BOOK REVIEW

Rumors of the Death of BigLaw Are Greatly Exaggerated Reviewing Mitt Regan & Lisa H. Rohrer, *BigLaw: Money and Meaning in the Modern Law Firm* (University of Chicago Press 2021)

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Abstract

Many legal profession scholars have predicted the decline, or even demise, of large law firms. But not only are they still with us, they are flourishing. Drawing from hundreds of interviews with firm partners, Mitt Regan and Lisa Rohrer offer a sophisticated explanation of the resilience of this form of organizing the delivery of legal services. Regan and Rohrer see firm managers as trying to solve a Prisoner's Dilemma and Assurance Game in light of the risk that partners with a substantial book of business may exit the firm and take their clients to another firm. Financial and non-financial rewards, many of which are within the control of firm management, provide firm-specific capital that keep partners committed to their existing firms and prevent their defection on the lateral market. Regan and Rohrer argue that they have identified a distinctive ethical conception of lawyering associated with BigLaw that combines business logic and the logic of professionalism. This Review considers the relationship between large firm structure and compensation practices and some competing conceptions of ethical lawyering.

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INTRODUCTION: BIGLAW AND ITS DISCONTENTS

Mitt Regan and Lisa Rohrer's new book, *BigLaw: Money and Meaning in the Modern Law Firm*, offers a nuanced explanation of both the economics and ethics of the large law firm structure.[1] The book is the result of a qualitative empirical study, drawing from 279 interviews with partners at large law firms.[2] Although it does not ask this question explicitly, it may be understood as an explanation of how it can be the case that the big-firm mode of organization can not only continue to exist, but also flourish, despite predictions of its demise. The authors' account relies on a conception of professionalism that avoids the artificial dichotomy between a business and a profession. Rather, as Regan and Rohrer understand it, professionalism is a normative middle ground that allows lawyers to

1. MITT REGAN & LISA H. ROHRER, BIGLAW: MONEY AND MEANING IN THE MODERN LAW FIRM (2021). I have always disliked the expression "BigLaw," perhaps because I associate it with the obnoxious legal website *Above the Law* and online culture more generally, although the term was used in Larry Ribstein's 2010 article. Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749 (2010). Regan and Rohrer do not offer a formal definition of the scope of the firms contemplated by their book's title, except to refer to law firms in the AmLaw 100 and 200 annual rankings published by *American Lawyer* magazine. *See* REGAN & ROHRER, *supra*, at 4–5. The familiar distinction drawn by John Heinz and Edward Laumann between two hemispheres of legal practice, differentiated by the identity of the client and distinct from one another in terms of prestige, does not map exactly onto the contemporary idea of BigLaw. *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 379 (1982). A roughly contemporaneous article talks somewhat loosely about large law firms representing corporate clients, which is not a bad definition of BigLaw. *See* Robert A. Kagan and Robert E. Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 404 (1985). Law professor Deborah J. Merritt has suggested that, based on online chatter among prospective law students, the salient distinction would be between law schools that do a good job placing students into jobs in BigLaw rather than "shitlaw." *See* Deborah J. Merritt, *Two Hemispheres*, L. SCH. CAFÉ (May 2, 2015), https://www.lawschoolcafe.org/2015/05/02/two-hemispheres/ [https://perma.cc/752U-SXW2]. Needless to say, I do not endorse the term "shitlaw" to refer to working in firms that serve the legal needs of individuals or small companies as opposed to giant multinational corporations. However, the law firm partners interviewed for this book are mostly involved with producing "bespoke" legal services as opposed to delivering a more routine, commoditized product. *See* REGAN & ROHRER, *supra*, at 40–41, 105 (describing the "legal services cycle" in which firms initially deliver innovative, high-margin services but these premium profits are eroded as new market entrants develop more efficient ways to deliver the services). In thinking about the scope of this book, I will use something like an amalgam of Regan and Rohrer and Heinz and Lauman's definitions, talking about law firms representing organizations, not individuals, and with sufficient earnings to have a fighting chance of making it onto an *American Lawyer* list, and also concerned with delivering specialized, non-routine services.

2. REGAN & ROHRER, *supra* note 1, at 247–48.

"attend to the need for financial viability in light of market conditions" while at the same time realizing "the nonfinancial values of professionalism."[3]

The legal practice model of large firms serving mostly corporate clients faces a structural crisis, is in serious decline, or is on life support, depending on whom you ask.[4] Some version of this story has been told for decades. When I entered law practice in the mid-1990s, all the talk was about the relatively recent increase in lateral moves by law firm partners, leading to a transformation from collegial governance and lockstep compensation to a more nimble but ruthless "eat what you kill" mentality.[5] Lawyers were talking about client dissatisfaction with hourly billing and a demand for alternative fee structures.[6] The increased prominence of globalization and digital technology led to worries about the unbundling and outsourcing of formerly lucrative work such as document review. In his 1993 book, *The Lost Lawyer*, former Yale Law School Dean Anthony Kronman lamented the end of a long era in which outside law firms served as trusted business advisors as well as providers of specialized legal services. Serving as a kind of riposte to Kronman, Ben Heineman, the former general counsel of General Electric, published *The Inside Counsel Revolution* in 2016, arguing that it was a good thing, from the point of view of the interests of corporate clients, that in-house counsel had taken on a much more prominent role vis-à-vis outside law firms. Around the same time, scholars predicted that novel organizational structures, exemplified by firms like Axiom, would render traditional law firms obsolete.[7] Nowadays the concern about the decline of large law firms—or barely concealed glee at their expected demise—is often accompanied by predictions that artificial intelligence and Big Data-driven approaches will render human lawyers obsolete at performing most legal tasks.[8] Even if we are not yet in a world populated by robo-lawyers and robo-judges, upstart technology-enabled competitors like LegalZoom threaten the viability of some lawyers' practices—namely, those who provide relatively routine, "commoditized," legal services such as the drafting of wills and formation documents for small business entities. The consistent message is that large law firms are going the way of formerly dominant

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3. REGAN & ROHRER, *supra* note 1, at 24.

4. *See, e.g.*, BENJAMIN H. BARTON, GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION (2015); DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS (2015); THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER (2010); Ribstein, *supra* note 1; RICHARD SUSSKIND, THE END OF LAWYERS? (2008); Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV. 905 (1994).

5. Well described in a previous book by one of the authors. *See* MILTON C. REGAN, JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER (2004).

6. *See, e.g.*, Susan Beck & Michael Orey, *Skaddenomics*, 13 AM. LAW., Sept. 1991.

7. *See, e.g.*, John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995 (2014).

