legal Profession*, WASH. LAW., Jan. 2008, at 30, 33.

<sup>55</sup> For a discussion of how incentives can change law firm behavior, see Rapoport, *supra* note 6.

<sup>56</sup> *See id.*

<sup>57</sup> Clients may not pay all of their bills and may negotiate with their lawyers to reduce their bills, *see, e.g., id.* at 46–48, so “paid” time matters more than mere “billed” time.

This incentive problem, which focuses a lawyer's attention on the current fiscal year, is evident in a 2012 survey of over 2200 partners at major law firms.

When asked to assess the importance of various factors that are considered in determining compensation at their firms, origination of business was ranked as the most important factor (74 [percent] picking "very important") followed by revenues generated through that partner's work for clients (59 [percent]). In contrast, management responsibilities was selected as "very important" by only 9 [percent] of respondents; and only 10 [percent] of respondents reported that good citizenship was very important. When asked what was "most important" in determining compensation, 65 [percent] selected origination followed by 21 [percent] for working attorney receipts.<sup>58</sup>

To make matters worse, these seemingly "objective" metrics mask an underlying set of contingencies, ranging from how the business was generated (for example, is it "new" or from a hundred-year client?) to why the client didn't pay for the hours billed (was the work shoddy, or was the client a dead-beat?). The supposed objectivity of the statistics is further undermined because they at once show too much and too little.<sup>59</sup> For instance, suppose Partner X is credited with \$1,000,000 in business originations. But what if he's a terrible lawyer? What if the business came in through a cold call to the switchboard? What if he runs off every potential rival in his practice area, each of whom goes on to be a very successful lawyer at another firm? Or what if he actually turns off five potential clients for every one that he lands?

So why do firms use such metrics when they so clearly serve to enhance only the external goods of the practice (i.e., money and its collateral prestige)? The short answer is lawyer mobility. At one point, most firms were organized under the Cravath model,<sup>60</sup> in which firms hired the "best and brightest" from law school, eventually made some of those hires into partners for life, and exported the rest to positions with clients, the government, or firms in regional markets. There were virtually no lateral moves at the partnership level, a situation facilitated by stable client relationships. But as client loyalty waned, a market developed for lawyers with portable business. Thus, although many partners would, as Galanter and Henderson have put it,

gladly trade a portion of their earnings for a shorter workweek, greater job security, more interesting work, the opportunity to mentor (or be mentored), do more pro bono work, or take a long, uninterrupted vacation . . . , these aspirations are

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<sup>58</sup> William D. Henderson, *From Big Law to Lean Law*, 38 INT'L REV. L. & ECON. 5, 10–11 (2013) (footnotes omitted).

<sup>59</sup> For you baseball nuts out there, think about how Randy's fellow Kansans Bill James and Michael Lewis have shown that the statistical conventional wisdom can be counterproductive—even wrong. See, e.g., MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003).

<sup>60</sup> Named after the elite New York firm Cravath, Swain & Moore. See, e.g., William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 376–77 (2011); Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1807–08 (2008).

virtually impossible to negotiate when rainmaking partners located in multiple offices through the world are free to exit at any time with clients in tow.<sup>61</sup>

In effect, then, the internal goods of the practice (being an excellent lawyer who serves clients well) are held hostage to the external (money and prestige).<sup>62</sup>

What the devolution from the internal to the external means is that Aristotelian “friendship” (i.e., the virtue that holds institutions together) is no longer possible in law firms.<sup>63</sup> Indeed, the friendship bond has been replaced by a pervasive sense of anxiety: competitors are always poaching key clients; younger lawyers aren’t developing strong loyalties because they see their future riddled with contingencies; management is focusing on deceptive metrics; and even highly successful partners can see their careers hit the rocks after a major client defects to another firm.<sup>64</sup> Above all, as one commentator tartly puts it, “[l]arge firms view good lawyers as expendable.”<sup>65</sup> As a consequence:

For the vast majority of modern large law firms, economics rather than culture are the glue that holds the firm together. Indeed, the distinguishing feature of the elastic tournament is a constant focus on the real or imagined marginal product of each lawyer in the firm—associates, of counsel, sundry off-track attorneys, and equity and non-equity partners. Although this system is remarkably effective at maximizing the financial return on (at least some) human capital, it simultaneously undermines or hinders other values cherished by the profession.<sup>66</sup>

That economic conundrum leads us back into the legal education issue with which we started—and will lead us further into the billing thickets that have entangled the profession. In the past, new lawyers learned to apply their legal education through a combination of watching and doing. Several forces have

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<sup>61</sup> Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1906–07 (2008).

<sup>62</sup> Lawyers note that compensation shapes culture through the behaviors that it encourages and discourages. If a firm pronounces the importance of pro bono work but seems not to take it into account in setting compensation, it will be clear to lawyers that the firm does not regard time spent on pro bono matters as important. Similarly, if a firm provides compensation credit for a partner who takes on non-billable management responsibilities when he could be devoting that time to developing his own clients, the firm credibly signals that it values partners who are willing to make some personal sacrifices on behalf of the firm as a whole.

Milton C. Regan, Jr. & Lisa H. Rohrer, *Money and Meaning: The Moral Economy of Law Firm Compensation*, 10 U. ST. THOMAS L.J. 74, 80 (2012). For another powerful indication of the importance of a law firm’s culture, see Jennifer Smith, *The Downside of Luring Lateral Partners*, WALL ST. J. LAW BLOG (Oct. 20, 2014 11:37 AM), <http://blogs.wsj.com/law/2014/10/20/the-downsides-of-luring-lateral-partners/> (“While money is of course one motivation for switching firms, the number one reason cited by survey respondents [of lateral partners] was firm culture.”).

<sup>63</sup> Bernie Burk and Dave McGowan make this point in a wonderful article. See Burk & McGowan, *supra* note 49.

<sup>64</sup> Galanter & Henderson, *supra* note 61, at 1898.

<sup>65</sup> *Id.* at 1911 (quoting Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 690 (2005)).

<sup>66</sup> *Id.* at 1907.

conspired to undo on-the-job learning. First, large firms have discovered that they could increase the number of associates dramatically while holding the number of partners steady. But this increase in leverage necessarily means that associates spend less time with—and learning from—more senior lawyers. As Henderson puts it, high leveraging “makes high quality training, mentoring, and monitoring infeasible.”<sup>67</sup> The problem here is, of course, that the contemporary large law firm’s default incentives run against the very sort of behavior that made them successful in the past:

The increased reliance on leverage draws into sharp relief the tendency of Big Law to use its existing reputational capital to maximize short-term profits rather than take the steps necessary to build a stronger organization capable of taking market share from competitors. The higher leverage makes it much more difficult to properly screen, monitor, and train lawyers who are capable of building the firm’s reputational capital. Further, when we layer on top the increased pressure to originate business—to either preserve one’s standing in the firm or take advantage of rich payouts available to lateral partners—equity partners lack meaningful financial incentives to invest time in the mentoring of junior lawyers.<sup>68</sup>

And as Lawrence Fox astutely observes, the casualties from this process are readily identifiable and concrete:

Loyalty is an early victim, as is the concept of the firm—all for one and one for all. Further, if the real rewards go to those with the biggest books of business, what happens to other firm responsibilities such as hiring, training, running a summer program, pro bono services, bar association work and a myriad of other areas of endeavor? They still might get done but they will be done by individuals who will be under-rewarded for their efforts, sadly reflecting the reality that law as business has driven out so much of what we valued and celebrated about law as a learned and committed profession.<sup>69</sup>

Then, too, as the number of technically sophisticated lawyers has increased (often outstripping demand), “[t]his reality strongly reduces the incentive of clients to subsidize the training of entry-level lawyers, particularly at inflated pay scales that are disconnected from the value provided to clients.”<sup>70</sup> As Henderson and others have reported many times, some clients now refuse to pay for time billed by first- and second-year lawyers, which exacerbates the associate-development problem, because meaningful “briefcase carrying” represents money out of pocket for the firm.<sup>71</sup>

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<sup>67</sup> Henderson, *supra* note 58, at 6.

<sup>68</sup> *Id.* at 10.

<sup>69</sup> Lawrence J. Fox, *The End of Partnership*, 33 *FORDHAM URB. L.J.* 245, 248 (2005).

<sup>70</sup> Henderson, *supra* note 60, at 380.

