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# Redeeming the Lawyer's Time: A Proposal for a Shift in How Attorneys Think About - And Utilize - Time

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## NOTE

### REDEEMING THE LAWYER'S TIME: A PROPOSAL FOR A SHIFT IN HOW ATTORNEYS THINK ABOUT—AND UTILIZE—TIME

JOSEPH E. LA RUE\*

#### INTRODUCTION

Dicta from case law reminds us that the practice of law has traditionally been classified as one of the three,<sup>1</sup> or perhaps four,<sup>2</sup> *professions*. Yet what exactly is meant—or should be meant—by that classification is subject to some dispute. Once upon a time, the word “profession” had a high and noble meaning. It was used to denote a vocation of service to others, requiring special knowledge acquired through education not readily available to the general public.<sup>3</sup> The Supreme Court offered the traditional definition of the term when it stated that a profession is:

[a] vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guid-

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1. *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1070 (8th Cir. 1992) (noting that, along with theology and medicine, law was one of the three recognized professions at common law).

2. *Lee Optical Co. v. State Bd. of Optometry*, 261 So. 2d 17, 26 (Ala. 1972) (“Through time the learned professions have been recognized as law, medicine, and the ministry, to which is sometimes added the profession of arms.”).

3. See Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231 (1995).

ing, or teaching them, or in serving their interests or welfare in the practice of an art founded on it. . . . The word implies professed attainments in special knowledge as distinguished from mere skill. A practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for its own purposes.<sup>4</sup>

Professions which understand themselves in these terms will naturally hold dear a sense of altruism as they place the good of society and those they serve above their own self-interest.<sup>5</sup>

A more recent, competing view—often associated with the philosophy of Max Weber—is that a profession is merely a cartel. Under this theory, the essential characteristic of a profession is that it is able to monopolize the furnishing of a particular kind of service.<sup>6</sup> Such a view of *profession* is naturally very business-orientated and cares primarily about protecting its own interests. Instead of emphasizing service to others, it focuses on maximizing profits. It is no doubt this view, or one similar to it, led Professor Alan Dershowitz to write in the introduction of his book of advice to young attorneys that his book would offer “some speculations on whether it is possible to be both an effective professional and a good person . . . .”<sup>7</sup> Once upon a time there would have been no doubt: of course professionals were good people. That premise is no longer blindly accepted.

The American legal community faces a crisis, the denouement of which will determine whether the practice of law remains a profession in the traditional sense or instead becomes recognized as merely another Weberian business-cartel.<sup>8</sup> While

4. *United States v. Laws*, 163 U.S. 258, 266 (1896) (citing the definition of the word “profession” in the Century Dictionary).

5. This is not to suggest that it used to be the case that all lawyers were predominately altruistic, or that there were not lawyers who frequently put their own interests above the good of society. Rather, it is simply to affirm that there was a time when being a professional meant more than earning a good living; it also meant giving back to society through service and leadership.

6. RICHARD L. ABEL, *AMERICAN LAWYERS* 17–30 (1989).

7. ALAN DERSHOWITZ, *LETTERS TO A YOUNG LAWYER* xviii (2001).

8. See generally MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); Carl T. Bogus, *The Death of an Honorable Profession*, 71 *IND. L.J.* 911 (1996).

many factors are frequently suggested as causing this crisis,<sup>9</sup> one seems to predominate, and that is the changing way attorneys think about—and utilize—their time.<sup>10</sup> This Note shall explore this changing conception and propose an alternative model for time utilization which, if implemented, will enable the service-oriented *profession* of law—with all it has meant and still means to society—to overcome the crisis of extinction it now faces.

To be fair, there have been other “crises” which have affected the legal profession through the years, yet the profession has always survived. For example, one thinks of such things as the dispute following the Revolution regarding whether English common law should remain the law of the land,<sup>11</sup> the establishment of the law school as the gate through which one must pass to enter the Bar,<sup>12</sup> and the introduction of racial<sup>13</sup> and gender<sup>14</sup>

9. Carl Bogus sees the problem primarily in terms of the shift from the “lawyer-statesman” (the professional in the historical-traditional sense of the term) to the “lawyer-technician,” which he defines as a mere seller of expertise, whose only goal is to advise his client how to reach the client’s objective and provide the services necessary to allow him to do so. See Bogus, *supra* note 8, at 920–21. Other factors frequently mentioned include:

[I]ncreased numbers of lawyers, increased litigiousness in American society, increased competition for clients, a win-at-all-costs mentality, poor treatment of clients, lack of discipline, increased emphasis on money in the practice of law, increased or offensive lawyer advertising, poor portrayal of attorneys by the media, changes in law firms (less firm loyalty, more firm reorganization, attorney layoffs), and failures in legal education.

Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 557–58 (1998) [hereinafter Daicoff, *Leopards*] (citations omitted).

10. See Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239 (2000) (reporting survey results of how billable hour requirements affect attorney satisfaction and lead to unethical activities by attorneys).

11. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 94–100 (1973).

12. *Id.* at 278–82, 525–38, 564–66. See ABEL, *supra* note 6, at 40, 42 (noting that law schools did not exist in America prior to 1817 and, as recently as 1923, not a single state made law school attendance compulsory for admission to the Bar). The last Supreme Court Justice without a law school degree was Robert H. Jackson, appointed in 1941. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 138 (2d ed. 2001).

13. WALTER J. LEONARD, *BLACK LAWYERS: TRAINING AND RESULTS, THEN AND NOW* (1977); GERALDINE R. SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* (1983); see also FRIEDMAN, *supra* note 11, at 553–54 (discussing established lawyers’ slow acceptance of “undesirables” into their ranks); see generally Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 955–56 (2004) (noting that, despite making law review and Order of the Coif at the University of Michigan Law School, the author was told frankly by partners at

diversity within legal education and the practice of law. Each of these crises required the profession to adapt to new viewpoints of society as it forged new understandings of itself.

As great as those crises may have seemed at the time, in retrospect they pale in comparison to the crisis the legal profession faces today. While those crises caused the profession to adapt to change, it was only an *adaptation* which took place; the profession, as such, remained recognizable. For example, had lawyers from the nineteenth century somehow been able to observe the racial and gender integration of law firms, they would have noted that the firms had lost their “white, male” monolithic character. They would, however, have still observed the familiar activities and attitudes of the *profession* of law: things such as a commitment to excellence in counseling and representing clients, a dedication to community service as well as civic leadership, and a “professional civility” in dealing with members of the Bar.

The crisis facing the legal community today, though, is different. It is a crisis with the potential to extinguish the profession as we know it, as it snuffs out the “professional nature” of the practice of law and turns it into nothing more than a business venture.<sup>15</sup> It is thus a *crisis of identity*, with the very nature and soul of the legal profession—what it is, and what it will be—at stake. At present, it is unclear how the crisis will be resolved, although it is very clear that the practice of law is moving in the direction of abandoning its professional moorings and identifying itself as a business. As the profession has sunk deeper into the depths of uncertainty as to what its true identity is, painful dysfunction has been the result. One commentator sums it up this way:

Public opinion of attorneys and the legal system is very low, dissatisfaction among lawyers . . . is widely known, substance abuse and other psychological problems are almost twice as frequent among attorneys as in the general population, attorney discipline cases and malpractice suits

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firms to which he applied in the mid-1960s that their firm “would not hire a Negro”).

14. See Sandra Day O’Connor, *Portia’s Progress*, 66 N.Y.U. L. Rev. 1546 (1991) (providing a brief history of women’s struggle for equality within the legal profession); see also CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 83–84 (2d ed. 1993) (opining that law has been “worse than other professions in its antipathy to women”).

15. Bogus, *supra* note 8, at 911 (“The legal profession is dead or dying. It is rotting away into an occupation.”).

appear to be common, and the lack of civility and "professionalism" among attorneys is frequently discussed.<sup>16</sup>

Against this background of unmitigated pessimism, this Note offers hope. Specifically, it shall present an alternative to the current view of time prevalent within the legal community and offer suggestions for how attorneys should think about and use time so as to restore the practice of law to its professional roots. By learning to think about and utilize time according to this model, attorneys will increase their quality of life as well as their job satisfaction.

Part I of the Note is this Introduction. Part II shall explore the current billable hour regime and the costs it imposes on lawyers.<sup>17</sup> Next, the suggestions of others for solving the professionalism crisis shall be considered.<sup>18</sup> Particular attention shall be paid to Professor Cathleen Kaveny's helpful suggestions for bringing a Catholic perspective of time to bear upon the practice of law.<sup>19</sup> The Note shall then offer a theological view of time from an evangelical Christian perspective and articulate what the author calls a "time-redemption model" for thinking about our use of time.<sup>20</sup> Finally, suggestions shall be offered for how attorneys might create a time-redeeming legal culture as a way to restore the profession to its professional moorings,<sup>21</sup> followed by a brief conclusion.<sup>22</sup>

Although a theological framework for understanding time from the evangelical tradition's approach to Christian theology will be suggested, it is not my intent to argue the superiority of an evangelical Christian understanding of time over Professor Kaveny's Roman Catholic one. Rather, my purpose is to provide another, viable option for resisting the billable hour regime and restoring a sense of traditional professionalism to the practice of law. It is not my claim that the model presented in this Note is the only acceptable one which allows attorneys to do that. It is, however, my hope that the model presented herein will be helpful to many as they struggle to find meaning and significance for their lives, their work, and their profession.

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16. Daicoff, *Leopards*, *supra* note 9, at 547 (citations omitted).

17. *See infra* Part I.A-C.

18. *See infra* Part II.A-B.

19. *See infra* Part II.B.

20. *See infra* Part III.A-B.

21. *See infra* Part IV.A-D.

22. *See infra* Part V.

## I. THE BILLABLE HOUR REGIME AND ITS TRAGIC COST TO LAWYERS AND SOCIETY

One would think that a system in which attorneys charged their clients for the actual time spent working for them would be a good thing. Besides the obvious benefit of providing a (seemingly) objective way to justify a bill to a client, the billable hour system provides a (seemingly) objective way for law firms to evaluate their associates for bonuses, raises, and promotions. “Seemingly,” though, has proven illusive. In spite of the theoretical benefits, the billable hour paradigm has failed miserably in practice, largely because of the ethical failures of billing partners who have sought to implement it and the attorneys who must live under it. For instance, lying to clients about their bills has become so widespread it is now said to have reached epidemic proportions.<sup>23</sup> This has caused even the most ethically-minded associates to feel that they must lie, or else place themselves at a competitive disadvantage when bonuses and raises are determined.<sup>24</sup> As can be imagined, clients are unhappy with the billable hour regime,<sup>25</sup> and many attorneys loathe it.<sup>26</sup>

The phenomenon of the billable hour is linked to the crisis of identity facing the legal profession. It is arguably the greatest facilitator for the movement toward a business-paradigm for the practice of law. Furthermore, the billable hour regime—with its ever-increasing demand for more hours billed—has led to many of the dysfunctions attorneys experience today.<sup>27</sup>

### A. *History of the Transition to Billing by the Hour*

The obsession with recording time on time sheets is so pervasive today that it is easy to forget that the billable hour regime

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23. Bogus, *supra* note 8, at 922 (“Padding time records is a genuine professional plague, one not confined to a few firms or even a few lawyers within most firms. It is a silent epidemic . . .”); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 665 (1990) [hereinafter Lerman, *Lying*] (noting frequent examples of “padding bills, billing two clients for the same time, doing unnecessary work to run the meter, and failing to disclose the basis of the bill”).

