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# PROFITS AND PROFESSIONALISM

**Cover Page Footnote**

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## PROFITS AND PROFESSIONALISM

*Deborah Rhode\**

“Ethics pays” is a recurring refrain among commentators on professional and business ethics. This should come as no surprise. In a culture preoccupied with profit, appeals to self-interest may be the most persuasive strategy. Yet if virtue were always its own reward, we would surely see more of it. Promoting ethical values in professional workplaces that are increasingly focused on the bottom line will require pushing beyond the platitudes. We need more probing analysis of key questions. To what extent does ethics pay? How well? Under what circumstances? And most important, what can be done to increase the rate of return?

The following discussion explores those questions in three contexts. The first involves workplace cultures. How do we create more organizational structures in which adhering to principles serves prudential interests? A second area of inquiry involves pro bono service. If, as research suggests, lawyers do well by doing good, how can we communicate that message more effectively in work and educational settings? A third cluster of issues concern quality of life. If, as a wide array of studies indicate, balanced lives promote bottom lines, what will convince more legal employers to adjust their policies accordingly?

### I. DOES ETHICS PAY? WORKPLACE CULTURES AND PROFESSIONAL VALUES

A widespread concern within the American bar is the perceived “decline of the profession into a business.” About three quarters of surveyed lawyers believe that the profession has become more “money conscious,” and few regard the change as welcome.<sup>1</sup> The prevailing assumption is that the priority on short-term profits undermines moral values and social

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1. Wes Hanson, *Lawyers, Lawyers, Lawyers, Ethics: Easier Said Than Done*, JOSEPHSON INST. NEWSLETTER (Josephson Instit., Los Angeles, California), 1993, at 38; Chris Klein, *Big Firm Partners: Profession Sinking*, NAT'L L.J., May 26, 1997, at A1 (eighty-two percent of surveyed large firm partners believed that the profession has changed for the worse).

responsibilities.<sup>2</sup> Growing financial pressures make it increasingly difficult for lawyers to antagonize clients or supervisors by delivering unhappy messages about what legal rules and legal ethics require. Greed may not be the root of all evil, but it is surely responsible for much of the bar's complicity in financial, environmental, and health and safety disasters.<sup>3</sup>

Yet while most commentary on legal ethics laments the bar's capitulation to market values, most commentary on business ethics insists that those values, if properly assessed, are part of the solution, not the problem. From this perspective, where individuals and institutions go wrong is in focusing on short-term financial gains, which come at the expense of larger long-term costs. The legal and reputational consequences of moral myopia often dwarf any immediate payoffs. Recent work on moral leadership, particularly trade publications written by and for managers, is peppered with reassuring homilies. *If Aristotle Ran GM* offers a representative sample: a "climate of goodness . . . will always pay great dividends," "you can't put a simple price on trust," "unethical conduct is . . . self-defeating or even self-destructive over the long run."<sup>4</sup> A dispassionate review of global business practices might suggest that Aristotle would need to be running more than General Motors for this all to be true. But no matter; in most of this commentary, a few spectacularly expensive examples of moral meltdowns will do. Companies make "billion dollar errors in judgment" by marketing unsafe products, fiddling with the numbers in securities filings, or failing to report or discipline rogue employees.<sup>5</sup> The moral of the story is always that if "values are lost, everything is lost."<sup>6</sup>

Even more hardheaded leadership advice is often tempered with at least lip service to the cost effectiveness of integrity and reminders that profits are not an end in themselves. In their best selling book, *In Search of*

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2. See sources cited in DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* 9, 216-17 n.18-19 (2000); ANTHONY KRONMAN, *THE LOST LAWYER* (1993).

3. For example, see RHODE, *IN THE INTERESTS OF JUSTICE*, *supra* note 2, at 7-10; David Luban, *Making Sense of Moral Meltdowns*, Address at the Stanford Center on Ethics (Apr. 2004).

4. TOM MORRIS, *IF ARISTOTLE RAN GENERAL MOTORS: THE NEW SOUL OF BUSINESS* 127, 134, 157 (1997).

5. The error in judgment is a phrase applied to Salomon Brothers' mishandling of a trader who submitted false bids. For a thoughtful discussion, see LYNN SHARP PAINE, *VALUE SHIFT* 9-12 (2003). Other commonly cited examples include fraud by Enron, Tyco, and unsafe products by Johns Manville (asbestos) and H.R. Robbins (Dalkon Shields). See Saul W. Gellerman, *Why Good Managers Make Bad Ethical Choices*, *HARV. BUS. REV.*, July-Aug. 1986, at 85; JOHN DALLA COSTA, *ETHICAL IMPERATIVE* 241-43 (1998).

6. NOEL M. TICHY & ANDREW R. MCGILL, *MICHIGAN BUSINESS SCHOOL GUIDE TO THE ETHICAL CHALLENGE* 84 (2003).

*Excellence*, Thomas Peters and Robert Waterman insist that “[t]he top companies make meaning, not just money.”<sup>7</sup> Jack Welch, a CEO best known for his pursuit of profits, not ethics, similarly insists that “numbers aren’t the vision, numbers are the product.” Although they cannot be disregarded, they should not achieve “such priority that [leaders] fail to deliver on the things that really matter to the company in the long run: its culture . . . its values.”<sup>8</sup> In fact, that is useful advice, and had he followed it his record might have been less mixed.<sup>9</sup> But when and whether ethics pays is much more complicated than this commentary generally suggests.

### Social Responsibility and Financial Performance

A wide range of studies have attempted to address the relationship between social responsibility and financial performance among businesses, but surprisingly little work has focused on law firms. That work, discussed below, has looked only to the correlation between support of pro bono activities and profitability, not to broader issues of ethical culture. In the business context, researchers have considered a wide range of measures, but these efforts have been complicated by the absence of any consistent, standardized criteria of social responsibility. No widely shared methodologies are available for comparing organizations’ records on many dimensions such as diversity, community relations, philanthropy, and environmental stewardship.<sup>10</sup> Moreover, correlations do not establish causation and any documented relationships between financial and social performance may run in either or both directions. In some cases, profitability may drive benevolence: organizations that are doing well have more resources to invest in doing good. Alternatively, attention to moral values may improve financial performance by improving relations with various stakeholders: employees, clients, customers, suppliers, and community members. These factors also may be interrelated, and mediated by other variables. Social performance could be both a cause and

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7. THOMAS J. PETERS & ROBERT H. WATERMAN, *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA’S BEST-RUN COMPANIES* 279 (1982); *see also* ROBERT C. SOLOMON, *ETHICS AND EXCELLENCE* 44, 47 (1992).

8. ROBERT SLATER, *JACK WELCH ON LEADERSHIP* 51, 55 (2004). For a discussion of Welch’s ethical record, *see id.* at 133-39; Michael E. Brown & Linda K. Treviño, *Is Values-Based Leadership Ethical Leadership?*, in *EMERGING PERSPECTIVES ON VALUES IN ORGANIZATIONS* 151, 166 (Stephen W. Gilliland et al. eds., 2003); Gellerman, *supra* note 5, at 90.

9. *See sources cited supra*, note 8.

10. STEPHEN J. GARONE, *THE LINK BETWEEN CORPORATE CITIZENSHIP AND FINANCIAL PERFORMANCE* 3, 5-9 (1999); Sandra A. Waddock & Samuel B. Graves, *The Corporate Social Performance-Financial Performance Link*, 18 *STRATEGIC MGMT. J.* 303, 304 (1997).

consequence of financial performance, but the strength of either relationship could be significantly affected by additional industry-specific factors.<sup>11</sup>

Despite these methodological complications, the overall direction of research findings is instructive. Some studies have compared the social performance of organizations with high and low financial returns.<sup>12</sup> Other surveys have looked for relationships between social and financial performance among all Standard and Poors 500 companies.<sup>13</sup> Although results vary, few studies find a purely negative correlation. In one overview of ninety-five surveys, only four found a negative relationship; fifty-five found a positive relationship; twenty-two found no relationship and eighteen found a mixed relationship.<sup>14</sup>

A similar pattern emerges from qualitative and quantitative research that addresses the impact of specific ethical behaviors on financial results or on measures likely to affect such results, such as employee relations and public reputation. The vast majority of these studies find significant positive relationships. For example, companies with stated commitments to ethical behavior have a higher mean financial performance than companies lacking such commitments.<sup>15</sup> Employees who view their organization as supporting fair and ethical conduct, and its leadership as caring about ethical issues, observe less unethical behavior and perform better along a range of dimensions; they are more willing to share information and knowledge, and to “go the extra mile” in meeting job requirements.<sup>16</sup> Employees also show more concern for the customer or client when employers show more concern for them, and workers who feel justly treated respond in kind; they are less likely to engage in petty

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11. See Waddock & Graves, *supra* note 10, at 304.

12. See PAINE, VALUE SHIFT, *supra* note 5, at 52; see also GARONE, *supra* note 10, at 6; JOSHUA DANIEL MARGOLIS & JAMES PATRICK WALSH, PEOPLE AND PROFITS? THE SEARCH FOR A LINK BETWEEN A COMPANY'S SOCIAL AND FINANCIAL PERFORMANCE (2001); Elisabet Garriega & Domenec Mele, *Corporate Social Responsibility Theories: Mapping the Territory*, 53 BUS. ETHICS J. 51 (2004).

13. See Waddock & Graves, *supra* note 10, at 307-16.

14. MARGOLIS & WALSH, *supra* note 12, at 10-11.

15. See the studies discussed in Elena G. Procario-Foley & David F. Bean, *Institutions of Higher Education: Cornerstones in Building Ethical Organizations*, 6 TEACHING BUS. ETHICS 101, 102 (2002).

