

1-1-2013

The Relational Infrastructure of Law Firm Culture and Regulation: The Exaggerated Death of Big Law

Russell G. Pearce

Eli Wald

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Pearce, Russell G. and Wald, Eli (2013) "The Relational Infrastructure of Law Firm Culture and Regulation: The Exaggerated Death of Big Law," *Hofstra Law Review*: Vol. 42: Iss. 1, Article 16.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol42/iss1/16>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

THE RELATIONAL INFRASTRUCTURE OF LAW FIRM CULTURE AND REGULATION: THE EXAGGERATED DEATH OF BIG LAW¹

Russell G. Pearce*

Eli Wald**

I. INTRODUCTION

In recent years, the ethical infrastructure and culture of law firms has come under attack from commentators,² such as Larry Ribstein, Bill Henderson, and Marc Galanter, who, in related ways, predict “the death of Big Law.”³ They assert that the individualistic ethical infrastructure

1. The quote, “the report of my death is greatly exaggerated,” has been wrongly attributed to Mark Twain, who actually said, “the report of my death was an exaggeration.” Louis J. Budd, *Mark Twain as an American Icon*, in *THE CAMBRIDGE COMPANION TO MARK TWAIN* 7 (Forrest G. Robinson ed., 1995). We are not the only commentators who have found this analogy useful. See, e.g., Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 6; Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 955 (2012); Stanford Law Sch. Ctr. on the Legal Profession, *Pre-Mortem: Is the Death of Big Law Being Greatly Exaggerated (Again)?*, STAN. L. SCH. (Oct. 4, 2013), <https://www.law.stanford.edu/event/2013/10/04/pre-mortem-is-the-death-of-big-law-being-greatly-exaggerated-again>.

* Edward & Marilyn Bellet Professor of Legal Ethics, Morality & Religion, Fordham University School of Law. Many thanks to my colleague Bruce Green for his ongoing contributions to my thinking on these topics. We greatly appreciate the suggestions we received at the Maurice A. Deane School of Law at Hofstra University *Conference on the Ethical Infrastructure and Culture of Law Firms*, especially the valuable and detailed comments from Susan Fortney and Tony Alfieri.

** Charles W. Delaney, Jr. Professor of Law, University of Denver Sturm College of Law.

2. See Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 335-39 (2003); Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 692, 699 (2002); Christine Parker et al., *The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour*, 31 U.N.S.W. L.J. 158, 173 (2008); Tanina Rostain, *Partners and Power: The Role of Law Firm Organizational Factors in Attorney Misconduct*, 19 GEO. J. LEGAL ETHICS 281, 283 (2006); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 10, 18 (1991); Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245, 246, 251-53 (1998).

3. See, e.g., Marc Galanter & William Henderson, *The Elastic Tournament: A Second*

and culture of large firms undermine their commitment to professional values and will result in their failure to prepare for, and to survive, long-term economic and technological trends.⁴

We identify a contradiction at the heart of this analysis. While these critiques correctly identify the individualistic flaws of law firm culture, they share the same individualistic assumptions.⁵ They presume that lawyers, law firms, and clients are captives of what we describe as “autonomous self-interest”—that they are “Holmesian bad men (and women)” and organizations who “seek to maximize their own atomistic good” without regard for the interests of their colleagues, employees, neighbors, and communities.⁶ This assumption dictates the critics’ analysis of law firms and law firm behavior, whether considering their organizational behavior or their role in advising clients. For example, the framework of autonomous self-interest postulates that self-interest and regard for others are binaries, dooming the potential for lawyers and law firms simultaneously to pursue long-term economic self-interest and to promote the public good.⁷

Instead, we propose that lawyers and clients, when given the opportunity, prefer “relational self-interest—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.”⁸ Admittedly, the Death of Big Law commentators correctly recognize that autonomous self-interest has replaced relational self-interest as the

Transformation of the Big Law Firm, 60 STAN. L. REV. 1867, 1872 (2008); William D. Henderson, *From Big Law to Lean Law*, INT’L REV. L. & ECON. (forthcoming 2013), available at <http://www.dx.doi.org/10.1016/j.irl.2013.06.001>; Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 751-55. While we focus most of our attention on Galanter, Henderson, and Ribstein, we recognize that other recent and noteworthy commentators offer a perspective that shares many elements of their analysis. See, e.g., Noam Scheiber, *The Last Days of Big Law*, NEW REPUBLIC, Aug. 5, 2013, at 24, 29-32; see also, e.g., STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* 69-70 (2013); BRUCE MACEWEN, *GROWTH IS DEAD: NOW WHAT?* 1, 3 (2013).

4. Galanter & Henderson, *supra* note 3, at 1872; Ribstein, *supra* note 3, at 751-55; see generally Henderson, *supra* note 3.

5. See *supra* notes 2-4 and accompanying text.

6. Russell G. Pearce & Eli Wald, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 MICH. ST. L. REV. 513, 515 [hereinafter Pearce & Wald, *Relational Approach*].

7. *Id.*

8. *Id.* at 514 (alterations in original) (footnotes omitted). As we have noted elsewhere, “[t]he comparison of autonomous and relational concepts of the self is not original to us.” 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, 17 n.90 (2011) [hereinafter Pearce & Wald, *The Obligation of Lawyers*] (discussing proponents of a relational perspective from the fields of economics, philosophy, and relational feminism).

dominant culture of the legal profession and that this culture has undermined both the economic and professional conduct of law firms.⁹ But rather than seeing Big Law or professional values at the brink of death, we explain that a relational perspective provides law firms with the opportunity to maintain their economic health and revitalize their professional values. Indeed, a relational approach to law firm culture suggests a way to strengthen client representation, obligation to the public good, development of younger lawyers, and increased diversity.¹⁰

II. THE ASSUMPTION OF AUTONOMOUS SELF-INTEREST AT THE HEART OF THE DEATH OF BIG LAW HYPOTHESIS

On its face, the Death of Big Law hypothesis posits that the perspective of what we describe as autonomous self-interest threatens the viability of large law firms in the market for legal services.¹¹ But a paradox lies at the heart of this analysis. It both faults lawyers for their individualistic behavior and assumes that this behavior is inevitable.

A. *The Traditional Model of Big Law Success: Negotiating the Tension Between Firms as Webs of Relationships and Lawyers as Autonomously Self-Interested*

The Death of Big Law hypothesis begins with a theory of why large, elite law firms develop and thrive.¹² The theory seeks to explain why large institutional corporate clients will purchase certain services from large law firms, rather than provide those services in-house or purchase them from individual lawyers or smaller boutique firms, especially because large law firms face the diseconomies of scale arising from the costs of managing a large bureaucratic organization and from complying with the conflicts of interest rules. Increasingly sophisticated

9. *Id.* at 522-23.

10. *See infra* Part IV.

11. Pearce & Wald, *Relational Approach*, *supra* note 6, at 523; *see infra* Part II.A.

12. At their best, theories purporting to explain the contemporary success of Big Law are somewhat partial and simplistic. First, the world of Big Law is populated by many different kinds of law firms and no one theory or theories can account for the success of each member of this diverse universe. *See* Eli Wald, *The Other Legal Profession and the Orthodox View of the Bar: The Rise of Colorado's Elite Law Firms*, 80 U. COLO. L. REV. 605, 619-21, 669, 671, 677-79 (2009); Eli Wald, *Smart Growth: The Large Law Firm in the Twenty-First Century*, 80 FORDHAM L. REV. 2867, 2873-74 (2012) [hereinafter Wald, *Smart Growth*]. Second, the success of some Big Law firms cannot be explained without reference to their past and the longstanding and lucrative relationships they used to have with some large corporate clients. Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1824, 1849 (2008) [hereinafter Wald, *The Rise and Fall*].

in-house legal departments, acting for large corporate clients,¹³ generally seek outside counsel in two circumstances—where they lack expertise or where they face “a peak load problem,” that is, where they do not have the staff “to undertake on short notice . . . demanding work.”¹⁴ In both of these situations, corporate clients could potentially (and sometimes do) hire individual lawyers or small boutique firms, rather than a large firm, to provide either the expertise or the additional staff.¹⁵ The advantage of Big Law is that, in providing both expertise and additional staff, large elite firms offer “quality assurances” and lower transaction costs.¹⁶

The foundation for this success is a web of relationships between lawyers in the firm and between the firm and clients. Law firms create reputational capital that enables them to provide “quality assurances” of “honest and faithful service” “by monitoring and screening potentially untrustworthy lawyers.”¹⁷ Such quality assurance plays an important role not only vis-à-vis a particular client in the context of a specific representation (as in, signaling to a client that the firm can be trusted), but it also positions Big Law firms to serve as reputational intermediaries lending and charging clients for using the firm’s reputational capital (as in, other parties can trust the client because it is represented by the firm).¹⁸ To accomplish this “reputational bonding function they must motivate lawyers to provide the mentoring, screening, and monitoring that supports the firm’s reputation.”¹⁹

Over time, clients hire large firms both because of the “quality assurances,” backed up by the firm’s reputation, and because of the “quality assurances” that follows from having a long-term relationship with the law firm.²⁰ The point person for maintaining the long-term relationship is “a ‘rainmaking’ partner with whom the client may have a long-term relationship [who] recommend[s] one or more specialists”

13. Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 278 (1985); Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1057, 1059, 1070-72 (1997); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 481-82 (1989); Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407, 409 [hereinafter Wald, *In-House Myths*].

14. Ribstein, *supra* note 3, at 758, 760.

15. *Id.* at 758.

16. *Id.*

17. *Id.* at 754, 758.

