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### Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles

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#### Recommended Citation

Russell G. Pearce and Eli G. Wald, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 Mich. ST. L. Rev. 513 (2012)

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# RETHINKING LAWYER REGULATION: HOW A RELATIONAL APPROACH WOULD IMPROVE PROFESSIONAL RULES AND ROLES

*Russell G. Pearce\* & Eli Wald\*\**

2012 MICH. ST. L. REV. 513

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## INTRODUCTION

At the core of modern regulation of the American legal profession is the assumption that lawyers, clients, and regulators are largely individualistic—or autonomous—in how they behave and how they understand their self-interest.<sup>1</sup> In this Essay, we seek to ground regulation of lawyers in a more accurate and beneficial understanding that lawyers, clients, and regulators are largely relational in how they act and how they understand self-interest. We suggest that a relational approach will result in more effective regulation and will also encourage lawyers to rethink their role in representing clients and in serving as public citizens so that they embrace a more expansive understanding of their duties to the public good.

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1. See *infra* Part II; see, e.g., David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 68, 70-75 (Austin Sarat et al. eds., 1998) (arguing that the modern regulatory approach assumes and builds upon lawyers' individualism and clients' autonomy).

Given the dominance of the culture of autonomous self-interest, these aspirations may appear quite ambitious, but they are neither unrealistic nor unprecedented. Indeed, they resemble the traditional understanding of lawyers' role and function of attorney regulation.<sup>2</sup> Until the 1960s, the assumption underlying lawyer regulation was relational self-interest<sup>3</sup> —“the view that all actors are inter-connected, whether [as] individuals [or in groups] . . . [and] cannot maximize [their] own good in isolation. Rather, maximizing the good of the individual or [group] requires consideration of the good of the neighbor, the [constituent, community], and of the public.”<sup>4</sup>

This relational regulatory approach, in turn, led lawyers to view themselves as “civics teachers”<sup>5</sup> who served as intermediaries between the people and both the law and the public good.<sup>6</sup>

But the understandings of the lawyer's role and the resulting regulatory approach shifted over time to that of autonomous self-interest.<sup>7</sup> Lawyers,

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2. See *infra* Part I.

3. Although the relational perspective was dominant prior to the 1960s, a significant minority of lawyers did embrace autonomous self-interest. See, e.g., Russell G. Pearce, *Lawyers As America's Governing Class: The Formation and Dissolution of the Original Understanding of the Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 392-95 (2001) [hereinafter Pearce, *America's Governing Class*]; Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 13 (1988); PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 99-121 (1965); Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397 (2003).

4. Russell G. Pearce & Eli Wald, *Law Practice As a Morally Responsible Business: Reintegrating Values into Economics and Law* 5 (July 2010) (unpublished manuscript) (on file with author), available at <http://law2.fordham.edu/calfiles/flscal24523.doc> [hereinafter Pearce & Wald, *Law Practice*].

5. 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); see also 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, 5, 40, 41 (2011) [hereinafter Pearce & Wald, *Obligation of Lawyers*].

6. See Green & Pearce, *supra* note 5, at 1212-15; David Luban, *Rediscovering Fuller's Legal Ethics*, in REDISCOVERING FULLER: ESSAYS ON IMPLICIT LAW AND INSTITUTIONAL DESIGN 193, 199 (Willem J. Witteveen & Wibren van der Burg eds., 1998) [hereinafter Luban, *Fuller's Legal Ethics*]; Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958); DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007) [hereinafter LUBAN, *LEGAL ETHICS*]; Pearce, *America's Governing Class*, *supra* note 3. Commentators who proposed similar approaches included David Hoffman, George Sharswood, Louis D. Brandeis, and Harlan Fiske Stone. See Russell G. Pearce, *The Legal Profession As a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1346-57 (2006) [hereinafter Pearce, *Legal Profession*]. The American Bar Association embraced this perspective in the preambles to the American Bar Association Canons of Professional Ethics, and Code of Professional Responsibility. ABA CANONS OF PROFESSIONAL ETHICS pmbl. (1908); MODEL CODE OF PROF'L RESPONSIBILITY pmbl. (1969)

like others in elite culture, came to view individuals and organizations as “atomistic actors [who] seek to maximize their own atomistic good.”<sup>8</sup> As a result, lawyers’ commitment to the community of lawyers and to the public good declined, and lawyer regulation followed suit, focusing over time more on aspirations and incentives that assumed and reinforced the notion that lawyers and their clients embraced autonomous self-interest. Indeed, contemporary ethics rules consist largely of black letter rules that implicitly promote the notion that lawyers are neutral partisans,<sup>9</sup> also known as hired guns—Holmesian bad men (and women) who seek to get away with what they can, and to encourage clients to do the same, within the bounds of the technical requirements of law and regulations.<sup>10</sup>

In recent years, efforts to rethink the regulation of lawyers in a more relational context have emerged. In the United States, for example, commentators have suggested and a few states have adopted regulation at the firm level.<sup>11</sup> In Australia and the United Kingdom, principles-based regulation models aspects of what a more relational system would look like.<sup>12</sup> These efforts represent a growing commitment once again to embrace the relational context of lawyers’ work and to design regulatory approaches to

7. Until the middle of the nineteenth century, the prevailing professional ideology took for granted that lawyers were public persons owing special duties to the public good. *See, e.g.,* Pearce, *Legal Profession*, *supra* note 6; Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 *AM. J. LEGAL HIST.* 191, 201 (1977) (“In the law, until the middle of the nineteenth century, it had been taken for granted that the lawyer was a public person.”). After the Civil War, professional ideology began a long, slow process of narrowing that commitment. *See, e.g.,* Pearce, *Legal Profession*, *supra* note 6, at 1351; Mark DeWolfe Howe, Book Review, 60 *HARV. L. REV.* 838, 840 (1947) (reviewing 1 ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS, 1819-1947* (1946)) (Lawyers “never knew the old and found all their dreams realized in the dedication of their talents to the expanding interests of their clients.”); Eli Wald, *Loyalty In Limbo: The Peculiar Case of Attorneys’ Loyalty to Clients*, 40 *ST. MARY’S L.J.* 909, 928-36 (2009) [hereinafter Wald, *Loyalty*]; 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, 2029-39 (2005).

8. Pearce & Wald, *Law Practice*, *supra* note 4, at 5.

9. LUBAN, *LEGAL ETHICS*, *supra* note 6, at 27; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29 (1978).

10. Pearce & Wald, *Obligation of Lawyers*, *supra* note 5, at 18. With the exception of a few aspirations, such as those described in a non-binding preamble or the recommendation that lawyers perform pro bono contained within Rule 6.1, the Rules impose black letter requirements upon lawyers. *See generally* MODEL RULES OF PROFESSIONAL CONDUCT (2011). Indeed, the black letter approach of the Rules replaced the American Bar Association Code of Professional Responsibility, which included both aspirational Ethical Considerations and black letter Disciplinary Rules. And the Code, in turn, replaced the wholly aspirational American Bar Association Canons of Professional Ethics. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* §§ 1-1 to 1-25 (2012 Supp.).

11. *See infra* Part III.

12. *See infra* Part III.

both reflect and sustain this commitment. Building on and extending insights from these efforts, we propose a relational approach to regulating lawyers that would change both the process and substance of regulation, as well as encourage American lawyers to recommit themselves to the public good in their role as civics teachers in their everyday work.

