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THE PROFIT PRINCIPLE: TRACING THE MORAL DECLINE OF CORPORATE LAW FIRMS

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Reviewing Servants of the Damned: Giant Law Firms, Donald Trump, and the Corruption of Justice. David Enrich. (New York: HarperCollins. 2022).

THE PROFIT PRINCIPLE: TRACING THE MORAL DECLINE OF CORPORATE LAW FIRMS

*Sung Hui Kim**

Servants of the Damned: Giant Law Firms, Donald Trump, and the Corruption of Justice. By *David Enrich*. New York: HarperCollins. 2022. Pp. xiii, 576. \$32.50

Now, any man's interests, any man's outlook, are shaped in greatest part by what he does. . . . Hence, the practice of corporation law not only works for business men toward business ends, but develops within itself a business point of view—toward the work to be done, toward the value of the work to the community, indeed, toward the way in which to do the work.

—Karl Llewellyn, 1933¹

INTRODUCTION

On the morning of September 21, 2022, I received an email from a senior administrator of the UCLA School of Law. The email invited me to participate in a closed-door, face-to-face meeting with the partner in charge of the U.S. offices of Jones Day, Kevyn Orr; another partner in the firm's Los Angeles office who had spoken at the law school's convocation just a few weeks earlier; and two first-year law students who had spearheaded a petition signed by more than a hundred students. I was asked to join because I teach professional responsibility and write about legal ethics.² With a little digging, I obtained a copy of the students' letter and read it with intrigue.

After thanking the school for welcoming the incoming class at the convocation ceremony, the letter quickly pivoted to its complaint. It objected to UCLA's choice of a Jones Day partner as the guest speaker for

* Vice Dean for Curricular and Academic Affairs and Professor of Law, the University of California, Los Angeles, School of Law. All opinions expressed in this Review are solely those of the author and have not been officially or unofficially endorsed by the UCLA School of Law. The author thanks Jerry Kang for insightful comments, the editors of the *Michigan Law Review* for their superior editing, and Anthony Han, J.D. Class of 2025, Zunaira Sardar, J.D. Class of 2024, and the world-class librarians of the UCLA Hugh & Hazel Darling Law Library for exemplary research assistance.

1. K.N. Llewellyn, *The Bar Specializes—With What Results?*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 177, 177 (1933) (emphasis omitted).

2. At the time of the events recounted in this Review, the author did not occupy an administrative role within the law school.

the convocation and asked the law school to “refrain from inviting a member of [Jones Day] to speak at future convocation ceremonies.”³ The letter queried why the law school should bestow the honor of administering the students’ oath of professionalism to a member of a firm whose partners had been actively undermining “our commitments to be compassionate towards others, to help secure the future of our planet, and to defend our democracy.”⁴

The letter went beyond bare allegations and marshalled specific examples to support its claims: (i) Jones Day represented the real estate industry in *Alabama Association of Realtors v. HHS*⁵ in successfully blocking the Center for Disease Control’s eviction moratorium, which placed hundreds of thousands of families at risk of losing their homes during the pandemic;⁶ (ii) the firm worked on behalf of coal companies to severely limit the Environmental Protection Agency’s ability to regulate carbon emissions from power plants in *West Virginia v. EPA*;⁷ and (iii) the firm represented the Trump presidential campaign in its challenge to early voting, including its well-publicized attempt to block the counting of mail-in ballots cast in Pennsylvania during the November 2020 presidential election, which—if successful—would have disenfranchised citizens who voted in good faith.⁸

As this convocation controversy was unfolding, David Enrich’s new book about Jones Day, *Servants of the Damned: Giant Law Firms, Donald Trump, and the Corruption of Justice*,⁹ was published,¹⁰ prompting a vociferous rebuttal from Kevyn Orr, the head of the firm’s U.S. offices, who had

3. Letter from Students of the UCLA Sch. of L. to [REDACTED], UCLA Sch. of L. (on file with author).

4. *Id.*

5. Ala. Ass’n of Realtors v. HHS, 141 S. Ct. 2485 (2021); *Jones Day Secures Supreme Court Decision for Property Owners Blocking CDC Eviction Moratorium*, JONES DAY (Aug. 2021), <https://www.jonesday.com/en/practices/experience/2021/08/jones-day-secures-supreme-court-decision-for-property-owners-blocking-cdc-eviction-moratorium> [perma.cc/S77Y-8AW9].

6. Adam Liptak & Glenn Thrush, *Supreme Court Ends Biden’s Eviction Moratorium*, N.Y. TIMES (Nov. 7, 2021), <https://www.nytimes.com/2021/08/26/us/eviction-moratorium-ends.html> [perma.cc/ZWM7-P7MX].

7. See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Coal Companies Prevail in Supreme Court Battle Over EPA’s Power*, JONES DAY (June 2022), <https://www.jonesday.com/en/practices/experience/2022/02/coal-companies-prevail-in-supreme-court-battle-over-epas-power> [perma.cc/73H8-L8S8].

8. David Enrich, *How a Corporate Law Firm Led a Political Revolution*, N.Y. TIMES MAG. (Aug. 25, 2022), <https://www.nytimes.com/2022/08/25/magazine/jones-day-trump.html> [perma.cc/ED6P-YU3C].

9. David Enrich is currently a business investigations editor for *The New York Times*.

10. The book was released to general audiences on September 13, 2022. *Servants of the Damned: Giant Law Firms, Donald Trump, and the Corruption of Justice*, KIRKUS REVS.

been invited to meet with the student petitioners.¹¹ *Servants of the Damned* exposes the little-known role played by the largest and most powerful global law firms—often dubbed “BigLaw”¹²—in advancing the causes of their well-resourced but not always well-behaved clients. Enrich explores this subject largely, though not exclusively, through the lens of a single law firm: Jones Day. He traces Jones Day’s transformation from a regional law firm based in Cleveland under the name of Blandin & Rice (p. 16) to the principal “firm representing John D. Rockefeller’s burgeoning 19th-century petroleum monopoly”¹³ to its pioneering rise as a global powerhouse of more than 2,400 attorneys in forty-two offices across five continents.¹⁴ While not unique among law firms, Enrich writes, “Jones Day’s arc . . . is a powerful encapsulation of the changes that have swept the legal industry in recent decades” (pp. 7–8).

In this Review, I identify some of the key insights that *Servants of the Damned* offers about Jones Day specifically and BigLaw generally, and I evaluate Enrich’s claims about the causes of the moral transformation of large law firms. In Part I, I recount how Enrich richly details Jones Day’s dramatic transformation. I retell how the firm gradually traded “[t]he Independence Principle” (p. 29)—the guiding notion that the firm “must maintain its freedom and independence to turn down any representation” (p. 18)—for a new ethical orientation that insists law firms are profit-maximizing institutions and must not judge their clients’ causes or objectives (so long as they are legally permissible) (p. 166). Along the way, I discuss Enrich’s in-depth reporting on Jones Day’s position as the firm of choice for the Trump campaign and administration.