<sup>71</sup> *Id.* at 387. Adding to the problem, as large firms have migrated exclusively to premium work at premium prices, the steady flow of small cases and transactions that junior lawyers could once credibly handle with minimal supervision have evaporated. For a long period in which revenues increased dramatically almost every year, large firms filled the development gap with sophisticated (and expensive) professional development programs. Although these programs enjoyed some success, they also—not universally, of course—suffered from some

The takeaway from all this for new lawyers is that money (and the billable hours that generate it) matters *above all*, even though most everyone knows at some visceral level that a law firm “cannot credibly compete on the basis of quality when it underinvests in its most important asset—legal talent.”<sup>72</sup> And that takeaway leads to another: that new lawyers aren’t being trained in how to bill. If law firms want to remain ethical as well as solvent, they must be more responsive to the increasing client demands for transparency and economy. To both of us, that means that law firms must encourage habits that let even the newest lawyers bill ethically. So let’s turn to virtue ethics as a way to encourage those habits.

## II. VIRTUE ETHICS AND ITS RELATIONSHIP TO LAWYER BEHAVIOR

*Virtue ethics holds one responsible for his or her choices and his or her actions, with the requisite consideration that these are affected by the facts, circumstances, and actual conditions of one’s personal and professional existence in which morality operates. But more importantly, persons are held responsible for their character—the sum total of those chosen and cultivated traits from which such choices and actions arise. Cultivating one’s personal and professional character, and thus acting in accordance with it, involves precisely the kind of intentionality that underlies the whole project of morality.*<sup>73</sup>

We’re just two of many who have hopped on the virtue ethics bandwagon.<sup>74</sup> The basic gist of virtue ethics is that people are virtuous when they have created and follow habits of excellence—habits that inculcate behavior that mimic the behavior of the best among us.<sup>75</sup> By starting with the question of

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of the same complaint-generating characteristics of law schools, in that they were often designed and run by non-lawyers or lawyers who had left practice after a short period. In any event, in recent years, many firms have “attempt[ed] to prop up profitability by slashing entry-level hiring and by cutting costs on professional development along with other nonessential expenses.” *Id.* at 387–88.

<sup>72</sup> *Id.* at 388.

<sup>73</sup> Paul J. Saguil, *A Virtuous Profession: Re-Conceptualizing Legal Ethics from a Virtue-Based Moral Philosophy*, 22 WINDSOR REV. LEGAL & SOC. ISSUES 1, 10 (2006).

<sup>74</sup> See, e.g., Andrew B. Ayers, *What if Legal Ethics Can’t Be Reduced to a Maxim?*, 26 GEO. J. LEGAL ETHICS 1 (2013); Caryn L. Beck-Dudley & Steven H. Hanks, *On Virtue and Peace: Creating a Workplace Where People Can Flourish*, 36 VAND. J. TRANSNAT’L L. 427 (2003); Sherman J. Clark, *Law as Communitarian Virtue Ethics*, 53 BUFF. L. REV. 757 (2005); Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3 (2012); Clark D. Cunningham & Charlotte Alexander, *Developing Professional Judgment: Law School Innovations in Response to the Carnegie Foundation’s Critique of American Legal Education*, in THE ETHICS PROJECT IN LEGAL EDUCATION, ch. 5 (Michael Robertson et al. eds., 2011); Adrian Evans & Michael King, *Reflections on the Connection of Virtue Ethics to Therapeutic Jurisprudence*, 35 U.N.S.W. L.J. 717 (2012); Saguil, *supra* note 73, at 1.

<sup>75</sup> In virtue ethics, the “how” is by means of character and virtue. To virtue ethicists, one ought to live life “excellently,” which, in turn, will further the individual’s, and society’s, happiness and well-being. Indeed, the classical ethicists on whose shoulders modern

how an “excellent” person (in the Aristotelian sense)—in our case, an excellent lawyer<sup>76</sup>—would behave in a particular situation, we can work backwards to determine how to develop the habits that would make it more likely to lead to the right behavior.<sup>77</sup> The trick, of course, is to identify just what habits a virtuous biller might have, so that we could emulate those habits. We will go on to identify techniques for monitoring and improving billing practices, but we also suggest that observing the way that the very best lawyers bill would be a good starting point. The assumption here is that virtuous and ethical lawyers will carry their good habits across the whole of their practices.<sup>78</sup>

Neither of us is wedded to the idea that developing habits alone will counteract all of the cognitive pressures that humans encounter.<sup>79</sup> It’s probably more reasonable to assume that the combination of ethical habits and an awareness of cognitive errors is a better way to shape lawyer behavior.<sup>80</sup> Those cognitive errors<sup>81</sup> can include cognitive dissonance,<sup>82</sup> diffusion of responsibility,<sup>83</sup> and so-

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virtue ethicists stand, endeavored to answer the question: “What is a good life for a human being?”; not the more direct and mundane question: “What ought I to do?”

Colombo, *supra* note 74, at 10 (footnotes omitted); see also Michael S. McGinniss, *Virtue Ethics, Earnestness, and the Deciding Lawyer: Human Flourishing in a Legal Community*, 87 N.D. L. REV. 19, 34 (2011) (“[A] virtue ethicist derives the rules of action for persons of good character from the virtues themselves, rather than establishing a duty-based rule of action first and deciding whether a person is acting in good character solely by determining whether he has acted in conformity with the rule.” (footnote omitted)).

<sup>76</sup> The concept of the Aristotelian “excellent lawyer” is different from, say, a lawyer who goes around thinking of herself as an excellent lawyer in general. There’s a difference between someone who has confidence in her own skills (“I’m an excellent lawyer”) and someone who thinks of herself as so good that she doesn’t need to pay attention to the ethics of what she’s doing.

<sup>77</sup> McGinniss, *supra* note 75, at 32.

How does a virtue ethicist go about making moral decisions? First, before asking “what should I do?,” a person faced with a moral dilemma should ask “what kind of person should one be?” For a virtue ethicist, the answer is that one should be a person of good and virtuous character whose actions are consistent with that character.

*Id.* (footnote omitted).

<sup>78</sup> See Lorie M. Graham, *Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Education*, 20 J. LEGAL PROF. 5, 48 (1995–96).

<sup>79</sup> We can now see the important implications of the person-situation debate for character-based moral theories. The virtue ethics tradition relies on the existence—and presumably on some sort of behavioral manifestation—of character traits. As Owen Flanagan puts it, “the entire enterprise of virtue ethics depends on there being individual traits of character which are causally effective in the production of behavior across situations of a kind.” But if Situationism is right, human behavior should not be understood as flowing from settled character and, hence, virtue ethicists hold an empirically inadequate conception of character traits and, presumably, a normatively wrong notion of moral character.

Miguel Alzola, *Character and Environment: The Status of Virtues in Organizations*, 78 J. BUS. ETHICS 343, 347 (2008) (citations omitted).

<sup>80</sup> *Cf. id.* at 352–53. (“In any event, there is a middle way between Situationism and Dispositionalism in organizational scholarship and business ethics. The empirical data support a synthetic theory of behavior according to which both of these viewpoints reflect important aspects of the truth.”).

<sup>81</sup> One of us has discussed cognitive errors a fair amount, most recently in Rapoport, *supra* note 6, at 44.

cial pressure.<sup>84</sup> We don't expect that an awareness of cognitive errors will change the way that humans are hard-wired to think, and we don't think that developing ethical habits will make someone more ethical. But we do believe that—if we had to choose between trying to make someone who's not particularly ethical into someone who is actually ethical and developing systems that make even the not-ethical person behave as if he were ethical—we'd pick the latter. We don't mind tilting at windmills,<sup>85</sup> but we'd rather attack real problems that might have real solutions.

### III. A RECAP: INCENTIVES AND THEIR EFFECTS ON BILLING BEHAVIOR

*As a general rule, employees respond to the incentives that their employers give them.*<sup>86</sup>

The trick with incentives is that people may think that they're shaping behavior one way, but the very incentives that they put into place often trigger unintended consequences that counteract the behavior they want to elicit.<sup>87</sup> In terms of lawyer billing behavior, hourly billing is a perfect example.<sup>88</sup>

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<sup>82</sup> For an armchair description of cognitive dissonance, see, e.g., Kendra Cherry, *What Is Cognitive Dissonance?*, ABOUT.COM, <http://psychology.about.com/od/cognitivepsychology/f/dissonance.htm> (last visited Feb. 23, 2015).