8. *See, e.g.*, Dana Remus & Frank Levy, *Can Robots Be Lawyers: Computers, Lawyers, and the Practice of Law*, 30 GEO. J. LEGAL ETHICS 501 (2017); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041 (2014).

industry players like my Upstate New York neighbor Kodak, who seemingly could not grasp the existential threat posed by disruptive technologies.[9]

In addition to these structural and economic considerations, large law firms have long faced criticism from the point of view of ethics. Kronman, again, has been influential. He critiques the conditions of big firm practice as contributing to the erosion of professional independence and the virtues it enables, sympathy and detachment, which are essential preconditions for the lawyer's exercise of practical wisdom.[10] The early-2000s financial accounting scandals led to an outpouring of criticism of associations between law firms and other service providers, such as accounting firms, in so-called multidisciplinary practices ("MDPs").[11] The ABA's Ethics 20/20 Commission's proposal to permit limited forms of MDPs was roundly rejected in the name of professional independence following the collapse of Enron Corporation. But criticism of the blurring lines between the business of practicing law and professional values hardly began with Enron. I sometimes begin my Professional Responsibility class with consideration of Justice Sandra Day O'Connor's argument, dissenting in a lawyer advertising case, that the defining characteristic of a profession is "an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market."[12] The normative discourse within the legal profession has frequently dichotomized business and professional values, with the former seen as a threat to the sustainability of the latter.[13] If this is the right way to think about professionalism, it seems natural to worry that a huge organization with over a billion dollars in gross revenue—even one made up only of lawyers—may generate pressures to more loosely observe the standards of conduct that cannot be enforced by regulation or the logic of the market.

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9. *See* William D. Henderson, *Glass Half Full: The Decline and Rebirth of the Legal Profession*, 27 L. & POL. BOOK REV. 28 (Feb. 2017) (reviewing BARTON, *supra* note 4).

10. ANTHONY T. KRONMAN, THE LOST LAWYER 66–74 (1993).

11. *See, e.g.*, Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097 (2000).

12. Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 488–89 (1988) (O'Connor, J., dissenting).

13. For many years, Russ Pearce has written insightfully about the history of the business/profession dichotomy in the self-understanding of American lawyers. *See, e.g.*, Russell G. Pearce & Pam Jenoff, *Nothing New Under the Sun: How the Legal Profession's Twenty-First Century Challenges Resemble Those of the Turn of the Twentieth Century*, 40 FORDHAM URB. L.J. 481 (2012); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995). Tom Morgan has similarly given reasons to be skeptical of this dichotomy. *See, e.g.*, MORGAN, *supra* note 4, at 66; Thomas D. Morgan, *Inverted Thinking About Law as a Profession or Business*, 2016 J. PROF. LAW. 115 (2016); Thomas D. Morgan, *Calling Law a Profession Only Confuses Thinking About the Challenges Lawyers Face*, 9 U. ST. THOMAS L.J. 542 (2011).

Despite Ben Barton's rhetorical question asking why big law firms are pursuing the mindlessly self-destructive strategy of a relentless pursuit of profit,[14] and Larry Ribstein's prediction in 2010 that the large law firm business model would become unsustainable,[15] the beginning of 2022 finds this sector of the legal profession awash in record profits, paying previously unheard-of salaries and bonuses to associates, and predicting nothing but good times ahead. One might respond that this is nothing more than a brief outlier period in a longer-term trend. Perhaps, however, the outlier perspective is that of critics like Barton who were writing in the wake of the Great Financial Crisis of 2007–09. At the time of writing this Review, the American economy might be on the brink of a recession,[16] so perhaps the BigLaw sector of the market for legal services will look different in the next couple of years. A different response might be to contend that BigLaw is a winner-take-all market,[17] so drawing general conclusions from the firms raking in big bucks with M&A work in 2021–22 is like looking at the earnings of Dwayne Johnson and Will Smith and deciding that a career in film acting looks like a good bet. However, it is not only the few top firms like Wachtell Lipton and Cravath that are prospering. The AmLaw 100 or 200 represents a fairly big slice of the market for legal services provided to private corporations, and across the board, those firms, which include many smaller boutiques as well as regional law firms, are making out reasonably well.[18] It is therefore worth considering what economic, social, and normative factors explain why this form of legal services delivery persists.

I. BIGLAW AND THE VALUE OF PROFESSIONALISM

Regan and Rohrer begin their explanation of the BigLaw model's resilience by setting out the game-theoretic problems that any profit-driven organization of lawyers must solve. It may be financially advantageous for a partner to grab and run, hoard clients, and avoid work with low economic returns (such as representing clients pro bono, mentoring junior colleagues, serving on firm committees, and so on), but it may be in the long-run best interests of everyone in the firm, and the firm itself, to incentivize cooperative behavior by individual partners. This is the familiar Prisoner's Dilemma structure. In addition, firm management must play an Assurance Game by convincing partners that there is something in it for them in the long run if they cooperate and don't defect in the short run.

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14. BARTON, *supra* note 4, at 74.

15. Ribstein, *supra* note 1, at 752.

16. *See, e.g.*, Isabella Simonetti & Jason Karaian, *"Uncomfortably High": What Economists Say About the Chance of Recession*, N.Y. TIMES (June 28, 2022) (noting a range of views among economists), https://www.nytimes.com/2022/06/28/business/recession-probability-us.html [https://perma.cc/FKK8-D4TU].

17. *See generally* ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY (1996).

18. *See* Dan Packel, *Faced with a Fractured Economy, the Am Law 200 Not Only Survived—They Grew*, AM. LAW. (May 18, 2021), https://www.law.com/americanlawyer/2021/05/18/faced-with-a-fractured-economy-the-am-law-200-not-only-survived-they-grew/ [https://perma.cc/5D2Z-N3K2].

Successful firms attempt to solve both of these games by providing opportunities for partners to acquire "firm-specific capital in the form of ties between partners and the firm that are based on both financial and nonfinancial rewards that the firm provides."[19]

Regan and Rohrer are not the first scholars to understand large-firm governance in this way. Ribstein, for example, has shown how law firms "establish incentive and compensation devices that encourage members to invest in developing the firm's reputation rather than solely their own books of business."[20] However, Ribstein's economic approach is subtly different from the model of professionalism defended by Regan and Rohrer. Ribstein sees the function of big firms as performing a reputational bonding function, which solves an information asymmetry problem.[21] Legal services are credence goods, which require buyers to rely on trust. This exacerbates agency costs, created by the inability of clients to monitor the performance of lawyers (because professional services are opaque, specialized, etc.). Regan and Rohrer, on the other hand, are not committed to an explanation of big-firm structure only in terms of information asymmetries. They are less focused on the firm-client interaction (via the mechanism of reputational bonding) and more attentive to intra-firm incentives. As they see it, firm management must provide monetary and non-monetary rewards sufficient to incentivize partners to stay put and also to forego some short-term economic gains:

> Partners' willingness to engage in other-regarding behavior requires trust that their colleagues or the firm will not take advantage of them. . . . How can a firm elicit such trust? At a minimum, management needs to convince partners that the cooperative behavior characteristic of professionalism will enable the firm to be a profitable and competitive business enterprise that will provide substantial financial benefits to its partners.[22]

In addition to providing substantial financial benefits to partners, however, well-managed law firms provide significant non-monetary rewards. Regan and Rohrer refer to these non-economic benefits as (to borrow an idea from Alasdair MacIntyre[23]) goods that are internal to the practice of law.[24] Internal goods are their own reward, so to speak, and may provide a motivation for partners to stay at a law firm even in the face of a competing offer from another firm which offers the possibility of making more money. Importantly, these internal goods are other-regarding, but they are not necessarily limited to practicing in the public interest, as many traditional accounts of professionalism, including Roscoe

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19. REGAN & ROHRER, *supra* note 1, at 8.

20. Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1707 (1998).

21. Ribstein, *supra* note 1, at 753.

22. REGAN & ROHRER, *supra* note 1, at 28.

23. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 187 (1984).

24. REGAN & ROHRER, *supra* note 1, at 74–75.

Pound's influential definition,[25] would have it. Rather, partners identify many small instances of contributing to the well-being of other firm lawyers, or the firm itself, as having ethical significance:

> This included pitching in to help colleagues without concern for personal reward, introducing clients to colleagues, being generous with sharing credit, being willing to forego work to avoid creating a conflict of interest for another colleague, mentoring junior lawyers, taking on committee or project responsibilities for the firm, providing responsible advice to clients that does not put the firm or third parties at undue risk, adopting a reasonable interpretation of conflict of interest rules, and doing the best possible work in accordance with professional standards even if the client is less profitable than others.[26]

As Regan and Rohrer rightly note, these quotidian little moments of cooperation are far more common than the big, do-or-die ethics issues often discussed in law school professional responsibility courses or ethics CLEs. Most lawyers will not be faced with decisions such as whether to reveal a client's confession that the victims of a kidnapping may be alive somewhere in the desert,[27] or that an innocent person is rotting in prison for a crime the client actually committed.[28] However, almost all will have occasion to consider whether to be a good organizational citizen or a jerk. One of the contributions of this book is therefore broadening the concept of ethics and professionalism to include situations and conduct that are not only a part of the lives of most lawyers, but that also contribute to professional satisfaction and well-being in tangible ways.

Moreover, by not dichotomizing economic success and ethical standards of practice, Regan and Rohrer reduce some of the stigma that one sometimes encounters in connection with practice in large law firms. At least among my students, there seems to be a pervasive attitude that working in a BigLaw-type firm is something one does out of regrettable necessity to pay off debt, and after a few years, one will move on to a practice that is meaningful and satisfying, although less lucrative. I do not mean in any way to slight the importance and praiseworthiness of working in a practice setting such as a public defender's office or public interest law firm. However, the artificial dichotomy between a business and a profession, as represented by Justice O'Connor's distaste for the pursuit of economic gain in the practice of law, makes it appear to be ethically suspect to choose to

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25. At the recommendation of then-Chief Justice Warren Burger, the ABA established a Commission on Professionalism, widely known as the Stanley Commission, which produced a much-discussed report. AM. BAR ASS'N COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986). The Stanley Commission Report adopted the definition of a profession given by former Harvard Law School Dean Roscoe Pound: "[t]he term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service." *Id.* at 10.

26. REGAN & ROHRER, *supra* note 1, at 27.

27. *See generally* McClure v. Thompson, 323 F.3d 1233 (9th Cir. 2003).

28. ALTON LOGAN & BERL FALBAUM, JUSTICE FAILED: HOW "LEGAL ETHICS" KEPT ME IN PRISON FOR 26 YEARS (2016).

remain in a big firm (unless one also makes a big show of only biding one's time until a suitable opportunity arises to practice in the public interest). Regan and Rohrer's account provides a reason to believe that the internal rewards of collegiality, community-building, mentoring junior lawyers, and fostering a culture of excellence in client service are themselves an ethical ideal that helps explain the persistence of the BigLaw form of practice.[29]

The point is not to provide an apology for making a lot of money while serving wealthy clients. Rather, it is to avoid the tacit message that, because practicing in a large law firm is *already* ethically suspect, we should not expect high ethical standards of large law firm practitioners. As someone who also teaches business ethics, I have often found it troubling that professions are distinguished from "mere" businesses on the ground of pursuing other-regarding values instead of economic success. The implication is clearly that for occupations on the "mere" business side of the dichotomy, concern for the interests of others is not part of the job. Ironically, scholars, such as Ben Barton, who bemoan the decline and fall of the once-noble legal profession are not only engaging in unwarranted nostalgia for an imagined Golden Age, but are also letting large law firms off the hook by contending that the "relentless pursuit of profit" must necessarily lead to declining ethical standards. The choice for these large law firms would seem to be either to reject the pursuit of profit (and what would that mean in a competitive labor market?) or bite the bullet and concede that their ethical standards are nothing more than minimizing the risk of disciplinary sanctions or civil liability.

One of the more interesting findings of Regan and Rohrer's empirical research is that Kronman's ideal of the lawyer as a trusted advisor is alive and well among big-firm lawyers, notwithstanding his concerns about the increasing specialization of legal practice.[30] If the practice of law were informed solely by business logic, one of the principles of providing good client service would be the hoary business maxim that the customer is always right.[31] This principle, if followed, would subordinate or replace altogether the traditional conception of professionalism, which emphasizes the independence of lawyers and the imperative of providing candid advice on a wide range of legal and nonlegal matters. In its strongest form, the ideal of professionalism envisions lawyers as having a role in stabilizing social conflict. In contrast with business logic, the logic of professionalism requires lawyers to act in ways that take into account the common good of

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29. Galanter and Palay explain the appeal of smaller, "boutique" law firms in terms of their capacity to provide the non-monetary rewards of collegiality, close personal relationships, and the opportunity to have substantial responsibility as a relatively junior associate. *See* Galanter & Palay, *supra* note 4, at 917. (Examples of boutique firms include Kellogg Hansen, Susman Godfrey, and MoloLamken.) To the extent big firms ever really saw boutiques as competitors, the former can compete more effectively with the latter to attract top talent by providing similar non-monetary rewards.