24. Fortney, *supra* note 10, at 279.

25. Stephen W. Jones & Melissa Beard Glover, *The Attack on Traditional Billing Practices*, 20 U. ARK. LITTLE ROCK L. REV. 293 (1998) (noting that clients are among those attacking traditional billing practices); Duncan A. MacDonald, *Gross Profits: A Client’s Perspective*, 22 HOFSTRA L. REV. 655 (1994) (discussing how hourly billing breeds cynicism and hostility).

26. James J. Alfani & Joseph N. Van Vooren, *Is There a Solution to the Problem of Lawyer Stress? The Law School Perspective*, 10 J.L. & HEALTH 61, 63 (1996) (noting that the hours associates have to work under the billable hour regime is the “single biggest complaint” about being a lawyer).

27. See generally Fortney, *supra* note 10.

is a fairly recent development in the practice of law.<sup>28</sup> Prior to the middle of the twentieth century, legal billing was more art than science.<sup>29</sup> A bill was prepared with a number of factors in mind: the amount of work done, the results achieved and their value to the client, and how much the client could legitimately be expected to pay.<sup>30</sup> Clients who could not afford to pay very much, or whose cases were thought to be especially worthwhile, were often charged less than wealthy clients or clients who were viewed as scoundrels.<sup>31</sup> Fees were not calculated according to any objective standard; rather, they were the result of the professional judgment of the attorney preparing the bill,<sup>32</sup> which contained a single figure with the explanation, "For Professional Services Rendered."<sup>33</sup> Lawyers took pride in being able to construct their bills in such a way that they were fair to both themselves and their clients.<sup>34</sup>

#### 1. The Birth of the Large Law Firm and the Introduction of Computer Technology Provided the Superstructure for the Transition to the Billable Hour Regime

In the 1960s, two factors converged that did away with this subjective standard of billing and provided the superstructure from which the billable hour regime would rise: the birth of the large law firm and the introduction of computerized methods of time-keeping.<sup>35</sup> In the early 1960s, only thirty-eight law firms in the United States had more than fifty attorneys, and most of those firms were in New York City. By the late 1980s, there were more than five hundred firms with more than fifty attorneys, while more than one hundred had over two hundred attorneys.<sup>36</sup>

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28. For a history of hourly billing, see generally GLENDON, *supra* note 8, at 29-30; WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF THE TIME-BASED BILLING BY ATTORNEYS* 9-22 (1996) [hereinafter ROSS, *HONEST HOUR*]; Bogus, *supra* note 8, at 922-24.

29. Bogus, *supra* note 8, at 922.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 922-23.

34. *Id.* at 923. Bogus notes that billing was thus "one of the ultimate tests of professionalism." The system worked largely because "lawyers believed that it was more important to be fair than it was to maximize income in the short run." Bogus sees this belief as having been "driven by the satisfaction that lawyers derived from being professionals." *Id.*

35. *Id.*

36. *Id.* (citing Mark Galanter & Thomas Palay, *The Transformation of the Big Law Firm*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 45 (Robert L. Nelson et al. eds., 1992)).



Law firms began growing in size for many reasons, but principal among them was the realization that attorneys can earn more money by selling the work of salaried associates than merely selling their own labor.<sup>37</sup> Because of overhead expenses and simple mathematics, no lawyer can personally generate enough through his own billings to equal what he can earn if he employs associates.<sup>38</sup> For example, a 1980 study conducted by Price Waterhouse showed that median partnership income in twelve large New York firms was \$242,685, while the gross fees generated by all the attorneys in those firms were only \$184,000.<sup>39</sup> This realization, coupled with the introduction of computer technology that allowed firms to easily collate and bill clients for the labor of multiple attorneys, led attorneys to become capitalists and firms to hire more associates.<sup>40</sup>

## 2. The Pressure to Make Enough Money to Sustain the Large Firm Gave Impetus to the Billable Hour Regime

As law firms grew, the practice of billing became more involved, with billing attorneys forced to justify their bills to firm managers, whose responsibility it was to make sure that the firm's associates were profitable.<sup>41</sup> These managers quickly learned that in order to ensure profitability, each associate had to bill about three times his salary.<sup>42</sup> This pressure on managers to ensure profitability caused them to be unsympathetic when partners wanted to write off their own time or that of the associates who were working under them (even when doing so would have been justifiable), which led ultimately to the collapse of the subjective method of billing.<sup>43</sup>

The transition to the billable hour regime did not happen all at once, though; rather, it was a bit-by-bit, step-by-step process. The pressure on law firm managers to ensure firm profitability through associate productivity led to the introduction of the time sheet. At first, these hourly figures served primarily as a point of

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37. ABEL, *supra* note 6, at 191. Interestingly, prior to 1910, no law firm billed for associates' time: the billable requirement for associates has been a twentieth century phenomenon. See William Kummel, Note, *A Market Approach to Law Firm Economics: A New Model for Pricing, Billing, Compensation and Ownership in Corporate Legal Services*, 1996 COLUM. BUS. L. REV. 379, 385 n.17 (citing LAW FIRM MANAGEMENT: A BUSINESS APPROACH § 6.2.1.3 (Susan S. Samuelson ed., 1994)).

38. ABEL, *supra* note 6, at 191.

39. *Id.*

40. *Id.* at 183.

41. *Id.* at 182.

42. ABEL, *supra* note 6, at 192.

43. Bogus, *supra* note 8, at 923.

departure for managing partners to determine fair bills, much as fair bills had always been determined.<sup>44</sup> However, as studies were published in the 1960s and 1970s which indicated that attorneys who determined their fees based solely on their hourly billing rates made more money than those attorneys who used other methods,<sup>45</sup> hourly billing became the favored method for billing clients.<sup>46</sup> Once the Supreme Court invalidated minimum fee schedules<sup>47</sup> the die was cast: billing by the hour came to be seen as the only sure way to maximize profitability.<sup>48</sup>

### 3. The Decisions of the Courts Gave Legitimacy to the Billable Hour Regime

As these changes were taking place within law firms, several cases involving unpaid attorney's fees allowed judges to weigh in on what factors should be considered when figuring clients' bills.<sup>49</sup> The upshot was that the courts announced that the "lode-star" for determining an attorney's fee should ordinarily be a consideration of the number of hours worked for a client, multiplied by the attorney's hourly billing rate.<sup>50</sup> At first, courts insisted that other factors—specifically, the quality of work produced and any contingent nature of success—be included in the equation.<sup>51</sup> While the "contingent nature of success" valuation could only be used to figure an increase in the attorney's fee,

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44. Ross, *HONEST HOUR*, *supra* note 28, at 19.

45. Kummel, *supra* note 37, at 385 (noting a study by the ABA, published in the early 1960s, which demonstrated that attorneys who billed by the hour were more profitable than those who did not); Ross, *HONEST HOUR*, *supra* note 28, at 17–19 (referring to the recommendations of various business consultants that attorneys would benefit by using timekeeping as a tool for office management).

46. Fortney, *supra* note 10, at 246.

47. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (declaring minimum fee schedules an illegal form of price fixing).

48. See Kummel, *supra* note 37, at 385.

49. Most of these cases involved Title VII civil rights litigation in which the plaintiff had prevailed and subsequently sought from the defendant "reasonable attorney fee[s]" under 42 U.S.C. § 1988 (2000). However, the principles they expressed for determining attorneys' fees are still relevant to this study, for they show what the courts viewed as the proper methodology to employ when determining clients' bills.

50. *Lindy Bros. Builders v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973) ("The value of an attorney's time generally is reflected in his normal billing rate. A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time—taking account of the attorney's legal reputation and status (partner, associate)."). The *Lindy* court used the descriptive word "lodestar" to describe this formula for determining attorneys' fees. *Id.* at 168.

51. *Id.*

reflecting the value of his time spent pursuing a case with less likelihood of success,<sup>52</sup> the work product valuation could conceivably be used to affect a departure either upward for superior work, or downward for inferior or inadequate work.<sup>53</sup> Ultimately, however, some courts placed such emphasis upon the product of the hourly rate multiplied by the hours expended that departures were ruled out of the equation,<sup>54</sup> while others continued to allow for other factors to be considered—but only for departures upward.<sup>55</sup> Interestingly, the factors that some courts have identified to be examined when awarding attorney's fees are similar to the factors that, prior to the rise of the billable hour regime, were considered by attorneys when figuring their bills.<sup>56</sup> The difference is that, whereas prior to the rise of the hourly billing method these factors could have been used to

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52. *Id.* The court noted that this valuation factor is especially important where the attorney does not have an agreement with the client guaranteeing payment even if no recovery is procured.

53. *Id.*

54. *See* *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 20 (1st Cir. 1979) (allowing attorney's fees for "counsel's standard hourly billing rates multiplied by the hours actually spent" working on the project); *Northcross v. Bd. of Educ.*, 611 F.2d 624, 636 (6th Cir. 1979) (holding that attorneys were entitled to recover fees for "all time reasonably spent on a matter," regardless of whether the "time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events"); *In re Montgomery County Real Estate Antitrust Litigation*, 83 F.R.D. 305, 322 (D. Md. 1979) (noting that because the skill of attorneys is generally already figured into their hourly rate, no departure upward for considerations of skill is needed).

55. *Zoll v. E. Allamakee Cmty. Sch. Dist.*, 588 F.2d 246, 252 (8th Cir. 1978) (noting that, while departures from the lodestar are allowed, they are only allowed upward, since the minimum courts should award as attorney fees should be at least the number of hours worked multiplied by the attorney's regular hourly rate).

56. According to the *Zoll* court, there are twelve such factors to be considered:

- (1) the time and labor required,
- (2) the novelty and difficulty of the question,
- (3) the skill requisite to perform the legal services properly,
- (4) the preclusion of other employment due to acceptance of the case,
- (5) the customary fee,
- (6) whether the fee is fixed or contingent,
- (7) time limitations imposed by the client or the circumstances,
- (8) the amount involved and the results obtained,
- (9) the experience, reputation and ability of the attorneys,
- (10) the undesirability of the case,
- (11) the nature and length of the professional relationship with the client and
- (12) awards in similar cases.

lower a client's bill, today they are almost universally used only for the purpose of increasing the bill.<sup>57</sup>

#### 4. Summary

It was in this way that lawyers' professional lives came to be dominated by the time sheet. It did not happen all at once; nor was there just one cause. Rather, at least seven primary factors played into the rise of the billable regime: first, the ever-present desire to maximize profits; second, the gradual realization that attorneys could make more money from the labor of others than they could from their own labor alone; third, the advent of large law firms as a way to harness that extra labor; fourth, the invention of the computer and time-management software, which provided the record keeping tools necessary to utilize that extra labor by tracking multiple attorneys' work and cross-referencing it for individual clients; fifth, the pressure on managing partners to make firms profitable, which meant that associates had to produce income equal to roughly three times their salary; sixth, the gradual realization that attorneys could make more money billing by the hour than with any other method; and seventh, the acceptance of billing by the hour by the courts.