<sup>83</sup> See, e.g., Kendra Cherry, *What Is Diffusion of Responsibility?*, ABOUT.COM, <http://psychology.about.com/od/dindex/f/diffusion-of-responsibility.htm> (last visited Feb. 23, 2015).

<sup>84</sup> See, e.g., Saul McLeod, *Asch Experiment*, SIMPLYPSYCHOLOGY (2008), <http://www.simplypsychology.org/asch-conformity.html> (last visited Feb. 23, 2015).

<sup>85</sup> Cf. MIGUEL DE CERVANTES SAAVEDRA, *DON QUIXOTE* 44–45 (Wordsworth Editions Ltd., 1998) (1605).

<sup>86</sup> Rapoport, *supra* note 6, at 44.

<sup>87</sup> One way to think about the problem of unintended consequences is to think about “latent functions”:

There are essentially two methods for attributing goals to a law-related system, the “positive” and the “normative.” The positive method is to observe the operation of the system, determine what results it is in fact bringing about, and then to assume that it intends to bring about those results. Careful empirical observation of a law-related system almost always reveals that the system is doing things and producing results that participants in the system did not intend or anticipate. Systems-oriented sociologists refer to them as “latent functions.” Despite their unexpected nature, it is appropriate to treat these results as intended.

Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 502–03 (1997) (footnotes omitted) (citing to, among other sources, ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 63 (1957)). Thanks to Peter Bayer for pointing this idea out. For a slightly icky discussion of perverse incentives, see Rapoport, *supra* note 6, at 108 n. 227 (discussing the “rat tail” example of how incentives can trigger the exact opposite behavior that the incentives were designed to elicit).

<sup>88</sup> Studies of law as one of the “learned” professions (classically: medicine, law, and the clergy) naturally compare lawyers and physicians. See, e.g., SULLIVAN ET AL., *supra* note 46. For many years, medicine seemed to maintain a degree of insulation from the encroachment of “business” motives and evaluative standards. In recent years, though, medicine has been infected with its own version of the billable-hour virus, which has come in the form of reimbursement schedules tied to the amount of time that a payer says should have been spent on a particular consultation or procedure. See CMS MANUAL SYSTEM, CTRS. FOR MEDICARE

Lawyers developed hourly billing as a way of reassuring clients that the work that they were doing for the clients was reasonable.<sup>89</sup> In a study of the economics of hourly billing, George Shepherd and Morgan Cloud suggested that the shift to hourly billing from fixed-fee billing stemmed from a change to more liberalized discovery rules.<sup>90</sup> The documentation of time spent on a particular matter—as opposed to the classic one-line bill of “for services rendered, \$x”<sup>91</sup>—gave clients a way to measure the effort that the lawyers had expended. This client-centric<sup>92</sup> development, though, then became a way for a law firm to “measure . . . the utility of the worker and . . . the success of the firm itself.”<sup>93</sup>

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& MEDICAID SERVS., DEP’T HEALTH & HUMAN SERVS. § 20.2(C) (2010), *available at* <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/downloads/R2121CP.pdf>. But there is a difference: in law, incremental billing is intended to serve as a damper on how much a client must pay (but provides an incentive to pile up more billable hours); in medicine, incremental billing is also intended to keep costs down (but provides an incentive to spend as little time as possible with a patient). See David Frenz, *Is Time Really on Your Side?*, TODAY’S HOSPITALIST, Aug. 2012, *available at* [http://www.todayshospitalist.com/index.php?b=articles\\_read&cnt=1515](http://www.todayshospitalist.com/index.php?b=articles_read&cnt=1515) (“Hospitalists are also generally aware that they can bill based on time. While seemingly attractive—think of that chatty patient or family member who won’t let you escape—there are caveats and headaches that reduce its utility.”). For all we know, the clergy has (or will!) implement time-based efficiency metrics.

<sup>89</sup> Susan Fortney made a related point to one of us in an email. See E-mail from Susan Fortney, Dir., Inst. for the Study of Legal Ethics, to Nancy Rapoport, (June 29, 2014, 6:40 PM) [hereinafter Fortney E-mail] (on file with author Rapoport) (“On the development of billable hour practice, I believe that consultants actually promoted billable hour practice as a way for lawyers to capture their efforts and make more money.”) (draft attached to email).

<sup>90</sup> See George B. Shepherd & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. ILL. L. REV. 91, 94.

The profession was pushed irresistibly to hourly billing by economic pressures that resulted from the introduction of rules that permitted wide-open pretrial discovery. By creating unbearable cost uncertainty for lawyers who handled litigation matters, wide-open discovery forced lawyers, and surprisingly their institutional clients, to demand that the traditional forms of fixed fees be abandoned in favor of hourly billing.

*Id.* (footnote omitted). Kudos to Bernie Burk for pointing us in this direction.

<sup>91</sup> See, e.g., Stuart L. Pardau, *Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May Be Greatly Exaggerated*, 50 IDAHO L. REV. 1, 2–6 (2013).

<sup>92</sup> Well, hourly billing was also a way for lawyers to cost-shift to clients the risks of underpricing an engagement. See Shepherd & Cloud, *supra* note 90, at 95–96.

As cost uncertainty increases, the lawyer’s risk-bearing costs under the fixed-fee contract increase. If cost uncertainty increases sufficiently, then the risk costs that the fixed-fee contract imposes on the lawyer will eventually exceed the fixed-fee contract’s moral-hazard-reducing benefits. At that point, the lawyer will be better off under hourly billing, even after compensating the client for accepting the cost uncertainty and the moral hazard.

*Id.*

<sup>93</sup> Dennis Curtis & Judith Resnik, *Teaching Billing: Metrics of Value in Law Firms and Law Schools*, 54 STAN. L. REV. 1409, 1412 (2002) (reviewing DEBORAH L. RHODES, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000))

Hours are a factor in deciding salary levels, raises, bonuses, and promotions. Firms may also use hourly records to equalize work among associates, to calculate “utilization” of associates (how associates are measuring up to the firm’s hourly requirements), and to calculate a “realization” figure (how much the firm has actually collected for an associate’s work).

*Id.*

The more billable hours racked up (at least, the more billable hours that resulted in income for the firm), the better off the firm expected its finances to be.

Billable hours can provide some information about how “productive” a lawyer is and how profitable her firm is<sup>94</sup>—but, to paraphrase Jane Austen,<sup>95</sup> it is a truth universally acknowledged that when firms base their reward structures on billable hour totals,<sup>96</sup> they’re encouraging billing abuse, which is a particularly virulent form of unethical behavior.<sup>97</sup>

When we say “unethical,” we don’t mean that the behavior is intentionally dishonest.<sup>98</sup> (Some billing errors are dishonest, of course, but many billing errors are inadvertent.) Cognitive errors such as cognitive dissonance and social

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<sup>94</sup> See, e.g., Jesse Nelman, *A Little Trust Can Go a Long Way Toward Saving the Billable Hour*, 23 GEO. J. LEGAL ETHICS 717, 722 (2010) (“The billable hour can be salvaged through education in the form of modest regulation and the development of proper billing judgment for associates. This approach will provide lawyers with the notice and guidance they need to develop and sustain ethical billing practices despite pressure to perhaps do otherwise.”).

<sup>95</sup> JANE AUSTEN, *PRIDE AND PREJUDICE* 3 (Arc Manor 2008) (1813) (“It is a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife.”).

<sup>96</sup> Objective compensation systems that do not recognize and reward other contributions, such as management and supervision time, discourage partners from devoting time to such activities. Attorneys functioning in such a system face tremendous pressure to bill hours and generate business, making it difficult for them to devote time to “non revenue” producing endeavors, such as training and supervision. As described by Professor Patrick Schiltz, the “pressure to bill hours—pressure to ‘bill or be banished’—is necessarily pressure not to mentor.” Similarly, the emphasis on business generation can undermine meaningful supervision because an “hour devoted to bringing in business is valued much more today than an hour devoted to mentoring a junior colleague.”

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) (footnotes omitted). Prof. Fortney, in commenting on an earlier draft of this article, noted that billing abuses are more likely when billing partners are “unwilling or unable to monitor the bill.” Fortney E-mail, *supra* note 89.

