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## “Nudging” Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms

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## ARTICLE

*Nancy B. Rapoport*

### “NUDGING” BETTER LAWYER BEHAVIOR: Using Default Rules and Incentives to Change Behavior in Law Firms

**Abstract.** In the changing landscape of law practice—where law firm profits are threatened by such changes as increased pressure from clients to economize and the concomitant opportunities for clients to shop around for the most efficient lawyers—are there ways to change how things are done in law firms so that firms can provide more efficient and ethical service? This article suggests that an understanding of cognitive biases and basic behavioral economics will help law firms tweak their incentives and default rules to promote the improved delivery of legal services.

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*The structure of the large, modern law firm makes it easier for lawyers to be anonymous and to hide in the crowd where they are more likely to develop bad ethical habits. Hence, large law firms in particular should support structural changes that serve to counterbalance and compensate our natural tendencies to justify our misbehavior when we believe that no one is looking.*<sup>1</sup>

As a general rule, employees respond to the incentives that their employers give them.<sup>2</sup> Some of those incentives are explicit (“if you do *x*, *y*, and *z*, you’ll get a bonus”), and some aren’t (the people in the “in crowd” do *a*, *b*, and *c*, so if you want to be in the “in crowd,” you should also do *a*, *b*, and *c*). The first step in changing behavior lies in realizing that the targeted behavior has already been triggered by existing

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1. 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, 680 (2011) (footnote omitted).

2. This truism dawned on me when we were studying what went wrong at Enron. See generally NANCY B. RAPOPORT, JEFFREY D. VAN NIEL & BALA G. DHARAN, ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER (Foundation Press 2d ed. 2009) (examining the ins and outs of the Enron-era scandals); NANCY B. RAPOPORT & BALA G. DHARAN, ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (2004) (detailing the effect of the Enron scandal on the business and legal worlds and the lessons to be learned from the scandal); Nancy B. Rapoport, *Lessons From Enron—And Why We Don’t Learn From Them*, COM. LENDING REV., May–June 2009, at 21 (pointing out the human element underlying corporate scandals); Nancy B. Rapoport, *Enron, Titanic, and the Perfect Storm*, 71 FORDHAM L. REV. 1373, 1378–85 (2003) (examining employee incentives and their effects at Enron).

Enron got from its employees exactly that which it had wanted to get. Want people to “think bigger” without the need to demonstrate the value of the resulting idea itself? Then reward people at the beginning of a project, rather than after it’s shown a profit, as Enron did by building the economically ludicrous Dabhol power plant. See, e.g., Sam Parry, *Enron’s India Disaster*, CONSORTIUMNEWS.COM (Dec. 30, 2001), <http://www.consortiumnews.com/2001/123001a.html> (criticizing Enron’s work in India). Want people to turn on their colleagues rather than encourage teamwork? Use a “rank and yank” system that routinely drops the bottom 10% of high achievers off the payroll. See, e.g., John Schwartz, *As Enron Purged Its Ranks, Dissent Was Swept Away*, N.Y. TIMES, Feb. 4, 2002, <http://www.nytimes.com/2002/02/04/business/as-enron-purged-its-ranks-dissent-was-swept-away.html?pagewanted=all&src=pm> (analyzing Enron’s internal governance). Want people to invent the dollar figures associated with profits for ideas that have no market corollary? Give them bonuses and let them use mark-to-market accounting without having a real “market” for comparison purposes. Cf. *Enron: The Smartest Guys in the Room*, SPIKE (Apr. 15, 2005), <http://www.spike.com/video-clips/aiz715/enron-the-smartest-guys-in-the-room-mark-to-marketing> (discussing Enron’s creation and its profit structure). Enron’s incentives encouraged the behavior that ultimately brought it down.

incentives.<sup>3</sup> The second step involves working backwards from the behavior to identify the incentives that created it. The third step, of course, is the most difficult: developing different incentives that trigger more of the behavior that you want without simultaneously triggering new behavior that you don’t want. Even outside of work, incentives (and their companions—default rules that encourage or discourage certain behavior) are powerful forces in our lives.

Consider just how many of our daily decisions are driven by default rules and incentives. A few months ago,<sup>4</sup> I realized that Bank of America now returns my ATM card before asking me to input my password—presumably because it wants to make sure that its customers don’t leave their cards in the machines.<sup>5</sup> Bank of America also has opt-in incentives to let its customers add a bit to their savings accounts whenever they use their debit cards to pay for something. Every time someone who’s enrolled in the “Keep the Change” program makes a purchase with the card, the bank rounds up the purchase to the nearest dollar and deposits the difference in the customer’s savings account.<sup>6</sup> As an extra incentive, the bank keeps track of how much a customer has saved by using the program. For literally less than a dollar at a time, the customer gets a pain-free way to add to his savings.<sup>7</sup> These little nudges encourage those behaviors that Bank of America wants, like removing debit cards from ATM machines and making savings a routine activity.<sup>8</sup>

Default rules like these make certain decisions easier because the cost of bucking the rules often exceeds the benefit. Not everything lends itself to

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3. If, say, a university wanted its football coaches to make sure that most of their players graduated on time, then perhaps the university might want to consider tweaking the amount of coach compensation that comes from bowl games and the amount that comes from graduation rates.

4. Sometimes I’m slow on the uptake.

5. It might not even be possible to input the password with the card still in the machine, because of the “spit-out” feature that Bank of America has created. A person puts his card in; the machine spits it out; he enters his password.

6. BANK OF AM., KEEP THE CHANGE SAVINGS PROGRAM, <https://www.bankofamerica.com/deposits/manage/keep-the-change.go> (last visited Jan. 24, 2014). So, if someone enrolled in the program buys something that costs \$9.53, the debit card rounds that purchase up to \$10 and deposits the difference (\$0.47) into his savings account.

7. Other banks are probably doing (or will be doing) these types of programs as well.

8. Jennifer Robbennolt and Jean Sternlight refer to these “relatively minor changes in the relevant situation that can have a significant influence on behavior by leading, or ‘channeling,’ people in a particular direction” as “channel factors.” JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 136–38 (2012).

default rules and low-stakes incentives, but why couldn't we use default rules and incentives to encourage certain behavior inside law firms?

#### I. CULTURE AND BEHAVIOR IN LAW FIRMS, AS REFLECTED BY DEFAULT RULES AND INCENTIVES

Just as “[h]appy families are all alike; every unhappy family is unhappy in its own way,”<sup>9</sup> law firms have developed their own cultures and norms. The successful<sup>10</sup> ones seem to have a lot in common; the failure of others can often be traced to singularly bad decisions.<sup>11</sup> And yet, even those “happy” law firms have differences, as anyone who has worked in more than one law firm can tell you. Virtually everyone in a successful law firm<sup>12</sup> is a hard worker, with significant talent in a variety of skills—analysis, writing, client relationships, strategy, and so on. But some firms have hallways in which the office doors are typically open for some schmoozing, and others have hallways in which pretty much every door stays shut. Some firms are relatively egalitarian; others aren't.

Still, even the happiest law firms are sweating bullets these days. BigLaw,<sup>13</sup> especially, is changing.<sup>14</sup> Clients are putting more and more

9. LEO TOLSTOY, *ANNA KARENINA 1* (Barnes & Noble Classics 2003).

10. Or at least those whose mistakes haven't caught up to them yet—publicly.

11. Dewey & LeBeouf comes to mind. One of the reasons that it seems to have failed is that it guaranteed large draws to partners whose books of business couldn't support such high amounts. See James B. Stewart, *The Collapse: How a Top Legal Firm Destroyed Itself*, *NEW YORKER* 80, 87–89 (Oct. 14, 2013) [hereinafter *The Collapse*] (discussing the downfall of Dewey & LeBeouf after its merger); see also Martha Neil, *Ex-Partner Blames Legal Recruiters, Excessive Pay Guarantees, Angry Colleagues for Dewey's Downfall*, *A.B.A. J.* (May 10, 2012, 3:12 PM) [http://www.abajournal.com/news/article/former\\_partner\\_blames\\_legal\\_recruiters\\_excessive\\_pay\\_guarantees\\_for\\_dewey/](http://www.abajournal.com/news/article/former_partner_blames_legal_recruiters_excessive_pay_guarantees_for_dewey/) (looking at the alleged causes of Dewey & LeBeouf's financial failure); Peter Lattman, *Dewey & LeBeouf Files for Bankruptcy*, *N.Y. TIMES* (May 28, 2012, 10:21 PM), <http://dealbook.nytimes.com/2012/05/28/dewey-leboeuf-files-for-bankruptcy/> (examining Dewey & LeBeouf's bankruptcy).

12. And many of those at unsuccessful firms.

13. “BigLaw” has many definitions, see, for example, Noam Scheiber, *The Last Days of Big Law*, *NEW REPUBLIC* (July 21, 2013), <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries> (“There are currently between 150 and 250 firms in the United States that can claim membership in the club known as Big Law, the group of historically profitable firms that cater to the country's largest corporations.”), but I'm using the phrase in a more generic and fuzzy sense; firms that have more than one or two offices, more than one or two practice areas, and a long list of notable clients with deep pockets.

14. When the general counsel of eighty-eight big companies were asked, “[a]re you more or less likely to use a good lawyer at a pedigreed firm (e.g., AmLaw 20 or Magic Circle) or a good lawyer at a non-pedigreed firm for high stakes (though not necessarily bet-the-company work), assuming a 30%

demands on their law firms<sup>15</sup> but are agreeing to pay for fewer and fewer services.<sup>16</sup> Those clients are also getting more sophisticated about reading their lawyers' bills.<sup>17</sup> Law firms need to change to cope with the

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difference in overall cost?," 74% of the respondents said that they were less likely to use the pedigreed firm, 13% said that they'd choose the pedigreed firm, and 13% didn't choose one over the other. Dina Wang & Firoz Dattu, *Why Law Firm Pedigree May Be a Thing of the Past*, HBR BLOG NETWORK (Oct. 11, 2013, 2:10 PM), <http://blogs.hbr.org/2013/10/why-law-firm-pedigree-may-be-a-thing-of-the-past/>. I think that the days of general counsel choosing "name brand" BigLaw firms for every type of engagement are long gone.

15. For an eye-opening report on what Chief Legal Counsel care about, see ALTMAN WEIL, INC., 2013 CHIEF LEGAL OFFICER SURVEY, *available at* [http://www.altmanweil.com/dir\\_docs/resource/4d12f27b-5e52-46b3-8a706372f360a85c\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/4d12f27b-5e52-46b3-8a706372f360a85c_document.pdf).

16. See William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 461-62 (2013) (examining the saturated legal market); 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 (2011) (analyzing the historical growth pattern of law firms). As one recent story reports: "I met last week with the head of legal operations for a top-five bank (also one of the biggest clients in the world) who is publishing updated billing guidelines that decline to pay for first- and second-year associates." Paul Lippe, *Yale Law Prof Falls Short in Challenging Obama's 2-year JD Idea*, A.B.A. J. (Sept. 11, 2013, 4:53 PM), [http://www.abajournal.com/legalrebels/article/Profs\\_op-ed\\_opposing\\_a\\_twoyear\\_jd/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=daily\\_email](http://www.abajournal.com/legalrebels/article/Profs_op-ed_opposing_a_twoyear_jd/?utm_source=maestro&utm_medium=email&utm_campaign=daily_email).

Certainly, though, some BigLaw firms are taking their associate training to a new level in response to client pressure about using junior associates on matters, even as the financial pressures on firms make training a more expensive proposition. For example, Skadden has partnered with the Fullbridge Program for its associate training. THE FULLBRIDGE PROGRAM, <https://fullbridge.com/law/> (last visited Jan. 24, 2014). As Jodie Garfinkel at the firm has explained to me:

Skadden has partnered with Fullbridge to ensure that its newest associates understand[] business and financial concepts. It combines that training with its own in-house training so that its newest associates are as comfortable with the concept[] of how to read balance sheets as they are with the substantive law in their practice areas. [Skadden associates] train across practice areas to ensure a more fulsome understanding of the Firm's practice. Associates who are conversant in the business world and who understand the range of legal issues facing clients . . . provide better value to their clients. In addition to this new training, to ensure attorneys are prepared to deal with increasing responsibility, Skadden provides training throughout their . . . time at the Firm.

E-mail from Jodie Garfinkel to author (Nov. 20, 2013, 02:38 PM) (on file with author). Milbank also has developed a partnership to train more senior associates: its program is called Milbank@Harvard. *Milbank@Harvard To Launch This Fall*, MILBANK (Aug. 11, 2011) <http://www.milbank.com/news/milbank-harvard-to-launch-this-fall.html> (last visited Jan. 9, 2014). These types of programs cut against the "common knowledge" that large firms aren't training their associates.

17. My buddy Dustin Benham has pointed me to Casey Flaherty's work in getting his outside counsel to demonstrate that they understand certain basic timesaving technology. See, e.g., D. Casey Flaherty, *Could You Pass This In-House Counsel's Tech Test? If the Answer Is No, You May Be Losing Business*, A.B.A. J., LEGAL REBELS BLOG (July 17, 2013, 7:30 AM), [http://www.abajournal.com/legalrebels/article/could\\_you\\_pass\\_this\\_in-house\\_counsels\\_tech\\_test](http://www.abajournal.com/legalrebels/article/could_you_pass_this_in-house_counsels_tech_test) ("I do not have the data or rigor to quantify just how much waste exists in the legal system or what percentage of it is attributable to

increasing demands of clients—but to change on an organizational level, they'll have to change the behavior of those who work there, and changing behavior is no easy feat.

I first started thinking about ways to change lawyer behavior because of my work as a fee examiner in some large Chapter 11 cases. With that work has come the opportunity to study lawyer behavior as it's reflected through the voluminous bills submitted for payment from bankruptcy estate funds. Based on those experiences, as well as my research on Enron and other corporate scandals,<sup>18</sup> my conversations with friends at several firms, and my own (admittedly now ancient) experience as a lawyer in a large law firm, I've formed some tentative conclusions about the effect of incentives in the workplace. On the theory that lawyers are, in fact, also sentient beings,<sup>19</sup> I've decided that the best way to regulate lawyer behavior is to pay attention to the natural human tendency to conform to default rules and incentives. By altering certain default rules and incentives in firms, firms can “nudge” changes in the behavior of everyone from lawyers to paralegals to support staff.<sup>20</sup> Rules and incentives regarding such things as when and how billable hours get recorded, how lawyers in practice groups cross-sell the firm's services, and how newer lawyers get

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technological incompetence. My claims are much broader: *a lot* (of waste exists in the legal system) and *enough* (of that waste is attributable to technological incompetence to make this a problem worth addressing.”).

18. NANCY B. RAPOPORT, JEFFREY D. VAN NIEL & BALA G. DHARAN, ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER (Foundation Press 2d ed. 2009); NANCY B. RAPOPORT & BALA G. DHARAN, ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (2004); Nancy B. Rapoport, *The Real Reason Why Businesses Make Bad Decisions*, BUS. LAW TODAY, July/Aug. 2009, at 52 (reviewing JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN (Princeton University Press 2008)); Nancy B. Rapoport, *Lessons From Enron—And Why We Don't Learn from Them*, COM. LENDING REV., May–June 2009, at 21; Colin Marks & Nancy B. Rapoport, *Corporate Ethical Responsibility and the Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1269 (2009); 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 (Univ. of Michigan Press 2004)); Nancy B. Rapoport, *Enron, Titanic, and the Perfect Storm*, 71 FORDHAM L. REV. 1373 (2003) (appearing also as an essay in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 927 (2004)).

19. Notwithstanding the theme of most jokes about lawyers.

20. Of course, as my buddy Walter Effross has pointed out to me, lawyers are trained both to detect and to consider ways to work around default rules. E-mail and attachment from Walter Effross to author (Sept. 20, 2013, 03:58 PM) (on file with author).



trained are all examples of how developing the right incentives and default rules can make a firm behave in more efficient, ethical, and possibly more profitable ways.

I chose the word "nudge" in this article's title deliberately, and not just because I like its double entendre of "push" and "nag."<sup>21</sup> In *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Richard Thaler and Cass Sunstein use basic principles of behavioral economics to describe how incentives—including default rules that let people "opt in" and "opt out" of certain behaviors—can change those behaviors over time.<sup>22</sup> The "nudge" concept involves tweaking an incentive or default rule to shape behavior, rather than making sudden and drastic changes.<sup>23</sup> My hypothesis is that, by doing some tweaking, firms can nudge<sup>24</sup> their people to engage in those behaviors that will better serve clients in the long run.<sup>25</sup>

Lawyers who are in charge of their firms are supposed to monitor the ethical behavior of those who work there.<sup>26</sup> They're supposed to make sure that client confidences stay protected, conflicts are avoided, fees are reasonable, and people are working competently and diligently.<sup>27</sup> Like

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21. See MERRIAM-WEBSTER'S NEW COLLEGIATE DICTIONARY 797 (10th ed. 1997) (defining "nudge" as "to touch or push gently" or "to prod lightly : urge into action").

22. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 83–87 (2009).

23. If Mayor Bloomberg had tried a less drastic method of getting people to drink fewer sodas—such as by having a graduated tax on larger sizes, rather than an outright ban on large cups—there might have been a less vituperative reaction to his edict. See Chris Dolmetsch & Henry Goldman, *New York Soda Size Limit Statute Barred by State Judge*, BLOOMBERG.COM (Mar. 11, 2013, 3:30 PM), <http://www.bloomberg.com/news/2013-03-11/new-york-city-soda-size-limitations-barred-by-state-court-judge.html> (discussing the Bloomberg soda issue); see also *infra* notes 115–16 and accompanying text.

24. "Nudge" may be an understatement with some of my proposals here, especially as they relate to changing incentives or default rules regarding compensation. Any changes to compensation incentives will be a big deal—not a subtle, "nudge" type of event. At most places (including most law firms), compensation issues are analyzed in elaborate detail.

25. Theoretically, better service to clients in the long run should also benefit the firm.

26. See MODEL RULE OF PROF'L CONDUCT R. 5.1(a) (2013) ("A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.").

27. And in some circumstances, not following rules in specific matters can cost law firms money. For example, in large Chapter 11 cases, the new U.S. Trustee Guidelines are very specific about such rules as billing time in tenths of hours. See U.S. DEP'T OF JUSTICE, FEE GUIDELINES, APPENDIX B—GUIDELINES FOR REVIEWING APPLICATIONS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FILED UNDER 11 U.S.C. § 330 FOR ATTORNEYS IN LARGER CHAPTER 11 CASES, at 1, 17 (2013), [http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/Fee\\_Guidelines.pdf](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/Fee_Guidelines.pdf) (requiring that time be kept "in increments of no more than one tenth (.1)

any other type of organization, a law firm will have rules for each of these ethical principles.<sup>28</sup> But having rules in place isn't nearly as important as having the *right* rules in place. Every business that has failed, with its C-level officers indicted or sued, has had rules. The real incentives, though, cut against following those rules.<sup>29</sup>

That's why it's important to figure out what the *actual* default rules and incentives are in any law firm, rather than focusing upon the "official" rules in that firm.<sup>30</sup> I'm not convinced that we'll always isolate the correct incentives to trigger ethical behavior, because finding the precisely correct incentives is an exceptionally difficult undertaking. But we should try. Otherwise, the types of behaviors that underlie some of the major changes occurring in modern U.S. BigLaw practice—a move toward outsourcing certain types of legal tasks,<sup>31</sup> more client pressure on bills, a (slight) move away from billing by the hour, the demise of some high-powered law firms,<sup>32</sup> the merging of others,<sup>33</sup> and the downsizing of yet more<sup>34</sup>—will

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of an hour"). Firms whose professionals "block-bill" are subject to objections by the United States Trustee regarding the reasonableness of their fees. Whether the bankruptcy courts sustain those objections for failure to follow the Guidelines remains to be seen.

28. And as my buddy Randy Gordon has pointed out to me, malpractice insurers take great pains to get law firms to comply with the ethics rules. E-mail from Randy Gordon to author (Sept. 23, 2013, 01:11 PM) (on file with author).

29. To beat a particularly beloved dead horse of mine, take Enron. Enron had a code of ethics that specified that its employees followed the "R-I-C-E" model of respect, integrity, communication, and excellence. But Enron's incentives encouraged disrespect, lying, hiding the ball, and seriously dumb deals. Nancy B. Rapoport, *Lessons From Enron—And Why We Don't Learn from Them*, COM. LENDING REV. May–June 2009, at 21, 21.

30. My buddy Walter Effross reminded me that the difference between official rules and actual rules is like the difference between an organizational chart and the actual "who's doing what" within an organization. See notes on earlier draft from Walter Effross to author (Sept. 20, 2013) (on file with author) (analyzing rules and management within a law firm); see also LEE G. BOLMAN & TERRENCE E. DEAL, *REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP* 43–116, 189–246 (4th ed. 2008) (discussing the structural and political "frames").

31. See, e.g., K. William Gibson, *Outsourcing Legal Services Abroad*, L. PRAC. MAG., July/Aug. 2008, at 47, 48–49 available at [http://www.americanbar.org/publications/law\\_practice\\_home/law\\_practice\\_archive/lpm\\_magazine\\_articles\\_v34\\_is5\\_pg47.html](http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_articles_v34_is5_pg47.html) (describing legal market outsourcing).

32. See L. SHUCKS, <http://lawshucks.com/biglaw-dead-pool/> (last visited Jan. 24, 2013) (listing a running tally of dead BigLaw firms).

