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## Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada

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# COMPARATIVE PERSPECTIVES ON LAWYER REGULATION: AN AGENDA FOR REFORM IN THE UNITED STATES AND CANADA

Deborah L. Rhode\* & Alice Woolley\*\*

*Regulation shapes every area of modern economic life. Getting regulation right—knowing when it is necessary, what it should accomplish, and what form it should take—is a critical part of policymaking in every society. Developing an effective oversight structure requires a complex analysis of each society’s particular historical, cultural, and legal foundations. Regulation of the practice of law is no different, although it has received surprisingly little public attention in the United States and Canada. That is not for lack of problems, and other countries with similar legal systems, such as Australia and England and Wales, have begun to do better at addressing common oversight failures. This Article explores why problems in American and Canadian legal regulation persist, and identifies reform strategies that build on recent innovations from abroad.*

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## INTRODUCTION

Although similar in many ways, the United States and Canada have constitutional and cultural differences that affect lawyer regulation. In the United States, constitutional requirements of separation of powers have enabled state courts to assert inherent authority over professional regulation. In Canada, the provincial legislatures have granted regulatory power to the law societies, which are governed by lawyers elected from the bar. In theory, each structure has its strengths. The American system protects the independence of the profession, and provides a somewhat more disinterested oversight body than one controlled directly by the bar. The Canadian system offers greater potential for public accountability and checks on regulatory performance. In practice, however, the oversight structures of both countries have similar weaknesses. The profession in both the United States and Canada determines the focus of regulatory activities, and too often the emphasis is on protecting its own economic and reputational interests. Frequently, the result is inadequate responsiveness to consumer concerns and unduly punitive sanctions for misconduct that occurs outside professional contexts but that threatens lawyers' public image.

In our view, the fundamental problem in both countries is structural. No matter how well intentioned, no occupational group is situated to take a disinterested perspective on matters that implicate its own status and livelihood. Nothing in the history of bar self-governance suggests that lawyers are an exception. Recognition of this fact has led reformers in Australia and England to develop structures in which the profession shares authority with, and is accountable to, non-lawyer regulators. These reforms are part of a broader trend to encourage greater accountability and transparency in regulatory structures that we believe should inform American and Canadian governance systems.<sup>1</sup>

Our proposals begin from two key premises about regulatory objectives. The first is that certain imperfections in the market for legal services justify external oversight.<sup>2</sup> Such imperfections include what economists variously describe as: information asymmetry and barriers; free riders; and externalities. A second premise is that regulatory structures should focus on public protection rather than public image.

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1. See Laurel S. Terry, Steve Mark, & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685 (2012). As the OECD Report on Legal Services notes, there is a risk that self-regulation may promote the interests of the profession without yielding corresponding benefits to the public at large. OECD, *COMPETITIVE RESTRICTIONS IN LEGAL PROFESSIONS 2007*, at 19–20 (2008).

2. A perfectly functioning market has five features: (1) numerous buyers and sellers, (2) homogeneous products that can be readily compared, (3) adequate information for buyers and sellers, (4) no barriers to entry and exit, and (5) no externalities. As Alice Woolley has argued elsewhere, the legal services market has only one of these features—there are numerous buyers and sellers in the market. Alice Woolley, *Imperfect Duty: Lawyers' Obligation to Foster Access to Justice*, 45 ALTA. L. REV. (SPECIAL ISSUE) 107, 120–38 (2008). See generally Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

Regulation fails when it does not effectively deter or remedy breaches of lawyers' obligations to clients and to the legal system. In the market for legal services, a common imperfection involves many consumers' inability to make accurate assessments about the services they receive, either before or after purchase. Most individual (as opposed to business) clients are one-shot purchasers. Their lack of experience, coupled with the expense and difficulties of comparative shopping for non-homogenous professional services, makes it hard for such consumers to identify cost-effective practices.<sup>3</sup> Even sophisticated corporate clients may experience problems in assessing the necessity or efficiency of certain services and detecting fraudulent billing.<sup>4</sup> Results are an inadequate gauge of professional performance because they may reflect factors beyond lawyers' control, such as the fallibilities of judges or jurors, or the perversity of opposing parties.

Information barriers may adversely affect the quality or distort the pricing of professional services. On the one hand, if clients cannot accurately discriminate among the services available, and no regulatory body enforces minimum standards, lawyers will lack adequate incentives to invest time, education, and resources in providing effective services. Competition may encourage attorneys to cut corners and a "market for lemons" may develop, in which bad lawyering drives out the good, and the public pays the price. On the other hand, in the absence of adequate information, consumers may assume that status and price signify quality and will hire a more expensive lawyer than they require. In the absence of some external regulation to ensure the cost effectiveness of legal services, too many purchasers may end up with incompetent, overpriced, or unethical practitioners.

A further difficulty involves "free riders," that is, those who gain from bar standards without personally observing them. For example, the bar collectively has an interest in having lawyers conduct themselves in such a way as to maintain public trust. Absent effective regulatory structures, however, individual attorneys will have inadequate economic incentives to avoid cheating; they can benefit as free riders from the bar's general reputation without adhering to the rules that maintain it.

A final category of market imperfections involves external costs to society and third parties from conduct that may be advantageous to particular clients and their lawyers. For example, the public generally has an interest in seeing prompt and just resolution of disputes in circumstances where individual clients would be willing to pay lawyers to delay or obstruct truth-finding processes.

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3. Legal services are non-homogeneous both because the needs of clients are not the same and also (and more importantly) because the services offered by one lawyer may vary radically from the services offered by another in terms of efficiency, diligence, skill, and legal knowledge.

4. In one survey of American lawyers, only 44 percent said they were never influenced by the temptation to do more work than the client needed, and 43 percent believed that at least 10 percent of work by American lawyers is unnecessary. William G. Ross, *How Widespread Is Unethical Billing?*, ACCT. & FIN. PLAN. FOR L. FIRMS, L.J. NEWSLETTERS, Oct. 2007, at 2.

All of these problems call for regulation that makes protection of client and societal interests the paramount concern. Imperfections in the market for legal services require oversight measures to ensure competent and ethical service to clients at a reasonable price. The central challenge is to design regulatory processes that preserve professional independence but that also secure professional accountability where market mechanisms are unable to do so. By this standard, both American and Canadian oversight structures fall short.

### I. THE UNITED STATES DISCIPLINARY PROCESS

The American disciplinary process has never lacked for critics. Over the last four decades, both bar commissions and independent scholars have identified serious problems in responses to misconduct. As Richard Abel summarized their consensus: “[T]oo little unethical behavior is named, blamed, claimed, and punished.”<sup>5</sup> Most Americans agree. Only about a third of the public believes that the bar does a good job disciplining lawyers.<sup>6</sup> “Too slow, too secret, too soft, and too self-regulated” has been a widespread complaint.<sup>7</sup> Yet lawyers themselves tend to fault the system on precisely the opposite grounds. Many see it as “unfair, oppressive, and counterproductive” for those subject to regulation.<sup>8</sup>

Both critiques have some basis in fact, although it is consumers who pay the greatest price. The basic problem is structural. As John Coffee puts it, self-regulation permits “the continued government of the guild, by the guild, and for the guild.”<sup>9</sup> What that has meant for bar discipline is too little focus on consumer protection and too much focus on lawyers’ reputational concerns. Many disciplinary authorities do not even handle garden variety misconduct—“mere” negligence and overcharging—because of resource limitations and the (erroneous) assumption that other civil liability remedies are available.<sup>10</sup> But virtually all authorities sanction misconduct committed outside of professional relationships in what is too often a misdirected effort to prevent discredit of the bar.

#### A. *The Flawed Structure of Professional Discipline*

The basic difficulty is that state supreme courts have claimed inherent authority to regulate the profession but have insufficient time, interest, or

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5. RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* 505 (2008). For the ABA’s recommendations as to new model procedures for discipline at the state bar level, see ABA COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, REPORT TO THE HOUSE OF DELEGATES ix–xvii, 40–45 (1991).

6. See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* 158 (2000); see also PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 63 (ABA ed., 1999).

7. ABA COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *supra* note 5, at xxiv.

8. ABEL, *supra* note 5, at 505.

9. John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1316 (2003). For similar views, see Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209, 231 (1996).

10. DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 983 (5th ed. 2009).

capacity to exercise that authority effectively.<sup>11</sup> Most of these courts face crushing caseloads, and their justices have neither the resources nor the expertise to ensure adequate oversight.<sup>12</sup> Nor do they have much inclination or incentive to challenge the organized bar on matters that hold great importance for lawyers but are not priorities for the general public. Judges share the background and world view of those they claim to regulate. As social theorists note, a group's distinctive norms, behaviors, and ways of thinking construct an institutional identity that shapes decision making.<sup>13</sup> Moreover, most state judiciaries are elected and depend on lawyers for endorsements, rankings, and campaign contributions.<sup>14</sup> Even in states where judges are selected through merit processes, state and local bars exercise substantial influence.<sup>15</sup> The judiciary is also dependent on support from the organized bar concerning salaries and budgets, and is readily accessible to lawyer lobbying at conferences, annual meetings, and social gatherings.<sup>16</sup> By contrast, consumer interests rarely have such opportunities for influence.

Part of the problem is the public's lack of information and incentives to mobilize on the issue. Few voters are aware of the judiciary's role in regulating the profession, and no powerful groups have sought to make such issues relevant in judicial elections.<sup>17</sup> Help Abolish Legal Tyranny (HALT), the only national consumer organization that focuses on reforming the legal profession, has only about 20,000 members.<sup>18</sup> Its resources and influence cannot compare to those of local and national bar associations that represent close to a million lawyers.<sup>19</sup> Nor have consumer protection agencies been willing to intervene and even the playing field.<sup>20</sup> A primary reason is that the individual clients and third parties most vulnerable to lawyers' misconduct lack political leverage and incentives to demand

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11. This argument draws on earlier work, including Deborah L. Rhode, *Professional Regulation and Public Service: An Unfinished Agenda*, in *THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE* 153, 161–68 (Scott L. Cummings ed., 2011); RHODE, *supra* note 6, at 158–65.

12. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1207 (2003).

13. BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 133 (2011); Barton, *supra* note 12, at 1176; Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 456, 459 (2008) [hereinafter Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*].

14. Barton, *supra* note 12, at 1187, 1195; Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, *supra* note 13, at 458.

15. Kelly Armitage, *Denial Ain't Just a River in Egypt: A Thorough Review of Judicial Elections, Merit Selection and the Role of State Judges in Society*, 29 CAP. U. L. REV. 625, 656 (2002); Barton, *supra* note 12, at 1199.

