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## Being Good Lawyers: A Relational Approach to Law Practice


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# Being Good Lawyers: A Relational Approach to Law Practice

ELI WALD\* AND RUSSELL G. PEARCE†

## ABSTRACT

*In response to past generations of debates regarding whether law is a business or profession, we advance an alternative approach that rejects the dichotomies of business and profession, or hired gun and wise counselor. Instead, we propose a relational account of law practice. Unlike frameworks grounded in assumptions of atomistic individualism or communitarianism, a relational perspective recognizes that all actors, whether individuals or organizations, have separate identities yet are intrinsically inter-connected and cannot maximize their own good in isolation. Through the lens of relational self-interest, maximizing the good of the individual or business requires consideration of the good of the neighbor, the employee or customer, and of the public. Accordingly, relational lawyers advise and assist clients, colleagues, and themselves to take into account the well-being of others when contemplating and pursuing their own interests.*

*A relational approach to law practice does not require a choice between labeling law a business or a profession, and indeed is consistent with both perspectives. Lawyers can access relational perspectives from a wide range of understandings of the lawyer's role, with the exception of the particular hired gun ideology that views lawyers as amoral mouthpieces for clients who act as Holmesian bad men and women aggressively pursuing their self-interest with no regard to others. The relational framework offers all lawyers, whether they see themselves as professionals or business persons, a framework for understanding that they can continue to serve as society's civic teachers in their capacity as intermediaries between the people and the law, integrating relational self-interest into their representation of clients and their community service. By doing so, lawyers as professionals, individuals, and community members will more effectively represent clients, as well as enhance their contribution to the public good and to the quality of their own professional and private lives. They will also surmount the generation-long malaise resulting from the crisis of professionalism.*

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## INTRODUCTION

The practice of law is great work. In a liberal democracy, the law shapes how people live their personal lives and participate in business and in civil society. In the United States, lawyers perform much, but not all, of law work.<sup>1</sup> Yet, for more

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1. See Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 *FORDHAM L. REV.* 368, 378-81 (2014) [hereinafter Barton, *Lawyer's Monopoly*]; John S. Dzienkowski & Robert J. Peroni,

than a generation, bar leaders and scholars have bemoaned the decline, betrayal, or death of the legal profession.<sup>2</sup> What explains this divergence between the great work of law and these widespread negative perceptions? And how can we find a way to restore the convergence between the greatness of law work and the way lawyers and the public view that work? This article argues that a relational perspective will help lawyers move beyond the crisis of professionalism and will provide them with a framework for exploring practical ways to improve the quality of their work, their satisfaction with their work, and their contribution to their communities, and, as a result, more effectively serve clients, the legal system and the public interest.

The need for a new paradigm today arises from the ineffectiveness of the traditional lawyer professionalism paradigm, which historically provided the dominant, although not universal, guide to the lawyer's vocation.<sup>3</sup> That historical paradigm—the business-profession dichotomy—held that in contrast to business people who sought to maximize profit, lawyers worked primarily for the public good in their representation of clients and their civic leadership.<sup>4</sup> Under this paradigm, lawyers combined zealous representation with a responsibility to counsel their clients on the spirit, as well as the letter of the law, and the public good. And zealous representation did not permit lawyers to be uncivil or to subvert the legal system.<sup>5</sup>

The traditional paradigm, however, has been in decline. The dominant conception of the lawyer's role had shifted from professionalism's combination of public and private responsibilities to the exclusively private role of extreme partisan for the client with little moral or public accountability,<sup>6</sup> a conception consistent both with the traditional rhetoric of zealous representation as well as

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*Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 83–84 (2000).

2. See *infra* Part I.B.

3. See generally, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1 (1988) [hereinafter Gordon, *Independence*]; 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) [hereinafter Pearce, *The Professionalism Paradigm Shift*]; Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 *FORDHAM L. REV.* 1339 (2006) [hereinafter Pearce, *Blue State*]; Rebecca Roiphe, *Redefining Professionalism*, 26 *U. FLA. J.L. & PUB. POL'Y* 193 (2015) [hereinafter Roiphe, *Redefining Professionalism*].

4. See Anthony T. Kronman, *Legal Ethics: Professionalism*, 2 *J. INST. STUD. LEG. ETH.* 89, 90–91 (1999); Pearce, *Blue State*, *supra* note 3, at 1356.

5. See GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* 117–20 (1884); Russell Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *GEO. J. LEGAL ETHICS* 241, 261 (1992) [hereinafter Pearce, *Legal Ethics Codes*]; see also, *Paramount Communications v. QVC Network*, 637 A.2d 34, 54 (Del. 1994) (“Staunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process.”).

6. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xx (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*]; WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 8 (1998) [hereinafter

the profit maximizing ethic of business. This new hired gun ideology is grounded in an atomistic conception that defines self-interest as the narrow, short term interest of the atomistic actor—the Holmesian bad man’s normative goal of what he can get away with<sup>7</sup>—and thereby defines any concern for others as inconsistent with self-interest. This atomistic perspective became dominant after the 1960s and helps explain the ascendance of extreme partisanship and the decline of professionalism.<sup>8</sup>

The results of this paradigm shift for the legal profession have been profound: surveys indicate that the public has lost respect for lawyers<sup>9</sup> and that lawyers exhibit lower levels of job satisfaction and higher levels of substance abuse and anxiety related mental illness than the general public.<sup>10</sup> Even the notion that legal work shares a common core of responsibilities has come under challenge from critics who argued that professional responsibilities were better promoted through fragmented and specialized roles,<sup>11</sup> or that professionalism was nothing more than a self-serving myth.

During the past forty years, many lawyers and scholars have sought either to revive belief in the business-profession dichotomy employing a wide range of additional arguments to persuade lawyers to reimport public or moral responsibility into their role,<sup>12</sup> rebuild the professionalism paradigm,<sup>13</sup> or to offer alternatives to the newly dominant conception of extreme partisanship.<sup>14</sup> Others have prescribed personal fulfillment as the way for lawyers to find meaning.<sup>15</sup> While all of these efforts have made marginal progress, they have not succeeded

SIMON, PRACTICE OF JUSTICE]; Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672–74 (1978).

7. See generally Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458–60 (1897) (address at the dedication of the New Hall of the Boston University School of Law on January 8, 1897).

8. See, e.g., Pearce, *Blue State*, *supra* note 3, at 1358–64.

9. See Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1416–17 (1999). We recognize that the reputation of lawyers has often been mixed. See, e.g., MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005). Our point is that in recent years the reputation has become more negative.

10. See *infra* Part III.C.

11. See *infra* notes 261–66 and accompanying text.

12. See, e.g., AM. BAR ASSOC. COMMISSION ON PROFESSIONALISM, “. . . In the Spirit of Public Service:” *A Blueprint for the Rekindling of Lawyer Professionalism* 10 (1986), [http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley\\_Commission\\_Report.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley_Commission_Report.pdf) [<https://perma.cc/AKR8-GFY3>] (last visited Apr. 2, 2016) (“Has our profession abandoned principle for profit, professionalism for commercialism?”); American Bar Association, *A Guide to Professionalism Commissions* 8 (2011); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); Pearce, *The Professionalism Paradigm Shift*, *supra* note 3, at 1241; see also Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1556 (2002) [hereinafter Rhode, *Law, Lawyers*]; *infra* notes 224–35 and accompanying text.

13. See, e.g., Pearce, *The Professionalism Paradigm Shift*, *supra* note 3.

14. See *infra* notes 224–27 and accompanying text.

15. Cf., e.g., Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 617–20 (2015); Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with*

in restoring commitment to the professionalism paradigm.<sup>16</sup>

In this article, we suggest that a way forward is emerging. Building on the work of economists, philosophers, scientists, and legal scholars,<sup>17</sup> we argue that the atomistic understanding is descriptively false and normatively unpersuasive, and is detrimental to both lawyers and their clients.<sup>18</sup> In contrast, we apply and develop a relational perspective that rejects the extreme individualism of the atomistic conception and views individuals and organizations as both having agency and existing within webs of relationships. Self-interest accordingly requires consideration of the long-term impact of conduct on family, friends, neighbors, and communities. Such a relational approach not only provides a foundation for a fulfilling professional role for lawyers but also for a more effective representation of clients.

Part I of this article describes the traditional paradigm of law practice and its decline resulting in a crisis of professionalism. Part II first examines the rise of the currently dominant atomistic conception and its corresponding ideology of lawyers as hired guns, as well as its harmful consequences for lawyers and their clients. It then introduces an alternative vision—a relational approach to law practice—examining its potential benefits for lawyers and clients alike. Following an interdisciplinary introduction of the core ideas of the relational framework,

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*Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 566–71 (1998).

16. See Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 432 (2011) (discussing the lack of commitment to teaching professionalism in law schools) [hereinafter Wald & Pearce, *Making Good Lawyers*].

17. See, generally, e.g., LUBAN, *LAWYERS AND JUSTICE*, *supra* note 6; JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* (2011); MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011); DONALD W. PFAFF & SANDRA SHERMAN, *THE ALTRUISTIC BRAIN: HOW WE ARE NATURALLY GOOD* (2015); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998) [hereinafter SANDEL, *LIBERALISM*]; SIMON, *PRACTICE OF JUSTICE*, *supra* note 6; Charles Taylor, *Atomism*, in *PHILOSOPHY AND THE HUMAN SCIENCES* (1985); ROBERT VISCHER, *MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE: LESSONS IN LOVE AND JUSTICE* (2013); W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010); IRIS MARION YOUNG, *RESPONSIBILITY FOR JUSTICE* (2011); Luigino Bruni & Robert Sugden, *Fraternity: Why the Market Need Not be a Morally Free Zone*, 24 ECON. & PHIL. 35 (2008); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998); Gordon, *Independence*, *supra* note 3; Bruce A. Green & Russell G. Pearce, "Public Service Must Begin at Home": *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207 (2009) [hereinafter Green & Pearce, *Lawyer as Civics Teacher*]; Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389 (2005) [hereinafter Kruse, *Lawyers, Justice*]; Dana A. Remus, *Reconstructing Professionalism* (UNC Legal Studies, Research Paper No. 2676094, 2015), <http://ssrn.com/abstract=2676094> [<https://perma.cc/C87Q-5CUT>] (last visited Apr. 2, 2016); Rhode, *Law, Lawyers*, *supra* note 12; Roiphe, *Redefining Professionalism*, *supra* note 3; Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 986–87 (1987); Hilary Sommerlad, *Women Solicitors in a Fractured Profession: Intersections of Gender and Professionalism in England and Wales*, 9 INT'L J. LEGAL PROF. 213 (2002); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469, 515–19 (1990); Benjamin Zipursky, *The Internal Point of View in Law and Ethics: Introduction*, 75 FORDHAM L. REV. 1143 (2006).

18. See Wald & Pearce, *Making Good Lawyers*, *supra* note 16, at 407.

Part II explores in detail the meaning of a relational approach to law practice: how it can inform and shape the attorney-client relationship, serve as the basis for alternative ideologies to the dominant hired-gun professional ideology, help reimagine rules of professional conduct, improve the organization and practice of law firms, and enhance legal education. Part III explores the impact of a relational approach on the discourse of professionalism. It argues that four false dichotomies have dominated the legal profession's discourse during the crisis of professionalism and demonstrates how all four dichotomies mistakenly rely in whole or in part on the atomistic conception. Finally, Part III explains how a relational perspective turns these false dichotomies into workable challenges. Law can be both a business and a profession. Lawyers can disagree on the specific contours of their role while retaining a core shared identity that, in turn, can provide a source of meaning in work that promotes job satisfaction.

## I. THE CRISIS OF PROFESSIONALISM

### A. THE PROFESSIONALISM PARADIGM

As far-fetched as the argument may sound today, the belief in the business-profession dichotomy provided the foundation for the elements of traditional lawyer professionalism that were dominant, although not exclusive, from the early days of the United States through the 1960s.<sup>19</sup> Business people worked to maximize profits through a regulated market.<sup>20</sup> Professionals, in contrast, possessed inaccessible expertise and primarily pursued the public good, not self-interest, entitling them to autonomy as individuals and as a group.<sup>21</sup> Under the business-profession dichotomy, lawyers were zealous representatives of clients who served the public good through wise counsel and civic leadership.<sup>22</sup>

The business-profession dichotomy was essential to traditional professionalism's understanding that lawyers played a vital role in a liberal democracy. Federalist No. 35 explained that an elite leadership class was necessary to help guide the will of the majority in order to promote and protect the rule of law and the public good.<sup>23</sup> Although the framers identified professionals generally as the

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19. Pearce, *Blue State*, *supra* note 3, at 1346–51, 1358–59.

20. *See, e.g.*, Pearce, *The Professionalism Paradigm Shift*, *supra* note 3, at 1231.

21. *See id.*

22. *See* Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 26 (2011) [hereinafter Pearce & Wald, *The Obligation of Lawyers to Heal*].

23. The Federalist No. 35, at 214–16 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter The Federalist No. 35]; *see also* 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, 385–87 (2001) [hereinafter Pearce, *American Lawyer's Role*]; Roiphe, *Redefining Professionalism*, *supra* note 3, at 203, 206.



elite leadership class,<sup>24</sup> lawyers and the rest of the American elite soon came to identify lawyers in particular as the group responsible for civic leadership. In 1835, when Alexis de Tocqueville met with American leaders in an effort to ascertain how America could enjoy majority rule without majority tyranny, he described lawyers as the “highest political class.”<sup>25</sup>

Although significant voices both within and outside the profession questioned the business-profession dichotomy, it retained its hold on the leadership of the legal profession until the mid-twentieth century.<sup>26</sup> During the Jacksonian era when legislatures eroded the barriers to becoming a lawyer, David Hoffman and George Sharswood authored guides for legal ethics grounded in a republican understanding of lawyers’ leadership role.<sup>27</sup> In a related move to protect the business-profession dichotomy, when both lawyers and non-lawyers worried in the late nineteenth century that law practice had become a business, elite lawyers formed the American Bar Association (ABA) partly in order to promote and protect the traditional vision of professionalism.<sup>28</sup>

Under traditional lawyer professionalism, lawyers could balance client advocacy with the public good if they served as civics teachers who explained to clients the importance of the spirit, as well as the letter, of the law, and the public good.<sup>29</sup> In the nineteenth century, Judge George Sharswood, whose work became the basis for the ABA Canons of Ethics, popularized the use of the term “zealous advocacy” for purposes of describing client representation at the same time as he instructed ethical lawyers to serve as civics teachers and to reject Lord Henry Brougham’s claim<sup>30</sup> that lawyers should serve as hired guns for their clients.<sup>31</sup> As recently as the early 1960s, Erwin Smigel’s survey of Wall Street lawyers

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24. The Federalist No. 35, *supra* note 23, at 214-16.

25. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 304 (Henry Reeve trans., Edward Walker 1847) (1835), <https://books.google.com/books?id=sRETAAAYAAJ&pg=PA304&dq=%22democracy+in+america%22+%22Highest+political+class%22&hl=en&sa=X&ved=0ahUKEwiUq9-qnLLMAhUqkIMKHT2sBrQQ6AEIzAB#v=onepage&q=%22democracy%20in%20america%22%20%22Highest%20political%20class%22&f=false> [https://perma.cc/VU7L-RSXJ] (last visited June 17, 2016).

26. See Pearce, *Blue State*, *supra* note 3, at 1361.

27. *Id.* at 1350.

28. See Russell G. Pearce & Amelia J. Uelman, *Religious Lawyering In A Liberal Democracy: A Challenge And An Invitation*, 55 CASE W. RES. 127, 147 (2004); see also John A. Matzko, “The Best Men of the Bar”: The Founding of the American Bar Association, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 75 (Gerard W. Gawalt ed., 1984) (describing the American Bar Association’s elite founders); Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2019–20 (2005).