In Part II, I discuss Enrich’s implicit claim that the ethical orientation of law firms changed principally because of the Supreme Court’s 1977 decision in *Bates v. State Bar of Arizona*,¹⁵ which struck down the ban on lawyer advertising. Enrich suggests that *Bates* triggered the rise of trade publications like *American Lawyer*, which—under the leadership of the brilliant media entrepreneur Steven Brill—engendered an industry-wide

(July 12, 2022), <https://www.kirkusreviews.com/book-reviews/david-enrich/servants-of-the-damned-trump> [perma.cc/ZQ35-EL5X].

11. Kevyn Orr, Opinion, *First, Smear All the Lawyers*, WALL ST. J. (Sept. 21, 2022, 1:32 PM), <https://www.wsj.com/articles/first-smear-all-the-lawyers-jones-day-clients-political-agenda-narrative-legal-representation-regulations-anonymous-sources-11663767476> [perma.cc/F28Q-4E6V].

12. See, e.g., MITT REGAN & LISA H. ROHRER, BIGLAW: MONEY AND MEANING IN THE MODERN LAW FIRM 5 (2021).

13. David Cay Johnston, *How Chasing Fees Leads the Biggest Law Firms to Distort Justice*, WASH. POST (Oct. 7, 2022, 5:00 AM), <https://www.washingtonpost.com/books/2022/10/07/how-chasing-fees-leads-biggest-law-firms-distort-justice/> [perma.cc/9QUG-2F8E].

14. Orr, *supra* note 11 (providing the statistics).

15. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

obsession with profits (pp. 34–59). In particular, *American Lawyer's* annual ordinal ranking of the top law firms based on their revenues and profitability spurred law firms to hike entry-level associate salaries, open more branch offices, demand higher billable hours, and soft pedal, if not ignore, ethical concerns. Although Enrich is correct to identify *Bates* and *Brill* as occupying important roles in the legal profession's ethical transformation, I offer a more comprehensive and structural explanation for this transformation. My explanation focuses on the profound economic changes that affected law firms and their corporate clients beginning in the 1970s and the contemporaneous backlash against the progressive policies of the New Deal and the Great Society that bolstered the financial security of the middle class. I also highlight the psychological role that cognitive dissonance has played in merging the forces of economic self-interest with ideology to facilitate BigLaw's full-throated endorsement of growth and profits.

In Part III, I explain the particular significance of *American Lawyer* in intensifying the economic competition among large law firms. Drawing on the economic concept of "winner-take-all" markets, I argue that Brill's rankings system accelerated the ethical transformation of law firms by helping recast the economic competition among law firms into a competition not only for profits *but also status*. This focus on status, aided by an ordinal ranking system, helped transform the already fierce competition among law firms into a zero-sum battle, fueling the competition to new and unprecedented heights.

Finally, in the Conclusion, I describe what became of that planned meeting with the UCLA law students, the senior law school administrator, and the Jones Day partners. I then offer some observations about whether this generation of law students and young lawyers may or may not follow the path modeled by their lawyer-predecessors.

I. THE ETHICAL TRANSFORMATION OF JONES DAY

Enrich starts his narrative in 1944, when a couple of tanks of liquid gas exploded in "a big balloon of fire" that would smolder for days, destroying homes and businesses and leaving 130 people dead and 225 people hospitalized (pp. 13–14). The owner of those tanks was the Cleveland-based East Ohio Gas Company, which Jones Day had represented for decades (p. 15). Instead of fighting the inevitable lawsuits, Jones Day advised its client to admit fault promptly and preemptively pay nearly \$7 million (equivalent to about \$100 million today) to make thousands of people whole again (pp. 15–16). The client heeded Jones Day's advice. Their response was viewed by the local community as fast and fair (p. 16).

This story is startling, because it departs so dramatically from the type of legal advice expected from a large corporate law firm. Today, one would expect corporate litigators to shift the blame to the various suppliers for faulty manufacturing, lowball the value of the victims' damaged

property, or avalanche plaintiffs with documents during discovery (p. 15). Instead, back in 1944, Jones Day counseled its client to do the right thing.

From the firm's early days until at least the early 1970s, Jones Day was guided by a principle established by its former managing partner Frank Ginn: "The firm must maintain its freedom and independence to turn down any representation" (pp. 18, 30–33). Abiding by this "Independence Principle" (p.29), the firm declined potentially lucrative representations. For example, it rejected a request to advise on a merger because it doubted the motives of the investment bankers pushing the deal (p. 18). For many years, the firm "refused to engage in lobbying" because such activities were beneath the honorable calling of the profession (p. 28). In 1973, partner Chappie Rose turned down a request to represent President Richard Nixon in his standoff with Congress because Nixon refused to allow Rose to review the infamous Oval Office audio recordings (pp. 28–29). As former Jones Day associate (and McKinsey founder) Marvin Bower recalled about Jones Day's earlier years, "If you are not willing to take pain to live by your principles, there is no point in having principles" (p. 18).

Soon, however, Jones Day, like many other law firms, traded its principles for new ones. According to Enrich, under the leadership of managing partner Allen Holmes and later Dick Pogue, the firm actively shed the "traditional lawyer mentality" and began to think more like investment bankers, who were racking up outsized profits (p. 61). The firm's new strategy centered on growth and market dominance, as reflected in its lucrative but morally fraught representations. For example, during the 1980s, Jones Day acted as lead litigation defense counsel for R.J. Reynolds Tobacco Company and developed its "scorched earth" litigation strategy, which included deluging plaintiffs with discovery, blaming smokers for their own health problems, and muddying the science on smoking's addictiveness.¹⁶ In 1988, Jones Day's lobbying specialists actively recruited as a client a West German chemical company seeking to avoid U.S. sanctions for its alleged involvement in building a poison-gas factory in Libya for Muammar Gaddafi.¹⁷ In the late 1980s, the firm represented the Lincoln Savings & Loan Association while it was under federal investigation both before and during the financial meltdown of the savings and loan industry—a representation that ended with Jones Day paying \$51 million to settle lawsuits by federal regulators (pp. 83–90).

Jones Day represented Purdue Pharma—maker of the blockbuster synthetic opioid OxyContin—in protecting its patents, including patents

16. Pp. 73–79. Jones Day continues to represent RJR Tobacco. *Charles R.A. Morse, JONES DAY*, <https://www.jonesday.com/en/lawyers/m/charles-morse> [perma.cc/8EQH-ZA47].