30. REGAN & ROHRER, *supra* note 1, at 216.

31. *Id.* at 201.

society.[32] Lawyers have sometimes contended that they are in a better position than their clients to exercise civic virtue—that is, an impartiality among private interests, with due concern for the public good or general welfare of society.[33] Louis Brandeis, who is often cited as a paradigm of the "wise counselor" approach to ethical lawyering,[34] reportedly advised his client, a business owner, that his employees' demands for higher wages were justified.[35] In a similar vein, a line attributed to Elihu Root is frequently cited: "[a]bout half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."[36] The partners interviewed for this book do not go that far, but they do report that advising clients on nonlegal considerations is an important and satisfying part of their role. Lawyers say they would be willing to suggest to a client that something is not the right thing to do, even if it is legal, and report counseling clients on the spirit as well as the letter of the law.[37] The authors conclude:

> [P]artners whose conception of professional responsibility has contracted as a result of recent market pressures have perfectly acceptable rationales for embracing narrow understanding of their responsibilities. The fact that the partners in our interviews did not do so in describing the role of trusted advisor suggests, although it certainly does not prove, that many lawyers in large firms have retained a more robust understanding of their professional obligations.[38]

While this "robust understanding" is not as fulsome as the "wise counselor" conception of professionalism that places the public interest at the center of professional ethics,[39] it is not equivalent to the strongest form of the so-called "Standard Conception" or "Neutral Partisanship" approach to legal ethics, which envisions lawyers as using every available legal means to further the objectives

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32. *See, e.g.*, KRONMAN, *supra* note 10, at 66–74 (referring to the capacity of a good lawyer to view the situation of a client with both sympathy and detachment, an attitude that combines perception, imagination, and independence); PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION (1999); SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750–1900 (1991); Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 46 (Deborah L. Rhode, ed., 2000). For an excellent history of the collapse of this ideal, see Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649 (2016).

33. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14–15 (1988) (*quoting* THE FEDERALIST NO. 35 (Alexander Hamilton)).

34. *See*, *e.g.*, John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965); Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377 (2004).

35. *See* David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 722–23 (1988) (reporting this incident).

36. PHILIP JESSUP, ELIHU ROOT 132–33 (1938) (quoted in, *e.g.*, MORGAN, *supra* note 4, at 62–63).

37. REGAN & ROHRER, *supra* note 1, at 202, 209.

38. *Id.* at 210.

39. *See* W. Bradley Wendel, *Pluralism, Polarization, and the Common Good: The Possibility of* Modus Vivendi *Legal Ethics*, 131 YALE L.J.F. 89, 94 (Oct. 24, 2021).

of their clients.[40] As the authors rightly conclude, "the trusted advisor plays a more expansive role than prescribed by the model of the Neutral Partisan."[41]

This does not mean that lawyers see themselves as having obligations to serve as a "moral activist" (David Luban's conception of the professional role),[42] take actions that seem most likely to promote justice (Bill Simon's view),[43] or follow my more modest approach of promoting the legal entitlements of clients as opposed to their (pre-legal) interests.[44] The problem with all of these normative models, to the extent they seek to "prescribe how a lawyer should think of herself and how this self-understanding should influence her daily work,"[45] is that they presuppose considerable independence between lawyers and the clients they serve. (Independence is also central to the Brandeisean conception of professionalism described above). When big-firm lawyers report on sources of satisfaction in their work, however, they often refer to *engagement* with their clients, not independence. Problem-solving can be an intrinsic reward for toiling away in the vineyards of big firms. One partner stated: "[t]he core emotional satisfaction of helping someone solve a problem is . . . what I really like. That is what I went to law school for, and I do feel like I get to that on a daily basis."[46] In order to participate in an engaged problem-solving process with clients, it is necessary to obtain their trust, and maintaining a stance of arms' length independence from clients is unlikely to foster the necessary trust.[47] Lawyers perceive that clients want them to be part of the team, which, in the context of large organizations, will itself be a complex, multidisciplinary entity. The findings of Regan and Rohrer's study therefore line up nicely with the theoretical approaches of several scholars who have emphasized values such as loyalty, trust, and the situatedness of lawyers and

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40. *See*, *e.g.*, Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RES. J. 613 (1986).

41. REGAN & ROHRER, *supra* note 1, at 220.

42. *Id.* at 220–22 (discussing DAVID LUBAN, LAWYERS AND JUSTICE (1988)).

43. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE (Harvard University Press, 1999).

44. *See* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010). Not to quibble with the authors' critique of my view, but I do think there is not much daylight between the practical consequences of my position and the observation by one partner interviewed by the authors, who agreed that a lawyer's role in representing a client can be described this way: "I know what you want to do, I know what you are trying to accomplish, how can we accomplish that within the framework of the law and get you a solution that works." REGAN & ROHRER, *supra* note 1, at 218.

45. REGAN & ROHRER, *supra* note 1, at 222. Alice Woolley and I have argued that the leading normative theories of legal ethics are psychologically unrealistic. *See* Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065 (2010). Regan and Rohrer's arguments discussed in this part turn this critique on my own normative position. They are probably right that acting with reference to the legal rights and duties of clients, to the exclusion of non-legal interests, presupposes the same level of independence that Woolley and I said would be difficult to sustain for a lawyer following Luban's or Simon's approach.

46. REGAN & ROHRER, *supra* note 1, at 203 (internal alterations omitted).

47. *See id.* at 217–19.

clients within a field of relationships.[48] Legality always remains a "hard boundary,"[49] but it operates in the background, while the foreground of ethics on a day-to-day basis is constituted by relational norms.

Although Regan and Rohrer's book is a work of social science, the authors do offer two cautionary and insightful normative remarks about the centrality of commitment to clients in the ethical landscape of large-firm lawyers.[50] First, taking the client's position invites framing harm to others as a liability risk rather than an intrinsic wrong. This tendency seems, to me at least, to pervade the discipline of business ethics, perhaps because of the influence of the view, often traced to Milton Friedman, that the only obligation of business managers is to increase the profits of the enterprise.[51] My normative work in legal ethics is aimed at resisting lawyers' corresponding tendency to understand their only obligation as promoting the interests of clients. In both business and legal ethics, as the authors recognize, there is a tendency to instrumentalize moral wrongdoing so it can be presented to clients or corporate directors and officers in the terms they understand, i.e., liability risk and a hit to the corporation's stock price, respectively. Regan and Rohrer rightly point out a related concern, which is that harm to others rises to the level of a liability risk only if the relevant "other" is in a position to potentially inflict money damages or reputational consequences on the client.[52] If a client's conduct injures a disempowered individual or group, framing moral wrongs in cost-benefit terms tends to let the lawyer off the hook for engaging in morally wrongful but legally permitted conduct.[53] Second, it is all well and good to regard legality as a hard constraint on what can be done for a client, but as all lawyers know, the limits of the law may depend not only on how the lawyer

48. *See id.* at 223 (first citing Roiphe, *supra* note 32; then citing Dana Remus, *Reconstructing Professionalism*, 51 GA. L. REV. 807 (2017); and then citing Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 603 (2016)).

49. REGAN & ROHRER, *supra* note 1, at 220.

50. *See id.* at 228–30.

51. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970). There is a sizeable literature considering whether, as a matter of corporate law, the sole *legal* duty of corporate directors and officers is to maximize shareholder value. *See also* LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012); Jonathan R. Macey, *Corporate Law as Myth*, 93 S. CAL. L. REV. 923 (2020); Hon. Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761 (2015).