16. See LINDA KLEBE TREVIÑO & GARY R. WEAVER, MANAGING ETHICS IN BUSINESS ORGANIZATIONS: SOCIAL SCIENTIFIC PERSPECTIVES 233 (2003) [hereinafter TREVINO & WEAVER, MANAGING ETHICS]; studies cited in PAINE, VALUE SHIFT, *supra* note 5, at 42-44; Kim S. Cameron et al., *Exploring the Relationships Between Organizational Virtuousness and Performance*, 47 AM. BEHAV. SCIENTIST 766 *passim* (2004); Tom R. Tyler & Steven L. Blader, *Social Identity and Fairness Judgments*, in EMERGING PERSPECTIVES ON VALUES IN ORGANIZATIONS 67, 69-75 (Stephen W. Gilliland et al. eds., 2003).

dishonesty such as pilfering, fudging on hours and expenses, or misusing business opportunities.<sup>17</sup> The financial payoffs are obvious. Employee satisfaction improves customer satisfaction and retention, enhances workplace trust, furthers cooperation and innovation, and saves substantial costs resulting from misconduct and surveillance designed to prevent it.<sup>18</sup>

Such findings are consistent with well-documented principles of individual behavior and group dynamics. People care deeply about “organizational justice” and perform better when they believe that their workplace deals justly with its stakeholders.<sup>19</sup> Workers also respond to cues from peers and leaders. Virtue begets virtue, and observing moral behavior by others promotes similar conduct.<sup>20</sup> Employers reap the rewards in higher morale, recruitment and retention.<sup>21</sup>

### Ethical Reputation, Ethical Counseling, and Financial Value

A reputation for ethical conduct also has financial value. In the legal profession, it can attract clients and employees, and build constructive relationships with opposing counsel and government regulators. One of lawyers’ most crucial contributions involves helping clients live up to their best instincts and deepest values. Even highly profit-driven businesses often need and want counselors who can provide a “corporate conscience.”<sup>22</sup> In that capacity, lawyers can help clients evaluate short-term economic objectives in light of long-term concerns that include maintaining a reputation for social responsibility and managerial integrity.<sup>23</sup> Neither lawyers’ nor clients’ long-term interests are served by eroding the institutional frameworks on which law and markets ultimately depend. Norms like good faith, honesty, and fair dealing are essential for

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17. TREVIÑO & WEAVER, *MANAGING ETHICS*, *supra* note 16, at 233; PAINE, *VALUE SHIFT*, *supra* note 5, at 45; Robert B. Cialdini, *Social Influence and the Triple Tumor of Organizational Dishonesty*, in *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS* 53-56 (David M. Messick & Ann E. Tenbrunsel eds., 1996).

18. GARONE, *supra* note 10, at 11; Cialdini, *supra* note 17, at 56.

19. Tyler & Blader, *supra* note 16, at 67-79; PAINE, *VALUE SHIFT*, *supra* note 5, at 46.

20. PAINE, *VALUE SHIFT*, *supra* note 5, at 45-49; Cameron et al., *supra* note 16, at 773.

21. GARONE, *supra* note 10, at 11; PAINE, *VALUE SHIFT*, *supra* note 5, at 45; Cameron et al., *supra* note 16, at 770-83.

22. See RHODE, *IN THE INTERESTS OF JUSTICE*, *supra* note 2, at 65; Deborah L. Rhode, *Ethics in Counseling*, 30 *PEPP. L. REV.* 591, 608 (2003); Robert Gordon, *Why Lawyers Can't Just Be Hired Guns*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 42 (Deborah L. Rhode ed., 2000); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 *A.B.A. J.* 1159, 1161 (1958).

23. Robert Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1, 26-28, 71-74 (1988).

efficient commercial markets and regulatory systems. These values require some shared restraint in the pursuit of short-term interests. Legal processes present frequent opportunities for obstruction, obfuscation, and overreaching. Lawyers who take advantage of such opportunities undermine expectations of trust and cooperation. These expectations are common goods on which both lawyers and clients ultimately depend. In the short term, free riders can profit by violating norms that others respect. But these values cannot survive in contexts where deviance becomes common. Over the long run, a single-minded pursuit of short-term self-interests is likely to prove self-defeating for both the profession and the public.<sup>24</sup>

Business ethics commentators have made similar points, and have attempted to quantify the reputational costs of organizational misconduct and social irresponsibility.<sup>25</sup> As they note, these costs can be substantial, and can dramatically affect market share and stock value.<sup>26</sup> According to some studies, most of the decline in shareholder value following allegations or proof of illegal behavior reflects injuries to reputation, not prospective fines or liability damages.<sup>27</sup> A substantial body of research also suggests that the goodwill flowing from an ethical reputation can buffer organizations during periods of difficulty resulting from financial, consumer product, or environmental scandals.<sup>28</sup> A celebrated case in point is Johnson & Johnson's decision to recall Tylenol after an incident of product tampering. It was a socially responsible decision that was highly risky in financial terms; pulling the capsules cost more than \$100 million, and many experts at the time believed that it would doom one of the company's most profitable products. But Johnson & Johnson's reputation for integrity, reinforced by the recall decision, maintained public confidence, and the product bounced back with new safety features and no

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24. *See id.* at 54.

25. CHARLES J. FOMBRUN, REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE 85 (1996); GRAHAME DOWLING, CREATING CORPORATE REPUTATIONS: IDENTITY, IMAGE, AND PERFORMANCE 219 (2001); PAINE, VALUE SHIFT, *supra* note 5, at 48-49; Cialdini, *supra* note 17. *See also* Jennifer Reese, *America's Most Admired Corporations*, FORTUNE, Feb. 8, 1993, at 44 (noting that admired corporations tend to have good ethical records); PAINE, VALUE SHIFT, *supra* note 5, at 48-49.

26. PAINE, VALUE SHIFT, *supra* note 5, at 49; Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear From Committing Criminal Fraud*, 36 J.L. & ECON. 757 (1993).

27. Karpoff & Lott, *supra* note 26, at 760.

28. PAINE, VALUE SHIFT, *supra* note 5, at 49; Cameron et al., *supra* note 16, at 773; William J. Holstein, *The Snowball Effect of Volunteer Work*, N.Y. TIMES, Nov. 21, 2004, at C12.

long-term damage.<sup>29</sup>

Unhappy endings from socially irresponsible decisions also abound. A notorious example of a corporate public relations disaster that could have been averted was Royal Dutch Shell's decision to sink an obsolete oil rig with potentially radioactive residues in the North Sea despite strong environmental protests. The resulting adverse publicity and consumer boycotts took a huge financial toll.<sup>30</sup> Survey data from the United States and abroad also reveal that most individuals believe that companies should set high ethical standards and contribute to broader social goals. For example, between one-third and two-thirds of American consumers report that they seriously consider corporate citizenship when making purchases, and a quarter recall boycotting a product because of disapproval of the company's actions.<sup>31</sup> Corporate lawyers who take seriously their obligation to represent the organization, not just its current managers, can help insure that these long term reputational costs receive consideration in board decision making.

### When Ethics Doesn't Pay: The Case for Values

Examples of the high costs of moral myopia are not uncommon; professional and business ethics texts offer countless variations on the same theme. But the reasons why the examples are so abundant also point up the problems with "ethics pays" as an all-purpose prescription. As Harvard Business School Professor Lynne Sharp Paine puts it, a more accurate guide would be "ethics counts."<sup>32</sup> Whether doing good results in doing well depends on the institutional and social context. In the corporate setting, Paine notes, the "financial case for values" is strongest when certain conditions are met:

1. legal and regulatory systems are effective in enforcing ethical

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29. PAINE, VALUE SHIFT, *supra* note 5, at 30; JAMES BURKE, A CAREER IN AMERICAN BUSINESS (Harv. Bus. Sch. Case No. 389-177, 390-030, 1989); DALLA COSTA, *supra* note 5, at 217.

30. PAINE, VALUE SHIFT, *supra* note 5, at 20-22; Michael D. Watkins & Max H. Bazerman, *Predictable Surprises: The Disasters You Should Have Seen Coming*, HARV. BUS. REV., Mar. 2003, at 72.

31. HILL & KNOWLTON, 2001 CORPORATE CITIZEN WATCH SURVEY (2001) (one third); *Caring in the Community*, MGMT. TODAY, Mar. 1995, at 19-20; Ronald Alsop, *The Best Corporate Reputations in America: Johnson & Johnson (Think Babies!) Turns Up Tops*, WALL ST. J., Sept. 23, 1999, at B1 (boycott). In one international poll, a fifth reported rewarding or punishing a company for its social performance and another fifth considered doing so. ENVIRONICS INT'L, LTD., IN COOPERATION WITH THE PRINCE OF WALES BUSINESS LEADERS FORUM & THE CONFERENCE BOARD, THE MILLENNIUM POLL ON CORPORATE SOCIAL RESPONSIBILITY (1999); *see also* PAINE, VALUE SHIFT, *supra* note 5, at 82, 111.

32. *Id.* at 134.

- norms;
2. individuals have choice in employment, investment, and consumer decisions and are well informed concerning those choices; and
  3. the society expects organizations to operate within an ethical framework.<sup>33</sup>

When “ethics pays,” it is generally because an informed public wants it to, and because leaders in business, government, and the professions have designed effective incentive and compliance systems.

It is, however, naive and misleading to suggest that these systems are always in place.<sup>34</sup> In law, problems arise not only because legal and ethical enforcement systems are highly imperfect, but also because the public is ambivalent in its desires. Ethics is what clients want in other peoples’ lawyers. In their own attorneys, zealous advocacy in pursuit of short-term interests often appears preferable.<sup>35</sup> As a consequence, many practice areas end up with differential markets in morality. A tidy living flows from conduct euphemistically described in terms like “bombing,” “hard ball,” or “scorched earth.”

A further problem with “ethics pays” as the core argument for ethical practice is that it is ultimately self-defeating. To make the case for “values” turn solely on instrumental considerations is to reinforce patterns of reasoning that undermine ethical commitments. We respect moral conduct most when it occurs despite, not because of, self-interest. What defines ethical behavior is a commitment to do right whether or not it carries a cost. Our challenge as a profession and a society is not only to find ways of minimizing that cost, but also to respect and reinforce adherence to fundamental principles when they come at a price.

## II. PRO BONO CONTRIBUTIONS: DOING WELL BY DOING GOOD

Similar points are applicable to charitable contributions. Pro bono activities and financial support have many payoffs for lawyers, legal employers, and the legal profession generally. But there is also value in encouraging such contributions when they are motivated by intrinsic rather than extrinsic rewards.

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33. *Id.* at 76.

34. For examples, see Amar Bhide & Howard H. Stevenson, *Why Be Honest If Honesty Doesn't Pay*, HARV. BUS. REV., Sept.-Oct. 1990, at 121.

35. See RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 2, at 6-7; A.B.A., PERCEPTIONS OF THE UNITED STATES JUSTICE SYSTEM 59 (1999).