29. See Green & Pearce, *Lawyer as Civics Teacher*, *supra* note 17, at 1212; Pearce & Wald, *The Obligation of Lawyers to Heal*, *supra* note 22, at 5.

30. Lord Brougham famously enunciated the notion that the lawyer should be an extreme partisan with no moral accountability in the nineteenth century—the lawyer “knows . . . but one person in the world” and that is the client. Pearce, *American Lawyer’s Role*, *supra* note 23, at 394. At that time, and through the 1960s, the American elite expressly rejected Brougham’s view. *Id.* at 394–95. By the late twentieth century, prominent commentators described Brougham’s dictum as the “basic narrative” of the legal profession, even mistakenly reading that narrative retroactively into the profession’s history. See, e.g., Geoffrey C. Hazard, Jr., *The Future of*



similarly found that they understood themselves as guardians of the law who served as civics teachers for their clients at the same time that they provided zealous representation.<sup>32</sup>

In their everyday work, lawyers explained to clients, whether businesses or individuals, their obligations to the letter and spirit of the law, as well as the public good.<sup>33</sup> As experts in the law, they provided guidance to their neighbors and their communities, and often served in positions of public leadership, such as in the legislative, executive, and judicial branches of the government.<sup>34</sup> Indeed, private practice and public service were complimentary, such that private practice was thought to be a form of public service, as well as a stepping stone to public office, which in turn was not understood to be an end in itself but rather part of career that combined both public and private duties.<sup>35</sup> The practice of law in the public and private sphere was consistent and self-enhancing.

Accordingly, traditional lawyer professionalism grounded in the business-profession dichotomy provided the dominant, although not exclusive, framework for understanding lawyers through the 1960s.<sup>36</sup> For those who embraced professionalism, it provided a powerful and inspirational guide for lawyers' public and private roles.

## B. THE PARADIGM IN CRISIS

The crisis of lawyer professionalism represented the manifestation in law of a societal rejection of the potential for the public good. In the 1960s, both the left and the right discredited the possibility of disinterested expertise. They asserted that the public good did not exist. All was self-interest; pretensions to the public good only masked financial and political self-interest.<sup>37</sup> The concept of the bad man that Oliver Wendell Holmes proposed as a metaphor for how to understand the law<sup>38</sup> had now become the dominant way to understand the motivation of individuals and organizations.

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*Legal Ethics*, 100 YALE L.J. 1239, 1244 (1991); Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319 (2006).

31. Pearce, *Legal Ethics Codes*, *supra* note 5, at 243–44, 248; Green & Pearce, *Lawyer as Civics Teacher*, *supra* note 17, at 1227–28.

32. ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 8–10 (1964).

33. *See, e.g.*, Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555 (1905) (representing businesses like diplomacy).

34. *See id.* at 556–57; Pearce, *American Lawyer's Role*, *supra* note 23, at 387.

35. Pearce, *American Lawyer's Role*, *supra* note 23, at 385–87; *see also* Gordon, *Independence*, *supra* note 3, at 14.

36. *See* Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 149 (Robert L. Nelson et al., eds, 1992); Pearce, *Blue State*, *supra* note 3, at 1342; Roiphe, *Redefining Professionalism*, *supra* note 3, at 207.

37. *See, e.g.*, Pearce, *Blue State*, *supra* note 3, at 1358–64; Roiphe, *Redefining Professionalism*, *supra* note 3; Louis Menand, *The Thrashing of Professionalism*, N.Y. TIMES MAG., Mar. 5, 1995, at 41.

38. *See* Holmes, *supra* note 7, at 459.

The U.S. Supreme Court reflected this shift in its 1977 decision in *Bates v. State Bar of Arizona* where it described “the belief that lawyers are somehow ‘above’ trade [as] an anachronism.”<sup>39</sup> Indeed, law practice had always provided a livelihood as well as a calling. In promoting professionalism, Roscoe Pound had described law work as primarily “[p]ursuit of the learned art in the spirit of a public service . . . . Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.”<sup>40</sup> When the belief in public service was no longer viable, gaining a livelihood became the entire purpose of law, exactly the same as for other businesses.

Indicative of the crisis of professionalism, Chief Justice Burger delivered his famous 1984 speech to the American Bar Association lamenting that lawyers had abandoned the public good for profit and that professionalism was in crisis.<sup>41</sup> Yale Law School Dean Anthony Kronman, Harvard Law Professor Mary Ann Glendon, and law firm partner and statesman Sol Linowitz, joined with other leaders of the profession in declaring “lawyers, their ethics, and their professionalism are ‘lost,’ ‘betrayed,’ in ‘decline,’ in ‘crisis,’ facing ‘demise,’ near ‘death,’ and in need of ‘redemption.’”<sup>42</sup> As one state bar President observed, “the legal profession is ‘on the way into a black hole of pure commercialism from which there is no return[.]’”<sup>43</sup> The Chief Justice of the Supreme Court of Virginia noted that “‘something *is* wrong, and I think I know what it is. It is commercialism. Yes, Commercialism, with a capital ‘C,’ and it has invaded the legal profession like a swarm of locusts.”<sup>44</sup>

As a result of the perceived commercialization, lawyers came to be viewed as profit maximizers—and not just any profit maximizers, but Holmesian bad men and women who pursued on behalf of clients whatever they could get away with regardless of the consequences to others or to the community.<sup>45</sup> Freed to advertise by the *Bates* decision, lawyers’ marketing of their services became

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39. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371–72 (1977).

40. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

41. See Warren E. Burger, C.J., *The State of Justice: Remarks at the Mid-year Meeting of the American Bar Association* (Feb. 13–14, 1984), in *A.B.A. J.*, Apr. 1984, at 63.

42. Pearce, *The Professionalism Paradigm Shift*, *supra* note 3, at 1257 (internal citations omitted); see also MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 84 (1994); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 243 (1993) [hereinafter KRONMAN, *THE LOST LAWYER*]; LINOWITZ & MAYER, *supra* note 12.

43. See Alex S. Keller, *Professionalism: Where Has it Gone?*, 14 *COLO. LAW.* 1383, 1385 (1985); see also Pearce, *The Professionalism Paradigm Shift*, *supra* note 3, at 1257.

44. Harry L. Carrico, *The New Professionalism*, N.Y.S. B.J., Jan. 1990, at 11, 12 (address delivered to first class in Virginia State Bar’s mandatory course on professionalism); see also Pearce, *The Professionalism Paradigm Shift*, *supra* note 3, at 1257. But see Deborah L. Rhode, *The Professionalism Problem*, 39 *WM. & MARY L. REV.* 283, 283 (1998) (“Lawyers belong to a profession permanently in decline. Or so it appears from the chronic laments by critics within and outside the bar.”). For a discussion of the cycles of declination rhetoric and bar responses, see, e.g., Pearce, *American Lawyer’s Role*, *supra* note 23.

45. See, e.g., Russell G. Pearce & Eli Wald, *Relational Infrastructure of Law Firm Culture and Regulation: The Exaggerated Death of BigLaw*, 42 *HOFSTRA L. REV.* 109, 130 (2013) [hereinafter Pearce & Wald, *Relational*

transparent and they looked like other businesses in the marketplace.<sup>46</sup> Of course, even this view reflected a change in societal perception—David Hoffman and Abraham Lincoln had advertised without appearing to be less committed to lawyers' public responsibilities.<sup>47</sup> But advertising was not the only apparent manifestation of business behavior. Law itself became a "big business" with tens of billions of dollars in revenue.<sup>48</sup> The compensation of law firm partners exceeded a million dollars in the 1990s<sup>49</sup> and the starting salary of associates rose from "\$10,000" in the 1960s to "\$80,000 in the 1990s"<sup>50</sup> and to \$180,000 in 2016.<sup>51</sup>

A prominent manifestation of profit maximization was the perception that pursuit of profit had caused lawyers to betray the "public trust"<sup>52</sup> in order to serve business clients without concern for either the spirit of the law or the public good.<sup>53</sup> As one of us noted in 1995:

While a professional "holds a position of independence, between the wealthy and the people, prepared to curb the excess of either," the Business Servant, in contrast, seeks "to extract the maximum advantage of the legal system" for the interests of wealth. In so doing, the Business Servant "skew[s legal outcomes] in favor of resourceful parties, thus undermining the legitimacy of legal institutions." The Business Servant fails the professional duty to serve as a "buffer between the illegitimate desires of clients and the social interest."<sup>54</sup>

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*Infrastructure*]; G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409, 1477 (1990).

46. See Carroll Seron, *New Strategies for Getting Clients: Urban and Suburban Lawyers' Views*, 27 LAW & SOC'Y REV. 399, 400 (1993).

47. See, e.g., Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 547–48 (1982) (discussing Abraham Lincoln); Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should be Allowed To Advertise: A Market Analysis of Legal Service*, 58 N.Y.U. L. REV. 1084, 1084 n.2 (1983).

48. 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, 313 n.1 (1985).

49. "It is common for the top partners in the biggest firms to earn upwards of \$2 million per year." Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 900 (1999).

50. Pearce, *The Professionalism Paradigm Shift*, *supra* note 3, at 1251 (citing *Today's News: Update*, N.Y. L.J., Nov. 7, 1994, at 1 (identifying \$83,000 as going rate for first-year associates at the major law firms in New York City since 1989)).

51. Salaries for first-year associates at BigLaw firms remained stable at \$160,000 from 2007 through 2016. Cravath Swaine & Moore LLP announced in June 2016 that it would raise first-year associate salaries to \$180,000 starting July 1, 2016 and other BigLaw firms soon followed. Elizabeth Olson, *With Pay Jumps at Elite Firm, Junior Lawyers Share Spoils*, N.Y. TIMES (June 7, 2016), at B3; see also Brian Baxter, *More Firms Jump on Cravath Pay Scale, as S&C Beats Top End*, THE AMERICAN LAWYER (June 9, 2016), <http://www.americanlawyer.com/id=1202759700996/> [<https://perma.cc/9EAK-H6FK>].

52. Pearce, *The Professionalism Paradigm Shift*, *supra* note 3, at 1242–43.

53. Compare SMIGEL, *supra* note 32, at 8–10 with Pearce, *Blue State*, *supra* note 3, 1358–65 (discussing sources).

54. Pearce, *The Professionalism Paradigm Shift*, *supra* note 3, at 1243–44 (internal citations omitted).

Accompanying the Business Servant account was a similar narrative painting business clients as Holmesian bad men who had increased their power vis-à-vis their lawyers so that even if big firm lawyers wanted to remain guardians of the law they could no longer do so.<sup>55</sup> According to the narrative, as business clients became more atomistic, they no longer valued long term relationships with their lawyers and instead demanded that lawyers compete with price and service for their work.<sup>56</sup> Further undermining the independence of outside law firms was the increasing sophistication of in-house corporate departments that led them to replace deference to outside lawyers with corporate control of outside representation.<sup>57</sup>

As lawyers came to understand themselves as profit maximizers and business servants, the image of lawyers as self-interested promoters of selfish interests came to dominate public discourse. Many commentators outside the profession complained that lawyers undermined the public interest as they manipulated the legal system for their own advantage and that of their clients.<sup>58</sup> Where lawyers were once viewed as good faith intermediaries between the law and their clients, they were now seen as selfishly promoting their own interests or those of their clients without any regard for the public good.<sup>59</sup> Public discourse labeled lawyers as enemies of common sense and justice,<sup>60</sup> or as rent-seekers who promote an unnecessarily complex and wasteful legal system in order to enrich themselves.<sup>61</sup> Predictably, the public came to view lawyers as “greedy”<sup>62</sup> and believe that “lawyers use the system to protect the powerful and enrich themselves.”<sup>63</sup>

Most alarmingly, the demise of the business-profession dichotomy and with it the ability to understand their role as one meaningfully connected to the public good has left lawyers who do not embrace a libertarian view that the public good consists of extreme partisan lawyers representing self-interested clients<sup>64</sup> without

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55. See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749 (2010); see also RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS: THE SOCIAL TRANSFORMATION OF AMERICAN BUSINESS SCHOOLS AND THE UNFULFILLED PROMISE OF MANAGEMENT AS A PROFESSION (2007).

56. See Ribstein, *supra* note 55; David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067 (2010) [hereinafter Wilkins, *Team of Rivals?*].

57. See Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407 (2012).

58. See Pearce, *The Professionalism Paradigm Shift*, *supra* note 3, at 1260–61.

59. See *id.* at 1251.

60. See, e.g., PHILIP K. HOWARD, *THE RULE OF NOBODY: SAVING AMERICA FROM DEAD LAWS AND BROKEN GOVERNMENT* (2015); WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA’S RULE OF LAW* (2002).

61. See Peter C. Kostant, *Paradigm Regained: How Competition from Accounting Firms May Help Corporate Attorneys to Recapture the Ethical High Ground*, 20 PACE L. REV. 43, 55–56 (1999).

62. Gary A. Hengstler, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 62.

63. Stephen Budiansky & Ted Gest, *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50, 51.

64. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (describing the libertarian perspective).

a meaningful sense of purpose in the practice of law. Not surprisingly,<sup>65</sup> as a result, their job satisfaction is below that of other occupations and their rates of substance abuse and anxiety-rated mental illness are far higher.<sup>66</sup> Some lawyers report that they would advise their friends and relatives not to become lawyers.<sup>67</sup> It should be noted, however, that other lawyers do buy into the belief that by serving private clients they are serving the public interest exactly because the public interest is nothing more than an aggregate of the clients' private interests.<sup>68</sup> Yet even such lawyers experience some professional discomfort in the increasingly transparent and competitive market for legal services.<sup>69</sup>

## II. BEING A GOOD LAWYER: A RELATIONAL APPROACH TO LAW PRACTICE, PROFESSIONAL IDEOLOGY, ROLE MORALITY AND CIVIC LEADERSHIP

A relational approach grounds lawyers' practice, professional ideology, role morality, civic leadership, and rules of professional conduct in a revived understanding of the structural-functionalist view.<sup>70</sup> That view, like professionalism, describes lawyers as intermediaries between the people and the law. But the relational approach to self-interest does not rely on the business-profession binary and therefore can offer lawyers a structural-functionalist way to find value in their work consistent with familiar ways of understanding contemporary legal culture.<sup>71</sup>

### A. ATOMISM, THE CRISIS OF PROFESSIONALISM, AND THE EMERGING RELATIONAL PARADIGM

The hired gun notion of the lawyer's role relied upon a more general atomistic conception<sup>72</sup> that became dominant in law, business, and politics following the 1960s.<sup>73</sup> Viewing individuals and organizations as having separate and unconnected existence, the atomistic perspective defined self-interest from the Holmesian bad man's perspective—what an individual or organization could get away with regardless of the impact on colleagues, customers, neighbors, or community.

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65. See *infra* Part III.C.; see also Krieger & Sheldon, *supra* note 15, at 621–23 (describing an empirical study that demonstrates the importance of lawyers' internal values to their job satisfaction).

66. See *infra* Part III.C.

67. See *infra* Part III.C.

68. See, e.g., Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 20–21 (1998); Wald & Pearce, *Making Good Lawyers*, *supra* note 16, at 405.

69. See, e.g., Pearce & Wald, *The Obligation of Lawyers to Heal*, *supra* note 22, at 34; Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2245 (2010) (describing the dominant BigLaw ideology as "hyper-competitive").

