

## **Legal Ethics and Regulatory Legitimacy: Regulating Lawyers for Personal Misconduct**

### **I. Introduction**

Regulation of the legal profession is pervasive. In every common law country lawyers operate within a complex series of formal and informal norms that determine, *inter alia*, who is admitted to the bar, the extent of competition permitted by non-lawyers, when lawyers' conduct is lawful and/or ethical, and when lawyers' conduct is not. Legislatures, courts and regulatory bodies such as law societies impose requirements and restrictions on the practice of law, and sanction lawyers who violate them.

In the aftermath of the 2008 collapse of the international credit markets, and the association of that collapse with limited and inadequate regulation of the financial sector in the United States,<sup>1</sup> the fact of pervasive regulation of an economic activity does not require defending the way it might once have. Nonetheless – and perhaps even more so given the newly discovered enthusiasm for regulation as a “good thing” – it is important to ask persistently and rigorously: why do we (why should we) regulate what lawyers do? And, more significantly, why do we have the particular regulations that we have? What is the point and purpose of having disciplinary rules or standards? Which rules are specifically justifiable and which are not? And on what basis can that assessment be made? What is the benchmark that distinguishes good and legitimate regulatory activity from that which is bad and/or illegitimate?

In an earlier chapter in this volume Professor Duncan Webb reviews law society and judicial regulation of lawyers' personal misconduct<sup>2</sup> in Australia, Canada, England and New Zealand.<sup>3</sup> His chapter outlines the history, legislative framework and proffered regulatory justifications for sanctioning lawyers for morally or legally opprobrious conduct outside of legal practice in those jurisdictions. Professor Webb suggests that this regulatory action is misplaced. It relies on poorly articulated and defended empirical assumptions, represents undue concern with the reputation of the

profession as opposed to the public interest, and as often as not “amounts to little more than an emotive exclamation that lawyers whose conduct shows no allegiance to the legal system are bad.”<sup>4</sup>

This paper builds on Professor Webb’s analysis of the regulation of extra-professional misconduct. It does so to critique the regulation itself and, as well, to make some general claims about the appropriate methodology for assessing regulatory action (or inaction). Section II argues that while regulation need not be based on demonstrable empirical facts, problems arise where its asserted empirical foundations are falsifiable or doubtful. In that event some non-empirical justification for the regulation must be offered, some explanation as to why its faulty empirical foundations can be ignored. The current approach to regulation of extra-professional misconduct rests on just such dubious empirical foundations. Specifically, the research of behavioural psychology suggests that the regulation rests on empirically doubtful assertions about the existence of ascertainable “moral character” predictive of individual conduct across situational contexts. For the regulation to be justified, some alternative foundation must be provided.

Section III assesses the legitimacy of regulation of lawyers’ personal misconduct through theoretical frameworks traditionally employed to justify and/or critique regulatory activity: economic and democratic theories of regulation. It argues that these frameworks are justifiably used to assess regulation of lawyers and that in this instance they support Professor Webb’s conclusions that the current regulation of personal misconduct is unjustified. In economic terms, regulation of lawyers’ personal misconduct cannot be normatively justified as necessary to correct for the numerous imperfections in the market for legal services. In democratic terms, regulation of lawyers’ personal misconduct fails to achieve the necessary standards of legitimacy.

Section IV briefly considers what, if any, regulation of personal misconduct might be justified in empirical, economic or democratic terms.

## **II. The requirement of empirical validity: Does personal misconduct accurately predict professional misconduct?**

### *A. Do facts matter?*

In justifying various regulations governing the legal profession, courts and regulators frequently make empirical claims of one sort or another. In defending solicitor-client privilege, for example, the Supreme Court of Canada claimed that, without the privilege, “clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients.”<sup>5</sup> In articulating the rules around conflicts of interest, the Court suggested that “[u]nless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies.”<sup>6</sup> In justifying a decision to discipline a member for incivility, the Law Society of Alberta claimed that “Professionals are expected to act professionally and must do so or they compromise the interests of not only their clients but society at large.”<sup>7</sup> Similar claims are made in other areas and/or jurisdictions.<sup>8</sup>

Does it matter if these assertions are false? It may be that they are true. It may even be that courts and regulators are entitled, without evidence to the contrary (or where they are susceptible neither to proof nor disproof), to assume them to be true. But what if they are demonstrably untrue or, at least, demonstrably doubtful? What if, for example, it can be shown that “more people would talk to a lawyer *sans* privilege, than they would to a marriage counselor... In fact,... most people [surveyed] were either unaware of the attorney-client privilege or believed that it extended to other professional relationships”?<sup>9</sup> What if decisions on retaining a lawyer are wholly unrelated to systemic concerns or perceptions of the profession as a whole?<sup>10</sup> It would go too far to claim that a regulation may only be justified where it is based on demonstrable empirical facts. However, it

seems *prima facie* reasonable to suggest that if the empirical foundations of a regulation prove falsifiable, or doubtful, then that should be addressed. If nothing else, regulators should cease to assert factual premises that have been demonstrated to be dubious or, at minimum, should acknowledge the premises' empirical uncertainty. They should also explain why, in the face of doubt as to the factual foundations usually offered for a rule, that rule is nonetheless desirable and appropriate.<sup>11</sup> A foundational value of common law legal systems is rationality.<sup>12</sup> Reliance on empirically doubtful or falsifiable conclusions in exercising legal power is not rational. And there is certainly precedent for the position that where beliefs prove false over time the law should respond with change.<sup>13</sup>

*B. Does personal misconduct accurately predict professional misconduct?*

Professor Webb outlines the justifications offered for disciplining lawyers for personal misconduct in the various jurisdictions whose decisions he considered: they cannot be trusted; they do not respect the law; they cannot command the confidence of the court; they undermine the public reputation of the profession; they are not esteemed by their peers; they are infamous; they must be denounced. These justifications can be loosely grouped into two broader categories: justifications based on a concern that the personal misconduct demonstrates a propensity for misconduct in legal practice; and justifications based on a concern that failing to discipline the lawyer for personal misconduct will bring the profession as a whole into disrepute. Disciplinary justifications concerned with a lawyer's trustworthiness, with respect for law and with the need for the confidence of the court, all generally flow from the asserted relationship between personal and professional misconduct; disciplinary justifications concerned with the public reputation of the profession, esteem from the offending lawyer's peers, infamy and denunciation, all generally relate to protecting the profession's reputation. In this section I will assess the empirical validity of the claimed relationship between personal and professional misconduct: that is, the validity of the assertion that,

based on one or more instances of personal misconduct, it can be determined that a lawyer is, generally, untrustworthy, disrespectful of the law and/or unworthy of the confidence of the court.<sup>14</sup>

When regulators claim a relationship between personal misconduct and a lawyer's legal practice they make two empirical assumptions. They assume a) that a single incident (or incidents) of personal misconduct is demonstrative of a lawyer's general moral character and b) the moral character so demonstrated is indicative of the likelihood of immoral (unethical) conduct by the lawyer in his or her legal practice. Both of these empirical claims are highly doubtful.<sup>15</sup> They rest on what social psychologists call the "fundamental attribution error." That is, the error that arises from the tendency for people to "seriously and routinely underestimate...both the number of observations and the distribution within them that is required to warrant the attribution of... character traits such as honesty."<sup>16</sup> We commit the fundamental attribution error when, without anything more, we discover that a friend has told us a lie and attribute to him the vice of dishonesty, when we see someone at a party eating too much food and we attribute to him the vice of greed, or when we see someone being kind to a disabled person and attribute to him the general virtue of compassion.

Limited instances of behaviour do not warrant this kind of generalized assumption about an individual's character. They do not do so because the overwhelming evidence of social psychology is that, in general, circumstances are far more predictive of behaviour than is a generalized notion of "character". While individuals behave with significant temporal stability – the person who eats too much at a party today is predictably likely to eat too much at a party tomorrow – they demonstrate little "cross-situational consistency" in their behaviour. As a consequence, a particular behaviour which occurs in a particular context almost certainly says more about the influence of that context than about the character of the person who engaged in it. That is, it likely suggests that other people

in that same context will behave in the same way, but it does not suggest that that person will behave in the same way if placed in a different context.<sup>17</sup>

The experiments supporting these conclusions have been summarized at some length in my chapter in the earlier volume of conference papers, *Re-affirming Legal Ethics: Taking Stock and New Ideas*, which addressed the empirical problems with the regulation of the “character” of applicants for bar admission.<sup>18</sup> For the purposes of the argument here it is sufficient to note that this evidence from social psychology undermines significantly “protection of the public” related justifications for disciplining lawyers for personal misconduct. The context of personal misconduct is – by definition – significantly variant from the context of legal practice. There is no reason to believe that reprehensible behaviour in the one context says much at all about the likelihood of reprehensible behaviour in the other, particularly where there is no suggestion that there has been reprehensible behaviour in legal practice. And the more variant the circumstances, the less predictive the behaviour in one circumstance is to another. Thus assertions like the following, where a Canadian court rejected the argument that a lawyer’s sexual misconduct did “not impair or reflect upon the integrity or competence of the solicitor in any dealings that he may have with clients,”<sup>19</sup> are, as currently articulated, empirically unsustainable:

[Cwinn] took advantage of these young girls in the relationship of dependence, trust and confidence that existed in all the circumstances outlined in the report of the Discipline Committee. I accept the guidelines of the Law Society (and also the submission of counsel for the solicitor) as to what must be shown before conduct is "conduct unbecoming a barrister and solicitor." Having done so *it is my view that his conduct was not only reprehensible, but that it does seriously reflect upon and shatter his professional integrity to the point where the protection of the public is involved.* In my opinion, therefore, Convocation was correct in finding the solicitor guilty of conduct unbecoming a barrister and solicitor [emphasis added].<sup>20</sup>

The Court’s statement about the relationship between the misconduct and Cwinn’s professional integrity is simplistic and certainly not true simply because believed to be true by the Court.

