NOTES

Professional Structures and Professional Ethics

H. Patrick Glenn*

The author argues that much of the current debate concerning legal ethics is misconceived, since it takes little account of the importance of professional structures. For ethical standards to exist which may be designated as professional, there must be structures which remove the ethical from the domain of purely individual choice. Current developments in the legal professions in Europe, the U.S.A., and Canada are examined to ascertain in what measure they are compatible with this fundamental requirement.

L'auteur soutient que le débat actuel en matière de déontologie juridique est, dans une grande mesure, mal conçu, car il ne tient pas compte de l'importance des structures professionnelles. Afin d'avoir des standards qui puissent être désignés comme professionnels, il doit y avoir des structures qui empêchent que la déontologie soit entièrement une question de choix personnel. Les développements récents en matière des professions juridiques en Europe, aux États-Unis, et au Canada sont examinés pour voir s'ils sont compatibles avec cette exigence fondamentale.

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*Peter M. Laing Professor of Law, McGill University. This is a revised version of an inaugural lecture given May 17, 1989, at the Faculty of Law, McGill University on the occasion of the establishment of the Peter M. Laing Chair.

Synopsis

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Introduction

Peter Laing led a distinguished professional life. He was one of Montreal's leading counsel; he played an important role within his profession and his firm — exhibiting a remarkable analytical talent — and he was a devoted servant of McGill University for many years, both as a Governor and as legal counsel. It is not an easy thing to achieve distinction in such a manner in the practice of a profession. Qualities must be exercised, in the daily tumult and over an extended time, which both meet external need and withstand the critical appraisal of one's peers. Distinction flows *from* these qualities, as they are exercised in a lifetime. There is thus a qualitative and a temporal measure of professional distinction. It is a lifetime which is judged, and according to rigorous, though often unexpressed, standards. Leaders of the Bar are individuals who have met these standards over time, and their professional lives are necessarily informed by a professional ethic. What, however, is the nature of this ethic, and what are its most significant elements ?

My argument is a very simple one, but it is today far from obvious. The argument is that professional structures are of profound ethical significance; they have a hidden dimension which deserves discovery, or perhaps rediscovery. No concept of professional ethics should therefore be isolated from the structure of the profession. If this argument is correct, two preliminary conclusions should follow. The first is that much of the current and vigorous debate concerning legal ethics is misconceived; it assumes a discrete field of legal ethics, even taught as an academic specialty, in which solutions are sought for specific problems free of considerations of structure. The second conclusion is related to the

first. It is that much of the debate over reform and change of the profession is equally misconceived, since ethical impact of structural reform on the individual practitioner is infrequently the object of discussion. In the result, the structures of the profession should bear much of its ethical load, and reform of structures should be in function of ethical considerations, amongst other things. Ethical impact statements are required. However, since today this argument is not obvious, and since it challenges some major directions of North American legal practice, it requires more than simple affirmation.

I. Europe

What is meant, first of all, by professional structures? Four characteristics emerge very clearly from the European professional tradition, though today the debate in Europe is perhaps more intense than in North America.[1] First, European practice is divided amongst several professions; second, the boundaries of professional practice are fixed by defined incompatibilities, known as such, which prevent members of a profession from undertaking specific activities; third, the professions exercise a strong corporate control over their membership; and fourth, they do so through enforcement of ethical standards the explication of which is one of the ongoing functions of the professional body itself. Even enumerated in summary fashion these structures do not appear entirely irrelevant to ethical considerations; examining them individually should reinforce this conclusion.

The European professions appear to have existed separately from the initial emergence of formal legal tasks. There are jurists, procurators, *advocati*, and *notarii*,[2] and law appears professionally not as a broad field in which one roams to one's advantage, but as a series of discrete functions, each with its defined objectives. This has important ethical implications. First, in the measure that the functions are mutually exclusive — one cannot be both procurator and a *advocatus* — the notion of professional incompatibilities is part of the structure of the profession itself. As an *advocatus*, there are legal tasks one cannot accomplish. Second, the existence of distinct categories of legal practitioners permits precise identification of the goal, or in Aristotelian ethical language the *telos*, of each of them. The most brilliant example of the incorporation of ethical objectives into the simple process of designation is in the word advocate, from the Latin *advocare*, to call to aid, yielding the *advocatus* as a person who *by definition* is one who responds to calls for help. It is no accident that the French

[1]Fusion of barristers and solicitors is now being debated in the United Kingdom, and fusion of *avocats* and *conseils juridiques* is now underway in France. The structure of all European legal professions may be profoundly affected by common market measures due for implementation in 1992.

