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A TAXONOMY OF LAWYER REGULATION:
How Contrasting Theories of Regulation Explain the Divergent Regulatory Regimes in Australia, England/Wales, and North America

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ABSTRACT

What explains the dramatic contrast between legal services regulation in the United States and anglophone Canada, on one hand, and England/Wales and Australia, on the other? In order to help explain these divergent regulatory choices, and to further comparative analysis, this Essay proposes a taxonomy[4] of theories of legal services regulation drawn from these common-law jurisdictions. Although most jurisdictions employ a combination of approaches, as well as some hybrid methods, the Essay identifies the two dominant perspectives: (1) the professionalist-independent framework, predominate in anglophone North America, and (2) the consumerist-competitive framework found in the common law jurisdictions of Northern Europe and Australia. This theoretical divide, in turn, helps explain why the United States and Canada have largely adhered to a body of self-regulation focused upon aspirations of professionalism and professional independence. Australia and England/Wales, by contrast, have embarked upon market-oriented reform that purports to promote consumer protection and consumer interests. In describing this taxonomy, we recognise jurisdictions sometimes employ hybrid regulatory strategies that combine elements of the professionalist-independent and consumerist-competitive frameworks, such as gatekeeper rules promulgated by the State (as opposed to gatekeeper regulations promulgated by judges or the legal profession). We also acknowledge that regulatory approaches are dynamic and that regulators may very well shift perspectives over time. Nevertheless, organising the claims of commentators and regulators into categories will help to promote analysis and comparison of legal services regulations, as well as to improve the quality of decision-making by those who craft and enforce the rules. We identify, for example, the crucial distinction between how these two approaches construct an understanding of legal services clients. Consumerist-competitive systems identify clients as consumers (who are similar to consumers of other goods and services) and apply this perspective to the particular context of purchasing legal services. In contrast, professionalist-independent systems understand the experience of a legal services client as fundamentally different from that of other consumers and, accordingly, require a wholly distinct regulatory approach.

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The Essay proceeds as follows. Part I situates our inquiry in the context of a larger, more fundamental question: why regulate legal services in the first instance? We identify and describe various theories that explain the introduction of regulation, contrasting in particular the private interest (capture) and public interest (market failure) approaches. Part II then turns to an exploration of the regulators' normative theories on how legal services ought to be regulated. Here we describe the taxonomy of consumerist-competitive and professionalist-independent approaches, including how consumerist-competitive approaches tend to favour government regulation, market-oriented solutions, firm-level accountability, and principles-based regulatory strategies and why professionalist-independent approaches tend to favour self-regulation, individual lawyer accountability, and command-and-control regulatory strategies.

INTRODUCTION

In recent years, Australia and England/Wales[5] took a markedly different approach to the regulation of legal services than the United States or Canada. Regulatory efforts in Australia and England/Wales provided different responses to changing technological and social conditions with a purported goal of enhancing both market competition and innovative regulatory strategies. By contrast, the American Bar Association (ABA), in response to the recent work of the ABA 20/20 Commission, embraced only minimal changes related to technology advancements and generally rejected efforts to promote market competition and innovation.[6] While a few Canadian provinces made similar limited changes, most resisted these trends.[7] Instead, anglophone North American jurisdictions generally adhere to a relatively traditional system of regulation based on professional independence.

Although a number of scholars and commentators throughout the common law world have noted these divergent regulatory responses,[8] they have devoted less attention to the justifications that underpin these responses. This Essay proposes a taxonomy of the rationales underlying the contrasting regulatory strategies in order to help explain their divergence and to promote comparative analysis. In doing so, we build on the path-breaking work of Richard Abel in offering a taxonomy of sociological theories of the

[5] We refer to England/Wales recognising that the Legal Services Act (2007) generally refers to England and Wales, but not the other jurisdictions within the United Kingdom.

[6] See ABA Model Rule 1.1, Comment 8 (2012): 'To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject'. (emphasis added to highlight revised language).

[7] Significant reform to rules about alternative business structures is being considered in the provinces of Ontario (Alternative Business Structures Working Group, *First Report to Convocation (June 27, 2013)*, (Toronto: Law Society of Upper Canada, 2013) online: LSUC <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147495044> accessed 3 December 2013 and Nova Scotia (Nova Scotia Barristers' Society, "2013 – 2016 Strategic Framework," online: http://nsbs.org/sites/default/files/cms/menu-pdf/strategicframework.pdf > accessed 3 December 2013. In British Columbia, the regulator is examining the question of whether notaries, paralegals, and lawyers should be brought under the authority of a single regulator (Law Society of British Columbia, "Public Consultations in Vancouver, Victoria and Prince George on Future of Legal Regulation (Press Release, September 5, 2013)," online: <http://www.lawsociety.bc.ca/page.cfm?cid=3811&t=Public-consultations-in-Vancouver,-Victoria-and-Prince-George-on-future-of-legal-regulation> accessed 5 November 2013.

[8] Among the numerous commentaries and publications, legal services regulation is the topic of a new annual International Conference of Legal Regulators and a major new monograph (Frank Stephen, *Lawyers, Markets and Regulation* (Edward Elgar, 2013)).

legal profession[9] and David Wilkins in providing a taxonomy of models for controlling lawyer conduct.[10] Our taxonomy classifies strategies for regulating legal services, including economic, sociological, policy, and professional perspectives.

The Essay proceeds as follows. Part I situates our inquiry in the context of a larger, more fundamental question: why regulate legal services in the first instance? It contrasts private interest (capture) theories relating regulation to supplier self-interest with public interest theories about regulation's value for clients and the public. The private interest theories include both sociological and economic variants, while the public interest theories divide into market-failure and legal-ethical accounts.

Part II then considers regulators' normative theories of how legal services should be regulated. Here we propose a distinction between a professionalist-independent framework that valorises the professional independence of lawyers and focuses on the special, non-consumer interests of clients versus a consumerist-competitive framework that focuses on the consumer interests of clients and seeks to advance them by fostering competition between legal service providers. These two frameworks, in turn, rely on underlying core values and promote particular regime elements, including (i) occupational structure, (ii) governance, (iii) regulatory posture toward people other than legal services licensees, and (iv) level of regulatory focus (individual versus firm). In anglophone North America, the professionalist-independent model is the dominant, although not exclusive strategy, while England/Wales and Australia generally employ the consumerist-competitive approach.

But while a particular approach may be dominant, most jurisdictions do not rely exclusively on one or the other and may shift their reliance from one regime to another over time. For example, while legal services regulators in the United States generally apply a professionalist-independent approach, a few jurisdictions have begun to apply a consumerist-competitive approach to permit licensed paralegals.[11] Similarly, England/Wales generally employs consumerist-competitive strategy but maintains a system of self-regulating front line regulators based upon a professionalist-independent model.[12] Jurisdictions also employ hybrid frameworks, such as a professionalist-regulatory model that combines professionalist assumptions regarding lawyer capabilities with consumerist disregard for self-regulation and includes gatekeeping legislation and common law malpractice doctrine.[13]

We intend our taxonomy of current regulatory approaches to assist scholars and regulators alike as they evaluate merits of existing regulation and consider proposals for reform.[14] For purposes of this Essay, we

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[9] Richard Abel, *American Lawyers* (Oxford University Press, 1989) 14-39. Abel divides sociological theories of the legal profession into Weberian, Marxist, and structural-functionalist categories.

[10] David B. Wilkins, 'Who Should Regulate Lawyers?' (1992) 105 *Harvard Law Review* 799. Wilkins identifies 'compliance arguments' and 'independence arguments' and argues for a contextual approach to calibrating the use of compliance and independence approaches.

[11] See discussion infra (n 160).

[12] See discussion infra (n 161).

[13] See discussion infra (n 162).

[14] Significant changes can be seen in legal services regulatory regimes across the common law world. For example, consider the very short period which elapsed between the implementation of the *Legal Services Act 2007* in fall 2011 and the call for another major overhaul just two years later in fall 2013. *See* Owen Bowcott, 'Labyrinthine legal services regulation 'needs to be streamlined'' (The Guardian, first published 10 September 2013) www.theguardian.com/law/2013/sep/10/legal-services-board-labyrinthine-regulation (last accessed 23 October 2013). Similarly, shortly after the ABA 20/20 Commission declined to engage in meaningful reform related to nonlawyer ownership, multidisciplinary partnerships, and limited license legal technicians or similar efforts to

do not take a normative position on the relative merits of the contrasting approaches.[15] Rather, we seek to clarify and facilitate analysis of legal services regulation as well as to improve the quality of decision-making by those who craft and enforce the rules.

PART I: WHY REGULATE LEGAL SERVICES?

The development of a taxonomy of legal services regulation begins with the question of why we regulate legal services in the first instance. Part I identifies and briefly summarises the justifications advanced for regulation of the legal profession across jurisdictions, including economic private interest theory, sociological private interest theory, market failure public interest theory, and legal-ethical public interest theory. Interestingly, the competing regulatory regimes in many ways are also rooted in a common goal of protection for clients (or consumers) but each aims to accomplish this goal via dissimilar means. For example, as we discuss below, client protection for North American regulators is grounded in preservation of autonomy for legal services practitioners and the legal profession, often framed as 'professional independence',[16] to ensure loyalty and fidelity to the client and to avoid the influence of a competing interest such as a non-lawyer partner in the law practice. By contrast, client protection for Australia and England/Wales is drawn from consumer protection principles. Part I concludes by observing that while some of these theories provide a justification for different regulatory approaches, others merely offer critique.

1.1 Private Interest Theories

According to the private interest theory of legal services regulation, rules are created in order to protect the interests of lawyers. This is an application of the capture theory of regulation, which holds that regulation is typically 'acquired' by the regulated group, and 'designed and operated primarily for its benefit'.[17] Economists and critical sociologists have developed distinct versions of the private interest theory, but their shared premise is that provider self-interest typically explains observed regulation. The private interest critique implicates all regulated occupations (especially self-regulating 'professions'), but it has also been specifically and forcefully applied to lawyers.