However repellent Cwinn's behaviour might have been, it did not, *prima facie*, "shatter his integrity" so as to place his clients at risk. Protection of young girls unfortunate enough to come under Cwinn's sphere of influence was at issue, but that protection occurs through the criminal justice system. Absent some other evidence, or some cogent explanation as to why there was some relationship between Cwinn's misconduct with these girls and protection of his future clients, the Court gave insufficient justification for upholding the decision to disbar Cwinn.

This is not to say that ethical regulation must be dictated by the findings of behavioural psychology, or that behavioural psychology renders *any* regulation of a lawyer's personal misconduct unjustifiable. As noted, within behavioural psychology it is acknowledged that even if robust character traits – traits that dictate behaviour reliably across a variety of circumstances – do not exist, there may be "local" character traits that create significant temporal stability in human behaviour.<sup>21</sup> The greater the similarity between the context of personal misconduct and the context of professional practice, the greater the empirical justification for regulating that personal misconduct.

Moreover, observations about how, in general, situations affect human behaviour do not explain or predict how any given individual will behave, or eliminate the ability to make psychological judgments or assessments about individuals. As recently noted by David Luban, situational psychology does not explain why as situations change the behaviour of some remains the same.<sup>22</sup> In the end, situations may help explain human behaviour, but they do not determine it.<sup>23</sup> Finally, in many contexts, such as determination of custody cases or likelihood of re-offending, courts rely on psychological evidence, and on psychological assessments of individual character, to make legally required determinations of future conduct from past behaviour.<sup>24</sup>

Nonetheless, behavioural psychology does demonstrate the insufficiency of the bare assertion by a regulator that a lawyer who has evaded or avoided tax, has sexually offended or has lied, is untrustworthy, generally disrespectful of the law or unworthy of the court's confidence. Absent some reason to relate the circumstances of the personal misconduct to the lawyer's professional practice, or some independent evidentiary basis for concern with the lawyer's conduct as a lawyer, the most empirically justified assumption is that the personal misconduct has little probative value for the lawyer's professional conduct. This suggests that it is only where personal misconduct by a lawyer is closely related to his or her professional practice (where, perhaps, it is only through a technicality that the misconduct can be said to be non-professional), or where the misconduct is coupled with issues related to the lawyer's conduct of his professional practice, that regulatory action against the misconduct is justified on protection of the public grounds. If, for example, a lawyer served as a volunteer on a not for profit board and misappropriated funds belonging to the not for profit, the lawyer should not be permitted to avoid discipline on the grounds that such volunteer service did not constitute "legal practice" or "professional misconduct". By contrast, evading personal income taxes, or committing fraud to obtain a home mortgage, however reprehensible, must be coupled with some evidence of professional misconduct to warrant *professional* discipline. Other regulatory mechanisms such as the criminal justice system exist to discipline personal misbehaviour; professional discipline requires some relationship to professional practice. The evidence of behavioural psychology demonstrates that such a relationship does not exist through the mere fact of the personal misconduct; more is required.

### **III. Regulatory Theory**

Perhaps because so much of the thinking on the regulatory aspect of legal ethics has focussed on the question of who should regulate lawyer conduct, it has sometimes got lost that decisions

made by regulators of the legal profession, whether courts, legislatures or administrative bodies, and whether self-regulatory or including significant non-lawyer involvement, are properly understood and analyzed as regulatory action. Regulation of the legal profession is obviously distinct in important ways from usually discussed spheres of regulatory activity like the determination of electricity rates, management of resource development or approval of pharmaceuticals as effective and safe. Nonetheless, as noted in the Introduction, decisions about who is admitted to the bar, about the extent of competition permitted by non-lawyers, and about what constitutes permissible (ethical) and impermissible (unethical) conduct, constitute state regulation of individual (economic) activity. These decisions are empowered and authorized by legislation; a regulatory decision-maker with coercive power over individuals administers them; the regulatory decision-maker makes decisions on policy and adjudicates individual cases; and the decisions of the regulator are subject to judicial oversight. The fact that the regulator has historically been (and in some instances is currently) constituted of individuals subject to its authority does not change the fundamental nature of its decisions as constituting regulatory activity. Independence of the bar has had, and likely continues to have, some relevance to the question of the manner in which lawyers are regulated, and as to the applicable norms to which lawyers should be subject, but it does not change the fundamental regulatory nature of the activity being undertaken.

While not widely applied to the regulation of the legal profession,<sup>25</sup> theoretical understandings of regulation as applied in other areas are sophisticated and can be meaningfully applied to critique the substance as well as the form of lawyer regulation. This part both assesses the regulation of personal misconduct by lawyers against the main forms of regulatory theory and justifies the use of each theory for such assessment. It considers the two main normative theories that can justify regulation – regulation to address market imperfections and failures, and regulation

in pursuit of broader democratically legitimate norms – and the extent to which these theories succeed (or fail) in justifying the regulation of personal misconduct by lawyers.

### 1. Economic regulation

Economics dominates regulatory theory.<sup>26</sup> Some have gone so far as to suggest that while regulation “is quintessentially an interdisciplinary subject, those lawyers, political analysts, and sociologists who look at regulation seem often to have surrendered the value debate to welfare economists.”<sup>27</sup> This section considers the “public interest”<sup>28</sup> economic justification for regulation and whether it provides normative support for regulation of lawyers’ personal misconduct. Public interest theories argue that regulation is justified in those circumstances where because the normal operation of market forces fails, or the imperfections of the market are sufficiently great, the benefits of regulation outweigh its costs. The value orientation of public interest theories is towards creation of economic efficiency, towards generation through regulation of the same efficiency gains as would exist if the market were perfect.

Before considering the application of public interest economic theory however, some analysis of why economics should inform lawyer regulation is required; the argument that the norms of economics, and economic efficiency, are relevant to the regulation of the legal profession is not self-evident. The most notable treatments of legal ethics consider the lawyer’s duties from the perspective of the lawyer as a moral agent, or as an actor within the legal system. The idea of the lawyer as an actor within the economic system, and appropriately regulated as such, is less prevalent. Part of the reason for this may be, as noted by Julia Black, that once economic analysis enters the debate it has, if taken seriously, a tendency to consume its competitors whole, leaving no room for the acknowledgment of the relevance of other considerations to the identification of appropriate legal or regulatory norms.<sup>29</sup> And to understand lawyers exclusively as economic

actors, with no consideration of the claims of moral or political philosophy, is simplistic; in no sector of the regulation of legal practice should “our primary concern... be the efficiency of legal markets and their capacity to promote the efficiency of other markets.”<sup>30</sup>

Nonetheless, the role of lawyers in the economy, and the identification of the effect of imperfections in the market for legal services on the interests of clients and others, is normatively significant for the assessment of lawyer regulation. Lawyers *are* economic actors. They sell their services for money. Further, the actions they take affect the functioning of the economy more generally and can often be better understood if considered in economic terms. And, most importantly, it is generally accepted that market for legal services is highly imperfect.<sup>31</sup> These imperfections make it difficult for clients to effectively monitor the services they are given. They can make it nearly impossible for them to ensure that they are not billed unfairly.<sup>32</sup> They additionally have the tendency to make lawyers less affordable and accessible.<sup>33</sup> And they create the risk that lawyers will improperly pursue client interests, imposing negative externalities on others in particular and on society in general.<sup>34</sup> Absent regulatory response the market for legal services will allow these problems to persist; the costs of them doing so must therefore be assessed against the costs of regulation to address them. Regulation that responds to these imperfections can be justified if it is cost-effective in that sense. Other bases for regulation are legitimate, and regulation justified on economic grounds can nonetheless be criticized if it undermines other regulatory goals; however, the existence of other reasons does not change the fact that lawyers are economic actors and appropriately regulated as such.

The remainder of this section will thus apply public interest economic analysis to the specific question of extra-professional misconduct: is regulation of lawyers’ personal misconduct necessary to supplement imperfectly operating market forces?

With respect to such regulation in its current form, the answer to this question is “no.” To understand why this is the case it is first necessary to understand something about the nature of the relevant imperfections in the market for legal services – i.e., the type of market imperfections likely to justify regulation of a lawyer’s personal misconduct. The two most relevant issues with the market for legal services are product non-homogeneity and informational asymmetry.<sup>35</sup> In brief,<sup>36</sup> legal services are not homogenous. The needs of different clients, and the quality of services provided by different lawyers, can vary radically, and the “winner-takes-all” nature of legal services makes these differences disproportionately important. This makes it very difficult for consumers to engage in the type of “comparison” shopping that is possible in, for example, the economy car market, where the basic features of cars made by Honda, Toyota, General Motors and Ford are much the same, and consumption decisions can be made based on price. A consumer of legal services has no such luxury. In addition, the consumer who purchases an economy car will likely end up with something functional to his purposes and budget – an economy car is an economy car; by contrast, a consumer of legal services may quite easily end up with a lawyer inappropriate to his purposes, with too much or too little expertise and time. Further, that inappropriate lawyer may impair the client’s pursuit of his legal interests, given that such pursuit may require not only that his lawyer be good, but may also require that his lawyer be better than the lawyer on the other side.