70. See RICHARD L. ABEL, *AMERICAN LAWYERS* 37 (1989).

71. See Remus, *supra* note 17; Roiphe, *Redefining Professionalism*, *supra* note 3, at 240.

72. Cf. Taylor, *supra* note 17.

73. Pearce & Wald, *The Obligation of Lawyers to Heal*, *supra* note 22, at 17.

Rakesh Khurana, for example, has traced how the atomistic perspective transformed business behavior from long-term profits consistent with civic leadership to short term profit maximization.<sup>74</sup> In politics, conflicts became zero sum and incivility became common.<sup>75</sup>

In law, the ascendance of atomism triggered the crisis of professionalism. The structural-functionalist claim to disinterested leadership became unpersuasive. Lawyers and their clients, whether individuals or businesses, were Holmesian bad men who were not capable of perceiving or pursuing the public good. As described above, the business-profession dichotomy, once a source of pride, became the cause of crisis. The lawyer's role evolved from zealous representative consistent with the public good to extreme partisan, which many critics expressly identified with the atomism of the Holmesian bad man.<sup>76</sup> As a result, atomism undermined the ability of many lawyers to find meaning in their work, and promoted the perception that law work was specialized and fragmented, resulting in the dichotomy between segmentation and universalism.

Unconstrained atomistic self-interest achieved cultural dominance.<sup>77</sup> To the extent that law is the social glue of our legalized culture, law has come to celebrate and embody aggressive self-interest as morally desirable. Law not only reflects our culture's love affair with unconstrained self-interest, it also helps construct it, legitimate it and further cement it as our normative core. It is therefore within the power of law and lawyers to take a leadership role in challenging the supremacy of atomistic self-interest.<sup>78</sup> Indeed, a change in culture is inevitably intertwined with a change in law. Law work will certainly not be able to fashion a counter attack on unconstrained self-interest all by itself, but it can and should play a role in the effort. In this sense, lawyers are particularly well-situated for the role of challenging atomistic self-interest as a legitimate and sufficient basis for business, politics, and law.

Yet if lawyers are to play a leading role in reintegrating a richer conception of relational self-interest into law, economics, politics, and other areas of our culture, then lawyers must first reconsider their unwarranted faith in atomistic self-interest. Lawyers' professional ideology, role morality and even rules of professional conduct must be expanded from a narrow conception of client-centered representation which relies on clients' atomistic self-interest to a conception that takes seriously other values, and, in particular, relational

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74. See KHURANA, *supra* note 55.

75. See Pearce & Wald, *The Obligation of Lawyers to Heal*, *supra* note 22. As we explain elsewhere, incivility has always been present in politics and law practice. Yet it has increasingly become part of the norm, as opposed to an exception to it.

76. See, e.g., WENDEL, *supra* note 17; VISCHER, *supra* note 17.

77. See, e.g., Pearce & Wald, *The Obligation of Lawyers to Heal*, *supra* note 22, at 415–18.

78. See, e.g., Pearce & Wald, *Relational Infrastructure*, *supra* note 45, at 116.



self-interest.<sup>79</sup> These are explored below, but first a definition of a relational approach to law practice is warranted.

As atomism gained traction after the 1960s, it soon faced challenges from relational and communitarian perspectives. The communitarian view is the opposite of the atomistic. Where the atomistic views all actions as grounded in individual self-interest, “communitarianism claims that individual identity is constituted or constructed by community.”<sup>80</sup> The perspective between the extremes of atomism and communitarianism<sup>81</sup> is the relational approach that rejects these binaries in favor of recognizing that individual and organizational actors have both individual agency and exist through webs of relationships. As Jennifer Nedelsky explains, “human beings have the capacity to interact creatively with all the relationships that shape us—and thus to reshape, re-create, both the relationships and ourselves.”<sup>82</sup> This relational framework has become prominent among philosophers, political theorists, neuroscientists, psychologists, feminist theorists, economists, and legal scholars.<sup>83</sup>

The relational perspective, in turn, provides a relational understanding of self-interest distinct from the atomistic approach. Nobel Prize winner Amartya Sen has challenged the framework of atomistic self-interest on both descriptive and normative grounds. He explains that ethics is essential to the study of

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79. Because the problem of unconstrained self-interest is a problem of culture, not a problem of lawyers and the legal profession alone, other professionals as well as lay people have a role to play in combating it. For example, in May of 2009 a group of Harvard Business School students introduced an MBA oath that redefined self-interest to reintegrate the public good. *See generally* MAX ANDERSON & PETER ESCHER, *THE MBA OATH: SETTING A HIGHER STANDARD FOR BUSINESS LEADERS* (2010). While the oath has been gaining in popularity one might doubt the binding power of such a measure. Lawyers have long articulated lofty proclamations of professional duties with questionable impact on their actual practices.

80. Paul N. Cox, *The Public, the Private, and the Corporation*, 80 MARQ. L. REV. 391, 474 (1997).

81. We recognize that the term communitarian is not always used consistently and that some commentators employ it to refer to any political perspective which contrasts with pure individualism. *See, e.g.*, MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 7 (1996).

82. NEDELSKY, *supra* note 17, at 47.

83. *See, e.g.*, YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN: HOW COOPERATION TRIUMPHS OVER SELF-INTEREST* 2-7 (2011); PETER BUIRSKI & PAMELA HAGLUND, *MAKING SENSE TOGETHER—THE INTERSUBJECTIVE APPROACH TO PSYCHOTHERAPY* (2009); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); VIRGINIA HELD, *ETHICS OF CARE: PERSONAL, POLITICAL, AND GLOBAL* 63-64 (2006); CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014); EVA FEDER KITTAY, *LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY AND DEPENDENCY* 20 (1998); ETHAN J. LEIB, *FRIEND VS FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT* (2011); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1991); NEDELSKY, *supra* note 17; NEL NODDINGS, *CARING: A FEMINIST APPROACH TO ETHICS AND MORAL EDUCATION* (1984); NUSSBAUM, *supra* note 17; PFAFF & SHERMAN, *supra* note 17; AMARTYA SEN, *ON ETHICS AND ECONOMICS* (1987); SANDEL, *LIBERALISM*, *supra* note 17; Taylor, *supra* note 17; MICHAEL TOMASELLO, *WHY WE COOPERATE* 4 (2009); Young, *supra* note 17; Bruni & Sugden, *supra* note 17; Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 YALE L. & POL’Y REV. 263 (2006); Timothy D. Lytton, *Rules and Relationships: The Varieties of Wrongdoing in Tort Law*, 28 SETON HALL L. REV. 359 (1997); Eduardo M. Penalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005); Daniel Siegel & Debra Pearce McCall, *Mindsight at Work: An Interpersonal Neurobiology Lens on Leadership*, *NEUROLEADERSHIP J.*, 2009, at 1.



economics. Rejecting the notion that people are fundamentally maximizers of their own self-interest, he argues that “many distinct ethical considerations” influence behavior, such as “bonhomie and sympathy for others” and “commitments to various causes.”<sup>84</sup> He observes that “[t]he jettisoning of all motivations and valuations other than the extremely narrow one of self-interest is hard to justify on grounds of predictive usefulness, and it also seems to have rather dubious empirical support.”<sup>85</sup>

Economists Luigino Bruni and Robert Sugden similarly reject atomistic self-interest on both descriptive and normative grounds. They note, for example, that atomism cannot explain why people often observe unenforceable agreements or refrain from enforcing the letter of contracts.<sup>86</sup> They explain that economic exchanges are more generally characterized by an ethic of mutual benefit that combines both self-interest and reciprocal concern for others.<sup>87</sup> Rejecting the notion that economic exchanges are morality-free, they argue that mutual benefit is both morally mandated and necessary to long-term self-interest. Economic development—the creation of economic value—requires that parties trust that their counter-parties will respond with mutual benefit, and will not try to take advantage of them.<sup>88</sup> The latter strategy discourages the creation of value by dissuading people from entering economic exchanges.

Bruni and Sugden’s work is especially relevant to lawyers.<sup>89</sup> In describing economic exchanges as a social relationship, they reject binaries between economic and social, self-regarding and self-sacrificing.<sup>90</sup> Applying this analysis to the economics of caring occupations, which would presumably include the work of the lawyer, Bruni and Sugden accordingly reject theories that workers in these occupations are motivated by “intrinsic motivations” that are “incompatible with market motivations,” such as the business-profession dichotomy.<sup>91</sup> Instead, they argue that the economics of caring occupations are characterized by an ethic of mutual benefit that combines self-regarding and self-sacrificing elements just like other economic exchanges.<sup>92</sup>

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84. SEN, *supra* note 83, at 89.

85. *Id.* at 79.

86. See Bruni & Sugden, *supra* note 17, at 41; see also Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 57 (1963) (studying relational approaches in commercial law).

87. They do not use the specific terms atomistic self-interest and relational self-interest, but their analysis applies to these concepts. See Bruni & Sugden, *supra* note 17, at 41; see also DANIEL H. PINK, *DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US* (2009).

88. See Bruni & Sugden, *supra* note 17, at 46–47.

89. See, e.g., Eli Wald & Russell G. Pearce, *What’s Love Got to Do with Lawyers? Thoughts on Relationality, Love, and Lawyers’ Work*, 17 LEGAL ETHICS 334 (2014).

90. See *id.* at 343.

91. See Bruni & Sugden, *supra* note 17, at 58.

92. *Id.* at 51.

Relational self-interest assumes that people and organizations exist in relationships—they are not atomistic.<sup>93</sup> From this perspective, mutual benefit is necessary to self-interest. Because people are all inter-connected, one's actions that affect a colleague, client, adversary, neighbor, or community will eventually have some direct or indirect impact on someone else in the organization. As Bruni and Sugden explain, this exchange is mutually beneficial both on a micro level that benefits the participants and on a macro level that benefits society.<sup>94</sup> Relational self-interest mandates an ethic of mutual benefit in relationships that includes basic values, such as honesty, trust and cooperation, as well as consideration of the public good.

To be clear, relational self-interest is consistent with all but the Holmesian bad man conception of the lawyer's role as extreme partisan. A range of responsible partisan perspectives that leave room for mutually beneficial dialogue all fall within the relational spectrum.

#### B. A RELATIONAL ATTORNEY-CLIENT RELATIONSHIP<sup>95</sup>

A relational approach applies to all facets of law practice and to all actors with whom a lawyer interacts. To begin with, the attorney-client relationship is a social interaction; clients are not means to lawyers' ends—paying the bills, working on challenging cases, attaining status and power—but rather partners in a mutual exchange. The goal of the relationship from the lawyer's perspective is both to earn a livelihood and to educate and assist clients in the pursuit of their goals on an informed basis.<sup>96</sup> Empowering clients in a relational manner requires getting to know them and their objectives. A relational approach does not necessarily entail becoming friends with one's clients,<sup>97</sup> but it does require treating the client as party to a relationship by getting to know a client well enough to understand decisions in context. Thus, a relational approach is inconsistent with both imputing generic goals to clients and with accepting a

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93. Cf. THOMAS L. SHAFFER, *ON BEING A CHRISTIAN LAWYER: LAW FOR THE INNOCENT* (1981); Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

94. See Bruni & Sugden, *supra* note 17.

95. While a "relational relationship" sounds redundant we nonetheless use it because the "attorney-client relationship" is a term of art, and as importantly, because the relationship has become very much a reflection of the standard conception, that is, an atomistic, individualized relationship in which both attorney and client aggressively pursue their own self-interest and in which the attorney assists the client to pursue narrow self-interest. In this context, a "relational relationship" is anything but redundant. Eventually, of course, if our suggestions are accepted, the definition of the attorney-client relationship will be that of a relational relationship.

96. See Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747 (2008).

97. Cf. THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 44–45 (1994) [hereinafter SHAFFER & COCHRAN, *LAWYERS, CLIENTS*]; Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060, 1073–74 (1976).

client's stated goals "as-is" without developing an informed perspective from which a lawyer can understand them.<sup>98</sup>

For example, a matrimonial attorney representing a party in a dissolution of marriage should not assume that the client's objective is to aggressively pursue the client's own narrow self-interest leaving their soon to be ex-spouse with as little as possible and should not accept this to be the client's goal without more.<sup>99</sup> Instead, the attorney must learn more about the client's relationship with the significant other as well as with other related parties if any, his values and feelings, as well as stated and unstated objectives, to allow the lawyer to develop a perspective from which she can understand the client's interests and objectives and from which she can offer informed advice. Relational advice will in turn reflect the client's short and long term interests, and an assessment of the proposed course of conduct on affected parties.

Similarly, a corporate attorney retained by an entity client to help it reorganize or merge with another entity should not assume that the corporate client's sole objective is to maximize short-term profits. As former in-house counsel Ben Heineman, large law firm leader William Lee, and prominent scholar David Wilkins explain,

the ultimate goal of corporations—especially global companies—should be the fusion of high performance with high integrity, with the general counsel and inside lawyers playing key roles in achieving both. High performance means strong sustained economic growth through provision of superior goods and services, which in turn provide durable benefits for shareholders and other stakeholders upon whom the company's health depends. Such commercial performance entails an essential balance between risk-taking and economic risk management.<sup>100</sup>

Rather, treating the client as a relational organization, the lawyer should inquire about the entity's relationships with its employees, customers, and creditors and the impact of the proposed course of conduct, if any, on communities in which the entity operates.<sup>101</sup> As a result, the lawyer's advice

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98. See Deborah J. Cantrell, *Lawyers, Loyalty and Social Change*, 89 DENV. U. L. REV. 941, 963–68 (2013); Gordon, *Independence*, *supra* note 3, at 3, 5; William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 222–24 (1991) [hereinafter Simon, *Lawyer Advice*]: (describing the autonomy and paternalistic approaches to counseling).

99. Lynn Mather & Craig A. McEwen, *Client Grievances and Lawyer Conduct: The Challenges of Divorce Practice*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 63, 75–76, 84 (Leslie C. Levin & Lynn Mather eds., 2012) [hereinafter *LAWYERS IN PRACTICE*]; Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 267–69 (2014) [hereinafter Wald, *Resizing*].

100. Ben W. Heineman, Jr. et al., *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, HARV. L. SCH. CENTER ON THE LEGAL PROFESSION (Nov. 20, 2014), [https://clp.law.harvard.edu/assets/Professionalism-Project-Essay\\_11.20.14.pdf](https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf) [<https://perma.cc/UR6J-MT3W>].

101. The theory of "stakeholder" interests in a corporation is not new to corporate law. In *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), the Supreme Court of Delaware noted that, in

should reflect not only commitment to maximizing value to shareholders but also a consideration of other stakeholders likely to be effected by the organization's conduct. As Heineman, Lee and Wilkins observe, "Ultimately, high performance with high integrity creates fundamental trust among shareholders, creditors, employees, recruits, customers, suppliers, regulators, communities, the media, and the general public."<sup>102</sup> Echoing Bruni and Sugden, they note that "[t]his trust is essential to sustaining the corporate power and freedom that drives the economy."<sup>103</sup> They acknowledge that as a practical matter the relational approach will require "rebalancing" atomistic legal and corporate culture "and will require commitment to long-term goals and values, even at the expense of short-term economics."<sup>104</sup>

The content of relational advice may vary greatly among different lawyers. Should the matrimonial attorney advise her client to be reasonably generous toward his soon to be ex-wife? How generous? And should the client consider not only his own and his children's best interests but also the feelings of his wife's parents in designing custody arrangements, let alone the interests and feelings of his wife? Similarly, what stakeholders should be considered by the entity client in its reorganization plan? And what consideration specifically should these constituents receive? Different lawyers with different values may answer these questions differently. As alarming as this proposition may sound to some lawyers, such pluralism is a desirable aspect of a relational approach to law practice.