18. See, e.g., John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 14 IND. J. GLOBAL LEGAL STUD. 35, 38-40 (2007); Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN ST. INT’L L. REV. 465, 466, 482-83 (2008).

19. Ribstein, *supra* note 3, at 754.

20. See *id.* at 758.

within the firm and helps solve a “peak load problem.”²¹ This long-term relationship creates both “trust [for] a particular firm” and “substantial costs [in] firing a firm and looking for another one.”²² This internal referral mechanism allows Big Law firms to offer lower transaction costs by acting as a holistic one-stop shop, catering to their corporate clients’ various needs. It also sustains relationships within the firm, as rainmakers refer their clients to other partners within the firm with a reciprocal expectation that their partners will return the courtesy.

Although the Death of Big Law hypothesis relies on a theory that describes the success of large law firms in terms of relationships both within law firms and between law firms and their clients, it also assumes that lawyers themselves are autonomously—and not relationally—self-interested actors within those relationships, and this assumption leads to the unraveling and Death of Big Law.²³ The core challenge in both maintaining reputational capital and relationships with clients is that individual “lawyers constantly must allocate time and effort between building [and monitoring] the firm’s reputation and building their own clienteles.”²⁴ The problem with autonomously self-interested lawyers is that they systematically prefer and pursue their own careers and clienteles over, and to the exclusion of, the interest of the firm in building and monitoring its reputation.²⁵

The only way to constrain autonomously self-interested lawyers from promoting their narrow atomistic interests at the expense of the firm is to “align[] incentives through pay, promotion, and liability”²⁶ with “the firm’s overall success.”²⁷ With regard to partners’ compensation and retention, the best method to accomplish this goal is “to give them shares of the firm’s profits that are adjusted only to reflect lawyers’ seniority and not their individual rainmaking or billing contributions.”²⁸ This approach provides partners with an incentive “to maintain the firm’s reputation”²⁹ by “mentoring, screening, and monitoring” in order to ensure the delivery of high quality legal services.³⁰ In terms of associate promotion, the awarding of partnership

21. *Id.* at 757-58.

22. *Id.* at 758.

23. Pearce & Wald, *Relational Approach*, *supra* note 6, at 514-15.

24. Ribstein, *supra* note 3, at 754.

25. See, e.g., Susan Saab Fortney, *Are Law Firm Partners Islands unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 308-09 (1997).

26. Ribstein, *supra* note 3, at 755.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 754-55.

through “an ‘up-or-out’ tournament”³¹ provides autonomously self-interested associates with the incentive to compete on their own behalf and against each of their peers to master firm culture and achieve excellence as a lawyer, even while performing work as members of teams of lawyers at all levels of seniority.³² The tournament benefits competitors by limiting the opportunism of autonomously self-interested partners. For purposes of the Death of Big Law analysis, “[t]he ‘out’ part of this ‘up or out’ tournament . . . [binds] the firm not to cheat on its implicit promise by trying to keep successful associates without making them partners.”³³ Autonomous self-interest similarly underlies the importance of shared liability. According to the Death of Big Law approach:

[J]oint and several liability for the law firm’s debts helps ensure that partners will support the firm’s reputation by carefully selecting and monitoring colleagues who might create liabilities. [It] therefore tends to reinforce the equal-sharing compensation model . . . [and] helps keep firms intact because lawyers who leave remain responsible for liabilities incurred during their tenure.³⁴

These institutional features, lock-step partner compensation by seniority and up-or-out tournament style promotion policies for associates, are used to constrain the conduct of autonomously self-interested Big Law lawyers and allow large law firms to develop and thrive as webs of relationships to the benefit of clients and lawyers alike.³⁵

B. Autonomously Self-Interested Lawyers Will Be the Death of Big Law

The model for Big Law success posits external and internal conditions that harness the autonomous self-interest of large firm lawyers to create the reputational capital necessary for Big Law to prosper. Not surprisingly, when these conditions changed in ways that could no longer constrain autonomously self-interested lawyers, commentators predicted the Death of Big Law.³⁶ Ribstein explains that

31. An extensive literature has examined and debated the partnership tournament. See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 28-29 (1991); Burk & McGowan, *supra* note 1, at 54-60; Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 567, 571 (1988); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1581 n.1 (1998).

32. Ribstein, *supra* note 3, at 756.

33. *Id.* at 756 n.17; see also Gilson & Mnookin, *supra* note 31, at 567.

34. Ribstein, *supra* note 3, at 757.

35. *Id.*

36. *Id.* at 777.

“[t]he real problem with Big Law is the non-viability of its particular model of delivering legal services.”³⁷

1. External Changes

According to the Death of Big Law commentators, changes in external market conditions have undermined—and will continue to erode—the market power of large firms and their reputational capital. In Ribstein’s view, the core asset of reputational capital rests on the assumption of information asymmetry between lawyers and clients.³⁸ As in-house legal departments have become larger and more sophisticated, they can “dispense with specialists and can figure out on their own which individual lawyers are reliable and meet their specific needs.”³⁹ They no longer need to rely on reputational capital and “have less need to buy outside legal services based on personal relationships with individual lawyers or to rely on a stable of ‘preferred provider’ Big Law firms.”⁴⁰ Accordingly, explains Ribstein, corporate clients have no reason for attachment to long term relationships with law firms and are instead relying on “teams of lawyers” or “frequently switch[] law firms.”⁴¹ Without the need to rely on reputational capital, clients can also choose to hire non-Big Law providers to offer additional capacity when needed. Ribstein further suggests that “capacity insurance” will only be important to “a limited class of clients and transactions . . . [specifically] large diversified financial institutions and participants in big financial transactions and mergers and acquisitions.”⁴²

Further shrinking the value of Big Law’s reputational capital are alternative providers of both expertise and capacity. These include increasing global competition,⁴³ technological advances, and non-lawyer alternatives. Global competition includes both “the emergence of global legal and financial centers such as London, Singapore, and Hong Kong,”⁴⁴ as well as “the outsourcing of legal services to India and other places with lower labor costs.”⁴⁵ Improvements in technology have also undermined the market position of law firms.⁴⁶ The availability of “computerized legal research, fast Internet connections, and declining

37. *Id.* at 752.

38. *Id.* at 753.

39. Galanter & Henderson, *supra* note 3, at 1896; Ribstein, *supra* note 3, at 760.

40. Ribstein, *supra* note 3, at 760.

41. *Id.* at 761.

42. *Id.* at 763.

43. *Id.* at 765.

44. *Id.*

45. *Id.* at 766.

46. *See id.* at 761.

costs of data storage and retrieval . . . have eroded some of Big Law's scale advantage."⁴⁷

Moreover, the increase in the number of large law firms further complicates their plight. At the same time that the essential asset of Big Law—reputational capital—is losing value as corporate clients grow in sophistication and knowledge, the increase in the number of large law firms causes increased competition in the market for corporate legal services driving prices and profits down in the least convenient time for Big Law.

2. Internal Changes

Accompanying the decreasing value of reputational capital in the market, argue the Death of Big Law commentators, are developments within law firms that further reduce their reputational capital.⁴⁸ As market conditions increase competition, lawyers are less willing to accept, and law firms are less willing to impose, restrictions on autonomous self-interest.

The most significant change is in the partnership tournament. Galanter, Henderson, and Ribstein describe how the “classic tournament” has given way to an “elastic tournament” that promotes a culture of individualism—an “atomistic ethos”—at the expense of loyalty to the firm.⁴⁹ At the partner level, it does so by shifting away from seniority-based compensation to payment “based on their individual books of business,”⁵⁰ by pervasive hiring of lateral partners, and by the creation of new categories and tiers of equity partnerships meant to disproportionately compensate top rainmakers. These developments provide partners with a greater incentive to “focus on their personal clients and neglect building general firm business” in order to maximize competition and increase their “market value” and “mobility.”⁵¹ The widespread practice of recruiting lateral partners, especially as “rainmakers to generate business,”⁵² further “reduces the role of the tournament as a mechanism for screening and training new partners.”⁵³ Similarly, the expansion of limited liability partnerships also reduces incentives to monitor and removes disincentives to departing from the firm.⁵⁴

47. *Id.*

48. *Id.* at 753.

49. Galanter & Henderson, *supra* note 3, at 1872; Ribstein, *supra* note 3, at 774.

50. Ribstein, *supra* note 3, at 755.

51. *Id.*

52. *Id.* at 759-60.

53. Henderson, *supra* note 3, at 4; Ribstein, *supra* note 3, at 762.

54. Ribstein, *supra* note 3, at 764; *see, e.g.*, Susan Saab Fortney, *High Drama and Hindsight*:

At the associate level, indeed in all levels below the equity partners, Galanter and Henderson describe how the elastic tournament results in a “core-mantle model of the firm,” rather than a pyramid.⁵⁵ Although, in order to pay “star rainmakers,” law firms have “increase[d] the number of associates whose billings produce profits without commensurately increasing the number of partners who share these profits,”⁵⁶ more associates remain with the firm as non-equity partners or permanent non-partner lawyers.⁵⁷ At the same time, partners compete in a perpetual tournament that requires them to “work longer hours, accept differential rewards, and fear de-equitization or early, forced retirement.”⁵⁸

In catering to lawyers’ autonomous self-interest, the core mantle has devastating effects on firm culture. Galanter and Henderson describe the elastic tournament as “an adaptation that confers disproportionate power on the most single-minded pursuers of the bottom line.”⁵⁹ As a result of adopting an “eat-what-you-kill” ethos, institutionalizing it, and rewarding those rainmakers who excel at it, law firms have privileged economic values over professional values.⁶⁰ They have abandoned the role of wise counsel to embrace the role of the hired gun,⁶¹ and find it difficult “to maintain a strong culture of trust and cooperation.”⁶² At the same time, note Galanter and Henderson, “informal training and mentoring in most large firms are on the wane because partners are reluctant to invest the time beyond what is necessary to optimize their own practices.”⁶³ These shifts also weaken efforts to promote diversity because they disproportionately harm minority and female associates who “are less likely to get coveted work assignments or develop alliances with powerful partners.”⁶⁴

Taken together, these internal changes weaken “the forces binding lawyers and clients to the firm.”⁶⁵ The new approaches to compensation, promotion, and liability have transformed Big Law firms into “collection[s] of individuals sharing expenses and revenues that ha[ve]

The LLP Shield, Post-Anderson, BUS. L. TODAY, Jan.–Feb. 2003, at 47, 48–49; see also Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences — The Traps of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717, 732–35 (1997).