Second, the legal services market features significant informational asymmetry and even informational impossibility. Lawyers know more than clients about the law and about what is required to solve a legal problem; clients depend on the advice of the lawyer to determine what legal services they need. At the same time even lawyers cannot always know what is necessary to solve a problem, and even *ex post* it may be difficult to know how much of a good or bad outcome is attributable to the quality of legal services provided, as opposed to other unrelated facts. This makes it difficult for consumers to decide which lawyer to employ. Again to contrast to the economy car

market, a consumer looking for a car has significant information in the form of consumer ratings, manufacturer history and even personal experience with which to determine the appropriate car to purchase. This gives the consumer economic power in the economy car market that she simply does not have in the legal services market, where she has very little basis on which to judge which lawyer is the right one for solving her legal problem.

The relevance of these imperfections to the question of whether regulation of lawyer's personal conduct is justified, is that if a) personal misconduct by a lawyer affects the quality, cost or effectiveness of legal services, or may otherwise be important to a client in choosing a lawyer, and b) market imperfections mean that there is no way for the client through the market to identify and make consumption choices based on that information, then arguably regulation of that misconduct is justified.

When stated in this way, however, the problems with a public interest economic rationale for regulation of personal misconduct quickly become apparent. As noted earlier, it is by no means evident that a lawyer's misconduct outside of legal practice affects the legal services that will be provided. It is also not evident that a client would care about a lawyer's personal misconduct when choosing whether to retain her. For example, that Maurice Sychuk murdered his wife was notorious; the Alberta oil and gas community was aware of what he had done. Yet Mr. Sychuk was able to obtain work providing legal services to clients as a "Consulting Landman," who is responsible for oil and gas related legal agreements. The market provided the necessary information about Mr. Sychuk and clients made their decision with that information in hand. Further, if the market is not effective in providing this information – and in less notorious cases, or with the passage of time, clients may be ignorant of what the lawyer has done – then the obvious regulatory response is to require that the information be provided. There is no economic reason for the extreme

response of denying clients the choice as to whether or not to retain the lawyer in question. Nor is there any justification for fining or imposing like sanctions on the lawyer; doing so punishes the lawyer but provides no additional information for the client to use to make a decision about which lawyer to retain.

Finally, and most importantly, much of the time the regulation of personal misconduct by lawyers is only indirectly related to protection of the public – through protection of the profession’s reputation. As explained by Professor Webb, regulators argue that individuals will not go to lawyers when they need them unless the profession as a whole is held in good repute. Framed in economic terms, and trying to be charitable, the economic argument in support of this position might look something like this: due to the absence and asymmetry of information, and the problem of product non-homogeneity, consumers making a decision about whether to retain a lawyer and which lawyer to retain necessarily rely on status as a decision-making heuristic.<sup>37</sup> Not knowing whether or to what degree they need a lawyer, or which lawyers are better (or more appropriate for their particular legal problem), they look at lawyer status to decide whether to hire a lawyer and which one to hire. As part of this process, consumers rely on the reputation of the profession as a whole. If the reputation of the profession is inappropriately compromised, consumers will be impaired in their ability to rely on status; their assessment of status will be irrationally distorted. Therefore, regulation to protect the profession’s reputation where it will be inappropriately compromised is warranted.<sup>38</sup>

There are a variety of problems with this argument. The most obvious is, of course, the doubtful validity of the underlying empirical claim that consumers decide to retain individual lawyers based on the broader reputation of the profession.<sup>39</sup> Also suspect is the related claim that the reputation of the profession is undermined if lawyers who have misbehaved personally are not

sanctioned by the profession in some way, as is its corollary – the assertion that the reputation of the profession is protected simply through the sanctioning of the misbehaving lawyer.<sup>40</sup>

In addition and more importantly, the use of status by consumers is essentially a method for consumers to compensate for existing market imperfections, and emphasis on the status of the profession as a whole is an irrational addition to that consumer heuristic. If economic regulation is justified in this area it should be orientated at reducing the need for consumers to rely on status,<sup>41</sup> not at artificially bolstering the profession's status so as to heighten any existing irrationality that consumers are building into their consumption decisions. To analogize, if consumers are making irrational decisions because they misconceive the risk associated with a particular activity (for example, flying) the response would be to correct their misconception about the risk (by providing accurate safety information), not to hide information from them because there is a danger that it will heighten their misconception (e.g., concealing information about an airplane crash). It is possible that the heightening irrationality approach will ultimately produce the appropriately economically efficient result (that, perhaps, consumers retain lawyers when they will benefit from doing so), but it will do so largely through coincidence not because it has appropriately identified and resolved the market imperfection problem.

An alternative public interest economic argument in favour of regulation of personal misconduct to protect the profession's reputation might be based on the economic concept of externalities.<sup>42</sup> An externality is an economic cost (or benefit) associated with an activity which is born (or received) by someone other than the economic actor and which, as a consequence, can distort economic behaviours in undesirable ways. The externality argument here would be that if lawyer A engages in personal misconduct, and as a consequence lawyer B suffers reputational injury resulting in economic costs for lawyer B, that cost constitutes a negative externality. If subjecting

lawyer A to discipline eliminates the harm to lawyer B – that is, if it effectively transfers the cost from B to A – then regulation is justified on this basis. A internalizes the cost of the externality, and he (and others like him) are thereby appropriately disincented from acting in a way that will impose the cost on B.

This argument is, however, also problematic. Without some empirical support for the claim that personal misconduct by lawyer A has a negative economic effect on lawyer B; that disciplining lawyer A effectively transfers the economic cost of the externality (requires that A internalize the cost); and that the effect of regulation is proportionate (that the cost transferred to A is proportionate to the cost avoided for B and others like B), regulation on this basis reaches too far. And such empirical support seems unlikely to be forthcoming. While Maurice Sychuk’s murder of his wife was reprehensible, it seems most unlikely that it had any measurable economic impact on other Alberta lawyers. In that light the argument simply seems too theoretical to warrant regulatory action as potentially extreme as disbarment.

In sum, then, neither of the categories of justifications for regulating personal misconduct are supported by public interest economic analysis. Even if empirically sustainable, regulation to protect the public could be accomplished simply through providing greater information to consumers; there is no reason to prevent consumers from making an informed choice about which lawyer to retain. And regulation to protect the profession’s reputation rests on doubtful empirical claims about the relationship between professional reputation and consumer choice, does little to foster such choice in fact, and cannot be rationally justified in economic terms.

Before moving on to consideration of democratic legitimacy, the other significant economics based theory of regulation – private interest economics, or “public choice” – merits some acknowledgement. Public choice analysis of government regulation rests on two central

observations about human behaviour and activity. First, public choice asserts that government actors are like all humans as understood from an economic perspective: they are utility maximizing and instrumentally rational. That is, they will act in ways most likely to further their personal utility.<sup>43</sup> Second, public choice theory identifies the problem of collective action for the individual in the state<sup>44</sup> and observes that groups with a special interest in political outcomes – who tend to have greater information, smaller numbers (lower organization costs) and higher economic stakes – will spend the most time and money lobbying the government, and will be the most effective in doing so. Large groups with broad and disparate interests will not be able to organize effectively to advocate for government policies in their favour.<sup>45</sup>

From these two observations public choice draws its conclusion: special interest groups have a disproportionate influence on government policy. They are able to mobilize and persuade government actors that a particular course of action will maximize those actors' utility. In its first clear articulation by Stigler, the focus of public choice based analysis was on the power exerted by a particular special interest group, regulated industry, and on the tendency of industry to “capture” government regulation for its own benefit.<sup>46</sup> The analysis almost immediately departed from this “industry takes all” approach, however, moving to the more general observation that “Compact, well-organized groups will tend to benefit more from regulation than broad, diffuse groups”.<sup>47</sup>

The analytical significance of public choice arguments is relatively limited – the observation that democracy tends to fall prey to “special interest” groups is close to being a truism. Further, public choice analysis of regulation tends to be tautological: whichever group benefits most from regulation is presumed to have had the most influence over the regulation. Public choice does, however, provide some important colour and context to the normative analysis from other regulatory theories. Specifically, when a group has the features of a group likely to disproportionately

influence regulation, and the regulation in question significantly benefits that group, there is reason to subject that regulation to additional scrutiny, to require better empirical support, more persuasive economic analysis and/or more rigorous democratic legitimacy before viewing that regulation as justified.

Such additional scrutiny is warranted in the case of extra-professional misconduct. As Professor Webb cogently argued in his paper “Are Lawyers Regulatable?”<sup>48</sup>, lawyers have the capacity to capture the process of regulation, whether that process has significant non-lawyer involvement or not:

My suggestion is that lay persons who are involved in the regulation of legal professions face considerable pressure to co-operate in significant ways with the profession. Where the lay person is a member of a regulatory body, that pressure will, simply by virtue of group dynamics, be immense. Even where the layperson is a regulator who is independent of the regulated profession, there will be considerable motivation to ensure a workable relationship between regulator and regulated.