1.1.1 Economic Private Interest Theory

The economic critique of occupational regulation began where modern economics itself began: in 1776, with Adam Smith's Wealth of Nations. Smith suggested that the true purpose of mandatory apprenticeships in that era was the suppression of competition.[18] He also denounced self-regulatory occupational groups as natural fora for 'conspiracy against the public' and 'contrivance to raise prices'.[19]

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liberalise who may practice certain segments of law, a number of states have embarked on formal exploratory endeavors to assess these and related reforms. Regarding changes in Canada, see n 7, *supra*.

[15] For the purposes of this Essay, legal services regulation includes only rules enforceable by the State or by a body with state-recognised powers.

[16] For example, ABA Model Rule 5.4 is titled 'Professional Independence of a Lawyer'.

[17] George J. Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management Science* 3.

[18] Adam Smith, *An inquiry into the nature and causes of the wealth of nations* (1776), Book I, Chap. 10, Part II.

[19] Ibid.

The subsequent economic literature in this field may be understood as an elaboration and empirical buttressing of Smith's views.[20] A major contribution came with George Stigler's 'regulatory capture' concept in 1971. Stigler argued that economic groups consistently seek to enrich themselves by securing the state's coercive power to limit competition and fix prices.[21] Very soon after this idea became ascendant, its applicability to professional self-regulation was recognised.[22] While the members of an economic group must typically exert some effort to capture a state regulatory agency and bend it to their interests, a self-regulator controlled by members of the occupational group is effectively 'pre-captured'.[23] Self-regulation gives an occupational group carte blanche to manipulate regulation in order to enrich itself.[24]

To rebut arguments that regulation serves the public interest,[25] economists in this school point to evidence that regulation of legal services and other occupations is excessive, ineffectual or unnecessary to protect consumers.[26] They posit that the goal of occupational self-regulators (such as the American attorney licensing and disciplinary authorities or the Canadian law societies) is, instead, to maximise economic rents (artificially created transfers) for the members of the group.[27] Rent-seeking can take the form of 'ethics' rules which reduce competitive behaviour. For example, prohibitions on multi-disciplinary practices and nonlawyer ownership or investment in law practices are understood as mechanisms to suppress competition and reserve profits for members of the legal profession,[28] as are limitations on advertising and client solicitation.[29]

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[20] Benjamin H. Barton, 'Economists on Deregulation of the American Legal Profession: Praise and Critique' (2011) 2011 *Michigan State Law Review* 493.

[21] See Stigler (n 17) 4-7.

[22] See Stephen (n 8) Chapter 7.

[23] Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97; Javier Núnez, 'Can Self Regulation Work?: A Story of Corruption, Impunity and Cover-up' (2007) 31 *Journal of Regulatory Economics* 209.

[24] See e.g. Iain Paterson, Marcel Fink and Anthony Ogus, *Economic Impact of Regulation in the Field of Liberal Professions in Different Member States (Study for the European Commission, DG Competition)* (2003) 18-21; Gillian Hadfield, 'Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets,' (2008) 60 *Stanford Law Review* 1689.

[25] See section 1.2, below, for an account of the public interest theory of legal services regulation.

[26] Bernardo Bortolotti and Gianluca Fiorentini, 'Barriers to Entry and the Self-Regulating Profession: Evidence from the Market for Italian Accountants' in Bernardo Bortolotti and Gianluca Fiorentini (eds), *Organized Interests and Self -Regulation : An Economic Approach* (Oxford University Press 1999) 132-3; Richard Moorhead, Avrom Sherr and Alan Paterson, 'Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales' (2003) 37 *Law & Society Review* 765; Morris M. Kleiner and Hwikwon Ham, *Regulating Occupations: Does Occupational Licensing Increase Earnings and Reduce Employment Growth?* (2005) 2-3.

[27] Mario Pagliero, 'What is the Objective of Professional Licensing? Evidence from the US Market for Lawyers' (2011) 29 *International Journal of Industrial Organization* 473; Robert D. Tollison, 'Rent Seeking: A Survey' (1982) 35 *Kyklos International Review for Social Sciences* 575, 578.

[28] Deborah Rhode, 'Reforming American Legal Practice and Legal Education: Rethinking the Role of Nonlawyers in Delivering and Financing Legal Services,' (2014) *Legal Ethics* [forthcoming].

[29] Geoffrey Hazard, Russell Pearce and Jeffrey Stempel, 'Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services,' (1983) 58 *New York University Law Review* 1084.

Rents are most reliably guaranteed by cartels, which is how these critics perceive licensing regimes.[30] Occupational licensing, backed by the criminal prosecution of unauthorised practice, is understood as 'use of the political process to improve the economic circumstances of a group'.[31] If the licensing hurdles are set by self-regulatory groups, they will make them excessively onerous.[32] As Milton Friedman pointed out in his analysis of the medical profession, lobbying for new licensing regimes and barriers almost invariably comes from occupational groups, and not from consumers. This, according to Friedman, is a telling indication that licenses serve the interests of the former group at the expense of the latter.[33] Far from safeguarding the public, Friedman argued,

> licensure has reduced both the quantity and quality of medical practice… reduced the opportunities available to people who would like to be physicians, forcing them to pursue occupations they regard as less attractive; [and] forced the public to pay more for less satisfactory medical service.[34]

Alex Maurizi found empirical support for the proposition that self-regulatory professions manipulate the pass rates on licensing exams to preserve professional incomes as demand fluctuates; [35] Mario Pagliero added similar evidence specific to American lawyers.[36] When standards are raised, existing practitioners are often 'grandfathered' while new entrants must meet the higher standard.[37] According to the capture critique, grandfathering is a safe way for the members of the occupation to restrict supply and enhance their collective reputation without putting themselves to the inconvenience of meeting the higher standards.[38]

1.1.2 Sociological Private Interest Theory

The critical sociology of the professions has also analysed their development and interaction using the premise of self-interest. This sociological version of the private interest theory (also known as the 'market control' approach) is often traced to early-20th century German sociologist Max Weber.[39] Weber

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[30] Michele Boldrin and David K. Levine, *Rent-Seeking And Innovation (Federal Reserve Bank of Minneapolis Research Department Staff Report 347)* (2004); Deborah L. Rhode, 'Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions' (1981) 34 *Stanford Law Review* 1 (noting that the legal profession's "conduct in restricting entry and negotiating agreements with competing groups is that of a trade association or cartel, rather than that of a monopolist.").

[31] See Stigler (n 17) 13.

[32] Avner Shaked and John Sutton, 'The Self-Regulating Profession' (1981) 47 *Review of Economic Studies* 217, 225. See also Hayne E. Leland, 'Quacks, Lemons and Licensing: A Theory of Minimum Quality Standards' (1979) 87 *Journal of Political Economy* 1328, 1337-9.

[33] Milton Friedman, *Capitalism and Freedom* (University of Chicago Press [1962] 2002) 140.

[34] *Ibid*, 158.

[35] Alex Maurizi, 'Occupational Licensing and the Public Interest' (1974) 82 *Journal of Political Economy* 399.

[36] See Pagliero (n 27).

[37] James E. Moliterno, *The American Legal Profession in Crisis: Resistance and Responses to Change* (Oxford 2013) 100 and 106-7.

[38] Anthony I. Ogus, *Regulation : Legal Form and Economic Theory* (Clarendon Press 1994) 220; Manitoba Law Reform Commission, *Regulating Professions and Occupations* (Manitoba Law Commission 1994).

[39] See e.g., Abel (n 9).

observed the recurring tendency of economic competitors to form interest groups among themselves. These eventually evolve into a 'legal order that limits competition through formal monopolies'.[40] After a period of quiescence this approach was enthusiastically revived around 1970, and flourished for the next 25 years. The assumption of professional self-interest and the focus on social power are leitmotifs running through the leading texts of the sociological version of capture.[41]

One of the distinct contributions of the sociological tradition, which is not present in the economists' version, is the dual nature of professional self-interest. It has a pecuniary aspect (professionals' desire for market-control or market-shelter to enrich themselves),[42] but it also manifests itself in their desire to set themselves above and apart from other workers and service providers.[43] Self-regulation helps them accomplish the latter goal by excluding arriviste competitors, and using discipline to expel those who lower the tone of the 'club' after somehow sneaking in.[44] Professional discipline regimes are a favourite target for critics in this tradition. Typically it is argued that professional discipline will either be lax, or else will protect the interest of the profession and its elites rather than those of the public.[45]

Lawyers are often identified (along with doctors) as archetypal professionals.[46] It is therefore unsurprising that both the economic and the sociological versions of the capture critique have been applied explicitly to lawyers. Richard Abel and Deborah Rhode are perhaps the common law world's best known and most prolific authors in this tradition. Regulation, according to Abel, has typically been used by Anglo-American lawyers to dampen competition,[47] build legitimating myths[48] and avert surveillance

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[40] Max Weber, *Economy and Society : An Outline of Interpretive Sociology, edited by Guenther Roth and Claus Wittich; translators: Ephraim Fischoff et al.* (Bedminster Press [1922] 1968) 342 -344.

[41] Terence Johnson, *Professions and Power* (Macmillan 1972); Magali Sarfatti Larson, *The Rise of Professionalism : A Sociological Analysis* (University of California Press 1977); Andrew Delano Abbott, *The System of Professions : An Essay on the Division of Expert Labor* (University of Chicago Press 1988); Anne Witz, *Professions and Patriarchy* (Routledge 1992).

[42] Stefan Timmermans, 'Professions and Their Work: Do Market Shelters Protect Professional Interests?' (2008) 35 *Work and Occupations* 164, 165.