52. REGAN & ROHRER, *supra* note 1, at 228.

53. David Luban discusses the representation by an environmental law clinic at Tulane Law School of low-income, mostly Black residents who objected to plans to build a chemical plant in their neighborhood. *See* David Luban, *Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 237–38 (2003). Consider the following hypothetical: a group of plaintiffs obtain representation through a law school's clinical program, but otherwise would almost certainly have had no effective avenues for visiting costs upon XYZ Chemical Co. for siting the factory in their neighborhood. A lawyer at ABC Law Firm, representing XYZ Chemical Co. in the environmental permitting process, might accordingly fail to raise the environmental and racial justice considerations asserted by the residents. That is the danger of instrumentalizing advice on harm to others.

interprets the law but on what the lawyer advises the client to do in order to work around the law. Legal interpretation in the course of counseling clients and representing them in transactional matters is a big topic. It is well explored by Regan and one of his Georgetown Law colleagues, Tanina Rostain, in their book, *Confidence Games: Lawyers, Accountants, and the Tax Shelter Industry*.[54]

The strongest ethical critique of the views stated in the interviews reported by Regan and Rohrer is not that lawyers are trying to evade their ethical responsibilities, but that they display a kind of complacent, bourgeoise contentment with the status quo and willingness to overlook social injustices and the interests of others that are not recognized in clearly applicable legal prohibitions. What are we to think of lawyers who choose this career path? Bill Simon cites the protagonist of Sinclair Lewis's novel *Babbitt*, who understands professional ethics as "part hypocrisy and part expression of a boundless capacity to delude himself that his own material self-interest invariably coincides with the interests of others."[55] Put that way, the ethical vision of BigLaw partners sounds unattractive at best and their appeal to meaningful work quite hollow. One possible defense of BigLaw partners' ethical world would be to see their activities as meaningful, both subjectively as a source of satisfaction to lawyers and objectively as something genuinely worthwhile, and to see the concerns of impartial morality, including the interests of third parties harmed by the activities of clients, as not necessarily overriding the importance of these commitments.[56] This is another big topic and, in fairness, one that is orthogonal to Regan and Rohrer's investigation, but I think there are some interesting, relatively underdeveloped issues in normative legal ethics to be developed along these lines.

A secondary ethical critique of big-firm lawyering, not addressed directly by many of the interviews in the book, is that the intense pressure to bill hours can lead to overbilling, bill padding, and even outright fraudulent billing.[57] Regan

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54. TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY (2014). Interested readers should refer to an important paper by David Wilkins, arguing that reliance by lawyers on the bounds of the law to constrain client wrongdoing must inevitably grapple with the problem of legal realism. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

55. William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 570 (1985).

56. Susan Wolf has explored these themes insightfully, often building on the work of Bernard Williams. *See*, *e.g.*, Susan Wolf, *Meaning and Morality*, *in* THE VARIETY OF VALUES: ESSAYS ON MORALITY, MEANING, AND LOVE 127 (2015).

57. *See*, *e.g.*, Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problem of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 64–67 (2008); Douglas R. Richmond, *The New Law Firm Economy, Billable Hours, and Professional Responsibility*, 29 HOFSTRA L. REV. 207, 209 (2000); Lisa G. Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 HOFSTRA L. REV. 847 (2006); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999); William G. Ross, *Kicking the Unethical Billing Habit*, 50 RUTGERS L. REV. 2199 (1998); William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (Billing for Professional Fees, Disbursements and Other Expenses).

and Rohrer report that in-house lawyers at corporate clients are taking a more active role in monitoring attorneys' fees,[58] but in theory they should not have to do this. Lawyers are obligated by professional disciplinary rules not to charge unreasonable fees,[59] but disciplinary actions against lawyers for overbilling are quite unusual.[60] Lawyers are therefore expected to use "billing judgment,"[61] not only in fee applications to courts, but in the fees they charge their clients. The growth of the legal fee auditing industry, however, shows that lawyers are not resisting the temptation to overcharge clients.[62]

II. LOOKING UNDER THE HOOD

Regan and Rohrer's book, like much other recent scholarship on the American legal profession, tacitly assumes that lawyers who are no longer in the trenches are out of touch with the day-to-day realities of BigLaw lawyers. The authors' interview-based empirical approach reveals many features of contemporary law practice, at least for partners, that may not be widely known or understood. This Part provides a more granular perspective; it reviews two of the detailed findings from Regan and Rohrer's study which complicate the picture that many lawyers and legal academics may have of the BigLaw form of practice.

A. ALWAYS BE CLOSING

In a famous scene from the film version of David Mamet's play *Glengarry Glen Ross*, Alec Baldwin's character delivers a bracing motivational speech to several forlorn-looking men tasked with selling crappy real estate. Only one thing matters in life, he tells them: "A-B-C . . . Always Be Closing. . . . You close or you hit the bricks." If you have seen the movie, you know it is not meant to be an appealing comparison with the entrepreneurial culture of modern law firms. Indeed, lawyers tend to be nostalgic for the (imagined or at least exaggerated) good old days, when law firms had a stable of repeat-player institutional clients who relied on the same firm as outside counsel for a wide variety of matters. Lawyers came up through the firm from the associate ranks to partnership and expected to be serving the firm's long-term clients. A few top New York City law firms and elite financial institutions still enjoy this cozy relationship, such as Davis Polk & Wardwell and Morgan Stanley, and Sullivan & Cromwell and

58. REGAN & ROHRER, *supra* note 1, at 36–37.

59. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2018) [hereinafter MODEL RULES].

60. One exception that proves the rule is a case in many Professional Responsibility casebooks involving egregious over-charging for a relatively straightforward criminal defense matter where the customary fee in the community would have been about 10–15% of the fee actually charged by the lawyer. *See In re* Fordham, 668 N.E.2d 816 (Mass. 1996). Perhaps not coincidentally, the lawyer was a partner at a BigLaw firm making a foray into criminal defense practice for an acquaintance.

61. Hensley v. Eckerhardt, 461 U.S. 424, 434 (1983).

62. *See, e.g.*, William G. Ross, *An Ironic and Unnecessary Controversy: Ethical Restrictions on Billing Guidelines and Submission of Insurance Defense Bills to Outside Auditors*, 14 NOTRE DAME J.L., ETHICS & PUB. POL'Y 527 (2000).

