1. Introduction

Justitia is the goddess of law and justice, usually depicted blind and armed with sword and scales. Justitia’s legions are those who earn a living by providing legal services to others. These people give advice about the law; they represent others in courts or tribunals; they prepare documents with legal effect. They do this work for individuals, for corporations, and for governments. Some march alone; others in small partnerships; still others in firms of thousands.

The goddess at the head of this column represents celebrated ideals such as the rule of law and the pursuit of justice. However, the reality is that Justitia’s legions muster themselves with the goal of meeting human needs. We live in a law-thick world. To secure a benefit or avoid a loss in this world, we often find that we must somehow use the law. This is as true for global corporations as it is for ordinary individuals, and it is as true for the most ambitious programs of social change as it is for the most elemental human needs.

People, in short, need to use the law. However, law has become more complex along with the world itself and is now intricate enough that most people, in most cases, are unable to make effective use of it without assistance. They need and are often prepared to pay for expert legal services. Even the loftiest conceptions of law and its practitioners must acknowledge that legal services will be bought and sold.

Nonetheless, transactions in legal services have long been considered ill-suited to untrammelled free market exchange. For that reason, legal services regulation, the subject of this book, has been with us for as long as expert legal services have been sold. Legal services regulation

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2 The Bible, for example, contains two passages quoted to guide lawyers. An aspirational ideal is provided by the Book of Proverbs: ‘Open thy mouth for the dumb in the cause of all such as are appointed to destruction. Open thy mouth, judge righteously, and plead the cause of the poor and needy’ (Proverbs 31:8–9). The Book of Luke takes a darker view, with Jesus urging: ‘Woe unto
consists of rules about who can provide legal services, what characteristics those services must possess, and under what conditions they can be provided.

1. OVERVIEW

This book’s primary focus is what I call the \textit{professionalist-independent tradition} of legal services regulation. This tradition is characterized by self-regulatory governance of a unified legal profession, insulated from non-clients and focused on individual lawyers as independent moral agents. Within the developed common law world, the professionalist-independent tradition now survives primarily in North America.

This introductory chapter will provide a bibliographic sketch of the comparative literature, a definition of ‘legal services regulation,’ and a brief explanation of the terminology used in the book. Subsequent chapters of this book pursue two primary goals, one comparative and one normative. Part I pursues the comparative goal of identifying the distinctive regulatory techniques of professionalist-independent legal services regulation, which are observable today in the American states and the Canadian common law provinces. The professionalist-independent tradition contrasts sharply with the regulatory regimes of common law Northern Europe and Australasia, which have adopted competition and consumer interests as their core values in regulating legal services.

Chapter 2 identifies the shared frame of reference for all legal services regulatory regimes in the developed common law world. Policy-makers generally agree that legal services must be regulated in order to protect clients, to protect third parties from negative externalities, and to ensure that legal services providers produce certain positive externalities as they go about their business.\textsuperscript{3} Developed common law countries also draw on the same toolbox of regulatory techniques in pursuit of these goals. Entry rules, conduct assurance rules, conduct insurance rules, and business structure rules are regulatory tools in all of these jurisdictions.\textsuperscript{4}

Despite this shared frame of reference, Chapter 3 shows that regulators of legal services must nevertheless make four significant choices. These pertain to occupational structure, governance, insulation, and level of

\textsuperscript{3} Chapter 2, section 1, \textit{infra}.

\textsuperscript{4} Chapter 2, section 2, \textit{infra}.
regulatory focus. Each of these four choices allows a spectrum of policy responses, and each common law jurisdiction will be plotted on each spectrum.

Chapter 4 will show that a paradigmatic contrast has emerged with the regulatory regimes of common law North America on one hand and those of common law Northern Europe and Australasia on the other. North Americans continue to regulate legal services in the professionalist-independent tradition, while England & Wales and Australia have reformed their regimes in order to emphasize competition and consumer interests. The professionalist-independent tradition is characterized by:

(i) regulatory establishment of a hegemonic and unified legal profession;
(ii) self-regulatory governance;
(iii) a policy of insulating lawyers from non-lawyers; and
(iv) a regulatory focus on the individual practitioner, as opposed to the firm in which he or she works.