[2]M. Kaser, *Römisches Rechtsgeschichte*, 2d ed. (Göttingen: Vandenhoeck & Ruprecht, 1967) at 168, 180, 210.

avocat until the mid-twentieth century was unable in law to recover honoraria.

What thus occurred in Greece and Rome is of enormous interest, though we may never be able to explain entirely how it came about. On the one hand Greek thought gave us the concept of specialized human knowledge — the sophists were the first to write treatises on technology — as a means of uncontrolled and uncontrollable domination of the world. On the other hand notions of creativity and domination were largely suppressed in the articulation of legal tasks, as the legal professions were defined in terms of their function of service, not in terms of specialized knowledge as a means of mastery, and functions of service were divided to permit clearer articulation of the goals of service. Ethics *was* structure, and the continuing division of the professions in Europe is the legacy of this idea.

The incompatibility between the legal professions draws attention to other activities which may be incompatible with the exercise of each of them. The second major characteristic of the European legal professions, of both civil and common law traditions, is the existence of clearly established incompatibilities. Known as such, they prohibit, for example, the English barrister from engaging in commercial activities, the French *avocat* from accepting salaried employment, and the German *Rechtsanwalt* from being employed as a university professor. The admixture of structure and ethic is perhaps most clearly evident in Germany, where the romanists played a decisive role in the dismantling of feudal structures. Here the rationalization of law resulted in great emphasis being placed on professional role, to the point of counsel becoming obligatory in normal litigation. It is thus here in Germany in the sixteenth century that we find the origins of the maxim "Only a fool acts as his own counsel."[3] Lawyers now begin to earn good livings, and this includes the law professors. In the University of Leipzig in the 1500s the *ordinarius* for Roman law receives three hundred gulden annually, compared to only two hundred for the humanist and the *mathematicus*, but the university attaches the proviso that the romanist must "stay in place at the university and not move about to carry on his practical business." The reaction against Roman law and Roman lawyers is widespread, and Martin Luther, in his general attack on the law, charges that "the real reason why you people study law and become jurists is money. You want to be rich."[4] However, the legal professions remain, and remain distinct, and today in Germany one does not speak of legal ethics or deontology but of *Standesrecht*, the law defining one's place (where one stands) or role, since it is one's role which defines the standards of conduct one must meet. The concept of role is

[3]G. Strauss, *Law, Resistance and the State [:] The Opposition to Roman Law in Reformation Germany* (Princeton: Princeton University Press, 1986) at 93.

[4]Strauss, *supra*, note 3 at 183. For Luther's antipathy to the law see M. Villey, *La formation de la pensée juridique moderne* (Paris: Les Editions Montchrestien, 1975) at 297, 302.

thus both positive, in articulating function, and negative, in excluding antithetical functions through defined incompatibilities.

Structures of ethical content may however be challenged, ignored, or simply suffer from cultural entropy. The structures of European legal professions do change over time, perhaps the most notable example being the virtual elimination of the English notary in the sixteenth century. In ethical terms, however, there is a constancy of structure, which is their third major characteristic, since the professions are established in such a way that their internal ethic is meant to be self-enforcing, *i.e.*, in a manner internal to each profession itself. The professions are strong corporate bodies; membership in them is essential to practice; and they are doted with the means to exercise control over their members. This control is not always exercised, and there are constant complaints that it is overly protective of privilege, but it exists, whether in regional French Bar associations, the English Inns of Court, or the *Anwaltskammern*. These are not notably democratic institutions, and discipline is exercised by virtue of seniority or by those sufficiently distinguished to hold office for necessarily limited and brief periods of time, not subject to the constraints of re-election. The standards of the profession itself may thus be enforced, by those familiar with them as a result of long practice, and these standards are in no way limited to those edicted by rules of law for the general population. Hence the professional ethic is conceived as being voluntarily assumed and more onerous in character than any standard which could be imposed by external means. Such standards must be learned, since they are not expected of the general population, and the authorities of each profession play a continuing and diversified role of both education and, where necessary, punishment, in deciding disciplinary cases.