Goldman Sachs.[63] But for most firms, this is a thing of the past. For partners today, there is constant pressure to be entrepreneurs.[64]

One line of concern, in ethical terms, that may arise in connection with the BigLaw form of practice is the predominance of business considerations over traditional conceptions of professionalism. Regan and Rohrer present this critique in sociological terms as a tension between professional logic with business logic. In their view, however, these two logics can complement each other in a well-run firm. Their explanation appeals to both an external market, in which law firms compete for clients, and an internal market, in which firm partners seek credit from firm management for bringing work into the firm.[65] As one respondent put it, "work is all personal, work moves; I don't care what people say. Everyone is entrepreneurial, everybody who is worth anything is out trying to get everything they can in terms of clients."[66] Not only that, but corporate clients can bring generalized legal expertise in-house; they really only need outside counsel for matters in which deep and narrow expertise is required.[67] Of course, it is precisely those lawyers with deep and narrow expertise who are in a position to take clients —their "book of business"[68]—with them in pursuit of a more lucrative lateral offer. This sounds like a recipe for a Hobbesian war of all against all within law firms. Consistent with the research of business professor Heidi Gardner, however, the lawyers who talked to Regan and Rohrer explained that the legal needs of the clients they wish to serve are complex and require expertise in a number of discrete fields—for example, IP, tax, regulatory, bankruptcy, and litigation.[69] A successful pitch to a client would have to emphasize *the firm's* capacities, not the reputation or ability of a single partner. Law firm management therefore has an incentive to establish formal systems and informal cultural norms that discourage hoarding clients. Many of the professional values that matter to lawyers center on collaboration with other lawyers to solve client problems. If a firm can promote "relational trust" among partners, particularly if the partners find collaboration intrinsically and not merely instrumentally rewarding, it can go a long way toward solving the Assurance Game.[70] Professional logic can thus have a synergistic interaction with business logic.

It can . . . but relational trust is difficult to maintain, particularly against the background of two highly competitive markets: (1) the market for legal services, in which law firms try to distinguish themselves from other firms in providing

63. Christine Simmons, *Why Moving a Book of Business to a New Firm Is Now Easier Than Ever*, AM. LAW. (Jan. 27, 2022) https://www.law.com/americanlawyer/2022/01/27/why-moving-a-book-of-business-to-a-new-firm-is-now-easier-than-ever/ [https://perma.cc/ETP4-2SRX].

64. REGAN & ROHRER, *supra* note 1, at 54–55.

65. *Id*. at 130–32.

66. *Id*. at 80.

67. *See id*. at 43–44.

68. *Id*. at 181–82.

69. *See id*. at 82–89.

70. *See id*. at 91–93.

high-quality services at reasonable cost to sophisticated, discerning clients, and (2) the labor-side market in which partners make lateral moves from one firm to another.[71] The simultaneous pressures exerted by these markets leave law firms exposed to sudden collapses caused by the cascading effects of partner departures.[72] Non-lawyer ownership of law firms is prohibited by the rules of professional conduct in most U.S. jurisdictions.[73] Not only are law firms owned by their partners,[74] but partners are compensated based on firm profits. As a result, they are vulnerable to a "partner run," similar to a bank run, which begins when senior rainmakers perceive that firm profits are beginning to decline; these lawyers depart, taking not only clients, but a cluster of service partners who are dependent upon the rainmaker for their own professional livelihoods.[75] The management challenge for law firms is therefore to keep rainmakers happy while avoiding creating a sense of unfairness among other firm lawyers.[76] Rainmakers are not self-sufficient.[77] They can only bring in client business if the client perceives that the firm will be able to provide the needed services, and this in turn requires the contributions of colleagues. Firm management needs to provide both financial rewards to rainmakers and non-financial rewards to all partners in a way that creates a cohesive firm culture and a work environment that provides enough intrinsic satisfaction to counteract the incentive to jump ship in pursuit of more money.

Managers do have some limited ability to create incentives for partners to participate in a collaborative firm culture. There is only so much management can do, however, to rein in powerful rainmakers. One partner referred to the way the ever-present threat to resort to the lateral market inhibits the ability of managers to incentivize pro-social behavior:

> We don't say, "Hey, asshole, we don't like what you've done. You would have made X but you're going to make X less something because of the way you acted," because right now that asshole probably is producing $5 million of

71. *See id.* at 178–79.

72. John Morley, *Why Law Firms Collapse*, 75 BUS. LAW. 1399, 1403–04 (2020).

73. MODEL RULES R. 5.4.

74. Many law firms are not organized as general partnerships but as limited liability partnerships, professional corporations, or some similar entity form. *See, e.g.*, Susan Saab Fortney, *Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships*, 39 S. TEX. L. REV. 399, 408 (1998); Allan W. Vestal, *Special Ethical and Fiduciary Challenges for Law Firms Under the New and Revised Unincorporated Business Forms*, 39 S. TEX. L. REV. 445, 445–46 (1998).

75. Morley, *supra* note 72, at 1403–04. The term "rainmaker" is fairly well known. It refers to partners who originate client business, sometimes called "finders," who are contrasted with service partners, who either handle the relationship with the client (in which case they are referred to "minders") or perform legal work for the client (in which case they are called "grinders"). *See* REGAN & ROHRER, *supra* note 1, at 124, 128–29.

76. *See* REGAN & ROHRER, *supra* note 1, at 153–61. The authors acknowledge the difficulty of simultaneously satisfying the economic demands of rainmakers and sustaining a sense of cohesiveness throughout the firm: "[t]he ability of rainmakers to go elsewhere . . . often imposes a practical limit on how much firms can do." *Id.* at 164.

77. *Id.* at 171.

> business. He says, "Okay, [if] you don't want me, I'll go down the street and they'll pay me double what you're paying me."[78]

Of course, the threat of departing the firm and taking a five-million-dollar book of business does not excuse inaction if the partner is doing something genuinely unethical or unlawful. But much of the conduct of lawyers that has an impact on firm culture falls short of that level of wrongdoing. Bullies and jerks who are also rainmakers may be tolerated to the detriment of firm-wide perceptions of fairness and collegiality. Given the small but meaningful acts of cooperation lawyers can take to create and sustain a satisfying work environment, and in light of the ever-present possibility that powerful, self-interested lawyers' actions can corrode that culture, it is apparent that managing a successful law firm requires considerable skill and emotional intelligence. Since few lawyers have formal training in management and leadership techniques, one would expect considerable variation in firm cultures, and indeed Regan and Rohrer occasionally make reference to firms that have had particular success in fostering collaborative cultures.[79]

Law students often say they have a hard time choosing among offers from BigLaw firms that all tend to market themselves to students in the same way: commitment to pro bono representation, mentorship and professional development for associates, diversity, equity, and inclusion ("DEI") programs, and perhaps even work-life balance and support for families. I often tell students to try to pick up cues about the firm's culture, but this is extremely difficult to do merely from a few interviews, or even after spending a summer at the firm. However, it can be a make-or-break matter for a successful career. The firm at which I practiced after graduating from law school lacked the cohesive culture that Regan and Rohrer identify with resilient organizations that provide sufficient monetary and non-monetary rewards to keep lawyers committed to sustaining the firm. Not long after I left the firm, it collapsed in a fairly spectacular way.[80] My wife's law firm, in the same city, grew from a leading Pacific Northwest firm into a national powerhouse. Even at the time, and without any training in legal sociology, it was apparent that one firm was well managed to create a collaborative culture and, at the other, partners were pretty much left to their own devices. A law student fortunate enough to receive offers at both firms would clearly have been better off at the well-managed firm, but *ex ante* and looking in from the outside, it would have been hard to determine which firm that was. Yet, for many of the reasons Regan and Rohrer describe as applicable to partners, associate satisfaction and career success is dependent to a significant extent upon firm culture. Their occasional suggestive remarks (e.g., "[w]e regard Firm 6 as having an especially strong

78. *Id*. at 173.