The wider problem of regulatory capture has been recognized and documented. This is the phenomena whereby regulators over time increasingly advocate for the interests of the bodies they are tasked with regulating, rather than promoting the interests of the general public. Capture is a natural result of the development of a significant and ongoing relationship between the regulator and the regulated, in contrast to the sporadic contact that the regulator has with different members of the public. This can lead to the regulator having a detailed understanding of the problems facing the profession, without a counterbalanced understanding of the problems facing the public. Capture of this kind may also result from more concerted lobbying of an overt kind.<sup>49</sup>

Moreover, the substance of regulation of extra-professional conduct appears most obviously to benefit lawyers themselves; it sends a message that lawyers are a certain sort of person, concerned with moral probity and excluding those whose behaviour is dubious or reprehensible. It helps to maintain the sense of the legal profession as exclusive, as not including those on the societal margins, and as legitimately able to assert itself as worthy of respect (however little it may actually be respected).

When viewed through the lens of private interest economics, therefore, the weaknesses in the empirical foundations and public interest economic justifications for regulation of extra-professional misconduct become more acute. The following section will consider the assessment of lawyer regulation in general – and of this regulation in particular – from the perspective of democratic legitimacy.

## 2. Democratic Theories of Regulation

### *a. Framework*

As earlier noted, regulatory theory has been overwhelmingly dominated by economics based explanations and justifications for regulatory action. Recently, however, some regulatory theorists have rejected this exclusive emphasis, suggesting that there is no *a priori* reason in a democratic state for economic values to dominate in this way. They assert instead that the core justifications for regulatory action must be based in democratic legitimacy not economic efficiency.<sup>50</sup>

What does it mean to say that regulation must have democratic legitimacy? There are two ways to consider this problem. First, what is meant by legitimacy in a general sense? Second, how does one establish whether legitimacy can be claimed for regulatory action?

The answer to the first question is relatively straightforward.<sup>51</sup> Legitimacy is the claim of political actors to allegiance and conformity from the citizenry for reasons other than merely the coercive power of the state. It is the claim that there are reasons for citizens to accede to political power grounded in something other than the fact of brute political force.<sup>52</sup> To say that a political act is illegitimate, or has a weak claim to legitimacy, is not of course to say that a citizen should not adhere to it,<sup>53</sup> but is to say that the political actor has failed to provide a reason specific to that political action for the citizen to justify adherence, and is subject to criticism on that basis.

The answer to the second question – how do we know when the political claim to legitimacy is made out – is more challenging, and can be answered at varying levels of complexity.

The simplest (and weakest) form of this argument asserts that the actions of regulators must reflect their legislative jurisdiction – that an action must lie within the regulator’s statutory mandate.<sup>54</sup> Given the breadth of the jurisdiction granted to legal regulators, it is clear that the regulation of personal misconduct satisfies this minimal standard of democratic legitimacy.

A slightly more complex and stronger articulation of democratic legitimacy asserts that regulatory action is legitimate only when it is both within a regulator’s statutory mandate and that mandate itself can claim democratic legitimacy.<sup>55</sup> What is necessary for a statute to satisfy that standard goes beyond what can be explored here, and is likely irrelevant given that, on any mainstream consideration, the legislation pursuant to which regulators govern personal misconduct would be considered democratically legitimate, reflecting the necessary “institutional accountability.”<sup>56</sup>

The problem with both these articulations of a democracy based theory of regulation, however, is that their focus on legislative authority and legislative legitimacy does not recognize the self-defining nature of regulatory action.<sup>57</sup> As clearly articulated by Habermas, regulatory activity in the modern administrative state is not “normatively neutral, technically competent implementation of statutes within the framework of normatively unambiguous responsibilities.”<sup>58</sup> Regulatory actors have normative power. Within highly generalized and/or normatively non-directive legislative authority, they have the power to determine our societal ends, the goods that we as society hope to achieve, and the extent to which state power may be exerted against individuals.<sup>59</sup> Limits on regulatory action are imposed by the process of judicial review, but given the breadth of statutory power under which regulators operate, those constraints do not remove regulatory actors’

normative authority, and nor do they remove the requirement that, one way or another, the norms relied on by regulators in the first instance, or courts on judicial review, must be democratically legitimate.

Given this observation, a robust theory of democratic legitimacy requires that regulators acting pursuant to statutory mandates that do not themselves legitimate the regulatory action (e.g., where they are general or non-directive), independently justify their actions on a democratic basis. They must establish that the norms which they assert to govern their decisions are democratically legitimate:

Insofar as the administration cannot refrain from appealing to normative reasons when it implements open legal programs, it should be able to carry out these steps of administrative lawmaking in forms of communication and according to procedures that satisfy the conditions of constitutional legitimacy. This implies a ‘democratization’ of the administration that, going beyond special obligations to provide information, would supplement parliamentary and judicial controls from within... [P]articipatory administrative practices must not be considered simply as surrogates for legal protection but as procedures *ex ante* effective in legitimating decisions that, from a normative point of view, substitute for acts of legislation or adjudication.<sup>60</sup>

As suggested by this quotation from Habermas, these justifications can be procedural. Indeed, most who argue for the importance of democracy to regulation do so to assert and explain the necessity of appropriate procedure for both quasi-judicial and public policy decisions by regulatory actors.<sup>61</sup> These justifications can also be substantive, however. They can arise from the relationship between the norms justifying the regulatory action and other democratically recognized norms, such as constitutional requirements;<sup>62</sup> norms arising from the general and institutional operation of the law (e.g. principles of interpretation<sup>63</sup> and the rule of law); the common law; or norms embodied in other statutes. On this last point, while a regulator has no jurisdiction to implement statutes outside its jurisdiction simply because of legal norms contained in other legislation,<sup>64</sup> it can justify action

generally authorized by its own statute through identification of its consistency with norms or directions contained in other legislation.<sup>65</sup>

To be democratically legitimate on this robust conception of democratic legitimacy, therefore, the regulation of a lawyer's personal conduct must incorporate three claims: 1) that there is legislative authorization of the regulation which sufficiently legitimizes the normative claim made by the regulator in regulating the conduct;<sup>66</sup> 2) that the regulation flows from a process which independently legitimizes the normative claim made by the regulator in regulating the conduct;<sup>67</sup> 3) that the norms protected by the regulation are found and justified elsewhere in the legal system.

These claims do not have to exist simultaneously – the democratic argument is not that a regulatory act or policy must satisfy all the grounds in order to be legitimate. But nor is the argument that a bare ability to make one claim for legitimacy is sufficient. The claim to legitimacy rests on some operation of all three claims to a greater or lesser extent. For example, if a regulatory policy follows from a robust process with an appropriate degree of public input, then even if it is not specifically legislatively endorsed (although legislatively authorized) and even if it is inconsistent with some other recognizable democratic norms, it can claim legitimacy. Conversely, and this is the argument that will be made with respect to the regulation of lawyers' personal conduct, even if the policy has some claim to legislative authorization, and even if it follows from a recognizably valid process, if those claims are weak or marginal, and if the regulation is inconsistent with other fundamental democratic norms, then the policy has only a weak claim to legitimacy.<sup>68</sup> The regulator has failed to articulate a sufficient reason, other than its coercive power, for the regulatory action to be respected.

With respect to the regulation of lawyers, a further point about the relevance of democratic principles must be noted. Lawyers are not merely the subject of democracy; they are a constituent

part of democracy in action.<sup>69</sup> The legal rules that represent the response to the problem of moral pluralism in a democratic society<sup>70</sup> are made effective in part through the actions of lawyers. As a consequence, democratic values have relevance for the regulation of the legal profession not only because lawyers, like any citizen, have the right to require justification before state action is brought to bear upon them, but also because the norms of a democratic society, of the legal system in which lawyers play a part, are particularly relevant to the question of what should be judged as proper conduct in a lawyer. How lawyers act, the choices lawyers make, the rules they must comply with, help determine the shape and effectiveness of our legal system, of democracy itself. In constraining and shaping those acts and choices, therefore, the needs and requirements for the functioning of a democratic legal system should be taken into account.

*b. Legislative legitimacy*

As set out by Professor Webb, the legislation pursuant to which regulators in Australia, New Zealand and Canada regulate personal misconduct by lawyers falls into roughly three categories: 1) legislation which permits regulators to determine that a lawyer is a “fit and proper person,” and permits consideration of conduct outside the practice of law;<sup>71</sup> 2) legislation which permits regulators to discipline lawyers for criminal convictions where the conviction “reflects on his or her fitness to practice, or tends to bring his or her profession into disrepute;<sup>72</sup> and, 3) legislation which permits discipline of lawyers for “conduct unbecoming” where the conduct is “contrary to the best interests of the public or of the legal profession, or harms the standing of the legal profession.”<sup>73</sup> The question is whether this legislation validates and legitimates the norms used by the profession to justify its discipline of lawyers for personal misconduct. Does it bridge the regulatory “gap” so as to ground the profession’s disciplinary norms?