### Benefits to Lawyers

A wide array of research, both on lawyers and on the public generally, finds that benefiting others also benefits ourselves. Volunteering is correlated with both physical and mental health. Compared with the population generally, people who regularly assist others apart from family and friends have longer lives, less pain, stress, and depression, and greater self-esteem.<sup>36</sup> Volunteers also report a sense of physical well being, both immediately after helping and when the service is remembered, and are more likely to be happy with their lives.<sup>37</sup> One of the most commonly cited benefits is that such assistance makes individuals “feel better” about themselves; other frequently noted rewards include opportunities to “broaden horizons,” “do something worthwhile,” build social relationships, and gain educational or employment-related experience.<sup>38</sup>

Although the correlation between volunteer activities and well-being does not establish a causal relationship, the evidence available suggests that such a relationship exists. That evidence includes the high frequency of individuals’ subjective experience of benefits, the consistent association of volunteering with objective measures of health, and the biological indications of a “helper’s high.”<sup>39</sup> Although the neurological basis for heightened physiological well-being is not well understood, some research suggests that caregiving activities reduce stress, which improves the functioning of the immune system and triggers the release of endorphins that produce pleasurable physical sensations.<sup>40</sup> So too, volunteer work, like other forms of organizational activity, tends to reduce participants’ sense of isolation and increases their sense of efficacy and self-esteem.<sup>41</sup>

For lawyers, pro bono involvement brings this same range of professional and personal rewards. Particularly for young attorneys, such

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36. See research summarized in ALAN LUKS WITH PEGGY PAYNE, *THE HEALING POWER OF DOING GOOD: THE HEALTH AND SPIRITUAL BENEFITS OF HELPING OTHERS* xi-xii, 17-18, 45-54, 60 (2d ed. 2001); John Wilson & Marc Musick, *The Effects of Volunteering*, 62 L. & CONTEMP. PROBS. 141, 142-43 (1999); Marc A. Musick et al., *Volunteering and Mortality Among Older Adults: Findings from a National Sample*, 548 J. GERONTOLOGY S173, S178 (1999).

37. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 331 (2000); LUKS WITH PAYNE, *supra* note 36, at xi-xiii, 17-18, 118-19; John M. Darley, *Altruism and Prosocial Behavior Research: Reflections and Prospects*, in *PROSOCIAL BEHAVIOR* 312-27 (Margaret S. Clark ed., 1991).

38. Ram A. Cnaan & Robin S. Goldberg-Glen, *Measuring Motivation in Human Services*, 27 J. APPLIED BEHAV. SCI. 269, 275-79 (1991); FRANCIE OSTROWER, *WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY* 13-14 (1995).

39. See sources cited in *supra* notes 18 and 19.

40. LUKS WITH PAYNE, *supra* note 36, at 47-55.

41. Wilson & Musick, *supra* note 36, at 153-55.

work can also provide valuable training, contacts, trial experience, and leadership opportunities.<sup>42</sup> Through pro bono programs, lawyers can develop new areas of expertise and demonstrate marketable skills. Participation in community groups, charitable organizations, high visibility litigation, and other public interest activities allows attorneys to expand their perspectives, enhance their reputations, and attract paying clients.<sup>43</sup>

Lawyers also report the same kinds of psychological rewards from service that motivates other volunteer activity. Pro bono work can be a way to “give back,” to promote social justice, and to make an immediate positive difference in someone’s life.<sup>44</sup> For most private practitioners, whose paid work is predominantly commercial, volunteer activity allows them to express the values that directed them to legal careers in the first instance. American Bar Association (“ABA”) surveys consistently find that lawyers’ greatest dissatisfaction with their practice is a lack of “contribution to the social good.”<sup>45</sup> Pro bono work can provide that contribution. As the pro bono director of one Wall Street firm noted, lawyers “talk about their [pro bono] work in a way they’ve never done

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42. Esther Lardent, *Pro Bono Work Is Good for Business*, NAT’L L.J., Feb. 19, 2001, at B20; W. Terence Walsh, *Pro Bono 2000: A Bridge Over Troubled Waters*, GA. B.J., June 2000, at 12, 15; John Ryan, *Duty Calls*, CA. L. BUS. Feb. 12, 2001, at 17; Daniel Becker, *The Many Faces of Pro Bono*, WASH. LAW., May 2001, at 22, 30; *The Role of the Private Bar and Pro Bono Service in Meeting the Legal Needs of the Twenty-First Century*, 3 N.Y. CITY L. REV. 171, 186 (2000); *Lawyers of This Year*, NAT’L L.J., Dec. 25, 2000, at A24; Cynthia Fuchs Epstein, *Stricture and Structure: The Social and Cultural Context of Pro Bono Work in Wall Street Firms*, 70 FORDHAM L. REV. 1689, 1693-94 (2002); Robert Granfield & Thomas Koenig, “It’s Hard To Be a Human Being and a Lawyer”: *Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495 (2003).

43. John B. Heinz et al., *Lawyers’ Roles in Voluntary Associations: Declining Social Capital?*, 26 LAW & SOC. INQUIRY 597, 599 (2001); Jill Schachner Chanen, *Pro Bono’s Pros—and Cons: Rewards Are Great But It Takes a Deft Balance of Time and Effort*, A.B.A. J., May 1998, at 80; Donald W. Hoagland, *Community Service Makes Better Lawyers*, in THE LAW FIRM AND THE PUBLIC GOOD 104, 109 (1995); Jack W. Londen, *The Impact of Pro Bono Work on Law Firm Economics*, 9 GEO. J. LEGAL ETHICS 925 (1996); Thomas J. Brannan, *Pro Bono: By Choice or By Chance?*, 84 ILL. B.J., Sept. 1996, at 481; Ronald J. Tabak, *Integration of Pro Bono Into Law Firm Practice*, 9 GEO. J. LEGAL ETHICS 931, 932 (1996).

44. Ruth M. Bond, *Taking Time Out to Help Those in Need with Legal Burdens Brings Satisfaction, Pride*, S.F. DAILY J., Jan. 15, 2002, at 4; Tanya Neiman, *Nothing Cures Like . . .*, 26 S.F. ATT’Y, Feb.-Mar. 2000, at 44, 45; Walsh, *supra* note 42; Becker, *supra* note 42, at 22; Evelyn Apgar, *General Counsel, Pro Bono Gripes Galore*, 6 N.J. LAW., Nov. 1997, at 3.

45. A.B.A., YOUNG LAWYERS DIV., CAREER SATISFACTION SURVEY 20 (2000) [hereinafter A.B.A. 2000 CAREER SATISFACTION SURVEY]; A.B.A., YOUNG LAWYERS DIV., CAREER SATISFACTION SURVEY (1995) [hereinafter A.B.A. 1995 CAREER SATISFACTION SURVEY].

before. People say, 'This is the best day of my life.'"<sup>46</sup>

### Benefits to Legal Employers

By promoting participants' professional growth, reputation, and satisfaction, support of volunteer service also promotes the interests of their employers. Research on private-sector organizations finds that employee loyalty and morale are significantly greater when organizations are involved in their communities, and that employer-giving levels correlate positively with public image and financial performance.<sup>47</sup> Of course, as noted earlier, correlations do not establish causation, and it is unclear whether outstanding financial performance drives charitable contributions or the other way around. Alternatively, causal relationships might run in both directions. High-earning organizations have the most resources to invest in unpaid public service. They may also be in the best position to reap reputational rewards from such efforts, because they can afford to pursue and publicize their efforts.

For legal employers, strong pro bono programs can produce further, although hard to quantify, benefits in terms of retention, recruitment, and job performance.<sup>48</sup> Lack of career development opportunities is one of the main reasons that lawyers change jobs.<sup>49</sup> Although relatively few surveyed

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46. Vivia Chen, *Going Corporate*, AM. LAW., Sept. 2003, at 94 (quoting William Fogg).

47. Shari Caudron, *Volunteering; And the Bottom Line*, INDUSTRY WK., Feb. 1994, at 13, 18; Craig Smith, *The New Corporate Philanthropy*, 74 HARV. BUS. REV., May-June 1994, at 105; Barbara R. Bartkus et al., *Governance and Corporate Philanthropy: Restraining Robin Hood?*, 41 BUS. & SOC'Y 319 (2002); CATHLEEN WILD, CORPORATE VOLUNTEER PROGRAMS: BENEFITS TO BUSINESS, REPORT NO. 1029, 9, 11, 20-21 (1993); William J. Holstein, *The Snowball Effect of Volunteer Work*, N.Y. TIMES, Nov. 21, 2004, at C12; GARONE, *supra* note 10, at 11; Jan Larson, *Sweet Charity*, 2 MARKETING TOOLS 3, 68 (May 1995); Bill Shaw & Frederick R. Post, *A Moral Basis for Corporate Philanthropy*, 12 J. BUS. ETHICS 745, 746, 749 (1993); Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV. 1, 57-60 (1994).

48. Londen, *supra* note 43, at 925; John Ryan, *Rescue Mission*, CA. L. BUS., Feb. 12, 2001, at 15 (quoting Jack Londen); Carrie Johnson, *As the Need for Free Legal Helps Soars Amid Cutbacks in Federal Programs, Some Law Firms Are Responding by Moving Full-Time Pro Bono Lawyers Into Their Ranks*, LEG. TIMES, June 30, 1997, at S44; Memorandum to New York Partners of Clifford Chance Re. Associates Concerns (Oct. 15, 2002) (noting that firm's unsupportive attitude toward pro bono was a "significant minus" in recruiting and adversely affected some associates' perception of firm culture), <http://www.lawcost.com/clifchancememo.htm> (last visited Nov. 24, 2005).

49. JUDITH N. COLLINS, NAT'L ASS'N FOR LAW PLACEMENT FOUNDATION ("NALP"), THE LATERAL LAWYER: WHY THEY LEAVE AND WHAT MAY MAKE THEM STAY 24, 43-52, 77 (2001); AUSTIN G. ANDERSON & ARTHUR G. GREENE, THE EFFECTIVE ASSOCIATE TRAINING PROGRAM: IMPROVING FIRM PERFORMANCE, PROFITABILITY AND PROSPECTIVE PARTNERS (1999).

lawyers cite inadequate support for pro bono work as a major reason for leaving a position, the opportunity for such work may be an important part of why other lawyers stay; it can significantly enhance the quality of their professional lives.<sup>50</sup> As one winner of a bar pro bono award noted, such activity is an “enormous morale booster for the entire firm.”<sup>51</sup> “Everyone feels that they touched a life . . . No office picnics or parties can give you that.”<sup>52</sup>

Public opinion research also confirms the reputational value of pro bono work. In one representative survey, which asked what could improve the image of lawyers, the response most often chosen was their provision of free legal services to the needy; two-thirds of those surveyed indicated that it would improve their opinion of the profession.<sup>53</sup> In another poll, almost half of those responding thought that lawyers did not contribute enough to their communities through donations of time, legal services, or money. Only a quarter disagreed.<sup>54</sup> Legal employers who make substantial contributions can help challenge such perceptions, while establishing themselves as exceptionally responsible citizens.

### The Costs of Cost-Benefit Justifications

As is true with other ethical commitments, to justify pro bono involvement in solely instrumental terms may undermine its moral significance and distort charitable priorities. The problems are well-documented in corporate philanthropy, where organizational leaders often use business giving as a form of “social currency” that enhances status and self-image rather than effectively addresses social needs.<sup>55</sup> The demand for

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50. JUDITH N. COLLINS, *supra* note 49, at 156, Table A-22 (only 7.2 percent of lawyers cited lack of credit for pro bono work). For the value of pro bono programs in retaining lawyers by increasing their workplace satisfaction, see sources cited in notes 48-49 *supra*.