### I. THE TRADITIONAL APPROACH TO LAWYER REGULATION

Until the promulgation of the Model Rules of Professional Conduct (the “Rules”) in 1983, the approach to lawyer regulation was largely relational both in terms of the ethical guidelines and the understanding of why lawyers would follow those guidelines. The relational nature of society and of lawyers made this regulatory vision possible. Lawyers were thought to be better than lay people at identifying and pursuing the public good. Their highest duty was helping society and individuals live together in a society that promoted the public good and rule of law.<sup>13</sup> Lawyers would pursue this lofty role through their relationships with clients. As advisors and advocates, lawyers explained to clients that pursuing their own self-interest required them to take into account the good of their neighbors, coworkers, and communities.<sup>14</sup> Lawyers also fulfilled their leadership role through their service as politicians and leaders in both their local communities and on the national stage.<sup>15</sup>

The first generation of American legal ethics scholars, led by David Hoffman and Judge George Sharswood, offered a distinctively relational understanding of lawyer’s ethics.<sup>16</sup> They viewed lawyers as a governing class in a republican society. Their perspectives reflected a view that society was not a collection of autonomous individuals, but an ““organic whole.””<sup>17</sup> Nonetheless, they recognized the danger that some individuals would focus

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13. See, e.g., ABA CANONS OF PROFESSIONAL ETHICS pmbl. (1908); MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (2011); Pearce, *Legal Profession*, *supra* note 6, at 1347-58.

14. See, e.g., ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1969); Green & Pearce, *supra* note 5, at 1212-15.

15. See, e.g., Green & Pearce, *supra* note 5, at 1217-20; Stephen Breyer, *The Legal Profession and Public Service*, 57 N.Y.U. ANN. SURV. AM. L. 403, 404 (2000).

16. See Hon. George Sharswood, *An Essay on Professional Ethics*, 32 ANN. REP. A.B.A. 7, 9, 30, 54 (1907); DAVID HOFFMAN, *Resolutions in Regard to Professional Deportment*, in A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 752 (1972); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 250 (1992) [hereinafter Pearce, *Rediscovering*]; Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 674 (1979).

17. Pearce, *Rediscovering*, *supra* note 16, at 250 (quoting William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 699 (1985)).

on their autonomous self-interest and not the public good, to the detriment of society. Building on the insights of the Framers<sup>18</sup> and of leading jurists like Justice Story and Chancellor Kent,<sup>19</sup> they posited that lawyers, as professionals, were skilled at perceiving and promoting the public good and would ensure that society balanced the interests of individuals with the public good.<sup>20</sup> In this role, through their political leadership and client counseling, lawyers would “secure popular acceptance” of the public good and rule of law<sup>21</sup> by “diffus[ing] sound principles among the people”<sup>22</sup> and promote justice by “counsel[ing] the ignorant, defend[ing] the weak and oppressed, and . . . on all occasions [serving] as the bulwark of private rights against the assaults of power.”<sup>23</sup> After learning of this world view from American lawyers, Alexis De Tocqueville concluded that “[i]n America, . . . lawyers consequently form the highest political class, and the most cultivated portion of society.”<sup>24</sup>

The relational framework shaped and informed both the creation of ethical guidelines and the analysis of how to get lawyers to follow those guidelines. Lawyers and clients existed within a web of relationships, both within the legal community and the community as a whole.<sup>25</sup> With their relational perspective, lawyers would understand that they had ethical obligations to the public good and their clients, and that it was in their interest, as well as that of clients and society, for them to fulfill both the letter and spirit of those obligations. Accordingly, the “accurate and intelligible rules”<sup>26</sup> of professional conduct were general principles and not detailed instructions.<sup>27</sup> Regulating lawyers’ behavior through open-ended standards,

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18. THE FEDERALIST NO. 35 (Alexander Hamilton).

19. MILLER, *supra* note 3, at 109.

20. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J. P. Mayer ed., George Lawrence trans., 1969); Pearce, *Rediscovering*, *supra* note 16, at 250-58.

21. Pearce, *Rediscovering*, *supra* note 16, at 255.

22. Sharswood, *supra* note 16, at 54.

23. *Id.* at 53-54.

24. TOCQUEVILLE, *supra* note 20, at 270.

25. Pearce, *Rediscovering*, *supra* note 16, at 260-61.

26. Sharswood, *supra* note 16, at 56.

27. Lawyers owed their clients “warm zeal” and “immovable fidelity,” subject to lawyers’ obligations to the law, to virtue, and to fellow lawyers. *Id.* at 78, 117; Pearce, *Rediscovering*, *supra* note 16, at 262-66. For example, the duty of loyalty required lawyers to avoid “taking fees of two adversaries,” disclose potential conflicts, and avoid conflicts with the lawyer’s own interests that could arise from business transactions with clients. Sharswood, *supra* note 16, at 109-10, 117, 164-65. Without distinguishing between the attorney-client privilege and the duty of confidentiality, Sharswood explained that under a general duty of confidentiality, an attorney was to keep the client’s confidences, even when the lawyer learned of the criminal defendant’s guilt or of facts damaging to this client’s civil case. *Id.* at 84-85, 104-07; see, e.g., Pearce, *Rediscovering*, *supra* note 16, at 262. Competence was a matter of “preparation, punctuality, attention to detail, and continuing education.” Pearce, *Rediscovering*, *supra* note 16, at 262 (citations omitted).

as opposed to by bright-line rules, demonstrated confidence in lawyers: confidence that lawyers understood their role in relational terms—to serve clients consistent with serving the public interest—and confidence that lawyers would consistently act pursuant to this understanding.<sup>28</sup>

This relational perspective similarly informed the explanation of how lawyers' understanding of their role and relationships with clients, colleagues, and the public would ensure compliance with high ethical standards. Sharswood explained that an "invisible hand of reputation" among lawyers ensured that professional success was inextricably tied to ethical conduct.<sup>29</sup> He advised a young lawyer to:

let business seek the young attorney; and though it may come in slowly, and at intervals, and promise in its character neither fame nor profit, still, if he bears in mind that it is an important part of his training that he should understand the business he does thoroughly, that he should especially cultivate, in transacting it, habits of neatness, accuracy, punctuality, and despatch, candor towards his client, and strict honor towards his adversary, it may safely prophesied that his business will grow as fast as it is good for him that it should grow.<sup>30</sup>

Sharswood observed that "[s]ooner or later, the real public—the business men of the community, who have important lawsuits, and are valuable clients—endorse the estimate of a man entertained by his associates of the Bar, unless indeed there be some glaring defect of popular qualities."<sup>31</sup> Accordingly, lawyers did not need an ethical code of binding, bright-line rules.

Admittedly, this relational perspective included elements that we would reject today. The conceptions of leading "business men" as "the real public" and of lawyers' superior ability to identify and pursue the public good reflect an elitism and paternalism that is inconsistent with modern values. Indeed, in a culture where lawyers and business leaders were a small group of white men, the relational grounding was an exclusionary one that limited entry on the basis of race, gender, and often religion. Moreover, what lawyers considered the public interest sometimes coincided with their own self-interest as lawyers.<sup>32</sup> Nonetheless, as imperfect and limited as it

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28. Cf. *supra* notes 13-24 and accompanying text (describing the traditional relational approach to lawyers' role and regulation).

29. Pearce, *America's Governing Class*, *supra* note 3, at 390 (citing Sharswood, *supra* note 16, at 75).

30. Sharswood, *supra* note 16, at 131-32.

31. *Id.* at 75; cf. Geoffrey C. Hazard, Jr. & Ted Schneyer, *Regulatory Controls on Large Law Firms: A Comparative Perspective*, 44 ARIZ. L. REV. 593, 595-96 (2002) (finding that informal methods of discipline are effective on solo or small practitioners who depend on their reputation to obtain clients, and exploring the application of informal methods of regulation to large law firms).