The currently dominant approach to lawyers' role morality leaves little room for values other than atomistic self-interest. The American Bar Association Model Rules of Professional Conduct ("Rules") formally permit broad discretion to lawyers,<sup>105</sup> noting that lawyers have discretion to advise clients on relevant moral considerations and similarly may exercise "moral judgment"<sup>106</sup> and

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the context of a hostile tender offer, a board of directors might be warranted in considering the interests of note holders in addition to those of stockholders. *See, e.g.*, R. Edward Freeman & David L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, CAL. MGMT. REV., Spring 1983, at 88, 89 ("[Stakeholder theory] says that there are other groups to whom the corporation is responsible in addition to stockholders: those groups who have a *stake* in the actions of the corporation."); *see also* Ann E. Conaway, *Lessons to be Learned: How the Policy of Freedom to Contract in Delaware's Alternative Entity Law Might Inform, Delaware's General Corporation Law*, 33 DEL. J. CORP. L. 789, 792-93 (2008); Mario Minoja, *Stakeholder Management Theory, Firm Strategy, and Ambidexterity*, 109 J. BUS. ETHICS 67, 68 (2012); Eric W. Orts & Alan Strudler, *Putting a Stake in Stakeholder Theory*, 88 J. BUS. ETHICS 605, 606-08 (2009).

102. Heineman et al., *supra* note 100, at 22.

103. *Id.*

104. *Id.* at 7.

105. Pearce, *Legal Ethics Codes*, *supra* note 5, at 242; Bruce Green, *The Role of Professional Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 42 (1997).

106. MODEL RULES OF PROF'L CONDUCT RULE 2.1; *Id.* at pmb1. para. 9 (2015) ("In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional

consult their “personal conscience.”<sup>107</sup> Yet these moral “escape hatches” mean little when lawyers, like others within our culture, adopt a reductive market-based atomistic morality because then resorting to one’s personal conscience and moral judgment only confirms the supremacy of narrow self-interest. Expanding the breadth and scope of lawyers’ approach has been constrained by law’s desire to insulate itself from other values.<sup>108</sup>

Contrary to the reductive position of the atomistic perspective, we must make room for values other than narrow self-interest to enter and inform the relational foundation of the practice of law and its rules of conduct. These values will reflect our pluralist commitments and our multi-faceted identities. We must self-consciously expand the foundation of the practice of law to explicitly incorporate these very diverse values. There is no doubt that opening the door to, and acknowledging the legitimacy of other non-legal considerations in lawyers’ legitimate exercise of professional judgment represents a challenge and a danger to law’s legitimacy. But the profession cannot escape this challenge because the alternatives are unappealing: the current self-interested culture has proven again and again how reductively dangerous it is, and formulations that call for fidelity to the law or to justice,<sup>109</sup> as compelling as they are in theory, are likely to fail because they run against a reductive market-based atomistic ideology defining our values universe in terms of unconstrained self-interest.<sup>110</sup>

Lawyers must acknowledge, and, in turn, explain to others that it is legitimate and desirable to turn to relational values in defining their role morality and exercising their professional judgment. The road to challenging the dominance of unconstrained self-interest goes through acknowledging the relevance and importance of the identities we maintain as individuals rooted in webs of relationships. The road to reversing the divorce of relational accountability from business conduct, legal culture, and political discourse entails developing

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discretion can arise. *Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.* These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”) (emphasis added).

107. MODEL RULES OF PROF’L CONDUCT pmbl. para. 7 (2015) (“Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by *personal conscience* and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.”) (emphasis added).

108. The Model Rules, for example, still call upon lawyers to attempt and resolve “difficult” questions and conflicts between lawyers’ competing roles in terms of the “principles underlying the Rules” without explicitly defining or even identifying these principles. MODEL RULES OF PROF’L CONDUCT, para. 9. Embracing such principles and other values, however, is exactly the task at hand.

109. See DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007) [hereinafter LUBAN, *LEGAL ETHICS*]; SIMON, *PRACTICE OF JUSTICE*, *supra* note 6; WENDEL, *supra* note 17.

110. See Eli Wald & Russell G. Pearce, *Beyond Cardboard Lawyers in Legal Ethics*, 15 *LEGAL ETHICS* 147 (2012) (reviewing W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010)) [hereinafter Wald & Pearce, *Beyond Cardboard Lawyers*].

strategies for lawyers to lead themselves, their clients and ultimately our nation toward a return to moral accountability.

Accordingly, we ought to accept as desirable that different matrimonial and corporate lawyers, informed by diverse values, should offer their respective clients different advice about how exactly to take into account the interests of others likely to be impacted by the client's course of conduct. Indeed, it is in this pluralist sense that a relational approach to law practice does not demand of lawyers Herculean efforts in the practice of law.<sup>111</sup> Advising clients in complex situations may not be an easy task, yet it is an undertaking in which different lawyers will be guided by their diverse values and core beliefs. Clients, empowered by relational advice, will in turn be in a position to set the objectives of the attorney-client relationship on an informed basis. And, to be clear, clients from a relational perspective have ultimate authority in the attorney-client relationship.<sup>112</sup>

Lawyers interested in adopting a relational approach, however, might reasonably wonder about client reactions to it in a competitive market for legal services dominated by atomism. To begin with, what is a relational attorney to do if her client insists on pursuing a "bad person" course of conduct, with little regard to the interests of others, the lawyer's advice notwithstanding?<sup>113</sup> To begin with, the question misses an important aspect of a relational approach. In a relational context, one in which lawyer and client treat each other as parties to a social relationship, many clients are unlikely to totally disregard the lawyer's advice. This is, to be sure, not because of some blind deference clients owe lawyers,<sup>114</sup> but because the lawyer's advice in a relational context would be informed by an appreciation and an understanding of the client's values and interests. Why would clients wish to systematically disregard advice they know to be grounded in their own values and interests? Put differently, the question assumes the very atomism this article challenges. It assumes that clients would choose to ignore their lawyers' advice and revert back to their atomistic self-interested perspective. Yet, while such an assumption may be a plausible one under the dominant standard conception, it is simply not an inevitable one in a relational paradigm.

However, exactly because of our commitment to value pluralism, reasonable clients and lawyers may on occasion disagree.<sup>115</sup> Would a relational attorney paternalistically insist that the client adopt her advice when lawyer and client disagree? Of course not. The primary difference between the relational and

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111. RONALD DWORKIN, *LAW'S EMPIRE* 241–55 (1986).

112. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2015).

113. Cf. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 *YALE L.J.* 1545, 1556–58, 1565–71 (1995).

114. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2015).

115. See WENDEL, *supra* note 17; Katherine Kruse, *Legal Ethics, Jurisprudence, and Legitimacy* (June 25, 2015) (unpublished manuscript, on file with author).



atomistic attorney is that the relational lawyer seeks dialogue regarding the client's goals, in contrast to atomistic approaches where the client provides instructions without dialogue or without full dialogue regarding the relational implications of a decision. A primary goal of a relational approach to law practice is to challenge and expand the reductive atomistic manner in which lawyers tend to think about their work. In turn, a relational approach will change how lawyers exercise judgment on behalf of clients, and how they come to offer advice. Accordingly, a relational approach will change how lawyers communicate with clients and how they advise clients. Viewed from this perspective, whether some lawyers ultimately defer to their clients or in contrast decide to withdraw from the representation of some clients is a secondary question. All lawyers, whether atomistic or relational, must decide for themselves when disagreement becomes "repugnant" and gives a lawyer cause to withdraw from representation under Model Rule 1.16(b)(4).<sup>116</sup>

Indeed, we suggest that withdrawal could very well be less common in a relational representation. Where atomistic representation could very well include instructions, commands, and zero-sum conversations, a relational representation necessarily requires client and lawyer to share information and values with each other, making the potential for collaboration and cooperation more likely, even where the parties disagree.

Next, what is a relational attorney to do if her client rejects not only the content of relational advice but altogether the relational approach, for example, by refusing to engage with the lawyer in the very ongoing conversations and consulting that constitutes the relational attorney client relationship, insisting instead on short and concise interactions framed in terms of narrow self-interest and atomism? The emerging interdisciplinary relational literature strongly suggests many clients will not reject a relational approach. As we have seen, people tend to be more relational than the dominant atomistic approach assumes. Atomism is not inherent to people, rather, it is culturally manufactured. To be effective, atomism must be taught in order to overcome inherent relational inclinations. In particular, emerging evidence about clients establishes that clients, even large entity for-profit clients, are interested in forming mutually beneficial relationships with their lawyers as opposed to shying away from relational engagement.<sup>117</sup> As it turns out, a relational approach to law practice is good for business. Not surprisingly, it is the business approach of law firm rainmakers who well understand the importance and value of building strong relationships with clients.

For example, in a competitive market for legal services, in which elite large law firm lawyers increasingly find themselves uninvolved in their clients'

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116. MODEL RULES OF PROF'L CONDUCT R 1.16(b)(4).

117. Wilkins, *Team of Rivals?*, *supra* note 56.



strategic decision-making processes,<sup>118</sup> and many solo and small law firm lawyers struggle to find clients let alone develop the kinds of relationships conducive to conversation about values and long term self-interest,<sup>119</sup> relational counseling will provide clients with superior long term strategic benefits. Former General Electric General Counsel has made this point often in the corporate context,<sup>120</sup> as has Deborah Cantrell in the public interest arena.<sup>121</sup> Although these conversations and strategies might prove unfamiliar, alienating, and unpersuasive if grounded in the variety of moral terms that critics of the dominant conception have suggested, lawyers and clients steeped in atomistic self-interest might find relational self-interest a more organic way to consider a range of values.

To be sure, some clients, seeking advice in the context of the dominant individualistic culture, may very well expect their lawyers to manifest the aggressive atomistic approach, and unthinkingly reject relational alternatives, refusing to invest the necessary time and money to build a relational foundation. A relational attorney, acting as a civics teacher, must, however, insist on educating clients by introducing and modeling the relational approach. There is no inconsistency between insisting on introducing relational content and building a relational attorney-client relationship on the one hand, and ultimately deferring to clients in the spirit of Rule 1.2(a), should a client insist on pursuing narrow self-interest *after* contemplating relational alternatives. Indeed, these two aspects of the relational attorney-client relationship are very much consistent: the objective of a relational lawyer is to educate and inform in a dialogue with her client, who will set the objectives of the relationship from an informed perspective. Indeed, a dialogue resulting in a well-informed client decision-making is the objective of the relational approach.

Finally, a relational attorney might wonder whether a relational approach to law practice serves her own interests, beyond whether clients would be interested in it and willing to pay for it. Would not the relational approach, by definition, be time-consuming, resulting in increased investment in existing client relationships and a reduced opportunity to explore and form new lucrative relationships? While certainly more time-consuming than a superficial lawyer-client interaction, the relational approach, counter-intuitively, may be the very approach needed in a highly competitive and rapidly changing market for legal services. As

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118. KRONMAN, *THE LOST LAWYER*, *supra* note 42, at 286–87.

119. *See, e.g.*, G.M. Filisko, *Turn-Around: Solos Seek Advice to Survive a Struggling Economy*, A.B.A. J., Mar. 2010, at 51 (discussing the difficulties faced by solo practitioners); Leigh Jones, *Survey of Law Firm Economics: Revenues Up at Larger Law Firms; Large Firms Saw Increases in 2012 While Small Firms Struggled*, NAT'L L.J., (Jul. 29, 2013), <http://www.nationallawjournal.com/id=1202612599398/Revenues-Up-at-Larger-Law-Firms> [<https://perma.cc/F35Y-PVGY>].

120. *See* BEN W. HEINEMAN JR., *HIGH PERFORMANCE WITH HIGH INTEGRITY* (2008); Heineman et al., *supra* note 100, at 23–28.

121. *See* Cantrell, *supra* note 98, at 963–68.

global competition, outsourcing included, in the market for legal services,<sup>122</sup> increased competition by non-lawyer legal service providers,<sup>123</sup> and technological advancements, artificial intelligence included,<sup>124</sup> all suggest, lawyers are already facing significant pressures to rethink and innovate their products and the manner in which they produce and deliver them. A relational approach is an example of the very innovation lawyers must adopt to stay relevant and competitive: as other lawyers, non-lawyers and technology increasingly encroach on traditional lawyers' domains, relational attorneys should happily concede old turf (which they cannot protect in any event) and use their new found time and resources to focus on value-propositions in the attorney-client relationship, including pursuing dialogues regarding advice and goals.

The daily practice of many lawyers could also change by practicing relational self-interest. Lawyers would serve as America's civic teachers by representing clients. They would explain not only the letter of the law, but the meaning of being a responsible member of the community.<sup>125</sup> Today, most lawyers teach, if only implicitly, atomistic self-interest to clients. Relational self-interest provides a way to demonstrate to lawyers who in turn can explain to clients why they have obligations to their neighbors and their community that transcend atomistic self-interest. Relational self-interest explains that attorneys should discard the dominant hired gun role that encourages clients to maximize their atomistic self-interest without regard to implications for their neighbors or their community.

Changes to the daily practice of relational attorneys would include the nature of conversations lawyers have with their clients as well as their frequency, and the manner in which they advocate for clients. Relational self-interest provides a bridge to more open and informative conversations with clients than the atomistic model. As Bruni and Sugden observe, many people prefer to apply an ethic of mutual benefit in all aspects of their life, including economic exchanges.<sup>126</sup> Relational self-interest deconstructs the dichotomies between self-interest and self-sacrifice, and between economic and social that too often obstruct our ability to recognize the moral dimensions of our legal and economic relationships.<sup>127</sup> In so doing, it creates a space for lawyers to engage in relational counseling and to urge their clients to view themselves as responsible members of a political community.

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122. See, e.g., Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 *FORDHAM L. REV.* 2137 (2010).

123. See, e.g., Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 *AKRON L. REV.* 205 (2014); Barton, *Lawyer's Monopoly*, *supra* note 1.

124. See, e.g., 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).

125. Green & Pearce, *Lawyer as Civics Teacher*, *supra* note 17, at 1213–14.

126. See, e.g., Bruni & Sugden, *supra* note 17, at 38–40.

127. See *id.*

Such counseling will produce dialogue, not paternalism.<sup>128</sup> By definition, paternalism is a non-dialogic approach where lawyers dictate to clients a course of conduct. In a relational representation, lawyers honor the relationship with the client and, as with all good relationships, facilitate a constructive discussion of areas of agreement and disagreement regarding the responsibilities of lawyers and clients. That contrasts with the dominant understanding that lawyers and clients share a commitment to, and can only communicate regarding, atomistic self-interest, where the atomistic conception thereby creates cardboard caricatures of clients and of lawyers. The result is not dialogue, but at best advice based on limited and often inaccurate understandings of the client and at worst a type of paternalism based on the lawyer's crude stereotype that the client is, and should be, solely atomistic.<sup>129</sup> As Bruni and Sugden note,<sup>130</sup> even people who consider themselves atomistic incorporate relational elements into parts of their lives. Relational counseling allows clients to share all of these elements and concerns. Atomistic counseling shuts down—or does not draw out—the almost inevitable relational concerns.

Relational counseling will therefore take place not only in specially designated “relational conversations” or “moral counseling,”<sup>131</sup> but in how lawyers come to understand their clients' problems and objectives, and, in turn, in the kind of solutions they devise and recommend. Relational counseling that stems not from purporting to take a moral high ground divorced from lawyers' and clients' understanding of the lawyer's role, but rather that is inherent to lawyers' conception of their job will be more seamless in its manifestations, more integrated in every facet of practice, and therefore less likely to lead to friction with clients.