Of these two roles it is probably the educative which is the more important, since the remaining and fourth characteristic of the European legal ethic is that it is largely unarticulated. It does not consist of rules, but rather of standards, and even the standards may not be formally expressed. The process of explication of the standards is thus an essential one, but the explications never replace the standards themselves. Rules are for others, who may reasonably be expected to ask precisely what they should do. Rules are not, however, except as a minimal requirement, for those who administer the rules, and who must necessarily act beyond the rules as justification for their role in administration of the rules. The notion of a code of professional ethics is thus a very recent one and some legal professions, such as the English bar, have traditionally seen no need for their creation. Where they do exist, they may consist of little more than maxims and are thus only statements of standards which defy exhaustive delineation.

The European professional tradition in law, consisting of these four characteristics — separate professions, defined by incompatibilities, strongly governed, and adhering to general standards — is thus a unified one, since it is common to the civil and common laws and constant through the development of

them. Traditions are never received elsewhere, however, in the form in which they have been developed. The legal profession in North America is therefore not identical to that which has existed in Europe, and the differences extend beyond the national differences which exist within the European tradition. Is there however a North American legal profession which teaches different lessons in terms of ethical responsibility? To what extent are our four European professional characteristics replicated in the New World?

II. United States of America

The legal profession in the United States of America is a unified profession and has never exhibited the diversity of the European tradition. The most common explanation for the unified profession in the U.S. is that of the reality of frontier life, which was unable to sustain the luxury of divisions of labour in intellectual pursuits. This is perhaps the best explanation. It is closely related to what may have been a desire not to limit the efficient practice of law in a new world by importing restrictions of the old. For whatever reasons the concept of a unified profession spread rapidly over much of North America, and has become, with the accompanying authorization of partnership agreements (prohibited for the English barrister), the principal support for the extraordinary growth of law firms in the United States. Given all of law to practice, moreover, and the resulting need to associate, U.S. professionals quickly moved beyond the individualized forms of practice current in Europe. As in the sixteenth and seventeenth centuries in Europe, the initial growth and prosperity of the profession coincided with a rationalization of law itself. The growth in size of U.S. firms took place initially from 1870 to 1930,[5] and during this period U.S. law underwent formalization, while its teaching entered a scientific era, with the development of the case method of instruction. Since that time there has been no significant change in the structure of the U.S. profession (admission of corporate forms of organization having preserved many forms of partnership structure) but there have been changes in the scale and the manner of individual and partnership practice. In the last two decades the largest of U.S. firms has grown from over 100 to over 1000 members, and within the unified profession *de facto* specialization has developed, in terms of areas of specialized knowledge of law as opposed to traditional legal functions. As a delivery mechanism for the provision of highly specialized intellectual services, in large quantity and if necessary in highly compressed periods of time, the legal partnership becomes subject to a heavy burden of internal and inflexible costs, which in turn generate new forms of practice and methods of work. The most historically interesting of these is the concept of billable time, a subject on which much remains to be said. It provides a quantifiable indicia of assistance provided, which is however both independent of results produced and largely within the control of members

[5]A. Freeman, "A Critical Legal Look at Corporate Practice" (1987) 37 J. Legal Ed. 315 at 317.

of the firm themselves. This is not the place to detail the present workings of the large U.S. firms, but a number of aspects of the large firm, in the context of the unified profession, are relevant to the question of professional ethics. Let us look briefly at these, before moving on to the remaining three characteristics of the European profession.

First, the agglomeration of lawyers within a single structure has meant that many of them work not in direct relation with a client to whom assistance is provided, but in an internal hierarchy which functions in some measure according to internal criteria of productivity. "Shop norms" have emerged, in the language of Professor Hazard,[6] which means there has been necessary displacement, in some measure at least, of the traditional objects of the lawyer-client relation: the need of the client and the compensation in reasonable measure of the individual lawyer for service provided. The nature of the shop norms will vary according to the distribution system of individual firms for revenue generated beyond the compensation provided to the lawyer or lawyers actually rendering the services, but in all cases the lawyer concerned is required to respond to structural priorities which are distinct from the interests of the client. The brutally financial nature of the calculation is evident in the notion now current in the U.S. of firm leverage, expressed in associate-to-partner ratios, which are the object of precise calculations. The rapid increase in firm size in the U.S. in the last decade has been accompanied by a marked increase in use of associate legal talent, as a means of levering partner revenue and meeting overall partnership costs.[7]