17. See pp. 63–64. Company officials denied wrongdoing. P. 63.

covering special pills that the company planned to market as “abuse deterrents” (p. 275). Even further, according to Enrich, it represented and used its political connections to help Walmart, whose pharmacies were filling “preposterous numbers of opioid prescriptions,” fend off a U.S. Attorney’s legitimate investigation (pp. 267–81). In the late 1990s, it ceased its pro bono representation of the Brady Center to Prevent Gun Violence and began defending gun-manufacturer Colt in lawsuits by victims and by state and local governments for the “havoc wreaked by its AR-15 assault rifle” (p. 122). In the 2010s, relying on the scorched earth tactics perfected in the tobacco litigation, the firm successfully defended Abbott Laboratories against a lawsuit alleging that its powdered baby formula was contaminated with bacteria that caused meningitis in infants’ brains (pp. 137–48). In 2004, when *American Lawyer* bestowed upon Jones Day the title of “Product Liability Department of the Year,” the publication observed, “From handguns to tobacco . . . Jones Day defends the *powerfully damned* and the *damned powerful*” (p. 123, emphases added).

But as unpalatable as these representations may seem, Jones Day is hardly exceptional for representing the “powerfully damned.” Enrich insists that Jones Day is not “uniquely terrible” (p. 7) and perhaps “not even the worst” (p. 174). He concedes that today, large law firm practice ordinarily consists of “helping clients sidestep regulations, control the media, whitewash their reputations, dodge taxes, and hide their money—tasks that don’t fit under even the most expansive definition of work to which clients are constitutionally or ethically entitled” (p. 174). Enrich also points to other law firms, such as Paul, Weiss, Skadden Arps, Gibson Dunn, Baker McKenzie, and Boies & Schiller, that are known to have undertaken morally problematic representations (ch. 16). As one Jones Day partner candidly explained, “[a]t the end of the day, law firms are profit-maximizing institutions” (p. 166).

Though this practice is not exceptional, Enrich suggests that Jones Day can be distinguished by its close identification with conservative clients and its apparent willingness to do the bidding of the Republican Party under former President Donald J. Trump (p. 4). By the 1980s, Enrich claims that “Jones Day had already established a pedigree as a politically wired firm with a clear rightward tilt” (p. 62). Enrich describes how the Issues and Appeals group at Jones Day—founded in the 1980s and populated with dozens of former Supreme Court clerks, mostly from conservative justices—positioned itself to act as the litigation team of choice for conservative clients and causes (pp. 187–207). This team led the as-

sault on the Affordable Care Act and represented the Catholic organizations challenging the regulation that required employer health plans to cover employees' contraception.¹⁸

In May 2014, Jones Day made the consequential decision to hire three former Patton Boggs partners—Ben Ginsberg, Don McGahn, and Bill McGinley—and their associates to establish a political and election law practice that advised Republicans (p. 214). Through McGahn,¹⁹ who would later become Trump's White House counsel (pp. 238–39), Jones Day began representing Trump and his presidential campaign in 2015 (pp. 215–17), even lending its pro bono efforts to vet candidates for White House and Justice Department positions after Trump won the 2016 election (pp. 239–40). More than a dozen of the firm's lawyers assumed senior positions in the new Trump Administration (pp. 241, 284), including Noel Francisco—Trump's solicitor general—who defended Trump's ban on travelers from various predominantly Muslim countries (p. 285). The firm helped Trump fend off the Mueller investigation into Russian interference in the election (pp. 5, 284) and laid the legal groundwork for Republicans to question the legitimacy of election results in Pennsylvania before Election Day 2020 (pp. 6, 292–96). Although some associates and partners, including Ben Ginsberg, expressed outrage at Trump's efforts to overturn the 2020 election and urged the firm to stop lending its credibility to a client hell-bent on subverting democracy and the rule of law (pp. 289–92), the firm seemed to treat these events as business as usual (pp. 295–96). Jones Day continued to represent Trump's political action committees after he left office (pp. 309–10).

How should we evaluate Jones Day's involvement with the Trump campaign and administration? In response to Enrich's book, Jones Day partner Orr denied that the firm is a " 'right wing' institution" or has a "political agenda," insisting that the firm's lawyers "have held senior positions in every presidential administration, Democratic and Republican, for decades."²⁰ Although this response provides some context, Orr does not actually rebut Enrich's factual claims about the deep connections between the firm and the Trump Administration. Nor does the fact that Jones Day lawyers may have "devoted more than 450,000 hours to assisting" migrants along the U.S. southern border while also "challenging Trump-era immigration restrictions"²¹ absolve the firm for the moral

18. Pp. 189–90, 201. As White House counsel, McGahn later worked with the Justice Department to issue a rule in October 2017 that permitted employers with religious objections to birth control to exclude contraceptive coverage from their health plans. Enrich, *supra* note 8.

19. McGahn also represented the Republican National Committee, the National Rifle Association, the billionaire Koch brothers, and Citizens United. P. 215.

20. Orr, *supra* note 11.

21. *Id.*

wrongs that it has helped perpetrate. Moreover, while the firm's leadership might distance itself from any express political agenda, it seems clear that some prominent partners clearly embrace a political agenda. As Enrich reports, at a Federalist Society event at the Reagan Presidential Library in 2019, McGahn declared, "I am you. You are me."²² After reshaping the federal judiciary while serving as White House counsel, McGahn returned to Jones Day to lead its government regulation practice²³ and continued to counsel "Senate Republicans on judicial strategy."²⁴

In my view, the specific question of whether Jones Day is motivated by a political agenda or has merely developed a lucrative niche practice catering to Republican clients, consistent with its competitive strategy, is not so important. As the maxim goes, "[t]he only thing necessary for the triumph of evil is for good men to do nothing."²⁵ By choosing to represent Trump—even after the January 6 insurrection—the firm showed itself to be utterly indifferent to the moral consequences of its representation.²⁶ It cannot dodge moral responsibility for deploying its formidable talents to serve a man determined to undermine democracy.

II. THE CAUSES OF THE ETHICAL TRANSFORMATION OF THE LEGAL PROFESSION

Jones Day is not unique,²⁷ which raises the question—why did this ethical transformation happen broadly within the legal profession? In a pair of illuminating chapters (pp. 34–50; "Advertisers-at-Law" and "Creating a Monster"), Enrich identifies two key events that may have been responsible. The first was the relatively sudden elimination of a formal restraint on competition. In 1977, the U.S. Supreme Court struck down the State Bar of Arizona's blanket ban on lawyer advertising on First Amendment grounds in *Bates v. State Bar of Arizona*.²⁸ As told by former managing partner Dick Pogue,²⁹ the Jones Day partners gathered together and were told that it was now "'perfectly proper' to solicit business, to market themselves" (p. 45). According to Pogue, the partners were shocked: "They just couldn't accept it. It was so drastically contrary

22. P. 283; Enrich, *supra* note 8.

23. See *Donald F. McGahn II (Don)*, JONES DAY, <https://www.jonesday.com/en/lawyers/m/donald-mcgahn?tab=overview> [perma.cc/PPS4-TKZ9].