Although billing by the hour may have had its genesis as a way for big firms to maximize profits, it quickly spread to firms of all sizes—so much so that today it is by far the most popular way for firms, regardless of size, to bill their clients.<sup>58</sup> This is not surprising since the billable hour regime purports to provide several benefits to firms employing it. First, and most significant, is the benefit of *financial remuneration*: studies indicate that attorneys who bill for their time make more money than those who do not.<sup>59</sup> Since attorneys at small firms presumably want to maximize their income as much as attorneys at large firms do, it makes sense that small firms would adopt the big firm practice of

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*Id.* at 252, n.11. These factors were first set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974), *overruled on other grounds by* *Blanchard v. Bergeron*, 489 U.S. 87 (1989). In *Johnson*, the guidelines applied to lawyers who undertook civil rights work, with no mention of whether the factors were only to be used for departures upward or were to be employed for departures both upward *and* downward. The *Zoll* Court, however, would only use these factors for making departures *upward* from the lodestar of hours worked multiplied by the hourly rate. Departures downward are not authorized under the *Zoll* analysis, since “the minimum award should generally be not less than the number of hours claimed times the attorney’s regular hourly rate[.]” *Zoll*, 588 F.2d at 252.

57. *Zoll*, 588 F.2d at 252.

58. Fortney, *supra* note 10, at 246.

59. See *supra* text accompanying notes 45–46.

hourly billing. The second benefit is that of *billing justification*: billing for time actually spent working on a client's legal issue makes it easier to justify the bill if the client questions it. At least, it is easier to justify a bill today than it used to be, when the only rationale the bill offered for the charge was, "For professional services rendered." The third benefit making the billable hour attractive to all firms is that it provides a *standard for comparison*: tracking billable hours provides firms with an easy way to compare one attorney with another in a sort of "apples to apples, oranges to oranges" manner. Finally, one should not discount the benefit of *legitimacy arising from conformation*: as more firms began billing by the hour and it became the accepted way to bill, the peer pressure must have been enormous on smaller firms to accept the practice and thus demonstrate that they were "real law firms."

#### B. *The Cost of the Billable Hour Regime: Something Dear Was Lost*

If there are benefits to be had from the billable regime, there are high costs as well—costs which make those who have chosen the path of law feel like something very dear has been lost to them. The billable requirement imposed by firms often separates attorneys from every other worthwhile pursuit they might enjoy. In 1987, the Chief Justice of the United States Supreme Court expressed his concern about the billing requirements of the billable regime when he asked, "What are the consequences to the associate, to the profession, and to the public at large if the associate is expected to bill two thousand or twenty-one hundred hours per year? Does such an associate have time to be *anything but* an associate lawyer in that large firm?"<sup>60</sup> Apparently the answer to the Chief's second question is a resounding "no," at least according to one commentator who opines that, "Much of what gives the lives of most people joy and meaning—family, friends, hobbies, the arts, recreation, exercise—are absent from [attorneys' lives]."<sup>61</sup>

Something dear *has* been lost under the billable hour regime. The most significant loss, of course, is that of the "professional nature" of the profession, as the practice of law is steadily becoming a business enterprise under the billable regime.<sup>62</sup>

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60. William H. Rehnquist, *The Legal Profession Today*, 62 IND. L. J. 151, 153 (1987).

61. Patrick J. Schlitz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 726 (1998).

62. See *supra* text accompanying notes 6–10.

But there are other losses as well—to the attorney and to the profession, as well as to those who love attorneys, and to society in general. Specifically, we may delineate four broad categories into which these losses may be placed. The loss of *time* is the overarching category, leading to both the loss of *community* and the loss of *integrity*. These losses lead ultimately to the loss of the attorney's own sense of *self*, as he becomes a mere cog in another's wheel, billing hour after hour, and losing track of why exactly it is that he is doing it. Each of these losses will be examined in turn.<sup>63</sup> It must be underscored at the outset, though, that the loss of time, which was brought about by the billable regime and the identity crisis to which it subjected the practice of law,<sup>64</sup> has led to each of these other losses: they are all a natural result of the loss of time attorneys now experience.

### 1. The Loss of Time

The increasing amount of time that attorneys work is well documented.<sup>65</sup> While the records are somewhat sketchy, the best available data indicates that the median number of billable hours during the 1960s was between 1400 and 1500 for both associates and partners.<sup>66</sup> In 1976, Wall Street associates were billing an average of 1667 hours each year.<sup>67</sup> A 1982 survey showed that associates billed an average of 1700 hours per year (although, attorneys at venerable Cravath, Swaine & Moore were already billing an average of 2100 hours); three years later, a survey of 150 medium-sized and large firms showed that the billable requirement for associates had reached 1760.<sup>68</sup>

Attorneys' workdays only got longer in the 1990s. According to a survey conducted in the mid-1990s, the median billable hours nationally were 1700 for partners and 1826 for associates.<sup>69</sup> Another study put the number of associates who billed at least 2000 hours in 1990 at forty-eight percent (with twenty-four percent billing at least 2000 hours, twenty percent billing at least

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63. See *infra* Parts I.B.1–5.

64. See *supra* Introduction.

65. See generally ABEL, *supra* note 6, at 192–93; Bogus, *supra* note 8, at 923–26; Patrick J. Schlitz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 888–94 (1999) [hereinafter Schlitz, *On Being*].

66. ABEL, *supra* note 6, at 192 (discussing studies from the 1960s that showed a median of 1410 hours billed per year in Colorado, 1450 in Florida, and 1500 in South Carolina).

67. *Id.*

68. *Id.*

69. Bogus, *supra* note 8, at 924 (citing ALTMAN WEIL PENZA, INC., THE 1995 SURVEY OF LAW FIRM ECONOMICS VII-11, at 1 (1995)).

2400 hours, and four percent claiming to have billed more than 3000 hours).<sup>70</sup> In 1993, fifty-one percent of associates and twenty-three percent of partners reported billing at least 2000 hours.<sup>71</sup> By the mid-1990s in some firms, partners and associates both averaged more than 2000 billable hours,<sup>72</sup> while some firms had instituted minimum billing requirements for associates of 2200 hours.<sup>73</sup>

The situation is even direr in the early part of the new century. Some firms now have billable requirements of 2300 to 2400 hours per year, and many require such lofty billing targets to be met before an associate becomes eligible for a bonus.<sup>74</sup> At first blush, 2000 billable hours—or even 2300 or 2400—does not seem like that much. This is a faulty assumption, however, because not all of the time an attorney spends in the office is “billable.” Examples include the obvious, such as the time spent eating meals, interacting with co-workers, getting coffee, talking on the phone with friends or family, and conducting personal business with those who can only be reached during business hours.<sup>75</sup> But there are also many other activities, without which the modern practice of law would be impossible, which nevertheless can not be billed. These include such things as administrative matters, client development, and professional activities.<sup>76</sup> All

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70. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 15 n.78 (1991) [hereinafter Ross, *Ethics*] (noting that these figures are “striking” because he included many small firm, small city associates in his survey, along with those from the big firm, big city environment).

71. ABEL, *supra* note 6, at 193.

72. *Id.*

73. Bogus, *supra* note 8, at 925.

74. Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money and Professional Integrity*, 30 HOFSTRA L. REV. 879, 885 (2002) [hereinafter Lerman, *Slippery Slope*]; see also Fortney, *supra* note 10, at 276–77 (noting that seventy-six percent of attorneys responding to a survey in 1999–2000 indicated that they either “strongly agreed” or “somewhat agreed” that their income and advancement within the firm were tied to their billable hours).

75. Bogus, *supra* note 8, at 925.

76. *Id.* Bogus lists the following as examples of administrative matters: “[D]iscussing work procedures with one’s secretary, the office manager, or other firm personnel; completing formal evaluations of such personnel, or other forms; reading a continuous flow of memoranda dealing with office policies; and attending firm meetings.” *Id.* at 925 n.126. For client development activities he identifies such things as:

meeting with potential clients to discuss the possibility of representation; serving on corporate or philanthropic boards for the purpose of meeting potential clients; attending bar association meetings to become acquainted with potential referrers of business; writing arti-

of these activities take *time*—somewhere between thirty<sup>77</sup> and thirty-three percent<sup>78</sup> of the work day, according to the best estimates.<sup>79</sup> Put another way, a typical attorney will work somewhere around three hours for every two hours he bills.<sup>80</sup>

At the onset of the billable hour regime, an attorney had to work roughly 2200 hours to generate his 1500 or so billable hours.<sup>81</sup> This required working nine hours per day, five days a week, or seven and a half hours per day, six days a week (assuming he took three weeks of vacations, sick days, and personal days; and that he did not work on the eight public holidays). Those were long hours, but attorneys could work them and still have a life outside of the office.

Today, that may no longer be the case. As the billable requirements have risen, the hours needed to keep up have become overwhelming. Consider how much time it takes to bill 1850 hours, which is clearly a low-end estimate of the hours attorneys are required to bill these days.<sup>82</sup> To bill 1850 hours per year requires 2775 hours of work-time, which means working eleven and a half hours per day, five days a week, or nine and a half hours per day, six days a week.<sup>83</sup> Add to that a half-hour commute each way,<sup>84</sup> and we may hypothesize that an attorney who wants to bill 1850 hours a year, and wants to be home on the weekends, leaves home each morning at 8:00 a.m., arrives at the office at 8:30, is at the office until 8:00 p.m. that night, and

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cles for legal or trade publications or lecturing at seminars to enhance one's visibility; and more direct forms of marketing.

*Id.* at 925 n.125. Professional activities include: "reading advance sheets and other professional literature; attending continuing legal education programs; engaging in bar association activities; and doing pro bono work." *Id.* at 925 n.127.

77. *See id.* at 925.

78. *See* Ross, *Ethics*, *supra* note 70, at 14 (stating that attorneys usually must spend three hours in the office for every two hours that they bill).

79. An empirical study regarding what percentage of an attorney's workday can be billed does not seem to have ever been conducted. While the two-to-one ratio for billable to non-billable time seems to be widely accepted, some posit other estimates. For instance, Glendon states that "it often takes 9 to 12 hours in the office to yield 7 hours of billable time," which means that somewhere between twenty-three percent and forty-two percent of the workday is consumed with non-billable tasks. GLENDON, *supra* note 8, at 30.

80. Ross, *Ethics*, *supra* note 70, at 14.

81. *See supra* text accompanying note 66.

82. *See supra* text accompanying notes 74–78.

83. Assuming, again, that the attorney took three weeks of vacations, sick days, and personal days, and that he did not work on the eight public holidays.

84. Obviously, the commute may be considerably longer. Any additional time spent commuting will naturally add to the time that the attorney is away from home.



doesn't arrive back home until 8:30. He does that every day, Monday through Friday. Or, if he prefers working Saturdays too, he leaves home each morning at 8:00 a.m., gets in the office and starts work by 8:30, works until 6:00 p.m., and gets home at 6:30, every day, Monday through *Saturday*. Those are *long* hours and leave little time—and, one would think, little energy—for activities outside of the office. Still, *some* time and energy are left.

Once we move beyond 1850 hours or so, though, the situation changes.<sup>85</sup> To bill 2000 hours, an attorney must work twelve and a half hours per day, five days per week, or ten hours per day, six days per week. Add on the conservatively-estimated half-hour commute, and our hypothetical attorney leaves home at 8:00 a.m., gets to the office and begins work at 8:30, works until 9:00 p.m., and arrives back home at 9:30. Or, if he chooses to work Monday through Saturday, he leaves home at 8:00 a.m. and arrives back home at 7:00 p.m. If an attorney wishes to bill 2200 hours, he must work eleven hours per day, six days per week. Of course, why stop at just eleven hours per day, when an extra hour each day—that is, twelve hours per day, six days per week—will yield 2400 hours of billable time?