79. *See id*. at 172.

80. *See*, *e.g*., Alex Fryer, *Attorneys Glean Lessons from Bogle & Gates' Demise—Even Large Firms Can Be Vulnerable, Legal Analysts Say*, SEATTLE TIMES (Feb. 5, 1999).

culture"[81]) leave me wishing the authors would go into business producing some kind of report or scorecard on positive law firm cultures—I want to know who Firm 6 is! (The online resource Chambers has attempted to respond to this need with its Chambers Associate career guide,[82] although its boosterish tone makes me a bit skeptical of the reliability of its information.). But to conclude this subsection, one of the important takeaways from the book is that the imperative of Always Be Closing has not resulted in firm cultures that are invariant with respect to non-monetary professional values.

B. THE INTERNAL MARKET

As far as I know, legal profession scholars have not previously highlighted a third market, which has a profound impact on the functioning of large law firms. In addition to the market for legal services and the lateral market, Regan and Rohrer describe an almost completely unregulated market *within* law firms—described by one partner as "the Wild, Wild West"—for origination credits.[83] These credits are essential currency for partners seeking to obtain financial and non-financial rewards commensurate with the economic value they bring to the firm. Equity partners, whose compensation is based on a share of the firm's profits, compete for credit for bringing new clients to the firm or originating new work for existing clients.[84] This sounds like a straightforward, objective measure, but in fact origination credits are the focal point of considerable haggling among partners. The reason is that origination credits may be shared with other partners who played important roles in bringing in the client or providing services to the client. Suppose a corporate partner is pitching the firm to a prospective client. Suppose further that satisfactorily serving the client's legal needs would require contributions from lawyers with expertise in environmental law, tax, and litigation. The corporate partner needs colleagues with these skills to be part of the team presented to the client. No matter how much a lawyer may excel at business development, no one is self-sufficient when the legal needs of clients are complex and draw upon a wide range of legal specialties. The corporate partner may therefore offer to share origination credits with the environmental, tax, and litigation partners who help land the representation. The agreement to share credit creates bonds among members of the team and incentivizes the other lawyers to help service the corporate partner's client. In this way, the relationship of reciprocity between rainmakers and the service partners who work on their matters is cemented.

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81. REGAN & ROHRER, *supra* note 1, at 174.

82. *See About Us*, CHAMBERS ASSOC., https://www.chambers-associate.com/about/about-us [https://perma.cc/F2L4-STY7] (last visited Sept. 23, 2022).

83. *See* REGAN & ROHRER, *supra* note 1, at 137–41.

84. *Id*. at 129.

This is how it should work, but as in any market, there can be market failures. Sharing origination credits is almost entirely dependent upon the good faith of the rainmaker. As Regan and Rohrer observe, "[a] service partner's receipt of origination credits depends on the generosity of a rainmaker and whatever bargain the service partner is able to strike."[85] But the bargain the parties strike is likely to be influenced by the parties' preexisting bargaining power. Moreover, the Prisoner's Dilemma problem that law firm management must solve is exacerbated if rainmakers and service partners are not repeat players with respect to one another. A rainmaker landing a one-off client engagement might opt to defect from the cooperative arrangement that was reached with service partners, hogging all the origination credit at the end of the year when compensation decisions are made. This action will certainly lead other lawyers to reconsider cooperating with the rainmaker on future pitches to prospective clients, but they may have no realistic alternative to accepting whatever crumbs the rainmaker deigns to provide. In a previous book, Mitt Regan describes how a service partner in the bankruptcy department of a large law firm was in essentially a patron-client relationship with a rainmaker corporate partner.[86] Refusing to cooperate was not an option for the service partner, who was almost entirely dependent on the corporate partner for work.

One of the major granular insights of Regan and Rohrer's study is that the Prisoner's Dilemma and Assurance Game problems grow to a significant extent out of the informal market for origination credit.[87] Knowing this, one might expect firm managers to rely less on origination credits when awarding compensation to equity partners. The reason this is not a strategy that is readily available is something I found startling: lawyers looking to move to a new firm are not the only actors who care about the measure of Profits Per Partner ("PPP"). Prospective clients considering proposals by outside law firms also rely to a great extent on PPP, but in this case, as a proxy for the quality of the law firm. As is well known, professional services are credence goods, meaning their quality is difficult to assess, even by those who consume them.[88] In the absence of any direct indicator of the quality of law firms, clients look at indicators such as the clients the firm serves, the type of work it performs for these clients, and the educational background and experience of firm lawyers. That is not surprising, as these seem to be rational proxies for quality of services provided by the firm. What is surprising, however, is that prospective clients tend to collapse all of these indicators into a single, concise proxy: PPP.[89] Maximizing PPP therefore becomes the Prime Directive for law firm management. This leads to decisions

85. *Id*. at 166.
86. *See* REGAN, *supra* note 5, at 63–70.
87. *See* REGAN & ROHRER, *supra* note 1, at 168–69.
88. *Id*. at 102.
89. *See id*. at 103.

such as "pruning" unprofitable partners and practice groups,[90] maintaining a two-tiered system of equity and income partners and keeping more partners in the latter category,[91] and pursuing lateral hires with a substantial book of business,[92] all as ways to boost PPP. This dynamic also tends to entrench origination credits as the most important factor in determining partner compensation.[93]

Origination credits also play a role in explaining one of the more persistent instances of bias within the legal profession—the pay gap between men and women, even among partners at elite law firms. One of the most consistent findings relating to gender equality in the legal profession is the partner pay gap. A 2020 survey by the legal search firm Major, Lindsey & Africa revealed that the average compensation for male equity partners in law firms was $1.13 million while the average for women was $784,000.[94] According to law professor Joan Williams, several biases account for this disparity, including the higher standard applied to the work of women and people of color, attribution of women and people of color's work to their white male colleagues, and in-group favoritism among white male partners.[95] Williams also mentions a factor explored in depth by Regan and Rohrer, namely, the internal market for origination credit. The Major, Lindsey & Africa survey reports that male partners had average originations that are approximately 50% higher than those reported by female partners—$3.1 million and $2.1 million, respectively.[96] In addition to biases like the need to continue to prove one's competence, the findings of Regan and Rohrer's research reveal a subtle dynamic that influences the allocation of origination credit, which they say is the most important factor accounting for the partner pay gap.[97] Research shows that women tend to be less likely to negotiate and, when they do, risk being perceived as difficult and demanding—that is, not stereotypically "feminine"; a more moderate presentation style, on the other hand, tends to undermine perceptions of competence.[98] Bringing in new clients is more a matter of developing personal relationships than performing high-quality legal work,[99] and development of these relationships may be affected by the refusal of male

90. *Id*. at 104.