Second, the sociological studies now attracted to the practice of large U.S. firms indicate that the firms themselves, given the specialized services they provide, become heavily dependent on the interests of particular clients. In Chicago lawyers in general spend about a third of their time, and corporate lawyers about half their time, on the client for whom they work the most.[8] The result is a highly differentiated bar, one which is fragmented through the impact of client interests upon it.[9] It has been said that this "strong coincidence in attitudes among counsel and clients" diminishes "counsel's capacity for unbiased normative decisions",[10] and that client control of professional organization will result in the profession lacking "the power to draw the boundaries that separate lawyers' work from that of other occupations ... to set standards of professional

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[6]G. Hazard, ed., *Ethics in the Practice of Law* (New Haven: Yale University Press, 1976) at xv.

[7]The last decade of rapid firm expansion has been accompanied amongst the large U.S. firms by a growth in the average associate-to-partner ratio by a third, from 1.25-1 to 1.68-1. In New York the average ratio is 2.56-1. "Leverage Data is Inconclusive" *The [New York] National Law Journal* (26 December 1988) S-15.

[8]D.L. Rhode, "Ethical Perspectives on Legal Practice" (1985) 37 Stan. L. Rev. 589 at 627.

[9]J.P. Heinz & E.O. Laumann, "The Legal Profession: Client Interests, Professional Roles and Social Hierarchies" (1978) 76 Mich. L. Rev. 1111 at 1112.

[10]Rhode, *supra*, note 8 at 629.

conduct, and thus to control the course of the profession."[11]

Third, the process of specialization itself is said to impact on the ethical perspective of the individual lawyer. Why this is so depends on the nature of judgment exercised in the lawyering process, which properly extends beyond technical proficiency. Total immersion in law precludes awareness of why it exists as law, and of the necessary ethical restraints in its practice. This is particularly the case when practice is at the level of an associate firm member. In U.S. practice the levels of specialization are increasingly said to be "emotionally destructive,"[12] "means by which lawyers become professionally and ethically isolated from ordinary life,"[13] and as precluding, in the language of the senior counsel to Coudert Brothers in Washington, "a decent way of life."[14] Yet the attractions of the specialist's legal world remain such that this is where much of the best talent resides.

Fourth, the dimensions of the large firms are such, when combined with the flow of lawyers amongst them, that what are known in North America as conflicts of interest become increasingly frequent. The dispute between two long-standing clients poses excruciatingly difficult questions for the large firm; the transfer of lawyers from firm to firm during protracted litigation creates similar difficulties. The large firm in the unified profession thus inevitably creates ethical difficulties of this kind, and means of solution must be sought elsewhere.[15]

The second major characteristic of the European professional tradition is the existence of fixed rules of incompatibility which preclude the individual lawyer from entering into relations or transactions inconsistent with his or her professional role. A divided profession means there are incompatibilities between the professions: one cannot be both advocate and notary, barrister and solicitor. Yet, the European incompatibilities extend well beyond the definition of the professions to exclude, for example, a barrister from entering into commercial activities in collaboration with a client. In the United States, no incompatibilities exist to separate one legal profession from another and this appears to have precluded the development of any other form of incompatibility. If one is free to practice all law, one is free to do it in conjunction with other activities

[11]Heinz & Laumann, *supra*, note 9 at 1142.

[12]Freeman, *supra*, note 5 at 320.

[13]N.L. Firak, "'Ethical Fictions as Ethical Foundations': Justifying Professional Ethics" (1986) 24 Osgoode Hall L.J. 35 at 61.

[14]L. Greenhouse, "Linowitz's Call for Lawyers to Be People Again" *The New York Times* (22 April 1988) B-5.

[15]It is also clear from the U.S. experience that the structural rules which do remain part of U.S. practice are of ethical importance. These include the unlimited liability of the lawyer practicing in corporate form, the limits on extraterritorial operation of corporate practices, the prohibition of capital external to firm members in firm financing, and the prohibiton of multi-disciplinary firms. None of these structural rules are of assistance, however, in resolution of the problems created by the large firm practice.