Not surprisingly, billable hour requirements, and the time it takes to meet them, have negatively impacted attorneys' personal lives.<sup>86</sup> Many attorneys find that they no longer have time for the very activities and pursuits which give life meaning and joy. As Professor Schiltz noted,

What makes people happy is the *nature* of the work they do and the quantity and quality of their lives outside of work. Long hours at the office have no relationship to the former and take away from the latter. Every hour that lawyers spend at their desks is an hour that they do not spend doing many of the things that give their lives joy and meaning: being with their spouses, playing with their children, relaxing with their friends, visiting their parents, going to movies, reading books, volunteering at the homeless shelter, playing softball, collecting stamps, traveling the world, getting involved in a political campaign, going to church, working out at a health club. There's no mystery why lawyers are so unhappy: They work too much.<sup>87</sup>

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85. See Bogus, *supra* note 8, at 926 (noting that "[o]nce we move beyond perhaps 1800 billable hours per year, however, we are entering different terrain.").

86. See generally Fortney, *supra* note 10 (detailing the results of a survey describing the effect of billable hours on attorneys' lives).

87. Schiltz, *On Being*, *supra* note 65, at 895.

Thus, the first (and existentially most noticeable) loss that attorneys experience under the billable regime is the loss of *time*. As their lives become consumed with billable hour requirements, they have little or no time to do anything besides practice law. The second loss—the loss of *community*—flows directly from this loss of time.

## 2. The Loss of Community

In one of the seminal articles to consider the loss of professionalism within the practice of law, Professor Carl Bogus asked, “Do we want lawyers to enjoy family life? Do we want them to be involved parents?”<sup>88</sup> With the demands that the billable hour regime places upon attorneys’ time, it is difficult to think that we do. We would do well to wonder how attorneys can possibly have quality relationships with their spouses and/or children, or even with friends for that matter, if they are not able to spend quality time with them. Few doubt that relationships are important to our personhood. It has even been said that they are “intrinsic to the definition of the person. It is only in relationship with other people that the person is fulfilled.”<sup>89</sup> Yet, the loss of time that attorneys experience leads directly to a loss of community with others: many attorneys are simply too busy to forge deep, quality relationships.<sup>90</sup>

It was Stephen Covey who asked, “How many people on their deathbed wish they’d spent more time at the office?”<sup>91</sup> It was a *lawyer* who retorted,

We’ve all heard the cliché that “nobody on their death bed ever regretted not having spent more time at the office.” Sure! *If* you achieved a high degree of professional and financial success during your lifetime. But the reality is that there are many people who *should* regret not have spent more time at work. These are the people who failed to achieve their potential because of laziness or misplaced priorities. We rarely hear *their* deathbed regrets: “Damn, I should have spent more time working and less time with

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88. Bogus, *supra* note 8, at 926.

89. Amelia J. Uelmen, *Can a Religious Person Be a Big Firm Litigator?*, 26 *FORDHAM URB. L.J.* 1069, 1078 (1999) (commenting on Catholic teaching about life in society).

90. See Fortney, *supra* note 10, at 265–66 (noting that among attorneys surveyed, twenty-five percent indicated that they had “more trouble sustaining an intimate relationship than they used to”); Deborah L. Rhode, *The Professionalism Problem*, 39 *WM. & MARY L. REV.* 283, 300 (1998) (noting that nearly half of American attorneys believe they do not have sufficient time for their families).

91. STEPHEN R. COVEY ET AL., *FIRST THINGS FIRST* 17 (1994).

my ungrateful kids and the wife who left me for a more successful guy."<sup>92</sup>

Of course, one would like to ask Professor Dershowitz whether perhaps the reason lawyers' spouses leave them is because they are working too much, and home too little, as opposed to the other way around. Perhaps Professor Dershowitz had it wrong: perhaps attorneys should endeavor to spend not less, but *more* time at home connecting with their families.<sup>93</sup>

Not surprisingly in view of the hours lawyers work, married attorneys tend to be more dissatisfied with their marriages than non-lawyers,<sup>94</sup> and attorneys divorce more frequently than other professionals do.<sup>95</sup> While no doubt other factors are involved in attorneys' marriage difficulties, a predominant factor appears to be the stress the billable regime puts on attorneys' marriages.<sup>96</sup> Simply put, the extraordinary amount of time required of attorneys each day under the billable hour regime, and the stress that requirement produces, robs many attorneys of the opportunity to either forge relationships with others, or nurture relationships they already have. There simply is not enough time. Thus, community is lost.

### 3. The Loss of Integrity

A third loss lawyers experience as a result of the billable hour regime is the loss of integrity, especially as it relates to being honest about the amount of hours they bill.<sup>97</sup> It must be noted at the outset that not all lawyers have personally experienced this loss: we must suppose that some lawyers maintain their integrity in spite of the tremendous pressure to produce unrealistic billable hours.<sup>98</sup> Yet, as Chief Justice Rehnquist noted several years

92. DERSHOWITZ, *supra* note 7, at 25. To his credit, Dershowitz did elsewhere acknowledge that he personally worked "too hard." *Id.* at xviii.

93. See STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE FAMILIES* 117 (1997) (opining that until our commitment to our families is stronger than all our other time commitments, we will never truly make our family our priority).

94. SUSAN SWAIM DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* 10 (2004).

95. Schlitz, *On Being*, *supra* note 65, at 877.

96. DAICOFF, *supra* note 94, at 124–25.

97. There are other issues of integrity that have been in the spotlight in recent years, including such serious matters as stealing money from their firms, partners, and clients. See Lerman, *Lying*, *supra* note 23, at 686–88. These additional issues implicating integrity do not appear to rise directly from the imposition of the billable hour regime and so are beyond the scope of this Note.

98. See Bogus, *supra* note 8, at 927 (accepting that it is possible for some lawyers to honestly bill an extremely high volume of hours for several years

ago, the pressure to bill leads inevitably to the temptation to exaggerate the hours actually billed.<sup>99</sup> Many succumb to that temptation.<sup>100</sup>

Attorneys exaggerate their hours in four primary ways. First, some lawyers “run the meter.” They perform work that isn’t really necessary, and then bill the client for it.<sup>101</sup> This can be a useful—but still dishonest!—tactic when there is not sufficient work to legitimately meet one’s billable requirements.<sup>102</sup> The attorney may tell himself that he is not really doing anything wrong; after all, he *actually performed* the work for which he is billing the client, so the client received the benefit for which he is paying. Yet, if the work was not needed to solve the client’s problem, the client *has* been overcharged—the attorney *has* over billed—and the attorney who tries to tell himself otherwise is engaging in self-deception.

The second way attorneys exaggerate their hours is by padding their bills and double billing.<sup>103</sup> Padding takes place when extra charges are tacked on to legitimate bills. This may happen when the attorney believes that the client “can afford it,” or that the bill is so large, and so much work was done for the client, that a few extra hours will not be noticed.<sup>104</sup> Double billing, on the other hand, occurs when an attorney researches an issue that affects two or more clients and bills each of the clients for the full amount of his time spent researching. He may have spent four hours on his research, but if it benefits three clients, he is able to bill twelve hours of his time. The busy attorney scrambling to meet his 2000 hour billable requirement may reach a point at which he can justify to himself, and to others, the practices of padding and double billing. He cannot do so, however, without a loss of integrity.

The third way attorneys exaggerate bills is by what is known as “premium billing,” where substantial sums are added to the

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running, without padding the totals, but noting that the difficulty is so great that few lawyers have the stamina to do so for long).

99. Rehnquist, *supra* note 60, at 155.

100. See Lerman, *Lying, supra* note 23, at 705 (noting that nearly all of the attorneys she interviewed admitted to being deceitful in their billing practices); see also Bogus, *supra* note 8, at 927 (opining that “[m]ost people who are forced to work at this pace over long periods will succumb to the temptation to relieve some of the pressure by padding time”).

101. Lerman, *Lying, supra* note 23, at 706–09.

102. See *id.* at 714 (noting that some associates, especially in smaller firms, do not have enough work to meet their firms’ requirements, and so have to “fudge”).

103. *Id.* at 709–13.

104. *Id.* at 712.

client's bill, based on the billing attorney's subjective determination of the true value of the work to the client.<sup>105</sup> On one hand, this seems fair; after all, the attorney is only seeking compensation equal to what his work has really been worth. The problem, though, is that the client is not made aware of the way the bill has been computed.

The fourth, and apparently most common, way attorneys exaggerate bills is by estimating the hours they worked on behalf of their clients.<sup>106</sup>

Many have heard of the extreme cases, such as that of the partner in a Chicago firm who, for four years running, billed an average of almost 6000 hours per year.<sup>107</sup> His high billable year during that stretch was 1992 when he billed 6230 hours, and his low was 1990 when he billed 5568.<sup>108</sup> Most attorneys agree it is not possible to bill these types of hours without cheating.<sup>109</sup> But this attorney-billing-machine maintained that the hours were legitimate, explaining that the 6022 hours he billed in 1993 are explained by the fact that he worked fifty-two "all nighters" at an average of 21.4 hours per day, which accounts for 1113 hours.<sup>110</sup> Five hundred fifty hours represented a contingency fee from 1992.<sup>111</sup> The remaining 3759 hours were accomplished by working every day of the year (including weekends and holidays), billing an average of 12.2 hours per day.<sup>112</sup> He maintained that he only needed three to four hours of sleep per night, so his normal routine was to arrive at the office between 5 and 6 a.m. and leave for home at 11 p.m. or midnight.<sup>113</sup> In spite of his professed sincerity, it is difficult to believe that he lived this pace, day-in and day-out, *for four years*. And in fact, no one really believes it—not the lawyers in his firm,<sup>114</sup> and certainly not the lawyers in other firms.<sup>115</sup>

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105. *Id.* at 714–16.

106. *Id.* at 716–18. Lerman notes that this was perhaps the most common deceptive billing practice among the attorneys she interviewed. *Id.* at 716.

107. Karen Dillon, *6,022 Hours*, AM. LAW., JULY-AUG. 1994, at 57.

108. *Id.* at 58.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* (quoting associates at his firm who said such things as "There's no way anybody could do that," and "We used to joke, 'How did he get four kids?'").

115. *Id.* (quoting one associate at another firm who said, "This is a disgrace to the whole profession. We have enough troubles with our public image. . . . [N]obody in the profession regards this as plausible. Nobody.").

Though the attorney just described is obviously an extreme example, these practices are apparently quite common among many lawyers.<sup>116</sup> Attorneys often believe that if they refuse to pad their hours, they will be placed at a competitive disadvantage when bonuses, raises, and promotions are given.<sup>117</sup> As one attorney stated, "If you don't lie, you are perceived to be a slacker, even though, in reality, you may work far more than others."<sup>118</sup> With Professor Bogus we should pause for reflection: "What becomes of a profession that teaches recruits to lie? What happens to a profession that closes its eyes to a pattern of deceit?"<sup>119</sup> One must wonder what has gone wrong when, as John Grisham writes, "Most good lawyers can work eight or nine hours a day and bill twelve. . . . It's not exactly fair to the client, but it's something everybody does."<sup>120</sup> Though Grisham's work is fictional, it bears a frightening resemblance to fact. There has been a loss of integrity within the legal profession.