There is a reasonable argument that the legislation bridges the gap. Where legislation expressly authorizes the regulator to consider the interests of the public, and a lawyer's fitness to practice, it arguably renders legitimate the regulatory assertion that discipline for personal misconduct is appropriate because that misconduct suggests a predilection to professional misconduct. If the personal misconduct has that effect then, surely, it is contrary to the public interest and demonstrative of unfitness to practice. Similarly, where legislation expressly permits consideration of whether the conduct brings the profession into disrepute, or harms its standing, it arguably renders legitimate the regulatory assertion that discipline for personal misconduct is warranted in order to protect the profession's reputation. If the profession's reputation suffers from a failure to regulate personal misconduct, then regulation of personal misconduct is warranted to protect that reputation.

On further examination, however, this source of legitimacy is less obvious. This is clearly the case in the legislation which simply authorizes regulation to ensure that a lawyer is a "fit and proper person." To take that legislation and to use it to discipline lawyers for personal misconduct requires the insertion of a further regulatory norm: that "fit and proper" encompasses both intra and extra-professional misconduct, and that regulation of such misconduct can take place to protect the profession's reputation. That further norm may be authorized by the legislation;<sup>74</sup> however, since the regulatory action does not by necessity follow from the legislative power provided, it must have some basis for claiming democratic legitimacy apart from that legislative grant. In other words, regulators are making a choice. They are not simply "doing what they've been told to do". As a consequence, they need to justify that choice as democratically legitimate; the legislation alone is insufficient to demonstrate that that norm is a norm reflecting the democratic will.

This may also be the case, albeit less obviously, in legislation such as that prevalent in some Canadian jurisdictions, where regulation is expressly permitted to be directed at protecting the profession's standing. This is because regulators have identified the standing of the profession as normatively important in a particular way. Specifically, they have seen the standing as of independent significance – as not needing to be tied to any other normative concerns. It is one thing to say that the reputation of the profession is important because that reputation serves some useful function for the public interest, or for the functioning of the legal system. It is quite another thing to say that high standing and repute for the profession is, in and of itself, a good thing. There are, as noted, some attempts to see reputation as instrumentally important, as related to consumers' willingness to go to a lawyer;<sup>75</sup> however, the overarching concern does seem to be with lawyers' reputation *simpliciter*. Again, while the legislation authorizes concern with the profession's reputation in general terms, it does not do so specifically. It is regulators themselves who have chosen to see it in this way.

This argument may seem somewhat attenuated – how specific does legislation have to be to provide democratic legitimacy to a regulatory norm? On the other hand, in this case it is also difficult to see the legislation as embodying the democratic will in the same way, for example, as does a debated and contested piece of legislation that has been the subject of committee proceedings and public debate, particularly in light of the observations of private interest economics noted above. While legislation empowering the regulation of the legal profession is legislation properly passed by an institutionally accountable body, it also looks a lot like legislation that demonstrates the occasional (if not consistent)<sup>76</sup> truth of public choice explanations for legislative and regulatory action. If regulators of lawyers have been given this power legislatively it may say more about the power of lawyers over the legislative process, and of the “stickiness” of historical models of professionalism, than about the consistency of the norms found in the legislation with broader

democratic principles. As a consequence, the norms adopted by regulators under that legislation warrant greater scrutiny – require a closer relationship to the legislative authority – to claim democratic legitimacy.

In sum, when the norms against which they justify their conduct are assessed against their enabling legislation, regulators have only modest grounds for asserting legitimacy in their regulation of personal misconduct. The argument that the legislature has considered and endorsed the profession’s approach appears more technical than substantial as a “reason” for viewing the action as reflective of the democratic will.

*c. Process legitimacy*

Democratic legitimacy does not flow simply from legislative decision-making. Judicial and executive decision-making is also legitimating. It is so in significant part because of its independent procedural requirements and norms. As noted, democratic theories of regulation place particular emphasis on the relationship between procedurally sufficient regulatory decision-making and democratic legitimacy.<sup>77</sup>

Decisions to discipline lawyers for personal misconduct are required to follow from a fair and relatively rigorous, generally quasi-judicial, process. That fact bolsters the legitimacy of those decisions, and may well be the best argument in their favour. It is a “reason” to think that the regulatory action is justified.

*d. Democratic Norms*

The final ground for assessing the democratic legitimacy of regulating lawyers’ personal misconduct is the consistency of the norms underlying that regulation with other democratic norms. This section assesses this possibility.<sup>78</sup>

The objective of ensuring that prospective clients are protected from practitioners likely to be unethical is consistent with the norms embodied in the overall law of lawyering (which places primacy on protection of client interests); in the law of fiduciary obligations; in the general democratic commitment to access to justice; and in the recognition of the importance of legal representation to that access (in the criminal context, the right to counsel).<sup>79</sup> However, pursuing that objective irrationally by excluding lawyers who do not demonstrably pose a threat to treat their clients unethically, and in addition denying clients an ability to make an informed choice about whom to retain, does not further those or other democratically legitimate norms. In fact, it is arguably contrary to them.

Rationality, “reason,” is a significant and recognized norm of the legal systems discussed here. For example, in a recent administrative law decision the Supreme Court of Canada abandoned a distinction in substantive judicial review cases between a “patent unreasonableness” standard and a “reasonableness” standard, in part on the basis that it is unacceptable to suggest that an administrative decision which was unreasonable could stand so long as it was not “patently” unreasonable. The Court said that it is “inconsistent with the rule of law to retain an irrational decision.”<sup>80</sup> To strike a lawyer from the rolls simply because of the regulator or court’s naïve faith in the relationship between distasteful personal conduct and a predilection to unethical conduct in practice is irrational. While the prejudice upon which it rests may not be as intuitive and offensive as traditional exclusions based on religion or race, it is still a form of prejudice, a decision based on false intuitions not on reasoned analysis from the evidence.

The lack of rationality in this form of regulation means regulators treat too lightly the rights and interests of the lawyer being disbarred (and the clients who retain them). While in none of the jurisdictions examined by Professor Webb, unlike the United States, is a license to practice law

considered a property right, it is also fair to say that it is an interest with legal significance. This is reflected in, for example, the considerable procedural rights awarded to lawyers facing disciplinary sanctions, and by cases recognizing the legal significance and importance of an individual's right to a livelihood.<sup>81</sup> Given that is the case, to take away that license based on an empirically doubtful relationship between personal and professional misconduct, or because of the reputation protecting instincts of other lawyers, is dubious.

It also ends up making the professional discipline appear duplicative of that which has already been applied to the lawyer elsewhere in the legal system, like a form of double jeopardy. While as noted by Professor Webb, professional regulators are quick to assert that they are not duplicating sanctions already imposed<sup>82</sup> – that their concern is not with the personal misconduct *per se* – the lack of a compelling and forward looking justification for sanctioning the misconduct makes this perspective incredible. As made clear in Professor Webb's discussion of the cases, the fact is that as often as not it appears that the distasteful conduct is driving the professional discipline. This is illustrated by *Sychuk* itself. While the Law Society of Alberta claimed that continued disbarment was necessary so as not to undermine the denunciatory effect of the life sentence, the reality of the disbarment was to add to the (backward looking) denunciation – it was an additional prosecution and sanction imposed on Sychuk in large part because he murdered his wife. While murdering his wife was a wicked thing to do, and warranted sanction, it is inconsistent with the fundamental and long-standing reluctance to permit double jeopardy for the Law Society of Alberta to add its prosecution and punishment to that which has already taken place under the penal justice system. If the penal justice system, for all its denunciation in a life sentence, permits Sychuk to live in relative freedom and to hold employment, and the employment he is qualified for is that of a lawyer, then the law society needs some cogent reason to refuse him the license for which he is otherwise qualified. Such a reason is not evident in the decision.

This is in part because regulatory action in order to protect the reputation of the profession is even more difficult to legitimate in light of other recognized democratic norms. In all of the jurisdictions we have examined there is clear recognition of the importance of maintaining a competitive market, and in preventing anti-competitive behaviour such as price-fixing and economic collusion. While professions have traditionally enjoyed exemptions from the application of competition legislation,<sup>83</sup> the norms embodied in such legislation nonetheless provide a legitimate measure against which to assess the profession's regulatory policies. When this regulatory policy is measured against those norms it fares poorly; as discussed in the following section, it appears more than anything to represent an attempt by lawyers to maintain and protect their professional standing in furtherance of their own interests, and without regard to the interests either of the lawyer struck from the rolls or the general public. In a sense, the type of economic analysis considered under the economic theories of regulation can be incorporated as relevant in consideration of democratic norms as well; the numerous body of legislation and case law endorsing and valuing the operation of the competitive marketplace suggests that absent some other important norm to justify it, regulation which impairs the operation of the marketplace is problematic.