33. On October 25, 2013, the merger discussions between two very large firms, Pillsbury Winthrop Shaw Pittman and Orrick, Herrington & Sutcliffe, hit the national news. See, e.g., Peter Lattman, *Law Firms Orrick & Pillsbury in Merger Talks*, N.Y. TIMES (Oct. 25, 2013, 4:02 PM), [http://dealbook.nytimes.com/2013/10/25/law-firms-orrick-and-pillsbury-in-merger-talks/?\\_r=0](http://dealbook.nytimes.com/2013/10/25/law-firms-orrick-and-pillsbury-in-merger-talks/?_r=0)

make practicing in a BigLaw environment an increasingly risky proposition.<sup>35</sup> To illustrate some of the stresses that law firms are experiencing, I'm going to draw from my own experiences at a BigLaw firm and from some stories about other BigLaw firms.<sup>36</sup> I'm focusing on BigLaw firms because that's also the focus of most of the national news about changes in law practice, although my observations will apply to some non-BigLaw practices as well.<sup>37</sup>

Let's start with an old-fashioned tale about law firm incentives in the 1980s. When I worked at a BigLaw firm, a few of our lawyers were late in submitting their billable time to the accounting department. By "late," I mean several weeks late. Submitting late timesheets<sup>38</sup> created two serious problems: first, without a record of billable hours, billing partners<sup>39</sup> 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

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("[The] combination would create one of the country's 10 largest firms, with about 1,700 lawyers."). That particular merger cratered. See Jennifer Smith, *Orrick-Pillsbury Merger Talks Are Off* (Nov. 25, 2013, 3:12 PM), <http://blogs.wsj.com/law/2013/11/25/orrick-pillsbury-merger-talks-are-off/>.

34. The extreme lateral mobility that some partners have enjoyed, thanks to their robust "books of business" (clients who will follow them), has added to law firm bottom-line uncertainty.

35. The more that lawyers in firms feel that their business model is threatened, the more likely it is that some of them will panic and accede to client demands that might not necessarily be ethical in order to keep the client's business. The more pressure that lawyers face, then, the more we need to come up with structures to counteract any improper survival strategies.

36. My source at a very good midsize firm paints a very different picture of what his firm does with respect to compensation, bonuses, circulating information about colleagues' pay and activities, and policies about billing. At his firm, the interoffice conference time gets written off as benefitting the firm more than the client, although the underlying activities that come out of those conferences do get billed to the client.

37. My ideas might not translate well to firms with certain types of practices, such as criminal defense work, as my buddy Doug Berman pointed out to me when I presented this paper at Ohio State.

38. Late-submitted timesheets may still represent contemporaneously recorded time that simply hasn't been turned over to the billing department yet; late-recorded time, on the other hand, is a more serious problem.

39. Or shareholder.

subconscious incentive to overestimate the time spent on a given task.

Back when many of us received our (hard-copy) paychecks in envelopes, the managing partner tried to change the habits of those who turned in late timesheets by making the scofflaws pick up their checks in his office. I'm reasonably certain that the long march to the managing partner's office, though, didn't change the behavior of any inveterate late-billers—at least those who had figured out how not to live paycheck-to-paycheck. The “long march” might have spurred some occasional late-billers to learn to record their time contemporaneously, but the fact that the long march policy didn't disappear after a few weeks suggests that the policy didn't change much behavior.<sup>40</sup>

Take another late-1980s example: bonuses. We associates made good salaries, but at some point in my career, the firm decided to award yearly bonuses of several thousand dollars for associates who billed significantly more time than the minimum yearly billable requirement. (I seem to recall that the minimum yearly requirement was around 1,800 or 1,900 hours a year, although I only knew a handful of friends who billed fewer than 2,300 or 2,400 hours a year.) On the theory that people preferred more money to less money, the firm used bonuses to encourage us to work even harder.

There were three problems with the incentive of bonus payments. First, it equated “more hours” with “more hours that were valuable to the firm (and the client).” Unfortunately, not every billable hour is created equal. Inefficient time billed by the hour drains away value to the client, and exhausted lawyers often work inefficiently.<sup>41</sup> In other words, what the firm was measuring (hours) didn't necessarily reflect the underlying goal of

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40. My husband has pointed out that one of his law firms also had a “no timesheet, no pay” policy, and he's not sure that his firm's policy worked, either. Other firms fine lawyers for late timesheets by deducting a certain amount from their salaries, but the point's the same—some people will change their behavior because of the operant conditioning that comes from fines and penalties, and others will keep on submitting late timesheets unless we find structural ways to make it almost impossible for them to *be* late. *Cf. infra* notes 146–57 and accompanying text.

41. Moreover, it's more likely that tired lawyers make all sorts of mistakes, including ethical ones. *See, e.g.*, MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 34 (2011) (“[D]ecision making tends to be most ethically compromised when our minds are overloaded. The busier you are at work, for example, the less likely you will be to notice when a colleague cuts ethical corners or when you yourself go over the line.”).

doing more high-quality and valuable work. The more slowly that a lawyer worked, the more billable hours he or she would rack up, and the closer that lawyer would be to a bonus. Second (even if a lawyer ignored the temptation to work slowly),<sup>42</sup> the proffered bonus still created perverse incentives. A lawyer might work twenty more billable hours one month if that extra work might result in moving from one bonus level to a higher bonus level. But that same lawyer might not be as excited about working those twenty extra billable hours if he or she was, say, 300 hours away from the next bonus level. The relationship of lawyer-to-billable-treadmill was by no means a straight line. Finally, for those lawyers who valued leisure time more than money, bonuses provided no incentive at all.<sup>43</sup>

We associates weren't unique in terms of adjusting to our firm's incentives.<sup>44</sup> People play to the incentives that they're given. Those incentives might be more money in one's paycheck, or a higher standing in the community, or the trust and love of our friends and family. The trick, as every manager of every business knows, lies in creating the types of incentives that reward the behavior that you want while discouraging the behavior that you don't want. Therefore, if we want to sharpen the force of the rules that we intend to put in place, then we need to think about how incentives and default rules play into human behavior.

A recent story about one very good law firm illustrates this point. In *The New Republic*, Noam Scheiber described how Mayer Brown tried to change some incentives to encourage its partners to increase the amount of business coming in:

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42. And let's not pretend that the temptation to work more slowly, or do more work on a project than is reasonably necessary, isn't there. It is. The question is whether a lawyer yields to that temptation or even acknowledges the temptation in the first place. It's possible that a lawyer might nitpick and rewrite a draft to death not because she wants the hours but because she doesn't want to let go of a draft that isn't perfect—but it's also possible that, in the deep recesses of her mind—she knows that taking the extra time means extra fees.

43. See *Leaning Out: The 2013 Associate[s] Survey*, THE AM. LAW., Sept. 1, 2013, available at [http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202512392833&camp%3bThe\\_Associates\\_Survey&slreturn=20131128140543](http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202512392833&camp%3bThe_Associates_Survey&slreturn=20131128140543) (survey involving trading billable hours requirement for a portion of salary). Hat tip to Walter Effross for that one. When bonuses to associates first became trendy, I recall one of my friends saying, probably around October, that he had hit his 1,800 hours for the year and had decided to take the rest of the year off.

44. As my colleague Jean Sternlight pointed out on an earlier draft of this article, though, "[p]sychologists believe that there is lots going on beneath the surface so that incentives might not be as powerful as one might assume." Notes on earlier draft from Jean Sternlight to author (Sept. 20, 2013) (on file with author). She's right. Pure incentives will never tell the whole story. People's cognitive errors and biases will always factor in.

For decades prior to the 1980s, Mayer Brown tilted in the lockstep direction. But, after the collapse of Continental, Bob Helman realized the firm would go under if his partners sat around waiting for business to walk in the door. Hereafter, he decreed, each partner's compensation would depend heavily on the amount of business he or she drummed up.

Helman's plan may have worked too well. Ever since it went into effect, partners have competed aggressively not just against lawyers at other firms, but against one another. Chicago partners would fly into New York to poach clients from their Manhattanite counterparts, holding clandestine meetings in which they would pitch themselves as less expensive and a mere two-hour plane ride away. When the New Yorkers invariably caught wind of these plots, they would remind clients that they were far more efficient than their Midwestern cousins. 'What we would end up saying is . . . "Chicago will staff you with four partners on something we'd staff with one or two,"' recalls a former partner. 'It's crazy that I have to go in and have a conversation about it. Denigrating.' (The problem has been somewhat mitigated in recent years by more formal firm-wide 'client teams,' though many still complain about the struggle to be included.)<sup>45</sup>

The straightforward link of problem ("we need to bring in more business") to solution ("if partners get more money from whatever business they bring in, they're more likely to hustle for more business") was logical, but it had some unfortunate unintended consequences.<sup>46</sup> So did some of the

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45. Noam Scheiber, *The Last Days of Big Law: You Can't Imagine the Terror When the Money Dries Up*, NEW REPUBLIC (July 21, 2013), <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries> (footnote omitted).

46. Mayer Brown isn't the only firm that has struggled with this issue. In the book *Turks and Brahmins: Upheaval at Milbank, Tweed*, Ellen Pollock describes the initial pushback of some partners to the idea that the firm should change its lockstep compensation:

Lockstep compensation allowed partners to focus on serving their clients instead of amassing power. . . . [Partner Norman Nelson] painted a picture of life without lockstep, a world with squabbling partners, unbridled quests for power, and partners deserting the firm solely for more lucrative opportunities. In short, money ruled and, as Nelson reminded the quiet group before him, quarrels over money inevitably brought out the worst in people.

ELLEN JOAN POLLOCK, *TURKS AND BRAHMINS: UPHEAVAL AT MILBANK, TWEED* 201 (1990). Over the Thanksgiving holiday, I spoke with a partner at Clifford Chance who explained why the firm has stayed with lockstep compensation—the rationale was the same. The gradation of distinctions across a variety of talented people didn't seem to be worth the candle. The tradeoff is, of course, between having money represent an anchor point for measuring where a person is in the pecking order and engendering resentment if some people aren't pulling their weight.

firm’s other initiatives, such as disclosing to all partners how many points each partner was getting:

In practice, settling on compensation for partners at Mayer Brown, as at many firms, is an elaborate ritual that runs through the first two months of each year and includes a remarkable amount of special pleading by way of memos and personal interviews. Finally, in late February, the management committee hands down the “points list,” Ten Commandments–style, enumerating what share of the firm’s profits each partner is entitled to. In a typical year, each “point” might be worth \$3,000, so that someone who received 500 points would take home \$1.5 million. (The firm may also award a bonus on top of this amount.)

Unlike most other firms, Mayer Brown then introduces a final wrinkle: The points list is disclosed for all to see. Since each partner aspires to be among the 50 who make the first page, where the highest earners appear, the amount of resentment this engenders is hard to overstate.<sup>47</sup>

Circulating how many points each partner was going to receive is akin to circulating the monthly or yearly billable hours of each law firm employee. Intentional circulation of such information is designed in part to spur competition, and it clarifies the pecking order. (I don’t know if the Mayer Brown pecking order is based just on the partners’ realization rate, or on how powerful each partner’s clients are, or on some other metric or combination of metrics.) Of course, the reverse would also be true: if every partner took home the exact same amount, then some partners would feel that their extra efforts were unappreciated. Moreover, if the firm gave its associates no clue as to how well it was matching budgeted income to actual income (which is the ultimate point of circulating billable hour information),<sup>48</sup> then the associates wouldn’t have a sense of how busy everyone was each month.<sup>49</sup> There’s no clear right or wrong decision about disseminating information like this.<sup>50</sup> The point, though, is that

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47. ELLEN JOAN POLLOCK, *TURKS AND BRAHMINS: UPHEAVAL AT MILBANK*, TWEED 201 (1990).

48. I also think the reason that firms include everyone’s monthly billable hours relates to the fact that firms hire a lot of type A people who like to measure themselves against their peers. The people in law firms who went around faux-complaining about how hard they were working were likely the same people who went around to their first-year classmates talking about their LSAT scores.

49. Savvy lawyers know, though: it’s not the billables that matter. It’s the realization rate—of those hours that are actually billed to the client, how many will the client be willing to pay?

50. Dustin Benham has pointed out to me two advantages of circulating everyone’s hours to everyone else: it makes overinflated hours more difficult to hide (although the issue of whether anyone will point out overinflated hours depends in part on the “diffusion of responsibility”

how a firm chooses to disseminate information, and what information it chooses to disseminate, sends powerful signals to everyone at the firm about the firm's core values. It also helps people within the firm learn what levers to push to get more rewards:

The new [points] system was supposed to eliminate the brutal internal competition for credit and the frenzied haggling during compensation season. 'It was very clearly explained to people that, when you're in a band, you're probably in it for two-to-three years,' recalls a former partner on the firm's management committee. 'If you had a great onetime year, you'd get a bonus. . . . But you're not going to move a band because of one change.' It didn't pan out that way. 'Practice leaders . . . would say, "Here are fifteen people who need to move a band,"' adds the partner. 'All hell broke loose.'

Given that it is human nature to hoard in lean times, it didn't help that a recession was about to bear down on the firm. When the points sheet came out in February 2009, partners discovered that each point—the share of profits they were entitled to—was worth roughly [twenty] percent less than the previous year, a huge pay cut. The following February, the points were devalued by [ten] percent more. This in itself was understandable; the firm had been hit hard by the financial crisis. But when the partners looked more closely at the points list, they noticed something infuriating: A small

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phenomenon), and it makes it hard for slackers to hide that they're not pulling their weight. E-mail from Dustin Benham to author (Oct. 10, 2013, 01:31 PM) (on file with author). One major law firm uses a more complex way of measuring how the firm is doing, via something called a "financial dashboard":

Attorneys could also access on their computers a tool known as the financial dashboard. Some used it daily. The dashboard showed numbers such as accounts receivable by bucket category and work time in progress. "It is much more real time than a monthly sheet," one partner noted. "It shows hours, time value, unbilled time, fees collected. All those reports are drillable by client." Tracking daily metrics gave attorneys a granular understanding of their own profitability and the state of the firm. One practice group head said he spent one day each month managing bills for his practice through the dashboard.

Heidi K. Gardner & Annelena Lobb, *Collaborating for Growth: Duane Morris in a Turbulent Legal Sector*, HARVARD BUSINESS SCHOOL CASE STUDY 9-414-022 at 9 (July 26, 2013). It seems to me that the difference between circulating everyone's monthly billable hours and circulating a financial dashboard is the difference between reporting a mean without a standard deviation and reporting both the mean and the standard deviation. The latter actually gives someone useful perspective. See Susan Wloszczyna, *George Carlin, 71, Questioned Authority and Made it Funny*, USA TODAY (June 24, 2008, 5:27 PM), [http://usatoday30.usatoday.com/life/people/2008-06-23-carlin-obit\\_N.htm](http://usatoday30.usatoday.com/life/people/2008-06-23-carlin-obit_N.htm) (quoting Carlin's classic bit about partial sports scores: "(As sportscaster 'Biff Burns'): 'Here is a partial score: Pittsburgh, 37.'").



minority of their colleagues had been made whole through bonuses.<sup>51</sup>

That excerpt makes an important point about default rules and incentives: if there's a perception that they're not being administered fairly, then the rank-and-file can get ornery.<sup>52</sup> At some point, those who believe that playing by the rules makes them chumps will get more aggressive about their demands, or they'll leave, or they'll become demoralized and, yes, less productive.<sup>53</sup> The challenge when running any organization (let alone one stuffed to the gills with brainy overachievers) is to find fair and rational ways to channel individual behavior so that what people want to do dovetails with what the organization needs them to do. But channeling human behavior is incredibly difficult to do well, even if one understands some of the common ways that humans tend to think and behave. And trying to channel human behavior without understanding human biases and thought processes is sheer folly.

## II. SOME BASIC THOUGHTS ABOUT DEFAULT RULES AND INCENTIVES

*At the individual level . . . we fall prey to psychological processes that bias our decisions—and, more importantly, we don't know they are biased.*

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51. Noam Scheiber, *The Last Days of Big Law: You Can't Imagine the Terror When the Money Dries Up*, NEW REPUBLIC (July 21, 2013), <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries> (footnote omitted).

52. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 308 (2011) ("Employers who violate rules of fairness are punished by reduced productivity . . ."); see also Scott Killingsworth, *Modeling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961, 975 (2012) ("A company's authority is considered legitimate only to the extent that the organization is perceived as being ethical and fair in its interactions with employees and third parties.").

53. As Noam Scheiber noted:

Some of the beneficiaries were major business generators. As 2008 wore on, many of these big shots had eyed the exits and a few began to leave. "Rich Morvillo"—a prominent white-collar criminal defense lawyer—said, "I don't want to be the last man standing in D.C. If there's going to be an exodus, I'm going to be part of that," recalls one former partner. Meanwhile, others simply let it be known that they were out the door unless the firm opened its wallet—"the table-pounders," as some called them. While the logic of appeasing them was self-evident, the message it sent was terrible. "There was a sense among many of us at the time that the firm had in good faith been trying to move from eat-what-you-kill to a more collectivist culture," recalls one former partner. "It was a serious backtrack—punishing partners who had been playing by the rules."

Noam Scheiber, *The Last Days of Big Law: You Can't Imagine the Terror When the Money Dries Up*, NEW REPUBLIC (July 21, 2013), <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries> (footnote omitted).

*At the organizational level, business leaders typically fail to appreciate the role of bounded ethicality in their employees' decisions. Furthermore, they typically believe that their employees' integrity will protect them and the organization from ethical infractions. Yet many ethical infractions are rooted in the intricacies of human psychology rather than integrity. To design wise interventions, leaders need to consider the ways in which their current environment could prompt unethical action without the decision maker's conscious awareness.*<sup>54</sup>

#### A. *A Bit About Human Biases*

Just as so many others have,<sup>55</sup> I've written about the intersection of cognitive errors with lawyer decision-making.<sup>56</sup> The fact is that we all

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54. MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 21 (2011).

55. JENNIFER ROBBENNOLT & JEAN STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION AND DECISION MAKING*, (ABA 2013); RANDALL KISER MARTIN, *BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS* (2009); *PSYCHOLOGICAL PERSPECTIVES ON ETHICAL BEHAVIOR AND DECISION MAKING* (David de Cremer ed. 2009); *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* (Neil Brewer and Kipling D. Williams eds., 2005); Richard Birke & Craig R. Fox, *Psychological Principles in Negotiation Civil Settlements*, 4 HARV. NEGOT. L. REV. 1 (1999); John M.D. DiPippa, *How Prospect Theory Can Improve Legal Counseling*, 24 U. ARK. LITTLE ROCK L. REV. 81 (2001); Chris Guthrie, *Panacea or Pandora's Box? The Costs of Options in Negotiations*, 88 IOWA L. REV. 601 (2003); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000); Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43; Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO STATE J. DISP. RESOL. 281 (2006); Russell Korobkin & Chris Guthrie, *Psychology, Economics and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997); Russell Korobkin and Chris Guthrie, *Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994); Martine B. Powell & Rebecca B. Wright, *Professionals' Perceptions of Electronically Recorded Interviews with Vulnerable Witnesses*, 21 CURRENT ISSUES CRIM. JUST. 205 (2009); Martine B. Powell, *Specialist Training in Investigative and Evidential Interviewing: Is It Having Any Effect on the Behaviour of Professionals in the Field*, 9 PSYCHIATRY PSYCHOL. & L. 44 (2002); Jeffrey J. Rachlinski, *A Positive Psychological Theory of the Value of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998); Jean R. Sternlight, *Lawyer's Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO STATE J. ON DISP. RESOLUTION 269 (1999).

56. Nancy B. Rapoport, *The Client Who Did Too Much*, 47 AKRON L. REV. 121 (2014); Nancy B. Rapoport, *Rethinking U.S. Legal Education: No More "Same Old, Same Old"*, 45 CONN. L. REV. 1409 (2013); Nancy B. Rapoport, *Managing U.S. News & World Report—The Enron Way*, 42 GONZAGA L. REV. 423 (2013); Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. L. 117 (2012); Nancy B. Rapoport, *Changing the Modal Law School: Rethinking U.S.*

have the potential to be fooled by a variety of unconscious biases and misguided thinking. We might justify our serious misbehavior by rationalizing it with our perception that, as good people, we didn't do anything wrong (cognitive dissonance).<sup>57</sup> We might stay silent about something that's obviously wrong because we assume that someone else who knows about that problem will deal with it (diffusion of responsibility).<sup>58</sup> We might shape our behavior or opinions to conform to those of our peers, even though our own senses disagree with what our peers are saying and doing (social pressure).<sup>59</sup> We might tend to focus on one particular factor while ignoring all other information (anchoring).<sup>60</sup> And thanks to the fact that we're human, we might be experiencing some or all of these<sup>61</sup> cognitive errors simultaneously.