Indeed, lawyers' relational responsibility extends to how they advocate their clients' cause. Here, too, they have an opportunity to model dialogue and civility. As long as lawyers, like their clients, subscribe to an atomistic vision of unconstrained self-interest, talk of dialogue and civility with adversaries seems inconsistent with zealous representation, rather than conduct that benefits both client and lawyer in a relationally connected world. Imposing relational responsibility on atomistic lawyers will likely only entail lawyers coming to have a deeper relationship with their clients and a greater ability to promote the clients' narrow goals.<sup>132</sup> Once, however, lawyers begin to think of their own work in

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128. See, e.g., Russell G. Pearce & Eli Wald, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 MICH. STATE L. REV. 513, 525–27, 534 (2012) [hereinafter Pearce & Wald, *Rethinking Lawyer Regulation*].

129. See Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO J. LEGAL ETHICS 103, 106 (2010) [hereinafter Kruse, *Beyond Cardboard*]; Wald & Pearce, *Beyond Cardboard Lawyers*, *supra* note 110.

130. Bruni & Sugden, *supra* note 17, at 51.

131. Pepper, *supra* note 113.

132. See, e.g., Pearce & Wald, *Rethinking Lawyer Regulation*, *supra* note 128; Cantrell, *supra* note 98, at 963–68.

broader terms, discussions of lawyers' relational accountability for their practices might make more sense, lead to more effective representations, and might allow lawyers to meaningfully demonstrate to the clients a way of thinking richer than self-interest.

Accordingly, a relational approach to law practice would insist on greater civility among lawyers. Lawyers and law firms would be expected to extend professional courtesies, avoid abusive tactics, treat opposing counsel and judges with respect, and invest in firm cultures that encourage civil interactions. As we argue elsewhere, lawyers must model and teach civility.

Lawyers must demonstrate mutual respect, courtesy, trust, and cooperation. Civility starts in lawyers' interactions with their own clients. It calls for effective communications with clients, for prompt return of client calls and requests for information, for reasonable updates regarding material developments in the case, and for respectful emails. Civility continues with polite and respectful exchanges with lawyers' own staff, opposing counsel, opposing parties, witnesses, court personnel, and other third parties. It necessitates refraining from the use of abusive language and tactics, such as name-calling and the imposition of strategic delays and costs in litigation and business negotiations.<sup>133</sup>

Importantly, “[t]eaching civility also includes demonstrating a commitment to sustaining a space for communications and engagement, even in disagreement. It includes modeling to clients the ability to ‘agree to disagree’ and the commitment to ‘keep talking’ even when some substantive disagreements remain.”<sup>134</sup> It is in this sense that a relational approach to law practice will allow lawyers to act as civics teachers and reclaim a meaningful place in the conversation over and pursuit of the public good.<sup>135</sup>

Moreover, when lawyers pursue a relational approach to counseling, they open conversations up to a plurality of values—including atomistic self-interest—and will offer to society a model for how people with different opinions can engage in respectful dialogue. In both civic and business culture, lawyers will remind people that their long-term self-interest and basic values extend to all social interactions so that hateful words or unrestrained greed are never appropriate and that civility is in their relational self-interest. Today, for example, the atomistic model has locked our civic dialogue into a cycle of incivility where political actors see all differences as a zero-sum game,<sup>136</sup> rather than as the subject for dialogue between people who live together in a community or polity where they cannot escape the relational implications of their interests.<sup>137</sup> Relational counsel-

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133. Pearce & Wald, *The Obligation of Lawyers to Heal*, *supra* note 22, at 42 (internal citations omitted).

134. *Id.*

135. *Id.* at 43–52.

136. *Id.* at 37–39.

137. *See id.*

ing will provide an alternative model for mutual dialogue regarding even the most contested differences. Illustrative of how this approach can operate even under the most adverse conditions is Martin Luther King, Jr.'s advocacy for equal rights for African-Americans in the face of racist, and often violent, White opposition.<sup>138</sup> King "counseled his followers to hate racism, not racists, and to indicate that they were always open to reconciliation."<sup>139</sup>

Perhaps most importantly, relational counseling will provide clients with more effective and empowering representation. Once lawyers redefine their own professional understandings to incorporate relational self-interest, it will infuse every aspect of their representation of clients. Rather than practicing in a legal universe that consists solely of atomistic self-interest and shapes and constrains lawyers' legal imagination, lawyers will come to understand legal challenges and problems and thereafter avenues open to clients in much richer terms, informed by an enhanced relational foundation.

### C. RELATIONAL PLAUSIBILITY: PROFESSIONAL IDEOLOGY AND RULES OF PROFESSIONAL CONDUCT

Lawyers are the primary source for explaining to people how to understand their obligations to the law.<sup>140</sup> Not only clients but also friends, neighbors, and communities look to lawyers for guidance. Accordingly, even under the bad man model of lawyering, lawyers continue to serve as civics teachers.<sup>141</sup> They implicitly teach clients that their primary obligation is to promote their narrow self-interest within the bounds of the law and without regard to the good of their neighbor or their community. The question then is whether, given the unsuccessful efforts of the bar and leading commentators, lawyers can be persuaded to adopt a different approach to their role in civic leadership. Should lawyers continue to teach atomistic self-interest—the perspective of the bad man? This article asserts that atomistic self-interest is both descriptively and normatively inadequate and that relational self-interest provides a superior alternative for lawyers to embrace and teach to others. Yet, if both lawyers and clients want a relational relationship, lawyers have long been, if only implicitly, civics teachers, and a relational approach will result in more effective representations, why has it not become a reality?

Both within and outside the practice of law, relational approaches run against the homogeneity of the culture of atomistic narrow self-interest. This culture is anything but an invisible wall; rather, it is a powerful force shaping and informing the expectations and habits of lawyers and their clients alike. Before

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138. *See id.* at 8.

139. *Id.*

140. *See Green & Pearce, Lawyer as Civics Teacher, supra* note 17, at 1213–14.

141. *See* SHAFFER & COCHRAN, *LAWYERS, CLIENTS, supra* note 97, at 21–22.

turning to explore how the culture of atomism may be challenged by lawyers acting as civics teachers, it would be instructive to learn from history, specifically, from how the dominant culture has undercut previous challenges to its homogeneity.

David Luban and William Simon, and the many commentators that have followed in their paths or related ones since the 1970s, compellingly explain that the adversarial system does not require atomistic self-interest and that a normative commitment to atomistic self-interest impairs the truth and justice functions of the adversarial system.<sup>142</sup> Moreover, a normative commitment to atomistic self-interest leads lawyers to assist—or fail to prevent—illegal and anti-social conduct by clients.<sup>143</sup> Yet while Luban and Simon, as well as the other commentators,<sup>144</sup> were able to capture great interest in the academy and among bar leaders, they were unable to break the powerful spell of atomistic self-interest among lawyers.<sup>145</sup>

When common morality celebrates atomistic self-interest, individualism, and capitalism, Luban's moral activism does little to help lawyers move beyond their role morality; and when law is reduced to supporting and facilitating atomistic self-interest, Simon's commitment to substantive justice is unpersuasive to lawyers who have come to understand themselves and their clients as Holmesian bad men.<sup>146</sup> In other words, Luban and Simon correctly diagnose the symptoms of atomistic self-interest but fail to effectively overcome it because they continue to work within the system and assumptions of atomistic self-interest. Put differently, as daunting and challenging the cultural homogeneity of atomistic self-interest may be—and it is nothing short of a monumental task—previous attempts by leading scholars of the legal profession to challenge the hired gun ideology have failed exactly because they did not challenge the very culture that legitimizes, produces and sustains this ideology. A relational approach to law practice will only succeed and thrive if it does not shy away from challenging the very culture that aims to undermine it.

As Sen, Bruni, and Sugden assert, compared with atomistic self-interest, relational self-interest more accurately describes, both descriptively and normatively, the conduct, thinking, and desires of clients and lawyers alike.<sup>147</sup> The

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142. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 6; SIMON, *PRACTICE OF JUSTICE*, *supra* note 6.

143. See, e.g., Robert W. Gordon, *A New Role for Lawyers? The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1192 (2003); Marco Jimenez, *Finding the Good in Holmes's Bad Man*, 79 FORDHAM L. REV. 2069, 2112–14 (2011).

144. See *infra* notes 224–25 for a list of other commentators.

145. Empirical evidence across practice areas and hemispheres suggesting that lawyers identify with their clients is instructive here. As lawyers increasingly identify with their clients' goals, they come to think of their clients' objectives as consistent with substantive justice and are less likely to engage in moral counseling contrary to their clients' goals. Luban and Simon's compelling analytical posture ends up as a theoretical exercise practicing lawyers may be committed to but never actually come to apply.

146. *Supra* note 145.

147. See *supra* notes 84–94 and accompanying text.



prevalence of atomistic self-interest is therefore not the product of either some fundamental fact of human nature or of superior normative justifications. Rather, as we have argued above, atomistic self-interest has been culturally and ideologically manufactured by powerful cultural, social, and political forces and interests, vetted through the marketplace and legal arenas.<sup>148</sup> In the 21<sup>st</sup> century, individualistic, unconstrained atomistic self-interest has gained cult, near untouchable status as a cornerstone of the American dream.<sup>149</sup> But there is nothing inevitable about it. It is a product of American culture and law, and it is up to American culture and law to restrain it. Importantly, therefore, there is nothing illegitimate about promoting relational self-interest, and, in particular, nothing inappropriate about lawyers promoting relational self-interest. Therefore, challenging atomistic self-interest would be a monumental task, but it is not morally illegitimate.

This very aspect of relational self-interest—its legitimacy—differentiates it from previous attempts to attack the “standard conception” of lawyers as extreme partisans without moral accountability for their actions or those of their clients within the bounds of the law.<sup>150</sup> Simon’s powerful call for practicing law consistent with substantive justice has—wrongly—been criticized by many as both paternalistic towards clients and implausible given the pluralistic society we live in with its rich, diverse, and legitimately conflicting values.<sup>151</sup> If, as we explain in greater detail below,<sup>152</sup> Simon rejects paternalism, why do critics so often describe him as offering an account of lawyers and law practice that is paternalistic to clients? We believe that arguments based on morality, substantive justice, and the public good are alien to the dominant atomistic paradigm, which views all behavior as narrowly self-interested and any other claims as misleading,<sup>153</sup> manipulative,<sup>154</sup> or private and not properly part of the public sphere.<sup>155</sup> Under any of these conditions, values are not susceptible to dialogue, and Simon is unfairly dismissed as advocating for lawyers as philosopher kings who dominate their clients at the same time as they are themselves required to demonstrate Herculean efforts to practice law.

Professional ideologies, rules of professional conduct and practice realities based on relational self-interest would not be subject to the same critique. They would reflect the normative desires of clients (and lawyers) and would not be thought of as usurping the moral authority, decision-making and autonomy of clients. In particular, relational self-interest would not require Herculean moral

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148. See *supra* notes 72–77 and accompanying text.

149. See Kruse, *Beyond Cardboard*, *supra* note 129, at 154.

150. See *supra* notes 72–77 and accompanying text.

151. See *infra* notes 236–41 and accompanying text.

152. See *infra* notes 236–41 and accompanying text.

153. See Pearce, *Blue State*, *supra* note 3, at 1359.

154. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); Pearce, *Blue State*, *supra* note 3, at 1359.

155. See Anthony T. Kronman, *Civility*, 26 *CUMB. L. REV.* 727, 731 (1996).



efforts and language foreign to lawyers and clients alike. In contrast to the language of substantive justice, relational self-interest uses language that can appeal to lawyers who think of themselves as hired guns or as business people instead of professionals. Grounded in the self-interest that arises from understanding all people and organizations as inter-connected, relational self-interest begins from the familiar starting point of self-interest, as opposed to grand moral arguments that appear irrelevant or inappropriate to those socialized in a culture of atomistic self-interest. Instead, relational self-interest embraces integrating and discussing client and lawyer values in an organic manner, as part and parcel of communicating and building a relational attorney-client relationship. Indeed, relational self-interest promotes traditional professional values, such as loyalty, trust, civility, and the public good.<sup>156</sup>

Language alone, however, is not going to help relational lawyers overcome the dominant culture of atomistic self-interest. Developing a full account of lawyers' professional ideology, role morality, and rules of conduct premised on relational self-interest falls outside the scope of this article. Indeed, if we succeed in exposing the pervasive influence of atomistic self-interest, and help start a discourse exploring professional ideology and role based on relational self-interest, this article would achieve its goals. Nonetheless, we conclude this section with some preliminary thoughts about the meaning and shape of a professional world premised on relational self-interest.

While the "standard conception" is a natural outgrowth of atomistic self-interest, neither extreme partisanship nor moral non-accountability require rejection of relational self-interest. For example, advocates of the standard conception, such as Monroe Freedman, Abbe Smith, and Stephen Pepper, have also supported robust conceptions of dialogue that could include relational self-interest.<sup>157</sup> On the other hand, the standard conception is certainly consistent with the atomistic bad man perspective and some commentators have combined the standard conception with the atomistic ban to exclude relational self-interest from lawyer-client dialogue.

Accordingly, to move beyond atomistic self-interest, lawyers' professional ideology would have to be re-conceptualized and re-imagined. This, of course, has been the ongoing project of many leading legal ethics scholars,<sup>158</sup> a project that to date has been unsuccessful because of its inability to produce an attractive and compelling alternative to atomistic self-interest. Relational self-interest, which is consistent with these theorists and the work of many others, opens the door to the development of a new theory of lawyering and the construction of a new professional ideology.

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156. See Remus, *supra* note 17.

157. See *infra* notes 226–27 and accompanying text.

158. See, e.g., LUBAN, *LAWYERS AND JUSTICE*, *supra* note 6; Shaffer, *supra* note 17; SIMON, *PRACTICE OF JUSTICE*, *supra* note 6; WENDEL, *supra* note 17.

What would such ideology look like? Instead of bad man partisanship, lawyers' professional ideology could be premised on relational partisanship and competence, akin to agents' and fiduciaries' duty of care. Yet, unlike the duty of care of corporate officers and directors, lawyers would not benefit from a near absolute protection of a doctrine similar to the business judgment rule.<sup>159</sup> Lawyers' exercise of professional judgment would be subject to substantive, not only procedural, scrutiny, although the scrutiny would largely occur among the community of lawyers and clients, not as a matter of law.<sup>160</sup>

Next, instead of moral non-accountability, lawyers will remain relationally responsible for the consequences of their practice—as in fact they descriptively are. This would not mean, by any stretch of the imagination, compromised loyalty to clients. Indeed, it is compatible with both partisan- and responsibility-oriented conceptions of lawyering.<sup>161</sup> Rather, instead of atomistic, unconstrained, and arguably ineffective loyalty to clients, lawyers would owe clients a duty of loyalty that means more than avoidance of conflicts of interest. It would encompass a fiduciary commitment to wise counseling and representation.

Finally, lawyers' competent representation of clients would embody relational perspectives that would include the spirit, as well as the letter, of the law, as Simon and Wendel assert, and would also incorporate conceptions of the public good, similar to the responsible zealous advocacy of traditional professionalism.<sup>162</sup> No doubt, a professional ideology based on competent, relationally accountable representation is a far cry from partisan non-accountability of the dominant account's bad man lawyer.<sup>163</sup> But as Luban, Simon and others have shown,<sup>164</sup> most lawyers do not find such an approach compelling. Even within the confines of the adversary system in the criminal law context, partisan non-accountability is not necessary to ensure effective representation. At the end of the day, as Bruni and Sugden point out, and the MBA Oath movement evidences,<sup>165</sup> many clients, like lawyers, yearn for relational self-interest as an alternative to atomistic self-interest.<sup>166</sup> Explaining to them that they could and should conduct themselves in a way consistent with how they live their lives generally will reinforce this inclination.