Finally, although this dynamic is complicated, a fundamental and overarching norm of the law of lawyering is respect for client autonomy and decision-making. Client consent is a standard requirement for many ethical decisions, and an exception to the application of many ethical rules. It also underpins the ethics of lawyers in a more fundamental way, through justifying the role that lawyers play. If lawyers have an obligation of partisanship, and have any moral distance from their clients, it is because on the one hand it is partisanship that allows a client to pursue her goals in the legal system, and on the other hand since they are her goals, goals with respect to which she is the moral agent, the lawyer is distanced from them. While ethics debates for decades now have contested the morality of the lawyer's role, focusing on the extent to which the lawyer's own moral

agency is affected by it (if it should be), no one denies that the client's moral agency is relevant to understanding what lawyers do, and how they should do it. This means that to deny an individual her choice of counsel requires justification; it must be something important, a risk that the client cannot adequately appreciate, or something of other social importance, such as a risk that the lawyer will harm others or undermine the administration of justice. In the cases on regulation of personal misconduct the regulators and courts appeal to justifications such as these. As has been suggested, however, their attempt to do so largely rings hollow, except to the extent regulation usefully could alert clients that their prospective lawyer has engaged in personal misconduct. A client who is informed, who knows who Maurice Sychuk is, and what he did, should be given the choice of whether to retain him or not.

*e. Conclusion*

Disciplining lawyers because they have acted badly in their personal lives requires justification. No matter how wicked, distasteful, sleazy and unpleasant a lawyer's conduct of her personal affairs, professional discipline of that lawyer must be a legitimate exercise of regulatory authority. The previous section suggested that when assessed against the traditional justification of regulatory action in market imperfections and attainment of economic efficiency, regulation of personal misconduct fails. This section has considered the regulatory action more broadly, against the procedural and substantive norms of the democratic state, as embodied in the legislation pursuant to which this regulation takes place, the process through which it is done and other existing democratic norms. The best argument in favour of this regulation lies in the fact that it occurs pursuant to a quasi-judicial (and, when subject to review, a judicial) process. The worst – most troublesome – argument arises when the regulation is assessed against other democratic norms. Not only do those norms not support this type of regulation, they also suggest that this regulation is

positively inconsistent with principles fundamental to a democratic legal system – rationality, fairness, double jeopardy, market functioning and client autonomy.

Given this assessment, can the current regulation of lawyers for personal misconduct claim democratic legitimacy? In my view they have not. While there are process grounds to support these regulatory norms, and some limited legislative legitimacy for them, the most significant point is their inconsistency with broader democratic norms. In the end, the impression arising from this analysis is that there is “no good reason” for this regulation to persist. Without a good reason, there is no legitimacy.

#### **IV. Justifiable regulation of extra-professional misconduct**

This chapter has argued against the current regulation of extra-professional misconduct, in which lawyers who act badly in their personal lives are subject to professional regulatory consequences ranging from a fine or reprimand to suspension and disbarment. This section takes a more constructive approach. Specifically, given the grounds of empirical justification, correction for market failure and democratic legitimacy, what type of regulation of extra-professional misconduct, generally speaking, might be justifiable?

First, as was noted in the discussion of empirical justifiability, misconduct that technically falls outside of the practice of law, but in which the lawyer could reasonably be understood to have in some way engaged her legal skills or expertise, can be justified for much the same reasons that ordinary regulation of professional misconduct is justified – it creates proper disincentives and sanctions for those violating their professional obligations. In this case the expansion of the regulatory scope is simply to ensure proper implementation of those regulatory goals, not to shift to different regulatory goals. Regulation of extra-professional misconduct in its current form can best be understood as prophylactic, as directed at preventing some other as yet unknown harm.

Regulation of extra-professional misconduct which is in substance professional misconduct is not prophylactic, but is rather directed at the specific misconduct in which the lawyer engaged.

Second, regulation that provides clients with additional information that might be relevant to their consumption choices, but which the market will not provide, could be justified. It may not be desirable – a lawyer with criminal convictions could conceivably use a requirement that she publish those convictions as an opportunity to attract clientele interested in a lawyer they perceive as likely to circumvent legal rules (even if such perceptions are empirically suspect) – but it could be justified on economic grounds.

Third, a democratic society that wishes to sanction particular types of conduct, could legitimately include as part of that sanction a restriction on the individual's ability to pursue particular livelihoods or types of work. As part of the criminal sentence for fraud or embezzlement, for example, a person could be prohibited from managing trust funds as part of the sentence. The important distinction here is that in that case the sanction is a sanction for the crime or misconduct in question, and does not need to be justified as connected to the legislative mandate given to a professional regulator.

Finally, and less directly, whatever form regulation of extra-professional misconduct takes, regulators need to embrace far greater rigour in their implementation. No regulation to protect the profession's reputation should be permitted, and those jurisdictions that have legislatively eliminated that possibility are to be commended. Regulators should not assert that personal misconduct shatters a lawyer's integrity such as to warrant disbarment of the lawyer; some other reason for the decision must be provided, and such statements tempered given their dubious empirical validity. And overall, all regulatory activities should be directed towards the regulator's most important mandate: ensuring that lawyers play their fundamental role in a pluralist democracy

and that they do not abuse the power that they have given. Regulation of extra-professional misconduct, to the extent it is done at all, must be directed at that end.

## **V. Conclusion – Regulatory Pluralism**

The vexing question for legal ethicists has traditionally been: what constitutes right action in the practice of law? When is a lawyer's conduct properly described as ethical, and when is it properly described as unethical? The analysis in this paper suggests that, as challenging a task as it is to answer that question, answering its follow-up – how do we properly regulate what lawyers do to create the conditions for, and the outcome of, ethical legal practice so defined – is even more difficult. It is one thing to provide a convincing explanation of what being an ethical lawyer would look like. It is quite another thing to ensure that, in fact, lawyers practice in that way.

This accomplishment may not be fully achievable. But if it is to be achieved, or even pursued, the most significant mechanism for doing so will be the regulatory norms governing the legal profession, both formal and informal. As a consequence, regulation of the legal profession needs to be the subject of serious engagement, critiquing the regulation that occurs and identifying regulation that should occur but has not.

Then the question becomes, as posed at the outset of this paper – on what basis should regulatory activity (or inactivity) be assessed? The answer given here is: on multiple bases. Regulation is at its heart pluralistic; there is no one norm or value which all regulations at all times should or must adhere to. Regulation needs to be empirically rigorous; it must not be based on empirical assertions that are in reality no more than beliefs stated with confidence, and which may be falsifiable as facts. Regulation needs to respond to the imperfections in the market for legal services to ensure the accomplishment of economic efficiency but also, and more importantly, to ensure that those market imperfections do not enable unethical activities. And, finally, regulation

needs to be democratically legitimate; it needs legislative authorization, procedural rigour and consistency with democratic norms, particularly those related to fostering lawyers' role as actors within the democratic legal system.

What a critique of regulation on these bases looks like is illustrated by the analysis of the regulation of lawyer's personal misconduct. That regulation fails on each basis offered for assessment; if it could succeed on one it would be defensible and perhaps even desirable. But when it is identified as based on dubious empirical presumptions, as bearing no relationship to addressing the imperfections in the market, as of doubtful democratic legitimacy and as explicable as an example of regulatory capture, the logical conclusion is that the regulation in its current form should be abandoned. Another approach to such regulation may be justifiable, but not this one.

<sup>1</sup> See, e.g., Michael Lewis and David Einhorn, "The End of the Financial World as We Know It" and "How to Repair a Broken Financial World" *New York Times*, January 4, 2009.

<sup>2</sup> Like Professor Webb's, this chapter deals only with misconduct by lawyers outside of legal practice, which it refers to as "extra-professional misconduct" and "personal misconduct" interchangeably.

<sup>3</sup> Professor Webb also gives some consideration to case law in the United States.

<sup>4</sup> Duncan Webb, "Screamin' Mo Sychuk: Nefarious Conduct and the Fit and Proper Person Test" MS p. 9

<sup>5</sup> *Smith v. Jones* [1999] 1 S.C.R. 455 at para. 46

<sup>6</sup> *R. v. Neil* [2002] 3 S.C.R. 631 at para. 12

<sup>7</sup> *Law Society of Alberta v. Pozniak* [2002] L.S.D.D. No. 55 (QuickLaw) at para. 17.

<sup>8</sup> For an American example see the discussion on the website Legal Ethics Forum regarding exceptions to confidentiality to prevent wrongful incarceration or execution: <http://www.legalethicsforum.com/blog/2009/06/sacrificing-the-client-to-save-the-innocent-man.html#comments>

<sup>9</sup> A survey cited by David Luban in *Lawyers and Justice: An Ethical Study* Princeton: Princeton University Press, 1988) p. 218, fn. 26. Although for a strongly contrary view see Monroe Freedman and Abbe Smith, *Understanding Lawyers' Ethics* 3d ed. Newark: LexisNexis, 2004 pp. 139-140.

<sup>10</sup> See, for example, Ronald D. Rotunda, "The Legal Profession and the Public Image of Lawyers" *Journal of the Legal Profession* 23, 1999, 51 and W. Bradley Wendel, "How I Learned to Stop Worrying and Love Lawyer-Bashing: Some Post-Conference Reflections" *South Carolina Law Review* 54, 2003, 1027:1033-1041.

<sup>11</sup> An excellent example of this is the case of *R. v. Lyons*, [1987] 2 S.C.R. 309, where the Supreme Court of Canada considered the validity of the dangerous offender rules in light of the overwhelming evidence that psychologists cannot predict future dangerousness with any degree of reliability. The Supreme Court acknowledged the validity of the evidence, but held that given the uncertainty of future danger, and the offender's past history of offending, it was appropriate that the risk arising from the uncertainty of identification be placed on the offender. That is, they offered a reasoned justification for the rule despite the empirical problems underlying it.

<sup>12</sup> See note 80 *infra* and accompanying text.