Smart and well-educated people are still subject to the same spate of cognitive errors that the less fortunate experience. Let's take the example of Dewey & LeBeouf's demise. Dewey & LeBeouf was chock-full of smart

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*Legal Education in (Most) Schools*, 116 PENN ST. L. REV. 1119 (2012); Nancy B. Rapoport, *Through Gritted Teeth and Clenched Jaw: Court-Initiated Sanctions Opinions in Bankruptcy Courts*, 41 ST. MARY'S L.J. 701 (2010); Nancy B. Rapoport, *Rethinking Professional Fees in Chapter 11 Cases*, 5 J. BUS. & TECH. L. 263 (2010); 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* (Univ. of Michigan Press 2004)); Nancy B. Rapoport, *Enron, Titanic, and the Perfect Storm*, 71 FORDHAM L. REV. 1373 (2003); Nancy B. Rapoport, *The Real Reason Why Businesses Make Bad Decisions*, BUS. LAW TODAY, July/Aug. 2009 at 52 (reviewing JONATHAN R. MACEY, *CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN* (Princeton University Press 2008)).

57. See Saul McLeod, *Cognitive Dissonance*, SIMPLYPSYCHOLOGY (2008), available at <http://www.simplypsychology.org/cognitive-dissonance.html> (describing cognitive dissonance in layperson terms).

58. See, e.g., Noam Shpancer, *Bystanders and Heroes: The Dance of Defiance and Conformity*, PSYCHOLOGY TODAY (Dec. 26, 2012), available at <http://www.psychologytoday.com/blog/insight-therapy/201212/bystanders-and-heroes-the-dance-defiance-and-conformity> (providing examples of how the "bystander effect" can affect a person's behavior).

59. See, e.g., Saul McLeod, *Asch Experiment* SIMPLYPSYCHOLOGY (2008), available at <http://www.simplypsychology.org/asch-conformity.html> (describing the procedure, results, and conclusions of Solomon Asch's experiment on human group conformity).

60. See *Anchoring Bias in Decision-making*, SCIENCE DAILY, <http://www.sciencedaily.com/articles/a/anchoring.htm> (last visited Jan. 24, 2014) (describing the tendency to "anchor" on a specific item); see also *Selective Attention Test*, YOUTUBE, <http://www.youtube.com/watch?v=vJG698U2Mvo> (last visited Jan. 24, 2014) (showing the classic test of how focusing on a specific item will cause the viewer to miss or disregard a person in a gorilla costume moving through a crowd) (sorry for the spoiler alert).

61. Or others as well. See, e.g., *List of Cognitive Biases*, SCIENCE DAILY, [http://www.sciencedaily.com/articles/l/list\\_of\\_cognitive\\_biases.htm](http://www.sciencedaily.com/articles/l/list_of_cognitive_biases.htm) (last visited Jan. 24, 2014) (listing and defining the various cognitive biases).

and well-educated people. James Stewart's version of what killed the firm<sup>62</sup> demonstrates how all four of these cognitive errors can play out.

Steven Davis, the head of LeBeouf, Lamb, Green & MacRae, had wanted to bring in Ralph Ferrara, a high-billing partner from another firm, in order to move LeBeouf up the law firm pecking order. Ferrara was only willing to move if he received a guaranteed draw that wasn't tied to his performance, as well as a signing bonus that would replace his pension at his current firm: a deal that involved a \$16 million payout plus a guarantee of \$1.6 million a year.<sup>63</sup> When Morton Pierce, the co-chair of Dewey Ballantine, later negotiated with Davis over the merger of their two firms, that sweetheart deal with Ferrara came back into focus. Pierce also wanted a sweetheart deal (and he got one, with a five-year contract consisting of an annual \$5 million salary and a \$1 million profit payout plus a \$5 million signing bonus).<sup>64</sup> Other high-ticket contracts to retain key partners followed. If the merged firm had actually generated enough profits to pay everyone what their contracts said that they were owed, then Dewey & LeBeouf would likely still be around.<sup>65</sup> But the firm didn't make those kinds of profits,<sup>66</sup> and the firm went belly-up.

LeBeouf, Lamb's goal of becoming more prominent was reasonable.<sup>67</sup> But basic business sense says that, at best, the proposition of being willing to guarantee big bucks without reference to how much the "big bucks" recipient is contributing to the bottom line is very risky. So why was LeBeouf willing to go out on a limb? When a management committee runs an organization, there's a risk of both social pressure ("You don't *want* us to get better, you cheapskate, you?") and diffusion of responsibility ("I know that these contract guarantees are very expensive, but if they were totally out of whack, someone else on the management committee would

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62. See generally James B. Stewart, *The Collapse: How a Top Legal Firm Destroyed Itself*, NEW YORKER 80 (Oct. 14, 2013) (explaining the downfall of Dewey & LeBeouf).

63. *Id.* at 82–83.

64. *Id.* at 87.

65. There's no per se reason why an "eat what you kill" compensation system has to be "bad" and a lockstep one "good." Every compensation system has pluses and minuses. It's how the system actually works, given the particular people and client base involved, that dictates whether the system is good or bad for the firm.

66. *Id.* at 89–93.

67. In some sense, "prominence" is bounded by the fact that the folks higher up on the pecking order rarely are willing to step aside to make room for those who want to move up.

have stopped me") kicking in. The entire idea of "let's get famous lawyers to join us so that we look as though we're moving up in the pecking order" is a classic anchoring error mistake. By watching who was coming aboard, the firm was missing how much each new lateral might cost the firm in the long run. And by exposing the firm to potentially large shortfalls, Steven Davis likely was dealing with cognitive dissonance ("I know that these deals are risky, but if our firm is to thrive, I should make these deals even though I know that there's a huge financial exposure and that the lawyers who don't get similar deals will be demoralized"). Very smart people ran LeBoeuf, Lamb, and very smart people ran Dewey Ballantine, but the point is that smart *people* ran those firms. People make cognitive errors, and the errors that we now see in the aftermath of the Dewey & LeBoeuf death spiral are four of the most classic cognitive errors that exist.<sup>68</sup>

And yet, just like Ron Popeil's inventions,<sup>69</sup> there's more. We're capable of fooling ourselves in countless ways. We can, without realizing it, pick and choose what we remember in order to justify particular conclusions that we've reached (confirmation bias).<sup>70</sup> We can confuse

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68. Compare how Dewey handled compensation and how Duane Morris says that it handles it. In addition to being exceptionally transparent about its calculations, Duane Morris emphasizes the need to stay within its budget:

There are some personalities, when it comes to advising them of a downward adjustment in their compensation, where you simply have to be as direct as possible. I might say, for example, "Hey, you were at a number close to \$800,000 last year, and frankly, this year your results were a bit off. We are in a situation where we need to spread some of this money out to other folks that are on an upswing... I'm going to have to ask you to take a \$50,000 reduction, and here's why." I would likely go on to say to that lawyer: "You are an equity partner and last year enjoyed the fruits of our 14% over-budget results. We really need you to accept the reduction this year so that we can live within our budget." Sometimes these conversations are challenging, but in my experience we have always gotten through them well.

Heidi K. Gardner & Annelena Lobb, *Collaborating for Growth: Duane Morris in a Turbulent Legal Sector*, HARVARD BUSINESS SCHOOL CASE STUDY 9-414-022 at 11 (July 26, 2013); see also *infra* note 95 and accompanying text.

69. See, e.g., *About Ronco*, RONCO.COM, <https://www.ronco.com/aboutus.html> (last visited Jan. 24, 2014) (detailing the history and inventions of Ron "Ronco" Popeil).

70. Jennifer K. Robbenolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1155 (2013).

*Confirmation bias* also helps us remember aspects of the decision or situation that are consistent with an ethical self-image, rather than the details of any ethical lapse. "If mistakes were made, memory helps us remember that they were made by someone else. If we were there, we were just innocent bystanders." Such memory effects can result in what ethicist Patricia Werhane has called *moral amnesia* or "an inability to remember past mistakes and to transfer that knowledge when fresh challenges arise."

getting a good result with having had a sound process for reaching that result (hindsight bias). Because we're human, we can fall into certain patterns of thinking and behaving that, viewed dispassionately, are flat-out wrong, embarrassing, or downright venal. And we can do so when we're well-rested and well-fed, not particularly stressed-out, and with plenty of time to think about what we're doing. Imagine what happens when lawyers work at the frenetic pace of modern practice.<sup>71</sup> In the tug-of-war between how psychologists view the world and how sociologists view it, there's plenty of "the person versus the situation" considerations to go around. We all have cognitive biases, and our individual situations put us in the position of having those biases do their work extremely well.

#### B. *Social Pressure*

Of particular interest to those running law firms is the effect of social pressure on a person's decision-making. For the same reason that parents want their children to play only with those friends whom the parents believe are "good influences," the behavior that law firms generate will depend a whole lot more on how the majority of people in the firm behave than on what a firm's policies and procedures manual says. To illustrate this point, Solomon Asch's experiments on social pressure are classics, and his own description of their format is worth reading:

A group of seven to nine young men, all college students, are assembled in a classroom for a "psychological experiment" in visual judgment. The experimenter informs them that they will be comparing the lengths of lines. He shows two large white cards. On one is a single vertical black line—the standard whose length is to be matched. On the other card are three vertical lines of various lengths. The subjects are to choose the one that is of the same length as the line on the other card. One of the three actually is of the same length; the other two are substantially different, the difference ranging from three quarters of an inch to an inch and three quarters.

The experiment opens uneventfully. The subjects announce their answers in the order in which they have been seated in the room, and on the first round every person chooses the same matching line. Then a second set

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*Id.* (footnotes omitted; emphasis in original).

71. *Id.* at 1140 ("Long hours, deadlines, and workplace politics can combine to take a toll on lawyers, as can lack of sleep, frequent interruptions, travel, difficult decisions, and the struggle to balance work and family life.") (footnote omitted).

of cards is exposed; again the group is unanimous. The members appear ready to endure politely another boring experiment. On the third trial there is an unexpected disturbance. One person near the end of the group disagrees with all the others in his selection of the matching line. He looks surprised, indeed incredulous, about the disagreement. On the following trial he disagrees again, while the others remain unanimous in their choice. The dissenter becomes more and more worried and hesitant as the disagreement continues in succeeding trials; he may pause before announcing his answer and speak in a low voice, or he may smile in an embarrassed way.

What the dissenter does not know is that all the other members of the group were instructed by the experimenter beforehand to give incorrect answers in unanimity at certain points. The single individual who is not a party to this prearrangement is the focal subject of our experiment. He is placed in a position in which, while he is actually giving the correct answers, he finds himself unexpectedly in a minority of one, opposed by a unanimous and arbitrary majority with respect to a clear and simple fact. Upon him we have brought to bear two opposed forces: the evidence of his senses and the unanimous opinion of a group of his peers. Also, he must declare his judgments in public, before a majority which has also stated its position publicly.

The instructed majority occasionally reports correctly in order to reduce the possibility that the naive subject will suspect collusion against him. (In only a few cases did the subject actually show suspicion; when this happened, the experiment was stopped and the results were not counted.) There are 18 trials in each series and on 12 of these the majority responds erroneously.<sup>72</sup>

So what did Asch find? "Of the 123 put to the test, a considerable percentage yielded to the majority. Whereas in ordinary circumstances individuals matching the lines will make mistakes less than [one percent] of the time, under group pressure the minority subjects swung to acceptance of the misleading majority's wrong judgments in 36.8 [percent] of the selections."<sup>73</sup> That's a pretty big difference. Those who defied the group's "perception" tended to do so because of their confidence in their own judgment or out of a personal need to, in essence, call 'em as they saw 'em.<sup>74</sup> Those who bent to the group's "perception," though, did so even though they suspected that some of their colleagues (the actors who were creating the "majority" perception) were just playing along, or they did so

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72. Solomon E. Asch, *Opinions and Social Pressure*, 193 SCL. AM. 31, 32 (1955).

73. *Id.* at 32–33.

74. *Id.* at 33.

because they thought that the majority was dealing with some sort of optical illusion (and didn't want to rock the boat); still others actually believed that they themselves were having perception problems.<sup>75</sup> As Asch observed, "All the yielding subjects underestimated the frequency with which they conformed."<sup>76</sup> So Asch varied his experiment. The size of the group of actors mattered—most dramatically when the number of actors increased from one to two and from two to three. After that, the number of actors contradicting the subject's own perception mattered much less.<sup>77</sup> Another important variation was the inclusion of a second person who could validate the experimental subject's own perceptions:

Disturbance of the majority's unanimity had a striking effect. In this experiment the subject was given the support of a truthful partner—either another individual who did not know of the prearranged agreement among the rest of the group, or a person who was instructed to give correct answers throughout.

The presence of a supporting partner depleted the majority of much of its power. Its pressure on the dissenting individual was reduced to one fourth: that is, subjects answered incorrectly only one fourth as often as under the pressure of a unanimous majority . . . . The weakest persons did not yield as readily. Most interesting were the reactions to the partner. Generally the feeling toward him was one of warmth and closeness; he was credited with inspiring confidence. However, the subjects repudiated the suggestion that the partner decided them to be independent.<sup>78</sup>

Let's put this phenomenon in the context of a law firm. A junior associate sits in on a meeting with a mid-level associate, a senior associate, and a partner. They talk about six different matters for a total of thirty minutes. Firm policy, at least in this hypothetical, is that the minimum billable increment is .25.<sup>79</sup> (Yes, I know that most firms bill in tenths of

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 34; *see also* ORI BRAFMAN & ROM BRAFMAN, SWAY: THE IRRESISTIBLE PULL OF IRRATIONAL BEHAVIOR 154–55 (2008) (discussing Asch's experiments).

79. Not only do most law firms bill in tenths of hours, but also more than a few firms have agreed internally not to bill their clients for conversations among the lawyers working on a matter. As my friend Scott Unger explains,

I do not bill for sitting around speaking with others in my group. Clients would flip out. I tell younger associates I supervise not to do it. Of course, when working in teams on a file, we need



hours now. Humor me.) The partner says, "OK, that's .25 for each of six matters. Not bad: 1.5 hours for thirty minutes' worth of work." The senior associate nods, as does the mid-level associate. The junior associate now has to face the ethical dilemma: does she likewise record 1.5 hours of billable time, or—for those matters that only took a few minutes—does she decide only to bill .25 to those matters for which the discussion took at least ten minutes? My guess is that, unless one of the other associates speaks up, the junior associate is not only going to record 1.5 hours of time, but she's also going to justify her choice by thinking, "firm policy says that I need to put down at least .25 every time I work on something."<sup>80</sup> Maybe some of the lawyers in the firm use an unwritten

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to discuss the case and issues related to representation. We bill that time we spend talking amongst ourselves when we execute the action plan (researching, writing) or I bill it as a "no charge." I use the "no charge" code all of the time. That way, the client sees that I am not billing them for the discussions but am engaging in those discussions. I use the "no charge" code all of the time when I feel I am not adding value to a file. Billing it as "no charge" is a good way of keeping a client happy. Everyone likes something for free.

E-mail from Scott Unger to author (Sept. 21, 2013, 06:11 PM) (on file with author); *see also* 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).

80. As Jennifer Robbennolt and Jean Sternlight have observed:

Given all that we know about ethical blindspots, it would not be at all surprising if subordinate lawyers had difficulty making objective judgments about whether a question is "arguable" and about the "reasonableness" of the superior's resolution. And, as we have discussed, lawyers are skilled at making arguments on multiple sides of an issue. Thus, when a partner tells an associate to do something the associate initially finds ethically questionable, the associate may well be able to craft an argument to convince himself that the particular behavior is acceptable.

Even in the absence of directions from an authority, ethical behavior can be influenced by other people. We learn how to comport ourselves, in part, by watching the actions of those around us, looking to see how others—particularly those with more experience or expertise—behave. "[L]awyers are social beings; like other human beings in social and occupational groups lawyers behave largely in accordance with group norms." For attorneys this might be other lawyers within a firm or agency, lawyers who share space, or other formal or informal advice networks—their "communities of practice." The more widespread an attorney believes a particular practice is, the more likely he is to indicate that he would engage in it and the more tempting the unethical behavior, the more widespread he will believe it to be.

When [lawyers] begin work at law firms, they watch the more experienced lawyers to see what the real standards of conduct are. Each firm quickly communicates its institutional norms to new associates; many associates are anxious to assimilate themselves into an institution and to be successful within it. Therefore, they are not critical of the norms they are asked to adopt. They redraw their lines to fit into the value systems of their firms. If the senior lawyers are not precise in their billing practices, the junior lawyers will not be. If the senior lawyers exaggerate their credentials or expertise when talking with new clients, the

rule that certain very small increments stay “unbilled,” or they wait until the number of very small increments add up to around .25, but if the junior associate doesn’t get some clarification, she’s just taught herself something that will eventually greatly annoy her clients.<sup>81</sup>

Or take another example of social pressure that Dustin Benham suggested to me:

Imagine being a first-year lawyer and your task is to Bluebook a brief in a multi-million dollar appeal. You receive the brief last, after everyone’s edits are in. You see a glaring legal problem but at least [five] other lawyers, including some who have argued at the highest levels of the profession, have written and/or studied the brief. The deadline is the next day and fixing the problem will trigger a request for an extension. I’d like to see the statistic on how many associates have the guts to sound the alarm. If it was [one] out of [ten], I’d be pleasantly surprised.<sup>82</sup>

Social pressure and diffusion of responsibility seem to be two cognitive errors that are most likely to apply to law firm life.<sup>83</sup> In Lisa Lerman’s *Scenes from a Law Firm*,<sup>84</sup> Lerman provides excerpts from an interview with an associate who chose to remain anonymous.<sup>85</sup> That associate worked for a law firm from fall 1993 through all of 1994. His stories reflect significant social pressure effects. Here’s an example:

Sometimes I’d be reviewing a pre-bill and I’d look under “costs” and I’d see “150 copies.” I didn’t make 150 copies . . . . Someone had used the code for that particular case . . . . Every once in a while you’d pick up a file and the file was paper thin. There hadn’t been any activity on it for a year, and yet there are 150 photocopies charged to that file . . . . I’d go back to the partner and say, “Look[,] somebody’s been using the wrong code.” And he would say, “Well, there’s nothing we can do about that.” I’d say, “Are we

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junior lawyers will do the same.

Jennifer K. Robbenolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1146-47 (2013) (quoting Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 681 (1990)) (footnotes omitted).

81. States require that fees be reasonable. *See, e.g.*, MODEL RULE OF PROFESSIONAL CONDUCT 1.5(a) (2013) (charging .1 for a thirty-second conversation would trigger a consideration of this ethics rule).

82. E-mail from Dustin Benham to author (Oct. 10, 2013, 01:31 PM) (on file with author).

83. Hat tip to my buddy Bernie Burk.

84. Lisa G. Lerman, *Scenes from a Law Firm*, 50 RUTGERS L. REV. 2153 (1998).

85. *Id.* at 2153-54.

going to charge it to that client?" He goes, "Well[,] it's the same client . . . . It's the insurance company that pays the bill, so whether it is on that file or another . . . . What difference does it make?" It's a big faceless, giant insurance company. What's 150 copies at twenty cents a page?<sup>86</sup> Well, it's exactly that amount.<sup>87</sup>

That associate knew that billing 150 pages to the wrong matter was not ethical, and yet that's what the firm wanted him to do, just as the firm wanted him to change some paralegal and secretarial time to indicate that an attorney had done the work.<sup>88</sup> It takes a strong personality to overcome that much social pressure, and Lerman's anonymous lawyer isn't alone in experiencing pressure to behave unethically.<sup>89</sup> Couple social pressure with diffusion of responsibility, and you get a big mess. If everyone at a law firm believes that someone else at the firm is the firm's "moral conscience," then only the person with the title of "ethics guru"<sup>90</sup> (or those who serve on the firm's ethics committee) will get tagged with the responsibility of making sure that everyone in the firm conforms to the ethics rules. In a sense, diffusion of responsibility outsources ethical responsibility from "everyone" to "the guru." Clearly, then, if we decide that we want to change some behaviors inside a law firm,<sup>91</sup> we need to take social pressure and other cognitive errors into account.<sup>92</sup>

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86. Cognitive dissonance would lead the billing partner to say to himself, "Yes, we billed the copies to the wrong client, but fixing the problem would cost more than the original \$30 mistake, so it's not cost-effective to fix the problem." (Maybe not, but writing off the \$30 *would* be cost-effective.)

87. Lisa G. Lerman, *Scenes from a Law Firm*, 50 RUTGERS L. REV. 2153, 2161–62 (1998) (punctuation in original).

88. *Id.* at 2162.

89. See, e.g., Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537, 601–08 (1991) (discussing the disconnect in ethical behavior that his students observed).

90. The "ethics guru" model works best when the guru is a powerful lawyer within the firm, and it works significantly less well when the guru has little gravitas.

91. When you add some of the other cognitive errors that we make to the phenomenon of social pressure, you get statistics like this: "In a 2009 study of 2,800 employees, 49 percent reported they had observed some type of wrongdoing on the job in the previous year, despite the considerable efforts that organizations are taking to improve their employees' ethical behavior." MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 81 (2011).

92. As Ori and Rom Brafman have noted:

A growing body of research reveals that our behavior and decision making are influenced by an array of [unseen] psychological undercurrents and that they are much more powerful and pervasive than most of us realize.

### III. CHANGING BEHAVIOR BY CHANGING INCENTIVES AND DEFAULT RULES

*An organization's culture is built over time as members develop beliefs, values, practices, and artifacts that seem to work and are transmitted to new recruits. Defined as "the way we do things around here," culture anchors an organization's identity and sense of itself.<sup>93</sup>*

#### A. *The Importance of Setting the Correct Cultural Expectations As a First Step.*

Before a law firm can find ways of fine-tuning people's behavior, it has to figure out the culture that it wants to inculcate. We could spend hours reading all of the literature suggesting that lawyers have moved away from being professionals to being businesspeople, but the fact remains that law firms are both; they are businesses that need to make a profit, and they are organizations of professionals who need to remember their duties to their clients and to the system as a whole. How the people in a firm behave when they face ethics issues will, over time, shape the cumulative level of firmwide ethics. Again, it's not what the firm says on its webpage, in its Human Resources manuals, or in meetings that counts; it's how people in authority signal, consciously or subconsciously, how they want their colleagues to act.