After three decades of dramatic change, the reformed regimes of England & Wales and Australia contrast distinctly with professionalist-independent North America on all four of these features. These countries now have multiple competing legal occupations and co-regulatory governance. They no longer seek to insulate lawyers, and they have introduced firm-based regulation to complement individual-focused rules. Their smaller common law neighbours (the rest of the UK, the Republic of Ireland, and New Zealand) are in the process of undertaking similar reforms.

To explain this divergence, Chapter 4 considers the normative ideologies which underlie competitive-consumerist reform of legal services regulation. Competition and consumer interests became rallying cries for legal services regulatory reform in England & Wales and Australia beginning around 1980. They continue to animate regulation in these countries and have subsequently been taken up to varying extents in their smaller neighbours. Observers have predicted for many years that these ideals will exert a similar influence in North America, but professionalist-independent regulation has proven surprisingly resilient thus far.

The remainder of this book pursues a normative project. It argues that, although traditional professionalist-independent regulation is seriously

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5 Chapter 3, sections 1 through 4, infra.
6 Chapter 4, sections 1 and 2, infra.
7 Chapter 4, section 4, infra.
8 Chapter 4, section 3, infra.
9 Chapter 4, section 4, infra.
problematic, it can and should be reformed and renewed rather than abandoned. Part II lays out the most significant problems with this approach to regulation. Chapter 5 shows how professionalist-independent regulation courts regulatory failure, which is to say inability to accomplish the agreed goals of legal services regulation. The regulatory failure risk is in part a consequence of the timeworn mode’s multiple points of disjunction with the needs of today’s clients. Professionalist-independent regulation also fails when its self-regulatory governance renders regulators unable or unwilling to comprehend complex client interests and prioritize them over lawyer interests.

Chapter 6 takes up the other major problem with professionalist-independent regulation: its deleterious consequences for the accessibility of justice. The unity of the profession and the prohibition or marginalization of paraprofessions increases the price of legal services for individual clients. Meanwhile the insulation of lawyers from non-lawyers suppresses access-enhancing inter-professional collaboration and prevents the emergence of more accessible large firms serving individual clients. If justice is less accessible in the United States and Canada than it is in other wealthy common law countries, then professionalist-independent regulation seems to be at least part of the reason.

If the professionalist-independent tradition courts regulatory failure and impedes access to justice, then why should it not be swept into the dustbin of history? Part III of this book argues that this approach rests upon two public interest theories which, although often overstated, have convincing truth within them. The first theory is that legal services providers, like some other skilled workers, are professionals who collectively constitute a profession. Chapter 7 draws on functionalist sociology to explain professionalism as a series of arguments about altruism, regulatory efficiency, social contract, and social cohesion. The theory of professionalism is applicable to law as well as other expert occupations, and its influence is seen in the unified legal occupation and self-regulatory governance which characterize the mode. The elitism

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10 Chapter 5, section 1, infra.
11 Chapter 5, section 3, infra.
12 Chapter 6, section 2, infra.
13 Chapter 6, section 3, infra.
14 Chapter 6, section 1, infra.
15 Chapter 7, section 2, infra.
16 Chapter 7, section 3, infra.
17 Chapter 7, section 4, infra.
18 Chapter 7, section 5, infra.
involved in this approach is unsupportable, and there is no ‘social contract.’ However, the professionalism theory’s accounts of service orientation and the rule of law are valuable and the efficiency claim for self-regulation also holds some water.

Chapter 8 develops the second, lawyer-specific branch of the professionalist-independent public interest theory. The central idea here is that legal services regulation must protect lawyers’ independence. Independence is asserted both for individual lawyers and for the profession collectively and both for the benefit of clients as well as the benefit of society more broadly. It is asserted both against the state and against commercial interests. Independence arguments underlie the insulation goal and the individual-provider focus which are key attributes of professionalist-independent regulation. The author concludes that independence from the state is a laudable goal, although some of the other elements of the independence public interest theory are on shakier ground.