(including participation in leveraged buyouts), subject only to such ethical restrictions which may exist and be enforceable.

Enforcement of ethical obligations in the United States is severely hampered, however, by the voluntary character of many state bar associations, and by the renunciation of disciplinary functions, in favour of the courts, by many others. As we have seen, the differentiation of state bars in function of client interests may play a role in this process. The structure of the profession is thus too haphazard to allow disciplinary and ethical surveillance, and the courts are an ineffective substitute. The disciplinary proceedings which occur annually in the United States number only in the hundreds in a profession now exceeding 700,000 members. Strong professional government, the third of the European characteristics, is thus conspicuously lacking. This is the context in which one must understand press releases such as the following, which appeared in the December 26, 1988 edition of the National Law Journal:

> Los Angeles — More than three years after his release from state prison, the California Supreme Court has ordered La Jolla sole practitioner Stephen T. Lee disbarred, finding that the solicitation of a hit man to kill a government witness constitutes moral turpitude.

The U.S. profession thus appears significantly different from the European in terms of the unity of the profession, the absence of professional incompatibilities, and the weakness of professional surveillance and control. I will return to the fourth characteristic, that of ethical standards. We already know, however, that the individual U.S. lawyer stands before a wider world, free of any generalized limits on behaviour, and largely free of any effective means of control or surveillance. In contemporary language, the shift is from macroethics to microethics, and while theoreticians of applied ethics regard macroethics as providing "a necessary framework of the microethical",[16] it is clear that in the U.S. profession the structure of macroethics is largely, though not entirely, absent. There is of course an older language to describe the phenomenon, since what has been largely removed is the definition of *telos* or role, and the means of education in this *telos*. It is true that the concept of role continues to play a large part in contemporary U.S. ethical discussion, but the shift is from a *telos* or role which gives meaning to one's life as an individual, the fulfillment of which is one's purpose in life, to a role in a sociological sense, in which the self is reduced to a set of demarcated societal functions, devoid of ethical content. One's role is simply to deal with the situations as they arise, using the appropriate legal discourse and whatever "role model" appears appropriate in terms of efficiency of execution. The ethic of the professional life is here replaced by the ethics of the situation — quandary ethics in the language of their critics.

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[16]A. Edel, "Ethical Theory and Moral Practice: On the Terms of their Relation" in J.P. Demarco & R.M. Fox, eds, *New Directions in Ethics* (New York: Routledge and Kegan Paul, 1986) 317 at 323.

What has been the effect of this shift in ethical technique on the actual level of ethical practice in the U.S.?[17] Perhaps most revealing is the nature of legal ethical debate in the U.S., where a number of features of the debate are of interest. First is the dominance of the idea of conflict of interest in defining appropriate and inappropriate lawyerly conduct. I am unaware of the origins of the idea of a conflict of interest, but its origins do not lie in the history of the European profession, since the idea is there largely unknown. A conflict of interest appears initially to be ethically banal. People's interests are seen today as constantly in conflict and what can be said to be wrong with that?[18] Its use in legal ethics therefore implies the superposition of a further ethical criterion, or the conflict of interest will go largely unsanctioned unless actual harm is caused. This is what Francis Bacon contended after accepting gifts from litigants before him, in stating that there was no wrong since he had not been influenced in exercising his judgment. There have been recent Canadian political examples. In the measure that conflicts of interest go unsanctioned absent actual harm, a purported ethical standard is reduced to something very close to the general rules of civil liability. Use of the concept of conflict of interest, when combined with the absence of disciplinary authorities, may have this ultimate effect.

Another feature of U.S. legal ethical debate has been the call for development of "non-professional advocacy."[19] Non-professional advocacy is said to be necessary because the use made of the professional role in the adversarial process (and we are here speaking of role in the sociological sense) is said to authorize a standard of behaviour which is *less* than that required of the ordinary citizen. Thus all conduct is perceived to be tolerated by the adversarial system so long as it advances interests defined by the client. To remedy this abusive attitude and to eliminate vicious professional conduct it becomes necessary to resort to a public standard of the good, and no deviation can be allowed for the lawyer purporting simply to do his job. In these circumstances, professor Fried's defence of the concept of the lawyer as friend, entitled as friend to act aggressively within the law against adversaries,[20] is seen as a defence of an unsatisfactory status quo, in which the lawyer's role is no longer that of ethical agent, but

[17]For a recent discussion of ethical malpractice in the U.S., from the perspective of a justice of the 2d U.S. Circuit Court of Appeals, see R.J. Miner, "Lawyers Owe One Another" *The [New York] National Law Journal* (19 December 1988) 13.