51. Talcott J. Franklin, *Practical Pro Bono: How Public Service Can Enhance Your Practice*, 10 S.C. LAW., Jan.-Feb. 1999, at 14, 19.

52. Franklin, *supra* note 51, at 19-20.

53. PETER D. HART RESEARCH ASSOC., INC., A SURVEY OF ATTITUDES NATIONWIDE TOWARD LAWYERS AND THE LEGAL SYSTEM 18 (Jan. 1993); *see also* Gary A. Hengstler, *Vox Populi*, A.B.A. J., Sept. 1993, at 61 (citing survey data finding that almost half of those surveyed believed that providing free legal services would improve the profession's image). A survey by the Oregon bar found when individuals were asked what information might cause them to have a higher opinion of the legal profession, they gave top ratings to knowledge that lawyers had given free legal advice to mass disaster victims and had made financial contributions to community legal services organizations. Karen Garst, *Reporting on Survey, Part II*, OR. ST. B. BULL., Dec. 1996, at 39, 46.

54. A.B.A., PERCEPTIONS OF THE U.S. JUSTICE SYSTEM, *supra* note 35, at 59 (1999).

55. MICHAEL USEEM, THE INNER CIRCLE 121-26 (1984); Usha C. V. Haley, *Corporate Contributions as Managerial Masques: Reframing Corporate Contributions as Strategies to Influence Society*, 28 J. MGMT. STUD. 485, 494 (1991).

“value added” from charitable donations has even led some companies to spend more on advertising their good deeds than on the donations themselves.<sup>56</sup>

So too, in the legal context, viewing pro bono programs largely as a way of training junior attorneys or advancing reputational interests may ill-serve client or societal concerns. Many law firms make inadequate efforts to supervise pro bono work or to ensure that participants have “cultural competence” in assisting low-income minority clients.<sup>57</sup> Other legal employers prevent attorneys from representing causes that might offend current or potential paying clients.<sup>58</sup> Yet these are precisely the causes most in need of assistance. Restrictions on government-funded legal aid programs exclude broad categories of clients who have nowhere else to go, such as prisoners, undocumented aliens, women seeking abortions, or school desegregation plaintiffs.<sup>59</sup> Without pro bono assistance, groups that are most politically vulnerable are legally vulnerable as well. As bar codes and commentary acknowledge, one of lawyers’ most crucial roles involves representation of causes likely to offend political clients.<sup>60</sup> Obvious examples involve the pro bono counsel who defended alleged Communists during the McCarthy movement, southern civil rights workers during the 1950s and 1960s, and seemingly pathological death-row defendants in recently successful DNA-based appeals. These attorneys often paid a substantial professional price. We are all richer because of it.

By contrast, when charitable assistance is viewed primarily in instrumental terms, it often ends up targeting those least in need of charity. Traditionally, most of lawyers’ unpaid work has gone not to public interest and low-income groups, but to friends, family members, and organizations like symphonies or Jaycees, which serve primarily middle- and upper-income individuals.<sup>61</sup> Many lawyers also have defined pro bono service to include matters where a fee turns out to be uncollectible.<sup>62</sup> No comprehensive data are available on how much unpaid assistance attorneys

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56. Mary Lyn Stoll, *The Ethics of Marketing Good Corporate Conduct*, 41 J. BUS. ETHICS 121, 124 (2002).

57. See DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 40-41, 136 (2005) [hereinafter RHODE, PRO BONO IN PRINCIPLE].

58. *Id.* at 146-48; Esther F. Lardent, *Positional Conflict in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279, 2280 (1999).

59. 45 C.F.R. § 1610-42 (1999); DEBORAH L. RHODE, ACCESS TO JUSTICE 3-4, 105 (2004).

60. MODEL CODE OF PROF’L RESPONSIBILITY E.C. 2-27 (1986); RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 2, at 54.

61. RHODE, PRO BONO IN PRINCIPLE, *supra* note 57, at 14.

62. *Id.* at 19; CARROLL SERON, THE BUSINESS OF PRACTICING LAW 129-33 (1996); Gary Spencer, *Pro Bono Data Show Little Improvement*, N.Y.L.J., Mar. 5, 1999, at 1.

now provide or which clients benefit. Only three states require lawyers to report pro bono work, only one (Florida) makes the information public, and even it does not identify recipients. What research is available, including my own national survey of some 3000 lawyers, suggests that the American bar averages less than half an hour a week and fifty cents a day in pro bono contributions, as lawyers define the term.<sup>63</sup> Little of that support benefits low-income individuals.<sup>64</sup>

Large numbers of lawyers are also unhappy with their pro bono opportunities. American Bar Association surveys of young lawyers consistently have found that their greatest source of workplace dissatisfaction is a lack of “contribution to the social good.”<sup>65</sup> So too, when a recent joint study by the National Association of Law Placement Foundation and the American Bar Foundation asked relatively new entrants to the profession to rate their satisfaction with sixteen aspects of practice, they ranked pro bono opportunities second to last.<sup>66</sup>

In my own survey, about half of lawyers reported dissatisfaction with the amount of their pro bono work.<sup>67</sup> The central problem involved employer policies that failed to value public service in practice as well as principle. Only a quarter of surveyed lawyers’ workplaces (twenty-five percent) fully counted pro bono work toward billable hours.<sup>68</sup> Such findings are consistent with other recent survey data, and they reflect a culture that undermines public service commitments.<sup>69</sup> In effect, as many lawyers

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63. RHODE, PRO BONO IN PRINCIPLE, *supra* note 57, at 20. The most recent American Bar Association survey, which found that two thirds of lawyers averaged thirty-nine hours on pro bono work per year is not inconsistent with that finding, given that the survey used an extremely broad definition of pro bono work. That definition, based on Model Rule 6.1, included participation in activities “for improving the legal system or the legal profession through groups such as bar associations or judicial committees.” A.B.A., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 4, 10 (Aug. 2005). According to the American Lawyer’s most recent survey of the 200 most profitable firms, only thirty-six percent of lawyers performed twenty hours or more of pro bono work. Aric Press, *Brother, Can You Spare 20 Hours*, AM. LAW., Sept. 1, 2005, available at <http://www.americanlawyer.com>.

64. *Id.* at 14, 19; Judith L. Maute, *Pro Bono Publico in Oklahoma, Time for Change*, 53 OKLA. L. REV. 527, 562-63 (2000).

65. A.B.A. 2000 CAREER SATISFACTION SURVEY, *supra* note 45, at 28; A.B.A. 1995 CAREER SATISFACTION SURVEY, *supra* note 45.

66. NALP & THE AMERICAN BAR FOUNDATION, AFTER THE J.D.: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 49 (2004) [hereinafter NALP & THE AMERICAN BAR ASSOCIATION, AFTER THE J.D.].

67. RHODE, PRO BONO IN PRINCIPLE, *supra* note 57, at 148.

68. *Id.* at 138.

69. In an *American Lawyer* survey, only twenty-eight percent of respondents’ firms credited time on pro bono activities toward minimum billable hour requirements. *Commission AmLaw 100 and Law Firm Questionnaires*, AM. LAWYER, Aug. 2002, at 52.

noted, pro bono service was permissible only if it occurred “outside the normal work hours.”<sup>70</sup> Given what passes for “normal” in many firms, the price of public service is often prohibitive. Lawyers with substantial family obligations were particularly likely to see non-billable work as a “luxury” they could not afford.<sup>71</sup>

Other limitations on pro bono participation arise from informal workplace norms and practices. Only about half of lawyers’ firms subsidized all the costs of pro bono matters.<sup>72</sup> Only ten percent of surveyed lawyers indicated that their employers valued such work as much as billable hours in promotion and compensation decisions.<sup>73</sup> Almost a fifth believed that pro bono contributions were not viewed as important, and almost half felt they were negatively viewed.<sup>74</sup> In many firms, attitudes ranged from active discouragement to not-so-benign neglect. In essence, “money has been the absolute bottom line, so pro bono . . . is not rewarded.”<sup>75</sup>

A related problem involves the kind of pro bono involvement that employers permit. Almost half of the lawyers in my sample were dissatisfied with the type of pro bono work permitted.<sup>76</sup> Many of these lawyers ended up with unpaid work that they did not consider pro bono, such as favors for clients and their relatives, or the personal legal matters of partners and their families.<sup>77</sup> Such work seldom yields the kind of experience, visibility, and contacts that has career benefits.<sup>78</sup> Other attorneys were limited to services for the “pet organizations” of certain partners, or work that would benefit the “corporate image.”<sup>79</sup> Not only do these priorities discourage involvement and skew the allocation of scarce charitable resources, they also undermine the legitimacy of pro bono programs. That risk is particularly great when lawyers’ self-interests are implicated. As one attorney observed, “Right now this firm’s idea of pro

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70. RHODE, PRO BONO IN PRINCIPLE, *supra* note 57, at 138.

71. *Id.* at 138; *see also* Bryant G. Garth, *Noblesse Oblige as an Alternative Career Strategy*, 41 HOUS. L. REV. 93, 110 (2004) (noting time constraints that limit women’s participation).

72. RHODE, PRO BONO IN PRINCIPLE, *supra* note 57, at 139.

73. *Id.* at 140.

74. *Id.* (eighteen percent reported that pro bono activities were viewed as not important, and forty-four percent believed that they were negatively viewed).

75. *Id.*

76. *Id.* at 148 (forty-three percent were dissatisfied).

77. *Id.*

78. Garth, *supra* note 71, at 105.

79. RHODE, PRO BONO IN PRINCIPLE, *supra* note 57, at 148.

bono is to handle a partner's personal matters for free. It's a joke."<sup>80</sup>

The devaluation of public service in many workplaces represents a missed opportunity for all concerned. A preoccupation with short-term profits overlooks the long-term benefits to lawyers, their employers, and their communities. And to view unpaid work in primarily instrumental terms, as a way to provide training for practitioners or favors for friends and families, undermines the values on which charitable commitment depends.

### III. BALANCED LIVES AND BOTTOM LINES

A final casualty of the bottom-line orientation of legal workplaces involves quality of life. Over the last half century, billable hours for lawyers have dramatically risen, but what has not changed are the number of hours in the day.<sup>81</sup> A 1960s ABA Lawyers' Handbook defined a "normal" schedule as "approximately 1,300 fee earning hours per year."<sup>82</sup> "Normal" now is closer to 2000 hours.<sup>83</sup> To charge honestly at current levels often requires working sixty-hour weeks and the obligations in many organizations are even higher.<sup>84</sup> As one associate logging those hours responded to a question about her quality of life, "We can't live like this. This is not a life."<sup>85</sup> Most surveyed lawyers report that they do not have sufficient time for themselves and their families.<sup>86</sup> Only a third to a half believe that their employers support balanced lives and flexible workplace arrangements.<sup>87</sup> Only a fifth of mothers who are working full time

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80. *Id.*

81. For earlier work that makes similar points concerning balanced lives, see RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 2, at 10, 216 n.21; Deborah L. Rhode, *Balanced Lives: Changing the Culture of Legal Practice*, A.B.A. COMM'N ON WOMEN IN THE PROFESSION (2002) [hereinafter RHODE, *Balanced Lives*], available at <http://abanet.org/women> (last visited Oct. 15, 2005); Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 FORDHAM L. REV. 2207 (2002).