16. BARTON, *supra* note 13, at 133; Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, *supra* note 13, at 458; Barton, *supra* note 12, at 1200.

17. Barton, *supra* note 12, at 1203.

18. HALT, <http://www.halt.org/about/about-halt/> (last visited Apr. 21, 2012).

19. The American Bar Association alone has nearly 400,000 members. See *Membership*, ABA, <http://www.americanbar.org/membership.html> (last visited Apr. 21, 2012).

20. Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice*, 2009 J. PROF. LAW. 13, 25.



reform.<sup>21</sup> Most are “one shot” players who use lawyers infrequently and episodically. In other regulatory contexts, the constituency that has been most effective in mobilizing consumers or representing their interests has been public interest lawyers. But the success of their efforts often depends on financial support and pro bono contributions from the private bar.<sup>22</sup> Such assistance is hard to come by on issues that put the bar’s own interests at risk.<sup>23</sup> The few sporadic efforts that have been made to create more publicly accountable disciplinary structures have proceeded with little consumer support and have folded in the face of opposition by the bar.<sup>24</sup>

As a consequence, courts have delegated day-to-day oversight authority to bar organizations or to commissions that are nominally independent but that are closely aligned with bar interests. Lawyers can appeal disciplinary sanctions to the state supreme courts, but consumers have no effective recourse for decisions or processes that are unresponsive to their interests. Bar oversight processes are almost entirely reactive and generally respond only to complaints of serious professional misconduct or criminal convictions.<sup>25</sup> Although almost all jurisdictions have ethical rules requiring lawyers to report evidence of misconduct, these mandates are widely ignored and rarely enforced. Only about 10 percent of the complaints to disciplinary bodies come from the profession.<sup>26</sup> Yet despite lawyers’ notorious unwillingness to inform on colleagues, the most comprehensive survey found only four disciplinary actions over two decades for failure to report ethical violations.<sup>27</sup>

The resulting reliance on client grievances leads to under-inclusive remedies. The system fails to respond when clients benefit from the misconduct, as in abusive litigation practices or complicity in fraud, or when victims lack information or incentives to file complaints. Sophisticated business clients generally find that withdrawal of business or non-payment of fees are more effective remedies than those available from the disciplinary system. Even less powerful consumers who lack such options often doubt that bringing the matter to the bar will produce a satisfactory response. They are generally correct. The vast majority of grievances are dismissed without investigation because they fail to state a plausible claim within agency jurisdiction; for the remaining claims,

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21. RICHARD ABEL, *LAWYERS ON TRIAL: UNDERSTANDING ETHICAL MISCONDUCT* 476 (2011); RHODE, *supra* note 6, at 7–8, 208.

22. See Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 *STAN. L. REV.* 2027, 2074–75 (2008).

23. The only public interest legal organization that has been significantly involved in reforming the legal profession is Public Citizen, and the resources it has been able to devote to the issue are extremely limited. *Id.* at 2040.

24. For discussion of efforts in California and Florida, see ABEL, *supra* note 21, and BARTON, *supra* note 13, at 139.

25. RHODE & LUBAN, *supra* note 10, at 982–83; Judith L. Maute, *Bar Associations, Self-Regulation, and Consumer Protection: Whither Thou Goest?*, 2008 *J. PROF. LAW.* 53, 61–65.

26. ABEL, *supra* note 5, at 502.

27. See Lance J. Rogers, *Misconduct: Conference Panelists Call for Clarification of Obligation to Report Peer Misconduct*, 23 *LAW. MANUAL PROF. CONDUCT* 297 (2007).

inadequate resources often limit the effectiveness of responses.<sup>28</sup> Only about 3 percent of cases brought to disciplinary authorities result in public sanctions.<sup>29</sup> Even where the bar finds significant misconduct, sanctions are often lax and clients are not guaranteed adequate compensation.<sup>30</sup> For cases involving minor grievances of neglect, negligence, and fee disputes that authorities decline to handle, malpractice litigation is generally too expensive, and the lawyers most likely to be subject to complaints frequently lack civil liability insurance.<sup>31</sup> Although a growing number of states have alternative dispute resolution systems for minor grievances and fee disputes, few of these programs are mandatory and not all are perceived as effective by clients.<sup>32</sup> Many states also lack effective diversion systems or remedial approaches that respond to the causes of ethical violations. Attorneys too often receive reprimands rather than the training and oversight that will assist them in averting future problems.<sup>33</sup>

The problem is compounded by the absence of transparency. Most ethical violations by lawyers or inadequacies in bar responses are not visible to the public. Except in four states, bar disciplinary agencies will not disclose the existence of a complaint unless they have found a disciplinary violation or probable cause to believe that a violation has occurred. Lawyers with as many as twenty complaints under investigation have received a clean bill of health when a consumer asked for information about their records, and it has sometimes taken as many as forty-four complaints over a decade to get a practitioner disbarred.<sup>34</sup> Even where

28. See Michael S. Frisch, *No Stone Left Unturned: The Failure of Attorney Self-Regulation in the District of Columbia*, 18 GEO. J. LEGAL ETHICS 325 (2005); Maute, *supra* note 25, at 62 n.39, 64–65.

29. See Mark J. Fucile, *Law Firm Risk Management by the Numbers*, 20 PROF. LAW., no. 2, 2010, at 28.

30. See ABEL, *supra* note 5, at 500; Judith A. McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1454 (2004). Disciplinary bodies have lacked authority to impose fines or order damages, though they can condition decisions on restitution. Where restitution is not ordered or the lawyer lacks sufficient assets, victims of intentional misconduct can seek compensation from client security funds, but they are insufficient to cover most claims. See Maute, *supra* note 25, at 65 & nn.43–44; ABA CTR. FOR PROF'L RESPONSIBILITY, STANDING COMM. ON CLIENT PROT., SURVEY OF LAWYERS' FUNDS FOR CLIENT PROTECTION 2005–2007, at 27 (2008) (reflecting that funds paid for about 10 percent of claims).

31. An estimated 20 to 50 percent of lawyers lack liability insurance. See RHODE & LUBAN, *supra* note 10, at 1016.

32. See Maute, *supra* note 25, at 62 n.38. Only nine states have mandatory fee arbitration. See *Fee Arbitration for Attorney Costs*, LAWYERS.COM, <http://alternative-dispute-resolution.lawyers.com/arbitration/Fee-Arbitration-for-Attorney-Costs.html>. For discussion of disciplinary systems' lack of attention to performance issues and the rates of client dissatisfaction, see RHODE, *supra* note 6, at 159, 181; Deborah Rosenthal, *Every Lawyer's Nightmare*, CAL. LAW., Feb. 2002, at 23, 24. In Oregon's system, a majority of clients were not satisfied with the resolution of their complaints, although it is unclear how much of that dissatisfaction was related to unrealistic expectations. See generally OR. STATE BAR, ANNUAL REPORT OF THE OREGON STATE BAR CLIENT ASSISTANCE OFFICE (2006).

33. See Vivian Berger, *Mediation: An Alternative Means of Processing Attorney Disciplinary Complaints*, 16 PROF. LAW. 21, 24 (2005).

34. See Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 2 & nn.9–10 (2007); see also RHODE, *supra* note 6, at 160–61.



sanctions are imposed, the public lacks a ready way of discovering them. Not all states publish information concerning disciplinary sanctions, and many do not do so online or in forms that consumers can access.<sup>35</sup> Because the vast majority of complaints never result in public sanctions, and the vast majority of malpractice actions never result in published opinions, consumers often lack crucial knowledge about lawyers' practice histories.

The profession and the public also lack information that would enable them to assess the adequacy of disciplinary processes. Few states publish aggregate data concerning the nature of grievances, characteristics of attorneys, and sanctions imposed.<sup>36</sup> The lack of transparency concerning the treatment of complaints, and the lack of proactive oversight of corporate lawyers whose clients seldom file grievances, feeds practitioners' suspicion that the disciplinary system is biased against small firms, solo practitioners, and racial and ethnic minorities.<sup>37</sup> The studies to date have not been adequate to evaluate those concerns.<sup>38</sup> Nor do the twenty states that have diversion programs publish statistics on the effectiveness of these programs in preventing misconduct and addressing clients' concerns.<sup>39</sup>

One consequence of the profession's failure to develop adequate regulatory processes is that other decision makers have stepped into the breach and supplemented or supplanted bar oversight. For example, lawyers' complicity in some of the major financial scandals of the early twenty-first century led to no disciplinary actions but major new legislation.<sup>40</sup> Congress required, over the ABA's vehement objections, that counsel in publicly traded companies make internal reports of potential fraud to corporate leadership.<sup>41</sup> Other federal and state agencies have imposed ethical standards beyond what bar rules require, and prosecutors have brought criminal proceedings where disciplinary authorities have failed to act.<sup>42</sup> As John Leubsdorf summarizes the trend: "[M]ore and

35. Levin, *supra* note 34, at 20–21; Vesna Jaksic, *Attorney Discipline Web Data Uneven*, NAT'L L. J., Sept. 10, 2007, at 1, 7.

36. Lynn Mather, *How and Why Do Lawyers Misbehave?*, in *THE PARADOX OF PROFESSIONALISM*, *supra* note 11, at 130.

37. *Id.* at 111, 119. For example, almost half of Oregon lawyers believe that the disciplinary system is biased, largely based on the size of the disciplined lawyer's firm. A majority of African-American lawyers in Illinois believe that race plays a factor in disciplinary decisions. But only a small minority of white lawyers believe that race played a role in the disciplinary process. Levin, *supra* note 34, at 6–7.

38. Levin, *supra* note 34, at 7.

39. *Id.* at 4–6.

40. None of the lawyers involved in Enron faced bar sanctions. BARTON, *supra* note 13, at 253–54.

41. See Deborah L. Rhode & Paul D. Paton, *Lawyers, Enron and Ethics*, in *ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS* 625, 628 (Nancy Rappaport & Bala G. Dharan eds., 2004); Fred C. Zacharias, *The Myth of Self Regulation*, 93 MINN. L. REV. 1147, 1170 & n.109 (2009).