[18]Perhaps a great deal, given that concepts of interest and conflict are not ethically neutral. In contemporary public morality, however, it is usually seen as a simple fact that the interests of person A are in conflict with those of person B. Neither A nor B is the object of blame.

[19]See, for example, W.H. Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics" [1978] Wis. L. Rev. 29; and "Ethical Discretion in Lawyering" (1988) 101 Harv. L. Rev. 1083.

[20]C. Fricd, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation" (1976) 85 Yale L.J. 1060.

of a kind of client-controlled judicial Rambo. This attitude is itself instructive. Elsewhere in the world a call for non-professional ethics would not be seen as a call for a higher standard of conduct.

Finally, there appears as a result of all of this to be a shift occurring within the U.S. profession from the idea of broad standards of conduct to precise rules of professional conduct. This brings us to the fourth characteristic of the European tradition. In 1983 the American Bar Association converted its Model Code of Professional Responsibility into a detailed set, in black-letter form, of Model Rules of Professional Conduct. The U.S. academic community appears in some measure to welcome the appearance of a new academic specialty of the *law* of professional ethics.[21] This shift is closely related to the other characteristics of the U.S. profession which we have seen, which have the effect of collapsing structure or role in favour of largely uncontrolled individual choice. Standards address the question of how one acts and assume the existence of an articulated role the standard is meant to implement. In contrast, rules tell one what to *do*, in a particular case, and their implementation appears to require no concept of professional role or professional standards. To the extent that a profession seeks rules in order to know what to do, it is clear that it lacks a clear sense of role informing it as to how it should act.[22] It remains to be seen, in the unique U.S. context, to what extent rules, and rules alone, may provide a foundation for ethical conduct on the part of lawyers who work, on a daily basis, with rules.

Is the experience of the United States consistent with the teachings of the European professional tradition? I believe it is, since it illustrates the difficulties in sustaining the concept of a professional ethic in the absence of appropriate professional structures. This is not to say that legal practice in the United States has become unethical, since much legal practice is conducted by individual lawyers in a manner which does not create ethical difficulties. The enormous debate over legal ethics in the United States, however, is indicative of problems and the problems are structural. This conclusion emerges from the U.S. debate itself, which has in the last two decades turned not only to the concept of rules as a corrective for perceived ethical problems, but also to the concept of professional role or *telos*. This revival of interest in what is designated as "character ethics"

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[21]Professor Patterson states in the preface to his large volume:"This book is born of a conviction that too often the teaching of courses in legal ethics, or professional responsibility, is based upon the premise that the subject is one of ethics rather than law. That premise has been rejected in the preparation of these materials. A course in legal ethics is, and should be, a law course involving rules of law and legal problems." L.R. Patterson, *Legal Ethics[:]The Law of Professional Responsibility* (New York: Matthew Bender, 1982) at v. For the development of the academic treatment of the subject in the U.S. see A. Esau, "Teaching Professional Responsibility in Law School" (1988) 11 Dal. L.J. 403 at 437.

[22]For such a request for specific guidance see R. Kasanoff, Book Review of *Ethics in the Practice of Law*, ed. by G. Hazard (1980) 89 Yale L.J. 1438.

is seen as significant in all fields of applied ethics,[23] and the writing of Professor MacIntyre constitutes its recent extension into the field of public morality.[24] In law Professor Kronman has argued for the continuing vitality in the U.S. profession of the quality of "practical wisdom", representative of something other than the single-minded pursuit of client instruction.[25] Members of the judiciary have been still more explicit in linking ethical problems to those of structure, and a recent judicial declaration states explicitly that "...even the best-intentioned lawyers can be overwhelmed by a flawed system."[26] U.S. experience thus not only illustrates the ethical problems created by destructuring, it also illustrates the continuing relevance of role and structure as means of resolution of those problems. Will new standards emerge from the rules?