55. Galanter & Henderson, *supra* note 3, at 1877.

56. Ribstein, *supra* note 3, at 761.

57. Galanter & Henderson, *supra* note 3, at 1875–76.

58. *Id.* at 1877.

59. *Id.* at 1906.

60. *Id.* at 1898 n.123, 1913.

61. *Id.* at 1911–12.

62. Ribstein, *supra* note 3, at 775.

63. Galanter & Henderson, *supra* note 3, at 1918.

64. *Id.* at 1916–17.

65. Ribstein, *supra* note 3, at 759.

little or no value as a distinct entity.”⁶⁶ By undermining the capacity of firms to conduct the “mentoring, screening, and monitoring” necessary to maintain reputational capital, these developments remove the advantage that large firms offer in the market and presage the Death of Big Law.⁶⁷

3. The Perfect Storm?

The Death of Big Law advocates thus purport to describe a perfect Big Law storm: the rise of in-house counsel and the corresponding increase in corporate client sophistication significantly reduced the legal information asymmetry between clients and large law firms, which the latter have long relied on to produce high, little-scrutinized fees. As corporate clients grew more sophisticated, they had less of a need to use, and less of a reason to pay for, Big Law’s reputational capital, and the fees commanded by large law firms further shrank as a result of the Great Recession and the fierce competition in the market for corporate legal services, which by now has been populated by a growing number of large law firms.⁶⁸ All of this was happening as Big Law’s lawyers, especially their coveted rainmakers, were becoming increasingly autonomously self-interested, demanded more and more from firms for themselves, began moving more rapidly, and increasingly refused to build and monitor the firms’ human capital, a necessary element of sustaining Big Law’s reputational capital.⁶⁹ This perfect storm led to doom’s day Death of Big Law predictions.

In the rest of the Article, we challenge the second leg of this argument. Specifically, while we accept that American culture in general and its elite lawyers in particular have grown more autonomously self-interested, we reject the inevitability of this change. Put differently, we agree that unrestrained autonomously self-interested conduct by Big Law’s lawyers is unhealthy for its future, but we reject the fatalistic assumption of Death of Big Law advocates and their belief that large law firms can do little about it. Instead, we submit that Big Law can do quite a bit to incentivize their lawyers and restrain their atomistic self-interested conduct by building a relational infrastructure and culture. In this Subpart, we want to briefly challenge the first leg of the Death of Big Law’s perfect storm argument—that large law firms’ reputational capital is no longer of value to large sophisticated corporate clients.

66. *Id.* at 754.

67. *Id.*

68. *Id.* at 813.

69. *Id.* at 759.

It is true that the role and function of in-house counsel has been completely transformed over the last three decades or so, shifting from second-class legal actors who assist outside counsel to powerful actors who direct and supervise the work of large law firm lawyers.⁷⁰ As in-house counsel grew in sophistication, prestige and influence, they indeed developed the capacity to question the advice, representation, and fees of Big Law. It is also true that in-house counsel increasingly used this newfound power to question and sometimes break up long-standing relationships between corporate clients and Big Law; divide work that once went to Big Law to various components that now go to different law firms, thus reducing the ability of rainmakers to refer work to other partners at their firms; negotiate lower, more creative fee arrangements; and even micromanage Big Law staffing and cost decisions.⁷¹

All of this, however, suggests a power shift from Big Law to corporate clients, not the Death of Big Law. First, large law firms have proactively responded to these changes by reinventing themselves and their services. As hefty, little-scrutinized fees for general corporate work, now done increasingly by in-house legal departments or sent to lesser reputed and cheaper law firms were lost, some Big Law firms have responded by emphasizing top-notch specialized expertise by their rainmakers.⁷² That is, as clients began to refuse to pay large fees for the work product of associates, firms realized they could generate even higher fees for the specialized expertise of their partners. This development, no doubt, requires senior partners to work longer and harder, and reduces the potential to generate profits by billing associate hours for discovery and other non-expert tasks, but it allows Big Law to remain viable and profitable.

Second, the fact that in-house counsel can micromanage and disaggregate the work once done nearly exclusively by Big Law does not mean that they want or will do so. Indeed, mounting evidence suggests that, after a short period in which corporate clients replaced long-standing relationships with a handful of Big Law firms with a sea of relationships, they are not moving back to a stable set of relationships with a smaller set of “authorized service providers.”⁷³ This is because large law firms still provide economies of scale and quality assurances. In-house counsel can incur significant costs and risks for disaggregating legal services needed, monitoring the quality of work for many lesser

70. See *supra* text accompanying note 13.

71. Ribstein, *supra* note 3, at 760-61.

72. See, e.g., Wald, *Smart Growth*, *supra* note 12, at 2878.

73. David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *FORDHAM L. REV.* 2067, 2095 (2010).

known firms, outsourcing services, and reassembling the products in-house. They may on occasion do so, but often they might prefer to continue to farm out the work to Big Law. The result is not the Death of Big Law, but rather a more competitive market for corporate legal services.

The bottom line is this: the days of unscrutinized Big Law fee statements for “services rendered” are gone, powerful in-house counsel are here to stay, and the asymmetry in legal information that once characterized the relationship between Big Law and their clients is much reduced.⁷⁴ As a result, Big Law has been experiencing a relative decline of power vis-à-vis their clients and reduced demand for its reputational capital.⁷⁵ But relative power shift and reduced demand is simply not the same as the Death of Big Law. The difference is not a semantic one. Stagnant, conservative law firms who refuse to change may eventually fail, and, at the same time, large law firms who are too aggressive, who attempt to react too fast, may also fail.⁷⁶ And the Big Law universe as a whole may become more competitive and less stable. But the large law firm universe has been incredibly uncompetitive and stable for decades.⁷⁷ In this context, however, a power shift from Big Law to corporate clients does not mean the Death of Big Law, and large law firms who adopt and adapt are likely to continue to do well. Indeed, emerging evidence suggests exactly that.⁷⁸ Not only have some large law firms been doing well, they have restructured internally, so-called trimming the fat everywhere except for their (now equity or super-equity) rainmakers who, in some cases, are doing better than ever.

III. EXAGGERATING THE DEATH OF BIG LAW

The Death of Big Law analysis assumes that lawyers and clients are creatures of autonomous self-interest. Autonomous self-interest has indeed emerged as the dominant paradigm for lawyers, but as a result of an interplay between a cultural shift in society and market forces,⁷⁹ and not because lawyers are inevitably autonomously self-interested. As

74. Ribstein, *supra* note 3, at 761, 770.

75. *Id.* at 770.

76. Douglas R. Richmond, *Migratory Law Partners and the Glue of Unfinished Business*, 39 N. KY. L. REV. 359, 360-61 (2012); Heather A. Miller, Note, *Don't Just Check "Yes" or "No": The Need for Broader Consideration of Outside Investment in the Law*, 2010 U. ILL. L. REV. 311, 319-20 (citing examples of aggressive debt overload as a reason for a firm's demise).

77. Wald, *The Rise and Fall*, *supra* note 12, at 1818-19.

78. *Id.* at 1862; see also, e.g., Christine Simmons, *Largest New York Firms Show Steady Growth*, N.Y. L.J., May 9, 2013, at 2, 2.

79. Pearce & Wald, *The Obligation of Lawyers*, *supra* note 8, at 36; see Pearce & Wald, *Relational Approach*, *supra* note 6, at 514-15.

important economic theorists have noted, economic actors, such as lawyers and clients, are essentially relational.⁸⁰ The continued vitality of relationships of mutual benefit suggests that commentators have overstated the inevitability of autonomous self-interest and therefore disregarded and underestimated the ability of large law firms to respond in relational ways to cultural and market forces that render their lawyers more individualistic.

*A. Autonomous Self-Interest Fails to Account for
Lawyer and Client Conduct*

The Death of Big Law hypothesis posits that lawyers and clients calculate self-interest autonomously and defines self-interest as maximizing benefits without regard to implications for colleagues, economic relationships, or the public good. Within law firms, lawyers seek primarily their own development and compensation, and not the good of the firm. Indeed, they will only consider the good of the firm when their compensation and potential liability require them to do so.⁸¹ Similarly, corporate clients, acting through their in-house lawyers, will calculate their autonomous benefit independent of their relationships with law firms. Rather than placing some value on those relationships and collaborating with those firms on determining how to best obtain services and pursue their objectives, they increasingly seek to purchase services based solely on an autonomous evaluation of quality and cost.⁸² Indeed, three sets of individualistic incentives shape the conduct of corporate clients vis-à-vis their outside counsel and the public: corporate clients act as autonomously self-interested entities toward their customers, employees, and the public; their executives act as autonomously self-interested actors toward the entity; and in-house lawyers act as autonomously self-interested decision-makers toward their outside counsel.⁸³

This analysis fits within the dominant paradigm of the modern legal profession.⁸⁴ In contrast, lawyers historically viewed themselves from a relational perspective. They understood themselves as located within a

80. See Luigino Bruni & Robert Sugden, *Fraternity: Why the Market Need Not Be a Morally Free Zone*, 24 ECON. & PHIL. 35, 51 (2008) (grounding economic theory in mutual benefit and not in material self-interest); Robert Sugden, *Reciprocity: The Supply of Public Goods Through Voluntary Contributions*, 94 ECON. J. 772, 774 (1984) (discussing economic understandings of the self); see generally AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970) (arguing for the utility of social welfare in society); AMARTYA SEN, *ON ETHICS AND ECONOMICS* (1987).