<sup>97</sup> Lots of people have tried to parse out why lawyers overbill. For example, James Schratz did an interesting piece in the late 1990s talking about possible psychological reasons for overbilling. James P. Schratz, *I Told You to Fire Nicholas Farber—A Psychological and Sociological Analysis of Why Attorneys Overbill*, 50 RUTGERS L. REV. 2211 (1998); see also Adam C. Altman, *To Bill, or Not to Bill?: Lawyers Who Wear Watches Almost Always Do, Although Ethical Lawyers Actually Think About It First*, 11 GEO. J. LEGAL ETHICS 203 (1998); Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171 (2005); Lawrence J. Fox, *Save Us from Ourselves*, 50 RUTGERS L. REV. 2189 (1998); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999); Pardau, *supra* note 91; Jennifer K. Robbenolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1130–31 (2013); William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991); W Bradley Wendel, *In Search of Core Values*, 16 LEGAL ETHICS 350 (2013).

<sup>98</sup> See Lisa G. Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 HOFSTRA L. REV. 847, 868–69 (2006) (distinguishing between types of billing mistakes that do, and don’t, involve dishonesty).

pressure<sup>99</sup> can lead lawyers to make choices that benefit themselves more than they do the client. Lisa Lerman provides a useful example of the way in which subconscious choices can cost a client money:

[A lawyer] offered as an example one situation in which a company hired his firm and another firm to work on two very similar matters. His firm “did an exhaustive \$100,000 job and produced a two-inch binder filled with memos. The other firm did a fifteen page memo that cost about \$5,000.” The client was “initially kind of horrified at the difference.”

In explaining how this happened, [the interviewed lawyer] said, “It had something to do with the fact that the partner who had the matter in our firm felt that he had to get his billings up—thought he had to make a strong impression on the firm at that point in his career. And he had people around who could do the work for him.”<sup>100</sup>

Had the lawyer doing the \$100,000 job made a habit of asking himself if he could do the work faster and cheaper, maybe the client wouldn’t have been stuck with a large bill. On the other hand, maybe the incentives within that law firm discourage its lawyers from developing such a habit: those types of habits likely make it more difficult for law firms to turn a profit. Both of us have faced the pressures of having to bill significant hours, and we both believe that those pressures can be inordinate in a climate of shrinking law firm profits. To us, the pressures caused by the hourly billing metric demonstrate that “the situation” can cause more problems than could possibly be blamed on “bad” people. It’s not character;<sup>101</sup> it’s context.

Even when a lawyer wants to behave appropriately and bill accurately, a firm’s use of incentives that are based on hourly billing metrics will put lawyers who work efficiently at a disadvantage.<sup>102</sup> In 2000, Susan Saab Fortney conducted a survey of one thousand Texas associates, who had been licensed for no more than ten years and who worked in firms of more than ten attorneys.<sup>103</sup> Some of her respondents described the types of problems (the competitive disadvantages that efficient lawyers face; the pressure to lie; the tendency toward self-deception) created by using billable hours as the main metric for rewards.<sup>104</sup> Her 2005 study reinforced her earlier findings.<sup>105</sup> On the one hand,

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<sup>99</sup> Rapoport, *supra* note 6, at 58–59 & nn.55–61 (describing cognitive dissonance, diffusion of responsibility, social pressure, and anchoring errors as they might relate to lawyer behavior).

<sup>100</sup> Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 707 (1990) (footnote and alterations omitted).

<sup>101</sup> Well, ok: sometimes, it’s character.

<sup>102</sup> Susan Fortney reported this observation in, among other articles, Fortney, *supra* note 97, at 177–78 (linking the incentives of billable hours to overwork).

<sup>103</sup> Fortney, *supra* note 96, at 243–44 (reporting a final response rate of 55.2 percent). For an Australian survey of billable hour issues, see generally Christine Parker & David Ruschena, *The Pressures of Billable Hours: Lessons From a Survey of Billing Practices Inside Law Firms*, 9 U. ST. THOMAS L.J. 619 (2011).

<sup>104</sup> Fortney, *supra* note 96, at 279; *see also id.* at 275 (associate pointing out that the quest for high billable hours leaves no room for discussion about the quality of the work).

the more efficient lawyer will have more time to take on more projects, because she can complete her work in a shorter time; but she will also face the pressure of her peers if she consistently demonstrates that they might be working too slowly, and she may resent the fact that she's working harder than some of her peers.

We've read articles about the unseemly side of billing by the hour, such as the story about a law firm being sued by its client for overbilling.<sup>106</sup> When a major firm sends emails<sup>107</sup> that say, "Churn that bill, baby" and "That bill shall know no limits," something is off-kilter. That behavior is venal. But even when a firm discourages such unethical behavior, the pressures of law firm economics and the metrics of hourly billing create temptations.

To be fair, law firms have to be able to make a profit, and to make a profit, they have to be able to cover salaries, partner draws, and overhead. The higher the fixed costs (and, for that matter, the variable costs), the more likely it is that a firm will decide not to scrutinize certain billing behaviors too closely unless it is forced to do so by, say, a court.<sup>108</sup> But there is a practical reason for a law firm to think hard about how its incentives can affect its employees' behavior: billing mistakes that lead to client dissatisfaction will result in less income to the firm. Hours that are improperly billed are lost forever. There's no way to recoup that lost time if the client refuses to pay for it. So part of a firm's responsibility is to think hard about how its incentives affect the quality of its work product and the behavior of its employees; another part is to think about how to inculcate the habits that will help its employees behave ethically as consistently as possible.

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<sup>105</sup> See generally Fortney, *supra* note 97 (2005).

<sup>106</sup> See Peter Lattman, *Suit Offers a Peek at the Practice of Inflating a Legal Bill*, DEALBOOK, N.Y. TIMES (Mar. 25, 2013, 3:36 PM), <http://dealbook.nytimes.com/2013/03/25/suit-offers-a-peek-at-the-practice-of-padding-a-legal-bill/>. For the law firm's internal memo stating that the emails were intended as a joke, see David Lat, *Overbilling Gone Wild: Paying the (DLA) Piper*, ABOVE THE LAW, <http://abovethelaw.com/2013/03/overbilling-gone-wild-paying-the-dla-piper-plus-interesting-lateral-moves-into-and-out-of-dla/2/>. For a story discussing the confidential settlement, see Peter Lattman, *Settling Fee Dispute, Law Firm Denounces 'E-Mail Humor'*, DEALBOOK, N.Y. TIMES (Apr. 17, 2013, 6:18 PM), <http://dealbook.nytimes.com/2013/04/17/law-firm-dla-piper-settles-accusation-of-overbilling/>.

<sup>107</sup> Or, more accurately, when lawyers at the firm are dumb enough to send such emails.

<sup>108</sup> For a cautionary tale of a firm that ignored several red flags of one of its highest billing partners, see MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004). See also Nancy B. Rapoport, *The Curious Incident of the Law Firm That Did Nothing in the Night-Time*, 10 LEGAL ETHICS 98 (2007) (reviewing MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004)); Curtis & Resnik, *supra* note 93, at 1421.

If the system of required hours makes it likely that associates will cheat, it is equally likely that firms will not monitor the associates closely because the firms stand to benefit from the hours logged. Incentives for firms to be above reproach in financial dealings with clients are undermined by the increasing difficulty for law firms to remain solvent while continuing to meet (or to set) market rates in paying partners and associates.

*Id.*

IV. THE VIRTUOUS BILLER<sup>109</sup>

*Judge Schiltz has described the powerful impact his mentor, James Fitzmaurice, had on his own ethical and moral development as a lawyer:*

*Fitzmaurice did not teach me to practice law ethically through his words. I do not recall him ever saying, "This is what an ethical lawyer does." Rather, he taught me through his deeds. He taught me by being a decent man who practiced law every day in a decent manner. Moral formation "rests on small matters, not great ones," and what I recall most about Fitzmaurice are "the small matters":*

*I recall how Fitzmaurice would take strident letters or briefs that I had drafted and tone them down. I recall how Fitzmaurice would run into an attorney who had treated him shabbily and greet the attorney warmly. I recall how Fitzmaurice would time and again refer clients and files to young lawyers in our firm who were having trouble attracting business. I recall how Fitzmaurice never blamed others for his mistakes, but often gave others credit for his accomplishments. I recall how often Fitzmaurice took the blame for mistakes that I and other young attorneys made. I recall how Fitzmaurice, at the conclusion of a trial or hearing, would walk over to the client of his adversary and say, "I just want you to know that your attorney did a terrific job for you." In short, what I best recall about Fitzmaurice were not occasions of great moral heroism, but his "quiet, everyday exhibitions of virtue." It was through such exhibitions that he helped shape my character and instill in me the habit of acting ethically.<sup>110</sup>*

Let's assume that we want to describe the virtuous biller.<sup>111</sup> What habits might he or she have that makes the lawyer a virtuous biller? Paul Saguil has set out his concept of the legal "virtues": judgment, empathy, integrity/honesty, passion/engagement, diligence, and creativity/innovation.<sup>112</sup> Those six categories seem to be a good place to start.