III. Canada

The European professional tradition is common to the civil and common laws in regard to its principal characteristics of separate professions, reinforced by explicit incompatibilities, controlled by strong professional organization and using general standards of professional conduct. The U.S. legal profession departs from these characteristics in significant measure though, I have argued, the lesson to be drawn from the U.S. experience is in no way incompatible with their *raison d'être*. Is the Canadian profession, or professions, one which contributes to a North American professional model, distinct from the European, or are we a simple extension of the European tradition? The answer is not a simple one.

Conditions in New France were certainly as rigorous as those prevailing elsewhere on the Continent, but the continuing authority of the French Crown meant that it was unlikely that entire fields of professional practice would open up, free of the traditional limits of metropolitan practice. Indeed, the practice of advocacy was largely closed down, being in royal disfavour as a disruptive influence. This left the *notaire* as the exclusive, though limited, representative of the French legal professions. The arrival of the English meant the arrival of the Bar, with the result that the profession of Lower Canada followed an English bi-partite division (avoiding the multiplicity characteristic of France), but with the senior profession a direct descendant from the French tradition. This limited division remains characteristic of the Quebec profession today and, in spite of occasional calls for it on behalf of distinguished members of the Bench and Bar as recently as last autumn, fusion appears highly unlikely in the future. In 1988,

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[23]M.G. Singer, "Ethics, Science and Moral Philosophy" in DeMarco & Fox, *supra*, note 16 at 286, 297.

[24]A. MacIntyre, *After Virtue*, 2d ed. (Notre Dame: Notre Dame University Press, 1984).

[25]A.T. Kronman, "Living in the Law" (1987) 54 U. Chi. L. Rev. 835.

[26]H.T. Edwards, "The Role of Legal Education in Shaping the Profession" (1988) 38 J. Legal Ed. 285 at 290.

the Quebec Superior Court rejected any compatibility between the two professions under existing legislation,[27] and we have even added to the division in a small measure in providing for the profession of "conseiller en loi", unique in Canada, a direct descendant of the purely advisory Roman jurist.[28]

It is commonly said that there exists a unified profession in the common law provinces, and it is true that in each case a single governing body exists. However, the Canadian unified profession is not that of the U.S.: there is no single profession of, for example, attorney, but rather the junction of the distinct professions of barrister and solicitor and the removal of formal incompatibility between them. At the same time one is a member of two professions with separate roles and recognizably distinct functions. The concept of junction is distinct from that of fusion. For instance, in Ontario, the recent programme of specialization has not been based on scientific models organized around specific subject matter (fields of domination in which professional functions are unrestricted), but has reverted to the traditional legal function of oral pleading, the role or *telos* of the barrister.[29]

While the concept of incompatibility is less evident in the Canadian professions than in Europe, in principle the Canadian professional is not free to engage in any outside activity, as is the case in the United States. In this regard, the Quebec notarial profession is the most explicit and rigorous in setting out a list of specific incompatibilities including the exercise of another principal occupation in commerce or industry.[30] The incompatibilities of the Quebec Bar Act are shorter in number, but the Quebec bâtonnier has issued formal warnings against members of the Bar engaging in commercial activities,[31] and inattention to client files because of external commercial activities is susceptible to review in Quebec through proceedings of professional inspection which may themselves lead to disciplinary proceedings.

In the common law provinces the most striking provision in this regard is chapter VII of the Canadian Bar Association Code of Ethics, which has no counterpart in the United States, and which provides that the lawyer engaged in "another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence." This is, I believe, an incompatibility.

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[27]*Fréchette* c. *Chambre des notaires du Québec*, [1988] R.J.Q. 470 (C.S.).

[28]See the *Loi sur le barreau du Québec*, L.R.Q. c. B-1, s. 56.

[29]For recent developments see *The [Ontario] Lawyers' Weekly* (4 November 1988) 7. Approximately 300 Ontario barristers and solicitors have qualified for practice as specialists in the barrister's function. For announcement of a British Columbia practice designated as that of "Barristers at Law", see (1989) 47 The Advocate 315.

[30]*Code de déontologie des notaires*, R.R.Q. 1981, c. N-2, r. 3, art. 4.01.01.

[31]See, for example, *Le Barreau* (December 1983) 3 reporting the declaration of Bâtonnier Louis LeBel to the effect that "Il faut parfois savoir choisir entre la profession et une activité externe."