[43] Eliot Freidson, *Professionalism : The Third Logic* (Polity Press 2001) 199; see also Larson (n 41): 'I see professionalization as the process by which producers of special services sought to constitute and control a market for their expertise. Because marketable expertise is a crucial element in the structure of modern inequality, professionalization appears also as a collective assertion of special social status and as a collective process of upward social mobility'. Regarding the definition of 'service providers' and regulatory treatment of lawyers as service providers, see Laurel S. Terry, 'The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers,"' (2008) 2008 *ABA Journal of the Professional Lawyer* 189.

[44] Robert P. Kaye, 'Regulated (Self-)Regulation: A New Paradigm for Controlling the Professions?' (2006) 21 *Public Policy and Administration* 105.

[45] E.g., regarding lawyers, see Harry Arthurs, 'The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?' (1995) 33 *Alberta Law Review* 800, 805; Duncan Webb, 'Are Lawyers Regulatable?' (2008) 5 *Alberta Law Review* 233, 247; Alice Woolley, 'Regulation in Practice' (2012) 15 *Legal Ethics* 243; Deborah L. Rhode, 'Professional Regulation and Public Service: An Unfinished Agenda' in Scott L. Cummings (ed), *The Paradox of Professionalism : Lawyers and the Possibility of Justice* (Cambridge University Press 2011) 161.

[46] E.g. Gunter Burkart, 'Professions and Professionalization' in Austin Harrington, Barbara L. Marshall and Hans-Peter Müller (eds), *Encyclopedia of Social Theory* (Routledge 2006).

[47] Richard Abel, 'England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors' in Richard L. Abel and Philip Lewis (eds), *Lawyers in Society: The Common Law World* (University of California Press 1988) 43-4; See Abel (n 30) 142.

by outsiders.[49] Rhode has argued that lawyers' fear of third-party lawsuits has impeded the adoption of broader ethical standards,[50] and pointed to various regulatory policy issues in which the Bar's interest is so directly affected that self-regulators should never be expected to make disinterested decisions.[51] Benjamin Barton and Gillian Hadfield are other influential scholars who have applied capture theory to American legal services regulation. Barton contends that judges, as lawyers, consistently favour lawyers' interests in regulating them,[52] while Hadfield argues that the American legal profession's monopoly distorts access to justice.[53]

The private interest theory has been applied to legal services regulatory regimes around the common law world.[54] Julian Webb has analysed the ramifications of evolving economic and governance phenomena for the legal profession using this standpoint.[55] Frank Stephen's empirical research offers evidence for self-interest and capture among UK legal services regulators prior to the Legal Services Act, 2007. [56] Constance Backhouse has shown how Canadian lawyers used professionalism rhetoric and legal ethics rules to 'exercise power and exclusion based on gender, race, class and religion.'[57] Other legal scholars

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[48] Richard L. Abel, 'Why Does the ABA Promulgate Ethical Rules?' (1981) 59 *Texas Law Review* 639, 667 et seq.

[49] Abel, 'England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors'in *Lawyers in society: The Common Law World* (n 47) 24. See also Richard L. Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford University Press 2003); Richard L. Abel, *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings* (Oxford University Press 2008).

[50] Deborah L. Rhode, 'Moral Counseling' (2006) 75 *Fordham Law Review* 1317, 1333; Deborah L. Rhode, 'Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions' (1981) 34 *Stanford Law Review* 1, 6.

[51] Deborah L. Rhode, 'Professionalism In Perspective: Alternative Approaches To Nonlawyer Practice' (1996) 22 *New York University Review of Law & Social Change* 701, 706; Deborah L. Rhode, *Access to justice* (Oxford University Press 2004); ibid Deborah L. Rhode and Alice Woolley, 'Comparative Perspectives on Lawyer Regulation: An Agenda for Reform in the United States and Canada' (2012) 80 *Fordham Law Review* 2761. In a similar vein, see Sung Hui Kim, 'Naked Self-Interest? Why the Legal Profession Resists Gatekeeping' (2011) 63 *Florida Law Review* 129, 144.

[52] Benjamin H. Barton, *The Lawyer-Judge Bias in the American legal system* (Cambridge University Press 2011)[Barton, *Lawyer-Judge Bias*] 23, 132. See also Benjamin Hoorn Barton, 'Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulation' (2001) 33 *Arizona State Law Journal* 429.

[53] Gillian Hadfield, 'The Price of Law: How the Market for Lawyers Distorts the Justice System,' (2000) 98 *Michigan Law Review* 953.

[54] Its influence can be seen in works such as Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press 1999) and Avrom Sherr, 'The 'Control' Orthodoxy in England and Wales – A Retrospective Review' (2009) 16 *International Journal of the Legal Profession* 153.

[55] Julian Webb, 'The Dynamics of Professionalism: The Moral Economy of English Legal Practice - and Some Lessons for New Zealand' (2008) 16 *Waikato Law Review* 21; Julian Webb, 'Regulating Lawyers in a Liberalized Legal Services Market: The Role of Education and Training' (2013) 24 *Stanford Law & Policy Review* 533.

[56] Frank H. Stephen, Report of Further Research on the Law Society of Scotland Guarantee Fund. (Manchester and Edinburgh: Economy and Global Governance Institute for Law & Scottish Legal Complaints Commission, 2011). See Chapter 4 of Stephen, *Lawyers, Markets and Regulation* (n 8) entitled 'Lawyers and Incentives'.

[57] Constance Backhouse, 'Gender and Race in the Construction of "Legal Professionalism": Historical Perspectives (Paper presented at the First Colloquium on the Legal Profession)'.

who have drawn on private interest and market control analysis include Wesley Pue and James Moliterno.[58]

1.2 Public Interest Theories

The two public interest theories of legal services regulation—market failure and legal-ethical—begin with the premise that the purpose of regulation is to protect clients, third parties and interests other than those of legal services providers. Throughout the industrialised world, regulators rely on these related, but conceptually distinct, rationales to justify their work.

The market failure version perceives legal services as instances of information asymmetries and externality problems, which occur in various markets. The legal-ethical version is found in lawyer credos and legal scholarship, as well as in the work of structural-functionalist sociologists. The legal-ethical approach, in turn, relies on arguments that self-regulation is necessary to protect clients and society. A major distinction between the legal-ethical and market failure approaches is that the legal-ethical version treats purchasers of legal services as clients of legal services providers, while the market failure version treats them as consumers, with the consumers' typical interests in price, quality, and choice.

1.2.1 Market Failure Public Interest Theory

Market failure has been defined as 'a situation where the free play of market forces cannot be relied upon to maximise economic welfare'.[59] It is an exception to the doctrines of free markets and caveat emptor, which are today the general policy premises of wealthy common law countries.[60] The market failure version of the public interest theory holds that regulation is imposed upon legal services to correct or mitigate these failures.

Information asymmetry is a commonly cited market failure justifying regulation.[61] The information problem is that consumers are often unable to 'judge the value of the services offered on the market in terms of their own needs and priorities.'[62] The asymmetry lies in the fact that the provider of expert services often has a much better grasp of the relevant information than does the prospective consumer.[63]

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[58] W. Wesley Pue and University of Manitoba. Canadian Legal History Project., *Lawyers and the Constitution of Political Society : Containing Radicalism and Maintaining Order in Prairie Canada, 1900-1930* (Faculty of Law, University of Manitoba 1993) W. Wesley Pue, 'Becoming "Ethical": Lawyers' Professional Ethics in Early Twentieth Century Canada' (1991) 20 *Manitoba Law Journal* 237; Moliterno (n 37) Chapter 2.

[59] Frank H. Stephen, 'Regulation of the Legal Professions or Regulation of Markets for Legal Services: Potential Implications of the Legal Services Act 2007' (2008) 19 *European Business Law Review* 1130, 1131.

[60] Michael J. Trebilcock, Carolyn J. Tuohy and Alan D. Wolfson, *Professional Regulation : A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for the Professional Organization Committee* (Ministry of the Attorney General 1979) 45-46; Alice Woolley, 'Why do we Regulate Lawyers?' in David L. Blaikie, Thomas Cromwell and Darrel Pink (eds), *Why Good Lawyers Matter* (Irwin Law Inc. 2012) 110.

[61] Morris M. Kleiner, *Licensing Occupations : Ensuring Quality or Restricting Competition?* (W.E. Upjohn Institute for Employment Research 2006) 44; Ran Spiegler, 'The Market for Quacks' (2006) *73 The Review of Economic Studies* 1113; Alice Woolley, 'Imperfect Duty: Lawyers' Obligation to Foster Access to Justice' (2008) 45 *Alberta Law Review* 107, 121; Larry E. Ribstein, 'Lawyers as Lawmakers: A Theory of Lawyer Licensing' (2004) 69 *Missouri Law Review* 299, 304-306; see Stephen, *Lawyers, Markets and Regulation* (n 8) 13.

[62] Trebilcock, Tuohy and Wolfson (n 60) 51.

[63] Some scholars describe these problems in terms of agency costs instead of information asymmetry, e.g. Barton, 'Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulation' (n 52) 467; William Bishop, 'Regulating the Market for Legal Services in England: Enforced Separation of Function and Restrictions on Forms of Enterprise' (1989) 52 *Modern Law Review* 326, 328.

Information asymmetry is a consequence of the experience and credence qualities of expert services.[64] Not only do consumers have difficulty ascertaining their needs for legal services and the quality of the available alternatives before purchasing them (the experience quality),[65] but they also have difficulty in evaluating them before and after the purchase (the credence quality).[66] The asymmetry is compounded by the fact that most individual consumer-clients utilise expert services infrequently, and therefore have little opportunity to learn from experience.[67] The failures afflicting markets for professional services were clearly identified by Kenneth Arrow's 1963 article about medical care, and subsequent scholarship has argued that they are equally applicable in the case of legal services.[68]

Specific problems resulting from information asymmetry include supplier-induced demand,[69] and a downward spiral of declining quality attributable to adverse selection.[70] Legal services regulation can prevent or mitigate all of these problems. This approach asserts that effective licensure will ensure all providers meet a minimum quality standard. Meanwhile conduct rules forbid exploitation of vulnerable clients or inflation of demand.