82. WOMEN'S BAR ASS'N OF MASS., MORE THAN PART-TIME: THE EFFECT OF REDUCED HOURS ARRANGEMENTS ON THE RETENTION, RECRUITMENT, AND SUCCESS OF WOMEN ATTORNEYS IN LAW FIRMS 7 (2000).

83. See sources cited in RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 2, at 10.

84. *Id.* at 35; Patrick Schlitz, *On Being A Happy, Healthy, and Ethical Member of An Unhappy, Unhealthy, and Unethical Profession*, 58 VAND. L. REV. 871, 891-95 (1999).

85. Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 46 FORDHAM L. REV. 291, 385 (1995).

86. A.B.A. 2000 CAREER SATISFACTION SURVEY, *supra* note 45, at 28 (Table 20).

87. Gregory J. Mazores, *Association Retention for Law Firms: What Are Your Lawyers Saying About You?*, 29 CAP. U. L. REV. 903, 905 (2002) (finding that a third of associates believe that lawyers at their firms are encouraged to create a balance between work and life outside it). See figures compiled by Cynthia Fuchs Epstein et al., THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER 5 (1999) and by the

schedules are satisfied with the amount of time that they have for childcare.<sup>88</sup> Particularly in large firms, where sweatshop schedules are most common, some attorneys report finding it “difficult to have a cat, much less a family.”<sup>89</sup>

### The Costs of Excessive Hours and Inflexible Schedules

The adverse effects of excessive hours, both to lawyers and their employers, are well documented. For lawyers, overwork is a leading cause of disproportionately high rates of stress, substance abuse, reproductive dysfunction, and mental health difficulties.<sup>90</sup> These, in turn, contribute to performance and disciplinary problems that carry a cost for employers and clients as well as practitioners.<sup>91</sup> Bleary, burned-out lawyers can seldom deliver efficient service on a sustained basis. So too, excessive hourly demands contribute to widespread abuses such as meter running and fudging time sheets.<sup>92</sup>

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National Association of Law Placement, discussed in Martha Neil, *Lawyers Shun Firms' Offers of Part-Time Work*, CHI. L. BULL., Dec. 18, 2000, at 1 (suggesting that about half of surveyed practitioners doubt that their employers truly support flexible workplace arrangements).

88. JEAN E. WALLACE, LAW SCH. ADMISSION COUNSEL, RESEARCH REPORT NO RR-00-02, JUGGLING IT ALL: EXPLORING LAWYERS' WORK, HOME, AND FAMILY DEMANDS AND COPING STRATEGIES 15 (2002).

89. SUZANNE NOSSEL & ELIZABETH WESTFALL, PRESUMED EQUAL: WHAT AMERICA'S TOP WOMEN LAWYERS REALLY THINK ABOUT THEIR FIRMS 295 (1998).

90. Nancy Dart & Marilyn Tucker, *Workaholic Lawyers*, WASH. LAW., 1990, at 36, 40-41. An estimated one-third of American attorneys suffer from depression or from alcohol or drug addiction, a rate two-to-three times higher than the population generally. See sources cited in RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 2, at 8. Almost half of women lawyers, and almost two-thirds of those working more than forty-five hours a week, report that such stress levels have adverse effects on reproductive health. Marc B. Schenker et al., *Self-Reported Stress and Reproductive Health of Female Lawyers*, 39 J. OCCUPATIONAL & ENVTL. MED. 556 (1997); see also Mary Beth Grover, *Daddy Stress*, FORBES, Sept. 6, 1999, at 202 (noting problems for men). By contrast, adequate time for significant family involvement helps to buffer problems experienced in the workplace and improves health and performance. FAYE CROSBY, JUGGLING 86-67 (1991); David Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 LAW & SOC. INQUIRY 251, 254 (1991). For general discussion of the health costs of excessive workloads, see JILL ANDRESKY FRASER, WHITE-COLLAR SWEATSHOP 36-37 (2001); FAMILIES & WORK INST., FEELING OVERWORKED: WHEN WORK BECOMES TOO MUCH 5-8 (2001) [hereinafter FAMILIES & WORK INST., FEELING OVERWORKED].

91. It is estimated that substance abuse and mental health difficulties figure into sixty to eighty percent of discipline and malpractice cases. See sources cited in DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 973 (2001). For general discussion of the effects of overwork on job performance, see FAMILIES & WORK INST., FEELING OVERWORKED, *supra* note 90, at 8.

92. For inflated time reports, see sources cited in RHODE, IN THE INTERESTS OF JUSTICE, *supra* note 2, at 171; WILLIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME BILLING BY

Overly demanding workloads and inflexible schedules impose further costs in terms of early attrition.<sup>93</sup> Human relations studies find that replacing professional workers typically costs between one to one-and-a-half times their annual salary, and that the loss of an associate runs between \$200,000 to \$500,000.<sup>94</sup> That average includes the direct expenses of recruiting and retaining a replacement, but does not include intangible losses in terms of disrupted relationships with clients and colleagues, and diminished productivity while newly hired individuals acquire job-specific knowledge. Although most firms have partnership structures that assume substantial attrition, experts agree that current rates are not cost-effective, and that the associates who leave early are not necessarily the ones that employers want to lose.<sup>95</sup> Bar association studies and management consultants consistently note that most associates do not begin to generate profits until their third or fourth years.<sup>96</sup> At that point, almost half have left their first employer, and quality of life concerns are a major reason, particularly for women.<sup>97</sup> Excessive hours and inflexible schedules are a major cause of glass ceilings for female attorneys, and the resulting lack of gender equality and women mentors in positions of greatest status, security, and influence.<sup>98</sup>

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ATTORNEYS 3-4 (1996); Lisa Lerman, *Blue Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 259-62 (1999); Henry Maute, "Problem of Overbilling by Many Large Firms is Confirmed in Surveys," WALL ST. J., Sept. 17, 1993, at B7. Some lawyers also "fake face time" by strategies such as calling themselves on an office intercom late at night or changing time settings on their computer to send emails at very late or early hours. Ross Guberman, *Running from the Law*, WASHINGTONIAN, Oct. 2001, at 51; Joan C. Williams et al., *Better on Balance? The Corporate Counsel Work/Life Report*, 10 WM. & MARY J. WOMEN & L. 367, 392 (2004).

93. NALP, KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION (1998) [hereinafter KEEPING THE KEEPERS]; Debra Baker, *Cash and Carry Associates*, 85 A.B.A. J., May 1999, at 41.

94. RHODE, *Balanced Lives*, *supra* note 81, at 21; Joan Williams & Cynthia Thomas Calvert, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms*, 8 WM. & MARY J. WOMEN & L. 357, 361, 366 (2002) [hereinafter Williams & Calvert, *Balanced Hours*]; Williams et al., *supra* note 92, at 377 (citing human relations experts for the one to one and a half range); Patti Giglio, *Rethinking the Hours*, LEGAL TIMES, Nov. 8, 2004, at 33 (quoting Joan Williams regarding associate costs).

95. NALP, KEEPING THE KEEPERS, *supra* note 93; Williams & Calvert, *Balanced Hours*, *supra* note 94, at 367.

96. Rhode, *Balanced Lives*, *supra* note 81, at 20.

97. In the most recent survey by NALP, thirty-eight percent of associates left by the end of their third year, and sixty percent by the end of their fifth year. NALP, BEYOND THE BIDDING WAR: A STUDY OF ATTRITION, DEPARTURES, DESTINATIONS, AND WORKLOAD INITIATIVES 17 (2001); *see also* Williams & Calvert, *Balanced Hours*, *supra* note 94, at 367.

98. JOAN WILLIAMS, UNBENDING GENDER 71-73 (2000); BOSTON BAR ASS'N TASK FORCE ON WORK-FAMILY CHALLENGES, FACING THE GRAIL: CONFRONTING THE COURSE OF WORK FAMILY IMBALANCE 39 (1999); CATALYST, A NEW APPROACH TO FLEXIBILITY:

Inadequate work/life policies also adversely affect recruitment. Recent surveys find that most men as well as women indicate a willingness to take lower salaries in exchange for more time with their families.<sup>99</sup> In a cross-national study of some 2,500 university students, over half identified “attaining a balance between personal life and career” as their primary professional goal.<sup>100</sup> Young lawyers similarly identify time for personal life as one of their key concerns.<sup>101</sup> Those concerns are particularly great for women with families, who still end up with a disproportionate share of domestic tasks.<sup>102</sup> In a profession in which half the talent pool is now female, workplace practices that devalue family values place employers at a competitive disadvantage. A generation of female lawyers who grew up expecting equal opportunity in the workplace is increasingly unwilling to settle for less, or to give up satisfying personal and family lives to achieve it.

By the same token, a wide array of evidence indicates that humane hours, alternative work arrangements, and other family-friendly policies are cost-effective strategies. Such initiatives improve recruitment and

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MANAGING THE WORK TIME EQUATION 20-21 (1997) [hereinafter CATALYST, NEW APPROACH].

99. The Families and Work Institutes National Study of the Changing Workplace, involving some 2,800 workers, found that workplace flexibility and family support was the second most significant factor in job satisfaction, after job quality. Nearly two-thirds of all workers would reduce their work week by an average of ten hours. Steven Ginsberg, *Raising Corporate Profits by Reaching Out to Families*, WASH. POST, Apr. 19, 1998, at CMC; Sue Shellenbarger, *Study of U.S. Workers Finds Sharp Rise Since 1992 in Desire to Reduce Hours*, WALL ST. J., Apr. 15, 1998, at A10. For discussion of the generational shift in priorities within law and accounting firms as young men as well as women express greater desire for time with their families, see FAMILIES & WORK INST., GENERATIONS AND GENDER IN THE WORKPLACE (Oct., 2004) [hereinafter FAMILIES & WORK INST., GENERATIONS AND GENDER]. See Joan Williams, *Canaries in the Mine: Work/Family Culture and the Law*, 70 FORDHAM L. REV. 2230-31 (2002) [hereinafter Williams, *Canaries in the Mine*]; Bruce Baltestier, *Mommy Track: No Career Derailment*, N.Y.L.J., June 9, 2000, at 24; Terry Carter, *Your Time or Your Money*, A.B.A. J., Feb. 2001, at 26. One survey by Harris Interactive and the Radcliffe Public Policy Center found that almost three quarters of men in their middle thirties, compared to only a quarter of men over sixty-five, would be willing to take lower salaries in exchange for more time available for their family. Kirsten Downey Grimsley, *Family: A Priority for Young Workers*, WASH. POST, May 3, 2000, at E1.