Finally, Part IV of the book (Chapters 9 and 10) is the author’s agenda for the future of professionalist-independent legal services regulation. Despite its shortcomings, the North American approach honours professionalism and independence commitments which have significant value in today’s society. Professionalist-independent regulation must be revitalized by a thorough-going reform which updates it and refocuses it on the needs of today’s clients and public. The book will argue that there is a way to carry out such a reform without abandoning commitments to professionalism and independence.

Chapter 9 argues that professionalist-independent regulators must become more client-centric. Drawing on risk-based and principles-based theories of regulation, it asks regulators to focus on client interests in high quality, variegated, affordable, and innovative legal services. Complaint-driven discipline systems and licensing regimes are
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no longer sufficient to protect these interests. Regulators must become more proactive in ensuring that lawyers deliver value to clients, especially those clients who are unable to protect their own interests. Empirical output monitoring, promotion of price competition, and access to justice levies are among the reform ideas developed by this chapter.

Chapter 10 returns to the four distinctive policy commitments of the professionalist-independent tradition identified in Chapter 4. It shows how these ancient policies can be modernized in order to enhance regulatory effectiveness and accessibility, while revitalizing, rather than abandoning, professionalism and independence. Professional unity can be reconciled with multiple licensing, especially if governance structures are reformed to reflect the multiple communities of practice in today’s legal profession. Self-regulation can and should survive, if it is accompanied by enhanced lay participation within regulatory governance as well as better transparency and accountability. Insulating regulation must be rolled back to foster innovation and accessibility, but professional independence need not be a casualty of these reforms. Finally, the traditional ethical focus on the individual practitioner can be retained but complemented by a new attentiveness to ethical infrastructure within firms and, where appropriate, entity-based regulation.

The crossroads of the book’s title refers to the choice confronting policy-makers. There is a well-travelled path into competitive-consumerist legal services regulation, which offers accountability and accessibility, at the expense of professionalism and independence. There is also, however, a demanding and rocky high road upwards to the modernization of professionalist-independent legal services regulation. The book’s ultimate goal is to map out this route.

2. THE COMMON LAW WORLD AND THE LEGAL SERVICES REGULATION LITERATURE

This book focuses on legal services regulation in the wealthy countries which were once part of the British Empire. These nations share the English language and the common law system, which is the Empire’s

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29 Chapter 9, section 2.1, infra.
30 Id.
31 Chapter 10, section 1, infra.
32 Chapter 10, section 2, infra.
33 Chapter 10, section 3, infra.
34 Chapter 10, section 4, infra.
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The legal heritage (or, to some, its detritus). The scope of the book encompasses Australia, New Zealand, the United Kingdom, Ireland, and most of Canada and the United States.\footnote{It excludes Quebec, which is a civil law jurisdiction.}

In the federalist common law countries (Australia, Canada, and the United States), legal services regulation is within the constitutional jurisdiction of states or provinces.\footnote{Adam Dodek, ‘Regulating Law Firms in Canada,’ 90 Canadian Bar Review 383, 385 (2011); Ellen J. Bennett, Elizabeth J. Cohen and Martin Whittaker eds., Annotated Model Rules of Professional Conduct 472 (7th ed. American Bar Association: Chicago, 2011).} The sub-national regulators in these countries are state courts and bar associations in the United States, law societies in Canada, and entities which go by a variety of names in Australia.\footnote{Lawlink (New South Wales), ‘Lawyer Regulation in Australia: Useful Links,’ www.olsc.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/lra_usefullinks (last visited 23 May 2014).} However, in each of these federalist countries the states and provinces accept some guidance from national bodies, such as the American Bar Association and the Federation of Law Societies of Canada (FLSC).\footnote{Australia’s is the most ambitious of these initiatives (www.lawcouncil.asn.au/lawcouncil/index.php/divisions/rpr/coag-national-legal-profession-reform (last visited 3 October 2014)). Canada’s FLSC is more modest in its ambitions (www.flsc.ca (last visited 3 October 2014)), although becoming less so (Alice Woolley, Understanding Lawyers’ Ethics in Canada 6 (LexisNexis: Markham, 2011)). American nationalizing initiatives (the American Bar Association (www.americanbar.org/aba.html (last visited 3 October 2014)) and the National Organization of Bar Counsel (www.nobc.org (last visited 3 October 2014))) are arguably in an intermediate position between those of Australia and Canada.} The other wealthy common law countries are unitary states. However, the United Kingdom’s on-going devolution process has led to many legal services regulatory decisions being made in Northern Ireland and Scotland.\footnote{Legal Services Review Group (Northern Ireland) (‘Bain Commission’), ‘Legal Services in Northern Ireland: Complaints, Regulation, Competition’ (2006), www.dfpni.gov.uk/legal_services.pdf (last visited 3 October 2014); Legal Services Regulation Bill 2011 (Republic of Ireland).}