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<sup>109</sup> One way to think about billing virtues is by doing a jazz riff off Larry Solum's article about judicial virtues. See Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. 1365 (2005).

<sup>110</sup> McGinniss, *supra* note 75, at 55 (quoting Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 738 (1998)).

<sup>111</sup> The virtuous biller "must both 'walk the talk' and 'talk the walk'—making sure that behavior is consistent with other messages about ethics." Robbennolt & Sternlight, *supra* note 97, at 1170.

<sup>112</sup> Saguil, *supra* note 73, at 18–23.

### A. *Billing Judgment*

A virtuous biller exercises billing judgment by deciding what *not* to bill to the client—either before the work has been done or afterwards (but before the bill goes to the client).<sup>113</sup> Deciding what not to bill before the work is done requires thinking strategically about what the client needs, not just in the abstract but also with due consideration of the client’s budgetary and non-monetary concerns.<sup>114</sup> Does the client need salaried (and thus more expensive) first-year associates to review documents, or can contract attorneys suit the client’s needs? Does the client need a typeset closing binder, or will a nicely bound word-processed binder do just as well? If a lawyer jumps down a rabbit hole<sup>115</sup> to pursue a legal theory that ultimately does nothing to advance the client’s position, should the billing partner bill all of that time to the client, part of it, or none of it?<sup>116</sup> Should all interoffice conferences be billed, or just some of them?<sup>117</sup> The virtuous biller uses judgment at two stages: when deciding what work to do, and when reviewing the bill after the work has been done. The latter stage is imperative, and the former stage will save the firm from wasted and uncompensated effort.<sup>118</sup>

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<sup>113</sup> To be more precise, the lawyer in charge of preparing a bill should be the one exercising billing judgment. Subordinate lawyers may not have the skill set or knowledge to exercise such judgment. In commenting on an earlier draft, our friend Ron Colombo suggested that we should advert to the possibility that a firm might encourage a lawyer to “underbill” for all sorts of reasons, in addition to creating incentives that might encourage overbilling. Cf. E-mail from Ronald J. Colombo, Professor, Maurice A. Deane Sch. of Law, Hofstra Univ., to Nancy Rapoport (Aug. 28, 2014, 12:48 PM) (on file with author Rapoport). As Professor Colombo puts it, “virtue would seem to include not only avoiding the temptation to overbill, but the potential temptation to underbill as well.” *Id.* We get his point that we should discuss both overbilling and underbilling to make sure that we cover all of the bases. Maybe law firms do underbill, at least in part, when they cut their “rack rate” hourly rates; on the other hand, maybe the “rack rate” has achieved mythic proportions because most clients don’t pay that rate as often as they once did. (For a discussion of the downward pressures that clients are placing on law firm fees, see, e.g., Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. L. 117, 142–48 (2012)). So we take his point, but we doubt that any client will ever complain about underbilling. Moreover, because neither of us believes that the billable hour represents a true value of the legal services rendered, we’re advocating for the billing judgment that recognizes that the “value” of legal services is in the eye of the client more than in the eye of the lawyer.

<sup>114</sup> It’s all well and good for a client to say, “it’s a matter of principle, no matter how much it costs,” but typically the client says that *before* he receives the bill.

<sup>115</sup> Cf. LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* 3 (two vols. in one, 1906).

<sup>116</sup> Maybe the lawyer should bill the client for all of the research, on the theory that knowing that an approach might not be fruitful is still useful information; we’re agnostic about that issue as long as the billing partner makes such a decision after thinking long and hard about whether billing for ultimately useless research was in the client’s best interest.

<sup>117</sup> See J. Scott Bovitz, *Being a Great Lawyer (as a Partner)*, in NANCY B. RAPOPORT & JEFFREY D. VAN NIEL, *LAW FIRM JOB SURVIVAL MANUAL: FROM FIRST INTERVIEW TO PARTNERSHIP* 176–77 (2014) (encouraging the “no charge” notation on bills).

<sup>118</sup> See Fortney E-mail, *supra* note 89 (observing that virtuous lawyers will review bills with an eye toward benefitting the client and non-virtuous lawyers will review bills with an eye toward benefitting themselves).

### B. *Billing Empathy*

When we refer to “empathy,” we refer to a lawyer’s ability to see the bill from the client’s perspective.<sup>119</sup> Different clients will have different levels of sophistication in reviewing their legal bills. Large institutional clients who have experienced in-house counsel (especially those who used to work at big law firms) will read a bill differently from the client who is encountering a legal bill for the first time. Empathy in billing is related to billing judgment in terms of what might get written off before the client gets the bill, but it also relates to the level of explanation that goes into the bill itself.

Lawyers who have lived and breathed a case sometimes have a hard time looking at a legal bill as a way of telling the client the story of what they did for the client. “Review file” tells no story at all.<sup>120</sup> “Review docket to determine status of motion to disqualify” does. A virtuous biller would read each line of a bill to make sure that the bill gives the client a complete and accurate picture of what happened.

### C. *Billing Integrity/Honesty*

Even people who don’t use “virtue” in the Aristotelian sense will agree that billing virtue must include being honest about what the biller did for the client and being aware that all decisions about what to do—and not to do—on a matter should start with the principle that a lawyer is a fiduciary for her client. Decisions on what to do should start and end with the client’s needs, not the lawyer’s needs. If the lawyer is low on hours for the month, quarter, or year, that’s the lawyer’s problem, not the client’s.<sup>121</sup>

Part of billing integrity/honesty must include serious training in how and what to bill.<sup>122</sup> The virtue of billing with honesty is a virtue for the supervising partner and for each billing professional.<sup>123</sup> What may seem intuitive to a veteran lawyer (when and what to bill) can confuse the novice lawyer. New employees need to know the rules for hourly billing: when does the clock start and

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<sup>119</sup> Our colleague Jean Sternlight pointed out, in reviewing an earlier draft of this article, that unsophisticated clients might think that a reasonable bill is unreasonable, and that adjusting the bill in such a situation isn’t necessarily the right reaction (although explaining the bill would be important).

<sup>120</sup> Rapoport, *supra* note 6, at 86 (“[A]ttention to file’ has never told a single client what the biller actually did.”).

<sup>121</sup> See Lisa G. Lerman, *Scenes From a Law Firm*, 50 RUTGERS L. REV. 2153, 2158 (1998) (describing how a lawyer can create make-work projects and overbill for them). *But see* Fortney, *supra* note 96, at 280 (“Professor Ross contends that most over billing is the result of self-deception rather than conscious fraud.”).

<sup>122</sup> Supervising lawyers have a duty to ensure that their employees are behaving ethically. See MODEL RULES OF PROF’L CONDUCT R. 5.1 (2011) (detailing the responsibilities of a partner or supervisory lawyer). For a discussion of practical billing ethics, see, e.g., RAPOPORT & VAN NIEL, *supra* note 117, at 61–64.

<sup>123</sup> If we were smart alecks, we’d also refer to “excellent law firms” as if the firms were people. OK, we’re a little bit smart-alecky.

stop? What's the minimum billing increment? What happens when the minimum billing increment is still too large to use for a very short task, such as the gap between leaving a thirty-second message and a minimum 0.1-hour billing increment?<sup>124</sup> Is thinking about the client while getting a cup of coffee billable time? If a lawyer spends an hour thinking about the right strategy for a matter, can the lawyer write "thinking" as the billing description?<sup>125</sup> How can a firm reward time spent on non-billable activities?<sup>126</sup> One of us has suggested that the easier it is for a timekeeper to enter information, the more likely it is that the timekeeper will do so contemporaneously.<sup>127</sup> And we both believe that lawyers who join a firm—either as novices or as laterals—need to have training in that firm's policies.