100. Sue Shellenbarger, *Work and Family: What Job Candidates Really Want to Know*, WALL ST. J., Nov. 19, 1999, at B1.

101. FAMILIES & WORK INST., GENERATIONS AND GENDER, *supra* note 99, discussed in Leigh Jones, *Law Firms Mull the ‘Gen Y’ Equation*, NAT’L L.J., Mar. 2, 2005, at A1. See Williams & Calvert, *Balanced Hours*, *supra* note 94, at 370 (quoting NALP Director Paula Patton about preferences of younger lawyers).

102. Edmund L. Andrews, *Survey Confirms It: Women Outjuggle Men*, N.Y. TIMES, Sept. 15, 2004, at A22.

retention, and help reduce stress and other health-related disorders.<sup>103</sup> Some recent estimates suggest that every dollar invested in these policies concerning quality of life results in two dollars saved in other costs.<sup>104</sup> Other surveys find that part-time employees are generally more efficient than full-time counterparts, particularly those clocking sweatshop hours, and that any additional overhead expenses are more than offset by reduced attrition.<sup>105</sup> In short, balanced lives boost bottom lines.

### Confronting the Barriers to Balanced Lives

If the economic justification for balanced lives is so persuasive, the obvious question is why the legal workplace so often fails to permit or promote them. One explanation is that the priority placed on billable hours has assumed symbolic as well as economic significance. Lawyers' willingness to work extended schedules has become a proxy for harder to measure qualities such as commitment, ambition, and reliability under pressure.<sup>106</sup> In an increasingly competitive marketplace, the ability to offer client service "24/7" has obvious value, and weeding out those with different priorities may seem to make good economic sense. Moreover, partners who advance to decision-making positions typically do so without "special accommodation" and often believe that if they managed, so can everyone else.<sup>107</sup> A pervasive attitude is captured in a New Yorker cartoon

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103. FAMILIES & WORK INST., FEELING OVERWORKED, *supra* note 90, at 7-8, 55.

104. Richard Ellsberry, *The Family Friendly Office*, OFF. SYS., Mar. 1, 1999, at 42; Mackenzie Carpenter, *A Few Ounces of Prevention*, PITTSBURGH POST GAZETTE, June 5, 1998, at A1; Keith Cunningham, Note, *Father Time: Flexible Work Arrangements and Law Firms' Failure of the Family*, 53 STAN. L. REV. 967, 1004 (2001).

105. WILLIAMS, UNBENDING GENDER, *supra* note 98, at 112; Williams, *Canaries in the Mine*, *supra* note 99, at 2227; BOSTON BAR ASS'N TASK FORCE ON WORK-FAMILY CHALLENGE, *supra* note 98, at 25; LOTTE BAILYN, BREAKING THE MOLD: MEN, WOMEN AND TIME IN THE NEW CORPORATE WORLD 80-84 (1993); LINDA BRAY CHANOW, WOMEN'S BAR ASS'N OF WASHINGTON, D.C., LAWYERS, WORK, AND FAMILY: A STUDY OF ALTERNATIVE SCHEDULES AT LAW FIRMS IN THE DISTRICT OF COLUMBIA 8 (2000); M. DIANE VOGT & LORI-ANN RICKARD, KEEPING GOOD LAWYERS: BEST PRACTICES TO CREATE CAREER SATISFACTION 55 (2000).

106. Cynthia Fuchs Epstein & Caroll Seron, *The Symbolic Meanings of Professional Time*, in LEGAL PROFESSIONS: WORK, STRUCTURES AND ORGANIZATION 79-94 (Jerry Van Hoy ed., 2001); Renee M. Landers et al., *Rat Race Redux: The Adverse Selection in the Determination of Work Hours in Law Firms*, 86 AM. ECON. REV. 329, 329 (1996); EPSTEIN ET AL., THE PART-TIME PARADOX, *supra* note 87, at 56; BOSTON BAR ASS'N TASK FORCE ON WORK-FAMILY CHALLENGE, *supra* note 98, at 31; Martha Neil, *Lawyers Shun Firms' Offer of Part-Time Work*, CHI. DAILY L. BULL., Dec 8, 2000, at 22 (quoting Patton).

107. As one lawyer put in a study of glass ceilings in the New York bar, "I have a family. I didn't get time off to do that. Why should you?" Cynthia Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 409 (1995). For other examples of resistance, see NOSSEL & WESTFALL, *supra* note 89, at 9,

featuring a well-heeled professional advising his younger colleague: “All work and no play makes you a valued employee.”<sup>108</sup>

Reduced hours or alternative schedules evoke resistance on other grounds as well. Some lawyers are annoyed at having to schedule around someone else’s personal needs. Other lawyers resent having to assume a disproportionate share of travel, late assignments, or holiday work. Backlash is especially likely if employers fail to make fair arrangements for reallocation of part-time lawyers’ work, or limit alternative schedules to parents. Attorneys who have no choice about working long hours become understandably annoyed when forced to put in additional time because of colleagues’ shorter workweek.<sup>109</sup>

Further problems arise when lawyers on alternative schedules attempt to mitigate such resentment by demonstrating “commitment” and consistently exceeding their agreed-upon hours. The result of this “schedule creep” is that home becomes work, “unexpected emergencies” become expected events, and attorneys can end up with close to full-time work for part-time pay.<sup>110</sup> Such inequities, together with the stigma and isolation that often accompany a reduced schedule, discourage the vast majority of lawyers from seeking it. Although about ninety-five percent of law firms have policies that allow part-time work, only about four percent of lawyers in fact work part-time.<sup>111</sup> Between seventy-five and ninety percent of surveyed attorneys believe that taking a reduced schedule would jeopardize

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44, 102, 126, 187, 251, 266, 277, 297; Williams & Calvert, *Balanced Hours*, *supra* note 94, at 370; Amy Bach, *Nolo Contendre*, N.Y. MAG., Dec. 11, 1995, at 54; Jim Oliphant, *X-ing Out Tradition*, BROWARD DAILY BUS. REV., Dec. 18, 1998, at 16; Amy Saltzman, *Woman vs. Woman*, U.S. NEWS & WORLD REP., Mar. 25, 1996, available at [http://www.usnews.com/biztech/articles/960325/archive\\_009948.htm](http://www.usnews.com/biztech/articles/960325/archive_009948.htm) (last visited Sept. 1, 2005).

108. Leo Cullum, cartoon, THE NEW YORKER, Apr. 30, 1998, available at <http://www.cartoonbank.com> (last visited Oct. 13, 2005).

109. Cynthia L. Cooper, *Moms V. Non-Moms: Does Law Firm Culture Widen the Riff?*, PERSPECTIVES (A.B.A. Comm’n on Women in the Profession, Chicago, Ill.), Win.-Spr. 2002, at 8-9.

110. Rhode, *Balanced Lives*, *supra* note 81, at 24; Joan Williams & Cynthia Thomas Calvert, *Is Your Firm’s Part Time Program a Retention Tool?*, LAW PRAC. MGMT., Apr. 2003, at 33, 34; Williams, *Canaries in the Mine*, *supra* note 99, at 2226; WOMEN’S BAR ASS’N MASS., *supra* note 82, at 16; CATALYST, FLEXIBLE WORK ARRANGEMENTS 54 (2000); Williams et al., *supra* note 92, at 416; Giglio, *supra* note 94, at 33; Sue Shellenbarger, *Work & Family*, WALL ST. J., Feb. 17, 2005, at D1.

111. See Marci Alboher Nusbaum, *Lawyers Push to Keep the Office at Bay*, N.Y. TIMES, Sept. 7, 2003, at C13; Dianne Molvig, *Balancing Work and Personal Life: Flexible Work Options*, WIS. LAW., Apr. 2004, at 10, 13; Paula A. Patton, *Women Lawyers: Their Status, Influence, and Retention in the Legal Profession*, 11 WM. & MARY J. WOMEN & L. 173, 180 (2005).

their legal career and prospects for partnership.<sup>112</sup>

None of these obstacles to alternative work arrangements are insurmountable. Such arrangements can include not only reduced hours, but compressed or flexible schedules, and telecommuting. Contrary to widespread perceptions, the research available does not find substantial client resistance to these alternatives.<sup>113</sup> What clients want is responsiveness and continuity. If a lawyer working a non-traditional schedule can address their needs within a reasonable time frame, or ensure competent backup assistance from someone else, clients typically have no objection. Indeed, they generally prefer such arrangements to the retraining costs associated with high attrition.<sup>114</sup> Moreover, full-time attorneys working excessive hours do not necessarily provide more accessible or efficient service. As one in-house counsel noted, almost no outside attorneys “will be devoted to our case one hundred percent, so why should I care what they are doing the rest of their time, whether it is other clients’ work or family? If they are not responsive, I’ll be upset; it doesn’t matter why.”<sup>115</sup> And as other clients have pointed out, a part-time lawyer on a cell phone from a playground may be more accessible than a full time lawyer in a deposition for someone else’s case.<sup>116</sup>

So too, firms can minimize the internal backlash from alternative schedules by not limiting their availability to parents, and by designing equitable plans for reallocating work.<sup>117</sup> Employers who have taken such an approach generally have not found that it “opens the floodgates” to

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112. CATALYST, *WOMEN IN LAW: MAKING THE CASE* 19 (2001). See Martha Neil, *Working 9-5, or 10-3, or 1-4 . . .*, A.B.A. J., Dec. 2003 (quoting NALP director about partnership perceptions), at <http://www.abanet.org/journal/ereport/1203ca.html> (last visited Oct. 13, 2005); Jennifer Martin, *Part-Time Lawyers Suffer Overwork: Are Perceived as Being Less Devoted*, BAR LEADER, Sept. 2001, available at <http://www.abanet.org/barserv/overwork.html> (last visited Nov. 25, 2005); Williams & Calvert, *Balanced Hours*, *supra* note 94, at 375 (discussing perceptions about partnership and advancement); Williams, *Canaries in the Mine*, *supra* note 99, at 2225-26 (discussing stigma).

113. Williams et al., *supra* note 92, at 445-47 (noting that all but a handful of interviewees did not object to such schedules, and many supported them as a way to reduce turnover); Williams and Calvert, *Balanced Hours*, *supra* note 94, at 372 (noting clients’ desire for policies that reduce turnover); Molvig, *supra* note 111, at 13, 54 (quoting managing partner James Sandman regarding client preferences).