Even the tired old phrases such as "scorched-earth litigators" or "hard-nosed negotiators" will signal to the rank-and-file that they should be exceptionally aggressive.<sup>94</sup> Firms that promote themselves as being more

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. . . These hidden currents and forces include loss aversion (our tendency to go to great lengths to avoid possible losses), value attribution (our inclination to imbue a person or thing with certain qualities based on initial perceived value), and the diagnosis bias (our blindness to all evidence that contradicts our initial assessment of a person or situation).

ORI BRAFMAN & ROM BRAFMAN, *SWAY: THE IRRESISTIBLE PULL OF IRRATIONAL BEHAVIOR* 16–17 (2008).

93. LEE G. BOLMAN & TERRENCE E. DEAL, *REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP* 277–278 (4th ed. 2008).

94. Go back to Lisa Lerman's anonymous associate:

From the very beginning . . . I was told that "[w]e are not out to churn out five Cadillacs or Mercedes-Benz[e]s a year, what we are here to churn out is 150 Fords." "We'd rather that you would do a C job on 150 cases than an A job on fifty cases." "You have to 'add value' to the

collaborative, on the other hand, are signaling that they want less aggressive behavior. So, for example, if you place two law firms side by side, and Firm A specializes in take-no-prisoners divorce but Firm B specializes in collaborative divorce, you'd expect very different behavior from the professionals in those firms.<sup>95</sup>

Firms that want to develop a specific culture have to pay attention both to the behavior of those already in the firm<sup>96</sup> and the likely behavior of those who are invited to work there.<sup>97</sup> The recent *Harvard Business Review* case study of the Duane Morris firm provides a useful example. In considering lateral partners, the firm looks for "specific personality traits in

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firm." That comment came in repeatedly . . . "We're paying you X amount of dollars and it's costing us this much to keep you on board, so you have to find a way to make yourself profitable." Much of this instruction came from associates with seniority; they were trying to tell me how to survive at the firm. The partners never said these things to me, but it was clear that the partners rewarded those who worked by this philosophy.

That usually meant handling a large number of cases and doing a B grade job. It had nothing to do with doing quality legal work, or client maintenance, or establishing long-term relationships with clients. "Adding value" meant churning out as many billable hours as you could and doing as much marketing as you could.

Lisa G. Lerman, *Scenes from a Law Firm*, 50 RUTGERS L. REV. 2153, 2156 (1998).

95. Here's an example from a *Harvard Business Review* case study about Duane Morris:

One partner mentioned:

We as a firm have always had a "no jerks" rule. That is something that I personally take very seriously. I would say to anyone asking about Duane Morris that if someone is going to behave poorly, they had better do it quietly, because we do not tolerate rude or unprofessional conduct around the office. If anyone yelled at a staff member, oh my, I mean that lawyer would be ostracized quickly and hopefully would change their ways immediately. We are very protective of our culture.

[Chief Operating Officer] O'Donnell added:

You don't need to be a screamer to get things done here. Because the staff feels valued they continue to perform at a very high level—we don't have any laggards. People are often recognized by partners and clients for the jobs they do. I'll get at least one email a week congratulating somebody, thanking somebody or a group of people—and they will mention the secretaries, the marketing people and others involved. So we have a lot of people looking to give credit, rather than take credit. That is a virtuous circle.

Heidi K. Gardner & Annelena Lobb, *Collaborating for Growth: Duane Morris in a Turbulent Legal Sector*, HARVARD BUSINESS SCHOOL CASE STUDY 9-414-022 at 8 (July 26, 2013).

96. My buddy George Connelly has correctly pointed out to me the changes that I'm proposing in this article can affect up to four generations of professionals at a time. That's a lot of change for a great many people, and I'm cognizant that trying to make all of these changes at once, without much discussion at a firm beforehand, is a recipe for disaster.

97. For a discussion of what I think is the wrongheaded way that many firms hire new associates, see *infra* notes 184–86 and accompanying text.

new hires, alongside the requisite professional skills. The ideal candidate [is] collegial, task-oriented and a team player.”<sup>98</sup> Those potential partners receive detailed financial information about the firm and must fill out “a Lateral Partner Questionnaire (LPQ) that include[s] information about their clients, the portability of those clients, the partner’s billing reports, and a personal business plan.”<sup>99</sup> There’s a lot of due diligence that occurs on both sides of a potential lateral move at Duane Morris. Once hired, the new laterals get specific mentoring and training to make sure that there’s a good culture match.<sup>100</sup> The philosophy at the firm seems to follow that old adage, “act in haste and repent at leisure.” The extra investment before and immediately after hiring is an effort to build a specific culture at a conscious level.

Whether we’re talking about law firms, Fortune 100 businesses, or fast-food franchises, the countless subtle signals that occur each day will socialize people to behave one way or another.<sup>101</sup> Add to the mix what we know about cognitive errors, and you can see how important it is for law firms to be aware of just what type of behavior they’re eliciting. As Jennifer Robbennolt and Jean Sternlight have pointed out, “The stories that get told around the office send messages about what is valued. These messages can either reinforce or undermine the more formal ethics policies

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98. Heidi K. Gardner & Annelena Lobb, *Collaborating for Growth: Duane Morris in a Turbulent Legal Sector*, HARVARD BUSINESS SCHOOL CASE STUDY 9-414-022 at 12 (July 26, 2013). The firm also looks for the trait of collegiality in those people applying for associate positions. *Id.* Maybe every firm believes that it does a good job of screening for collegiality when considering laterals. The trick—just as much here as with any other company policy—is to see if the words match the actions.

99. *Id.* I’ll bet that Dewey’s former partners now wish that they’d done something along these lines when they brought in their expensive laterals.

100. *Id.* at 13.

101. The “we include support staff in our congratulatory emails” signal is important for setting the tone. *Id.* Other companies have their own distinctive tones and signals:

Like Enron, Johnson & Johnson has well-established codes of conduct. Why, then, have we witnessed such dramatic differences between these two companies in terms of ethical behavior? Differences in the length and content of the [codes of conduct] are probably not to blame. More likely, the real difference can be traced to the informal cultures in which these formal systems were embedded. Johnson & Johnson is widely known for its ethical culture . . . . [I]ts formal code of ethics was consistent with its informal culture . . . . By contrast, Enron became notorious for its underlying culture of greed and competition.

MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT* 118 (2011).

of the organization."<sup>102</sup> Moreover, if a law firm never discusses its professionals' behavior in a large setting (say, an all-hands departmental meeting), then its professionals will keep making ethics decisions in a vacuum.<sup>103</sup> Firms need to be deliberate and clear in their discussions about ethics.<sup>104</sup> More important, they need to think long and hard about how to structure their professionals' work environments to encourage good choices.

#### B. *Considering Entitlements: Perceived Losses Versus Perceived Gains*

If a firm wants to change its people's behavior, the first thing that its management should realize is that changing behavior in an existing organization—rather than starting fresh with a new organization—is likely to create frustration and anxiety for those who have to alter their old

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102. Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1168 (2013) (footnotes omitted); see also MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 123–24 (2011) ("Informal norms don't even require a complete story to become ingrained in an organization or society. The words we choose to describe, or disguise, behaviors can be just as effective. . . . [E]uphemisms send a powerful informal signal about an organization's values to its employees: as long as you disguise and hide your unethical behavior, we will accept it, and indeed even encourage it.").

103. Scott Killingsworth, *Modeling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961, 984 (2012) ("[I]n most cases, the outcomes of disciplinary actions are kept confidential, mainly for fear of privacy or defamation claims by disciplined employees. This invisible discipline can lead others to assume that the company is not following up on misconduct, which in turn could suppress reporting.").

104. As discussed by Jennifer Robbennolt and Jean Sternlight in *Behavioral Legal Ethics*:

The challenges of learning from ethical mistakes affect legal organizations as well as individual lawyers. One study of how ethics were handled in law firms found that "information regarding the nature of the problems or questions, and how they are resolved was rarely, if ever, fed back into the firm. Both associates and partners seemed unaware of the extent of reported (or unreported) problems, questions, or violations of ethical standards." Yet, when there is no feedback, learning will suffer, and this may lead to further deterioration in the entity's ethical norms.

The mindset with which one approaches mistakes can make a tremendous difference in one's ability to learn from them. Specifically, those with a *fixed mindset* see mistakes as an indication of incompetence or stupidity, react to them with anger or depression, and therefore miss out on opportunities to learn and improve. But those with a *growth mindset* see mistakes as opportunities to learn how to do better. Thus, part of establishing an ethical culture is to inculcate a learning or growth orientation to dealing with mistakes—providing and embracing opportunities for self-criticism.

Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1173 (2013) (footnotes omitted; emphasis in original).

habits.<sup>105</sup> If people perceive themselves as giving up something that they've "always" had (a way of entering billable time, say), they're going to be feeling the effect of a perceived loss.<sup>106</sup> As economists will tell you, people hate dealing with a perceived loss a lot more than they like getting a perceived gain:

Behavioral decision research has demonstrated that, on average, choices are not reference point independent, as rational choice theory assumes. For most people, perceived losses weigh more heavily than equivalent gains. A consequence of this is known as the "status quo bias": people prefer the status quo state of the world to change, all other things equal. A more specific version of the status quo bias is the "endowment effect": many people seem to value a tangible item or a legal right if they possess it than if they do not, especially when the item does not have a close market substitute.

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105. Change doesn't always create negative emotions, of course; some change is positive and very much welcomed. But much depends on who's initiating the change. Change foisted upon someone is often stressful; change initiated by the person who wants to change might not be.

106. For example, partners who have worked at law firms at which compensation was lockstep would likely feel a sense of loss if that lockstep arrangement was changed to a compensation rubric that depended in part on someone's individual performance. *See, e.g.*, ELLEN JOAN POLLOCK, *TURKS AND BRAHMINS: UPHEAVAL AT MILBANK, TWEED* 201 (1990) (describing the perceived effect of moving away from lockstep compensation).

Here's another recent example: Faculty members at Penn State protested the university's decision to dock them \$100 a month if they didn't provide the university's chosen health insurance provider with certain information about themselves. Although the university could have used a knowledge of perceived gains versus perceived losses to encourage faculty members to provide this information, it decided to be more straightforward:

Penn State . . . did consider alternate ways of introducing a cost-containment strategy—like artificially inflating employees' premiums by 35 percent and then offering a discount to those willing to participate in the wellness program. But administrators felt that the \$100 surcharge was more transparent. "It was an intentional design to drive participation . . . and it is driving participation."

Natasha Singer, *On Campus, a Faculty Uprising Over Personal Data*, N.Y. TIMES, Sept. 15, 2013, available at [http://www.nytimes.com/2013/09/15/business/on-campus-a-faculty-uprising-over-personal-data.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/09/15/business/on-campus-a-faculty-uprising-over-personal-data.html?pagewanted=all&_r=0). In a way, I applaud Penn State's desire to be transparent; on the other hand, the faculty's reaction to Penn State's transparency gave me that "so how's *that* working out for you?" feeling, especially because UNLV took the other tack with us. We had the opportunity to cut our monthly premiums by providing certain information to the insurance company. Apparently, that "perceived losses vs. perceived benefits" theory works pretty well—well enough, in fact, that Penn State reversed its decision and eliminated the penalty soon after the issue made the national news. *See id.* (stating that Penn State University abolished its faculty health plan penalties after much negative publicity).



Assume now that an individual would prefer A to B if she possessed neither. Given current background entitlements, however, she has an ownership interest in B, but not in A. She is given the opportunity to exchange B for A but, as a consequence of loss aversion, she rejects the offer. Is this choice welfare maximizing, or not? The answer depends on whether we believe that heuristic-influenced preferences are more reflective of "true" utility than heuristic-influenced judgments are reflective of true facts or probabilities.<sup>107</sup>

Consider the feeling of perceived loss that Yahoo employees must have felt when Marissa Mayer banned flextime.<sup>108</sup> For those who may not be old enough to remember, "office work" usually entailed being physically present in an office—and dressing up for work—for at least forty hours a week, each week, except for sick days, holidays, and vacation days. Office work did not mean "telecommuting," or "working while drinking coffee in a coffee shop that has WiFi," or "working four ten-hour shifts and getting one weekday off a week." It meant working 8-5, or 9-6, daily, with actual face time. Flextime was designed to meet the needs of those employees whom a company wanted to retain and whose jobs really didn't require them to be physically present in the office for forty solid hours a week. If Yahoo employees had never had the option of flextime, then losing it

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107. Russell Korobkin, *What Comes After Victory For Behavioral Law and Economics?*, SSRN, 10–11 (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1787070](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1787070) (footnotes omitted); see also ORI BRAFMAN & ROM BRAFMAN, *SWAY: THE IRRESISTIBLE PULL OF IRRATIONAL BEHAVIOR* 19 (2008) ("For no apparent logical reason, we overreact to perceived losses."); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 57 (2009) ("Roughly speaking, losing something makes you twice as miserable as gaining the same thing makes you happy . . . . What this means is that people do not assign specific values to objects. When they have to give something up, they are hurt more than they are pleased if they acquire the very same thing."); Nathan Novemsky & Daniel Kahneman, *The Boundaries of Loss Aversion*, *XLII J. MARKETING RESEARCH* 119 (May 2005) (proposing psychological principles to describe the limits of loss aversion). To make things more complicated, from a "rational actor" perspective, every human isn't the "same" sort of "rational": "As a by-product of challenging the traditional, heroic assumptions of law and economics about the extent of human cognitive ability, research in behavioral decisionmaking also implicitly undermines the assumption of identical cognitive ability across individuals. This consequence of the behavioral revolution is sometimes overlooked by legal scholars, who often assume deviations from behavior predicted by rational choice theory will be similar across individuals." Russell Korobkin, *What Comes After Victory For Behavioral Law and Economics?*, SSRN, 14 (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1787070](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1787070) (footnotes omitted).

108. See, e.g., Jenna Goudreau, *Back to the Stone Age? New Yahoo CEO Marissa Mayer Bans Working From Home*, *FORBES* (Feb. 25, 2013), available at <http://www.forbes.com/sites/jennagoudreau/2013/02/25/back-to-the-stone-age-new-yahoo-ceo-marissa-mayer-bans-working-from-home/> (debating the effect of Mayer's decision to resolve flextime privileges).

wouldn't have been an issue. But they did have it, and they lost it, and many of them were mighty unhappy about that loss. Giving employees flextime where they hadn't had it before is a "perceived gain"; taking it away after it's been a company policy is a "perceived loss." Guess which one engendered stronger emotions?<sup>109</sup>

Let's assume, then, that we're members of the management team of a hypothetical law firm that is utterly committed to using default rules and incentives to become a better place, both in terms of ethics and in terms of profitability. We know that we're going to have to change how some of our people behave—and what we're going to let them do—if we want to improve our firm. We know, too, that just changing policies on paper will be useless. In pop-culture-speak, we're going to have to "talk the talk and walk the walk." Let's also make a mental note that, when we start trying to change some behavior within the firm, we're going to have to take into account the extra resistance that we'll face in creating perceived losses.<sup>110</sup>

### C. *Default Rules and Incentives*

*It's not just that defaults matter; it's that they matter far more than most of us expect them to matter.*<sup>111</sup>

One of the first things that the hypothetical management team will have to identify is just what behavior it wants to change. Maybe it wants to encourage billers to submit their time contemporaneously, or nearly so, with the work that they do, so that the entries for billable time are more accurate. Maybe it wants billers to do a better job of describing what they've done in their time entries. Maybe it wants partners to staff matters more efficiently. Maybe it wants to encourage partners in different practice areas or across all of the firm's offices to cross-sell in order to keep more client matters within the firm, rather than losing out to other law

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109. The same principle applied to those law firms that tried "business casual Fridays" or allowed "business casual" clothing every day. Most law firms used to be fairly stuffy places with written or unwritten dress codes. Having the opportunity to dress down, even if "dressing down" meant wearing khakis and a polo shirt, was a perceived gain. Going back to more formal clothing was a perceived loss.

110. To the extent that we might be able to characterize the change (ethically) as a perceived gain, that change might be easier for people to accept.

111. MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 167 (2011).

firms. Maybe it wants to encourage senior lawyers to spend more time mentoring junior lawyers.<sup>112</sup>

The management team could try exhortation. It could host lunches at which it describes, in rosy terms, all of the behavior that it wants to encourage. It could even try putting brightly colored posters in the kitchens.<sup>113</sup> But creating or changing some default rules and tweaking some incentives might yield better results. Just as Bank of America has gotten people used to putting their ATM cards back in their wallets<sup>114</sup> before entering their passwords and to moving fractions of a dollar to their savings accounts each time that they use their debit cards, law firms could think creatively about ways in which minor changes in "how things are done" could reap some benefits.

Let's consider an example of how a non-law-firm environment uses minor changes to encourage different behavior. We know that grocery stores place certain goods in certain places in order to encourage consumption. As David Brooks pointed out in his piece on *The Nudge Debate*:

It's hard to feel that a cafeteria is insulting my liberty if it puts the healthy fruit in a prominent place and the unhealthy junk food in some faraway corner. It's hard to feel manipulated if I sign up for a program in which I can make commitments today that automatically increase my charitable giving next year. The concrete benefits of these programs, which are empirically verifiable, should trump abstract theoretical objections.<sup>115</sup>

I suppose that, if Brooks was used to having unhealthy food placed at eye level in the cafeteria and had to hunt for it in a more inconvenient location, he might feel a perceived loss when the healthy food was moved to eye level. The relocation of healthy food, then, would have to provide twice as much of a perceived gain in order to cancel out the perceived loss of having to hunt harder for the unhealthy food.<sup>116</sup>

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112. While, of course, still billing enough time to help the firm's bottom line.

113. Walter Effross came up with an even better idea: "[O]r, since stores that want to prevent shoplifting have had success putting in life-sized cardboard models of police officers, maybe use mockups of managing partners." Email and attachment from Walter Effross to author (Sept. 20, 2013) (on file with author).

114. Or between their teeth.

115. David Brooks, *The Nudge Debate*, N.Y. TIMES, Aug. 8, 2013, [http://www.nytimes.com/2013/08/09/opinion/brooks-the-nudge-debate.html?\\_r=0](http://www.nytimes.com/2013/08/09/opinion/brooks-the-nudge-debate.html?_r=0).

116. *But see* David A. Friedman, *Micropaternalism*, Draft, available at <http://ssrn.com/abstract=2236446> (examining the concept of micropaternalism and what must be done in order to overcome perceived losses); Michelle Castillo, *Million Big Gulp March to Protest Proposed NYC Soda*

Let's go back to the law firm environment. Some firms clearly have tried various types of incentives and default rules. At least one firm has created a contest (*e.g.*, "Mentor of the Year") to encourage senior lawyers to mentor junior ones. The names of the top three mentors each year are circulated to the whole firm, and I've heard that the mentors who place second and third are often motivated to go around to the junior lawyers and ask, "what more could I do to place first?"<sup>117</sup> And the law firm of Gray Plant Mooty has its Mooty Award, which recognizes (across all job titles, including receptionists) business development, marketing, and client service activities.<sup>118</sup> Law firms really are trying to come up with ways to encourage different behavior, with varying amounts of success.

If we want to, as the hypothetical management team, make it more difficult for lawyers to do things that we don't like (such as turning in their timesheets late) or make it easier for lawyers to do what we want (such as

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*Ban*, CBS NEWS (July 9, 2012, 4:40 PM) [http://www.cbsnews.com/8301-201\\_162-57468681/million-big-gulp-march-to-protest-proposed-nyc-soda-ban/](http://www.cbsnews.com/8301-201_162-57468681/million-big-gulp-march-to-protest-proposed-nyc-soda-ban/) (defining the situation as a protest against the government "dictating how people should live"); Verena Dobnik, *New York Soda Ban: Rally Held Against Bloomberg's Proposal*, HUFFINGTON POST (July 9, 2012, 10:15 PM) [http://www.huffingtonpost.com/2012/07/10/new-york-soda-ban-rally-bloomberg\\_n\\_1661423.html](http://www.huffingtonpost.com/2012/07/10/new-york-soda-ban-rally-bloomberg_n_1661423.html) ("[A] small, peaceful protest rally against a ban on big sodas on a sidewalk near City Hall Park – dubbed The Million Big Gulp March."); Chris Dolmetsch & Henry Goldman, *New York Soda Size Limit Statute Barred by State Judge*, BLOOMBERG.COM (Mar. 11, 2013, 3:30 PM) <http://www.bloomberg.com/news/2013-03-11/new-york-city-soda-size-limitations-barred-by-state-court-judge.html> (discussing a New York state judge's attempt to block Mayor Michael Bloomberg's ordinance "limit[ing] the size of sugary soft drinks sold in restaurants, movie theaters, stadiums and arenas to no more than 16 ounces (473 milliliters) a cup").