The second branch of the market failure public interest theory is that regulation prevents negative externalities resulting from bad legal service provision.[71] An externality (also known as a third party effect) occurs when the costs and benefits of a transaction are not borne exclusively by the parties thereto. Externalities create the potential for under-production, over-production, and self-dealing by consumers and producers at the expense of third parties.[72]

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[64] Francisco Cabrillo and Sean Fitzpatrick, *The Economics of Courts and Litigation* (Edward Elgar 2008); Larry E. Ribstein, 'Ethical Rules Agency Costs and Law Firm Structure' (1998) 84 *Virginia Law Review* 1707, 1712-13; Gillian Hadfield, 'The Price of Law: How the Market for Lawyers Distorts the Justice System' (2000) 98 *Michigan Law Review* 953, 968 (noting that legal services are credence goods and describing the informational disparities between lawyers and consumers).

[65] Wilkins (n 10) 824.

[66] Michael R. Darby and Edi Karni, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 *Journal of Law and Economics* 67, 68-9; Paul Fenn and Alistair McGuire, 'The Assessment: The Economics of Legal Reform' (1994) 10 *Oxford Review of Economic Policy* 1, 5; and Ogus, *Regulation : Legal Form and Economic Theory* (n 29) 216; Woolley, 'Imperfect Duty: Lawyers' Obligation to Foster Access to Justice' (n 61) 122.

[67] Edward Shinnick, Fred Bruinsma and Christine Parker, 'Aspects of Regulatory Reform in the Legal Profession: Australia, Ireland and the Netherlands' (2003) 10 *International Journal of the Legal Profession* 237, 237.

[68] Kenneth J. Arrow, 'Uncertainty and the Welfare Economics of Medical Care' (1963) 53 *The American Economic Review* 941.

[69] Carolyn Cox and Susan Foster, *The Costs And Benefits Of Occupational Regulation* (1990) 11-12; Frank H. Stephen and James H. Love, '5860: Regulation of the Legal Profession' in Boudewijn Bouckaert and Gerrit De Geest (eds), *Encyclopedia of Law and Economics* (1999) 989 <http://encyclo.findlaw.com/5860book.pdf > accessed 3 January 2014; Ribstein, 'Ethical Rules Agency Costs and Law Firm Structure' (n 64) 1711; Roger Van den Bergh and Yves Montangie, 'Competition in Professional Services Markets: Are Latin Notaries Different?' (2006) 2 *Journal of Competition Law & Economics* 189, 193-4.

[70] See Leland (n 32); Paterson, Fink and Ogus (n 24) 17; Shinnick, Bruinsma and Parker (n 67); Spiegler (n 61).

[71] E.g. Cox and Foster (n 69) 9-10.

[72] Randal N. Graham, *Legal Ethics : Theories, Cases, and Professional Regulation* (2nd ed., Emond Montgomery Publications 2011).

A negative externality occurs when a deficiency in the service causes harm to a third party. The third party might be a secondary victim of the deficiency, along with the innocent consumer.[73] However, a consumer who suffers from no information asymmetry, and requires no regulatory protection from her own service provider, might choose to purchase services that cause grave harms to others. Preventing these outcomes through licensing and conduct rules is the second public interest rationale given for legal services regulation.[74]

In legal services, while protecting consumer-clients is the dominant regulatory rationale, negative externalities are also mentioned as a reason to regulate. The classic example is the slapdash will. An inexpensive but poorly prepared will that is ambiguous or incoherent might be perfectly acceptable to a fully informed client. The testator might visit a drafting solicitor's office only because she wishes to see that a certain bequest is made. She might care little about the residue of the estate, given that she will not be around to see what happens to it. However, the resulting slapdash will can subject the beneficiaries to many painful and expensive years of personal strife and litigation.[75]

The third branch of the market failure public interest theory maintains that regulation encourages positive externalities from legal services provision.[76] Just like bad legal services, good legal services can spread their effects beyond the consumer. Regulation is justified, on this view, because unconstrained market actors will only transact for the quantity and quality of services that maximises their own welfare.[77] The unregulated free market would therefore 'under-produce' good legal services. Regulation might in principle be used to encourage purchase of legal services when these positive externalities justify it but the consumer would not otherwise do so.[78]

What are the positive externalities of good legal services? High quality litigated solutions to controversies create precedents and legal certainty from which others benefit.[79] Hiring a good legal service provider as opposed to conducting litigation as an unrepresented litigant also has positive

[73] Manitoba Law Reform Commission (n 38) 14.

[74] K. B. Leffler, 'Physician Licensure: Competition and Monopoly in American Medicine' (1978) 21 *Journal of Law and Economics* 165, 174.

[75] A defective transfer of real estate can have similar impacts on subsequent purchasers: Van den Bergh and Montangie (n 69) 196.

[76] Woolley, 'Imperfect Duty: Lawyers' Obligation to Foster Access to Justice' (n 61).

[77] Trebilcock, Tuohy and Wolfson (n 60) 60-1.

[78] Van den Bergh and Montangie (n 69) 191; Christopher Decker and George Yarrow, *Understanding the Economic Rationale for Legal Services Regulation: A Report for the Legal Services Board* (2010).

[79] David Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 *Georgetown Law Journal* 2619; Van den Bergh and Montangie; Council of Bars and Law Societies of Europe, *CCBE Economic Submission To Commission Progress Report On Competition In Professional Services* (2006); Council of Bars and Law Societies of Europe, *CCBE Economic Submission To Commission Progress Report On Competition In Professional Services* (2006); Council of Bars and Law Societies of Europe, *CCBE Economic Submission To Commission Progress Report On Competition In Professional Services* (2006) <http://www.ccbe.org/fileadmin/user_upload/NTCdocument/ccbe_economic_submis1_1182239202.pdf> 5 accessed 3 January 2014. William Bishop argued that regulation giving UK barristers a monopoly on certain forms of court advocacy helped preserve this positive externality, insofar as it increased the quality of legal argument. (Bishop (n 63) 333.)

externalities.[80] Regulation can also encourage—or even mandate—pro bono service that benefits the public by increasing access to justice at the same time that it benefits indigent individuals.[81]

1.2.2 Legal-Ethical Public Interest Theory

Bar leaders,[82] legal scholars,[83] and structural-functionalist sociologists[84] have offered a very different public interest rationale for legal services regulation. Rather than view legal services through the lens of the market, these commentators argue that the function of legal services providers is exceptional. Based on the unique characteristics, they assert that licensed legal services providers – lawyers – should as a general matter regulate legal services independent of interference from the market or the State. They claim that the legal profession's independence is necessary for lawyers to protect clients, the rule of law, and the public good. They differ slightly in their method of argument. Some derive lawyers' function from their status while others derive their status from their function.

The argument from status to function begins with the business-profession dichotomy described by bar leaders, legal scholars, and structural-functionalist sociologists. Unlike business people, lawyers have both inaccessible expertise and commitment to the public good, which both requires, and justifies societal reliance upon, the legal profession to regulate itself.[85]

As a result, society enters into a bargain with the profession where society agrees to self-regulation that offers autonomy from regulation by the market and the state. In the words of one commentator,

> Perceiving a social need, and the profession's competence to handle it, the society negotiates a deal with the profession: the society will confer the benefits and privileges of a legal monopoly upon the group in return for a promise of public service, i.e., a promise to carry on professional practice in accordance with high standards of performance, for the public good.[86]

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[80] Having a lawyer makes litigation easier and less costly for one's adversaries and for the court system. See e.g. Rachel Birnbaum and Nicholas Bala, 'Views of Ontario Lawyers on Family Litigants without Representation' (2012) 63 *University of New Brunswick Law Journal* 99; PricewaterhouseCoopers, *Economic Value of Legal Aid: Analysis in Relation to Commonwealth Funded Matters with a Focus on Family Law* (2009).

[81] But see Russell G. Pearce, 'How Law Firms Can Do Good While Doing Well (And The Answer Is Not Pro Bono)' (2005) 33 *Fordham Urban Law Journal* 211.

[82] American Bar Association Commission on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (Report for the ABA Commission on Professionalism 1986)

[83] E.g., Roscoe Pound, *The Lawyer from Antiquity to Modern Times: With Reference to the Development of Bar Associations in the United States'* (West Publishing Co., 1953) 5, Robert W. Gordon, 'The Independence of Lawyers' (1988) 68 *Boston University Law Review* 1.

[84] Abel, *American Lawyers* at 12, 16, 35-37 (discussing Emile Durkheim and Talcott Parsons).

[85] E.g., ABA Commission on Professionalism at 18; Russell G. Pearce, 'The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar' (1995) 70 *New York University Law* Review 1229, 1238-40 [hereinafter, 'Paradigm Shift'].

[86] Lisa H. Newton, 'Professionalization: The Intractable Plurality of Values' in Wade L. Robisen et al. (eds), *Profits and Professions: Essays in Business and Professional Ethics* (Humana Press 1983). See also Nancy J. Moore, 'Professionalism Reconsidered', (1987) *American Bar Foundation Research Journal* 773,784; Paradigm Shift at 1238 n. 38; Robert W. Gordon, 'The Independence of Lawyers', (1988) 68 *Boston University Law Review* 1, 6-7; Rayman L. Solomon, 'Five Crises or One: The Concept of Legal Professionalism 1925-1960' in Robert L Nelson et al. (eds.), *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Cornell University Press 1992) 146-47.