114. Molvig, *supra* note 111, at 10, 14; Williams, *Canaries in the Mine*, *supra* note 99, at 2229.

115. Williams et al., *supra* note 92, at 445-46 (quoting unidentified attorney).

116. Rhode, *Balanced Lives*, *supra* note 81, at 20; see also Williams et al., *supra* note 92, at 445-46.

117. Williams et al., *supra* note 92, at 425-26; Rhode, *Balanced Lives*, *supra* note 81, at 34.

arrangements that are unprofitable for the firm or unacceptable to clients.<sup>118</sup> Thousands of organizations, both in law and comparable professional settings, function effectively with policies that were once assumed to be unworkable and unaffordable.<sup>119</sup>

#### IV. PROFITS AND PRIORITIES

In *THE PARADOX OF SUCCESS*, John O'Neil notes that monetary success brings many rewards, but not necessarily the ability to enjoy them.<sup>120</sup> For lawyers, the priority on profits may often be self defeating; it can squeeze out time for family, friends, public service, and personal interests that would ultimately prove more satisfying than the incremental income generated by excessive workloads. Particularly in large firms, the ultimate achievement, full equity partnership, typically promises no reprieve from the punishing schedules that preceded it. As a hiring partner at Covington & Burling once put it, the promotion process is similar to a "pie-eating contest where the prize is more pie."<sup>121</sup>

#### Income and Satisfaction

In fact, considerable evidence indicates that such reward structures are not the best route to professional satisfaction. Money plays a much smaller role in promoting personal satisfaction than is commonly assumed. Americans' income, controlled for inflation, is twice what it was in the late 1950s, but fewer report being very happy and more objective evidence concerning mental health difficulties also suggests a decline in well-being.<sup>122</sup> Researchers consistently find that for individuals at lawyers' income levels, differences in compensation bear relatively little relationship to differences in satisfaction.<sup>123</sup> Individuals earning \$200,000 are not

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118. Rhode, *Balanced Lives*, *supra* note 81, at 41.

119. *Id.*; Williams et al., *supra* note 92, at 378-79.

120. JOHN R. O'NEIL, *THE PARADOX OF SUCCESS* 26-31 (2004).

121. Marie Beaudette, *Associates Leave Firm in Doves*, NAT'L L.J., Oct. 6, 2003, at A1 (quoting Mark Plotkin).

122. GREGG EASTERBROOK, *THE PROGRESS PARADOX* 164 (2003); BUREAU OF THE CENSUS, *CENSUS OF POPULATION AND HOUSING, 2002*, *available at* <http://govinfo.library.orst.edu/stateis.html/> (last visited Nov. 2, 2005); Schiltz, *supra* note 84, at 881-89.

123. David G. Myers & Ed Diener, *Who is Happy?*, 6 PSYCHOL. SCI. 12, 13 (1995); JULIET B. SCHOR, *THE OVERSPENT AMERICAN* 9 (1998); ROBERT H. FRANK, *LUXURY FEVER* 72, 112-113 (1999); Matthew Herper, *Money Won't Buy You Happiness*, FORBES, Sept. 21, 2004, *available at* [http://www.forbes.com/technology/sciences/2004/09/21/cx\\_mh\\_0921happiness.html](http://www.forbes.com/technology/sciences/2004/09/21/cx_mh_0921happiness.html) (last visited Nov. 25, 2005).

significantly happier than those earning half that much.<sup>124</sup> There is also no relationship between compensation and fulfillment across different fields of practice. Discontent is greatest among well-paid large firm associates and least pronounced among relatively low-earning academics, public interest, and public sector employees.<sup>125</sup>

One reason for this disconnect between wealth and satisfaction is that most of what high incomes can buy does not yield enduring happiness. Desires, expectations, and standards of comparison tend to increase as rapidly as they are satisfied. As psychologists note, the transitory pleasure that comes through non-essential purchases is less critical in promoting well-being than other factors, such as individuals' relationship with families, friends, and communities, and their sense of contributing to larger societal ends.<sup>126</sup>

### Self-Defeating Dynamics

Yet several dynamics converge to trap lawyers into choices that overvalue income. One dynamic involves the difficulty of downward economic mobility. Attorneys who initially chose well-paying jobs in order to gain training and prestige, or to pay off student loans, often become habituated to the lifestyle that such positions make possible.<sup>127</sup> So too, the work required to generate high income creates a heightened sense of deprivation that fuels heightened demands. Attorneys working sweatshop hours feel entitled to goods and services that will make their lives easier and more pleasurable. This pattern of compensatory consumption can become self-perpetuating. As one refugee from large firm practice notes, lawyers frequently use the "substantial income from their jobs in an attempt to fill the voids created by their jobs."<sup>128</sup> Part of the reason many professionals accept grueling schedules is to afford "extras" for themselves or their families that they have little time to enjoy. Yet luxuries can readily become necessities and prevent attorneys from

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124. Robert E. Lane, *Does Money Buy Happiness?*, 113 PUB. INT. 56, 61, 63 (1993); FRANK, *supra* note 123, at 183.

125. NALP FOUND. & THE AMERICAN BAR FOUND., *supra* note 66, at 8, 10; BOSTON BAR ASS'N TASK FORCE ON PROF. FULFILLMENT, EXPECTATIONS, REALITY, & RECOMMENDATIONS FOR CHANGE, Aug. 15, 1997, available at <http://www.bostonbar.org/prs/fulfillment.htm>.

126. MARTIN E. P. SELIGMAN, AUTHENTIC HAPPINESS 9 (2002) (arguing that pleasure is less related to enduring happiness than engagement in relationships and a sense of meaning, which involves using personal capacities to make a broader societal contribution); Herper, *supra* note 123.

127. O'NEIL, *supra* note 120, at 132; WILLIAM R. KEATES, PROCEED WITH CAUTION 126-27 (1997).

128. KEATES, *supra* note 127, at 126.

opting for a more satisfying balance of personal, professional, and public service pursuits.

A desire for relative status pushes in a similar and equally corrosive direction. For many individuals, including lawyers, money is a key measure of achievement and self-esteem, and spending money is a way to signal success and social status. The desire to impress and display is deeply rooted in human nature, and in America's increasingly materialist culture, self-worth is linked to net worth.<sup>129</sup> Income is, to large extent, a "positional good;" individuals' perceptions of their own pay depends on its position relative to others.<sup>130</sup> The frequently public nature of personal salaries has made the competition for relative status easier to play and harder to win.<sup>131</sup> As economists note, this kind of arms race has few winners and many losers. There is, in fact, no room at the top. "Addictive ambition" fuels desires not readily satisfied.<sup>132</sup> Attorneys who look hard enough can always find someone getting something more.

These dynamics skew the priorities not only of individual lawyers but also of the firms that employ them. Because money is at the top of almost everyone's scale, it is easier to reach consensus on maximizing compensation than on other values such as reducing hours or subsidizing substantial pro bono commitments. Firms that sacrifice profits for other workplace satisfactions risk losing talented rainmakers and recruits who prefer greater earnings. Once high pay scales are established, they are difficult to dislodge. Downward mobility is painful, and the working conditions necessary to sustain such incomes then encourage the sense of deprivation and entitlement that fuel desires for further financial compensation. Even attorneys who initially entered the profession with modest financial aspirations and strong social justice commitments often become trapped in these reward cycles. If these lawyers cannot afford to do the kind of public-interest work that they would really like, they want at least to be very well paid for what they are doing.

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129. For a discussion of the need to impress, see RICHARD CONNIFF, *A NATURAL HISTORY OF THE RICH* 145 (2002).

130. Robert H. Frank, *How Not to Buy Happiness*, DAEDALUS, Spr. 2004, at 69, 79.

131. As Steven Brill, the former editor of the *AMERICAN LAWYER*, has noted, once legal periodicals began comparing law firm salaries, "suddenly all it took for a happy partner making \$250,000 to become a malcontent was to read that at the firm on the next block a classmate was pulling down \$300,000." Steven Brill, "Ruining" the Profession, *AM. LAW.*, July-Aug. 1996, at 5.

132. ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER TAKE-ALL SOCIETY* 41 (1995); O'NEIL, *supra* note 120, at 29-30; KEATES, *supra* note 127, at 144; SCHOR, *supra* note 123, at 5-12; Mike Papantonio, *Legal Egos on the Loose*, *A.B.A. J.*, Sept. 1999, at 108.

## V. STRATEGIES FOR CHANGE

Changing the culture of law firm practice will require strategies on multiple levels. Leaders of firms need to recognize all the ways in which ethics pays and ethics counts, and must restructure their policies accordingly. Leaders in the profession need to do more to insure that ethics does in fact pay, and to provide rewards and recognition for firms that meet best practice standards on issues involving ethics compliance, pro bono service, and balanced lives. And leaders in legal education need to devote more attention in their teaching and research to institutionalizing ethical values.

### Law Firms

One consistent finding of research on organizational culture is the significance of ethical commitment among those in leadership positions.<sup>133</sup> Leaders set a moral tone and a moral example by their own behavior.<sup>134</sup> Workers take cues about appropriate behavior from those in supervisory positions. Whether employees believe that leaders care about principles as much as profits significantly affects the frequency of ethical conduct.<sup>135</sup> Whether leaders actively convey support for pro bono service and balanced lives is also critical in institutionalizing those values, and in realizing their benefits in recruitment, retention, and productivity.<sup>136</sup> Consistency between words and practices is particularly important.<sup>137</sup> Core values need to shape day-to-day decisions concerning promotion, compensation,

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133. PAINE, VALUE SHIFT, *supra* note 5, at 249; Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 142-43 (1999) [hereinafter Treviño et al., *Managing Ethics and Legal Compliance*]; Lynn Sharpe Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., March-Apr. 1994, at 106, 113; CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY 50, 94, 203 (2002).

134. Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1, 10-11 (2003); Chris Moon & Clive Bonny, *Attitudes and Approaches*, in BUSINESS ETHICS 34 (Chris Moon & Clive Bonny eds., 2001); Michael Hoffman, *Integrating Ethics into Business Cultures*, in BUSINESS ETHICS, *supra* note 134, at 43-44, 51.

135. Treviño et al., *Managing Ethics and Legal Compliance*, *supra* note 133, at 142; Heesun Wee, *Corporate Ethics: Right Makes Might*, BUS. WK. ONLINE, Apr. 11, 2002 (describing findings of Ethics Research Center 2000 Survey), [http://www.businessweek.com/bwdaily/dnflash/apr2002/nf20020411\\_6350.htm](http://www.businessweek.com/bwdaily/dnflash/apr2002/nf20020411_6350.htm) (last visited Nov. 25, 2005).

136. RHODE, PRO BONO IN PRINCIPLE, *supra* note 57, at 30; Williams, *Canaries in the Mine*, *supra* note 99, at 2234-35; Williams et al., *supra* note 92, at 433-36.

137. Vicky Arnold et al., *Understanding the Factors Underlying Ethical Organizations: Enabling Continuous Ethical Improvement*, 15 J. APPLIED BUS. RES. 1, 10 (1999); Moon & Bonny, *supra* note 134, at 29-34; Hoffman, *supra* note 134, at 50.

performance evaluation, and billable hour requirements.