81. Ribstein, *supra* note 3, at 755, 757.

82. *Id.* at 760-66.

83. *Id.*

84. Pearce & Wald, *The Obligation of Lawyers*, *supra* note 8, at 3.

web of relationships. The dominant, although not exclusive, conception of the lawyer's role was republicanism in the early nineteenth century and professionalism in the late nineteenth and twentieth centuries.⁸⁵ Viewing self-interest through a relational lens, self-interest required consideration of how lawyers' conduct, and that of their clients, would impact neighbors, colleagues, and the community. Many lawyers believed that they had a duty to promote the public good through counseling of clients, as well as through their actions.⁸⁶ Bruce Green and Russell Pearce have described this perspective as the lawyer as civics teacher.⁸⁷ Corporate clients, similarly, understanding their own self-interest through a relational lens, used to consider how their conduct and that of their customers would impact neighbors, colleagues, and the community.⁸⁸

In the 1960s, however, as part of a larger shift in American elite culture, lawyers gradually moved toward an understanding of themselves and their clients from the perspective of autonomous self-interest.⁸⁹ They saw their role not as civics teachers or as a governing class, but rather as individual advocates of the interests of individual clients. The hired gun perspective shifted from a minority perspective to the dominant perspective.⁹⁰ The lawyer's role was to serve as an extreme partisan within the bounds of the law, and, so long as the lawyer was serving as a partisan for the client's narrow self-interest, the lawyer had no responsibility for the conduct of lawyer or client.⁹¹ Indeed, the autonomously self-interested lawyer and client were understood to behave as Holmesian bad men and women—seeking to promote their autonomous self-interest within the bounds of the law.⁹² The same set of

85. *Id.* at 26.

86. *Id.* at 27.

87. 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, 1213 (2009); see Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 411 (2011).

88. See generally, e.g., 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).

89. Pearce & Wald, *The Obligation of Lawyers*, *supra* note 8, at 3; see generally GISH JEN, TIGER WRITING (2013) (exploring the cultural shift from interconnectedness to individualism in American society).

90. 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, 384, 387 (2001) [hereinafter Pearce, *Lawyers as America's Governing Class*]; Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1345, 1352 (2006).

91. Pearce & Wald, *The Obligation of Lawyers*, *supra* note 8, at 4.

92. *Id.* at 5.

cultural incentives and insights increasingly shaped the mission and values of corporate clients.⁹³

The dominant understanding of market actors reflected the same emphasis on autonomous self-interest. *Homo economicus* sought to maximize narrow self-interest, without regard to the implications for neighbors, collaborators, or community. Not surprisingly, therefore, when analyzing Big Law, the Death of Big Law approach viewed lawyers as basing their work and their business decisions on the principle of autonomous self-interest; and, at the same time, viewed corporate clients as sharing this autonomous vision and further reinforcing the cultural shift in Big Law by demanding that their outside counsel help them pursue their autonomously self-interested agendas aggressively.

Recent scholarship, however, has suggested that, even though autonomous self-interest represents the dominant paradigm for economic and legal actors, people actually do live their lives relationally.⁹⁴ Economists Amartya Sen, Luigino Bruni, and Robert Sugden, for example, explain that autonomous self-interest fails on both descriptive and normative grounds.⁹⁵ They point to studies that show that economic relationships are social relationships and that mutual benefit better describes conduct than autonomous self-interest.⁹⁶ For example, even when contracts are unenforceable, parties tend to follow the terms even when one of the parties could maximize return by insisting on additional benefits.⁹⁷ Similarly, if one party to a contract discovers that the terms of the contract will cause a significant harm it had not anticipated, the other party will generally agree to a minor adjustment that reduces this harm, rather than extracting the maximum price from the party suffering the potential harm.⁹⁸ Not surprisingly, while identifying mutual benefit as the general characteristic of economic exchanges, Bruni and Sugden explain how mutual benefit defines, in particular, the economics of helping professions, such as law.⁹⁹

This economic analysis helps explain why the behavior of lawyers, both within firms and between firms and clients, is better described as

93. *Id.*

94. *Id.* at 17 n.90.

95. *See supra* note 80.

96. *Id.*

97. LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 10-12 (2001) (examining relational perspectives among family law attorneys).

98. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 57 (1963) (studying relational approaches in commercial law).

99. Bruni & Sugden, *supra* note 80, at 51; Pearce & Wald, *The Obligation of Lawyers*, *supra* note 8, at 17 n.90.

relational self-interest. The rewards an individual lawyer receives actually do depend upon the good of her colleagues and her firm. A rising rainmaking partner, for example, will find it hard, or at least harder, to succeed without a loyal and supportive team of associates and junior partners assisting her,¹⁰⁰ and without the backing of other powerful partners in the firm. Similarly, a firm's success is dependent upon the success of its clients. Although individual lawyers or firms might choose to pursue a strategy of autonomous self-interest, and in the short run, such a choice may be the most advantageous from a narrow atomistic perspective, relational self-interest—a mutual benefit—will prove the most advantageous in the long term, as Sen, Bruni, and Sugden suggest.¹⁰¹

As we have noted above, this perspective is not new in the legal profession or in American culture. Until the 1960s, it was the dominant, though not exclusive view, and it guided how large firm lawyers interacted with their colleagues and their clients.¹⁰² Moreover, during the past few decades, a wide variety of legal scholars studying political theory,¹⁰³ relational feminism,¹⁰⁴ relational contract theory,¹⁰⁵ and alternative dispute resolution¹⁰⁶ have asserted, like Bruni, Sugden, and Sen, that mutual benefit offers both a descriptive and normative benefit to lawyers and clients. To be clear, we are not celebrating or embracing all aspects of this not so “golden era”: the relational perspective of the late nineteenth century and early to mid-twentieth century was also characterized by large law firms’ explicit discrimination against “undesirables” and paternalism vis-à-vis clients.¹⁰⁷ And arguably, it was exactly such discrimination, exclusion, and homogeneity of Big Law that helped sustain its relational perspective. That said, large law firms and their corporate clients were more relational in the past and can be once again more relational without relying on and restoring

100. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 534 (1996).

101. Bruni & Sugden, *supra* note 80, at 51; Pearce & Wald, *The Obligation of Lawyers*, *supra* note 8, at 17 n.90.

102. ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 225-26 (1964); Pearce, *Lawyers as America's Governing Class*, *supra* note 90, at 381.

103. Pearce & Wald, *The Obligation of Lawyers*, *supra* note 8, at 9-10; Jim Taylor, *Is the Anger in American Political Discourse Good or Bad?*, HUFFINGTON POST (June 1, 2010, 5:36 PM), http://www.huffingtonpost.com/dr-jim-taylor/is-the-anger-in-american_b_592844.html.

104. See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* 146 (1982); VIRGINIA HELD, *ETHICS OF CARE: PERSONAL, POLITICAL, AND GLOBAL* 63-64 (2006); EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY AND DEPENDENCY* 20 (1999); NEL NODDINGS, *CARING: A FEMINIST APPROACH TO ETHICS AND MORAL EDUCATION* 129 (1984).

105. Macaulay, *supra* note 98, at 56-57.

106. Pearce & Wald, *The Obligation of Lawyers*, *supra* note 8, at 42.

107. Wald, *The Rise and Fall*, *supra* note 12, at 1814.

the discrimination and paternalism once closely associated with relational self-interest.

Indeed, we are not the only critics to rely on relationships to critique the Death of Big Law hypothesis. Bernard A. Burk and David McGowan challenge the hypothesis for failing to account for the referrals that occur between and among lawyers in the firm—the “reputational capital” that accrues “when lawyers with appropriately complementary reputations and connections . . . join together in a firm [to] . . . better exploit the value of their own relational capital and thus jointly create value greater than the sum of their individual contributions.”¹⁰⁸ We extend this analysis even further. Not only referrals, but other aspects of the web of relationships within law firms and with clients, indeed, legal services themselves, are a product grounded in relationships of mutual benefit where lawyers in teams and as colleagues “jointly create value greater than the sum of their individual contributions.”¹⁰⁹

Not surprisingly, given the descriptive weakness of the Death of Big Law hypothesis, the evidence supporting it is at best limited and ambiguous. One open question is the relevant time period in evaluating the success of Big Law. During the twenty-five year period from 1987 through 2012, the total gross revenue of the “Am Law 100” increased from “\$7 billion to \$71 billion” and the profits per partner increased from “\$324,500 to about \$1.4 million.”¹¹⁰ But starting his analysis in 2000, Ribstein notes that “many large and established firms have dissolved or gone bankrupt . . . and others have significantly downsized.”¹¹¹ Indeed, this decline has occurred as “the rise in litigation and regulation signal an increasing need for lawyers.”¹¹² Henderson offers a similar, but more measured, conclusion: “Big Law is not dead—Larry was trafficking in metaphor—but it has plateaued. It is also losing market share.”¹¹³ Certainly, the Great Recession put a dent in large law firms. Law firms laid off more than 5000 lawyers and the total number of lawyers in the 250 largest firms declined by more than 5% in 2009 and 2010.¹¹⁴ At the same time, “in 2009 Am Law 200 firms saw modest declines in gross revenue,”¹¹⁵ with a modest increase to 0.8% through

108. Burk & McGowan, *supra* note 1, at 3.

109. *Id.*

110. Michael D. Goldhaber, *The Long Run*, AM. LAW., May 2012, at 99, 99.

111. Ribstein, *supra* note 3, at 751.

112. *Id.*

113. Henderson, *supra* note 3, at 2.

114. Burk & McGowan, *supra* note 1, at 28-29.

115. *Id.* at 39 n.99.