Complementing the argument from status to function is the argument from function to status that focuses on the role of lawyers in a liberal democracy. The independence of lawyers is necessary to protect individual rights, rule of law, and the public good. Independence both prevents 'any source of authority, public or private, [from limiting] clients' access to the public goods encoded in the law'[87] and encourages compliance with law by preserving lawyers' discretion to serve 'as a mediating force between the interests of private clients and the public purposes of the legal order.'[88] According to some, the independence of lawyers is also essential to protect judicial independence.[89]

The legal-ethical public interest theories are both similar to, and different from, the market failure public interest theory. Both approaches acknowledge information asymmetry, as well as negative and positive externalities. They differ in that the legal-ethical approaches view the delivery of legal services as essentialist. Many legal ethicists ascribe special interests to lawyers' clients, including a client's interest in loyal and devoted service from a trusted professional. These interests are unique, legitimate and not shared by most other consumers. Charles Fried's conception of the lawyer as a 'special-purpose friend' who, within the scope of his retainer, 'adopts your interests as his own' reflects this view.[90] No one would dream of demanding this from a microwave oven or a futures contract, and reducing client interest to any permutation of price, quality or choice does not sufficiently contemplate the nuanced and significant nature of legal advice.

Similarly essentialist is the description of lawyers' public role. The ABA's *Model Rules of Professional Conduct* suggests in the preamble that regulation guides lawyers to contribute to public welfare as 'officer[s] of the legal system' who 'play a vital role in the preservation of society.'[91] This notion has a long history in the United States, including Tocqueville's often quoted description of lawyers as the aristocracy of the United States,[92] Louis Brandeis's exhortation that the legal profession promote the public good,[93] and Roscoe Pound's description of law practice as the '[p]ursuit of the learned art in the spirit of a public service.'[94] Structural-functionalist sociologists, such as Emile Durkheim and Talcott Parsons, offer a corresponding understanding that lawyers serve a necessary and beneficial role as intermediaries between the people and the law.[95] Another version of this understanding is Brad Wendell and Alice Woolley's view that the lawyer's public role involves counselling, dispute resolution and

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[87] Wilkins, supra note , at 859. See also, e.g., Bruce A. Green, 'Lawyers' Professional Independence: Overrated or Undervalued?' (2013) 46 *Akron Law Review* 599, 604, 613-19.

[88] Wilkins (n 10) 859-60. See also, e.g., Green (n 87) 608-12.

[89] Wilkins (n 10) 853-58. See also, e.g., Green (n 87) 607.

[90] Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' (1976) 85 *Yale Law Journal* 1060, 1071. However subsequent work in legal ethics has called for attention to the consequences of lawyering on third parties and broader interests, e.g. Debra Lyn Bassett, 'Redefining the Public Profession' (2005) 36 *Rutgers Law Journal* 721 and Richard K. Greenstein, 'Against Professionalism' (2009) 22 *Georgetown Journal of Legal Ethics* 327.

[91] American Bar Association, *Model Rules of Professional Conduct* (2010) Preamble paras 1 and 5.

[92] Alexis de Tocqueville, *Democracy in America* (Adlard and Saunders, [1831] 1862)

[93] Pound (n 82) 5.

[94] Pound (n 82) 5.

[95] Emile Durkheim, *Professional Ethics and Civic Morals* (Brookfield Ctr, Routledge [1890] 1992)

preventing miscarriages of justice. If it is abandoned or performed negligently, the 'pluralist compromise of democracy' itself is put at risk.[96]

As a result of this essentialist view, legal-ethical theories propose that lawyers have the exclusive capacity to understand lawyers' duties to their clients, the court, third parties, and the public and to promulgate regulations to promote and police those duties. Lawyers do so through a scheme of self-regulation that governs the licensing and discipline of legal services providers, as well as through regulations that focus on protecting clients such as through rules regarding confidentiality and conflicts; protecting the administration of justice such as through rules prohibiting client perjury; and promoting the public good such as through rules encouraging pro bono and compliance with law.[97]

Within legal-ethical theories, the concept of self-regulation is a relatively broad one. Proponents of legal-ethical public interest theory do not necessarily require that organisations of lawyers regulate lawyers. Rather, many commentators describe regulation by judges who are lawyers as self-regulation, presumably because those judges work closely with the organised bar to develop rules governing lawyers and ultimately those judges adopt and enforce the rules.[98] As the American Bar Association's Model Rules of Professional Conduct explain:

> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.[99]

Where Part I offers a review of models for explaining the basis for regulating the delivery of legal services, Part II suggests a taxonomy of modes of regulatory strategies.

PART II: HOW SHOULD LEGAL SERVICES BE REGULATED?

Although sociological private interest theory provides only a critique, economic private interest, economic public interest, and legal-ethical public interest accounts prescribe regulatory modes. Because no jurisdiction has applied economic private interest theory to legal services, we focus here upon the economic and legal-ethical public interest accounts. To describe economic public interest modes of regulation, we use the term consumerist-competitive to underscore its emphasis on protecting consumers and promoting competition. To describe legal-ethical public interest modes of regulation, we use the term professionalist-independent to emphasise its commitment to the essentialist approach to legal services associated with professionalism and self-regulation. Professionalist-independent regimes are predominant in common law North America, while consumerist-competitive modes have increasingly come to the fore in England/Wales and Australia, as well as Ireland and New Zealand.

For purposes of our taxonomy, the dominant approaches of economic and legal-ethical public interest theories both define principles and suggest regulatory regimes. But examination of how regulation of

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[96] *Ibid.* 108. W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press [2010] 2012).

[97] See, e.g., ABA Model Rules of Professional Conduct.

[98] See Green (n 87) 605-06. But see Fred C. Zacharias, 'The Myth of Self-Regulation' (2009) 93 *Minnesota Law Review* 1147, 1189.

[99] See Model Rules (n 92) Preamble Para 10.

legal services functions in practice leads to further refinement of our taxonomy. While particular modes may be dominant in specific jurisdictions, all common law jurisdictions employ both professionalist-independent and consumerist-competitive strategies, as well as hybrid modes that combine elements of both. In addition, the professionalist-independent mode has produced an unintended consequence – the development of a robust sphere of legal services that is largely unregulated.

2.1. The Professionalist-independent Mode of Common Law North America

In the United States and in common law Canada, the dominant approach to legal services regulation still hews closely to a blueprint drafted in the late nineteenth century. With a few exceptions, these jurisdictions all maintain a unified, hegemonic occupation of 'lawyer' and uphold so-called 'self-regulatory' governance, whereby lawyers and lawyer-judges draft, adopt, and enforce the profession's rules for admission to practice law and to maintain one's law license. They are also distinctive in their regulatory efforts to insulate lawyers from non-lawyer influence through strictures on alternative business structures, external investment, and multi-disciplinary practice. They similarly promote lawyer independence from clients as a way to promote the pubic good. Finally, professionalist-independent regimes focus regulation on individual lawyers, as opposed to the firms in which they work.

2.1.1 *Professionalism and Autonomy as Core Values*

Professionalism and independence are the two conceptually connected but rhetorically distinct 'core values' which animate legal services regulation in common law North America.[100] As noted in Part I, the professionalism approach to legal-ethical public interest theory assumes the essentialist character of lawyers and the lawyer-client relationship. Lawyers differ from providers of other services in that they both have an understanding of how to protect clients and the public that is inaccessible to non-lawyers and a unique capacity as individuals and a self-regulating collective to provide those services with fidelity to clients, courts, and the public good.[101]

The second core value is independence, both of lawyers and of the legal profession. Although derived from the conditions that professionalism describes, the goal of independence is often deployed separately. It too references the assumption of legal-ethical theory that independence is necessary for lawyers to represent clients zealously, as well as to promote rule of law and liberal democracy. Both individual lawyers and lawyers as a group require independence to achieve these goals.[102]

Noel Semple, for example, argues that each of the four distinctive characteristics of anglo-North American legal services regulatory regimes—the unified legal occupation, self-regulation, insulation of legal services providers, and the focus on individual providers—can be traced to one or both of the professionalism and independence values.[103] Despite arguments that its influence is waning,[104] the resilience of the professionalist-independent mode was demonstrated by the rejection of market-oriented reforms by ABA's Commission on Ethics 20/20.[105]

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[100] Renee Newman Knake, 'Democratizing the Delivery of Legal Services' (2012) 73 *Ohio State Law Journal* 1, 5.

[101] See discussion supra Part I.

[102] See discussion supra Part I.

[103] Noel Semple, *Core Values: Professionalism and Independence Theories in Lawyer Regulation* (2013). For example, the core conception of each lawyer as an independent and autonomous moral agent underlies the resistance to firm-level regulation.

[104] Pearce (n 81); Maute (n 110); Terry, 'The Future Regulation of the Legal Profession" (n 35).

[105] Moliterno (n 37), chapters 8 & 9.

2.1.2 Primacy of Self-Regulation

Self-regulation, the first defining feature of professionalist-independent regimes, is a form of governance characterised by the right of the regulatees to promulgate and enforce their own regulations.

The self-regulatory character of legal services regulation is clear in common law Canada. Legal services regulation is dominated by law societies. The law societies are led by boards of directors, the members of which are known as 'benchers'.[106] In each law society, at least eighty per cent of the benchers are licensees.[107]

In the United States, while legislatures do engage in some limited forms of legal services regulation, the dominant roles are played by the state courts as well as state bar and licensing authorities and the ABA. For purposes of professionalist-independent proponents, the state bar and licensing authorities and the ABA are considered self-regulatory insofar as they are led by and accountable to lawyers (or lawyer-judges).[108] The judiciary, which has a central role in American legal services regulation,[109] is of course a branch of government. Some commentators therefore argue that the regime is better understood as one of state regulation or co-regulation rather than self-regulation.[110]

For purposes of our taxonomy, we need not resolve this dispute. Rather, we seek to describe the professionalist-independent principles and practices as described by their proponents. In the United States today, advocates of a professionalist-independent approach do tend to define regulation by judges who are lawyers as self-regulation.