24. Enrich, *supra* note 8.

25. John Rentoul, *The Top 10: Misattributed Quotations*, INDEPENDENT (Aug. 25, 2017, 2:56 PM), <https://www.independent.co.uk/voices/the-top-10-misattributed-quotations-a7910361.html> [perma.cc/5HT8-LKYX].

26. See pp. 309–10.

27. *Cf.* p. 9.

28. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

29. Pogue became managing partner in February 1984 when managing partner Allen Holmes became incapacitated. P. 60. At the time of the *Bates* decision, Pogue acted as Holmes' right-hand man. See p. 60.

to everything [they] had learned to accept” (p. 45). The shift from dignified restraint to hustling-for-business was decisive and swift. Jones Day immediately began to issue press releases touting its legal victories (p. 45). Other firms followed suit with aggressive marketing (pp. 45–46).

Lifting the ban on lawyer advertising was only part of the deregulatory decisions made by the Supreme Court. It also struck down minimum fee schedules in 1975³⁰ but upheld the states’ ability to impose certain restrictions on in-person solicitation in 1978,³¹ although those decisions probably had a greater impact on segments of the bar that catered mostly to individual clients and small businesses.³² Also, state regulatory bodies loosened entry regulations into the legal profession,³³ leading to the rapid increase in the supply of lawyers, which heightened the competitive pressures felt by firms in the 1970s.³⁴

The second related development that Enrich identifies is the rise of legal trade publications like *American Lawyer*, *Legal Times*, and *National Law Journal* (p. 50), which helped unleash an industry-wide obsession with profits (pp. 56–57). Enrich guides us through the fascinating story of how a twenty-seven-year-old Yale Law School graduate, Steven Brill, founded *American Lawyer* and built it into a media powerhouse (pp. 47–48, 56). *American Lawyer*’s crowning achievement was establishing in July 1985 the Am Law 50³⁵ (later expanded to the Am Law 75, 100 and the Am Law 200)³⁶—an ordinal ranking of the top fifty law firms based on their revenues and profitability (p. 55). The most talked-about metric was the firms’ profits per partner, widely known as “PPP”.³⁷ Soon after *American Lawyer* published the first rankings, firms hiked entry-level associate salaries to attract elite law school graduates, pressured lawyers to bill more hours, and intensified their growth efforts in pursuit of market domination (pp. 56–57). When confronted with a question about

30. Goldfarb v. Va. State Bar, 421 U.S. 773, 775, 780, 793 (1975).

31. Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 468 (1978).

32. Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 440–41, 475 (1989).

33. RICHARD L. ABEL, AMERICAN LAWYERS 40–43 (1989).

34. Sander & Williams, *supra* note 32, at 432, 476.

35. See p. 55.

36. See *Am Law 100 Reaches New Heights on Year of Near Universal Growth*, ALM (Apr. 23, 2019), https://www.alm.com/press_release/am-law-100-reaches-new-heights-on-year-of-near-universal-growth [perma.cc/LS4W-CXCW] (Am Law 75 and 100); Ben Seal, *The Am Law 100 Methodology: How We Make the List*, LAW.COM (Apr. 20, 2021, 9:30 AM), <https://www.law.com/americanylwyer/2021/04/20/the-am-law-100-methodology-how-we-make-the-list/?slreturn=20230907105236> [perma.cc/TC4V-6EK7] (Am Law 100); *The 2023 Am Law 200*, LAW.COM, <https://www.law.com/americanylwyer/am-law-200> [perma.cc/9G7B-WMR8] (Am Law 200).

37. See pp. 55, 57.

whether *American Lawyer* drove law firms to prioritize profits to the exclusion of everything else, Brill bemoaned, "It's all my fault."³⁸

Although Brill's rankings system accelerated the legal profession's lurch toward profit maximization during the 1980s, law firms were already well on that path by the mid-1970s. As for *Bates*, Enrich is correct to assign blame to the Supreme Court, but legal advertising is not the whole story. There are at least three additional, but less dramatic, factors that explain why the profession started to compete more unapologetically and blatantly for profits.

A. Increased Corporate Demand for Legal Services

First, those decades witnessed a significant increase in demand for corporate legal services. Although demand for all legal services grew in absolute terms from 1975 to 1995, the BigLaw corporate sector outpaced the individual and small business sector.³⁹ Specifically, the percentage of lawyers' effort devoted to corporate clients increased from 53% in 1975 to 64% in 1995, while effort devoted to individual and small business clients declined from 40% to 29%.⁴⁰ This increase in demand for corporate legal services was due (at least in part) to the changing character of American business.⁴¹ Before the 1970s, the highly concentrated manufacturing and agricultural industries dominated the U.S. economy.⁴² As a result, there were probably fewer and less complex demands for legal services.⁴³ Starting in the 1970s, however, service-oriented businesses in the financial services, insurance, and transportation industries came to dominate the U.S. economy.⁴⁴ These businesses tend to generate more contacts with third parties, which leads to more legal problems and more complex legal needs, given the highly regulated nature of their industries.⁴⁵

38. See p. 59.

39. JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 282 (2005). Statements referring to this sociological study are based on a large sample of Chicago lawyers from 1975 and 1995. *Id.* at 19; see also Sander & Williams, *supra* note 32, at 437 (finding that receipts from business legal services grew at a higher annual rate than receipts from individual clients from 1967 to 1982).

40. HEINZ ET AL., *supra* note 39, at 282.

41. *Id.* at 284.