32. See, e.g., JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1977); Pearce & Wald, *Obligation of Lawyers*, *supra* note 5, at 30-31.

was, the first generation regulatory approach did reflect and shape a relational understanding of lawyers' role.

The next, second generation of attorney regulation similarly embraced the relational approach, although with a lesser degree of trust in individual lawyers. In the late nineteenth century, the pervasive belief that the practice of law had become a business led to the development of the ideology of professionalism in order to protect the distinction between a profession and a business.<sup>33</sup> Under this new professionalism project, an elite group of lawyers would work through newly created bar associations to control admissions to practice, promulgate ethical rules, and enforce those rules.<sup>34</sup> The particular rules were the American Bar Association's 1908 Canons of Ethics.<sup>35</sup> Like Sharswood's approach, the Canons largely provided "general discretionary standards."<sup>36</sup> Indeed, most of the Canons were taken from Sharswood's text.<sup>37</sup>

With their foundation in a relational understanding, the Canons articulated a strong obligation of lawyers to the public good. The Preamble to the Canons explained that "[t]he future of the Republic, to a great extent depends upon [lawyers'] maintenance of Justice pure and unsullied," and justice "cannot be so maintained unless the conduct and the motives of the members of [the legal] profession are such as to merit the approval of all just men."<sup>38</sup> With regard to role, the Canons expressly rejected the assertion "that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause."<sup>39</sup> While zealously representing the client, the lawyer must act within "the bounds of the law" and without participating in "any manner of fraud or chicane."<sup>40</sup> The Canons advised that a lawyer "must obey his own conscience and not that of his client."<sup>41</sup> Indeed, a lawyer was a "minister[]" of the law who "advance[d] the honor of his profession and the best interests of his client when he renders service or gives advice tending to

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33. Pearce, *America's Governing Class*, *supra* note 3, at 399-401; *see also* Robert Gordon, "The Ideal and the Actual in the Law": *Fantasies of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 61 (Gerald W. Gawalt ed., Greenwood 1984); AUERBACH, *UNEQUAL JUSTICE*, *supra* note 32, at 33; RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 158 (Alfred A. Knopf 1955).

34. Pearce, *America's Governing Class*, *supra* note 3, at 399-400.

35. *Final Report of the Committee on Code of Professional Ethics*, 33 ANN. REP. A.B.A. 567, 575 (1908). *See generally* Pearce, *Rediscovering*, *supra* note 16, at 241 n.7; Pearce, *America's Governing Class*, *supra* note 3, at 400; James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395 (2003); Gordon, *The Independence of Lawyers*, *supra* note 3, at 13.

36. Pearce, *Rediscovering*, *supra* note 16, at 270.

37. *Id.* at 243-45, 267-70.

38. ABA CANONS OF PROF'L ETHICS pmbl. (1908).

39. *Id.* Canon 15.

40. *Id.*

41. *Id.*



impress upon the client and his undertaking exact compliance with the strictest principles of moral law.”<sup>42</sup> The Canons concluded that “above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.”<sup>43</sup>

The second generation regulatory approach retained a relational framework, but to a lesser extent than the first generation. The basis for trust in lawyers’ capacity to pursue the public good narrowed from the virtue of lawyers to the experience of lawyers. The duty to the public good itself narrowed. The antebellum responsibility to identify and pursue the good of society shifted to a less ambitious, but still relational, duty to “balanc[e] the competing interests of rich and poor in order to maintain a fair and stable social order.”<sup>44</sup> Similarly, with a lesser degree of confidence in the power of informal relational culture to ensure the ethical conduct of individual lawyers, professionalism drew on a formal set of specific rules that bar associations would articulate and enforce.<sup>45</sup>

Nonetheless, the Canons themselves remained, at least in principle, aspirational and non-binding. The second generation continued to trust that the invisible hand of reputation would provide for enforcement in everyday practice. As the Canons explained, “[t]he most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust.”<sup>46</sup>

The third generation of legal ethics regulations further reduced the reliance on relational culture but did not abandon it altogether. In 1969, the ABA replaced the Canons with the Model Code of Professional Responsibility.<sup>47</sup> The Code’s Preamble continued to articulate a relational connection to the public good. It explained that “[l]awyers, as guardians of the law, play a vital role in the preservation of society” and “[t]he continued existence of a free and democratic society.”<sup>48</sup> To “fulfill[] this role,” lawyers must “understand[] . . . their relationship with and function in our legal system.”<sup>49</sup> The Preamble recognized the powerful role of relationships within the bar and the larger society in enforcing ethical standards. It explained that:

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42. *Id.* Canon 32.

43. *Id.*

44. Pearce, *Legal Profession*, *supra* note 6, at 1357.

45. *Id.* at 1356.

46. ABA CANONS OF PROF’L ETHICS Canon 27 (1908); *see also* Hazard, Jr. & Schneyer, *supra* note 31, at 595-96.

47. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

48. *Id.* pmb1.

49. *Id.*

in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.<sup>50</sup>

At the same time, the Code's drafters no longer had the same confidence in the invisible hand of reputation. The Code acknowledged "changed conditions"<sup>51</sup> in the market for legal services. As the Code explained, "Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence."<sup>52</sup> The "changed conditions" had "seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laymen to make intelligence choices."<sup>53</sup> As a result, the invisible hand of reputation could not work effectively.

This changed understanding influenced the construction of the rules. While the content of the rules largely tracked those of the first and second generation, the Code was a bit more specific.<sup>54</sup> Moreover, the Code was the first lawyer regulation to include binding rules.<sup>55</sup> Alongside aspirational Ethical Considerations that reflected a continuing faith in the relational commitments of lawyers, the Code provided Disciplinary Rules that were binding and enforceable. Nonetheless, the Code described these Disciplinary Rules as only the floor for the lawyer's ethical responsibilities, with the Ethical Considerations providing the higher aspiration.<sup>56</sup> The evolution of the regulatory approach to law practice, from Hoffman-Sharswood's informal apparatus to the more formal 1908 Canons and 1969 Code, thus reveals a clear trend: a gradual move from a relational approach to understanding lawyers' role and rules to a more individualistic and autonomous one; and a corresponding shift from reliance on open-ended standards and aspirations to more bright-line rules restraining lawyers' pursuit of their clients' narrow interests and of their own self-interest at the expense of the legal system and the public good.

## II. THE INDIVIDUALISTIC BASIS OF MODERN LAWYER REGULATION

In contrast to the first three generations of lawyer regulation, the fourth generation largely, although not entirely, reflected and reinforced an autonomously self-interested understanding of lawyers and their clients.

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50. *Id.*

51. *Id.* at EC 2-7.

52. *Id.* at EC 2-6.

53. *Id.* at EC 2-7.

54. See Pearce, *Rediscovering*, *supra* note 16, at 272-76.

55. See HAZARD, JR., HODES & JARVIS, *supra* note 10, §§ 1.1, 1.11.

56. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1969).