2.1.3 The Subject Matter of Professionalist-Independent Regulation

Both professionalism and independence require lawyers to promulgate rules for licensing, conduct, and discipline. These rules, in turn, prescribe lawyers' duties to clients, third-parties, courts, and the public.[111] Client protections include guarantees of competence, loyalty, and confidentiality.[112] Essential to these protections are rules that assure lawyer independence from third parties, including rules that police third party payments for legal services, prohibit non-lawyer ownership of law firms, and circumscribe conflicts

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[106] Adam M. Dodek and others, *Canadian Legal Practice : A Guide for the 21st Century* (LexisNexis Canada 2009) *s.* 1.71. In some of the Atlantic provinces, the term is 'Council' and in the northern territories of Canada, the term is 'Executive'.

[107] In Ontario, where there is a paralegal licensure regime, 75% of the benchers (40 individuals) are lawyers and 9% are paralegals (5 individuals).

[108] See Barton, *The Lawyer-Judge Bias in the American Legal System*.

[109] Eli Wald, 'Should Judges Regulate Lawyers?' (2010) 42 *McGeorge Law Review* 149, 161; Benjamin H. Barton, 'An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?' 37 *Georgia Law Review* 1167, 1171; Fred C. Zacharias, 'The Myth of Self-Regulation' (2009) 93 *Minnesota Law Review* 1147, 1174.

[110] Judith L. Maute, 'Global Continental Shifts to a New Governance Paradigm in Lawyer Regulation and Consumer Protection : Riding the Wave' in Reid Mortensen, Francesca Bartlett and Kieran Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (Routledge 2010) 30; Laurel S Terry, Steve Mark and Tahlia Gordon, 'Adopting Regulatory Objectives for the Legal Profession' (2012) 80 *Fordham Law Review* 2661, 2670; Dana Ann Remus, 'Just Conduct: Regulating Bench-Bar Relationships' (2011) 30 *Yale Law & Policy Review* 123,132; See Zacharias (n 110); Ted Schneyer, 'Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice' (2009) 2009 *Journal of the Professional Lawyer* 13, 27.

[111] See ABA Model Rules (2013)

[112] See ABA Model Rules 1.1, 1.3. 1.6 (2013)

of interest.[113] Fulfilling obligations to third-parties, courts, and the public also require independence from clients. Rules generally require lawyers to avoid misleading third parties or assisting clients in violating the law.[114] They promulgate a duty to the court that includes prohibitions on making frivolous arguments or facilitating client perjury[115] and advance a public good function through the exercise of independent judgment in counselling clients and an aspiration to provide pro bono assistance to the poor.[116] We contrast the substantive rules of professionalist-independent regimes with those of consumerist-competitive regimes below at *2.2.3.*

2.1.4 Exclusive Legal Occupation

An axiom of professionalist-independent regulation is that only licensed legal services providers can provide legal services. Today, within each common law North American jurisdiction there is one group of people who are authorised to provide legal services independently and that group is known as 'lawyers.' Historically, professionalist-independent principles have not necessarily required a unified legal occupation. In England/Wales, for example, professionalist-independent regulation included licenses for barristers, solicitors, and notaries. In all professionalist-independent regimes, the delivery of legal services by those who do not obtain licenses from a self-regulated legal profession is forbidden as 'unauthorized practice of law'.[117]

2.1.5 Insulation of Legal Service Providers

As explained above, professionalist-independent modes protect the independence of lawyers. One method for doing so is to insulate legal service providers from the influence of non-licensees. Various business structure rules are deployed to prevent individual providers from being economically beholden to anyone other than their clients or other lawyers in their firms. While this does not foreclose all possible forms of collaboration between lawyers and non-lawyers, it does significantly restrict them.[118]

Non-lawyers are generally forbidden to own shares or assume directorship in incorporated law practices in anglo-North American jurisdictions.[119] Regulators also seek to insulate lawyers using rules prohibiting multi-disciplinary partnerships (MDPs). An MDP is a 'business arrangemen[t] in which individuals with different professional qualifications practise together'.[120] North American jurisdictions either forbid such

[113] See ABA Model Rules 1.7, 1.9, 1.11, 1.12, 5.4, 5.5 (2013)

[114] See ABA Model Rules 1.2, 4.1, 4.4 (2013)

[115] See ABA Model Rules 3.2, 3.3 (2013)

[116] See ABA Model Rules 1.2, 6.5 (2013)

[117] American Law Institute, *Restatement, Third, The Law Governing Lawyers* (American Law Institute 2000) 35: 'A person not admitted to practice as a lawyer may not engage in the unauthorized practice of law'. All states have statutes to this effect; Derek A. Denckla, 'Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters' (1999) 67 *Fordham Law Review* 2581, 2587.

[118] John S. Dzienkowski and Robert J. Peroni, 'Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century' (2000) 69 *Fordham Law Review* 83.

[119] American Bar Association, *Model Rules of Professional Conduct* (2010) (n 92), R. 5.4(d)(1); Gillian K. Hadfield, 'The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law' (2013) ___ *International Review of Law and Economics* ___, 14 [forthcoming].

[120] Canadian Bar Association International Practice of Law Committee, *Striking a Balance: The Report of the International Practice of Law Committee on Multi-Disciplinary Practices and the Legal Profession* (1999) at 11.

arrangements, or regulate them very tightly.[121] Finally, professionalist-independent regulators have also created rules to prohibit contractual relationships between lawyers and others which would give any 'nonlawyer…the right to direct or control the professional judgment of a lawyer'.[122] As a consequence of these rules, North American law firms historically have been exclusively financed and controlled by lawyers, and the consumer legal market has been served almost exclusively by small firms and solo practitioners.

2.1.6 Regulatory Focus on Individual Lawyers

The professionalist-independent perspective favors, but does not require, regulation of individual lawyers, and not of law firms. Its essentialist construction of lawyers and legal services assumes that most lawyers are trustworthy and promotes independence of lawyers, as well as of the legal profession.[123] It assumes that most lawyers will follow the rules provided them. The primary focus of discipline is the few lawyers who are not trustworthy. Accordingly, with minor exceptions, American and Canadian legal services regulation applies to individual lawyers, and not to law firms. American legal scholar Ted Schneyer recently concluded that, despite the scholarly efforts which Schneyer himself initiated,[124] 'the idea of disciplining firms has not caught on' in the United States.[125] This conclusion has been echoed by other observers of American legal services regulation.[126] Adam Dodek's comprehensive survey of Canadian legal services regulation reached a similar finding: 'as a general matter, law societies regulate individual lawyers,' and 'there is little explicit regulatory focus on law firms' in Canada although at least two provinces permit it, including British Columbia and Nova Scotia.[127]

2.2 The Consumerist-competitive Mode

Beginning in the 1970s,[128] legal services regulators in England/Wales and Australia began to focus on two core values derived from economic public interest theory: competition and consumer rights. These values have gradually displaced professionalism and lawyer independence as they are understood in the United States and Canada, manifesting themselves in regulatory regimes which today contrast sharply with those of anglophone North America. More recently, the influence of the consumerist-competitive mode has become evident in legal services regulatory reforms taking place in Ireland and New Zealand. In Ireland, consumerist-competitive reform has been driven by both the national competition authority

[121] Paul D. Paton, 'Multidisciplinary Practice Redux: Globalization, Core Values, And Reviving The MDP Debate In America' (2010) 78 *Fordham Law Review* 2193; Richard Devlin and Albert Cheng, 'Re-calibrating, Re-visioning and Re-thinking Self-Regulation in Canada' (2010) 17 *International Journal Of The Legal Profession* 233 at 236

[122] American Bar Association, R. 5.4(d)(3) (2013); Hadfield (n 119) 15.

[123] See discussion supra Part I.

[124] Ted Schneyer, 'Professional Discipline for Law Firms' (1991) 77 *Cornell Law Review* 1. See Russell G. Pearce and Eli Wald, 'Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles' (2012) 2012 *Michigan State Law Review* 513.

[125] Ted Schneyer, 'A Tale of Four Systems: Reflections on How Law Influences the 'Ethical Infrastructure' of Law Firms' (1998) 39 *South Texas Law Review* 245.

[126] E.g. Eli Wald, 'Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms' (2010) 78 *Fordham Law Review* 2245, 2266, note 113.

[127] Adam Dodek, 'Regulating Law Firms in Canada' (2011) 90 *Canadian Bar Review* 383, 404 and 409.

[128] The United States Supreme Court also began to establish a consumer rights agenda during the late 1970s, for example overturning the blanket ban on lawyer advertising in Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977), yet state courts, state bar authorities and the ABA ultimately did not apply the Court's reasoning in other areas of lawyer regulation.

and the similar inclinations of the "Troika" (International Monetary Fund, the European Central Bank, and the European Commission).[129]

The consumerist-competitive mode is characterised by (i) multiple and competing legal occupations, (ii) co-regulatory or external regulatory governance, (iii) tolerance of non-licensees influencing legal services providers and (iv) a dual regulatory focus on individual service providers and the enterprises in which they work.

2.2.1 Competition and Consumer Rights as Core Values

Consumerist-competitive approaches reject the essentialist view of legal services, including the business-profession dichotomy. They treat clients as being similarly situated to other consumers of goods and services, and lawyers as similar to other producers. Accordingly, applying an economic public interest theory of regulation, they address market failure by promoting competition and protecting consumers.

Competition between legal services providers is the first core value of these regimes. Many of the statutes in these jurisdictions now list 'promoting competition' among their regulatory objectives.[130] Competition authorities outside of North America have taken a forceful approach to legal services regulation, providing a major driver of reform.[131] Under economic public interest theory, competition will promote better quality services at lower prices.