#### 4. The Loss of Self

Even worse than the loss of time, community, and integrity that attorneys experience as a result of the billable hour regime is the fourth loss, which may be thought of as *the loss of self*: attorneys are often so bogged down in their *work* that they lose track of the big picture of what it means to be *human*.

Once upon a time, when the practice of law was still clearly a profession in nature, being an attorney could help one live as a person at the highest level. He was able to do good, help others, be involved in his community, enjoy his relationships, and still provide a reasonable living for himself and his family. In short, practicing law provided what might be called "big-picture meaning" to life. With the advent of the billable regime and the loss of time, this all changed. The emphasis is no longer upon doing good, but rather upon maximizing profits. Chief Justice Rehnquist describes the change in viewpoint from the pre-billable era to the current one as follows:

At the time I practiced law, there was always a public aspect to the profession, and most lawyers did not regard themselves as totally discharging their obligation by simply put-

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116. For quotes of actual attorneys, illustrative of the widespread nature of this type of conduct, see generally Fortney, *supra* note 10; Lerman, *Lying, supra* note 23.

117. Fortney, *supra* note 10, at 279.

118. *Id.*

119. Bogus, *supra* note 8, at 926.

120. JOHN GRISHAM, *THE FIRM* 58 (1991). I am indebted to Professor Bogus's Article for reminding me of this quote. See Bogus, *supra* note 8, at 918.

ting in a given number of hours that could be billed to clients. Whether it was "pro bono" work of some sort, or a more generalized discharge of community obligation by serving on zoning boards, charity boards, and the like, lawyers felt that they could contribute something to the community in which they lived, and that they as well as the community would benefit from that contribution. . . . [A] law firm that requires an associate to bill in excess of two thousand hours per year, thereby sharply curtailing the productive expenditure of energy outside of work, is substantially more concerned with profit-maximization than were firms when I practiced.<sup>121</sup>

The upshot of this change is not just that attorneys have less time to do other things (as significant of a problem as that is); rather, it is that much of the *meaning* once inherent in serving as an attorney has been depleted, along with the sense of satisfaction in knowing that one's work really counts for something.<sup>122</sup> While the billable hour regime is not the only cause of this loss of meaning,<sup>123</sup> the shift from a focus upon doing good to a focus upon maximizing profits is one of the principle ones.

As attorneys have found little meaning for their lives from the practice of law, they have become increasingly psychologically unhealthy.<sup>124</sup> As compared to the general population, attorneys have a higher incidence of depression,<sup>125</sup> anxiety and other mental illnesses,<sup>126</sup> incidents of alcoholism and drug abuse,<sup>127</sup> and suicidal thoughts and tendencies.<sup>128</sup> Attorneys have lost

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121. Rehnquist, *supra* note 60, at 153.

122. See Howard J. Vogel, *The Terrible Bind of the Lawyer in the Modern World: The Problem of Hope, the Question of Identity, and the Recovery of Meaning in the Practice of Law*, 32 SETON HALL L. REV. 152, 156–57 (2001).

123. See Diacoff, *Leopards*, *supra* note 9, at 557–67. The additional causes she cites are beyond the scope of this Note.

124. See generally Diacoff, *Leopards*, *supra* note 9; Schlitz, *On Being*, *supra* note 65.

125. DIACOFF, *supra* note 94, at 8–9 (noting that depression is at least twice as prevalent among attorneys as the general population). See also GLENDON, *supra* note 8, at 87–91; Schlitz, *On Being*, *supra* note 65, at 874–75.

126. Schlitz, *On Being*, *supra* note 65, at 876 (noting that lawyers and law students have higher rates of anxiety, hostility and paranoia than the rest of the population).

127. *Id.* at 876–77 (noting that it has been "conservatively estimated" that fifteen percent of lawyers are alcoholics and that a study of Washington attorneys revealed that twenty-six percent had used cocaine, more than twice the rate of the rest of the population). See also GLENDON, *supra* note 8, at 87–91.

128. *Id.* at 879–80 (explaining that attorneys think about suicide more often than the general population and that, in one study, eleven percent of attorneys had contemplated suicide at least once a month for the past year).

track of the big picture of life—they have lost the sense of self. This loss, along with the losses of time, community, and integrity, is directly attributable to the rise of the billable regime.

## II. SUGGESTED SOLUTIONS: A SURVEY OF RECENT LITERATURE ADDRESSING THE PROBLEM

Many scholars have suggested plans for addressing the concerns cited thus far in this Note. Generally, those proposals may be grouped within three broad categories. First are those which begin with the premise that the way in which law is practiced has permanently changed. These proposals offer suggestions for how the practice of law can better conform to its new, business-oriented paradigm. The second category of proposals seeks to “turn back the clock” and restore the practice of law to its professional roots. The third category of proposals seek to address the identity crisis theologically, arguing that the law profession is “broken” spiritually, and cannot be “fixed” until the profession deals with the underlying spiritual issues.

### A. *First Proposal: We Should Accept The Fact That The Way Law Is Practiced Has Permanently Changed*

The first category of proposals which we shall consider are those which hypothesize that the professionalism model for the practice of law is over, and the business model holds sway—and will do so for at least the foreseeable future. Those who hold this view argue that the practice of law should adapt to the business model in order to overcome its crisis of identity. Professor Barnhizer summed up this approach well when he wrote, “It is time to accept that the unique professional identity that allowed lawyers to claim they were part of a special profession has been deleted from the equation of law practice and that lawyers are engaged in the business of making money just like any other business.”<sup>129</sup>

Generally, advocates of this approach desire greater regulation within the practice of law.<sup>130</sup> Professor Barnhizer’s article is

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129. David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 221 (2004).

130. This is the general argument of Barnhizer, *infra* note 142, and Pearce, *supra* note 3. Kummel, *supra* note 37, opines that the business model must undergo a radical change before it is acceptable for the practice of law, while another scholar advances an argument that the business paradigm will require law schools to change the way they prepare law students for the practice of law. See Gary A. Munneke, *Legal Skills for a Transforming Profession*, 22 PACE L. REV. 105 (2001).



representative of this class. He essentially argues that (1) because the practice of law today is not a principled profession in which attorneys are obligated to act in an ethical manner, but rather is a business activity run for profit,<sup>131</sup> and, (2) those within the legal profession either cannot or will not regulate themselves,<sup>132</sup> it is therefore necessary to impose regulation from outside the profession upon the practice of law.<sup>133</sup> As it stands now, "the system is set up in such a way as to shortchange the very clients who are supposedly at the core of a lawyer's responsibility."<sup>134</sup> Barnhizer would impose regulation by way of a combination of "market incentives, consumer protection, and external regulatory oversight."<sup>135</sup> Specifically, he would take regulatory authority for the practice of law away from the bar,<sup>136</sup> require disclosure in support of malpractice actions,<sup>137</sup> allow attorneys who report ethical violations to profit (so as to encourage reporting, which is currently nearly nonexistent),<sup>138</sup> create systems for malpractice mediation and arbitration which are independent of attorney-control,<sup>139</sup> retool the education of attorneys by creating mentoring programs and restructuring and abbreviating law school,<sup>140</sup> break the monopoly graduates of law schools have on the right to practice law,<sup>141</sup> create a disclosure and accountability database so potential clients may make informed decisions about attorneys,<sup>142</sup> institute accountability mechanisms to ensure that the regulatory scheme works,<sup>143</sup> and require the designation of "professional" to be earned through service.<sup>144</sup>

Barnhizer's proposal has much to commend it (though one may certainly argue with his thesis that the business model for the practice of law has definitely superseded the professional one).<sup>145</sup> With increased outside regulation of the practice it is

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131. Barnhizer, *supra* note 129, at 232-44.

132. *Id.* at 225-32.

133. *Id.* at 212.

134. *Id.*

135. *Id.* at 249.

136. *Id.* at 256-57.

137. *Id.* at 257.

138. *Id.* at 257-58.

139. *Id.* at 258.

140. *Id.* at 258-60.

141. *Id.* at 260-61.

142. *Id.* at 261-63.

143. *Id.* at 263-64.

144. *Id.* at 264-65.

145. I believe the profession stands now at a crossroads, and it is too early to say which direction the practice of law will ultimately move—whether toward a business model or back toward the professional one. See GLENDON, *supra* note 8, at 288 (reminding us that the crisis is less than seventy years old, which is "a

certainly conceivable that many of the ethical and moral abuses would be curtailed if not eliminated, and that the client would receive better protection.

This does not, however, solve the problems of lawyers who must live under the billable regime. True, if unethical behavior were eliminated from the practice of law, attorneys would not "run the meter,"<sup>146</sup> and they would not face the ethical dilemmas involved in choosing whether or not to pad time.<sup>147</sup> But that does not mean that attorneys will be asked to bill fewer hours. None of Barnhizer's proposals deal with the basic problems of attorneys viewing time as nothing more than a way to make money, and viewing associates as nothing more than lawyers who have time. So long as partners view associates' time as a potential profit-maximizing commodity for the partners, associates are going to experience the loss of time discussed above.<sup>148</sup> This loss of time will continue to lead to a loss of community, as well as a diminished sense of self, with all the attendant damages those losses bring to the attorney's life. Thus, while greater external regulation of the practice of law would solve some of the unethical behavior within the practice, such regulation would not ultimately offer a solution to the destructive effects that the billable regime has brought to bear upon attorneys.

B. *Second Proposal: We Should Turn Back The Clock And Restore Law To Its Professional Roots*

Another approach to the identity crisis afflicting the practice of law is the proposal that we should resist the business model for the practice of law, and seek to restore the practice to its professional roots.<sup>149</sup> Those advocating we "turn back the clock" generally agree that the profession must make changes which will restore it to its pristine character. Representative are the three broad changes suggested by Professor Susan Fortney, who posits that (1) firms must change the way they compensate both part-

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short span in the life of [legal] traditions that have been evolving since the thirteenth century").

146. See *supra* text accompanying notes 101–02.

147. See *supra* text accompanying notes 103–04.

148. See *supra* text accompanying notes 65–87.

149. To varying degrees this is the argument of Bogus, *supra* note 8; Timothy W. Floyd, *The Practice of Law as a Vocation or Calling*, 66 *FORDHAM L. REV.* 1405 (1998); Fortney, *supra* note 10; Elizabeth A. Kovachevich & Geri L. Waksler, *The Legal Profession: Edging Closer to Death With Each Passing Hour*, 20 *STETSON L. REV.* 419 (1991); Lerman, *Slippery Slope*, *supra* note 74; Rhode, *supra* note 90; and Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 *FLA. ST. U.L. REV.* 25 (1999).

ners and associates so as to reward ethical behavior<sup>150</sup> by (a) emphasizing the quality and ethicalness of work over the quantity of work;<sup>151</sup> (b) creating financial incentives for mentoring activities;<sup>152</sup> (c) providing reduced-hour work alternatives which still allow for the possibility of making partner;<sup>153</sup> and (d) emphasizing human resources management so as to improve the working conditions of the associates.<sup>154</sup> Next, Fortney advises that (2) law firms adopt alternative billing methods to better serve clients and free themselves from the pitfalls of the billable system.<sup>155</sup> Finally, she suggests that (3) changes be made to the regulatory system to address the abuses that have arisen under the billable regime.<sup>156</sup>

This approach (and others like it) is commendable for many reasons. Fortney takes seriously the fact that attorney greed has created the current billable system,<sup>157</sup> and that the only way to change the system is by creating financial incentives to do so. However, these types of solutions ultimately fail to be satisfactory because they do not address the bigger problem, underlying the entire billable regime, which is ultimately spiritual in nature. Professor Joseph Allegretti writes, "Let me be clear: *At its core the legal profession faces not so much a crisis of ethics, or commercialization, or public relations, but a spiritual crisis. Lawyers and the profession have lost their way.*"<sup>158</sup>

Allegretti is correct: there is a spiritual problem which undergirds the billable regime, and to simply address the symptoms without addressing the problem will solve nothing, for other problems will quickly resurface. Unfortunately, the spiritual problem has become such that the former chairman of prestigious Cadwalader, Wickersham and Taft could defend his efforts to betray his partners for an opportunity for greater earn-

150. Fortney, *supra* note 10, at 292-96.

151. *Id.* at 292-93.