So, for example, to maintain an ethical workplace, firms need effective structures for raising and addressing ethical issues, as well as strategies for evaluating the adequacy of those structures. Systematic information is necessary concerning the nature and frequency of perceived ethical problems and the appropriateness of organizational responses. Do lawyers feel able to raise ethical concerns about clients, colleagues, and supervisors without risking adverse personal consequences? How well does the firm follow up on reports of possible misconduct? These are key factors in creating an ethical workplace climate, and too few legal employers have made serious attempts to assess them.<sup>138</sup>

On issues of pro bono contributions, law firms must ensure a closer relationship between professed values and daily practices. In theory, virtually all firms support such public service, but only a quarter fully count it toward meeting billable hour requirements, and only ten percent of surveyed lawyers believe that it is valued the same as paying work.<sup>139</sup> The inadequacy of current policies suggests obvious directions for reform. My own study identified best practices such as:

- a formal pro bono policy;
- visible commitment by the organization's leadership;
- credit for pro bono work toward billable hour requirements;
- consideration of pro bono service as a favorable factor in promotion and compensation decisions;
- recognition and showcasing of service;
- a pro bono committee or coordinator that matches participants with appropriate placements and ensures adequate training, supervision, and performance; and
- compliance with the Law Firm Pro Bono Challenge of three percent or five percent of billable hours or the ABA Model Rules' standard of fifty hours per lawyer per year or the financial equivalent.<sup>140</sup>

In determining what qualifies as "pro bono publico," firms should

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138. The same is true of business organizations. See Treviño et al., *Managing Ethics and Legal Compliance*, *supra* note 133, at 143-48; TREVIÑO & WEAVER, *MANAGING ETHICS*, *supra* note 16, at 224, 272; Paine, *Managing for Organizational Integrity*, *supra* note 133, at 113.

139. See RHODE, *PRO BONO IN PRINCIPLE*, *supra* note 57, at 138, 140, and text accompanying notes 68 and 73 *supra*.

140. RHODE, *PRO BONO IN PRINCIPLE*, *supra* note 57, at 169.

include only work that in fact focuses on the *public* good, not the concerns of family, friends, supervising partners, or deadbeat paying clients.

A comparable range of reforms is necessary on issues involving balanced lives. As noted earlier, excessive hours and inadequate alternatives are a widespread problem. Organizations such as the ABA Commission on Women in the Profession, Catalyst, and the Project on Attorney Retention at American University College of Law have proposed a variety of correctives, such as:

- reasonable billable hour standards that can accommodate significant family, pro bono service, and other personal commitments;
- broad eligibility for alternative schedules, including reduced time, flexible hours, compressed workweeks, and telecommuting,
- proportionate compensation and benefits for lawyers on reduced schedules;
- monitoring structures designed to minimize the risks associated with alternative schedules, such as poor quality assignments, lack of promotion opportunities, and workloads routinely exceeding agreed limits.<sup>141</sup>

Firms should also seek systematic information about work/life concerns from lawyers who are leaving the firm as well as those who remain.

### **Clients, Courts, and Bar Associations**

Related strategies should focus on providing more incentives for law firms to adopt adequate ethics, pro bono, and work/life initiatives. For example, bar associations could promulgate best practice standards on these issues and publicize the firms that comply. Courts or bar associations could also require legal employers to report information on at least some of these matters. After Florida instituted a pro bono reporting requirement, lawyers' volunteer hours and financial contributions grew substantially.<sup>142</sup>

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141. Williams, *Canaries in the Mine*, *supra* note 99, at 2234-37; Williams et al., *supra* note 92, at 423-32; Rhode, *Balanced Lives*, *supra* note 81, at 23-24; Rhode, *Balanced Lives for Lawyers*, *supra* note 81, at 2219. For a general approach to improving performance on gender-related issues see CATALYST, MAKING CHANGE: CREATING A BUSINESS-ALIGNED DIVERSITY SCORECARD (2005); and ERNST & YOUNG, SUPPORT FOR WOMEN'S LEADERSHIP, available at [http://www.ey.com/global/Content.nsf/US/About\\_Ernst\\_Young\\_-\\_Center\\_New\\_Workforce](http://www.ey.com/global/Content.nsf/US/About_Ernst_Young_-_Center_New_Workforce) (last visited Nov. 25, 2005).

142. Judith L. Maute, *Pro Bono Publico in Oklahoma: Time for Change*, 53 OKLA. L.

Similar progress has resulted from corporate clients' demand for information on racial and ethnic diversity in firms that they are considering as outside counsel.<sup>143</sup> But few corporate clients, only three percent in one recent survey, have required information about the pro bono involvement of firms that are seeking legal work.<sup>144</sup> Experience in other nations suggests that public service contributions would increase if more clients considered those contributions in selecting their lawyers.<sup>145</sup>

Public or private sector organizations that purchase substantial amounts of legal services could also make pro bono commitments a condition of representation. For example, in California, some municipalities, as well as the state government, include such provisions in contracts for legal services that exceed a specified amount.<sup>146</sup> Local governments in other nations not only consider pro bono efforts, but also require a percentage of the profits on their legal work to be used for charitable legal activities.<sup>147</sup>

More rewards and recognition should also go to firms with effective work/life policies. Pressure from clients would serve their own economic interests; they do not get cost-effective services from bleary, burned-out lawyers working sweatshop hours. The challenge remaining is to enable and encourage clients, as well as job applicants, to consider work/life issues when choosing among law firms. Publicizing firms' records concerning billable hour quotas and alternative schedules could assist that process.

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REV. 527 (2000) (noting the effects of pro bono amendments in twenty-two states and the District of Columbia); A.B.A. STANDING COMM. ON PRO BONO AND PUBLIC SERVICE, STATE PRO BONO REPORTING: A GUIDE FOR BAR LEADERS AND OTHERS CONSIDERING STRATEGIES FOR EXPANDING PRO BONO, Aug. 1999; Kellie Isbell & Sarah Sawle, *Pro Bono Publico: Voluntary Service and Mandatory Reporting*, 15 GEO. J. LEGAL ETHICS 845, 860-61 (2002).

143. For examples, see LAWYERS FOR ONE AMERICA, BAR NONE: REPORT TO THE PRESIDENT OF THE UNITED STATES ON THE STATUS OF PEOPLE OF COLOR AND PRO BONO SERVICES IN THE LEGAL PROFESSION 30-31, 45-46 (2000); ELIZABETH CHAMBLISS, A.B.A. COMM'N ON RACIAL AND ETHNIC DIVERSITY, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION ix (2004); BAR ASS'N OF SAN FRANCISCO, GOALS AND TIMETABLES FOR MINORITY HIRING AND ADVANCEMENT (2000).

144. Press release, Corp. Pro Bono Org., Survey Shows In-House Counsel Take an Interest in Pro Bono (Mar. 25, 2002), <http://corporatelibono.org/news/displayNews.cfm?newsID=1150> (last visited Nov. 25, 2005).

145. For efforts by the Solicitors' Pro Bono Group in Great Britain, see RHODE, PRO BONO IN PRINCIPLE, *supra* note 57, at 107; *Clients Put Pressure on Firms to Undertake Pro Bono Work*, LAWYER, Mar. 15, 2004, 13.

146. 2001 Cal. Stat. ch. 880, § 3 (AB 913) (amending CAL. BUS. & PROF., § 6072, effective Jan. 1, 2003. Shannon Lafferty, *Santa Clara to Require Pro Bono from Firms*, S.F. RECORDER, Apr. 11, 2002, at 2.

147. See RHODE, PRO BONO IN PRINCIPLE, *supra* note 57, at 110 for discussion of an Australian government requirement; *see also* Jason Silverii, *Government Releases Pro Bono Guidelines*, L. INST. J., May 2003, at 22.

### Law Schools

Further incentives for best practices in these areas could come from law schools. They could, for example, require legal employers who use campus placement facilities to disclose their pro bono and work/life policies, their employees' annual public service contributions, and the usage rates of alternative work schedules. Such information could also become part of national databases, directories, and media ranking systems.<sup>148</sup> Analogous reporting requirements could also be developed for the law schools themselves. Although ABA accreditation standards require schools to provide appropriate pro bono service opportunities, many institutions neither keep nor disclose specific information on participation rates. The best available information indicates that most students graduate without a law-related pro bono experience.<sup>149</sup> That record might improve if schools were required to disclose information on their student involvement as part of the accreditation process, or as a condition for membership in the Association of American Law Schools.

Messages about legal ethics, pro bono service, and balanced lives also need to be reinforced throughout the law school culture. Although issues of professional responsibility arise in all areas of legal practice, they are missing or marginal in most of legal education. Even less attention focuses on pro bono activities. One of the most dispiriting findings of my recent survey was that only one percent of surveyed attorneys recalled any discussion of pro bono responsibilities in their law school legal ethics courses or orientation programs.<sup>150</sup> Similar gaps occur with respect to work/life balance and its importance for the health and well-being of practitioners.<sup>151</sup> When evaluating career choices, students often have little grasp of what current billable hours requirements entail on a continuing basis and what other values may fall by the wayside.<sup>152</sup> All too often, legal education is silent on crucial issues facing students about how to structure a meaningful professional life. Correctives are obvious. Core courses can

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148. *The A-List*, AM. LAW., Sept. 1, 2005, at 84 (basing list on profitability, diversity, associate satisfaction, and pro bono work).

149. RHODE, PRO BONO IN PRINCIPLE, *supra* note 57, at 24.

150. *Id.* at 162.

151. Leading professional responsibility casebooks often provide no coverage of these issues. For exceptions, see DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS, *supra* note 91, at 79-88; GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 1090-91 (4th ed. 2004).

152. For discussion of law students' ignorance about the actual number of working hours needed to meet firm quotas, see generally Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991).

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include discussion of ethical issues and prominent pro bono cases, placement offices can showcase firms that comply with best practice standards on public service and work/life balance; and the administration can highlight these issues in extracurricular programs.

Law professors' research agendas reflect comparable omissions. Systematic studies of ethical compliance, pro bono practices, and work/life initiatives are noticeable for their absence. On the whole, legal educators have done far too little to educate themselves, their students, and their practitioner colleagues on crucial questions of professional values. We cannot afford to treat such issues of professional responsibility as someone else's responsibility.

Sigmund Freud began his classic account of *Civilization and its Discontents* with the observation that: "It is impossible to escape the impression that people commonly use false standards of measurement: that they seek power, success, and wealth for themselves and admire them in others, and that they underestimate what is of true value in life."<sup>153</sup> Lawyers are no exception. This symposium is a welcome opportunity to redirect our attention to core values and their role in law firm practice.

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153. SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 10 (James Strachey, trans., 1960).