Like competition, the second core value of consumerism treats clients as consumers, as opposed to essentialist clients. The goal of regulations and of increased competition is to provide consumers with lower cost services of better quality, while regulating providers to address market failures, such as information asymmetry.[132] The predominant goal of consumerism is to make legal services cheaper, more satisfactory to consumers and more variegated. Accordingly, while sharing the professionalist-independent goal of loyal and devoted service, they reject the essentialist claim that lawyer-client relationship is somehow unique.[133]

The goal of promoting competition and consumer interests also addresses externalities. Improving the quality of legal services reduces the harms to third parties from low quality services.[134] Reducing the price of legal services provides the positive externality of greater access to justice for low and middle income persons.[135]

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[129] Laurel S. Terry, 'Transnational Legal Practice (International)' (2013) 47 *International Lawyer* 485, 487-8.

[130] Legal Services Act 2007 (UK) s. 1(e); Legal Services Regulation Bill 2011 (Republic of Ireland) at main objectives section and at s. 9(4)(d); Legal Services (Scotland) Act 2010, s. 1(c).

[131] Director General of Fair Trading (UK), *Competition in Professions* (2001); Commission Of The European Communities, *Report on Competition in Professional Services* (2004). See also Christine Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (2002) 25 *University of New South Wales Law Journal* 676 and Laurel S. Terry, 'The European Commission Project Regarding Competition in Professional Services' (2009) 29 *Northwestern Journal of International Law & Business* 1.

[132] E.g. Seneviratne (n 138) 313; Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness' (n 131) 690; Shinnick, Bruinsma and Parker (n 67) 246.

[133] See section 1.2.1, above.

[134] See Legal Services Board, 'Regulatory Objectives' (http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf) 5-8. See also n 71, above and accompanying text.

[135] See n 76, above and accompanying text.

Because consumerist-competitive regimes include active regulation to protect competition and consumers, consumerist-competitive reforms often result in ambitious and complicated regulation of legal service providers at the same time they employ the competition-oriented rhetoric of deregulation.[136]

2.2.2 Co-Regulation or External Regulation

The consumerist-competitive mode rejects the professionalist-independent arguments for independence. Viewed in the context of consumers and producers more generally, self-regulation appears vulnerable to self-dealing and other forms of rent seeking.[137] Accordingly, the preferred methods of regulation are external to legal services providers or co-regulation that includes both lay people and legal services providers. The most common approach today is co-regulation agencies that include legal services providers but which are dominated by laypeople and accountable to the legislative or executive branches of government.[138] In England and Wales, for example, the primary regulator is the Legal Services Board, which follows this co-regulatory model at the same that it continues to employ subservient self-regulatory bodies to carry out delegated functions.[139]

2.2.3 The Subject Matter of Consumerist-Competitive Regulation

The goals of regulating the legal services consumer-provider relationship are similar to those for the lawyer-client relationship – competence, confidentiality, and loyalty. They similarly forbid lawyers from assisting clients in crimes or fraud, otherwise misleading third parties or deceiving the courts. Where they differ is the with regard to goal of lawyer independence. This distinction has three major effects. First, it could lead to a different evaluation of categories of regulation that both modes share. For example, in a competitive-consumerist regime, the purpose of conflict rules would be to require competent services and fulfilment of fiduciary obligations. In a professionalist-independent regime, the prohibition of conflicts that did not interfere with the provision of services could be justified in order to promote independence. Second, and similarly, although both regimes reflect public interest theories of regulation, the consumerist-competitive approach would have more tools available to solve externality problems. The professionalist-independent approach, for example, turns to a lawyer's duty of pro bono to redress inequality in access to justice. The consumerist-competitive approach could certainly require – or facilitate -- pro bono, but it could also seek through competition and regulation to address the problem through lower cost, reasonable quality services. Similarly, where professionalist-independent regulators seek to promote lawyer independent judgment as a vehicle for promoting adherence to law, consumerist-competitive regulators could take a similar approach and in addition or as an alternative seek to develop an ethical culture in a particular situation or organisation. We discuss how this insight applies to lawyer regulation at *2.2.6* below. Third, a consumerist-competitive paradigm is likely to reject rules grounded solely in the value of independence, such as restrictions on alternative business structures or multidisciplinary practices discussed at *2.2.5.* below. Of course, consumerist-competitive regulators could theoretically adopt such restrictions, but they would have to justify them on grounds of competence and integrity, and not independence.

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[136] Parker, 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness'; Webb, 'Regulating Lawyers in a Liberalized Legal Services Market: The Role of Education and Training' (n 55) 542.

[137] See notes 28 and 29, above, and accompanying text.

[138] Terry, Mark and Gordon (n 111) 2673. 'Joint regulation' is another phrase which has been used, e.g. by Mary Seneviratne, 'Joint Regulation of Consumer Complaints in Legal Services: A Comparative Study' (2001) 29 *International Journal of the Sociology of Law* 311, 311.

[139] David Clementi, *Review of the Regulatory Framework for Legal Services in England And Wales: Final Report* (2004). See also Andrew Boon, 'Professionalism under the Legal Services Act 2007' (2010) 17 *International Journal of the Legal Profession* 195.

2.2.4 Multiple, Competing Legal Occupations

The value of competition favours a plurality of competing legal services providers. Consumerist-competitive jurisdictions tend to have multiple licensing regimes, authorising different occupational groups to compete in different parts of the legal services marketplace.[140] In England and Wales, regulation establishes eight legal occupations.[141] Consumerist-competitive ideology also favours permitting non-licensed legal providers that are subject to consumer protection regulations. These include the staff of Citizens Advice Bureaus in England/Wales and nonlawyer employees of for-profit businesses, such as banks, who could conceivably provide assistance to consumers in legal matters, as well as businesses that provide legal advice through software programs.[142]

2.2.5 Tolerance of Non-Licensee Influence within Firms

Compared to professionalist-independent regimes, consumerist-competitive administrations allow significantly greater scope for non-licensees to become business partners, shareholders and managers of law firms. In England and Wales, non-lawyers may own and manage incorporated law firms and form partnerships of equals with lawyers. The Legal Services Act 2007 uses the term 'alternative business structure' for any law firm in which non-lawyers are owners or managers.[143] Australia's business structure rules are at least as liberal as England/Wales. Seven of the country's eight states and the territories allow non-lawyers to own shares in, and manage, incorporated law firms.[144] Multi-disciplinary partnerships have been permitted since 1990 and Australia is also home to the first publicly-traded law firm in the common law world.[145] External investment and collaboration with non-lawyers has facilitated the emergence of consumer brands and large firms in the personal legal services marketplace, such as the U.K.'s Co-Operative Legal Services and Australia's Slater & Gordon.

2.2.6 Firm-Based Regulation for Ethical Infrastructure

Finally, consumerist-competitive regimes are distinguished by the fact that, in addition to regulating individual legal service providers, they also regulate the enterprises in which those people work. Where professionalist-autonomy regimes trust in lawyers and assume that lawyers will collectively enforce good behaviour, consumerist-competitive regimes do not. Accordingly, they are more likely to promulgate regulations aimed at enhancing firms' 'ethical infrastructure' of 'organisations, policies, and operating

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[140] Regarding multiple licensing as a regulatory technique, see Joan Brockman, '"Fortunate enough to obtain and keep the title of profession: " Self-regulating organizations and the enforcement of professional monopolies' (1998) 41 *Canadian Public Administration* 587, 607-8.

[141] Legal Services Act 2007 (UK), sch 4.

[142] One of the most notable American businesses providing legal services through software programs is Legal Zoom. We understand that Legal Zoom often refers to its work as providing legal information but not legal advice. See *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.,* 1999 WL 47235 (N.D. Tex. 1999). Our view is that providing specific information about the law that is uniquely tailored to the individual situation of a particular client or consumer constitutes legal advice.

[143] Ibid s. 72.

[144] Christine Parker, Tahlia Gordon and Steve Mark, 'Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (2010) 37 *Journal of Law & Society* 466, 468.

[145] Andrew Grech and Kirsten Morrison, 'Slater & Gordon: The Listing Experience' (2009) 22 *Georgetown Journal of Legal Ethics* 535; Steve Mark, *The Future Is Here: Globalisation And The Regulation Of The Legal Profession Views From An Australian Regulator* (2009) 9. Other publicly-traded Australian law firms include Integrated Legal Holdings (http://www.ilh.com.au).

procedures'.[146] Much of the firm-based regulation in consumerist-competitive regimes is 'indirect'—it requires leaders within a firm to take responsibility for others.[147] However England/Wales and Australia have begun to adopt direct firm regulation, which looks beyond the behaviour of individuals and attends to the firm itself. Examples include the obligation to establish a procedure for responding to client complaints,[148] and Queensland's Workplace Culture Check questionnaire and dialogue process. [149]

How should legal services be regulated?

Dominant modes in developed common law countries.

	Professionalist-independent Mode		**Consumerist-competitive Mode**
Core Values:	Professionalism of Lawyers; Independence of Lawyers and the Bar		Competition between Legal Service Providers; Consumer Rights
Occupational Structure:	Exclusive Lawyer Occupation(s)		Multiple Legal Occupations
Governance:	Self-Regulation		Co-Regulation or External Regulation
Regulatory Posture to Non-Licensees:	Insulation of lawyers from Non-Licensees		Tolerance of Non-Licensees
Regulatory Focus	Regulation of Individual Providers		Regulation of Firms **and** Individuals
Geographic Ambit:	Anglophone North America	➔Rep of Ireland ➔ ➔Northern Ireland➔ ➔N. Zealand ➔ (in transit between modes)	England + Wales, Scotland, Australia

[146] Schneyer, 'Professional Discipline for Law Firms' (n 124) 10. See also the definition offered by Christine Parker and Lyn Aitken, 'The Queensland Workplace Culture Check: Learning from Reflection on Ethics inside Law Firms' (2011) 24 *Georgetown Journal of Legal Ethics* 399-401 note 5: 'Ethical infrastructure refers to how law firms' formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice influence and constrain ethical practice'.