42. Paul F. Rothstein, "Anything You Say May Be Used Against You": *A Proposed Seminar on the Lawyer's Duty to Warn of Confidentiality's Limits in Today's Post-Enron World*, 76 FORDHAM L. REV. 1745, 1749 n.16 (2007) (noting the increased trend toward criminal prosecutions of lawyers in connection with clients' crimes); Schneyer, *supra* note 20, at 16–17 (noting the rise in regulation by Congress and federal agencies); Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal*

more regulators have sought to regulate the bar . . . [and] have become increasingly unwilling to defer to either bar associations or courts.”<sup>43</sup> Clients and commercial organizations have also entered the arena. Retainer agreements by large companies have included ethical mandates, insurance companies have insisted on additional ethics-related safeguards as a condition of malpractice coverage, and lawyer directories and websites have sometimes included information on disciplinary history and/or client reviews.<sup>44</sup>

Yet these initiatives have fallen short. State courts’ assertion of inherent regulatory powers have limited the scope of comprehensive administrative and legislative intervention.<sup>45</sup> And insurance companies’ leverage has been limited by the unwillingness of all but one state bar to require that lawyers have malpractice coverage.<sup>46</sup> Moreover, on some matters, such as the bar’s oversight of non-professional misconduct, there have been no external efforts to intervene, despite the inherent problems in current enforcement practices.

*B. The Undisciplined Scope of Disciplinary Review:  
Non-professional Misconduct*

Whatever its inadequacies in responding to misconduct that occurs within a lawyer-client relationship, the bar has often been highly vigilant in its responses to criminal offenses occurring outside it. That should come as no surprise. Such cases are relatively easy to pursue, because the hard investigative work has already been done by prosecutors, and the offenders are often highly unsympathetic to both the public and the profession. Virtually all states have a version of the ABA’s Model Rules of Professional Conduct that authorizes discipline for a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer, or for conduct that involves “dishonesty, fraud, deceit or misrepresentation,” or is “prejudicial to the administration of justice.”<sup>47</sup> ABA standards identify eleven aggravating circumstances and sixteen

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*Profession as “Service Providers,”* 2008 J. PROF. LAW. 189 (describing entities regulating lawyers); Zacharias, *supra* note 41, at 1169–70 (discussing agency rules and criminal prosecutions).

43. John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 961 (2009).

44. For client agreements, see Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers’ Ethics*, 80 FORDHAM L. REV. 2577 (2012). For insurance companies, see Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996). For client reviews in Avvo, Martindale-Hubbell, and the Association of Corporate Counsel, see ABEL, *supra* note 21, at 474–75.

45. See Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation: The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1, 6–13 (1990); see also *supra* notes 11–16 and accompanying text.

46. Only one state, Oregon, requires insurance, and only five others require disclosure to the client if the lawyer does not have coverage. Maute, *supra* note 25, at 71.

47. MODEL RULES OF PROF’L CONDUCT R. 8.4(b)–(d) (2011).

mitigating circumstances that can be relevant in determining sanctions,<sup>48</sup> which permits widely varying responses to similar offenses across and even within jurisdictions.<sup>49</sup>

Part of the difficulty lies in the absence of evidence linking particular conduct to the justifications for bar discipline. Courts have articulated two main rationales for professional oversight of non-professional offenses. One is protection of the public and the administration of justice from future violations of ethical standards. The other is preserving popular confidence in the integrity of lawyers and the legal system. In principle, both seem uncontroversial; in practice, both have proven highly problematic.

The public protection rationale assumes that those who break rules in non-professional settings are also likely to do so in professional settings. Yet a vast array of psychological research makes clear that ethical decision making is highly situational, and depends on circumstantial pressures and constraints.<sup>50</sup> Except in extreme cases, efforts to predict dishonesty, deviance, or other misconduct based on past acts are notoriously inaccurate, even by psychologists, psychiatrists, and other mental health experts.<sup>51</sup> Untrained disciplinary officials and judges are unlikely to do better, particularly when the factors contributing to non-professional misconduct differ vastly from those encountered in lawyer-client relationships. But many decision makers dismiss or discount the circumstances that distinguish personal from professional misconduct.

A case in point involves Laura Beth Lamb. Trapped in an abusive marriage, Lamb lost her law license for ten years after taking the bar exam for her husband.<sup>52</sup> At the time of the exam, she was seven months pregnant and suffering complications from chronic diabetes. Her husband, who had previously failed two exams, had bouts of rage and depression during which he threw heavy objects, and threatened to kill Lamb and her unborn child if she did not take the test in his place. She agreed, disguised herself as her husband, and scored ninth out of some 7,000 applicants. After an anonymous tip revealed the matter to the state bar, she pleaded guilty to felony impersonation and deception. She received a \$2,500 fine, probation, and a sentence of 200 hours of community service. When she was fired from her job at the SEC, she took a position as a legal secretary. She also

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48. ABA, STANDARDS FOR IMPOSING LAWYER SANCTIONS 26–28 (2005), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/standards\\_sanctions.athcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/standards_sanctions.athcheckdam.pdf).

49. See *infra* notes 52–64 and accompanying text.

50. See generally JOHN M. DORIS, LACK OF CHARACTER (2002); PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL (2007); Gilbert Harman, *Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error*, 99 PROC. ARISTOTELIAN SOC'Y 315 (1999); Walter Mischel & Yuichi Shoda, *A Cognitive-Affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure*, 102 PSYCHOL. REV. 246 (1995); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 557–59 (1985); Alice Woolley, *Tending the Bar: The “Good Character” Requirement for Law Society Admission*, 30 DALHOUSIE L.J. 27 (2007).

51. See Rhode, *supra* note 50, at 558–59 (citing sources).

52. *In re Lamb*, 776 P.2d 765 (Cal. 1989).

divorced her husband and received psychological treatment. Despite her therapist's conclusion that Lamb "was unlikely to 'do anything remotely like this again,'" the California Supreme Court reasoned that her deceitful acts were of "exceptional gravity" and warranted disbarment.<sup>53</sup> In the court's view, the "legal, ethical, and moral pressures of daily practice come in many forms. Besides raw avarice and self-aggrandizement, they may include the sincere but misguided desire to please a persuasive or overbearing client . . ." <sup>54</sup> Yet for the court to equate the pressure of an insistent client to that of an abusive, mentally unstable spouse suggests a profound insensitivity to the risks of battering a pregnant woman.<sup>55</sup>

In a recent Massachusetts case, another victim of domestic violence had her license suspended for conduct unlikely to recur in any professional setting.<sup>56</sup> Fawn Balliro, an assistant district attorney, was assaulted by a man in Tennessee with whom she was romantically involved. A neighbor alerted the police, which led to misdemeanor assault charges. The defendant pressured Balliro to drop the charges because he was on probation for drug offenses, and if he was convicted, he would be incarcerated and no one would be available to support his two minor daughters. Balliro was unsuccessful in preventing the prosecution, and when called as a witness, testified falsely that her injuries occurred while falling. The case was dismissed, and the Tennessee prosecutor informed the Massachusetts District Attorney's Office that employed her of the suspected perjury. The Office put Balliro on leave until she agreed to undergo counseling and report her conduct to disciplinary authorities. She did so, and the bar recommended a public reprimand, partly on the basis of psychiatric testimony indicating that she was highly unlikely to commit such an act again.<sup>57</sup> The Massachusetts Supreme Court, however, concluded that false testimony under oath could not be condoned, "irrespective of the circumstances," and suspended her from practice for six months.<sup>58</sup> In so ruling, the court noted the perceived inequity of giving her a greater penalty than the two-month suspension previously imposed on a lawyer who had assaulted his estranged wife.<sup>59</sup> In the justices' view, however, lying under oath was a more serious offense than battery, despite the mitigating circumstances.

In most published decisions involving non-professional conduct, courts do not even bother to consider the likelihood of its replication in a professional relationship. It is enough that the conduct threatens the

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53. *Id.* at 767–68.

54. *Id.* at 769.

55. See PAN-AM. HEALTH ORG., DOMESTIC VIOLENCE DURING PREGNANCY 1–2 (2000), available at [http://www.planetwire.org/files.fcgi/2368\\_violencepregnancy.PDF](http://www.planetwire.org/files.fcgi/2368_violencepregnancy.PDF); Loraine Bacchus et al., *Domestic Violence: Prevalence in Pregnant Women and Associations with Physical and Psychological Health*, 113 EUR. J. OBSTETRICS & GYNECOLOGY & REPRODUCTIVE BIOLOGY 6, 6 (2004).

56. *In re Balliro*, 899 N.E.2d 794, 805 (Mass. 2009).

57. *Id.* at 796–98.

58. *Id.* at 804.

59. *Id.* at 804–05 (citing *In re Grella*, 777 N.E.2d 167 (Mass. 2002)).

reputation of the profession. A representative example involves Albert Boudreau, a Louisiana lawyer convicted of importing several magazines, and a video, of child pornography.<sup>60</sup> Boudreau purchased the items in the Netherlands, where the magazines were lawful and the models were of legal age to be photographed nude. They were underage by American definitions, however.<sup>61</sup> The Louisiana Supreme Court agreed with the disciplinary board that the actions constituted a “stain upon the legal profession,” and clearly reflected on the lawyer’s “moral fitness to practice law.”<sup>62</sup> Despite the absence of any prior disciplinary record, or any relationship between personal and professional conduct, the court ordered disbarment.<sup>63</sup>

If the goal of such sanctions is to ensure public confidence, surely a better strategy would be to make the oversight process more responsive to professional misconduct, and less idiosyncratic in its responses to non-professional offenses. It can scarcely enhance respect for bar discipline when lawyers guilty of such offenses receive wildly different treatment, and the focus is professional reputation rather than public protection. Sanctions for drug offenses, tax evasion, and domestic violence now range from reprimand to disbarment, and decision makers often disagree about the appropriate response in the same case.<sup>64</sup> As former Supreme Court Justice Robert H. Jackson noted in a related context, a standard like moral turpitude, which permits decisions to turn on reactions of “particular judges to particular offenses,” invites caprice and clichés.<sup>65</sup> Surely a profession concerned about the legitimacy of its own regulation should aspire to do better.

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60. *In re Boudreau*, 815 So. 2d 76, 76 (La. 2002).

61. *Id.* at 78.

62. *Id.* at 78–79.

63. *Id.* at 79–80.