sustained comparative effort in the study of legal occupations and their regulation. While that accomplishment has not been surpassed, there is today a growing comparative literature about legal services regulation in the common law world. Explicit or implicit comparisons are found in many recent essay collections about access to justice, legal ethics, and legal professionalism. Several important monographs analyse the regulation of legal services along with other expert occupations, thereby deploying a different but equally helpful comparative lens.

The law review scholarship has also responded to the dramatic changes in the legal services regulation in common law Northern Europe and Australasia since 1980. Articles by North American scholars have


45 Chapter 4 will explain this phenomenon as the emergence of the competitive-consumerist mode.
started to take stock of the new contrasts. Comparative methods have been deployed in studies of specific regime elements, such as self-regulation or the presence or absence of the firm as a regulatory target. Scholars have identified paradigm shifts in legal services regulation; unsurprisingly this literature is most prevalent in the UK and Australia, but it also has North American representatives.


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There is also a growing collection of country-specific monographs about legal services regulation. Most recently, economist Frank Stephen’s *Lawyers, Markets and Regulation* reviews liberalizing initiatives in the United Kingdom since the 1980s. Stephen takes an optimistic view of the potential for the Legal Services Act 2007 (England and Wales) to bring about a ‘technological revolution in lawyering’ through enhanced competition and collaboration. Christine Parker, Deborah Rhode, and Alice Woolley have written perspicacious normative analyses of the regimes in Australia, the United States, and Canada respectively. Richard Abel has contributed fine-grained accounts of lawyer discipline and regulation in the United States and England. Several recent books have critiqued the status quo of North American legal services regulation, while monographs defending the traditional North American model tend to be of older vintage. Finally, there is the plethora of legal ethics textbooks,


50 Frank Stephen, *Lawyers, Markets and Regulation* (Edward Elgar: Cheltenham, UK and Northampton, MA, USA, 2013); Chapter 5 of Stephen’s volume also considers some similar policy changes in other European jurisdictions.


which increasingly approach their topic in regulatory terms as well as the more traditional philosophical terms.\(^{55}\)

### 3. WHAT IS LEGAL SERVICES REGULATION?

Clear definitions of certain key terms are a necessary prelude to this venture. *Legal services* will be taken here to include advice about the law, preparation of instruments with legal effect, and representation of another in a court or tribunal.\(^{56}\) Legal services *regulation* includes rules about who can provide legal services, what characteristics those services must possess, and under what conditions they can be provided. While this baseline description of the concept may seem obvious, two further definitional points must be made.

First, while ‘regulation’ is a theoretically fraught term,\(^{57}\) for the purposes of this book legal services regulation includes only rules which are backed or enforceable by the state. This includes rules which are made by non-state bodies but are supported by state enforcement power, such as the edicts of self-regulatory and co-regulatory organizations. However, the definition adopted here consciously leaves out some types of non-state-backed external constraints on the behaviour of legal services providers which other authors have defined as ‘regulation’. Examples include media coverage, customs, peer pressure, and the decisions and policies of large clients.\(^{58}\) Nor does legal services regulation as used

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\(^{56}\) This definition draws on the definitions of ‘practicing law’ reviewed in Chapter 3, *infra*. Regarding the ambiguous and contested nature of these definitions, see Ray Worthy Campbell, ‘Rethinking Regulation and Innovation in the U.S. Legal Services Market,’ 9 *New York University Journal of Law & Business* 1, 37 et seq. (2012).