152. *Id.* at 293-94.

153. *Id.* at 294-95.

154. *Id.* at 295-96.

155. *Id.* at 296-97.

156. *Id.* at 298-99.

157. See generally Lerman, *Slippery Slope*, *supra* note 74, at 881-90.

158. JOSEPH ALLEGRETTI, *THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 3 (1996). Dean Kronman of Yale Law School also refers to the crisis as "spiritual." See KRONMAN, *supra* note 8, at 2. Professor Howard Vogel argues that Allegretti and Kronman are using the same word, *spiritual*, but attaching two different meanings. Allegretti sees it as "religious in character," while Kronman makes no such statement. Vogel posits that Kronman uses the word in the way it is frequently used these days: to describe the contemporary malaise and the yearnings experienced by many today. See Vogel, *supra* note 122, at 152-53 n.2. For purposes of this Note, I will be using the word "spiritual" to denote something which is religious in character.

ings by saying, "Life is not made up of love; it is made up of fear and greed and money."<sup>159</sup> To attempt to cure the symptoms while ignoring the underlying spiritual problem simply will not do. It is akin to trying to restore humanity to the innocence it knew in the Garden of Eden:<sup>160</sup> it simply cannot happen. Our "eyes were opened,"<sup>161</sup> and we have seen what we think is the benefit of "fear and greed and money." A "fall" cannot be undone; one cannot go behind it and start over, as if it had never occurred.<sup>162</sup> With the "fall" comes consequences: one's eyes are opened, his innocence is destroyed,<sup>163</sup> and he is driven from the Garden.<sup>164</sup>

We should not think that there was a time when the practice of law really was *innocent*, for in fact there was not. Greed has always been part of the profession, because greed is part of the human condition. What is being suggested, rather, is that the billable regime has allowed greed to be ratcheted up to a new level, and attorneys who have tasted the fruit of that greed (i.e., increased compensation) are unlikely to be willing to return to a system in which they made less money, unless we address the spiritual problem that underlies the billable regime.

C. *Third Proposal: To "Fix" The Problem, We Must Address The Underlying Spiritual Issues*

A few have attempted to present a better way.<sup>165</sup> Notable among them is Professor Cathleen Kaveny, whose *Billable Hours*

159. Barnhizer, *supra* note 129, at 232.

160. *Genesis* 1, 2 (New American Standard Bible, and so throughout this Note unless otherwise indicated).

161. *Genesis* 3:7.

162. See DEREK KIDNER, *GENESIS* 69 (1967) (opining that, after the Fall, "there is no road back" because "God's way is forward").

163. *Genesis* 3:7 states that "they knew that they were naked." This implies the end of their innocent state. 1 C.F. KEIL & F. DELITZSCH, *COMMENTARY ON THE OLD TESTAMENT: THE PENTATEUCH* 96 (James Martin trans., Hendrickson Publishers 1989) (1986).

164. *Genesis* 3:24.

165. See generally ALLEGRETTI, *supra* note 158; THOMAS L. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES* (1991) (presenting legal ethics from a Catholic-Christian standpoint); THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981); Joseph Allegretti, *Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 *FORDHAM L. REV.* 1101 (1998); Gordon J. Beggs, *Laboring Under the Sun: An Old Testament Perspective on the Legal Profession*, 28 *PAC. L. J.* 257 (1996); Floyd, *supra* note 149; M. Cathleen Kaveny, *Billable Hours in Ordinary Time: A Theological Critique of the Instrumentalization of Time in Professional Life*, 33 *LOY. U. CHI. L.J.* 173 (2001); Peter J. Riga, *Spirituality of Lawyering*, 40 *CATH. LAW.* 295 (2001).

in *Ordinary Time*<sup>166</sup> critiques the billable regime's view of time and proposes an alternate perspective drawn from Catholic theology. She writes,

From a Catholic Christian world-view, time is intrinsically rather than instrumentally valuable; it is not a commodity but a mystery; its moments are not fungible, but in significant ways unique; it is not an endless, colorless present, but a spiral punctuated by moments of decision. Finally, viewed in this theological and liturgical perspective, time does not lead to fragmentation and isolation but calls for personal integration and the nurturing of community.<sup>167</sup>

Few if any can read these words and not intuitively know that she has offered a considerably better way to view time. However, after leading the reader through a promising critique of the billable regime, and an exciting proposal for a better understanding of time, Professor Kaveny ends "not with a bang, but a whimper."<sup>168</sup> She asks, "Can the view of time embedded in Catholic theology and liturgy actually challenge the dominance of billable hours?" to which she answers, "Very likely not."<sup>169</sup> Opining that "[t]he billable hours mentality . . . is actually not unique in our [legal] culture, but is a more sharply delineated version—almost a caricature of the view of time dominant in American life today,"<sup>170</sup> Professor Kaveny concludes the main part of her essay by offering three "countercultural" suggestions for how attorneys trapped by the billable regime can challenge it in their own lives.<sup>171</sup> She then invites those from other religious communities to share their tradition's perspective about time in hopes of suggesting solutions to the problem of the billable regime.<sup>172</sup>

It is to that task which I now turn. I write as an evangelical Christian.<sup>173</sup> I should say at the outset that I have no quarrel with

166. Kaveny, *supra* note 165.

167. *Id.* at 194 (citations omitted).

168. T.S. ELIOT, *The Hollow Men*, in COLLECTED POEMS 1909–1962, at 79, 82 (1963).

169. Kaveny, *supra* note 165, at 215.

170. *Id.* at 216.

171. *Id.* at 218–20. Her suggestions are: (1) develop and defend one's own normative vision of time's meaning; (2) develop counter-cultural practices for the use of time; and (3) when "counter-cultural" attorneys reach the level of firm management, they should change the culture of the firm.

172. *Id.* at 219.

173. Evangelicalism is a worldwide movement within Protestant Christianity which transcends denominational differences. Precisely because it is interdenominational, it is difficult to define precisely the boundaries of its theology so as to say, 'This is what evangelicalism is', or, 'This is what evangelicals believe.' Generally, though, it may be said that evangelicals are committed to three

Professor Kaveny's analysis of time from the Catholic perspective, with which I agree, or with her proposed suggestions, which I support. In fact, were one to adopt her understanding of time and implement her proposed suggestions, I would say that he had done a fine thing. Why then do I write? Simply put, I write for two reasons. First, I believe the evangelical Christian tradition offers a model for understanding time that, while similar to the Catholic Christian model, has enough differences that it deserves to be enunciated in its own right. Perhaps it will resonate with some for whom the Catholic Christian model does not. Second, I also write because I respectfully believe that Professor Kaveny did not go far enough in her analysis of solutions to the problem, and so some additions are in order.

### III. CONSTRUCTING A THEOLOGICAL VIEW OF TIME FROM AN EVANGELICAL CHRISTIAN PERSPECTIVE

An evangelical Christian model for understanding time will be set forth in this section. In the following section, that model will be used to suggest proposed solutions to the problem of the billable regime's destructive view of time.

#### A. *Antecedents to the Evangelical Understanding of Time*

There are many things which may be said about time. With Christians of every creed, evangelicals posit that time originated with God. The opening words of the Bible are, "In the beginning God created the heavens and the earth."<sup>174</sup> While this verse does

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broad propositions, each of which have numerous implications for faith and life: (1) *The Bible is the only trustworthy record of God's revelation of himself to humankind.* As such, it is superior to other means of guidance for the church, whether that be tradition, reason, or scholarship. (2) *The death of Christ upon the cross and his resurrection from the dead allow us to receive forgiveness from God for our wrongful acts.* A personal response to Christ's saving work upon the cross (usually called "conversion" or "being born again", and accomplished by "accepting Christ in faith as one's personal Savior") allows one to experience salvation from sin and the promise of eternity in heaven. (3) *God's offer to forgive us through Christ's death and resurrection should be shared with all people.* Thus, evangelicals place a premium upon evangelism.

For helpful introductions to evangelicalism, see generally AMAZING GRACE: EVANGELICALISM IN AUSTRALIA, BRITAIN, CANADA, AND THE UNITED STATES (George A. Rawlyk & Mark A. Noll eds., 1993); MARK ELLINGSEN, THE EVANGELICAL MOVEMENT: GROWTH, IMPACT, CONTROVERSY, DIALOG (1988); JOHN R. W. STOTT, WHAT IS AN EVANGELICAL? (1977); DEREK J. TIDBALL, WHO ARE THE EVANGELICALS? TRACING THE ROOTS OF TODAY'S MOVEMENTS (1994).

174. *Genesis* 1:1.

not explicitly say that God created *time* when He<sup>175</sup> created “the heavens and the earth,” it implies as much through its use of the phrase “in the beginning.”<sup>176</sup> Since at least the time of Augustine, the Church has had this understanding of the creation of time.<sup>177</sup> Additionally, because God is its creator, it is only reasonable that time is under His direction and oversight;<sup>178</sup> that it has rhythm and purpose;<sup>179</sup> and that it is moving toward an ultimate denouement, when temporal limitations shall pass away, and we shall be ushered into eternity with all its promise and grandeur.<sup>180</sup> Furthermore, time is to be used wisely, not wasted,<sup>181</sup> since none of us knows how much time we have<sup>182</sup> and what little we do have tends to be fleeting.<sup>183</sup> On these things Christians generally agree, no matter what their ecclesiastical background.

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175. In this Note I follow the traditional practice of using the capitalized, third person masculine pronoun when referring to Deity.

176. I KEIL & DELITZSCH, *supra* note 163, at 46–47; see also 2 WOLFHART PANNENBERG, *SYSTEMATIC THEOLOGY* 42–43 (Geoffrey W. Bromiley trans., 1994) (1991).

177. PAUL TILlich, *A HISTORY OF CHRISTIAN THOUGHT: FROM ITS JUDAIC AND HELLENISTIC ORIGINS TO EXISTENTIALISM* 117–19 (Carl E. Braaten ed., 1968).

178. *Psalms* 31:15 (“My times are in Thy hand”); *Psalms* 139:16 (“All the days ordained for me were written in your book before one of them came to be”) (New International Version); *Isaiah* 14:24 (“The LORD of hosts has sworn saying, ‘Surely, just as I have intended so it has happened, and just as I have planned so it will stand.’”).

179. This may be inferred from the refrain after each day of creation, “And there was evening and there was morning” (*Genesis* 1:5, 8, 13, 19, 23, 31), as well as in the institution of the Sabbath day, which created a pattern of six days of work, one day of rest (*Exodus* 20:8–11). See also *Ecclesiastes* 3:1–8 (stating that there “is a time” for all of life’s major events, indicating something of life’s rhythm).