[147] Dodek, 'Regulating Law Firms in Canada' (n 127) 407. See e.g. Legal Services Act 2007 (UK), ss. 91 and 92.

[148] John Briton and Scott McLean, 'Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era' (2010) 11 *Legal Ethics* 241, 252; Legal Services Act 2007 (UK), s. 112.ç

[149] Mark 2-3; Parker and Aitken, 'The Queensland Workplace Culture Check: Learning from Reflection on Ethics inside Law Firms' (n 146) 407.

2.3 Adding Complexity to the Taxonomy: Multiple Strategies, Hybrid Categories, and Unintended Consequences

In Parts 2.1 and 2.2, we have described the professionalist-independent and consumerist-competitive frameworks. In practice, though, regulators rarely employ only one approach. In this section, we explain how the taxonomy sheds light on the complexity of legal services regulation by highlighting the use of multiple and hybrid frameworks, as well as the manifestation of unintended results.

2.3.1 Hybrid Strategies

The most common hybrid strategies are what we term *professionalist-regulated* approaches that combine professionalist-independent assumptions regarding legal services with external or co-regulation found in consumerist-competitive systems or professionalist-competitive approaches that combine professionalist-independent assumptions with the behavioural framework of the consumerist-competitive model.

One professionalist-regulated approach is the common law doctrine of malpractice, which regulates lawyers through tort and contract doctrines of general application, reflecting a consumerist-competitive strategy. But to the extent that malpractice law relies on the expert testimony of lawyers to define lawyers' duties it employs a professionalist-independent strategy.

Another common professionalist-regulated strategy is gatekeeping rules which seek to protect third parties and the public by requiring lawyers to take steps contrary to the instructions, and possibly the interests, of the corporation,[150] such as the Sarbanes-Oxley lawyer regulations[151] and IRS Circular 230.[152] These gatekeeping rules are consumerist-competitive in that they seek to remedy market failures through external regulation of lawyers. They are professionalist-independent in that, as Sung Hui Kim explains, they rely on "'lawyer-exceptionalism' – the notion that lawyers' societal function is unique and qualitatively different from that of other professionals who have legal obligations to avert fraud."[153] In contrast to these professionalist-regulated approaches, other gatekeeping provisions are wholly professionalist-independent, such as Rule 1.13 of the Model Rules.[154] It would also be possible to develop gatekeeping rules wholly within a consumerist-competitive framework, based upon a rationale that equates lawyers with fiduciaries generally or that imposes duties because of the tasks lawyers perform providing them with access to specific information and an opportunity to prevent wrongdoing, as opposed to lawyer exceptionalism.

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[150] William H. Simon, 'Organizational Representation and the Frontiers of Gatekeeping' (2011) 19 *American University Journal of Gender, Social Policy and the Law* 1067; David B. Wilkins, 'Making Context Count: Regulating Lawyers after Kaye, Scholer' (1993) 66 *Southern California Law Review* 1145, n 80. See also Fred Zacharias, 'Lawyers as Gatekeepers' (2004) 41 *San Diego Law Review* 1387 and John Leubsdorf, 'Legal Ethics Falls Apart' (2009) 57 *Buffalo Law Review* 959, 972; John C. Coffee Jr., 'The Attorney as Gatekeeper: An Agenda for the SEC' (2003) 103 *Columbia Law Review* 1293, 1297 offers the following definition: "gatekeepers are independent professionals who are so positioned that, if they withhold their consent, approval, or rating, the corporation may be unable to effect some transaction or to maintain some desired status."

[151] Sarbanes–Oxley Act of 2002 (Pub.L. 107–204, 116 Stat. 745, enacted July 30, 2002).

[152] http://www.irs.gov/Tax-Professionals/Circular-230-Tax-Professionals.

[153] Sung Hui Kim, 'Lawyer Exceptionalism in the Gatekeeping Wars' (2010) 63 *Southern Methodist University Law Review* 73, 73.

[154] American Bar Association, *Model Rules of Professional Conduct* (2010)

A gatekeeping provision that presents a closer question of classification is Rule 11 of the Federal Rules of Civil Procedure. Rule 11 applies to lawyers and to clients as would a consumerist-competitive provision, although the Rule imposes greater duties on lawyers, as would a professionalist-independent provision. Promulgated by courts, as are lawyer regulations under the professionalist-independent mode, the Federal Rules of Civil Procedure are developed outside of the lawyer regulation framework and require approval by Congress. Because it is court regulation that posits a special role for lawyers, we suggest placing Rule 11 within the professionalist-independent framework and not the professionalist-regulated category.

An additional example of a professionalist-regulated approach is California's regulation of lawyers. California is the only United States jurisdiction where the legislature, an external regulator, primarily promulgates rules of lawyer conduct. Yet these rules track professionalist-independent assumptions regarding the essentialism of legal services, including the prohibition of multidisciplinary practice.[155]

Another hybrid framework is professionalist-competitive. In the State of Washington and the Provinces of British Columbia, Quebec, and Ontario, for example, there are small notarial and paralegal professions which provide legal services in competition with lawyers.[156] Similarly, in New York, British Columbia, and Nova Scotia, regulations contemplate imposing responsibilities on law firms, [157] contrary to the professionalist-independent reliance on the accountability of lawyers as individuals.

2.3.2 Multiple Strategies

Where hybrid strategies combine professionalist-independent and consumerist-competitive elements, multiple strategies refer to employment of both professionalist-independent and consumerist-competitive strategies in the same jurisdiction. Indeed, no common-law jurisdiction employs only one regulatory strategy.

In common law North America, laws of general application that apply to lawyers, such as fraud or criminal provisions, represent a consumerist-competitive approach even within jurisdictions that generally regulate lawyers through professionalist-independent mechanisms. Similarly, England and Wales retain self-regulated entities reflecting a professionalist-independent approach as front-line regulators[158] that are subservient to state-accountable and layperson-dominated bodies.

2.3.3 Unintended Consequences

Professionalist-independent or consumerist-competitive approaches may sometimes cause very different results than what regulators intend. For example, professionalist-independent regulators in the United States reject the possibility of nonlawyers delivering legal services and therefore refuse to encourage regulation of nonlawyer legal service providers. As a result, an increasing number of legal services businesses are developing outside of the regulatory regime at both ends of the market, such as Axiom (project-based legal work) or Clearspire (virtual law practice) as alternatives to the traditional corporate

[155] California *Business & Professions Code Div. 3 - Professions and Vocations Generally, Ch. 4 - Attorneys* (Bus. & Prof. Code §§ 6000 et seq.) http://rules.calbar.ca.gov/SelectedLegalAuthority/TheStateBarAct.aspx.

[156] Washington Supreme Court Admission to Practice Rule 28, Limited Practice Rule for Limited License Legal Technicians. Re these small Canadian sub-profesions, see *Law Society Act (Ontario),* R.S.O. 1990, c L.8, ss. 25.1 and 25.2; *Notaries Act*, (British Columbia), RSBC 1996, c. 334*; Notaries Act* (Quebec), CQLR c N-3.

[157] Adam Dodek, 'Regulating Law Firms in Canada' (2011) 90 *Canadian Bar Review* 383, 404 and 409.

[158] David Clementi, *Review of the Regulatory Framework for Legal Services in England And Wales: Final Report* (2004). See also Andrew Boon, 'Professionalism under the Legal Services Act 2007' (2010) 17 *International Journal of the Legal Profession 195.*

law firm and LegalZoom (online legal forms) or Modria (online dispute resolution) as options for the consumer law market.[159]

Conclusion

We began this project by seeking to gain insight into why common law jurisdictions have adopted divergent regulatory strategies. By placing strategies for regulating legal services in the context of rationales for regulation more generally, we identified assumptions regarding the purposes and methods of regulations that we classify generally into professionalist-independent frameworks dominant in the United States and Canada, and consumerist-competitive frameworks dominant in Australia, England and Wales. These frameworks, in turn, construct particular occupational structures, governance regimes, and substantive rules, including limitations on the role of non-licensee service providers. The taxonomy of dominant frameworks also helps identify exceptions to these frameworks, whether they represent hybrid or alternate strategies, or unintended consequences.

A comprehensive normative evaluation of these alternative modes of regulation is beyond the scope of this Essay. Competitive-consumerist regulators take the consumer interests of clients more seriously, and this approach may produce more accessible and better-quality legal services for individual clients. However, others might argue that these regulators have abandoned ancient and worthy ambitions, such as instilling altruistic service orientation in lawyers and maintaining a profession independent of state and market. Even among the co-authors of this piece there is disagreement over the preferred regulatory regime. For example, one of us has advocated elsewhere that the American public would benefit from increased competitive-consumerist regulation through liberalisation of the nonlawyer ownership and investment bans in the United States.[160] Another argues more generally that a competitive-consumerist approach best promotes the goals of individual rights and equal access to political and economic power.[161] A third believes that sufficiently ambitious reform might bring professionalist-independent regulation into the 21st century without jettisoning its core commitments.[162] Regardless of our individual normative views, there is benefit in crafting a descriptive categorisation of lawyer regulation as we have done here. The intention of this taxonomy is to stimulate further inquiry into the assumptions underlying, and characteristics of, comparative regulatory regimes, as well as into which assumptions and characteristics are appropriate for particular purposes. The taxonomy is designed to aid scholars and regulators alike as they evaluate merits of existing regulation and consider proposals for reform.

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[160] Renee Newman Knake, 'Democratizing the Delivery of Legal Services' (2012) 73 *Ohio State Law Journal* 1,

[161] Russell G. Pearce and Sinna Nasseri, 'The Virtue of Low Barriers to Becoming a Lawyer: Promoting Liberal and Democratic Values' (2012) 19 *International Journal of the Legal Profession* 357-378.

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