42. See Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 347-48 (1994); HEINZ ET AL., *supra* note 39, at 284.

43. HEINZ ET AL., *supra* note 39, at 284. Manufacturing and agricultural businesses tend to have fewer contacts with third parties, fewer legal problems, and less complex legal needs. *Id.*

44. Eli Ginzberg & George J. Vojta, *The Service Sector of the U.S. Economy*, SCI. AM., Mar. 1981, 48, 49-50.

45. HEINZ ET AL., *supra* note 39, at 284.

Also, there may have been a growing demand for *larger* projects, which may have intensified efforts to grow the size of firms to staff those projects in-house, rather than sharing work with other law firms with niche practice areas or located in other jurisdictions. As Randall Thomas, Stewart Schwab, and Robert G. Hansen hypothesized, a steadily increasing demand for *large*, complex projects, which emanated from corporate clients who were growing in size and scope,⁴⁶ coupled with dramatic improvements in information technology,⁴⁷ may have steadily reduced the costs of growth for law firms.⁴⁸ Specifically, there was likely a shift from corporate clients asking firms to provide a limited set of services on a local basis “toward asking firms to provide them with more and more services on a broader and broader geographic basis.”⁴⁹ During this time period, firms also expanded their client base to represent public and private foreign entities.⁵⁰

Law firms responded to this increase in demand by hiring more lawyers, diversifying their practice areas, and either merging with other firms or growing internally to absorb a larger share of the growing market for corporate legal services.⁵¹ Crucially, firms embarked on a strategy of establishing branch offices in multiple jurisdictions. For example, until the mid-1960s, firms were generally located in and identified with a single city.⁵² But by the 1990s, it was unremarkable for a law firm to have offices in several major cities in the United States and abroad.⁵³ For example, by the end of 1999, fifty-seven of the seventy-two largest and most

46. Randall S. Thomas, Stewart J. Schwab & Robert G. Hansen, *Megafirms*, 80 N.C. L. REV. 115, 138 (2001).

47. Changes in information technology helped law firms break down communication, time, computing, and other barriers that previously constrained the size and scope of transactions that the firms could handle. Changes include, for example, the development of high-capacity, private email systems to connect lawyers in various branch offices. *Id.* at 127 n.32. Although the modern-day fax machine was patented as early as 1964, it was the 1980s that saw the surge in fax technology as a national and international form of communication. See *The History of Fax (from 1843 to Present Day)*, FAX AUTH. (Aug. 9, 2021), <https://faxauthority.com/fax-history> [perma.cc/4D2W-BNBN].

48. See Thomas, Schwab & Hansen, *supra* note 46, at 127, 138. These cost savings may have offset any diseconomies of scale and scope—the organizational costs that escalate as firms hire and manage a greater number of employees and a more diverse range of employees (different specializations or different departments, such as marketing or human resources). See *id.* at 124–26.

49. *Id.* at 127. This shift is plausible, given accounts of a growing perception of cross-border and mergers-and-acquisitions work in the 1980s. HEINZ ET AL., *supra* note 39, at 281.

50. Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL’Y INT’L BUS. 1093, 1094 (2000).

51. See Thomas, Schwab & Hansen, *supra* note 46, at 142.

52. MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 23, 47 (1991).

53. Silver, *supra* note 50.

international U.S. firms had London branch offices. These firms were headquartered in Chicago, Los Angeles, Boston, Houston, Dallas, Philadelphia, Washington, Minneapolis, St. Louis, Cleveland, San Francisco, Seattle, and Richmond.⁵⁴ Before 1970, in contrast, only two U.S. law firms, Coudert and Baker McKenzie, had offices in London.⁵⁵

The erosion of informal geographical boundaries for a law firm's services had far-reaching, yet underappreciated, consequences. Whereas previously (circa 1960)⁵⁶ a law firm might have regarded the relatively few corporate law firms operating in the same city or region as its main rivals for local clients, by the 1980s and 1990s every large law firm regarded every other large law firm in the world as a direct competitor for an ever-increasing number of global clients. In short, the erosion of geographic boundaries amplified competition such that firms headquartered in one metropolitan area were pitted against firms headquartered in *all* other major metropolitan areas. This effect dramatically multiplied the number of direct competitors for each firm, as well as the number of potential clients to whom each firm could market one's legal services.

By the end of the twentieth century, law firms' executive committees fully embraced the mantra of "[g]row or die" and "bigger is better."⁵⁷ The imperative for growth was motivated as much by fear as by greed—fear that if the firm did not provide solutions that met *every* area of a client's multifarious legal needs, then clients would take their business elsewhere.⁵⁸ Instead of referring business to another firm and risk losing the client to a competitor who would offer full service, law firms increasingly chose to hoard client work internally—a strategy that necessitated expansion and growth.⁵⁹

B. Greater Sophistication of In-House Counsel

This ever-present fear of being displaced by competitors was exacerbated by a second factor that hastened the ethical transformation of law firms.⁶⁰ As many commentators have observed, since the 1970s, corporate clients increasingly leveraged their purchasing power vis-à-vis law

54. *Id.* at 1104–14.

55. *Id.* at 1111.

56. Galanter and Palay refer to the period of the late 1950s and the early 1960s as the "golden age" of the big law firm when large law firms were "prosperous, stable, and untroubled." GALANTER & PALAY, *supra* note 52, at 20. Of course, "big" law firms during this period were significantly smaller than today. In 1965, the largest law firm had only 112 lawyers. *Id.* at 22.

57. HEINZ ET AL., *supra* note 39, at 291.

58. *Id.*

59. *Id.*

60. Also, fears of losing out to competitors were exacerbated by a general drop in lawyer incomes and worries about an increasing number of entrants into the legal profession. Michael Ariens, *Ethics in the Legal Industry*, 51 CREIGHTON L. REV. 673, 690 (2018).

firms by relying on sophisticated in-house counsel who exercised greater control over the law firms retained to do work.⁶¹ Corporations increased the size of their internal legal staffs and increasingly hired lawyers with prominent backgrounds to “manage their growing inventory of legal issues” and to strengthen the quality of their legal departments.⁶² In-house lawyers monitored and evaluated the performance of outside lawyers, scrutinized law firm bills to assess their cost-effectiveness, established standards about how outside counsel perform their work, and consulted with outside counsel on legal strategy.⁶³ In an effort to seek competition on price and quality of service, in-house lawyers often held “beauty contests” where law firms were invited to compete for the right to do the client’s legal work.⁶⁴

Sophisticated in-house counsel increasingly took over two crucial functions that were historically performed by a corporate client’s anchor law firms.⁶⁵ The first was *diagnosing* the client’s needs to determine what legal service the client requires.⁶⁶ Experienced and knowledgeable in-house lawyers depended less (than a corporate manager) on a distinguished partner at a law firm to tell the client what specialized service was needed.⁶⁷ The second function that in-house lawyers increasingly performed was *referring* the client to an appropriate specialist who could provide the needed service.⁶⁸ Experienced in-house lawyers were capable of identifying lawyers and law firms with the relevant specializations, and thus clients came to rely less on law firm partners to intermediate.⁶⁹ In short, corporate clients internalized much of the diagnostic and referral functions previously performed by key partners at their anchor law firm. As a result, corporate clients’ costs of switching law firms diminished, which in turn enhanced the market power of clients vis-à-vis law firms.⁷⁰

61. Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277, 290 (1985); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 381 (1985); ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 57–58 (1988); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 483–84 (1989); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 902 (1990).

62. HEINZ ET AL., *supra* note 39, at 297.

63. *Id.*

64. Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 451 n.210 (2008).