2013.¹¹⁶ For the period from 2007 through 2010, profits per equity partner increased almost 10%.¹¹⁷

Of course, the notion that Big Law will always remain the same, without changing for better or worse, is absurd. The history of law firms providing legal services to corporate clients is one of change and evolution. In his insightful analysis of the modern legal profession, Benjamin Barton reminds us of Lawrence Friedman's astute description of how the post-Civil War legal profession battled outsiders who contested its business model: "Nevertheless, the lawyers prospered. The truth was that the profession was exceedingly nimble at finding new kinds of work and new ways to do it. Its nimbleness was no doubt due to the character of the bar: open-ended, unrestricted, uninhibited, and attractive to sharp, ambitious men."¹¹⁸

Like the Death of Big Law commentators, we too anticipate changes in large law firms. Our point is simply this—by strongly relying on a conception of lawyers and clients as autonomous, and not relational actors, proponents of the Death of Big Law hypothesis have exaggerated their case. They have, moreover, failed to recognize evidence that at least some large firms are evolving in ways that allow them to continue to thrive.¹¹⁹

B. *The Death of Big Law Account Ignores Evidence of Big Law Innovation*

Robert Eli Rosen, Eli Wald, and David Wilkins have identified innovative and successful models of Big Law practice that have developed and expanded during the period where Death of Big Law commentators only find decline.¹²⁰

Wald has suggested that the Death of Big Law's focus on the shift from the classic tournament to the elastic tournament misses some of "the actual rich and vibrant world of large law firms."¹²¹ Wald notes that:

116. Sara Randazzo, *Goodbye to All That*, AM. LAW. Mar. 2013, at 43, 43.

117. MACEWEN, *supra* note 3, at 15-16.

118. Benjamin H. Barton, *A Glass Half Full Look at the Changes in the American Legal Market*, INT'L J.L. & ECON. (forthcoming) (manuscript at 46).

119. See *infra* Part III.B.

120. Robert Eli Rosen, "We're All Consultants Now": *How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 641-50 (2002); Wald, *Smart Growth*, *supra* note 12, at 2873-74; Wilkins, *supra* note 73, at 2070.

121. Wald, *Smart Growth*, *supra* note 12, at 2868.

[S]ome 'large' law firms have opted out and choose to remain, relatively speaking, small[,] . . . defying the organic growth prediction of the standard story [S]ome national firms have pursued a limited regional growth model, as opposed to a global one [S]ome have followed a smart growth strategy establishing niches in particular subject matters [And] some large firms have disappeared, electing to merge with growing law firms.¹²²

Wald suggests that "[n]ew models of organization and theories of growth patterns must be developed to account for the diversity of entities populating the large law firm universe."¹²³

In particular, as a counterpoint to the Death of Big Law analysis, Wald offers a case study of "the rise of a large Am Law 200 firm that does not follow the standard story."¹²⁴ His study "suggests an alternative model, one that relies on practice areas other than corporate law, depends on a client base not dominated by large corporate entities, and that features a partner-heavy, as opposed to an associate-heavy (or as of late, a non-partner-heavy) attorney pool."¹²⁵ In many ways, the firm's growth was self-consciously relational. It built on "success in commercial real estate and lobbying"¹²⁶ to develop "mainstream practice areas of corporate law and litigation" through "systematically . . . min[ing] its existing strengths and relationships."¹²⁷ In addition, "the firm employed strategically opportunistic thinking with regard to hiring, promotion, and retention of its associates and lateral partners."¹²⁸ Aware of the difficulty of retaining both associates and lateral hires, the firm looks for a "personality fit" through "one-on-one . . . recruiting"¹²⁹ and recognizes the importance of training junior lawyers.¹³⁰

While Wald highlights alternative models of large law firms that build on "smart" relationships with clients,¹³¹ Rosen and Wilkins have identified the development of a relational approach to the lawyer-client relationship that offers significant positive benefits to Big Law.¹³² Contrary to the relationship between autonomous lawyers and clients

122. *Id.* at 2873-74.

123. *Id.* at 2874.

124. *Id.* at 2875.

125. *Id.*

126. *Id.* at 2910.

127. *Id.* at 2911.

128. *Id.* at 2912.

129. *Id.*

130. *Id.* at 2913.

131. *Id.*

132. Rosen, *supra* note 120, at 670; Wilkins, *supra* note 73, at 2106.

that Death of Big Law theorists describe, Wilkins describes how corporate clients have rejected a “spot-contracting”¹³³ model that underlies Death of Big Law analysis,¹³⁴ in favor of “strategic alliances” that provide mutual benefit.¹³⁵ Corporate clients have discovered that the autonomously based “spot-contracting model . . . has failed to deliver the full range of benefits in terms of either quality or price that the in-house lawyers who led this charge believed that it would.”¹³⁶ Wilkins identifies “five interlocking trends” that have facilitated what Rosen has described as “partnering” between in-house counsel and outside law firms.¹³⁷

[C]onvergence of work in the hands of a limited number of ‘preferred’ firms, consolidation of the firms themselves through merger and acquisition, greater integration and knowledge transfer between companies and firms, changes in the organizational structure of companies that promote integration and blur the boundaries between the inside and the outside, and increasing instability and contraction in general counsel offices¹³⁸

As a result, the relationship between clients and lawyers, characterized “simultaneous[ly by] cooperation and competition[,] . . . increasingly ha[s] come to resemble the kind of strategic alliances or partnerships that many companies have entered into with other long-term suppliers in order to achieve common objectives.”¹³⁹ In contrast to “spot contracting,” these strategic alliances “emphasize[] the importance of reciprocity and mutual trust for the production of joint gains.”¹⁴⁰

IV. AN ALTERNATIVE FRAMEWORK: THE RELATIONAL INFRASTRUCTURE OF LAW FIRM CULTURE AND REGULATION

While the Death of Big Law hypothesis has not been persuasive in signaling the Death of Big Law, it has identified some ways that the dominant culture of autonomous self-interest undermines competitiveness, mentoring and training, diversity and ethics, and professionalism. But, in responding to these weaknesses, the Death of Big Law approach, which itself relies on the assumption of autonomous self-interest, misses the mark. Instead, a relational approach to law firm

133. Wilkins, *supra* note 73, at 2071.

134. Galanter & Henderson, *supra* note 3, at 1911.

135. Wilkins, *supra* note 73, at 2070-71.

136. *Id.* at 2071.

137. Rosen, *supra* note 120, at 670; Wilkins, *supra* note 73, at 2096.

138. Wilkins, *supra* note 73, at 2096.

139. *Id.* at 2097.

140. *Id.* at 2071.

culture and regulation offers a more effective framework for promoting competitiveness, diversity, and professional values.

A. Enhancing Competitiveness

The Death of Big Law advocates' prescription for competitiveness¹⁴¹ is more autonomous self-interest and more experimentation in terms of non-lawyer ownership and new business models that "move beyond client advice by law firms to include completely different types of businesses"¹⁴² that focus on the commoditization and ownership of intellectual property in legal service products. These recommendations reflect the inevitable assumption regarding the autonomous self-interest of large law firms' lawyers and their corporate clients: because the old values of reputational capital and partners' cooperative conduct cannot be saved, Big Law's future must be invention and transformation to modes that are more consistent with autonomous self-interest.

Consider the Death of Big Law commentators' suggestions to change the American Bar Association Model Rules of Professional Conduct ("Rules") to "restrict[] limited liability [and allow] non-competition agreements."¹⁴³ These proposals, they argue, will encourage lawyers to devote more energy to maintaining the quality of the firm because they could potentially face personal liability for poor quality services; and similarly, they will remove partners' incentives to develop their own independent relationships with clients at the expense of their commitment to the firm because they will not be able to take those clients with them if they leave the firm.¹⁴⁴

Assuming that these Rules were to be adopted, and we do not reach the question of whether they should be adopted, they would likely have a limited impact at best. The Rules themselves would signal to large firm lawyers that their colleagues do indeed understand them as autonomously self-interested, expect them to act in order to benefit themselves without concern for their colleagues, and do not trust them to be loyal to their firm. The very existence of the Rules would reinforce

141. For purposes of this Article, we are limiting our focus to consideration of how to make large law firms as competitive as they can be within the parameters of their existing form in providing advice and representation to businesses and wealthy individuals.

142. Ribstein, *supra* note 3, at 752.

143. *Id.*; see also Henderson, *supra* note 3, at 16-17; see generally Eli Wald, *Non-Compete Agreements in Colorado*, COLO. LAW., June 2011, at 63, 63 (2011) (summarizing recent developments in the approach of the Rules to lawyers' and law firms' non-compete agreements).