117. Conversation with Marty Brimmage and Lacy Lawrence at Texas Bench-Bar Conference (June 2013). Of course, depending on the proportionality of such an award to some of the other behaviors being rewarded at a firm, a mentoring award could backfire, much in the same way that teaching awards at universities sometimes backfire by causing the non-winners to think that the winner is not "serious" about scholarship.

118. See *Value: How You Define It, Year in Review 2012*, GRAY PLANT MOOTY [http://www.gpmlaw.com/\\_includes/2012-GPM-YearInReview.pdf](http://www.gpmlaw.com/_includes/2012-GPM-YearInReview.pdf) 26 (last visited Jan. 24, 2014)

John Mooty once said, 'Nothing is more important to the longevity of the firm than business development. It is the responsibility of everyone.' The aptly named Mooty Awards were established in 2005 as a way to publicly recognize Gray Plant Mooty employees who have excelled in the areas of business development, client service, and marketing during the year. Past recipients have ranged from LAAs, paralegals, and associates to principals and administrative staff."

*Id.* That the firm recognizes the importance of every employee to client service is especially significant.

phrasing descriptions in bills in a certain way), we could develop a system of default rules. There are two kinds: opt-in and opt-out. An example of an opt-in rule is Nevada's system for noting a person's organ donor status on a Nevada driver's license: check a box, and your license includes the notice that you want to donate some or all of your organs.<sup>119</sup> You have to do something extra—by checking a box—to opt in.<sup>120</sup> Checking a box isn't onerous, but it is an additional step. If Nevada wanted to make it easier for people to become organ donors, it could create an opt-out system in which everyone with a driver's license is a donor unless he or she checks a box to remove that designation. The more strongly we believe that we want to encourage a particular behavior, the more likely it is that we'd create an opt-out rule to make that "good" behavior dominant.<sup>121</sup> For example, if we want to encourage billers to describe certain activities in detail, then we might want to make it easier to enter detailed descriptions<sup>122</sup> than to enter vague descriptions like "attention to matter."<sup>123</sup> Incentives and default rules could help us "nudge" behavior. But we also have another tool to use: checklists.

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119. *Organ Donation*, ST. OF NEV. DEPT. OF MOTOR VEHICLES <http://www.dmvnv.com/dlorgan.htm> (last visited Jan. 24, 2014).

120. *Id.* The decision to become an organ donor might be difficult, but the act of checking a box certainly isn't. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 178–82 (2009) (quoting ORGAN DONATION: OPPORTUNITIES FOR ACTION 217 (James F. Childress & Catharyn T. Liverman eds., 2006)) (discussing the concept of opt-in organ donation); see also MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 17, 167 (2011) (detailing the stark difference between opt-in and opt-out organ donation policies); NUDGE BLOG, *Richard Thaler on Organ Donation* (Sept. 27, 2009) <http://nudges.org/2009/09/27/richard-thaler-on-organ-donation/> ("Here is how it works: When you go to renew your driver's license and update your photograph, you are required to answer this question: 'Do you wish to be an organ donor?'").

121. See, e.g., JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 88–97 (2012) (describing the varying psychological influences that affect people's choices and behaviors).

122. Even after all these years, I still use the abbreviations that my firm taught me for recording meetings ("MW") and calls ("TW").

123. Creating certain ways of recording our tasks just requires us to be creative. We could, for example, come up with some program that refuses to let us input vague language. I'll discuss billing and computer programs in more detail below. And as I'll say again below, no fair stealing my ideas here. If there's going to be an app that prevents attorneys from entering descriptions that are too vague, I want a piece of the action.

D. *Norming Behavior Through Checklists*<sup>124</sup>

*An investigation [into the crash of a Boeing 299 prototype plane] revealed that nothing mechanical had gone wrong. The crash had been due to “pilot error,” the report said . . . .*

*Still, the army purchased a few aircraft from Boeing as test planes, and some insiders remained convinced that the aircraft was flyable. So a group of test pilots got together and considered what to do.*

*What they decided not to do was almost as interesting as what they actually did. They did not require Model 299 pilots to undergo longer training . . . . Instead, they came up with an ingeniously simple approach: they created a pilot’s checklist. . . .*

*. . . You wouldn’t think it would make that much difference. But with the checklist in hand, the pilots went on to fly the Model 299 a total of 1.8 million miles without one accident. The army ultimately ordered almost thirteen thousand of the aircraft, which it dubbed the B-17.<sup>125</sup>*

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124. Thinking about checklists got me thinking about “fast” and “slow” types of thinking. Daniel Kahneman and others use the shorthand of “System 1” and “System 2” thinking to describe the “fast” and “slow” thinking in which humans engage:

Behavioral decision theorists, including Daniel Kahneman in his Nobel laureate address, have suggested that human beings have two mental strategies for responding to the problems of the world, the first being intuition and the second reasoning. These divergent approaches are sometimes referred to as “System 1” and “System 2.” System 1 is “fast and frugal.” It is automatic, reliant on simplifying heuristics, and relatively undemanding of cognitive effort and capacity. It allows us to navigate our way through the morass of judgments and decisions that life calls upon us to make constantly. Without it, few of us could make it through the day. But while it is clearly adaptive overall, its speed and information frugality can cause errors in individual circumstances. System 2 is more deliberate, is analytical in nature, and is able to take into account more information. It resembles, in quality if not always in degree, the type of non-selective, fully compensatory analysis assumed to be universal by rational choice theorists. Rather than taking shortcuts to ensure speed, the System 2 reasoning process takes into account all information relevant to a particular decision. When used selectively, System 2 reasoning can improve the overall quality of judgments and decisions, but its cumbersome nature makes it an impractical basis for decision making except on relatively rare occasions.

Russell Korobkin, *What Comes After Victory For Behavioral Law and Economics?*, SSRN, 15–16 (2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1787070](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1787070) (footnotes omitted); *see also* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21, 26 (2011) (“One of the tasks of System 2 is to overcome the impulses of System 1. In other words, System 2 is in charge of self-control.”).

125. ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT 33–34 (2009). One wonderful example of the use (and importance) of checklists is Felix Baumgartner’s checklist for his 128,000-foot jump to Earth. *See [Official] Felix Baumgartner Freefall From the Edge of Space with New World Record*, YOUTUBE (Oct. 15, 2012), <http://www.youtube.com/watch?v=VKojXTWJIhg> (showing Felix Baumgartner’s world record 128,000-foot freefall from

Let’s say that one of our frustrations on the management team is that some of the lawyers in our firm are not particularly imaginative at clearing conflicts. They list the obvious potentially adverse parties, but they occasionally miss whole swaths of groups that they need to consider in certain types of conflicts checks. If our management team could reach an agreement on the categories that we’ll always want our lawyers to check in certain types of cases, we could create (and mandate the use of) checklists to make sure that everyone is on the same page.<sup>126</sup> Chances are good that some lawyers would resent the very idea of a checklist,<sup>127</sup> but most probably would be willing to use checklists in order to avoid the ramifications of a bad conflicts check.

Not everything in a lawyer’s day lends itself to a checklist, but some things do.<sup>128</sup> Conflict checks are one example;<sup>129</sup> making sure that a

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space).

126. In a discussion with me, Dave McGowan came up with the very sensible suggestion of adding a splash screen to a firm’s conflicts-checking process, either showing recent cases in which a failure to check conflicts cost a law firm a lot of money or showing a reminder about how often the firm had had to withdraw in the middle of a matter because of a missed conflict (e.g., “Last year, we spent \$x dealing with conflicts.”).

127. See ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* 173 (2009) (discussing how a professional’s pride can interfere with his willingness to use checklists).

We don’t like checklists. They can be painstaking. They’re not much fun. But I don’t think the issue here is mere laziness. There’s something deeper, more visceral going on when people walk away not only from saving lives but from making money. It somehow feels beneath us to use a checklist, an embarrassment. It runs counter to deeply held beliefs about how the truly great among us—those we aspire to be—handle situations of high stakes and complexity. The truly great are daring. They improvise. They do not have protocols and checklists.

Maybe our idea of heroism needs updating.

*Id.*

128. See *id.* at 48–49 (emphasizing that simple problems can often be fixed with checklists).

Two professors who study the science of complexity—Brenda Zimmerman of York University and Sholom Glouberman of the University of Toronto—have proposed a distinction among three different kinds of problems in the world: the simple, the complicated, and the complex. Simple problems, they note, are ones like baking a cake from a mix. There is a recipe. Sometimes there are a few basic techniques to learn. But once these are mastered, following the recipe brings a high likelihood of success.

Complicated problems are ones like sending a rocket to the moon. They can sometimes be broken down into a series of simple problems. But there is no straightforward recipe. Success frequently requires multiple people, often multiple teams, and specialized expertise. Unanticipated difficulties are frequent. Timing and coordination become serious concerns.

Complex problems are ones like raising a child. Once you learn how to send a rocket to the moon, you can repeat the process with other rockets and perfect it. One rocket is like another rocket. But not so with raising a child, the professors point out. Every child is unique.

complaint alleges everything necessary to support a cause of action is another; and making sure that all cross-references in a transactional document have been proofread before the final version is executed is yet another. Law firms, of course, are already using checklists for some purposes. For example, Skadden<sup>130</sup> uses them to make sure that attorneys who come in as laterals get all of the information that they need to make a complete transition to their new firm.<sup>131</sup> So we might consider using checklists to develop staffing parameters when we're proposing to a client how we might staff a given matter. Of course, every checklist has to be accurate and credible, or no one will use them. Our checklists would have to be both concise and precise,<sup>132</sup> and they would have to be tested repeatedly to make sure that they work.<sup>133</sup>

Now, armed with the knowledge that humans are hard-wired to make certain cognitive errors, that we have a responsibility to ensure that our employees behave ethically, that taking things away from them will bother them more than giving them new things will make them happy, that some behaviors might lend themselves to default rules, incentives, or checklists, and that (unfortunately) the odds of us calibrating our changes correctly are very, very small, let's still give it a whirl. What things would we like to change in our hypothetical law firm, and how might we change them?

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... And this brings up another feature of complex problems: their outcomes remain highly uncertain. Yet we all know that it is possible to raise a child well. It's complex, that's all.

*Id.*

129. For example, a law firm could have separate checklists for different practice areas, so that a conflicts check for bankruptcy matters would review a firm's "connections," which is a term of art in bankruptcy cases. See FED. R. BANKR. P. 2014 (describing what types of disclosures are necessary).

130. SKADDEN, <http://www.skadden.com/> (last visited Jan. 13, 2014).

131. I learned about Skadden's use of checklists in a conversation that I had with Jodie Garfinkel, who runs the firm's training program.

132. See ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* 128 (2009) ("It is common to misconceive how checklists function in complex lines of work. They are not comprehensive how-to guides, whether for building a skyscraper or getting a plane out of trouble. They are quick and simple tools aimed to buttress the skills of expert professionals. And by remaining swift and usable and resolutely modest, they are saving thousands upon thousands upon thousands of lives.").

133. I don't consider checklists to be in the same category as either default rules or incentives, but I do believe that they're useful as a tool to make certain activities more consistent.



## IV. SOME POSSIBLE DEFAULT RULES FOR BIG LAW FIRMS.

Here are some behaviors that come to mind: billing habits; staffing decisions; cross-selling across departments or locations; mentoring junior lawyers and staying involved with summer associates; *pro bono* work or other community involvement; networking; willingness to move from one practice group to another; willingness to raise ethics issues with superiors; and involvement with the many annoying surveys that law firms are asked to fill out. Whew—that’s a lot of things that we might consider changing.

Before we choose some behaviors that we might want to change, let’s start with one overall point. If we want people to change behavior, then we’re going to have to empower everyone (not just the highest-ranking people) to be able to point out that the rules governing a particular behavior have changed (or should change). The overall structure of the firm must be one in which a first-year associate (or paralegal or not-so-powerful mid-level or senior lawyer) must be able to raise an ethics issue without fear of being marginalized or fired. It’s not enough to say that everyone has a responsibility to make sure that the ethics rules are followed. We have to make the law firm a safe place to point out when someone has difficulty following the rules.<sup>134</sup> Ron Rotunda certainly made this point when he said:

Granted, the ethics rules tell us that there is no defense to following bad orders. But the existence of that principle does not make it easy for the associate to challenge the partner or for the partner to challenge his major client and tell him that either he will turn over the document or the client can walk out the door. However, a law firm will make it easier for the associate or the partner to do the right thing if it creates a structure that overcomes these disincentives to be ethical. The firm should create incentive to encourage the younger lawyers to ask questions without feeling that they are being insubordinate.<sup>135</sup>

It helps a great deal when the actual structure of the law firm encourages people to raise ethics questions—say, with an inside lawyer or a committee

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134. The wonderful Nettie Mann pointed out to me that, in the military, not following the rules—and especially not following orders—can lead to a dishonorable discharge, depending on the severity of the insubordination. See 10 U.S.C. § 892 (2012) (explaining that a failure of a Service Member to follow an order or regulation is an offense punishable by court-martial).

135. 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, 702–03 (2011) (footnote omitted).

charged with being the “ethics guru.”<sup>136</sup> Even when there’s not an internal point-person or committee, though, the single largest predictor of whether people will come forward to raise ethics questions will be how the firm has treated those who raised such questions previously.<sup>137</sup> The lore of the firm might be that those who raised ethics questions were relegated to the legal equivalent of Siberia. Alternatively, the lore could be that (even if the law firm ultimately disagreed that there was an ethics problem) the person raising the question ended up feeling as though he or she had done the right thing by bringing it to the firm’s attention.<sup>138</sup> A firm

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136. See Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 346 (2003) (proposing that law firms have a mandatory internal specialist to oversee firm compliance with ethics rules). On the other hand, having an ethics “point-person” runs the risk of triggering a diffusion of responsibility about monitoring ethics issues.

137. Absent some ethics safety-value or guru, people might behave in ways that harken back to the famous Milgram experiments on electric shocks and word pairs. See Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOCIAL PSYCHOL. 371 (1963), reprinted with permission in NANCY B. RAPOPORT, JEFFREY D. VAN NIEL & BALA G. DHARAN, ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER 381 (2d ed. 2009) (providing the methodology and results of a behavioral experiment involving fake electric shocks given by participants to actors who pretended to give incorrect answers to word-pairing questions).

138. One risk is that the person who brings a potential ethics problem to the firm’s attention might be a chronic complainer or someone who is habitually wrong about ethics issues; there’s a risk that encouraging the raising of ethics questions will create too many false positives. Naturally, there has to be some balance between encouraging good-faith behavior and discouraging whining or malicious behavior. Chronic complainers often get tuned out, but in fact having someone who constantly delivers bad news or throws up roadblocks isn’t horrible. Often, our own biases prevent us from seeing pitfalls in our thought processes, so having someone who routinely slows down some of our decisions is a good thing. See, e.g., ORI BRAFMAN & ROM BRAFMAN, *SWAY: THE IRRESISTIBLE PULL OF IRRATIONAL BEHAVIOR* 159–60 (2008) (discussing the use of “blockers”). In general, encouraging full reporting, even if reporting generates false positives, will be good for an organization. See Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1176–80 (2013) (citing 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, 704 (2011)) (explaining how, within a firm, a disinterested attorney might be able to analyze another attorney’s ethical dilemma more objectively). Having an organization “walk the walk” is crucial.

Consider the positive messages sent in the following environment:

One CEO of a financial services firm was very serious about identifying and rewarding people who lived his organization’s values. He challenged his executives to bring him stories of employees who were doing the right things in the right way, who were models of the culture. He collected these stories and sent personal, handwritten thank-you notes to those model employees. While a phone call might have sufficed, employees were so thrilled with his

should also provide regular ethics feedback to its employees, on the order of “in the last quarter, these ethics issues were raised, and here’s how we resolved them.”<sup>139</sup> By reporting on tough ethics issues regularly, the firm can create a repository of how it has addressed them, and it can demonstrate the social norms—the *ethics* norms—that it wants its professionals to follow.<sup>140</sup>

Let’s assume, then, that our hypothetical law firm has made it clear that it wants to encourage ethical behavior and the raising of potentially tricky ethics issues. The first thing that we might want to change involves billable time.

#### A. *Changing Billing Behavior.*

I’m not a huge fan of the billable hour.<sup>141</sup> Using billable hours as the metric to represent “value to the client” creates bad incentives to stretch out work (and penalizes the more efficient workers). On the other hand, fixed rates and alternative billing methods aren’t panaceas, either.<sup>142</sup> But

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written recognition and praise that they displayed his notes in their offices. Those framed notes sent a rather loud message to other employees about what kind of behavior was valued at high levels. Of course, they also helped spread word of the ‘heroes’ and their deeds.

Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1176 (2013) (quoting LINDA K. TREVIÑO & KATHERINE A. NELSON, MANAGING BUSINESS ETHICS: STRAIGHT TALK ABOUT HOW TO DO IT RIGHT (2007)). Nettie Mann has pointed out to me that the TV show *Undercover Boss* is premised on the idea that high-level executives might not realize what’s going on in their own businesses. See *About*, UNDERCOVER BOSS, CBS, [http://www.cbs.com/shows/undercover\\_boss/about/](http://www.cbs.com/shows/undercover_boss/about/) (last visited Jan. 13, 2014) (“UNDERCOVER BOSS is an Emmy Award-winning reality series that follows high-level corporate executives as they slip anonymously into the rank-and-file of their own companies. Each week, a different executive will leave the comfort of [his] corner office for an undercover mission to examine the inner workings of [his] corporation.”).

139. See Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1179 (2013) (promoting the use of feedback as a tool that, when used appropriately, encourages attorneys to report ethical concerns with greater confidence that the firm actually values their reporting).

140. Although that repository might be discoverable (a discussion outside of the scope of this article), it’s still likely worthwhile.

141. See, e.g., Nancy Rapoport, *Nancy Rapoport’s Blogspot: Death of the Billable Hour*, BLOGSPOT.COM (June 24, 2013), <http://nancyrapoport.blogspot.com/search/label/Death%20of%20the%20billable%20hour> (blogging on the ethical dilemmas and concerns involved in billable hours).

142. Flat fees might encourage lawyers to do less, not because doing less work is more efficient, but because doing less work is more profitable. And creating a success fee as part of a lawyer’s services begs the question of how the lawyer and the client should define “success” for a particular matter. There’s no perfect way of measuring the value of a lawyer’s service to the client.

the billable hour is particularly susceptible to creating perverse incentives. Firms that measure partner draws or associate bonuses by the number of billable hours above a certain baseline are likely to get some pretty tired people working for them. Not everyone will be motivated by higher draws or by bonuses, but a lot of people will be.<sup>143</sup>

Among the problems with billable hours is the issue of contemporaneous time entry. It's easier to be accurate in recording the amount of time that a professional spends on a matter when the professional notes the time of day at which he started working on a task, the time at which he stopped, and what exactly he did. On very busy days, when he's working a little bit on a lot of different matters, keeping track of how long he spends on each task is difficult—not impossible, just difficult. I'm going to assume that our hypothetical law firm doesn't want any of its

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143. Here's what really high billable hours mean:

A billable hour is time spent working on a legal matter for the benefit of the client. The lawyer who seriously claimed to bill clients for 6022 hours in one year must bill, on average, over 16.5 hours each and every day of 356 days a year. There are only 8760 hours in an entire year. That lawyer is claiming to work more than sixteen hours every weekday and also *every* Sunday and *every* Saturday. He must be in the office working on client matters on Christmas Day, July 4th, December 31st, and January 1st. If he takes even one day off, he has to bill over sixteen hours on some other days, but on each of those other days he was already working over sixteen hours. On average, he has to spend less than eight hours a day to sleep—apparently sleep was not necessary for this lawyer who claimed to have worked all night for fifty-two days (and nights) in a row. Out of the 7.5 hours left in each day, he must not only sleep but also eat, commute to work, read a newspaper, shower and shave, dress himself, take a shower, pay his bills, etc. If he were a prisoner of war instead of a highly paid law partner, the Geneva Convention would forbid him from going fifty-two days without sleep.

When a lawyer claims to work that many hours, one would think that his partners know that something is amiss. However, perhaps his colleagues did not mind the increased income that the law firm earned. The lawyers who overbill may be moving up in the firm pecking order at an above-average rate. The more senior lawyers may close their eyes to what they do not want to see. Other lawyers, particularly the junior associates, may conclude that they should exaggerate their hours if they also wish to climb up the partnership ladder. They may well rationalize what they are doing: “everyone does it;” “I shouldn't reduce my billable hours for the thirty-minute chat with a friend, because I was still thinking about the client;” “I only read this newspaper briefly, and I really did that to see if there is anything that might inspire me about the client, so I'll charge him for my newspaper break.”

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, 718–19 (2011) (footnotes omitted).

professionals to cheat on their billable hours,<sup>144</sup> so it's going to want to encourage them to record their time as contemporaneously as humanly possible. One way to encourage accurate and prompt recording is by doing spot checks on someone's work (audits)—and audits might not be a bad idea, although they run the risk of insulting those who work at the firm.<sup>145</sup> An audit would catch the situation in which several people who attended a meeting on a given day recorded different times: for example, Mr. A recorded .9, Mrs. B recorded .4, and Ms. C recorded 1.3. That audit might give the firm notice that something—not necessarily cheating, but something—was amiss (although it's possible that the three professionals came and went at different times). But an audit will only catch certain things, and it will only catch those things after the fact. What we'll want to do is develop either an incentive or a default rule that encourages the contemporaneous recording of time.