65. Gilson, *supra* note 61, at 900–01.

66. *Id.* at 893, 900.

67. *See id.* at 900.

68. *Id.* at 893, 901.

69. *See id.* at 900.

70. *Id.* at 900–01.

This power shift helped raise the competition between firms headquartered in different cities and accelerated the trend toward multicity law firms.⁷¹ Because firms based in different cities were competing more directly and relationships with corporate in-house counsel were becoming more important, law firms were even less likely to turn down client work due to ethical concerns.⁷² And, given the increasingly competitive environment in which corporate businesses operated in the 1970s and 1980s, clients focused more on short-term profits and less on other longer-term business goals, such as research and development.⁷³ In the face of these pressures, ethics fell by the wayside.

C. *Self-Serving Role Ideology*

But the ethical transformation of law firms would not have been complete without the profound ideological shifts that served to legitimize the profession's newfound strategies and (un)ethical leanings. As I've argued elsewhere, ideologies about the purpose of a professional role—what I referred to as “role ideology”—can normalize unethical behavior by providing a culturally supplied justification and a veneer of legitimacy.⁷⁴ Over time, a lawyer may become acculturated to a particular role ideology that reframes unethical choices as entirely consistent with, and even possibly endorsed by, her professional obligations.⁷⁵ This change in perception makes what would normally be classified as unethical behavior seem socially acceptable. Cognitive dissonance theory predicts that when a person finds herself engaging in or complicit in behavior ordinarily regarded as unethical, she is likely to adopt a new definition of “ethical” that rationalizes the same conduct as “ethical” (at least in the capacity of a lawyer).⁷⁶

71. See *id.* at 903 n.75.

72. *Id.* at 903.

73. For example, the high cost of capital in the 1980s encouraged corporations to restructure themselves through leveraged buyouts and stock buyback programs and caused corporate managers to focus on enhancing net worth. In the late 1980s, the cost of capital decreased, but corporations faced even keener competition in the global marketplace. ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 69–70 (1995).

74. Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 *FORDHAM L. REV.* 983, 1012, 1032 (2005).

75. *Id.* at 1012.

76. Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 *FLA. L. REV.* 129, 146 (2011). This article notes that cognitive dissonance theory predicts that “when a person’s behavior is inconsistent with her prior self-image or attitudes to such a degree that dissonance or ‘psychic unrest’ is aroused, her internal attitudes will shift to generate greater alignment with her behavior in an effort to reduce the dissonance.” *Id.*

Beginning in the 1970s, lawyers gradually retreated from their self-understanding as “society’s engineers” tasked with the civic responsibility to align clients’ objectives with the public good.⁷⁷ Instead, lawyers adopted a primarily economic understanding of their role as legal service providers whose primary function was to advance their clients’ interests regardless of the public’s interest.⁷⁸ In essence, the role of the lawyer was redefined as giving client-consumers access to whatever claims, viewpoints, and legal positions they sought.⁷⁹ This transformation in lawyers’ role ideology arose out of multiple developments that converged in the 1970s: (1) the failure of the Keynesian model of active state intervention in the economy to account for the 1973 recession and the attendant rise of neoliberalism and free market ideology (exemplified by Milton Friedman’s plea that the social responsibility of business is to maximize profits),⁸⁰ (2) the rise of an intellectual movement that highlighted the self-interestedness and elitism of experts and professionals,⁸¹ and (3) the loss of faith in government and civil society to solve society’s ills through social planning.⁸² These developments can be understood as a response to government initiatives, such as the New Deal and the Great Society, that bolstered the financial security of the middle class.⁸³ These responses all share a profound skepticism toward grand theories about the common welfare and an increased faith in markets to distribute society’s goods.⁸⁴

Accordingly, lawyers came to believe that the legal profession’s public responsibilities began and ended with ensuring that clients had access to legal services⁸⁵ (even as lawyers resisted any mandatory *pro bono* obligation or mandatory tax to fund legal services to the indigent).⁸⁶ Exemplifying this view, Dick Pogue stated in an email, “It has always been my personal philosophy that everyone is entitled to counsel, no matter how unpopular their cause happens to appear in some circles at any particular time, and so it never occurred to me that anyone would question the

77. Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 672 (2016).

78. *Id.* at 677.

79. *Id.* at 673.

80. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 17, <https://www.ny-times.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> [perma.cc/B6AS-GRAG]; Roiphe, *supra* note 77, at 663–65.

81. Roiphe, *supra* note 77, at 665–66.

82. *Id.* at 668–72.

83. *Id.* at 658–70.

84. *Id.* at 664, 669–72.

85. *Id.* at 676.

86. Rima Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, 78 LA. L. REV. 547, 567–78 (2018) (describing the profession’s aspirational approach to pro bono and discussing opposition to mandatory pro bono).

firm's representation of a successful, law-abiding organization" (pp. 68–69).

But Pogue's perspective conveniently ignores the fact that only criminal defendants are constitutionally guaranteed the right to counsel,⁸⁷ and most people cannot afford the quality of legal representation sold by Jones Day. Indeed, the 2021 World Justice Project ranked the United States among the bottom fourteen countries in terms of accessibility and affordability of civil justice.⁸⁸ Even if an individual can access counsel, there are practical limitations to what lawyers can do to protect clients from unjust harms inflicted by opposing lawyers who represent the powerful. No matter how skilled or adept they may be, the lawyers representing ordinary individuals cannot wholly neutralize the economic power wielded by high-net-worth clients and their counsel.⁸⁹

In sum, a significant increase in demand for corporate legal services, coupled with a marked increase in the market power of corporate in-house counsel and aided by profound ideological shifts in the legal profession and society-at-large, also facilitated the ethical transformation of law firms. Enrich's tale about how Supreme Court justices inadvertently created the conditions that a brilliant entrepreneur of legal journalism would exploit makes for entertaining reading.⁹⁰ But I have offered a slightly more mundane, complex story of how the market for legal services matured and became more competitive in much the same way as other markets for goods and services. In short, some of the same factors that affected businesses generally during this era—including increases in domestic and global consumer demand, technological innovations that

87. Alan Jay Stein, Note, *The Indigent's "Right" to Counsel in Civil Cases*, 43 FORDHAM L. REV. 989, 989 (1975).

88. *United States: Civil Justice*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/country/2021/United%20States/Civil%20Justice> [perma.cc/65KP-9G93] (ranking the United States 126th out of 139 countries); see also Eli Wald, *The Access and Justice Imperatives of the Rules of Professional Conduct*, 35 GEO. J. LEGAL ETHICS 375, 404 (2022).