By the 1980s, the dominant understanding of the lawyer's role had shifted from a relational approach to an autonomous one. As we have written elsewhere, "Prior to the 1960s, the relational approach was dominant although not the exclusive professional account."<sup>57</sup> The republican understanding of lawyers as the governing class,<sup>58</sup> the professionalism conception of "guardians of the law,"<sup>59</sup> and the notion of the lawyer as civics teacher,<sup>60</sup> all presupposed a relational society where lawyers and their clients considered the interests of their families, neighbors, colleagues, and customers, as well as the public good.<sup>61</sup> As late as 1963, for example, Erwin Smigel surveyed Wall Street lawyers and found that they considered themselves primarily "guardians of the law" who counseled their clients on not only the letter of the law, but also the spirit of the law and the public good.<sup>62</sup>

In 1985, Robert A. Kagan, Robert Eli Rosen, and Robert L. Nelson conducted surveys that sought to replicate Smigel's work. They discovered that big firm lawyers had changed their perspective and now considered themselves neutral partisans—or hired guns.<sup>63</sup> The newly dominant conception described both the lawyer and client as autonomous.<sup>64</sup> Clients generally pursued their autonomous self-interest with increasingly less regard to interests of others and of the community.<sup>65</sup> Lawyers served as extreme partisans for clients' autonomous self-interest with declining regard to the interests of others or of the public good.<sup>66</sup> Understanding lawyer and client as autonomously self-interested actors, the dominant approach to the lawyer's role disfavored counseling clients on the implications for others or the public good because to do so would be to impose the lawyer's values on the cli-

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57. Pearce & Wald, *Obligation of Lawyers*, *supra* note 5, at 26.

58. Pearce, *America's Governing Class*, *supra* note 3, at 392.

59. *Id.* at 381 (citing ERWIN SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1963)); *see also* ABA CANONS OF PROF'L ETHICS pmbl. (1908).

60. Green & Pearce, *supra* note 5, at 5.

61. Pearce & Wald, *Obligation of Lawyers*, *supra* note 5, at 28-30.

62. *See* SMIGEL, *supra* note 59, at 8-10.

63. *See generally* Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985). *See* Pearce, *America's Governing Class*, *supra* note 3, at 1, 407-10.

64. Pearce & Wald, *Obligation of Lawyers*, *supra* note 5, at 28-30.

65. *See id.* at 28.

66. *Id.* at 28-30; *see* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672-75 (1978); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617; Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 150-71 (David Luban ed., 1984); Russell G. Pearce, *Professional Responsibility for the Age of Obama*, 22 GEO. J. LEGAL ETHICS 1594, 1600 (2009) [hereinafter Pearce, *Age of Obama*]; Wald, *Loyalty*, *supra* note 7, at 28-36.

ent's autonomous self-interest.<sup>67</sup> Both lawyer and client had become Holmesian bad men (and women) seeking to get away with what they could within the letter of the law.<sup>68</sup>

Describing this shift, Chief Justice Burger declared a crisis of professionalism.<sup>69</sup> Leaders of the bar and the academy joined him in proclaiming that lawyers no longer fulfilled their obligation to the public good that professionalism required and had become self-interested business people. They went so far as to assert "that lawyers, their ethics, and their professionalism are 'lost,' 'betrayed,' in 'decline,' in 'crisis,' facing 'demise,' near 'death,' and in need of 'redemption.'"<sup>70</sup>

As lawyers' conception of their professional role shifted, the American Bar Association adopted the 1983 Model Rules of Professional Conduct, which have been adopted since in almost every jurisdiction.<sup>71</sup> Both the content of the Rules and their form assume and reinforce the autonomous conception of the lawyer. The Rules did not erase all relational considerations. For example, they promoted a pro bono obligation,<sup>72</sup> continued a commitment to the public good in the Preamble,<sup>73</sup> permitted lawyers to counsel on moral questions,<sup>74</sup> and created rules intended to permit lawyers to serve as intermediaries.<sup>75</sup>

None of these rules, however, successfully promoted a relational understanding. Even though the Preamble to the Rules acknowledged the duty of lawyers as "public citizen[s]," it actually diminished the scope of lawyers' obligation to the public good.<sup>76</sup> It was the first Preamble to an ethics code to place representation of clients before representation of the public good, and it devoted far less of its text to that public duty. The few rules that promoted relational values were not particularly significant. Rule 2.2 per-

67. Pearce & Wald, *Obligation of Lawyers*, *supra* note 5, at 28-30. *See also* Pearce, *Age of Obama*, *supra* note 66, at 1600; *see* LUBAN, *Fuller's Legal Ethics*, *supra* note 6, at 9-11. In Kate Kruse's terms, lawyers treated clients as "cardboard clients," imputing to clients the desire to aggressively and narrowly pursue their autonomous self-interest. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 *GEO. J. LEGAL ETHICS* 103 (2009). Kruse herself, however, has nonetheless expressed skepticism regarding moral counseling. *Id.*

68. Pearce & Wald, *Obligations of Lawyers*, *supra* note 5, at 28-30.

69. Russell G. Pearce, *The Professionalism Paradigm Shift*, 70 *N.Y.U. L. REV.* 1229, 1237 n.35, 1254-55 (1995).

70. *Id.* at 1257 (citations omitted).

71. *See* MODEL RULES OF PROFESSIONAL CONDUCT (2011). *See generally* HAZARD, JR., HODES & JARVIS, *supra* note 10.

72. MODEL RULES OF PROFESSIONAL CONDUCT R. 6.1 (2011).

73. *Id.* pmb1.

74. *Id.* R. 2.1.

75. *Id.* R. 2.4; *ABA Model Rules of Professional Conduct (PRE-2002)*, LEGAL INFO. INST., [http://www.law.cornell.edu/ethics/aba/2001/ABA\\_CODE.HTM#Rule2.2](http://www.law.cornell.edu/ethics/aba/2001/ABA_CODE.HTM#Rule2.2) (last visited May 30, 2012).

76. MODEL RULES OF PROFESSIONAL CONDUCT pmb1. (2011).

mitting lawyers to serve as intermediaries proved unappealing to lawyers and the ABA repealed it.<sup>77</sup> The pro bono and counseling rules, in contrast to almost every other rule, were merely aspirational.<sup>78</sup> Not surprisingly, despite extensive rhetoric, most lawyers provide little or no pro bono services.<sup>79</sup>

More important, though, the Rules created a framework that legitimated and encouraged lawyers to pursue the dominant conception of the neutral partisan. They removed the strongest relational language from the Preamble<sup>80</sup> and prescribed numerous discretionary duties<sup>81</sup> that permitted lawyers to apply their autonomous perspective. Indeed, given the newly dominant understanding of lawyers as neutral partisans, lawyers exercised discretion in accordance with their conception of themselves and their clients as Holmesian bad men and women.

As a result, authorities and commentators have read the Rules to prescribe the dominant conception. For example, without even mentioning Rule 2.1, which expressly permitted lawyers to counsel clients on moral issues, the Tennessee Supreme Court Board of Professional Responsibility held that lawyers should not engage in moral counseling of clients.<sup>82</sup> Commentators reached a similar result. Thomas Shaffer described the Rules as embodying an “ethic[] of radical individualism”<sup>83</sup> that required lawyers to serve as neutral partisans.<sup>84</sup> David Luban, Stephen Ellman, and Geoffrey C. Hazard, Jr. ascribed to the Rules the notion of the lawyer as hired gun grounded in Lord Brougham’s famous “credo” that “[a]n advocate, in the

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77. For a discussion of the history and limitations of Rule 2.2, see Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Representing Spouses*, 62 *FORDHAM L. REV.* 1253, 1264-66 (1994); John R. Price, *In Honor of Professor John Gaubatz: The Fundamentals of Ethically Representing Multiple Clients in Estate Planning*, 62 *U. MIAMI L. REV.* 735, 748 n.69 (2008).