180. *Revelation* 21:1–5.

181. *Proverbs* 6:6–11 (advising that we observe and model the industriousness of ants, who wisely use the summer and autumn months to set aside food for the winter); *Proverbs* 20:13 (“Do not love sleep, lest you become poor; open your eyes, and you will be satisfied with food.”); *Ecclesiastes* 11:4 (“He who watches the wind will not sow and he who looks at the clouds will not reap.”).

182. *Psalms* 90:12 (asking that God “teach us to number our days” that we might bear in mind the transitory nature of our lives and use them wisely). See also *Luke* 12:16–21 (Jesus’ parable of the “certain rich man” who made all his plans without any thought of God, to whom God said, “You fool! This very night your soul is required of you; and now who will own what you have prepared?”).

183. *Psalms* 90:10 (expressing that although the average person may be able to count on living seventy years or so, “the days of our life” soon are gone, no matter how many they are); *James* 4:13–14 (stating that we cannot count on earthly life beyond the immediate *now* since we are “just a vapor that appears for a little while and then vanishes away”).

### B. *A Distinctly Evangelical Contribution to the Understanding of Time*

One distinctly evangelical contribution to the Christian understanding of time arises from its joining of the concept of *opportunity* with that of *evangelism*. Evangelicals generally view opportunities as having two components: first, the face-value component (whatever the opportunity claims to be on its face); and second, the evangelistic component (how the opportunity might be used to reach others for Christ).<sup>184</sup> Evangelical Christians thus see opportunities to better human life, or to alleviate human suffering, as containing also an opportunity to share their faith with the world.<sup>185</sup> This is true no matter how great—or how minor—the face-value opportunity seems. Even opportunities as commonplace as taking food to a sick neighbor, or offering words of encouragement to a sad acquaintance, have evangelistic content. Evangelical pastors are quick to remind their congregants that, “The call to evangelize is a command.”<sup>186</sup> Thus, evangelicals constantly look for opportunities allowing them to share their faith;<sup>187</sup> for, as John Stott has written: “[A]ll followers of Jesus Christ have the responsibility, according to the opportunities which are given them, both to witness and to serve.”<sup>188</sup>

Because evangelicals see opportunities as having these two components, we hold that time is of the essence when it comes to seizing opportunities to share Christ’s love and message with others. This flows naturally from what evangelicals believe about sin, repentance, faith, and salvation, as well as the uncertainty of when death will occur or Christ will return: “[N]othing could be more ruthless than to make men think there is still plenty of time

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184. JOHN STOTT, *THE CONTEMPORARY CHRISTIAN: APPLYING GOD’S WORD TO TODAY’S WORLD* 340 (1992) (opining that “social activity” relates to evangelism as a *consequence* of it, a *bridge* to it, and a *partner* with it).

185. 2 DONALD G. BLOESCH, *ESSENTIALS OF EVANGELICAL THEOLOGY* 167–71 (1978).

186. MILLARD J. ERICKSON, *CHRISTIAN THEOLOGY* 1061 (2d ed. 1998) (reminding the church that Jesus’ final words to his followers before he ascended to heaven following his resurrection were a clarion call to evangelize the lost—see *Matthew* 28:18–20 and *Acts* 1:8). Erickson, the Distinguished Professor of Theology at Baylor University’s Truett Seminary, is considered a leading formulator of evangelical theology today. His writings are standard in most evangelical seminaries.

187. This phenomenon has even been noted by the courts. See *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1014 (4th Cir. 1996) (noting that “as an evangelical Christian, Chalmers believes she should share the gospel and looks for opportunities to do so”); see also *Henderson v. Stanton*, 76 F. Supp. 2d 10, 13 (D.D.C. 1999); *Meltebeke v. Bureau of Labor & Indus.*, 903 P.2d. 351, 353 (Or. 1995).

188. STOTT, *supra* note 184, at 341.



to mend their ways. To tell men that the cause is urgent, and that the kingdom of God is at hand is the most charitable and merciful act we can perform . . . .”<sup>189</sup>

### 1. The Biblical Imperative to “Redeem” Time

Flowing from this emphasis on evangelistic possibilities being bound up with ordinary opportunities comes a theme which is central to evangelical ethical formulations of how we should live our daily lives (and, presumably, how we should practice as attorneys): the imperative to “redeem” time. The Apostle<sup>190</sup> Paul wrote, “Be very careful, then, how you live—not as unwise but as wise, making the most of every opportunity, because the days are evil.”<sup>191</sup> The English phrase, *making the most of every opportunity*, is a rendering of Paul’s Greek word *ἐξαγοράζω*<sup>192</sup> (*exagorazō*), which literally meant “to redeem.”<sup>193</sup> The King James Version of the Bible translated the word literally,<sup>194</sup> and the New King James Version has followed suit,<sup>195</sup> although most modern English versions of the Bible employ more dynamic translations.<sup>196</sup> Elsewhere in the New Testament *exagorazō* is used to refer to the ransoming and liberating acts of Christ in redeeming humanity from sin and its consequences.<sup>197</sup> The concept of “redemption” need not carry such weighty soteriological implications, however. In the Bible, “to redeem” is also used to mean, “to buy back.” For instance, in the Old Testament<sup>198</sup> slaves could be redeemed if a member of his family pur-

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189. DIETRICH BONHOEFFER, *THE COST OF DISCIPLESHIP* 234 (R. H. Fuller trans., Touchstone 1995) (1937).

190. Evangelicals refer to the apostles of Christ, such as Peter and Paul, by their title of “Apostle,” rather than using the descriptive term “Saint,” which is the more common referent employed in the Catholic tradition.

191. *Ephesians* 5:15–16 (New International Version).

192. *THE GREEK NEW TESTAMENT* (Kurt Aland et al. eds., 1983).

193. BAUER-ARNDT-GINGRICH-DANKER, *A GREEK-ENGLISH LEXICON OF THE NEW TESTAMENT* 271 (2d ed. 1979).

194. *Ephesians* 5:16 (King James Version) (“Redeeming the time”).

195. *Ephesians* 5:16 (New King James Version) (“Redeeming the time”).

196. For a representative sample of modern English versions of the Bible, see *Ephesians* 5:16 in the New American Standard Bible (“making the most of your time”), New Century Version (“Use every chance you have for doing good”), and the New Living Translation (“Make the most of every opportunity for doing good”) in addition to the New International Version (quoted in the text of the note immediately preceding n.191).

197. Friedrich Büchsel, *ἀγοράζω, ἐξαγοράζω* in *1 THEOLOGICAL DICTIONARY OF THE NEW TESTAMENT* 124, 126 (Gerhard Kittel ed., Geoffrey W. Bromiley trans., 1999) (1964); see *Galatians* 3:15; 4:5.

198. The Old Testament was written in Hebrew and Aramaic but translated into Greek several hundred years before the birth of Christ. This transla-

chased his freedom.<sup>199</sup> Houses, which had been sold to another, could be redeemed,<sup>200</sup> as could fields.<sup>201</sup> However, even in these usages where the full soteriological element of salvation from sin is absent, it is not quite correct to say that soteriology is missing altogether. The slave who has been redeemed has been saved from slavery, and the house or field that has been redeemed has been saved from another's use. Their situations have been altered such that new, better possibilities are present. This is especially obvious with regard to the redeemed slave, who now has the full range of possibility inherent in freedom. But, it is equally true with the house or the field: who can say to what use the 'redeemer' will put them? Thus, even when salvation from sin is not the intended meaning of *redemption*, at some level someone or something is always being saved from someone or something else.<sup>202</sup> When one "buys back" a field, or a house, or (especially) a person, salvation of this limited sort has taken place.

With this as background, it becomes obvious that *exagorazō* in *Ephesians* 5:16 does not carry the full soteriological sense of Christ's work of redemption on our behalf, but rather the lesser sense of altering circumstances to create better possibilities. The meaning here is something akin to an "intensive buying" on our part,<sup>203</sup> so that a fuller, richer use of time is possible than would have been had it not been redeemed. The idea is "making the most of every opportunity"<sup>204</sup> by "exhausting the possibilities available,"<sup>205</sup> or, put another way, "to snap up every opportunity that comes."<sup>206</sup> Still, at least one commentator reminds us that

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tion, called the Septuagint, does not employ *ἐξαγοράζω* to translate the *כָּנָה* (*gaal*), "to redeem," but rather uses similar words. Still, the point remains true: *redemption* in the Old Testament is used to indicate that something has been "bought back."

199. *Leviticus* 25:48.

200. *Leviticus* 27:15.

201. *Leviticus* 27:19–20.

202. F. F. BRUCE, *NEW TESTAMENT DEVELOPMENT OF OLD TESTAMENT THEMES* 33–34 (1994) (noting that the very word, redemption, is "drawn from the language of the Exodus and the return from exile: as the people of God were redeemed from slavery in Egypt and later from captivity in Babylon so in the fullness of time they were redeemed by the sacrifice of Christ.").

203. Büchsel, *supra* note 197, at 128.

204. FRANCIS FOULKES, *EPHESIANS* 156 (Canon Leon Morris ed., 2000).

205. Büchsel, *supra* note 197, at 128.

206. D. H. Field, *Buy, Sell, Market*, in 1 *THE NEW INTERNATIONAL DICTIONARY OF NEW TESTAMENT THEOLOGY* 267, 268 (Colin Brown ed., 1986).

the word *does* contain the sense of “buy up the opportunity.”<sup>207</sup> He suggests that perhaps the meaning of these verses is something along the lines of:

[W]isdom makes the most of its opportunities. These seasons are brief, they soon slip by; one must recognize them and must buy while the buying is good. We say “use” the opportunity; Paul says “buy it out,” purchase all that it offers. That means: pay the necessary price in effort and exertion. . . . Our lives are brief and present only so much opportunity; he is truly wise who invests 100 percent at every opportunity . . . .<sup>208</sup>

## 2. Learning From the Evangelical Understanding

The meaning of *Ephesians* 5:15–16 is clear: wise people make the most of their opportunities. And, in context, the opportunities about which we are speaking are those to *do good*, since the days “are evil,” and Christians are called by God to live for Him. Indeed, one may even say that Christians have been called in part for the purpose of serving God by doing good.<sup>209</sup> The goal for the Christian (whether an attorney or not) is to recognize the opportunities God gives him, and “buy them up”—i.e., *redeem* them—for good. This is the proper view of time. The real purpose of time is not to see how many hours we can bill; the real purpose is to *do good*. As attorneys, that will naturally include *some* billing (at least so long as the billable regime remains in place), because work is a good—it helps give life purpose, and provides for our needs, as well as the needs of those with whom we are generous as we share our abundance.<sup>210</sup> It is not the purpose of this Note to suggest that attorneys should quit the prac-

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207. R. C. H. LENSKI, COMMENTARY ON THE NEW TESTAMENT: THE INTERPRETATION OF ST. PAUL'S EPISTLES TO THE GALATIANS, TO THE EPHESIANS, AND TO THE PHILIPPIANS 614–15 (1998).

208. *Id.*

209. *Ephesians* 2:10 (“For we are His workmanship, created in Christ Jesus for good works, which God prepared beforehand, that we should walk in them.”).