<sup>13</sup> See, e.g., *Reference Re Same-Sex Marriage* [2004] 3 S.C.R. 698

<sup>14</sup> The relationship between personal misconduct by lawyers and the protection of the profession's reputation is also empirically uncertain. It does not, however, require consideration of a separate body of scholarship, and so is simply discussed in the context of my later assessment of regulation to protect the profession's reputation against the requirements of regulatory theory.

<sup>15</sup> For a discussion of the empirical problems associated with the concept of "character" in the context of the good character requirement for law society (bar) admission see Deborah Rhode, "Good Character as Professional Credential" *Yale Law Journal* 94, 1985, 491; Alice Woolley, "Tending the Bar: The 'Good Character' Requirement for Law Society Admission" *Dalhousie Law Journal* 30, 2007, 27; Alice Woolley and Jocelyn Stacey, "The Psychology of Good Character" in *Reaffirming Legal Ethics* (Routledge, forthcoming).

<sup>16</sup> Gopal Sreenivasan, "Errors about Errors: Virtue Theory and Trait Attribution" *Mind* 111, 2001, 441. Sreenivasan himself is, however, a skeptic about the attempts of social psychologists to undermine the notion of character.

<sup>17</sup> See John M. Doris, "Persons, Situations, and Virtue Ethics" *Noûs* 32(4), 1998, 504 (hereinafter "Doris 'Persons'"); John M. Doris *Lack of Character: Personality and Moral Behavior* New York: Cambridge University Press, 2002; Lee Ross & Richard E. Nisbett, *The Person and the Situation: Perspectives of Social Psychology* New York: McGraw-Hill, 1991; Philip Zimbardo, *The Lucifer Effect: How Good People Turn Evil* New York: Random House, 2007; Gilbert Harman "Moral Philosophy meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error", *Proceedings of the Aristotelian Society*, 99, 1999, 315-; "The Nonexistence of Character Traits" *Proceedings of the Aristotelian Society*, 100, 2000, 223-226. David Luban has an interesting discussion of the relationship between this social psychology evidence and legal ethics in chapters 7 and 8 of

*Ethics and Human Dignity* New York: Cambridge University Press, 2007; as noted below, Luban is skeptical about pure situationalist approaches. He has some reason to be. As many psychologists emphasize, while situations are highly significant in influencing human behaviour, they do not determine human behaviour. How people act involves a complex interaction of situation, personality, culture and other facts. See in general: David Matsumoto, "Culture, Context, and Behavior" *Journal of Personality* 75(6), 2007, 1285.

<sup>18</sup> See Woolley and Stacey, note 15, *supra*, and also Woolley, note 15, *supra*.

<sup>19</sup> *Re Cwinn and Law Society of Upper Canada* (1980), 108 D.L.R. (3d) 381 at para. 8.

<sup>20</sup> *Ibid.* at para. 10.

<sup>21</sup> Doris, "Persons" note 17, *supra* at 507. It is a truism of psychology in general that the best predictor of future behaviour is past behaviour.

<sup>22</sup> Luban, note 17 *supra* at 283.

<sup>23</sup> *Ibid.* at 284. And see also Matsumoto, note 17, *supra*. Although this does not show that "character" does exist or is determinative.

<sup>24</sup> Although such assessments are highly problematic: Woolley and Stacey, note 15, *supra*.

<sup>25</sup> There have been some attempts to consider economic theory relative to regulation of the legal profession. See notes 30 to 37, *infra*.

<sup>26</sup> See in general Barry Barton, "The Theoretical Context of Regulation" in Barton et al. eds, *Regulating Energy and Natural Resources* Oxford: Oxford University Press, 2006; R. Baldwin, C. Scott, and C. Hood, eds. *A Reader on Regulation* Oxford: Oxford University Press, 1998; Stephen Breyer, *Regulation and its Reform* Cambridge: Harvard University Press, 1982.

<sup>27</sup> Julia Black, "Proceduralizing Regulation Part I" *Oxford Jour. of Legal Studies* 20, 2000, 597:598.

<sup>28</sup> The public interest/private interest terminology is used within the regulatory sphere. See, e.g., Robert Baldwin and Martin Cave, *Understanding Regulation* Oxford: Oxford University Press, 1999. Private interest refers to theories of regulatory capture, also known as public or social choice, or as political economy. The relevance of private interest economic analysis is considered briefly at the end of this section.

<sup>29</sup> For example: "Our central claim is that the welfare-based normative approach should be exclusively employed in evaluating legal rules." Louis Kaplow and Steven Shavell, *Fairness versus Welfare* Cambridge: Harvard University Press, 2002 p. 3

<sup>30</sup> Gillian K. Hadfield, "Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets" *Stanford Law Review* 60, 2008, 102:143. Hadfield argues that in some segments of the market for legal services democratic values dominate and in others economic values dominate. I am not sure that the market can be divided quite that neatly – in most circumstances account must be taken of both economic and democratic values.

<sup>31</sup> Michael J. Trebilcock, Carolyn J. Tuohy, Alan D. Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organizations Committee* Toronto: Ontario Law Reform Commission, 1979; Philip Slayton and Michael Trebilcock eds. *The Professions and Public Policy* Toronto: University of Toronto Press, 1978; Gillian Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" *Michigan Law Review*. 98, 2008, 953; Michael Trebilcock and Lilla Csorgo, "Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective" *Dalhousie Law Journal* 24, 2001, 1; Alice Woolley, "Imperfect Duty: Lawyers' Obligation to Foster Access to Justice" *Alberta Law Review* 45(5), 2008, 107 (hereinafter "Woolley, 'Imperfect Duty'"); Michael Trebilcock, "The Regulation of the Market for Legal Services" *Alberta Law Review* 45(5), 2007, 215; Benjamin Hoorn Barton, "Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation" *Arizona State Law Journal* 33, 2001, 430.

<sup>32</sup> Alice Woolley, "Time for Change: Unethical Hourly Billing in the Canadian Legal Profession and How to Fix It" *Canadian Bar Review* 83(3), 2004, 859.

<sup>33</sup> Woolley, "Imperfect Duty" note 31, *supra*.

<sup>34</sup> Lawyers were relevant participants in the abuse associated with, e.g., the Enron scandal – i.e., the unlawful pursuit of client interests in that case imposed significant external costs on those relying on the accuracy and validity of the Enron financial statements.

<sup>35</sup> It must be noted that despite common assertions to the contrary, the market for legal services is *not* an economic monopoly. While lawyers as a whole have a monopoly, within the legal profession itself there are numerous buyers and sellers of legal services such that no participant is likely to be able to extract market rents solely because of that monopoly effect. Because of the sheer numbers of lawyers in the market it is also not obvious that, absent other market issues, the monopoly of lawyers themselves would lead to the extraction of economic rents.

<sup>36</sup> My paper, "Imperfect Duty" provides a relatively detailed analysis and review of the literature on imperfections in the market for legal services. Note 31, *supra*.

<sup>37</sup> See Woolley, "Imperfect Duty" note 31, *supra* and Joel Podolny, "A Status-Based Model of Market Competition" *The American Journal of Sociology* 98, 1993, 829.

<sup>38</sup> Brad Wendel was helpful in formulating this "best case" economic justification and the problems with it.

<sup>39</sup> See Rotunda, note 10, *supra*.

<sup>40</sup> *Ibid.*

<sup>41</sup> Although given the information impossibility problem reliance on status is probably inevitable to some degree.

<sup>42</sup> Thanks to Frances Woolley for helping to formulate this argument.

<sup>43</sup> Edward Rubin "Symposium: Getting Beyond Cynicism: New Theories of the Regulatory State Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw Out That Baby" *Cornell Law Review*, 87, 2002, 309:310.

<sup>44</sup> Mancur Olson Jr. *The Logic of Collective Action* Cambridge: Harvard University Press, 1965.

<sup>45</sup> See Peltzman, note 47 at 13.

<sup>46</sup> Stigler, *supra*.

<sup>47</sup> See Richard Posner, "Taxation by Regulation" *Bell Journal of Economics and Management Science* 3, 1971, 22; Sam Peltzman, "The Economic Theory of Regulation After a Decade of Deregulation" (1989) *Brookings Papers on Economic Activity: Microeconomics* 1989, 1989, 1:13; Sam Peltzman, "Toward a More General Theory of Regulation" *Journal of Law and Economics* 19:2, 1976, 211:217; Gary S. Becker, "A Theory of Competition Among Pressure Groups for Political Influence" *Quarterly Journal of Economics* 98:3, 1983, 371.

<sup>48</sup> *Alberta Law Review* 45(5), 2008, 235

<sup>49</sup> *Ibid.* pp. 251-252.

<sup>50</sup> Mike Feintuck, *'The Public Interest' in Regulation* Oxford: Oxford University Press, 2004, p. 17 (hereinafter Feintuck). See also Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* Cambridge: Harvard University Press, 1990.

<sup>51</sup> For a general articulation of this perspective on democratic legitimacy see: W. Bradley Wendel, "Civil Obedience" *Columbia Law Review* 104, 2004, 363.

<sup>52</sup> Bernard Williams, "Pluralism, Community, and Left Wittgensteinianism," in Bernard Williams, *In the Beginning was the Deed: Realism and Moralism in Political Argument* Princeton: Princeton University Press, 2005, p. 29.