78. MODEL RULES OF PROFESSIONAL CONDUCT R. 2.1, R. 6.1 (2011).

79. See, e.g., Deborah Rhode, *Profits and Professionalism*, 33 *FORDHAM URB. L.J.* 49, 62-64 & 62 n.63 (2005).

80. See *supra* notes 38, 48-50 and accompanying text.

81. Pearce, *Rediscovering*, *supra* note 16, at 272-75 (describing the discretionary provisions of the Rules).

82. See Bd. of Prof'l Responsibility of the Supreme Court of Tenn., Formal Ethics Op. 96-F-140 (1996), available at <http://www.tbpr.org/Attorneys/EthicsOpinions/default.aspx>; see Pearce, *Legal Profession*, *supra* note 6, at 1341-42; Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 *WAKE FOREST L. REV.* 635, 642-43 (1997); Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 *U. PA. L. REV.* 661, 681-82 (2001); Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 *CASE W. RES. L. REV.* 127, 143-45 (2004).

83. Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 *TEX. L. REV.* 963, 965 (1986-87).

84. Thomas Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 *VAND. L. REV.* 697, 697 (1988).

discharge of his duty, knows but one person in all the world, and that person is his client.”<sup>85</sup>

At the same time, the Rules employed a command and control model of regulation that reinforced the notion that lawyers were autonomously self-interested.<sup>86</sup> While the Code had provided Ethical Considerations and explained that the Disciplinary Rules were only a floor for ethical obligation, the Rules, with few exceptions,<sup>87</sup> provided binding requirements. In doing so, the Rules both assumed and lent credibility to the belief that lawyers were autonomously self-interested with little relational influence to promote compliance with ethical norms absent enforceable ethical dictates. If the Rules assumed lawyers were Holmesian bad men (and women), then lawyers could—quite properly—come to view the Rules from the prism of whatever they could get away with within the bounds of the law.<sup>88</sup> The relationship between regulatory strategy and lawyers’ self-conception was mutually reinforcing. By promulgating regulations that treated lawyers as Holmesian bad men and women, the bar normalized and constituted lawyers’ beliefs that they should behave as Holmesian bad men and women. Indeed, what lawyers could get away with within the bounds of the Rules became the measure of a satisfactory professional life.

The assumption of autonomously self-interested lawyers also had a further dimension—it influenced the substance of the Rules regulating the lawyer-client relationship. When lawyer and client are both autonomous, the goal of communication between them is notification and not dialogue. As Eli Wald has explained, “the communications regime orchestrated by the Rules, while purporting to be client-centered . . . in fact . . . create[s] a one-way street,” channeling information from clients to lawyers, but not encour-

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85. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 54, 393 (1988) (quoting 2 *TRIAL OF QUEEN CAROLINE* 8 (J. Nightingale ed., 2012)). See generally Stephen Ellman, *Lawyers and Clients*, 34 *UCLA L. REV.* 717 (1987); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *YALE L.J.* 1239, 1244 (1991).

86. See *infra* notes 131-35 and accompanying text for discussion of command and control rules.

87. See, e.g., *supra* notes 72-79 and accompanying text for a discussion of pro bono and counseling.

88. Cf. Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of “Principles-Based Systems” in Corporate Law, Securities Regulation, and Accounting*, 60 *VAND. L. REV.* 1411, 1423 (2007) (“[R]ules can be blueprints for evading their underlying purposes. Bright lines and exceptions to exceptions facilitate strategic evasion, allowing artful dodging of a rule’s spirit by literal compliance with its technical letter.”); Julian Webb, *Lawyering in Liquid Times: Values and Professionalism in an Age of Uncertainty*, Fourth International Legal Ethics Conference (July 2010) (on file with authors) (“Rules can weaken aspects of moral identity. They stop you having to think about the right solution; they can encourage creative compliance, and they may do little to discourage floating responsibility.”). See Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument*, 26 *GONZAGA L. REV.* 393 (1990); Julian Webb & Donald Nicolson, *Institutionalising Trust: Ethics and Responsive Regulation of the Legal Profession*, 2 *LEGAL ETHICS* 148 (1999).

aging a meaningful dialogue.<sup>89</sup> The Rules, for example, define “informed consent” as the client’s “agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation.”<sup>90</sup> A Miranda warning type communication between two autonomous individuals, without dialogue, suffices to satisfy this standard, which governs communications regarding conflicts of interest, whether conflicts between current clients,<sup>91</sup> or between current and former clients,<sup>92</sup> or conflicts between attorney and client, including “business transaction[s]” with clients.<sup>93</sup> Similarly, the specific Rule regarding communication and candor only requires a lawyer to provide information.<sup>94</sup> Rule 1.4 regulating “communication” requires a lawyer to “promptly inform,” “reasonably consult,” “keep the client reasonably informed,” “promptly comply with reasonable requests for information,” and “explain.”<sup>95</sup> All these terms mandate notification, not dialogue. Moreover, Wald notes that Rule 1.4 limits such information to the particular situations that Rule 1.4 lists and to information that is “reasonably necessary.”<sup>96</sup> Wald explains that these provisions, in contrast to an open-standard mandating communication of all “material” information, create a “‘Say as Little as Necessary’ Regime.”<sup>97</sup>

This same regime extends to the allocation of authority between lawyer and client, as well as to the confidentiality exceptions.<sup>98</sup> Rule 1.2 requires a lawyer to “abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, [to] consult with the client as to the means by which they are to be pursued.”<sup>99</sup> While the text of the Rule expressly limits the lawyer’s duty to consult regarding means to the requirements of Rule 1.4, the Comment to Rule 1.2 similarly limits the duty to communicate regarding the client’s decisions concerning the objectives of representations.<sup>100</sup> Rule 1.2, therefore, requires only notification, and not dialogue, regarding the making of decisions in the lawyer-client relationship.

The Rules that permit disclosure of confidential client information similarly do not encourage dialogue. Rule 1.6(a) makes “information relat-

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89. Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 750 (2008) [hereinafter Wald, *Attorney-Client Communications*].

90. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.0(b), (e) (2011).

91. *Id.* R. 1.7(b)(4).

92. *Id.* R. 1.9(a).

93. *See id.* R. 1.8(a).

94. *See id.* R. 1.4.

95. *Id.*

96. Wald, *Attorney-Client Communications*, *supra* note 89, at 759-66.

97. *Id.* at 759.

98. *See id.* at 757.

99. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.2(a) (2011).

100. *Id.* R. 1.2 cmt. 1.

ing to the representation” confidential, with general exceptions for “informed consent” or disclosures that are “impliedly authorized in order to carry out the representation,” as well as for specific exceptions listed in Rule 1.6(b).<sup>101</sup> The goal of Rule 1.6 is to encourage clients “to communicate fully and frankly.”<sup>102</sup> Nonetheless, this communication is once again limited to providing information, and not dialogue. The first general exception, where the client provides “informed consent,” only creates a notification requirement.<sup>103</sup> The second general exception, where client consent is implied, requires no discussion whatsoever.<sup>104</sup> Similarly, Rule 1.6(b), which lists circumstances where a lawyer has discretion to reveal confidential information, does not require dialogue before disclosure.<sup>105</sup> Instead, the Comment to the Rule only recommends that “[w]here practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure.”<sup>106</sup> The approach to required lawyer disclosure of false evidence or testimony under Rule 3.3 is similar. Rule 3.3 urges that the “lawyer should seek to persuade the client that the evidence should not be offered”<sup>107</sup> or “remonstrate with the client,”<sup>108</sup> not engage in a dialogue.