But we acknowledge that every minute spent training new lawyers is a minute that can't be spent doing other things that a firm needs its senior lawyers to do: work on their clients' matters, generate new business, think about strategic planning, and the like. Law firms these days are squeezed by clients—it's a buyer's market—and not particularly aided by law schools, which can't provide the type of hands-on training to all of their students that those students taking clinics will get. Could law schools do a better job of giving students a broader range of skill sets, and maybe some billing training? Maybe, but many law professors just don't have an up-to-date connection to the practice of law to provide useful, practical, bread-and-butter training to their students.<sup>128</sup> So we're

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<sup>124</sup> Questions also relate to what could be called "phantom time." Most firms do not have measures of actual time spent but bill in *units* of time, with rounding off (possibly rounding down but most often rounding up). In most large firms, the minimum unit ranges between six minutes (a tenth of an hour) to fifteen minutes (a quarter of an hour). If all tasks are charged, a one or two minute phone call, even if only to leave a message, could be billed as a quarter hour. An email sent or read similarly can produce bills of a tenth or a quarter of an hour. At the end of the day, a lawyer may have accumulated a wealth of hours and a list of charges, well in excess of the actual hours the lawyer spent in the office.

Curtis & Resnik, *supra* note 93, at 1416–17.

<sup>125</sup> Personally, we think that an hour of time spent "thinking"—when done by someone who is demonstrably experienced and creative—isn't a bad idea, but we still think that the description should be fleshed out.

<sup>126</sup> Fortney, *supra* note 97, at 179.

Respondents frequently commented on employer emphasis on billable hours production and the pressure to clock long hours. In struggling to meet billing expectations or targets, respondents explained the additional time commitment associated with completing non-billable tasks such as recruiting, training, speaking, writing, and marketing. Some noted that this non-billable work does not receive credit or consideration for bonus purposes.

*Id.*; see also Rapoport, *supra* note 6, at 98–102 (discussing possible incentives to encourage non-billable, but important, work).

<sup>127</sup> See Rapoport, *supra* note 6, at 85–86.

<sup>128</sup> Nor are most full-time faculty members allowed to have that type of current knowledge—at least not on a deep level. See ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2013–2014 § 402(b) (2013) ("A full-time faculty member is one whose primary professional employment is with the law school and who devotes substantially all working time during the academic year to the responsibilities described in Standard 404(a), and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member's capacity as a scholar and

sympathetic to the pressures that law firms face as they decide how they're going to train their timekeepers.<sup>129</sup>

#### D. *Billing Passion/Engagement*

If "engagement" refers to paying attention to what one is doing—to being fully in the moment—then the virtuous biller will monitor what's going on in each matter, not just when reviewing the bill but also while the work is being done. She will monitor the matter to make adjustments to staffing and projects when circumstances change, and she will communicate to her client about those adjustments.<sup>130</sup>

#### E. *Billing Diligence*

A virtuous biller doesn't wait until the end of the month<sup>131</sup> to describe what he did for his clients.<sup>132</sup> Waiting too long to record time is bad for the lawyer (he may forget to record some time)<sup>133</sup> and bad for the client (if the lawyer overestimates the time that he spent on a task). Instead, the virtuous lawyer creates habits that force him to record his time contemporaneously. When those

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teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one's responsibility as a faculty member.").

<sup>129</sup> As Bernie Burk put it in an email to one of us:

The choice is not between bearing and avoiding a cost (training); it's between bearing training costs and bearing the larger, more pervasive and more damaging (if harder to quantify and identify, and thus subject to cognitive bias) costs of having untrained lawyers. [T]he fact that the current state of the economics of the profession means that partners have to choose between a smaller cost and a bigger cost sucks for them, but that's the reality and when in doubt it's better to face reality than ignore it.

E-mail from Bernard A. Burk, Professor, U.N.C. Sch. of Law, to Nancy Rapoport (July 6, 2014) (on file with author Rapoport).

<sup>130</sup> And, when appropriate, she will seek her client's permission before making those adjustments.

<sup>131</sup> Or even until the end of the day.

<sup>132</sup> Submitting late timesheets created two serious problems: first, without a record of billable hours, billing partners couldn't send timely and complete bills to their clients; second, without making a contemporaneous record of what a lawyer had spent his or her time doing, developing those detailed records was an ethically risky proposition. There may have been some lawyers who could think back several weeks and belatedly record their work down to small slices of an hour, but they would have needed a superhuman memory to have done so accurately. Either they underestimated their work, or they overestimated it. The pressure to bill at least 1,800 (or 2,200, or 2,600, or more) hours a year likely meant that the scale of "filling in the blanks" created at least a subconscious incentive to overestimate the time spent on a given task.

Rapoport, *supra* note 6, at 51–52 (footnotes omitted).

<sup>133</sup> In other words, the lawyer makes a misrepresentation by making up entries to reflect what he "recalled." That misrepresentation is bad, and in certain circumstances (involving reasonable reliance), such misrepresentation can rise (or sink, as the case may be) to outright fraud, of both the civil and criminal variety.

habits are combined with the correct incentives for contemporaneous descriptions of his work, the odds of the bill's accuracy go up dramatically.<sup>134</sup>

#### F. *Billing Creativity*

We won't go so far as to say that a virtuous biller will eschew all billing by the hour,<sup>135</sup> but we will say that a virtuous biller will consider alternative forms of determining how to set her fees. Contingency fees are an example;<sup>136</sup> flat fees are another;<sup>137</sup> success fees are yet another.<sup>138</sup> The trick in setting a reasonable fee<sup>139</sup> is that it should reflect the relationship between work done and value provided, keeping in mind risk factors that include the client losing, the client becoming insolvent, and the other side refusing to pay, as well as the amount of time devoted to the matter (on the theory that—for most lawyers—there are only twenty-four hours in a day, and work done for one client precludes other uses of that time).

One other issue of billing creativity deserves mention here. Law firms should train their associates.<sup>140</sup> Training is not cost-free, and clients have started to push back hard on the idea that they should pay for the training.<sup>141</sup> That pushback leaves law firms with two choices: absorb training costs, or stop training associates. The virtuous biller will write off training time, in the belief that investing in associate training will pay off in the long term.<sup>142</sup>

<sup>134</sup> Susan Fortney has pointed out two other advantages: “The ethical lawyer who reconstructs time will shortchange him[-] or her[ ]self. Also contemporaneous billing enables a lawyer to testify that she always records as she goes along.” Fortney E-mail, *supra* note 89.

<sup>135</sup> After all, each of us bills at least a part of our time that way.

<sup>136</sup> But contingency fees can also sometimes lead to unethical settlements that can benefit the lawyer more than the client.

<sup>137</sup> Flat fees, though, can create an incentive to stop working once the case is no longer profitable for the lawyer—which is, of course, unethical.

<sup>138</sup> And success fees can create an incentive to craft solutions that will trigger those fees.

<sup>139</sup> Fees must be reasonable. See MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”).

<sup>140</sup> We both believe that law schools don't provide sufficient “real-world” training for their students to be able to hit the ground running as soon as they get their law licenses.

<sup>141</sup> See, e.g., Fortney, *supra* note 97, at 189 (“Faced with intense pressure to reduce amounts expended for outside counsel, many of these approaches involved cost-cutting measures, such as using independent legal auditors, task-based billing, and research outsourcing. . . . Surveys of general counsel reveal that their most pressing concern is controlling the costs of outside counsel.”); see also Rapoport, *supra* note 6, at 99 & n.192 (“[L]aw firms now neither provide significant observation experience nor write off as much time as they used to; moreover, those clients with good bargaining power are starting to refuse to pay for first- and second-year associate time.”); cf. Rapoport, *supra* note 113, at 145–46 (“The days of clients blithely acquiescing to skyrocketing hourly rates and burgeoning staffing of projects (if, indeed, those days ever existed) are gone.”).

<sup>142</sup> That investment pays off well when the associate stays at the firm and becomes a good lawyer; it pays off less well when the associate leaves.

### G. *Billing Virtues Versus Billing Vices*

Now that we have some basic descriptions of the billing virtues, it's useful to compare the virtues to their opposites, the billing vices.

TABLE 1: BILLING VIRTUES AND CORRESPONDING VICES

Billing virtue	Billing vice
Billing judgment	Billing everything to the client, even wasteful work or make-work
Billing empathy	Not describing work done for the client at all, or not describing it in a way that the client will understand what the lawyer did
Billing integrity/honesty	Putting the lawyer's own needs (to make a billable hour quota or to jockey for position within a firm) above the client's needs; misrepresenting work that's been done
Billing passion/engagement	Not paying attention to what's being done on a matter, and not scrutinizing the bill before sending it to the client
Billing diligence	Not recording time contemporaneously
Billing creativity	Adhering rigorously to the billable hours model, without instruction in how to bill time and without absorbing the costs of training associates

With these virtues—and vices—in mind, let's apply the virtues to create better billers.