My guess is that an opt-out default rule might help—and not just a rule, but something even more concrete: software that forces a person to go through some hoops before he or she can say, "I don't have a billing number that I can use."<sup>146</sup> Just as there are some websites that make you

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144. *But see* Lisa G. Lerman, *Scenes from a Law Firm*, 50 RUTGERS L. REV. 2153, 2158 (1998) (providing an account of how a lawyer might defraud clients by creating work and then billing the clients threefold for the contrived services).

The first lawyer gave me this tip: "You have . . . fifty or sixty files. . . . You need to find a reason to make a telephone call to somebody involved in each file." He said something like: "You think about it, you've got the client, you've got experts, [and] you've got opposing counsel. Think of all the people you can call. Find a reason to call somebody. Make the call. You bill for the call. When you hang up the phone you immediately do a confirmatory letter. Then you bill for the letter. And if the adjuster will let you, you do a memo to the adjuster . . . on what transpired during the call. Then bill for the memo. So you bill three times per call." And he said, "A month shouldn't go by without this happening at least once to every case." In other words, create a reason, and then create a bunch of work to go with it, and it looks like you are just being on top of the situation.

*Id.*

145. 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, 720 (2011) (suggesting that firms should use internal audits as a procedural safeguard against dishonest billing).

146. After all, there are all sorts of products that can jog your memory. A Jawbone Up can let someone set a reminder to stand up and move away from his desk every hour. SwipeSense reminds health care workers to wash their hands. *See* Tom Corrigan, *SwipeSense: Forget to Wash?*, WALL ST. J. (Oct. 7, 2013, 1:57 PM), *available at* [http://online.wsj.com/news/articles/SB10001424052702303643304579109790293734458.html](http://online.wsj.com/news/articles/SB10001424052702303643304579109790293734458?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424052702303643304579109790293734458.html) (tracing the origins of the startup company SwipeSense and its system of hand-sanitizer dispensers

enter your email address and password before you can access them, there could be a computer program that forced you to enter a billing number (including a “matter pending” number for matters that haven’t been assigned billing numbers yet, or for things like conflicts checks) and a description of your work each time that you opened a new document on your computer. Whenever you switched to a different document, or to a website (for, example, a legal research site), the computer program would ask you whether you were continuing with the same matter (and would prompt you for a fresh description of what you’re doing) or whether you were starting something new.<sup>147</sup> Of course, such a program would be annoying as heck, and I’m sure that someone would eventually hack a work-around for it, in much the same way that people hack their need for a matter code when using photocopiers.<sup>148</sup> But it might get folks into the habit of recording their time more contemporaneously.

Such a program might also prevent people from entering meaningless descriptions (“attention to file” has never told a single client what the biller actually did) by preventing anyone from using that description.<sup>149</sup> Instead, it might encourage other types of descriptions, such as requiring the biller to describe the kind of research that he or she was doing whenever the description started out with the word “research,” or just what he or she was reviewing or revising if the description started out with the word “review” or “revise.” There could be a sort of auto-complete function<sup>150</sup> like the ones that search engines use, where a biller can enter part of a description and the auto-complete could suggest several different ways of finishing that description.<sup>151</sup> In an ideal world, the very same

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that track and record the who, where, when, and frequency of hand-washing).

147. No fair stealing this idea. Billie Ellis and I have claimed it, and we really do want to create such a program (assuming that no legal billing software does that already). If you want to consider partnering with us, though, give one of us a call.

148. Hat tip to Walter Effross for reminding me about the work-arounds for inputting client matter numbers into the copier before making copies.

149. It’s possible that “attention to file” is an artifact that came from moving from one-line bills (“For services rendered, \$x”) to justifying a bill by describing timed tasks.

150. But without the embarrassing issues created by auto-correct. See *generally* DAMN YOU AUTOCORRECT, [www.damnyouautocorrect.com](http://www.damnyouautocorrect.com) (last visited Jan. 27, 2014) (compiling examples of the multitude of ways in which the use of auto-correct can lead to embarrassing results).

151. For example, the biller could enter “revise,” and the system could pull up the various matters on which that biller had already worked, so that the biller could select the document that she was revising (such as “revise summary judgment motion” or “revise schedules”).

computer program could help the biller redact sensitive information if such redaction were prudent—for example, if the firm wanted to include its bills in a motion to approve its fees but didn't want to reveal some upcoming strategy.<sup>152</sup> Better yet, if a biller was working on something that had particular rules about how to bill—such as particular billing codes that a client wanted the firm to use—perhaps that program could default to those rules on a given matter. Let's say that you represented a creditors' committee in a large Chapter 11 case, and you wanted some of your non-bankruptcy-group lawyers to work on a particular project. They might not know that it was important to bill in tenths of an hour and to avoid block-billing, but you might be able to include those parameters on the matter number so that when they entered a description that had several different tasks, the program would automatically ask them to use tenths of a hour to indicate how much time they'd spent on each task. The idea here is that telling people to do (or not do) something isn't nearly as good as creating a default rule that requires them to opt out if they want to do something different.<sup>153</sup>

What about that longstanding problem of people who might be recording their time contemporaneously but who can't seem to manage to submit their recorded time on a regular basis? That problem might be solved with a checklist that would prompt administrative assistants<sup>154</sup> to confirm, perhaps when they logged on to the system each morning, that their billers' timesheets had been turned in the day before.<sup>155</sup> Another way to go would be to use a negative incentive, such as docking a person's pay for a day, which would tap into the difference between a perceived loss and a perceived gain. My point is that some things relating to bills can be systematized to make it more difficult to record time several hours, days, weeks, or months after the fact and to make it more difficult to block-bill. We might not currently have the technology to make computer billing

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152. I mean it: Billie and I have dibs on this idea. *See supra* note 147 and accompanying text.

153. Walter Effross has pointed out to me that the move to electronic patient medical records might be a good example of an opt-out rule.

154. Although with the burgeoning ratio of billers to administrative assistants, maybe that suggestion isn't realistic.

155. If one of your billers lies and says that his timesheets were turned in when, in fact, they weren't, your firm has bigger problems to solve.

My colleague Jean Sternlight has suggested to me that another option is to have timesheets get submitted automatically after a biller has recorded time—maybe, say, at the end of the day (which could be midnight for many lawyers). Notes on earlier draft from Jean Sternlight to author (Sept. 20, 2013) (on file with author).

systems with these types of opt-out rules, but we certainly could develop them.

The larger issue of weaning law firms away from measuring an attorney's value to the client by counting billable hours, though, doesn't lend itself to simple default rules; however, it might lend itself to some incentives. Fixed fees, especially those that have certain markers—"if we save you \$x, we get a bonus kicker of \$y"—are an attempt to realign two concepts: what the law firm does for the client and the value of that work to the client.<sup>156</sup> Such fees provide an incentive to economize, because throwing more billable hours at a problem cuts away at the expected profit. But figuring out the correct fixed fee to charge is tricky, as is any sort of outcome-based fee.<sup>157</sup> Rational people will tend to produce the behavior that leads to rewards, so metrics that are based on, say, quick settlements<sup>158</sup> might cause an attorney to jump at the chance to settle a case even though going to trial might be a better move for the client.<sup>159</sup> The metrics also have to be realistic: defining "success" as "avoiding nuclear holocaust" is too broad a metric to be meaningful. Defining success as "100% return to unsecured creditors, plus interest, in a Chapter 11 case" is much better, although that definition would create its own anchoring errors.<sup>160</sup>

A particular hiccup will occur if some of the firm's work is charged out based on billable hours and some of it is based on fixed fees or some other alternative billing method. Those employees whose performance and compensation are measured primarily on their billable hours will have a hard time shifting gears for the work that they do on fixed-fee projects, because every hour "not billed" is an hour fewer to plug into their compensation formula. The only way to alter a preference for billable

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156. *But see Posts on Death of the Billable Hour*, NANCY RAPOPORT'S BLOGSPOT, <http://nancyrapoport.blogspot.com> (follow "Death of the billable hour" hyperlink under Labels list) (last visited Jan. 27, 2014) (noting that the billable hour was created because the old method of "\$x for services rendered" provided the client with little information to determine the value of the services that the client had received).

157. The posts on December 5, 2012 discuss the fact that hourly billing is a problem that has not yet been solved. *Id.*

158. Or success fees, or any other manner of outcome that can be defined to include virtually any result.

159. There's probably research out there that links fast settlements to contingency fees, but I haven't spent time looking for any.

160. For example, paying attention only to the return to unsecured creditors at the plan confirmation stage might mean that issues relating to long-term feasibility would get shorter shrift.



hours, then, is to change the method for calculating compensation. Moreover, when partner compensation is calculated in part on origination (who brings the business into the firm), in part on billable hours (or realization rate), and in part on alternative billing methods, then you have multiple incentives working against each other.

One possible alternative, as long as the firm is using billable hours for any part of its evaluation or compensation structures, is to come up with "billable hour equivalents" for work that's billed on fixed fees or based on benchmarks. For example, a firm could take a fixed-fee matter and estimate the various billers' billable hours associated with that fixed fee. If the pricing for the fixed-fee matter was based on Partner Pat working around 250 hours and Associate Aja working around 400 hours, the "guesstimated" hours could go into Pat's and Aja's yearly "hourly" totals.<sup>161</sup> The risk when using billable hour equivalents, though, is that law firm budgets are based on a certain amount of money coming into the firm each year from the work that the firm does. Projects based on billable hours have some wiggle-room built in—if the matter that the firm has undertaken suddenly explodes, then assigning more lawyers to the matter doesn't necessarily chip away at the firm's expected profit on the matter.<sup>162</sup> On a fixed-fee matter, though, those extra hours absolutely do chip away at the firm's expected profit, because the unanticipated extra hours are being deployed without additional compensation. If a firm bases a large part of its budget on fixed-fee projects but consistently guesses wrong on pricing, then it's not going to make its budget for the year. There's no easy solution here.

#### B. *Changing Staffing Decisions*

Nor is there any easy solution to encourage partners to think long and

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161. "Guesstimating" how many billable hours something might take likely is part of how a firm arrives at a fixed fee proposal. In order to calibrate the accuracy of such guesses, the firm might keep track of billable hours for projects even when those projects are being billed on a fixed-fee basis. It's a bit like adding fractions with different denominators: first, you figure out what multipliers will create fractions with the same denominators, and then you add the fractions together. See, e.g., *Fractions*, COOL MATH 4 KIDS, <http://www.coolmath4kids.com/fractions/fractions-12-adding-subtracting-different-denominators-01.html> (last visited Jan. 27, 2014) (simplifying the process of adding and subtracting different denominator fractions).

162. Cf. Nancy B. Rapoport, *Rethinking Professional Fees in Chapter 11 Cases*, 5 J. BUS. & TECH. L. 263, 288 (2010) (acknowledging that fixed fees can't adjust to address an unanticipated amount of work, which might result in a lawyer essentially finishing up a project for free).

hard about how they staff matters.<sup>163</sup> Especially in “bet the company” issues—like a large Chapter 11 case, or big patent litigation, or a tricky initial public offering—there’s a tendency to leave no stone unturned.<sup>164</sup> Part of the reason is that the lawyers working on the matter don’t want to be accused retrospectively of failing to do everything that they could have done to further the client’s cause.<sup>165</sup> Another part of the reason is that many of these big “bet the company” matters are exceptionally fast-paced, so the time that a partner might take to plan out the optimal staffing is compressed.

If we use what we know about perceived losses versus perceived gains—that people give perceived losses roughly twice as much weight as perceived

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163. Staffing decisions have long-term ramifications:

“I’ve discontinued using firms and shifted to other firms when I’ve looked at bills that are clearly just billing and not providing value. Whenever I see a partner billing regularly a couple of hours every bill for things like reviewing correspondence—whenever there are a lot of people touching the file and docketing,” says Cheryl Foy, university secretary and general counsel with the University of Ontario Institute of Technology.

Jennifer Brown, *More In-house Cutting Firms Loose: Study*, CANADIAN LAWYER MAGAZINE (Sept. 16, 2013), available at <http://www.canadianlawyermag.com/4816/more-in-house-cutting-firms-loose-study.html>; see also Jennifer Smith, *Smaller Law Firms Grab Big Slice of Corporate Legal Work*, WALL ST. J. (Oct. 22, 2013), available at <http://online.wsj.com/news/articles/SB10001424052702303672404579149991394180218> (“‘Not everything is a bet-your-company kind of case, and not every case warrants the big guns from New York,’ Mr. Milstein [Ronald S. Milstein, general counsel for Lorillard Inc.] said. ‘Smaller firms—they want you more, they value you more.’”)

164. For a lovely discussion of ethics and psychology, see JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 385–416 (2012).

165. Psychologists might term this tendency to leave no stone unturned “regret aversion.” See, e.g., *id.* at 99–100 (“When making decisions, people anticipate the prospect that they will experience regret following the decision[ and] . . . make decisions that they think will avoid or minimize the amount of regret that they expect to feel.”). Others may just point to the fear of being sued for malpractice for not pursuing every legitimate avenue. Of course, the client who is paying the bill from his own budget will usually weigh in, when it questions the law firm’s bill, about where the law firm should have drawn the line about how much work to do.

Clients who aren’t paying for their own fees have been of particular interest to me. See, e.g., Nancy B. Rapoport, *The Case for Value Billing in Chapter 11*, 7 J. BUS. & TECH. L. 117, 118 (2012) (explaining that the author became an “occasional fee reviewer” in bankruptcy cases); Nancy B. Rapoport, *Rethinking Professional Fees in Chapter 11 Cases*, 5 J. BUS. & TECH. L. 263, 265 (2010) (“In essence, the client sitting at the table is a stand-in for entities with little voice (and little individual stake) in determining how the professional makes his billable decisions.”) (citation omitted).

gains<sup>166</sup>—then maybe we can fashion a way to encourage better staffing decisions. Let’s assume that a client asks a law firm to propose how it might staff a particular matter, and the client agrees to the proposed staffing.<sup>167</sup> Perhaps some component of the bill (not the entire bill, but some significant component) might be tied to maintaining that proposed staffing, absent client consent to a change. There would have to be a safeguard for significant changes in the original presumptions underlying the staffing—for example, that the law firm on the other side was engaging in some sort of obstreperousness that ramped up the work for everyone. But if a law firm expects that a matter might bring in somewhere between \$*x* and \$*y* with a certain amount of staffing, and if adding more lawyers without client consent reduces the expected profit for the law firm, then the perceived loss might cause the partner in charge to think twice (or get client consent) before changing the staffing.<sup>168</sup> Of course, the perceived loss of the ability to staff a matter any way that a partner might deem appropriate will cause serious resistance to default rules on staffing levels.<sup>169</sup>

Default rules on how to staff certain types of matters *might* fix the “too

166. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 57 (2009).

167. In thinking about issues like fees and staffing decisions, the level of trust between an attorney and her client is significant. For clients who use lawyers often, the choice of law firm tends to be more of a choice of a particular lawyer or lawyers (which is why a lawyer’s book of business matters so much). Even though I’m suggesting changes that might help lawyers think more carefully about how they bill their work and how they staff their matters, ultimately, the client has to believe that the lawyer’s fees and staffing decisions make sense for that client’s needs.

168. We could even go as far as creating form engagement letters that set out default staffing for particular types of engagements, so that changing the defaults would have to be an affirmative act. Hat tip to Dustin Benham for suggesting this idea to me. E-mail from Dustin Benham to author (Oct. 10, 2013, 01:31 PM) (on file with author).

169. That’s where compensation measures that include more than “yearly billable hours” can help to clarify the need for a change. By comparing “revenue in” with “costs of generating that revenue,” a very different picture can emerge. As the chair of Duane Morris explained:

Many firms just look at the size of each person’s book of business. They’ll say, “Okay, you have \$4 million worth of business, Julia has \$4 million worth of business, Robert has \$4 million worth of business, you all ought to be compensated the same off your \$4 million worth of business.” But, in reality, your \$4 million worth of business took six people to produce, and you generated time value of \$3.5 million in producing \$4 million. Julia’s \$4 million took \$4.5 million worth of time value and 10 people. Robert’s \$4 million took \$7 million to produce, and it took 20-some people. So the costs and value are entirely different, and that would drive different partner compensation.

Heidi K. Gardner & Annelena Lobb, *Collaborating for Growth: Duane Morris in a Turbulent Legal Sector*, HARVARD BUSINESS SCHOOL CASE STUDY 9-414-022 at 9 (July 26, 2013).

many bodies added” problem, but they won’t fix the “I didn’t think about the right staffing in the first place” problem. Nor will they fix the “we’re not making budget so let’s shift the work to higher billers” problem. We don’t want to create an irrebuttable presumption that certain work always must go to low- (lower-?) level associates, but if we could find a way to encourage a presumption that work should go to the lowest *efficient* biller, then we wouldn’t need to object to very high-level work going to the people charging high rates—provided that they were only doing the work that needed their special expertise. In other words, I want my knee doctor to figure out the best way to treat a bum knee, but I don’t want him putting the cast on me himself—that’s why he has other trained people in his office. I believe that most lawyers who head projects for their clients want to allocate staffing appropriately, but I also believe that various things get in their way: the speed of law practice again comes to mind, as do all of the cognitive biases to which humans succumb.<sup>170</sup> To counteract the effect of the speed of practice and the fact that humans make cognitive errors all the time, maybe what we need is a combination of a checklist (“1. Clear conflicts; 2. Fill out staffing worksheet; 3. Draft engagement letter”) and a worksheet that will help the lead lawyer rough out who at the firm should be handling which tasks. Much like an application for an order authorizing employment in a bankruptcy case,<sup>171</sup> the lead lawyer on a matter could describe for the client which professionals—including paralegals—would be working on that matter. That roadmap, agreed upon by the firm and the client, would turn a gut hunch about appropriate staffing into a more deliberate consideration of staffing.

### C. *Changing Cross-Selling*

It’s usually better for a firm’s bottom line to keep a new matter for an old client in-house than it is to lose that matter to another law firm and then have to scramble to get replacement clients.<sup>172</sup> So what stops

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170. Jennifer Robbennolt and Jean Sternlight have a nice discussion of cognitive biases in JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 7–27 (2012).

171. See 11 U.S.C. § 327 (2012) (providing rules for employment of professional persons).

172. On the other hand, it might be better for an individual lawyer in a firm to cross-sell with a colleague at a different firm, particularly if that lawyer believes that the outside-the-firm lawyer is

partners from trying to refer matters to other partners within their firm? Their compensation.<sup>173</sup> This passage illustrates the issue nicely.

There was frustration with other aspects of the new compensation system, too. Previously, partners were reluctant to ask colleagues to help on their pitches, because credit was a zero-sum game: If a partner landed the business, she would have to award some of the credit to the colleague, leaving less for herself. Under the new rules, the firm allowed the partner to claim up to 100 percent of the credit herself, then dole out up to 100 percent more among any partners who had helped.

This encouraged collaboration at times, according to several former partners. The downside was that many began to view the additional 100 percent worth of credit as a slush fund, ladling it out to friends with little role in their cases or transactions. “It led to sleazy deals,” recalls one former partner. “It took about thirty seconds for people to figure it out.” Says a former finance lawyer of two senior partners in his group: “I saw the billing going around. One was getting credit on stuff the second opened, and the second was getting credit for stuff the first one opened.” There seemed to be no way around it: The more Mayer Brown set out to fix its problems, the more deviously its partners behaved.<sup>174</sup>

I might not have chosen the word “deviously,” but I agree that humans will respond to the incentives that they’re given. Mayer Brown may have tried to fix the original problem—not sharing any of the origination credit—with its creative idea of allocating more than 100% “credit” across partners, but that fix created its own problems.<sup>175</sup>

Maybe there’s another way to approach the issue of cross-selling. If a firm wants to reward cross-selling, then the act of cross-selling has to count for part of a partner’s compensation.<sup>176</sup> In a recent *Harvard Business Review* case study, the Duane Morris law firm explained its way of

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better suited for a particular matter but also if the inside-the-firm lawyer wants to keep her own options open for a subsequent lateral move.

173. The other thing that affects partners’ willingness to cross-sell is their own concerns about career mobility. As Randy Gordon has explained to me, “partners want to keep their portables portable,” so there’s an incentive not to share the wealth, as it were. E-mail from Randy Gordon to author (Sept. 23, 2013, 01:11 PM) (on file with author).

174. Noam Scheiber, *The Last Days of Big Law: You Can’t Imagine the Terror When the Money Dries Up*, NEW REPUBLIC (July 21, 2013), <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries> (footnote omitted).

175. See, e.g., *id.* (describing the process used by the firm).

176. And, if we’re feeling particularly nurturing towards associates, towards an associate’s bonus. After all, we want to train associates in the behavior that they’ll need as partners, right?

measuring a lawyer's value for compensation purposes:

Partners told Harvard business professor Heidi Gardner and her researcher that Duane Morris doesn't pay outsize compensation for being a rainmaker, and doesn't pay based on billable hours alone. The system encourages collaboration rather than fights over origination credit and the hogging of work.

The compensation calculation begins with metrics that show the profitability of each lawyer.

Attorney profitability is calculated by comparing the revenue collected on a lawyer's matters with the costs of that lawyer, measured by the lawyer's salary and overhead, according to the case study. If Attorney X earned \$200,000 and cost \$190,000 in overhead, Attorney X's costs to the firm for the year were \$390,000. If X worked 2,000 hours, the cost per hour worked out to \$195. The findings can then be used to see whether X was more or less profitable than he should be.