64. For drugs, see *Florida Bar v. Liberman*, 43 So. 3d 36, 37 (Fla. 2010) (disbarment for supplying friends with small amounts of methamphetamine and Ecstasy); *In re Lewis*, 651 S.E.2d 729, 730 (Ga. 2007) (two-year suspension for possession of cocaine); *In re Vegter*, 835 N.E.2d 494 (Ind. 2005) (public reprimand for marijuana possession); *State ex rel. Okla. Bar Ass’n v. Smith*, 246 P.3d 1090, 1095 (Okla. 2011) (public censure and one-year deferred suspension); Brian K. Pinaire et al., *Barred from the Bar: The Process, Politics, and Policy Implications of Discipline for Attorney Felony Offenders*, 13 VA. J. SOC. POL’Y & L. 290, 319 (2006). For tax evasion, see Pinaire et al., *supra*, at 319; *Tax Evasion Aggravated by High Lifestyle Nets Year-Long Suspension for Two Lawyers*, 26 LAW. MANUAL PROF. CONDUCT 14 (2010). For domestic violence, see Ignascio G. Camarena II, Comment, *Domestically Violent Attorneys: Resuscitating and Transforming a Dusty, Old Punitive Approach to Attorney Discipline into a Viable Prescription for Rehabilitation*, 31 GOLDEN GATE U. L. REV. 155, 173 (2001). For an illustration of disagreements on the same facts, see *In re Lever*, 869 N.Y.S.2d 523, 524, 528 (App. Div. 2008), which involved an associate who used his office computer to solicit sex by pretending to be a thirteen-year-old girl. The referee recommended a six-month suspension; the court imposed a three-year suspension, and two judges voted to disbar him.

65. *Jordan v. DeGeorge*, 341 U.S. 223, 239 (1951) (Jackson, J. dissenting).

## II. THE CANADIAN DISCIPLINARY SYSTEM

### A. Overview and Critiques

Provincial law societies regulate Canadian lawyers. As independent administrative agencies exercising jurisdiction granted by statute, these societies determine the standards for admission and discipline, as well as investigate and sanction lawyer misconduct.<sup>66</sup> Law societies also exercise various other regulatory powers, such as mandating continuing legal education, conducting practice audits, establishing trust accounting rules, and governing the insurance plans to which all Canadian lawyers must belong. Somewhat unusually for a Canadian independent administrative agency, law societies also have rulemaking authority.<sup>67</sup>

The law societies' governing statutes direct them to "uphold and protect the public interest in the administration of justice"; many also call on them to "uphold and protect the interests of [their] members."<sup>68</sup> "Bencher" elected from members of the profession govern each law society, along with a small number of appointed "lay" benchers.<sup>69</sup> Disciplinary decisions—about whether misconduct has occurred and what should be the appropriate sanction—are made by a panel of benchers. They are usually unpaid.<sup>70</sup>

In recent years, the law societies have increased their efforts to work together to adopt national strategies on questions of professional ethics and conduct. The Federation of Law Societies (Federation), an informal umbrella organization with representatives from each law society, has undertaken initiatives to require accreditation of Canadian common-law law schools, to facilitate mobility of lawyers between the provinces, and to develop a national code of conduct.<sup>71</sup> Although the accreditation and national code initiatives are still ongoing, they seem likely to succeed in significant part.<sup>72</sup> Neither the law societies nor the Federation undertake lobbying or similar activities; representation and advocacy for the profession are matters for the Canadian Bar Association.

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66. *See, e.g.*, Legal Profession Act, R.S.A. 2000, c. L-8 (Can.); Legal Profession Act, S.B.C. 1998, c. 9 (Can.); Law Society Act, R.S.O. 1990, c. L.8 (Can.); Professional Code, R.S.Q., c. C-26 (Can.).

67. *See* Legal Profession Act, S.S. 1990, c. L-10.1, s. 10 (Can.); Legal Professions Act, S.N.S. 2004, c. 28, s. 5(8) (Can.).

68. *See, e.g.*, Legal Profession Act, S.B.C. 1998, c. 9, s. 3 (Can.). In British Columbia the power to act in the interests of the profession is subordinate to the public interest. *Id.* That is not the case in some of the other provinces. For example, the Law Society of Alberta has the power to sanction any conduct that harms the reputation of the profession. *See* Legal Profession Act, R.S.A. 2000, c. L-8, s. 49 (Can.).

69. In Alberta, the power to appoint is vested in the Minister of Justice. *See* Legal Profession Act, R.S.A. 2000, c. L-8, s. 11 (Can.). In Ontario, it is the Lieutenant-Governor in Council. Law Society Act, R.S.O. 1990, c. L-8, s. 1 (Can.).

70. The exception to this is Ontario, where benchers are compensated in some circumstances.

71. *See National Regulatory Initiatives*, FED'N L. SOC'YS CAN., <http://www.flsc.ca/en/national-standards/> (last visited Apr. 21, 2012).

72. The accreditation program is relatively modest compared to the U.S. system, and many provinces are revising the code prior to adoption.



This structure gives the Canadian bar considerable autonomy; indeed, Canada may be the “last bastion of unfettered self-regulation of the legal profession in the common law world,” given that Australia, New Zealand, England and Wales, and other common law countries have significantly increased the role of non-lawyers in regulating the profession, and the United States has always involved state courts in the disciplinary process.<sup>73</sup> Canadian courts do exercise limited regulatory authority over lawyers through their inherent jurisdiction to control their own processes. That authority includes imposing costs on lawyers personally for unethical conduct, establishing the law on conflicts and privilege, and otherwise controlling the conduct of litigation before the courts.<sup>74</sup> This judicial authority is distinct, however, from the power of the law societies, and is subject to significant constraints. Courts cannot suspend or disbar lawyers, cannot impose consequences for patterns of conduct, and cannot sanction conduct that occurs outside of the litigation context.<sup>75</sup> Although other regulatory bodies—such as securities commissions—have the power to impose practice requirements, this authority as yet has had little substantive impact on Canadian lawyers’ ethical and legal obligations.<sup>76</sup>

Like their American counterparts, the Canadian law societies have been subject to significant criticism. Harry Arthurs characterizes Canadian lawyer regulation as reflecting an “ethical economy,” in which law societies focus disciplinary attention on marginal members of the profession who have engaged in obviously immoral conduct or who have violated the regulatory requirements imposed by the law societies. Arthurs suggests that law society discipline “reflects a tendency to allocate its scarce resources of staff time, public credibility and internal political consensus to those disciplinary problems whose resolution provides the highest returns to the profession with the least risk of adverse consequences.”<sup>77</sup> High-reward discipline cases are those that enhance “public goodwill or professional

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73. See ALICE WOOLLEY, UNDERSTANDING LAWYERS’ ETHICS IN CANADA 4, 4–9 (2011).

74. See, e.g., *R. v. Neil*, [2002] 3 S.C.R. 631 (Can.) (establishing a rule for duty of loyalty); *Smith v. Jones*, [1999] 1 S.C.R. 45 (Can.) (establishing a rule for solicitor-client privilege); *Walsh v. 1124660 Ontario Ltd.*, [2002] O.J. No. 4069, 116 A.C.W.S. (3d) 755 (Can. Ont. S.C.J.) (imposing costs of litigation on the defendant lawyer); *MacIntyre v. Dickie*, [1996] O.J. No. 1336 (Can. Ont. Gen. Div.) (imposing costs of discovery on the defendant lawyer); WOOLLEY, *supra* note 73, chs. 5, 8; Adam M. Dodek, *The Public Safety Exception to Solicitor-Client Privilege: Smith v. Jones*, 34 U. BRIT. COLUM. L. REV. 293, 293–94 (2001).

75. The exception is the taxation power—any lawyer account can be taxed, whether or not related to litigation.

76. See, e.g., *Wilder v. Ontario Sec. Comm’n*, [2001] O.J. No. 1017, 53 O.R. (3d) 519 (Can. Ont. C.A.).

77. Harry W. Arthurs, *Why Canadian Law Schools Do Not Teach Legal Ethics*, in ETHICAL CHALLENGES TO LEGAL EDUCATION AND CONDUCT 105, 112 (Kim Economides et al. eds., 1998) [hereinafter Arthurs, *Canadian Law Schools*]; see also Harry W. Arthurs et al., *Canadian Lawyers: A Peculiar Professionalism*, in 1 LAWYERS IN SOCIETY: THE COMMON LAW WORLD 123–85 (Richard L. Abel & Philip S.C. Lewis eds., 1988); H.W. Arthurs, *The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?*, 33 ALTA. L. REV. 800, 801–02 (1995).

solidarity”]; high-risk discipline cases are those that diminish them.<sup>78</sup> Arthurs notes that most lawyers who get disbarred are guilty of misappropriation of client funds or other obvious wrongdoing, or have shown themselves unwilling to respect law society authority; very few lawyers are disciplined for incompetence or other more ambiguous types of professional misconduct.<sup>79</sup> Further, disciplinary sanctions tend to disproportionately target lawyers in solo practice or small partnerships. This may be in part because those lawyers engage in higher risk types of practice (such as conveyancing) or lack “collegial supports and controls,” but also, more disturbingly, may be because they are at the margins of the profession in power and status.<sup>80</sup> A review of law society decisions confirms Arthurs’s characterization. In 2009, for example, most lawyers were sanctioned for obviously immoral conduct or for defying the regulatory authority of the law societies, and most lawyers brought before the law society practiced alone or in a firm of fewer than ten lawyers.<sup>81</sup>

Other critics of law societies identify a wide range of failures. These include: ineffective regulation of competence; lack of performance standards for lawyers undertaking particular tasks; lack of adequate (or any, in some jurisdictions) regulation of law firms; insufficient responses to unethical billing; inattention to inequities in access to justice; excessive concern with professional reputation; and mishandling of specific cases.<sup>82</sup> After citing ten failures in law societies’ responses to issues such as disclosure of imminent financial harm, competence, sexual relations between lawyers and clients, continuing legal education, fees, pro bono, and self-regulation, Richard Devlin and Porter Heffernan noted:

Our point . . . is not to immediately proclaim “regulatory failure” or suggest that self-regulation is irremediably unsalvageable. Rather, our purpose is to indicate that the current Canadian complacency [about lawyer regulation] is unwarranted. At every level of the regulatory regime—establishing standards, monitoring conduct, and enforcing penalties—there appears to be serious problems that

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78. Arthurs, *Canadian Law Schools*, *supra* note 77, at 112.

79. *Id.* at 113.

80. *Id.* at 115.

81. See Alice Woolley, *Regulation in Practice*, 15 LEGAL ETHICS (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1976090](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1976090).