Last, the way that the Rules approached enforcement of its provisions further manifested an understanding of lawyers as autonomous actors. From the first generation of legal ethics regulation to the fourth, the legal workplace had evolved. While the vast majority of lawyers had once worked as solo practitioners or in small firms, the modern reality was that a growing majority worked in medium to large law firms or other organizations.<sup>109</sup>

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101. *Id.* R. 1.6(a).

102. *Id.* R. 1.6 cmt 2.

103. *See supra* text accompanying notes 89-97.

104. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.6 cmt. 5 (2011).

105. *Id.* R. 1.6(b).

106. *Id.* R. 1.6 cmt. 14. For more extensive discussion of how the confidentiality rules do not promote dialogue, see Elisia M. Klinka & Russell G. Pearce, *Confidentiality Explained: The Dialogue Approach to Discussing Confidentiality with Clients*, 48 SAN DIEGO L. REV. 157 (2011). *See also* Wald, *Attorney-Client Communication*, *supra* note 89.

107. MODEL RULES OF PROFESSIONAL CONDUCT R. 3.3 cmt. 6 (2011).

108. *Id.* R. 3.3 cmt. 10.

109. Ted Schneyer has noted that “[w]hile as late as 1951, sixty percent of the bar practiced alone, two-thirds now work in law firms and other organizations.” Ted Schneyer, *Professional Discipline for Lawyers*, 77 CORNELL L. REV. 1, 4 (1991) [hereinafter Schneyer, *Professional Discipline*] (citing RICHARD L. ABEL, *AMERICAN LAWYERS* 179, 300 (1989) and BARBARA A. CURRAN ET AL., *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S* 13 (1985)). From 2010 to 2011, the Bureau of Labor Statistics found that only “[a]pproximately 26 percent of lawyers were self-employed” and that number over-states the number of lawyers in solo practice because it also includes partners in law firms. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, *OCCUPATIONAL OUTLOOK HANDBOOK* 259 (2010). Most of the remainder were “salaried lawyers [who] held positions in government, in law firms or other corporations, or in nonprofit organizations.” *Id.*



These realities notwithstanding, with the exception of a few rules that considered the obligations of individual lawyers who worked as supervisors<sup>110</sup> (or that did not impute the conflicts of individual lawyers to a firm in limited circumstances),<sup>111</sup> the vast majority of the Rules did not account for the fact that lawyers increasingly worked in organizations. Most glaringly, the Rules did not impose ethical duties and sanctions upon law firms, even though very few jurisdictions later decided to do so.<sup>112</sup> Put differently, by ignoring practice realities in which lawyers increasingly practice with others, the Rules in fact encourage attorneys to think of themselves as autonomous individuals rather than as relational members of organizations.

In all these ways, the Rules' embrace of the understanding that lawyers and clients are autonomous actors has undermined regulatory efforts in a number of significant ways. First, this perspective blocks the development of a culture that supports compliance. Lawyers who believe that they are autonomously self-interested will view rules instrumentally and think that they should properly behave as Holmesian bad men and women who try to get away with what they can within the bounds of regulations. Second, without a culture that promotes obedience to the Rules as a good in itself, compliance becomes dependent upon actual enforcement and fear of enforcement, and that becomes expensive and inefficient. Unfortunately, disciplinary committees for the most part only have very limited resources and therefore focus largely on violations of the ethics rules that are also subject to civil or criminal penalties, such as negligence, crimes, or frauds.<sup>113</sup> They generally do not enforce independent violations of the Rules,<sup>114</sup> and they leave most enforcement of the conflict rules to motions to disqualify and malpractice insurers.<sup>115</sup> Third, disciplinary authorities employ reactive and not proactive strategies. Enforcement is *ex post* and relies upon complaints of disciplinary violations.<sup>116</sup> Theoretically, of course, even in a command-and-control system, regulators could employ proactive strategies. Nonethe-

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110. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT R. 5.1, 5.2 (2011).

111. See, e.g., *id.* R. 1.8(k), 1.10, 1.11.

112. See, e.g., N.J. RULES OF PROFESSIONAL CONDUCT 5.1(a) (2010), available at <http://www.judiciary.state.nj.us/rules/apprpc.htm>; N.Y. RULES OF PROFESSIONAL CONDUCT 5.1(a) (2009), available at <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf>.

113. See, e.g., Schneyer, *Professional Discipline*, *supra* note 109, at 7.

114. *Id.*

115. See, e.g., Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71, 72 (1996) (discussing disqualification); Susan P. Shapiro, *Bushwacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 *LAW & SOC. INQUIRY* 87, 129 (2003) (discussing malpractice insurers); David L. Wilkins, *Who Should Regulate Lawyers?*, 105 *HARV. L. REV.* 799, 826-27 (1992) [hereinafter Wilkins, *Who Should Regulate*] (discussing the absence of discipline); *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 *HARV. L. REV.* 1244, 1285 (1981).

116. See, e.g., Wilkins, *Who Should Regulate*, *supra* note 115, at 805-06.

less, because proactive regulation requires relational interactions between the regulators and the regulated, autonomous perspectives weigh in favor of reactive discipline.

### III. EFFORTS TO REINVIGORATE THE RELATIONAL DIMENSION OF LAWYER REGULATION

Two recent developments indicate a possible trend toward moving lawyer regulation in a more relational direction. First, United States commentators have urged that the Rules focus on discipline at the firm level in addition to the traditional emphasis on the conduct of individual attorneys. Second, in Australia and the United Kingdom, regulators have replaced command-and-control models with principles-based approaches. While these approaches represent a significant advance, they are still vulnerable to the continued dominance of an autonomous culture among lawyers.

As with many innovative legal ethics ideas, the initiator of the proposal for law firm regulation was Ted Schneyer.<sup>117</sup> In 1991, Schneyer noted that from the 1950s to the 1980s, law practice had shifted from “sixty per cent” of lawyers practicing in solo practice to “two-thirds . . . work[ing] in law firms and other organizations.”<sup>118</sup> He offered three arguments for regulation at the level of law firms:

First, even when a firm has clearly committed wrongdoing, courts may have difficulty, as an evidentiary matter, in assigning blame to particular lawyers. . . .

. . .

Second, even when courts and disciplinary agencies can link professional misconduct to one or more lawyers in a firm as an evidentiary matter, they may be reluctant to sanction those lawyers for fear of making them scapegoats for others in the firm who would have taken the same actions in order to further the firm’s interests.

. . .

Third, and most important, a law firm’s organization, policies, and operating procedures constitute an “ethical infrastructure” that cuts across particular lawyers and tasks.<sup>119</sup>

These arguments are relational in the sense that they recognize that many lawyers do not practice as individuals, and meaningfully interact with

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117. Schneyer, *Professional Discipline*, *supra* note 109. See generally Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245 (1998). See also, e.g., Douglas N. Frenkel, *Ethics: Beyond the Rules—Questions and Possible Responses*, 67 FORDHAM L. REV. 875, 878 (1998); *How Should We Regulate Large Law Firms? Is a Law Firm Disciplinary Rule the Answer?*, 16 GEO. J. LEGAL ETHICS 203 (2002) [hereinafter *How Should We Regulate*]; *Collective Sanctions and Large Firm Discipline*, 118 HARV. L. REV. 2336 (2005).