Duane Morris chairman John Soroko told Harvard researchers why the numbers were important. "Many firms just look at the size of each person's book of business," he said. They see three lawyers with \$4 million worth of business, and compensate all of them the same for their rainmaking, he said. But those firms aren't looking at the costs and value associated with that business, he said.

The profitability calculation primarily drives pay, but the executive committee looks at other factors, taking into account a self-evaluation memo written by each lawyer. Mentoring, administrative roles, the ability to generate new business, internal referrals, the efficiency of the partner's team, attitude and work habits enter into the calculation. Any partner may see the full array of compensation information, though "remarkably few" ask to see the numbers.

Partner Sharon Caffrey told researchers that the compensation system doesn't overemphasize rainmaking. "There is a balance between rainmaking and work effort," Caffrey said, "so we don't have a lot of rainmakers with huge books of business receiving credit disproportionately, who then have many service partners who do not receive credit for helping the rainmakers achieve success."<sup>177</sup>

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177. Debra Cassens Weiss, *BigLaw Firm Reveals Nuts and Bolts of its Pay System in Harvard Case Study on Collaboration*, ABA J. (Oct. 15, 2013, 5:40 AM), [http://www.abajournal.com/news/article/biglaw\\_firm\\_reveals\\_nuts\\_and\\_bolts\\_of\\_its\\_pay\\_system\\_in\\_harvard\\_case\\_study/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=ABA+Journal+Top+Stories](http://www.abajournal.com/news/article/biglaw_firm_reveals_nuts_and_bolts_of_its_pay_system_in_harvard_case_study/?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories); see also Heidi K. Gardner & Annelena Lobb, *Collaborating for Growth: Duane Morris in a Turbulent Legal Sector*,

That Duane Morris has developed a way to quantify the various ways that a lawyer’s work contributes to the firm’s bottom line demonstrates both that this type of evaluation can be done and that it should be done. If our hypothetical law firm were to follow Duane Morris’s lead, then perhaps our compensation system could also include points for demonstrating specific actions that a lawyer took, not just to get new clients or new matters, but to maintain long-term client relationships across departments.<sup>178</sup> Remember: people will do that for which they’re rewarded. Reward cross-selling, and you’ll get more of it.

D. *Changing Time Spent in, and the Quality of, Mentoring*

The same is true about nurturing associates.<sup>179</sup> Associates are expensive:<sup>180</sup> For the first few years, most of them will get paid more than they’ll actually generate.<sup>181</sup> Moreover, if a law firm loses an associate whom it has trained for two or three years, then it watches hundreds of

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HARVARD BUSINESS SCHOOL CASE STUDY 9-414-022 at 9–10 (July 26, 2013) (examining the compensation system employed by Duane Morris).

178. Or maybe, in a more Hobbesian type of firm, we could use the concept of perceived losses to our advantage and take away points if a partner can’t document the efforts that she’s made to cross-sell within the firm. Of course, it will matter whether what’s being measured represents “inputs” (what a lawyer has done to maintain the relationship with the client) or “outputs” (whether the client has actually stayed with the firm). Just as *U.S. News & World Report’s* educational ranking system tends to focus more on inputs (test scores and GPAs) than on outputs (bar passage and employment rates), which in turn drives the behavior of law schools to game the rankings, how a firm measures certain behavior will also trigger increases in the frequency of that rewarded behavior. Cf. Sam Flanigan & Robert Morse, *Methodology: Best Law Schools Rankings*, U.S. NEWS (Mar. 11, 2013) <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/03/11/methodology-best-law-schools-rankings> (discussing the formula for ranking law schools).

179. Dave McGowan has pointed out to me that there’s a whole new issue brewing: the mentoring of contract and temporary attorneys. Without the umbrella of a long-term career trajectory to drive an associate’s training, how do we develop these new classes of lawyers? That’s a topic for another time.

180. Back when BigLaw had huge summer associate programs, the amount of attention paid to those summer associates—and the expense of those programs—was astounding. To be fair, though, those days of two-hour lunches and box seats at ballgames occurred at firms that also invested heavily in associate training (and didn’t charge out all of the associate training to clients).

181. See James D. Cotterman, *The Changing Face of Associate Compensation*, 37 ALTMAN WEIL REP.TO LEGAL MGMT., no. 9, June 2010, at 1, 2 (comparing the associates’ salaries to the revenue that they bring to the law firm); see also Bos. Bar Ass’n Task Force on Prof’l Challenges and Family Needs, *Facing the Grail: Confronting the Cost of Work-Family Imbalance* at 29 (1999) (“Only after three o[r] four years do associates’ billing rates and legal skills catch up to their salaries, benefits and allocated overhead so that they begin to return the firm’s financial investment in them.”).

thousands of sunk costs walk out the door.<sup>182</sup> It's in law firms' interests to (1) make good initial hiring decisions and (2) establish an environment conducive to retaining those good hires.<sup>183</sup>

I've tried for years to encourage law firms to make better hiring decisions, but far too many of them stick with the twin factors of the law school's ranking and the applicant's class rank.<sup>184</sup> No matter how many times I remind employers that the chances are slim that their new associates will have to take any law school exams for their clients, I can't get employers to look at the other skills that their associates will actually need to have. Sure, grades might do a decent job of sorting people into those who have strong analytical skills and decent writing skills versus those who don't, but there are many additional skills that associates will need if they intend to succeed in law firms.<sup>185</sup> And grades are typically comparative in law schools—grading curves only describe how well someone has done relative to his peers in a given course—rather than being

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182. See, e.g., PAULA A. PATTON, KEEPING THE KEEPERS II: MOBILITY & MANAGEMENT OF ASSOCIATES (2003) (“When a law firm is unable to retain the ‘keepers,’ it may lose more than profits from the bottom line.”).

183. See Heidi K. Gardner & Annelena Lobb, *Collaborating for Growth: Duane Morris in a Turbulent Legal Sector*, HARVARD BUSINESS SCHOOL CASE STUDY 9-414-022 at 3–4 (July 26, 2013) (describing Duane Morris's hiring philosophy).

184. I hear from reliable sources that law firms focus on these two factors for a couple of reasons: first, firms don't want to take the time to select potential employees if law schools can do the selecting for them, and second, the higher the associate's pedigree, the easier it is for the firm to justify the associate's billing rate to clients (“Yes, I know that we're charging \$370 [per] hour for someone who has no particular experience doing anything, but just look at where she went to school!”). Cf. Debra Cassens Weiss, *BigLaw Firm Reveals Nuts and Bolts of its Pay System in Harvard Case Study on Collaboration*, ABA J. (Oct. 15, 2013, 5:40 AM), [http://www.abajournal.com/news/article/biglaw\\_firm\\_reveals\\_nuts\\_and\\_bolts\\_of\\_its\\_pay\\_system\\_in\\_harvard\\_case\\_study/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=ABA+Journal+Top+Stories](http://www.abajournal.com/news/article/biglaw_firm_reveals_nuts_and_bolts_of_its_pay_system_in_harvard_case_study/?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories) (explaining how some firms recognize the value in collaborative skills).

185. I'd be remiss if I didn't insert some shameless self-promotion here. My husband and I have a new book out that discusses the various skills that lawyers will need to succeed in law firms. See generally NANCY B. RAPOPORT & JEFFREY D. VAN NIEL, *LAW FIRM JOB SURVIVAL MANUAL: FROM FIRST INTERVIEW TO PARTNERSHIP* (2014) (discussing the different skills necessary for success as a lawyer). I've also suggested that law schools could use some version of the twenty-six “Berkeley Factors” to rethink legal education. See Nancy B. Rapoport, *Rethinking U.S. Legal Education: No More “Same Old, Same Old”*, 45 CONN. L. REV. 1409 (2013) (advocating for the use of the factors); see also Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620, 630 (2011) (discussing the Berkeley factors).



absolute measures of talent. If I could persuade a law firm to hire based on performance in responding to a hypothetical issue rather than to a person’s school or class rank, I’ll bet that the firm could avoid some hiring mistakes (those involving people with good grades but poor “soft skills”).<sup>186</sup> But that’s a battle that I’m going to have to keep fighting.

Law firms have realized, though, that they need to invest in their associates in order to retain them.<sup>187</sup> For example, law firm efforts to increase the retention of women and people of color have developed in response to studies that women and lawyers of color tend to leave BigLaw in disproportionate numbers.<sup>188</sup> The savvier law firms have created “core

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186. Clifford Chance recently announced that it was changing the way that it screened job applicants:

Clifford Chance, one of the big five “magic circle” law firms in the United Kingdom, has quietly introduced a “CV blind” policy for final interviews with all would-be recruits. Staff conducting the interviews are no longer given any information about which university candidates attended, or whether they come from state or independent schools.

Richard Garner, *Law Firm Clifford Chance Adopts ‘CV Blind’ Recruitment Policy to Break Oxbridge Recruitment Bias*, THE INDEPENDENT (January 9, 2014), <http://www.independent.co.uk/student/news/exclusive-law-firm-clifford-chance-adopts-cv-blind-policy-to-break-oxbridge-recruitment-bias-9050227.html>.

187. My friend Matt Bruckner has pointed out that the failure to train junior associates in some law firms may represent a market response to the expense of training them—if they’re going to leave anyway, why invest in improving the very skill sets that will make them more attractive elsewhere?

188. *Compare Women in Law in the U.S.*, CATALYST KNOWLEDGE CTR. (Mar. 11, 2013), <http://www.catalyst.org/knowledge/women-law-us> (providing statistics on women in law school, law administration, and those employed in law firms), *with Law Firm Diversity Wobbles: Minority Numbers Bounce Back While Women Associates Extend Two-Year Decline*, NAT’L ASS’N FOR LAW PLACEMENT (Nov. 3, 2011), [http://www.nalp.org/2011\\_law\\_firm\\_diversity](http://www.nalp.org/2011_law_firm_diversity) (illustrating the number of women and minorities in law firms), *and* MONA HARRINGTON & HELEN HSI, *WOMEN LAWYERS AND OBSTACLES TO LEADERSHIP: A REPORT OF MIT WORKPLACE CENTER SURVEYS ON COMPARATIVE CAREER DECISIONS AND ATTRITION RATES OF WOMEN AND MEN IN MASSACHUSETTS LAW FIRMS 6–7* (2007), *available at* [http://web.mit.edu/workplacecenter/docs/law-report\\_4-07.pdf](http://web.mit.edu/workplacecenter/docs/law-report_4-07.pdf) (providing data on men and women’s career choices in Massachusetts).

I hope that law firm efforts in this regard aren’t just window-dressing.

It is easier to appoint a diversity officer [to comply with affirmative action requirements] than to change hiring practices deeply embedded in both individual and institutional beliefs and practices. Since the presence of a diversity officer is more visible than revisions in hiring priorities, the addition of a new role may signal to external constituencies that there has been improvement, even if, in reality, the appointment is a formality and no real change has occurred.

LEE G. BOLMAN & TERRENCE E. DEAL, *REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP* 299–300 (4th ed. 2008).

competencies” that they want their associates to have, subdivided by practice group and years of experience.<sup>189</sup> Knowing the skills that you want your associates to acquire is important. Making sure that the people are assigning work to those associates to maximize their exposure to those skills is just as important, and that’s where the gap between wanting to mentor associates and getting people to take time to mentor them can widen.

Let’s go back to incentives. People may really, really want to mentor associates, but they can easily put that desire on a back burner when other incentives compel them to put other things first—namely, service to clients. Mentoring becomes something that a senior lawyer “should” do, rather than something that a senior lawyer takes time to do, especially if that senior lawyer has many matters, each of which could take several hours of very long days to do.<sup>190</sup> That senior lawyer is not going to add a twenty-first hour to a twenty-hour day to meet with a mentee to see if she is getting a variety of work experiences.

In the old days,<sup>191</sup> senior lawyers mentored junior ones in part by making sure that they sat in on a wide variety of tasks before they were asked to “solo” on them. It’s my understanding that the billing attorneys

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189. See *Firmwide Core Competencies*, VINSON & ELKINS (Nov. 7, 2013), available at [http://www.velaw.com/uploadedFiles/VEsite/Careers/firm\\_core\\_comp.pdf](http://www.velaw.com/uploadedFiles/VEsite/Careers/firm_core_comp.pdf) (listing the qualities that the firm expects from associates); see also *Creating a Path to Success*, BAKER BOTTS, <http://www.bakerbotts.com/professionaldevelopment/> (last visited Jan. 8, 2014) (referring to its competency model based on a “series of four progressive levels”); cf. Bryn R. Vaaler, *Codifying Competencies, Law Firm Partnership & Benefits Report*, DORSEY & WHITNEY (Jan. 2005), <http://www.dorsey.com/newsevents/uniEntity.aspx?xpST=PubDetail&pub=2205> (explaining Dorsey & Whitney’s model). As a way of retaining valuable employees, many firms have also tried to figure out the thorny issue of “part-time” legal work, in order to give people with caregiving responsibilities a shot at some work/life balance. The problem with trying to design a system that allows for significant work/life balance is that the pacing of legal work ebbs and flows, so that predictable schedules that would allow things like part-time work and job-sharing are difficult to maintain. On the other hand, contract attorneys trade a chance for partnership and the development of a wide variety of experiences for a more predictable schedule, so there *are* work-arounds. Unfortunately, many of those work-arounds don’t lend themselves to a normal progression on a partnership track.

190. I have, however, spoken to a number of senior lawyers who are happy to take the time to serve as mentors, in large part because they themselves were mentored and they saw how much they learned from the mentoring that they received. The problem with law firms that don’t have a culture of mentoring is that they will create future generations of lawyers who weren’t mentored and don’t see the benefit of serving as mentors themselves.

191. In other words, when I was an associate.

wrote off much of that observation time. It's also my understanding that law 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.<sup>192</sup> So what's a law firm to do?

One law firm has launched a "residency" program that will pay some first-year associates a smaller salary in exchange for more training and a smaller billable hours requirement.<sup>193</sup> Given the current bad job market for newly minted lawyers, that approach is likely more palatable to firms (if not to those associates who get the lower salary) than is any suggestion that partners cut the amount of their draws to fund increased mentoring.<sup>194</sup>

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192. See, e.g., Ashby Jones & Joseph Pallazzolo, *What's a First-Year Lawyer Worth?*, WALL ST. J. (Oct. 17, 2011), [http://online.wsj.com/article/SB10001424052970204774604576631360989675324.html?mod=ITP\\_marketplace\\_0](http://online.wsj.com/article/SB10001424052970204774604576631360989675324.html?mod=ITP_marketplace_0) ("According to a September survey for The Wall Street Journal by the Association of Corporate Counsel, a bar association for in-house lawyers, more than 20% of the 366 in-house legal departments that responded are refusing to pay for the work of first- or second-year attorneys, in at least some matters. Almost half of the companies, which have annual revenues ranging from \$25 million or less to more than \$4 billion, said they put those policies in place during the past two years, and the trend appears to be growing.")

193. See Debra Cassens Weiss, *'Residency Program' Associates at This BigLaw Firm Will Get More Training and Less Pay*, ABA J. (Oct. 22, 2013, 7:48 AM), [http://www.abajournal.com/news/article/residency\\_program\\_associates\\_at\\_this\\_biglaw\\_firm\\_will\\_get\\_more\\_training\\_and/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=ABA+Journal+Top+Stories](http://www.abajournal.com/news/article/residency_program_associates_at_this_biglaw_firm_will_get_more_training_and/?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories) (describing Greenberg Traurig's new residency program); see also Sara Randazzo, *Calling All Unemployed Law Grads: Greenberg Is Hiring*, AM. LAW. DAILY (Oct. 21, 2013), [http://www.americanlawyer.com/PubArticleALD.jsp?id=1202624550961&Calling\\_All\\_Unemployed\\_Law\\_Grads\\_Greenberg\\_is\\_Hiring#ixzz2iSbgFuze](http://www.americanlawyer.com/PubArticleALD.jsp?id=1202624550961&Calling_All_Unemployed_Law_Grads_Greenberg_is_Hiring#ixzz2iSbgFuze) ("Firm leaders [at Greenberg Traurig] envision the program as a way of recruiting talented associates it wouldn't have hired during the traditional on-campus interview process for one reason or another. It will also allow the firm to assign junior lawyers to client matters without billing their work at the usual cringe-inducing hourly rates."); Lawrence M. Solan, *Pay Associates Less? A Novel Response to a Rapidly Changing Legal Market*, HUFFINGTON POST (Jan. 22, 2013, 1:08 PM), [http://www.huffingtonpost.com/lawrence-m-solan/pay-associates-less-a-nov\\_b\\_2527419.html](http://www.huffingtonpost.com/lawrence-m-solan/pay-associates-less-a-nov_b_2527419.html) ("If clients are not willing to pay top dollar for the work of inexperienced associates, hire the associates at lower salaries, and give them substantial raises as their value increases."). Apparently, those associates hired on the "residency" track at Greenberg Traurig will be hired on a one-year trial basis. See Sara Randazzo, *Calling All Unemployed Law Grads: Greenberg Is Hiring*, AM. LAW. DAILY (Oct. 21, 2013), [http://www.americanlawyer.com/PubArticleALD.jsp?id=1202624550961&Calling\\_All\\_Unemployed\\_Law\\_Grads\\_Greenberg\\_is\\_Hiring#ixzz2iSbgFuze](http://www.americanlawyer.com/PubArticleALD.jsp?id=1202624550961&Calling_All_Unemployed_Law_Grads_Greenberg_is_Hiring#ixzz2iSbgFuze) (writing on the trial-basis employment); Dan Slater, *At Law Firms, Reconsidering the Model for Associates' Pay*, N.Y. TIMES (Apr. 1, 2010, 1:17 AM), <http://dealbook.nytimes.com/2010/04/01/at-law-firms-reconsidering-the-model-for-associates-pay/> (exploring the transformation in how law firms train and hire associates). Hat tip to Dustin Benham.

194. The idea that partners are going to be willing to take less money has about as much of a chance as suggesting that law professors are going to agree to cut their own salaries to make law school a better value proposition for students. Cf. Paul Caron, *Washington U. Dean Syverud Tells ABA Task Force: Law Profs, Deans Are Paid Too Much; 50% Pay Cut Would Solve Problem*, TAXPROF

One way or another, though, something has to give—law schools can't rely on law firms to train their graduates; law firms don't have the budget to train their graduates the way that they used to (with shadowing); and those unhappy associates who are able to switch jobs will leave if their careers aren't developing apace.

In our hypothetical law firm, we'd need to come up with incentives that would do two things: encourage senior lawyers to mentor junior ones (by giving them good career advice) and encourage senior lawyers to act as sponsors of those junior lawyers (by suggesting that the junior lawyers get specific types of experience, like speaking on a big continuing legal education panel or staffing a matter to get experience doing tasks that they've not yet completely mastered). Staring us in the face, though, is the fact that time is a zero-sum game. There are simply not enough hours in the day for most lawyers to spend a significant time mentoring their associates.

One possibility that comes to mind is to make more use of those senior lawyers who are no longer partners.<sup>195</sup> Senior "Of Counsel" lawyers have decades of valuable experience<sup>196</sup> and likely have reached a stage in their careers at which their advice and training would provide some serious "bang for the buck"—as long as their mentoring consists of more than just talking about the good old days.<sup>197</sup> Our law firm could establish a cadre of very senior lawyers with some time to spare and some funding for those lawyers to develop training programs for their junior colleagues. The diversion of some budget dollars to that purpose might be dollars that are very well spent.<sup>198</sup>

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BLOG (Aug. 11, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/08/washington-u-.html](http://taxprof.typepad.com/taxprof_blog/2013/08/washington-u-.html) (discussing faculty costs in law schools).

195. Of course, asking lawyers to do more mentoring is no assurance that those mentors will be good at mentoring or that mentoring will actually encourage more associates to stay with the firm.

196. And often a more flexible schedule.

197. I'm envisioning something like an in-house National Institute for Trial Advocacy program, run by these very senior lawyers, in the various practice groups.

198. A related issue is the mentoring of summer associates. Again, the zero-sum effect of having only twenty-four hours in a day means that very busy lawyers are going to RSVP to summer associate events and then become no-shows. They're going to invite a summer associate to lunch, once, and then forget all about him or her. Even though summer associate programs are shrinking, they're still an important pipeline for law firm recruiting, and they have the advantage of letting summer associates demonstrate more of their skills during a longer period than the one-day, on-site interview can glean. Although I can't think of many ways to encourage more interaction with

Another possibility is to create several categories of "billable hour equivalent" activities,<sup>199</sup> all of which get factored into a professional's compensation.<sup>200</sup> Such a calculation could involve categories like this:

Billable hour work (and probably the amount collected, not just billed, to factor in <sup>201</sup> the value of the work to the client) <sup>202</sup>	Fixed-fee work (probably by using some calculation of the amounts budgeted for the work or by tracking the actual hours billed)	Contingency fee work	Work on behalf of the firm (committee work, mentoring)
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The firm would have to create weights for the various categories, as well as definitions of each type of service to the firm,<sup>203</sup> and it would have to be

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summer associates, other than a tracking system that relates "time spent at summer associate events" (and paying attention to the summer associates at those events, rather than spending time in a corner checking email) to points for partnership levels, savvy firms need to think hard about whether having a summer associate program with limited participation by the firm's lawyers is really worth the effort.