82. Richard F. Devlin & Porter Heffernan, *The End(s) of Self-Regulation?*, 45 ALTA. L. REV. (SPECIAL ISSUE) 169 (2008); Adam M. Dodek, *Regulating Large Law Firms* (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1984635](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984635); Gavin MacKenzie, *Regulating Lawyer Competence and Quality of Service*, 45 ALTA. L. REV. (SPECIAL ISSUE) 143, 150 (2008); Michael Trebilcock, *Regulating the Market for Legal Services*, 45 ALTA. L. REV. (SPECIAL ISSUE) 215, 224 (2008); Alice Woolley, *Ethics as Regulation: A Comment on Merchant v. Law Society of Saskatchewan*, 72 SASK. L. REV. 279, 290–92 (2009) [hereinafter Woolley, *Ethics as Regulation*]; Alice Woolley, *Time for Change: Unethical Hourly Billing in the Canadian Profession and What Should Be Done About It*, 83 CAN. B. REV. 859, 860–61 (2004) [hereinafter Woolley, *Time for Change*]; Woolley, *supra* note 2, at 107–41.

require us to question whether self-regulation is truly in the public interest.<sup>83</sup>

### B. A Flawed Structure

Many of the reasons for the limited effectiveness of Canadian regulatory processes match those identified in the American system. The most significant barrier to effective bar oversight arises from the regulatory structure itself. A province-based system has limited ability to access any economies of scale. While the law society of Ontario can draw resources (financial and personnel) from some 30,000 members, the law society of Saskatchewan can draw from only 1,500; yet both law societies are expected to offer the full range of regulatory oversight, and to respond to all forms of lawyer misconduct.<sup>84</sup> Even in the larger provinces of Ontario and Quebec, available resources may fall short of meeting regulatory needs. Law societies have the broad and complex task of formulating as well as enforcing regulatory policies. Yet these societies depend on modest member dues to fund services, and on the (mostly volunteer) time of lawyers to implement their regulatory agenda.<sup>85</sup> No other area of complex economic activity in Canada relies so heavily on regulation through the volunteer efforts and financial support of the group being regulated. It is scarcely surprising that the system falls short.

These problems are compounded by a highly autonomous regulatory structure. It may well be that any lawyer regulatory structure will be vulnerable to capture by its subjects on at least some issues.<sup>86</sup> In the Canadian system, however, no capture is necessary. Lawyers control every aspect of the governance process, and have the statutory authority to regulate in their own interests. No countervailing forces have a meaningful voice. No elaborate conspiracy theory is required to suggest that such a regulatory structure is likely to privilege professional over public interests, and to focus attention on contexts where those interests align: clear moral misconduct by the least powerful members of the bar.

As in the United States, consumers in Canada have not effectively organized to demand a more effective oversight process. Despite the widespread criticism by experts, the public has voiced almost no comparable concerns. Even events that seem most likely to attract negative publicity, such as exposure of a sexual relationship between the head of the Law Society of Upper Canada (Ontario) and a vulnerable client, or the conviction of the President of the Law Society of British Columbia on charges related to drunk driving, have attracted relatively little public

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83. Devlin & Heffernan, *supra* note 82, at 182.

84. Saskatchewan had to address the best-known legal ethics scandals of the last fifteen years in Canada: the solicitation of clients and fee abuses by Anthony Merchant in relation to the Indian residential schools litigation. *Id.* at 176–77.

85. As noted earlier, in most provinces benchers are not compensated; in Ontario, they are paid once their time commitment reaches a certain level.

86. Duncan Webb, *Are Lawyers Regulatable?*, 45 ALTA. L. REV. (SPECIAL ISSUE) 233, 253 (2008).

attention and no suggestion that those events demonstrate regulatory failure.<sup>87</sup> Although no evidence indicates that the public's view of lawyers is more positive in Canada than in other nations, any disenchantment with the profession has not led to activism or calls for change.

The lack of consumer engagement may have multiple causes, including the diffusion of regulation across the provinces; the absence of a prominent role for lawyers in Canadian history or public life; and the inaccessibility of information about lawyer misconduct and regulatory failures. Most law society disciplinary decisions are publicly available through CanLII and in addition, each law society provides statistics in its annual report about the number of active and inactive lawyers in the province, the number of complaints, and the imposition of serious sanctions.<sup>88</sup> No publicly available information is available, however, on complaints that do not result in sanctions, or about the number of complaints that have been made against a lawyer. Although law societies issue ethics opinions to lawyers who request them, the rulings are not available to other practitioners in any readily accessible form.

In addition, the limited jurisdiction of the law societies leaves many aggrieved parties without an effective remedy. Although the societies normally respond to disciplinary matters only when brought to their attention by complaints, generally from clients, these societies cannot provide meaningful compensation.<sup>89</sup> The absence of such remedies diminishes parties' incentives to complain and, in turn, also diminishes the profession's opportunities to respond. A further problem is the failure of Canadian academics and law schools to make lawyers' ethical and regulatory responsibilities a primary area of concern. In many Canadian law schools, legal ethics has not been a required course. Despite recent improvements, only a handful of Canadian legal academics work primarily in the area of legal ethics, and only slightly more have written about the

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87. *Law Soc'y of Upper Can. v. Hunter*, 2007 ONLSHP 27 (CanLII); *Law Soc'y of B.C. v. Berge*, 2005 L.S.B.C. 28 (CanLII).

88. See CANLII, <http://www.canlii.org>; see also, e.g., LAW SOC'Y OF ALTA., ANNUAL ACCOUNTABILITY REPORT (2009), available at [http://www.lawsociety.ab.ca/files/financial/Annual\\_Report\\_2009.pdf](http://www.lawsociety.ab.ca/files/financial/Annual_Report_2009.pdf).

89. On occasion, law societies discover financial misconduct through the audit process. In addition, the Law Society of Upper Canada has introduced a process for judges to make complaints about lawyers that will result in mentoring rather than disciplinary proceedings. This process is designed to ensure that judges are not deterred from reporting lawyers because of concerns that the sanctions may be too severe. See Letter from Malcolm L. Heins, CEO, Law Soc'y of Upper Can., to the Honourable Madam Justice Heather Forster Smith, Chief Justice of the Superior Court of Justice (Mar. 31, 2010), [http://www.lsuc.on.ca/media/mar3110\\_scj\\_protocol.pdf](http://www.lsuc.on.ca/media/mar3110_scj_protocol.pdf). As in the United States, lawyers have an ethical obligation to report misconduct by other lawyers, but this obligation is generally not fulfilled, and lawyers who do complain about other counsel may be perceived as doing so for strategic or tactical reasons. The Law Society of Upper Canada has some ability to order lawyers to repay fees to a client or contribute to a general compensation fund. See Law Society Act, R.S.O. 1990, c. L.8, parts 13 & 14 (Can.). Some law societies will undertake fee arbitration between lawyers and clients. See, e.g., LAW SOC'Y OF MAN., CONCERNS ABOUT YOUR LAWYER, <http://www.lawsociety.mb.ca/for-the-public/concerns-about-your-lawyer#fees> (last visited Apr. 21, 2012).

subject at all.<sup>90</sup> This absence of scholarly interest restricts the information available to the public concerning problems in oversight processes.

This is not to impugn the good faith efforts by law societies to live up to their regulatory responsibilities. But it is to underscore the structural and resource limitations that keep those efforts focused on egregious or readily proved misconduct, and that leave many problems unaddressed. Competence, counseling, fees, litigation conduct, and lawyering in large firms frequently fall outside law society oversight.

### C. Regulation of Character

Although a great deal of lawyers' professional conduct remains insulated from regulatory attention, their personal behavior is a common focus of bar discipline. Law societies do not hesitate to sanction lawyers convicted of crimes unrelated to legal practice, even where there is no reason to believe that the lawyer has engaged in professional misconduct or is at risk of doing so.

As in the United States, this willingness may be partly attributable to the lack of evidentiary problems and to the morally distasteful nature of the lawyer's misconduct.<sup>91</sup> And, as noted earlier, many law societies have express authority to regulate in the interests of the profession, which includes maintaining lawyers' reputations in the eye of the public.<sup>92</sup>

In one recent example, the Law Society of Upper Canada (Ontario) considered the conduct of a nationally prominent energy lawyer who was convicted of sexual exploitation of two girls between the ages of fifteen and eighteen. The lawyer was a friend of the girls' family, the relationships were consensual, and the girls retained a positive attitude toward the

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90. See, e.g., Adam M. Dodek, *Canadian Legal Ethics: A Subject in Search of Scholarship*, 50 U. TORONTO L.J. 115 (2000). For improvements, see Adam M. Dodek, *Canadian Legal Ethics: Ready for the Twenty-First Century at Last*, 46 OSGOODE HALL L.J. 1 (2008). More scholars teach in the area than write in it. With the Federation of Law Societies's new requirement that every common-law law school teach legal ethics, it may be that—as happened following the ABA's requirement of a mandatory law school course—legal ethics will become a more active area of legal scholarship.

91. The criminal conviction proves the case, and the lawyer has no right to re-argue it in a different setting. *Toronto v. Canadian Union of Pub. Emps., Local 79*, [2003] S.C.R. 77 (Can.).

92. See, e.g., Legal Professions Act, R.S.A. 2000, c. L-8, s. 49(1) (Can.) (defining the power of the Law Society to discipline matters whether or not occurring within the lawyer's practice, and either in the best interests of the public or of the profession). In Ontario, Rule 1.02 of the Rules of Professional Conduct defines "conduct unbecoming" as conduct "in a lawyer's personal or private capacity, that tends to bring discredit upon the legal profession." LAW SOC'Y OF UPPER CAN., RULES OF PROF'L CONDUCT 1 (2000). For examples of reliance on protecting the profession's reputation, see *Law Soc'y of Man. v. Dolovich*, 2010 MBLS 11 (CanLII); *Law Soc'y of Upper Can. v. Horgan*, [2010] L.S.D.D. No. 14, paras. 14–15 (Can.); *Law Soc'y of B.C. v. Berge*, 2005 LSBC 28, paras. 83–87 (CanLII); *Law Soc'y of B.C. v. Rodgers*, 2005 LSBC 42, para. 9 (CanLII); *Law Soc'y of Upper Can. v. Mills*, 2005 ONLSHP 5, para. 30 (CanLII); *Law Soc'y of Upper Can. v. Johnston*, [2003] L.S.D.D. No. 21, para. 37 (Can.); *Law Soc'y of Man. v. Bjornson*, [1996] L.S.D.D. No. 258 (Can.); *Law Soc'y of Upper Can. v. Morra*, [1995] L.S.D.D. No. 171, para. 26 (Can.).

lawyer, even after his criminal conviction.<sup>93</sup> According to the trial judge, they were not “‘true victims’ in the ordinary sense of the word” and were “not seriously negatively impacted by their overall relationship with the accused.”<sup>94</sup> The trial judge nonetheless sentenced the lawyer to a brief period of incarceration based on his breach of trust. In disciplinary proceedings, an expert testified that the lawyer was extremely unlikely to re-offend; there was no evidence to suggest misconduct in the lawyer’s professional life.<sup>95</sup> One of the girls wrote a letter expressing her support and sympathy for the lawyer. Nonetheless, the Law Society revoked his license to practice based on the seriousness of his breach of trust, the need to deter similar conduct, and the importance of ensuring public confidence in the legal profession. The Society stated:

The issue of general deterrence is an important factor by itself, but it also has a connection to the maintenance of the standing and integrity of lawyers before the public. . . . In our view, general deterrence of lawyers from engaging in exploitative sexual behaviour, and maintaining the public’s confidence in the status of lawyers and their entitlement to practise as a self-regulating profession, are two sides of the same coin.<sup>96</sup>

Yet for reasons noted earlier, the normative and empirical foundations for this focus on reputational concerns are weak.<sup>97</sup> No evidence suggests that sanctioning non-professional conduct is an effective way of promoting public confidence. More attention to lawyers’ misconduct in professional settings might better safeguard the image of attorneys and the credibility of regulatory processes. A more defensible justification for sanctions based on lawyers’ personal conduct is that personal misconduct is predictive of future professional conduct. This rationale is most plausible when the actions closely relate to the lawyer’s legal practice, or arise from opportunities afforded by the lawyer’s practice.<sup>98</sup> But in many contexts, such as the one reflected in *Law Society of Upper Canada v. Budd*, the relationship is highly attenuated, and the empirical evidence summarized earlier underscores the impossibility of accurately predicting future moral behavior based on conduct occurring in different factual circumstances.<sup>99</sup> Law societies generally take no account of such evidence, and expect that the public will assume a connection between personal and professional conduct.