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159. See, e.g., Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1145–48 (2012) (discussing the duty of care and the business judgment rule).

160. See, e.g., Russell G. Pearce, *Model Rule 1.0: Lawyers are Morally Accountable*, 70 FORDHAM L. REV. 1805 (2002).

161. *Id.* (identifying proponents of various perspectives on the lawyer's role construct of moral accountability).

162. Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085, 3145–52 (2013); see also Gordon, *Independence*, *supra* note 3.

163. See *supra* notes 6–8 and accompanying text.

164. See *supra* notes 142–45 and accompanying text.

165. See generally ANDERSON & ESCHER, *supra* note 79.

166. See *supra* notes 84–94 and accompanying text.

As to rules of professional conduct that breathe life into and implement professional ideologies, the legal profession's Rules are currently strained to the point of internal contradiction. Retaining the language of duties to the courts and the legal system as officers of the legal system and to the public good as public citizens,<sup>167</sup> the *Model Rules* struggle to cope with the prevalence of atomistic self-interest. As many commentators pointed out, revisions to the *Model Rules* in recent years, such as the addition of numerous exceptions to confidentiality in Rule 1.6(b) and 1.13(c), are a poor fit within the atomistic self-interest ideology.<sup>168</sup> Yet while commentators have used this observation to try and defeat recent amendments to provide these exceptions,<sup>169</sup> it also serves the opposite goal of helping demonstrate that we need to rethink and have conversations regarding the rules of professional conduct in light of the relational reality of law practice.

Indeed, relational self-interest helps lawyers fulfill some of their existing obligations under the *Model Rules*. The *Model Rules* permit lawyers to encourage relational self-interest. For example, Rule 1.2 and Rule 2.1 conform to mutual benefit, including respect for client dignity, as commentators as diverse as Luban, Freedman, and Smith would suggest or, even better from our perspective, relational autonomy to use Nedelsky's phrase.<sup>170</sup>

More importantly, relational self-interest better reinforces lawyers' duties as officers of the legal system and as public citizens. Relational self-interest can better explain exceptions to confidentiality and duties to non-clients. It would provide a language for debating confidentiality,<sup>171</sup> and mandatory or discretionary disclosures, that would encompass the contrasting views of relational commentators. Similarly, it would offer a context for considering accountability for providing legal services to indigent clients, whether through mandatory pro bono or other measures that recognize how equal justice is important to maintaining community as a web of relationships. Next, relational self-interest as it applies to lawyers would require regulation of law firms at the firm level, doing away with the unreasonable—and detached from practice realities—emphasis of the *Model Rules* on individual atomistic lawyers as the basic exclusive unit of regulation.<sup>172</sup> Finally, relational self-interest could accommodate new rules that

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167. See MODEL RULES OF PROF'L CONDUCT pmb1. (2015).

168. See Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving The Tension Between Confidentiality Requirements And Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 246–50 (2007).

169. See, e.g., Lawrence J. Fox, *It Takes More Than Cheek to Lose Our Way*, 77 ST. JOHN'S L. REV. 277 (2003) (arguing for a broad confidentiality rule).

170. See MODEL RULES OF PROF'L CONDUCT R.1.2, 2.1 (2015); see also Laurel S. Terry et al., *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 FORDHAM L. REV. 2661, 2665–66 (2012). For a discussion of the concept of relational autonomy, see Nedelsky, *supra* note 17, at 38–65.

171. William H. Simon, *The Confidentiality Fetish*, ATLANTIC MONTHLY, Dec. 2004, at 113.

172. Wald, *Resizing*, *supra* note 99, at 278–82.

would better accord with the representation of co-clients and collaborative lawyering than the existing conflicts rules grounded in atomistic self-interest.

Moreover, relational self-interest opens the door to a conception of rules of professional conduct that will suggest new approaches to regulation of legal services providers. For example, following in the footsteps of the United Kingdom,<sup>173</sup> relational commitments may lead to the development of principles-based regulatory schemes and may apply to all providers of legal services, whether lawyers or not. “These approaches recognize that relationships within firms are essential to promoting ethical conduct and they create a reciprocal relationship between regulators and those they regulate,”<sup>174</sup> and may include recognizing the fostering of relational self-interest as a goal of regulation. Such regulation will pay attention to “how law firms develop and implement their own ethical identities and plans,”<sup>175</sup> develop “ethical guidelines [that] view the lawyer-client relationship as fully relational and promote dialogue that would more likely include discussion of relational self-interest,”<sup>176</sup> and the creation of “vehicles for small and solo practitioners to obtain the benefit of firm type regulation,”<sup>177</sup> such as organization “through bar associations, inns of court, or their own groups, to establish affinity alliances of small and solo practices that would work together to develop their own regulatory plans, including ways to assist and monitor each other without breaching duties of confidentiality and loyalty.”<sup>178</sup>

There is no denying that the road to introducing a workable, viable relational approach to law practice is a long one, given the dominance of the opposing atomistic model, and that relational lawyers would have to do battle with powerful cultural forces which legitimize narrow self-interest. Law, it is worth repeating, is not going to be able to fashion a successful counter attack on unconstrained self-interest all by itself, but it must try, with lawyers as civics teachers leading the way. And, at least within law, the development of relational professional ideologies and corresponding rules of professional responsibility utilizing the familiar language of relational self-interest would constitute an important step in the right direction.

Other aspects of the relational approach to law practice may help in fighting the cultural battle. Relational self-interest provides lawyers with a way to understand the value of their work, increase job satisfaction, and decrease substance abuse and anxiety-related mental illness in a manner consistent with

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173. See Julian Webb, *The Future of the Legal Profession: Article: Regulating Lawyers in a Liberalized Legal Services Market: The Role of Education and Training*, 24 STAN. L. & POL'Y REV. 533, 543–47 (2013) (describing the United Kingdom's Legal Services Act of 2007).

174. Pearce & Wald, *Rethinking Lawyer Regulation*, *supra* note 128, at 533–34.

175. *Id.* at 534.

176. *Id.*

177. *Id.*

178. *Id.* at 535.

how members of the bar conceive of their role with regard to their clients. It offers bar leaders an effective way to promote these values, in contrast to the reliance on professional rhetoric that has proven ineffective. When lawyers as individuals and as a community employ the framework of relational self-interest to conduct themselves as relationally responsible business people, they will find that their work is full of passion and reward. Their work will, of course, continue to be stressful. Nonetheless, they will understand why their work has meaning and will have more tools to manage stress. Moreover, insofar as many of the demands in balancing work and other responsibilities have a moral dimension, recognition of the moral implications of lawyer conduct will make consideration of balance more visible and more acceptable. As a result of these changes, lawyers should experience a significant improvement from the current experience of high rates of job dissatisfaction, substance abuse, and anxiety-related mental illness.<sup>179</sup>

#### D. RELATIONALITY IN THE WORKPLACE

Unfortunately, significant cultural hurdles are not the only powerful force relational attorneys would have to do battle with, as institutional dynamics also cement and legitimize atomistic self-interest. Just as American lawyers have grown increasingly more devoted to atomism and narrow self-interest, so have the institutions that house them. American law firms, large and small, increasingly embody the culture of atomism, adopting hiring, promotion and organizational policies and procedures that reward atomism and diminish the likelihood of relational alternatives. The adoption of the billable hour as the predominant measure of assessing productivity and the subsequent increase in billable targets,<sup>180</sup> the demise of lock-step compensation and rise of eat-what-you-kill schemes,<sup>181</sup> increased mobility and resulting decreased long-term loyalty to the workplace,<sup>182</sup> decline in mentoring and training,<sup>183</sup> the adoption of multiple tracks of partnerships,<sup>184</sup> and installing rainmaking equity partners on the top of the professional pyramid all have the potential to serve, support and legitimize the fetish of narrow self-interest and reduce the space for relational alternatives at the workplace.

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179. See generally Krieger & Sheldon, *supra* note 15.

180. WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* 9-22 (1996); Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 246-47 (2000).

181. Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1906 (2008); MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004).

182. Wald, *supra* note 168, at 199-200.

183. Pearce & Wald, *Relational Infrastructure*, *supra* note 45, at 117.

184. William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the AM Law 200*, 84 N.C. L. REV. 1691 (2006).

A relational approach to law practice would apply with equal force to a lawyer's interactions and relationships with lawyers and non-lawyers alike, both within one's firm and outside of it. Indeed, many of the particular strategies employed to promote atomistic organizational cultures, such as hourly billing, shifting from lock-step compensation to greater reward for rainmakers, lateral hiring, or multiple partnership tracks, could just as easily survive with a different function in a relational organizational culture. Within a firm, consider recent laments regarding the decline of training and mentoring<sup>185</sup> at BigLaw.<sup>186</sup> As in-house counsel increased their prestige and power compared to outside counsel, entity clients have begun to more closely scrutinize the staffing and billing habits of large law firms, often refusing to pay for the training and mentoring of junior associates.<sup>187</sup> At the same time, increased competitive pressures have raised billing and business development expectations of BigLaw partners, making them less willing and less able to train and mentor; and rendered their law firms less willing to cover the cost of training and mentoring.<sup>188</sup> Who then, commentators caution, will train and mentor the next generation of large law firm lawyers?

The concern looms large under the dominant paradigm in which large law firm partners and entity clients all aggressively pursue their own atomistic self-interests, but may be somewhat less disconcerting should an alternative relational approach emerge. Relational partners would consider associates counterparts in social exchanges and would train and mentor them, realizing that the investment carries a mutual benefit. BigLaw as relational entities might accept somewhat lower profit margins and would not only tolerate but indeed incentivize its partners to mentor, train and invest in cultivating a more relational culture. Associates, contrary to the teachings of the prevailing ideology, would not treat training and mentoring as an arm's length exchange, their reward for the long hours they have committed to the firm, but instead might invest in the mutual relationship with training partners and mentors.<sup>189</sup> General Counsel, in turn, might be willing to work their tight budgets to cover some of law firms' training and mentoring costs.

Next, consider the ongoing trend of increased use of contract lawyers at BigLaw. Under the dominant paradigm, commentators have correctly described the trend as creating second-class citizens, lawyers who are ill-treated by partners and associates, who have little chance of securing professional status and

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185. Pearce & Wald, *Relational Infrastructure*, *supra* note 45, at 118–20.

186. "The term "BigLaw" generally refers to the largest law firms in the [world]." See Lawrence Friedman & Louis Schulze, *Not Everyone Works for BigLaw: A Response to Neil J. Dilloff*, 71 MD. L. REV. 41, 41 n.3 (2012).

187. Pearce & Wald, *Relational Infrastructure*, *supra* note 45, at 131, 135.

188. *Id.* at 116–17, 135.

189. *Id.* at 135–37.



benefits, resulting in increased stratification within the profession.<sup>190</sup> Atomistic self-interest does legitimize the marginalization of contract lawyers by clients, partners, and associates who accurately perceive contract attorneys as means to an end—the maximization of their narrow self-interest. A relational approach, however, would mandate treating contract lawyers respectfully and providing them with reasonable opportunities to develop their professional careers, either within or outside of BigLaw.

As the saying goes, old habits die hard, and old institutional habits grounded in a dominant ideology and culture that celebrate atomistic self-interest will die even harder, especially as powerful equity partners—the big winners of the atomistic approach to law practice—increasingly consolidate their power at the top of BigLaw.<sup>191</sup> The dominance of atomistic self-interest within legal institutions should not be underestimated, and aspiring relational attorneys at BigLaw would be naïve to believe otherwise. Yet the relational opportunity is there.<sup>192</sup> Lawyers, including lawyers who join and stay at large law firms, not only seek relational alternatives to the dominant atomistic approach but will find that consciousness of relational factors will help develop the most effective strategies for furthering career goals given that relational factors most accurately describe the descriptive context even of a workplace where colleagues and clients employ atomistic rhetoric. Indeed, many clients, including large entity clients, demand relational advice and partnerships from their lawyers.<sup>193</sup> Relational institutions, including law firms, have much to gain from adopting relational policies and procedures.

#### E. RELATIONAL LEGAL EDUCATION

Other legal institutions, law schools included, would have to adjust as well, abandoning the culture of atomistic self-interest and developing relational alternatives. As we establish elsewhere:

[I]aw schools form law students as competitive and adversarial professionals who are taught to believe that it is legitimate, and indeed desirable, to pursue aggressively the interests of their clients, as well as their own interests, without regard to the interests of their colleagues, neighbors, and communities. Law schools teach law students to view their classmates as competitors and pursue their own [atomistic] self-interest as students. [Atomistically] self-interested law students grow into [atomistically] self-interested attorneys, but law schools

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190. Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 *BUFF. L. REV.* 1155, 1189 (2008) (“With temporary attorneys, large law firms appear to have created a new lawyer underclass.”).

191. Galanter & Henderson, *supra* note 181, at 1898 n.123, 1913; Henderson, *supra* note 184; *see generally*, ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988).

192. *See supra* notes 117-21 and corresponding text.

193. *See supra* note 117.



do not stop there. Rather, they teach students to understand their clients as [atomistically] self-interested, and to pursue their clients' [atomistic] self-interest at the expense of their clients' relational self-interest in considering the interests of opposing parties, third parties, the public good, and the spirit of the law. Indeed, the law itself is taught as a morally-free zone, a body of abstract principles subject to manipulation, in which the public interest is nothing more than an aggregate of clients' private interests, and in which a lawyer's role is to pursue aggressively her client's [atomistic] self-interest.<sup>194</sup>

Yet law schools can become arenas of reform, where law students are reacquainted with and immersed in relational approaches. Legal education can and should explain professional values in terms of relational self-interest, revise its traditional curriculum, for example, by un-teaching "atomistic thinking like a lawyer" to mean "atomistic zealous advocacy on behalf of clients" and teaching instead relational thinking like a lawyer and zealous advocacy, including a deep commitment to the quality of justice in our society, and making the formation of professional identity a cornerstone of its mission.<sup>195</sup> If nothing else, the current culture of atomistic self-interest makes legal ethics a second-rate course.<sup>196</sup> A relational framework would make ethics a primary focus of legal education, perhaps with the addition of a first year course that helps lawyers understand their connection to the economic, social, and political well-being of society, as well as to their resulting responsibilities. In other words, the course will have to go above and beyond coverage of the rules of professional conduct and serve as an arena in which students can first come to experience and develop a challenging and rewarding foundation for their future law practice.<sup>197</sup> In addition, pervasive ethics initiatives will help build and instill in law students a commitment to professional values that will have both a more persuasive grounding and a more pressing claim on the student's allegiance in the context of relational self-interest.

Accepting the framework of relational self-interest extends beyond individual accountability to the community of lawyers. The bar's obligations fall within two broad categories: promoting institutional arrangements that will best advance a just society and supporting lawyers in their efforts to live up to their individual obligations. Taking these responsibilities seriously will require significant reforms. For example, our society routinely denies equal justice to those who cannot afford legal representation or cannot afford representation equal to that of

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194. Wald & Pearce, *Making Good Lawyers*, *supra* note 16, at 415 (internal citations omitted). *See id.* at 415–29 for a detailed analysis of the ways in which law schools adhere to and teach atomistic self-interest. In the previous article, we used the term "autonomous self-interest" to describe the concept that we are now calling "atomistic self-interest."

195. *See id.* at 433–40.

196. *See* Eli Wald, *Book Review*, 59 J. LEGAL EDUC. 311, 311–12 (2009) (reviewing RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008)).

197. *See* Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 722 (1998).

their adversary. Thus far, efforts to redress unequal justice have been limited to rhetoric or to pro bono and public service programs that have at best a marginal impact. In the context of the dominance of atomistic self-interest these limited efforts make sense. In a world exclusively informed by autonomy, individualism, and self-interest, access to legal services is primarily thought of in terms of private access to the law for those who are able to pay for it.