89. See, e.g., Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103 (1974); Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 360–63 (1999); Sung Hui Kim, *Economic Inequality, Access to Law, and Mandatory Arbitration Agreements: A Comment on the Standard Conception of the Lawyer's Role*, 88 FORDHAM L. REV. 1665, 1666 (2020); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 259 (1990).

90. In holding that the ban on lawyer advertising violated the First Amendment, the Supreme Court rejected the argument that advertising would "tarnish the dignified public image of the profession" and that "price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977).

eroded geographical boundaries and reduced the costs of growth, increased sophistication of buyers, and shifts in ideology—also affected law firms and their ethics.⁹¹

III. THE SIGNIFICANCE OF THE RANKINGS SYSTEM

Now that we have a deeper understanding of the causes of the ethical transformation of law firms, what precisely was the significance of Brill's rankings system to this transformation? In their illuminating 1995 book *The Winner-Take-All Society*, economists Robert Frank and Philip Cook explain the growing phenomenon of what they refer to as “winner-take-all” markets. In these markets, monetary “rewards tend to be concentrated in the hands of a few top performers, with small differences in talent or effort often giving rise to enormous differences in incomes.”⁹² According to Frank and Cook, the single most distinguishing characteristic of winner-take-all markets is that rewards depend not only on *absolute* performance⁹³ but also to varying degrees on *relative* performance—how a contender (or group of contenders) ranks vis-à-vis other contenders.⁹⁴

Take, for example, the market for classical musician soloists. Performers of the first rank on any given instrument, who may number only in the hundreds, have substantial incomes that dwarf the incomes of second rank performers.⁹⁵ To be sure, there may be discernible quality differences between musicians in the top and second tiers. But in winner-take-all markets, the quality differences are not proportional to the differences in income.⁹⁶ For instance, in the market for classical musician soloists, “most consumers would have difficulty detecting more than minor differences in a ‘blind’ hearing.”⁹⁷

In my view, Brill's rankings system accelerated the ethical transformation of law firms, by helping to convert the market for legal services into one sharply attuned to both absolute profits *and* relative rankings. Brill provided reasonably reliable information about the profitability of

91. Other economic factors not discussed herein include the availability of new financial resources and the reduction of antitrust enforcement, both of which spurred corporate demand for legal services for larger, complex projects. Nelson, *supra* note 42, at 351–53.

92. FRANK & COOK, *supra* note 73, at 24.

93. *Id.* The paradigmatic example of rewards based on absolute performance is compensating a production worker for the number of units assembled each week, as opposed to how his productivity compares with that of his coworkers. *Id.*

94. *Id.*

95. Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845, 845 (1981).

96. FRANK & COOK, *supra* note 73, at 30–31 (“In some cases winners are chosen by lottery. . . . Other winner-take-all contests are decided by tests of skill, learning, or ability. . . . But many other winner-take-all contests are resolved on the basis of considerably more subjective evaluations.”).

97. Rosen, *supra* note 95, at 845.

law firms, which he distilled into a PPP. He then translated this PPP into an ordinal ranking of law firms, which refocused lawyers' attention toward relative performance. In doing so, he effectively reframed the economic competition among law firms for profits into a competition for profits *and status*.

This recasting in terms of status has psychological consequences because when contenders perceive the contest to be a fight not only over money but also status, the contest increasingly bears a zero-sum flavor,⁹⁸ motivating contenders to spend greater and greater resources to enhance or maintain their status.⁹⁹

So, what is the evidence that the market for legal services has become one in which monetary rewards are based not only on absolute performance but also (to varying degrees) on *relative* performance? A full exploration of the evidence is outside this Review's scope and space constraints. But one empirical study is illuminating.

In 2006, William Henderson published a study of single-tier and two-tier (or multi-tier) partnerships, the latter accounting for 79% of the firms listed in the Am Law 200 in 2004.¹⁰⁰ Henderson found that during 2003¹⁰¹ not only was there wide differentiation in the profitability of Am Law 200 firms¹⁰² but also that single-tier firms were significantly more profitable (and thus higher ranked) than two-tier firms, boasting an average PPP of \$1,048,690 over an average PPP of \$684,557 for two-tier firms.¹⁰³ After ruling out a number of potential explanations,¹⁰⁴ he con-

98. In game theory, a zero-sum game is one in which one player's gain is equivalent to the other player's loss, resulting in the net benefit of the game becoming zero. *Zero-Sum Game*, BLACK'S LAW DICTIONARY (11th ed. 2019). Dividing a pie, for example, is a zero-sum *situation* because a larger share for me translates into a smaller share for you. Competitions over status tend to be zero-sum situations because one contender's (or one group of contenders') move into the top spot often directly results in another contender's (or another group of contenders') move into a lower spot. Non-zero-sum situations are situations in which one contender's gain does not necessarily translate into the other contender's loss; for example, situations where the pie gets enlarged.

99. FRANK & COOK, *supra* note 73, at 113 ("The status motive thus lends a zero-sum flavor to the winner-take-all struggle.").

100. William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691, 1695 n.16–17, 1714 (2006). Two-tier firms contain separate tracks for "equity" and "nonequity" partners; the equity tier controls the firm and enjoys a greater per capita share of the firm's profits. *Id.* at 1691. By contrast, single-tier firms only have "equity" partners who share profits, often according to a predetermined schedule of lockstep compensation. *Id.* at 1694.

101. *Id.* at 1714–15.

102. In 2003, the average PPP at an Am Law 200 firm was \$761,025 (with a standard deviation of \$454,939). *Id.* at 1719.

103. *Id.* at 1727.

104. For example, Henderson concluded that the differentials were not due to higher leverage (defined as the ratio of lawyer-staff to equity partner) or higher concentrations in key metropolitan areas with high costs of living. *Id.* at 1696, 1721, 1727, 1748.

cluded that the higher profitability of single-tier firms was likely attributable to superior reputational capital or prestige, as measured by other known, but less popular, proxies for firm reputation.¹⁰⁵ Henderson's conclusion, which suggests that prestige is the principal driver for PPP and thus the firm's ordinal ranking, appears to support the proposition that a firm's *relative* standing is an important factor in explaining the size of rewards. Although there may be nontrivial quality differences that partially explain the significant profitability differentials between single-tier firms and two-tier firms, these quality differences are unlikely to be great. The large corporate law firms in the Am Law 200 are fairly homogeneous: They are all "highly selective in their hiring practices, recruiting at the nation's most prestigious law schools and requiring exemplary law school records from graduates of lower-ranked schools."¹⁰⁶ By dramatically reducing the transaction costs of obtaining reliable information about the profitability of law firms and then translating that information into an ordinal ranking, Brill's rankings system helped recast the economic competition among law firms into a competition for profits *and* status. Given the zero-sum nature of fighting over status, law firms increasingly prioritized growth and profits to preserve or enhance their status. Of course, these priorities tended to crowd out other important ethical values.