\(^{57}\) Definitions of the word ‘regulation’ abound: see e.g. Barak Orbach, ‘What Is Regulation?’, 30 *Yale Journal on Regulation Online* 1 (2012).

\(^{58}\) Terry et al., *supra* note 46, at 2664; James M. Fischer, ‘External Control over the American Bar,’ 19 Geo. J. Legal Ethics 59 (2006); Eli Wald, ‘Should Judges Regulate Lawyers?’, 42 McGeorge L. Rev. 149, 156 (2010); W. Bradley Wendel, ‘Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities,’ 54 Vand. L. Rev. 1955 (2001). One scholar goes so far as to describe ‘professional responsibility scholarship’ as a ‘regulatory force’ (John
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herein include the decisions of the government qua consumer of legal services\(^{59}\) or voluntary practice guidelines drafted by subgroups of practitioners.\(^{60}\)

Restricting legal services regulation to \textit{rules} also excludes unenforced and aspirational terms in legal services-specific regulatory codes.\(^{61}\) For example, Rule 6.1 in the American Bar Association (ABA)’s Model Rules of Professional Conduct (MRPC) states that ‘a lawyer should aspire to render at least (50) hours of \textit{pro bono publico} legal services per year.’\(^{62}\) In of themselves, directives of this nature will not be considered regulation within these pages, because they are aspirational and not enforced.\(^{63}\)

Legal services regulation is therefore in one sense a narrower concept than legal ethics. Legal ethics is generally defined to include more than state-backed rules,\(^{64}\) and it seeks to guide conduct which will never be subject to regulatory control.\(^{65}\) However, legal services regulation is in another sense a broader concept than legal ethics. Legal ethics is

Leubsdorf, ‘Legal Ethics Falls Apart,’ 57 Buff. L. Rev. 959, 970 (2009)).
‘Corporate Social Responsibility is a form of private regulation’ of law firms.

\(^{59}\) For example, the American standards for appointing lawyers in bankruptcy proceedings (Leubsdorf, \textit{supra} note 58 at 1008–1010).


\(^{61}\) Observing that codes combine hortatory and regulatory provisions, see Margaret Ann Wilkinson, Christa Walker and Peter Mercer, ‘Do Codes of Ethics Actually Shape Legal Practice?’, 45 McGill L.J. 645, 651 (2000).


\(^{63}\) Granfield and Mather, \textit{supra} note 43. This is not a claim that these provisions are meaningless or have no effect.


\(^{65}\) E.g. Tania Rostain, ‘Ethics Lost: Limitations of Current Approaches to Lawyer Regulation,’ 71 S. Cal. L. Rev. 1273, 1278 (1998). Rostain observes that students of legal services regulation lack ethicists’ ‘focus on ways of nurturing
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generally about how one should go about providing legal services, while legal services regulation includes rules forbidding certain people from participating in legal services provision.\(^{66}\)

Second, legal services regulation will be confined here to rules which are specific to legal services providers. Many state-backed rules affect the conditions in which legal services can be provided only because they affect all service provision, or all commerce, or all human conduct. For example, legal practitioners must not defraud their clients and must withhold and remit to the government any applicable taxes, but neither criminal laws against fraud nor tax codes will be considered part of legal services regulation for the purposes of this book.\(^{67}\) More significantly, legal services regulation does not include laws which require anyone possessing certain information to divulge it to state officials, even though these laws may impinge upon lawyers’ ethical obligation to keep client confidences.\(^{68}\)

Restricting the scope to rules specific to legal services provision also excludes other terms found within legal services codes of conduct, because they simply paraphrase or add penalties to generally applicable laws. For example, Ontario’s Rules of Professional Conduct for lawyers state that a lawyer must not ‘knowingly attempt to deceive a tribunal,’ while Canada’s Criminal Code states that ‘every one commits perjury who, with intent to mislead, makes … a false statement’ to a tribunal under certain conditions.\(^{69}\) Ontario’s rule against lawyer deception of a professional commitments to the legal framework and collective values embodied in laws.’