Relational self-interest and the understanding that our fates are all interconnected open the door to the conceptualization of broader reforms. In order to provide greater access to legal services for low and middle income persons, the bar should permit businesses to provide legal services so long as they satisfy minimum standards of ethics and quality.<sup>198</sup> Similarly, to promote more diversity within the bar and encourage access to legal services, a college degree in law should become the ticket for bar admission, as it is in most of the world and was in the United States prior to the 1930s.<sup>199</sup>

### III. THE FALSE DICHOTOMIES OF PROFESSIONALISM CRISIS DISCOURSE

Importantly, a relational discourse moves the legal profession forward by offering a way to resolve the professionalism crisis. As Thomas Kuhn has explained, debates regarding core understandings mark a paradigm crisis like the crisis of professionalism.<sup>200</sup> Not surprisingly, accompanying the collapse of the business-profession dichotomy, controversies arose related to the role of the lawyer, job satisfaction, and the unity of the legal profession.<sup>201</sup> This Part explains how the paradigm crisis has caused a mistaken understanding that the different approaches to these four issues are inevitably irreconcilable dichotomies, rather than reasonable disagreements subject to reconciliation and dialogue. Next, it shows that commentators are beginning to move beyond the crisis of professionalism and the perception of irreconcilable dichotomies at the core of professional identity. Finally, it argues that a relational approach helps dispel the false dichotomies and is consistent with recent approaches to professionalism and emerging theories of law practice.

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198. See, e.g., Russell G. Pearce & Sinna Nasser, *The Virtue of Low Barriers to Becoming a Lawyer: Promoting Liberal and Democratic Values*, 19 INT'L J. LEGAL PROF. 357 (2012); John O. McGinnis & Russell D. Mangas, *An Undergraduate Option for Legal Education*, 38 INT'L REV. L. & ECON. 117 (2014).

199. See Pearce & Nasser, *supra* note 198; McGinnis & Mangas, *supra* note 198; see also Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 FORDHAM L. REV. 817, 830–34 (2000) (discussing the history of legal education requirements in the U.S.); Robert W. Gomulkiewicz, *Intellectual Property, Innovation, and the Future: Toward a Better Model for Educating Leaders in Intellectual Property Law*, 64 SMU L. REV. 1161, 1166 (2011) (noting that “[i]n most countries, law is an undergraduate degree”).

200. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 47–48, 88 (2d ed. 1970); see also Pearce, *The Professionalism Paradigm Shift*, *supra* note 3, at 1234–37 (describing Kuhn’s theory of paradigms).

201. See *infra* Part III.B and Part III.C.

## A. THE BUSINESS-PROFESSION DICHOTOMY

In their account of the crisis of professionalism, leading lawyers and legal scholars described business behavior and professionalism as inherently in tension.<sup>202</sup> In fact, the dichotomy between business and profession, while a rhetorical commitment, never accurately reflected the reality of lawyers' work. If lawyers are relational, then their work relationships necessarily incorporate elements of both a business and a traditional profession.

Indeed, over time, the claim that professionals were guardians of the public good had narrowed in reaction to popular skepticism.<sup>203</sup> The confidence of the framers, as well as antebellum legal ethicists David Hoffman and George Sharswood, that professionals had superior virtue gave way after the Civil War to the narrower claim that lawyers' training and experience provided them with superior expertise and disinterested independence.<sup>204</sup> After the 1960s, the claim narrowed again so that beyond a vague justification for lawyer self-regulation, the commitment to the public good was outside of most lawyers' every day work—pro bono clients and support for public interest lawyers.<sup>205</sup>

But even from the beginning of sincere faith in the business-profession dichotomy as the basis for lawyers' civic leadership, lawyers earned their livelihoods and prestige from their work, inevitably providing a self-interested motive not very dissimilar from that of business people that co-existed with a belief in public responsibilities that enabled lawyers to obtain the exclusive right to practice law and to claim the prestige and influence of civic leadership.

The cultural change after the 1960s that created the crisis of professionalism and viewed every motivation as atomistically self-interested had a similarly one-dimensional understanding of lawyer conduct that denied the possibility that lawyers or their clients would choose long term self-interest, moral responsibility, or conduct other than instrumental manipulation. Yet, while the dominant rhetoric promoted atomistic self-interest, the reality of law practice has always reflected aspects of relational self-interest. In the big firm setting, David Wilkins has demonstrated that lawyer-client relationships are coming to resemble the reciprocal and mutually beneficial relations of businesses with long-term suppliers.<sup>206</sup> Moreover, lawyers are increasing pro bono hours<sup>207</sup> and pro bono practice serves both a public good and lawyer self-interest in terms of prestige and training.

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202. See *supra* notes 37–44 and accompanying text.

203. See Pearce, *American Lawyer's Role*, *supra* note 23, at 383–84.

204. See *id.* at 384–95.

205. *Id.* at 383–84, 419–20.

206. See Wilkins, *Team of Rivals?*, *supra* note 56, at 2097.

207. See, e.g., Victor Marrero, *Pro Bono Legal Services: The Silent Majority—a Twenty-five Year Retrospective*, 41 FORDHAM URB. L.J. 1317, 1334–36 (2014) (describing that mandatory pro bono reporting requirements have increased the number of pro bono hours being reported).

Not surprisingly, then, after a generation where bar and academic leaders lamented the end of the business-profession dichotomy, more and more scholars and leaders are arguing that the business aspect of legal practice does not prevent commitment to the public good. While the trend in the 1990s was to bemoan business conduct by lawyers, the trend in the twenty-first century has been different, with leading scholars acknowledging that law has always been to some extent a business and rejecting traditional professionalism's contention that professional lawyers should have the exclusive privilege to practice law. They agree that non-lawyers should be able to provide some or all legal services, either expressly or implicitly rejecting the application of the business-profession dichotomy.<sup>208</sup> In doing so, they have adopted relational perspectives that view legal work and legal workers as requiring a range of expertise and participating in a range of relationships, as opposed to the one size fits all and zero sum perspective of the business-profession dichotomy. Removing the presumption that only professional lawyers can ethically and competently provide all legal services opens the possibility of a range of relational perspectives to legal work.

Tom Morgan, for example, long a leading professional responsibility scholar, has observed that "very good people have tried to make something of the professional rhetoric, but we are a long way from [those] grandiose claims . . . . In my view, professionalism in the sense developed by the A.B.A. during the twentieth century is—and should be seen as—dead."<sup>209</sup> But Morgan sees opportunity in this transformation. He asserts that "[l]awyers, like all citizens, have a moral obligation to devote their best efforts to using their skills in ways that contribute to the public interest"<sup>210</sup> and observes that "consumers of legal services are likely to reward providers" who adopt the business ethic of "deliver[ing] services more efficiently and at lower costs."<sup>211</sup> According to Morgan, this will increase access to justice and will not undermine lawyer's values.<sup>212</sup> Morgan notes that "[t]hose values have not and will not go out of date . . . . The lives of practitioners using legal training, whatever their number or the nature of their individual training and practice, will be the best instruments of justice."<sup>213</sup> To Morgan, whether lawyers or not, legal services providers can serve the public good. Morgan is only one of a number of distinguished scholars who

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208. See, e.g., BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* (2015) [hereinafter BARTON, *GLASS HALF FULL*]; THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* (2010); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law* (forthcoming), <http://ssrn.com/abstract=2183978> [<https://perma.cc/7MMT-6KRS>]; Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1 (2012); Remus, *supra* note 17; Rhode, *Law, Lawyers, supra* note 12, at 1553; Roiphe, *Redefining Professionalism, supra* note 3.

209. MORGAN, *supra* note 208, at 68–69.

210. *Id.* at 69.

211. *Id.* at 232.

212. *Id.*

213. *Id.*

have argued—contrary to the business-profession dichotomy—that increased competition would lower the price and improve the quality of services and thereby increase access to justice.<sup>214</sup>

Dana Remus and Rebecca Roiphe also reject the business-profession dichotomy, but in a way that differs from Morgan. Whereas Morgan seeks to replace the business-profession dichotomy with a business, or market, ideology which has inherent guarantees of the public interest, Remus and Roiphe seek to “redefine” and “reconstruct” professionalism in ways that reject the business-profession dichotomy,<sup>215</sup> but oppose a largely market driven approach to delivering legal services as well. Remus asserts that the tension between commercialism and professionalism,

cannot be resolved through an embrace of market forces any more than it can be hidden behind traditional rhetoric of professionalism and commitment to the public interest. Rather, it must be continually mediated and managed through professional structures and ethical rules that harness market forces in productive rather than protective ways.<sup>216</sup>

Roiphe, in turn, argues that professional “independence is an aspect of professional identity rather than a condition that results from the isolation of lawyers from businessmen and others[.]”<sup>217</sup> Roiphe asserts that the danger to professional independence arises not “from innovative markets, sources of funding, or new law firm structures” but rather from “proposals to segment the profession in ways that might erode a common identity” that “has consistently provided a language for debating the nature of the lawyer’s role in a democracy.”<sup>218</sup>

The bar, as well, is reconsidering its fixation on the business-profession dichotomy. The State of Washington has drawn great attention for its experiment in permitting paralegals to provide limited family representation.<sup>219</sup> As other jurisdictions consider similar measures,<sup>220</sup> the delivery of legal services is being de facto deregulated through consumer software, like Legal Zoom, and non-lawyer businesses providing discovery and contract management. In response,

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214. See, e.g., Barton, *supra* note 1, at 390; Hadfield, *supra* note 208; Deborah L. Rhode, *Reforming American Legal Education and Legal Practice: Rethinking Licensing Structures and the Role of Nonlawyers in Delivering and Financing Legal Services*, 16 LEGAL ETHICS 243 (2013).

215. See Remus, *supra* note 17; Roiphe, *Redefining Professionalism*, *supra* note 3.

216. Remus, *supra* note 17, at 5.

217. Roiphe, *Redefining Professionalism*, *supra* note 3, at 196.

218. *Id.*

219. See Remus, *supra* note 17, at 8; WSBA, <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians> [<https://perma.cc/8WWH-YB8T>] (last visited July 30, 2016) (“Washington is the first state in the country to offer an affordable legal support option to help meet the needs of those unable to afford the service of an attorney. Legal Technicians, also known as Limited License Legal Technicians (LLLT), are trained and licensed to advise and assist people going through divorce, child custody and other family-law matters in Washington.”).

220. Laurel A. Rigertas, *Collaborations Between Lawyers And New Legal Professionals: A Path To Increase Access To Justice And Protect Clients*, 24 KAN. J.L. & PUB. POL’Y 539, 542 (2015).

the bar has slowly begun to explore the possibility of regulating legal services alongside lawyers,<sup>221</sup> implicitly acknowledging that non-lawyers can provide legal services.

In rejecting the business-profession dichotomy, these varied perspectives share an understanding that law work is relational and that law workers are both business people and professionals at the same time. In this way, they offer a way to overcome the crisis of professionalism through a relational perspective.

## B. THE LAWYER'S ROLE

As described above, accompanying the crisis of professionalism was a shift in the dominant lawyer's role from the structural-functionalist vision of zealous advocates who self-consciously served as intermediaries between the people and the law to zealous advocates who were extreme partisans without moral accountability or responsibility for the public good. Consistent with the increasing emphasis on individualism and on self-interest both critics and defenders of extreme partisanship described it in terms of Holmesian bad men lawyers representing Holmesian bad men clients.<sup>222</sup> Clients sought to get away with what they could within the bounds of the law. In representing clients' goals, lawyers did the same. The resulting binary was lawyer as Holmesian bad man hired gun versus lawyer as structural-functionalist civics teacher. From a relational perspective, however, most perspectives are neither wholly atomistic nor wholly paternalistic.

As the debate developed, advocates of both paradigms offered a wide range of rationales and applications. Arguments justifying extreme partisanship included respect for individual autonomy, value pluralism, and the adversary system.<sup>223</sup> Criticisms began with David Luban and William Simon's assessment of the adversary system as a flawed mechanism for justice, and their proposals for lawyer responsibility for the public good, Luban from extralegal morality and Simon from the internal substantive perspective of a just legal system.<sup>224</sup> Other

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221. ABA Model Regulatory Objectives for the Provision of Legal Services, Resolution 105 Revised and Amended Resolution 105, <http://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/105.pdf> (Feb. 2016) [<https://perma.cc/6S5S-MFSZ>] [hereinafter Model Regulatory Objectives]; see *ABA Policy-Making Body Adopts Principles to Guide Courts in Regulating of Legal Service Providers*, ABA (Feb. 8, 2016) [http://www.americanbar.org/news/abanews/aba-news-archives/2016/02/aba\\_policy-makingbo.html](http://www.americanbar.org/news/abanews/aba-news-archives/2016/02/aba_policy-makingbo.html) [<https://perma.cc/RM5P-KRDB>]; see also McGinnis & Pearce, *supra* note 124, at 3057-59; see also BARTON, GLASS HALF FULL, *supra* note 208, at 88-97; MORGAN, *supra* note 208, at 95-98.

222. See, e.g., DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* (2011); LUBAN, *LAWYERS AND JUSTICE*, *supra* note 6; Christine Parker et al., *The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation*, 22 *GEO. J. LEGAL ETHICS* 201 (2009); Schwartz, *supra* note 6, at 672-74; W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 *FORDHAM L. REV.* 1473, 1487 (2006).

223. See, e.g., MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* § 1.08 (4th ed. 2010) (value pluralism) [hereinafter FREEDMAN & SMITH, *LAWYERS' ETHICS*].

224. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 6; SIMON, *PRACTICE OF JUSTICE*, *supra* note 6.



scholars soon offered other ways of extending the lawyers' role beyond the promotion of the Holmesian bad man client on the basis of value pluralism, relational feminism, critical race theory, religious commitments, and a reconceptualization of the lawyer as civics teacher.<sup>225</sup>

While advocates generally painted the extreme partisan visions and alternative visions as binary, the actual distinctions were far more complex. Outside of a very few commentators who argued for a Holmesian bad man gloss on the extreme partisan, most—even the most prominent defenders of the hired gun role,<sup>226</sup> were open to lawyers integrating their personal views into certain dimensions of law practice, such as whether to represent a client, and to engaging in mutually respectful dialogue regarding long term self-interest, morality, and the public good.<sup>227</sup> Similarly, for advocates of the various perspectives on morally responsible lawyering, the default was zealous representation, even for clients with whom the lawyer disagreed.<sup>228</sup> As a general matter, these scholars reserved refusal to represent, or withdrawal from representation, for the extreme case—not everyday lawyer work—and advocated for respectful counseling of clients, not overriding the clients' decisions and disregarding clients' autonomy.<sup>229</sup> With the exception of Thomas Shaffer, they rejected the label of paternalism<sup>230</sup> and even Shaffer's paternalism resembles Buber's I-Thou dialogue,<sup>231</sup> more than the caricature of a paternalistic lawyer disregarding the client's views in order to promote the lawyer's view of the client's best interest. Indeed, Shaffer and Bob Cochran, advocates of morally responsible lawyering, urge lawyers to represent clients whose behavior they might find reprehensible.<sup>232</sup>

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225. See, e.g., JOSEPH G. ALLEGRETTI, *THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* (1996) (addressing religious values); SHAFFER, *supra* note 93 (addressing religious values); VISCHER, *supra* note 17 (addressing religious values); WENDEL, *supra* note 17 (addressing value pluralism); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 370 (1992) (addressing critical race theory); Cahn, *supra* note 93 (addressing relational feminism); Green & Pearce, *Lawyer as Civics Teacher*, *supra* note 17 (addressing civics teachers); Kruse, *Lawyers, Justice*, *supra* note 17 (addressing value pluralism); Menkel-Meadow, *supra* note 93 (addressing relational feminism); Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straightjacket of Legal Practice*, 95 MICH. L. REV. 766, 773 (1997) (addressing critical race theory); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502, 1526 (1998) (addressing critical race theory); see also Pearce & Wald, *The Obligation of Lawyers to Heal*, *supra* note 22, at 40–41.