144. Henderson, *supra* note 3, at 17.

lawyers' understanding of themselves as autonomously self-interested Holmesian bad men and women.¹⁴⁵

And in that role, of course, large law firms' lawyers would view these Rules from the perspective of what they could get away with and seek to evade the spirit of the Rules while complying with their letter.¹⁴⁶ They would therefore seek to do the minimum required to avoid liability. This could include finding ways to make others in the firm responsible for potential liability, developing a method for insuring their own liability, or demanding increased compensation to cover their potential liability, and at the same time, continuing to cultivate their individual clients at the expense of their obligations to the firm. Similarly, with regard to non-competition agreements, rainmakers could refuse to work for firms that impose these Rules, require higher compensation from firms that impose them, and put efforts into developing networks of connections that would provide business to them or their new firm upon leaving, despite the non-competition agreement.

Our point is that rules that conceive of lawyers as autonomously self-interested, even as they attempt to provide disincentives to atomistic and individualistic conduct, will tend only to reinforce and legitimate autonomously self-interested conduct. A more effective way to promote firm loyalty would be to pursue a relational strategy. If lawyers were to understand that their self-interest was best pursued relationally, and not autonomously, they would see the good of the firm and their colleagues as inextricably connected to their own good. Even though, as we have explained earlier, the reality of legal work is relational, a change in lawyers' attitudes would indeed make a difference in how they manage those relationships.¹⁴⁷

As a general matter, businesses that maximize relational self-interest are more effective, and thus, more competitive.¹⁴⁸ The challenge to maximizing law firm effectiveness, therefore, is to encourage lawyers to understand their self-interest as relational and to view the goal of their relationships with their clients and the firm as a mutual benefit. The direct method to accomplish this goal is to persuade lawyers that their self-interest is in fact inextricably connected with that of their colleagues. This approach already seems to have had significant

145. Pearce & Wald, *Relational Approach*, *supra* note 6, at 515.

146. *Id.*

147. For example, a Stanford study of long-term Prisoner's Dilemma games found that seventy percent of participants chose to cooperate when they believed the game to be about community, which they understood as relational, and only thirty percent chose a cooperative strategy when they believed the game was "Wall Street," which they viewed as autonomous. ROBERT F. HURLEY, *THE DECISION TO TRUST* 195 (2012).

148. Wilkins, *supra* note 73, at 2093.

success.¹⁴⁹ The strategic alliances that Wilkins describes as accounting for significant business for law firms rely on an understanding that lawyers and clients function best when they seek mutual benefit.¹⁵⁰ As a general matter, moreover, rainmakers succeed as rainmakers precisely because they understand the value of mutually valuable long-term relationships with clients.¹⁵¹ These developments provide helpful evidence in demonstrating the value of relational self-interest.

Consider the following examples of how law firms can rethink and reconceive of their relationships with their clients, moving away from an autonomously self-interested mindset and embracing relational self-interest instead. Large law firms and their partners increasingly complain about corporate clients' growing micromanagement of staffing and cost decisions pertaining to their attorney-client relationships.¹⁵² Corporate clients, taking advantage of the growing sophistication of their in-house legal departments and their increased bargaining power vis-à-vis their outside counsel, impose fee caps, negotiate lower fees, and intervene in staffing decisions, refusing to pay for the work of junior associates and demanding that senior partners with relevant expertise actually work on their matters, as opposed to merely supervising the work of associates and junior partners.¹⁵³ This perspective reveals an autonomously self-interested mindset, conceiving of in-house counsel and large law firm lawyers as rivals playing a zero-sum game in which one's loss is the other's gain.

We suggest a different perspective, one in which law firms and their partners embrace these new staffing and cost realities as an opportunity to work more closely with clients, to better understand the clients' business needs and costs, and to fashion better and more cost-effective solutions to the challenges clients face. Such a change, to be sure, is not going to be easy to implement. Large law firms have long relied on staffing associates to generate fees, train the associates, and relatively reduce the time demands imposed on senior partners;¹⁵⁴ and have similarly relied on the billable hour as a constitutive organizational feature not only to generate profit, but also to assess associates and partners alike, such that fee caps and negotiated reduced fees disturb and undermine Big Law's organizational infrastructure.¹⁵⁵ And yet, a

149. See, e.g., Ribstein, *supra* note 3, at 755.

150. Wilkins, *supra* note 73, at 2072.

151. Pearce & Wald, *Relational Approach*, *supra* note 6, at 535.

152. Wilkins, *supra* note 73, at 2123 n.233.

153. *Id.* at 2108.

154. Wald, *Smart Growth*, *supra* note 12, at 2870.

155. Wilkins, *supra* note 73, at 2133.

relational commitment to clients suggests that large law firms should not be coerced to negotiate staffing and cost decisions with their most powerful and demanding clients, but should offer these new arrangements to all of their clients. Interest among clients in these new arrangements will no doubt vary, but all will appreciate Big Law's demonstrated and visible attention to the cost considerations faced by in-house lawyers and corporate clients.

Next, consider the increasingly common phenomenon known as "secondment," in which large law firms lend their associates and partners to their clients for a few months at a time.¹⁵⁶ Historically, large law firms have treated secondments with suspicion, and of course, they would, pursuant to an autonomously self-interested perspective: associates and partners are the human capital property of the firm and corporate clients are the enemy trying to lure them away.¹⁵⁷ Viewed in this light, secondments were understood to be a dangerous tool by which corporate clients could recruit a law firm's top talent and undermine its diversity efforts.¹⁵⁸ Indeed, even as law firms have increasingly come to terms with secondments, they have done so from an autonomous perspective, conceiving of these arrangements as consistent with the firm's self-interest at the expense of others. If, for example, a corporate client did lure a firm attorney away into its in-house department, that attorney might later direct work to his old law firm rather than to its competitors.

Once again, we suggest an alternative relational perspective, pursuant to which Big Law will embrace secondments as a way of connecting with clients for mutual benefit. Large law firms should restructure their associate and partnership tracks to fully integrate secondments and proactively encourage their own lawyers and clients to seek these opportunities. For example, firms should ensure that returning lawyers are effectively integrated back into the law firm ranks and do not experience an adverse consequence as a result of being away from the firm. We envision a reality in which first year Big Law associates and their firms might think of the paradigmatic partnership track not as an eight-year track within the firm, but as a period of time that includes several secondments.¹⁵⁹

156. Ass'n of the Bar of the New York City Comm. on Prof'l and Judicial Ethics, Formal Op. 2007-2 (2007), available at <http://www.nycbar.org/Ethics/eth2007.htm> (discussing secondment of law firm attorneys and association with a law firm); see Rosen, *supra* note 120, at 647; Wilkins, *supra* note 73, at 2092.

157. See Wald, *In-House Myths*, *supra* note 13, at 433.

158. See *id.*

159. Reintegrating seconded attorneys back into the firm after a time away from it somewhat parallels the ongoing efforts of some law firms, as well as other companies, to develop off-ramps

Finally, consider the application of a relational perspective to relationships within law firms. When co-workers view each other from a perspective of mutual benefit, they can trust each other and build social capital.¹⁶⁰ Robert Hurley has noted that trust “enables cooperative behavior” and “is a form of social capital that enhances performance between individuals, within and among groups, and in larger collectives (for example, organizations).”¹⁶¹ He further noted that, “leaders without trust have slower and more cautious followers [and] organizations without trust struggle to be productive.”¹⁶² Similarly, Bruni and Sugden emphasize the importance of mutual benefit to economic flourishing.¹⁶³ An expectation of mutual benefit encourages exchanges that create value, while an expectation of an autonomous response results in the absence of trust and the avoidance of efforts to create value.

Law firms can promote relational self-interest through institutional policies and practices that build trust. Hurley explains that, “research makes it clear that trustworthiness or its absence emanates from the basic underpinnings of how the organization operates and that building trust requires more than ethics classes or codes of conduct.”¹⁶⁴ A characteristic of “high-trust organizations” is that “employees exercise their ability to make decisions and take risks while feeling secure that others want them to succeed. They feel that their efforts will be fairly supported and that their results will be judged fairly.”¹⁶⁵ Some of Hurley’s suggestions for creating a high-trust organization are well within the capacity of a large law firm: develop a shared understanding of “why the firm exists (purpose and mission) and its obligations to stakeholders”;¹⁶⁶ “[c]reate an empowering culture [by, among other things], promot[ing] managers who share power and retrain[ing] or demot[ing] micromanagers”;¹⁶⁷ “[c]ontinuously upgrade and improve capability”;¹⁶⁸ “[m]easure the degree to which your espoused culture is

and on-ramps policies allowing firm attorneys who have left the firm to subsequently return to it. See generally SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS (2007).

160. HURLEY, *supra* note 147, at 7-8; see Eli Wald, *The Visibility of Socioeconomic Status and Class-Based Affirmative Action: A Reply to Professor Sander*, 88 DENV. U. L. REV. 861, 870-73 (2011) (exploring the impact of social capital on lawyers’ careers).

161. HURLEY, *supra* note 147, at 7.

162. *Id.* at 8.

163. Pearce & Wald, *The Obligation of Lawyers*, *supra* note 8, at 8 n.33.

164. HURLEY, *supra* note 147, at 114.

165. *Id.* at 114-15.

166. *Id.* at 124.

167. *Id.* at 121.

168. *Id.* at 132.

practiced”;¹⁶⁹ “overcommunicate”;¹⁷⁰ and “[h]old leaders accountable for helping people understand the ‘why’ behind company values and decisions.”¹⁷¹

These may sound a bit abstract. Consider sabbatical programs in which every few years a partner can go on a three month fully-paid leave.¹⁷² An autonomously self-interested cynic might respond that these will never work out in Big Law’s “eat-what-you-kill” climate—partners will not take sabbaticals for fear that their clients will resent their absence; or that colleagues who cover for them and address their clients’ need will then steal their clients; or that the firm might construe their sabbatical as demonstrating insufficient commitment to the firm and its clients—all reasonable concerns from an autonomous perspective. And indeed, if all Big Law did was to adopt a paper policy of sabbaticals, many, if not most, partners would likely not take advantage of it; or, if there was an option to keep working in lieu of a sabbatical and cash its value, some, if not most, partners would opt for that.