93. *Law Soc’y of Upper Can. v. Budd*, [2009] L.S.D.D. No. 141, para. 6 (Can.).

94. *Id.* at paras. 16–17.

95. *Id.* at para. 58.

96. *Id.* at paras. 86–87.

97. See generally Alice Woolley, *Legal Ethics and Regulatory Legitimacy: Regulating Lawyers for Personal Misconduct*, in *ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION* 241 (Francesca Bartlett et al. eds., 2011).

98. In *Law Society of Upper Canada v. Johnston*, [2003] L.S.D.D. No. 21 (Can.), a Crown attorney was prosecuted for paying for sexual services from a minor. He had met at least one of the women he solicited in his capacity as a Crown attorney. Again, while this was not conduct arising in his legal practice, it was a clear abuse of an opportunity provided by his practice, and sanctioned as such. *Id.* at paras. 10, 32.

99. See *supra* notes 50–51 and accompanying text.



For example, in *Law Society of Manitoba v. Dolovich*, the Law Society justified the disbarment of a lawyer convicted of possessing and distributing child pornography on the basis that his disrespect for law would make him untrustworthy in the eyes of the public.<sup>100</sup>

The concern raised by Mr. Dolovich's convictions of possession and distribution of child pornography is not that he is medically or psychologically unfit to practice law. Rather, the concern is that neither the public nor Mr. Dolovich's fellow lawyers can have any confidence or trust in him to represent citizens in legal matters or to research and explain legal issues when his conduct reveals such a profound lack of respect for the laws of this country.<sup>101</sup>

Other decision makers have similarly suggested that personal misconduct can so "shatter . . . [a lawyer's] professional integrity" that public trust will be impossible.<sup>102</sup> In effect, these assertions simply restate the argument based on professional reputation in different terms.

Yet the concern with public image is not always consistent. *Law Society of Upper Canada v. Tassy* involved a lawyer who had developed a somewhat pathological attitude towards cyclists.<sup>103</sup> On three different occasions he was convicted of assaulting bicycle riders, which he defended as a response to the cyclists' "discourteous and dangerous" acts.<sup>104</sup> The bar hearing panel raised the possibility that Tassy might have a mental illness and recommended a reprimand if he could provide a psychiatric report indicating his fitness to practice law. He did so and received only that sanction. Although that result does not seem unreasonable, it is hard to reconcile with other Law Society rulings. Decision makers concerned with professional reputation might be reluctant to be so lenient with a seemingly unstable lawyer who assaulted three cyclists, one of them a child, and showed no remorse. But if, as the result in *Tassy* suggests, the primary goal should be public protection, which is assured by a psychiatric affidavit concerning fitness, why is this approach not appropriate in other cases like *Budd* or *Dolovich*?

As these cases suggest, decision making on personal conduct is as inconsistent in Canada as in the United States. Canadian lawyers can be disbarred for conduct far removed from practice, as in *Budd* or *Dolovich*, but only reprimanded or fined for conduct that is equally serious or more closely related to practice, such as violating a court order and committing assault,<sup>105</sup> threatening someone with a weapon,<sup>106</sup> evading taxes,<sup>107</sup> lying

100. See *Law Soc'y of Man. v. Dolovich*, 2010 MBLS 11 (CanLII).

101. *Id.*

102. *Cwinn v. Law Soc'y of Upper Can.*, 108 D.L.R. 3d 381, para. 10 (Can. Ont. Div. Ct.).

103. *Law Soc'y of Upper Can. v. Tassy*, [1997] L.S.D.D. No. 46 (Can.).

104. *Id.* In two cases, he hit them with a walking stick. *Id.* at para 18. In another case, he shoved a young boy and the boy's older sister. *Id.* at para. 28.

105. See *Law Soc'y of Man. v. Bjornson*, [1996] L.S.D.D. No. 258 (Can.).

106. See *Law Soc'y of B.C. v. Rodgers*, [2005] L.S.D.D. No. 125 (Can.).

107. See *Law Soc'y of Man. v. Ament*, [1993] L.S.D.D. No. 150 (Can.).

to the police,<sup>108</sup> or committing fraud.<sup>109</sup> These varying results are partly attributable to the broad range of factors that law societies can consider, such as remorse, rehabilitation, and prior professional conduct.<sup>110</sup> Although taking such factors into account may seem reasonable in principle, when the practice is coupled with the subjective nature of judgments, the concerns about public image, and the lack of empirical foundations for predictions about future conduct, the results appear highly idiosyncratic. Such a process is scarcely conducive to inspiring public confidence.

### III. ALTERNATIVE REGULATORY MODELS

Other countries with legal systems comparable to the United States and Canada have moved in a direction of greater responsiveness to consumer concerns, and could serve as appropriate models for reform. These countries have established co-regulatory structures in which the bar shares authority with other, more publicly accountable entities. Although systematic research will be necessary to evaluate the effectiveness of these reforms, their frameworks hold promise for dealing with the structural problems that have plagued the United States and Canadian systems.

#### A. Consumer-Oriented Reforms

Traditionally, barristers and solicitors in England and Wales were governed by their own professional societies, which performed both representational and regulatory functions. In 2007, after widespread criticism and review, Parliament enacted a new Legal Services Act that identifies “protecting and promoting the interests of consumers” as one of its key objectives.<sup>111</sup> The Act establishes an independent Legal Services Board that has responsibility for oversight of legal services in England and Wales, with a majority of lay members and a lay chair. The Board approves a frontline regulator for each class of licensed legal providers. The approved regulators retain disciplinary responsibility for complaints that allege serious professional misconduct, but must create a largely independent body to exercise oversight.<sup>112</sup> In addition, the governance body of the largest regulator, the Solicitors Regulation Authority, will by 2013 have a majority of lay members.<sup>113</sup> If an approved regulator is too slow or ineffective in exercising its authority, the Board may fine the regulator, make remedial orders, or withdraw its oversight powers.<sup>114</sup>

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108. *See* Law Soc’y of N.W.T. v. McCauley, [1993] L.S.D.D. No. 213 (Can.).

109. *See* Law Soc’y of Upper Can. v. Reid, [1993] L.S.D.D. No. 27 (Can.).

110. *See, e.g.*, Law Soc’y of Man. v. Ament, [1993] L.S.D.D. No. 150 (Can.).

111. Legal Services Act of 2007, c. 29, § 1(d) (Eng.).

112. *Id.* § 4. The approved regulator for solicitors is the Law Society of England and Wales, and disciplinary jurisdiction rests with the Solicitors Regulation Authority.

113. *See* LAW SOC’Y GEN. REGS., § 14(6) (2008), <http://www.lawsociety.org.uk/documents/downloads/generalregulations.pdf>.

114. *See* Schneyer, *supra* note 20, at 27.

Less serious complaints involving performance issues are addressed by the Legal Ombudsman, created by the Office for Legal Complaints, and subject to the authority of the Legal Services Board.<sup>115</sup> The Ombudsman determines an outcome between the lawyer and the client that is “fair and reasonable,” taking into account how a court would perceive the relationship between the lawyer and client, the applicable rules of conduct, and what the “ombudsman considers to have been good practice at the time of the act/omission.”<sup>116</sup> The Ombudsman may require the lawyer to apologize, refund or waive fees, or pay compensation up to £30,000 for financial losses or “inconvenience/distress,” and may also take action to put right “any specified error, omission or other deficiency.”<sup>117</sup>

Parties with complaints must first approach lawyers to seek resolution within a given period set by a statute of limitations.<sup>118</sup> If unsuccessful, they may then approach the Ombudsman, who must resolve any grievances in accordance with the requirements of procedural fairness, including a hearing where appropriate.<sup>119</sup> The Legal Ombudsman may dismiss a complaint if he or she believes that it has no “reasonable prospect of success” or is frivolous or vexatious; if the complainant did not suffer “financial loss, distress, inconvenience or other detriment”; if the lawyer already offered “fair and reasonable redress”; if the matter would be more appropriately dealt with by a court or “there are other compelling reasons why it is inappropriate for the issue to be dealt with by the Legal Ombudsman.”<sup>120</sup> The Legal Ombudsman also has other powers, such as the authority to investigate, to advise a client that a related complaint could have been brought against another lawyer or law firm, and, if the complaint indicates professional misconduct, to advise the regulatory body responsible for that lawyer.<sup>121</sup> Every time a complaint is made against a lawyer that is not resolved in that lawyer’s favor, the lawyer must pay a £400 “case fee” in addition to any other sanctions the Legal Ombudsman imposes.<sup>122</sup> England and Wales have also authorized creation of alternative practice structures that will allow non-lawyer ownership and will subject the entity to regulatory oversight.<sup>123</sup> This new regime reflects a form of “principles-

115. See Legal Services Act 2007, c. 29 (Eng.); LEGAL OMBUDSMAN, SCHEME RULES, R. 2.1, 2.7, 2.8 (2011). The Ombudsman’s Scheme Rules are approved by the Legal Services Board.

116. LEGAL OMBUDSMAN, *supra* note 115, at R. 5.37.

117. *Id.* at R. 5.38, 5.40, 5.43, 5.45.

118. *Id.* at R. 4.1, 4.4–4.8, 5.3.