118. Schneyer, *Professional Discipline*, *supra* note 109, at 4.

119. *Id.* at 8-10.

other attorneys in ways that impact their professional conduct. Schneyer made a further relational point. Viewing the lawyer-client relationship and the law firm as having relational characteristics, he suggested that focusing only on the reactive dimension of these relationships through a disciplinary system that responds to complaints would be less effective than enforcement through proactive monitoring, in addition to reactive efforts.<sup>120</sup> In explaining the ineffectiveness of the Rules prescribing discipline for supervisory failures, he referred both to the three reasons described above, as well as the reactive nature of law firm discipline, and noted that accordingly, complaints under these rules were “rare indeed.”<sup>121</sup>

A few commentators responded to Schneyer’s proposal with condemnation. Some commentators argued that the autonomous approach to lawyer regulation was sufficient.<sup>122</sup> Others described the locus of ethical responsibility as the autonomous individual and argued that firm liability “may actually undermine *individual* ethical incentives rather than furthering attorney accountability”<sup>123</sup> or that firm liability would unfairly penalize individuals who are not directly culpable.<sup>124</sup>

Elizabeth Chambliss and David Wilkins, on the other hand, joined Schneyer in supporting law firm discipline.<sup>125</sup> But they argued that firm regulation required “that all law firms, regardless of size, be required to designate one or more partners to be responsible for monitoring the quality of the firm’s ethical infrastructure.”<sup>126</sup> While acknowledging the powerful, relational influence of a law firm’s culture,<sup>127</sup> Chambliss and Wilkins also relied on the assumption of autonomous self-interest in asserting that individual

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120. Ted Schneyer, *On Further Reflection: How “Professional Self-Regulation” Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 619-28 (2011) [hereinafter Schneyer, *On Further Reflection*].

121. *Id.* at 603.

122. See, e.g., *Testimony of Robert A. Creamer, Joseph R. Lundy and Brian J. Redding, Attorneys’ Liability Assurance Society, Inc., A Risk Retention Group, to the American Bar Association Ethics 2000 Commission*, AM. BAR ASS’N CTR. FOR PROF’L RESPONSIBILITY, [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/e2k\\_witness\\_lundy.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_witness_lundy.html) (last visited May 31, 2012); *How Should We Regulate*, *supra* note 117, at 211.

123. Julie Rose O’Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal*, 16 GEO. J. LEGAL ETHICS 1, 4 (2002); see also Margaret Colgate Love, *Update on Ethics 2000 Project and Summary of Recommendations to Date*, PROF. LAW., Winter 2000, at 2, 8.

124. Douglas R. Richmond, *Law Firm Partners As Their Brothers’ Keepers*, 96 KY. L. J. 231, 262-63 (2007).

125. Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 341 (2003).

126. *Id.* at 345.

127. *Id.* at 344-45; Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 FORDHAM URB. L.J. 119, 138-39 (2005).

responsibility is the most effective way to further organizational compliance with ethical rules.<sup>128</sup>

Subsequently, Schneyer reconsidered his own proposal. While he did not disavow firm discipline, he found that it had proven ineffective in jurisdictions that had adopted it and concluded that proactive enforcement was an even more important reform than merely adding reactive regulation at the firm level.<sup>129</sup> Schneyer instead turned to a principles-based regulatory approach (although he did not use this terminology).<sup>130</sup> Principles-based approaches contrast with the dominant command-and-control approach where regulators promulgate detailed rules.<sup>131</sup> Although the distinction between principles based and command-and-control is not always clear,<sup>132</sup> principles tend to be more general, flexible, and durable.<sup>133</sup> Pierre Schlag notes that the “evaluative” nature of principles results in “plac[ing] the onus on the parties to work out and communicate their intentions completely and thoroughly.”<sup>134</sup> Accordingly, Dan Awrey observes, principles-based regulations “promot[e]” the relational objective of “communication between drafters, decisionmakers, and those subject to their application.”<sup>135</sup> Andrew Boon similarly notes that principles-based regulatory approaches “usually include intense dialogue between involved actors about the purpose and application of the principles, but the burden of interpretation and responsibility for achieving outcomes is on the regulated firm.”<sup>136</sup>

The principles-based approach Schneyer recommended was implemented in New South Wales, Australia.<sup>137</sup> A similar version was later adopt-

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128. Chambliss & Wilkins, *supra* note 125, at 345-46.

129. Schneyer, *On Further Reflection*, *supra* note 120, at 616.

130. *Id.* at 619-28. With regard to terminology, Schneyer expresses the fear that Americans will “dismiss the New South Wales program as top-down, command-and-control regulation that is utterly out of step with our regulatory traditions.” *Id.* at 628. He is apparently equating “command-and-control” regulation with regulation by a government agency with authority over the bar, in contrast to self-regulation by the profession itself. This usage differs from the way we discuss regulation in the essay where command-and-control and principles-based describe approaches to regulation, whether at the level of a government agency or the profession itself.

131. Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 446 (2003).

132. See, e.g., Cunningham, *supra* note 88, at 1409; Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1 (2008); Dan Awrey, *Regulating Financial Innovation: A More Principles-Based Proposal?*, BROOKLYN J. CORP. FIN. & COM. L. 273, 275 (2011).

133. Awrey, *supra* note 132, at 275, 285, 288.

134. Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 388 (1986).

135. Awrey, *supra* note 132, at 278.

136. Andrew Boon, *Professionalism under the Legal Services Act 2007*, 17 INT’L J. LEGAL PROF. 195, 207-08 (2011).

137. Schneyer, *On Further Reflection*, *supra* note 120, at 619-28.

ed in the United Kingdom.<sup>138</sup> Schneyer describes how “in 2001, when state legislation first permitted law firms to be organized as [incorporated legal practices],” Steve Mark, the Legal Services Commissioner of New South Wales, required firms that took advantage of limited liability to “develop an ‘ethical infrastructure,’ which he defines as the ‘formal and informal management policies, procedures, and controls, work-team cultures, and habits of interaction . . . that support and encourage ethical behavior.’”<sup>139</sup> Rather than dictate specific ethical rules, the New South Wales approach identified ten broad objectives, including “timely provision of services; competent work practices to avoid negligence; . . . identification and resolution of conflicts of interest; . . . adequate means to ensure compliance with the notices, orders, and other requirements of regulatory authorities; [and] adequate supervision of the practice and staff.”<sup>140</sup> Each limited liability firm must “designate at least one licensed NSW solicitor as a ‘legal practitioner director’” as well as maintain and implement “‘appropriate management systems.’”<sup>141</sup> Limited liability firms must complete a self-assessment and prepare a report for the regulator, which may discuss the report with firm, “conduct a further review, and if necessary, formally audit the firm.”<sup>142</sup> The goal of this process is “educating firms toward compliance.”<sup>143</sup> Schneyer describes how one empirical study found that “the complaint rate for self-assessed [limited liability firms] dropped *two-thirds* from their pre-assessment rate.”<sup>144</sup>

In the United Kingdom, the Legal Services Board decided to implement principles-based regulation in 2009.<sup>145</sup> In implementing this approach, the Solicitors Regulatory Agency (“SRA”) recognized that it represented a shift from “identifying detailed rule breaches as an end in itself” to “assessing the outcome for clients and the public interest.”<sup>146</sup> The SRA’s proposed outcome focused regulation includes:

outcomes-focused regulatory requirements designed to give flexibility by avoiding unnecessary prescriptive rules on process, while giving clear guidance on what . . . firms must achieve for their clients; . . . an approach to the supervision of firms that helps firms achieve the right outcomes for clients, and that encourages firms to be open and honest . . . with [the SRA] . . . [and] enforcement action which is prompt,

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138. See *infra* notes 145-47.

139. Schneyer, *On Further Reflection*, *supra* note 120, at 620-21.

140. *Id.* at 622.

141. *Id.* at 621 (citations omitted); *supra* note 128.