## V. VIRTUOUS BILLING APPLIED

### A. *Creating a System to Find—and Recognize—Red Flags*

*Ethical law firms want to build ethical habits. They do not want their lawyers billing phantom hours. One structural change that these law firms can institute is to have its bills (or, at least, its larger bills) subject to routine audit. Indeed, that is what some firms are doing. The auditors work for the law firm, not the client, so they can report the problem and give the firm an opportunity to correct it.*

*A law firm that institutes this change sends a message to every partner and associate: it is better for the law firm to catch the error (whether or not intentional) than for the law firm to react to a client's complaint. And it is better for the lawyer not to pad his hours because it will not look good if the law firm's auditors discover the padding.*<sup>143</sup>

Although the truly virtuous biller will have developed those habits that result in accurate, ethical, understandable bills, we must assume that there will be

<sup>143</sup> Rotunda, *supra* note 1, at 720 (footnotes omitted).

those who have not yet developed such habits and those who are the classical bad actors.<sup>144</sup> The virtuous law firm will, as President Reagan once said, “[t]rust, but verify.”<sup>145</sup> The many scandals that have occurred in organizations ranging from Enron<sup>146</sup> to General Motors<sup>147</sup> happened in part because the organizations’ internal systems didn’t check the right things and didn’t pay attention to red flags. Law firms haven’t escaped such scandals,<sup>148</sup> and they need to make sure that neither willful blindness to misconduct nor subconscious cognitive errors will keep them from discovering problems in billing behavior.<sup>149</sup>

### B. Training the Billers

We’ve already discussed the importance of training people on how and what to bill.<sup>150</sup> Law firms probably understand how important training on billing is for every new employee, but understanding the need and providing effective training are two different things. As Susan Saab Fortney has explained,

Neophyte attorneys forge into private practice with little or no experience in billing their time. Often associates start work with a “lecture” from a senior attorney who advises associates to “[b]ill every minute . . . we’ll adjust the bill on the back end.” This approach to billing does not recognize the traps involved in

<sup>144</sup> And we don’t mean “bad actors” as in those actors that you see in straight-to-video flicks.

<sup>145</sup> The Conservative Will, *Trust But Verify*, YOUTUBE (MAR. 7, 2008), <https://www.youtube.com/watch?v=As6y5eI01XE>. Finding ways to verify can be fun (and amusing). In a recent article, Steven Levitt and Stephen Dubner explained why David Lee Roth’s performance contract insisted that his dressing room have no brown M&Ms. People who read the contract carefully enough to realize that brown M&Ms were *verboten* and who were willing to sift through the M&Ms to pull out the brown ones would do a good job on the more important parts of his pre-concert set-up. Steven D. Levitt & Stephen J. Dubner, *Traponomics*, WALL ST. J., May 10, 2014, at C1. Thanks to Levitt and Dubner, now fledgling law review staffers will know why their Bluebooking and proofreading skills matter so much.

<sup>146</sup> See, e.g., Jeffrey D. Van Niel & Nancy B. Rapoport, *Dr. Jekyll & Mr. Skilling: How Enron’s Public Image Morphed from the Most Innovative Company in the Fortune 500 to the Most Notorious Company Ever*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 77 (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

<sup>147</sup> See ANTON R. VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS (2014), available at <http://www.detroitnews.com/article/20140605/SPECIAL01/140605001>.

<sup>148</sup> See, e.g., Lerman, *supra* note 98, at 848 (2006) (discussing the billing scandal central to the case of *In re Romansky*); see also Lattman, *supra* note 106; Pardau, *supra* note 91, at 6–7 (2013) (providing a laundry list of billing scandals at both big and small law firms).

<sup>149</sup> [C]onsider a firm that awards bonuses based on billable hours. If Associate *B* bills an average of 165 hours per month through September, but then bills 250 hours per month in the three remaining months of the year, thus reaching 2,235 hours and earning the \$30,000 bonus the firm awards for 2,200 hours, are there reasonable grounds for suspicion? Perhaps *B* became involved in a large matter requiring an exceptional time commitment late in the year, or saw a dramatically increased workload for other legitimate reasons. It is also possible that *B* falsified time to earn a bonus to which *B* was not entitled. Either way, an alert firm leader tracking billable hours can determine whether there is cause for concern.

Richmond, *supra* note 2, at 111 (footnote omitted).

<sup>150</sup> See *supra* notes 122–25.

billing another attorney's time. First, it assumes that the supervisor possesses enough information on the client's legal matter to evaluate intelligently the amount of time expended. Second, the approach assumes that the supervisor can ably sift through associate time sheets, which may be "propaganda piece[s]." Finally, if the firm compensates a billing partner for the amount collected from billed clients, the billing partner may be reluctant to write off associate time.

Some senior attorneys may provide additional guidance on billing in instructing associates to "write down your time the same day, be honest, use good judgment, and don't double bill." This general advice gives associates unfettered discretion because the rules on billing practices remain unclear. Even when firm managers implement general billing guidelines, attorneys still have a great deal of latitude in the way that they apply the guidelines. This was illustrated by a management consultant who found a great deal of disparity in what firm partners would bill for travel, even though the firm implemented a policy to bill for travel time. Rather than leaving attorneys in a quandary on billing practices, firm managers can clarify how and what attorneys should bill. This guidance can include written guidelines, training programs and formalized channels within the firm for open communication.<sup>151</sup>

Training programs are necessary but by no means sufficient. The effect of social pressure (how other billers behave in the same firm) can counteract any official training program over time.<sup>152</sup> Not only is it important that the people at the top of the pecking order set the right tone,<sup>153</sup> but it is equally important that

<sup>151</sup> Fortney, *supra* note 96, at 252–53 (alterations in original) (footnotes omitted).

<sup>152</sup> See Rapoport, *supra* note 6, at 63–66 & nn.72–82 (describing Solomon Asch's experiments in social pressure and applying social pressure concepts to life inside a law firm).

<sup>153</sup> Another unintended consequence of quantifying law practice is that ethical attorneys who do not pad or do not work long hours may be placed at a competitive disadvantage come evaluation time. A couple of respondents referred to this problem. One respondent who described his or her diligence in using an electronic timer program to bill by the minute, expressed frustration over colleagues who estimate their time. The respondent stated, "I can't compete with estimators, but I'm not willing to compromise my strict billing practice either." In noting that the billable hours system "encourages lying," another respondent explained, "If you don't lie, you are perceived to be a slacker, even though, in reality, you may work far more than others." "Slacker" associates may feel pressure to change their practices or find other employment. Ethical associates who refuse to compromise their standards may become increasingly disillusioned in having to compete with other associates who use questionable billing practices to record hours. These ethical associates may voluntarily leave private practice.

Fortney, *supra* note 96, at 279; *see also id.* at 247–48 ("Even when firms deny the existence of a minimum or quota, associates learn about the firm's expectations or norms."). For another view of minimum requirements, cf. OFFICE SPACE (Twentieth Century Fox Film Corp. 1999), with quotes available at <http://www.imdb.com/title/tt0151804/quotes>:

Stan, Chotchkie's Manager: We need to talk about your flair.

Joanna: Really? I . . . I have fifteen pieces on. I, also . . .

Stan, Chotchkie's Manager: Well, okay. Fifteen is the minimum, okay?

Joanna: Okay.

Stan, Chotchkie's Manager: Now, you know it's up to you whether or not you want to just do the bare minimum. Or . . . well, like Brian, for example, has thirty[-]seven pieces of flair, okay. And a terrific smile.

Joanna: Okay. So you . . . you want me to wear more?

Stan, Chotchkie's Manager: Look. Joanna.

Joanna: Yeah.

a biller's peers behave appropriately. Solomon Asch's work teaches us that having as few as one or two people in a group diverge can cause others to go astray, even when they "know better."<sup>154</sup>

What kind of training would a virtuous law firm provide to its new employees? Dennis Curtis and Judith Resnik have some good ideas:

[T]he seeming simplicity of an hourly billing system hides a series of questions—about which hours to bill, about the uses of billable hours, and about law firm structure and incentives. What is "work" that ought to be billed? Who judges how much of that work is necessary?