But what if large law firms made taking a sabbatical a mandatory requirement such that every partner at the firm had to take it? And what if the firm developed a detailed infrastructure to support these sabbaticals, including a transition period both before and after each sabbatical to ensure that partners and clients felt comfortable with it? Of course, firms could not guarantee that covering partners would not steal the clients of a vacationing colleague, but they could implement procedures and policies that would discourage such conduct. The end result could be firms with changed, more trusting, more cooperative work environments.

Although we do not offer a detailed roadmap for creating a high-trust organization of relational self-interest, we will in the following Subparts elaborate on some of these suggestions as we offer more particular analysis of important components of a competitive and effective law firm.

169. *Id.* at 135.

170. *Id.* at 137.

171. *Id.*

172. See, e.g., Bruce Balestier, *Shearman Associates Like Their Time Off: Fifth- and Sixth-Years Praise Sabbatical Idea*, N.Y. L.J., June 2, 2000, at 24, 24; Friederike Heine, *Law Firm Sabbaticals Continue Even in Recession*, LAW.COM (Apr. 13, 2010), <http://www.law.com/jsp/article.jsp?id=1202447960512&slreturn=20131014173920>; see also Bruce A. Green, *Foreword: Professional Challenges in Large Firm Practices*, 33 FORDHAM URB. L.J. 7, 27 (2005) (“[L]arge law firms experiment with sabbaticals for both promising associates and productive partners, very much along the line of academic sabbaticals—three months, full pay, as a reward for particularly promising, productive, exceptional members of the firm.” (internal quotation marks omitted)).

B. Training and Mentoring

In a business that sells legal services, the training and mentoring of lawyers is vital.¹⁷³ Proponents of the Death of Big Law thesis have identified the failure to do so as a major source of the decline of large law firms. Henderson asserts that reputational capital has diminished—and will continue to diminish—because “partners may be able to make more money by focusing on their own client relationships and giving short-shrift to activities that would preserve and grow the firm’s reputational capital (for example, training and mentoring junior lawyers).”¹⁷⁴ Given the incentives of its lawyers, “the ‘firm’ itself has remarkably little autonomy to pursue noneconomic objectives, such as . . . the training and mentoring of the next generation of lawyers.”¹⁷⁵ Moreover, as sophisticated clients increasingly refuse to pay for what they perceive is the training and mentoring of junior associates, firms have even less of an incentive to invest in these activities. That is, law firms find it increasingly harder to get their best talent to train and mentor, and cannot write off the time doing so as billable; thus, further reducing the willingness of billing-minded lawyers to train and mentor, resulting in a vicious cycle of diminishing training and mentoring.¹⁷⁶

But, because of its reliance on the assumption of autonomous self-interest, the Death of Big Law hypothesis cannot offer an effective solution to the problem it identifies. For example, commentators describe mentoring as a “noneconomic objective.”¹⁷⁷ Mentoring can only be noneconomic under an autonomous paradigm where the lawyer defines her self-interest without regard to interests of her colleagues, clients, and firm. Under relational self-interest, where the good of the individual lawyer is inextricably intertwined with the colleagues and the firm and where mutual benefit is the goal, mentoring is without question central to the work and the economic well-being of the firm. Accordingly, developing a culture of relational self-interest would make mentoring a priority.

173. Henderson, *supra* note 3, at 3.

174. *Id.*

175. Galanter & Henderson, *supra* note 3, at 1868. Galanter and Henderson note that, “informal training and mentoring in most large firms are on the wane because partners are reluctant to invest the time beyond what is necessary to optimize their own practices.” *Id.* at 1918.

176. The diminishing space for mentoring and training at Big Law has been well documented by many scholars. See, e.g., Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 178 (2005); 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, 281-82 (2000) [hereinafter Fortney, *Soul for Sale*].

177. Fortney, *Soul for Sale*, *supra* note 176, at 282.

Autonomous self-interest, moreover, also explains a weakness in how law firms understand and seek to implement mentoring. Most law firms establish mentoring programs that consist of autonomous lawyers communicating with other autonomous lawyers about a process they understand from an autonomous perspective. Even though they focus on skill building and sometimes “office politics,”¹⁷⁸ this generally consists of formal expectations of associates and informal etiquette, important but quite limited dimensions of mentoring. A relational approach to mentoring, like that found more generally in business, is far more robust. The mentor-mentee relationship begins when the two work together, not as a result of an assignment independent from shared work. In their shared work, mentors are responsible for helping their mentee develop “competence, credibility, and confidence.”¹⁷⁹ They “must play the dual role of coach and counselor: coaches give technical advice – explaining how to do something – while counselors talk about the experience of doing it and offer emotional support.”¹⁸⁰ The mentor must also help the mentee “establish[] and expand[] a network of relationships,” including the development of relationships with sponsors, peers, role models, and additional mentors.¹⁸¹ In doing so, the mentor would prepare the mentee not only for an expanded role within the firm but also for other employment if partnership is not in the mentee’s future. This far more robust and effective approach to mentoring would produce both better quality work and a high-trust environment, results that would in turn maximize the firm’s competitiveness.

Such a mentoring relationship is, importantly, not a one-way street. Instead, the mentor receives significant rewards from the relationship as well: every lawyer in a firm, the most powerful and effective rainmakers included, rely on a team of associates and partners to assist them in their work. A lawyer with a reputation for being a great trainer and mentor will attract the best associates and junior partners who will, in turn, render the mentor even more successful.¹⁸² Autonomous self-interested lawyers, both partners and associates, tend to think of a mentorship relationship as a handout given from the former to the latter, an activity in which the partner is actively mentoring and the associate is passively being mentored.¹⁸³ Effective business models demonstrate the fallacy in

178. David A. Thomas, *The Truth About Mentoring Minorities: Race Matters*, HARV. BUS. REV., Apr. 2001, at 98, 100.

179. DAVID A. THOMAS & JOHN J. GABARRO, *BREAKING THROUGH: THE MAKING OF MINORITY EXECUTIVES IN CORPORATE AMERICA* 96 (1999).

180. Thomas, *supra* note 178, at 104.

181. *Id.*

182. Wilkins & Gulati, *supra* note 100, at 565-66.

183. See SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 69 (2013).

such thinking: mentoring demands two active participants. It works most effectively not in the abstract but when the mentoring is tied to work done together and also entails training. The mentee must not approach the relationship passively but must be thoroughly prepared and researched, demonstrating that she respects and values the time and commitment invested by the mentor. This, in turn, would render the mentorship more valuable from the mentor's perspective. In *Lean In*, Sheryl Sandberg captures this very insight cautioning future mentees from approaching mentors with an "Are you my mentor? Are you my mentor?" attitude akin to the one-sided and dependent relationship a baby bird has with its mom in the children's story *Are You My Mother?*¹⁸⁴ The point is not only that if one has to ask, then the answer is already known. Rather, it is also that if partners and associates alike thought of mentorship as inherently tied to their work together and as a mutually beneficial activity, there would be no need to really ask the question.¹⁸⁵

Large law firms can support such a relational perspective by eliminating formal and informal mentoring programs that are detached from work assignments and that tend to promote identity matching and stereotypes. They can signal the importance of mentoring and training by recognizing that not everybody is equally gifted as a mentor and train their partners to become good mentors. And, they can visibly recognize and institutionalize the importance of mentoring by recognizing it as a billable activity, akin to the growing recognition of mentoring for Continuing Legal Education ("CLE") credits.¹⁸⁶ Indeed, firms can set mentorship hours expectancies just like they do for pro bono work, tie partner compensation to it, and evaluate performance by seeking feedback from both partners and associates. Finally, firms can restructure the assignment of work policies of its associates and partners in order to reflect the importance of training and mentorship inherently tied to the firm's allocation of work.

184. SANDBERG, *supra* note 183, at 64; *see generally* P.D. EASTMAN, ARE YOU MY MOTHER? (1960);

185. SANDBERG, *supra* note 183, at 69.

186. *See, e.g.,* Terrence O'Donnell, *Federal Court Practitioners Serve as Mentors to Newly Admitted Attorneys: The Supreme Court of Ohio's Lawyer to Lawyer Mentoring Program*, FED. LAW., Feb. 2011, at 28, 29 (describing a mentorship CLE program approved by the Ohio Supreme Court); *Tennessee Bar Association Launches New Program: Get CLE Credit by Mentoring*, TENN. B.J., Feb. 2011, at 5, 5 (reporting a proposed mentorship CLE program pending before the Tennessee Supreme Court); *see also* Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1117 (2011) [hereinafter Wald, *Primer on Diversity*].