226. See, e.g., FREEDMAN & SMITH, *LAWYERS' ETHICS*, *supra* note 223, at Ch. 3; MARKOVITS, *supra* note 222; Fried, *supra* note 97; Pepper, *supra* note 113; Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COL. L. REV. 1 (2003).

227. See, e.g., FREEDMAN & SMITH, *LAWYERS' ETHICS*, *supra* note 223, at Ch. 3; Pepper, *supra* note 113.

228. See LUBAN, *LEGAL ETHICS*, *supra* note 109; SIMON, *PRACTICE OF JUSTICE*, *supra* note 6; WENDEL, *supra* note 17; Kruse, *Lawyers, Justice*, *supra* note 17.

229. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 6, at 159; Simon, *Lawyer Advice*, *supra* note 98, at 223.

230. See Shaffer, *supra* note 17, at 986–87.

231. See generally MARTIN BUBER, *I AND THOU* (Walter Kaufmann trans. 1970).

232. See, e.g., Thomas Shaffer, *Should a Christian Lawyer Serve the Guilty*, 23 GA. L. REV. 1022 (1989) (making arguments based on Aristotelian and Christian ethics); ROBERT COCHRAN ET AL., *LAWYERS CLIENTS AND*

Similarly, the issue of client autonomy captures both the claim that the competing conceptions of role are binary and the falseness of that claim. One narrative of the extreme partisan perspective is that in respecting client autonomy it replaced or rejected a paternalistic conception found in traditional professionalism and in the diverse perspectives on responsible lawyering.<sup>233</sup> With regard to traditional professionalism, the claim is particularly ironic. The crisis of professionalism rhetoric complains that lawyers have lost something when their corporate clients have become more sophisticated and have more leverage in their relationship with their lawyers<sup>234</sup>—precisely the client autonomy that the now dominant rhetoric of extreme partisanship celebrates.<sup>235</sup>

As William Simon has compellingly explained, “the debate between the autonomy and paternalist views is so often moot.”<sup>236</sup> Acknowledging that the simplistic versions of paternalism as lawyers imposing their own views and autonomy as lawyers simply following clients’ directions conflict, Simon explains that, “once we get beyond the crude versions, it is hard to distinguish the autonomy and paternalist views.”<sup>237</sup> The “refined view [of each] contemplates a dialogue with the client that it recognizes is both essential to understanding the client and fraught with dangers of oppressing or misunderstanding him.”<sup>238</sup> At the same time, “[e]ach refined view involves a dialectic of objective constructs (the ‘typical client’ presumption or the minimal reasonableness test) and efforts to know the client as a concrete subject.”<sup>239</sup> He argues that:

The paternalist view is intensely individualistic to the extent that it aspires to deep knowledge of the client as a concrete individual and grounds the lawyer’s decision in the client’s self-realization. Even where it disregards client choices because they fail the minimum reasonableness test, it is not denying the value of autonomy, just that the particular client has the capacity for autonomous choice.<sup>240</sup>

Similarly, he observes that “the refined autonomy view is quite collectivist to the extent that it licenses the application of objective ‘typical’ client presumptions

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MORAL RESPONSIBILITY (2d ed. 2009) (arguing based on Aristotelian conception of friendship and Buber’s understanding of I-Thou relationships).

233. See, e.g., MARKOVITS, *supra* note 222; FREEDMAN & SMITH, *LAWYERS’ ETHICS*, *supra* note 223. We want to distinguish these scholars from those who find lawyer paternalism based in lawyer negligence or placing their allegiance to fellow lawyers above loyalty to their clients. See e.g., DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO’S IN CHARGE?* (1974); AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS* (1995); Abraham S. Blumberg, *The Practice of Law as a Confidence Game*, 1 *LAW & SOC’Y REV.* 15 (1967).

234. See, e.g., Ribstein, *supra* note 55, at 760–61.

235. See MARKOVITS, *supra* note 222.

236. Simon, *Lawyer Advice*, *supra* note 98, at 225.

237. *Id.* at 224.

238. *Id.*

239. *Id.*

240. *Id.* at 224–25.

to the particular client.”<sup>241</sup>

Fortunately, when we move beyond the simplistic and inaccurate domain of dichotomous conceptions of role, whether autonomy versus paternalism, or zealous versus responsible lawyering, we enter the relational workplace, where lawyers of different views would benefit each other through dialogue in the relational legal profession. Put differently, while any thoughtful conception of the lawyer’s role entails a dialogue with the client that is both “essential to understanding the client and fraught with dangers of oppressing or misunderstanding him,” a relational approach suggests a platform on which lawyers can navigate the fine line between empowering and manipulating clients.

### C. JOB SATISFACTION

In the wake of the crisis of professionalism, a division has arisen regarding whether lawyers are satisfied or unsatisfied with their work. The majority of commentators observe that some lawyers in private practice are unhappy because they no longer find meaning in their work.<sup>242</sup> As Susan Daicoff has observed, “‘professionalism’ has declined, public opinion of attorneys and the legal profession has plummeted, and lawyer dissatisfaction and dysfunction have increased.”<sup>243</sup> Commentators who describe private practice during the crisis of professionalism as largely unhealthy point to the relative high rates of substance abuse and mental health problems among lawyers in private practice,<sup>244</sup> and one commentator goes so far as to label big firm practice itself as a source of mental illness.<sup>245</sup> Anecdotes abound of lawyers who say they would not recommend friends or family to become lawyers, and at least one study found a majority of lawyers to have this view.<sup>246</sup>

Based on a recent and large-scale empirical study, Krieger and Sheldon found that “public service lawyers were happier and more satisfied than other lawyers, including those in the most prestigious, highly paid positions.”<sup>247</sup> In particular, they observed that “there were no external rewards or status factors that strongly, or even moderately, predicted attorney well-being . . . . The data contradict beliefs that prestige, income, and other external benefits can adequately compensate a lawyer who does not regularly experience autonomy,

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241. *Id.* at 225.

242. See Krieger & Sheldon, *supra* note 15, at 592; Schiltz, *supra* note 49, at 881.

243. Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1340 (1997).

244. See Krieger & Sheldon, *supra* note 15, at 586–87 (finding that “[l]awyers in public service positions also drank less than private attorneys, particularly those in positions that typically provide the most income”); Schiltz, *supra* note 49, at 874–77 (describing the high rates of mental illness and alcohol and drug abuse among lawyers).

245. See Schiltz, *supra* note 49, at 902–03.

246. GLENDON, *supra* note 42, at 85; Schiltz, *supra* note 49, at 881–82.

247. Krieger & Sheldon, *supra* note 15, at 627.

integrity, close relationships, and interest and meaning in her work.”<sup>248</sup>

At the other end of the dichotomy are the job satisfaction skeptics. Monroe Freedman points out one should be careful not to overstate, simplify and trivialize the extent of lawyers’ unhappiness.<sup>249</sup> Similarly, in their Chicago study, John Heinz, Kathleen E. Hull, and Ava Harter found “generally high levels of satisfaction reported by all categories of lawyers.”<sup>250</sup> Contrary to Krieger and Sheldon, they found that “[t]he strongest and most consistent effect on lawyers’ overall job satisfaction is produced by . . . lawyers’ income levels”<sup>251</sup> at the same time that they conceded that “[t]he percentage of ‘very satisfied’ respondents is ten points lower in the large firm category than in any of the other practice settings.”<sup>252</sup>

While the dichotomy between the satisfaction and dissatisfaction approaches appears based in binary conclusions regarding both satisfaction and its primary cause, both sets of studies find that lawyers are similar to business people in the relational way they understand and approach their work,<sup>253</sup> suggesting that the business-profession dichotomy does not apply to job satisfaction and that grounds exist for further dialogue regarding the causes and symptoms of job satisfaction. Ironically, the dominance of the atomistic self-interest approach has gotten in the way of serious studies into the extent and causes of lawyers’ dissatisfaction with their work. While some critics have argued that atomism and the lawyer as a bad man were the causes of unhappiness and others opposed the charge, both camps failed to realize that the debate over lawyers as hired guns simply distracted from studying the actual causes of and extent of lawyers’ dissatisfaction and led to artificially binary perspectives that made dialogue problematic.

#### D. SEGMENTATION OR SHARED VALUES?

Admittedly, law work is segmented. Heinz and Lauman, for example, coined the famous metaphor of two hemispheres to divide lawyers who represented corporations from those who represented individuals,<sup>254</sup> and subsequently many have documented the increased specialization and segmentation of law prac-

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248. *Id.* at 623–24.

249. See Monroe H. Freedman & Abbe Smith, *Misunderstanding Lawyers’ Ethics*, 108 MICH. L. REV. 925 (2010) (reviewing DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ETHICS IN A DEMOCRATIC AGE* (2011)).

250. John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 757 (1999).

251. *Id.*

252. *Id.* at 745.

253. See *id.* at 757; Krieger & Sheldon, *supra* note 15, at 621.

254. JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 319 (1982).

tice.<sup>255</sup> Today, new forces contribute to the increased fragmentation of law practice, with non-lawyer businesses providing significant amounts of legal work. Legal Zoom, for example, accounts for approximately twenty percent of incorporations in California.<sup>256</sup> As a result, questions arise as to whether core shared values continue to unite all lawyers as opposed to non-lawyers, and, relatedly, whether regulation of lawyers and of legal services (including those offered by non-lawyers) should be universal or segmented.

To date, the bar regulates lawyers, and non-lawyer providers are unregulated. This is a segmented approach that both creates and reaffirms a dichotomy between legal workers who are lawyers and those who are not.<sup>257</sup> As non-lawyer software accounts for an increasing percentage of the market for legal services, this dichotomy is starting to fade. The bar has approved experiments in non-lawyer practice, such as that in Washington State,<sup>258</sup> and the ABA is considering regulating legal services, alongside lawyers, similar to the way England and Wales currently regulate legal services.<sup>259</sup> Indeed, just as England and Wales have established regulatory objectives for legal services, the ABA is considering a similar step. Dana Remus has identified an alternative to the dichotomy—regulating legal services to ensure the “relational dynamics” of “trust, judgment, loyalty, empowerment, and service.”<sup>260</sup>

Interestingly, at the same time that the trend is moving toward extending universal regulation from lawyers to legal services, some seek to replace universal regulation of lawyers with contextual rules or specialized codes of conduct.<sup>261</sup> Although the ABA has historically taken a universal approach to regulating lawyers,<sup>262</sup> some scholars have argued for contextual regulation.<sup>263</sup> Levin and Mather, for example, have argued that “[t]he one-size-fits-all approach

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255. See generally JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005).

256. BARTON, *GLASS HALF FULL*, *supra* note 208, at 93.

257. See *id.*

258. See Remus, *supra* note 17, at 8; WSBA, *supra* note 219.

259. See Model Regulatory Objectives, *supra* note 221; Webb, *supra* note 173, at 543–47 (describing the United Kingdom’s Legal Services Act of 2007); William C. Hubbard, *A Year of Progress*, 101 A.B.A. J. 8, 8 (2015) (describing the ABA’s Commission on the Future of Legal Services).

260. Remus, *supra* note 17, at 24.

261. A similar debate is emerging with regard to law schools with Randy Jonakait and Brian Tamanaha arguing for different training for elite and non-elite law schools, and with other scholars, including Elizabeth Chambliss and Rebecca Roiphe, defending the universal approach. Compare BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 167–85 (2012) and Randolph N. Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 862, 902–03 (2006/2007) with Elizabeth Chambliss, *It’s Not About Us: Beyond the Job Market Critique of U.S. Law Schools*, 26 GEO. J. LEGAL ETHICS 423 (2013) and Roiphe, *Redefining Professionalism*, *supra* note 3, at 198, 241; Rebecca Roiphe, *A History of Professionalism: Julius Henry Cohen and the Professions as a Route to Citizenship*, 40 FORDHAM URB. L.J. 33, 72–74 (2012).

262. See Wald, *Resizing*, *supra* note 99, at 228.

263. See, e.g., Lynn Mather & Leslie C. Levin, *Why Context Matters*, in *LAWYERS IN PRACTICE*, *supra* note 99, at 3–17; Alexander A. Guerrero, *Lawyers, Context, and Legitimacy: A New Theory of Legal Ethics*, 25 GEO. J. LEGAL ETHICS 107 (2012); David B. Wilkins, *Some Realism about Legal Realism for Lawyers: Assessing the Role of Context in Legal Ethics*, in *LAWYERS IN PRACTICE*, *supra* note 99, at 25–42.

of the ABA Model Rules of Professional Conduct . . . needs to be revised.”<sup>264</sup> As with regard to extending regulation from lawyers to legal services, Dana Remus has in contrast identified universal values of “trust, judgment, loyalty, empowerment, and service” that would apply to all legal services providers.<sup>265</sup> Eli Wald has offered a way to collapse the dichotomy between universal and context through “univertext” rules that would integrate universal values and the empirical lessons from lawyering contexts.<sup>266</sup>

As the profession struggles to come to terms with the increased specialization of its members which questions the existence of core values all are beholden to, increased stratification and increased competition from non-lawyers, a relational approach offers a solid foundation on which to build future regulation of lawyers and non-lawyers who offer legal services alike. On the one hand, a relational approach unites all lawyers around the core values of trust, judgment, loyalty, empowerment, and service to clients, as well as renewed commitment to the public good, establishing the very foundation for promulgating univertext rules that would integrate these universal values and the empirical lessons from lawyers’ varying specialized contexts. On the other hand, a relational perspective creates a space in which lawyers can connect with non-lawyers, opening the door to regulation of all legal service provides.

#### CONCLUSION

Law work is great work. The time is right to move beyond the rhetoric lamenting the state of the legal profession and of legal work generally. Building on exciting trends both inside the legal profession and society as a whole, we can recover the joy and reward of law work, and can recognize that being good lawyers and making a good livelihood are perfectly reconcilable.

Indeed, lawyers as civics teachers are uniquely situated to help society overcome the atomistic self-interest perspective that has dominated American culture, politics, ideology and values for the past generation. Although atomistic self-interest has also governed law and lawyers’ professional ideology, role morality, and practice, precluding members of the bar from acting as leaders in the public interest promoting the public good alongside the private interests of their clients, the tide is shifting. Private and public interests have in the past and will in the future co-exist, and the public interest can once again mean more than an aggregate of private interests. Relational self-interest provides the conceptual basis on which lawyers and others can build to develop this lost vision of the public good.

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264. LAWYERS IN PRACTICE, *supra* note 99, at 370.

265. Remus, *supra* note 17, at 24.

266. Wald, *Resizing*, *supra* note 99, at 256–57.



The shift to a practice of law, professional ideology, role morality, rules of professional conduct, and civic leadership based on an ethic of relational self-interest outlined in this article is only a beginning. The most important change is one of direction. Once lawyers take the lead in helping society and helping themselves reintegrate ethics into law and economics, the legal profession can fulfill the charge it received from Justice Louis Brandeis during national turmoil at the start of the Twentieth Century. As Brandeis noted in words that are equally true today, “[t]here is a call upon the legal profession to do a great work for this country.”<sup>267</sup>

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267. Brandeis, *supra* note 33, at 563.