<sup>53</sup> The arguments on this point are complex, and beyond the scope of this paper. For a stringent (and somewhat odd) articulation of this view see Immanuel Kant, *The Metaphysics of Morals* Mary Gregor transl. Cambridge: Cambridge University Press, 1991, pp. 129-133.

<sup>54</sup> Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* New York: Oxford University Press, 1999, pp. 76-78.

<sup>55</sup> “Although such [political] power originates in autonomous public spheres, it must take shape in the decisions of democratic institutions of opinion-and will-formation, inasmuch as the responsibility for momentous decisions demands clear institutional accountability”. Jürgen Habermas, “Popular Sovereignty as Procedure” in *Deliberative Democracy: Essays on Reason and Politics* James Bohman and William Rehg ed. Cambridge: The MIT Press, 1997, 35:59.

<sup>56</sup> *Ibid.*

<sup>57</sup> Which is, of course, properly understood as executive decision-making, and therefore conceptually distinct from the legislature.

<sup>58</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg Cambridge, MA: MIT Press, 1996, p. 440 (hereinafter Habermas, *Facts and Norms*). It is questionable, of course, whether administrative decision making has ever been normatively neutral, although it certainly used to be less extensive

<sup>59</sup> Tony Prosser, “Theorising Utility Regulation” *Modern Law Review*, 62, 1999, 196:216; P.P. Craig *Public Law and Democracy in the United Kingdom and the United States of America* Oxford: Clarendon Press, 1990, p. 136 (hereinafter Craig).

<sup>60</sup> Habermas, *Facts and Norms* at 440-41. For further articulation of Habermas’s position in this respect see: Jürgen Habermas, “Paradigms of Law” *Cardozo Law Review* 17, 1996, 771.

<sup>61</sup> *Ibid.* See also: Julia Black, “Proceduralizing Regulation Part I” *Oxford Journal of Legal Studies* 20, 2000, 597; Julia Black, “Proceduralizing Regulation Part II” *Oxford Journal of Legal Studies* 21, 2001, 33; Alice Woolley “Legitimizing Public Policy” *University of Toronto Law Journal* 58, 2008, 153 (hereinafter Woolley, “Legitimizing Public Policy”); Mark Seidenfeld, “A Civic Republican Justification for the Administrative State” *Harvard Law Review*, 105, 1992, 1512.

<sup>62</sup> Prosser, *supra* note 59 p. 215 – “regulatory space should be seen as operating within a set of boundary constitutional principles.” Prosser goes on to argue that given the absence of “a relevant set of determinate constitutional principles” in the UK it may be necessary to ground the search for such principles in a proceduralist model akin to that articulated by Habermas. In that sense Prosser’s work is consistent with that of Black and Woolley, “Legitimizing Public Policy” *ibid.*, although Prosser places less emphasis on Habermas’s deliberation theory and more on his articulation of how to institutionalise democratic processes.

<sup>63</sup> Sunstein, note 50 *supra*, although Sunstein clearly does not limit his identification of the relevant principles of interpretation to those currently employed in judicial decision-making.

<sup>64</sup> See, e.g., *Re Athabasca Tribal Council and Amoco Canada Petroleum Co. Ltd.* (1981) 124 D.L.R. (3d) 1 (SCC)

<sup>65</sup> Some argue that any democracy based theory of regulatory action requires taking a position on the “deeper controversies concerning different conceptions of the democratic society in which we live” (Craig, note 59 *supra* p. 4). For this paper the justificatory framework from the more robust democratic theories is proceduralist and positivist. It emphasizes democratic justification arising from a process linking the regulatory action to representative decision-making (whether legislative or internal to the administrative framework) and from compliance with substantive legal (including institutional) norms found and justified elsewhere in the democratic legal system within which this particular regulatory activity is taking place. It does not rest on, for example, broader substantive assertions that to be democratically legitimate regulation should ensure “the democratic interests in equality of citizenship” (Feintuk, note 50 *supra* p. 250) or should comply with any other norms outside those articulated by the legal system within which the regulation is taking place.

<sup>66</sup> This is not to say that the action is *ultra vires* – i.e., the claim is not, as would be the claim in the first “thin” conception of democratic legitimacy, that the action is illegitimate in the sense of being appropriately subject to reversal or nullification on judicial review. Regulators are given broad margins of manoeuvre by legislators, to the point where it is a unifying principle of common law judicial review that within their jurisdiction regulators are entitled to make incorrect decisions; as a consequence, a claim that regulatory action is illegal is a strong one. More robust democratic theories of regulation, like their economic counterparts, are theoretical frameworks for critiquing regulatory decision-making; they are not more stringent claims of regulatory illegality.

<sup>67</sup> This form of legitimacy can be understood as flowing from the fact that regulatory decision-makers are fundamentally executive in nature not legislative, and as a consequence can claim democratic legitimacy apart from legislative authority. This is most obvious in jurisdictions like the United States, where there is separation of powers, and rule-making and other agency processes are infused with democratic legitimacy through the office and authority of the President.

<sup>68</sup> This approach is analogous to the approach adopted by William Simon with respect to the exercise of ethical discretion in lawyering with respect to the measuring of the relative importance in a given case of the “overlapping tensions between substance and procedure, purpose and form, and broad and narrow framing.” William Simon, “Ethical Discretion in Lawyering” *Harvard Law Review*, 101, 1987-1988, 1083:1096. As in the exercise of ethical discretion, is an element of judgment inherent in assessing the grounds of legitimacy, and the three grounds need to be balanced against each other. So, similarly, here one “can imagine a procedural context that is so reliable as to make superfluous” (p. 1102) the need to assess the substance of the norm against other democratic norms. On the other hand, when the process (whether on the adjudication of a particular case, or at the level of policy) does not involve rigorous consideration of the norms, that process does not remove the need to assess the policy against them. It should be noted that the reliance on Simon here is by way of analogy, not a form of endorsement of the ethical discretion approach in general.

<sup>69</sup> This argument is made by Brad Wendel, who uses it to develop his position that the fundamental ethical obligation of lawyers is one of fidelity to law. See, e.g., Bradley Wendel “Professionalism as Interpretation” *Northwestern University Law Review* 99, 2005, 1169. It is also developed by Tim Dare in his recent book: *Counsel of Rogues? A Defence of the Standard Conception of the Lawyer’s Role* Burlington: Ashgate Publishing Company, 2009

<sup>70</sup> See footnote 52 *supra* and accompanying text.

<sup>71</sup> See Webb, footnote 21.

<sup>72</sup> See Webb, footnote 22.

<sup>73</sup> See Webb, footnotes 28 and 29.

<sup>74</sup> A number of Canadian jurisdictions, for example, expressly authorize regulation of conduct “whether or not it occurs in the practice of law”.

Having said that, even that authorization could be interpreted as simply ensuring that lawyers are not able to make technical arguments that they were not practicing when they committed the misconduct in question. It does not, again, require by necessity that the law societies regulate in this way.

<sup>75</sup> See text accompanying note 38, *supra*.

<sup>76</sup> See Stephen Croley “Theories of Regulation: Incorporating the Administrative Process” *Columbia Law Review*, 98, 1998, 1

<sup>77</sup> See Black note 61, *supra* and Woolley, “Legitimizing Public Policy” note 61, *supra*.

<sup>78</sup> The assessment of these norms against other democratic norms creates significant interpretive issues. Norms within a legal system can conflict, and can within themselves reflect specific compromises of broader norms that are in tension. Those interpretive issues go well beyond the scope of this paper, and are not resolved here. The claims made here are that interpretation is possible, and that while there can be more than one “good” interpretation within law, there can also be demonstrably wrong interpretations: “legal doctrine resembles a multi-generational compromise, with

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principles and counter-principles that roughly track the political fault lines of different stages of evolving society. The result is indeterminacy in legal doctrine. But it is indeterminacy of a special and limited sort – moderate, not global, indeterminacy... Brewster was wrong: *not* every proposition is arguable” (David Luban note 17, p. 197) In my view, the assertion that regulation to maintain the reputation of the legal profession, or regulation to prevent a risk to the public which is empirically undemonstrated (and likely untrue in general terms) is consistent with democratic norms is wrong, or “not arguable”.

<sup>79</sup> All of these norms can make independent claims to legitimacy – the law of lawyering in the process used in most jurisdictions prior to the enactment of codes of professional conduct (although such process is problematic in some jurisdictions given minimal participation by non-lawyers), the judicial process around the law of fiduciary obligations and the common law and legislative norms in favour of access to justice and the right to counsel (which also has constitutional significance)

<sup>80</sup> *Dunsmuir v. New Brunswick* 2008 SCC 9, para. 42.

<sup>81</sup> *Wilson v. BC Medical Services Commission* (1988) 53 D.L.R. (4<sup>th</sup>) 171, although it is noted that this case is of doubtful precedential authority.

<sup>82</sup> And courts have expressly found that this regulation does not constitute double jeopardy, as discussed by Webb, MS p. 4, discussing *Ex Parte Brounsall* (1778) 2 Cowp 829, 98 RE 1385.

<sup>83</sup> See in Canada *Jabour v. Law Society of British Columbia* (1980) 115 D.L.R. (3d) 549 (B.C.C.A.) (aff’d [1982] 2 S.C.R. 307)