C. Diversity

Diversity is another area where a relational approach could benefit law firms. Women and people of color are significantly under-represented in partnership ranks despite the significant efforts law firms have made in both hiring and mentoring.¹⁸⁷ Death of Big Law commentators have identified “racial and gender diversity” as one of those “noneconomic objectives” that firms are not, and will not, significantly pursue,¹⁸⁸ at least not in times of economic crisis. Here too, an ethic of autonomous self-interest does not support commitment to a firm-wide objective. Lawyers do not understand the diversity of the firm as reflecting on their self-interest. Instead, they often think of diversity efforts as a cost and increasingly complain of “diversity fatigue.”¹⁸⁹ Moreover, to the extent that firms do worry about diversity—and many do—they apply an autonomous approach to mentoring women and people of color just like the general mentoring program described above. Research in business indicates that a more robust, relational approach to mentoring is more effective at promoting women and people of color.¹⁹⁰

In addition, rather than viewing mentor and mentee as autonomous actors, a relational perspective understands them as embedded in the gender and racial dynamics of the firm, the legal profession, and the larger society.¹⁹¹ Accordingly, a relational approach to diversity would require race- and gender-conscious measures to educate mentors and mentees on how to openly discuss issues of race and gender and to ensure that women and people of color find mentors, sponsors, and role models with whom they share an identity, as well as with white men who continue to be the dominant group within law firms.¹⁹² Importantly, such training will be part and parcel of the holistic relational approach to training and mentoring discussed above and not a standalone “diversity” effort. It will therefore result in better training and mentoring for all, not just women and minorities.

Consider maternity leave policies in the context of gender diversity: some firms have recently implemented policies that allow male associates to claim paternity leave,¹⁹³ but in an autonomously self-interested culture, female attorneys are incentivized to take as short a

187. Wald, *Primer on Diversity*, *supra* note 186, at 1079.

188. Galanter & Henderson, *supra* note 3, at 1868.

189. Wald, *Primer on Diversity*, *supra* note 186, at 1110.

190. *Id.* at 1118.

191. THOMAS & GABARRO, *supra* note 179, at 110-11.

192. *Id.* at 110.

193. Christen Linke Young, Note, *Childbearing, Childrearing, and Title VII: Parental Leave Policies at Large American Law Firms*, 118 YALE L.J. 1182, 1189 (2009).

leave as possible and male lawyers are discouraged from taking it altogether, rendering more generous parental procedures unutilized paper policies.¹⁹⁴ Firms could, as an alternative, require all of their attorneys, male and female alike, to take paid parental leave upon becoming parents, and also encourage all of their attorneys to take additional unpaid leave. Similar to a sabbatical program, firms could take proactive steps to ensure that lawyers on leave do not suffer adverse consequences as result of taking a leave by closely monitoring workload assignments before and after the leave, and institutionally arranging for coverage while lawyers are on leave. Of course, some female and male attorneys will still only take the required paid leave, but even so, firms would be sending a credible signal reflecting their commitment to gender diversity to all.

D. Ethics and Professionalism

Death of Big Law commentators argue that lawyer individualism has caused the “[d]ecline of [l]arge [f]irms as [e]xemplars of [l]egal [e]thics”¹⁹⁵ and has led large firms to discard professionalism’s commitment to the public good in favor of an embrace of the hired gun role.¹⁹⁶ Examples may include: pressure on associates and partners alike to meet increased billable targets, which incentivize firm lawyers to pad their time; and an “eat-what-you-kill” culture that causes relative unhappiness among firm lawyers and, at the same time, crowds out activities like becoming active members of bar associations and occupying public roles in the community. Here too, a relational approach offers the potential for responding to the harms of an autonomous approach.

Without engaging in the debate regarding whether large firms ever were, or are, exemplars of legal ethics, we agree that the individualist ethos of autonomous self-interest is problematic for legal ethics rules. The autonomous Holmesian bad man or woman looks at the Rules as obstacles to get around and not as the embodiment of aspirations and values.¹⁹⁷ As we have written elsewhere, a relational approach would suggest principles-based regulations that are implemented at the firm level.¹⁹⁸ Where command and control regulations reinforce the

194. *Id.* at 1191-92.

195. Galanter & Henderson, *supra* note 3, at 1907.

196. *Id.* at 1867-68.

197. Pearce & Wald, *The Obligation of Lawyers*, *supra* note 8, at 5.

198. Pearce & Wald, *Relational Approach*, *supra* note 6, at 531-33; *see also* Susan Saab Fortney & Tahlia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152, 154-55

autonomous approach of the Holmesian bad man, principles-based regulations emphasize the relationships of those being regulated with each other and their regulators as they involved the regulated lawyers in creating specific rules for themselves. These strategies have been employed in Australia¹⁹⁹ and the United Kingdom,²⁰⁰ and the early indications are that they have been successful.²⁰¹ Such relational approaches make it more likely that lawyers understand, and identify with, the rules that govern them.

In addition, firms should pursue a relational approach by infusing a commitment to legal ethics and professionalism throughout the firm. This, to be clear, does not necessarily mean institutionalizing legal ethics, for example, by putting in place a risk assessment and risk management department. Indeed, some have argued such institutionalization could end up decreasing a commitment to professionalism rather than increasing it.²⁰² Instead, law firms could demonstrate their commitment to professionalism by sending visible signals to all lawyers about its importance. This could involve vesting an ethics guru or an ethics committee with actual power, for example, by putting in place procedures that subject all partners, powerful rainmakers included, to the judgment of an ethics committee regarding conflicts of interest and their resolution.

In the same way, relational self-interest helps restore professional values, such as civility and commitment to the public good. Here too, if lawyers recognize that their relational self-interest depends upon that of their adversaries and of their community, then they will take seriously their professional values. One proposal that encourages the development of this perspective is Green's suggestion that law firms, "develop, adopt, and implement their own individualized codes of professionalism."²⁰³ Firms, for example, could encourage their lawyers to, and reward them for, acting as public citizens within their communities by creating a space for such activities alongside billable targets and pro bono activities and signaling their importance by having their most powerful partners actively participate in them.

(2012) [hereinafter Fortney & Gordon, *Australian Approach*].

199. Fortney & Gordon, *Australian Approach*, *supra* note 198, at 152-54.

200. Pearce & Wald, *Relational Approach*, *supra* note 6, at 515.

201. *Id.* at 531-32.

202. See, e.g., Bruce A. Green, *Public Declarations of Professionalism*, 52 S.C. L. REV. 729, 731-33 (2001).

203. *Id.* at 733.

V. CONCLUSION

The Death of Big Law advocates argue that large law firms are facing a near perfect storm: on the one hand, corporate clients, using in-house legal departments, have reduced the information asymmetry that used to be the bread and butter of Big Law's reputational capital and source of their high fees,²⁰⁴ and have used their new-found bargaining power to significantly curtail Big Law's profits.²⁰⁵ On the other hand, the culture of autonomous self-interest has taken hold at Big Law, making their lawyers increasingly less likely to perform the very tasks essential to sustaining large law firms' reputational capital, and their rainmakers more likely to demand "eat-what-they-kill" compensation and leave if their demands are not met.²⁰⁶ Consequently, large law firms have become inherently unstable with little hope for reversing course. The very cooperative reforms and measures Big Law would need to implement in order to survive are the actions that their increasingly autonomously self-interested lawyers refuse to take.

The Death of Big Law has been greatly exaggerated. First, while the market for corporate legal services has experienced a significant power shift from outside counsel to their clients, Big Law has been proactive in its response, both vis-à-vis clients by developing new skills and services, such as replacing its dependency on high volume paperwork with highly specialized legal services and by offering new and competitive fee arrangements; and, internally by restructuring, securing the compensation of its rainmakers by labeling them equity partners, and reducing costs in all of its other tracks. Second, while large law firms and their lawyers have grown increasingly autonomously self-interested, this dominant culture is not inevitable. Big Law can take measures to protect its key asset—reputational capital—by putting in place a relational infrastructure that is likely to build and develop its human capital, while limiting opportunistic and individualistic conduct.

Building a relational ethical infrastructure, moreover, represents more than a chance for Big Law to respond to increased competition in the market for corporate legal services, ever more powerful clients, and gradually more discontent and mobile rainmakers who increasingly refuse to monitor and build the firms' capital, demand more pay, and sometimes still leave, further destabilizing already compromised institutions. Instead, a relational perspective presents an opportunity for large law firms to reinvent themselves as great institutions, organizations

204. Ribstein, *supra* note 3, at 760.

205. *Id.*

206. Pearce & Wald, *The Obligation of Lawyers*, *supra* note 8, at 35.

that do well by doing right, arenas for pursuit of clients' private interests alongside the public good that deserve their elite status atop the profession.

In *Partner Shmartner!*, Wilkins argues the large law firms are at a turning point.²⁰⁷ While in the past, they were able to attract top talent by credibly promising their lawyers cutting-edge intellectual work, a seat at the table advising private and public clients regarding their most significant private and public decisions, socioeconomic and cultural status, and high pay; Big Law can increasingly only offer high pay and even that, in exchange for imposing higher and higher demands on its lawyers' personal lives, may not be enough.²⁰⁸ While high pay on these terms may continue to appeal to some lawyers, Wilkins cautions that this state of affairs is unstable in the long-run: large law firms may survive but they will lose their credible claim for elite professional status and become little more than professional sweatshops.²⁰⁹ Relational infrastructure, relational values, and relational perspective, however, offer an alternative—a way for Big Law not only to survive but to reinvent itself as a desirable elite institution. It may not be able to offer lawyers the same mix of cutting-edge intellectual work Big Law could offer when the world of large law firms was populated by a couple dozen competitors, and may not be able to guarantee a seat at major decision-making junctions now taken by in-house counsel, other advisors, and other lawyers. But it can offer, in addition to high pay, compelling professional careers serving important private and public interests, a workplace characterized by trust and loyalty, and not only socioeconomic but also cultural and professional status.

207. David B. Wilkins, *Partner, Shmartner!* EEOC v. Sidley Austin Brown & Wood, 120 HARV. L. REV. 1264, 1264 (2007).

208. *Id.* at 1277.

209. *Id.* at 1271.