119. *Id.* at R. 5.1–5.35.

120. *Id.* at R. 5.7(a)–(c), (m).

121. *Id.* at R. 5.15, 5.19. The regulatory bodies in England are different for solicitors, barristers, and other legal service providers. *Id.* at R. 1.2, 5.59.

122. *Id.* at Rules 6.3–6.4.

123. Press Release, Legal Servs. Bd., LSB Confirms October 2011 as Start Date for Alternative Business Structures (Feb. 23, 2010), *available at* [http://www.legalservicesboard.org.uk/news\\_publications/press\\_releases/2010/pdf/23022010\\_abs\\_press\\_release.pdf](http://www.legalservicesboard.org.uk/news_publications/press_releases/2010/pdf/23022010_abs_press_release.pdf).

based regulation” that focuses on proactively improving performance, not simply sanctioning violations after the fact.<sup>124</sup>

In Australia, widely publicized scandals also prompted state governments to create more accountable and consumer-oriented regulatory processes. In 2004, a Standing Committee of Attorneys General created Model Provisions for the Legal Profession that eventually were translated into Legal Profession Acts by all but one state and territory.<sup>125</sup> Although the Acts vary in certain respects, they share a commitment to increased transparency and responsiveness in oversight processes. For example, in New South Wales, an Independent Legal Services Commissioner receives all complaints and refers them either to consumer-oriented mediation or to the bar’s own regulatory bodies. Complainants who are unsatisfied with the results may seek review by the Commissioner, who has the power to substitute a new decision. The Commissioner also oversees the process for handling complaints and may take over a particular investigation or recommend more general changes.<sup>126</sup> Queensland has an independent Legal Services Commission headed by a non-lawyer.<sup>127</sup> Its disciplinary system includes a Client Relations Center, which resolves minor disputes, and a Legal Practice Tribunal, composed of a Supreme Court Justice, one non-lawyer, and one practitioner. Problems of competence and diligence can be subjects for discipline, and all disciplinary actions are published on the Legal Service Commission website.<sup>128</sup>

Beginning with landmark 2001 legislation in New South Wales, all but one Australian state and territory also allow “incorporated legal practices” (ILPs), which permit ownership interests by non-lawyers.<sup>129</sup> The regulatory framework for these incorporated legal practices serve as models for regulatory innovation. Under this framework, ILPs must have at least one practitioner director responsible for creating appropriate management systems that ensure compliance with professional conduct rules.<sup>130</sup>

124. See Andrew Boon, *Professionalism Under the Legal Services Act 2007*, 17 INT’L J. LEGAL PROF. 195, 213 (2010).

125. See Bobette Wolski, *Reform of the Civil Justice System 25 Years Past: (In)adequate Responses from Law Schools and Professional Associations (And How Best to Change the Behaviour of Lawyers)*, 40 COMMON L. WORLD REV. 40, 66–67 (2011).

126. See DAVID NICOLSON & JULIAN WEBB, PROFESSIONAL LEGAL ETHICS 86 (1999); CHRISTINE PARKER & ADRIAN EVANS, INSIDE LAWYER’S ETHICS 54–55 (2007); Deborah L. Rhode, *In the Interests of Justice: A Comparative Perspective on Access to Legal Services and Accountability of the Legal Profession*, 56 CURRENT LEGAL PROBS. 93 (2003).

127. *Legal Profession Act 2007* (Qld) s 591 (Austl.), available at <http://www.legislation.qld.gov.au/legisln/current/l/legalproa07.pdf>; Leslie C. Levin, *Building a Better Lawyer Discipline System: The Queensland Experience*, 9 LEGAL ETHICS 187, 193–94 (2006); see also PARKER & EVANS, *supra* note 126, at 56.

128. See Levin, *supra* note 127, at 193; see also PARKER & EVANS, *supra* note 126, at 56.

129. See Christine Parker, Tahlia Gordon, & Steve Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J. L. & SOC’Y 466, 467 (2010); see also *Legal Profession Act 2007* (Qld) s 2.7 (Austl.), available at <http://www.legislation.qld.gov.au/legisln/current/l/legalproa07.pdf>; John Britton & Scott McLean, *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era*, 11 LEGAL ETHICS 241 (2010).

130. *Legal Profession Act 2004* (NSW) s 141 (Austl.).

Directors who fail to take “all reasonable steps” available to meet their obligations are subject to disciplinary sanctions.<sup>131</sup> Legal Services Commissioners also have authority to conduct a compliance audit of practice management systems, whether or not a complaint has been filed.

In New South Wales, which has one of the most well-developed oversight structures, ILP management systems must address ten objectives relating to matters that often give rise to complaints, such as competence, communications, supervision, trust funds, and conflicts of interest.<sup>132</sup> All ILPs must conduct a self-audit to assess their compliance with each of these objectives.<sup>133</sup> ILPs that rate themselves as not fully compliant must work with the Office of the Legal Service Commissioner to improve their practice management systems.<sup>134</sup> In cases where the ILP’s self-audit or client complaints raise concerns, the Commissioner can initiate an independent audit.<sup>135</sup> A comprehensive study of the New South Wales framework found that requiring ILPs to go through the process of self assessment resulted in frequent internal reforms and reduced the number of complaints by about half.<sup>136</sup> Part of the success of the system is attributable to the constructive non-adversarial working relationship that has developed between the Commissioner and the ILPs subject to regulation.<sup>137</sup>

The same has been true in Queensland, which is now in the process of developing external audit processes that will ensure adequate oversight without overly intrusive or burdensome requirements. Among these processes are web-based surveys of ILP practitioners and staff concerning matters such as ethical culture, billing practices, and complaint management systems.<sup>138</sup> Results will enable the ILPs to benchmark their performance against that of peers, and will help the Commissioner assess the effectiveness of different regulatory processes. Success with this framework could lead to adoption for traditional firms as well as those with alternative practice structures.<sup>139</sup>

### B. Non-professional Conduct

Whether the new consumer focus will alter how courts and disciplinary agencies treat conduct occurring outside professional relationships is unclear. Traditionally, Australian decisions reflected much the same inconsistency apparent in the United States and Canada. So, for example, one 2002 ruling disbarred a practitioner guilty of sexual offenses against a minor on the ground that “[t]he public would rightly doubt the standards of a profession which permitted a person who has recently committed such

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131. Briton & McLean, *supra* note 129, at 244.

132. See Parker, Gordon, & Mark, *supra* note 129, at 472.

133. *Id.* at 473.

134. *Id.*

135. *Id.*

136. *Id.* at 493.

137. See *id.*; see also Briton & McLean, *supra* note 129, at 248–49.

138. See Briton & McLean, *supra* note 129, at 250–51.

139. See *id.* at 253.

serious offenses to remain one of its members.”<sup>140</sup> By contrast, a year later, another court declined to disbar a lawyer guilty of trafficking in cocaine.<sup>141</sup> Because bar oversight authority comes from the legislature, however, it is subject to some democratic accountability, and reputation of the profession is now no longer identified as a relevant consideration in imposing sanctions.<sup>142</sup> The trend of recent decisions is to focus on the seriousness of the offense and whether it involves dishonesty.<sup>143</sup>

One widely reported 2004 New South Wales decision is emblematic of the continuing division of views among Australian judges concerning non-professional misconduct. It involved a solicitor convicted of lewd conduct toward the children of a woman who later forgave and married him. The solicitor failed to disclose to prospective legal employers those convictions and another that had been reversed on appeal.<sup>144</sup> Although the Court of Appeals ordered disbarment, the Supreme Court emphasized that the conduct surrounding the solicitor’s breach of trust was “so remote from anything to do with professional practice that the characterisation of the appellant’s personal misconduct as professional misconduct was erroneous.”<sup>145</sup> Because the solicitor had already lost his license for five years while the case was pending, the court believed that no further sanction was appropriate.

England and Wales, however, show no signs of departure from their traditional approach, which permits sanctions for conduct that could impair the profession’s reputation. The 2007 Solicitors’ Code of Conduct requires practitioners to avoid any conduct “within or outside [their] professional practice which undermines [public] trust.”<sup>146</sup> The Code of Conduct for barristers similarly requires that they not engage in conduct likely to “diminish public confidence in the legal profession or the administration of justice or otherwise bring the profession into disrepute.”<sup>147</sup> To some tribunals, a criminal conviction seems almost by definition to justify striking a practitioner from the rolls in order to “maintain the reputation of the profession” and “sustain the public confidence.”<sup>148</sup> In cases involving matters such as drugs, sex, or driving while intoxicated, disbarment is ordered without any discussion of the nexus between personal and professional misconduct; the decision simply lists the offenses and declares

140. *Law Soc’y of S. Austl. v Rodda* [2002] SASC 274 ¶ 29 (Austl.)

141. *Prothonotary of the Supreme Court of N.S.W. v P* [2003] NSWCA 320 (Austl.). For other cases, see Duncan Webb, *Nefarious Conduct and the ‘Fit and Proper Person Test,’* in ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION, *supra* note 97, at 218–40.

142. *See id.* at 222.

143. *See id.*

144. *A Solicitor v Council of the Law Soc’y of N.S.W.* [2004] HCA 1 (Austl.).

145. *Id.* ¶ 34; *see also* Webb, *supra* note 141, at 224.

146. SOLICITORS REGULATION AUTH., SOLICITORS’ CODE OF CONDUCT 2007, R. 1.06 (2007).

147. CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES ¶ 301(a)(iii) (8th ed. 2004).

148. *Law Soc’y v. Gilbert*, [2000] All E.R. (d) 1891 (Eng.). Although that case involved professional misconduct, the court’s decision to increase the sanction following a criminal conviction is reflective of the priority placed on professional reputation.



them “discreditable” and likely to “bring the profession into disrepute.”<sup>149</sup> Unlike recent regulatory reforms concerning professional misconduct, the focus in non-professional discipline seems to be on public image, not public protection.

#### IV. AN AGENDA FOR REFORM

To what extent the United States and Canada might follow England and Australia’s lead in consumer-oriented reforms is by no means clear. As Ted Schneyer notes, the changes in those countries were largely attributable to powerful consumer groups with government allies, including antitrust regulators.<sup>150</sup> In the United States and Canada, as discussed earlier, such pressures are largely absent. American antitrust law has not generally been invoked to challenge state court rules, and the inherent powers doctrine limits legislative intervention on bar regulatory matters.<sup>151</sup> American courts have, however, tolerated legislative and administrative regulation that they consider consistent with their authority.<sup>152</sup> Some courts might be willing to implement reforms along the lines that England and Australia have pioneered, if structured in ways that did not challenge the judiciary’s ultimate authority. To the extent that the Australian model of regulating ILP demonstrates success in reducing complaints through a cooperative, problem solving, rather than adversarial, approach, some bar associations might be willing to adopt similar frameworks. Greater transparency in decisions concerning non-professional misconduct might also persuade bar associations and courts to adopt standards promoting greater consistency.