While there is no prohibition on the exercise of an outside profession or business, as in the European model, there remains a prohibition of any such activity which threatens the proper exercise of the profession, and the matter is not left to more specific provisions relating to conflict of interest between lawyer and client. The incompatibility is not absolute, but it remains an incompatibility of function, and therefore reinforces the concept of role.

It is consistent with the existence of divided professions and the incompatibilities which define them that there exists a strong professional organization capable of maintaining these definitions of professional role. Here the Canadian pattern is more clearly in the European tradition. It appears evident that while European incompatibilities have been renounced in favour of greater freedom of professional practice and greater reliance on individual professional ethics, the means of enforcement of such ethics has remained at least equivalent to those which exist in Europe. There is much to suggest that Canadian professional government is even stronger than its European counterpart. Membership in a professional organization is essential to practice, periods of articles or *stage* are obligatory, in all cases accompanied by training organized by the professional organization itself, and the professional organizations impose substantial fees to support the wide range of activities they undertake. This pattern is radically different from that prevailing in the United States, and in the measure that provincial bar or notarial organizations are well funded and staffed it is also a departure from many European national models. For present purposes, it is the disciplinary and inspection powers of the provincial governing bodies which are most striking. They include the provisions for inspection of professional competence in the province of Quebec, generalized regulations for inspection or audit of professional accounts, and disciplinary procedures which are actually used as a means of implementation of ethical standards. While precise statistics are unavailable, examination of reported provincial disciplinary proceedings suggests that the Canadian professions produce hundreds of disciplinary decisions annually, roughly equivalent to the number of disciplinary proceedings in the whole of the United States, where the profession is more than ten times the size. Perhaps most significantly, disciplinary proceedings extend to violations of ethical standards where no harm is caused to the client, and the notion of conflict of interest is thus given an ethical dimension which raises the principles relating to conflicts of interest beyond the level of rules of civil liability.[32]

Finally, the Canadian professions have not followed, at least as yet, the U.S. pattern of enunciation of detailed and black letter rules of professional conduct. At a time when general standards of conduct are increasingly found in texts of law of general application, the decision appears to have been made to

[32]See, for example, *British Columbia Disciplinary Digest*, (August 1987) 3.

resist the "enormous pressure to legalize professional ethics."[33] Instead general standards, the explication of which is the ongoing function of the professional organization itself, have been retained. The Preface to the Code of Professional Conduct adopted in 1987 by the Canadian Bar Association explicitly states that "... the Code does not attempt to define professional misconduct or conduct unbecoming, nor does it try to evaluate the relative importance of the various rules or the gravity of a breach of any of them. Those functions are the responsibility of the various governing bodies... . The essence of professional responsibility is that the lawyer must act at all times *uberrimae fidei*... ." It is, in short, a Code which instructs in how to act, and not in what to do.

Conclusion

In his *Ethics and the Limits of Philosophy*,[34] Bernard Williams concludes that all philosophical efforts to ground ethics objectively in a process of practical reasoning, from Aristotle through Kant and beyond, have failed. In spite of this, he declares himself to be resolutely optimistic, though ethics for the moment, and for him, can be rooted in nothing more than human disposition. This is the conclusion of a philosopher who has examined moral philosophy and found it, in his words, "... not involved enough; it is governed by a dream of a community of reason that is too far removed ... from social and historical reality and from any concrete sense of a particular ethical life — farther removed from those things, in some ways, than the religion it replaced."[35] He is optimistic, however, since this conclusion in his view is not conclusive in ethical matters. It simply indicates that "... we need to have some reflective social knowledge, including history, that can command unprejudiced assent if the better hopes for our self-understanding are to be realized. We shall need [this] if we are to carry out the kind of critique that gives ethical insight into institutions through explanations of how they work and, in particular, of how they generate belief in themselves."[36] If the philosophers cannot tell us how to live an ethical life, and yet ethical lives are lived, we need to know how it is done. The ethics of the legal profession suggest that there is more involved than individual human disposition.

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[33]Esau, *supra*, note 21 at 410.
[34](London: Fontana Press/Collins, 1985).
[35]*Ibid.* at 197-98.
[36]*Ibid.* at 199.