199. Notes on earlier draft from Jean Sternlight to author (Sept. 20, 2013) (on file with author).

200. A law firm's decision to compensate activity that doesn't directly generate income requires the firm first to decide that profitability isn't the only goal that it wants to pursue. Many firms make that decision. The question (whether it's about profitability specifically or about other goals) is always whether the incentives that the firm puts in place actually elicit the behavior that the firm wants to encourage.

201. Factoring in "collected" and not "billed" hours is at least a rough approximation of the value of the work to the client, although the amounts collected will also be affected by the client's leverage with the firm and the client's solvency.

202. Take a look at Duane Morris's Matter Contribution Analysis (MCA):

Duane Morris first developed its matter contribution analysis (MCA) system in 1992. It was a quantitative system used to calculate profitability by client, matter, or individual attorneys. The MCA became the basis of the firm's quantitative analysis for compensation. The system was unusual among firms in that it tracked attorney revenue to the level of individual profitability, not just hours billed.

Heidi K. Gardner & Annelena Lobb, *Collaborating for Growth: Duane Morris in a Turbulent Legal Sector*, HARVARD BUSINESS SCHOOL CASE STUDY 9-414-022 at 8 (July 26, 2013); *see also supra* note 68 for a discussion of calculating those individual profitability numbers.

203. For example, what's "mentoring"? Is it having an associate shadow a senior lawyer and ask questions about what the lawyer is doing, after which the senior lawyer critiques the associate's own efforts at the same tasks? Is it having the senior lawyer make sure that the associate gets a varied set of

careful that those weights were significant enough to nudge the desired behavior. For example, weighing mentoring at 0.001% isn't going to nudge anyone to do more mentoring. Weighing mentoring at 10% might. Different lawyers might even negotiate the weights given to their various activities before the start of a new fiscal year, reflecting their relative availability for non-income-producing work and the type of income-producing work (billable hour, fixed-fee, contingency fee) that they generally do. As long as the firm could figure out a way to maintain a certain minimum profit each year, it might be willing to experiment with ways to "count" non-income-producing activity that it wanted to encourage.

E. *Changing the Amount of Time Dedicated to Certain Non-Billable Activities*

*In a typical day, it takes a lawyer more than eight hours of time to work eight billable hours. For example, the lawyer cannot charge for time spent on law firm committee work or similar administrative matters. The partner cannot bill a client for the time he discusses with his partners what should be that year's bonus for a given associate. This partner will spend time on continuing legal education, a bar meeting, or client development. That is not billable either. When the lawyer is eating lunch, taking a coffee break, chatting with a colleague about last night's baseball game, or using the restroom, that is not work that he can bill to any client.<sup>204</sup>*

Just as there are duties that any professor must undertake even though such duties take away from teaching and research (so-called "service" activities), there are duties that every lawyer must do that aren't billable to a client. Paramount is the duty to do *pro bono* work,<sup>205</sup> but there is also

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experiences each year? Or is mentoring success measured by whether the associate succeeds in his or her career over time? And if associate success is the benchmark, must the associate be successful at the firm that was busy mentoring the associate, or is general career success a way to measure the quality of the mentoring? (Don't ask me how one might measure how much the mentoring contributed to an associate's skill set, as compared to the associate's innate talent or work ethic. I have no idea.)

204. 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, 718 (2011).

205. See MODEL RULES OF PROF. CONDUCT R. 6.1 (2013) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of *pro bono* publico legal services per year.").

committee work, networking, participation in the countless surveys that law firms seem to get, and the all-important training of junior lawyers. None of this work "counts" as billable time, and, therefore, much of this work often gets pushed aside.

But one of the best ways to make it count is, well, actually to count it—or at least some of it. When I was at a BigLaw firm, *pro bono* time counted as "billable" time, and the law firm took pains to let it be known that some people billed hundreds, or even over a thousand, hours a year doing *pro bono* work. At least one of my friends there became a partner even though he had billed over a thousand hours of *pro bono* time in one of the years leading up to his partnership. Part of the reason that state bars and the ABA create awards to recognize *pro bono* work is to encourage more people to do it, and to do more of it. To me, the single best way to encourage *pro bono* work is to treat it the way that my firm did: make each hour of *pro bono* equivalent to an hour billed to a paying client—that's not an inexpensive decision, because that time is coming out of the partners' draws. I recall hearing, at one point, that counting *pro bono* as billable time was equivalent to a \$50,000 per partner per year donation.<sup>206</sup>

At least *pro bono* time is an ethics requirement—or, more accurately in most places, an ethics aspiration. The time spent networking—speaking at conferences, serving on non-profit boards, and the like—isn't.<sup>207</sup> There's some evidence that the best way to keep a client's business is to hunker down and do a good job, rather than networking.<sup>208</sup> But law firms don't

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206. We could then add to the basic compensation chart a new category to recognize *pro bono* work:

Billable hour work (and probably the amount collected, not just billed, to factor in the value of the work to the client)	Fixed-fee work (probably by using some calculation of the amounts budgeted for the work or by tracking the actual hours billed)	Contingency fee work	Work on behalf of the firm (committee work, mentoring)	<i>Pro bono</i> hours
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207. My friend Elias George has pointed out to me that, given the difference between the weights of perceived losses and perceived gains, there needs to be twice as much recognition of a firm's *pro bono* efforts (perceived gains) to make up for the costs in lost billable time (perceived losses). In a related discussion, Dave McGowan has reminded me that the logical next step of dealing with a perceived loss would be an increased tolerance for risk to try to "break even." Much of Las Vegas's gaming world is based on this concept.

208. See Mark Herrmann, *Nothing You Can Say Can Cause Me to Retain You*, ABOVE THE LAW (July 15, 2013, 10:16 AM), <http://abovethelaw.com/2013/07/nothing-you-can-say-can-cause-me-to-retain-you/>

run themselves, and there's all sorts of scutwork that people have to do to keep their firms running. Throwing people a bone by giving them a tiny amount of economic incentive to do the scutwork isn't a bad idea.<sup>209</sup>

F. *Changing the Willingness to Move from One Practice Group to Another.*

Some practice areas are cyclical. For example, when bankruptcy lawyers are happy, transactional lawyers usually aren't, although I'm not sure that the obverse is true. The problem is that many BigLaw lawyers work in highly specialized practice areas and can be reluctant to work in areas different from their own.<sup>210</sup> On the other hand, firms that are very busy in one practice area will want to reassign lawyers from less-busy practice areas, at least on a temporary basis, if they can. Logically, lawyers who are in practice areas that aren't very busy should have a vested interest in switching fields, if the alternative is getting laid off. But cognitive biases can contribute to a reluctance to switch practice areas.

Let's say that Chapter 11 work is slow. During a downturn in Chapter 11 filings, bankruptcy lawyers could hope against hope that the work will

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retain-you ("Meeting me at a cocktail party and chatting me up won't work. Swapping business cards with me won't work. Following up after the cocktail party with a call or e-mail and sitting down with me for a cup of coffee or lunch won't work."). *But see* NANCY B. RAPOPORT & JEFFREY D. VAN NIEL, LAW FIRM JOB SURVIVAL MANUAL: FROM FIRST INTERVIEW TO PARTNERSHIP 151 (2014) (encouraging networking in general).

209. For example, I've heard from one lawyer at a big firm that some firms encourage their professionals to fill out nationwide surveys like the American Lawyer Mid-Level Associate Survey by offering them tokens, like Starbucks gift cards, for filling them out. Email from Lacy Lawrence to author (June 10, 2013, 7:26 PM) (on file with author). Our new chart, then, could include a column for networking and other activities with a tangential benefit to the firm:

Billable hour work (and probably the amount collected, not just billed, to factor in the value of the work to the client)	Fixed-fee work (probably by using some calculation of the amounts budgeted for the work or by tracking the actual hours billed)	Contingency fee work	Work on behalf of the firm (committee work, mentoring)	<i>Pro bono</i> hours	Networking and other work that provides less immediately tangible benefits to the firm
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210. In fact, they may have such a specialized practice that retooling their skills for another type of practice would be very difficult.



pick up soon. They might be somewhat reluctant to take on matters in other practice areas because they’ll want to stay “ready” when Chapter 11 work picks up again. They may “anchor” on the idea that bankruptcy work is cyclical. For example, they may interpret the publicity surrounding a few high-profile Chapter 9 cases to mean that more Chapter 11 work is just around the corner, which is perhaps an example of confirmation bias. Or they may just be afraid that their skill sets won’t transfer readily to another practice area. There are rational reasons for wanting to stay ready for a resurgence of work in one’s own area, where one’s skills are valued.<sup>211</sup> But practice areas with temporary lulls are different from practice areas that are dying.<sup>212</sup> Our hypothetical law firm is going to have to figure out a way to hold harmless those lawyers who are willing to pitch in and work in busier practice areas than their own—either during lulls or when it’s clear that their own specialties are dying—without charging clients for the necessary training involved in learning a new practice area. Maybe our hypothetical firm can develop a “team player” component of compensation to recognize how difficult it can be for a lawyer to switch practice areas, or maybe it can calculate compensation on a rolling-year cycle to take into account the ebb and flow of practice areas.

Think that a compensation formula that takes these various activities into account is a pipe dream? The Duane Morris firm designs its compensation structure to take into account attorney profitability,<sup>213</sup> the efficiency of those working for a particular partner,<sup>214</sup> each attorney’s self-evaluation,<sup>215</sup> and a variety of other non-billable work.<sup>216</sup> If a firm wants

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211. For a great book discussing how to encourage people to consider change when they’ve developed rational reasons to resist change, see ROBERT KEGAN & LISA LASKOW LAHEY, *IMMUNITY TO CHANGE: HOW TO OVERCOME IT AND UNLOCK THE POTENTIAL IN YOURSELF AND YOUR ORGANIZATION* (2009). Another one of their books, ROBERT KEGAN & LISA LASKOW LAHEY, *HOW THE WAY WE TALK CAN CHANGE THE WAY WE WORK: SEVEN LANGUAGES FOR TRANSFORMATION* (2002), provides an excellent method for uncovering the gap between what people intend to do and what they actually accomplish.

212. One doesn’t see a lot of slide-rule and buggy-whip factories these days.

213. See Heidi K. Gardner & Annelena Lobb, *Collaborating for Growth: Duane Morris in a Turbulent Legal Sector*, HARVARD BUSINESS SCHOOL CASE STUDY 9-414-022 at 8–9 (July 26, 2013) (describing Duane Morris’s “matter contribution analysis (MCA) system” as a “a quantitative system used to calculate profitability by . . . individual attorneys” that “became the basis of the firm’s quantitative analysis for compensation”).

214. See *id.* at 10 (“[P]artners were evaluated on the efficiency of their overall ‘team,’ defined as including anyone who received 25% or more of their work from the focal partner. ‘We get credit for working regardless of whether I’m working on my matter or your matter or someone else’s matter; I’m still working,’ noted [one Duane Morris attorney].”).

215. See *id.* (describing what an attorney was expected to include in the required yearly self-

to change its professionals' behavior, it has to take pains to reward the behavior that it wants. If it calibrates those reward systems accurately—likely after much trial and error—it should start to see positive results.

## V. CAVEATS AND CONCLUSION

*[N]o individual, no government, is ever going to be as smart as the people who are scheming against you. So when you introduce an incentive scheme, you have to just admit to yourself that no matter how clever you think you are, there's a pretty good chance that someone far more clever than yourself will figure out a way to beat the incentive scheme. So, one response is to say, well, before I put it in place, let me at least try to think through all the crazy different approaches that might be taken that could trick my incentive scheme. But even on top of that, I think you want to design incentive schemes that are relatively simple. The more complicated you make something, the more opportunities there are for people to game it. If it's simple, you usually think if you're reasonably intelligent, you can think about a lot of the ways that people might respond to it, and prevent these sort of unexpected, backfiring, overly zealous responses to what you're doing.<sup>217</sup>*

We don't have any data (yet) indicating that any of my suggestions will work. We might be able to gather some data over time. For example, law firms might track the realization rate of their fees to see if any of the nudges that encourage more timely billing practices have resulted in fewer fees being written off. Firms might be able to compare the retention rate of associates with more active mentors versus the retention rate of associates whose mentors are less hands-on. It's possible, perhaps, to study whether lawyers whose non-billable-hour efforts are valued tend to stay at law firms. Of course, we'll never be able to overcome the “correlation isn't

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evaluation memo).

216. *See id.* (“Sharon Caffrey, a Duane Morris partner based in Philadelphia, noted many factors in her own compensation: ‘I run the products liability group, I’m very active in the firm’s women’s initiative. I’m on the partners’ board. I do a lot of unbillable things for the firm, but I feel I get compensated for them to some extent.’”).

217. Interview by Stephen J. Dubner with Steven D. Levitt, *The Cobra Effect—A New Freakonomics Radio Podcast*, FREAKONOMICS RADIO (Oct. 11, 2012, 11:28 AM), <http://freakonomics.com/2012/10/11/the-cobra-effect-a-new-freakonomics-radio-podcast>. As my dad has reminded me on several occasions, “nothing is foolproof because fools are so ingenious.” *Murphy’s Laws Site*, <http://www.murphys-laws.com/murphy/murphy-laws.html> (last visited February 26, 2014); *see Talk: Murphy’s Law*, WIKIQUOTE (Aug. 26, 2010, 3:15 PM), [http://en.wikiquote.org/wiki/Talk:Murphy%27s\\_law](http://en.wikiquote.org/wiki/Talk:Murphy%27s_law) (attributing this saying to the “Murphy” of Murphy’s Law).

causation” problem,<sup>218</sup> and many factors might contribute to a client paying more of a given bill or a lawyer deciding to stay longer at a firm. Firms should come up with some markers of success,<sup>219</sup> of course, so that they can try to measure if their changed incentives are getting the right behavior.

And firms should come up with some ways to encourage subtle changes in certain types of behavior if they want to adapt to the increased pressure that major clients are exerting. On the other hand, there are many reasons why law firms won’t leap to take advantage of my suggestions.<sup>220</sup> Let’s look at some barriers to change.<sup>221</sup>

One barrier to change is that I might be flat-out wrong as to how any of my proposed changes will work.<sup>222</sup> Another barrier involves relative leverage: the larger or more powerful the practice group in the firm, the more difficult it might be to change that group’s collective behavior<sup>223</sup>—there will be many more people exerting lots of social pressure *not* to change, and many of those people will suggest that the changes “should apply to thee and not to me.” They’ll rationalize (perhaps accurately) that fixing problems in a litigation department will differ from fixing problems in a transactional department—in other words, that not all solutions should be firm-wide. Moreover, they may attribute past ethics missteps to the moral failings of some of the individuals within the firm, rather than to

218. I doubt that we’ll see any “control group” lawyers.

219. Hat tip to my buddies Mary Beth Beazley and Art Greenbaum for pointing this out to me.

220. Not the least of which is that I haven’t worked at a law firm in decades. (I’ve been around a lot of lawyers, both as a law professor and as an expert witness, though.)

221. Richard Thaler and Cass Sunstein have noted:

A group will shift if it can be shown that the practice is causing serious problems. But if there is uncertainty on that question, people might as well continue doing what they have always done. An important problem here is “pluralistic ignorance” – that is, ignorance, on the part of all or most, about what other people think. We may follow a practice or a tradition not because we like it, or even think it defensible, but merely because we think that most other people like it. Many social practices persist for this reason, and a small shock, or nudge, can dislodge them.

RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 58–59 (2009).

222. When it comes to proposing what types of changes will work in a particular law firm, the fact that I’m around lawyers a lot may not be a perfect substitute for hearing from lawyers who work in that firm.

223. *Cf.* STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 45 (2d ed. 2006) (“[A] smaller community tends to exert greater social incentives against crime, the main one being shame.”).

the incentive structure and default rules within the firm.<sup>224</sup> As Jennifer Robbennolt and Jean Sternlight have pointed out:

Consistent with the *actor-observer bias*, we attribute others' moral failings to flaws in their dispositions, but attribute our own missteps to situational factors. We focus more on ethics when judging others, but find competence more important than integrity when judging ourselves. And we judge others based on faulty predictions about what we might have done under the same circumstances.<sup>225</sup>

Changing various default rules (not to mention installing the computer programs associated with billing that I want to develop) will create a lot of resentment, and very clever people<sup>226</sup> will develop some work-arounds that may entirely defeat the changes.<sup>227</sup> It's possible, in fact, that every

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224. Not that there aren't bad people. There are. But I think that more people behave badly due to the situations in which they're placed rather than due to some innate psychopathy.

225. Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1150 (2013) 36–37 (footnotes omitted). They go on to point out:

But while we can be relatively harsh judges of others' ethics, our psychology can make it difficult to notice and respond to others' unethical behavior. First, limits on our ability to pay attention can lead us to miss unethical behavior right in front of us when we are focused on other things like our own cases and deadlines. Second, we have a tendency to identify with other people—colleagues or clients—whose interests are aligned with ours, making it harder to notice and objectively assess their ethics. Similarly, it can be difficult to acknowledge the unethical behavior of others when doing so would harm one's own interests. This *motivated blindness* can cause our judgments to be biased in favor of our client or colleague and we are inclined to view their actions favorably, disinclined to believe that they have acted wrongly, and able to recruit reasons to support their actions. Third, we may let others off the hook because we are aware of other instances in which they have acted ethically—a form of *moral licensing*. Fourth, just as it can be difficult to identify the point at which one's own behavior has gradually crossed the line, detection of when others' incrementally degrading behavior becomes unethical can be challenging. Fifth, the fact that *outcome bias* may cause our evaluations of the quality of a decision to be influenced by how the decision turns out, can lead us to ignore others' unethical decisions unless and until something bad happens.

*Id.* at 1150-51 (footnotes omitted).

226. Including the very clever people who work in law firms.

227. My colleague Jean Sternlight reminded me of the classic “unintended consequences” story: the “rat tail” incident.

Appealing to both civic duty and to the pocketbook, a one-cent bounty was paid for each rat tail brought to the authorities (it was decided that the handing in of an entire rat corpse would create too much of a burden for the already taxed municipal health authorities). Unfortunately, this scheme backfired. Despite initial apparent success, the authorities soon discovered that the best laid plans of mice and men often go awry. As soon as the municipal administrators

law firm might want to change but is waiting for its major competitors to make the first move, in much the same way that many law schools are waiting for their major competitors to try out new curricula and two-year J.D. programs first.

Let’s return to the point that I made at the very beginning of this article: incentives at work, even those that the employer hasn’t created consciously, will inexorably trigger certain behavior from employees. If a law firm wants to change that behavior, then it needs to spend some significant time figuring out which of its many incentives triggered that behavior. It’s not enough to say, for example, that late-submitted timesheets are bad and that we therefore have to force people to turn their timesheets in promptly. We have to ask ourselves what in the firm’s incentive structure induces some people to turn their timesheets in late. Is it that their workload is so high and so frenetic that they don’t believe that they have sufficient time to record their activities contemporaneously? Is it that the firm puts such a premium on high-billing attorneys that it cuts them too much slack on their non-billable duties?<sup>228</sup> Is it that dicing time into tenths of an hour makes describing those tasks that take under thirty minutes to do just not worth the effort of recording them? Once we figure out what’s driving certain behavior, then we can start thinking about developing ways to alter the incentive structure. We will come up with

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publicized the reward program, Vietnamese residents began to bring in thousands of tails. While many desk-bound administrators delighted in the numbers of apparently eliminated rats, more alert officials in the field began to notice a disturbing development. There were frequent sightings of rats without tails going about their business in the city streets. After some perplexity, the authorities realized that less-than-honest but quite resourceful characters were catching rats, but merely cutting off the tails and letting the still-living pests go free (perhaps to breed and produce more valuable tails). Later, things became even more serious as health inspectors discovered a disturbing development in the suburbs of Hanoi. These officials found that more enterprising but equally deceptive individuals were actually raising rats to collect the bounty. One can only imagine the frustration of the municipal authorities, who realized that their best efforts at *dératisation* had actually increased the rodent population by indirectly encouraging rat-farming.

Michael C. Vann, *Of Rats, Rice, and Race: The Great Hanoi Rat Massacre, an Episode in French Colonial History*, 4 FRENCH COLONIAL HIST. 191, 198 (2003).

228. For a good case study of this particular phenomenon—letting high-billing attorneys violate other firm procedures—see MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 52–54 (Univ. of Michigan Press 2004). As Professor Regan explained, “[i]n 1994, [John] Gellene’s billable hours approached 3,000 . . . . [His] tendency toward intense tunnel vision sometimes led him to ignore the administrative requirements that accompany life in a large law firm . . . . Most glaringly, his chronic failure to submit his ‘daynotes,’ or billing records, on time was a source of frustration.” *Id.*

new incentives that will still have some bad, or maybe outright awful, unintended consequences. But we have to try.<sup>229</sup> We know enough about human behavior and enough about the sea changes in legal practice that it's time to try. As the book *Freakonomics* points out so well:

Incentives are the cornerstone of modern life. *And understanding them—or, often, ferreting them out—is the key to solving just about any riddle, from violent crime to sports cheating to online dating.*<sup>230</sup>

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229. As Lyle Lovett sings: “But what would you be if you didn’t even try? You have to try[.]” *Here I Am Lyrics*, METROLYRICS, <http://www.metrolyrics.com/here-i-am-lyrics-lyle-lovett.html> (last visited Jan. 24, 2014).

230. STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 11 (1st ed. 2005).

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*“Nudging” Better Lawyer Behavior*

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