In Canada, no structural barriers prevent reform along the lines adopted in Australia and in England and Wales. Although the lack of public

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149. CODE OF CONDUCT OF THE BAR OF ENGLAND AND WALES ¶ 301(a)(i), (a)(iii); *see* BAR STANDARDS BD., DISCIPLINARY FINDINGS: SIMON AUSTIN HAMILTON (2009), <http://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/disciplinary-findings/?DisciplineID=74852> (child pornography, public indecency); BAR STANDARDS BD., DISCIPLINARY FINDINGS: NICOLA JANE MARSHALL (2008), <http://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/disciplinary-findings/?DisciplineID=74836> (driving while intoxicated, failure to stop after accident); BAR STANDARDS BD., DISCIPLINARY FINDINGS: AMIR HASSAN MODJIRI (2007), <http://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/disciplinary-findings/?DisciplineID=74803> (cocaine possession); BAR STANDARDS BD., DISCIPLINARY FINDINGS: RUPERT JOHN MASSEY (2006), <http://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/disciplinary-findings/?DisciplineID=74742> (indecent assault on a male); BAR STANDARDS BD., DISCIPLINARY FINDINGS: JOHN PAUL TEMPLE (2006), <http://www.barstandardsboard.org.uk/complaints-and-professional-conduct/disciplinary-tribunals-and-findings/disciplinary-findings/?DisciplineID=74757> (child pornography).

150. Schneyer, *supra* note 20, at 24.

151. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 789 & n.18 (1975); *see also supra* notes 11–16, 42–45 and accompanying text. For infrequent antitrust action, *see* Terry, *supra* note 42, at 200–02.

152. *See* Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149, 156 (2010); Charles Wolfram, *Lawyer Turf and Lawyer Regulation: The Role of the Inherent Powers Doctrine*, 12 U. ARK. L.J. 1, 6–13 (1989). For the U.S. Supreme Court’s willingness to tolerate congressional regulation, *see* Barton, *supra* note 12, at 1211–12.

concern about the weaknesses in lawyer regulation may inhibit fundamental changes, some incremental progress may be possible through shifts in law society practice or through legislative amendments to the authorizing statutes under which those law societies operate.

#### A. *Proposals for the United States*

A more effective disciplinary process in the United States would expand its oversight and remedial approaches concerning professional performance, and narrow its concern with non-professional offenses. The jurisdiction of disciplinary agencies should be broadened to include neglect, negligence, and fees, and resources should be increased to ensure adequate investigation and remedial responses. Rather than relying almost exclusively on client complaints (supplemented by felony convictions), regulatory officials should initiate investigations based on judicial sanctions and self-audits. More effort should be made to insulate regulatory agencies from professional pressures and to develop cost-effective dispute resolution processes for minor misconduct. A co-regulatory structure along the lines developed for Australia, England, and Wales could include a lay ombudsman with responsibility to mediate disputes, review dismissed cases, and make periodic reports to the courts concerning the performance of the regulatory process. Lawyers should be required to carry malpractice insurance and remedies should include client compensation. Support services and diversion programs for lawyers with mental health, substance abuse, office management, and short-term financial difficulties should help these practitioners establish an appropriate remedial plan and supervise their compliance.<sup>153</sup> More efforts should also be made to track the effectiveness of these programs and to deal with recidivists.

The process also needs to become more transparent. Lawyers should be required to provide information to clients or to centralized databanks concerning their disciplinary and malpractice records.<sup>154</sup> Four-fifths of surveyed Americans express a desire for such resources, and replicable models involving physicians are widely available.<sup>155</sup> Disciplinary complaints should also be made public if the relevant oversight body finds probable cause for investigation. Although lawyers have generally opposed this proposal on the ground that disclosure of unfounded complaints would unjustly prejudice their reputations, no evidence has demonstrated those harms in the minority of states with open processes. If civil complaints and police arrests are matters of public record, it is not clear why grievances against lawyers should be subject to special protection.<sup>156</sup> Because consumer surveys find deep suspicion about closed door proceedings, even

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153. See ABEL, *supra* note 5, at 512–14; RHODE, *supra* note 6, at 163–64; Diane M. Ellis, *A Decade of Diversion: Empirical Evidence that Alternative Discipline Is Working for Arizona Lawyers*, 52 EMORY L.J. 1221 (2003).

154. See ABEL, *supra* note 5, at 514; RHODE, *supra* note 6, at 162–63.

155. See Steven K. Berenson, *Is It Time for Lawyer Profiles?*, 70 FORDHAM L. REV. 645, 651–57, 680 (2001). For these and other reforms, see RHODE, *supra* note 6, at 162–65.

156. See Levin, *supra* note 34, at 21–22.

the ABA's own disciplinary commission has recommended disclosure of non-frivolous complaints.<sup>157</sup>

Concerns of public protection should also figure more prominently in the review of non-professional misconduct. Given the difficulties of predicting future offenses from unrelated past misconduct, the most empirically defensible approach would be to limit bar oversight to matters involving fraud, dishonesty, and other acts relevant to professional work.<sup>158</sup> If that limitation is politically implausible, another possibility would be to establish guidelines for the treatment of specified offenses, modeled on standards applicable in other licensing contexts subject to legislative oversight. At the very least, the profession should strive for more consistent treatment of similar conduct, and should avoid duplicating criminal sanctions for largely reputational objectives.

### B. Proposals for Canada

To achieve a truly efficient and effective regulatory system in Canada will require structural changes.<sup>159</sup> Although it is unrealistic to expect that oversight could be moved from the provinces to the federal government, it does seem possible to reduce the autonomy of the law societies and their dependence on volunteers.<sup>160</sup> While investigation and prosecution functions could remain within the law societies, a separate tribunal should be established to adjudicate disciplinary cases. That tribunal could also mediate lawyer-client disputes, much as the Legal Ombudsman does in England and Wales. Oversight should be expanded to address performance concerns that fall short of professional misconduct, and to provide remedies for clients.

Tribunal members could be paid and appointed by a joint committee of the chief justices of the provincial court of appeal and trial courts, and the elected and lay benchers of the law society. This appointment process should be designed to ensure some diversity in members' backgrounds and some professional independence and public accountability for their performance. Most complaints involving client services could be brought directly by the aggrieved party, although the law society should have the option of intervening in a case where it believes appropriate.

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157. ABA COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY 33 (1992); Levin, *supra* note 34, at 22.

158. See, e.g., *Att'y Disciplinary Bd. v. Keele*, 795 N.W.2d 507, 513–14 (Iowa 2009) (refusing to discipline a lawyer for illegal possession of a firearm where there was no nexus between that offense and his ability to function as a lawyer).

159. These suggestions, and their normative underpinnings, are discussed further in Alice Woolley, *Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation* (Sch. of Pub. Pol. Res. Paper 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1877884](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1877884).

160. A federal regulator may also be cumbersome and expensive, and find it difficult to effectively regulate legal practice outside of the larger Canadian cities or to respond to specific practice issues arising out of problems unique to a particular province—for example, aspects of its rules of courts or real estate laws.

Under such a system, law societies would retain their power to set standards of conduct, to screen and investigate complaints, and to determine whether matters brought to their attention should proceed to the disciplinary tribunal. While most competence cases would be brought to the dispute resolution tribunal directly by the complainant, law societies would also have standing to bring issues related to lawyer performance.

Following the model of England and Wales, each province should also create a distinct legal regulatory review office. Such an office should review the decisions of the law societies and recommend modifications or reconsideration. At least one province, British Columbia, already has an Ombudsman who has jurisdiction over a wide range of consumer concerns.<sup>161</sup> Like that Ombudsman, the position proposed here would not have the power to direct the law society to reach a specific conclusion on matters of policy or in specific cases. Its mandate would be to provide a voice for consumer and other interests that are not sufficiently reflected in law society decision making.

In addition to these structural changes, the substance of lawyer regulation in Canada also requires revision and expansion. In particular, law societies should focus greater attention on common consumer grievances and remedies, especially in relation to excessive fees and gaps in malpractice insurance coverage.<sup>162</sup> Law societies should emphasize standard-setting and other proactive oversight activities, rather than simply responding to specific instances of serious professional misconduct.<sup>163</sup>

With respect to non-professional behavior, the statutory power of the law societies to regulate in the interests of the profession should be abolished and the focus should be on public protection, not public image. Sanctions should be reserved for conduct that may undermine the lawyer's ability to practice, such as substance abuse, or that suggest dishonesty or willful violation of court orders. Bar disciplinary processes should not be used to duplicate the criminal justice system; their role should be narrowly directed to protection of clients and the justice system.

#### CONCLUSION

The problems of lawyer regulation in the United States and Canada are significant, systemic, and structural. But they are not inevitable. Recent reforms in England, Wales, and Australia lay the foundations for an oversight framework that is more responsive to public interests. Whether these changes will achieve their full potential remains to be seen. At the

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161. The review power of this Ombudsman extends beyond lawyer regulation to other governmental functions, and it is not clear how frequently this officer has intervened in lawyer disciplinary cases. More research is necessary to determine the effectiveness of this position and what might be necessary to strengthen its oversight in cases involving lawyers.

162. See Woolley, *Time for Change*, *supra* note 82; Woolley, *supra* note 2. All lawyers in Canada are required to participate in insurance schemes governed by the provincial law societies. In some provinces, however, the lawyer may not access the insurance scheme if he or she is found to have engaged in professional misconduct, which undermines client protection.

163. See Trebilcock, *supra* note 82, at 224–27.

very least, however, these reforms promote greater transparency and accountability, and create the potential for ongoing revision in light of experience. The United States and Canada could benefit from comparable strategies.

One value of colloquia like this one is that their international focus invites more searching scrutiny of insular national practices that ill serve societal needs. For centuries, the American and Canadian bars have asserted that self-regulation is critical in maintaining the profession's "independence from government domination."<sup>164</sup> International comparisons suggest that such independence can be maintained through co-regulatory structures that also provide greater checks on professional self-interest and greater responsiveness to consumer concerns. The challenge remaining for the United States and Canada is to build on these insights from abroad to inspire national reforms that are long overdue.

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164. MODEL RULES OF PROF'L CONDUCT, pmb1. ¶ 11 (2011).