210. Indeed, God ordained work from the very beginning: “Then the LORD God took the man and put him into the garden of Eden to cultivate it and keep it . . . .” *Genesis* 2:15. He further sanctioned it in the Ten Commandments: “Six days you shall labor and do all your work . . . .” *Exodus* 20:9. Yet, work is not an end, but rather a means to help others: “Let him who steals steal no longer; but rather let him labor, performing with his own hands what is good, in order that he may have something to share with him who has need . . . .” *Ephesians* 4:28.

tice of law.<sup>211</sup> Rather, like everyone else, attorneys should recognize work is not the *only* good; and, if almost all of their available time is spent working and billing, they will likely miss significant, other opportunities for doing good that might well be better uses of their time. Because each of us has opportunities to do good every day, the question becomes, *Do we seize those opportunities, or do we let them pass because we are too busy to be interrupted with an opportunity to do good?*

Perhaps an illustration will make this clearer. C. S. Lewis observed, "Our life comes to us moment by moment. One moment disappears before the next comes along; and there is room for very little in each."<sup>212</sup> Indeed, often, there is room for only one activity or event in each of our moments. If, for example, I choose to cook my dinner from 5:00 until 5:30 this evening, that naturally precludes me from taking a walk through my neighborhood at the same time. I *could* conceivably choose to do either of those activities, but I cannot choose to do both of them at the same time—they are mutually exclusive. Neither activity is intrinsically better than the other, such that we can say that choosing one over the other is always a "better choice." However, one *might be* a better choice, depending on other circumstances and events. For example, if a thunderstorm is approaching, perhaps I should go for the walk and cook my dinner when I return home. On the other hand, if I have not eaten all day long and I'm feeling faint from hunger, perhaps I should cook my dinner and forego the walk. Or maybe there is something else which would make better use of the moments of my life stretching from 5:00 until 5:30 this evening—my child's piano recital, perhaps—and so I will forego both cooking and walking to fill my moments with this better opportunity. The point is, there are numerous activities with which I *could* fill my life from 5:00 until 5:30 this evening, and because I am a free creature I have the ability to choose which of those activities I will actually engage in. .

When we begin to think about time this way, we realize that every moment of our lives presents us with an opportunity to engage in *something*, and the question is: in what activity will we engage in this moment we have been given? Frequently, our choices are not intrinsically "good" or "bad," any more than cooking dinner is better or worse than taking a walk. Yet, some-

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211. In fact, the Apostle Paul tells us that the one who refuses to work should not be given charity. *2 Thessalonians* 3:10 (commanding that, "if anyone will not work, neither let him eat.").

212. C. S. LEWIS, *MERE CHRISTIANITY* 130 (1943).

times circumstances dictate that one choice is better than another, much like attending your child's piano recital is a better choice than taking a walk. Those who are "redeeming time" are aware that each moment of their lives counts, and so is to be used in the best way possible. Consequently, they endeavor to choose the best activity, out of all the possible choices, for each moment of their lives. They understand that their available moments are limited, and so they try to use the moments of their lives to accomplish good. As was previously stated, work is a good. So too, though, are other things, such as nurturing one's relationships with family and friends, worshiping one's God, and devoting time to serve others in some capacity. For that matter, so is cooking dinner and taking a walk. Those who seek to redeem time seek to bring all of these goods into balance, that they might make the best use of their lives for good. They truly seek to "make the most of every opportunity," and they recognize that sometimes doing so will mean working, and sometimes it will mean playing, while sometimes it will mean doing something entirely different.

As an evangelical Christian, I understand my purpose for doing good as more than just to accomplish that *particular* good, as if the good were an end in itself; rather, doing good is a means to the end of expressing my faith in God to the world, as well as sharing His love with the world.<sup>213</sup> Still, it is possible to sever these two concepts—seizing opportunities to do good, and utilizing those opportunities for the ultimate purpose of evangelism—and at this point in the Note we shall do so. One *need not* view doing good as a means to an end (whether of evangelism, or some other end) in order to choose to do good; rather, doing good may be viewed as an end in itself. Even John Stott severs the two concepts when he notes that for a Christian, "it is part of his Christian vocation to serve [humanity] in whatever way he can."<sup>214</sup>

As we transition from the preceding survey of evangelical Christianity's theological understanding of time to a more ethically based consideration of how we ought to live in time, it will serve us well to ponder a foundational question: instinctively, don't we know that practicing law with the goal of using our time to "do good" is better than practicing it with the goal of billing as much as we possibly can? Put differently, don't we all long to

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213. See JOHN STOTT, BASIC CHRISTIANITY 141 (1999) (stating that, "In his own home, among his friends in his college or at his place of business, it is [the Christian's] solemn responsibility to live a consistent, loving, humble, honest, Christ-like life, and to seek to win other people for him.").

214. STOTT, *supra* note 184, at 340.

practice law in such a way that, at the end of the day, we feel that we accomplished something *good*, something which was *valuable*, something which counts for more than a mere number on a time sheet representing the hours that we billed? Even as we are caught up in the world of the billable regime, we know in our heart-of-hearts that there must be a better way, and we hope in our deepest dreams that someone will *save us* from the destruction of the billable regime, and redeem us for a higher purpose in the practice of law?

So, how do we dismantle the billable regime? How do we go beyond the business model for the practice of law, and reach a point where we have time to seize opportunities to do good? The rest of this Note shall examine that question, suggesting strategies that will allow attorneys to structure their lives and practices in a more time-redeeming way.

#### IV. CREATING TIME-REDEEMING ATTORNEYS IN A TIME-REDEEMING LEGAL CULTURE

It only stands to reason that if *we* want a different approach to time within the legal profession, *we* must approach time differently ourselves. We may wish that someone else would come as a messiah to save us from the billable regime; but, if we are to be saved and our lives redeemed (in the lesser sense), it seems that we must begin the process ourselves. Though it would obviously be easier to do so if the profession as a whole approached time differently, we cannot afford to wait on that eventuality. The fact is that the eventuality is unlikely to arise if *someone* does not begin the process of viewing time, and using time, differently. John Stott wrote that for society to change in a way Christians will find beneficial, they must willingly embrace the responsibility of permeating society and infusing it with the morality of the gospel.<sup>215</sup> In much the same way, for law firms—steeped in the billable regime as they are—to change so as to provide our lives as lawyers with fuller meaning and purpose, those of us who believe that we should make wiser choices with our use of time and seize opportunities to do good must begin the process.

Of course, we must recognize that in the short-term we will be counter-cultural in doing so. Firms will not allow us to decrease our billables, simply because we say that we now have a different view of time. Nor will they encourage us to make choices 'to do good,' if such choices ultimately conflict with their

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215. *Id.* at 350–51.

bottom line. So, what can we do to begin the process of creating a time-redeeming culture, and become time-redeeming lawyers?

### A. *Making Better Choices With Our Use of Time*

First, we must make better choices with our personal use of time. What I mean is this: we should ask ourselves before doing anything that uses time whether that activity is time-redeeming. Some of our uses of time—especially in our jobs—are non-discretionary. For example, when a partner tells a young associate she needs an answer before the end of the day that associate will have to research that partner's question, no matter whether that is the best use of his time or not. Many of the activities in which we engage are not obligatory in the sense described above, though, and so are discretionary uses of time. These activities are the ones I am suggesting should be evaluated in light of the time-redemption model. For instance, consider our society's obsession with television. Many attorneys who claim they have "no time" for what they say they consider the really important things in life—their families, for instance, or civic leadership, perhaps—have time to watch television. Perhaps television viewing would be an activity better left undone so as to spend more time with one's spouse and children. The same is true of many of the activities in which we engage. What I am suggesting is: if we want to be time-redeeming people, who "make the most of every opportunity," we have to *honestly* evaluate the opportunities we are given and choose accordingly.

Now, one might argue that he only watches television late at night, after the children are in bed. That is good so far as it goes; but, could he be doing other activities during that time, that would free up time for when the children are awake? With the advent of online research tools and word processors, even much legal work can be done from the home. Could the busy attorney perhaps work after the children have gone to bed, so as to have time available for them when they are awake? Another choice many attorneys make with respect to their use of time has to do with whether they will pursue a bonus or not. Many firms have structured bonuses in such a way that they are only awarded to those who not only meet their minimum billing requirement, but also bill significantly above it. Ultimately, attorneys make choices as to whether they are going to do that or not. The time-redeeming attorney will evaluate the effect of that extra billing on his life, as well as the lives of his loved ones, and choose accordingly. This is not to say that all attorneys should forego the extra income that extra billing can bring. It is simply to say that

thought should be given to the choice, rather than just mindlessly billing more than one has to because "everyone else does it." Another choice time-redeeming attorneys will make is the choice to say, "No" when the situation dictates. Admittedly, this is more difficult for younger associates than it is for more senior associates and partners. Still, there are situations which compel the time-redeeming attorney to choose another activity at that particular moment, rather than acquiesce to the subtle pressure to put the career first, no matter what. While there *are* times when, because of the nature of the practice, we are given work without warning which must be completed immediately and so we *must* work late (and perhaps miss a scheduled event with friends or family), it seems to me that there are many more times when we make the choice to do so. We choose to work late, rather than to say to the one offering us the work, "I'm sorry. I already have plans tonight. Can I start it for you tomorrow?" Time-redeeming attorneys make wise choices regarding when to take the work and when to pass on it, because they are committed to "making the most of every opportunity."

### B. *Redefining Personal Success*

Many attorneys have been so indoctrinated by the billable hour regime that they honestly believe that their success is tied to the amount of hours they bill and the amount of money they make. They are constantly stressed out because of the billable requirements, but they cannot contemplate billing less, because that would mean they would not be as successful. Time-redeeming attorneys repudiate this reasoning. Instead, they define success according to the amount of good they do, not the amount of hours they bill. What this means is: time-redeeming attorneys understand the importance of balance in their lives, and they define their personal success according to how closely to the ideal they achieve that balance.

There are many things we may do with our time which are "good." We might make a list that looks like this: (1) Being a good spouse/parent/friend; (2) Being a good employee; (3) Being involved in community service. The religious person might add (4) Being involved in his faith community. Someone else might add (5) Being involved in community theater. The point is, these lists are highly individual, but they define for us what we perceive "the good" that we can do to be. *Success*, then, is the balancing of all of these possible goods, so that none gets neglected. When we view success this way, it becomes much eas-



ier to say “no” to work assignments that we do not really have to take; in fact, it often becomes imperative that we do so.

### C. *Changing the Culture from the Bottom, Up*

Professor Kaveny suggests that it is unrealistic to believe that law firm culture will change much in the short term and that the only real solution is for attorneys who view time differently to reach the level of law firm leadership.<sup>216</sup> Ultimately, she may be right. But, we can be sure that nothing will change if we do not try to change it. It therefore is important that every time-redeeming attorney, from the highest partner to the lowest associate, lives his/her life within the firm as a “change agent.” We can do this by enthusiastically talking about our new view of time every chance we get, as well as what a difference this view of time is making in our lives (in terms of balance and happiness). By doing so we plant seeds that might bear the fruit of change more quickly than we would think.

### CONCLUSION

The billable hour regime currently dominates the practice of law. It makes life difficult for those who must practice under its shadow. This Note has traced the history of the rise of the regime, described the costs it has imposed on attorneys, offered the suggestions of others for lessening those costs as well as the author’s suggestion of adopting and implementing a theological understanding of time, and talked about what needs to happen to make a time-redeeming model of time, drawn from that theological understanding, a reality.

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216. Kaveny, *supra* note 165, at 215, 220.