Start first with deciding what counts as "work" for which time can be billed. Easy agreement emerges around the idea that lawyers can properly charge for legal work—research; writing memoranda for the purpose of giving advice; representing clients at negotiations, in court, and in administrative proceedings; lobbying or working on legislation and regulations; and perhaps in coordinating public relations or developing information from other professions about projects related to a client's interests. In terms of the quantity of such work, agreement between client and lawyer may in fact be more difficult to achieve, as clients may worry about lawyers who do more than is needed for a particular project.

Assume for the moment that a packet of activity constitutes "the work" properly done by lawyers, as contrasted with para-professionals or nonprofessionals. How much of it needs to be done? What work is actually necessary? And who decides? Entailed are questions of delegation—about which workers ought to undertake which tasks and about which workers determine the contours of the task. Most of those who have explored these issues agree that the problem of measuring the quantity of such work that ought to be undertaken is significant. A widely shared perception is that the billable hour affects the lawyer's answer to that question. As William Ross explains,

[o]ne of the most egregious forms of overbilling in many law firms is the almost infinite amount of time that is expended upon research into even the most minute legal issues. As with other forms of overbilling, excessive research probably arises most often out of a genuine belief that the work serves the client's best interests, even if that belief is part of a subconscious rationalization of the desire to inflate the client's bill.<sup>155</sup>

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Stan, Chotchkie's Manager: People can get a cheeseburger anywhere, okay? They come to Chotchkie's for the atmosphere and the attitude. Okay? That's what the flair's about. It's about fun.

Joanna: Yeah. Okay. So more[,] then, yeah?

Stan, Chotchkie's Manager: Look, we want you to express yourself, okay? Now if you feel that the bare minimum is enough, then okay. But some people choose to wear more and we encourage that, okay? You do want to express yourself, don't you?

Joanna: Yeah, yeah.

Stan, Chotchkie's Manager: Okay. Great. Great. That's all I ask.

<sup>154</sup> Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31, 31–34 (1955); see also Rapoport, *supra* note 6, at 62–64 (discussing Asch's experiments).

<sup>155</sup> Curtis & Resnik, *supra* note 93, at 1413–14 (footnotes omitted); see also Lerman, *supra* note 98, at 888–89 (discussing how much lawyer discretion is involved in billing time). One of us has suggested the use of (or the development of) computer software that would help lawyers record their time contemporaneously. See Rapoport, *supra* note 6, at 85–87. Jennifer

One possible source of training that might combine client development with the development of useful habits is for a firm to invite inside counsel to the firm, on a regular basis, to engage in a conversation about things that inside counsel wish that their outside counsel would do differently.<sup>156</sup> A firm could bring in a panel of judges who rule regularly on issues like fee requests to talk about what does and doesn't pass muster. And a firm could bring in its insurance carrier to talk about common pitfalls. We know that good training is hard, and it's expensive, but the failure to train may end up costing a firm more in the long run.

### C. *The Tyranny of the 0.1 Hour Increment*

As an aside, we can't resist pointing out that the decision on what the smallest billable increment in a firm should be creates some powerful (dis)incentives. The larger the minimum increment, the more likely it is that billers under pressure will fit tiny tasks into a vessel meant for bigger tasks. A thirty-second phone call shouldn't be billed as a quarter-hour (or tenth of an hour) of work, but that doesn't mean that someone won't try to do just that. On the other hand, the smaller the increment, the less meaningful it becomes when someone is exercising the virtue of billing diligence. If a lawyer bills in tenths of an hour and engages in multiple tasks each hour, is she really going to be willing to spend *more* than a tenth of an hour to record her time in those tenths, or will she just estimate, cross her fingers, and hope for a reasonably ethical result? It's difficult to maintain billing diligence on the busiest of days.

That's why training—and a more useful billing policy—is so important. Here's one option:

Imagine, for example, a firm decision that no one could bill any client for less than ten minutes of time and that if amounts smaller than that were spent, no billable time would be logged. Imagine a rule that, as each lawyer departed for the day, that person had to leave a time sheet, and that no information logged later could be entered for that time period. Imagine that firms developed a system of team billing. The group of lawyers responsible for a given case might have projected caps on billing and no member of the group could enter hours without a more senior person agreeing that the time spent was necessary. Imagine a presumption against spending more than a certain number of hours a month, with a view that anyone logging over a specific amount had to meet with two senior members of the firm to explain the reality and propriety of excess hours. (Instead of minimum billable hours, imagine law practice with the conceit of maximum billable hours.) The practices of billing could shift from an individualistic activity to a cooperative event, with lawyers working on the same matter deciding together at the end of the day or week how many hours to bill.

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Robbennolt and Jean Sternlight have pointed out that people tend to want to search for more and more information when making decisions. See JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS* 85 (2012).

<sup>156</sup> Or a law firm could invite the two of us to such a conversation, but we can't throw much business to the firm, and inside counsel can.

Further, junior lawyers could be told that they lack the authority to determine the amount of time to record, and rather that the responsibility for allocating work and counting hours rested with the partners in charge. Such changes would require firms to work hard to allocate jobs among lawyers, but the benefit would be that the lawyers could concentrate on the substantive projects without worrying about whether the hours spent added sufficiently to their monthly total.<sup>157</sup>

Not only would a system like this one be more ethical, but it would also be more humane and more efficient.<sup>158</sup>

#### CONCLUSION

*The moral fabric of an attorney is stitched out in the dozens—hundreds—of decisions that she makes each day. It is stitched out in the tone of voice she uses when talking with others, out of her choice of adjectives while writing a letter, out of the care she takes in describing what she represents to be the truth of a matter. It is stitched out of one decision after another, each of which may be mundane in itself, but all of which combine to form the moral fabric of the attorney, and combine with like decisions of other attorneys to form the moral fabric of law firms and legal communities.*

*Not only are these decisions mundane, they are made almost instinctively. “Discernment is hard work; it takes time and emotional energy.” Busy lawyers have neither. When an attorney is asked a question by a client or judge or when she sifts through documents that have been demanded by her opponent, or when she fills out her time sheet before rushing out of the office, she will have fractions of seconds to make decisions. She will have little time to think, much less to seek the counsel of colleagues or texts. She will act almost instinctively. What she does will not reflect the quality of her mind as much as it will reflect the quality of her character; it will not reflect discernment as much as it will reflect habit.<sup>159</sup>*

Developing the habits that create virtuous billers will create a chicken-and-egg problem, but that’s not a bad thing. As our colleague Tigran Eldred has pointed out,

if a law firm develops the types of virtuous billing practices you describe, would any improved ethical behavior be the result of more virtuous lawyers? Or would it be because the institutional incentives and norms create the type of influence

<sup>157</sup> Curtis & Resnik, *supra* note 93, at 1423–24.

<sup>158</sup> See also Alexandra Wolfe, *David Boies—The Lawyer on Overturning Proposition 8 and the Secret to His Legal Successes*, WALL ST. J., June 21, 2014, at C1 (describing David Boies’s shift away from billing by the hour to fixed fees, on the grounds that hourly billing creates bad incentives and makes the workplace “less collegial”).

<sup>159</sup> McGinniss, *supra* note 75, at 49 (quoting Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 719–20 (1998)).

toward conformity that you and others have so well documented in organizational settings?<sup>160</sup>

We don't know whether developing better habits will make people more virtuous only in the Aristotelian sense, or whether developing better habits will make people truly more ethical.<sup>161</sup> But we think that the effort is worthwhile.

One caveat, though: we wish that we could end on a wholly positive note, but we think that the classical lawyer virtues will continue to exceed our grasp so long as the problems that we've identified with multinational corporate law practices persist. Mind you, we're not suggesting that lawyers in multinational firms can't serve clients with technical excellence (they can, and they do) or that lawyers cannot behave ethically and morally (most do). And we know that some lawyers have found (or will find) ways to practice in a classically virtuous way. For as Bill Henderson has suggested, law firms outside the primary capital markets may well abandon the Cravath system and find ways to build solid (perhaps not solid gold) practices around like-minded lawyers, no longer in thrall to rainmakers and their omnipresent threats of departure. We have our doubts, because it takes a great deal of traction to pull away from institutions weighed down by money and tradition, but we're still hopeful.

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<sup>160</sup> E-mail from Tigran Eldred, Professor, New England Law | Boston, to Nancy Rapoport (July 9, 2014) (on file with author Rapoport).

<sup>161</sup> And at least one of us doesn't care. When she teaches Professional Responsibility, she tells her students that she cares more about whether they behave as if they're ethical than if they actually are ethical. She believes that she can teach people how to behave as if they're ethical. *See supra* note 7; *cf. supra* note 41.