CONCLUSION

So, what became of the meeting with the two student petitioners, the partners of Jones Day, and the senior law school administrator? Well, it never took place. Uncowed, the students insisted that the meeting be held "on the record" and not locked up under any confidentiality agreement. Unsurprisingly, the other parties demurred, taking the position that only a confidential meeting could allow for a candid discussion of different perspectives. Because the parties were not able to come to a consensus on this critical term, there would be no face-to-face meeting and, as a result, no open debate about how Jones Day navigates or should navigate its ethical issues.

As I look back at these events and my conversations with these students, I wonder why they believed that a petition was the most efficacious way of effecting a change in policy, as opposed to—for example—a conversation with the dean. At the same time, I am impressed by their moral courage and commitment to the public interest. Although one might quibble with their chosen methods, these students displayed what many have

105. *Id.* at 1729 ("[I]t appears that the superior profitability of single-tier firms is probably attributable to superior prestige rather than incentives that flow from the partnership structure."). The proxies for firm reputation were the Vault prestige score, which was derived from a 2002 electronic survey of large law firm associates at 126 leading law firms and the 2004 Mid-Level Associates Survey. *Id.* at 1725–26.

106. *Id.* at 1719.

long bemoaned was generally lacking in our current materialistic and self-obsessed American culture: civic virtue, “[t]he sacrifice of individual interests to the greater good of the whole.”¹⁰⁷ Troubled by whom the law school had held out as role models,¹⁰⁸ these students could have played it safe and kept their noses to the grindstone. Instead, they mobilized and made their trouble public.

The students who organized the petition were not alone in demonstrating civic virtue. More than a hundred 1Ls signed their petition, protesting the choice of the convocation speaker from Jones Day. Moreover, news reports provide anecdotal evidence that law students are increasingly mobilizing to call out injustices in the legal profession.¹⁰⁹ For example, in 2018, Harvard Law School students rallied to denounce law firms that required summer associates (and other staff) to sign pre-dispute mandatory arbitration agreements (MAAs)—often bundled with nondisclosure agreements (NDAs)—covering sex and race discrimination claims.¹¹⁰ Their efforts ultimately led to “fifty law schools, including Harvard, Yale, and Stanford, request[ing] information from member law firms of the National Association for Law Placement about their use of

107. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 53 (2d ed. 1998).

108. These particular 1L students were specifically displeased about the notion of Jones Day as an aspirational model. But I’ve also had conversations with other 2Ls and 3Ls who have expressed broader disappointment about a perceived messaging emphasis on BigLaw.

109. See Sung Hui Kim, *Legal Ethics After #MeToo: Autonomy, Domination, and Non-disclosure Agreements*, 73 *DUKE L.J.* 463, 531–32 (2023). To be sure, not all expressions of collective moral outrage are salutary or even benign. Critics of so-called “cancel culture” have pointed out its potential dark side, including its occasional tendency to presume guilt, essentialize, undermine tolerance for diverse ideological viewpoints, shut down open debate, and devolve into a sadistic entertainment spectacle—a “21st-century version of the guillotine.” Ryan SC Wong, *Revisiting Cancel Culture*, *CONTEXTS*, Fall 2022, at 69, 71, <https://doi.org/10.1177/15365042221131087> [<https://perma.cc/7E2L-RRFC>]. Campaigns of public shaming may not be the most effective way to change minds. Also, we must remind ourselves of the fact that the January 6 rioters on Capitol Hill held the sincere—but wrongheaded—belief that they were mobilizing for the common good. Although all criticisms of social activism should be taken to heart, I believe that expressions of collective moral outrage, if deployed in a manner that does not undermine other important values, such as tolerance and open debate, can facilitate a beneficial change in norms by drawing attention to instances of injustice and abuses of power that have been ignored and left unrectified by the powerful for far too long. (Some prominent examples of important campaigns are #BlackLivesMatter, #MuteRKelly, #MeToo.) At its best, expressions of moral outrage can provide the necessary political impetus for meaningful social change.

110. *Elite Law Students Toppling Firms’ Mandatory Arbitration Policies*, *LAW.COM*, <https://www.law.com/instant-insights/elite-law-students-toppling-firms%E2%80%99-mandatory-arbitration-policies/> [perma.cc/9H47-2YJ6]. “MAAs require employees to waive their right to file all statutory and common-law employment-related claims in court even before they have or know they have claims.” Kim, *supra* note 89, at 1674. For a summary of these social activism developments, see Kim, *supra* note 109, at 530–33.

MAAs and NDAs.”¹¹¹ In response, many law firms renounced their use of these agreements.¹¹²

Given such anecdotes of civic activism of law students, I can’t help but wonder: What will become of the legal profession once late Millennials and Gen Zers enter the leadership of the legal profession in great numbers? Will law firms continue to claim that they cannot be held morally accountable for their morally troublesome representations?¹¹³ Or will law firms take on projects only after they have been morally vetted—a different sort of “conflicts check”?

I doubt that law firms will dramatically change how they consider (or not consider) the morality (or immorality) of their clients’ projects. After all, the legal profession is highly fragmented,¹¹⁴ and civic-minded students are likely to self-select into public interest practices or niche firms. As long as money and status matter (as they do, even to law professors) and students carry crushing debt loads, there will always be a steady supply of graduates making a beeline to corporate law firms, where they will be acculturated into the firms’ norms. Moreover, some empirical work suggests that the *perception* of increased civic activism, signified by boycotts and protests, is far greater than the reality.¹¹⁵ Nevertheless, I remain hopeful—when so much in the world is at stake—that the next generation of lawyers can revitalize the ethical roots of the profession.

111. Kim, *supra* note 109, at 531.

112. See *id.* at 531–32; Chris Villani, *Venable Next for Students Pushing to End Forced Arbitration*, LAW360 (Feb. 4, 2019, 2:42 PM), <https://www.law360.com/articles/1125070/venable-next-for-students-pushing-to-end-forced-arbitration> [perma.cc/CG6T-72MB].

113. See, e.g., Orr, *supra* note 11 (“[T]he ethical rules for lawyers have long provided that the views of clients can’t be attributed to lawyers and that lawyers shouldn’t decline clients because of concern about public criticism.”).

114. See HEINZ ET AL., *supra* note 39.

115. See Nicholas C. Dias, James N. Druckman & Matthew S. Levendusky, *Unraveling a “Cancel Culture” Dynamic: When and Why Americans Sanction Offensive Speech*, 15–16 (Aug. 2, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4235680 [perma.cc/8HGQ-P78H] (finding that while 7 percent of respondents had boycotted or protested an event, 37 percent had seen others do so).