91. *Id*. at 125. In the harsh world of large law firms, a substantial disparity in compensation between tiers of partners may not necessarily be a bad thing. One lawyer reported that it's better to be paid less than to be kicked to the curb. *See id*. at 161 (quoting a lawyer: "You could also take the view that we could have [a lower spread if we just got rid of everybody below [a certain productivity level]]. We don't want to do that.").

92. *Id*. at 181–82.

93. *Id*. at 133.

94. *See* JEFFREY A. LOWE, MAJOR, LINDSEY & AFRICA, 2020 PARTNER COMPENSATION SURVEY 22 (2020).

95. *See generally* Joan C. Williams, *Male Partners Get Paid More than Female Partners – Lots More*, BLOOMBERG L. (June 9, 2022); JOAN C. WILLIAMS, MARINA MULTHAUP, SU LI & RACHEL KORN, AM. BAR ASS'N COMM. ON WOMEN IN THE PROFESSION & MINORITY CORP. COUNS. ASS'N, YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION (2018).

96. *See* LOWE, *supra* note 94, at 28.

97. REGAN & ROHRER, *supra* note 1, at 62.

98. *Id*. at 141–42.

99. *Id*. at 165–66.

partners to bring women in on important client relationships.[100] As noted above, the market for origination credits "generally is unregulated by the firm and depends on interpersonal dynamics."[101] Firm management has some tools to intervene in the market, including opting for transparency in compensation decisions.[102] However, rainmakers ultimately have a lot of power by virtue of their ability to exit the firm and take clients with them. The lateral market therefore constrains what firm management can do to ensure gender equality within the ranks of equity partners. Presumably a similar dynamic exists with respect to lawyers of color, although this issue is not explored in the book.

CONCLUSION

BigLaw is not for everyone. Regan and Rohrer do not say much about the perennial problem of work-life balance, but a few reported comments by lawyers show that families, relationships, hobbies, and even getting enough sleep are interests that must be subordinated to the firm and its clients:

> We're here to work, we're here to perform, and we're here to succeed, don't treat [women lawyers] any different. If I need my kids raised, I'll get a nanny . . . .[103]

> [In response to a request to work part-time, a partner said] you shouldn't be asking to do that; you should be working every minute of every day to impress me and show me that you are committed to this job.[104]

> [Y]ou can send an email out to a half dozen people and say, "I just got this question; the client would like to have a meeting on this Saturday night at 6:00; who can do this?" and four out of six people will respond and say, "Yeah, I'm happy to help out," even though it's Saturday night at 6:00.[105]

The punishing schedule and relentless billable-hour requirements of big-firm life (traceable in part to the need to pay high salaries to be competitive in the associate recruiting market) are exacerbated by the market forces described by Regan

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100. *Id.* at 67. The problem may begin much earlier, when male associates get better work assignments than female associates and are therefore better able to develop the professional skills they need to climb the ladder. One woman lawyer put it well:

> You almost [had to accept] that it was really hard to find a first rate candidate by the time they are an eighth or ninth year associate [who was a] woman, but it's because they weren't traveling with the partners they worked with, they weren't getting assigned to the great deals, they weren't given responsibility that guys were given coming up the ranks. Well, no kidding the guys are more qualified by the time they are [there for] nine years—you trained them to be more qualified.

Id.

101. *Id.* at 143.

102. *Id.* at 175 (discussing class action pay equity lawsuit filed against Jones Day, alleging that the firm's "'system of "black box" compensation results in the systematic underpayment of women'").

103. *Id.* at 67 (alteration added).

104. *Id.* at 69 (alteration added).

105. *Id.* at 93.

and Rohrer. Yet, plenty of students compete for BigLaw jobs. Many avow that they are doing so only in order to pay off their law school loans, whereupon they will begin the career they actually want, which usually has something to do with public-interest lawyering. Whether this is sincere or a socially acceptable excuse, associates tend to stick it out for a while. Decades ago, Marc Galanter and Thomas Palay wondered whether BigLaw firms would remain the apex predators of the law firm world or whether boutiques, "lifestyle" firms, or other forms of delivering legal services would outcompete them.[106] Regan and Rohrer's study shows that BigLaw has proven to be a remarkably resilient structure, so far untouched by any of the potentially disruptive forces that might have been expected to render these firms obsolete.

As a normative professional ethics theorist (and former big-firm lawyer), my primary interest connected with BigLaw has been in the impact it has on the core values of the profession. Among them is sufficient independence from clients to enable lawyers to carry out their public responsibilities. In my view, lawyers should not aim directly at the public interest in the representation of clients. Rather, lawyers advise, represent in litigation, and provide assistance in transactions with reference to the rights and duties established by law. If, *by this*, one means ethical lawyering, then nothing about the structure or environment of BigLaw firms is inherently corrosive of core professional values. But, of course, this is only one position in a long-running debate and others may have a very different understanding of ethical lawyering. Much of the ethical criticism of large firms presupposes one of these alternative views, such as the Brandeisian duty to counsel clients regarding the interests of third parties or the public interest. The lawyers interviewed for this book do not believe that their firms support that approach to the practice of law, but they would cite the opposing ideal of engaged loyalty and diligent client service. This conception of ethical lawyering connects nicely with the law governing lawyers, particularly the common law of fiduciary duties.[107] Again, there may be other ethical problems with big firms, such as over-lawyering cases and over-charging clients, but Regan and Rohrer's book shows that partners in these firms are not insensitive to their obligation to represent clients within the bounds of the law.

BigLaw has always had its detractors, and they may find the tone of this book overly optimistic. It is solidly grounded, however, in the sociology of the legal profession and is supported by hundreds of interviews with practicing lawyers. It is also hard to argue with the simple fact that these firms continue to grow and thrive. While it is certainly possible that some as-yet unforeseen disruption to the legal services industry will send BigLaw the way of the dodo, Regan and Rohrer should be commended for starting with the premise that these firms are succeeding and proceeding to ask why.

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106. *See* Galanter & Palay, *supra* note 4, at 919–20, 925–27.

107. *See generally* W. Bradley Wendel, *Should Lawyers Be Loyal to Clients, the Law, or Both?*, 65 AM. J. JURIS. 19 (2020); Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301 (1998).