\(^{66}\) See Chapter 2, section 2.1, infra (‘Entry Rules’).

\(^{67}\) Leubsdorf, supra note 58, at 1026 and Fischer, supra note 58, at 97: consumer protection statutes sometimes apply to lawyers. Many generally applicable common law doctrines also catch lawyers’ behaviour: Benjamin Hoorn Barton, ‘Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulation,’ 33 Arizona State Law Journal 430, 448 (2001).

\(^{68}\) For a review of American laws of this nature and a consideration of how they affect the ethics of confidentiality, see Rebecca Aviel, ‘When the State Demands Disclosure,’ 33 Cardozo L. Rev. 675 (2011).

tribunal is legal services regulation only to the extent that it goes beyond the criminal prohibition of perjury.\textsuperscript{70}

Finally, confining legal services regulation to rules specific to legal services providers also means excluding state-backed rules which affect a subset of legal services providers, along with other people, due to some special characteristic or risk of their practice. For example, United States federal law requires all opinions about tax liability issued by ‘practitioners’ to meet certain requirements\textsuperscript{71} and includes lawyers along with accountants and others within the definition of this term.\textsuperscript{72} However, excluding these rules which only incidentally affect legal practitioners does not mean confining legal services regulation to the edicts of law-focused regulatory agencies.\textsuperscript{73} Common law doctrines such as solicitor negligence are a form of legal services regulation, insofar as they are backed by the state and are specific to lawyers.\textsuperscript{74}

4. A NOTE ON TERMINOLOGY

This book uses the term ‘practitioner’ where many readers will expect to see ‘lawyer’ or ‘law firm.’ It uses the term ‘expert occupation’ where many readers will expect to see ‘profession.’ Some explanation of this terminology is necessary, if only to deflect suspicions of intentional obscurity.

These choices manifest an effort to avoid terminological prejudgment of the controversies which are the topic of this volume. First, to refer to legal services regulatees as ‘lawyers’ implies that the firms in which they work are not, or should not be, the targets of legal services regulation. Moreover, to use either ‘lawyer’ or ‘law firm’ may imply that non-lawyers who provide legal services are not or should not be regulated.

\textsuperscript{70} Harry Arthurs, ‘The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?’, 33 Alta. Law Rev. 800, 802 (1995): much of the discipline simply disbars or suspends lawyers who have been criminally convicted.

\textsuperscript{71} 31 Code of Federal Regulations (CFR) §10.34.

\textsuperscript{72} 31 CFR §10.3. Likewise, American federal law requires all debt collectors, including lawyers who do this work for their clients, to follow the rules set out in 15 USC Sec. 1692. (See also Leubsdorf, supra note 58, at 1005–8.) Other examples include bankruptcy and money-laundering statutes: Terry et al., supra note 46, at 2664.


\textsuperscript{74} Cox and Foster, supra note 44, at 6–7; Trebilcock et al., supra note 44, at 67–70; Maute, supra note 42, at 33.
The term ‘practitioner’ is preferred here because it is innocent of these implications.

Second, the term ‘profession’ and its variants are used only selectively and advisedly, because applying them to a group of workers can import analytical and even normative conclusions about them. Post-war functional sociologists spilled oceans of ink seeking the distinctive traits of ‘professions,’ in order to distinguish them from mere ‘occupations.’

They laboured toward conclusions such as William Goode’s ‘I am doubtful that the librarians will become full-fledged professionals …’ which subsequent scholars have found unhelpful if not obnoxious.

While sociologists do still use the term, they reject its deployment as a ‘fixed, general concept,’ and recognize that its use involves contestable claims about the nature or value of different types of work.

To avoid these implications, this volume will use the term ‘expert occupations’ to refer to those who provide legal and other similar services. In labelling the ‘professionalist-independent mode,’ the term ‘profession’ is used consciously, because those who regulate in this mode openly adopt the term’s analytical and normative connotations.

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78 Id.