142. *Id.* at 622.

143. *Id.* at 623.

144. *Id.* at 624.

145. Boon, *supra* note 136, at 207.

146. *Id.* at 210.

effective, proportionate and creates a credible deterrent against failure to act in a principled manner.<sup>147</sup>

Firm level regulation and the principles-based approaches as developed, for example, in both the United Kingdom and Australia offer the promise of a more relational way to regulate lawyers. Nonetheless, such relational regulatory regimes are vulnerable to a legal culture of autonomous self-interest. In that culture, lawyers and law firms would seek to manipulate the regulatory scheme as Holmesian bad men and women just as they would manipulate regulations focused on individuals and a rules-based approach. Indeed, John Flood has expressed the concern that large law firms are manipulating the United Kingdom's principles-based regulatory system to promote their narrow self-interests. He has suggested that large law firms have sought to "exploit" the principles-based approach "to arrogate power to themselves" and "escape[] considerable, though not all, regulatory oversight."<sup>148</sup> Andrew Boon has raised another concern. He worries that under principles-based regulation "[f]irms may have a very different practice on a particular ethical issue than that of a neighbouring firm and divergence could magnify over time. The risk here is that the common ground of professional ethics is lost, with each firm becoming an 'ethical silo.'<sup>149</sup> Boon's fear that legal services providers will no longer share ethical commitments and aspirations reflects an assumption that lawyers are autonomously focused and will only interact relationally with those with whom they must—under principles-based regulation, the regulators, as opposed to their peers.

In addition, certain goals of the United Kingdom regulations, such as permitting non-lawyers to own or deliver legal services, and including non-lawyers in the regulation of legal services, have proven quite controversial.<sup>150</sup> Nonetheless, principles-based regulation does offer a relational strategy for regulating lawyers within the existing United States framework that limits the ownership and delivery of legal services to lawyers and does not include non-lawyers in the regulation of lawyers.

#### IV. A PRELIMINARY PROPOSAL TO IMPROVE RULES AND ROLES THROUGH A RELATIONAL APPROACH TO LAWYER REGULATION

Firm level regulation and the New South-Wales and United Kingdom principles-based approaches offer an excellent foundation for a relational approach to regulation. These approaches recognize that relationships within firms are essential to promoting ethical conduct and they create a recipro-

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147. *Id.* at 212.

148. *Id.* at 251.

149. Boon, *supra* note 136, at 225.

150. See, e.g., Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN ST. INT'L L. REV. 465, 465-67 (2008).

cal relationship between regulators and those they regulate. Nonetheless, if the dominant culture of law practice remains autonomous self-interest, further steps are necessary to promote an understanding of lawyers as relationally self-interested actors with responsibility to the public good.

These steps would explain and reinforce the perspective that lawyers and their clients exist within a web of relationships that includes not only the relationship between lawyer and client but also between each of them and their colleagues, adversaries, friends, families, and the actors in the legal system. The first step would expressly recognize fostering relational self-interest as a goal of regulation. To strengthen this element, bar leaders and bar organizations should educate their members as to the relational nature of legal practice and the value of relational, as opposed to autonomous, self-interest.

Next, the regulatory framework should include a full range of relational dimensions. Instead of focusing exclusively on relationships between regulator and regulated, the regulatory approach should also focus on how law firms develop and implement their own ethical identities and plans. Firms, for example, should ensure that junior attorneys and staff are part of the processes of creating and implementing an ethical infrastructure. Moreover, the plans themselves should include a commitment to a relational ethic within the firm, including training, mentoring, and developing relationships of mutual respect. In developing their regulatory plans, law firms should consult with persons outside the firm who have relationships with the firm, including clients, members of the bar, judges, and members of the public. Additionally, in order to accommodate the perspective of relational self-interest, law firms' regulatory objectives should include aspirations, and not only command-and-control rules. The valuing of professional aspirations would emphasize that lawyers are more than Holmesian bad men and women.

A relational perspective would also influence the substantive content of ethical principles. Instead of Miranda warnings that are too often intended to protect the autonomous self-interest of lawyers,<sup>151</sup> ethical guidelines should view the lawyer-client relationship as fully relational and promote dialogue that would more likely include discussion of relational self-interest.<sup>152</sup> Lawyers' relational self-interest would provide a solid grounding for commitment to professional values, including civility, the public good, pro bono, and civic leadership.<sup>153</sup>

Last, regulators and bar associations should help create vehicles for small and solo practitioners to obtain the benefit of firm type regulation.

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151. *Supra* notes 89-97 and accompanying text.

152. *See, e.g.*, Wald, *Attorney-Client Communications*, *supra* note 89; Klinka & Pearce, *supra* note 106.

153. Pearce & Wald, *Obligation of Lawyers*, *supra* note 5.

They could, for example, organize 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.

But why would this program succeed in an environment where most lawyers understand their role in terms of autonomous self-interest? In reality, lawyers work and live in a web of relationships. Many lawyers will acknowledge that their success has resulted from relationships with clients, colleagues, and adversaries.<sup>154</sup> Rainmakers at big firms, for example, often characterize their abilities to attract and maintain clients in relational terms.<sup>155</sup> The vocabulary of relational self-interest will allow them to make sense of their achievements and their ethical obligations. Moreover, we suggest that many of those lawyers who express dissatisfaction with their careers are in fact unhappy because of the disjunction between the relational way they live their lives and the autonomous way they understand their work as lawyers.<sup>156</sup> For them as well, the language of relational self-interest will enable them to see how their life and their work as lawyers are indeed harmonious.<sup>157</sup> Adopting the framework of relational self-interest will not inevitably prevent either the silos of practice or the self-interested regulation that Boon and Flood fear,<sup>158</sup> but it will promote a sense of community among lawyers and a commitment to the public good that will make those outcomes less likely.

#### CONCLUSION

Command-and-control regulation of lawyers through the Rules and the disciplinary system both assumes and reinforces the dominant conception of lawyers as neutral partisans—as Holmesian bad men and women.<sup>159</sup> Not only is this approach ineffective in achieving its purported goal of regulatory compliance, but it also undermines efforts to promote professional values, such as commitment to the public good.<sup>160</sup>

A relational approach to lawyer regulation offers the potential for helping the community of lawyers move from the autonomous self-interest

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154. *Id.* at 34, 44-45.

155. *See, e.g.*, Alan Feuer, *Trauma Surgeon of Wall Street*, N.Y. TIMES, Nov. 13, 2009, [http://www.nytimes.com/2009/11/15/nyregion/15cohen.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2009/11/15/nyregion/15cohen.html?_r=1&pagewanted=all); Renee Ciria-Cruz, *Getting Down to Business: Pressure grows to retain clients and find new ones*, CALIFORNIA LAW., Apr. 2010, at 30, 30-32.

156. Pearce & Wald, *Obligation of Lawyers*, *supra* note 5, at 47-48.

157. *Id.*

158. *See supra* text accompanying notes 148-49.

159. *See supra* Part II.

160. *See supra* Parts I-II.



perspective of the neutral partisan to that of the civics teacher who views society through the prism of relational self-interest. Instead of seeing ourselves as, and teaching our clients and communities to understand themselves as, Holmesian bad men and women, we could teach the perspective of relational self-interest—that in determining what is good for me it is essential that I consider what is good for my neighbor, colleague, customer, and community. The current regime of command-and-control lawyer regulation impedes this vision. A principles-based approach that fully embraces a relational perspective, including firm level regulation, offers a realistic way to achieve this vision, including a robust commitment of lawyers to the public good.